



STEAMSHIP MUTUAL

Sea Venture

Issue 31



Introduction

Serving our Members is at the heart of what we do at Steamship Mutual.

Our aim in publishing Sea Venture is to provide a topical series of articles and information about recent legal decisions and developments. We know from our meetings with Members that they find the articles in Sea Venture to be useful and informative, and Sea Venture 31 has a wide selection of articles that will be of interest to many readers.

Cyber security is an issue that affects us all and is frequently in the news. Our article on this topic will be relevant to many readers, some of whom will have no doubt seen our “Cyber Security: Smart, Safe Shipping” film (<https://www.steamshipmutual.com/loss-prevention/cybersecurity.htm>). The article in this edition of Sea Venture discusses the recently issued BIMCO cyber security guidelines.

Sulphur emissions continue to be a key concern, and the introduction of the Marpol Annex VI Regulation 14.1.3 on 1 January 2020 will affect many of our Members. Following on from the article in the last edition of Sea Venture, the article we publish in this edition addresses some of the contractual problems Members may face.

Issue 31 is being launched in time for our sixth residential Member Training Course, and we always enjoy welcoming Members to this event. This edition introduces you to some of our staff around the world – we have articles about the Steamship Rio office as well as the legal team based in London. Future editions will continue this focus on regional offices and departments within the Club, featuring some of the people who provide services to our Members around the world.

These are just some of the features in this edition – you will also find articles on speed and consumption claims relating to bad weather; an update on developments in salvage; time limits in bunker purchases and problems in concluding a settlement agreement. So browse Sea Venture at your leisure and watch out on Twitter and LinkedIn for video presentations of some of these articles.

We hope you find this edition useful.

The Sea Venture Editorial Team
June 2019



Contents

Contract

- 06 Beware Pyrrhic Victories
- 09 How to Settle on a Settlement Agreement
- 11 New LMAA Clauses Concerning Commencement of Arbitration
- 14 What is Good Weather?
- 17 Sulphur 2020: Contractual Conundrums
- 20 Equitable Set-Off of Charterparty Claims
- 22 *Lady M* – Court of Appeal Considers the Fire Exception in the Hague-Visby Rules
- 24 The “Eleni P” – Interpreting an Off-hire Clause

Cargo & Jurisdiction

- 29 Pre-award Attachment of Financial Assets in Mainland China
- 31 On Deck But Outside Hague-Visby Rules

People

- 34 What is Prompt Enough?
- 37 Seafarers Residing in France
- 39 Jones Act – When is a Worker a “Seaman”?
- 42 Philippines: Progress Towards Claims Under Appeal in POEA System

Miscellaneous

- 46 Recent Developments in Salvage
- 49 Bunker Time Bars: Buyers Beware
- 52 Cyber Security and Data Protection
- 57 Blockchain: The New Kid on The Block

News

- 62 Visit of Spanish University Students
- 63 Steamship Mutual Welcomes SAPIC South American P&I Correspondents
- 64 Steamship Mutual in Brazil
- 65 Meet the Legal Team
- 66 MSC Bellissima Visit

Editorial Team

Holly Austin-Davies, Piers Barclay, Edward Barnes, Patrick Britton, Jeff Cox, Neil Gibbons, Bill Kirrane, Joanne Sharma, Danielle Southey and John Taylor.

Electronic Versions

www.steamshipmutual.com/publications

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



Contract



Beware Pyrrhic Victories

Unanticipated results when legal principle is applied to the facts of a case.



Constantin von Hirsch
Syndicate Executive
Eastern Syndicate
constantin.vonhirsch@simsl.com

Classic Maritime v Limbungan [2018] EWHC 3489 (Comm) provided a salutary reminder that the compensatory principle that underpins any award of damages under English law can produce unanticipated results when applied to the particular facts of a case. The Owners in this case found this out to their peril; whilst they won the legal argument against Charterers, the Court held that they were not entitled to any damages.

The case will also be of interest for its discussion of different types of force majeure clauses, with the High Court drawing a distinction between frustration clauses and exception clauses and outlining the different requirements as to causation for a party seeking to rely on such clauses.

Background

Facts

On 5 November 2015, the Fundao dam in Brazil burst. As well as causing catastrophic environmental damage and loss of life, the bursting of the dam would also give rise to a dispute between an Owner and a Charterer who had entered into a contract of affreightment (the "COA") for the carriage of iron ore pellets from Brazil to Malaysia. The dispute arose after Charterers, Limbungan Makmur, failed to perform five shipments as required under the COA, which they blamed on the bursting of the dam.

Under the COA, Charterers had the option of shipping iron ore pellets from one of two ports: Ponta Ubu and Tubarao. Charterers claimed that the bursting of the dam had made it impossible to ship cargo from either of these ports. Ponta Ubu was the port from which the operator of the Fundao dam (Samarco) had shipped its iron ore pellets, but production at the mine was stopped following the bursting of the dam, with the result that there was no longer any cargo available for shipment. Tubarao, on the other hand, was the port from which another Brazilian mining company, Vale, shipped its iron ore pellets. Vale, though, was apparently unwilling to supply Charterers with cargo as it decided to prioritise supply to its

existing customers in the wake of increased demand following Samarco's decision to stop production.

Owners brought a claim against Charterers for failure to provide cargoes as required under the COA. Charterers sought to rely on an exceptions clause which absolved either party of liability in the event of an accident at the mine.

The exceptions clause

The COA contained an exceptions clause (Clause 32), which provided materially as follows:

'Exceptions – neither the vessel, her master or owners, not the charterers, shippers or receivers shall be responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God... floods... accidents at the mine or production facility... or any other causes beyond the owners' charterers' shippers' or receivers' control; always provided that such events directly affect the performance of either party under this charter party...'

The issues in the case

i) Whether Charterers could rely on the exceptions clause

Owners argued that the clause required a causal connection between an accident at the mine and Charterers' failure to perform, maintaining Charterers would have been unable to perform its obligations even if the dam had not burst. Accordingly, Owners argued that Charterers could not avail themselves of the exceptions clause.

A key issue in the case was therefore whether the exceptions clause imposed a 'but for' test of causation. In other words, in order to rely on the clause, did Charterers have to prove that 'but for' the dam bursting they would have performed their obligations?

Teare J held that Clause 32 did impose such a test. With reference to the wording of clause 32, it was held that the words "resulting from" and "directly affect the performance" did impose a causation requirement.

In doing so, the judge distinguished the present case from a line of authority that established that it is not necessary for a party seeking to rely on force majeure to show that it would have performed its obligations but for the force



majeure event (see, for example, *Continental Grain v STM Grain* [1979] 2 Lloyd's Reports 460).

This distinction was justified by pointing to an important difference between exception clauses (such as Clause 32 in this case) and contractual frustration clauses (such as *Continental Grain*). Contractual frustration clauses bring the contract to an end, such that the parties no longer have any obligations to perform. An examination of whether a party would have performed its obligations 'but for' the force majeure event is therefore not required.

Exceptions clauses, on the other hand, are concerned with excusing a party from liability for a breach of contract at a time when the contract remained in existence and the parties were still required to perform their obligations. In that context, the judge explained that *"it would be a surprise that a party could be excused from liability where, although an event within the clause had occurred which made performance impossible, the party would not have performed in any event for different reasons"* (at para 82).

Having considered whether Clause 32 imposed a causation requirement, Teare J then had to decide whether Charterers could satisfy this requirement. Although he accepted Charterers' arguments that the bursting of the dam had made performance impossible, he found that even if the dam had not burst, it was more likely than not that Charterers would have failed to perform its obligations (for reasons that are beyond the scope of this article, but essentially to do with commercial decisions taken by the group of companies to which Charterers belonged).

Accordingly, Charterers were therefore not entitled to rely on Clause 32 to excuse its non-performance.

ii) Whether Owners were entitled to substantial damages

As Charterers could not avail themselves of the exceptions clause to exclude liability, the question of whether Owners could claim substantial damages then fell to be decided.

The fundamental principle underlying the recoverability of damages under English law is the compensatory principle: any award of damages will, so far as is possible, try to compensate a claimant by restoring him to the position he would have been in had the other party not breached the contract.

The actual breach in this case was Charterers' unwillingness or inability to perform its obligations, which predated the bursting of the dam. When it came to applying the compensatory principle, the proper comparison was therefore between the position Owners were now in and the position Owners would have been in had Charterers been willing and able, but for the dam bursting, to perform the contract.

"Awarding damages in those circumstances would therefore have put Owners in a better position than they would have been..."

On a comparison of these two positions, it became clear that Owners would not actually have been any better off if Charterers had been willing and able to perform the contract. For even if Charterers had been willing and able to perform the contract, no cargoes would in fact have been shipped because of the bursting of the dam; and in that event, Charterers would have been excused for its failure to make the required shipments by virtue of Clause 32. Awarding damages in those circumstances would therefore have put Owners in a *better* position than they would have been in had Charterers not breached the contract, which would be contrary to the compensatory principle.

For that reason, Teare J held that on a proper application of the compensatory principle, Owners were not entitled to substantial damages, notwithstanding that Charterers could not rely on Clause 32 to excuse its failure to perform the contract.

Comment

This case provides welcome guidance on the difference between two different types of force majeure clauses: exception and frustration clauses. In the case of a frustration clause that operates to bring the contract to an end, a party will not have to establish that it would have performed the contract but for the force majeure event. Whereas in the case of an exceptions clause that excuses liability for non-performance but that does not bring the contract to an end, the party seeking to rely on the clause will have to establish that it would have performed its obligations under the contract had it not been for the force majeure event.

