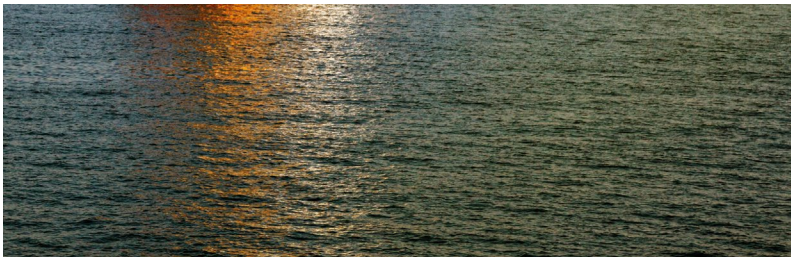
STEAMSHIP MUTUAL

Sea Venture



Issue 26

In this issue

Editorial Team

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

Introduction

Gary Rynsard
Chief Executive Officer
gary.rynsard@simsl.com

Welcome to the latest edition of Sea Venture.

2016 Renewal

For the 2016 renewal the Board had decided that there should be a zero standard increase, the second successive year with no standard increase. This had been made possible by the continued good underwriting performance which had resulted in a further strengthening of the Club's capital position. A combined ratio of 76% following the previous year's 78% has led to an all-time high figure for Free Reserves of US$440 million.

The Board is considering how the Members can best be assisted by the Club's extremely strong capital position. Holding rates steady in very challenging freight markets is of course a major benefit to Members. Further steps, including a return of premium, will be considered by the Board meeting in October. The Directors are clear in their determination that the Members' interests are paramount and are equally clear that a financially strong, stable Club is exactly what Members want.

At the last renewal the most pleasing aspect was the number of Members who increased the proportion of their fleets that they decided to place with the Club. Whilst it is always gratifying to welcome new Members there can be no stronger endorsement of what the Club is delivering by way of service and financial strength than existing Members switching business to the Club from competitors in the market. The combination of steady controlled growth in entered tonnage with a more than matching increase in capital is a recipe for continued success. An increase in business without an increase in the capital base would beg questions.

The freight markets are very difficult for many Members. Continued weakness in the world economy make it hard to be optimistic in the short term. Volatility would appear to be almost inevitable in both capital and freight markets. If the Club can be an island of stability hopefully that will be of some comfort for hard-pressed shipowners.

As ever the Managers are grateful to everyone that has contributed articles to this edition of Sea Venture; the majority of which are also published on the Club's website. In particular it is pleasing to recognise first time contributors Edward Barnes and Chloe Townley from the Eastern Syndicate, Sarah Lamb and Sean Lima from the European Syndicate, and John Hamlyn from the Club's Legal Department.

04
The Ocean Virgo

11
Implying Terms into a Commercial Contract

15
Maritime Liens in the Untied States

27
Decommissioning an Oil Rig?

44
Insurance Act 2015

Contents

Features

Steamship Mutual News

20 June 2016

Features

The Ocean Virgo – High Court Considers Good Weather Period

Danielle Southey
Syndicate Associate
danielle.southey@simsl.com

Whilst underperformance disputes are common place, in most cases, the current low rates of hire means that disputed sums are modest and litigation is unappealing. It is, therefore, interesting when disputes dealing with underperformance are reported.

The recent case of *Polaris Shipping Co. Ltd v Sinoriches Enterprises Co. Ltd (Ocean Virgo)* [2015] EWHC 3405 (Comm.) discussed the admissibility of good weather periods where the charterparty had no express limit on the length of the period that could be admissible.

Facts

The bulk carrier, "Ocean Virgo", was fixed for a time charter trip in December 2013 on a NYPE form. The charterparty contained performance warranties on the basis of "*good weather/smooth sea, up to max BF SC4/Douglas sea state 3, no adverse currents, no negative influence of swell*".

Under that charterparty, the vessel performed a ballast voyage from China to Canada and then a laden voyage carrying coal to South Korea, where she was re-delivered.

Charterers claimed US$263,832 for breach of the performance warranties relying on information gathered in weather routing reports. The definition of good weather was not disputed but Owners defended the claim on the basis that the 'good weather' periods were too short to establish a breach of the warranties.

Award

The sole arbitrator dismissed Charterers' claim finding there were no admissible periods of good weather on which the vessel's performance could be assessed.

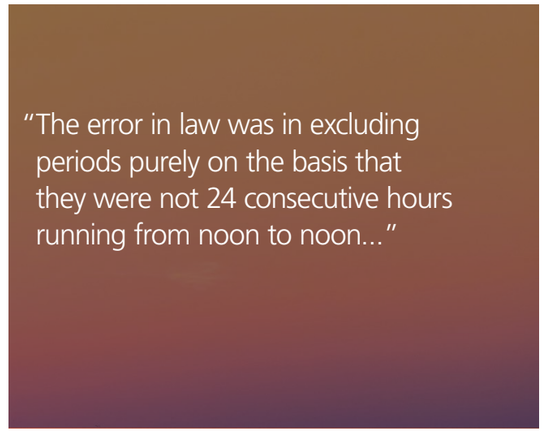
The arbitrator noted that in order for a period of the voyage to be admissible, that period must be at least 24 consecutive hours from noon to noon. Based on this interpretation, the arbitrator found that there had not been any periods of good weather. In particular, the arbitrator discounted two periods of 14 and 16 hours, respectively, on the basis that they were each under 24 hours in length. More generally, the arbitrator commented that any weather sample considered for the purpose of establishing a breach of warranty had to be sufficiently large so as to be representative of the voyage.

Appeal

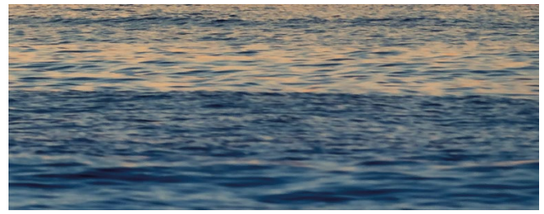
The Commercial Court allowed Charterer's appeal under s. 69 of the Arbitration Act on the basis that the arbitrator had erred in law when he had limited admissible good weather periods to 24 consecutive hours running from noon to noon. The Court held there was no reason for the arbitrator to do this; the charterparty did not limit the admissibility of good weather periods in this way since there were "*no words in the charterparty which justify construing good weather as meaning good weather days of 24 hours from noon to noon*"[1]. The Court remitted the award to the arbitrator to reconsider whether the 14 and 16 hour periods of good weather were sufficient samples on which to judge the vessel's performance.

Comment

It is worth noting that in his judgment, Mr Justice Teare did not consider it an error in law in determining that a period of good weather was inadmissible because it was too short to be a suitable sample, in fact this was a permissible approach for the arbitrator to take in assessing evidence. The error of law was in excluding periods purely on the basis that they were not 24 consecutive hours running from noon to noon because there was nothing in the charterparty to support such a restriction. As such if the clause had been worded in another way, the case could have been decided differently.



"The error in law was in excluding periods purely on the basis that they were not 24 consecutive hours running from noon to noon..."



Helpfully, Mr Justice Teare restated the 'traditional manner' in which a charterer should assess whether there has been a breach of a performance warranty, citing *The Didymi*[2] and *The Gas Enterprise*[3] , in first assessing performance in good weather, as prescribed by the charterparty, and then applying any shortfall in performance that is established to the whole voyage (aside from any periods of slow steaming at charterers' request).

If, therefore, the 14 and 16 hour periods in question in the case of the Ocean Virgo are considered as sufficient samples on which to assess the voyage, the arbitrator will then need to determine whether those periods establish a breach of the performance warranties. If so, that level of underperformance will be applied to the whole of the charterparty, aside from any periods of slow steaming on Charterers' instructions.

Of course it remains possible for contracting parties to agree that a vessel's performance should be assessed by reference to good weather, only if it exceeds 24 consecutive hours running from noon to noon. Some may prefer the certainty that a fixed minimum length is seen to give, rather than the subjective assessment of what a suitable sample period might be.

Whether there is any rationale in continuing the traditional 'noon to noon' methodology is perhaps less clear, particularly when more detailed weather breakdowns are so readily available.

There is also an added complication in that a 'noon to noon' approach will often result in either a 23 or 25 hour sample period when a ship sailing either east or west through different time zones adjusts its clocks by an hour: a factor that was not addressed by either the arbitrator or the court.

In any event, any prescribed limit on the minimum length of periods that can be considered as admissible will now need to be expressly incorporated into the charterparty.

The case is also a good illustration of the Arbitration Act's appeal procedures available under s.68 and s.69. Mr Justice Teare reiterated in his judgement that the court should read an arbitrator's award in a "*reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it*" and not with "*the objective of upsetting or frustrating the process of arbitration*"[4]. ■

[1] Polaris Shipping Co.Ltd v Sinoriches Enterprises Co. Ltd (Ocean Virgo) [2015] EWHC 3405 (Comm.) Paragraph 18.
[2] The Didymi [1998] 2 Lloyd's Reports 108.
[3] The Gas Enterprise [1993] 2 Lloyd's Reports 352.
[4] Quoting Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14 per Bingham J.

The Global Santosh – Acts of Delegates & Off-Hire

Stuart James
Syndicate Associate
stuart.james@simsl.com

The Supreme Court has now handed down its much anticipated judgment in *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)*, by a majority of four to one overturning the Court of Appeal.

The Commercial Court and Court of Appeal decisions are discussed at:

https://www.steamshipmutual.com/publications/Articles/GlobalSantosh0613.htm

https://www.steamshipmutual.com/publications/Articles/globalsantoshappeal0814.htm

At the centre of the dispute between the parties was a common charterparty provision providing for the vessel to be off hire during any period of detention or arrest unless this had been *"occasioned by any personal act or omission or default of the charterers or their agents"*. The case raised questions of widespread interest concerning the scope of a contracting party's responsibility for the acts of third parties performing its contractual obligations – an issue the arbitrators and lower courts were far from agreed upon. The Supreme Court's judgment now provides welcome guidance in this area.

In summary NYK, as disponent owners, chartered the "Global Santosh" to Cargill for one time charter trip from Sweden to West Africa. Cargill had entered into a voyage charter with Sigma Shipping Limited under which they nominated the vessel to carry a cargo of bulk cement to Port Harcourt, Nigeria. The cargo was one of six shipments of cement sold by Transclear SA to IBG Investment Ltd and, under the 'free out' part of the sale terms, IBG were responsible for unloading the cargo and were liable to pay Transclear demurrage if unloading of the cargo was delayed.

In the event, the vessel arrived at Port Harcourt on 15 October 2008 but was delayed for over two months at the anchorage due to congestion, due in part to the breakdown of IBG's unloader. The vessel finally proceeded to the berth on 18 December but was turned back by the port authority because, on the previous day, Transclear had obtained an arrest order over the cargo in order to secure a claim against IBG for US$1.56 million for demurrage which had by then accrued. By mistake, the arrest order also named the vessel.

Cargill withheld hire for the period that the vessel was subject to the arrest order, relying on an additional, typed clause (clause 49) pursuant to which the vessel was to be off-hire during any period of detention or arrest by any authority or legal process, unless the detention was occasioned by any *"personal act omission or default of the Charterers or their agents"*. NYK disputed that the vessel was off hire, arguing that Transclear and IBG were agents of the Charterers and that their conduct thus fell within the proviso to the clause. The matter was referred to London arbitration.

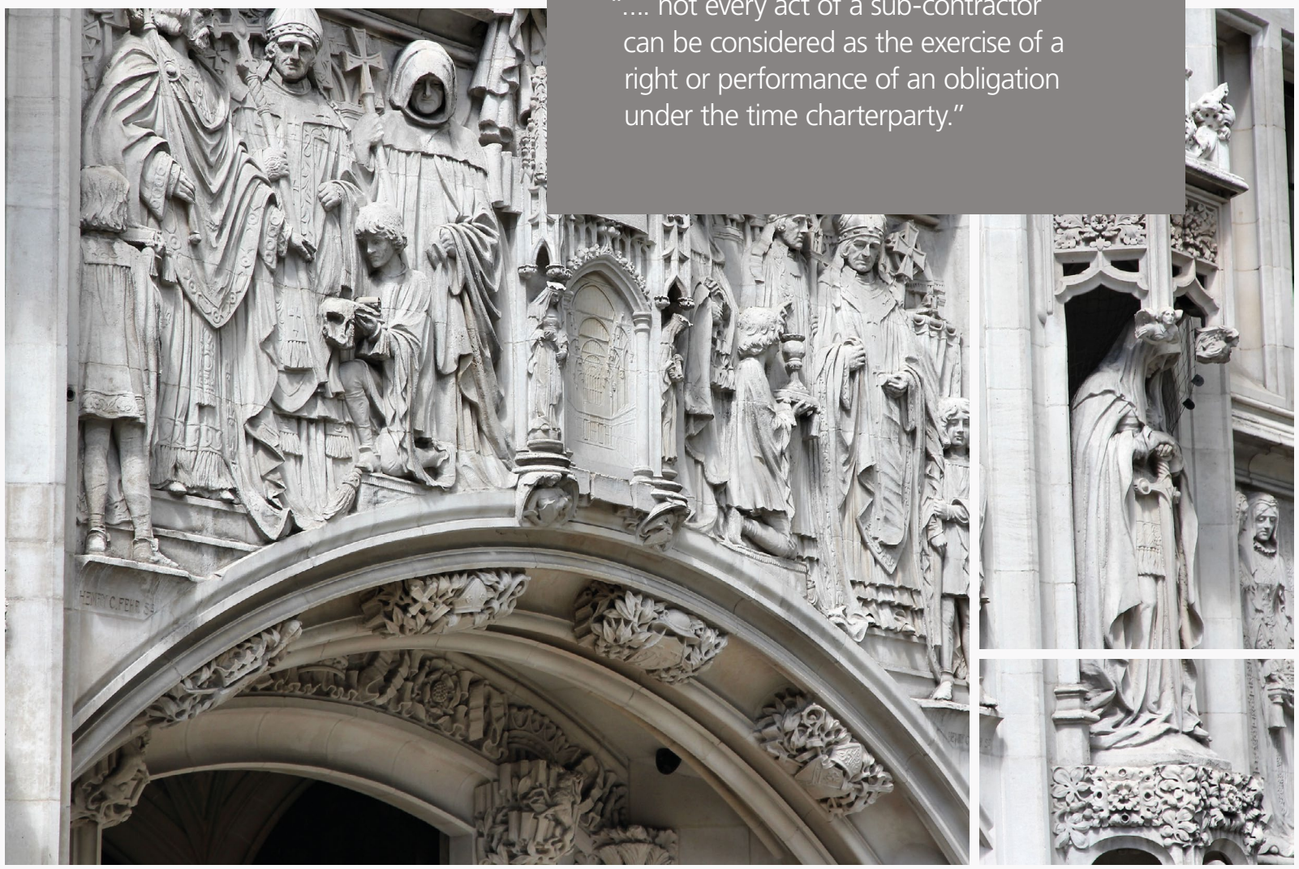
By a majority the arbitrators held that at the time of the arrest, and in arresting the vessel, neither Transclear nor IBG were acting as an agent for the purpose of carrying out obligations of Cargill under the charterparty and that Cargill were therefore entitled to place the vessel off-hire. NYK appealed.

In the Commercial Court, Mr Justice Field held that the reference to "agents" in clause 49 was not limited to agents in the strict legal sense (i.e. parties directly authorised by Cargill), but extended to those to whom Cargill, by sub-chartering the vessel, had delegated or sub-delegated performance of their obligations under the charter. Nonetheless their act, omission or default had to occur in the performance of the delegated task. Controversially, Field J went on to find that IBG's failure to unload the cargo within the lay days specified in the sale contract was an omission or default that had occurred in the course of performing the obligation to discharge as delegated. Both parties were granted permission to appeal.

Reversing the decision of the lower Court, the Court of Appeal held that there was nothing within the proviso to clause 49 which limited the acts or omissions referred to in that clause to those occurring in the course of performing the delegated task and that; *"If a party (e.g. a sub-charterer) is a delegate of Cargill flowing from the sub-letting of the vessel, that party remains a delegate for the purposes of the proviso regardless of the legal nature of the act or omission. Not every act or omission of the delegate will or need be in the course of performance of the delegated task."*

Whilst the Court recognised that Cargill was under no obligation to discharge the vessel within any given time, it nevertheless found that the dispute in question arose out of Cargill's trading arrangements concerning the vessel which fell on the charterers' "side of the line". This, the Court considered, *"gives effect to the familiar division between owners' and charterers' spheres of responsibility"*. As such the vessel was on hire. Cargill appealed.

"…. not every act of a sub-contractor can be considered as the exercise of a right or performance of an obligation under the time charterparty."



The Supreme Court has now provided a helpful review of the law in this area (albeit with one of the five Law Lords dissenting). In its judgment the Supreme Court considered the nature of a time charter which it characterised as *'a contract under which rights are enjoyed and obligations performed vicariously'*. Drawing on earlier authority it has confirmed that references to "charterers' agents" are not to be limited to those persons directly authorised to act on the charterer's behalf.

However, importantly, it noted that not every act of a sub-contractor can be considered as the exercise of a right or the performance of an obligation under the time charter. In the present case, whilst both Transclear and IBG were Cargill's agents for the purposes of the charterparty the correct question was whether IBG, by omitting to discharge within the allowed time frame, were vicariously exercising rights or obligations under the time charter between NYK and Cargill. The Court held that incurring or enforcing a liability for demurrage under a sub-contract could not be regarded as the vicarious exercise of any facility made available to Cargill under the time charter. As such the vessel was off hire.

In reaching its conclusion the Supreme Court has expressly rejected the test applied by the Court of Appeal viz. whether the arrest was occasioned by matters lying within the owners' or the time charterers' sphere of responsibility, with Lord Sumption saying he did "*not find the distinction helpful in the current context*" .

It is now relatively rare for charterparty disputes to reach the Supreme Court and so this latest decision will provide welcome guidance on the correct approach to be taken when interpreting this common charterparty provision dealing with loss of time when a vessel is detained or arrested by *"personal act omission or default of the Charterers or their agents"*. The key would now appear to be to identify the relevant acts of the party said to be an agent or delegate of a charterer, and if the act or omission was undertaken in the performance of a relevant obligation under the charterparty. In practice this may not be easy to determine. ■

Battle of Jutland Centenary: Could Cunard's Campania have Changed History?

Patrick Britton
Syndicate Associate
patrick.britton@simsl.com

31 May 2016 was the centenary of the Battle of Jutland, the only major fleet action of the First World War. The battle is regarded as a tactical defeat in that Great Britain lost more ships, but a strategic victory in that the German fleet was largely confined to port for the rest of the war, and its disintegration into mutiny played a significant part in Germany's final collapse in 1918.[1] One ship which narrowly missed taking part in the battle was the Royal Navy's aircraft carrier, HMS "Campania", the first ship ever to launch an aircraft while underway, and formerly RMS "Campania", a Cunard Line Royal Mail express steamer. This article discusses the history of "Campania" and whether her presence at the Battle of Jutland might have assisted the British Grand Fleet.

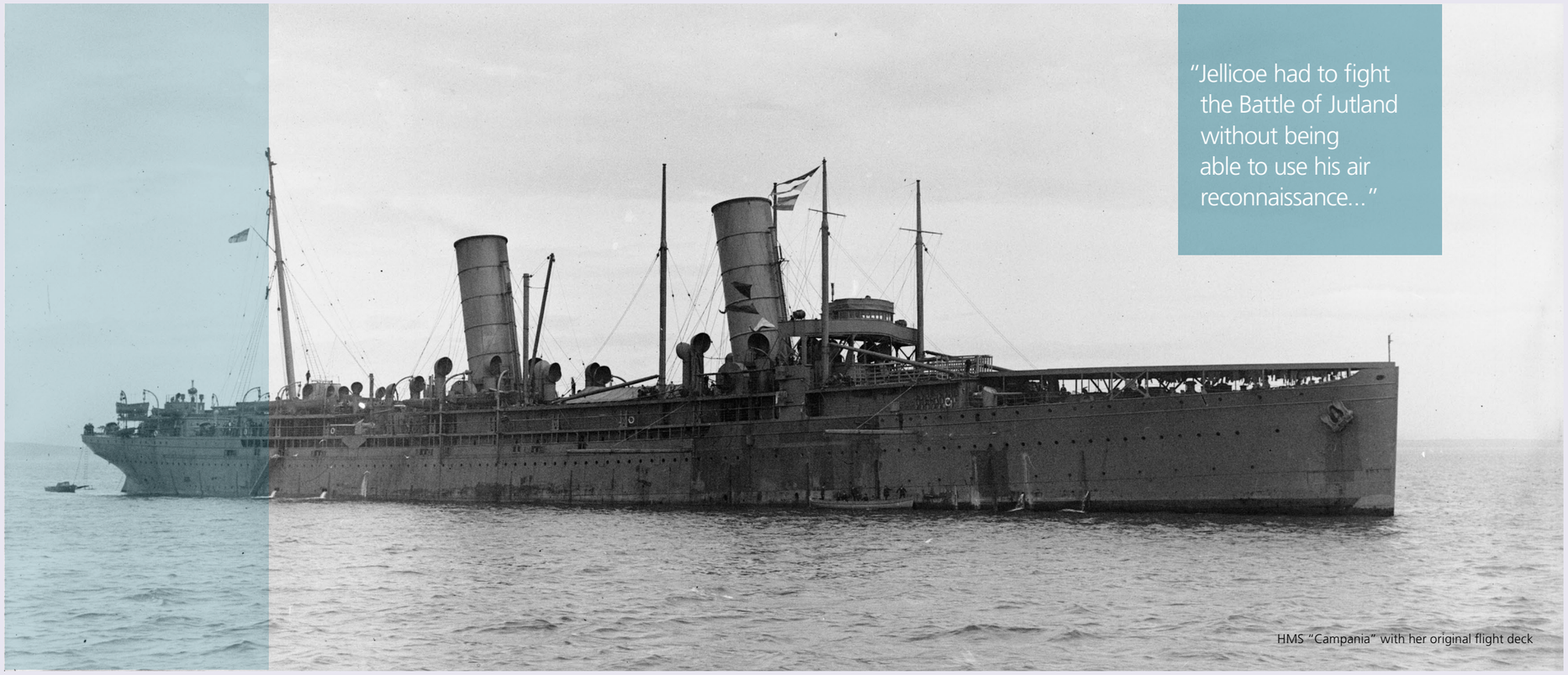
Ordered by the Cunard Line from the Fairfield Shipbuilding & Engineering Company Limited of Glasgow in August 1891, "Campania" and her sister ship "Lucania" achieved a number of 'firsts'.[2] They were the first twin-screw ships built for the line, driven by two sets of five-cylinder triple-expansion engines. They were the first Cunard ships to abandon auxiliary sail power; the redundant masts were retained as flag poles. They were the first Atlantic liners to have refrigeration machinery, and among the first to offer first class passengers cabins with suites. The most expensive Cunarders yet built, costing £650,000 each, their lavish first class interiors were designed to make passengers 'feel they were at home with the aristocracy', or as one passenger remarked *"Campania's general style is Italian somewhat sobered down by an air of British substantiality"*. At 12,950 tons and 620 ft long, "Campania" and "Lucania" were 'Atlantic greyhounds' built for speed, with their funnels raked backwards to enhance the impression of motion. "Campania's" maiden voyage from Liverpool to New York in April 1893 was the fastest to date and on her return leg she regained the 'Blue Riband' for Cunard, becoming the line's first ship to cross the North Atlantic in less than 6 days at an average speed of above 21 knots.[3] Together "Campania" and "Lucania" encapsulated the ideals, tastes and technological achievements of the Victorian age.

RMS "Campania" made 250 crossings between Liverpool and New York before she was retired from Cunard's service in spring 1914. She returned to Cunard's transatlantic service following the outbreak of war as her successor RMS "Aquitania" was requisitioned for trooping duties, but by the end of 1914 "Campania" had been sold for scrap.[4] However, the Royal Naval Air Service ("R.N.A.S"),[5] formed in July 1914, was in need of a large fast vessel for operations with the Grand Fleet and decided to convert "Campania" into the first Fleet Air Arm carrier. The conversion carried out at Cammell Laird's Birkenhead yard involved the removal of most of the passenger accommodation, and the creation of a vast hangar which extended up through the former first class dining saloon to a large hatchway on the boat deck. The hangar could house twelve Short 184 reconnaissance seaplanes stored with their wings folded back.[6] The aircraft would be lowered into the water for take-off - no vessel existed with a flight deck at this time - and a seaplane tender (a high speed motor launch) carried on board would assist with their recovery. If the German fleet was spotted from the air, signals were to be sent using Very's Lights in code, such as red-green-green-red for 'enemy in sight'. Aircraft were also fitted with basic wireless sets.

The conversion was completed by February 1915. Painted overall in wartime grey, the newly-commissioned HMS "Campania", under the command of Captain Oliver Swan,[7] joined the Grand Fleet at Scapa Flow for test flights. Launching the seaplanes proved difficult as the fragile machines were easily damaged during the lowering operation, as they smashed against the "Campania's" rolling sides. Once in the water, their floats tended to break off in heavy seas. On the suggestion of her Signals Officer, R. Leyland, Admiral Sir John Jellicoe ordered HMS "Campania" to return to Cammell Laird to have a large wooden flying deck constructed forward of her bridge. Attempts were then made to launch the seaplanes on wooden trolleys while the ship was underway. After much competition between the R.N.A.S. pilots, Lieutenant Breeze was selected to make the first take-off attempt. On 5 May 1915, with "Campania" steaming into a wind of about force 4, his Short 184 aircraft successfully took off, inaugurating a new era in sea warfare - the advent of the aircraft carrier. The seaplane landed on its floats and was recovered using the ship's tender and derricks.

After further test flights, it was soon realised that the flight deck was too short: instead of becoming airborne, the aircraft frequently plummeted off the end of the ship, earning the pilot and observer a swim in the cold North Sea. The regular sight of the white fuselage standing upright out of the water after another unsuccessful take-off led to "Campania's" crew nicknaming the Short 184 'The White Coffin'. Sailors looking on from the battleships of the Grand Fleet found it all hilarious. By May 1916 HMS "Campania's" flight deck had been extended and the angle of its rake increased. This necessitated removing her original forward funnel and replacing it with two smaller port and starboard funnels. "Campania" was also equipped with a Caquot kite balloon for short-range observation, and her aft mast was removed and aft deck cleared for this purpose. From a liner with handsome yacht-like lines, the modifications gave her a strange appearance, but she was now ready for war.

The German High Seas Fleet, commanded by Vice-Admiral Reinhard Scheer, had been blockaded in the North Sea since the start of the war by the British Grand Fleet, based at Scapa Flow in the Orkney Islands under Admiral Jellicoe. The German naval command wished to avoid risking the High Seas Fleet in an encounter with the superior strength of the entire Grand Fleet. As long as the High Seas Fleet continued to exist, the Grand Fleet was tied down maintaining the blockade and its escorts could not join the fight against Germany's submarine fleet attacking the Allied merchant ships. Nevertheless, Vice-Admiral Scheer hoped to provoke a battle between the full strength of the High Seas Fleet and a detached portion of the Grand Fleet, specifically, the British Battle Cruiser fleet - the Grand Fleet's reconnaissance and mobile striking arm based at Rosyth under Vice-Admiral Sir David Beatty. If British naval strength could be eroded, the High Seas Fleet might stand a chance of taking on a



> "Jellicoe had to fight the Battle of Jutland without being able to use his air reconnaissance..."

