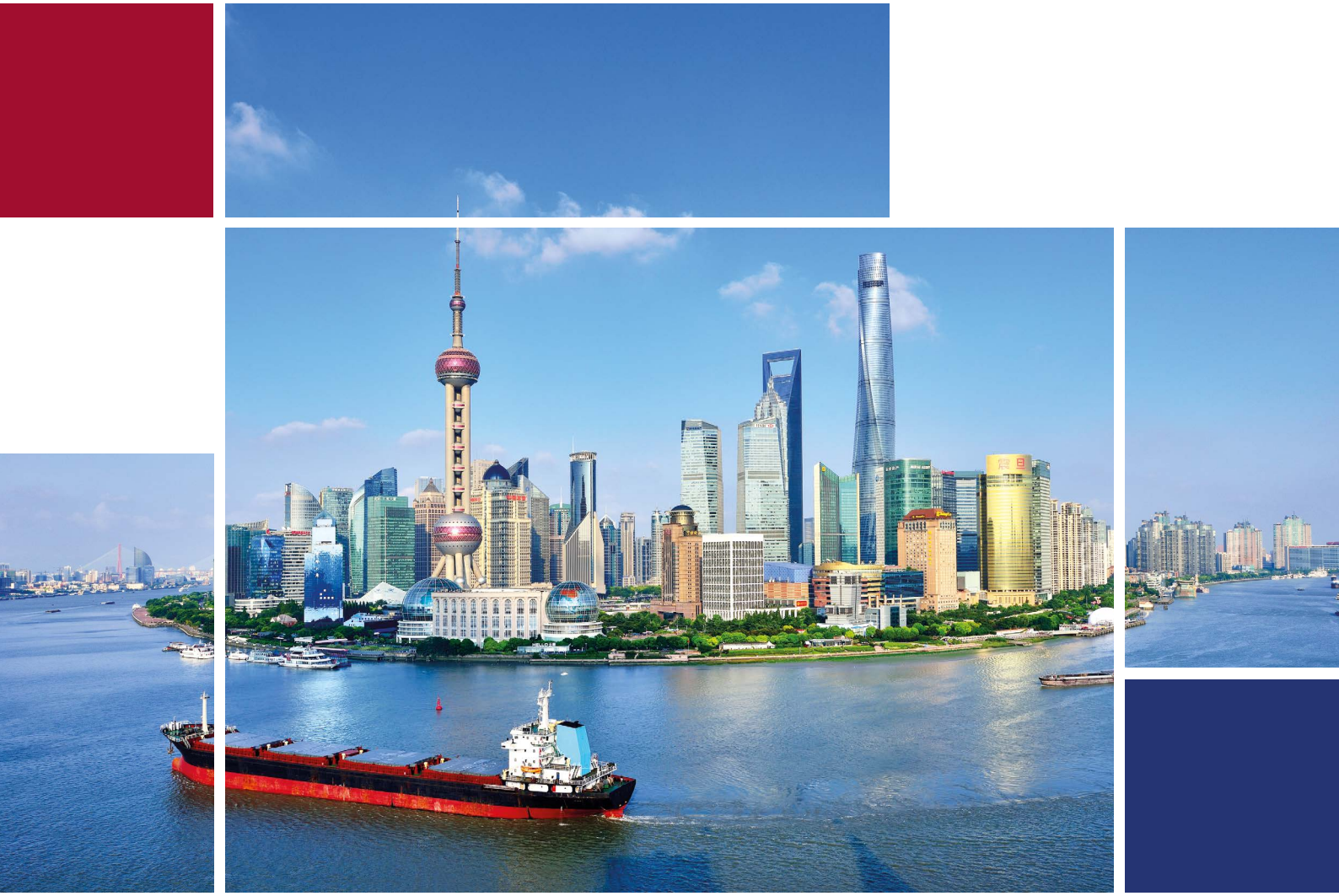
STEAMSHIP MUTUAL

Sea Venture



Issue 27

In this issue

Editorial Team

Piers Barclay, Edward Barnes, Paul Brewer, Patrick Britton, Heloise Clifford, Mairéad Ní Cheóinín, Malcolm Shelmerdine, Danielle Southey

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

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Introduction

Gary Rynsard
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With record Free Reserves as at 20 February 2017, the Club has never been in a stronger financial position.

The main factor behind this year's performance is the low level of claims in the 2016/17 year for both the Club's and International Group Pool claims. Prior years have also developed favourably whilst investments have returned 3%. These developments will enable the Board to consider a further return of premium at their meeting in October, the Club having already returned 10% of premium on the 2014/15 year.

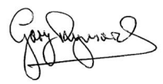
We are very conscious of the fact that the Club's capital is the Members' capital, that many of our Members face difficult times and the Board will be looking to ensure that the financial strength of the Club is used to the benefit of the Members.

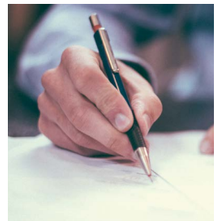
The 2017 renewal saw the third successive year with no General Increase. Freight Markets continue to be very difficult for many members and inevitably there were many tough negotiations. Nevertheless the renewal has been concluded broadly in line with expectations. A number of members have transferred tonnage to the Club from other International Group Clubs and new members have been welcomed into the Club. At 151 million GT the entered tonnage is at an all-time high.

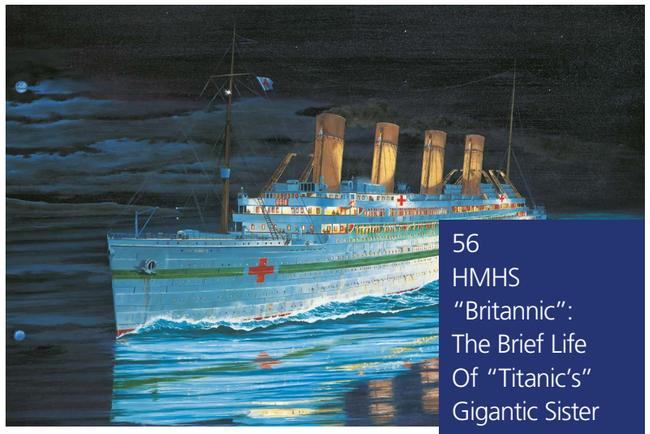
The Club continues to look for ways to improve its service to the Members. As part of this effort we anticipate that new offices will be opened in the near future in Singapore and Tokyo. We hope that these offices will both serve existing Members and attract new Members to the Club. Despite the improvements in technology nothing can beat the immediacy of face to face communication.

As ever we hope the content of this edition of Sea Venture will be of interest and are grateful to all that have contributed articles.

20 March 2017







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Sanjeev Bhandari

Sanjeev Bhandari

It is with the deepest regret we have to report on the passing of Sanjeev Bhandari who died in Kolkata, India on 4 January 2017.

Sanjeev was for many years the Club's representative in Kolkata as a member of the Crowe Boda team. He was a unique individual with a vast knowledge of maritime law, the Indian shipping business, and an intimate understanding of P&I. His influence was felt across the Indian Shipping world. Sanjeev will be missed not only by his friends and colleagues in India but also by many people in the P&I, legal, and shipping world.

Those in the Club will remember him for his bottomless curiosity, and for his determination to find the correct, rather than merely the convenient, answers to the endless questions thrown up by our work.

On behalf of the many in the industry that had the good fortune to have known him, we convey our deepest sympathies to Sanjeev's family and friends. ■

Hire – Not a Condition of the Contract

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In April 2013 Flaux J gave judgment in *Kuwait Rocks Co v AMB Bulkcarriers Inc (The Astra).* He decided the obligation to make punctual payment of hire was a condition of the contract and, therefore, a breach of this condition entitled the vessel Owners to both withdraw the vessel and claim damages for loss of profit for the remainder of the charter period.

That decision caused some consternation in shipping circles.

In March 2015 Popplewell J gave judgment in *Spar Shipping AS v Grand China Logistics Holding (Group) Co., Ltd.* He disagreed with Flaux J's decision in *The Astra*; finding that the payment of hire was not a condition of the contract.

Not surprisingly given the importance of the question – whether the punctual payment of hire under a charter is a condition of the contract - both decisions have attracted considerable discussion.

The decision in Spar Shipping was appealed by both parties. The Court of Appeal decision was published on the 7 October 2016. The decision is of great interest on two fronts.

First whether the obligation to pay hire on time is a condition of the contract. The second being a detailed consideration of when charterers are in renunciatory breach thus entitling Owners both to terminate the Charterparty and to damages for the unexpired charter period.

Is Payment a Condition?

The Court of Appeal has firmly rejected *The Astra*. In a nutshell, the Court decided unanimously that the payment of hire on time is not a condition of the Contract. In the words of Hamblen LJ:

"… we should hold that The Astra was wrongly decided. I would add that in circumstances where, as here, the law had apparently been settled by an existing decision for some 40 years, without any indication of market disquiet, I consider that a court should be very cautious before departing from such a decision so as to disturb the predictability of the law and detract from its certainty."

Gross LJ in delivering the leading judgment reviewed and addressed in detail the following:

i. The express option to terminate;

ii. Ascertaining whether a clause is a condition;

iii. General presumptions as to time being of the essence;

iv. The anti-technicality clause;

v. Certainty; and

vi. Market reaction;

and came to the clear conclusion that:

"…, I was not persuaded that the inclusion of the express withdrawal clause provided a strong or any indication that cl. 11 of the charterparties was a condition. As a matter of contractual construction, the Charterparties did not make it clear that cl. 11 was to be categorised as a condition. Considerations of certainty, most important though they are, did not sway me from this conclusion, in particular given the significant certainty achieved by cl. 11 as a contractual termination option, simpliciter and the fact that breaches of cl. 11 could range from the trivial to the grave; greater certainty would be achieved by categorising cl. 11 as a condition but at a cost of disproportionate consequences flowing from trivial breaches – in my view, an unsatisfactory balance. I sense that market reaction is generally supportive of the decision of the Judge in this case and view it as reassuring. I do not regard as significant the arguments advanced on the basis of a general presumption as to time being of the essence in mercantile contracts or those which relied on the anti-technicality clause… and I would respectfully hold that The Astra was wrongly decided on this issue."

[clause 11 is headed "HIRE PAYMENT"]

Renunciatory Breach?

However of more interest is the second limb of the appeal before the higher court, namely whether the Charterers had renounced the Charterparty thereby allowing Owners to claim damages for the unexpired period.

Renunciatory breach is not an easy concept. Conduct is repudiatory if it deprives the innocent party of substantially the whole benefit of the contract.

But when is conduct renunciatory? This is if a party evinces an intention to commit a repudiatory breach – in other words if a reasonable person would conclude that one party does not intend to perform his future

"…., I was not persuaded that the inclusion of the express withdrawal clause provided a strong or any indication that cl. 11 of the Charterparties was a condition."

obligations and the failure to perform such obligations would be repudiatory.

Furthermore, evincing an intention to perform but in a manner which is inconsistent with the contractual terms is still evidencing an intention not to perform and such conduct can be renunciatory if the future intended performance is so inconsistent as to be repudiatory.

And whilst an intention to perform indicates a willingness to perform, willingness does not mean a desire to perform despite an inability to do so - as per Devlin J in *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 437,

"I would like to but I cannot' negatives intent just as much as 'I will not'."

Before the Court of Appeal neither party disputed that Popplewell J had correctly summarised the test for when a breach was renunciatory; rather Charterers claimed the Judge had wrongly applied the test to the facts of the matter, being, it was said, *"too cynical"* and *"not sympathetic enough"*.

So whilst bearing in mind that every case will be decided on its facts, the facts of Spar Shipping are worth reviewing as they give an indication of what a Court may look to when assessing when conduct is renunciatory in the future cases.

Owners had three vessels on charter to the same Charterer. There had been regular failures to pay hire on time during a period of five months. Almost all hire payments on the three vessels were unpaid when they fell due. Some were not paid at all, others only months after they fell due. In those months, only once were instalments paid on time. The arrears fluctuated between about US$1.5 million and US$2.5 million, and would have been up to US$1 million more but for the exercise by Owners of liens on sub-hire/sub-freights.

Charterers had made clear that non-payment was due to cash flow difficulties caused by the fall in the market. They had said they expected a cash injection from their parent company which would allow for payment of hires going forward and the arrears. They

twice promised to pay off half the arrears but failed to do so. By the end of the five month period, Charterers simply repeated that they had cash flow difficulties, provided no certain proposals, and simply said they would pass on sub-hires.

When Owners called on the parent company under a guarantee given pursuant to the three Charterparties, the response was that the parent company was prioritising payment of bank interest over operational payments and referred to the overdue hire as a 'relatively small sum'.

On the basis of these facts, Popplewell J found at first instance that an objective person would conclude that the Charterers were unwilling, because they were unable to pay hire punctually for the balance of the Charters or to pay off the arrears unless the market improved, and the defaults would likely be substantial - weeks or months and arrears of US$2 million or more. In the arbitration, the Charterers had stated that they were willing to pay hire at the agreed rate but could not, due to cash flow problems.

Popplewell J found that the Charterers were evincing an intention not to perform in a manner that deprived Owners of substantially the whole benefit of the Charterparties. He had rejected an argument that, comparing the total sums payable under the Charterparties with *"arrears by a few instalments constituting a small proportion of the total"* could not be said to be depriving Owners substantially of the whole benefit of the Charterparties.

In the Court of Appeal, Gross LJ confirmed that it must be borne in mind that renunciation can be evinced by substantially inconsistent performance and may be inferred where it is apparent that the defaulting party is doing no more than procrastinating in the hope that something may turn up - as per Lord Shaw of Dunfermline in *Forslind v Bechely-Crundall* [1922] SC (HL) 173.

Further, as renunciation looks to the future, renunciation may be inferred from both the nature and causes of past breaches (even if by themselves insufficient or irrelevant for repudiation) and the evinced unwillingness to perform in the future.

So Gross LJ then applied the facts to the test:

1. what was the contractual benefit Owners intended to obtain from the Charterparties?

2. what was the prospective non-performance? and

3. was the prospective non-performance such as to go to the root of the contract?

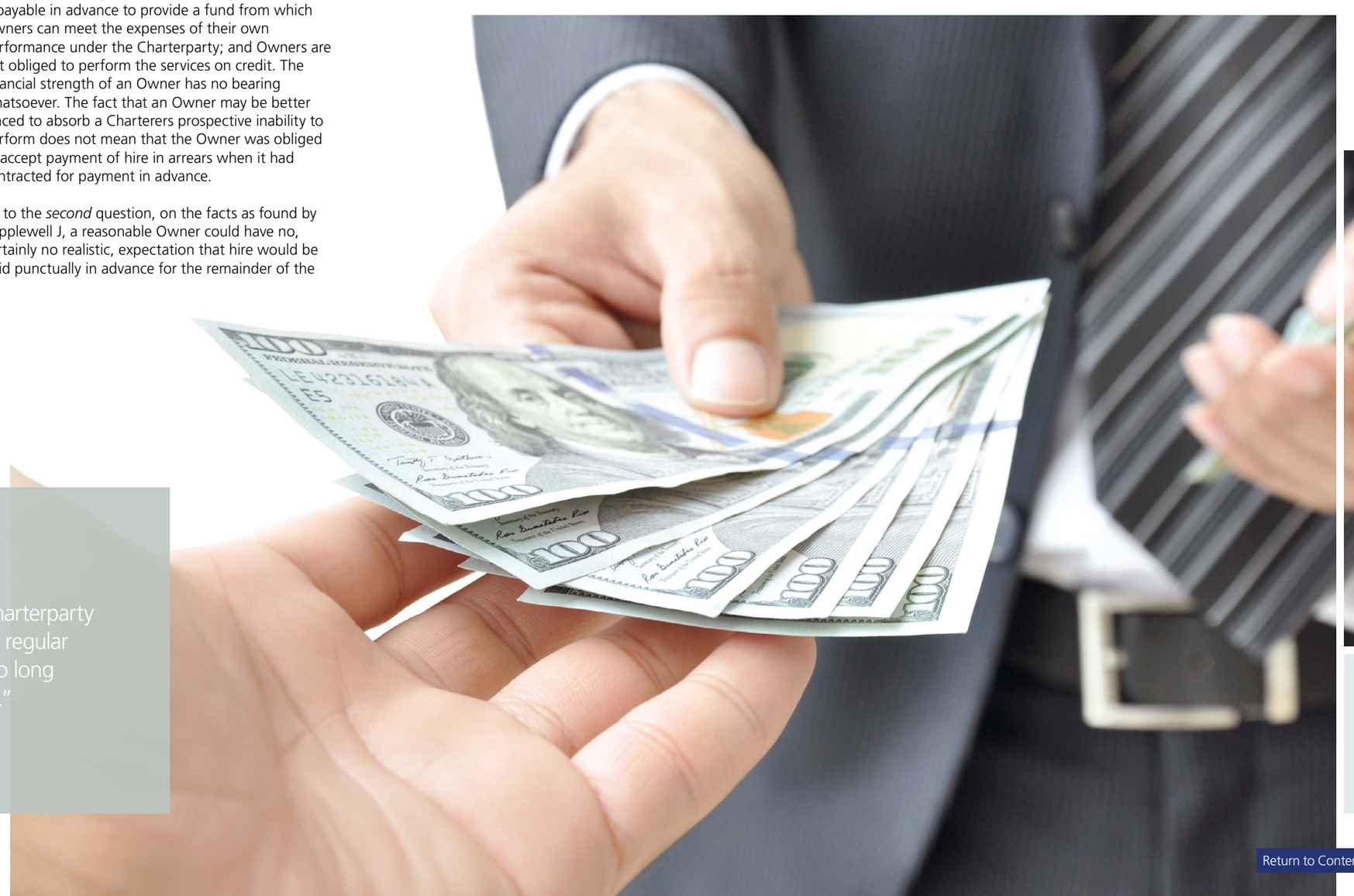
As to the first, the bargain under a time Charterparty is that an Owner is entitled to regular payment of hire in advance, so long as the Charterparty continues. Hire is payable in advance to provide a fund from which Owners can meet the expenses of their own performance under the Charterparty; and Owners are not obliged to perform the services on credit. The financial strength of an Owner has no bearing whatsoever. The fact that an Owner may be better placed to absorb a Charterers prospective inability to perform does not mean that the Owner was obliged to accept payment of hire in arrears when it had contracted for payment in advance.

As to the *second* question, on the facts as found by Popplewell J, a reasonable Owner could have no, certainly no realistic, expectation that hire would be paid punctually in advance for the remainder of the period. On its own case, Charterers were in difficulty due to market conditions. The best that could be hoped for was that they were willing to pay hire – but in arrears.

And to the final, third, question - whether the prospective non-performance was such as to go to the root of the Charterparties – Gross LJ had no doubt that it was. To quote:

"The prospective non-performance would unilaterally convert a contract for payment in advance into a transaction for unsecured credit and without any provision for the payment of interest. The importance of the advance payment of hire in time Charterparties has already been emphasised and need not be repeated. That any failure to pay a single instalment of hire punctually does not amount to a breach of condition… is one thing; an evinced intention not to pay hire punctually in the future is very different… and, in my judgment, goes to the root of the Charterparties. Taken to their logical conclusion, Mr Coburn's submissions [for Charterers] would mean that Charterers could hold Owners to the contracts by stating that all payments of hire would be made but late and in arrears – leaving Owners obliged to accept this limping performance and attendant uncertainty. In my view, that is not the law, at least in this context. For the avoidance of doubt, whichever test is adopted the answer would be the same; thus I am satisfied that GCS's [Charterers] evinced intention would deprive Spar of "substantially the whole benefit" of the Charterparties."

The judgment is clear, concise and welcome guidance of an Owners' position in what continues to be a very difficult market for all. ■



"....the bargain under a time Charterparty is that an Owner is entitled to regular payment of hire in advance, so long as the Charterparty continues."

L-R: Mr Robert Y P Kao, Senior Vice-President, U-Ming Marine, Mr Jerry Lin, ANZ Bank (Finance Providers), Mr Douglas Hsu, Chairman of the Far Eastern Group, Mr Andrew Harward, ANZ Bank, Mr C K Ong, President, U-Ming Marine, Mr Rohan Bray, Director, Steamship Mutual Management Hong Kong

U-Ming Marine's Auspicious Start to 2017 with the Delivery of Two New Vessels

Rohan Bray
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U-Ming Marine Transportation Corporation of Taiwan, a long-time Member of the Club, recently named and took delivery of two vessels and held a naming ceremony for a third.

The 35,336 GT Panamax Bulk Carrier "Asian Majesty" was named and delivered at the Oshima shipyard on 28 November 2016. The 99,212 GT Capesize Bulk Carriers "Cape Brilliance" and "Cape Galaxy" were named in a ceremony at the Shanghai Waigaoqiao shipyard on 10 January 2017, shortly before the "Cape Brilliance" set sail on her maiden voyage to Australia. The "Cape Galaxy" is due to be delivered in February.

The sponsor and godmother of the "Asian Majesty" was Mrs Shiang Yang Tang, while the sponsors and godmothers of the "Cape Brilliance" and "Cape Galaxy" were Ms Heike Truöl and Mrs Chen Hsu Hsu-Mei respectively.

U-Ming Marine has been a loyal Member of Steamship Mutual for over 35 years and operates a fleet of large bulk carriers and cement carriers. The Shipowners were represented at both ceremonies by Mr Douglas Hsu, Chairman of the Far Eastern Group, the parent group of U Ming, and Mr C K Ong, President of U-Ming Marine and serves as a Member of the Steamship Mutual Board of Directors. Edward Lee, Managing Director of Steamship Mutual Management Hong Kong office, attended the ceremony at Oshima and Rohan Bray, Director of the same office, attended on behalf of the Club at Shanghai Waigaoqiao.

U-Ming Marine was established in 1984 to provide marine transportation of cement, dry commodities and industrial raw materials, specialising in the trading of vessels and agency services.

Steamship Mutual wishes all three vessels many years of safe and prosperous voyages. ■

Limited Recognition of Foreign Maritime Liens in Australia

COCKSMACNISH
Paul Hopwood
Cocks Macnish

Federal Court clarifies limited recognition of foreign maritime liens under Australian law

Ship "Sam Hawk" *v Reiter Petroleum Inc [2016] FCAFC 26*

Factual Background

The ''Sam Hawk" was owned and registered in Hong Kong, under Greek management, and operated by a Swiss company. It was under time charter to Egyptian Bulk Carriers ('EBC').

EBC contracted with Reiter Petroleum for the provision of bunkers at Istanbul. The supply of bunkers was subject to Reiter's general terms and conditions, which required that the contract was to be construed according to the law of Canada. However, there was a further term that Reiter was permitted to assert a lien wherever it finds the vessel, and that the law of the United States would apply to determine the existence of any maritime lien.

Reiter arranged for the provision of bunkers by a Turkish bunkers supplier. The Owner of the "Sam Hawk" was not a party to this bunkers supply contract, and was unaware that Reiter was involved in the provision of bunkers. Prior to receiving the bunkers it sent a 'no liability' notice to the Turkish bunkers supplier. When bunkers were provided on 7 December 2013 the Master of the "Sam Hawk" sent a further 'no liability' notice to the supply barge.

Reiter commenced proceedings in the Federal Court of Australia and arrested the vessel at Albany, Western Australia, in November 2014. Reiter asserted jurisdiction on the basis of s. 15 of the *Admiralty Act 1988* (being a claim on a maritime lien), and ss 17 and 4(3)(m) (being a general maritime claim on the basis that the Owner was a 'relevant person' who would be liable on the claim in proceeding commenced as an action in personam in respect of goods supplied to ship for its operation).

The Owner applied to have the action dismissed and have the arrest set aside, challenging jurisdiction and seeking summary judgment on each of the s.15 and s.17 bases.

First Instance Decision

At first instance McKerracher J dismissed the Owner's application. The decision principally concerned whether the phrase 'maritime lien' in s.15 of the *Admiralty Act* included foreign maritime liens arising in circumstances that would not give rise to a maritime lien under Australian law. His Honour found that because the existence or otherwise of a maritime lien was a matter of substance rather than procedure (in light of the decision of the Australian High Court in *John Pfeiffer Pty Ltd v Rogerson*[1]), the question fell to be determined under the *lex causae*. In the course of the reasons His Honour expressed a preference for the decision of the minority in the Privy Council decision in *The Halcyon Isle*[2] to that of the majority. On that basis, His Honour found that the proper law clause in the bunkers supply contract determined the *lex causae*, and that the Court would therefore recognise a maritime lien arising under the law of the United States as a valid basis for its jurisdiction.

Having found that the Court had jurisdiction His Honour declined to grant summary judgment.

> ".... Allsop CJ and Edelman J made it clear that a maritime lien is a legal concept which necessarily includes the circumstances in which it might arise."

The Owner sought leave to appeal on both grounds.