This case should also serve as a sobering reminder to Members – and indeed their legal advisors – of the need to focus their minds on the availability of any remedies before deciding to commence legal action. For although the compensatory principle is well known, its application to the facts of a particular case can still produce results that may not have been anticipated at the outset. A failure to take stock of the availability of any remedies at the outset could lead to a claimant finding themselves in the unfortunate situation in which Owners found themselves in this case: they may have won the legal argument, but they were not entitled to substantial damages. ■

How to Settle on a Settlement Agreement

Dispute resolution clauses and the settlement of charterparty accounts.



Chloe Townley
Syndicate Executive
European Syndicate
chloe.townley@simsl.com

Four Island [2018] EWHC 3820 (Comm), QBD, Commercial Court, Mr Justice Males, 12 December 2018

The "MT Four Island" was chartered on amended Asbatankvoy terms by a recap dated 27 June 2014. The charterparty provided for English law and jurisdiction. Owners had a claim for US\$718,950 demurrage and US\$190,200 heating costs. Over a series of email exchanges, Charterers agreed to pay US\$600,000 in full and final settlement of Owners' claims, although no formal settlement agreement was signed. Despite the agreement, Charterers failed to pay.

Owners commenced arbitration to claim the agreed figure of US\$600,000 pursuant to the arbitration clause in the charterparty which provided for London arbitration to determine *"any and all differences and disputes of whatsoever nature arising out of this charter"*. In their defence Charterers argued that the arbitrators did not have jurisdiction to determine the dispute because the settlement agreement did not provide for London arbitration, and so the arbitrators' appointment did not extend to dealing with a claim for the agreed settlement sum.

The arbitrators held that they did have jurisdiction to determine the claim, and as Charterers had not advanced any argument on the merits of those

claims, awarded the sums to the Owners. In reaching their decision the arbitrators commented that, given the informal nature of the agreement to pay US\$600,000 for disputes under the charterparty, it was the plain intention (even though not expressed) that the separate agreement should be governed by the same dispute resolution provisions as the original charterparty under which the claims arose. The arbitrators also held that, particularly where there is no self-contained agreement, any reference to some other, different dispute resolution procedure would have to be expressly recorded, rather than just inferred, to overturn this position.

Charterers submitted a Section 67 appeal application to the Commercial Court, arguing that the settlement agreement did not contain an arbitration clause or seek to incorporate the charterparty's arbitration clause. Charterers also argued that the arbitrators were appointed to hear disputes under the charterparty, not the agreement.

Dismissing the appeal, the Court described the agreement as *"an informal and routine arrangement to finalise the sums due under the charterparty"* which did not reference a dispute resolution procedure or choice of law, but agreed with the arbitrators that the parties clearly intended the charterparty's arbitration clause to apply in the event the sum was not paid, even though the agreement to pay US\$600,000 represented a new cause of action. The Court added that the parties could not have intended that if the agreed sum went unpaid the Owner would not be able to pursue the claim in arbitration and would instead have to commence court proceedings in the Charterers'

"...it was the plain intention (even though not expressed) that the separate agreement should be governed by the same dispute resolution provisions as the original charterparty under which the claims arose."

home jurisdiction or seek permission to serve English proceedings out of the jurisdiction.

The Court said that whilst the notice of arbitration did not refer to the agreed sum, instead referencing a claim for demurrage and heating costs, this was effective to refer the claim for the agreed sum to arbitration, reflecting the broad and flexible approach of the Court to the wording of arbitration notices. The Court concluded that “the tidying up of accounts and the resolution of outstanding

claims from a charterparty voyage is clearly a matter which arises under the charterparty”.

Whilst this judgment may provide some deterrent to future cases on this point, it may be prudent for owners/charterers negotiating the settlement of charterparty accounts to mark correspondence “without prejudice”, and to expressly state that the dispute resolution clause of the underlying contract will apply to any agreements or settlements of disputes. ■



New LMAA Clauses Concerning Commencement of Arbitration

Analysis of the new LMAA clauses for use in charterparties.



Joanna Bailey
Syndicate Executive
Americas Syndicate
joanna.bailey@simsl.com

In November 2018, the LMAA published two new clauses for use in charterparties. The clauses can be found on the LMAA’s website at <http://www.lmaa.london/terms-incorporation-clause.aspx>

LMAA Arbitration Clause

The new LMAA arbitration clause is very similar to the BIMCO Standard Dispute Resolution Clauses. There is now a specific reference to a hearing taking place outside of England, and that if this does occur, it will not affect the seat of arbitration, which will remain as England.

The default figure for the LMAA Small Claims Procedure to apply is US\$100,000 or less. Parties can opt in to arbitration under the LMAA Intermediate Claims Procedure in cases involving claims between US\$100,000 and US\$400,000.

LMAA Arbitration Notice Clause

This clause is a completely new LMAA clause which addresses the service of arbitration notices, and provides for the service of notices of arbitration by email.

If this clause is used in a charterparty, then at the time of the fixture both parties should enter the correct email addresses they would like notices and any communications in relation to arbitration proceedings to be sent. This includes the sending of any emails

that give notice of commencement of arbitration as well as emails discussing the appointment of an arbitrator. If there are any changes to email addresses, then the charterparty should be amended to reflect this. This should avoid the kind of problems that have arisen in a number of recent cases, where one party disputes whether an email notice of arbitration was validly served on the basis either that the addressee was not authorised to accept service or was otherwise not the correct party to give notice to.

Recent case law

The Commercial Court considered, in *Glencore Agriculture BV v Conqueror Holdings Ltd (The Amity)* [2018] 1 Lloyd’s Rep 233, a dispute that arose between the parties under a voyage charterparty which contained an agreement to arbitrate on LMAA terms. Conqueror Holdings Ltd (“Conqueror”) served an arbitration notice by email to Glencore Agriculture BV (“Glencore”). The notice was sent to the email address of a junior employee at Glencore, who was employed in an operational/chartering role, and whilst emails had previously been sent to this individual concerning the voyage, the email commencing arbitration and further emails sent by Conqueror and the appointed arbitrator in relation to the arbitration all went unanswered.

When the arbitrator issued an award in Conqueror’s favour, Glencore applied to set it aside on the basis that there was no valid service of the arbitration notice, submitting that the employee to whom the arbitration notice was sent did not have authority to receive such documents. Conqueror argued that agency principles did not apply because they had served the notice directly on Glencore by writing to a Glencore email address.

“...service on the individual’s email address could not constitute valid service because the particular individual did not have express authority to accept service, and nor could authority be implied in this regard.”



The Judge made an order in Glencore's favour and held that the award should be set aside. This was on the basis that there is a clear distinction between an individual business email address and a generic department email address. In this instance, service on the individual's email address could not constitute valid service because the particular individual did not have express authority to accept service, and nor could authority be implied in this regard. The individual concerned had no more than a limited operational role concerning the voyage in question. It was therefore far more probable that an email sent to a generic company email address would come to the attention of a person or persons internally authorised to deal with them.

The new notice clause clearly aims to avoid these types of problems by nominating specific email addresses to receive notice.

Comment

When concluding a fixture, owners and charterers should give consideration to the default position in the standard charterparty form as to the dispute resolution and whether those provisions require amendment. If so, what arbitration provisions are most appropriate.

Members should take heed that previous communications with a particular individual concerning a charterparty will not necessarily mean that that person has legal authority to accept service of an arbitration notice. Incorporation of the LMAA Notice Clause is likely to be beneficial in eliminating the scope for challenge to the validity of service. Furthermore, care should always be taken when the time limit for commencing arbitration is approaching, as failure to serve an effective notice could result in the claim becoming time barred. ■

“...at the time of the fixture both parties should enter the correct email addresses they would like notices and any communications in relation to arbitration proceedings to be sent.”

What is Good Weather?

References to Douglas sea state and significant wave height in a charterparty performance warranty.



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

In a recent reported arbitration (London Arbitration 6/19), a Tribunal considered a good weather description which referred to both Douglas sea state and significant wave height in a charterparty performance warranty.

Under a time charter trip from South Africa to China, Owners warranted the vessel's performance in good weather conditions. The charterparty description of good weather was;

"good weather conditions are understood to mean wind speeds of maximum beaufort force 4 (11-16 knots) and total- combined (sea and swell) significant wave height confined to limits of douglas sea state 3 (0.5-1.25 metres) with no adverse currents and no influence of swell."

Charterers relied on the reports of a weather routing company to allege breach of performance warranties during good weather and claimed damages of US\$128,388.86. Owners argued there had been no good weather periods and so any underperformance claim was bound to fail. The arbitration tribunal considered whether the conditions fell within the charterparty good weather definition.

"Significant wave height confined to limits of Douglas sea state 3 (0.5 – 1.25 metres)"

The parties agreed that it was difficult to reconcile 'significant wave height' and 'douglas sea state' – the first being a single measure of the average of the highest third of the waves encountered and the second being a range of heights. However, the parties made opposing submissions on how the two phrases could be read together.

Charterers contended that 'significant wave height confined to limits of douglas sea state 3' included conditions with a swell height of up to two metres. They said that the word 'significant' was evidently not intended to have its technical meaning. Charterers pointed to a reported London arbitration¹,

in which the tribunal referred to swell heights of up to 2m as being within Douglas sea state 3.

Owner's position was that good weather was limited to conditions where the 'total-combined' sea and swell height did not exceed 1.25m.

Owner's expert report analysed the meaning of 'significant wave' and held that it was comprised of two components: a wind wave and a swell wave. The report described wind waves as those generated by local winds whilst swell waves were produced by distant occurrences. The report concluded that Douglas sea states only considered wind waves.

Owner's expert found the solution to the ambiguity of 'significant wave height confined to limits of douglas sea state 3' to be in the charterparty reference to wind. Good weather was also limited to 'maximum Beaufort force 4' which, Owners contended, usually generates Douglas sea state 3 wind waves. There would be no need for the words 'significant wave height' if the intention had only been to limit wind waves to Douglas sea state 3, since this was clear already from Beaufort force 4. Therefore, to give meaning to 'significant wave height', Owners said that it was the combined wind wave and swell that should be limited to 1.25m. The reference to Douglas sea state 3 was simply to provide rationale to the range of 0.5-1.25m.