HMS "Campania" with her original flight deck

diminished Grand Fleet. However, there was a major flaw in Scheer's plan: British cryptanalysts had deciphered German naval codes, and although the intelligence was often sketchy, Jellicoe had prior warning of many of his deployments. Thus when the High Seas Fleet departed its North Sea bases on 31 May 1916, Beatty's Battle Cruiser Fleet was already sailing to intercept it, as Scheer hoped it would, but so was the entire Grand Fleet.

Unfortunately when the Grand Fleet left its base on 30 May 1916, HMS "Campania" remained behind. Why this happened is not entirely clear. She may have been anchored in a remote part of Scapa Flow, or she may have not entirely received the signal to sail, or her aircraft may have been ashore. Once the mistake was identified, four hours passed before she was able to depart with her two escorting destroyers. Steaming at her full speed of 19.5 knots she was unable to match the Grand Fleet's speed of 22 knots. As the gap widened, Jellicoe ordered her back to Scapa Flow, fearing she would be torpedoed. Thus Jellicoe had to fight the Battle of Jutland without being able to use his air reconnaissance to locate the enemy.[8] Scheer had a fleet of five zeppelins for air reconnaissance, but bad weather on 31 May delayed their launch and they were unable to arrive at their patrol areas in time. However, it is unlikely that the airships would have been able to see much owing to hazy conditions and a 1,000 ft cloud base.

The Battle of Jutland was fought at a range of between 10,000 and 18,000 yards.[9] Jellicoe relied on his squadron commanders to keep him informed of the position of the High Seas Fleet, but in the heat of the action they frequently failed to do this, or their reports lacked essential information. Communications relied primarily on flags and signal lights, which were often too far away to make out, and on wireless, but wireless messages relayed between ships often suffered mutilation or were garbled. As Jellicoe wrote later to the First Lord of the Admiralty: "*The whole situation was so difficult to grasp, as I had no real idea of what was going on and we could hardly see anything except the flashes of guns, shells falling, ships blowing up, and an occasional glimpse of an Enemy vessel.*" [10] Inadequate communications meant Jellicoe had to deploy the Grand Fleet into line to take up battle formation based on guesswork, and delayed engaging the High Seas Fleet in conditions of fast diminishing visibility. It is unsurprising that Scheer's fleet was able to escape during the night. HMS "Campania's" reconnaissance aircraft may have enabled Jellicoe to deploy more quickly and to begin the battle earlier than late afternoon.

The British ships had other major problems at Jutland. Most serious was the dangerous way cordite propellant was stored in the gunhouses, and magazine doors left open, in order to maximise rate of fire, and this resulted in three battle cruisers, HMS "Invincible", HMS "Indefatigable" and HMS "Queen Mary", blowing up. The mismatch between the slow development of communications technology in contrast to the rapid development of the speed of warships, the power and range of their guns, and the fire control equipment available, is one of the most notable aspects of naval warfare of the era. The British may have expected a 'second Battle of Trafalgar', but Admiral Lord Nelson would have had a much better idea of what was happening from HMS "Victory's" quarterdeck at Trafalgar than Admiral Jellicoe did from the bridge of his flagship HMS "Iron Duke" at Jutland. Whether the aircraft of HMS "Campania" would have helped is a matter of conjecture.

On 5 November 1918, six days before the end of the war, HMS "Campania" collided with the battleship HMS "Royal Oak" and the battle cruiser HMS "Glorious" in the Firth of Forth, after dragging her anchor in high winds. The resultant hull breach caused her engine room to flood and with the ship settling by the stern, her crew was safely evacuated. HMS "Campania" sank five hours after the initial damage when a boiler exploded, sending her to the seabed. With the tops of her masts visible at low tide, the wreck was deemed a serious menace to navigation, and was later blown up. ■

---

[1] Out of 144 British and 125 German warships involved in the Battle of Jutland, British casualties amounted to 6,600 men and 14 ships, while German casualties numbered 3,076 men and 11 vessels.

[2] Most Cunard ships were given Latin names for land masses ending in 'ia'. Campania was the Roman province whose present day capital is Naples. Lucania is the region in southern Italy between Campania and Calabria.

[3] "Campania" captured the 'Blue Riband', an accolade given to the fastest passenger liner crossing the North Atlantic based on average speed, from the Inman Line's "City of New York" of 1888. "Lucania" was slightly faster and held the speed record for Cunard from 1894 until 1897, when Norddeutscher Lloyd's 14,349 ton "Kaiser Wilhelm der Grosse", the world's then largest ship, captured the record for Germany.

[4] "Lucania" was de-commissioned in 1909 and on 14th August that year she caught fire and sank while laid up in Liverpool docks. She was later salvaged and scrapped.

[5] On 1st April 1918 the R.N.A.S. was merged with the British Army's Royal Flying Corps to form the Royal Air Force.

[6] The Short 184 biplane had a single 225 hp Sunbeam engine to power it along at 80 mph, it carried two & three-quarter hours' fuel and could climb to a maximum height of 9,000 ft in a minimum time of three-quarters of an hour. It was built by Messrs Short Brothers of Rochester and Bedford.

[7] Her First Lieutenant was Charles Herbert Lightoller, a Royal Navy Reservist and formerly Second Officer of RMS "Titanic", the most senior surviving officer of the tragedy.

[8] Beatty's fleet included a seaplane carrier HMS "Engadine", a converted channel ferry, but she lacked a flight deck and only one of her Short 184s managed to take off from the sea owing to rough weather. It made three sighting reports but "Engadine" was unable to communicate these to Beatty.

[9] 9 – 16 km

[10] A Marder, From the Dreadnought to Scapa Flow, Vol III (Oxford, 1961), p.110.

"In reaching this decision, he [Lord Neuberger] emphasised the importance of respecting the bargain which had been struck by two commercial parties."

Implying Terms into a Commercial Contract – Does the Restrictive and Traditional Test Still Apply?

Heloise Clifford
Syndicate Manager FDD
heloise.clifford@simsl.com

On 2 December 2015 the Supreme Court issued a decision in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd [2015] UKSC 72* which restated the legal test to be applied when deciding whether or not terms should be implied into a commercial contract. Although this case concerned the implication of a term into a commercial property lease agreement, the principles which are stated have a much wider application and will be of relevance to shipping and trade contracts and to all commercial agreements generally.

Background Facts

The dispute concerned a commercial lease entered into between the defendant landlord of the property and the claimant tenant. The expiry date for the lease was 2 February 2018 and rent was payable in advance in equal quarterly instalments. In July 2011 the claimant exercised its contractual right to break the lease with the result that it would expire on 24 January 2012. Shortly before the 25 December 2011 the claimant paid the rent due in respect of the quarter from that date to the 25 March 2012.

The key issue to be determined was whether the claimant was entitled to be refunded the rent paid in advance for the period from 24 January 2012 (when the lease expired) to 25 March 2012 (the date up to which advance rent had been paid).

There was no express term in the lease which dealt with the return of rent paid in advance covering the period 24 January to 25 March. Therefore, in order for the claimant to succeed it had to establish that there was an implied term.

At first instance, the Court decided that the claimant was entitled to a refund but on appeal the Court of Appeal overturned this decision. The claim was then appealed by the claimant to the Supreme Court.

Traditional Test for Implied Terms

The conditions (which may overlap) to be satisfied for a term to be implied into a contract were set out by Lord Simon in the Privy Council case *BP Refinery (Westernport) Pty Ltd v President Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJT 20 and are as follows:

1. The term must be reasonable and equitable;

2. It must be necessary to give business efficacy to a contract, no term will be implied if the contract is effective without it;

3. It must be so obvious that "it goes without saying";

4. It must be capable of clear expression; and

5. It must not contradict any express term of the contract.

The Supreme Court Decision

Lord Neuberger, who gave the main judgment, dismissed the appeal and held that there was no implied term in the contract. In reaching this decision, he emphasised the importance of respecting the bargain which had been struck by two commercial parties.

In giving his judgment, he reviewed and commented on prior authorities on implied terms. In summary, he made the following observations:

- In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 Lord Simon's principles were set out by Sir Thomas Bingham MR who described it as a test whose "*simplicity could be almost misleading*". It was also observed that where a contract is long and detailed, it is difficult to ascertain whether an omission was the result of a deliberate decision or an oversight by the parties. Sir Thomas went on to comment that whilst it is tempting for the court to imply a term which reflects the merits of a situation, as they appear with hindsight, this is not the correct approach. It is not enough to show that had the parties foreseen a situation which had in fact occurred they would have wished to make a contractual provision for it.

- Lord Neuberger observed that this was consistent with the approach taken by Bingham LJ, as he then was, in the earlier case of The *APJ Priti* [1987] 2 Lloyd's Rep 37, 42. In this case he rejected an argument that a safe port warranty should be implied into a voyage charter. In reaching this decision, he remarked that the omission of the warranty may have been deliberate because such a term is not necessary for the business efficacy of the charter.

In giving his lead judgment in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company*, Lord Neuberger observed that the principles for implying terms, and the judicial observations which had been made in relation to these, represented a clear and consistent approach that did not require reformulating. However, he did make six helpful comments in relation to the second of Lord Simon's conditions; the "necessity" test, and how this is to be applied:

i. Firstly, he noted that Lord Steyn had observed in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, that the implication of a term was "*not critically dependent on proof of an actual intention of the parties.*" It does not need to be shown that there was an actual intention; instead the answer should be by reference to a notional reasonable person in the position of the parties when they were negotiating the contract.

ii. A term should not be implied into a detailed commercial contract merely because it appears "*fair*" or because the parties would have agreed it had it been suggested to them. Whilst these grounds are necessary for implying a term, they are not sufficient.

iii. Thirdly, he noted that it was questionable whether Lord Simon's first condition, reasonableness and equitableness, will ever add anything. If a term satisfies all of the other principles of Lord Simon's test, it would be difficult to think of a situation where it would not be reasonable and equitable.

iv. Only one of the "*business necessity*" and "*obviousness*" tests needs to be satisfied, although in practice it would be rare for a term to only meet one of these requirements.

v. He commented that if one approaches the question by reference to the officious bystander, it is "*vital to formulate the question to be posed by [him] with the utmost care.*"

vi. Finally, the test is not one of "*absolute necessity*". The reason for this is that necessity is to be judged by "*business efficacy*" and involves a value judgment. As such Lord Simon's second condition is that a term can only be implied if "*without the term, the contract would lack commercial or practical coherence.*"

In addition to this, in deciding there was no implied term it was also noted that the lease was a full and carefully considered contract, which had been professionally drafted, and which contained obligations of a similar nature to the implied term proposed by the claimant. Of critical importance to this decision is that there is clear case law that rent payable and paid in advance can be retained by the landlord, save in very exceptional circumstances (eg. where the contract could not work or would lead to an absurdity) and, therefore, express words would be needed before it would be right to imply a term to the contrary.

One of the key issues in the case was the correct interpretation of the decision of the *Privy Council in Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1998. Various academic authors and commentators had suggested that this case established a more liberal test for the implication of terms into contracts and that it would suffice if the term was reasonable, albeit not absolutely necessary. The claimant sought to take this position in support of its argument. In *Belize Telecom*, Lord Hoffman suggested that the process of implying terms was part of the exercise of construing the contract and, in making this observation, he said "*[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*" In clarifying this statement Lord Neuberger said "*the notion that a term will be implied if a reasonable reader, knowing all the provisions of the contract and the surrounding circumstances, would understand the term to be implied is acceptable, provided that: (i) the reasonable reader is treated as reading the contract at the time it was entered into; and (ii) he would consider the term to be so obvious that it goes without saying or to be necessary for business efficacy.*" He went on to stress that whilst he accepted "*(i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract*", Lord Hoffmann's analysis in Belize Telecom could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.

Following their review of *Attorney General of Belize* and the later authorities which referred to that case, their Lordships emphatically rejected the more liberal approach to implying terms into contracts and emphasised that nothing which Lord Hoffman had said diluted the test with the result that the restrictive and traditional requirements, as set out above, continued to apply.

Implied Terms in Shipping Contracts

The implication of terms into contracts is a complicated area of law and one which frequently arises in shipping cases. Key examples of this are The *Island Archon* and *The Kitsa*. These cases both concerned the scope of the implied indemnity for losses or expenses incurred by an owner in following a charterer's orders. In the first of these cases it was held that if at the time that the charter is concluded, the occurrence and type of loss or expense to the shipowner flowing from the order as to employment of the vessel were unforeseen, that will be a key factor in determining whether the loss or expense falls within the scope of the implied indemnity. In the second, costs of de-fouling the hull after a long port stay were considered to be foreseeable and forseen at the time of entering into the charter and as such a risk which owners had agreed to accept.

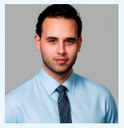
These decisions are consistent with the reasoning in *Philips Electronique Grand Public SA v British Sky Broadcasting* and also with the principles as highlighted by Lord Neuberger, in particular what a reasonable person would have thought when considering what the parties' intentions were at the time of entering into the contract.

Comment

This is the first judgment that has been handed down by the Supreme Court which analyses the law on implied terms and has brought much needed clarity to this issue. Following this judgment, it is clear that the test to be applied continues to be stringent and very restrictive. As a result, the application of this test can lead to results which may seem harsh as it will not be sufficient that the term is fair and reasonable or that if it had been suggested to the parties it would have been agreed. Therefore, where there is no express term dealing with a specific situation, even if the outcome is considered by the claimant to be clear or obvious, it may not meet the criteria for implied terms with the possibility of an outcome which could be perceived as uncommercial.

The impact of this is that careful thought must be given when entering into commercial contracts, particularly charterparties where standard terms are often utilised, to ensure that the terms reflect the intended agreement. Whilst it is of course difficult to predict every eventuality and ensure that these are all addressed in a contract, draft wording should be meticulously considered before a contract is entered into, particularly where the rights and obligations are long term. ■

Arbitration and Protecting Time for Counterclaims



Sean Lima
Syndicate Executive
sean.lima@simsl.com

Arising out of a dispute in arbitration, the Commercial Court was asked to consider a question of law of general public importance – whether the wording of a notice of appointment of an arbitrator was sufficient to stop time running for a counter claim under s.14(4) of the Arbitration Act 1996. *(Glencore International AG v (1) PT Tera Logistic Indonesia (2) PT Arpeni Pra [2016] EWHC 82 (Comm).*

The Facts

The parties had entered into four contracts for the charter of floating cranes which provided that demurrage would be payable by the Respondent or detention payable by the Appelant dependent on whether delay was caused by the floating cranes or by the mother vessel. Disputes arose and PT commenced four arbitrations claiming detention. When Glencore served its defence and counterclaim in two of the arbitrations after the limitation period for claims had expired, PT claimed that Glencore's counterclaims were time barred. PT claimed that Glencore's notices of appointment in those arbitrations were insufficient to stop the running of time under s.14(4) of the Arbitration Act 1996 which provides:

"Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter."

The tribunal considered the wording of each parties' notice of appointment in the two arbitrations.

PT's notices in each set of proceedings stated that arbitration had been commenced *"in respect of their claims under this Contract" and "in respect of claims under the Contract"*.

Both of Glencore's notices responded by appointing their arbitrator *"in relation to all disputes arising under the contract"*.

By a majority of 2 to 1, the Tribunal decided the counterclaims were time barred, with the dissenting arbitrator taking the view that the words *"all disputes"* were routinely used in the market in the expectation that they encompassed claims that might only be identified after service of notices commencing arbitration; that is that they were sufficient to include both claims and counterclaims.

The Judgment

Knowles J considered that in a situation where the claim and the counterclaim arise from a single set of facts which gives rise to a balancing of accounts, or netting-off under a contract, references to *"claims"* or *"all disputes"* would ordinarily be sufficient to interrupt the running of time in respect of the counterclaim in accordance with s.14(4) of the Act. He considered that there was a need to keep a commercially open mind when regarding how the words are used and in what context they were used. He further stated that in the situation before him, any type of delay by either party could generate claims for damages and it would be highly unlikely that the parties would have wanted detention or demurrage claims to be dealt with by separate tribunals. Allowing the appeal, Knowles J concluded that *"…it is unsurprising that the Appellant should describe [this issue] as one of market interest"* and that although there were particular facts arising in this case, the basis of his judgment *"…would firmly indicate the same answer in a great many contract cases of what might be termed a "balance of account" nature."*

Parties to a dispute should bear in mind that although the counterclaim in this case was allowed, the claim and counter claim arose from a single set of facts giving rise to a balancing of accounts. Knowles J did not address the question where disputes arise in relation to separate facts, where there is scope for more uncertainty. Although the dissenting arbitrator's position in this respect is helpful, the decision in this case reinforces the need for clear and concise language to be used in drafting appointment notices. This would be especially necessary in situations where the counterclaims could arise from a separate set of facts which would not clearly make the case one of *"a balance of accounts"*. ■

Maritime Liens in the United States

James A. Marissen
Partner, Keesal, Young & Logan

In previous articles published on the Club's website and in Sea Venture, there have been overviews of the types of maritime and statutory liens available in other jurisdictions. As United States law recognizes a more extensive array of maritime liens than the laws of other nations, the United States is a preferred jurisdiction in which to enforce maritime liens. This article will provide a summary of how different types of maritime and statutory liens arise under United States law and offer some practical guidance in relation to the enforcement of those liens.

Proceed with Caution!

A few preliminary words of caution are needed when discussing maritime and statutory liens under United States law.

First, for certain aspects of maritime liens, there are divergent legal precedents which apply in different judicial districts within the United States. By way of explanation, the doctrine of stare decisis (being the common law doctrine by which legal precedents are authoritative, binding and must be followed) applies in the United States such that decisions of the United States Supreme Court are binding on all twelve United States Circuit Courts of Appeals and all United States District Courts (being the federal courts of first instance which exclusively exercise admiralty jurisdiction).

However, where there are no Supreme Court decisions on a legal issue, decisions of the individual United States Circuit Courts of Appeals are binding on all the United States District Courts within their judicial circuit. As you may appreciate, this system has allowed for the development of legal precedents, particularly with respect to determining the existence of maritime and statutory liens, which differ from one judicial district to another within the United States. Accordingly, local law advice will invariably be necessary before any attempt is made to enforce a maritime or statutory lien in the United States. Moreover, the principles discussed below should be considered to be merely a general summary of United States maritime lien law.

Second, under United States law, maritime liens arise by operation of law and cannot be created by contractual provision. Accordingly, irrespective of whether a contract specifies a choice of law which governs maritime liens, determining the applicable choice of law is often vigorously contested as it is usually determinative of whether a maritime lien exists. Although, as discussed above, certain legal precedents regarding the choice of law differ between the judicial circuits within the United States, three general principles apply: (a) if a foreign law applies and that foreign law would confer a maritime lien for the asserted claim (being something more than merely a right to in rem enforcement), United States law will recognize that maritime lien regardless of whether there is any connection between the claim and the United States; (b) if a foreign law applies but does not confer a maritime lien for the asserted claim, there must be a sufficient connection between the claim and the United States for United States maritime lien law apply; and (c) if United States law is specified in a contract as the law governing maritime liens, there must still be a sufficient connection between the claim and the United States for United States maritime lien law apply.

Nature and Creation

The fundamental characteristics of maritime liens under United States law are very similar to those from other common law jurisdictions.

Under United States law, a maritime lien is a privileged claim upon maritime property (i.e. a vessel) which arises by operation of law out of services rendered to, or injuries caused by, that maritime property.

A maritime lien does not require any form of consent to be granted before it can arise, nor is it required to be filed or recorded for perfection. Rather, the maritime lien attaches simultaneously with the cause of action and adheres to the maritime property until it has either been enforced through an in rem proceeding in admiralty (i.e. by arresting a vessel) or discharged or extinguished. The maritime lien is thus a non-possessory proprietary interest in the res. This non-possessory interest remains with the res even if there is a transfer of ownership to a good faith purchaser.

A maritime lien is only available if the actions or omissions which give rise to the claim fall within admiralty jurisdiction. While most maritime liens arise by operation of law, some are created by statute under the Commercial Instruments and Maritime Liens Act ("CIMLA") 46 U.S.C. §§ 31301 – 31343. That said, United States law generally construes the doctrines and facts claimed to give rise to maritime liens narrowly, against lien status.

There is one important limitation on the enforcement of a maritime lien, being that it only attaches to the specific maritime property which gives rise to the claim. This limitation precludes a maritime lien being enforced against sister vessels or other beneficially owned maritime property. The specific maritime property upon which a lien can attach includes a vessel, a vessel's equipment, cargo, freights and subfreights.

Traditional Maritime Liens

Under United States law, traditional maritime liens are recognized for the following claims:

1. Maritime torts, including personal injury, death, collision, pollution and conversion;
2. Master and crew wages;
3. Salvage;
4. General Average;
5. Breach of charterparty;
6. Damage or loss of cargo; and
7. Unpaid freight and demurrage.

As is immediately evident from this list of claims, the vast majority of maritime torts and/or breach of maritime contracts give rise to maritime liens under the United States law.

Statutory Maritime Liens

Certain maritime liens are created by statute under United States law, the most common being the preferred ship mortgage and a lien for "necessaries" under CIMLA.

While the laws of most nations do not recognize maritime liens for "necessaries" provided to vessels, the United States is one jurisdiction which does. Accordingly, the enforcement of a purported maritime lien for "necessaries" is an extremely common claim in the United States and has been utilized extensively in the recent collapse of the O.W. Bunker Group by various entities seeking payment of bunkers delivered to vessels.

Assuming United States law applies (and we would reiterate the difficult choice of law issues discussed above which often arise in the context of asserting a statutory maritime lien for "necessaries" under CIMLA), to assert a valid maritime lien for "necessaries" under CIMLA, a claimant will need to meet all of the requirements set out in 46 U.S.C. section 31342. Specifically, section 31342 provides that:

"... a person providing necessaries to a Vessel on the order of the owner or person authorized by the owner:

1. has a maritime lien on the Vessel;
2. may bring a civil action in rem to enforce the lien; and
3. is not required to allege or prove in an action that credit was given to the Vessel."

Accordingly, for claimant to have a maritime lien, they must be a person who is "providing", "necessaries", to the Vessel "on the order of the owner or person authorized by the owner."

"Providing"

The "necessaries" must be provided to the vessel by the person claiming a maritime lien under CIMLA. While this requirement may be simply stated, difficulties often arise satisfying this requirement.

In some instances, the person claiming the maritime lien may not have physically provided the "necessaries," but may have merely arranged for the provision of "necessaries." Under United States law, a party need not be the physical supplier or deliverer to have "provided" necessaries within the meaning of CIMLA and remain eligible for a maritime lien. However, particular attention is needed in these circumstances to ascertain the precise contractual arrangements between all parties involved in the provision of "necessaries," including any and all intermediary traders and/or brokers. This is crucial to ascertain the manner in which all parties involved in the provision were originally retained, how they were compensated and/or derived a profit, and, perhaps most importantly, whether payment has been made by the person claiming a maritime lien. This analysis is important to ensure that the person claiming the maritime lien is, in fact, "providing" the "necessaries" to the Vessel as contemplated by CIMLA.

Another difficulty arises due to the fact that maritime liens are freely assignable under United States law. Accordingly, particular attention is needed to determine whether the person claiming the maritime lien actually provided the "necessaries" to the vessel, whether the party from whom they may have taken an assignment of the maritime lien actually provided the "necessaries" to the vessel, whether they have given any consideration for the assignment, and whether the terms of any written assignment actually convey rights to exercise a maritime lien.

> "....the United States law recognises a more extensive array of maritime liens than the laws of other nations, ..."

"Necessaries"

"Necessaries" is defined in CIMLA to include "repairs, supplies, towage, and the use of a dry dock or marine railway". In addition, "necessaries" has been broadly interpreted under United States law to mean any goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function. Examples of valid "necessaries" include stevedoring services, pilotage services, provisions for crew and passengers, wharfage and dockage, towage, advertising and, of course, bunkers and lubricating oil.

"On the Order of the Owner or Person Authorized by the Owner"

Section 31341(a) of CIMLA provides that:

"… the following persons are presumed to have authority to procure necessaries for a vessel:

1. he owner,
2. the master,
3. a person entrusted with the management of the vessel at the port or supply; or
4. an officer or agent appointed by
    a. the owner;
    b. the charterer;
    c. an owner pro hac vice; or
    d. an agreed buyer in possession of the vessel."

As is evident from the clear language Section 31341(a) of CIMLA, various persons, including a charterer, are presumed to have authority to order such necessaries and thus bind the vessel in rem through the creation of a maritime lien. Notwithstanding section 31341(a) of CIMLA, this general presumption of authority can be rebutted if there is evidence that the supplier of "necessaries" had actual or constructive notice of relevant person's (including a charterer's) inability to create a lien on the vessel. While the burden of proof on owners to rebut this presumption is a heavy one, owners usually rely upon prohibition of lien clauses in two circumstances.

First, it is common for owners to attempt to preclude a charterer from having actual authority to incur any maritime liens against the vessel by inserting a prohibition of lien clause (commonly referred to as a "non-lien" clause) in the charterparty. Such clauses are valid and enforceable as between owners and charterers. Furthermore, such clauses will be effective against suppliers of "necessaries", but only if they have actual knowledge of the clause *at or before the time the "necessaries" are provided to the vessel.* Thus, for example, to prevent a bunker supplier engaged by a time charterer from obtaining a maritime lien against the vessel for the value of the bunkers, notice of the prohibition of lien clause in the charterparty must be provided to the physical supplier *before* the bunkers are pumped on board the vessel. Notice of the prohibition of lien clause given *after* the bunkers are pumped on board will be ineffective to prevent a maritime lien arising. Should owners have any reservations about the charterers willingness and/or ability to provide such advance notice, they can of course take independent action to provide physical suppliers with actual notice of the prohibition of lien clause in the charterparty (and that any provision of "necessaries" is not being made on the credit of the vessel). This can be done by the Master providing a letter to the physical supplier confirming that the charterer has no authority to create a lien over the vessel *before* the bunkers are stemmed. If advance notice of the prohibition of lien clause is given in the correct form to the physical supplier before the provision of "necessaries," no maritime lien will arise.

Second, it is common practice for crew to stamp a prohibition of lien clause on the bunker delivery receipt. However, the stamping of a bunker delivery receipt with a notice of the prohibition of lien clause will only be effective if it is done before the bunkers are pumped on board the vessel. Bunker delivery receipts stamped after the bunkers are pumped on board will be ineffective to prevent a maritime lien from arising.

Enforcement

Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions under the Federal Rules of Civil Procedure provides the mechanism by which maritime liens can be enforced against vessels and/or other maritime property. A Rule C arrest can be utilized to either (a) acquire jurisdiction over a defendant, (b) seize property to obtain security for a claim and/or (c) seize property in connection with the enforcement of a judgment. Rule C is an in rem

arrest of a vessel or other maritime property which is brought directly against the vessel and/or other maritime property itself as the defendant. A Rule C in rem action may be brought only by a plaintiff who possess a maritime lien and thus the in rem process may be asserted only against the specific property that is the subject of the maritime lien.