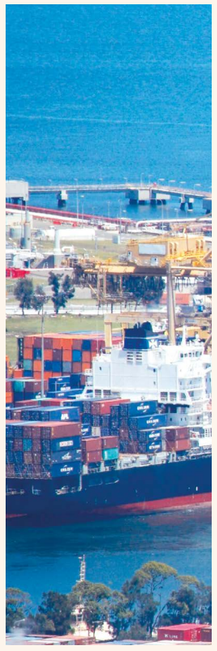
Decision on Appeal

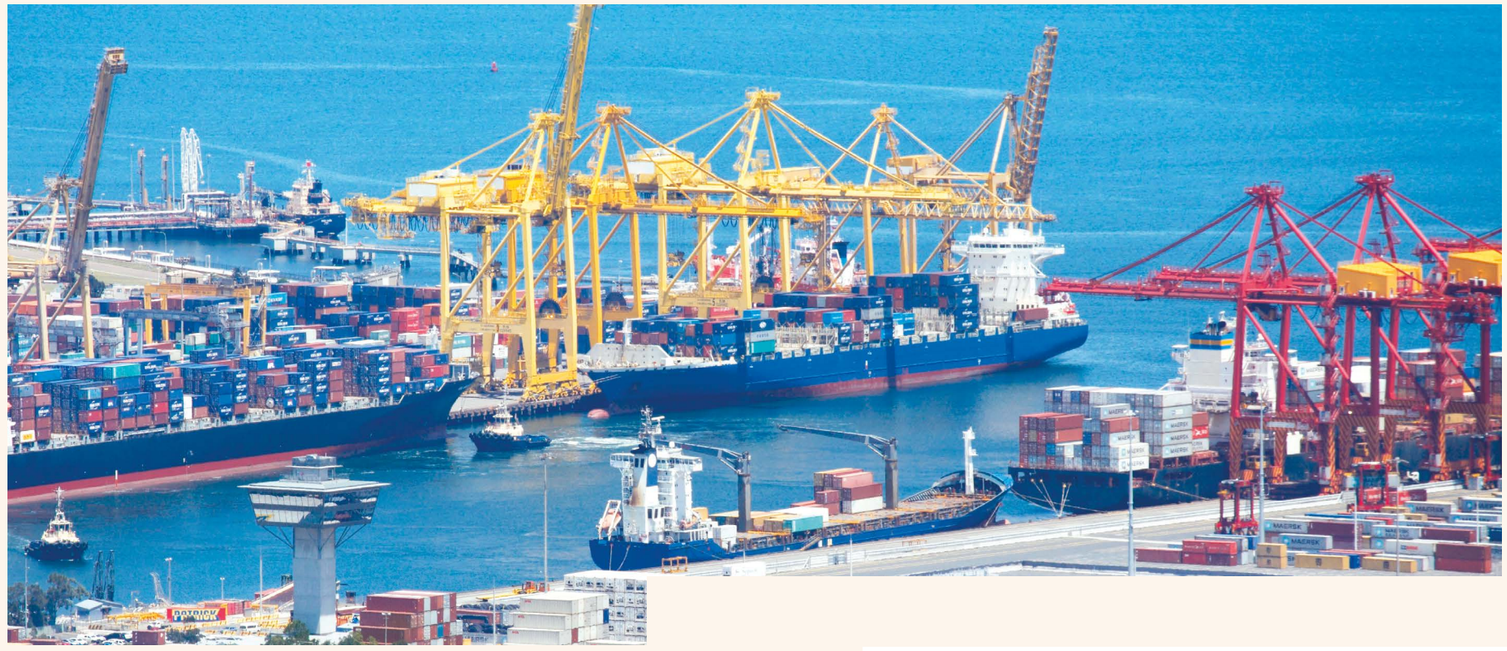
The Full Federal Court, comprising five judges, unanimously granted leave to appeal, allowed the appeal, and ordered that the arrest be set aside and the proceedings dismissed.

Allsop CJ and Edelman J, with whom Besanko and Kenny JJ substantially agreed, decided the maritime lien jurisdiction question by applying a two-step rule of private international law under s.15. The first step is to identify the foreign law right. The second is to characterise that right by reference to Australian law to determine whether it is, or is sufficiently analogous to, a maritime lien as recognised in Australian law.

In the course of a lengthy judgment, Allsop CJ and Edelman J made it clear that a maritime lien is a legal concept which necessarily includes the circumstances in which it might arise. Thus, in Australia, a maritime lien can only arise in relation to the familiar categories of salvage, damage done by a ship, wages of master or crew, and master's disbursements. Foreign maritime liens which do not arise from these circumstances will not be a 'maritime lien' for the purposes of s.15, and therefore will not be a basis for the Court's jurisdiction.

Further, Allsop CJ and Edelman, Besanko and Kenny JJ placed considerable importance on the fact that a maritime lien grants not only a basis for jurisdiction, but also a privileged priorities position in relation to the proceeds of sale of a vessel. Thus, to recognise foreign maritime liens in circumstances where





"…. such a lien will have to display the characteristics of a maritime lien under Australian law ……. and arise in circumstances recognised as giving rise to a maritime lien by Australian law…"

Australian law would not do so would be to disturb the well-established domestic system of priorities, potentially with unjust results. Their Honours rejected the idea that it might be possible to recognise foreign maritime liens for the purposes of jurisdiction but not to accord such liens the privileged place that Australian maritime liens have in relation to priority.

In the course of their joint judgment Allsop CJ and Edelman J expressed a preference for the majority decision in *The Halcyon Isle* to that of the minority, principally because it was, in their view, an example of the two-stage choice of law process that was the basis for their decision in this case.

While Rares J agreed with the result, his reasoning was different. His Honour set out at length the basis for his agreement with the minority reasoning in *The Halcyon Isle*, and suggested that the correct approach would be, in an appropriate case, to allow the *lex loci contractus* to determine whether a maritime lien exists, but the *lex fori* to determine its priority. Ultimately this was not such a case, because the circumstances of the supply of bunkers established no relevant connection between the Owners and the laws of the United States.

The summary judgment issue was dealt with shortly. In circumstances where the Owner was not a party to the bunkers supply contract, had no notice of the involvement of Reiter in that supply, had not expressly or impliedly held out EBC as its agent, and had issued 'no liability' notices to the physical bunkers supplier, the Court found that there was no reasonable prospect that Reiter would be successful on general maritime claim for supply of necessaries under s.17.

Conclusion

The *Sam Hawk* decision makes clear that in limited circumstances an Australia court will recognise a foreign maritime lien as a basis for its jurisdiction under s.15. However such a lien will have to display the characteristics of a maritime lien under Australian law (including inalienability and a privileged priorities position) and arise in circumstances recognised as giving rise to a maritime lien by Australian law, described above. In effect, then the Full Court has all-but-closed the door that appeared to have been opened by this case at first instance.

The "Sam Hawk" is entered with the Club. The Member's defence was supported under their FDD cover. ■

[1] (2000) 203 CLR 503

[2] *Bankers Trust International Ltd v Todd Shipyards Corporation* [1981] AC 221 which is authority for the proposition that questions as to the existence of an asserted maritime lien are procedural or remedial in nature and are therefore to be determined in accordance with the law of the forum.

CPI Official Ceremony in Shanghai

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China P&I Club, Steamship Mutual's long time business partner in China since 1985, officially established its management company China P&I Management Company Limited in Shanghai on 31 May 2016.

The opening ceremony, officiated by Mr. Song Chunfeng, Managing Director of China P&I Management, was attended by over 120 guests from government departments, shipping and the insurance industry, many of whom came from overseas. Guests of honour included Mr. Jiang Zhuoqing, Vice Mayor of Shanghai, and Mr. Xu Lirong, Chairman of the Board of China COSCO Shipping Corporation Limited.

Steamship Mutual was represented at the ceremony by Edward Lee, Managing Director of its Hong Kong Representative Office.

Over the past decades China P&I Club has gone from strength to strength. Steamship Mutual is proud to be associated with this success and wish China P&I Club all the very best in the years ahead. ■

Local dignitaries & senior management of CPI at the opening ceremony.

The Risks of Letters of Indemnity

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A recent High Court decision by Teare J again highlights the commercial risks associated with delivering cargo against a Letter of Indemnity when no bill of lading is presented.

In October 2013, SCIT Trading agreed to sell a cargo of 70,000 tonnes of iron ore to Xiamen C&D Minerals, to be delivered at a main port in China. SCIT Trading had a contract of affreightment with SCIT Services, who agreed a voyage Charter with Oldendorff Carriers, who agreed a voyage charter on similar terms with Oldendorff GmbH. Oldendorff GmbH agreed a timecharter with the Owners of the panamax bulker "ZAGORA". Each of the Charterparties had a clause requiring Owners to deliver cargo against Charterer's Letter of Indemnity in case no bill of lading was available for presentation at the discharge port.

Xiamen C&D Minerals agreed, through an associated company, to sell the cargo to an end-user, Shanxi Hainan. The ship loaded the cargo in Australia between 11 and 14 December 2013. On 16 December, Shanxi Haixin nominated Lanshan as the discharge port, and Sea-Road as agents at the port. This information was passed along the charter chain towards Owners of the "ZAGORA". A few days later Letters of Indemnity were passed between the parties in the chain, and on 20 December, the Owners informed the Master of the "ZAGORA" that they had received a Letter of Indemnity for delivering the cargo to Xiamen and instructed him *"to deliver the cargo to Xiamen C&D Minerals Co. Ltd. ("Xiamen") or to such party as you believe to be or to represent Xiamen .....or to be acting on behalf of Xiamen .....at Lanshan Port, China, without production of the original bill of lading"*. When the ship berthed at Lanshan on 29 December, a representative of the agents, Sea-Road attended onboard and advised the Master that he was there to handle cargo arrangements for Xiamen. Discharge was completed on 31 December, and the ship sailed without incident.

When "ZAGORA" called at Lanshan some eight months later, she was arrested by the Bank of China, who claimed to have paid for the cargo under a letter of credit, but not to have received any payment from the buyer, so that they were lawful holders of the bill of lading, and had a claim against the ship for misdelivery. That claim was brought under Chinese law. When the ship was arrested, the Owners called upon Oldendorff GmbH to honour the terms of the Letter of Indemnity, and to obtain the release of the ship. A similar request was passed along the Charterparty chain, but no action was taken to free the ship. Oldendorff broke the impasse by arranging security, without prejudice to their rights under their Charterparties, and the ship was freed to sail almost one month after the arrest.

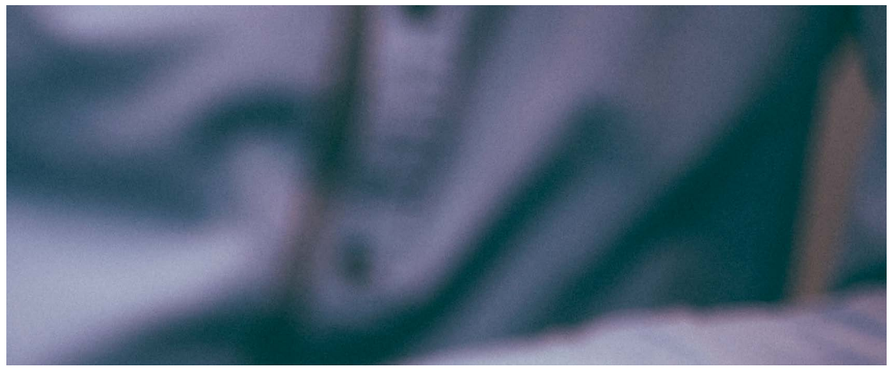
Oldendorff Carriers then commenced a court action in London against SCIT Services to enforce their Letter of Indemnity. SCIT Trading in turn commenced proceedings against Xiamen, and, when Charterers raised arguments in defence, Oldendorff also commenced an action against the Owners, so that they could pass any defences back along the charter chain. The three actions, between Owners and Oldendorff GmbH, Oldendorff Carriers and SCIT Services, and SCIT Trading and Xiamen were consolidated so that all of the arguments could be heard before one court. Before the case reached court, Xiamen and the SCIT companies dropped out of the proceedings, so that only the Owners and the Oldendorff companies appeared at court. Oldendorff Carriers might have obtained a default judgment against SCIT Services, but Oldendorff's counsel requested that the Court hand down a judgment on the merits, as it was considered that it might be easier to enforce such a judgment against SCIT Services in the future. Oldendorff also raised arguments that had been brought by Xiamen or SCIT, as defences against the Owners.

Charterers' main argument was that discharge and delivery are different concepts (see the *BREMEN MAX* www.steamshipmutual.com/publications/Articles/LOI1208.html, a case that was also decided by Teare J) and that the Owners had been instructed to discharge the cargo to Sea-Road, who were acting as Owners agents for this purpose, and that Sea-Road were to deliver the cargo against presentation of a bill of lading later. As such the Letters of Indemnity were not triggered by mere discharge of the cargo to Owners agents because this did not amount to delivery to Xiamen. However, the Court found on the facts that Sea-Road were acting as agents of Xiamen, and because Owners had been ordered to deliver the cargo to Sea-Road the letters of indemnity were triggered: Oldendorff were bound by the terms of the letter that they gave to the Owners, and had a claim against SCIT Services under their Letter of Indemnity.

This case is a reminder to Members of the potential pitfalls of agreeing to deliver cargo carried under a bill of lading without the production of a bill of lading. Whilst a common practice there is no P&I cover for liabilities, costs, or expenses arising from delivery in these circumstances unless otherwise determined by the Club's Directors.

When a Member agrees to surrender possession of the cargo by discharge or delivery other than against production of the relevant bill of lading the Member no longer has *"the power to compel any dealings in or with the cargo which can prevent the consignee from obtaining possession"* (Tomlinson J - *The Jag Ravi*). As such, there is a risk of claims for misdelivery and, as this case highlights, Letters of Indemnity intended to protect the Member against the potential consequences (i.e. arrests) and liabilities arising from such claims (and the associated costs) are not always honoured as a Member might expect.

While the Club recommends a wording for Letters of Indemnity against delivery of cargo without production of bills of lading (see www.steamshipmutual.com/Circulars-London/L.141.pdf), it is a commercial decision for the Member to make as to whether the party that issued the Letter of Indemnity will be both willing and able to comply with the provisions of the Letter of Indemnity when the consequences and liabilities might be substantial. Careful attention should also be given to the wordings of any Letter of Indemnity that might be offered. ■



"Whilst a common practice there is no P&I cover for liabilities, costs, or expenses arising from delivery in these circumstances unless otherwise determined by the Club's Directors."

Maintenance – Test Whether the Claim is Unreasonable

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Sabow v American Seafoods Company, USDC W.D. Wa. Case No. C16-0111-JCC

Crewmember Rodwan Sabow suffered a back injury in February 2015 whilst working as a fish processor on-board an American Seafoods Company (ASC) vessel. Surgery was required and duly paid for by the employer, as was maintenance at the daily rate set out in his individual employment contract; this being US$30 a day. When a seaman is injured in the service of the vessel it is the vessel owner's duty to pay the seaman maintenance compensation, for room and board, along with cure payments for medical treatment necessary to restore the seaman to health.

The crewmember contended this rate did not cover his room and board expenses and requested an increase to US$37.97 a day. Previously the case of *Rowell v Tyson Seafood Grp*, [1999] WL held that *"A seaman's right to a reasonable payment for maintenance is a legal right that cannot ordinarily be abrogated by contract."* However, the Ninth Circuit has held that a collective bargaining agreement limiting the amount of maintenance is enforceable albeit this generally does not extend to individual employment contracts as was the case here.

The request for an increased sum was rejected and resulted in Sabow filing suit; in response to which ASC made an application for declaratory relief on the issues of Jones Act negligence and unseaworthiness. Sabow argued the application should be dismissed due to his right to have his maintenance claim heard separately and because of a seaman's rights to choice-of-forum privilege. He had filed his maintenance and cure action in federal court but wanted to have the Jones Act and unseaworthiness counts heard in state court.

The first issue the Court had to address was the standard of review to be applied to the pre-trial motion filed by ASC, with ASC asserting that the summary judgment standard should apply. The dilemma this placed before the court was that the summary judgment standard requires facts to be construed in a light most favourable to the non-moving party, in this case the ship-owner, whereas the Jones Act position requires all doubts to be resolved in favour of the seaman.

The Washington Supreme Court previously gave guidance on this issue holding that the summary judgment standard applies only to determine a seaman's initial entitlement to maintenance and cure on the basis that this initial entitlement *"presents legal questions that can properly be resolved on summary judgment," but that "it does not necessarily follow that the summary judgment standard must be applied to a seaman's motion to reinstate maintenance and cure."*

This judgment did not squarely address the facts in Sabow's case where the issue was the rate payable as opposed to the entitlement. However, the Court ruled the point to be moot on the basis that ASC had not shown any true dispute of fact such that would allow the Court to rule in their favour.

This led to the Court turning to the question of what a reasonable maintenance rate would be. Sabow argued that costs should be measured against the expense of lodging locally shoreside whereas ASC argued that the measure should be the cost of living aboard ship. It has been traditionally accepted that a seaman is entitled to food and board of equivalent quality to that which he or she would have received onboard the ship.

Recently courts have recognised that it is impractical to base the maintenance rate compared with conditions on the ship and in *Hall v Noble Drilling*, [5th Cir. 2001] (Hall) Judge Robart held that when determining the proper rate of maintenance one should consider *"what is reasonable in the seaman's locale and not simply what would cover the literal equivalent of conditions aboard the ship."* The Court agreed that this was the proper method to be used to calculate a reasonable rate.

Having reached this conclusion the issue then became how to calculate what the rate should be. In *Barnes v Sea Hawaii Rafting* [2014], the District of Hawaii cited the Fifth Circuit in applying a three-part test for determining the maintenance award:

"First, the Court must estimate two amounts: the plaintiff seaman's actual costs of food and lodging; and the reasonable cost of food and lodging for a single seaman in the locality of the plaintiff. In determining the reasonable costs of food and lodging, the Court may consider evidence in the form of the seaman's actual costs, evidence of reasonable costs in the locality or region, union contracts stipulating a rate of maintenance or per diem payments for shoreside food or lodging while in the service of a vessel, and maintenance rates awarded in other cases for seamen in the same region.

Second, the Court must compare the seaman's actual expenses to reasonable expenses. If actual expenses exceed reasonable expenses, the Court should award reasonable expenses. Otherwise, the court should award actual expenses. Thus, the general rule is that seamen are entitled to maintenance in the amount of their actual expenses on food and lodging up to the reasonable amount for their locality.

Third, there is one exception to this rule that the Court must consider. If the Court concludes that the plaintiff's actual expenses were inadequate to provide him with reasonable food and lodging, the plaintiff is entitled to the amount that the Court has determined is the reasonable cost of food and lodging."

Based upon the judgment in *Incandela v Am. Dredging Co* 2nd Cir. [1981] Sabow adopted a different approach and argued that he was only required to make an initial *prima facie* showing that his living expenses are reasonable following which

"..... when determining the proper rate of maintenance one should consider *"what is reasonable in the seaman's locale and not simply what would cover the literal equivalent of conditions aboard the ship."*

the burden shifts to the vessel owner to produce rebuttal evidence. Having considered the options the Court was content to apply the burden-shifting test here.

Using this test Sabow was required to make a *prima facie* case showing that his living expenses were reasonable. The crewmember provided evidence which demonstrated he was renting a one bedroom apartment at a cost of US$800 a month. He further provided evidence that this cost was consistent with the average rental price for such a property in his area.

In *Hall v Noble Drilling* (above) the Judge said that; *"If a seaman rents a one-bedroom apartment for a reasonable amount, he is certainly entitled to reimbursement for all of his actual lodging expenses, since this is modest for even a single person."*

Sabow also supplied evidence of his monthly household expenses and food plan which was *prima facie* evidence that the request for a maintenance rate of US$37.97 a day was reasonable.

Whilst ASC presented evidence to show that a rate of US$30 was acceptable such an argument missed the point which was that it was not for the employer to show that the offered rate was reasonable but rather that the amount claimed was unreasonable. Evidence of the availability of cheaper accommodation elsewhere was also deemed to be irrelevant on the basis that a crewmember need not find the cheapest accommodations but only needs to show that his accommodation was reasonable.

ASC further asserted that, because the crewmember was living with his wife and children, the amount of his rent should be prorated. However, the Court ruled that such prorating is not appropriate when a seaman shares his home with his family. The logic being that a seaman who pays for the rent or mortgage of a home he shares with his family actually spends out-of-pocket the entire amount. He cannot pay any less without losing his home. If a seaman would incur the lodging expenses of the home even if living alone, then the entire lodging expense represents the seaman's actual expenses.

Therefore, taking into account all of the above, the Court found in favour of the crewmember and granted his motion for an increased rate of daily maintenance.

Having successfully prosecuted his claim the crewmember asked the Court to award attorney fees on the basis that when a seaman is forced to take legal action to secure an entitlement to maintenance and cure then an award of attorney fees is appropriate if the vessel Owner had no good reason for the failure to pay. The Court denied this request on the basis that given the lack of clarity in the case law they could not say that ASC's actions were without good cause. ■

Calcium Hypochlorite: It's Back and Hiding in Plain Sight

holman fenwick willan hfw

Rory Butler & Alex Kemp
Holman Fenwick Willan

The often dramatic risks associated with transporting calcium hypochlorite first came to light in the 1970's in a series of serious incidents involving US and Japanese producers. Casualties in the 1990's including (it has been suggested) "CONTSHIP FRANCE", "DG HARMONY", ACONCAGUA" and "CMA DJKARTA" brought the problem back into the spotlight with increased awareness of operators to these risks.

Calcium hypochlorite is often shipped in powder, granules or tablets as a white or yellowish solid. It is liable to exothermic decomposition at elevated temperatures, initiated by heat, impurities in the product or reaction with acids. The temperature at which self-accelerating decomposition commences can be as low as 50°C depending upon packaging. The potentially severe consequences of a casualty from calcium hypochlorite led to it becoming categorised as a dangerous cargo and included within the IMDG Code as a Class 5.1 oxidising agent (or on occasion a Class 8 corrosive).

Since the cargo has been categorised as an IMDG cargo, consistent with other IMDG cargos, some shippers have sought to misdeclare it, using euphemisms to avoid the increased rates associated with a dangerous cargo. They have been as misleading as "bleaching powder", "water treatment compound", "lime chloride" or "prechloroisocyanoric acid". Such misdescriptions have obvious practical and legal difficulties for the carrier and show a cavalier approach to the safety of terminal and container vessel workers. Whilst there are admirable efforts in the container industry such as CINS ("cargo incident notification system") which attempt to identify misdeclared shipments of all types, and their recent collaboration with the International Group on stricter guidelines for carrying calcium hypochlorite, this does not help where there is deliberate circumvention. For example, the new guidelines essentially add to the IMDG requirements and require plastic drums, adequate air circulation, a 45kg weight limit per drum and a maximum payload per container of 14mt.

However, the most concerning development is the rise in incidents allegedly caused by shipments fully declared and carried in accordance with the IMDG Code. The main producers of this chemical are now in China and India and so it tends to be shipped on East to West routes in hot and humid climates. At terminals, or on board, temperatures can reach the 50°C self-accelerating decomposition point. Transit via

"... some shippers have sought to misdeclare it, using euphemisms to avoid the increased rates associated with a dangerous cargo."

a container handling terminal in the Middle East where the container is left in the heat, even for a few days, could initiate heating. Reefers are one solution. Of course their efficacy require correct stowage and the continued operation of the refrigeration unit. Indeed, in the event of failure, a reefer can actually cause the heat produced by decompositions to accumulate faster. The new International Group guidelines[1] do not mandate the use of reefers and a decision on their use versus dry containers is to be subject to risk assessment.

It is not hard to imagine further incidents caused by correctly declared and carried shipments of calcium hypochlorite. Certain Owners and major container lines have simply banned shipments of calcium hypochlorite originating from India or China. Shippers will still need to transport their product and will seek to avoid higher freight rates. This may result in calcium hypochlorite going back to being an undeclared cargo and we return full circle to trying to identify misdeclared cargos.

Either way, it is clear we are experiencing seemingly the most prolific spate of fires/explosions, allegedly linked to calcium hypochlorite in history. In the past few years, it has been suggested that the following vessels suffered fires at the hands of calcium hypochlorite: "CHARLOTTE MAERSK", "AMSTERDAM BRIDGE", "HANSA BRANDENBURG", "NORTHERN GUARD", "HANJIN ATHENS", "MAERSK LONDRINA", "HANJIN GREEN EARTH" and "MAERSK SEOUL". What is most concerning are the lives lost – crew members providing in some cases truly impressive fire-fighting services.

However, this problem does not seem to capture the same interest of international bodies as other issues in container shipping. For example, the World Shipping Counsel has reported that on average (for 2011, 2012 and 2013) 733 containers were lost at sea per year, not including catastrophic losses. These will have been caused by various factors including stowage errors or stow collapses resulting from overweight containers. Therefore, in the last five years one could assume a maximum loss of around 3,665 containers from the world fleet from overweight containers. In contrast, according to Lloyds List Intelligence in the past five years or so there have been around 40 casualties reported to them where the cause is a fire/explosion on a container vessel. The cause of these fires will vary immensely though, as identified above, a significant proportion may be due to calcium hypochlorite.

With that in mind it is hard to understand why there has been such focus by the IMO on introducing mandatory rules requiring shippers to verify the gross mass of a container. Fires identified as possibly caused by calcium hypochlorite or other dangerous cargo result in damage to containers in far greater numbers than those lost overboard even before one considers vessel damage. Perhaps the time has come for this cargo to be once again given the close attention and regulation it requires.

This article was first published in IHS Fairplay (www.fairplay.ihs.com) and is reproduced with permission. ■

[1] The International Group and CINS have issued revised joint industry guidance on the carriage of Calcium Hypochlorite by sea. There are available through this link: http://www.igpandi.org/article/revised-joint-industry-publication-sets-out-guidelines-carriage-calcium-hypochlorite

Something in the Air: A Shipowner's Guide to Navigating California's Low-Sulphur Fuel Use Regulations

KEESAL YOUNG & LOGAN

David A. Tong
Keesal, Young & Logan

Califonia's Continued Regulation of Low Sulphur Use: How did we get here?

The United States has ratified MARPOL, including Annex VI's low-sulphur use requirements for vessels. Congress has implemented MARPOL as federal law. Annex VI is codified in the Code of Federal Regulations. Despite the existence of this robust international and federal regime requiring vessels to use low sulphur fuels when trading in United States waters, since 2009 the State of California, by and through the California Air Resources Board ("CARB"), has enforced its own low-sulphur fuel use regulations (the "CARB Regulations"). The CARB Regulations apply to vessels calling at Californian ports and apply equally to Owners, Operators, and Charterers of such vessels – regardless of any contractual agreements between such parties.