"...to give meaning to 'significant wave height', Owners said that it was the combined wind wave and swell that should be limited to 1.25m."



Tribunal's findings

The Tribunal held there had been no periods of good weather. The Tribunal agreed that there was no established method of reconciling significant wave height with Douglas sea state. The Tribunal explained they had looked for an interpretation that would avoid ignoring any words agreed by the parties whilst still giving practical value to the performance warranties.

The Tribunal rejected Charterers' contention that swell heights of up to 2m were within the definition of Douglas sea state 3. The Tribunal could see no obvious correlation between these two things and were not privy to the considerations of the tribunal in the earlier reported arbitration to be able to justify such a finding.

The Tribunal agreed with Owners that the words 'total combined' meant both sea and swell waves. They also agreed that relevant wave height was 1.25m.

The Tribunal, however, had not been persuaded by Owner's expert opinion that relied on the reference to Beaufort force 4 to explain the ambiguity in the wave description. The Tribunal said that it was common for charterparties to include reference to both Beaufort wind strength and a Douglas sea state and this was not unnecessary duplication.

The Tribunal accepted their interpretation might render the words 'douglas sea state 3' unnecessary, but nevertheless felt it was the most appropriate reading in order to give effect to the parties' intention that sea and swell be combined to form the significant wave height.

"No adverse current and no influence of swell"
Charterer's weather routing report not only sought to exclude periods of adverse current from their performance calculations, but went a step further by deducting 0.04 knots from the vessel's speed on account of an average 0.04 knot boost from following currents.

The Tribunal held that this approach was inappropriate. The reference to 'no adverse current' in the good weather description was intended to ensure the vessel was not hindered by current when calculating its performance. To deduct positive current as the weather routing report had sought to do, went beyond the recap's remit.

Evidence of weather

The vessel's log books reported worse weather conditions than those reported in Charterer's weather reports.

The charterparty provided that:

"Should there be a discrepancy between the vessel's deck logs and Oceanroutes, both parties shall discuss in good faith to assess nature of such discrepancies for a mutual agreement."

In light of this wording, the Tribunal had relative freedom to decide how much evidential weight to attribute to the logs and the reports. Following what they considered was an established view, the Tribunal found that the vessel's logs were generally the best evidence of the conditions experienced. This view could be rebutted with evidence of falsification or exaggeration – but no such evidence was found in this case.

Conclusion

This case serves as a useful reminder of the evidential weight given to a vessel's logs. It may also provide useful guidance when considering adverse and positive current: it seems parties should make express provision in the charterparty if they wish for either or both of these things to be factored into performance calculations. The Tribunal could not escape the ambiguity in the performance warranty which arose from the different and irreconcilable measures of sea conditions. However, they did provide useful insight when explaining their interpretation objectives – of giving purpose to the warranties whilst endeavouring not to ignore any agreed words, which might be drawn upon in other cases of unclear warranty descriptions.

However, note that London Maritime Arbitration awards do not create binding law nor establish any legal precedent: it is possible that another arbitration tribunal could decide these same questions differently. ■

¹ London Arbitration 4/11

"The reference to 'no adverse current' in the good weather description was intended to ensure the vessel was not hindered by current when calculating its performance."

Sulphur 2020: Contractual Conundrums

Contractual responsibilities and liabilities for compliance with Sulphur 2020.



Heloise Campbell
Syndicate Manager
Eastern Syndicate
heloise.campbell@simsl.com

As Members will be aware, the Marpol Annex VI Regulation 14.1.3 (the "Regulations") will come into force on 1 January 2020 requiring vessels to comply with the 0.5% SOX emissions limit worldwide, other than in Emission Control Areas [ECA] to which the existing 0.1% limit will continue to apply. The Club has already discussed the options available for compliance in its August 2018 article [<https://www.steamshipmutual.com/publications/Articles/MARPOLAVI0818.htm>]. However, with less than 10 months to go before implementation, more questions are being asked as to the contractual responsibilities and liabilities for compliance with this wide ranging Regulation.

As of 1 January 2020, the Regulations will limit the sulphur content for ship's fuel and as of 1 March vessels will be prohibited from carrying fuels with a sulphur content in excess of 0.5% (except as cargo or with a scrubber fitted). Therefore, from these dates vessels will either need to use low sulphur fuel oil or have a scrubber fitted.

This article highlights contractual issues which are likely to arise from these Regulations and may give rise to disputes. In order to minimise the scope for disputes, these issues should be considered and negotiated between the parties, in order that contracts contain suitable clauses to address these.

Charterparty issues – the need for clauses to address these

Obligation on charterers of non scrubber equipped vessels to supply LSFO

Unless negotiated recently, and with an eye to the Regulations, existing Charterparties are unlikely to specify that compliant LSFO is to be supplied to the vessel. However, even if this is not expressly stated, a term may be implied requiring any fuel supplied to be lawful and compliant with the Regulations as, in the absence of this, any Charterparty would be unworkable. The Courts generally take a restrictive approach to implying terms into contracts (<https://www.steamshipmutual.com/publications/Articles/ImplyingTermsIntoCommercialContract.htm>) but will do so where it is necessary. Alternatively, if the Charterparty contains a requirement that the fuel supplied is suitable for burning, depending on the wording of this provision, it could be argued that to be suitable for burning the fuel must be lawful.

www.steamshipmutual.com/publications/Articles/ImplyingTermsIntoCommercialContract.htm) but will do so where it is necessary. Alternatively, if the Charterparty contains a requirement that the fuel supplied is suitable for burning, depending on the wording of this provision, it could be argued that to be suitable for burning the fuel must be lawful.

Cleaning of tanks / lines

An important consideration is flushing of lines and cleaning of tanks (storage, settling and service) in order to accommodate LSFO and to ensure that any remnants of prior stems do not contaminate this. This may be a time consuming process and, for fleets, it may be necessary to trial on one vessel of each type to ensure that the methodology used is effective and plans can be put in place to ensure that this process is completed before 1 January 2020. In practice, it may be prudent to change over the LSFO well before this date.

Flushing of lines may not be sufficient and extensive tank cleaning may be required, especially if there has been a build up of residues over time. Owners may argue that the residue is only in the tanks/lines due to fuel supplied by Charterers over a period or months or years (depending of course on the length of the Charterparty). However, it could also be argued that where Owners are required to maintain the vessel in a "thoroughly efficient state" or to "comply with regulations" this would extend to ensuring that the tanks/lines are suitable for receiving LSFO.

Removal of non compliant fuel

The Regulations also require that any non compliant fuel be removed from the vessel prior to 1 March 2020. Therefore, where, for example, the vessel has multiple fuel tanks and residues have been removed to ensure compliant fuel can be taken into one/more of these tanks prior to 1 January, it may be that the remaining HSFO needs to be removed before this later date (1 March 2020). For the same reasons as discussed above it could be argued that this obligation rests with Owners albeit, where there is more than residues, this may raise an argument that if such fuel is Charterers' the obligation rests with them.

Issues on board due to LSFO

There is a real prospect of issues arising on board with the engines as a result of the LSFO blended fuels – for example some engines may not be able

to cope with the change in viscosity, instability, or incompatibility (if indeed these issues transpire) of the new blended fuels. In some circumstances, vessel modifications may be required. There is an argument that it would be for Owners to resolve any such issues on the basis of any maintenance provisions in the Charterparty. However, if the issues experienced are due to the quality of the fuel, as opposed to the engine's ability to burn the fuel, this may rest with Charterers as a result of an obligation to provide fuel suitable for burning/use. Resolution of these disputes will be fact dependent and Members are reminded of the need to obtain evidence for bunker claims (https://www.steamshipmutual.com/publications/Articles/Bunkering_collecting_samples0514.htm).

Speed & performance warranties

Consideration will also need to be given to whether the vessel can meet any speed and performance warranties in the Charterparty. LSFO has a different calorific value than HFO and it may be that switching fuel results in higher consumption and lower average speeds. It may be that, unless amended warranties are agreed, Charterers may have a claim for damages if the vessel is unable to meet these when using LSFO. In response, Owners may have a counterargument that the Charterparty incorporates an implied term that lawful/compliant fuel is required to be provided and that any warranties must be interpreted in line with this.

BIMCO and Intertanko clauses

BIMCO has published two clauses which seek to address the issues and "share" the obligations arising from the Regulations. Intertanko has also published a suggested clause. These clauses will no doubt form the basis for the many negotiations for Charterparty clauses to address the issues discussed above arising from the Regulations. However, whether and to what extent these clauses are suitable will always depend on other clauses in the Charterparty, the length of the charter period including the degree to which this spans the period from 1 January to 1 March, and the negotiating position between the parties.

2020 fuel transition clause for time charterparties

This clause is intended to be included in Charterparties which span the introduction of the Regulations. This clause places an obligation on Charterers: (i) to supply compliant fuel to the vessel before 1 January; and (ii) to remove non-compliant fuel prior to 1 March 2020.

Removal of fuel is at Charterers time, risk and cost and they are required to ensure tanks are "free of liquid and pumpable fuel" by 1 March 2020. Once Charterers have made the tanks "free of liquid and pumpable fuel", Owners are obliged at their risk, time and cost to ensure tanks are fit to receive compliant fuel. This will likely necessitate removal of residues that are not "liquid and pumpable" which could result in significant cleaning. Depending on the length of charter prior to 1 January 2020, the parties may wish to consider negotiating this

provision to allocate who will bear the cost of tank cleaning, if this is necessary, and also the risk of any cleaning being ineffective. There is also no express obligation that Charterers' removal of fuel is done to "Owners' satisfaction" and it may be that disputes arise as to the effectiveness of this and, for example, if this had been carried out effectively, whether extensive cleaning would not have been required.