Priorities

Should it be necessary to enforce maritime liens and/or preferred ship mortgages against maritime property through a judicial sale, there is predetermined priority of claims under United States law. Determining the priorities to any sale proceeds involves a two-step process: ranking and classifying the different classes of liens and/or mortgages and then determining what claims come first within each class.

With respect to ranking classes of claims, the following order is adopted:

1. Expenses of justice incurred during an arrest (not regarded as a lien but given first priority);
2. Master and Crew wage liens;
3. Salvage and general average liens;
4. Tort liens, including personal injuries and death;
5. Pre-mortgage statutory maritime liens for necessaries;
6. Preferred ship mortgage liens;
7. Statutory maritime liens for necessaries;
8. State law created maritime liens;
9. Liens for violations of federal statutes;
10. Preferred non-maritime liens, including tax liens;
11. Attachment liens (i.e. Supplemental Admiralty Rule B Attachment claims); and
12. Maritime liens in bankruptcy.

With respect to determining priority within each class of maritime liens, the usual maritime rule of "last-in-time, first-in-right" applies (different rules apply for preferred ship mortgages). The rationale behind this rule is that the providers of later necessaries have benefitted their predecessors by keeping the vessel in operation longer, thereby increasing the chance that the vessel could earn profits to pay off earlier liens.

Discharge and Extinguishment

While maritime liens are non-consensual and arise by operation of law, there is no specific statute of limitations for asserting a maritime lien under United States law. Rather, maritime liens can be discharged and/or extinguished in a variety of ways including waiver, laches, destruction of the res and, of course, payment of the claim.

A maritime lien can be waived by agreement or by implication. However, for a maritime lien to be waived, the courts will require clear evidence of intent to waive the lien in favor of other security. Disputes over the waiver of maritime liens often arise in the context of a supplier providing materials or services to a vessel. The supplier usually seeks to rely upon the rebuttable presumption that they are relying upon the credit of the vessel, whereas the vessel owner challenges this presumption by asserting that the supplier relied solely on the personal credit of someone other than the vessel (perhaps the vessel owner or charterer) and thus purposefully intended to waive their maritime lien.

A maritime lien can also be extinguished through the equitable doctrine of laches. Under this doctrine, a maritime lien is extinguished when a lienholder has unreasonably delayed asserting their lien to the prejudice of the other party. The doctrine of laches will not be applied where there is no proof of both "inexcusable delay" and "prejudice". For "inexcusable delay", the courts usually look to the analogous statutes of limitation to determine what is an unreasonable delay in commencing the action, beyond which time unreasonable delay is presumed. For "prejudice", actual prejudice must be proven and prejudice is not presumed from the mere passage of time, even if the delay is unreasonable. Such prejudice could include the unavailability of witnesses and/or loss of documents/records. Accordingly, whether a laches defense is available is determined on a case-by-case basis and will depend upon the length of time that has passed from when the maritime lien arose and what circumstances exist at the time of enforcing the maritime lien to argue that the delay has been prejudicial.

Finally, contractual time bars, such as those found within contracts of carriage, also extinguish maritime liens. Accordingly, the running of the one year time bar under the United States Carriage of Goods by Sea Act, 46 U.S.C.A § 30701 et seq., will extinguish any maritime lien cargo interests may have on a vessel for breach of charter and/or cargo damage.

Comment

This article can only provide a general summary of United States maritime lien law. However, the key points to remember regarding the enforcement of maritime liens in the United States are, (a) consult with local United States counsel in the anticipated jurisdiction of enforcement to determine the validity of the purported maritime lien; (b) determine what choice of law governs the purported maritime lien; (c) determine whether all the requirements of the purported maritime lien have been met, in particular all the requirements CIMLA for statutory maritime liens; (d) determine the priority of the purported maritime lien; and, (e) ascertain that the purported maritime lien has not been discharged or extinguished. ■

Repudiatory Breach, Damages and the Ability to Perform – The Glory Wealth

Ishfaq Ahmed
Stone Chambers London

Key Points

- There is some apparent tension between decisions of the highest court when resolving the question whether what would have been an innocent parties' future inability to perform or repudiatory conduct should be taken into account on the assessment of damages when that innocent party has accepted a repudiation of the contract.
- The recent case of *The Glory Wealth* is an important judgment supporting the argument that such matters should be taken into account in order that the innocent party is not put in a better position than it would have been in had the contract been performed (following the majority House of Lords decision in *The Golden Victory*).
- Parties in repudiatory breach will seek to extend *The Golden Victory* to its limits in respect of the assessment of damages. The challenge for the courts will be to ensure that those limits and those assessments are kept within manageable and reasonable bounds.

Introduction

An important issue in recent years has been the extent and valuation of an owners' rights where charterers have repudiated a long term charterparty or contract of affreightment. Since damages claimed under such contracts can be very large, the courts have been taxed with issues including the availability of markets and discounts for the accelerated receipt of hire (Zodiac Maritime Agencies Limited v Fortescue Metals Group Limited (*The Kildare*)[1]), the remoteness of damage (Transfield Shipping Inc v Mercator Shipping (*The Achilleas*) 2) and the effect of a war cancellation clause on damages (Golden Strait Corp v Nippon Yusen Kubishika Kaisha (*The Golden Victory*) [3]). In a recent case, the Commercial Court once again faced a question of law *"….of importance to the general law of contract and, in particular, the assessment of damages for breach of contract"*: Flame SA v Glory Wealth Shipping PTE Ltd (*The Glory Wealth*) [4]. Although there were two issues appealed under section 69 Arbitration Act 1996, this note concentrates on the damages issue.

The general issue arising can be stated shortly. A contract is repudiated and the repudiation is accepted. It could be a charterparty contract, sale of goods, provision of other services etc. The repudiator and guilty party alleges that the innocent party, on the due date of its performance, would never have been able to perform and therefore has not lost anything of value. Should this be taken into account when assessing damages?

In the interests of certainty and finality, the general principle is that damages are assessed at breach, which in the case of repudiatory breach is the date of acceptance of the repudiation. However, in *The Golden Victory* it was stated that the "lodestar" is that damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more[5]. The effect of the majority decision in *The Golden Victory* was that considerations as to certainty would give way to this compensatory principle. As a result, *The Golden Victory* eroded the general principle of damages assessment. Subsequent events, in that case the operation of a war cancellation clause due to the 2003 Iraq war, were to be taken into account.

Given its significance it is perhaps surprising that in *The Glory Wealth* it was only before the Court (and after skeleton arguments) that

The Golden Victory was discussed in detail and, had it not been for an adverse factual finding, may even have won the day for the charterers.

The Facts

A contract of affreightment (the "COA") dated 19 August 2008 provided for the carriage of [6] cargoes of coal in bulk in each of the years 2009, 2010 and 2011. The charterers under the COA failed to declare laycans for the 5th and 6th shipments of 2009 and for all 6 shipments in 2010. The disponent owners succeeded before the arbitral tribunal which found that the charterers were in actual repudiatory breach of the COA by failing to declare laycans for the voyages in question and that each such repudiatory breach had been accepted by the disponent owners as terminating the disponent owners' obligation to carry cargoes on those voyages. They awarded damages to the disponent owners in the sum of US$5,426,608.60 plus interest, the large difference between the COA rate and the market rates being accounted for by the sudden collapse in the freight market following the Lehman Brothers collapse.

The charterers argued that due to the market collapse the financial position of the disponent owners had so deteriorated that, had the charterers declared the laycans in question, the disponent owners would have been incapable of providing the required vessels anyway. They therefore submitted that the disponent owners were only entitled to substantial damages if they, the disponent owners, could prove that if the charterers had declared any of the laycans in question the disponent owners would have been able to perform the corresponding voyages by going out into the market and chartering in a vessel at the relevant time. If that was not the case, then disponent owners would be put in a better position than they would have been in if the contract had not been repudiated.

The Tribunal Decision

In finding for the owners on this issue, the tribunal accepted the reasoning in the leading textbook, Treitel on the Law of Contract[6], 13th. ed., @ 20-082, based on the House of Lords' decision in Gill & Duffus SA v Berger and Co Inc[7] that: "*where the charterer's case was that he would have been entitled to terminate on account of the shipowner's future breach*" that cannot be taken into account so as to reduce damages to a nominal amount "*for once the shipowner had accepted the charterer's earlier repudiation and so terminated the contract for that anticipatory breach, the shipowner would be relieved of any further obligation to perform, so that his failure to perform on the due day could no longer be a breach.*"

Standing alone, the second part of the quote from Treitel is of course correct. Once an innocent party has accepted a repudiatory breach it would be nonsensical for the innocent party to be continued to be required to perform. Not only from the point of view of a waste of resources and the futility of the matter but because where one party has ex hypothesi evinced an intention not to be bound, and this has been accepted then this ought to bring the innocent party's obligations to an end. Thus, using an example from Treitel @ 17-026, where in a contract for the sale of goods to be manufactured by A to B's order, B wrongfully repudiates the contract, and this is accepted by A, A is entitled to terminate the contract; and, if he does so, two things follow: A need no longer manufacture the goods, and he can claim damages from B.

Therefore, it follows that the innocent party's failure to perform on the due date cannot be a breach of contract. However, this is arguably a very different matter to any allegation by the guilty party that the innocent party would not have been able to perform on that date and therefore has not suffered a loss. If that can be shown on the evidence to have been the case then not to take this into account would seem to put the innocent party into a better position than he would have been in if the contract had gone ahead as planned. This was the issue debated before the Court.

The Court Decision

Teare J carried out a comprehensive review of the apparently conflicting authorities on this issue. His lordship held that although the reasoning of the House of Lords in *Gill & Duffus* and in *The Golden Victory* led in different directions, neither was a decision on the actual point to be determined. The court was dealing with a question concerning the assessment of damages and since there had been no clear decision of an appellate court binding upon the court and pursuant to which the application of the contractual principles regarding an accepted repudiation had led to an award of damages which put the innocent party in a better position than he would have been in had the contract been performed, his lordship concluded that the court should follow the compensatory principle endorsed by the House of Lords in *The Golden Victory*. Although, the owners were supported by the reasoning in *Gill & Duffus*, that reasoning did not address the compensatory principle and the decision was not one in which the innocent party was placed in a better position than he would have been in had the party in breach not repudiated the contract.

As a result, his lordship held that the assessment of loss necessarily requires a hypothetical exercise to be undertaken, namely, an assessment of what would have happened had there been no repudiation. That enables the true value of the rights which had been lost to be assessed. The innocent party claims damages and therefore the burden lies on that party to prove its loss. That requires the innocent party to show that, had there been no repudiation, it would have been able to perform its obligations under the contract. If the court were to assume that the innocent party would have been able to perform, rather than to consider what was likely to have happened in the event that there had been no repudiation, the court might well put the innocent party in a better position than it would have been in had the contract been performed. When assessing what the innocent party would have earned had the contract been performed the court must assume that the party in breach has performed its obligations.

"However, this is arguably a very different matter to any allegation by the guilty party that the innocent party would not have been able to perform on that date and therefore has not suffered a loss."

In *The Glory Wealth*, in the end the charterers' legal victory was of little consequence. The Court held that the finding of the tribunal that, on the totality of the evidence before it, the disponent owners would have been able to fulfil their obligations if the charterers had called upon them to do so effectively concluded the issue. Thus, the result of the arbitration would have been no different.

Comment

The Golden Victory has been the subject of strong distinguished academic criticism (for example by Professor Francis Reynolds). However, in *The Glory Wealth* the court endorsed the compensatory principle set out in that decision. *The Mihalis Angelos*[8] (cancellation clause) and *The Golden Victory* (war clause) both concerned cases where there was an express contractual term dealing with the subsequent event or contingency. In *The Mihalis Angelos* the Court of Appeal had held (obiter) that the damages would be nominal where at the date of the accepted repudiation it was inevitable that the charterers would cancel since the vessel would not arrive in time. *The Golden Victory* allowed the Courts to look at events that had occurred by the time that assessment of damages took place even though those events were a mere possibility at the date of breach. *The Glory Wealth* arguably extends these decisions and supports the argument that the reasoning and effect of those cases applies equally to future repudiatory breaches that may have occurred by the innocent party as well as other political and non-contractual contingencies or events e.g. government requisition. It merely supports the argument since it is a decision of first instance and was arguably only obiter since, as the arbitrators had already decided the factual issue against charterers, the determination of the legal point was not essential. Another important point to note is that *The Glory Wealth*, like *The Golden Victory*, involved an actual repudiatory breach. However, there is little reason to suppose that the reasoning would not apply in cases involving an anticipatory breach.

Underlying the court's reasoning in *The Glory Wealth* (and repeated a number of times) was that in none of the previous authorities was the claimant placed, by an award of damages, in a better position than he would have been in had the contract been performed. It could be argued that this conclusion entails within it the assertion that in those previous decisions the courts did not appreciate the distinction between liability and damages and that the effect of their pronouncements could be interpreted to apply to issues concerning damages as well as liability, thus awarding substantial damages to parties who may not have been able to perform. However, be that as it may, it would be correct to say that the authorities are not entirely clear. In support of the decision in *The Glory Wealth* it may be observed that in two decisions where there was clearly the risk of overcompensation (The Mihalis Angelos and *The Golden Victory*) the Courts declined to allow this. Indeed, even in *Gill & Duffus* arguably there is some support for the conclusions reached in *The Glory Wealth*. At the end of the passage on page 392 Lord Diplock states:

"*In the events that happened the certification clause in the contract is in my opinion relevant only to the measure of damages to which the sellers are entitled. It does not go to their liability even if they could show that the damages should be nominal only.*"

This passage, although coming directly at the end of a passage quoted in *The Glory Wealth*, was not referred to in the judgement. Instead, Teare J stated that "*Lord Diplock did not say that the buyer's liability in damages could be extinguished altogether or that the seller would be unable to prove any substantial damages because the buyer would*

have been able to reject the goods themselves"[9]. However, Lord Diplock in the passage quoted did not appear to exclude entirely the prospect of damages being reduced to a nominal amount. The contrary argument, of course, would be that the reference to nominal damages in the passage was not to nominal damages due to what would have been a future repudiatory breach by the innocent party, but as a result of already pre-existing breaches as at the date the repudiation was accepted. Thus, if goods shipped were defective in the extreme then such a breach could enable buyers to argue that damages should be nominal if the goods are, say, valueless. However, (the argument would continue) the passage quoted above does not justify the repudiating party proving that since it would have rejected the goods anyway, then damages should be reduced to a minimum.

This then raises questions as to the precise scope of Lord Diplock's meaning in the quoted passage and in exactly what circumstances the buyers (or the innocent party) would be allowed to argue that the damages should be nominal. Although the view expressed in *Treitel* is based on *Gill & Duffus* the actual proposition derived from the case is not entirely clear from the judgment, nor was there a decision reached by the House of Lords there on the issue of the compensatory principle or inability to perform by the innocent party on the due date. Although this is not the place to enter into a detailed consideration of *Gill & Duffus*, there is at least some potential for debate on its precise scope, dealing with a fairly technical point involving CIF contracts, and if that is correct, then the door does remain open for the compensatory principle to be given prominence. In any case, *Gill & Duffus* will need to be reviewed in the future since there is a tension perceived amongst academics as well as practitioners in the case law of the highest court which would need to be grappled with by subsequent courts.

In the circumstances, it is submitted there are good prospects that *The Glory Wealth* will be followed in the future. However, for the time being and on a practical level, *The Glory Wealth* means that the innocent party is to be put in the same position, and in no better position than that he would have been in had the contract been performed. No windfalls are allowed. Thus, it will not be assumed that the innocent party would have performed its obligations insofar as the issue of damages is concerned. The relevance of the older line of cases discussed in *The Glory Wealth* is that the party in breach cannot rely upon a future hypothetical breach as an ex post facto justification for its repudiation, although it can refer to it on the question of damages.

This does, however, mean that the ultimate result may now be even less dependent on whether repudiation is accepted or not by the innocent party. The effect of decisions such

> "How the law develops in the future will be of interest to both academics and practitioners."

as *Avery v Bowden*[10] and *Fercometal S.A.R.L.v Mediterranean Shipping Co SA (The Simona)*[11] has been that where a repudiation is not accepted then the contract remains alive for the benefit of both parties. Thus, in *Avery v Bowden* the repudiating party was subsequently allowed to rely on a subsequent frustrating illegality and in *The Simona* the repudiating party was allowed to serve a further cancellation notice.

A fuller examination of the facts in *The Simona* will help illustrate the point. There the voyage charter provided for a laycan of 3 to 9 July. The charterers refused a requested extension to the cancelling date and purported to cancel the charter, which was wrongful as they tried to do so before 9 July. Their repudiation of the charterparty was not accepted and charterers then sent another notice of cancellation on 12 July. It was held that they were entitled to do so, the right to cancellation having survived since the repudiation had not been accepted by owners. Some commentators (e.g. *Treitel*) have drawn from this case the conclusion that if the innocent party had in fact accepted the repudiation rather than affirmed the contract, then the subsequent intervening events would not have assisted the repudiating party and the innocent party would have succeeded in full. However, if the recent cases are correct then whether the repudiation is accepted or not is rendered largely academic since the issue of subsequent conduct and events can be taken into account on the issue of damages. In *The Simona* even if they had not cancelled by 9 July the charterers would have cancelled after that date due to commercial reasons and the new line of authority suggests that this must be taken into account (even if not "pre-destined" to happen at the date of breach as in *The Mihalis Angelos*). The issue is largely academic, of course, because if the repudiation is accepted then nominal damages may still be claimed but not otherwise.

Some may argue that this is the fairer result. Take for example, the innocent party who knows at the time of the repudiatory conduct that it is in some difficulty and therefore will not be able to perform. It therefore decides to accept the repudiation. If its subsequent insolvency was not taken into account when assessing damages, then matters uniquely within that party's knowledge would allow that party to take advantage and

claim for loss it would never have suffered and indeed, if the contract had continued, would have concerned matters for which it may have been found liable in damages. Although it may be argued that the guilty party takes this risk by its conduct, one should not lose sight of the attractiveness of the opposite argument to the courts.

On a fact investigation level parties will, of course, need to be astute to such arguments and an important factor may well be the resources and/or financial standing of the innocent party and/or any other reason that party may not have been able to perform. It is interesting that in *The Glory Wealth* one of the complaints made by the charterers under section 68 was that they had received incomplete/late disclosure of documents relating to owners' ability to perform. They also made attempts to appeal findings of facts in relation to this issue as a point of law. Since success with such arguments is notoriously difficult (the charterers did not succeed) any party will (in common with other aspects of the case) wish to ensure proper disclosure from the other side at a reasonably early stage so that it can properly tailor its case. Parties will also want to be astute in ensuring that they can obtain proper findings of fact from the fact finding tribunal. For the guilty party this will include findings not only that the other party would have been unable to perform or been otherwise in repudiatory breach of contract but that this hypothetical breach would then have been accepted. Of course, the innocent party may well blame the guilty party for its inability to perform or rely on arguments as to estoppel which will give rise to their own issues.

Notably in *The Mihalis Angelos* the cancellation was inevitable (e.g. Megaw LJ referred to it as "predestined"). In *The Golden Victory* the relevant event had already happened. The question arises what is to happen at lower levels of risk. If *The Glory Wealth* is correct, then what happens if at the date that damages are assessed, if this occurs prior to the intended date for performance, there are some prospects, less than the balance of probabilities, that the innocent party would not have been able to perform on the latter date? In *The Golden Victory* the point was not relevant since the event had already occurred. However, it was discussed and it was suggested by the House that lower levels of risks were to be taken into account. Thus, Lord Scott referred to a "*real possibility*" that was more than conceptual, Lord Brown referred to contingencies of less than 50% chance of happening if "*…of some real and not just minimal significance*", and Lord Carswell referred to the contingency lying "*anywhere on the scale between extreme unlikelihood…to virtual certainty*". In *The Glory Wealth* Teare J referred to the passage from the judgment of Lord Scott although not specifically endorsing it on this point. Thus, following the dicta referred to, if the chance of repudiatory conduct occurring at the date of performance is assessed as being 30% then this would presumably need to be taken into account and proportionate deductions made. However, it is fair to say that the courts will not want to see every contingency debated and that some limits will be placed on this as otherwise the result could be chaotic. How and where the limits are placed remains to be seen.

It could be argued that the result of *The Glory Wealth* is that there is even more incentive for the guilty party to delay settlement and/or the hearing or to embark on fishing expeditions in the hope that an event or some facts may be revealed which would allow it to argue that nominal or lower damages only should be awarded. This has indeed been a recurrent criticism of *The Golden Victory.* However, there the majority in the House of Lords did not regard that point as sufficient to deflect them from their conclusion, and pointed out that the innocent party and tribunal could attempt to proceed with despatch and expediency to avoid such stratagems.

Conclusions

The Glory Wealth is important in the comprehensive consideration of the case law surrounding the important issue of the proper calculation of damages and the valuation of rights lost where a future inability to perform by the innocent party is alleged. How the law develops in the future will be of interest to both academics and practitioners. A lodestar is "*a star that is used to guide the course of a ship, especially the pole star*" (Online Oxford Dictionaries). Parties in repudiatory breach will no doubt seek to extend *The Golden Victory* to its limits, to guide the courts towards ever speculative assessments, and the challenge for the courts will be to ensure that those limits and those assessments are kept within manageable and reasonable bounds[12].

This article was first published on Stone Chambers' website in January 2014.

An update on this article – **Update: Glory Wealth Shipping PTE v Flame SA** – is on page 26 of this publication. ■

1 [2001] 2 Lloyd's Rep. 360
2 [2009] I AC 61
3 [2007] 2 AC 353
4 [2013] Lloyd's rep.653
5 Lord Scott @382
6 Formerly written by Professor Sir Guenter Treitel and now edited by Professor Edwin Peel
7 [1984] AC 382
8 [1970] 2 Lloyd's Rep 43
9 Para 5
10 (1856) 5E. & B. 714
11 [1989] I A.C. 788
12 The author is grateful to Mark Jones, Stone Chambers, for his comments on an earlier draft of this article.

Arrest Haven: The Netherlands

Robert Hoepel
AKD Rotterdam

Introduction

As some may have experienced, the Netherlands is an attractive jurisdiction for ship arrests. Procedural law provides for an effective way to easily obtain leave for a pre-judgment attachment in order to secure a claim. Such pre-judgment attachment could have significant consequences for owners, charterers and (bunker) suppliers, though. This became even more so with the revised Brussels I Regulation which came into force in 2015.

Pre-Judgement Attachment

The pre-judgment attachment is frequently used by Dutch and foreign creditors to collect claims against various debtors, both Dutch and foreign. The order by the court to grant leave for such a pre-judgment attachment is commonly used to obtain security, so as to make sure that the debtor will fulfill its obligations should a judgment be rendered against it. A creditor can then simply liquidate the attached assets of its creditor to obtain payment under the judgment. Furthermore, it is widely used as an effective means of putting pressure on debtors in order to obtain quick payment while, at the same time, avoiding lengthy and sometimes costly substantive legal proceedings or arbitration.

In practical terms obtaining leave for a pre-judgment attachment can be achieved in just a matter of hours. Courts are always available to rule on an application for a pre-judgment attachment even during evenings and weekends if it concerns an urgent matter. This is obviously the case in the event that security is to be obtained from a vessel owner whose vessel is to call at a port and there is uncertainty as to when she will depart. The decision by the court on the application is a so-called ex-parte decision, which means that the debtor is not able to defend itself on the application itself. The creditor applying for the attachment generally has the benefit of the doubt when seeking leave for an attachment. If the applicant has an arguable case regarding the merits of its claim, leave is likely granted. Normally only the facts will be considered by the court who will apply a marginal test on the basis of limited facts and, in many of the cases, only very few documents to substantiate the claim. However, a debtor confronted with an attachment for a bogus claim is able to counter the arguments in summary proceedings to have the attachment lifted. Once leave is obtained from the court it is the bailiff who actually executes the attachment, which usually takes only one hour depending on the location of the assets.

Cross-Border Effect on a Dutch Pre-Judgment Attachment Order

Since the revised Brussels I Regulation came into force, under certain circumstances, it would even be possible to file an application with the Rotterdam Court in order to obtain leave for the attachment of assets elsewhere in the EU. The revised Brussels I Regulation provides uniform rules throughout the EU on international jurisdiction and recognition and enforcement of civil judgments, and replaces the previous Brussels I Regulation. So, on the basis of the revised Brussels I Regulation a creditor is able to enforce assets of its debtor throughout the EU by obtaining leave from the attachment friendly Dutch courts. The only condition for such cross-border pre-judgment attachment order is that the Rotterdam Court has jurisdiction on the merits of the claim. This is, for example, the case where parties have included in their contracts a 'choice of forum' clause conferring jurisdiction on the Rotterdam Court.

The revised Brussels I Regulation provides that the ex-parte order is served upon the debtor before assets are attached. If, for example, the debtor is a Greek ship owner and the vessel is to be arrested in Germany, good co-ordination between the authorities responsible for the service and the actual arrest is needed to uphold the surprise effect of the arrest.

An interesting example of the revised Brussels I Regulation in practice is the arrest of the pusher-barge Navin 24.[1] The court granted a direct attachment order to arrest the barge, which was located in Germany or Austria for a claim relating to unpaid charter hire. Jurisdiction was based on a choice of forum clause in the time-charter, which vested jurisdiction in the Rotterdam Court.

The Navin 24 is an example of the attachment friendly jurisdiction of the Netherlands, also in applying the revised Brussels I Regulation in a cross-border case. It is anticipated that upcoming European legislation will further bolster this development. From 2017, the EAPO-Regulation (European Account Preservation Order) will enter into force and will provide for the opportunity to allow a court to grant an EAPO which can be directly enforced in another member state, leading to the attachment of a bank account of the debtor. It could also be used against third parties domiciled in other member states that owe money to the debtor. Where the EAPO Regulation specifically targets bank accounts, the revised Brussels I Regulation applies to tangible assets located in other member states.

Security

As pointed out above, a party confronted with an attachment of its assets for an obvious nonsense claim, could easily initiate summary proceedings and request the court to lift the attachment. Alternatively, and often seen, a debtor (often through its insurers) puts up security to have the attachment lifted. In particular when its vessel is arrested,

"., providing security in standard terms is an efficient way to lift the attachment with limited costs".

providing security on standard terms is an efficient way to lift the attachment with limited costs.

In the Netherlands the Rotterdam Guarantee Form 2008 (RGF2008) is commonly used and, as was recently ruled again, is sufficient security to force a creditor to lift the attachment. The standard wording of RGF2008 is widely accepted as an attractive form of security, for instance because it does not prejudice jurisdiction of foreign courts or arbitration institutes in substantive proceedings. In other words, a creditor could benefit from obtaining security in the Netherlands while at the same time be able to pursue its claim in another preferred jurisdiction.

International Group Club letters of undertaking may, subject to the wording, also be accepted by the courts in the Netherlands, but in practice parties prefer to work on the basis of RGF2008 in order to avoid any potential discussion on the terms and conditions of the security to have it in place without delay.