Since 1 January 2014, the CARB Regulations have required the use of distillate fuel with a sulphur content of 0.1% (1,000 ppm) or less for operating main engines, auxiliary engines, and boilers within 24 nautical miles of the California coast ("Regulated California Waters"). The CARB regulations contain a "Sunset Provision" which was hoped to be triggered when Annex VI's heightened requirement that vessels use fuel with a sulphur content of 0.1% when transiting the North American Emission Control Area (the "ECA") came into effect on 1 January 2015. The ECA extends 200 nautical miles off the United States' west coast and thus encompasses Regulated California Waters.

However, on 7 April 2016, CARB announced its decision not to repeal the CARB Regulations. Consequently, CARB decided to continue its enforcement of the CARB Regulations for at least the next two years. Those subject to the CARB Regulations should be prepared to comply with them for at least that time period and, perhaps, indefinitely.

The Sun Never Sets in California: CARB's Decision not to Repeal the CARB Regulations

CARB's decision not to repeal the CARB Regulations was based on three primary findings:

Distillate Fuel Requirement

The CARB Regulations specifically require the use of low-sulphur marine gas or diesel oil that meets all the specifications for DMB grades as defined in Table I of ISO 8217. Annex VI only requires the use of fuel with a sulphur content of 0.1%. Thus, in theory, compliance with Annex VI could be achieved through the use of low-sulphur, heavy fuel oil. Notwithstanding the commercial non-availability of such product, CARB appears to take issue with even the possibility of achieving compliance under Annex VI through the use of low-sulphur heavy fuel oil. CARB maintains low-sulphur fuel would be ineffective at reducing sulphur oxide (SOx) and diesel particulate matter (DPM) emissions.

Alternative Emission Control Technologies

Annex VI permits the use of fuel with a sulphur content exceeding 0.1% provided the vessel uses methods resulting in equivalent emission reductions. CARB does not currently believe such methods (namely, scrubber systems) are as effective at reducing SOx and DPM emissions as low-sulphur distillate fuels.

Fuel Sampling: It's Not What You Buy, It's What You Burn

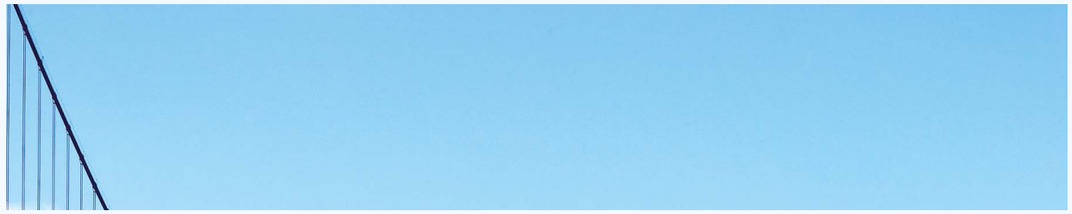
A USCG vessel inspection will focus primarily on Annex VI's record keeping requirements. The USCG does not currently engage in mandatory fuel sampling during such inspections. The USCG will sample fuel only when the records indicate an Annex VI violation has occurred.

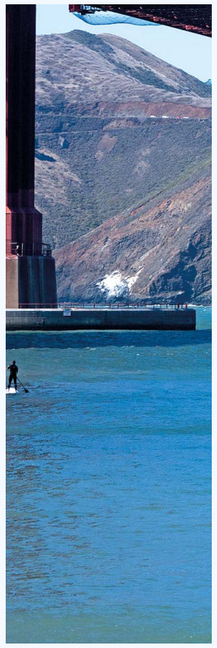
Conversely, CARB engages in mandatory fuel sampling. CARB's concern is not just that compliant fuel is bought, but that compliant fuel is burned. A bunker delivery note may prove compliant fuel was purchased, but it does not prove that compliant fuel was not contaminated. CARB believes contamination can be caught only through fuel sampling. Until the USCG implements a mandatory fuel sampling policy, CARB will likely continue to lack confidence in the efficacy of federal enforcement of Annex VI.

CARB'S Continued Enforcement of the CARB Regulations

The penalties and fines CARB has the authority to seek increase based on the magnitude of the violator's conduct. At the low end, penalties ranging from US$1,000 to US$10,000 per day apply to "strict liability"

"The penalties and fines CARB has the authority to seek increase based on the magnitude of the violator's conduct."





offenses, i.e., those for which the intent or negligence of the violator is irrelevant. On the high end, penalties and fines applicable to those who willfully violate the CARB Regulations can reach US$1 million per day for corporate violators. CARB follows a five-step approach in its enforcement of the CARB Regulations:

1. Detect violations,
2. Notify the violator,
3. Engage in a discussion with violator regarding the violation,
4. Determine the penalty amount, and
5. Resolve the case through a settlement, which will be made publicly available.

Fuel Testing and Notice of Violation

CARB tests all fuel samples its inspectors take at its own laboratory. CARB has made its testing procedures based on ISO 8754 which is publicly available. If CARB's test concludes a sample's sulphur content is non-compliant, it will issue a notice of violation which must state the legal basis for the penalty and how the penalty was determined, including mitigating or aggravating factors. Although CARB typically includes the sulphur content of the tested sample it does not, as a matter of practice, share its laboratory's reports and analysis of the sample.

Settlement Discussions

Violators are given an opportunity to engage CARB in settlement discussions. If CARB cannot settle the case, it will be referred to the State Attorney General's office, which will commence litigation.

Mitigating Factors

When determining penalty amounts, California law specifically requires CARB to consider:

- The extent of the harm to public health;
- The nature and persistence of the violation;
- The length of time over which the violation occurred;
- The compliance history of the violator, including the frequency of past violations;
- The preventative efforts taken by the defendant, including the record of maintenance and any program to ensure compliance;
- The unproven or innovative nature of control equipment; including the efforts of the violator to attain, or provide for, compliance.
- Actions taken by violator including nature, extent, and time of response of any cleanup and construction to mitigate violation;
- Cooperation of violator; and
- The financial burden to violator, including the financial condition of violator.

It is no surprise CARB considers whether or not it is dealing with a repeat violator, the extent of the air pollution caused by the violation, the steps taken by the violator to address the pollution once it has occurred, and the violator's level of cooperation with CARB. However, with respect to the highlighted factors, CARB will give a violator credit for the "installation, operation, and maintenance of equipment specifically intended to prevent, identify, and correct violations" and when the violator has undertaken "creative methods" or "unusual efforts" to achieve compliance, CARB does not provide specific examples of such equipment, methods, or efforts. These factors do not require CARB to give violators credit for conduct that simply meets the industry standard of care, or which is required by law. To achieve mitigation, such policies and procedures must exceed those standards.

For example, CARB may decide to reduce a penalty if a violator has implemented a *"voluntary disclosure program."* A voluntary disclosure program is a documented systematic, objective, and periodic set of measures specifically intended to prevent, detect, disclose, and correct low sulphur fuel violations.

Proactive Measures Shipowners can Consider Taking to Best Defend Against Enforcement of CARB Regulations

Here are some examples of measures that could be implemented, in whole or in part, with these principles in mind:

Heightened Bunker Specification Requirements

Given the incredibly small difference between compliant and non-compliant fuel, consider sourcing and purchasing distillate fuels as far below the 0.1% content threshold as possible.

Bunker Delivery Samples and Testing

Do not just rely on the bunker supplier's delivery notes, samples, and analysis as evidence that compliant fuel was purchased. At the time of delivery, ensure that the vessel takes its own samples of the bunkers as they are delivered. Have those samples tested by a reputable shore side laboratory for compliance. If the testing results state the bunkers are non-compliant, attempt to deviate to another port where compliant bunkers are available before entering Regulated California Waters.

Increased Tank Cleaning

CARB has recommended that before each bunkering of low sulphur fuel, *"…vessel operators may want to thoroughly clean storage, settling, and service tanks of any higher sulphur residual fuels or sludge."* If this is not achievable, assess whether the number of tank cleanings can nevertheless be increased beyond current practices.

Line Flushing

If a vessel's fuel transfer system is designed such that compliant, low-sulphur fuel is transferred from the storage tanks to the settling tanks and from settling tanks to the service tanks by using the same line as the heavy fuel oil when it is transferred, CARB has suggested that the engineering department *"…may want to flush those lines into a HFO settling [and service] tank for a prescribed amount of time to be sure [any low-sulphur fuel] contaminated with HFO is flushed before beginning transfer"* of the low sulphur fuel.

Dedicated Sampling Points

CARB inspectors will either identify with the assistance of the engineering department, or by themselves, the last possible point in a vessel's fuel transfer system where they can safely take a sample before the fuel enters the main or auxiliary engines. Frequently, this point, such as a purifier or injector, is not designed for the purpose of fuel sampling. For example, filters at such locations can collect residue and sludge which might result in a *"false positive"* result for samples taken from them. Consequently, consideration should be given to fitting a dedicated, downstream sampling location at a reasonable point before the fuel enters the engines for consumption. Short of that, the engineers should identify the point from which CARB will most likely take its fuel samples. In either case, this *"CARB dedicated"* sampling point should be regularly inspected and cleaned by the engineering department – especially before calling at a Californian port.

Onboard Sampling and Testing

The engineering department should take samples from the dedicated sampling point when the vessel is within regulated California waters so that those samples can be tested. Onboard samples should be sent to a reputable shore side laboratory for testing.

Inspections of Possible Contamination Points

Establish a schedule for inspection of possible points within the fuel transfer system for contamination of low-sulphur fuel with non-compliant fuel. Log these inspections, including whether any conditions are discovered that may cause contamination, and all measures taken to correct and repair those conditions.

Sampling at Time CARB Conducts its Inspection

CARB's inspectors will be among the first people to board a vessel once it is alongside. The vessel will not likely be able to secure the attendance of an independent surveyor or local P&I correspondent in time for the CARB inspector's fuel-sampling. Therefore, the engineering department should request a cut of CARB's fuel samples. If CARB refuses, the engineers should provide the CARB inspector with a letter of protest documenting the inspector's refusal, and keep a copy of that letter for the vessel. The engineering department should then take its own fuel sample as contemporaneously as possible to the time the CARB inspector takes its own (i.e., either immediately before or after). If the vessel receives a notice of violation based on CARB's sample, samples obtained by the vessel under either of these scenarios will enable the company to conduct a test on the same, or essentially the same, fuel tested by CARB. If the vessel's test results show the fuel is compliant, vessel interests will be in the best position possible to argue that no violation occurred. Compliant fuel samples taken by a local correspondent or surveyor even just hours after CARB has taken its samples, will not have the same credibility as test results on a cut of CARB's own sample or samples taken immediately before or after CARB took its sample.

Random Third-Party Audits

Retain third-party auditors to conduct random onboard audits of compliance with any of the foregoing measures, or variation of the same, which are implemented.

Comment

In light of the significant differences that exist between CARB's and the USCG's enforcement of low-sulphur fuel use regulations, those subject to CARB's regulations should prepare themselves for the possibility that CARB's enforcement of them will be indefinite. Those seeking to best position themselves to avoid violations, challenge notices of violations, or mitigate penalties sought by CARB should consider proactive measures, to one degree or another, similar to those recommended in this article. ■

Once On Demurrage, Always On Demurrage?

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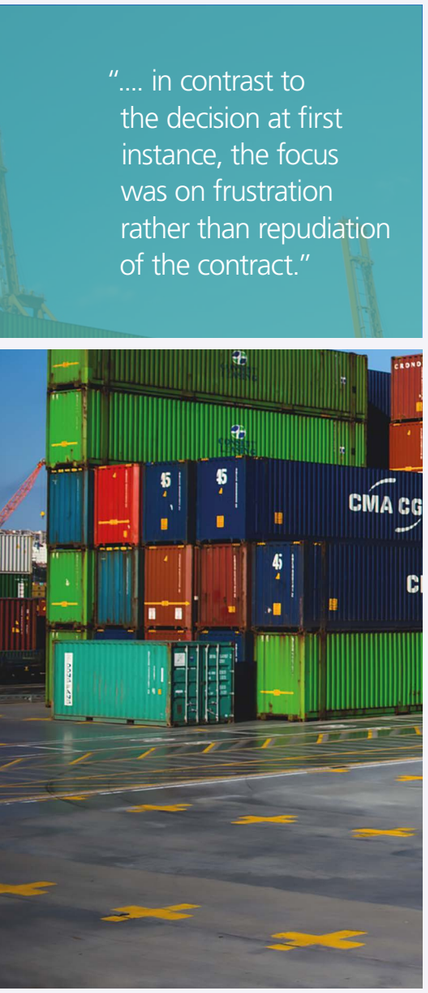
MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt [2016] EWCA Civ 789 was an appeal from the first instance Commercial Court decision [https://www.steamshipmutual.com/publications/Articles/mscmediterraneanshippingcottonex-anstalt.htm] and raises important issues relating to the law of international trade.

The Court of Appeal held that demurrage on detained containers did not accrue indefinitely and that, in contrast to the decision in the Commercial Court that MSC had no legitimate interest in keeping the contract alive beyond the 27 September 2011, the well recognised English law position that an innocent party can choose whether to bring the contract to an end by accepting repudiatory conduct or affirm the contract, did not apply in this case because the contract had been frustrated by delay.

The Facts

The case arose out of a shipment of raw cotton carried in 35 containers to Bangladesh, in mid-2011. The containers were owned by the carrier and under the terms of the relevant bills shippers were obliged to return the containers within 14 days of discharge from the vessel, failing which demurrage for late delivery would begin to accrue.

"…. in contrast to the decision at first instance, the focus was on frustration rather than repudiation of the contract."



The price of raw cotton collapsed and receivers failed to take delivery. The result of this was that the containers remained uncollected, and the Bangladeshi port authorities refused to allow carriers or anyone else to unpack the goods.

On 27 September 2011 shippers informed carriers that legal title to the goods had passed to receivers since it had received payment for the cotton under the letters of credit. It was also argued that they were no longer the lawful holder of the bills. On this premise shippers refused to pay demurrage.

Carriers pursued an action against shippers to seek recovery of outstanding demurrage, arguing that demurrage continued to accrue for so long as the containers were not redelivered. On the other hand, shippers argued that their inability to redeliver the containers within the foreseeable future amounted to a repudiation of contract, which carriers were obliged to accept, thereby bringing the contract and any continuing obligation to pay demurrage to an end.

First Instance

Leggatt J held that the demurrage clause was triggered and as a result demurrage did accrue, but it did so only up until the 27 September 2011 when the shipper repudiated the contract and there was no realistic prospect of redelivery. Thus it was held that at this point carriers had no legitimate interest in keeping the contract alive. To do so would be *"wholly unreasonable because the carrier has not been keeping the contracts alive in order to invoke the demurrage clause for a proper purpose but in order, in effect, to seek to generate an unending stream of free income"*. In reaching this conclusion the judge relied on English common law principle of good faith in contractual dealings and the exercise of contractual discretion a being analogous to the exercise of an option to terminate a contract.

Court of Appeal

The carriers appealed and continued to argue that demurrage accrued indefinitely with a corresponding obligation on the shippers to pay damages until redelivery.

It is worth taking a step back to consider the key legal principles in this context. Under English law a contract which is capable of performance, but is repudiated by a party does not come to an end unless that repudiatory conduct is accepted by the innocent party as bringing the contract to an end. Alternatively the innocent party can affirm the contract and insisting on performance subject to having a legitimate interest to do so. This principle was discussed and reaffirmed in the context of Time Charterparties in *The Aquafaith* [https://www.steamshipmutual.com/publications/Articles/Aquafaith0512.htm].

In the Court of Appeal in *MSC v Cottonex Anstalt*, Moore-Bick LJ held that the contract came to an end automatically on 2 February 2012 when, in an attempt to break the deadlock, the carriers offered to sell the containers to the shippers. This was on the basis that as a result of the shippers' breach the commercial purpose of the contract had become frustrated. The Judge went on to state that any consideration as to whether or not carriers had a legitimate interest in affirming the contract was a moot point since the contract had in any event become frustrated. Therefore, in contrast to the decision at first instance, the focus was on frustration rather than repudiation of the contract. As a result of the decision that the contract had automatically ended it was not open to carrier to affirm the contracts since it was no longer capable of performance. However, having brought about that situation by its breach in failing to redeliver the containers the shipper was liable in damages for the loss of the containers.

Likewise considerations of good faith were dismissed on the basis that it may undermine commercial certainty, setting a dangerous precedent for parties to invoke this principle and detract from terms which the parties have previously agreed. When commenting on the support the judge in the Commercial Court derived from this principle Moore-Blick LJ said:

"The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case."

and

"There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction,…"

Shippers also argued that carriers were under a duty to mitigate its losses by buying replacement containers. Moore-Bick LJ rejected this argument holding that the duty to mitigate does not arise in a claim for liquidated damages.

Tomlinson LJ supported the leading judgment stating *"there is no alternative to the conclusion that the contract has come to an end"*.

Comments

The key message from this decision is that parties negotiating demurrage clauses should not expect a constant income stream once the clause is triggered. Determination of the amounts due will largely depend on whether or not the contract has become incapable of performance and has become frustrated. This will of course depend on the facts of any matter and the steps taken by the parties in relation to performance. ■

The *Longchamp* – The Court of Appeal Considers When is an Alternative Actually the Same Thing and a Ransom Reasonable?

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Although the decision of the Court of Appeal in this case is relevant to specific points, on specific facts and applying the somewhat esoteric York Antwerp Rules it does illustrate why shipping law remains a fascinating niche. General Average ("GA") is an ancient concept and although the codifying York Antwerp Rules ("YAR") keep being tweaked (most recently YAR 2016 – https://www.steamshipmutual.com/Circulars-London/L.281.pdf) they are also of a longstanding pedigree. Despite the weight of history, it still fell before the Court in the 21st century to determine if the cost of running a ship whilst her Owners negotiated with pirates to obtain her release was a GA expense.

GA is essentially a system by which some of the costs or losses incurred rescuing the vessel from peril are shared amongst those with an interest in the vessel in proportion to their financial interest in the vessel and her cargo etc. "Average" is a somewhat anachronistic way to say "loss". In most cases the mechanistic application of the YAR will determine if an "average" is to be shared between the parties (i.e. "general average") or should lie where is falls (i.e. "particular average"). In this case there was a disagreement whether certain expenses were general or particular average.

Background

Pirates boarded the vessel during passage of the Gulf of Aden and after a brief shoot out with the Indian Navy, took control of the vessel and forced her crew to sail to Eyl, Somalia. A ransom demand of US$6 million was made and rejected by the vessel's Owners. Thereafter something akin to a commercial negotiation took place between the pirates' negotiator and professional negotiators hired by Owners. Eventually after a period of 51 days a ransom payment of US$1.85 million was agreed, and five days later was delivered to the pirates by airdrop into the sea. The pirates released the vessel the next day and the vessel sailed.

The vessel's cargo was carried pursuant to a bill of lading which incorporated the YAR 1974. During the vessel's captivity Owners declared GA. Subsequently, a GA adjustment was published determining which expenses and losses were to be shared amongst those with an interest in the vessel at the time of her capture, and which costs or expenses were not GA and so should lie where they fell. There was no dispute that the ransom payment was a GA expense; thus cargo owners paid their share. The GA Adjuster went further, however, and also found that the Owners' cost of crew wages, bonuses, maintenance and the bunkers consumed during the detention were GA expenses. The rationale behind this decision was stated by the Adjuster as follows:

"… an amount of US$4,150,000.00 was saved in the common interest of all property owners concerned, which would have been otherwise recoverable in General Average as per Rule A of the York-Antwerp Rules 1974. We are of the considered opinion that the expenses, which were incurred during the period of negotiation over the ransom amount, can be allowed in General Average as substituted expense as per Rule F of the York Antwerp Rules 1974, but only up to the amount of General Average expense which has been avoided."

Rule F of YAR 1974 states:

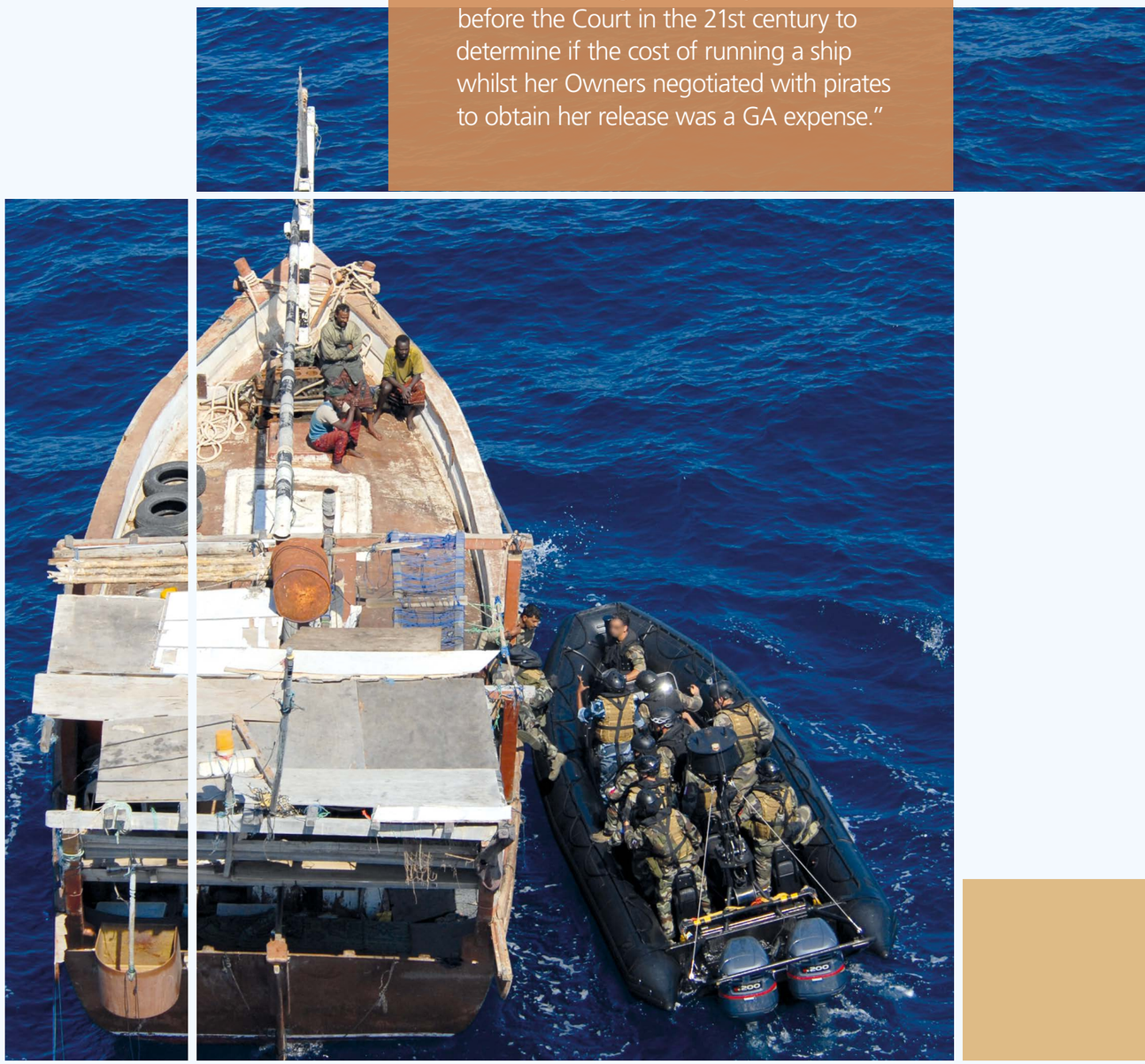
"Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided" [the YAR 2016 wording is materially the same].

Whilst the Adjuster believed the crew costs etc fell into Rule F, his contemporaries in the Association of Average Adjusters disagreed, as did the cargo interests, and so the dispute found its way to the High Court.

The High Court upheld the Adjustment in robust terms, stating there was *"no doubt"* that the expenditure in question was incurred in substitute for a higher ransom payment, and thus Rule F was engaged. The Court also found that if the Owners had paid the original demand of US$6 million this would have been a reasonable course of action meaning the whole of this sum would have been a GA expense. The effect of this finding is that there were two courses open to Owners at the outset: (i) pay the first ransom demanded or (ii) refuse and negotiate. Following the High Court's formulation the cost incurred maintaining the crew during the negotiation is a substitute for the difference between the first ransom demand and the final agreed figure.

The cargo interests disagreed and appealed to the Court of Appeal. There were various issues for the Court to determine. For the purpose of this article focusing on just the Rule F issue the question was what constitutes a reasonable ransom payment.

"Despite the weight of history, it still fell before the Court in the 21st century to determine if the cost of running a ship whilst her Owners negotiated with pirates to obtain her release was a GA expense."



Before the Court of Appeal

The Court of Appeal was content to adopt the High Court's formulation as to what is required to trigger an expense becoming an alternative GA expense under Rule F. The salient part of this formulation is that for Rule F to apply, there must have been an alternative course of action that, if adopted, would have led to expenditure that would have been GA expense.

Was there an alternative course of action open to Owners in the circumstances? In disagreeing with the High Court, the Court of Appeal reached the conclusion 'no': there was in reality only one course of action open to Owners, and that payment of an initial ransom demand or payment following a period of negotiation were two acts on the same continuum, not alternatives. Hamblen LJ held *"…payment on demand is simply a different way of going about the same course of action and not an alternative course of action. Whether or not the ransom is paid on demand there will still be negotiation, there will still be delay, there will still be the incurring of*

vessel and crew running costs during the period of delay. In either case the same expenses will be incurred; the difference is only in their extent." The Court of Appeal seems particularly to have taken into account the fact that after the ransom had been agreed there was still a period of some six days whilst the mechanics of the airdrop of the ransom and the vessel's release were discussed between the pirates and Owners, and was then implemented.