The clause as drafted only imposes obligations to remove "liquid and pumpable fuel" (on Charterers) and cleaning obligations (on Owners) after 1 January and before 1 March 2020 and does not fully address the need for cleaning tanks/flushing lines prior to 1 January 2020 to ensure that sufficient tanks are fit to receive compliant fuel by the date that the Regulations come into force. If there is no tank separation and tanks/lines are not cleaned sufficiently before the sulphur cap comes in to ensure that no residues remain there is a real risk that HFO residues may contaminate LSFO and result in an inadvertent breach of the Regulations.

This is addressed to a degree at Clause b(i) which provides for Charterers to supply compliant fuel before 1 January and the vessel to have sufficient compliant fuel to reach the nearest bunkering port. In addition to this, there is a provision requiring Owners and Charterers to use best endeavours to ensure that by 1 January there is no non-compliant fuel carried. However it is not clear whether the compliant fuels to be supplied are to include fuel to be used by the vessel to flush the tanks/lines in the process of making the tanks free of liquid/pumpable fuel and the likelihood that more than one stem of LSFO would need to be provided before 1 January in order to comply with the obligations.



cleaning is required by each of Charterers and Owners, and the extent to which an Owner can say that they are not satisfied with the steps taken by Charterers.

With each of these clauses, parties should consider the impact of the requirement that Charterers warrant the compliance of third parties, which importantly will include bunker suppliers. Any supply and other ancillary contracts will need to be carefully reviewed to ensure that Charterers are not exposed for this risk, especially in circumstances where there are concerns about the quality and compatibility of some of the new blended LSFO.

Tolerances and enforcement

Annex VI provides that the Regulations shall apply to all "ships". The obligation to comply with the Regulations is therefore on the ship/Owners and Owners will be the principal party responsible in the event of a violation of the Regulations.

However, Regulation 11 expressly provides that how the Regulations are to be enforced is to be left to each contracting state to decide. Therefore, there is a risk that a time charterer may be held responsible, for example if they have supplied non-compliant fuel. Under the terms of the charterparty a liability of Owners may also be capable of being passed on to Charterers by way of an indemnity claim.

It is not yet clear how the Regulations will be enforced by different states and it is highly likely that a range of approaches will be taken. For example, in some instances tolerances may be permitted but a cautious approach should be taken and it should be assumed that if a vessel does not comply that a fine will be levied.

Comment

These Regulations will necessarily result in negotiations both of future fixtures and addendums to existing Charterparties and there are many issues which will need to be contemplated. Parties should consider their existing and future contractual commitments to ensure that the practical and legal issues are accounted for; this may necessitate a combination of the BIMCO/ Intertanko clauses and/or bespoke negotiated provisions.

The IMO is recommending a ship specific implementation plan and it would be sensible for both Owners and Charterers to give early consideration to appropriate testing to ascertain what cleaning/flushing or modifications are required, and to ensure that non scrubber equipped vessels are able to take on and burn LSFO by 1 January 2020.

The contractual position is far from straightforward and will always depend on the negotiating position of the parties and also the other terms of the Charterparty, for example trading range and length. However, careful consideration should be given to the issues highlighted in this article and should any questions arise these should be addressed to your usual Club contact. ■

2020 marine sulphur content clause for time charterparties

This clause is intended for use in Charterparties which will be in existence when the sulphur cap comes into force on 1 January 2020. This provides for Charterers to use, and allow to be carried, only low sulphur fuel, and to indemnify the Owners for all losses arising from the failure to supply compliant fuel. The risk of the vessel not being able to use compliant fuel rests with Owners and in order to do so Owners will need to ensure that the tanks are suitable for the fuel, including cleaning and removal of residues, and also that the engine is able to cope with burning LSFO.

Intertanko bunker compliance clause for time charterparties

This clause is broader than the BIMCO clauses and includes specific reference to speed and performance warranties and a warranty from Charterers that the bunkers are suitable for burning. In turn, it includes a warranty from Owners that the vessel is able to consume compliant bunkers.

There are separate obligations depending on when the vessel is to be redelivered. When the vessel is to be delivered prior to 31 December 2019, Charterers warrant that non-compliant fuel will not exceed a set quantity and there will be a minimum quantity of compliant fuel on board. In contrast to the BIMCO clause, where the vessel is to be redelivered after 31 December, i.e. when the Regulations will be in effect, Charterers are expressly required to prepare the bunker tanks, including cleaning and flushing, to Owners' satisfaction, before 1 January. If tank cleaning is required in order for compliant bunkers to be received this will be for Owner's account and the vessel will be off hire. There is, however, scope for dispute as to what

Equitable Set-Off of Charterparty Claims

A recent case considers contract implications on the right to make deductions by equitable set-off.



Miguel Caballero
Syndicate Executive
Americas Syndicate
miguel.caballero@simsl.com

In the recent London Arbitration 7/19, the Tribunal considered whether the parties were entitled to exclude by contract the right to make deductions by way of equitable set-off.

Equitable set-off

Charterparties may contain express rights for charterers to make a deduction from hire, for example off-hire claims or deductions for owners' disbursements.

Where charterers have a claim in damages, it may be possible to make a deduction from hire if the charterer can establish that they are entitled to make the deduction by way of equitable set-off.

The English Court of Appeal in *The Nanfri*¹, set out that the doctrine of equitable set-off could

in principle apply to the payment of hire under a time charterparty provided that:

- a. The cross-claims arise as a result of the same transaction or closely connected with it; and
- b. Owners' breach of charterparty had directly impeached on the Owner's demand for hire. This would usually arise where the owners' actions had deprived charterers of or prejudiced their use of the whole or part of the vessel

If the right of equitable set-off is established, then charterers would not be in default for withholding sums.

The exact scope of the application of the doctrine has not yet been established by the courts. There are a number of cases where the right to equitable set-off has been permitted, such as in the event of a breach of a speed and performance warranty², loss of time resulting from the Master's refusal to enter port³, owners' failure to make the whole cargo space of the ship available⁴, etc. There are other cases, such as in cases of claims for cargo shortage or damage⁵

or the Master's failure to keep a proper log⁶, that the claims do not give rise to a right of set-off.

Background to Arbitration 7/19

In the above reference the vessel had been time chartered on a NYPE 1981 form as amended. The Recap amended Clause 54 and provided:

"...CL 54 – DELETE AND REPLACE WITH 'CHRTRS HAVE NO RIGHT TO MAKE ANY DEDUCTIONS FROM HIRE PAYMENTS BUT IN CASE AN EXTRAORDINARY MATTER SUCH AS ATTENDING TO CREW'S HOSPITALISATION OR SURVEY WORK FOR OWNERS ACCOUNT THEN OWNERS WILL APPOINT THEIR OWN AGENTS OR THEY WILL PAY DIRECTLY'

CHRTS DO NOT HVE THE RIGHT TO DEDUCT FM HIRE PAYMENT ANY AMOUNTS ON ALLEGED UNDER PERFORMANCE, EXCEPT UNDISPUTED OFF HIRE."

Owners commenced arbitration proceedings against Charterers for an alleged outstanding balance in their favour of US\$237,720 and made two applications:

- The first for an immediate award in the sum of US\$80,930. Owners argued that Charterers had issued a hire statement showing a balance of that amount in Owners' favour.
- The second for an immediate payment of US\$107,520. Owners' second application was based on a deduction of US\$85,270 in respect of three alleged off-hire events that had not been agreed and a deduction of US\$24,390 that Owners were prepared to accept upon receipt of the supporting vouchers (which had not taken place to date).

Charterers asserted they were entitled to an equitable set off against any sums due to Owners because Charterers had a counterclaim arising out of the refusal by the Owners to perform a voyage from Russia to Morocco. They also explained that the "Owners expenses" deductions were made up of the bunkers consumed during the off-hire periods.

Charterers claimed they were entitled to withhold hire on the basis of Clauses 15, 49, 57, 58 and 95, which allegedly permitted the non-payment of hire upon certain events occurring. Charterers argued that Clause 54 was not applicable to these clauses because no hire was deducted but there had simply been a suspension of hire.

Charterers also pointed to Clauses 88 (bunkers on delivery) and 89 (C/E/V), which presumably contemplated deductions.

Owners replied that Charterers' claims for damages were time-barred and that Charterers had failed to prove the applicability of the off-hire clauses because they had not shown a loss of time.

Arbitration Tribunal's decision

The Tribunal held that, while Charterers have in certain circumstances the right to deduct sums from hire by way of equitable set-off, the parties were also entitled to contractually agree to exclude such a right.

In the Tribunal's view, the wording of Clause 54 was clear that the parties had agreed to such an exclusion and therefore Charterers did not have any right to make deductions by way of equitable set-off.

The Tribunal further held that the prohibition was qualified as Clause 54 allowed deductions for undisputed off-hire. However, in this case Owners had contested the off-hire deductions.

The Tribunal dismissed Charterers' argument that this matter did not fall within Clause 54 as a "suspension" of hire on the basis that it was a distinction without a difference as these sums amounted to a deduction.

Owners succeeded and an immediate award for sums deducted from hire was awarded to them.

Comments

When the Charterers have suffered a loss that has arisen as a result of Owners' breach, Charterers might be tempted to deduct the damages suffered from next hire payment. However, outstanding hire due to a wrongful deduction by Charterers may in some circumstances entitle Owners to withdraw the ship or suspend service and, in some cases, might even allow the Owner to claim that the deduction amounts to a repudiatory breach of the entire contract.

The parties are free to include express provisions in the charterparty that entitle them to make deductions from hire when certain events take place. Absent any express agreement, the parties need to consider very carefully whether they would be entitled to make deductions under the doctrine of equitable set-off before doing so.