Once security is provided it is only a matter of minutes for the bailiff to practically lift the attachment. In the event of a ship arrest, the Master of the vessel is informed as well as the port authorities.

Conclusion

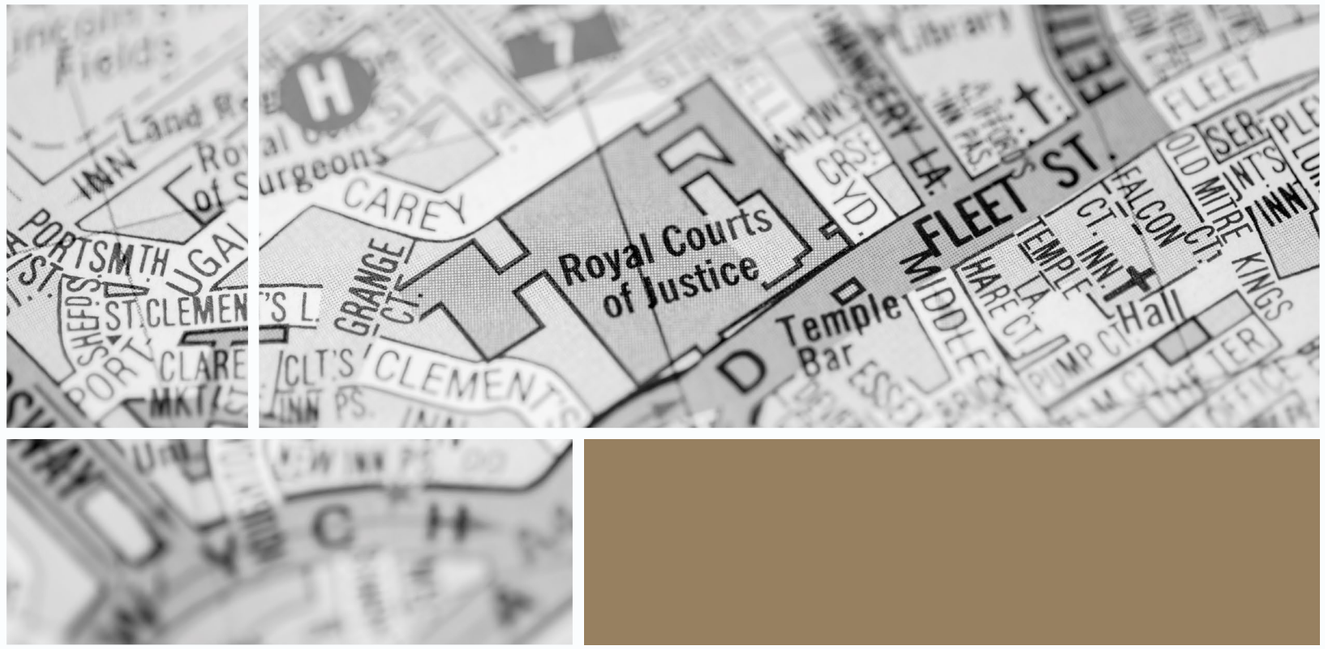
The Netherlands is widely recognised as an attractive jurisdiction for attachments. Dutch courts easily allow for the attachment of assets of a debtor, which decision is usually based on limited factual information and with relatively limited substantiation. The revised Brussels I Regulation will most likely increase the options for creditors in the future to attach debtor's assets throughout the EU. As mentioned above, it is a condition for such cross-border attachment that the Rotterdam Court has jurisdiction over the merits of the claim.

A recent development with the Rotterdam Court will even more facilitate enforcement of debtor's assets by creditors. Since 1 January 2016 it is, in certain cases, possible to have the proceedings on the merits conducted in English. These cases include maritime and transport cases and parties could jointly apply to have the proceedings in English. A further step is anticipated where all maritime and transport related cases will be concentrated in Rotterdam and the Rotterdam Court will be the maritime court in the Netherlands. ■

[1] Court of Rotterdam, 12 March 2015, ECLI:NL:RBROT:2015:3395

Update: Glory Wealth Shipping PTE Ltd v Flame SA

Ishfaq Ahmed
Stone Chambers London



The compensatory principle is that, as far as is possible, the innocent party is put by money into the same position that he would have been in if the contract had been performed. In a previous note on *Flame SA v Glory Wealth Shipping PTE Ltd (The Glory Wealth)* [2014] 2 WLR 1405 it was predicted that parties to arbitration and litigation would seek to extend the compensatory principle in respect of the assessment of damages and that the challenge for the courts would be to ensure that those limits and those assessments are kept within manageable and reasonable bounds.

This has turned out to be the case to a lesser or greater extent in both arbitrations and court proceedings – see e.g. *Bunge SA v Nidera BV* [2015] 3 All ER 1082. However, less predictably the issue arose again in another appeal under s.69 of the Arbitration Act 1996 in the same case this time under the inverted title *Glory Wealth Shipping PTE Ltd v Flame S.A.* [2016] EWHC 293 (Comm,) the reason being that this time it was the Owners, Glory Wealth, who were the appellants. It may be recalled that the case concerned a Contract of Affreightment (the "COA") dated 19 August 2008 providing for the carriage of 6 cargoes of coal in bulk in each of the years 2009, 2010 and 2011. The specific issue this time concerned Glory Wealth's claim for damages against Flame, the Charterers, in relation to six shipments in 2011. Glory Wealth became "deeply insolvent" by 2011. This led to substantial claims against Glory Wealth from other parties with the risk that Glory Wealth's assets in US dollars would be subjected to Rule B attachments in New York. In order to protect assets from Rule B attachments Glory Wealth used two companies, Evensource and First Goal, owned by two of Glory Wealth's directors, to receive all inward freight earned under the COA and to pay out all outgoing freight or charter hire on vessels used to carry nominated cargoes. This lead to the argument before the tribunal by Flame that Glory Wealth had not suffered any loss as the freight would not have passed through its hands.

The arbitration tribunal agreed with Flame holding that although Glory Wealth was deprived, by Flame's breach of the COA, of the right to receive freight, in the circumstance of the case that had caused no loss to Glory Wealth. This was because it would never have received the freight and the freight would never have been transferred to Glory Wealth by Evensource or First Goal, who the tribunal held were not agents of Glory Wealth. With the intention of applying the compensatory principle, the tribunal held that because Glory Wealth would never have received the freight a nil award of damages would place Glory Wealth in the position it would have been in had Flame performed its obligations under the COA.

However, the Court (again Teare J) held that this conclusion was wrong and that Glory Wealth had suffered a substantial loss. Glory Wealth had a contractual right to receive freight due under the COA of which it had been deprived. The value of that right was found by the tribunal to be worth in excess of US$3 million. This was not worth any less by reason of the fact that Glory Wealth had decided that the freight would be paid to other companies with the result that the freight would never have been transferred to it. The tribunal had erred in law by failing to hold that by being deprived by Flame's breach of its right to freight, Glory Wealth had suffered a loss. The tribunal did not take into account that the right to receive freight is not just limited to the right to receive it into one's bank account. Another limb of the right is the right to give it away. Flame's breach had deprived Glory Wealth of the benefits of ownership of the right to freight under the COA. Glory Wealth was therefore entitled to an award in excess of US$3 million.

Comment

The arbitral tribunal had reached its conclusion by reference to the compensatory principle. However, the Court was careful to look at the separate limbs of the right of a party to receive freight which extends to the right of disposal. Thus, holding that Glory Wealth had suffered no loss had not been the proper application of the compensatory principle by the tribunal since this took no proper account of the right a party has to dispose of the funds it is due. The fact that Evensource and First Goal were not the agents of Glory Wealth and would not have held the freight to the order of Glory Wealth did not affect the conclusion that Glory Wealth had indeed suffered a loss. The case was slightly complicated by the fact that Glory Wealth's actions in running the sums through Evensource and First Goal amounted to dishonest concealment and turpitude. However, ultimately these matters did not affect the question of law answered by the Court.

Thus, the case is a further illustration of the compensatory principle in action. The arbitral tribunal or court will look closely at the entitlement of a party under a contract to establish the value of contractual benefits that have been lost in order to establish as best it can the actual loss. No doubt if Evensource or First Goal had been made the claimants for the freight in the arbitration they would have been met with the argument by Flame that they were not parties to the COA, thus in effect allowing Flame to obtain a windfall in respect of an admitted repudiatory breach of contract, if its arguments had been correct.

This article was first published on Stone Chambers' website in February 2016. ■

Decommissioning an Oil Rig? Will Your Indemnity Contract Also Abandon You?

Stuart Crozier
Syndicate Executive
stuart.crozier@simsl.com

On 24 February 2016, in the case of *Tetra Technologies, Maritech Resources v Continental Insurance Company*, the United States Court of Appeals for the Fifth Circuit issued a decision in the continuing debate regarding the availability of contractual defence and indemnity for operations in federal waters on the Outer Continental Shelf ("OCS").

Tetra Technologies (Tetra) entered into an agreement with Maritect (Platform Owners) to salvage a decommissioned oil production platform in the Gulf of Mexico. Tetra retained Vertex to perform some aspects of the salvage operation. During this operation the bridge upon which the claimant, a Vertex employee, was working separated from the platform causing all of the workers who were on it to fall 80 feet into the Gulf of Mexico, suffering serious injuries.

Tetra and Vertex had entered into a Master Service Agreement ("MSA") under which Vertex employees would perform work for Tetra. The MSA required Vertex to indemnify Tetra for injuries sustained by Vertex's employees and to list them as an additional insured under their general liability insurance policy with Continental. Vertex disputed that there was any indemnity obligation on them under the MSA due to the application of the Louisiana Oilfield Indemnity Act ("LOIA"); which prevents a party from contracting out of their own negligence.

On 27 March 2015 the Court for the Eastern District of Louisiana agreed with Tetra and found that Continental and Vertex were required to indemnify Tetra because the LOIA did not apply in these circumstances.

Continental appealed to the Court of Appeals for the Fifth Circuit and asserted that:

1. The Outer Continental Shelf Lands Act ("OCSLA") made Louisiana law applicable as surrogate federal law.

2. The indemnity agreement was void under the LOIA.

The OCSLA extends the benefits of the Longshore and Harbour Workers' Compensation Act ("LHWCA") to

workers injured or killed upon fixed structures (e.g., oil well platforms) that are permanently attached to the outer continental shelf for the purpose of natural resource exploration or development.

Under the LOIA, legislation states that any contractual language which would indemnify a negligent party for any claims resulting from death or bodily injury would be void, as being against public policy.

Tetra countered and argued that neither the LOIA nor the policy precluded recovery against Continental or Vertex.

The Court of Appeals for the Fifth Circuit had to address the arguments asserted by Continental.

The OCSLA Made Louisiana Law Applicable as Surrogate Federal Law

The court sought guidance from the case of Texas Petroleum Corp v PLT Engineering Inc ("the PLT test") (Fifth Circuit 2006) where it established that three requirements must be met for state law to apply as surrogate federal law under the OCSLA:-

1. The controversy must arise on a situs covered by the OCSLA i.e. the seabed or artificial structures permanently or temporarily attached
2. Federal maritime law must not apply of its own force
3. State law must not be inconsistent with federal law.

On review of the first requirement of the PLT test the court applied a "focus of the contract" test to determine whether the controversy arose on an OCSLA situs. This requirement is met if the majority of the performance under the contract is to be performed on stationary platforms.

Continental argued that the MSA and Salvage Plan establish that the controversy arose on an OCSLA situs, asserting the goal of the work was the destruction and decommissioning of a platform on the OCS. Tetra countered that there was no evidence as to where the majority of Vertex's work for Tetra was to be performed but contended that most of the work was to be performed on lift barges and not on an OCS platform.

The court considered where the majority of Vertex's performance was to occur under the contract however the evidence was not definitive and, therefore, concluded that neither party was entitled to judgement under the first prong of the PLT test.

On review of the second requirement of the PLT test, The court analysed the historical treatment of contracts and applied a six-factor "fact specific" test into the nature of the contract:-

1. What does the specific work order at the time of injury provide?
2. What work did the crew actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. What extent did the work being done relate to the mission of that vessel?
5. What was the principle work of the injured worker?
6. What work was the injured worker actually doing at the time of injury?

In respect of the first two factors, the Court found the evidence was inconclusive as to whether the contract was non-maritime. Continental referred to the Salvage Plan and the injured workers testimony but these sources did not describe the nature of the entire work order. The Court also found similar problems with the third, fourth and fifth factors. Continental noted that the injured worker worked on a vessel but contended that his actual work was not related to a vessel in navigation.

The Court, therefore, concluded that the evidence was insufficient to determine whether federal maritime law applied of its own force and so neither party was entitled to summary judgement on PLT's second prong.

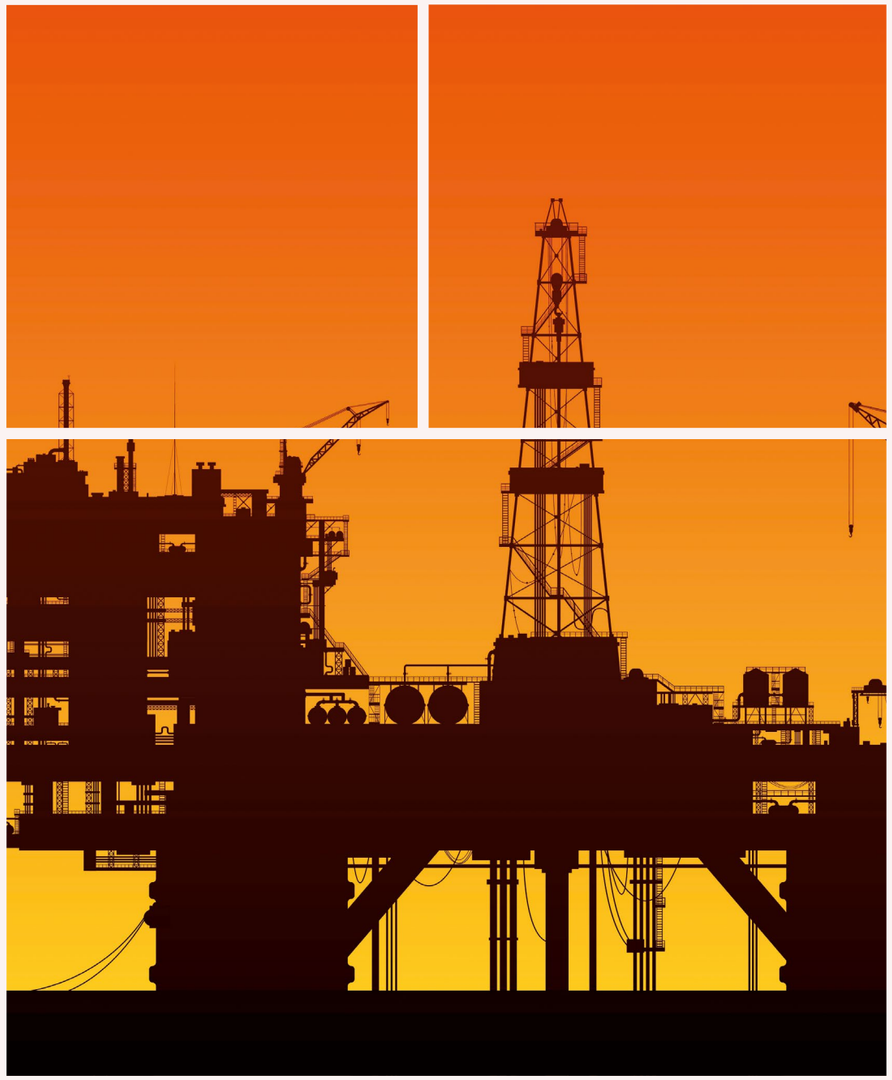
Finally, the Court reviewed the third prong and noted there was nothing within the LOIA that was inconsistent with federal law. Because Tetra did not argue otherwise the Court concluded that PLT's third prong was satisfied however, as the evidence was insufficient to determine the first two PLT tests, neither party was entitled to summary judgement as to whether the LOIA must be adopted as surrogate federal law under OCSLA.

However, it was decided that this was not an issue under the District Court's analysis because it concluded that if Louisiana law did apply the LOIA would not void the indemnity agreement under these circumstances and if Louisiana Law did not apply, the policy would not exclude coverage.

As the result would be the same either way, under the District Court's interpretation, the Fifth Circuit did not see the need to resolve the OCSLA question. The issue was therefore remanded back to the District Court to determine whether Louisiana law must be adopted as surrogate federal law.

The Indemnity Agreement was Void Under the LOIA

The Court then looked at what would happen if OCSLA requires the adoption of Louisiana law as surrogate federal law making the next question whether LOIA applies to this litigation, and if it did, would this void Vertex's indemnity obligation along with any obligations Continental may have had to Tetra under the insurance policy.



"The Court sought guidance from the case of Texas Petroleum v PLT Engineering Inc ("the PLT test")..."

There is an adopted two part test to determine if LOIA applies:-

1. There must be an agreement that pertains to an oil, gas or water well
2. If point one is met, the Court will examine the contracts involvement with operations related to the exploration, development, production or transportation of oil, gas or water.

This enquiry requires a fact intensive case specific analysis, looking at the work being done and the intended goal of the operation.

In considering the facts, the District Court concluded that the salvage of a fully decommissioned production platform does not have the required nexus to a well, because it is not in use, however the question is whether this operation had sufficient nexus to a well for the LOIA to apply and void the indemnity agreement.

Continental argued that a platform salvaging operation had the required nexus to a well.

Tetra argued that salvaging a decommissioned platform is not collateral to plugging or decommissioning the well but is effectively one step removed.

The Fifth Circuit considered previous cases on this issue but concluded that a contract for salvaging a platform from a decommissioned oil well has a sufficient nexus to a well under LOIA. Therefore, LOIA would void Vertex's indemnity obligation as well as Continental's obligation to indemnify Tetra as an additional insured.

The Court did however remand the case back to the District Court because there was insufficient evidence to determine whether OCSLA requires the adoption of Louisiana law as surrogate federal law. Further, commenting that if the District Court concludes that Louisiana law applies to this dispute, LOIA will void the indemnity agreement. If, however, the District Court concludes that Louisiana law does not apply, then Tetra and Maritech will be entitled to judgment against Continental and Vertex because the Policy does not exclude coverage.

This case highlights the risk that contractual defence and indemnity provisions in contracts dealing with operation on the OCS may not always work, their application are likely to be very detail and fact specific and, therefore, at a minimum the potential application of state anti-indemnity statutes need to be considered in the context of contractual risk allocation. ■

"OW Bunkers did not need to have or acquire title to the bunkers, they only needed to have acquired the right to authorise use of the bunkers under the preceding chain of contracts."

Supreme Court Ruling on the Res Cogitans – OW Bunkers

Emily McCulloch
Syndicate Manager
emily.mcculloch@simsl.com

Over 18 months after the collapse of the OW Bunker Group, the UK Supreme Court handed down its judgment in the OW Bunkers "test case", the *"Res Cogitans"*, on 11th May 2016. In a decision widely anticipated by the global shipping industry, the Owners' appeal was dismissed in favour of OW Bunkers/ING who remain entitled to payment for the bunkers stemmed from Owners.

Issues before the Supreme Court

Further to the Court of Appeal judgment handed down in October 2015, the Owners sought leave to appeal to the Supreme Court on the following issues:-

1. Was the contract a contract for sale within the meaning of section 2(1) of the Sale of Goods Act 1979?

2. If not, was the contract subject to an implied term that OW Bunkers would perform or had performed its obligations to its supplier, in particular by paying for the bunkers timeously?

3. An additional point not argued before the Court of Appeal was also put to the Supreme Court for their consideration: was the Court of Appeal decision in *F G Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2014] 1 WLR 2365 (referred to as *"Caterpillar"*) wrong and should be overruled?

Judgment

The Supreme Court had little difficulty in upholding the decision of the Court of Appeal, with Lord Mance providing the following reasoning in respect of each issue:-

1. OW Bunkers' contract with the Owners cannot be considered a straightforward agreement to transfer property in the bunkers to the Owners for a price. Rather, it was an agreement with two aspects: (a) to permit consumption of bunkers prior to payment without any property passing and (b) in so far as bunkers remained unconsumed, to transfer property in said bunkers in return for paying the full price for all the bunkers. The contract is, therefore, a "sui generis" (unique) transaction and not a contract of sale.

2. The only implied undertaking OW Bunkers needed to give was that they had the legal entitlement to give permission for the bunkers to be used. OW Bunkers did not need to have or acquire title to the bunkers, they only needed to have acquired the right to authorise use of the bunkers under the preceding chain of contracts. There was consequently no implied term as to OW Bunkers' obligations to its supplier in terms of punctual payment or otherwise.

3. Although it was held that the contract was not a contract of sale, the Supreme Court discussed whether the Court of Appeal in *Caterpillar* was correct in concluding that where goods are delivered under a contract of sale, but title is reserved pending payment of the price, the seller cannot enforce payment of the price. It was considered that, had the contract been one of sale, the Supreme Court would likely have overruled *Caterpillar* as section 49 of the Sale of Goods Act is not a complete code of situations where the price may be recoverable. In the present case, the price was recoverable due to its express terms in the event the bunkers were consumed entirely.

"The Owners' appeal was dismissed in favour of OW Bunkers/ING who remain entitled to payment for the bunkers stemmed from Owners..."

Conclusions

The Supreme Court has confirmed in no uncertain terms that the Owners have no defence to OW Bunkers' claim to the agreed price, and the Owners have no further recourse to appeal in the UK.

Whilst finally clarifying the nature and consequences of the bunker contracts in question, the decision will offer little comfort to Owners and Charterers who will undoubtedly face renewed demands for payment by OW Bunkers/ING, but are still exposed to the threat of vessel arrests and claims by unpaid physical suppliers. There remain legal challenges in multiple jurisdictions, many of which have reached contrasting decisions, and the Supreme Court decision is therefore unlikely to bring an end to the saga. ■

For earlier articles discussing the OW issues see
OW Bunkers – A Global Perspective
https://www.steamshipmutual.com/publications/Articles/owbglobalperspective.htm

Anti-Suit Injunctions: Limits of the Court's Generosity Tested

Chloe Townley
Syndicate Executive
chloe.townley@simsl.com

The recent decision in *Ecobank Transnational v Tanoh [2015] EWHC Civ 1309* reiterates the importance of bringing an application for injunctive relief promptly, as unnecessary delay can prevent an otherwise strong application. This was a case in which the Court of Appeal upheld the decision of the Commercial Court to dismiss the anti-enforcement injunction citing both general discretionary considerations and the need for comity.

Facts

Mr Tanoh, was employed by Ecobank under an Executive Employment Agreement (EEA) dated 15 December 2011. In Article 26 of the EEA, the parties agreed that all disputes or claims arising under or in connection with the EEA would be resolved by arbitration in London under UNCITRAL Rules (and Article 28 agreed English law). On 12 March 2014 Ecobank purported to terminate Mr Tanoh's contract. Proceedings followed:

- On 4 April 2014 Mr Tanoh commenced proceedings in Togo alleging that the termination was in breach of Togo Labour Code. Shortly thereafter on 12 May 2014 Mr Tanoh also commenced a further set of proceedings in the Ivory Coast, alleging a director of Ecobank had written a defamatory letter about him and that Ecobank were guilty of a tort of inaction by failing to disprove the letter.

- In both sets of proceedings Ecobank attempted to challenge jurisdiction of the foreign courts. In the proceedings in Ivory Coast Ecobank also pleaded its position as to the merits. Ecobank failed on all counts with the courts in Togo and Ivory Coast ordering Mr Tanoh be paid approximately US$11 million in February 2015 and US$12.8 million in January 2015 respectively.

- Ecobank commenced arbitration proceedings in London against Mr Tanoh on 22 December 2014 for claims which overlapped with those brought in the proceedings in Togo but not of those in the Ivory Coast. It was not until 10 April 2015 that Ecobank sought an interim worldwide anti-enforcement injunction in respect of both sets of proceedings commenced by Mr Tanoh. The injunction was granted (without notice) pending a full hearing.

- In the Commercial Court, Knowles J dismissed the injunction, holding that while the English Court had the power to order an anti-suit injunction, an application had to be brought without delay and once matters had reached the stage of a foreign judgment it became a serious matter for the English Court to intervene and grant an injunction. Ecobank appealed the decision.

The Decision

Before considering delay, Christopher Clarke LJ first considered whether the application met the other requirements to successfully obtain relief, finding that:

The claims brought in Togo and the Ivory Coast did fall within the arbitration clause.

- Regarding the Civil Jurisdiction and Judgments Act 1982, Section 32 applied such that the English Courts were not bound to follow the decision/s of the foreign courts.

- In considering whether Section 32 applied, Clarke LJ considered whether Ecobank had lost its right to object to jurisdiction. The fact that Ecobank had pleaded the merits of the case in the proceedings in Ivory Coast did not illustrate they submitted to the jurisdiction of the foreign court since the foreign court had requested that Ecobank plead out their merits (and their application to have jurisdiction determined separately, prior to merits, was rejected). Ecobank had made it clear that they were objecting to jurisdiction throughout.

Clarke LJ went on to consider the threshold for ordering an anti-enforcement injunction and the impact of the issue of delay in the circumstances. Clarke LJ found that:

- The test for ordering an anti-enforcement injunction is no lower than that for an anti-suit injunction, in both cases the English Court would be interfering with the output of a foreign court.

- Whilst delay is not necessarily a bar to relief, the requirement to act promptly meant that an applicant was unlikely to succeed where they did not apply until after judgment in the foreign proceedings.

- As such, it was rare for the English Courts to grant anti-enforcement injunctions. No authority had been cited where an anti-enforcement injunction had been granted because simply the proceedings sought to be restrained had been commenced in breach of arbitration or an exclusive jurisdiction clause. Instead they had only been ordered in specific circumstances, such as where (1) the respondent has acted fraudulently; or (2) it was not possible for the applicant to have sought relief before the judgment was given.

- The courts, could in their discretion, take into account the impact of delay, including to what extent Mr Tanoh incurred expense prior to the application being made, and the interests of the foreign court. A relevant factor is, therefore, the longer the delay the greater amount of labour and cost will have spent which could have been avoided.

- In considering delay, it is not a precondition to find detrimental reliance by the party against whom the injunction is sought. In any event, in this case some prejudice was suffered firstly to Mr Tanoh, since although Ecobank raised jurisdiction challenges in the foreign proceedings it was not apparent they were ever going to seek injunctive relief, and secondly to the foreign courts, for their labour time and cost.

- The tenor of modern authorities is that an applicant should act promptly and claim injunctive relief from an early stage, and should not adopt an attitude of waiting to see what the foreign court decides. On the issue of comity, reference was made to an earlier decision in which it was said [The" Angelic Grace" (1995) 1 LLR - Leggatt LJ] it would be patronising and the reverse of comity for the English Court to not grant injunctive relief until it was apparent whether the foreign court was going to uphold the objection to its exercising jurisdiction and only do so if and when it failed to do so.

In conclusion, Clarke LJ dismissed the appeal on the basis that there was no good reason for Ecobank to have delayed in seeking anti-suit relief in England. It was noted that delay should be avoided for a number of reasons, namely to avoid prejudice, detriment, waste of resources, the need of finality and considerations of comity.