Although it perhaps did not need to go further to determine this dispute, the Court of Appeal moved on to consider whether - hypothetically in light of its finding there was no alternative course of action open to Owners - if payment of the initial ransom demand had been paid would this have been rightfully a GA expense? Under Rule A of YAR Rule 1974 (and later incarnations) expenses can only fall into GA if they are reasonably incurred. As such, if it was held that it was not reasonable to pay the initial demand then this would have been another basis on which Owners' claim for the cost of maintenance would have been stymied: the unreasonable payment of the initial demand would not fall within Rule A and thus the cost of maintaining the vessel whilst negotiating to reduce the demanded figure could not amount to an *"expense incurred in place of another [permissible GA] expense"* under Rule F.

The Court of Appeal agreed with the High Court that if Owners had paid the original demand of US$6 million this would have been a reasonable course of action and so would not fall foul of Rule A. The Court reasoned that there are obvious risks to people and property whilst the ship is subject to capture by armed criminals. Paying the initial ransom demand may well be the quickest, safest way to rescue the ship, and so this course of action should not be said to be *"unreasonable"*.

No doubt this reasoning is flavoured by pragmatism and policy: it is clearly not desirable to try to set a rule of law as to what is, and is not, a reasonable ransom payment. Whilst it seems the Somali pirates were prepared to negotiate ransom payments their *modus operandi* may not be shared by other criminals engaged in piracy. This point is important not just in the context of a Rule F dispute but also in future piracy related adjustments as well. If the Court of Appeal had found that payment of such an initial ransom was unreasonable one can imagine litigation in future cases where parties seek to avoid contributions to ransom payments as a GA expense on the argument that Owners should have negotiated a better deal and hence the payment made was not *"reasonable"* under YAR Rule A. It seems the Court of Appeal has put paid to this argument in all but the most extreme cases.

In summary, Owners' cost of keeping the crew and ship running whilst negotiating a ransom demand does not fall into GA. On the other hand an English Court will likely demur from applying a criteria of reasonableness to the size. ■

"Members may wish to consider including in Charterparty contracts express provisions detailing the price to be paid for bunkers in excess or short of those required to achieve about the same quantity on redelivery as on delivery."

Issues with Quantities on Redelivery

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Under most Time Charterparties, the supply of bunkers is the responsibility of Charterers. Bunkers will usually become Charterers' property upon delivery of the ship until they are purchased back by Owners upon redelivery.

With regard to the quantity of bunkers Charterers should supply to the vessel for redelivery, Owners are under a general duty to assist and to provide Charterers with all relevant information to enable Charterers to arrange this supply. Further, Charterers will not be permitted to order additional quantities which are not required for the performance of the chartered service for their own commercial purposes, for example to make a trading profit on redelivery where the market price is less than any stipulated contract price. Whilst these are general rules, there are a number of areas in which disputes can arise in relation to the quantity of bunkers to be on board on redelivery and the price to be paid for those bunkers, particularly at times where the bunker market is volatile or profit margins are narrow. The purpose of this article is to discuss some of these issues and relevant arbitration decisions which provide guidance on these.

What Margin is Applied by Using the Term *"about"* to Describe the Required Quantity of Bunkers on Redelivery?

The term *"about"* is often used to qualify speed and performance warranties and in this context it has an accepted meaning. However, it is also often used to describe the bunkers to be on board on delivery and redelivery and unfortunately when used in this manner its meaning is less certain.

It is obviously difficult to determine precisely when a vessel will be redelivered so it is logical that an allowance is made. However, the quantity of bunkers on board on redelivery may result in one party making a profit and, therefore, the key question is how much of an allowance is permitted.

In London Arbitration 13/03 the Tribunal considered the margin to be applied where a Charterparty required Charterers to redeliver the vessel with *"about"* the same quantities of bunkers as on delivery. The vessel had been delivered with 1598.800 mt of IFO and Charterers argued that taking into consideration a 5% margin for *"about"* they were allowed to redeliver the vessel with a minimum quantity of 1518.860 mt.

The Tribunal held that there was every reason for a margin to be allowed since it was not always possible to obtain precisely the same amount of bunkers to be on board on redelivery as on delivery. They concluded that Charterers were not in breach if they were within a 5% margin of the delivery quantity.

In the later decision in London Arbitration 15/13 (https://www.steamshipmutual.com/publications/Articles/MoreCargoOnBoard1113.htm), the Tribunal considered a similar contractual obligation, Charterers also relied on a 5% margin. In contrast, Owners' position was that the margin should only be 2% and that there was no standard rule (unlike in speed and performance claims).

Owners had advised 12 days before redelivery that the vessel would need at least 133 mt of IFO. Despite

this, Charterers stemmed only 95 mt of IFO at the last discharge port prior to redelivery. Therefore, there was no genuine difficulty in ascertaining the quantity needed for redelivery bunkers in advance of redelivery as the Master had provided the necessary information.

The Tribunal concluded that any absolute rule where the term about was held to mean 5% would lead to an unacceptable situation where Charterers could try and save costs by redelivering with a 5% shortfall. In addition, the particular facts would need to be considered. For example, if, as in this case, the vessel could stem bunkers shortly before redelivery, a further tolerance for unexpected weather conditions may not be justifiable. The Tribunal held that a shortfall of no more than 2% was appropriate on these facts.

It appears from these decisions that the margin to be applied will depend on the proximity of the last bunker stem to the place at which the vessel is to be redelivered. Whether an estimate has been made on honest and reasonable grounds or a Charterers' decision is influenced by potential costs saving is likely to be a further consideration.

What Price is Payable for Bunkers Remaining on Board on Redelivery in Excess of the Quantities Required?

In London Arbitration 17/15, the Master had requested a supply of bunkers in excess of the quantity Charterers believed were required on redelivery - which was about the same as on delivery. The quantity of bunkers required was queried by Charterers but when the Master confirmed the quantity, arrangements were made by Charterers to stem these bunkers at a price of US$408.50 per mt.

The vessel ended up with 272.427 mt more on redelivery than the charterparty required, even after allowance had been made for the term *"about"*.

Following redelivery, Charterers argued that the excess bunkers should be paid for at the Charterparty price i.e. the fixed price stipulated in the Charterparty for bunkers on delivery and redelivery, which was US$500 per mt. Owners argued that the market price in the redelivery area, US$328.50 per mt, should apply.

The Tribunal observed that whichever party was successful in their argument would make a windfall profit. To decide how to approach this matter, the Tribunal applied what they termed *'business common sense'*, and concluded that Charterers were entitled to receive the price that they had paid for the excess bunkers and no more (i.e. an additional US$21,794.16 (272.427 mt x (US$408.50 – US$328.50)) to that shown in the Owners' final hire statement).

Whilst it was not relevant to this case, where a Charterparty makes no provision for the bunker price to be paid on delivery or redelivery, the market price in the redelivery area will apply without regard to the price actually paid. However, certain Charterparty forms either specify the price or provide a mechanism for establishing the price. By way of example, the Shelltime 4 form (line 290) provides that: *"Such prices are to be supported by paid invoices."*

Delayed Delivery Resulting in Bunkers Less than the Required Redelivery Quantity – What Price is Paid by Charterers to Compensate Owners?

Another potential problem for Charterers is where they have stemmed bunkers for redelivery, and this amount is anticipated to fall within the margin of about the same quantity as on delivery, but then unexpected delays occur, for example due to port congestion, resulting in the vessel being delivered with a quantity of bunkers less than that required. In circumstances where the market price is significantly higher than the bunker price set out in the contract, this may lead to a debate as to what price is to be paid by Charterers to Owners for the shortfall.

If there is a contractual obligation to redeliver with *"about"* the same quantities as on delivery, and Charterers deliver with a quantity which is less than this amount, they will be in breach of the Charterparty. This will be the case even where the circumstances that have put Charterers in breach are beyond their control. The key question will then be what damages are payable as a result. The ordinary measure of damages would be that which would out Owners, in this case the innocent party, in the position they would have been in but for Charterers' breach.

If Charterers redelivered the vessel with the correct quantity of bunkers, Owners would pay for those bunkers at the price set out in the Charterparty. However, where the vessel is redelivered with a shortfall, Owners will have to purchase bunkers at the higher market price to make up that shortfall. On this basis, the market price for bunkers is likely to be the measure of loss for any bunkers less than *"about the quantity on delivery"*. Whilst it will depend on the facts, for example when and where redelivery bunkers were stemmed, and where Owners will next take bunkers on board, the price paid for the bunkers prior to redelivery may be a sensible measure of the market price and therefore market loss.

Comment

As highlighted in this article, there are a number of issues which can arise with bunker quantities on redelivery. The circumstances in which such issues arise are likely to be influenced by the bunker market at that time.

To avoid similar issues arising, Members may wish to consider including in Charterparty contracts express provisions detailing the price to be paid for bunkers in excess or short of those required to achieve about the same quantity on redelivery as on delivery.

The outcome of any dispute on such issues will depend on the specific facts and wording of any relevant Charterparty clauses. In this respect, it is important to ensure these terms of the Charterparty reflect the intended agreement between the parties. ■

Back to the Future – The Shipping Way

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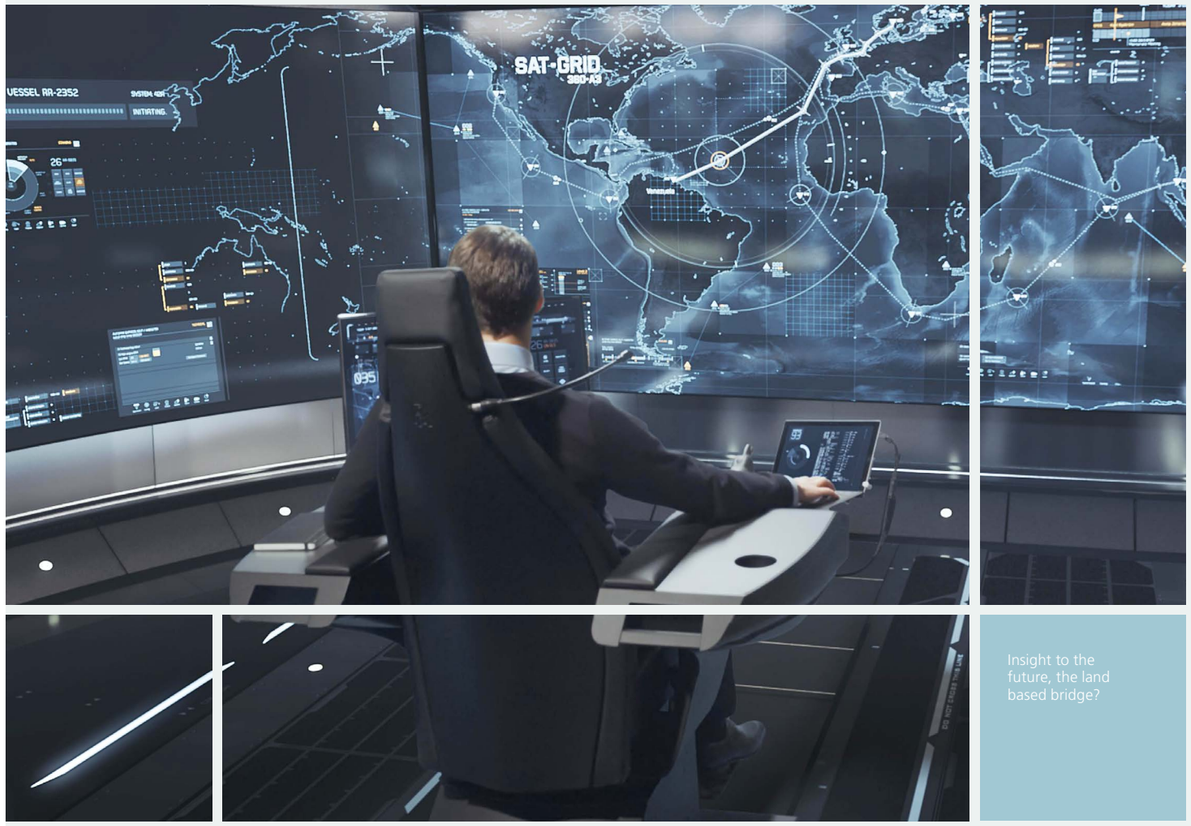
"Autonomous shipping is the future of the maritime industry. As disruptive as the smartphone, the smart ship will revolutionise the landscape of the ship design and operations"
Mikael Makinen, President Rolls-Royce Marine[1]

Rolls-Royce presented its vision of the future at the 2016 Autonomous Ship Technology Symposium in Amsterdam. Together with other partners in the Advanced Autonomous Waterborne Applications (AAWA) project, Rolls-Royce joined forces with universities, ship designers, equipment manufacturers and classification societies with the aim of revolutionising the shipping industry.

The white paper released in 2016 by Rolls-Royce argues that autonomous ships will save costs, weight, space, as well as enabling more cargo to be carried and reduce human error on board vessels. The project has received €6.6 million of funding from Tekes (Finnish Funding Agency for Technology and Innovation) and is expected to run until the end of 2017.

AAWA is already undertaking trials with its partners Finferries, ESL Shipping and Brighthouse Intellegience. The "Stella", a FinFerries ferry, is testing a combination of sensor technologies – for example, high tech cameras and various radar systems, including guided radar or 'Lidar' (Light Detection And Ranging), which enable the vessel to monitor both its environment and gather data for its own 'health'. ESL Shipping will explore how remote and autonomous technology can be used for shorter cargo trips. Brighthouse Intelligence will focus on developing cybersecurity solutions and situational awareness packages: a pre-requisite for autonomous ships.

It is intended that vessels will be manned in operation rooms miles away from the ship. This will require new skills with the potential for new job opportunities, particularly for younger people. An added benefit



Insight to the future, the land based bridge?

for the 'remote crew' is that they will not be exposed to the normal risks of a life at sea – that can arise from both internal and external factors – and will be able to spend more time with their families.

Cargo management and emergency situations are set to be handled either by automation or tele-operation. The white paper does not yet provide a fixed formula as to how these will be handled. The effectiveness of cyber security will be vitally important in order to obtain industry approval. Again the white paper does not discuss specifics but recognises that remote and autonomous vessels need to be made *"as safe as existing vessels with sufficient confidence taking into account relevant uncertainties"*.

A fundamental question is whether a ship without a crew is a ship or a drone. The white paper concludes that autonomous vessels will qualify as "ships" under various laws. However, when current laws and regulations have been drafted in an era of crewed vessels substantial change will be required to address the issues and risks posed by driverless, or even crewless, vessels. Indeed, supporters of the idea recognise that the biggest obstacle to change is not technical but regulatory.

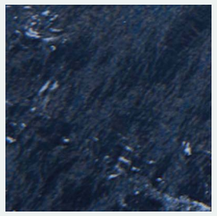
There is interest in the concept of autonomous vessels with the European Union funding a €3.5 million study – the Maritime Unmanned Navigation through Intelligence in Networks project. This suggests that eventually there will be widespread interest in crewless vessels with in consequence the need for everyone involved in shipping to address change. It has been said that *"…autonomous shipping is not a question of whether or not but rather a question of when."*[2]

If or when it happens the transition to an autonomous unmanned shipping era will take place gradually. AAWA anticipates that the first ship with reduced crew and remote support will be sailing by 2020 and, after a further 15 years, there will be autonomous unmanned ocean vessels sailing international waters.

In 2017 such change may seem unlikely, or perhaps too much akin to a scene from a Star Wars film, but in much the same way that containerisation and diesel engines transformed shipping, driverless ships may do so too. Before then there are numerous challenges and hurdles to clear but autonomous vessels may represent the future, and some commentators see digital shipping and automatisation as a safer and less costly way forward for shipping that may offer a solution to the current depressed shipping markets. ■

[1] AAWA Position Paper, *"Remote and Autonomous Ships - The next Steps"*, pp. 4
[2] AAWA Position Paper, *"Remote and Autonomous Ships - The next Steps"*, pp. 77

Images courtesy of Rolls-Royce PLC



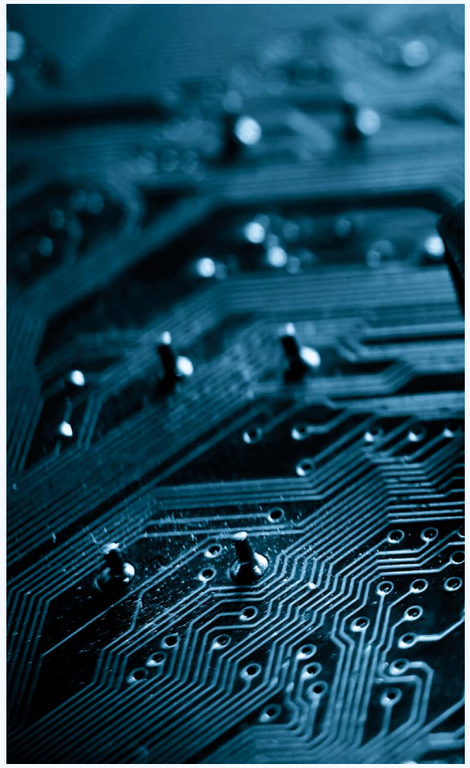
"AAWA anticipates that the first ship with reduced crew and remote support will be sailing by 2020 and, after a further 15 years, there will be autonomous unmanned ocean vessels sailing international waters."

USCG Clarifies Reporting Requirements of Cyber Related Incidents for Vessels and Facilities with USCG Approved Security Plans

KEESAL YOUNG LOGAN

David A. Tong & Sean Cooney
Keesal, Young & Logan

"The Policy Letter provides guidance on the types of physical and cybersecurity related events that may trigger reporting requirements.... "



The U.S. Coast Guard recently published CG-5P Policy Letter 08-16: "Reporting Suspicious Activity and Breaches of Security" (the "Policy Letter") http://www.kyl.com/wp-content/uploads/2017/01/CG-5P-Policy-Letter-08_16.pdf. The Policy Letter clarifies what type of cybersecurity events constitute suspicious activity ("SA") and a breach of security ("BoS") that must be reported to the National Response Center (NRC).

Currently, any operator of a vessel or facility with an approved Vessel Security Plan (VSP) or Facility Security Plan (FSP) is required to report to the NRC any activity that may result in a transportation security incident. This includes any SA (observed behavior reasonably indicative of pre-operational planning related to terrorism or other criminal activity) or a BoS (incidents in which a security measure has been circumvented, eluded, or violated).

While cyber-related incidents may trigger SA or BoS reporting requirements, the Coast Guard recognises that vessel and facility operators experience countless malicious but low-level cyber events that are addressed via standard anti-virus programs or network security protocols. These routine threats do not need to be reported as SA or a BoS.

The Policy Letter provides guidance on the types of physical and cybersecurity related events that may trigger reporting requirements, and those that do not. The following activities must be reported as either SA or a BoS:

Suspicious Activity (SA)

"Targeted" incidents, including large, sustained attacks on important cyber systems;

Spear phishing campaigns, a marked increase in network scanning, or other attacks may be considered SA if the volume, persistence, or sophistication of the attacks is out of the ordinary.

Breach of Security (BoS)

Intrusion into telecommunications equipment, computer, and networked systems linked to security plan functions (e.g., access control, cargo control, monitoring);

Unauthorised root or administrator access to security and industrial control systems;

Successful phishing attempts or malicious insider activity that could allow outside entities access to internal IT systems that are linked to the Marine Transportation System;

Instances of viruses, Trojan Horses, worms, zombies or other malicious software that have a widespread impact or adversely affect one or more on-site mission critical servers that are linked to security plan functions;

Any denial of service attacks that adversely affect or degrade access to critical services that are linked to security plan functions;

Physical events such as unfamiliar persons in restricted areas, individuals displaying unusual behavioral patterns, or discovery of potentially dangerous devices on or near the facility/vessel.

The Following Activities do not Meet the Reporting Requirements as SA or a BoS:

Routine and "untargeted" cyber incidents such as spam, phishing attempts, persistent scanning of networks, and other nuisance events that do not breach a system's defenses;

Breaches of telecommunications equipment, computer, and networked systems that clearly target business or administrative systems unrelated to safe and secure maritime operations.

Operators should report any SA or a BoS to the NRC by accessing their website http://nrc.uscg.mil/. For cyber incidents that do not involve physical effects (such as pollution or a physical breach of security), the Coast Guard allows parties to report the incident to the National Cybersecurity and Communications Integration Center (NCCIC) at (888) 282-0870. Parties must inform the NCCIC that they are a Coast Guard regulated entity to ensure that federal reporting requirements are satisfied. ■

Steamship Mutual's Latest Loss Prevention DVD 'Cyber Security: Smart, Safe Shipping'

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As part of Steamship Mutual's loss prevention initiatives, the Club has released their latest DVD **'Cyber Security: Smart, Safe Shipping'** highlighting the implications of a potential cyber security breach for a shipping company.

All businesses rely heavily upon computer systems to sustain their operations. These systems improve operational efficiency and capability, but they can be vulnerable to the risk of being compromised by cyber-attack. Such attacks can take various forms, and if that risk of attack materialises, operational effectiveness can be seriously compromised.

Consequently, companies are becoming increasingly aware of cyber risk, and are taking a variety of measures to harden system security, raise awareness of cyber risk amongst their staff and strengthen procedures to mitigate that risk.

Cyber risk however is not confined to shore-based operations. Commercial ships are becoming progressively more dependent upon computers to operate and control various shipboard systems. These systems may be integrated, and the ability for ships to connect to the internet is growing as the communication demand grows. As with computers ashore, shipboard systems are equally vulnerable to cyber-attack. If a vessel's systems is compromised, the effect of that could be considerably more serious than would be the case ashore. The ship, its crew and cargo could be placed at risk, and could in addition create risk to other parties. As with cyber risk ashore, the human interface commonly represents the principal weakness in the cyber security framework.

Because of the potential threats that shipping operations pose to the environment, other vessels and port infrastructure, it is vital that shipowners and operators are aware of cyber risk, and that awareness on the part of individual seafarers is increased so that they become particularly vigilant in adhering to company procedures designed to maintain the integrity of computer systems, and in monitoring the reliability of the data output from shipboard computer systems.

"Because of the potential threats that shipping operations pose to the environment, other vessels and port infrastructure, it is vital that shipowners and operators are aware of cyber risk, ..."

The objective of Steamship Mutual's latest DVD-ROM is to assist in the process of increasing awareness of cyber risks at sea in an effort to help control an ever growing threat. As with previous productions, the DVD-ROM has been produced by Callisto Productions Limited of Aberdeen with the financial support of The Ship Safety Trust.

To coincide with issuing the **'Cyber Security: Smart, Safe Shipping'** DVD-ROM, Steamship Mutual confirms the Club's support for the "Be Cyber Aware At Sea" campaign. This campaign encourages the sharing of research data, best practice cyber guidelines and educational articles to help all stakeholders understand the challenges that the digital era brings to shipping and offshore operations. More information about the industry can be accessed on this website: http://www.becyberawareatsea.com/

The **'Cyber Security: Smart, Safe Shipping'** DVD-ROM has been distributed to Club members. A trailer of the DVD-ROM is available to watch on https://www.steamshipmutual.com/loss-prevention/cybersecurity.htm

The DVD-ROM is available to order on request from Steamship Mutual by accessing the Loss Prevention section of the Club's website. ■

Compliance with Orders and Continuing Performance Warranty

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Hull fouling is a well-known problem affecting vessels trading in topical water ports. It can lead to loss of time from diminished vessel performance and lost time and costs associated with hull cleaning. Disputes arising from such fouling can be costly and complex.

Back in 2005, Steamship Mutual supported a Charterer Member in its successful defence in the benchmark case on hull fouling - *The Kitsa* [https://www.steamshipmutual.com/publications/Articles/Articles/HullFoul0405.asp]. In *The Kitsa*, it was held that the Charterers had given legitimate orders to the vessel and that the port of call was within the permitted trading limits of the Charterparty. It was also found that the risk of fouling at that port had been foreseeable by Owners and Charterers on fixing the Charterparty and that the fouling was not fortuitous as, particularly, the vessel had not sat at that port for a period longer than was usual for that type of vessel trading at that port. Therefore, the risk of fouling was considered to be an operational risk which Owner had agreed to bear when fixing the Charterparty and there were no grounds on which Owners could claim an indemnity from Charterers for the cost of cleaning the hull.

Some years later BIMCO published a clause to address hull fouling as a result of a prolonged stay in tropical waters in compliance with Charterers' orders. The clause states that if the vessel remains in a tropical zone or outside such a zone for more than an agreed period of time *".. any warranties concerning speed and consumption shall be suspended pending inspection of the vessel's underwater parts…."* and that either party can call for an underwater inspection to be arranged jointly by Owners and Charterers. When cleaning is required this is at Charterers' *"… risk and cost …"* but under the Master's supervision. However, if Owners for whatever reason refuse to permit cleaning, Charterers are entitled to reinstate the speed and consumption warranties. In contrast if cleaning is not permitted or possible, or Charterers decide to defer cleaning, the Charterparty performance warranties remain suspended until cleaning is performed.

However, the parties to a consolidated appeal recently heard in the Commercial Court – *The Coral Seas* – had not made provision for the effects of hull fouling and the question that fell to be decided on appeal by Mr Justice Phillips was:

"Where under a time charter the owner warrants to the time Charterer that the vessel shall maintain a particular level of performance throughout the charter period, and the time Charterer alleges underperformance in breach of that warranty, is it a defence for the Owner to prove that the underperformance resulted from compliance with the time Charterer's orders?"

The Head and Sub Charterparties were, so far as set out below, back to back and each contained the following relevant terms:

"1. … whilst on hire … Owners shall … keep the vessel in a thoroughly efficient state in hull … machinery and equipment … for the service and all times during the currency of this Charter."

"8. … the captain shall prosecute his voyages with the utmost despatch … The Captain … shall be under the orders and directions of the Charterers as regards employment and Agency …"

Clause 29
….
"(b) Speed Clause"
"Throughout the currency of this Charter, Owners warrant that the vessel shall be capable of maintaining and shall maintain on all sea passages, from sea buoy to sea buoy, an average speed and consumption as stipulated in Clause 29(a) above, under fair weather condition not exceeding Beaufort force four and Douglas sea state three and not against adverse current."