The subject award also suggests that the parties are equally free to agree to exclude the right to make deductions by way of equitable set-off. This is an interesting development. We will see if other arbitrators and/or the English courts follow this approach in further decisions. ■

¹ *Federal Commerce Ltd v Molena Alpha Inc; (The 'Nanfri')* [1978] 2 Lloyd's Rep. 132

² *Santiren Shipping Ltd. v Unimarine S.A. (The 'Chrysovalandou Dyo')* [1981] 1 Lloyd's Rep 159.

³ *Nippon Yusen Kaisha v Acme Shipping Corporation (The Charalambos N. Pateras)* [1971] 2 Lloyd's Rep. 42

⁴ *Compania Sud Americana de Vapores v Shipmair B.V. (The Teno)* [1977] 2 Lloyd's Rep. 289

⁵ *Federal Commerce Ltd v Molena Alpha Inc; (The 'Nanfri')* [1978] 2 Lloyd's Rep. 132

⁶ *Leon Corporation v Atlantic Lines and Navigation Co. Inc. (The Leon)* [1985] 2 Lloyd's Rep 470



Lady M – Court of Appeal Considers the Fire Exception in the Hague-Visby Rules

An update on the case of deliberately-started fire on a vessel, and the defence according to Hague-Visby Rules.



Chloe Townley
Syndicate Executive
European Syndicate
chloe.townley@simsl.com

In *Glencore Energy UK Ltd v Freeport Holdings Ltd*, “*The Lady M*”, [2019] EWCA Civ 388, the Court of Appeal upheld the first instance decision which determined that a shipowner can rely on the fire defence in the Hague-Visby Rules even if the fire was started deliberately by a ship’s officer (see our article on the High Court’s decision at <https://www.steamshipmutual.com/publications/Articles/wrongfulandrecklessacts062018.htm>).

First decision

The High Court determined that the words of the Hague-Visby Rules exceptions should be given their plain and ordinary meaning. In doing so the Court held that the Article IV Rule 2(b) exception (the carrier’s liability to be excluded for “*Fire, unless caused by the actual fault or privity of the carrier*”) applied to incidents of fire without any qualification as to how they were started, whether deliberately or accidentally.

Leave to appeal was granted to the Glencore on the following grounds:

- a. That the conduct of the crew member in starting the fire constituted barratry, and this conclusion did not depend on a close analysis of his state of mind; and
- b. That the defence under rule 2(b) of the Hague-Visby Rules was not available where the Master or crew caused the fire by a barratrous act.

Appeal decision

Glencore argued that further interpretation of the word “fire” was required, by considering common law and the “*travaux preparatoires*” (the discussions by the delegates who drafted the original Hague Rules).

The Owners argued that the words of Rule 2(b) exception were clear: all loss arising from fire ought to be excluded (except where fire is caused with the actual fault or privity of the carrier). Owners argued that Glencore were seeking to imply a further

qualification to the exception, unless caused by barratry of the crew, when there was no basis to do so.

The Court of Appeal agreed with the Owners’ arguments. There was no policy reason in isolation or in context to interpret the word “fire” in a way that excludes fires deliberately caused by the crew. The words in Rule 2(b), and in particular the word “fire”, were clear and should be given their natural and ordinary meaning, so it was not appropriate to refer to case law or the *travaux preparatoires*, which in any case did not provide any alternative interpretations to “fire”.

The Court of Appeal allowed Glencore’s appeal on the mental element for barratry. The Owners had argued that the crew member was suffering from insanity so lacked the necessary mental state to commit an act of barratry, but the Court of Appeal considered that the Owners had failed to plead this argument adequately, or bring evidence to support it, and commented that the Owner’s arguments on this point should not have been considered in the first instance decision.

Comment

The Court confirmed the previous decision of the High Court, so owners were still entitled to rely on the fire exception to exclude their liability. The court considered that the wording of the Hague-Visby exclusion was clear, and there was no need to review common law precedents or the Hague Rules “*travaux preparatoires*” to interpret the wording. ■

“Owners argued that Glencore were seeking to imply a further qualification to the exception, for barratry of the crew, when there was no basis to do so.”



The “Eleni P” – Interpreting an Off-hire Clause

Hire claim for time detained by pirates.



Kalliopi Dalakleidi
 Syndicate Associate
 Americas Syndicate
kalliopi.dalakleidi@simsi.com

In *Eleni Shipping Limited v Transgrain Shipping BV (The Eleni P)* [2019] EWHC 910 (Comm) the Commercial Court considered an appeal under Section 69 of the Arbitration Act 1996 by Owners of an award in which the Tribunal rejected Owners’ claim for hire to be paid by Charterers during the period for which the vessel was detained by pirates in the Arabian Sea.

Facts

On 29 April 2010 voyage orders were given by Charterers for the vessel to load a cargo of iron ore from a port in Ukraine for discharge at Xiamen, China. The vessel passed the Suez Canal and sailed through the Gulf of Aden without issue. However, the vessel was attacked in the Arabian Sea and captured by pirates on 12 May 2010.

The vessel was released by the pirates approximately seven months later. After undertaking repairs and resupply, the vessel proceeded to China to discharge the cargo and was redelivered to Owners.

The primary claim by Owners against Charterers was for unpaid hire of about US\$4.5million for the period the vessel was under the pirate’s control. The Tribunal rejected Owners’ claim based on their interpretation of Clauses 49 and 101 of the Rider Clauses to the charterparty which the Tribunal considered suspended hire.

High Court judgment

The main issue of the appeal was the correct construction of Clauses 49 and 101. The Judge referred to the recent case law considering the principles applicable to the construction of commercial contracts [See the Club’s previous articles ‘Contractual Interpretation – Commercial Common Sense’ (<https://www.steamshipmutual.com/publications/Articles/RainySky1212.htm>) and ‘A more Literal Approach to Construction’ (https://www.steamshipmutual.com/publications/Articles/LiteralApproachtoConstruction04_16.htm)].

Referring to his own previous decision in *The Ocean Neptune* [2018] 1 Lloyd’s Rep 654, the Judge reminded that the Court must consider the objective meaning of the language adopted by the parties. If there are two possible constructions of a clause, the Court should prefer the construction consistent with business common sense.

Whilst these principles are applicable to all contracts, the Judge remarked that time charters give rise to particular considerations as the allocation of risk is inherent to their nature. There is an established approach that the risk of delay is on Charterers who remain liable to pay hire unless there is a specific exemption in the form of an off-hire provision. The burden rests with Charterers to bring themselves within an exemption.

Clause 49

Clause 49 provided that “*should the vessel be captures [sic] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost ...*”

Owners argued that each of the words in Clause 49, “captured”, “seized”, “detained”, “arrested”, were dependant and qualified by the following phrase in the clause “by any authority or any legal process”.

On the contrary, Charterers argued that the phrase “by any authority or any legal process” applied only to “arrested” and did not qualify the word “captured”, which was freestanding. The vessel could be captured due to any cause including the vessel’s capture by pirates.

The Tribunal agreed with Charterers’ position. However, the Judge preferred Owners’ interpretation of the clause. In summary his views were that:

- All four categories in the clause (“captured”, “seized”, “detained”, “arrested”) were separated by the word “or” which in itself was a neutral phrase that did not specify if the phrase “by any authority or any legal process” was intended to qualify all four categories or only the last. However, the words which followed were undoubtedly meant to govern all four. Relying on the presumption against superfluity, the Court



considered this indicated that the reference to “by any authority” should govern all four categories.

- If Clause 49 was to be interpreted in accordance with Charterers’ argument, this would not be consistent with the general off-hire Clause 15. Clause 15 treated as an off-hire event limited types of detention, being by average accidents to ship or cargo. This part of Clause 15 would be rendered inoperative if Clause 49 applied to any detention to the vessel notwithstanding the cause or the nature of the detention.
- The Judge did not find the Arbitrators’ reasoning regarding the application of Clause 49 persuasive. The Tribunal assessed that “capture” was not an act that could be carried out by an “authority” and, therefore, had to be read as a freestanding exclusion. The Judge explained that “capture” in its ordinary literal use does not necessarily indicate the use of force. The Judge stated “*Unoccupied land or undefended goods may be captured. My wife may capture my heart. I see no difficulty as a matter of the ordinary use of language in the concept of a governmental authority or ruler capturing a vessel.*”

Clause 101

Clause 101 provided that “*...in case the vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended. It’s remain understood [sic] that during transit of Gulf of Aden the vessel will follow all procedures as required for such transit including but not limited the instructions as received by the patrolling squad in the area for sage participating to the convoy west or east bound.*”

Owners argued that to trigger the off-hire provisions of Clause 101 the threat/kidnap must happen within the geographical area defined as the Gulf of Aden. Charterers on the other hand argued that the clause applied where the threat/kidnap took place as a consequence of the vessel being required to sail

through the Gulf of Aden. The Tribunal agreed with Charterers’ argument considering it was generally understood that transiting the Gulf of Aden exposed ships to risks of piracy in and around that area.

The Court noted that the language of Clause 101 did not provide guidance as to interpretation. However, the Court preferred the construction adopted by the Tribunal, as the primary purpose of Clause 101 was to permit the Charterers to engage in trade through the Gulf of Aden and set out that:

- The geographical area of Gulf of Aden cannot be precisely defined. In any event, as this was a finding of fact by the Tribunal this was not a matter that could be challenged on an appeal. This issue was fatal to Owners’ construction of Clause 101.
- Clause 101 applied solely to the vessel performing voyages through the Gulf of Aden in order to enable Charterers to trade the vessel though the Suez Canal. In this respect Clause 101 allocated to Charterers the risk of paying extra war premium, but then Owners were to face the risk of delays from a possible detention by pirates as a consequence of the vessel transiting the Gulf of Aden in accordance with Charterers’ employment orders.
- The mention in Clause 101 of the war risk, kidnap and ransom premium together with the crew bonus were not subject to a single geographical area. These parts of Clause 101 referred to payments which would occur due to the vessel transiting the Gulf of Aden and do not concern a single and defined geographical area.