Comment

The decision reiterates the modern trend of the courts reluctance to grant relief where an applicant has waited to see what the outcome of an application opposing jurisdiction in the foreign courts will be prior to applying to the English Courts for injunctive relief.

Those finding themselves in a position where proceedings have been brought somewhere other than where the parties had agreed, should promptly decide whether or not to bring an anti-suit injunction. ■

When is a Trip Not a Trip?

Heloise Clifford
Syndicate Manager FDD
heloise.clifford@simsl.com

The recent case *SBT Star Bulk & Tankers (Germany) Gmbh & Co KG v Cosmotrade SA (The "Wehr Trave") [2016] EWHC 583 (Comm)* is likely to be a decision that would not have been anticipated by some owners. This was an appeal of an arbitration award concerning the scope of orders permitted to be given by charterers under a "one Time Charter trip". The question considered was whether the charterparty entitled the charterers to load another cargo having discharged all its originally loaded cargoes. For the reasons explained in this article, the answer to this question was "yes".

Facts

The charter was on an amended NYPE 1945 form with additional typed clauses. The relevant clauses of the charter were:

- *"That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for one Time Charter trip via via [sic] good and safe ports and/or berths via East Mediterranean/Black Sea to Red Sea/Persian Gulf/India/Far East always via Gulf of Aden, with steels and/or other lawful/harmless general cargo, suitable for carriage in a cellular container vessel as described. Duration about 40-45 days without guarantee minimum 40 days without guarantee within below mentioned trading limits."*

- *"Vessel to be placed at the disposal of the Charterers on passing Skaw, Denmark dropping outward pilot Algeciras…"*

- *"re-delivery…..on dropping last outward sea pilot one (1) safe port in Charterers' option Mumbai/Colombo range or in Charterers' option one (1) safe port East Coast India range, not north but including Chennai Colombo/Busan range including China not north Qingdao…"*

The vessel was delivered into charter at Algeciras on 16 October 2013. Voyage orders were given by charterers to owners as follows:

- *"Loading ports rotation: Sevastopul (Ukraine) + reverting (probably Gemlik/Turkey)."*

- *"Discharging ports rotation: probably will be (Jeddah + Muscat + Hamriyah + Jebel Ali + Dammam."*

The vessel loaded cargo at three ports and then proceeded on her route, discharged at one port in the Red Sea, one port in the Gulf of Oman and three ports in the Persian Gulf. The vessel berthed at her final disport in the Persian Gulf on 7 December 2013 and on the following day charterers ordered her to proceed to Sohar, Oman (the second disport) to load another cargo for delivery on the West Coast of India.

It was this final order to load in Oman which caused the dispute between the parties. It was the owners' position that this order was not a permissible order under the terms of the charter as the contract was for "one time charter trip". The arbitration tribunal found in favour of charterers and reached the conclusion that their orders were lawful. Owners appealed this decision.

Owners' Arguments in the Appeal

The owners' argued that charterers' were entitled to load in "eastmed/blacksea", and that the term "via" identified the range where cargo could be loaded, for a trip to discharge "redsea/pg/india/far east". Their position was that the "trip" came to an end at the final disport in the Persian Gulf and that if it was not limited to one trip, it would have been open ended allowing charterers to employ the vessel on as many voyages with load and discharge ports within the permitted range as they liked.

Charterers' Arguments in the Appeal

Charterers' arguments focused on the defining characteristics of a time charter. They submitted that time charters fall within one of two categories: (i) term time charters for an agreed period; and (ii) a charter defined by a trip within a geographical range. However, for both types the key characteristic of the contract is that the vessel is under the orders and directions of the charterer for the period. Charterers relied on the observations of Popplewell J in The Wisdom C [2014] EWHC 1884 (Comm), [2015] 1 WLR 1 that *"A time charter is not [a voyage charterparty]: the owner does not agree to carry goods from and to specific or nominated ports, but rather to make the vessel and her crew available to the charterer, in return for hire, as a means for the charterer to transport goods…This is as true of a trip time charter, such as the charterparty in this case, as of a term time charter. Although the length of the period of hire is limited by a trip defined within a geographical range (and sometimes, though not in this case, by a maximum duration)…"*

The Decision

In reaching his decision, the Judge (Sir Bernard Eder) commented that there is no single definition as to what constitutes a "trip" or "one trip" and that the concept of a trip time charter embraces a number of possible permutations. For example, a "trip" may be loading at A and discharging at X, or it may involve a number of loadports and/or a number of disports. Alternatively, it may mean several loading and discharging operations at different ports along a route from A to Z.

He noted that previous authorities would not be of general application and the scope of the particular "trip time charter" would depend on the specific terms agreed by the parties. In addition, he noted that the charterers' entitlement to give directions and orders may be restricted, for example by reference to period, geographical route and number of load/disports.

When considering this specific charter, the Judge focused on whether the orders given by charterers were restricted by the terms of the charter. He reached the view that the words "one Time Charter trip" did not restrict the charterers as regards orders for loading and discharging provided that those orders were within the trading limits and the route was not inconsistent with the contractual route. His conclusion was that charterers were, in principle, entitled to call at such ports as they wished provided that the calls were within the trading limits and the route was not inconsistent with the contractual route for a voyage from Algeciras (the delivery range) to the Colombo/Busan range (the re-delivery range) via the East Mediterranean and/or the Black Sea and/or the Red Sea and/or the Persian Gulf and/or India and/or the Far East (always via the Gulf of Aden and always ending in the Colombo/Busan range). In reaching this decision, he commented that "via" meant by way of and "to" denotes the contractual route. Therefore, these terms did not restrict the load and disports.

The owners' appeal was dismissed on the basis that the further order to load was a legitimate on the basis that it was within the trading limits and consistent with the contractual route.

Comment

Whilst it is clear from this decision that it is not possible to define precisely what is meant by the term "time charter trip", it emphasises the need to ensure that the wording of any recap and resulting charter is reflective of the parties' intentions. For example, if the owner only intends to charter the vessel for one series of loadports and one series of disports along a particular route, this should be expressly and clearly stated. ■

A More Literal Approach to Construction

Alex Towell
Syndicate Associate
alex.towell@simsl.com

In the recent High Court decision of *Laird Resources LLP v Amm Holdings & Ors [2015] EWHC 2615 (Comm)*, Mr Justice Flaux considered the case law on the construction of contracts and the recent departure from *"commercial common sense"* towards a more *"literal construction"* of the terms.

This marks the Commercial Court's first decision applying the recent Supreme Court decision in *Arnold v Britton [2015] 2 WLR 1593* on interpretation of contracts. This article seeks to summarise the more recent decisions in a succession of cases which demonstrate the evolution of the court's approach to the construction of commercial contracts.

The Supreme Court Decision in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50

In December 2012, the Club reported the decision of the Supreme Court in Rainy Sky SA v Kookmin Bank. In the Court of Appeal Lord Patten had reached the conclusion that unless the natural meaning of the words produces a result which is considered so extreme it cannot have been intended, the court has no choice but to give effect to those terms of the contract.

The decision was reversed by the Supreme Court where Lord Clarke took the view that the ultimate aim of the judiciary is to *"determine what the parties meant by the language used… where they have all the background knowledge that would reasonably have been available to the parties at the time of the contract… In the case of ambiguity the court should adopt the interpretation that is most consistent with business common sense and to reject the other".*

The *Rainy Sky* decision temporarily founded this "business common sense" approach. However, there has been resistance to the lower courts seeking to apply business common sense in order to 'do justice' between the parties by reading meaning into contracts and agreements. For example in *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd.* [2006] EWCA Civ 1732 Lord Neuberger commented that *"judges are not always the most commercially minded, let alone the most commercially experienced, of people".*

The Supreme Court Decision in *Arnold v Britton* [2015] 2 WLR 1593

Lord Neuberger reaffirmed this view in the Supreme Court decision of *Arnold v Britton* where he gave effect to the literal interpretation of the words used in a contractual provision. This case involved the interpretation of a service charge provision in a long lease agreement for chalets on a leisure park.

In his decision, Lord Neuberger set out a number of guidelines courts should consider when construing the meaning of a commercial contract. The key points are as follows:

1. The natural and ordinary meaning of the clause

   Courts should not rely on commercial common sense and surrounding circumstances to undervalue the importance of the language used. They should consider what would be interpreted by a reasonable reader and, except in a very unusual case, this is most obviously gleaned from the language used.

2. The less clear the words used the more the courts can depart from the natural meaning of those words

   In other words, the clearer the natural meaning the more difficult it is to justify departing from those words.

3. The application of commercial common sense retrospectively

   Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language.

4. Courts should seek to establish what has been agreed not what should have been agreed

Commercial common sense is a very important factor to take into account when interpreting a contract. However, a court should be very slow to reject the natural meaning of a provision simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. It is not the function of the court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. When interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

5. Courts should only consider the facts and circumstances that were known at the time to both parties to the contract.

   When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties. It cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

6. The interpretation of intention in face of uncontemplated events.

   In some cases an event subsequently occurs which was plainly not intended or contemplated by the parties, judging by the language of the contract. If it is clear what the parties would have intended to happen in those circumstances the court will give effect to that intention.

The Decision in *Laird Resources LLP v Amm Holdings & Ors* [2015] EWHC 2615 (Comm)

Arnold v Britton has now been applied by the Commercial Court in *Laird Resources LLP v Amm Holdings & Ors.*

The claimant had provided management services in respect of a portfolio of property assets owned by the defendant. The claimant had also created and managed a trust used to finance the portfolio. Under the terms of his engagement, the claimant was to benefit from a one third interest in the portfolio in return for his management services.

The relationship between the two parties broke down when the defendant questioned the nature and value of work undertaken by the claimant. The contract between the parties was ultimately dissolved by way of settlement which was recorded officially in "The Deed of Settlement".

Clause 2 of The Deed of Settlement provided that capital receipts generated by the portfolio were to be paid into the trust in return for the claimant relinquishing his ongoing interest in the portfolio. It also provided that the defendant would pay the claimant the sum of £650,000 plus VAT.

Clause 2.9 provided that the defendant would pay said amount *"... notwithstanding whether... any sums as referred to... above [Capital Receipts] has or have been received. by no later than 31 December 2014".*

Capital receipts were not paid into the trust and the defendant did not pay the settlement amount to the claimant. The claimant submitted that Clause 2.9 imposed an unconditional obligation on the defendant to pay the settlement sum. The defendants argued that such payment was dependant on the claimant first paying capital receipts into the trust.

In considering this case, Mr Justice Flaux applied the principles set out in *Arnold v Britton.* He was persuaded by the claimant's argument and reached the decision that when giving the words their natural meaning, clause 2 made no specific requirement for capital receipts to be paid in order for the settlement sum to be paid. His view was that the wording of clause 2 was clear and that if it had been the intention for the capital receipts to be paid before the defendant was to pay the claimant the settlement sum, it should have said so.

Comment

This decision serves as a reminder for parties to be clear and concise in the drafting of contracts. Where wording is clear, in light of this decision, it is likely that the courts will be reluctant to depart from the natural meaning of those words even if the drafting is poor or the bargain between the parties seems to be unfair. ■

A Brief Commerical Look at Tanker Charters in the Wake of the Kriti Filoxenia

Edward Barnes
Syndicate Executive
edward.barnes@simsl.com

In *ST Shipping & Transport Inc. v. Kriti Filoxenia Shipping Co SA* [2015] the Commercial Court reviewed the relationship between the cancellation clause (Clause 17) and the re-nomination clause (Clause 24), in a standard BPVOY3 form. The Court was asked to determine whether the Charterer could still exercise the right to cancel after nominating an alternative load port.

The standard BPVOY3 provides that:

Clause 17.2: *"If it appears to Charterers that the vessel will be delayed beyond the cancelling date, Charterers may require owners to notify Charterers of the date on which they expect the vessel to be ready to load, whereupon Charterers shall have the option to cancel this charter and such option shall be declared by Charterers within 96 hours, Sundays and holidays excepted, of the receipt of the said notification from Owners."*

Clause 24.2: *"If after loading or discharge port or place has been nominated, Charterers desire to vary such port or place, owners shall issue such revised instructions as are necessary at any time to give effect to Charterers' revised orders..."*

Background Facts

The dispute arose whilst the vessel was en-route to the first nominated load port, Tuapse. The Charterer requested the vessel's ETA for Tuapse and two further ports from within the permitted range. The Charterer was informed that the vessel could only reach Tuapse and Sevastopol before the cancellation date; however, the Charterer exercised the right under clause 24 and re-nominated the third port, Batumi, as the new first load port. From the time the vessel left her previous discharge port she would never have been able to reach Batumi by 16:00 on the cancellation date; therefore, it was not the timing of the re-nomination that hampered achievability. Upon confirmation the following day that the vessel's ETA for Batumi remained after the cancellation date, the Charterer gave notice to cancel the Charterparty. The Owner accepted Charterer's notice as a repudiatory breach and succeeded at arbitration in the claim for damages in the amount of US$737,303.

On Appeal to the High Court

The Charterer raised two questions of law:

"Q1. Whether, on the true construction of the Charterparty, the Charterers' right to cancel the Charterparty pursuant to clause 17 thereof survives a re-nomination of the first load port pursuant to clause 24. (and)

Q2. If the Charterers' right to cancel the Charterparty pursuant to clause 17 does survive a re-nomination of the first load port, whether on the true construction of the Charterparty Charterers are nevertheless not entitled to cancel the Charterparty in circumstances where the re-nomination was made at a time when the ETA for the re-nomination port was after the Cancelling Date."

The Court upheld the Tribunal's conclusions on both questions.

The Court stressed that the BPVOY3 Charterparty is a carefully drafted document and that if the parties had intended for the cancellation clause to survive re-nomination it would have been expressedly provided for. The Charterparty was intended to be read using the ordinary and natural meaning of the words used, remembering the inherent commercial responsibility within any Charterparty that both parties should do their utmost to assist the vessel in performing under the Charterparty and not prejudice any of the clauses. It therefore follows that under the cancellation clause the Charterer has a duty not to impair the achievability of the cancellation date.

The two competing commercial interests were clear. The absence of a re-nomination clause would provide Owners with certainty of instruction; however, the clause offers the Charterer the flexibility to align their shipping and cargo commitments. It was the Owner's interests that prevailed.

Mr. Justice Walker found that the vessel was under no obligation to anticipate the re-nomination of the first load port. The initial nomination was contractually binding and not *"written in pencil."* Therefore at the point of initial nomination the vessel's duty was only to ensure that it arrived at the initial port prior to the cancellation date.

If Charterer's argument had been successful, and the right to cancel survived re-nomination, the result would be that the vessel would be compelled to steam to the initial load port at such a speed as necessary to allow for any potential re-nomination within the permitted range. Otherwise the Owner risks cancellation if, at the time of re-nomination, the vessel cannot arrive at the re-nominated port before the original cancellation date. This is clearly unfair on the Owner and commercially undesirable.

The Judge emphasised, taking into account the importance of Charterer's duty of co-operation,

that when a re-nomination is made the Charterer does not look back to the point prior to the original nomination. It looks to the vessels current position. Had the Charterer nominated Batumi originally they would have been able to legitimately exercise their right to cancel because the vessel could never have made the cancellation date. However, the duty to reach any other port in the range ceased once the Charterer nominated Tuapse. The duty of cooperation meant that the Charterer could not cancel if the vessel's ETA at the re-nominated port was after the cancellation date at the time of re-nomination.

Tanker Charters Moving Forward

The more prevalent tanker charters in circulation provide for the cancellation clause to survive re-nomination, with the period of delay arising from the re-nomination being added to the cancellation date. Charterers therefore preserve their right to cancel, whilst Owners maintain an acceptable level of certainty.

In comparison to BPVOY3, the BPVOY4 provides:

Clause 22.2.1: *"If solely by reason of Owners' compliance with such revised Charterers' Voyage Orders, the Vessel suffers delay causing her to arrive at the nominated port after the Cancelling date stated in section G of Part 1 or new cancelling date determined under Clause 16.1, the then Cancelling Date or the new cancelling date, as the case may be, shall be extended by the period of such delay."*

If the same facts as above were to occur during a BPVOY4 charter, would the vessel have incurred any delay *"solely by reason of Owners' compliance with such revised Charterers' Voyage Orders"*? The port of Tuapse was en route to the port of Batumi and the vessel was not required to deviate. The loss of time suffered by reason of the renomination was that the vessel had slow steamed to Tuapse, not expecting a renomination to a further port. Even with the cancellation date extended to incorporate the time lost resulting from the slow steaming, the evidence suggests that vessel would still have provided an ETA after the new cancellation date. At the moment of confirmation the Charterer would have been entitled to cancel without being concerned with any implied duty of cooperation. The position would be the same under the SHELLVOY5 or 6 charters, which both preserve the Charterer's right to cancel after re-nomination. Under an EXXONMOBILVOY 2005 form the Charterer would have had to wait until the cancellation date had passed before notifying the Owner of their intention to cancel, but the Owner would be equally susceptible to cancellation.

When contracting under a BPVOY3 charter, if Charterers wish to preserve their right to cancel after re-nomination, the standard form must be amended so that this right is expressly provided for. Otherwise if similar circumstances arise, Charterers will have to balance the commercial importance of re-nominating the load port against losing their right to cancel on a voyage by voyage basis.

"The Kriti Filoxenia serves to remind both Owners and Charterers of the importance of incorporating clearly drafted clauses to protect their commercial interest".

To balance the commercial scales, Owners may seek to ensure that the repercussions of any delay or deviations are explicitly for Charterers' account, which may include the vessel's future employment. The BPVOY4, EXXONMOBILVOY 2005, SHELLVOY5 & SHELLVOY6 charters hold Charterers liable for the additional steaming time and excess bunkers consumed. As a result of amendments to the (1999 Amended) SHELLVOY 5, Charterers are no longer at risk of having to compensate the owner for any loss and expense, other than for deviation or delay at the demurrage rate. Prior to this amendment Owners under a SHELLVOY5 could claim for any loss or expense as long as Charterers were promptly notified. This limitation clearly benefits Charterers' interests. The remaining charters are silent on this point. The amendment to the SHELLVOY 5 standard form probably represents current market conditions.

Although the right to re-nominate should be exercised within a "reasonable time" none of these other forms mentioned set a specific time-limit on Charterers right to re-nominate the load port. If the vessel has tendered NOR at the originally nominated port then that should bring an end to the renomination option; however each case will turn on its own facts and it may be arguable that the right is lost at an earlier time. Any change in voyage orders may result in losses to Owners well in excess of the demurrage and bunker amount. Depending on the vessel's schedule, future contractual responsibilities may be jeopardised by Charterer's delay. Owners may therefore wish to consider the vessel's future employment ventures before contracting to limit their compensation in any way. Alternatively they can of course factor in the additional risk and look to reflect it by increasing rates.

The Kriti Filoxenia serves to remind both Owners and Charterers of the importance of incorporating clearly drafted clauses to protect their commercial interests. This is true both in terms of preserving rights and when considering their repercussions.

BPVOY5 came into force on 21 March 2016. Whilst beyond the scope of this article, the cancelling clause under the new charter form (cl 7) is more or less the same as BPVOY4 (cl 16), but there are differences between these forms and BPVOY3. Similarly there are differences between the Revised Voyage Orders clauses of BPVOY4 and 5, and BPVOY3. ■

POEA Upheld in Louisiana

Paul Brewer
Syndicate Manager
paul.brewer@simsl.com

A Filipino crewmember - Lito Martinez Asignacion - was injured whilst working on-board the Marshall Islands Flagged vessel "Rickmers Dailan". The vessel was docked in the port of New Orleans. After receiving treatment for nearly a month, Asignacion was repatriated to the Philippines, where he continued to receive medical attention.

Despite the fact that Asignacion was employed under a Philippine Overseas Employment Administration ("POEA") contract requiring that all disputes were governed by the laws of the Republic of the Philippines and subject to the exclusive jurisdiction of the Philippines National Labour Relations Commission ("NLRC"), Asignacion sued Rickmers, the vessel owner, in Louisiana State Court for damages. Unsurprisingly Rickmers challenged the jurisdiction of the Louisiana State Court and sought to enforce the arbitration clause in the POEA contract. The state court agreed, and ordered arbitration in the Philippines where the Grade 14 disability rating was upheld and Asignacion was awarded a lump sum of US$1,870 due under the terms of the POEA.

However, that was not the end of the matter. Asignacion filed a motion in Louisiana State Court asking that the award be set aside on the grounds it violated United States public policy. Rickmers then had the suit removed to Federal (District) Court and brought an additional action seeking to enforce the Philippine award.

The District Court determined that The Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the New York Convention (the "Convention") applied. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states.

In the US the Court should confirm the award unless a reason specified within the Convention exists. One example being that the Convention permits a signatory to refuse to recognise or enforce an award if recognition or enforcement would be contrary to the public policy of that country.

Arbitral awards falling under the Convention are enforced under the Federal Arbitration Act. Federal policy strongly favours arbitration and the Supreme Court has previously advised that this policy applies

"Accordingly the US District Court for Eastern District of Louisiana found the award to be unenforceable as a matter of public policy..."

with special force in the field of international commerce. Courts are permitted to vacate a decision only in very unusual circumstances.

After a choice of law analysis the District Court found that because the Marshall Islands adopt United States general maritime law, that to enforce the Philippines award would violate public policy which is there for the protection of seamen. Asignacion's public policy defence primarily consisted of a complaint about the adequacy of remedies under Philippine law and the fact that United States public policy requires that foreign arbitral panels give seamen an adequate choice-of-law.

Accordingly the US District Court for the Eastern District of Louisiana found the award to be unenforceable as a matter of public policy because it denied the claimant the opportunity to pursue remedies to which he was entitled as a seaman.

Subsequently, in April 2015, the Court of Appeal for the Fifth Circuit reversed the District Court's decision and ruled that the Philippine panel's award was enforceable, holding that the employment agreement's mandated application of Philippine law did not violate US public policy.

In reaching this decision the Fifth Circuit noted that the Supreme Court has rejected the argument that all disputes must be resolved by US courts applying US law, even where the remedies under applicable foreign law may be less wide than those available in the US. To do so would demean the standards of justice elsewhere in the world and unnecessarily promote the primacy of United States law over the laws of other countries.

The Supreme Court has also held that it would place a great burden on shipowner if it were to impose the duty of shifting from one compensation regime to another whenever a vessel passes the boundaries of territorial waters, and that the availability of certain benefits should not depend on the wholly fortuitous circumstance of the vessels location at the time of an injury.

The importance of the POEA standard terms also weighed heavily in favour of enforcing the agreement because of the fact that it promotes and safeguards the interests of Filipinos.

Following on from this decision by the Fifth Circuit Court of Appeal Asignacion applied to the US Supreme Court for a writ of certiorari to review the Fifth Circuit's decision. This application was denied. While not binding on other Federal Circuit Courts of Appeals, the Fifth Circuit's decision in *Asignacion* is a welcome decision that should assist shipowners and their P & I Associations to uphold agreed law and jurisdiction provisions in crew contracts. ■

Orders to Proceed to Politically Unstable Ports

Sarah Nowak
Syndicate Associate
sarah.nowak@simsl.com

Initial Assessment – Reliable information – Correspondents

From time to time Owners receive orders from their Charterers to call at a port in a country which may be politically unstable and where there may be a warlike situation developing, for example Yemen, where there are continuing reports of fighting and airstrikes in response to terrorist activity. In such circumstances, it may be difficult for Owners to obtain information quickly about the situation on the ground and understandably, Owners will have concerns for the safety of the vessel and her crew. In extreme situations, Owners may consider rejecting Charterers' orders.

The Club is able to assist Owners, and indeed Charterer members if their Owners are refusing to follow orders. First, the Club can obtain updates from the local Club correspondents who will be able to provide information on whether the port is open and working, and any restrictions issued by the Port Authority, for example whether vessels are being allowed to enter the port, in relation to any unrest and the danger posed to shipping generally.

Secondly, on the basis of such information the Club can assist with legal advice for Owners who may be considering refusing Charterers' orders or Charterers faced with an Owners refusal to follow orders.

What Does the Charterparty Say?

The charterparty will usually set out any excluded ports. Assuming the vessel has not been ordered to call at an excluded port, the charter may also contain a Conwartime clause – an example of which is set out below:

> *(ii) "War Risks" shall include any actual, threatened or reported:*
>
> *war; act of war; civil war; hostilities; revolution; rebellion; civil commotion;* ***warlike operations****; laying of mines; acts of piracy; acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever); by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners,* ***may be dangerous or are likely to be or to become dangerous to the Vessel****, her cargo, crew or other persons on board the Vessel.*
>
> *b) The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/ or the Owners, may be, or are likely to be, exposed to War Risks. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.*

If, upon review, Owners consider that the situation at the port constitutes "warlike operations" for the purposes of the clause, the next consideration will be whether in their reasonable judgement the port is or is likely to become dangerous to the vessel, her cargo, crew or other persons on board the vessel, thereby allowing the Owners to seek from Charterers a nomination for an alternative port. This issue was reviewed by the court in *The Triton Lark* [2012] EWHC 70 (Comm) and page 14 of Issue 19 of Sea Venture.

Case law: *The Triton Lark*

This was a case that involved the refusal of an order to go through the Gulf of Aden at the height of the piracy problem. The decision of the Owners must be a reasonable one and an Owner must be able to show that there was a real likelihood that the vessel would be exposed to such a risk. "Real likelihood" is difficult to pin down but the Court decided that it must be something more than a 'bare possibility'.

"Ultimately Owners must make the decision on the information available and advice received..."

Crown copyright 2015

The test is both qualitative and quantitative. A Master may refuse an order where there is a war risk and there is a real likelihood that that risk will be dangerous to the vessel, where the danger is defined by reference to the extent and prevalence of the risk and the nature of the consequences to the vessel should that risk come about i.e. not a risk that a serious event will occur but a serious risk than an event will occur.

It is therefore necessary to apply the test to the position that Owners are in: in other words, while it may be clear that the consequences of a warlike operation at the port are obvious and severe, Owners should also consider the likelihood.

The Court had also made it clear that if Owners refuse to follow Charterer's orders, it would expect to see that Owners had taken third party advice, for example from a risk analysis company, on what was happening on the ground. This would assist Owners in making the decision but also hopefully avoid any later criticism of the decision ultimately taken by Owners, particularly where the Charterer's right to give directions as to the employment of the vessel was described by the Court as a "key right".

It may be possible to obtain clear analysis of the threat of an attack or risk of danger to the vessel while at the port but more difficult to assess how significant that risk is. However, in considering whether an Owner's refusal to enter a port in such

circumstance's was reasonable and whether the vessel was likely to be exposed to danger, the Court in *The Triton Lark* set the threshold at something that has less than a 50% chance of happening but does not include something which is a bare possibility, and if Owners were able to obtain expert evidence stating that there was a risk to the vessel that was more than a bare possibility, then that might allow Owners to refuse to proceed.

A Commercial Decision for Members

Ultimately Owners must make the decision on the information available and advice received. During *pre-fixture* negotiations, this will involve Owners carrying out their own due diligence and risk analysis of the proposed voyage, and the inclusion of relevant terms in the charterparty so that, if an area is not excluded, *post-fixture* Owners have available to them an option to refuse to call at certain ports in the case of warlike situations, for example the Conwartime clause.