In the course of trading the vessel waited for a berth at Guaiba Island from 14 January to 10 February 2008. It was clear on departure that the vessel's performance had fallen off significantly. At Singapore an underwater inspection found light fouling of the flat bottom and heavy fouling of the propeller by barnacles. The propeller was cleaned underwater.

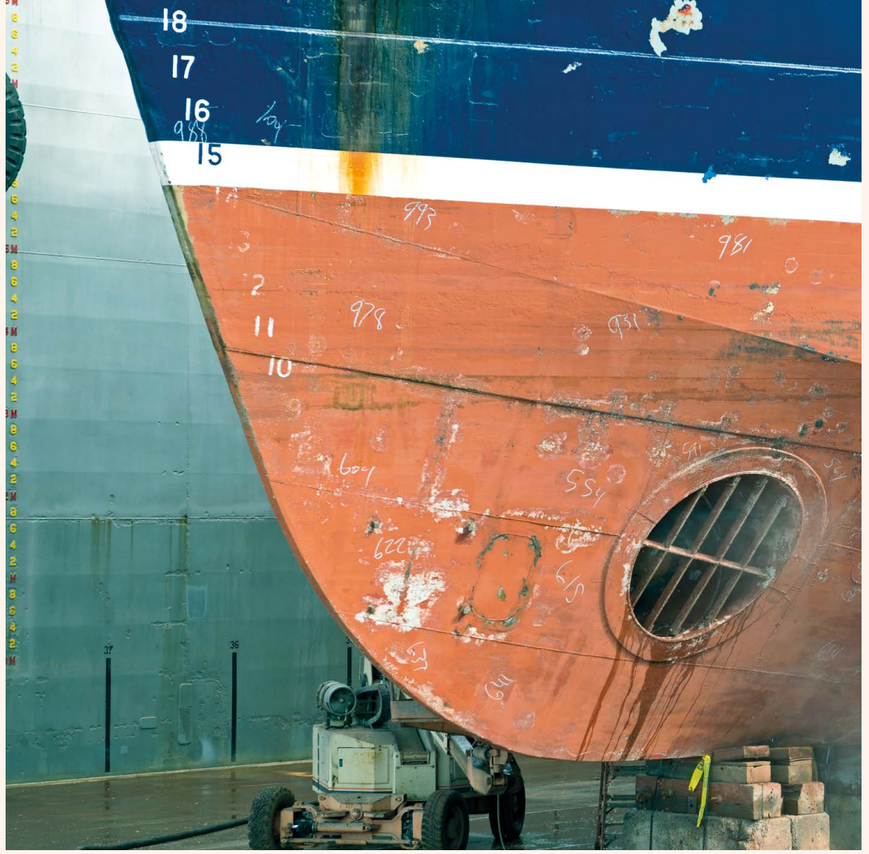
Sub Charterers (and in turn Head Charterers) made deductions from hire, asserting a right to set-off damages for breach of the continuing speed warranty contained in clause 29(b) of the Charterparties. The claims were referred to concurrent London arbitrations heard by a common tribunal.

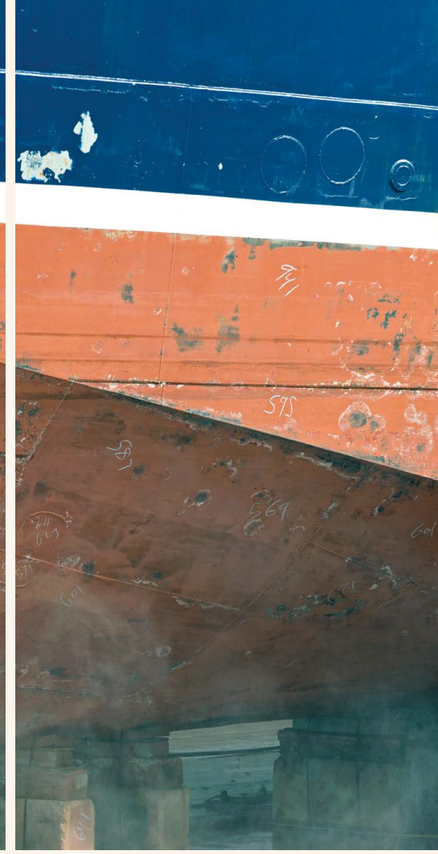
The tribunal made the following findings of fact:

i. *the vessel did not maintain the warranted speed;*

ii. *the cause was underwater fouling of the vessel's hull and propeller by marine growth, as a result of the lengthy stay in tropical waters; and*

iii. *the marine growth could not be regarded as unusual or unexpected, but constituted fair wear and tear incurred in the ordinary course of trading.*





" ….. Phillips J concluded that as the warranty was that the Vessel *"shall be capable of maintaining and shall maintain on all sea passages,"* the warranty was not limited to the vessel's capacity as a new build, ….. "

The tribunal held that, on a true construction of the Charterparties, the speed warranty in clause 29(b) applied to all sea voyages, including those after a prolonged wait in tropical waters and that it was the Owners/Head Charterers who had assumed the risk of a fall-off in performance as a result of fouling consequent upon Head Charterers'/Sub Charterers' lawful orders.

Owners and Head Charterers sought leave to appeal. *Inter alia*, they asserted that the tribunal's reasoning was wrong, being contrary to the principle of law as stated in Time Charters 7th Ed. (2014) paragraph 3.75 as follows:

"Where the Owners give a continuing undertaking as to performance of the ship, and the ship has in fact underperformed, it is a defence for the Owners to prove that the underperformance resulted from their compliance with the Charterers' orders: see The Pamphilos [2002] 2 Lloyd's Rep 681 per Colman J., at page 690. In that case, the ship's failure to achieve the promised performance resulted from marine fouling, which was in turn the result of the Owners' complying with the Charterers' order to wait for 21 days at a tropical port."

Males J had given leave to appeal on the basis that, if the tribunals' finding were correct, a passage in the leading textbook is wrong or at least too widely stated, thus the awards were of some general interest and at least open to serious doubt.

Phillips J considered the leading authorities in making his decision.

It is established law that a Shipowner has an implied right of indemnity against a Time Charterer in respect of the consequences of complying with

the Charterer's orders as to the employment of the ship, even if the orders were ones the Charterer was contractually entitled to give. However, it is equally well established that such indemnity does not extend to the usual perils of the voyage in respect of which the Owner must be taken to have accepted the risk: *The Island Archon* [1994] 2 Lloyds Rep 227 CA.

As explained above, in *The Kitsa* the vessel's hull became seriously fouled due to delay in warm waters. Owners claimed the cost of cleaning from the Charterers under the implied indemnity. Aikens J recognised that, in the broadest sense, the hull fouling was caused by the Charterers' orders to go to Visak, but held that the cleaning costs were outside the implied indemnity as they were a risk the Shipowner must be taken to have agreed to bear.

In *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)* [2012] 2 AC 164 [https://www.steamshipmutual.com/publications/Articles/Kos0613.htm], Lord Sumption, took the same approach to the scope of an Owner's indemnity, expressly recognising that the indemnity did not apply to marine fouling occurring in the course of contractual trading:

"… The owners are not entitled to an indemnity against things for which they are being remunerated by the payment of hire. There is therefore no indemnity in respect of the ordinary risks and costs associated with the performance of the chartered service. The purpose of the indemnity is to protect them against losses arising from risks or costs which they have not expressly or implicitly agreed in the charterparty to bear. What risks or costs the owners have agreed to bear may depend on the construction of other relevant provisions of the contract, or on an informed judgment of the broad range of physical and commercial hazards which are normally incidental to the chartered service, or on some combination of the two. The classic example of a loss within the indemnity, and probably the commonest in practice, is one which arises from the master complying with the charterers' direction to sign bills of lading on terms of carriage more onerous than those of the charterparty … On the other hand, the indemnity will not apply to risks which the owners have contractually assumed, which will usually be the case where they arise from, for example, their own negligence or breach of contract or consequences such as marine fouling which are incidental to the service for which the vessel was required to be available."

In light of the case law, the tribunal had held that the Owners had assumed the risk of a fall-off in performance as a result of marine fouling and that therefore the indemnity had no application.

On appeal before Philips J, Owners' did not seek to rely on an implied indemnity. Their case was that the speed warranty should be construed as being given on the basis that the vessel continues to have a clean hull and propeller. Consequently, if the vessel suffered marine fouling in the ordinary course of the Charterers' use of the vessel, the Owners would be responsible for cleaning the hull (and/or could not claim damages on re-delivery), but the Charterers would not be entitled to treat the vessel as off-hire, nor claim for a diminution in performance.

Owners argued that the above approach to the contractual "scheme" was recognised in *The Pamphilos* and reflected in the passage in "Time Charters", neither of which was considered by the tribunal. In *The Pamphilos*, the arbitrators had decided that marine growth was an ordinary incident of trading in accordance with the Charterer's orders so that the charterer was not in breach of the re-delivery obligation, but nonetheless had determined that the Charterer's deduction of hire for underperformance was unjustified.

In reaching his decision in the appeal, Phillips J concluded that as the warranty was that the vessel *"shall be capable of maintaining and shall maintain on all sea passages,"* the warranty was not limited to the vessel's capacity as a new build but related to her actual continuing performance.

Further, the parties had agreed a restriction on the extent of the performance warranty, limiting it to passages under fair weather conditions. It would have been open to the parties to have excluded voyages after the vessel had been waiting in tropical water ports, and such clauses are now commonly included in Time Charters. Owners were seeking to construe the warranty as containing an exclusion which the parties chose not to agree.

He rejected the contention that the continuing performance warranty did not apply where the vessel's performance fell-off because of fair wear and tear in the course of contractual trading. Whilst recognising that Colman J expressed the opposite view in *The Pamphilos*, that was in the context of refusing leave to appeal under s.69 of the Arbitration Act, and was only reported because the application for leave was dealt with at the end of a judgment on an appeal under s.68. Further, the terms of the speed warranty in that case were not set out in the report and it does not appear that the cases on the application of the implied indemnity were cited.

Phillips J concluded that the proposition stated in paragraph 3.75 of Time Charters is too widely stated. Where a vessel has underperformed, it is not a defence to a claim on a continuing performance warranty for the Owners to prove that the underperformance resulted from compliance with the time Charterers' orders unless the underperformance was caused by a risk which the Owners had not contractually assumed and in respect of which they are entitled to be indemnified by the Charterers. ■

Trinity House, Serving the Mariner

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Incorporated by Henry VIII on 20 May 1514, Trinity House is a charity dedicated to safeguarding shipping and seafarers, providing education, support and welfare to the seafaring community. Trinity House has a statutory duty as a General Lighthouse Authority to deliver a reliable efficient and cost effective aids to navigation for the benefit and safety of all mariners. It is also the licensing authority for Deep Sea Pilots who assist the navigation of vessels in North European waters.

Mariners navigating on the UK coast rely on Trinity House lights, marks and navigation aids, yet rarely see the complex and extensive behind the scenes work which ensures they are there when they need them. Navigators rely on them to identify position and allow a safe course to be planned but what if a crucial light is not working or a wreck has blocked a narrow channel.

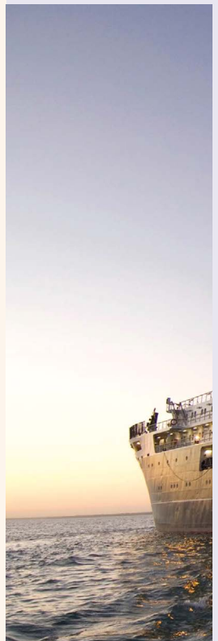
Jonathan Andrews, Head of Eastern Syndicate Underwriting, visited Trinity House in the course of 2016 and spent three days on board Trinity House's Multifunctional Tender (MFT), "Galatea". The visit was arranged at the invitation of Rear Admiral Sir Jeremy de Halpert, Prime Warden of the Worshipful Company of Shipwrights and an Elder Brother of Trinity House.

The "Galatea" is designed with buoy handling, wreck marking, towing and multibeam and side scan hydrographic surveying capability.

Steamship Mutual Director Elected a Younger Brother of Trinity House

The Governance of Trinity House is overseen by a Court of Elder Brethren selected from the much larger ranks of Younger Brethren. Once sworn in, Elder and Younger Brethren are members for life and represent Trinity House at almost every level of maritime activity in Britain. There are over 31 Elder Brethren and around 400 Younger Brethren comprised of distinguished men and women from – but not limited to – the Merchant Navy, the Royal Navy, numerous senior pilotage and port and harbour offices, the Royal Yacht Squadron, the maritime industry at large and Trinity House's own Support Vessel Service.

We are delighted to report that Chris Adams, Director, Head of European Syndicate and Loss Prevention, was elected as a Younger Brother by the Corporate Board in November 2016. He very much looks forward to the opportunity to use his considerable experience in the areas of safety training, loss prevention and charitable work to support the objectives of Trinity House. ■



Chris Adams, Director, Head of European Syndicate and Loss Prevention

Gross v Simple Negligence

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Where claims are pursued – whether in contract or tort – it is not infrequent that allegations of "gross negligence" are made by a claimant. Whilst the word "gross" may have a particular meaning in some jurisdictions, English law does not draw a distinction between 'negligence' and 'gross negligence'. Either the conduct is negligent in the sense that there has been a breach of a duty to take reasonable skill and care to perform contractual obligations or to avoid acts or omissions that might cause foreseeable injury, or it is not.

Where gross negligence may have relevance under English law is if there is an express reference to the term in a contract. If so the question is, whether the parties to the contract intended to limit the circumstances in which any breach could be alleged by raising the threshold for the duty of care owed by one party to the other. For example, is an indemnity triggered by gross negligence less burdensome than one where the threshold is straightforward negligence?

Disputes can, therefore, arise as to what was intended by the use of the term "gross" negligence and, if there is any difference between 'gross' and 'simple' negligence , if the alleged conduct of the wrongdoer is sufficiently serious to constitute "gross" negligence.

The English law approach to the meaning of gross negligence ranges between the view that 'gross' adds little or nothing to negligence such that gross negligence is just negligence with an added adjective – *Willson v Brett* [1843] 12 LJ Ex 264, to the more modern view that the addition of the word 'gross' does add something to negligence, with the difference being one of degree and not of kind – *Camerata v Credit Suisse* [2011] EWHC 479 (Comm).

In *Camarata* the claimant alleged that the defendant's negligence was the cause of its investment loss. Whilst the claim ultimately failed the court did consider and reject the argument that a distinction should be drawn between negligence and gross negligence. Instead the focus was on the meaning of the relevant provisions of the bank's terms and conditions, which stated the bank was not liable for any advice it provided unless that liability arose "directly as a consequence of the gross negligence, fraud or wilful default of us or any of our directors, officers, or employees".

The terms and conditions had used both "negligence" and "gross negligence" which indicated intent to distinguish between the two. This was important because it meant that more than mere negligence was required before the bank could be liable to the claimant. The court also referred to the case of *Red Sea Tankers Ltd v Papachristidis* (*The Ardent*) [1997] LLR 2 548 in which Mance J said:

"If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. Gross negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence ... as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk."

The Judge further explained that gross negligence may include *"conduct which a reasonable person would perceive to entail a high degree of risk of injury to others coupled with heedlessness or indifference to or disregard of the consequences. The heedlessness, indifference or disregard need not be conscious."*

It is perhaps unlikely that as a matter of English law a definition of "gross negligence" will be formulated. The English law approach is to reflect the natural and ordinary meaning of the words https://www.steamshipmutual.com/publications/Articles/LiteralApproachtoConstruction04_16.htm and, as such, whilst always a question of construing the contract as a whole it is possible that "gross negligence" will be construed as meaning something more than mere negligence. If so, Mance J's words are likely to be instructive. ■

> "The English law approach to the meaning of gross negligence ranges between the view that 'gross' adds little or nothing to negligence such that gross negligence is just negligence with an added adjective....to..."

Vasant J. Sheth Memorial Foundation

Maritime Cadet Akhil Mathew

The Vasant J. Sheth Memorial Foundation is a registered charitable trust based in Mumbai dedicated to promoting education, welfare, health, conservation and publishing in maritime related areas. The Foundation was established in 1993 by The Great Eastern Shipping Company Limited as a tribute to its founder, Vasant J. Sheth.

In partnership with the Ship Safety Trust ("SST") the Foundation awards scholarships to cadets studying in two of India's leading maritime colleges; The Tolani Maritime Institute and The Great Eastern Institute of Maritime Studies in Lonavala. The SST was established by the Managers of Steamship Mutual to promote safer ships and the prevention of loss of life at sea.

In the last four years two cadets have been awarded scholarships to further their maritime education on an annual basis.

Akhil Mathew is one of the cadets to benefit from the partnership between the Foundation and SST. He has now taken his first step on the maritime career ladder and has secured a position with Seaspan Ship Management Ltd.

Akhil has expressed his thanks to the Vasant J. Sheth Memorial Foundation and Steamship Mutual for the opportunity and support afforded to him whilst at The Great Eastern Institute of Maritime Studies. We wish him every success in the future.

Vasant J. Sheth was a former Chairman to the Board of Steamship Mutual. The Great Eastern Shipping Company is a present day Member of the Club. ■

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Post-Accident Arbitration Clauses for Jones Act Crew Claims

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In the United States of America seaman injured in the course of their employment may elect to bring a civil action in law, with the right of trial by jury, against the employer. Whilst a crewmember has the choice of a jury trial or a bench trial there is the possibility of a third option, arbitration. The enforceability of arbitration was discussed in the case of *Vane Line Bunkering Inc v Cleveland Hooper*, in the United States Court for the Southern District of Florida, Miami Division.

Background

By way of background, Cleveland Hooper ("Hooper") was injured when he fell whilst working on board a Vane Line Bunkering ("Vane") vessel. In the days following the incident Vane presented Hooper with the option of signing up to their post-incident Advanced Wage Agreement ("AWA").

The aim of AWA is to allow an injured crewmember to focus fully on their rehabilitation, without having to be concerned about their financial position which often leads to attorney representation. Under the agreement with Hooper, in addition to receiving his statutory benefits of maintenance and cure, Vane agreed to make advances in unearned wages and company benefits whilst Hooper continued to recover from his injuries and to continue to do so until he was either fit for duty or reached maximum medical improvement, whatever came first.

By signing this agreement a crewmember accepts payment of unearned wages and company benefits and in return agrees to arbitrate all claims against the vessel and/or Vane under the Comprehensive Arbitration Rules and procedures of JAMS in Washington DC, Philadelphia or New York. Further the agreement requires that:

i. Either party may call for the arbitration by notice to the other sent by registered mail;

ii. Arbitration is conducted by a sole arbitrator selected in accordance with JAMS rules;

iii. Any filing fees, case management fees and deposit for the compensation of the arbitrators shall be advanced by Vane, subject to subsequent allocation.

iv. The decision of the arbitrator is final and binding on the parties and any United States District or other court of competent jurisdiction shall have authority to enforce the agreement, to enter judgment on the award and to grant any remedy provided by law in respect of the arbitration proceedings.

Hooper signed the agreement and accepted payment of wage advances along with maintenance and cure benefits for many months.

The Case

Once the case approached the point where settlement could be considered Vane filed a motion to compel arbitration in accordance with the terms of the AWA. Hooper responded alleging Vane failed to pay an appropriate amount of maintenance and cure and filed a lawsuit alleging damages for employer negligence and unseaworthiness of the vessel as the cause of his injuries.

Significantly, Hooper alleged the arbitration statement included within the AWA was unenforceable.

Vane took the position that the fact that Hooper was a seaman did not affect the enforceability of the arbitration provision. Whilst the Federal Arbitration Act ("FAA") does apply to contracts of employment of seaman the post-accident arbitration clause was not included within the original employment contract. However, agreements to arbitrate within post-injury AWA's have been recognised and are also enforceable under the FAA.

In their analysis the Court looked at the FAA which states that an agreement in writing to submit to arbitration an existing controversy arising out of such a contract shall be valid, irrevocable and enforceable. This mandatory language reflects a strong, well-established and widely recognised Federal policy in favour of arbitration.

Hooper made three arguments against the enforceability of the arbitration clause in the AWA. Firstly he argued that the AWA qualifies as a seaman's contract of employment and was therefore void under the FAA. Secondly, that the Federal Employers' Liability Act (FELA) prevents the Court from enforcing the arbitration provision and thirdly, that the entire AWA is void.

The Court addressed each of these three points in turn.

1. The Court agreed with Vane that the phrase *"contracts of employment"* does not mean any contract that has some connection to a seaman's employment. Further the courts have uniformly held that post-incident agreements to pay seaman advanced wages are non-employment agreements under the FAA.

2. The Jones Act incorporates parts of FELA (which protects, governs and compensates railroad workers injured on the job) and which voids any contractual provision seeking to limit a seaman's choice of forum. However, the Fifth Circuit (in *Pure Oil Co v Suarez* 5th Cir [1965]) held that the venue provisions in FELA are not incorporated into the Jones Act. Therefore the Court concluded that Hooper's argument that FELA's provisions limiting venue should be applied to the Jones Act was rejected.

3. Hooper's argument for voiding the AWA was based upon *"fraud in the inducement"* and negligent misrepresentation of the AWA. The Court, however, noted that Hooper's challenges were to the validity of the AWA and not directed at the arbitration clause itself. The Court concluded that under FAA rules these arguments should be made to the arbitrator in the first instance and, therefore, Hooper must submit these to the appointed arbitrator.

Based upon the above the Court found in favour of Vane and granted their Motion to Compel Arbitration.

Conclusion

Whilst post-incident Advanced Wage Agreements, and in particular the relevant arbitration clause, have proved beneficial, they may not be appropriate in all cases. Shipowners should consider claims on their own individual merits before considering this as an option.

The merits of including such clauses in the original contract of employment were discussed in: https://www.steamshipmutual.com/publications/Articles/LindoNCL0212.htm ■

"By signing this agreement a crewmember accepts payment of unearned wages and company benefits and in return agrees to arbitrate all claims.... "

The *Atlantik Confidence* – No Weakening of the Test to Deny Limitation

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On 30 March 2013, a fire broke out in the engine room of the "Atlantik Confidence" (the "Vessel") Within a few hours the Master made the decision to abandon the Vessel. The Vessel listed to port and eventually sank on 3 April. The Vessel was carrying various project cargoes for discharge at ports in the Middle East.

Owners, Kairos Shipping ("Owners") sought to limit their liability based on the Vessel's tonnage and the limits in the Convention on Limitation of Liability for Maritime Claims 1976 (as amended by the 1996 Protocol). A limitation fund was constituted in the English Admiralty Court by way of Letter of Undertaking provided by The Standard P&I Club at £7.3 million plus interest https://www.steamshipmutual.com/publications/Articles/atlantikconfidence0814.htm.

AXA Insurance, one of the interested cargo insurers ("Cargo") sought, in this stage of the action before Mr Justice Teare, to break limitation relying on Article 4 of the Convention claiming that the sinking occurred due to a:

'personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'.

The burden of proof in seeking to break limitation is upon the party seeking to do so. The burden is a heavy one because of the nature of the conduct which must be proved. Cargo's case was that the Owner scuttled the vessel. It was alleged that the fire was deliberately started and that the sinking was upon the instruction of the alter ego of the Owners, Mr. Ahmet Ali Agaoglu, the sole shareholder and director.

It was common ground that Cargo must prove its case on the balance of probabilities and that in determining whether Cargo has discharged that burden the Court's approach should be the same as it is when an Owner makes a claim on a hull insurance policy and the insurer alleges that the ship was scuttled.

The approach is summarised by Aikens J. in *Brownsville Holdings Ltd v Adamjee Insurance Co.* (*The Milasan*) [2000] 2 Lloyd's Reports 458 as follows:

"(4) if a defendant insurer is to succeed on an allegation that a vessel was deliberately cast away with the connivance of the Owner, then the insurer must prove both aspects on a balance of probabilities. However as such allegations amount to an accusation of fraudulent and criminal conduct on the part of the Owner, then the standard of proof that the insurer must attain to satisfy the Court that its allegations are proved must be commensurate with the seriousness of the charge laid. Effectively the standard will fall not far short of the rigorous criminal standard;

(5) although there is no "presumption of innocence" of the Owners, due weight must be given to the consideration that scuttling a ship would be fraudulent and criminal behaviour by the Owners;

(6) when deciding whether the allegation of scuttling with the connivance of the Owners is proved, the Court must consider all the relevant facts and take the story as a whole. By the very nature of these cases it is usually not possible for insurers to obtain any direct evidence that a vessel was wilfully cast away by her Owners, so that the Court is entitled to consider all the relevant indirect or circumstantial evidence in reaching a decision;

(7) it is unlikely that all relevant facts will be uncovered in the course of investigations. Therefore it will not be fatal to the insurers' case that "parts of the canvas remain unlighted or blank" (see Michalos and Sons v Prudential Insurance (The Zinovia) [1984] 2 Lloyd's Rep 264 at p.273 per Bingham J.);

(8) ultimately the issue for the Court is whether the facts proved against the Owners are sufficiently unambiguous to conclude that they were complicit in the casting away of the vessel;

(9) in such circumstances the fact that an owner was previously of good reputation and respectable will not save him from an adverse judgment;

(10) the insurers do not have to prove a motive if the facts are sufficiently unambiguously against the Owners. But if there is a motive for dishonesty then it may assist in determining whether there has been dishonesty in fact."

After a six week hearing involving extensive factual and expert witnesses, Mr Justice Teare found that the sinking was a deliberate scuttling:

"The vessel was deliberately sunk by the master and chief engineer at the request of Mr. Agaoglu, the alter ego of the Owners. In those circumstances the loss of the cargo resulted from his personal act committed with the intent to cause such loss. The loss of the cargo was the natural consequence of his act as he must have appreciated. There can be no doubt that he intended the cargo to be lost just as much as he intended the vessel to be lost. It follows that the Owners' claim for a limitation decree must be dismissed."