The Court concluded that whilst Owners succeeded on Clause 49, the appeal ultimately failed due to the interpretation of Clause 101. Hire was, therefore, suspended during the period of the detention by pirates by virtue of Clause 101.

Comment

The case is a salient reminder that when specific clauses in a charterparty are the subject of interpretation by either a Tribunal or a Court, account will be taken of not only legal principles and case law but also commercial and business sense and the general scheme allocating risks under the charterparty. ■

“The vessel was released by the pirates approximately seven months later.”

Cargo & Jurisdiction





Pre-award Attachment of Financial Assets in Mainland China

A special advantage for Hong Kong maritime arbitrations?



Rohan Bray
CEO Hong Kong Branch
Hong Kong Office
rohan.bray@simsl.com

The Hong Kong Government and Supreme People's Court of the People's Republic of China recently signed up to an arrangement which will mean each can make and enforce orders in aid of arbitrations conducted in the other jurisdiction. To give it its official (if somewhat unwieldy) title, the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* is the latest in a line of mutual agreements whose purpose is to build bridges between the separate and distinct systems of law in force in Hong Kong and Mainland China. Although sovereignty over Hong Kong was handed back to China on 1 July 1997, the territory still retains its common law based system of laws and courts and as a result there can often be significant areas of uncertainty when one jurisdiction is asked to assist in various aspects of litigation being conducted in the other.

The Arrangement was signed by both parties on 2 April 2019 and will come into force on a date to be announced by the Hong Kong Government and the Supreme People's Court. According to the Arrangement, any party to arbitration proceedings in Hong Kong may, before an award is made, apply to an Intermediate People's Court for interim measures "by reference to" relevant laws and judicial interpretations of Mainland China (Article 3). "Interim measures" can include preservation of assets and evidence. Likewise, a party to a Mainland China arbitration can apply to the Hong Kong High Court for interim measures which are already available to parties in foreign (non-China) arbitrations (for example, injunctions) and preservation of assets and evidence (Article 6). This article is limited to an examination of the position pertaining to Hong Kong arbitration.

In the maritime context, particularly with charterparties, it is common for a contract between a non-PRC entity and a PRC counterpart to provide for Hong Kong arbitration, often specifying English law as the governing law. PRC entities will frequently have assets located in

Mainland China, and these can already be enforced against once an award is obtained (by virtue of an earlier Arrangement between Hong Kong and Mainland China entered into in 1999). In terms of pre-award security, it has been the case for some years that a maritime claimant in any arbitration outside Mainland China could obtain an order for "preservation" (i.e. attachment) of property in China, pursuant to the PRC Special Maritime Procedure Law ("SMPL"). This option is, however, limited in terms of the types of property which can be attached; the Supreme People's Court, in an official explanation concerning the application of the SMPL, has said that the relevant property consists of ships, cargo carried by a ship, ship's bunkers and ship's provisions.¹

The attachment of any other type of property, like bank accounts or shares, is governed by the PRC Civil Procedure Law ("CPL") and, due to a lack of express empowering provisions, applications for pre-award attachment of such *non-marine* assets in aid of foreign (including Hong Kong) arbitrations are often rejected by Mainland judges. The new Arrangement will increase the opportunities for claimants in arbitration to obtain attachments of such assets, similar to the way in which freezing orders / Mareva Injunctions and property attachments are available in many places. Since the Arrangement is exclusively between Hong Kong and Mainland China, this benefit will accrue only to parties in Hong Kong arbitration, and not in other fora.

Turning to some details of the Arrangement, Article 3 states that before an award is made, a party to Hong Kong arbitration "can make an application for interim measure to the Intermediate People's Court of the place of residence of the [respondent] or the place where the property...is situated." If arbitration has not already commenced when the application is made, it must be commenced within 30 days of the interim measure being ordered. This latter provision would appear to allow "pre-emptive" applications without notice, in order to avoid potential disposal or transfer of assets if the respondent is given advance warning, similar to *ex parte* injunction applications in common law jurisdictions.

Article 4 specifies the documents required to make an application. As well as the "application for interim measure", these include a copy of the arbitration agreement, identity documents of the applicant (e.g. ID card, certificate of incorporation) and details of

the claim in arbitration (e.g. pleadings, supporting documents). If the documents are not in Chinese, an accurate Chinese translation is required. The details required in the “application for interim measure” are set out in Article 5. These include personal and contact details of the parties, preservation amount and information about the property to be preserved, and explanations of the need for urgency and the adverse consequences if the interim measure is not granted.

The Mainland court can order the applicant “to provide security” (Article 8), presumably to compensate the respondent in the event that it incurs a loss or damages as a result of an illegitimate or unconscionable application for interim measures. This appears similar to the obligation of a party seeking to arrest a vessel or other maritime property in China to provide security (often referred to as “counter-security”) as a pre-condition for the Court granting the order (SMPL, Chapter VI).

On the face of it, therefore, the 2019 Arrangement has the potential to make Hong Kong the most favourable place to arbitrate against parties with Mainland assets: but unfortunately it may not be all plain sailing for maritime litigants.

The vast majority of maritime arbitrations are what might be termed “ad hoc”. While the LMAA, under whose terms the majority of maritime arbitrations are conducted, is a formal association, with office holders, a constitution and a common code of ethics, it does not itself administer arbitrations in the manner of institutions such as ICC, LCIA, CIETAC, CMAC, SIAC, HKIAC etc. LMAA arbitrations are, therefore, ad hoc in nature. When parties to maritime contracts elect Hong Kong arbitration, they commonly adopt LMAA Rules, use a clause similar to the “Hong Kong Maritime Arbitration Clause” drafted by the Hong Kong Maritime Arbitrators Group, or do not specify any particular set of rules or supervising institution at all. In all such cases the arbitration will be ad hoc.

The Mainland legal system has always had misgivings about ad hoc arbitrations, to the extent that purported agreements for ad hoc arbitration in the Mainland are invalid (PRC Arbitration Law, Article 16), though it is noteworthy that an ad hoc tribunal in a maritime dispute, properly constituted in a foreign jurisdiction, can be recognised for the purposes of the SMPL and that awards of ad hoc tribunals are recognised in Mainland China pursuant to the New York Convention

of 1958. This preference for institution-based arbitration is underscored by the Arrangement. Accordingly, under Article 3 for a claimant to make an application for interim measures on the Mainland they must be a party to “arbitral proceedings in Hong Kong”. The definition of what constitutes “arbitral proceedings in Hong Kong” is found in Article 2; these are proceedings which are “seated in the HKSAR and...administered by...arbitral institutions...dispute resolution institutions or permanent offices” which are established in Hong Kong, set up in Hong Kong by intergovernmental organisations of which the PRC is a member, or have been set up in Hong Kong by external arbitral institutions and satisfy criteria prescribed by the Hong Kong Government. For the purposes of Article 3, therefore, a purely ad hoc arbitration cannot constitute “arbitral proceedings in Hong Kong”, and a claimant in such an arbitration would not be eligible to take advantage of the measures introduced by the Arrangement.

While parties to maritime contracts continue to agree arbitration clauses with wordings which have been used consistently for many years, the prospective advantages for Hong Kong arbitration outlined in the 2019 Arrangement may unfortunately prove to be elusive. It is notoriously difficult to persuade parties to give close consideration to contractual arbitration clauses, as these tend to be “cut and pasted” from previous contracts, or agreed as a simply stated “[Name of jurisdiction] law and arbitration to apply” type provision. However to exploit the enhanced possibility, made available through the 2019 arrangement, of obtaining pre-award attachments of non-marine assets in Mainland China, clauses which provide for some kind of institutional arbitration will need to be drafted and agreed; for Hong Kong maritime arbitrations the most likely viable institutions would seem to be HKIAC and CMAC. The challenge will be to draft clauses nominating one of these institutions, using wording sufficient to engage the potential of the new Arrangement whilst at the same time maintaining as many of the positive features of ad hoc arbitration that parties to maritime arbitrations have grown accustomed to over many decades.

Invaluable input on PRC law and practice was provided by Ms Xinwei Zhao, Managing Partner of HiHonor Law Firm in Qingdao: <http://www.hihonorlaw.com/en/index.php>.

¹ Supreme People’s Court Interpretations on the Application of the Special Maritime Procedure Law of the People’s Republic of China (2003), Article 18

“This latter provision would appear to allow “pre-emptive” applications without notice, in order to avoid potential disposal or transfer of assets if the respondent is given advance warning...”

On Deck But Outside Hague-Visby Rules

Heavy weather on a voyage leads to a claim for lost and damaged cargo.



Bill Kirrane
Syndicate Manager
European Syndicate
bill.kirrane@simsl.com

The English High Court has decided that a shipowner has no liability for loss or damage to deck cargo where the bill of lading covering the cargo stated that the cargo was carried on deck and incorporated a clause excluding liability for such cargo “howsoever arising.”

A project shipment comprising 201 packages of cargo was shipped from Thailand to Algeria onboard the ELIN. A bill of lading was issued for the cargo, which included in the description of the cargo:

“(of which 70 pckgs as per attached list loaded on deck at shipper’s and/or consignee’s and/or receiver’s risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising)”

Standard wording on the other side of the bill of lading included:

“(c) The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into or after discharge from the Vessel or while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals.”

Some of the cargo was lost or damaged when the vessel encountered heavy weather on the voyage. The cargo interests alleged that cargo was lost or damaged because the Owner failed to exercise due diligence to make the ship seaworthy at the commencement of the voyage, or to properly and carefully load, stow, carry and care for the cargo.