The considerations for Owners must include:

- Appetite for risk - the political and warlike situation at certain ports, for example in Yemen is developing but it is not new, so there might already be some general understanding of the risks involved for an Owner considering the trade ;
- Possible claim for breach/ claim from cargo receivers- it is open to Owners to argue that the risk is more than a 'bare possibility' but they must assess the risk at the time the vessel is due to call at the port and that is susceptible to change-are they willing to risk a claim for breach;
- The need, or whether it appropriate, to seek independent risk analysis of the position on the ground;
- Additional premium/ crew war bonus- if additional amounts are payable, can an agreement be reached with Charterers that they will cover these costs;
- Put down a marker with Charterers to show that Owners are monitoring the risk and keeping their options open, and seek Charterer's confirmation that, in light of recent events at the port, their orders have not changed.

Finally, until or unless Charterers provide alternative orders, Owners should in any event continue to monitor the situation at the port to which the vessel has been ordered because the position can change quickly, and if (i) Charterers maintained their original orders, and (ii) subsequent reports indicate that the port is open and operating, Owners may find they have no option but to proceed to the port or risk being in breach. ■

The New Flamenco – Court of Appeal Decision

Emily McCulloch
Syndicate Manager
emily.mcculloch@simsl.com

In *Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U (Formerly Travelplan S.A.U) (The "New Flamenco")* the Court of Appeal considered whether the benefit derived by owners on the sale of their vessel should be taken into account when calculating damages for repudiatory breach by their time charterers in redelivering the vessel early.

The Facts

By way of recap, the vessel was a small cruise ship time chartered by her then owners in February 2004 to Travelplan (the "Charterers"). Fulton Shipping, who managed the vessel, purchased her in March 2005 and entered into a novation agreement under which they assumed the rights and liabilities as Owners under the Charterparty. In August 2005 the parties agreed to extend the charter for two years to 28 October 2007 (reflected in Addendum A), and in June 2007 orally agreed terms to extend the charter for a further two years to 2 November 2009 (reflected in Addendum B). The Charterers later disputed having made the agreement reflected in Addendum B and confirmed their intention to redeliver the vessel on 28 October 2007 in accordance with Addendum A. Owners accepted Charterers' anticipatory repudiatory breach as terminating the Charterparty. The vessel was redelivered on 28 October 2007 and, shortly before, Owners entered into a Memorandum of Agreement for the sale of the vessel for US$23.765 million due to the fact there was no available chartering market at that time.

Arbitration Award and Commercial Court Judgment

In arbitration, Owners claimed damages for net loss of profit they would have earned during the additional two year extension, giving credit for the costs and expenses which would have been incurred in operating the vessel but which were saved as a result of the sale of the vessel. Due to the financial crisis, the arbitrator considered that the vessel's value would have been US$7 million if sold in November 2009 when Owners say the vessel should have been redelivered. Charterers therefore argued Owners were bound to give credit for the benefit derived from the sale of the vessel in October 2007 in full. The arbitrator agreed with the Charterers who were, therefore, entitled to credit in the amount of US$16.765 million in respect of the benefit accrued to Owners by selling the vessel when worth more in October 2007.

Owners, in response, contended that the Commercial Court judgment should be supported as fluctuations in capital assets should not be taken into account for mitigation purposes, and before benefit could be considered that benefit had to be of the same kind or type as the loss.

On 21 December 2015, the Court of Appeal handed down judgment allowing Charterers' appeal. Longmore LJ had the unenviable task of confirming the correct approach to be taken and his reasoning is summarised below.

- Per *British Westinghouse*, if a claimant takes measures to mitigate losses arising from a breach and is in the ordinary course of business, that benefit is normally taken into account in assessing the claimant's losses unless the measure is wholly independent of the relationship of the claimant/defendant;
- The question of an available market is well established as the measure of damages in time Charterparty cases (*The Elena D'Amico*). Where there is no available market, the measure of loss is prima facie the difference between the contractual hire and the cost of earning that hire but this cannot usually be claimed where the shipowner can mitigate losses – for example by trading the vessel, if opportunities arise. The arbitrator was therefore correct in applying the *The Kildare* and *The Wren*- both of which took into account benefits secured by spot chartering vessels following early redelivery. Further, there is no reason why the benefit should not be calculated by difference in the vessel's sale value and the value at the time the Charterparty was due to expire.
- It was sufficient for the arbitrator to rely on the judgment of *British Westinghouse* in that the benefit must arise from the consequences of the breach. No further analysis of causation was required.
- Owners had sought to argue that the arbitrator had made an error of law as it would be contrary to fairness and justice for Charterers to derive benefit from action taken by Owners for their own benefit. Whilst an argument that is supported by some authorities this is not a principle that must be followed in all cases and was not accepted. In fact a further principle is a claimant who sustains loss should, so far as possible, be placed in the same situation as if the contract had been performed and, having considered the case as a whole the arbitrator had concluded that Owners had made a considerable profit from their mitigation which must be brought into account.

In conclusion, Longmore LJ did contend that this is a difficult area of law but that the arbitrator had made a "common sense overall judgment". This decision has provided further clarification of the correct measure of damages for early redelivery under a time Charterparty where there is no available market. ■

The decision was appealed by Owners to the Commercial Court, [see **"Keeping the Benefits of a Breach"** https://www.steamshipmutual.com/publications/Articles/newflamenco0714.htm], who agreed with Owners that Charterers were not entitled to benefit from the difference in value of the vessel as such benefit was not legally caused by the breach. Charterers took their case to the Court of Appeal.

Court of Appeal Decision

In summary, Charterers argued the following:-

1. The Commercial Court had not given sufficient weight to the arbitrator's findings of fact that the benefit of the sale had been caused by Charterers' breach and had been acquired by Owners in mitigation of their loss. This should have been the end of the matter.
2. The judge had been over-influenced by the *The Elena D'Amico* which considered whether there is an available market to assess damages for early redelivery.
3. If there was no available market, the actual trading of the vessel and market fluctuations would have been considered and the sale would have been included in this consideration.
4. It was irrelevant that Owners may not have been obliged to mitigate their loss by selling the vessel; *British Westinghouse* showed that if a loss was mitigated and a benefit received, it should be credited.

Insurance Act 2015

Sacha Patel
Legal Services Manager
sacha.patel@simsl.com

The Insurance Act 2015 (the '2015 Act'), which is due to come into effect in the United Kingdom on 12 August, 2016, will bring about the most significant changes to insurance contract law in the UK for over 100 years. The Act will apply to all contracts of insurance concluded after 12 August 2016 that are governed by English Law, as well as to variations to existing contracts of insurance which are concluded after 12 August 2016.

The current law in the UK is based on common law developed over the 18th and 19th centuries, which was codified in the Marine Insurance Act 1906 (the 1906 Act). While the name of the 1906 Act would suggest that it applies only to marine insurance, in practice, it has been applied to all areas of commercial insurance on the basis that it reflects the common law applicable generally, which just happens to have derived mainly from maritime case law.

The 1906 Act was drafted at a time when the insurance industry was in its infancy, and when policy makers were concerned to nullify the possibility of exploitation by insureds. Consequently, it confers wide-ranging rights upon insurers to refuse claims or to treat their liability as discharged, where such remedy seems, at least to the modern eye, disproportionate to the breach committed by the insured.

The Law Commission began a review of insurance law in 2006, and submitted its recommendations as to non-consumer insurance law in 2014. In essence, the Law Commission found that the 1906 Act was in many respects no longer fit for purpose – the commercial insurance market had developed into a highly sophisticated field, such that the rigidity of the 1906 Act, notably in its treatment of disclosure and remedies for breach of the duty of disclosure, were no longer appropriate. These

"Eight of the Clubs in the International Group ("the IG") are affected by the 2015 Act because their Rules are subject to English law".

recommendations were accepted by Parliament, resulting in the adoption of the 2015 Act, which amends certain provisions of the 1906 Act but does not have the effect of repealing it in its entirety.

The 2015 Act has as its central aim the creation of a fairer balance between the interests of the insurer and the insured. Importantly, however, the 2015 Act provides only a default regime, much of which can be contracted out of. Indeed, in its 2014 report the Law Commission expressly acknowledged that "In some sophisticated markets, including the marine insurance market, we expect contracting out will be more widespread". Insurers are able to contract on terms which exclude the provisions of the 2015 Act, save in relation to two areas. First, under Section 9(2) of the 2015 Act, a representation made by an insured prior to contract may not be treated as a warranty by means of a provision in the contract, such as a "basis of contract" clause. What this means is that insurers may no longer rely on such a provision to avoid liability ab initio, and instead must establish that a representation relates to a specific warranty, the breach of which would then give rise to a proportionate remedy. Secondly, Section 13A of the 2015 Act implies into contracts of non-consumer insurance a term requiring the reimbursement of claims within a reasonable time. The 2015 Act does not permit contracting out of this implied term to avoid liability for deliberate or reckless failure to reimburse an insured's claim within a reasonable time.

It should be noted that certain of the proposals put forward by the Law Commission, notably concerning broker's liability for insurance premium and a statutory definition of "insurable interest", were not included in the Act. It is likely that there will be further reform of the law to address these issues in due course.

The 2015 Act – Key Features

The 2015 Act introduces new provisions in three broad areas: disclosure obligations, warranties and the treatment of fraudulent claims.

(i) Disclosure Obligations

Section 17 of the 1906 Act states: *"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party"*. Section 18 places a duty on the insured to disclose to the insurer *"every material circumstance" which the insured "knows or ought to know"* before the contract is entered into. Under section 18(2), a material circumstance is defined as *"every circumstance which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk"*.

The only remedy available to the insurer for breach of disclosure obligations under the 1906 Act was avoidance of the contract – the contract being treated as if it never existed, and the insurer entitled to refuse all claims made under it. This reflected the intention of lawmakers to protect the interests of the insurer as much as possible. The 2015 Act introduces the new concept of an obligation to make a "fair presentation of the risk" (Sections 3 – 7).

Section 3(4) of the 2015 Act provides that:

"The disclosure required is as follows:

a. *disclosure of every material circumstance which the insured knows or ought to know, or*

b. *failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purposes of revealing those material circumstances."*

Section 3(4)(b) highlights the greater role required of the insurer.

(ii) Knowledge

The Insured's Knowledge

The insured must disclose to the insurer all material circumstances which it knows, or ought to know. Under Section 4(6) of the 2015 Act an insured *"ought to know"* information that would be revealed by a reasonable search of information available to it.

Knowledge would be deemed to be knowledge of the insured if it is:

- known to the senior management of the insured or the person responsible for insurance placement; or
- known to the broker.

The anticipated effect of the above, along with the revised duty of disclosure under Section 3(4) is that there will be more focussed disclosure, and less "data dumping", i.e. presentation of large volumes of material without regard for what is material and what is not. Indeed the Law Commission has indicated that this could amount to a deliberate breach of the duty to make fair presentation.

The Insurer's Knowledge

Section 5 of the 2015 Act sets out the tests for what the insurer "knows", "ought to know" and "is presumed to know":

The insurer "knows" what is known to the individuals who decide on behalf of the insurer whether to accept the risk in question. The knowledge of the insurer's claims department may also be deemed to be knowledge of the insurer. Combined with the option given to the insured under Section 3(4) to disclose only that which would put the insurer on notice of the need to make further enquiry, this means that the insurer will need to take a proactive role in the disclosure process.

The insurers knowledge will include that which *"an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know"*, in other words, general knowledge.

(iii) General Points Concerning Knowledge

Section 6 of the 2015 Act contains general provisions regarding knowledge:

"Knowledge" includes not only actual knowledge, but also what is often referred to as "blind eye" knowledge – matters which the individual suspects but deliberately chooses to ignore, such as an adverse development to a claim likely to impact on the claim reserve. Failure to disclose such knowledge could also amount to a deliberate breach of the duty to make fair presentation.

(iv) Warranties

In the treatment of warranties, the main changes introduced under the new Act are as follows:

Section 9 - "basis of contract" clauses, which convert all statements made by an insured when applying for insurance into warranties, are deemed to be of no effect. This is one of the two sections of the new Act which insurers cannot contract out of.

Section 10 - breaches of warranty will suspend, rather than discharge, an insurer's liability. There will be no liability for losses which arise whilst an insured is in breach, but once that breach is remedied, cover will be reinstated.

Section 11 - warranties or other terms, except those which affect the risk as a whole, will not discharge the insurer from liability where the insured can prove that the relevant breach would not have increased the risk of the loss which actually occurred.

(v) Remedies for Breach of the Duty of Fair Presentation

The remedy of avoidance under the 1906 Act for a breach of disclosure obligations is abolished in the 2015 Act and replaced with a proportionate system of remedies for breach of the duty to make a fair presentation. These proportionate remedies operate on the basis of establishing whether, had the insurer received a fair presentation, he would have either:

a. not entered into the contract at all;

b. entered into the contract but on different terms (but would not have altered the premium charged); or

c. entered into the contract but with a higher premium.

If any of the above criteria are met the breach will be a 'qualifying' breach, and the available remedy will depend on whether or not the breach is either deliberate or reckless (i.e. the insured knew it was in breach or did not care whether it was in breach). If it is the insurer would have the remedy of avoidance of the contract from inception and be able to retain the premium paid by the insured. The Law Commission helpfully provides the following guidance on what might be construed as a deliberate breach of the duty of fair presentation:

1. *"refraining from disclosing a circumstance which the insured knows to be material;*

2. *making a data dump or otherwise presenting risk in a particular way in order to conceal certain information (as in the case where a summary is very misleading); or*

3. *intentionally lying about a material representation, either in the initial presentation or by knowingly giving a false response to an insurer enquiry".*

In so far as what may be construed as reckless, this is not defined in the Act, so its meaning will likely be subject to existing case law – *"…making a statement without caring whether it is true or false."* (Derry v Peek (1889) LR 14 App Cas 337)

Where a qualifying breach is not deliberate or reckless, the available remedy under the Act would have the objective of putting the parties in the position they would have been in had a fair presentation been made.

If the insurer is able to establish, on the balance of probabilities, that he would not have written the risk at all, the remedy will be avoidance from inception, with the premium being returned to the insured.

If the insurer would nevertheless have written the risk but on different terms, the contract will remain but those different contractual terms will be implied into the contract from inception, which in turn could impact upon claims which had been covered by the insurer prior to the breach of duty having been discovered.

If the insurer would have charged a higher premium to write the same risks, the remedy will be for the contract to continue in force but for the amount of any claims reimbursement to be reduced by the same proportion as the premium

actually paid bears to the premium that would have been charged but for the breach of duty.

By way of example, if the insurer would have charged £10,000 but only charged £5,000, then the claim reimbursement would be reduced by half.

P&I Clubs and the 2015 Act

Eight of the Clubs in the International Group ("the IG") are affected by the 2015 Act because their Rules are subject to English law. Accordingly and in the interest of continuity across the wider IG, the consensus amongst the eight IG Clubs is to contract out of certain aspects of the Act, and to adopt those which clarify certain aspects of the law which are presently uncertain.

(i) Non-Disclosure/Fair Presentation of the Risk

The new duty to make fair presentation of the risk is perceived to be generally favourable to insureds. In particular the insured's obligation can be discharged not only by disclosure of all material facts, but also by sufficient disclosure overall to put a prudent insurer on notice that further enquiries are required. In turn a greater burden will be placed on insurers to ensure that relevant material is requested and considered. Similarly the provisions in Sections 4 and 6 in respect of what an insured or its agents knows, or is deemed to know, for the purposes of discharging his obligations, are said to make the duty on the insured less onerous. In the P&I world, the relationship between a Club and its Member is a close one. Both are sophisticated market participators and entry or renewal discussions are detailed and focused. A fair presentation and a professional assessment of the risk are of mutual benefit to both owners and Club and what both would aspire to.

Accordingly, the Clubs have accepted the new fair presentation and knowledge regimes in Sections 3 – 7 of the 2015 Act. At the same time, recognising the importance across the IG Clubs of proper disclosure, the more diluted provisions in Section 8 of the 2015 Act in relation to remedies for breach are contracted out of, so as to retain the remedy of avoidance of the policy for failure to make a fair presentation of the risk.

(ii) Warranties

So far as concerns warranties or other conditions of cover, for example the warranty or condition that the Member will comply with any requirement of Class, the existing practice is that cover is suspended during the period of breach, so that the Member will not be entitled to any recovery from the Club in respect of any claim arising during that period, except at the discretion of the Directors of the Club. Bearing in mind the mutual nature of the cover provided by the IG clubs, the importance attached to matters such as compliance with Class and the availability of the Directors' discretion in appropriate cases, existing practice is to be maintained. Accordingly the Clubs have contracted out of Sections 10 and 11.

(iii) Fraudulent Claims

The current law allows an insurer to avoid a fraudulent claim at common law and, under Section 17 of the 1906 Act, avoid the policy, allowing the insurer to recover sums paid out previously under a non-fraudulent claim.

Under Section 12 of the 2015 Act, where the insured makes a fraudulent claim, the insurer is not liable to pay that claim and may recover any sums paid to the insured in respect of that claim. The insurer may also treat the contract as having been terminated with effect from the time of the fraudulent act.

Under Section 13, where an insurance contract confers benefits on third persons who are not parties to the insurance contract, the submission of a fraudulent claim by such a third person will not affect the rights of the parties to the contract. The Clubs provide cover to persons who are affiliated to or associated with the Member but not entered in the Club. In the event that a fraudulent claim were submitted by such an affiliate or associate of a Member, it is felt that for consistency such fraud should have the same impact on the Member as that provided by Section 12 of the new Act, namely the right to decline payment/recover sums paid and to terminate the cover. The clubs have, however contracted out of Section 13, so that conduct of one party which is sufficient to bar that party's recovery would bar rights of recovery of the others under the same entry.

Members who have questions concerning the Insurance Act 2015 are advised to direct their enquiries to their usual contacts with the Managers. ■

Sanctions Update

John Hamlyn
Legal Services Executive
john.hamlyn@simsl.com

Sanctions are restrictions or prohibitions imposed by a country or group of countries on another country, entity or individual. They are intended to coerce certain behaviour from, or achieve a certain result with respect to, the sanctioned party. Sanctions can take many forms, including economic, trade, diplomatic, military and sports.

Notable sanctions in recent years have been implemented by the EU, the US and the UN, and have targeted nations including Iran, Cuba, North Korea, Syria and Russia in respect of issues such as nuclear proliferation programmes and suspected human rights abuses.

Below we will look at the most recent updates in respect of several important sanctions regimes – Iran, Cuba and North Korea. Given that sanctions are subject to alteration at short notice, Members are encouraged to contact the Managers for the latest information, and advice upon issues which may affect Club cover.

Iran

In January 2016, the Joint Comprehensive Plan of Action ("JCPOA") was implemented. This comprised an agreement by Iran to scale back its nuclear programme, in return for which various sanctions imposed by the EU, UN and US would be reduced or lifted.

In particular, the EU lifted sanctions which had been incrementally imposed since 2009 targeting Iran's oil, gas, petrochemical, shipping, insurance and financial sectors. Sanctions remain in respect of activities, goods and equipment relating to Iran's nuclear industry, and for some dual-use goods (products and technologies normally used for civilian purposes but which may have military applications). Asset freezing measures targeting a large number of Iranian entities were also lifted, meaning that lawful transactions can be undertaken with those entities, although restrictions remain in place for certain individuals and entities subject to human rights or nuclear proliferation measures.

The US lifted sanctions on non-US companies and persons having involvement in certain activities or dealing with certain sectors of the Iranian Government and economy, including Iran's energy, shipping, and shipbuilding sectors; the sale, supply or transfer to or from Iran of precious metals, graphite, and raw or semi-finished metals (except those for use in connection with Iran's military or ballistic missile programmes or which have a potential nuclear end-use); and facilitating financial transactions involving certain Iranian financial institutions. The US also removed the asset freeze against certain individuals and entities.

However the US maintained its primary sanctions, which continue to prohibit US persons from engaging in business with Iran, save for a limited number of areas for which exemptions apply or that are authorised by the Office of Foreign Assets Control ("OFAC") (mainly concerning provision of foodstuffs, medical items and Iran's aviation sector). US dollar transactions in connection with Iranian business also remain prohibited, the effect of which may be to continue to stifle lawful business conducted by non-US companies.

It should be noted that under the terms of the JCPOA the EU and US reserve the right to "snap back" sanctions on Iran – i.e. reverse the relaxation or lifting – if Iran is found to have violated its obligations.

Cuba

In March 2016 the US Treasury's Cuban Assets Control Regulations ("CACR") and the US Department of Commerce's Bureau of Industry and Security's ("BIS") Export Administration Regulations ("EAR") were amended to further relax trade and travel restrictions in respect of Cuba which have been in place for many decades.

The amendments are designed to make it easier for US citizens to travel to Cuba and interact with Cuban nationals, to relax certain restrictions on banking transactions involving Cuban nationals or financial institutions, and to reduce some restrictions on the carriage of cargo to Cuba and the import into the US / consumption by US persons of certain goods from Cuba.

As a result, US banks can now process a wider range of transactions involving Cuba, including 'U-turn' transactions in which Cuba or a Cuban national has an interest. Banks may now handle a transaction which starts outside the US, passes through a US bank, and moves outside the US – as long as the originator and beneficiary of the transaction are not subject to US jurisdiction.

US persons can now establish a physical or business presence in Cuba where that business involves export/re-export of goods to Cuba, mail, parcel or cargo transportation services, or travel / carrier services, provided that such business is authorised by CACR or is otherwise CACR exempt.

Vessels carrying cargo from the US bound for countries other than Cuba may stop briefly in Cuba without obtaining a license from the BIS for that cargo to move through Cuba, as long as the cargo leaves on the same vessel, does not enter the Cuban economy, and is not moved to another vessel while in Cuba. In addition, US individuals can travel to Cuba to participate in full-time educational exchange activities, but prohibitions on pure tourist travel remain in force.

The US has also removed Cuba from the United States Coast Guard's list of countries which are determined not to have in place effective anti-terrorism measures at their ports. This eases the security burden placed on vessels calling at a US port after calling at a Cuban port. However, vessels may only make such calls in very limited circumstances, where such movements involved activities expressly licensed under the CACR. The 180 day rule remains in effect, providing that no vessel, US or foreign flagged, that calls at Cuba to engage in the trade of goods or services may thereafter call at a US port for 180 days, except pursuant to a license issued by the Secretary of the Treasury.

North Korea

On 2 March 2016 the UN Security Council ("UNSC") adopted Resolution 2270 (2016) ("the Resolution") in response to the nuclear test conducted by the Democratic People's Republic of Korea ("DPRK") on 6 January 2016, and the launch of a ballistic missile by DPRK on 7 February.

> "Sanctions remain in respect of activities, goods and equipment relating to Iran's nuclear industry, and for some dual use goods (products and technologies normally used for civilian purposes but which may have military applications)."

The Resolution expands on existing prohibitions on activities in respect of the provision, manufacture, maintenance or use of nuclear-related, ballistic missile-related or other weapons of mass destruction ("WMD")-related items, materials, equipment, goods and technology. The Resolution extends the prohibition to all arms and related material, including small arms and light weapons, as well as to associated financial transactions, technical training, advice, services or assistance which could contribute to supporting DPRK's armed forces.

It also allows UN States to (amongst other things); inspect cargo within or transiting through their territory going to or from DPRK; prohibit the chartering of their flagged vessels to DPRK, and provision of crew services; prohibit their own nationals or those subject to their jurisdiction from registering vessels in DPRK, using the DPRK flag on their vessels, or owning, leasing or operating a DPRK flagged vessel. UN states can also deny the use of their airspace to any aircraft known to be carrying prohibited items, prevent the export by DPRK of various ores and minerals by any vessels or aircraft flagged to that UN state, and prohibit the sale to DPRK of various aviation and other fuels. Finally, UN states can expel DPRK diplomats or government representatives who have assisted the violation of UN resolutions, and can prevent teaching or training of DPRK nationals within their territories or by their nationals, that could contribute to nuclear proliferation.

The Resolution subjects to asset freeze 31 ships identified as being economic resources controlled or operated by DPRK shipping company Ocean Maritime Management. It also identifies a further 16 individuals and 12 entities for asset freeze, including Chongchongang Shipping Company (alias Chong Chon Gang Shipping Co Ltd), and a number of banks and trading companies.

In March 2016 the EU implemented the above UN sanctions against DPRK. In addition to the UN-mandated restrictions on the operations of DPRK banks in the EU and on the operation of EU banks in DPRK, EU Member States are now

required to exercise enhanced monitoring of transactions between EU banks and DPRK banks.

In February 2016, the US expanded the scope of their sanctions via the North Korea Sanctions and Policy Enhancement Act. The Act requires mandatory designation of individuals and entities found to have knowingly imported, exported, or re-exported to, into, or from DPRK certain controlled goods, services, or technology connected with WMDs or their delivery systems, or which materially contribute to the use or development of nuclear, radiological, chemical, or biological weapons or their delivery systems.

Individuals or entities may also be designated; for the import, export or re-export to or from DPRK of arms, luxury goods, or training, advice or significant financial transactions relating to the manufacture or use of WMDs; if involved in censorship or serious human rights abuses by the Government of DPRK; if engaged in money laundering or counterfeiting, or narcotics trafficking that supports the Government of DPRK or its senior officials; if engaged in cybersecurity abuses on behalf of the Government of DPRK; for selling or supplying to or from the Government of DPRK or its representatives metals, ores or software, for use in processes related to WMDs and their delivery systems or other proliferation activities, or for use by DPRK's armed forces, or security or intelligence services.

Persons may also be designated if they are involved in providing support, goods or services to UN-designated persons, bribing an official of the Government of DPRK, or stealing or embezzling public funds for the benefit of an official.

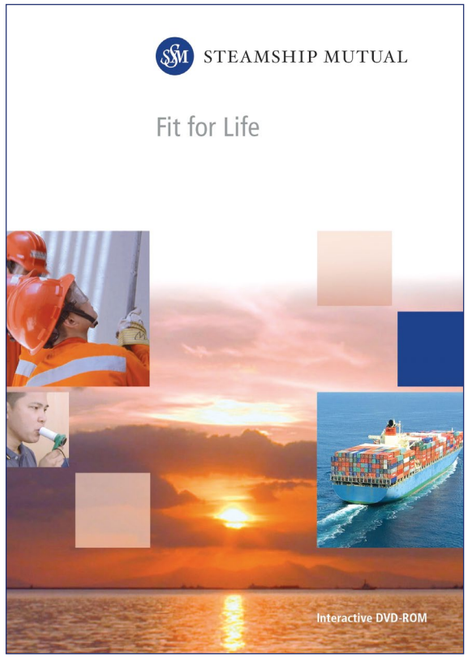
Finally, the Act provides for enhanced monitoring of trade involving DPRK, including; gathering information on the effectiveness of procedures at foreign air and sea ports at preventing the facilitation of certain prohibited activities; enhanced inspection of goods entering the US from ports or airports identified as operating insufficient anti-facilitation procedures; and the forfeiture of ships and aircraft used to facilitate certain prohibited activities.