In reaching his decision Mr. Justice Teare, assessing the evidence, made the following findings:

1. The vessel was lost at sea after a fire. There was a real and substantial possibility that that fire was started deliberately;

2. The engine room flooded. That flooding could have been caused deliberately; and

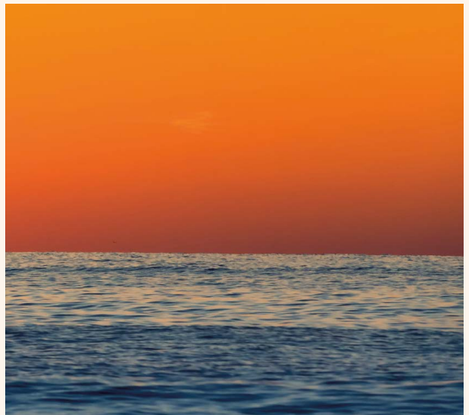
3. At about the same time the ballast double bottom tanks nos. 4 and 5 on the portside were flooded. That flooding could have been caused deliberately.

The Judge considered that whilst the improbable can happen it was difficult to accept that three improbable events may have occurred in rapid succession.

Such reasoning is often relied upon in alleged scuttling cases. In *The Ioanna* [1922] 12 LLR 54 Greer J. said:

"Now an improbability does not prove that the thing did not happen, but one improbability throws possibly some doubt upon it, and one requires stricter proof where the event is improbable than where it is a probable or likely event. Still one improbability would not be sufficient to justify me in coming to the conclusion that the event did not happen. But when there are two improbabilities the likelihood of it happening is still more remote, and when there are three it is more remote still."

"The Judge considered that whilst the improbable can happen it was difficult to accept that three improbable events may have occurred in rapid succession."



The Vessel sank in deep water which meant it could not be inspected with a view to determining the cause of the fire or the cause of the sinking. The available evidence was, therefore, limited to surveys of the vessel prior to the final voyage, the observations of the fire by the chief engineer and second engineer and photographs of the Vessel taken after she had been abandoned and before she sank.

As regards the evidence the Judge found there were a number of events which, whilst taken alone, might not have been of great weight but cumulatively were suggestive of a deliberate casualty. These included that before the fire:

1. The master was ordered to change route into deep water; and

2. There was an unscheduled abandon ship drill.

And after the fire:

3. The chief engineer was reluctant to allow others in the engine room;

4. He told the master on the bridge after CO2 had been injected and shortly before the vessel was abandoned that there was a risk of explosion from diesel oil tanks when it is unlikely that he held that opinion;

5. The master delayed in sending a distress message and failed to alert Owners to the casualty before he abandoned ship;

6. He failed to investigate the list to port;

7. He failed to remove the chart from the bridge; and

8. After the vessel had been abandoned the master and chief engineer returned twice to the vessel.

No evidence was put forward to indicate that the master and chief engineer had a motive themselves but there was evidence to suggest the involvement of senior employees in the Owners' office:

1. The office instructed the master to follow a route which would take the vessel into deep water;

2. There was a telephone call between the master and the office after the master had been requested to change route and to ring the office. It is likely that the master's instructions to scuttle were then confirmed;

3. Two superintendents were sent to the casualty on board "Heather" – a vessel in the same management;

4. The purpose of sending "Heather" was said to have been to provide a report and photographs but neither superintendent provided a report;

5. The superintendents did not take a camera with them but instead took with them some tools; and

6. Owners did not inform the salvors of the presence of the "Heather" in Muscat at the same time as the salvage team.

Taking all of the above the Judge felt these indicated the involvement of Mr. Agaoglu. He had motive to arrange the sinking. His companies were in real financial difficulty and it is likely that he was under pressure from his bank. This would be resolved by the insurance proceeds of US$22 million. For all those reasons the Judge held that Mr. Agaoglu requested the deliberate sinking of the Vessel and was unable to accept his evidence that he did not do so.

Limitation is considered virtually unbreakable and whilst this decision is not ground breaking as regards the law, and does not suggest any weakening of the test to deny limitation, it is remarkable for its finding. ■

Clarification of a Carrier's Burden of Proof When Relying on a Hague Rules Defence

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On 10 November 2016, the Court of Appeal handed down its decision in *Volcafe v CSAV* [2016] EWCA Civ 1103. This case concerned the question of whether a defendant carrier must first disprove negligence before being able to rely on the available defences in Article IV Rule 2 of the Hague Rules. For the reasons explained below, the Court of Appeal held in a unanimous decision that the answer to this is "no".

This is a question which has been extensively debated over the last 90 years. The decision is welcome confirmation that the burden of proof under the Hague Rules does not require a carrier to disprove its own negligence in order to rely on the available defences.

Facts

The claims were for condensation damage to nine consignments of bagged coffee beans carried in twenty kraft paper lined, unventilated containers from Columbia to various disports in Northern Europe. The claimant cargo interests alleged that the carrier had failed to take reasonable care of the cargo and was in breach of its obligation to carefully load, handle, stow, carry, keep, care for and discharge the cargoes.

The bills of lading, which were issued by the defendant carrier, recorded the shipment as in apparent good order and condition and contained a clause paramount making the carriage by sea subject to the Hague Rules from the time of loading onto the ship. Pursuant to the terms of carriage, the carrier's stevedores were responsible for preparing the containers and stuffing the bags into them at the loadport. After the stuffing of the containers, they were loaded onto vessels owned or operated by the carrier on various dates between January and April 2012.

It was common ground between the experts at the trial that:

i. Condensation is inevitable in the carriage of bagged coffee from a warm to a cold climate; and

ii. There is no certain way to prevent condensation damage when bagged coffee carried in a lined unventilated container, which is why industry guides recommend carriage in ventilated containers.

However, the experts agreed that carriage in lined and unventilated containers is a widespread commercial practice.

The Hague Rules

The relevant provisions of the Hague Rules which were considered were:

i. Article III Rule 2 – *"the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"*.

ii. In *G. H. Renton v Palmyra Trading* [1957] AC 149 *and Albacora v Westcott & Laurence Line Ltd* [1966] S.C. (H.L.) 19 the word *"properly"* was interpreted as meaning *"in accordance with a sound system"*.

iii. Article IV Rule 2 (m) – *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from wastage in bulk or weight or any other loss or damage arising from an inherent defect."*

The Mercantile Court Decision

In the first instance hearing, the carrier put forward the following arguments:

"The Judgment also provided useful guidance on the burden of proof under the Hague Rules, how to assess whether a system is "sound", the scope of the inherent vice reference...."

i. Reliance was placed on the inherent vice defence at Article IV Rule 2 (m) of the Hague Rules.

ii. Alternatively, condensation damage to this cargo was inevitable; and

iii. Article II Rule 2 of the Hague Rules did not apply to the stuffing and lining of the container as these operations were carried out several days prior to loading.

The cargo interests' position was that the bags had been negligently stowed in the container and that this was causative of the damage. In considering this matter, the Judge took the approach that once the consignees had shown that the coffee bags had been delivered in a damaged condition, the onus was then on the carrier to establish inherent vice or inevitability of damage and also to disprove negligence.

Whilst the consignees' argument that there had been negligent stowage within the containers which increased condensation was rejected, the Judge still concluded that the carrier was liable for the damage. This was on the basis that carrier could not demonstrate that it had complied with Article II Rule 2 as it could not evidence that the containers had been carried *"in accordance with a sound system"*. In reaching this conclusion, the Judge commented *"a general practice – had one existed - could not itself have rendered a system sound in the absence of any appropriate theoretical or empirical underpinning, and I do not read any judicial pronouncement as having decided or even suggested the contrary."*

In this case, the carrier could not prove it had obtained expert input to demonstrate that the material used by the stevedores to line the containers could be expected to prevent the damage.

It was also held that where a cargo is loaded into a carrier's containers which are subsequently loaded onto the vessel, it is unrealistic to treat this as anything other than a single loading process even if there is an interval between stuffing and loading.

Court of Appeal Decision

Following a detailed review of the first instance decision and the previous authorities, the Court of Appeal allowed the appeal. The Judgment also provided useful guidance on the burden of proof under the Hague Rules, how to assess whether a system is "sound", the scope of the inherent vice reference, and also the interaction between Article III Rule 2 and Article IV Rule 2 (m).

The key points from his Judgment are as follows:

i. Once the carrier has shown a *prima facie* case for application of an Article IV Rule 2 defence, which includes inherent vice, the burden shifts to the cargo claimant to establish negligence on the part of the carrier and therefore the operation of the exception. Mr Justice Flaux commented *"I do not consider that there is anything in the Rules themselves which points to a different construction than that, in relation to exceptions such as Article IV rule 2(m) (or for that matter other exceptions such as rule 2(c)), the carrier does not need to disprove negligence to rely upon the exception."* This analysis was considered to be consistent with the weight of the authorities, which apply the principles set out in *The Glendarroch* [1894] P 226.

ii. Therefore, whilst there is a degree of overlap between the inherent vice defence and the obligation of the carrier pursuant to Article II Rule 2, in that the focus is on the ability of the cargo to withstand the ordinary incidents of carriage in light of the carrier's obligations to properly care for the cargo, the burden remains on the cargo claimant to establish that the carrier was negligent. In reaching this decision, Mr Justice Flaux emphasised the principle that he who alleges must prove.

iii. The inherent vice defence encompasses damage caused by the inherent qualities of normal cargo.

iv. In light of the agreement between the experts at the trial that the damage to the cargo was due to condensation and that the coffee beans themselves were the source of this condensation, a conclusion ought to have been reached by the

High Court that the carrier had an Article IV Rule 2 (n) defence. The second question to be considered should then have been whether the claimant had established that the carrier was negligent in employment of an unsound system for the carriage of the goods.

v. The trial Judge's approach to determining whether there was a sound system in place went beyond what the law requires and would impose a counsel of perfection on carriers and their masters and officers. Mr Justice Flaux confirmed that one of the indicators that there is a sound system in place is that it is in accordance with general industry practice, as set out in *Albacora* [1966] 2 Lloyd's Rep 53. On the basis of the expert evidence, he should have concluded that there was a general industry practice of lining the containers with corrugated cardboard or kraft paper of 1 or 2 layers. The evidence was that two layers of kraft paper had been used to line the containers and therefore the Judge should have concluded that the cargo claimant had failed to establish that the carrier's system was not a sound system. If this conclusion had been reached, the inherent device defence would have succeeded.

vi. The evidence also suggested that minor condensation damage to cargo carried in unventilated containers would be inevitable, no matter what lining was used. Therefore, the carrier's alternative defence that the damage was inevitable should have been upheld.

vii. Finally, Mr Justice Flaux confirmed the temporal scope of the Hague Rules. In his Judgment he noted that it is open to the parties to agree what acts or services fall within the concept of *"loading"*. In this instance, it was agreed that the carrier would be responsible for lining and stuffing the containers and, therefore, these were operations to which the Hague Rules applied. As a result, the carrier was obliged to perform these services properly and carefully, as required by Article III Rule 2. This was notwithstanding that the preparation, stuffing and loading of the containers took place some days prior to loading at the container terminal.

Comment

This type of damage regularly occurs in the container trade but it is rare for these questions to reach High Court, let alone the Court of Appeal. These are routine matters which will usually result in a commercial settlement before the case escalates to this level. Therefore, this case provides useful clarification on the onus of proof where cargo is recorded as being received in apparent good order and condition yet is damaged on discharge. In addition, it provides welcome guidance on a carrier's duty of care under Article II Rule 2 and how these duties relate to the carrier's defences in Article IV. ■

Punitive Damages and Unseaworthiness

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On 22 February 2016 The King County Superior Court dismissed Allan Tabingo's claim for punitive damages on the basis that such damages are not recoverable under the general maritime law doctrine of unseaworthiness. Subsequently the plaintiff received permission to appeal from the Supreme Court of the State of Washington and, on 28 June 2016, contrary to the U.S Fifth Circuit's decision in *McBride v Estis Well Service* [2013], was granted its request for a review of the Trial Court's decision.

The crew member had been injured whilst working for American Seafoods as a trainee deckhand on-board the "American Triumph". During routine operations Tabingo had been pushing fish from the nets into the hatches. Whilst his hand was near the hinge a fellow crew member mistakenly pushed the button which closed the hatch. The Vessel's crew were unable to prevent the closing of the hatch due to a defective hydraulic handle. This handle had allegedly been broken for approximately two years. The crew member injured his hand, resulting in the amputation of two of his fingers.

The plaintiff filed suit pursuing a claim for punitive damages on the basis that the defective hydraulic handle rendered the Vessel unseaworthy and that such unseaworthiness was as a result of wilful neglect on the part of the Shipowner.

By way of background, the U.S Supreme Court, in *Miles v Apex Maritime Corp* [1990], had held that when the Jones Act was enacted in 1920 it incorporated the substantive provisions of the Federal Employers' Liability Act ("FELA") which protected railroad workers from employer negligence. The Jones Act did not specify the type of damages seamen can recover from their employers, but simply stated that it incorporated all rights and remedies available under FELA. FELA did not prescribe remedies either, but pre-1920 common law held that FELA only allowed plaintiffs to recover pecuniary (actual loss) damages and not punitive damages. It was held that federal maritime law dictates that the type of damages available to a seaman under the doctrine of unseaworthiness should be the same as available under the Jones Act, and as punitive damages are not available in the latter nor should they be for the former.

Following on from this, in the case of *Townsend v Atlantic Sounding* [2009], it was held that a seaman

> "In the event the Washington Supreme Court rules in favour of the plaintiff ..... this will create conflict and diversity between States, ... "

could recover punitive damages for his employer's wilful failure to pay maintenance and cure.

After considering American Seafood's motion the King County Superior Court granted them partial summary judgment, dismissing the claim for punitive damages. The decision was based on the above rationale; that damages under the doctrine of unseaworthiness must be the same as those under the Jones Act, where no punitive damages are allowed. The Court held that damages recoverable as a result of unseaworthiness should not extend beyond those allowed by Congress under the Jones Act. Whilst punitive damages are allowed in maintenance and cure claims this is only because Congress did not address or define these remedies in the Jones Act.

However, on the claimant's request for review the Washington State Supreme Court had accepted direct discretionary review of the case raising the issue of whether punitive damages are available under the general maritime doctrine of unseaworthiness. The commissioner, on behalf of the Washington State Supreme Court, found that the State Court may have been in error on the basis that some prior cases support the view that the general punitive damage rule would have been applied to unseaworthiness cases and nothing in *Townsend* suggests the principles identified there should not extend to unseaworthiness claims.

Of potential concern to shipowners are the commissioner's comments and interest in the *Townsend* decision which held that the Jones Act did not eliminate pre-existing remedies available to seaman, such as the separate common law cause of action based on the right to maintenance and cure. The commissioner stated that *"there is no apparent reason the general principles identified in Townsend would not extend to unseaworthiness claims...."* and that the Jones Act was not enacted to narrow a seaman's remedies but rather was meant to correct obvious flaws that existed which prevented them from seeking damages where their employer had been negligent. Therefore, if punitive damages for unseaworthiness pre-dated the Jones Act then such remedies should remain on the basis that Congress never intended the Jones Act to narrow a seaman's existing remedies.

American Seafood's response to Tabingo was that The Court should defer to congress when it comes to defining a seaman's remedies. The logic being that if a court did allow punitive damages under general maritime law it would be supplanting Congress judgment under the Jones Act and this would be inconsistent with the courts' place in the constitutional scheme.

American Seafoods also argued that when the Jones Act was enacted it incorporated FELA and that since 1908 there had not been a single case in which punitive damages have been allowed. The rule has therefore been that federal maritime law mandates that the type of damages available to a seaman under the doctrine of unseaworthiness should be the same as those under the Jones Act. This being on the basis that unseaworthiness and negligence are alternative grounds of recovery for a single cause of action and a seaman is only entitled to one indemnity by way of compensatory damages.

Ultimately American Seafoods took the position that the Washington Supreme Court should uphold the trial Court's decision. In their view when Congress enacted the Jones Act by incorporating FELA they were aware of the state of incorporated FELA law, including FELA's prohibition on punitive damages and so the courts should respect this.

In the event the Washington Supreme Court rules in favour of the plaintiff and finds that punitive damages are available as a matter of law in unseaworthiness actions this will create conflict and diversity between States, specifically the Fifth Circuit, on this issue. Ultimately this might result in the US Supreme Court intervening and clarifying the law which will then be binding on all States.

The appeal to the Supreme Court of the State of Washington was heard on 17 January 2017. ■

High Court Considers Apportionment of Claims under the Inter Club Agreement

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A recent High Court decision has considered the effect of Clause 8 of the NYPE Inter Club Agreement, and in particular, the apportionment of *"All other cargo claims"* under clause 8 (d) where there is clear evidence that a claim arose out of an act of the Charterers.

The Yangtze Xing Hua [2016] EWHC 3132 (Comm) was fixed in a trip time-charter on the NYPE form, with the Inter Club Agreement ("ICA") incorporated, and carried a cargo of soya bean meal from South America to Iran. She arrived off the discharge port in December 2012, but the Charterers ordered the ship to wait off the port for over four months. When she discharged her cargo in May 2013 quantities of lumpy, discoloured cargo were found in two of the cargo holds. A claim for the cargo damage was eventually settled for over €2.6 million, but Owners and Charterers then went to arbitration to decide which of them should bear liability for the claim.

It was common ground between the Owners and Charterers that liability for the cargo claim should be resolved in accordance with clause 8 (d) of the ICA, which states that:

"(d) All other cargo claims whatsoever (including claims for delay to cargo) [shall be apportioned as follows]

50% Charterers
50% Owners

unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim."

The arbitration tribunal found that the delay off the discharge port was too prolonged for the cargo to withstand damage, given its moisture content, and that the Charterer's decision to hold the ship off the discharge port for over four months was the act that gave rise to the claim, so that the Charterers should be held 100% liable for the claim under the ICA.

The Charterers appealed, arguing that the tribunal's construction of *"act"* was wrong, and that the phrase *"act or neglect"* implied that there had to be some fault or culpable act by the Charterers to render them 100% liable.

Teare J. held that the meaning of *"act or neglect"* in Clause 8 (d) of the Inter Club Agreement must depend on its context, and must be construed having regard to the language of the ICA as a whole. He noted that the ICA has been described as *"a mechanical approach to the apportionment of liability"* intended to avoid protracted and costly litigation, and considered that the word *"act"* would be understood to bear its ordinary and natural meaning, without regard to questions of fault.

The Charterers' appeal was dismissed, however it is understood that leave to appeal from this decision has been granted. ■

> "..... the meaning of *"act or neglect"* in Clause 8 (d) of the Inter Club Agreement must depend on its context, and must be construed having regard to the language of the ICA as a whole."

Unpaid Freight – A Debt or Claim in Damages?

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In the recent case of *D'Amico Shipping Italia SPA v Endofa DMCC & Anor* [2016] the vessel Owner applied for summary judgment that a balance of freight was due and owing from the voyage Charterer. The court was required to consider if the freight was payable as a debt or as damages. Whether the claim was for a debt owed or in damages was important because the issue of mitigation is relevant to a claim in damages but not to a claim in debt.

Facts

This claim concerned a voyage to carry a cargo of crude oil from Ghana to Germany.

On the vessel's arrival at the discharge port freight had not been paid and neither Charterers nor Shippers gave any instructions for the discharge of the vessel. Owners eventually obtained the permission of the court to discharge the cargo and sold it for US$3.2 million.

Owners had claims for load port demurrage and detention and the balance of freight due and commenced proceedings against both the Charterer and the Shipper. The Shipper did not acknowledge service and judgment against them was entered in default.

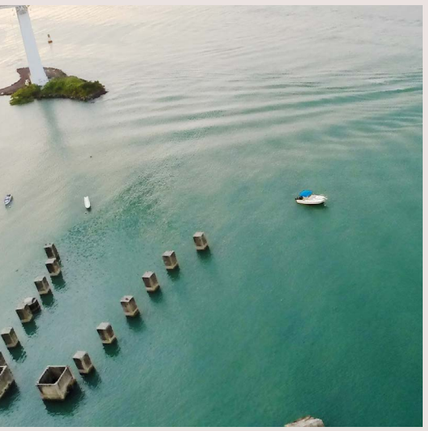
On an application made on notice to Charterers, an order was sought from the court to use the cargo sale proceeds to satisfy the claims. This article discusses the claim for freight and in respect of which Owners sought summary judgment.

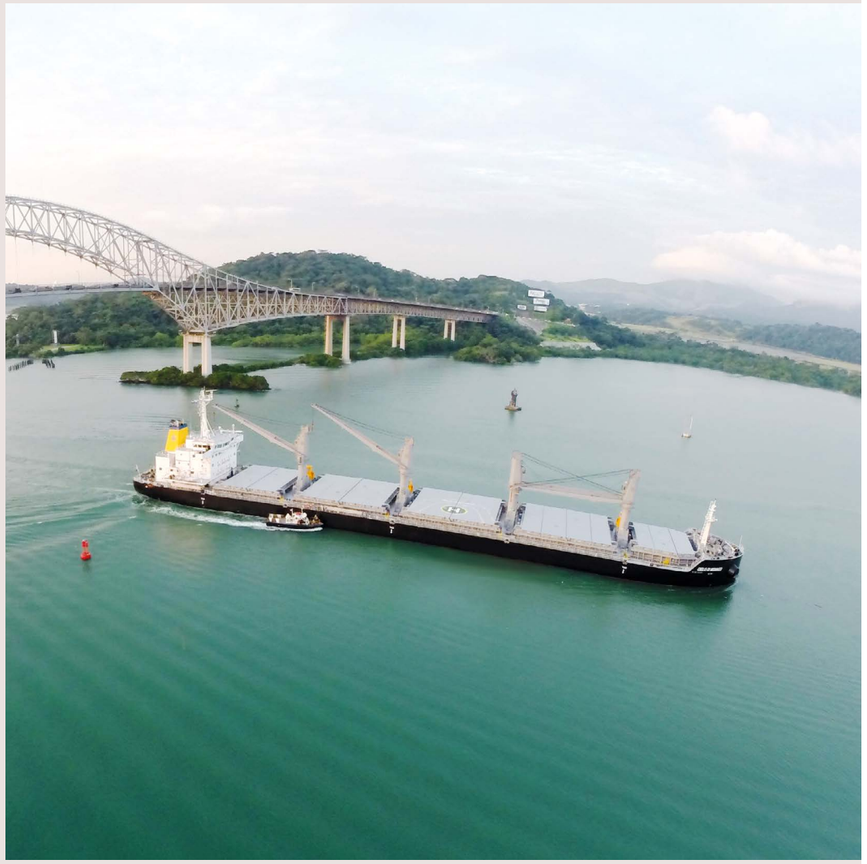
Commentary

For Charterers to successfully defend the claim for freight they would have to firstly show that freight was not recoverable as a debt and that instead their failure to give instructions to discharge was a breach of the Charterparty which prevented freight becoming due to Owners. If so this would, therefore, give rise to a claim in damages and in respect of which a triable issue of a failure to mitigate would mean summary judgment was inappropriate.

Whether freight had become due under the Charterparty and was recoverable as a debt turned on when freight was payable. Charterers' position was that this was once bulk is first broken i.e. when discharge begins, or as Owners

" ....this conclusion ...." was *"also in keeping with the general law and commercial practice so far as payment of freight is concerned..."... "*





argued when the vessel was tendered to the Charterer and made available for discharge.

The Charterparty provided that freight was payable BBB, or *"before breaking bulk"*, and a separate bespoke term of the charter was construed by the court to mean that freight had become due and was thus payable as a debt at the point when the vessel became an arrived ship and was made available to Charterers. The clause stated:

"If the freight and any other amount due to the owners, including, but not limited to accrued demurrage is not received by the Owners before notice of readiness is tendered, the Owner may … refuse to commence discharging the cargo until such time as the payment due is received by the Owners"

Accordingly the freight was owed as a debt. The court also went on to say this conclusion not only reflects the contractual construction of the relevant Charterparty but was *"also in keeping with the general law and commercial practice so far as payment of freight is concerned. The Owner has a lien for freight, that is a right to withhold discharge of and retain possession of the cargo until freight which is due is paid. That presupposes that freight is ordinarily payable when the Owner is ready to discharge the cargo and has signalled that to the charterer, not when the Charterer chooses to start the discharge of it."*

Conclusion

When freight is payable will depend on the terms of any applicable Charterparty.

Not all Charterparties provide as in this case that freight is payable BBB – *"before breaking bulk"*. Under the Gencon form Charterparty, the general rule is that payment of freight and delivery of the cargo are acts which are to be performed concurrently. It is however important to note that an Owner's obligation to commence discharge is conditional on the Charterer being ready and able to pay for the cargo as it is discharged. If the Charterer is not ready or willing, the Owner accrues his entitlement to receive freight as a debt if he holds himself ready to make delivery for a reasonable period of time. Charterers cannot simply refuse to accept delivery and expect that Owners will never receive entitlement to freight as a debt. ■

London Arbitration 26/16 – Short Loading Claims

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This decision looked at whether Charterers were able to claim damages from Owners for losses incurred, as a consequence of a short loading, between the seller and buyer of the cargo. The seller of the cargo was a wholly owned subsidiary of the Charterers. The Tribunal considered whether the losses could be passed on to Owners under the Charterparty.

Facts

The vessel was chartered on an amended Baltimore Form C Berth Grain form for the carriage of:

"…a full and complete cargo, in bulk, subject to limits guarantee, 55,000 mt, 10% more or less in Owners' option bulk HSS (intention soyabeans) stowage factor about 48 feet, without guarantee. Owners warrant the vessel is able to load, stow and carry the cargo as described, without any bagging, strapping or securing."

The vessel loaded 49,237.739 mt of cargo which was 262.261 mt less than the minimum contractual requirement of 55,000 mt, less 10% in Owners' option. As a result of this short loading, the buyer demanded a discount on the sale price and, after settlement discussions with the seller, a discount was agreed at US$180,915.70. Charterers brought arbitration proceedings against Owners to claim this amount in damages.