At a case management conference, Picken J. ordered the trial of a preliminary issue with respect to any deck cargo:

“Whether, on a true construction of [the Bill of Lading], the Defendant is not liable for any loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or the Defendant’s negligence.”

Stephen Hofmeyer QC, sitting as a Judge in the High Court decided that the Owners had no liability for loss or damage to the cargo that had been stowed on deck.

He commented that the carriage of goods on the deck of a ship is inherently risky, so that deck cargo is treated differently at law. Goods carried on deck and stated to be carried on deck in the bill of lading are not “goods” within the meaning of the Hague or Hague-Visby Rules. A shipowner can contract to ship such goods on his own terms, and not be bound by the Rules.

In English law clear words are necessary if a party to a contract wants to exclude or limit their liability, and such words are read restrictively, against the party that seeks to rely on them.

In this case the judge considered that the words on the bill of lading were clear and unambiguous, and he commented that “words of exemption which are wider in effect than “howsoever caused” are difficult to imagine, and, over the last 100 years, they have become “the classic phrase” whereby to exclude liability for negligence and unseaworthiness.”

It was therefore held, on the preliminary issue, that in this case: *“On a true construction of the Bill of Lading, the Owner is not liable for any loss of or damage to any cargo carried on deck, including loss of or damage to any cargo carried on deck caused by the unseaworthiness of the Vessel and/or the Owner’s negligence.”* ■





목포항 제주 무사증 및 밀입국 집중단속
목포해양안전지원센터 | 목포해양국공제사무소 | 목포수산업 보호지원센터

People

What is Prompt Enough?

Lack of clarity surrounding the interpretation of duties under the Jones Act is highlighted when appropriate treatment is delayed.



Agapi Terzi
Syndicate Executive
Americas Syndicate
agapi.terzi@simsl.com

On 19 December 2019, the US Court of Appeal for the Fifth Circuit, in *David J. Randle v Crosby Tugs, LLC*, affirmed the District Court summary judgment in favour of the vessel owner and highlighted the importance of dealing promptly with the manifestation of seafarers' illness symptoms.

The Fifth Circuit Court addressed two issues, ruling that:

- a. The Jones Act duty to provide a seafarer with prompt and reasonable care is not breached by calling emergency responders (911); and
- b. Shipowners cannot be held vicariously liable for the malpractice of non-agent medical providers.

Background

Randle, the plaintiff, suffered a stroke while working on board the "Delta Force". The nature of his symptoms was not apparent but the Master, as soon as he was notified, called 911. Randle was transferred by emergency responders to the Teche Regional Medical Center Hospital ("TRMC"). TRMC doctors failed to correctly diagnose his medical condition and did not provide him with proper medication. As a result of the unsuitable medical treatment, Randle suffered a permanent disability.

Randle commenced proceedings against Crosby Tugs ("Owners") for negligence and unseaworthiness. His action was premised on an allegation for breach of the duty under the Jones Act, due to Owners' negligence by failing to provide prompt and proper medical care. He further alleged that Owners were vicariously liable for the malpractice of the doctors at TRMC. Owners applied for a summary judgment to dismiss the claim. The US District Court agreed with Owners and dismissed both the negligence and unseaworthiness claims.

Subsequently, Randle appealed against the Court's decision which led to a review by the Court of

Appeal for the Fifth Circuit of the duty of shipowners to provide prompt medical care, as well as their vicarious liability for the treating physicians' actions.

Court of Appeal decision

Randle did not challenge the District Court's summary judgment on his unseaworthiness claim and the Fifth Circuit Court considered only the negligence claims. The Fifth Circuit Court relied on *Gautreaux v Scurlock Marine Inc.*, 107 F 3d 331 and reiterated that under the Jones Act, a seafarer is entitled to recover if his employer's negligence is the cause, in whole or in part, of his injury.

Direct negligence arising allegedly by "merely" calling 911

As per the US Supreme Court, it is well established that under the Jones Act an owner's duty to provide prompt and adequate medical care to seafarers is non-delegable. Breach of such duty renders owners directly liable to seafarers.

An example of such a breach is when an owner chooses a doctor not properly qualified to care for the seafarer's injury.

The alleged breach of the duty has to be considered with a view of the circumstances of the case and the nature of the injury.

The Fifth Circuit Court held that on this occasion, the Master acted reasonably and as expected by using common sense and calling 911, which is intended for emergency cases, in order to ensure that the seafarer received treatment as soon as possible. Being away from the home port, the Master made all reasonable efforts to provide adequate medical treatment and the fact that TRMC failed to properly treat Randle did not imply that Owners were directly liable for their failure.

Vicarious liability for malpractice

The Court held that an agency relationship exists when an owner takes an affirmative act to choose the agent (medical provider) and the latter is acting as a result of a contract or under normal operational activities. Owners did not have any relationship with TRMC. Owners had no authority to choose this particular facility when calling 911 and no

authority over the doctors at TRMC. Therefore, no agency relationship existed between them.

The Fifth Circuit Court held that Randle had failed to show that there were any genuine issues of material fact as to whether Owners had acted negligently by calling 911 or that Owners were vicariously liable for TRMC's malpractice. The Court affirmed the granting of summary judgment in Owners' favour.

Comment

Issues around the interpretation of duties under the Jones Act remain clouded, and therefore there is a continuous scrutiny by US courts. In particular, the duty to provide prompt and reasonable medical care is still being challenged by plaintiffs and reviewed in the courts.

The basis for decision appears to be that, not being a qualified medical professional, a Master's duty for reasonable and prompt care is to make a reasonable and common sense decision, which in this case was to have the ill person transferred immediately to the emergency services.

It is also clear that shipowners should be cautious if entering into contracts with specific medical providers or referring seafarers to specific medical facilities to avoid the potentially significant exposure to a claim based on vicarious liability for their malpractice.

As a judgment from the US Court of Appeal for the Eastern District of Louisiana, this decision can be used as a reference by defendant lawyers and may be persuasive for judges in other District Courts but is not binding in other Circuits. ■

"...doctors failed to correctly diagnose his medical condition and did not provide him with proper medication."





Seafarers Residing in France

New ruling presents shipowners with a stark choice on social security contributions.

**THOMAS
COOPER**

Dani Allan, Christophe Hunkeler
and Servane Bourée
Thomas Cooper LLP, Paris

Until 2011, French domiciled seafarers did not have the right (as did other land-based employees) to claim enhanced compensation from the State when a work-related injury (or worse) was caused by the negligence (*faute inexcusable*) of the employer, a right that had existed elsewhere for decades. With MLC 2006 however, the French State looked again at the seafarer's lot in order to ensure compliance with the intentions of the MLC. One of the results of this was the introduction of the laws of 9 March and 30 December 2017, and the consequent modification to Article L.5551-1 of the Transport Code.

The 9 March 2017 law stated that seafarers residing in France (and working on foreign flagged vessels) were obliged to be affiliated to the French social welfare regime (ENIM). However, a second law quickly followed relaxing the position, so that the law of 30 December of the same year clarified that affiliation was not obligatory, provided the ship owner proposed social welfare benefits (public or private) of at least an equivalent level to those provided by French social security (Article L.111-1 of the Social Security Code).

Article L.5551.1 criteria:

1. Residence is stable and regular – a stay of at least six months within French territory. Residence can be proven by such things as a tenancy agreement or utility contracts (telephone, electricity, gas etc.). For those without a residence but nonetheless working (and living) on board vessels, then the six months is satisfied by a presence in French territorial or internal waters – such presence being calculated over a 12 month rolling period (in other words the six month period does not have to be continual).
2. The seafarer must be working on a foreign-flagged (non EU /EEA) vessel.
3. Will not relate to those vessels listed in Article L.5561-1 of the Transport Code, namely:
 - i. Coastal vessels undertaking a regular national coastal or cruise service around France of less than 650 gross tonnage;

- ii. Coastal vessels undertaking a regular national coastal service around French islands, except those cargo carrying vessels of gross tonnage of greater than 650 tonnes when the voyage concerned follows or precedes a voyage to a destination to or from another State ; and
- iii. Supply and service vessels used in French territorial or internal waters, for example, tugs, pilot vessels, specialist salvage vessels (including pollution control and wreck removal), also support vessels used to supply services to offshore windfarms.
- iv. Vessels of “traditional construction” used to participate in nautical events are also excluded.

How will this work in practice?

- Social welfare protection for a seafarer qualifying as above must cover, (as per article L.111-1 of the Social Security Code), medical costs (interventions/ hospital stays/long term illness care), maternity and paternity costs and healthcare costs (GP visits/ prescribed medical products) for the seafarer and his beneficiaries. It must also cover sick pay in the event of illness or accident (work-related or not); compensation for permanent disability; retirement benefits including retirement pensions and family benefits (child maintenance and child care). The French social security system ENIM offers this protection. Any alternative welfare package must offer the same cover;
- The ship owner must complete and send to ENIM a “declaration of honour” indicating that as employer, it undertakes to cover the seafarer.
- Where the ship owner elects not to affiliate itself to ENIM then the declaration and affiliation can be done by the employee, i.e. the seafarer.
- Where the seafarer is already affiliated to ENIM it can apply to opt out of the French social security welfare scheme as long as he/she will be covered by a welfare scheme providing at least equal protection. Where this is not the case then affiliation to ENIM will be maintained.

Penalties

- The French Social Security Code prescribes that where an employer (Ship owner) incites

“...benefits under the French system are so wide and the calculations so complicated...”

an employee (seafarer) to refuse to respect the provisions of the social security/transport codes, the employer can be punished by a prison sentence of maximum two years and/or a fine of €30,000.