Regardless of which sanctions regime applies, and whether sanctions may have been relaxed, lifted or strengthened, we recommend the usual due diligence should be undertaken in relation to any cargo carried and its use, and on all parties to the trade / transaction. Reliance on statements made by trading partners as to their due diligence will not necessarily provide a defence should trade result in a breach of sanctions.

The Club publishes regular sanctions updates on our website. For further information, please see our sanctions page: https://www.steamshipmutual.com/liabilities-and-claims/Sanctions.htm ■

Fit for Life

Seafarers are essential to world shipping, and their safety and that of the shipping operations they facilitate is inextricably linked to their health. It is vitally important for many reasons that seafarers are and remain fit for service at sea, and the Club's most recent loss prevention DVD **'Fit for Life'** seeks to promote awareness of the significance of good health. We are delighted that the Seatrade Awards have recognised the important contribution to this objective made by **'Fit for Life'** through the shortlisting of our DVD for the Seatrade 'Investment in People' award. ■



The Prestige Court of Appeal Decision

Juan Zaplana
Syndicate Associate
juan.zaplana@simsl.com

In November 2002 the vessel *Prestige* broke up and sank off Cape Finisterre (Spain). The vessel was carrying 70,000 tonnes of fuel oil which escaped and polluted the north coast of Spain and southwest coast of France. The environmental damage was extensive and the costs of cleaning exceeded the limits established in the CLC Convention.

In late 2002 criminal proceedings were instituted in Spain against the Master, Chief Officer, and Chief Engineer; and in 2010 claims were brought by several entities including the states of France and Spain against the vessel owners and the London P&I Club (the "London Club") alleging that the owners and their Club were vicariously liable for the acts of the Master under the Spanish Penal Code (the "Spanish proceedings").

The London Club acknowledged direct rights of action under CLC but replied that any other tortious claims would fall under English law and London arbitration; hence, the direct action was not applicable for non-CLC claims as the *"pay to be paid"* rule incorporated in the London Club rules applied.

The London Club put up security up to the CLC limit in the Spanish proceedings but played no active part in these proceedings. However, the London Club commenced arbitration in London seeking negative declaratory relief for any non-CLC claims presented by Spain and/or France.

Spain and France did not take part in the arbitration proceedings and the arbitrators issued awards granting declarations as sought by the Club.

The Club then applied before the High Court for permission to enforce the awards as judgments.

Spain and France opposed the application alleging the following:

1. State immunity to the English proceedings under the State Immunity Act 1978;

2. The arbitral tribunal did not have jurisdiction and that Spain and France had a direct claim against the London Club under Spanish law independently of the terms of the contract of insurance; and

3. That the claims were by their nature not susceptible to arbitration.

Hamblen J dismissed the allegations made by Spain and France and held:

1. That the claims against the London Club were to be characterised under English law as claims to enforce English law obligations rather than independent Spanish statutory rights; and that those obligations could be enforced only in accordance with their terms (i.e. in arbitration and subject to the "pay to be paid" rule);

2. That Spain and France became a party to the arbitration proceedings under the London Club rules and were not entitled to State immunity;

3. That the claims were arbitrable; and

4. That it was appropriate to give permission to the London Club to enforce the award.

Spain and France appealed the decision of the High Court of Justice.

Court of Appeal

The Court of Appeal had to decide on three of the four issues decided by Hamblen J.

a. Characterisation

The Court clarified that 'characterisation' forms part of the English conflict of law rules. In order to ascertain the applicable law, the Court will not only characterise the nature of the claim but it is necessary to identify *the question at issue*.

A very similar question arose in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1) [2004] 1 Lloyds Rep 206* where the Court had to decide whether the appellants were bound by the terms of the Through Transport Club's Rules, in particular the arbitration clause and the "pay to be paid" rule.

In the case of the *Prestige*, the Court had to decide if the *question at issue* was the right to enforce an obligation defined by the London Club's Rules; or an independent statutory right created by Spanish legislation and independent to the contract, as was argued by the appellants.

The court analysed the evidence of experts in Spanish criminal and insurance law and concluded that the direct action right under Spanish law is an independent right which derives

"Hamblen J found that the legislation confers a right to recover damages from the insurer but only to the extent the London Club's Rules allowed..."

from law rather than contract but does not exist separately from the contract. Therefore, the Court resolved that it is not an independent right to the contract.

The Court then had to examine the nature of the right against the insurer and what the legislation was seeking to confer on the third party. The Court had to determine whether the right conferred is, in substance, one to enforce an obligation created by the London Club's Rules or one to enforce a liability which is independent of the contract of insurance. If the former, the obligation will be governed by the law governing the contract (i.e. English law) whilst if the later, it will be governed by the law of the country whose legislation created it (i.e. Spanish law).

Hamblen J found that the legislation confers a right to recover damages from the insurer but only to the extent the London Club's Rules allowed and since the London Club's Rules are governed by English law it is necessary to turn to English law.

The Court of Appeal agreed and concluded that:

"...the issues relating to the appellants' right to seek compensation from the Club are to be characterised as issues relating to an obligation sounding in contract and that as such are to be determined in accordance with English law as the proper law of the obligation. It follows that, in the application of English law, if the appellants wish to pursue claims against the Club they must do so in arbitration in accordance with the terms of the contract of insurance and subject to the "pay to be paid" clause."

b. State Immunity under the State Immunity Act

The appellants alleged state immunity in the English proceedings under the State Immunity Act 1978.

Of relevance was section 2 whether the appellants had taken a step in the proceedings. Section 2 provides:

"(3) A State is deemed to have submitted:

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3) (b) above does not apply to intervention or any step taken for the purpose only of:

(a) claiming immunity..."

The Court concluded that either state would have been entitled to rely on section 2 of the Act if they had not taken a step in the proceedings.

However, the appellants had issued applications under sections 67 and 72 of the Arbitration Act not only for the purpose of claiming immunity but also alleging that there was no valid arbitration agreement, inviting the Court to determine whether the Tribunal had jurisdiction or not. In doing so the Court of Appeal confirmed the view of Hamblen J that France and Spain took a step in the proceedings and hence they did not have state immunity to this case.

c. Were the claims arbitrable?

Appellants alleged that the claims made by them in the Spanish proceedings were of a criminal nature and therefore the claims would not be arbitrable. They also alleged that a conviction in the proceedings was an essential element of the cause of action against the London Club.

The Judge decided any liability of the London Club was of a civil nature. Hence, the right to recover from The London Club depended on proof of an insured liability under the insurance contract and did not require a finding of criminal liability.

The Court of Appeal dismissed the appeal and confirmed the decision of Hamblen J.

In reaching this conclusion, the arbitration and *"pay to be paid"* provisions of Club Rules have again been upheld.

The decision of the Court of Appeal in 2015 predates the Spanish Supreme Court decision in 2016 [see page 55 – **The Judgement of the Spanish Supreme Court on the prestige oil spill – Spain cannot have it both ways**]. The decision in the Spanish proceedings, that the London Club had no defence and was directly liable up to the policy limit (US$1 billion), is entirely at odds with the Court of Appeal decision. Since the Spanish decision is a subsequent irreconcilable regulatory decision, it should not be enforceable. In any event, it is understood an appeal is being considered against the Spanish Supreme Court judgement by the Master. ■

Navigating the Human Element

It is well established that human error is a significant and recurrent cause of many shipping casualties and the resulting P&I liabilities.

The Club's loss prevention DVD-ROM **"Groundings – Shallow Waters, Deep Trouble"** contains numerous examples of navigational casualties attributable to human error. The book "Navigating the Human Element", contains very useful guidance to address and reduce the risk of the human error which is so often the cause of many of the incidents that the Club is called upon to handle. It serves as a very relevant companion publication to the **"Groundings"** DVD and has some case study content in common with the DVD. ■

Cogenbill 'Paramount Clause' – Hague or Hague/Visby Rules?

Sally-Ann Underhill and James Hatchard
Reed Smith

In *Yemgas FZCO & Ors v Superior Pescadores SA* [2016] EWCA Civ 101, the Court of Appeal considered whether the standard 'Paramount Clause' wording in the Congenbill incorporates the Hague Rules 1924 (the "HR") or the Hague/Visby Rules (the "HVR").

The 'Paramount Clause' set out on the reverse side of the bills of ladings in the present case provided that *"The Hague Rules contained in the International Convention for Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract…"*

The wording, with one immaterial change, was therefore identical to the wording included in the Congenbill.

Machinery and equipment, intended for use in the construction of a liquid natural gas facility in Yemen, was loaded on board the vessel "SUPERIOR PESCADORES" in Belgium. Owners issued six bills of lading in the Conline form for carriage from Antwerp, Belgium to Balhaf, Yemen.

During the voyage, cargo in hold no.1 shifted, causing significant damage to part of the cargo itself. The total losses were said to be in excess of US$3.6 million.

A Club LOU provided to the cargo interests agreed that the claim would be subject to English law and jurisdiction.

Cargo interests claimed that the Paramount Clause was a contractual incorporation of the HR and that to the extent that the HR limit was higher than the HVR limit, the clause entitled them to claim the higher sum. This involved a degree of cherry picking as, for individual packages, the higher limit varied depending on whether the HR or HVR applied. In each case cargo interests claimed whichever limitation figure was the higher.

At first instance, Males J determined that he was bound by the authorities to hold that the Paramount Clause incorporated the HR, rather than the HVR. He held, however, that it was not an agreement for a higher limit pursuant to Article IV rule 5(g) of the HVR (which provides that *"By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sup-paragraph (a) of this paragraph may be fixed…").* Cargo interests were therefore confined to recover damages limited by the HVR.

The issues for determination by the Court of Appeal were:

- Whether, on the true construction of the Paramount Clause, it operates as an agreement between cargo interests and the shipowner that the HR or HVR apply.
- If it is an agreement that the HR apply:
  - Does it constitute an agreement to fix maximum amounts for the purposes of Article IV Rule 5(g) HVR?
  - What is the date of conversion into relevant currency of the limit of £100 gold package or unit:
    - the date when the cargo was delivered in its damaged condition, or
    - the date of the judgment?

The Court of Appeal unanimously upheld the decision that cargo interests were bound by the HVR limits, albeit on different grounds. The judgments include further analysis and review of the line of authorities considered by Males J at first instance.

Tomlinson LJ also took the opportunity to correct his approach in the Happy Ranger [2001] Lloyd's Rep 530 (which has to be read in light of the Court of Appeal's decision [2002] 2 Lloyd's Rep. 357).

It was held that in any case where a bill of lading is issued (i) incorporating the HR as enacted in the country of shipment; and (ii) the country of shipment has enacted the HVR, this should be considered as incorporating the HVR.

This meant that the further questions were not considered, but there is a helpful nod in the direction of the Rosa S [1998] QB 419 when considering the date of conversion into relevant currency of the limit of £100 gold package or unit.

We are grateful to Sally-Ann Underhill and James Hatchard of Reed Smith for this article, which was published on Reed Smith's website on 29 February 2016. ■

The Judgement of the Spanish Supreme Court on the Prestige Oil Spill – Spain Cannot Have It Both Ways

Eduardo Albors
Albors Galiano Portales

The long-awaited judgment of the Spanish Supreme Court (Criminal Chamber) in the *Prestige* matter was handed down on 14 January 2016.

Judgement of the Spanish Supreme Court

In a first judgment, the Spanish Supreme Court reverses part of the decision of the Superior Court of La Coruña and in a second judgment, holds the Master of the vessel, Apostolos Ionnais Mangouras, liable of a criminal offence against the environment resulting in catastrophic environmental damage. The Master is sentenced to two years' imprisonment and is also held liable to pay a fine of Euro 10 per day for twelve months and to pay a twelfth of the legal costs of the First Instance proceedings.

The second judgment holds the Master liable to pay damages resulting from the oil spill and holds the owners of the Prestige, MARE SHIPPING INC, vicariously liable for the damages. Owner's P&I Club, The London Steamship Owners' Mutual Insurance (The "London P&I Club") is held directly liable up to the limit of cover on the policy. The second judgment also finds the International Oil Pollution Compensation Fund (IOPC Fund) liable up to the limits of the Fund Convention.

Finally, the judgment confirms the acquittal of Mr. Jose Luis López Sors, Spain's former General Director of the Merchant Marine.

The Supreme Court bases the Master's conviction on the fact that he generated a greater risk by deciding to sail on an overloaded vessel of 26 years of age which was also in extremely poor conditions. According to the judgment, he was therefore unable to keep the vessel safely under control in critical moments. The Court criticises the Master for his reluctance to follow the orders from the authorities.

In terms of the civil liability of the Master, the second judgment denies the Master its right to limit its liability under the 1992 Civil Liability Convention ("the CLC"). The Court's view is that the Master acted recklessly and with knowledge that such loss would probably result, thus triggering the exception of article 5.2. The same exception is applied vis a vis to the shipowner, therefore denying their right to limit their liability too.

Although the Supreme Court admits that the London P&I Club constituted a fund in accordance with the limits of liability set out in the CLC (€22.778 million), it holds that the limit of liability is not applicable. The London P&I Club is therefore held directly liable up to the policy limit (US$1 million). The *rationale* of the Supreme Court is that because (i) the master committed a recklessly criminal act there is a right of direct action against the Club with no defences being available, and (ii) the Club chose not to defend itself during the proceedings, without giving any explanation as to why it had decided not to appear before the Court it is, therefore, for the London P&I Club to bear the consequences of their lack of procedural diligence.

Commentary

The above is the basic outline of the decisions of the Supreme Court regarding the liabilities of the Master, the shipowner and The London P&I Club.

Following the judgments issued by the Spanish Supreme Court in the *Prestige*, there have been several commentaries published in the Spanish legal press. Generally speaking, the judgments have been welcomed following the conviction of the Master, but also because the Supreme Court has considered the insurers of the vessel liable for any amounts in excess of the CLC limits, up to the limit of cover under the policy.

However, it seems that those involved in shipping law have received these judgments with great surprise and dismay. Indeed on 17 March 2016, the Spanish Maritime Law Association held a monographic session dedicated to the judgments where views were discussed by all the attendees and in which the State Attorney in charge of defending the Spanish State took part. During the course of the event it became clear that there was a widespread view that the judgments may well be flawed, at least from a maritime law viewpoint.

Criminal law experts will no doubt express their views on whether the conviction of the Master was indeed feasible taking into account the finding of fact by the Superior Court of La Coruña that

it was not possible to determine the cause of the structural problems with the vessel that ultimately led her to breaking her back. Whilst the writer is no expert in criminal law, there must be serious doubts as to whether, in these, circumstances the Master can be found guilty of a criminal offence against the environment in its aggravated form.

However, from the perspective of civil liability insurance, the judgments face heavy criticism that they contain an error in law when they break the limits of liability of the CLC holding the London P&I Club liable for amounts in excess of the CLC limit.

The arguments put forward by the Supreme Court are open to serious doubt. First, because the CLC is designed to protect the liability insurers' right to limit their own liability. The misconduct of the Master does not interfere with the insurers' right to limit their own liability: something made very clear in the CLC.

The contention that the limit of the policy was higher than the CLC limit should not succeed either. We all know that tanker vessels sail through territorial waters of countries that are not party to the CLC and where the limits of liability of the CLC do not apply. In those circumstances, there is a logical need to provide cover in excess of the CLC limit.

Finally, the argument that the Club's strategy failed as a result of their decision of not appearing before the Court to defend themselves is wholly unacceptable. Firstly, this is not, as a matter of fact, accurate, because the Club did appear before the Court to constitute the CLC Fund. Perhaps more importantly, however, is that even if the Club had not appeared, the well-established principle of *'iura novit curia'* (that the court should know the law), should force the Supreme Court to observe the limits of liability of the CLC without it being pleaded before them. There was a clear obligation on the Supreme Court to apply the rules of the CLC irrespective of the fact that the Club decided not to formally appear in the proceedings.

Conclusion

Whilst it would be unpopular with the victims of this oil spill insofar as their prospects of being compensated in full would have been diminished, whether right or wrong, this is the legal position under the International Convention currently in force in Spain.

If International Conventions are not going to be complied with, it is better not to ratify them or to denounce them. Once ratified, and in force, the Courts should apply them. Spain could have denounced the CLC following the AEGEAN SEA incident but decided not to, nor did it following the PRESTIGE. Spain can denounce the CLC now, assuming all the consequences for the tanker industry that such a measure would entail, but it cannot have it both ways. ■

Charterparty Guarantees – A Timely Reminder

Sarah Lamb
Syndicate Assistant
sarah.lamb@simsl.com

Charterparty guarantees are often sought by owners as a condition to entering into a fixture with a particular charterer because either the owner is not familiar with that charterer or the charterer is a relatively small company albeit part of a larger group. Whatever the charterers standing owners are not unreasonably anxious to ensure a charterers' obligations – the payment of sums due under a charterparty, will be performed.

Given the importance of ensuring cash flow - particularly in the current market, it is therefore perhaps surprising that greater care is not taken in some cases when agreeing a fixture to make sure performance guarantees are binding on the guarantor.

A recent London Arbitration award (LMLN 3/16) has again highlighted some of the pitfalls an owner might face after having accepted a guarantee; for example, authority to provide a guarantee and enforcement.

https://www.steamshipmutual.com/publications/Articles/GoldenOcean1212.htm

Authority to Bind

Problems can arise if as is often the case a charterparty contains a provision simply stating *'to be guaranteed by "xxxx"'* and the party named as the guarantor subsequently alleges it is not bound by these words and, therefore, the guarantee is not enforceable.

Under English law for a guarantee to be enforceable it is required, by section 4 of the Statute of Frauds 1677, that the guarantee is -

a. made or recorded in writing; and

b. signed by the guarantor or by someone with authority from the guarantor to do so.

Whether (a) and (b) are satisfied will depend on exchanges or negotiations between the parties to determine if xxx actually ever expressly agreed to provide a guarantee. This often turns on what authority a charterer, or broker acting on behalf of a charterer, agreeing and signing a charterparty has to hold out xxx as a guarantor, which in turn raises issues of actual, or ostensible, authority.

Actual authority is where a power has been expressly conferred on a party to act on behalf of another party.

As an example, an owner can give a broker express authority to agree charterparty terms, or a company can give an employee express authority to give a guarantee either directly or by another party binding the company.

In the absence of actual authority, a party might still be bound by ostensible, or apparent, authority. This is authority that appears to a third party to be legitimate; so for example, where a third party believes another has authority to bind a different company. In these circumstances it is possible that a company is bound even if the party acting on behalf of the company does so in breach of its authority.

"The UNTA"

In Mitsui Osk Lines Ltd V SMI[1] the English High Court considered whether a guarantee was entered into with proper authority specifically whether a chartering broker had authority to enter into a contract on an owner's behalf.

Owners of MV UNTA chartered the vessel to Trustworth, guaranteed by SMI, for a period of ten years. The charterparty ran until 2013 when Trustworth repudiated the contract claiming that the vessel did not comply with the contractual description. Owners accepted the repudiation as wrongful and claimed against SMI, under the guarantee, for damages for Trustworth's repudiation. The High Court considered whether the guarantee was signed by a person with actual authority.

Owners argued that the broker had actual authority and not just apparent authority. This was established by email exchanges between the broker and Mr Salgaocar of SMI in which the broker was provided with authority both to negotiate the charterparty terms, and on behalf of SMI, guarantee the Charterers' performance.

The High Court agreed with Owner's and the agreement was held to be enforceable.

The Statute of Frauds and Evidence of an Enforceable Agreement

In Golden Ocean v SMI,[2] the Court of Appeal considered whether a guarantee had been entered into in accordance with the Statute of Frauds 1677 which requires guarantees to be recorded in writing and signed by a person authorised by the guarantor.

Owners of a new build offered to charter to Trustworth Shipping PTE Ltd, guaranteed by SMI. Twenty days prior to delivery Trustworth and SMI denied a contract had been agreed and that SMI had agreed to be guarantor. Owners started arbitration against Trustworth and later commenced proceedings in the High Court against SMI under the guarantee in respect of Trustworth's repudiation of the charterparty. SMI sought to challenge service of the High Court proceedings on them on the basis that the Statute of Frauds had not been satisfied because there was no single document containing the whole of the contract of guarantee and, since there was no single document which could be identified as the contract of guarantee, there was, in effect, nothing to sue on.

It was common ground that there was no signed document of guarantee but the Owners relied on an email from the broker confirming the terms of the charterparty that was "electronically signed" with the broker's name.

The Court held there was no limitation as to the number of documents in which an enforceable guarantee might be found, all of the terms of the charterparty, and of the guarantee, were to be found in two emails sent by the broker to the Owners, and that it would be a 'serious blot on English commercial law if SMI could avoid liability because its obligation was to be found written in two documents rather than in one'.

Furthermore, the judge found that an electronic signature was sufficient for the purposes of the Statute of Frauds.

See also **'Is the Statute of Frauds Satisfied? Guarantees by Email'**.
https://www.steamshipmutual.com/publications/Articles/GoldenOcean1212.htm

LMLN 3/16

Whilst the Owners claim was successful these issues were again raised in LMLN 3/16, but with the added complication of whether authority to bind a guarantor was to be determined by English law or Chinese law, and if to be enforceable the guarantee should have been approved and registered with the Chinese State Administration for Foreign Exchange.

Charterers, a Hong Kong company, had no significant assets and so Owners, also a Hong Kong company, required a letter of undertaking ("LOU") before entering into the charterparty. The LOU was issued by Y Ltd (a Chinese company), sealed with Y Ltd's seal and on the face of it signed by the company's chairman, Mr B. The LOU was expressly governed by English law.

When Charterers failed to pay hire and damages awarded to Owners arbitration was started by Owners under the LOU against Y Ltd for the sums due from Charterers. But Y Ltd denied that they were obliged to pay on the basis that the seal was not applied to the LOU with proper authority, they were unaware of the LOU, the signature on the LOU had been forged, and that the LOU did not adhere to Chinese law.

Without discussing the decision in any detail the Tribunal decided:

1. On the balance of the evidence disclosed by Y Ltd, and whilst the LOU had not been signed by the person in whose name the LOU has been issued it had been signed by someone within Y Ltd with authority to do so and sealed with actual authority from Y Ltd.

2. Notwithstanding the LOU was expressly governed by English law the issue of actual authority was to be determined by Chinese law because questions of authority were not matters of contract.

3. However, if that was wrong it was necessary to consider ostensible authority, which the parties agreed was a matter of English law. In this respect, a party acting in good faith was entitled to assume all relevant procedures of Y Ltd had been complied with, and that since at least two directors of Y Ltd knew Owners required an LOU and that the LOU has been signed and sealed (chopped) by an individual with authority from Y Ltd to do so, the LOU was issued with the ostensible authority of Y Ltd.

4. The Chinese courts would not decline enforcement of the LOU on the basis that the guarantee should as a matter of Chinese law have been approved by SAFE for Y Ltd to make a payment under the LOU since this was an administrative requirement, so that a failure to register the LOU did not mean payment thereunder was unlawful.

5. Chinese law did not, as Y Ltd had argued, apply to the LOU on the basis of Article 3(3) of the Rome I Regulation' - "Where all other elements relevant to the situation at the time of choice [of applicable law] are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of the provisions of the law of that other country which cannot be derogated from by agreement", because all other elements were not connected with China alone.

Conclusion

These cases highlight the numerous issues that can arise when a guarantor of a charterer's liabilities seeks to avoid payment under a guarantee. Whilst correspondence prior to agreeing a charterparty can provide the necessary evidence of the authority pursuant to which a guarantee has been given, it is best to seek that confirmation in advance that the party that has been put forward as a guarantor has agreed to provide that guarantee, and the person providing that confirmation has authority from the guarantor to do so.

Members may find the guidance issued in the following Steamship articles, a useful reference.

- https://www.steamshipmutual.com/publications/Articles/Articles/SV_Mar97_14.asp
- https://www.steamshipmutual.com/publications/Articles/Articles/PerfGuarantees1104.asp ■

[1] Mitsui OSK Lines Ltd v Salgaocar Mining Industries Pvt Ltd (The "Unta") [2015] 2 Lloyd's Rep. 518

[2] Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd [2012]

OPA 90 – Limits of Liability Increased

Danielle Southey
Syndicate Associate
danielle.southey@simsl.com

In a Final Rule issued by the US Coast Guard, the limits of liability under the US Oil Pollution Act 1990 ("OPA") have been increased, effective from 21 December 2015.

Under OPA parties responsible for vessels, deepwater ports and offshore facilities are strictly liability, jointly and severally, for removal costs and damages caused by any oil discharge into the navigable waters or the adjoining shorelines of the United States, up to specified limits.

OPA provides for a review of these limits every three years, prompting the recent increase which is intended to reflect the increase in the Consumer Price Index.

Under the latest Rule, the review procedure has been simplified so that the limits will increase when the CPI next increases by 3%. If, after three years, the increase is less than 3%, a notice of no inflation will be published.

For vessels, the increase in limitation amounts to approximately 10%.

There are also consequent increases in the amount of financial responsibility that owners/operators are required to maintain in order to operatein the United States.

Full details, including a full table of the revised limits, can be found at the following link.
https://www.gpo.gov/fdsys/pkg/FR-2015-11-19/pdf/2015-29519.pdf ■

Source Category	Previous limit of liability	New limit of liability
(1) The OPA 90 limits of liability for tank vessels, other than edible oil tank vessels and oil spill response vessels, are– (i) For a single-hull tank vessel greater than 3,000 gross tons	The greater of $3,200 per gross ton or $23,496,000	The greater of $3,500 per gross ton or $25,845,600
(ii) For a tank vessel greater than 3,000 gross tons, other than a single-hull tank vessel	The greater of $2,000 per gross ton or $17,088,000	The greater of $2,200 per gross ton or $18,796,800
(iii) For a single-hull tank vessel less than or equal to 3,000 gross tons	The greater of $3,200 per gross ton or $6,408,000	The greater of $3,500 per gross ton or $7,048,800
(iv) For a tank vessel less than or equal to 3,000 gross tons, other than a single-hull tank vessel	The greater of $2,000 per gross ton or $4,272,000	The greater of $2,200 per gross ton or $4,699,200
(2) The OPA 90 limits of liability for any vessel other than a vessel listed in subparagraph (a) (1) of § 138.230, including for any edible oil tank vessel and any oil spill response vessel, are–	The greater of $1,000 per gross ton or $854,400	The greater of $1,100 per gross ton or $939,800

Supreme Court Shifts Test Away from "genuine pre-estimate of loss" but Declines to Abolish Rule Against Penalties

INCE &CO | INTERNATIONAL LAW FIRM

Stuart Shepherd and Amanda Urwin
Ince & Co

Cavendish Square Holding BV v. Talal El Makdessi; ParkingEye Limited v. Beavis [2015] UKSC 67

In two conjoined appeal decisions recently handed down, the UK Supreme Court has re-focused the long-established test for identifying a penalty clause, but has declined to abolish the rule against the unenforceability of penalties altogether. The decision is consistent with the general trend of the courts in recent years to become more reluctant to interfere with the parties' freedom of contract and particularly so in a commercial context. This is highlighted by an acknowledgement in the lead judgment by Lords Neuberger and Sumption that: *"In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach"*.