Charterers argued that Owners had breached the Charterparty as there was more than sufficient capacity to load the minimum quantity of cargo. This was especially so as hold no. 3 was slack upon sailing. Charterers also argued that Owners had breached the charterparty by presenting a vessel that was unable to carry the minimum quantity of cargo.

Owners' Arguments

Owners' defence to the short loading claim was that the charterparty qualified their obligation to load a minimum quantity of 49,500 mt because of the reference to the stowage factor of *"about 48 ft"*. The term *"about"* permitted a 3% allowance. The stowage factor of the cargo was in fact 49.77 ft – more than this 3% allowance.

The Master's calculation for the maximum quantity of cargo to be loaded was 49,620 mt based on a stowage factor of 48.5 ft. Charterers did not object and Owners contended that Charterers were, therefore, stopped from arguing that less cargo had been loaded because the stowage factor had been higher than that used by the Master in his calculation.

Owners also argued the loss which Charterers suffered did not arise under the Charterparty, but under the sale contract – and Charterers were not a party to this. Although the seller of the cargo was a wholly owned subsidiary of the Charterers, as they were separate legal entities, they could not step into the shoes of the Charterer to claim against the owner without any proof of assignment or transfer of the right to pursue the claim. Owners also said that the losses claimed by Charterers were too remote.

Charterers' Arguments

Charterers countered Owners' argument in respect of the stowage factor by pointing to the words *"without guarantee"* which followed the stowage factor, meaning that no warranty was in fact given.

Charterers did not address Owners' point that the seller was a separate legal entity.

Charterers denied the claim was too remote since the loss claimed was a direct consequence of the vessel being unable to load the full quantity of cargo.

The Decision

It was decided that Charterers had not breached the Charterparty in relation to the stowage factor as this had been given *"without guarantee"*, meaning that there was no contractual warranty in this respect. Furthermore, there were reasonable grounds for assuming that the stowage factor would be about 48 ft.

The Tribunal did not have enough evidence to ascertain whether the Master was to blame for the short loading of the cargo. As Owners had specifically warranted that the vessel could load, stow and carry the cargo as described, the onus was on them to show that any difficulty in complying with the warranty was the fault of Charterers. Owners were therefore in breach.

However, Charterers' claim for short loading failed. Whilst the tribunal accepted the reduction in the price of the cargo did not appear to be attributable to any other factor than the short loading there was no evidence to demonstrate that Charterers would be liable for losses incurred by the seller.

In any event, the Tribunal decided the losses being claimed by Charterers were too remote to be recoverable from Owners. It would not have been in the reasonable contemplation of the parties when entering into the Charterparty that any short loading would lead to a general reduction in price of all cargo actually carried.

Comment

Members should be aware of the effect the words *"without guarantee"* will have upon their rights if inserted into any Charterparty clause, not just those referring to stowage factors. Under English law, if the words *"without guarantee"* are inserted into a clause, absent bad faith, it will mean that the party in question has given no contractual undertaking in respect of that clause. This would make any claims for damages under such clause extremely difficult.

Members should also bear in mind that generally the onus will be on vessel Owners to ensure that the vessel is able to stow and load the amount of cargo stated in the Charterparty, especially if Owners have warranted to do so (as Owners had done in this case). Although, Owners were not held liable for Charterers' losses, they were still found to be in breach of the Charterparty. If the Charterers and the shipper had been the same entity, the decision may have been different.

Claims for lost profit under sale contracts due to short loading of cargo are unlikely to succeed against Owners. Unless in the contemplation of the parties when contracting they will be too remote, and not recoverable. ■

No Hague Rule Limitation for Loss or Damage to Bulk Cargo – *The Aqasia*

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The post First World War economy, and that of the Great Depression in the 1920's, was very different to the one in existence today. In particular, commodity prices during that period suffered a prolonged period of stagnation and were worth far less in value than their equivalent today.

Against this backdrop it is perhaps unsurprising that when the Hague Rules were being drafted those involved did not necessarily consider that the limitation provisions in Article IV r5 would be relevant to the carriage of bulk cargoes. Article IV r5 provides that:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit,…"

In a recent case Sir Jeremy Cooke in the English Commercial Court was asked to determine whether the Hague Rules limitation regime applied to bulk cargoes.

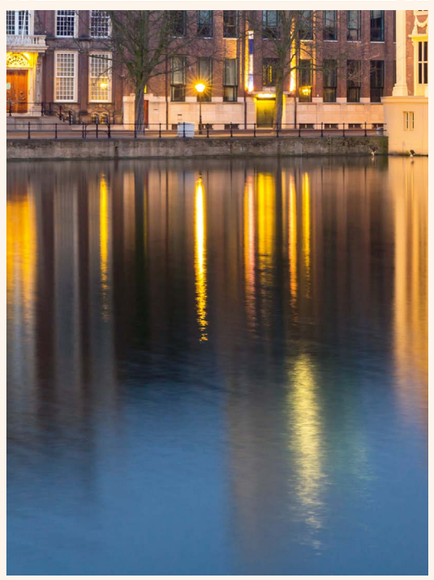
The defendants had agreed to carry 2,000 tons of fishoil in bulk 5% more or less in Charterer's Option from Westmans Islands and Faskrudsfjordur in Iceland to Stokmarknes, Averoy and Stavanger in Norway.

On 6 September 2013 the defendants loaded 2,056,926 kgs of cargo at Faskrudsfjordur and Vestmannaeyjar of which 550,000 kgs was loaded into tanks 1P, 2P AND 5S of the tanker "Aqasia".

While en route to discharge in Norway, a further cargo of fishoil was loaded at Lovund, Norway. Part of this parcel of cargo was loaded into tanks 1P, 2P and 5S and the resulting commingled cargo was then subject to a claim from cargo interests at discharge.

The claim was based on 547,309 kg of cargo amounting to US$367,836 plus interest and costs having been damaged. That the cargo had been damaged was not in dispute but what was contested was the right to limitation under the Hague Rules. The Owners were prepared to offer £54,730.90 applying the Hague Rule limit of £100 to each metric tonne of cargo damaged arguing the word *"unit"* could apply to the measurement used to quantify the cargo in the contract of carriage.

"The Judge did not consider the purpose of the Hague-Visby Rules was to introduce a limit of liability for bulk goods that had been excluded under the Hague Rules."



Looking at the language of Article IV r5, the Judge was persuaded by the Claimants that the phrase *"package or unit"* referred to a physical item rather than a unit of measurement. Applying the *noscitur a sociis* principle, the Judge was satisfied the use of the term package and unit in the same context indicated that they were referring to physical items. The position was supported by the use of the word *"package"* in Article III r3 (b) where it was accompanied with the word *"pieces"*, and where the references to *"quantity and weight"* were distinct and specified separately.

The Judge went on to point out that if the intention had been for the word unit to cover both unpackaged items as a units of shipment and also units of measurements for bulk cargo it would create a practical problem. Where both a package and its weight or volume appeared on the bill of lading it was probable this would give rise to different limitation amounts and it would then be a question of which would have been the appropriate one to use as, unlike the Hague-Visby Rules, there was no mechanism contained within the Hague Rules to determine which would apply.

Article 5 (a) of the Hague-Visby Rules (SDR Protocol) provides:

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

Although the case was based on the construction of the Hague Rules, the defendants argued that

the Hague-Visby Rules limitation provisions showed that bulk cargoes were within the scope of the phrase *"per package or unit"* as the limitation calculation included a weight limitation.

The Judge did not consider the purpose of the Hague-Visby Rules was to introduce a limit of liability for bulk goods that had been excluded under the Hague Rules. Conversely, as was evidenced by the inclusion of the phrase *"whichever is higher"* the intention was to provide cargo interests with two alternative types of limitation irrespective of the nature of the goods shipped. While the Judge agreed that the Hague-Visby Rules limitation provisions do apply to bulk cargoes he considered that the construction of the Hague Rules could not be influenced by the terms of the Hague-Visby Rules.

Other than the Australian Federal Court case *El Greco v Mediterranean Shipping* [2004] 2 Lloyd's Rep 537 there was no direct English authority for Sir Jeremy Cooke to rely on. However, in the *El Greco* Allsop J said (at paragraph 278):

"…The terms of art. IV, r. 5 of the Hague Rules were negotiated and agreed upon as a package limitation […] The addition of the words "or unit" can be seen to have been intended to clarify the rule by making unnecessary any debate in individual cases about the extent and nature of wrapping and the like, so that individual articles capable of being carried without packaging - boilers, cars and the like, and which could be seen as units of cargo as shipped - would be covered. This approach involves a rejection of the notion that "or unit" was inserted to cover bulk cargo by reference to freight unit, as in U.S. COGSA. The weight of judicial and other views that I have earlier referred to makes this a safe conclusion…"

The closest English decision was S*tudebaker Distributors Ltd v Charlton Steam Shipping Co Ltd* [1938] 1 KB 459, in which Goddard J decided a bill of lading clause limiting liability to US$250 per package could not apply to an unboxed car. In his judgment Goddard J stated that if the Shipowners wanted the clause to refer to any individual piece of cargo they could have used *"appropriate words, as, for instance, "package or unit," to use the language of the Hague Rules…"* An indication, therefore, that Goddard J thought the phrase *"unit"* only covered an individual piece of cargo and not a unit of measurement.

In addition to the distinction between the Hague and Hague-Visby Rules limitation provisions Sir Jeremy Cooke's decision has also highlighted the difference between the word *"unit"* in the Hague Rules, and *"customary freight unit"* in the United States Carriage of Good by Sea Act (US COGSA). Indeed the reference to customary freight unit in US COSA was acknowledged in the US Department of State Memorandum of 5 June 1937 as being intended to *"clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States" for purposes of interpretation"* thereby allowing USCOGSA to apply to bulk cargoes. ■

HMHS "Britannic": The Brief Life of "Titanic's" Gigantic Sister

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21 November 2016 was the centenary of the sinking of His Majesty's Hospital Ship "Britannic", the largest British Mercantile Marine loss of the First World War. "Britannic" was the last of the trio of huge Atlantic express liners built for the White Star Line, the first two ships being "Olympic" and "Titanic". They were conceived by J. Bruce Ismay, Managing Director of the White Star Line, and Lord Pirrie, Partner of Belfast shipbuilders Harland & Wolff, during a fateful dinner party in 1907, in response to the Cunard Line's "Lusitania" and "Mauretania" which entered service that year. The "Olympic" class, at some 45,000 gt and 882 ft long, would be 50% larger and nearly 100 ft longer than their Cunard rivals though not as fast; a perfect example of the White Star Line's policy of great size and comfort combined with moderate speed. They were to be the last word in luxury and elegance and "Britannic" would incorporate all the lessons learned from the construction and operation of her older sisters, making her the finest vessel ever built for the White Star Line. Tragically, this magnificent three-ship service never came about. "Olympic" was the only one of the trio ever to see New York, and by the end of 1916 the only surviving ship, as "Britannic" had joined "Titanic" on the seabed, in a sea she was never intended to sail, without ever carrying a fare-paying passenger. Harland & Wolff did their best to re-design "Britannic" to be capable of surviving the damage the iceberg had inflicted on her sister, yet "Britannic" went to the bottom in a third of the time it took "Titanic" to sink. This article considers what might have gone wrong.

Harland & Wolff yard no. 433 was not officially named "Britannic" until 1 September 1912 and a legend persists that she was originally intended to be named "Gigantic", and her name was changed after the "Titanic" disaster on 15 April 1912. "Olympic" and "Titanic" were named after the Greek immortal races, the Olympians and the Titans, with the addition of the White Star Line suffix -ic, so naming the third ship "Gigantic" after the mythical Greek Giants seems logical. However, Harland & Wolff's order book contains a reference to "Britannic" as early as 28 June 1911, indicating that if the third ship was ever going to be named "Gigantic", her name was changed long before "Titanic" sank. As well as being patriotic, White Star regarded "Britannic" as a lucky name, the previous "Britannic" (I) having served the line from 1874 to 1903.

"Titanic" foundered from uncontrolled flooding, two hours and 40 minutes after side-swiping an iceberg which popped-off the rivets' heads of her starboard hull plating, opening seams in the forepeak, No. 1 hold, No. 2 hold, No. 3 hold, and No. 6 and No. 5 boiler rooms to the sea. The world's then largest vessel, "Titanic" was at the cutting edge of marine engineering and naval architecture of the day, but the arrangement of her internal transverse bulkheads was shown to be woefully inadequate.

The "Titanic" disaster was a massive shock to Harland & Wolff, the maritime industry and to the world, and the White Star Line decided that drastic action was needed to restore confidence in its "Olympic" class liners. "Britannic's" construction had progressed only as far as the tank top and work was suspended while Harland & Wolff devised major hull revisions. These involved raising her transverse bulkheads to B deck (40 ft above the deepest load line) and fitting an inner skin along the length of the boiler room and engine room spaces. In theory, these improvements meant "Britannic" would be capable of remaining afloat with any six compartments completely flooded.

By the summer of 1914, "Britannic" was being fitted out at Belfast having been launched on 26 February that year. Work on the ship's wooden panelling and fixtures was well underway. One of the most prominent and admired features of "Olympic" and "Titanic" was the main first class companionway – the Grand Staircase – which extended seven decks from the Boat Deck to F Deck. "Britannic's" Grand Staircase would have been even more magnificent, as it was planned to incorporate a two-deck high pipe organ made by the Welte Company of Freiburg, which could be played either by an organist or using a roll mechanism for automated play. However, neither the organ nor the staircase's sumptuous wooden panelling had been installed by the outbreak of the Great War. Thereafter completing "Britannic" was not a priority and work slowed as shipyard workers rushed to enlist and raw materials were diverted to yards with Admiralty contracts.

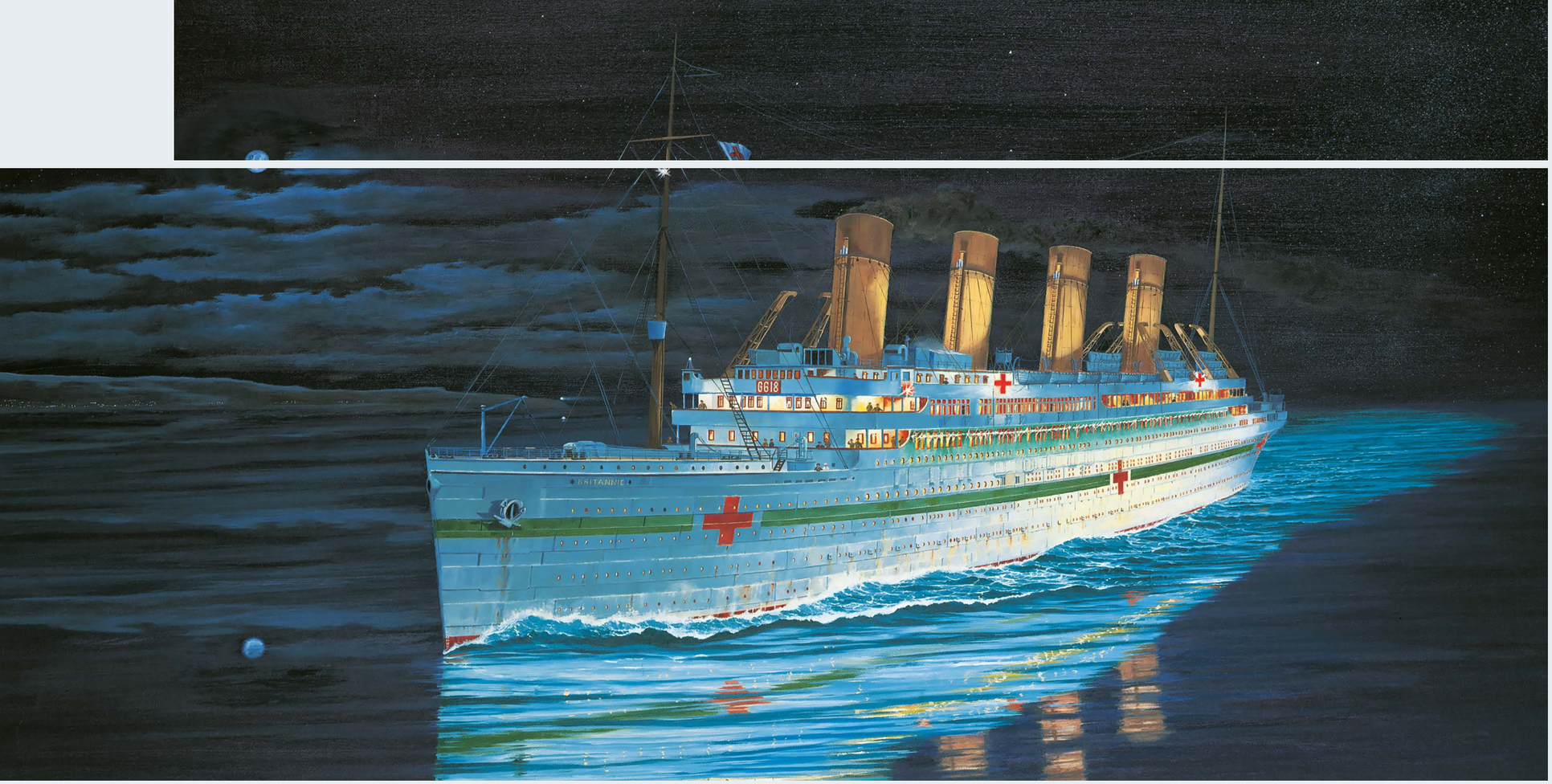
Following the Allied invasion of Gallipoli in April 1915, the War Office required large transports for trooping duties to the Mediterranean. First to be called up were Cunard's "Mauretania" and "Aquitania"; "Olympic" was requisitioned as a troop ship on 1 September, and on 13 November the War Office enquired of Harland & Wolff how quickly "Britannic" could be made ready as a hospital ship. Work began frantically to complete the ship's electrics and plumbing, and to install 3,309 bunks for the patients. The public rooms on the upper decks were ideal for conversion into wards, as the sick and wounded would be as close as possible to the lifeboats in an emergency, while lower down, where the motion of the ship was less noticeable, the first class dining room was transformed into operating theatres. "Britannic's" four funnels were painted the traditional yellow of British hospital ships, and her hull was painted in line with 1907 Hague Convention's requirements for military hospital ships. The overall scheme was described by the ship's chaplain, the Reverend John Fleming:

"She was a perfect beauty, freshly painted from end to end, the graceful band of green relieving the monotony of white, and the great red crosses standing out vividly against their background. In addition to the red crosses which were painted on the sides for the protection of the ship by day, there were on both sides of the ship, high up on the level of the boat deck, two red crosses, each lit by no fewer than 125 electric lights, while from end to end of the vessel there stretched a chain of bright green lights, behind which the vessel sheltered when the darkness fell. I remember one night when looking down from the mountain side upon one of the loveliest bays in Europe, catching sight of the "Britannic" lying at anchor. It seemed like a picture from fairyland, and the green lights and the giant red crosses stood out in bold relief against the dark background of the sea. It was not possible, whether by day or night, to mistake the character of the ship."[1]

During the winter of 1915 "Britannic" ran between Southampton and either Naples, where casualties were embarked from smaller hospital ships, or the Allied Headquarters for the Gallipoli campaign at Mudros. She mostly sailed without an escort, relying on her speed to avoid enemy submarines or surface ships that might not respect her status as a military hospital ship.

"Britannic's" use was discontinued after the evacuation of Gallipoli but in September 1916 a new offensive at Salonika, where an Allied army had been sent to block German supplies to Turkey, along with British offensives against the Turkish army in Palestine and Mesopotamia, placed the smaller hospital ships in the Mediterranean under renewed pressure and "Britannic" was called up again. She sailed from Southampton for the last time on 12 November 1916 on her sixth voyage, bunkering at Naples before proceeding to Mudros. A fortnight earlier the Imperial German Navy's "U-73", a Type UE-I ocean-going submarine minelayer, had laid two barrages of six mines at right angles to the shipping lane in the Kea Channel, which separates mainland Greece from the island of Kea.

Shortly before 8:00 am on Tuesday 21 November, "Britannic" entered the Kea Channel. The medical staff had just begun breakfast when at 8:12 am *"suddenly, there was a dull, deafening roar. "Britannic" gave a shiver, a long drawn out shudder from stem to stern, shaking the crockery on the tables, breaking things till it subsided as she slowly continued on her way. We all knew she had been struck."*[2] On the bridge Captain Bartlett immediately ordered the engines stopped,



"…..in about 10 minutes, "Britannic" was in the same condition "Titanic" had been in one hour after the collision with the iceberg."

Angel of the Night - HMHS "Britannic" by Simon Fisher

the watertight doors closed and a distress signal sent, while the damage was assessed and the lifeboats uncovered. The explosion had occurred on the starboard side between No. 2 and No. 3 cargo holds, destroying the bulkhead between them, and damaging the bulkhead between the fore peak tank and No. 1 cargo hold. The blast had also broken the watertight firemen's tunnel which led from their quarters in the bow through the cargo holds to No. 6 boiler room. The watertight doors would have been open at the time of the explosion as the watch was changing, and apparently failed to close properly, as No. 6 and No. 5 boiler rooms were flooding uncontrollably. The extent of the internal damage meant that in about 10 minutes, she was in the same condition "Titanic" had been in one hour after the collision with the iceberg. The loss of these first six compartments left "Britannic" dangerously close to her theoretical safety threshold.

The Master decided to try to beach the ship on the nearby Island of Kea and the engines were re-started. Unfortunately, as "Britannic" moved ahead, lifeboats were already being lowered without awaiting orders. One of the occupants was Violet Jessop, a White Star Line stewardess who had enrolled as a Voluntary Aid Detachment nurse and who had not only survived the "Titanic" disaster, but had also been on board "Olympic" when she collided with HMS "Hawke" in the Solent, whose bow tore a large hole in her side near the stern.[3] Once afloat, despite the boat crews' desperate attempts to get clear, two lifeboats were drawn astern towards the propellers. With the ship sinking by the head and listing to starboard, the still-revolving port propeller had risen above the water, and on seeing its thrashing blades everyone in the two boats jumped overboard, including non-swimmers like Violet. The resulting carnage killed 21.

The forward motion of the ship caused the damaged compartments to fill more rapidly and as the list to starboard increased, water entered through the E deck portholes which, contrary to regulations, had been opened by the medical staff earlier that morning to ventilate the lower decks, overwhelming Harland & Wolff's improved-bulkhead design. She quickly became unmanageable and the Master, who was unaware of the tragic events aft, decided to stop engines and evacuate the ship.

By 9:07am, 55 minutes after the explosion, all that was left of the largest four-funnelled liner ever built were 35 lifeboats and scores of swimmers on a wreckage-strewn sea. "Britannic's" distress call had been received and by 10:00 am, survivors were being picked up by the Beagle class destroyers HMS "Scourge" and HMS "Foxhound", and by the cruiser HMS "Heroic", among other vessels. 1,035 personnel were saved, 30 died and 21 were seriously wounded. Had "Britannic's" wards been fully occupied by patients the death-toll would have been catastrophic. Violet Jessop survived and, despite all her experiences in "Olympic" class liners, she rejoined the White Star Line in 1920 as a stewardess in "Olympic".

In December 1975, 59 years later, the wreck was located by Jacques Cousteau and in 1995 ROV technology enabled Dr Robert Ballard to survey it. "Britannic" lies on her starboard side in remarkable condition, and in the warm waters of the Aegean she has transformed into an artificial reef with corals and sea growths of every kind. The hull is virtually intact retaining its full 94 ft beam and most of the superstructure, including the deckhouses, ventilators, lifeboat davits and railings. As the wreck lies at a depth of only 395 ft it can be visited by free-swimming Scuba divers. During an expedition in 2009 divers Kohler and Stevenson were able to access the spiral staircase down to the firemen's tunnel and follow it to No. 6 boiler room, where: *"glass-faced gauges and brass plaques were mounted on the bulkhead, light fixtures contained the bulbs still inside, shovels and wheelbarrows had their wood handles intact, and everything was blanketed in silt, mummified in the still water."*[4] Not only had the watertight door into No. 6 boiler room been open, at the far side of the compartment they saw the door into No. 5 boiler room was also wide open.

This should not have been the case. All such doors were fitted with floats under the floor plates which would rise as water entered the compartment, closing the doors automatically. "Titanic" expert Parks Stephenson considered what may have gone wrong in "Britannic's" case:

"I believe that the mine detonated just underneath and close to the starboard side of the hull. The resultant bubble pulses lifted the bow of the ship (but not the stern), causing hull deformation that extended hundreds of feet aft of the original explosion location. The hull deformation caused the bulkheads to also deform, throwing the watertight door tracks out of true and jamming the door in place (full open position) before they could be dropped. When the clutches holding the doors released (either by normal or emergency method), the doors refused to fall. Water rushing in virtually unrestricted caused everyone in the area to flee shortly after. And… if you lose Boiler Room 5 you lose the ship".[5]

"Britannic's" six boiler rooms housed 24 double-ended and five single-ended coal-fired scotch boilers, making a total of 159 furnaces. All large passenger vessels struggled to find enough physically fit men willing to do the back-breaking work of the stokers, especially in wartime. No. 6 and No. 5 boiler rooms were evacuated two minutes after the explosion. Could a more experienced 'black gang' have done more in terms of damage control?