The Brief Background Facts

In *Cavendish v. El Makdessi*, Mr Makdessi agreed to sell his controlling stake in a company to Cavendish. The sale contract provided that if Mr Makdessi breached certain restrictive covenants, he would not be entitled to receive the final two instalments of price for his shares and he would also be obliged to sell his remaining shares to Cavendish for a reduced amount that did not take into account any goodwill. Mr Makdessi breached the restrictive covenants and then subsequently challenged the clauses in question on the grounds they were unenforceable penalties.

In ParkingEye v. Beavis, Mr Beavis challenged the levy of an £85 parking charge for having overstayed the two-hour time limit permitted in a car park in a retail centre. ParkingEye managed the car park and displayed numerous notices throughout, clearly stating that a failure to comply with the two hour time limit would *"result in a Parking Charge of £85"*. Mr Beavis argued that the £85 charge was unenforceable as a penalty (and/or unfair and unenforceable by virtue of the Unfair Terms in Consumer Contracts Regulations 1999).

Penalty Clauses under English Law: The Traditional Position

Under English law, a contractual provision requiring a contract breaker to pay the other party a specified sum of money in the event of a breach of contract has traditionally been treated either as:

a. an enforceable requirement to pay liquidated damages if the amount concerned is regarded as a genuine pre-estimate of loss; or

b. an unenforceable penalty – when the amount concerned is not a genuine pre-estimate of loss but in the nature of a deterrent against breach.

In order for a clause to be penal, the traditional view was that the sum that the contract breaker is required to pay must be *"extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach"*. Consequently, the comparison usually made was between the loss that would likely be incurred by the innocent party relative to the amount payable pursuant to the clause.

The Supreme Court Decision

The Supreme Court upheld the validity of the disputed clauses in both appeals; albeit for different reasons. In *Cavendish*, the Supreme Court distinguished between "primary obligations" (i.e. those obligations that are required to be performed by the terms of the contract) and "secondary obligations" (i.e. obligations that are triggered by a breach) and held that the clauses in that case were in the nature of primary obligations and therefore not susceptible to the rule against penalties.

In *ParkingEye*, the Supreme Court found that although the parking charge did potentially engage the penalty rule, the level of the charge was not such as to constitute a penalty. The Supreme Court stated that *"deterrence is not penal if there is a legitimate interest in influencing the conduct of the contracting party which is not satisfied by the mere right to recover damages for breach of contract"*. In that case, the legitimate interest was ensuring the efficient use of the car park by seeking to prevent users overstaying the two hour time limit which, in turn, benefitted ParkingEye.

Therefore, the Supreme Court has in effect shifted the focus from the loss that could conceivably have resulted from the breach as being the key question in identifying whether a contractual provision is penal. Rather, even where a damages clause imposes a liability in excess of that which the innocent party might suffer by reason of the breach, the clause may properly be justified by other considerations. This will depend on whether the innocent party had a "legitimate interest" in performance of the contract extending beyond the damages it would otherwise be entitled to receive from the contract breaker.

Following this decision, the question so far as enforceability of the relevant provision is concerned will be whether it is penal, not whether it is a genuine pre-estimate of loss. Therefore, a clause may require a payment that significantly exceeds a pre-estimate of loss but that will not necessarily make it penal.

The true test is whether the relevant provision imposes a detriment on the contract breaker that is out of all proportion to any legitimate interest of the innocent party in enforcement of the primary obligation. While the various Lord Justices take slightly different approaches, essentially the key questions are whether:

a. there is a legitimate business interest served and protected by the clause; and

b. the contractual provision to protect that interest is extravagant, exorbitant or unconscionable.

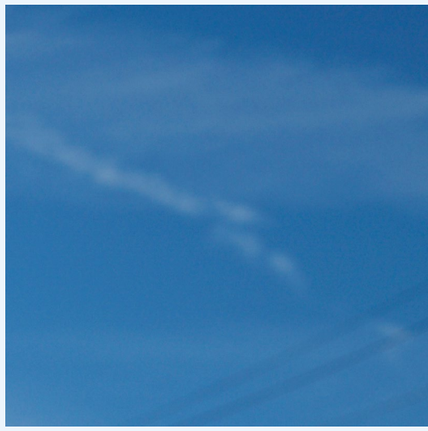
If the clause satisfies a legitimate business interest and is not extravagant, exorbitant or unconscionable, it will be enforceable. In order to fail the latter part of the test, the provision would effectively require a detriment to the contract breaker out of all proportion to the legitimate interest of enforcement by the innocent party.

Consequently, when considering whether a clause is penal, it is not just the financial loss that would have been suffered as a result of the breach that is relevant. Potentially relevant factors in applying the test would be: whether others in the same industry impose similar charges; the indirect business cost to the innocent party of breaches of the relevant obligation; and whether the secondary obligation was brought to the contract breaker's attention in an appropriate manner.

Comment

The Supreme Court has provided a welcome update of the law in relation to penalties. Parties must now have a greater expectation that provisions agreed by commercial parties on an equal footing will be enforced by the courts, providing the innocent party can show that the clause protects its legitimate business interest. Greater consideration will now be required at the drafting stage as to whether an obligation should be drafted as a primary obligation (which would avoid engagement of the rule against penalties) or a secondary obligation, and the distinction between the two is likely to provide fertile ground for disputes. ■

"The decision is consistent with the general trend of the courts... to become more reluctant to interfere with the parties' freedom of contract..."



Yachts and Maritime Refugees

Danielle Southey
Syndicate Associate
danielle.southey@simsl.com

In Sea Venture 24 the Club published an article by Holman Fenwick Willan discussing maritime refugees and the obligations of the Merchant Navy. More recently, the Club published a P&I alert discussing Yachts and Maritime Refugees which is set out in full below.

> "...a vessel is obliged to assist persons in distress at sea as a result of the Safety of Life at Sea Convention ('SOLAS'), Chapter V, Regulation 33. ...which applies to all vessels irrespective of type or purpose unless expressly exempt..."

Introduction

With the reappearance of many superyachts in the Mediterranean for the summer season, concerns have arisen about the risk of encountering refugees or receiving a request to assist in life salvage operations involving refugees. Whilst it is reasonable to expect coastguard agencies to prefer assistance from larger commercial vessels there is nevertheless a risk that a yacht will come across refugees whilst on passage and so it is important that Captains understand their obligations should this happen.

Fundamentally, a vessel is obliged to assist persons in distress at sea as a result of the Safety of Life at Sea Convention ('SOLAS'), Chapter V Regulation 33. Regulation 33, which applies to all vessels irrespective of type or purpose unless expressly exempt, makes clear that a Captain of a vessel is obliged to respond on receipt of *"information from any source that persons are in distress at sea"* and is *"bound to proceed with all speed to their assistance"*. The only circumstances in which the Captain can elect not to do so are if they are *"unable"* to or in *"the special circumstances of the case"* they consider it *"unreasonable or unnecessary to proceed to their assistance"*.

Regulation 33 also provides that persons embarked on board because they are in distress at sea, shall be treated *'with humanity, within the capabilities and limitations of the ship'*.

In addition to the SOLAS provisions, Captains should be aware of their duties under the United Nations Convention on the Law of the Sea ('UNCLOS'). Article 98 of UNCLOS provides that each state shall require the Captain of a ship flying its flag, in so far as is possible without *'serious danger'* to the ship, crew or passengers, to *'render assistance to any person found at sea in danger of being lost'* and *'to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him'*.

Guidance

If a yacht is required to assist in such an operation, it can give rise to a number of concerns, both legal and practical, such as:

- The seaworthiness/safety of a yacht if required to take on board a large number of refugees,
- Might an influx of refugees invalidate safety certification regarding the number of passengers on board and the life-saving appliances available and, if so, will exemptions apply as a result of a rescue operation,
- The yacht may have insufficient provisions and / or bunkers to be effective in a rescue operation.

It is possible that one of the issues above could render a yacht 'unable' to assist in an operation for the purpose of SOLAS regulation 33, i.e. having insufficient bunkers on board so unable to reach the location ordered, but whether or not a yacht would satisfy the 'unable to assist' threshold will be very fact dependent and we do not currently have any examples on which we can provide better guidance. However, it is quite possible, that the condition 'unable to assist' will be narrowly construed and that the burden will be on the Captain to establish that they were unable to assist

There is a range of practical written guidance available, such as is issued by the International Chamber of Shipping, which can prove a *useful aid to Captains*. Such guidance includes plans and procedures that can be adopted quickly in the event that a yacht is required to assist in a rescue operation. What may also prove particularly useful are the checklists for rescues at sea as well as safety signs in a number of languages that can be posted on board in the event refugees are taken on board and so Captains might want to consider keeping a printed copy on board. The provision of assistance will of course be the primary concern but, from an insurance perspective, following such guidance could also help to limit any liability exposure the Owner might face as a consequence of assisting refugees.

Once the yacht reaches port, local Club correspondents can play a key role in facilitating the disembarkation of refugees. Many of our correspondents have experience in disembarking and repatriating stowaways and this knowledge can be drawn upon in cases of refugees. The assistance our correspondents can offer might include alerting the local authorities and dealing with any necessary formalities and paperwork. Correspondent assistance can help minimise delays and so if a yacht does find itself in such a situation, we recommend that we be instructed to contact our correspondent as quickly as possible. The Captain may also be able to assist in minimising delay if it is possible for them to identify as many of the refugees as possible: even if they do not have passports, it might be possible to ascertain, names, nationalities and dates/places of birth which can significantly assist in the disembarkation procedure.

P&I Cover

The Club's Yacht Terms & Conditions provide that:

v Deviation Expenses
Port and deviation expenses when solely incurred: a for the purpose of landing or disposing of stowaways, refugees or other persons rescued at sea…

Provided that:

i. such expenses have in the opinion of the Managers been reasonably incurred; and

ii. they have been incurred as a direct result of the deviation; and

iii. any savings in expenditure which would have been incurred by the Assured but for the deviation shall be deducted from the amount recoverable.

vii Deserters and Stowaways
Repatriation expenses in respect of crew posted as deserters, stowaways, refugees and persons rescued at sea provided reasonably incurred and, in the case of deserters, irrecoverable from them."

Costs of diversion of the vessel to assist refugees can be considerable: these are covered by P&I insurance so long as the diversion is justified and reasonable. So if, for example, a yacht is asked to divert to assist by the Coastguard, it is highly likely that the diversion would be considered justified and reasonable. The diversion is measured from the moment the ship changes course for the rescue until she is back on course again. In addition:

- Any additional cost of bunkers, insurance, crew wages and provisions incurred as a result of the deviation can also be covered.
- Port charges can also be covered if they would not otherwise have been incurred by the yacht, but for the deviation.
- Costs incurred in caring for the refugees whilst on board can also be covered.

As set out in the Terms & Conditions above, credit should be given for any costs *saved* by the Member. It is also important to note that any loss of profits suffered as a result of a deviation will not fall within a yacht's standard P&I cover.

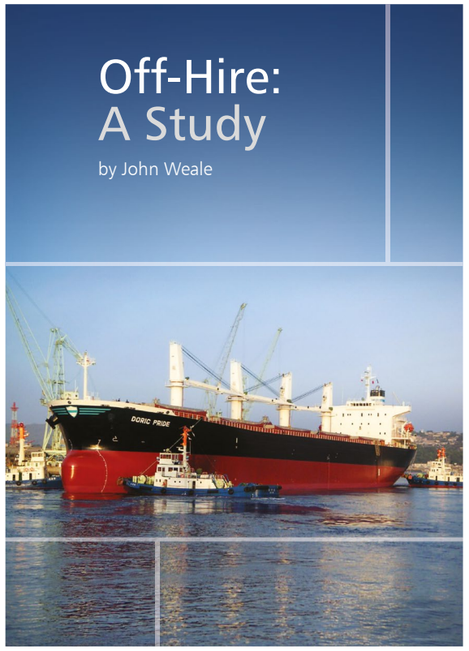
If circumstances allow, we recommend that crew members keep careful records of any deviation in the deck log books, particularly fuel consumption and the time and position at which the yacht returns to its original track. This will assist greatly when presenting a claim to the Club after the event.

Examples

To try to put the above into context, we have considered some possible scenarios that might arise and comment on the cover position for each:

- COSTS OF DEVIATION TO ASSIST REFUGEES
  The costs of diversion of the vessel fall within P&I insurance if the diversion is justified and reasonable. This includes additional bunkers, insurance, wages and provisions. Any additional port charges are also recoverable.
- COSTS OF DEVIATION BUT NO SUCCESSFUL RESCUE OPERATION
  Provided Members are reasonable and justified in deviating, costs should be recoverable irrespective of whether assistance was ultimately needed/ successful.
- COSTS OF REPATRIATING REFUGEES
  Any costs that a yacht Owner incurs in respect of disembarking and repatriating refugees falls within the scope of P&I –depending on the number of refugees taken on board, this could be considerable.
- CREW INJURED DURING RESCUE OPERATIONS
  Injuries to crew members will be covered in the usual way.
- REFUGEE INJURED WHILST ON BOARD OR DURING RESCUE OPERATION
  Whilst it might seem unlikely that a refugee would make a claim against the vessel for any injury sustained on board, if this were to occur, such a claim could fall within P&I cover as a liability for a person on board.

If you have any questions arising from the above, please contact the yachts team.
https://www.steamshipmutual.com/underwriting/yacht-facility.htm ■



Off-Hire: A Study

Steamship Mutual is proud to be publishing **"Off-Hire: A Study"** - a new book by John Weale, who, in his role as Senior Vice-President, Risk Management at Fednav Limited, Montreal, amassed a wealth of experience and expertise in handling both practical and legal shipping issues.

While it is a study of the large and complex body of law dealing with off-hire, it is not intended as a text book or legal treatise, but is written and intended for people working in shipping companies who have to deal with off-hire problems as they arise.

In his foreword to the book, Sir Bernard Rix, recently retired as a Lord Justice of Appeal, has said:

"It is a strength of this book that it takes a comprehensive, disciplined and enquiring look at both the older, leading, cases in this field and at the modern trend of authority. At every stage of the journey, the reader is given the facts, the arguments, the decision, and the principles, but always subject to the most searching eye for failures in consistency or realism". ■

Controlling Medical Care Costs in the USA

Martin Turner
Syndicate Manager
martin.turner@simsl.com

In the USA there are no government controls over what medical care providers can charge for their services. It is left to "the market" to create such controls. This, however, relies on the buyer of those services being sophisticated and knowledgeable, and there is recognition of the need to have such bills audited before any payment is made which can often result in substantially reduced costs.

The US domestic medical health insurers are well versed in such procedures and have in place pre-arranged "network rates" with medical care providers. Shipowners on the other hand are only very occasional users of such medical services and, unless they take precautions, can find themselves over-paying.

In simple terms the provision of medical services in the USA operates on a three tier system; a "rack rate" that is billed to see if the payer will just pay without question, a discounted rate that will follow from the bill being audited before it is paid, and "network rates" which are pre-arranged discounts locked in at the time that the patient is admitted.

Shipowners are often the victims of the "rack rate". However, they can get the benefit of a discounted rate even if specialist help is brought in late in the process, and can sometimes obtain "network rates" if such help is involved at the earliest opportunity, even if that is after a seafarer is hospitalised.

It can be a mistake to leave such matters in the hands of the local general agent. This is an area in which they may not have expertise and it could be viewed as an unwelcome burden especially if it's a charterer's agent dealing with a problem involving an owner's seafarer. Historically in the US Gulf Ports, and of late spreading to the US West Coast, agents have sometimes been inclined to pass this responsibility to medical consolidating companies, or "port clinic co-ordinators". These facilities take contractual control of the seafarer's care and make referrals to hospitals and other facilities, but the subsequent billing from those facilities is done behind a veil with the ultimate bill payer (the shipowner) denied an opportunity to scrutinise bills and/or at risk of having to pay summary bills from the clinic co-ordinator that may be excessive. Such companies purport to be ensuring the best possible care for the seafarer, but that is equally achievable by other means that allow the shipowner to exercise control over the costs.

To achieve this Steamship Mutual's local correspondent should be contacted as soon as possible, either directly or through the Club, after a seafarer requires significant medical care ashore. Depending on the circumstances, it may also be suitable to retain the services of a specialist medical management company to facilitate the admission of that seafarer to a suitable hospital, monitor the medical care being provided to them and to control the associated charges. The costs associated with employing such companies are transparent, and are often based on a percentage of the saving achieved in the bill audit process, or on the basis of time expended by medical staff in handling the matter.

Of course the seafarer's medical needs are the top priority, but such correspondent services are available 24 hours a day, as are the services of the medical care management companies. Such medical care companies can often facilitate hospital admission on the basis of "network rates" and thus provide the occasional user such as a shipowner, with access to advantageous billing rates approaching that available to the US bulk buyers of the domestic insurance market. Their medically qualified oversight on a case can help in the flow of information as regards a seafarers progress and ensure over–provision of medical services can be controlled along with costs.

In the USA the health care providers often work on the principle that, unless pre-arranged rates are agreed, they will present a "full value" bill and simply wait to see if it is paid in full. They will expect that bill to be audited by a professional bill auditor and will almost certainly be prepared to accept payment at a significant discount.

Unfortunately, that same methodology is increasingly being used worldwide as health care providers in other jurisdictions often utilise that US model. This underlines the need to contact Steamship's correspondent or the Club direct whenever significant medical care ashore might be needed. ■

"It may also be suitable to retain the services of a specialist medical management company to monitor the medical care being provided and to control the associated charges..."

Steamship Mutual News

Marfin Vessel 'Anton Topic' Involved in Successful Rescue

The Steamship entered bulk carrier 'ANTON TOPIC', was recently involved in a successful mid-Atlantic rescue operation.

On the evening of 13 May 2016, the vessel was contacted by an injured yachtsman in need of assistance. Mr Tolkien was participating in a single handed transatlantic yacht race when he ran into technical difficulties on board his sixty foot yacht, 880 nautical miles west southwest of the Azores. Whilst tending to a damaged sail, Mr Tolkein was struck and suffered a head injury. Following discussions between Mr Tolkein and his shore team, and in light of the fading daylight and his injury, the decision was made that Mr Tolkein should seek immediate assistance. Anton Topic picked up Mr Tolkein's distress call on VHF and were asked to assist.

Less than two hours later, liaising with Mr Tolkien by radio, Anton Topic manoeuvred alongside the yacht, in what was described as an 'expert approach' in difficult conditions of force 8 winds and a large swell. Mr Tolkein was helped on board using Anton Topic's pilot ladder before he was assessed by the crew who applied four stitches to his head injury. Mr Tolkein remained on board Anton Topic whilst she continued her voyage to Philadelphia.

Congratulations to the the Master and crew of the ANTON TOPIC for their good seamanship and rescue work. ■

Staff Retirements

In February David Leck and Joe Foster, two highly experienced members of the Loss Prevention Department (LPD), retired.

David joined the LPD as Loss Prevention Manager in March 2011 after a long and varied career in the shipping industry. He started his seagoing career in 1970 as an engineering apprentice and ultimately served as Chief Engineer with P&O European Ferries. He came ashore in 1994 to spend the next 8 years working for Lloyds Register where he rose to the position of Senior Surveyor before taking on marine engineer superintendence and managerial roles with Serco Marine Services in Portsmouth and Devonport. Retirement will provide David with greater opportunity to pursue one of his keen interests of classic car restoration.

Joe, a foreign-going Master Mariner with command experience on tankers first went to sea in 1973. After coming ashore in 1993 he held a number of shore-based positions gaining further experience as surveyor, an MCA examiner, nautical college lecturer, marine superintendent and operations manager before joining the LPD as Loss Prevention Executive in 2012. A new dog was acquired on retirement and we expect Joe to be exercising well in his beloved Yorkshire countryside and enjoying spending more time with his grandson.

We would like to thank them both for their greatly valued contribution to the Club's business and we wish them well in their retirement. ■

(Left to right) Sean Lima, Pablo Constenla, Sarah Lamb, Rosie Davies, Rebecca Penn-Chambers and Andrea Gentile

Sailors Society Initiatives

Three Peaks Challenge

On Saturday 18th June, two teams from Steamship Mutual will be donning their walking boots and attempting to climb Great Britain's three highest peaks, Snowdon, Helvellyn, and Ben Nevis in just 24 hours as part of the Sailors' Society Three Peaks Challenge 2016!

The Club is pleased to support initiatives aimed at helping seafarers and the Steamship team - Rebecca Penn-Chambers (Eastern Syndicate), Sarah Lamb (European Syndicate), Rosie Davies (American Syndicate), Pablo Constenla (American Syndicate), Andrea Gentile (European Syndicate) and Sean Lima (European Syndicate) - have pledged to raise £11,000 to support the ongoing efforts of the Sailors' Society to rebuild the lives of the hundreds of seafarers in the Philippines whose lives were devastated by Typhoon Haiyan in 2014. With the aim of building 100 new homes for seafarer's families, each costing £4,000, and a new medical centre, there is a great deal of money to raise.

Fundraising events to date have included a company dress down day, Krispy Kreme sale, and, most recently, a Charity Quiz Night.

Thanks to the contributions from the Club's correspondents, lawyers, and friends the team is well on the road to meeting its target.

As the challenge draws closer, the team is increasingly realising climbing the Three Peaks will be one of the most mentally and physically enduring challenges that they will undertake. However, they also know that with (more) training, the support of their team members, and the motivation of knowing they are supporting such an worthy cause, they will cross the finish line!

We wish them success. ■

Quiz Night

In support of those brave Steamship souls embarking on the Three Peaks Challenge in June this year, the Club held a charity quiz night.

The event was organised by the Steamship Three Peaks Challenge team (the said "brave Steamship souls"). In addition to the quiz they also organised a raffle with an array of prizes from local businesses including luxury cakes, vouchers for beard trimming, cookery and lifestyle books, and vouchers for "go-ape".

The Club invited a number of law firms to enter teams in the quiz and we are grateful to Mays Brown, CJC, HFW, Ince, MFB, Reed Smith, Hill Dickinson, Thomas Cooper and Stephenson Harwood for participating and entering into the spirit of the evening with some appropriately nautical and/or comical team names.

Notwithstanding the intense competition the winning team was Steamship's s Eastern Syndicate team of Michael Hird, Heloise Clifford, Beth Larkman, Marius Vitas, Edward Barnes, Tom Belton and Tom Kavanagh.

Special thanks must go to the evenings quiz master, Steamship's own Underwriting Executive Felix McClure.

A wonderful evening was had by all and as a result £1,840 was donated to the Sailor's Society; the chosen charity for the Steamship Three Peaks team.

Many thanks indeed to the organisers and we wish them every success with the challenge ahead. ■

Ship Handling in Warsash

In March, two of Steamship Mutual's claims handlers were invited to take part in a Ship Handling Day.

Kristina Larsson and Danielle Southey, both of whom are in the European Syndicate and form part of Steamship's Yacht Claims Team, travelled to Timsbury Lake in Hampshire to spend the day learning about slow speed manoeuvring.

The event was organised by Matthews Daniel and Sturge Taylor and hosted by Warsash Superyacht Academy at their ship handling centre. The centre provides training for captains and senior officers of both superyachts and commercial ships, in slow-speed vessel handling using impressive specially designed scale model ships including bulk carriers, container vessels, ro-ros and tankers. After spending the morning in training and familiarisation, the team spent the afternoon at the controls of the models, practicing mooring, close quarter manoeuvring, anchoring and even an unexpected re-floating exercise!

We are very grateful to Matthews Daniel and Sturge Taylor for organising a thoroughly interesting, insightful and fun day. ■

Sailor Society Wellness at Sea

In furtherance of one of the objectives of the Club's loss prevention DVD **"Fit for Life"**, the Managers are very pleased to be able to inform Members of the Club's support of the Sailors' Society's Wellness at Sea coaching programme. Funding for this sponsorship is provided by The Ship Safety Trust and will support the Physical Wellness module of this programme, particularly since the objectives of that module are perfectly aligned with the loss prevention messages contained within the Club's **"Fit for Life"** DVD. Details of the Wellness at Sea programme can be found at the following link to the Sailors' Society website.

http://www.sailors-society.org/ourprojects/wellness/

Further information about the programme will be provided on the Club's website, including details of the concessionary terms available to Members who may wish to avail themselves of the coaching provided under the Wellness at Sea programme. ■

WELLNESS AT SEA
SAILORS' SOCIETY

Representatives of the Managers and the Clubs Korean correspondents Mutual Services Korea and Korea Universal Marine, together with WJ Kim of Polaris Shipping

Reception in Seoul

The Managers held a reception in Seoul prior to the 2016 renewal and, despite heavy snowfall during the day, were delighted to welcome over 130 guests from the Korean shipping community. They were welcomed by JS Kim, Eastern Syndicate Underwriting Director, David Christie, Head of Eastern Syndicate, and Heloise Clifford, Syndicate Manager FDD, also from the Eastern Syndicate.

An address was given to the guests by Mr WJ Kim of Polaris Shipping, who was appointed to the board of the Club in 2015, in which he highlighted how important the Korean Membership is to the Club. Following this, the attendees enjoyed meeting with associates in the Korean shipping community over cocktails and food.

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


Francis Vrettos

The 15th International P&I Conference, Piraeus Marine Club

The International P&I Conference, organised every year at the Piraeus Marine Club, took place for the 15th time on 28 January 2016. As always the forum was very successful, with more than 200 delegates, and 10 speakers. For the first time Steamship Mutual participated in the debate with Francis Vrettos from the Club's Greek office speaking on the benefits of the Lloyd's Open Form.

Steamship's participation at the forum echoes the Club's commitment to the Greek market, following the opening of the Piraeus office, now almost four years ago. The Club's Greek business has grown significantly since the establishment of the local office. We have been pleased to welcome Dana Shipping, Golden Union, Stalwart, Fundador and Varco as new Members. We also extend thanks to our existing Members for their support in increasing their entries with the Club. ■

(Left to right) Matthew Poole, Paul Brewer, Mike Coleman, Mike White, Tatyanna Drakulovic, Catherine LaPlant and Yumi Peterson

Two Week Fishing Expedition?

On a recent visit to Coastal Alaska Premier Seafoods ("CAPS") Paul Brewer and Matthew Poole of the Club's Americas Syndicate were treated to a tour of the Northern Hawk, a 5,901 ton US built (1981) fishing trawler. The vessel is in immaculate condition and the Club is proud to have its entry. However, and notwithstanding the extensive health and safety plan implemented by the vessels owners the opportunity to participate in a two week Bering Sea fishing expedition was politely declined pending calmer seas!

By way of background CAPS is an Alaskan non-profit corporation participating in the Federal Western Alaska Community Development Quota Program (CDQ), and is governed by a 20 member Board of Directors with one director elected by the residents of each of the 20 member communities.

The CDQ Program was created for the people living in the 65 villages within 50 miles of the Bering Sea coast. The goal of the CDQ Program is to give the villages the chance to participate in the Bering Sea Pollock, crab, cod, and other ground fish fisheries.

Through the income derived from the CDQ Program CAPS reinvests in the Bering Sea vessels and quota to maximise its earnings. CAPS use the earnings to create jobs, programs and other opportunities for the residents of CAP's 20 member villages.

Paul and Matthew are extremely grateful to CAPS for their hospitality and for the opportunity to take a tour of such an impressive vessel. ■

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