White Star Line historian Paul Louden-Brown expressed his view:

"Imagine the conditions in the Mediterranean, the heat, the toll on the men, then the explosion. Panic from inexperienced men might also be part of the reason those doors were not closed…I think these are factors to consider. After all, it's easy for you or I to sit talking about why this or that was not done, but deep inside a metal box, below the waterline, and you hear an explosion, the lights go out, bells ringing, escaping steam, screaming, this is a nightmare situation that only the strongest could endure."[6]

The White Star Line did not feel able to order a vessel of the same mammoth size as the "Olympic" class again, and "Britannic" (II) was the largest British built liner until the advent of the Cunard Line's "Queen Mary".[7] The name "Britannic" lived on in the form of a 26,943 gt motorship which served the company on the Liverpool - New York route from 1930 until 1960, and was the last liner of the White Star Line to bear its livery. In 2007 the Museum of Music Automatons in Seewen, Switzerland, was restoring its Welte Philharmonic organ. While cleaning normally hidden beams, the word "BRITANIK" was found stamped on six locations inside the organ, pointing to its intended original purpose. The instrument is used to play the museum's inventory of 1,230 original Welte company rolls, allowing visitors to hear the music that, had the war not intervened, would have filled "Britannic's" Grand Staircase as she steamed across the North Atlantic.

Patrick Britton's full article can be read on:
https://www.steamshipmutual.com/publications/Articles/britannic.htm

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[1] Fleming, Rev. J, The Last Voyage of His Majesty's Hospital Ship "Britannic" (Wordsmith Publications, 1998) p.14.
[2] Jessop V and Maxtone-Graham J, Titanic Survivor - The Memoirs of Violet Jessop, Stewardess (Sutton Publishing, 1998) p.172.
[3] See Owners of the SS Olympic v Blunt [1913] P. 214. Fellow "Titanic" survivors who also survived "Britannic's" sinking included fireman John Priest and lookout Archie Jewel.
[4] Kohler R and Hudson C, Mystery of the Last Olympian (Best Publishing Co, 2016) p.107.
[5] Ibid, p.163.
[6] Ibid, p.162.
[7] In 1928 the keel of a 60,000 ton liner, "Oceanic" (III), was laid at Belfast for the White Star Line, 2½ years ahead of "Queen Mary", but her construction never progressed very far and was eventually abandoned.

Rule B: Still a Dynamic and Effective Tool in Maritime Disputes

SIMMS·SHOWERS LLP
INTERNATIONAL PRACTICE. PERSONAL COMMITMENT.

Marios J. Monopolis
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This article provides an overview of Rule B attachment and discusses the dynamic use of Rule B notwithstanding the Second Circuit's 2009 decision in *Jaldhi* prohibiting attachment of electronic funds transfers passing through United States banks could no longer be attached. To avoid confusion, the term *"attachment"* will be used herein to refer both to attachment (seizing property in the hands of a defendant) and to garnishment (seizing property in the hands of a third party).

Background

Rule B is one of seven special rules (the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) that live within the broader Federal Rules of Civil Procedure. Rule B can be used by a plaintiff with a maritime claim to attach or garnish, on an *ex parte* basis, a defendant's property in any federal district in the United States.

Maritime attachment arose in response to the peripatetic and transient nature of the maritime and shipping industry. Unlike parties in a traditional civil action, the geography of maritime parties can span the globe. Maritime attachment provides a partial solution to the challenge of locating foreign parties by creating jurisdiction through the attachment of the foreign party's property, thereby forcing the foreign party to appear and defend the action.

Maritime attachment and other maritime remedies provided in the Supplemental Rules and United States statutory law also arose in response to a need to provide protection to maritime claimants (e.g. providers of necessaries, seafarers) and to increase certainty and predictability to international commerce within a critical industry.

As explained further below, maritime attachment remains a powerful tool for the maritime claimant and its utility should not be underestimated.

Purposes

There are two fundamental purposes to a Rule B action. The first is to obtain jurisdiction over an otherwise foreign defendant. Where a defendant is not present in the district where the action is brought, a successful attachment of the defendant's property creates *quasi in rem* jurisdiction over that defendant. The second purpose is to obtain security for the plaintiff's claim. This can include not only security from which to pay any final judgment obtained in the Rule B action, but also security for any contemplated or pending international proceeding, including arbitration.

Prerequisites

The prerequisites for instituting a Rule B action are straightforward and require only a *prima facie* showing at the initial filing stage. First, the plaintiff must have a cognisable maritime claim against the defendant in either contract or tort. A contract must typically have maritime commerce as its principal objective in order to qualify as a maritime contract (or as one court has asked, is it "salty" enough?). When a contract is "mixed", in that it is comprised of both maritime and non-maritime elements, the contract must pass two tests. First, the court must conclude that the subject matter of the mixed contract is sufficiently connected to some aspect of maritime commerce. Second, the court must conclude that the nature of the contract is primarily maritime. Failing either of the two tests divests the court of its admiralty jurisdiction over the mixed contract.

Second, the defendant must not be "found" within the district where the Rule B action is brought. This prerequisite comprises two distinct requirements – first, that the defendant cannot be "found" for purposes of service of process (i.e. the defendant does not have a registered agent appointed within the district) and second, that the defendant does not have sufficient "minimum contacts" within the district. In order to satisfy Rule B's prerequisites, only one of these two requirements must be met.

Third, the defendant's property must either be present within the district when the Rule B action is brought or shortly thereafter. The property can include not only tangible items (e.g. bunkers) but also intangible items (e.g. accounts, internet website domains, IP addresses). In some instances, even property that is not technically "present" in the district may be subject to attachment provided that the garnishee in control of that property is subject to the jurisdiction of the court where the Rule B action is filed.

United States courts have not decided the outer time limitations of when property must be attached. In the Southern District of New York, where many Rule B actions are brought, some judges have set a 60 day limit – if no property has been attached within 60 days of service of the attachment writ, the writs expire. A different view implicitly sets the time limitation so that it is identical to that for service of a summons under the Federal Rules of Civil Procedure. Recent amendments to those Rules have reduced this time limitation from 120 days to 90 days.

Fourth and finally, there must not be any statutory or legal bar to the attachment. This prerequisite is typically only implicated where the defendant is a foreign sovereign: under the Foreign Sovereign Immunities Act (28 U.S.C. § 1330 et seq.), and subject to certain caveats, the property of a foreign sovereign is generally not subject to prejudgment attachment.

Process

In addition to a complaint which sets forth the particulars of the claim and is verified (usually by the plaintiff's attorney), the plaintiff will also include in its opening papers a motion requesting that the court authorise issuance of writs of attachment (formally called Process of Maritime Attachment and Garnishment). If the court is satisfied that the four prerequisites have been met, it will grant the motion and the clerk of the court will subsequently issue the requested writs.

In cases where the plaintiff can show exigent circumstances (i.e. that an account owed to the defendant and in the hands of the garnishee may be paid out quickly), the granting of the motion and the issuance of the writs may be accomplished within the same day that the action is filed. More typically, it will take one to two days before this occurs.

When the writs have been issued, the plaintiff must serve them on the garnishee(s) named in the complaint. An oft-ignored tool which many maritime practitioners fail to use is interrogatories. In addition to writs of attachment, Rule B permits the plaintiff to serve a limited set of interrogatories upon the garnishee(s) aimed at discovering information about property of the defendant in the hands of the garnishee(s). Rule B interrogatories can be an effective means of obtaining critical information about a defendant's business relationships and likely sources of attachable property.

The garnishee(s) has twenty-one days from service of the writ and interrogatories to respond. If the garnishee(s) admits to property of the defendant, that property must either be held by the garnishee(s) or deposited with the court.

A defendant – or any third party with an interest in the property attached – may petition the court to vacate the attachment (vacatur) by requesting a hearing under Rule E(4)(f). At the hearing, the defendant bears the initial burden of showing that one of the four Rule B prerequisites has not been met. In traditional cases (i.e. those that do not involve multiple defendants and allegations of alter ego), the challenge to the attachment will typically be brought against the third factor – that the defendant's property is not in the district. Fortunately, the inquiry here is usually straightforward and with the garnishee's answers to the interrogatories, the court should have little problem determining whether the challenge has any merit.

In alter ego cases, the challenges will typically come against the first (a cognizable maritime claim against the defendant) and third (the defendant's property is in the district) factors. What often happens is that the primary defendant, against which the plaintiff unquestionably has a claim, will have no property – either in the jurisdiction or anywhere else in the

world – but one or more of the alter ego defendants (such as a sister or parent company) will have property. These alter ego defendants will argue both that the plaintiff has no direct claim against them (i.e. that the alter ego allegations are insufficient to impart liability on them for the primary defendant's actions) and that the property attached belongs to them, and not the primary defendant. Whether the court agrees with these challenges and vacates the attachment will depend not only on the facts alleged but also on the standard applied as discussed further below.

Winter Storm, Consub Delaware, and *Jaldhi*

In 2002, a decision in the Second Circuit (*Winter Storm*) concluded that all electronic funds transfers ("EFTs") passing through intermediary banks could be attached under Rule B. This watershed decision opened the floodgates for maritime practitioners in New York and in the ensuing years saw a raft of Rule B attachment actions filed in the Southern District of New York (where the largest intermediary banks are located). Because the vast majority of international commercial business is transacted in United States dollars and because all United States dollar-denominated wire transfers must pass through an intermediary bank, *Winter Storm* made it significantly easier to attach a defendant's property without the need to first undertake potentially costly investigations and research into a defendant's business relationships.

Winter Storm was subsequently upheld in the Second Circuit's 2008 *Consub Delaware* decision, which specifically held that "originator EFTs" (wire transfers initiated by the defendant) were subject to attachment under Rule B. *Consub Delaware* did not address the question of whether "beneficiary EFTs" (wire transfers initiated by a third party and sent to the defendant) could be attached, leaving the *Winter Storm* holding (that all EFTs are subject to attachment) in place.

In 2009, however, the Second Circuit's decision in *Jaldhi* finally addressed the beneficiary EFT issue and held that such EFTs could not be attached under Rule B because they were not property of the defendant. In the lead up to *Jaldhi*, approximately one third of all new cases filed in the Southern District of New York – 1,000 in a single four-month period – were Rule B attachment actions. Additionally, the largest intermediary banks in New York were reporting more than 700 services of attachment orders on a daily basis.

In the end, *Jaldhi* overturned the court's holdings in *Winter Storm* and *Consub Delaware*, eliminating the ability to attach EFTs. The impact of *Jaldhi* on case filings and the maritime bar in New York was significant – almost overnight, the number of new case filings fell by 30%.

Rule B After *Jaldhi*

When the *Jaldhi* decision came out, many commentator's predicted the death of Rule B attachment actions, particularly in the Southern District of New York. And while it is true that the number of new case filings dropped significantly, Rule B is by no means dead or any less useful today than it was before *Jaldhi. Jaldhi* simply requires that a plaintiff now expend some resources upfront to determine whether – and what – assets of a defendant might be subject to attachment in the United States.

The more traditional or historical uses of Rule B attachment before *Winter Storm* opened the doors to attaching EFTs – finding the defendant's property in the hands of third party garnishees who do business with the defendant – are still available. With targeted research and investigation, it is often possible to identify both actual and likely entities that are doing business with a defendant, determine whether they have a presence in the United States,

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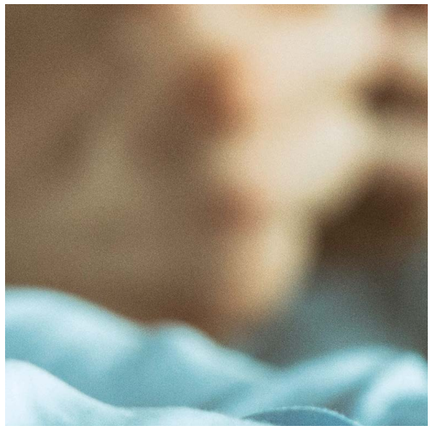


and gauge the likelihood that those entities may have property belonging to the defendant.

Rule B and Alter Ego

In today's interconnected world of international commerce, it is not unusual to see a layered web of related entities organised beneath a "group" umbrella. This is particularly true in certain parts of the world where public records registries do not exist. This adds a further level of complexity to a Rule B attachment, but one that can potentially be overcome through factually-supported allegations of alter ego.

United States courts have developed a fairly consistent pattern of case law to address claims of alter ego and have generally coalesced around an eight-factor test that focuses on corporate formalities, sufficient capitalisation, transfers of funds, commingling of directors and officers, common office space and telecommunications, and the amount of control exercised by the dominant entity (or individual) over the subservient entity.

The practical application, however, is far from consistent – particularly at the Rule E(4)(f) stage. The largest disagreement appears to be over what standard applies at the Rule E(4)(f). Some courts require the same showing for alter ego that is required for the initial Rule B claim – *prima facie*. This standard precludes consideration of evidence outside of the initial complaint and the court focuses only on whether the alter ego allegations in the complaint are sufficient enough. Other courts apply a "reasonable grounds" or "probable cause" standard which requires that the plaintiff put on some evidence to support the alter ego allegations. This stricter standard also allows the court to consider external evidence presented by the defendant or a third party with an interest in the attached property.

Rule B for Security Only

Historically, Rule B has been used primarily to obtain *quasi in rem* jurisdiction over a foreign defendant; even when security is also obtained, Rule B actions have traditionally involved litigating the underlying claim as well.

This has proved challenging for international maritime claimants whose contracts contain clauses providing for jurisdiction or arbitration in countries outside of the United States. Such clauses would typically preclude a plaintiff from instituting a substantive proceeding in the United States seeking a judgment on the underlying claim, although procedurally, it would be the defendant's burden to argue and show that the United States court lacked jurisdiction to adjudicate the claim.

Rule B, however, is not so limited. In addition to obtaining jurisdiction, Rule B also allows a plaintiff to obtain security for its claim ahead of any adjudication or arbitration of the same. Nothing in text of Rule B or the case law interpreting it limits either the type or geographic location of this adjudication. Coupled with the Federal Arbitration Act (9 U.S.C. § 1 et seq.), Rule B has successfully been used to obtain security in the United States for claims being adjudicated or arbitrated in foreign jurisdictions around the world.

Using Rule B to obtain prejudgment or pre-award security can be advantageous to a plaintiff where the rules of the foreign jurisdiction or tribunal would not otherwise permit such actions, including because Rule B does not require that a foreign proceeding has actually been commenced. As a practical result, maritime claimants can obtain security in the United States through Rule B without first commencing arbitration or initiating litigation in a foreign jurisdiction. If successful in attaching a property, claimants will often find a defendant quite willing to settle on favorable terms in order to avoid full-blown arbitration or litigation.

Conclusion

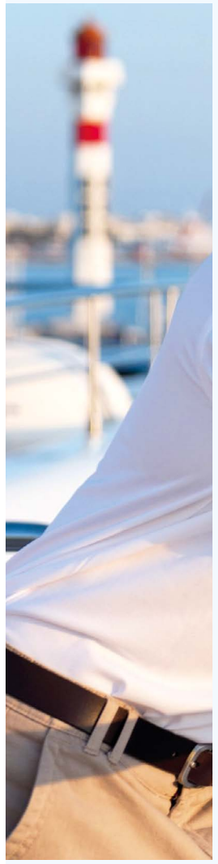
Rule B remains a potent weapon in a maritime claimant's arsenal, notwithstanding the limitations on attachment following *Jaldhi*. In the vast majority of cases, the comparatively limited investment in a Rule B action is always worth the effort. Even if property is not attached or alter ego cannot be conclusively proven, many defendants will want to avoid the commercial embarrassment of being branded deadbeats and will therefore seek to settle the underlying claim. Each fact pattern, however, is unique and requires careful consideration by competent United States counsel to determine whether Rule B is available. ■

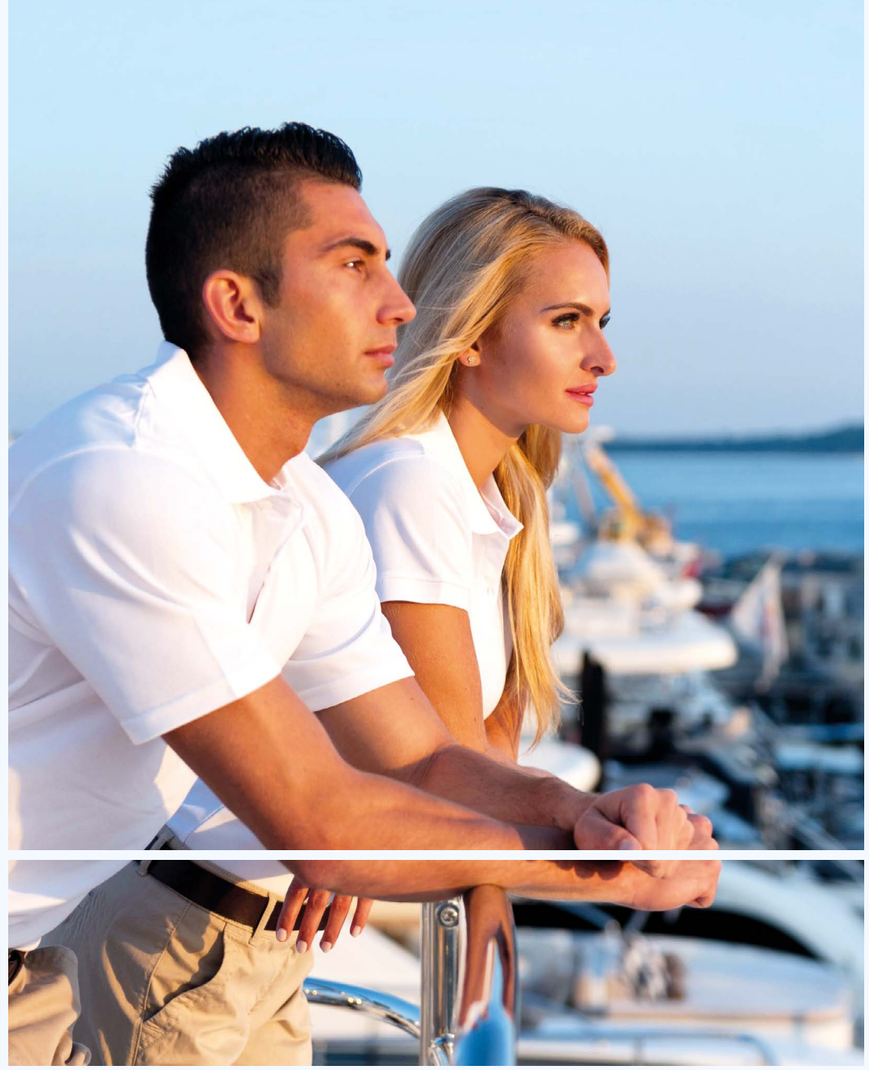
New Loss Prevention Postcards

The Club latest series of loss prevention postcards address safe working practices onboard vessel with a view to avoiding unnecessary crew injury

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

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





Steamship Mutual Conclude a Preferred Partner Agreement with Allianz Worldwide Care

Steamship Mutual has entered into a Preferred Partner agreement with Allianz Worldwide Care (AWC), one of the world's leading insurers and providers of health care insurance, to create a blend of P&I cover and personal insurance for a Member's crew. The cover plan will better enable Members to support their crew in obtaining preventive medical attention whilst on shore leave.

In recent years, Steamship Mutual has highlighted crew health as a significant and persistent area of P&I risk for Shipowners. Through the use of the Club's Pre-Employment Medical Examination (PEME) scheme, and promoting a healthy lifestyle amongst seafarers, Members can improve the prospect of their crew being and remaining fit for seagoing employment. This can reduce crew illness claims, and also the associated operational delays and costs.

Encouraging seafarers to seek medical treatment before they join a Member's vessel is key to reducing the disruption caused by crew illness. For many crews, however, the cost of such medical advice and treatment can be prohibitive, with the result that preventive treatment is not provided, thereby increasing the risk of illness developing whilst at sea.

The Cover Plan

AWC provides no-fault based health insurance to thousands of seafarers and their families around the world for medical costs which are incurred both on and off the vessel. Like Steamship Mutual, they have a commitment to provide the best possible service in their market sector and to developing long-term partnerships with their clients.

"Providing seafarers with additional health benefits also helps to maintain crew loyalty. Members have for many years recognised that a high crew retention rate, increases the efficiency of vessel operations and can reduce the likelihood of incidents and accidents on board."

AWC's insurance is personal to each crewmember and provides medical costs cover to them irrespective of an Owner's liability and without deductible. This means that if a crewmember is unwell or has an accident whilst on shore leave they can seek medical help without any cost to themselves and be fit for their contract when they join their vessel. This removes the financial deterrent that may otherwise inhibit a seafarer from seeking medical treatment prior to boarding the Member's vessel.

Providing seafarers with additional health benefits also helps to maintain crew loyalty. Members have for many years recognised that a high crew retention rate, increases the efficiency of vessel operations and can reduce the likelihood of incidents and accidents on board. The provision of health care with no deductible to a seafarers' family can provide them with peace of mind concerning the well-being of their family during the long period they are away from home. Under the AWC, seafarers and their families have the ability to choose their preferred doctors and hospitals, thereby avoiding the need to travel long distances to a small number of approved medical facilities.

The benefit of healthier crew and better vessel operations should lead to fewer claims, whether those are crew claims or incidents caused by the crew. This should in time reduce the claims incurred by a Member, improve their risk profile, and lead to better loss records.

Scope of Cover

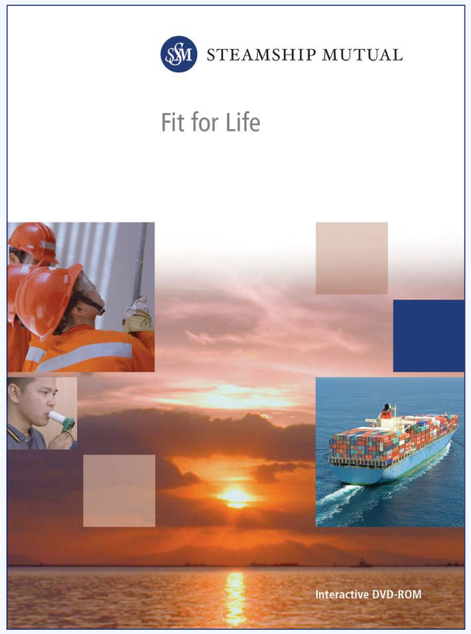
The beneficiary of each AWC's https://www.allianzworldwidecare.com/en health insurance is the individual seafarer. AWC's cover is not a liability cover on behalf of the Owner and therefore cannot be considered a replacement for P&I cover, nor can it be considered as insuring a Member's crew deductible.

Under the Preferred Partner Agreement, AWC will cover medical expenses in respect of crew accident and illness for all events off the vessel, subject to no deductible. They will also cover medical expenses in respect of crew illness (but not accident) for events on board the vessel, also subject to no deductible. As most of the claims which fall within this category are retained by Members, they are now able to access AWC's medical network and their ability to implement cost containment processes.

AWC's standard Steamship Plan does not include medical expenses arising out of accidents on board the vessel (this cover can be added by separate agreement). In such cases where liability issues are often at the forefront, the Club provides the best route for support and protection irrespective of the size of the claim.

Steamship Mutual is committed to the promotion of a healthy lifestyle amongst seafarers. Having a healthy crew on board should result in fewer claims and less operational disruption for the Club's Members. Through the use of the Club's Pre-Employment Medical Examination (PEME) scheme, and promoting a healthy lifestyle amongst seafarers, Members can improve the prospect of their crew being and remaining fit for seagoing employment. The Club also offers Members a number of resources to help promote crew fitness levels for seagoing employment. Steamship Mutual released its **"Fit for Life"** DVD, which is aimed at raising awareness amongst crew of the issues which can compromise fitness.

For further information on AWC's Cover Plan and the Table of Benefits, please contact your Club representative. ■



Bermuda's Economic Development Minister Dr. Grant Gibbons pictured with members of WISTA's newest international chapter, WISTA Bermuda.

Heather Cooper, Managing Director of Steamship Mutual's Bermuda Office Elected as a Board Member to the Inaugural WISTA Bermuda Chapter

WISTA Interntional
www.wista.net

The Managing Director of Steamship Mutual's Bermuda Office, Heather Cooper, has been elected to the board of the latest chapter of the Women's International Shipping & Trading Association (WISTA).

Bermuda is the 40th country to join the global organisation, whose members are women in management positions in the maritime transportation business and related trades worldwide.

Economic Development Minister Dr. Grant Gibbons congratulated the new WISTA Bermuda chapter official launch. Attendees included 17 local industry founding members, along with representatives from Bermuda Business Development Agency (BDA), the new Bermuda Shipping & Maritime Authority (BSMA), Department of Marine and Ports, and the Bermuda Sloop Foundation.

"I would like to congratulate the new WISTA executive members on the launch of their Bermuda chapter," said Minister Gibbons. *"Bermuda has a strong legacy of maritime administration dating back to the formation of the Bermuda shipping registry in 1789. WISTA's emphasis on career development, education and networking will contribute to the professional development and opportunities for women executives, and strengthen the overall competitiveness of our shipping and trading sector."*

"WISTA is a major player in attracting women to the shipping industry and supporting women in management positions. We are very proud to be a part of this respected organisation and we believe it will benefit our industry's female executives, and Bermuda in general," said Angelique Burgess, WISTA Bermuda President, BSMA Board member, and General Manager, Concordia Maritime (Bermuda).

Jeanne Grasso, a Partner with Blank Rome, in Washington, DC who represents WISTA International's Executive Committee, travelled to Bermuda for the launch and applauded local female shipping executives for having the vision for a chapter. The number of WISTA associations worldwide continues to grow, she said, with Bermuda joining four other new members this year, including Brazil, Georgia, Monaco and Morocco.

Heather Cooper commenting on her election to the board said: *"I have been involved in WISTA activities since its inception, so I'm delighted to be part of this initiative. Bermuda services global clients and markets, being home to a highly respected shipping registry and many international shipping companies. Our work with the jurisdiction's related entities, such as the newly created Bermuda Shipping & Maritime Authority (BSMA) and the Bermuda Business Development Agency (BDA), increases awareness of Bermuda's value and the advantages of its Cat 1 British Red Ensign Group registry. We look forward to further developing these relationships to foster growth and opportunities for women in this industry"* ■

STEAMSHIP MUTUAL

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