- A person deliberately refusing to comply with affiliation obligations, or constantly delays/fails to comply with requests to undertake the administrative steps can be punished by a maximum prison sentence of six months and/or a fine of €15,000.
- The French criminal code also makes provision for a prison sentence/fine of €30,000 in the case of false declarations/incomplete declarations seeking to obtain payments or benefits under the French welfare system.

Conclusions

The ship owner employing seafarers where Article L.5551-1 applies currently has a stark choice; affiliate themselves and their employees to the French social security system (ENIM) or offer equivalent cover elsewhere (either public or private).

Contributing to ENIM is expensive. Social Security contributions for an employer can add significantly to salary costs in France (between 20%-30% of the gross wage is a rough marker).

Alternative systems may be more cost efficient but unfortunately the benefits under the French system are so wide and the calculations so complicated (permutations are endless given the amount of the benefit will often depend on the salary, age, dependants, etc. of the seafarer), that it is almost impossible to state with any certainty whether alternative welfare cover would be as generous as French social welfare benefits in any given situation. The authors asked ENIM to indicate its maximum limits for the calculation benefits, but they have been unable to provide this information.

There is a risk therefore that if Article L.5551-1 remains in force in its current form that ship owning employees offering welfare cover outside the ENIM system could find themselves involved in expensive legal disputes with current or ex-employees seeking to demonstrate that their welfare cover is inadequate compared to that offered by the French State.

There are a number of points however to take into account to try to put this new law into some sort of context;

- If this law proves to be more prejudicial than beneficial to the French maritime industry, because either ship owners or seafarers elect to base themselves elsewhere (Italy and Spain for example) then modifications to the law may follow.
- Article L.5551-1 was introduced to ensure France adhered to MLC 2006. Long before its application however, French tribunals and courts frequently intervened in the employment contracts of foreign ship owners and seafarer employees who were either French nationals/non-French but French residing. The French courts have shown a dislike of foreign (frequently tax haven) manning agency contracts incorporating foreign law into an employment contract. Where the seafarer has been able to show residency in France or employment based out of say a French port, then French courts have simply stepped in and overridden the applicable law and applied French law instead. The result is more or less the same as the intention of Article L.5551-1. In other words an employer could find itself bound to contribute to the French social security system or compensate an employee/ex-employer on the basis of the benefits and compensation available in France, even where it had made provision for the employment contract to apply non-French law.
- The danger of “travail dissimulé” has always existed too, and with potentially serious consequences for the employer. In simple terms, travail dissimulé means undeclared work, i.e. paying your crew either cash or gross, without declaring them to any welfare system or leaving them to their own means (knowing there is a likelihood that they will not make any private provision for such cover). This is a criminal offence in France and also provides for heavy fines and imprisonment.
- The provisions of Article L.5551-1 are not new. The risks for any ship owner having vessels working out of French ports or working in French waters and employing seafarers on those vessels have always existed.
- In a sense the introduction of Article L.5551-1 has simplified the position or at least made it more transparent and available to non EU/EEA flagged vessels. ENIM has even provided declarations and forms in English to encourage affiliation.

Despite this context however, ship owning employers who fall within Article 5551-1 should be under no illusion. The only risk-free option, certainly given the relatively cheap access to justice for employees, combined with the pro-employee position of the French tribunals, is affiliation to the French social welfare regime, ENIM. ■

Jones Act – When is a Worker a “Seaman”?

Injury claim tests the Jones Act definition of a “seaman”.



Stuart Crozier
Syndicate Associate
Americas Syndicate
stuart.crozier@sims.com

In the recent case of *Ross v W&T Offshore Inc* 2018 WL 6492762 (E.D. La. Dec. 10, 2018) the United States District Court for the Eastern District of Louisiana discussed the criteria applied by the courts when assessing an injured party’s status in respect of claims brought under the Jones Act and general maritime law.

Background

The plaintiff worked as a cook for Bailey’s Support Services, Inc. while stationed on an oil production platform in the Gulf of Mexico owned by W&T Offshore Inc (“W&T”) called SS 349-A (the “oil platform”). While working on the oil platform, he slipped and fell on a wet galley floor. The plaintiff alleged that the fall caused severe injuries, and the injuries were a result of the negligence of W&T.

The plaintiff alleged that the oil platform constituted a vessel, and he sought to recover damages under the Jones Act and general maritime law on the basis that he was a “seaman”. The suit also raised claims under Louisiana law in the alternative.

W&T’s arguments

W&T filed a motion for partial summary judgment in respect of the plaintiff’s Jones Act and general maritime law claims arguing:

1. The plaintiff was not a Jones Act seaman because the oil platform was not a vessel.

2. The plaintiff’s unseaworthiness claim brought under the general maritime law should fail because unseaworthiness claims relate to a vessel and the oil platform was not a vessel.
3. The plaintiff’s negligence claim brought under general maritime law should fail because the plaintiff could not show a maritime situs or a connection to a traditional maritime activity.

Plaintiff’s argument in opposition

The plaintiff argued that, due to the hours he worked on other vessels prior to being assigned to the oil platform, he had attained Jones Act status. The plaintiff had worked aboard four vessels, which were owned by three different companies, prior to his assignment to the oil platform but argued that time served should be taken into consideration when assessing his status as a Jones Act seaman.

Court’s award

Summary judgment is appropriate when the pleadings and discovery show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In assessing the position, the Court will draw any reasonable inferences needed in favour of the non-moving party.

The Court considered each of the arguments raised by the parties:

i. Vessel status

The first question in any Jones Act action is whether the plaintiff qualifies as a Jones Act seaman, and the most fundamental prerequisite is whether any of the structures or vehicles worked on by the plaintiff are considered to be a “vessel”.

The definition of a vessel for the purposes of the Jones Act was determined by the United States Supreme Court in *Stewart v Dutra Constr. Co.* 125 S. Ct. 1118 (2005). The Supreme Court defined a vessel as every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. The status of a vessel is regardless of its primary purpose or state of transit at a particular moment. A vessel’s primary purpose need not be navigation or transportation, and it need not be in motion at the time of the seaman’s injury but the Supreme Court noted that a watercraft is not capable of being used for maritime transport in any meaningful sense if it has

“The plaintiff alleged that the fall caused severe injuries, and the injuries were a result of the negligence...”



been permanently moored or otherwise rendered practically incapable of transportation or movement.

W&T's argument focused on the need for a vessel to be practically capable of maritime transportation, regardless of its primary purpose. They asserted that a watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored. W&T's central point was that an oil platform is not a vessel because it is incapable of any movement. It is permanently affixed to the sea-floor by eight pilings and, in this instance, the platform had not moved from its location in over two decades. It does not float, has no navigational equipment, no means of self-propulsion and cannot be towed. Therefore, the oil platform is not a vessel. In which case, the plaintiff

was not injured aboard a vessel and his claims against W&T for negligence under the Jones Act must fail.

The District Court considered the test in *Stewart v Dutra Construction Co* (as explained above). With that test in mind, the Court looked at the case of *Mendez v Anadarko Petroleum Co* 568 US 1142, where the Fifth Circuit determined that an oil platform that was permanently moored by six mooring lines and attached to anchors embedded into the sea floor was not a vessel.

As the platform on which the plaintiff was working when he was injured was permanently affixed to the sea floor the Court concluded that the oil platform was not a vessel.

ii. Jones Act status

As a matter of fact, the plaintiff had worked aboard four vessels, which were owned by three different companies and under the direction or control of unnamed Charterers, prior to his assignment to the oil platform. The plaintiff argued that due to the hours he worked on these other vessels prior to being assigned to the oil platform he had attained Jones Act status.

The issue of who is a Jones Act seaman so far as US nationals are concerned is governed by the decision reached in the United States Supreme Court case of *Chandris Inc. v Latsis* ("*Chandris*") 515 US 347 (1995) which set out a two pronged test for determining whether or not an employee enjoyed seaman status:

1. The Function and Mission of the Vessel Test

Under this test the employee's duties must contribute to the function and the mission of the vessel.

2. Substantiality Test

The connection to the vessel (or an identifiable group of vessels) must be substantial in its duration and nature.

Therefore, a crewmember who spends only a fraction of their working time on board a vessel is not a seaman. As a guideline a worker who spends less than about 30% of his time in the service of the vessel in navigation should not qualify as a seaman under the Jones Act.

W&T argued that even if the plaintiff previously obtained Jones Act status in prior assignments, once he was permanently assigned to the oil platform his Jones Act seaman status ended. Further, the plaintiff did not work on a vessel, or an identifiable fleet of vessels under common ownership or control, as required to establish seaman status.

The District Court considered the *Chandris* test and whilst the plaintiff had provided evidence showing he was a Jones Act seaman at some point prior to being assigned to the oil platform, the undisputed evidence showed that he was reassigned to a job that was aboard an offshore oil platform. As this was not a vessel under the Jones Act, the Court found that the plaintiff could not be a seaman.

iii. Unseaworthiness

W&T argued that an essential element of any unseaworthiness claim was that there was a "vessel". Therefore, the plaintiff's claim must also fail on the same basis as above that the oil platform was not a "vessel".

The District Court agreed that as per Fifth Circuit precedent for a valid argument of unseaworthiness there requires the existence of a vessel. The Court

"As the platform on which the plaintiff was working when he was injured was permanently affixed to the sea floor the Court concluded that the oil platform was not a vessel."

had already found that the oil platform was not considered a vessel but a fixed platform.

iv. Claims under general maritime law

W&T argued the plaintiff's negligence claim brought under the general maritime law must fail because the plaintiff could not meet the two requirements for a tort claim in admiralty:

- i. Situs (or location test) – the tort occurred on navigable water or that the injury on land was caused by a vessel on navigable water; and
- ii. Connection to a traditional maritime activity – the incident had a 'potentially disruptive effect on maritime commerce' and that the activity giving rise to the incident has a 'substantial relationship to traditional maritime activity'.

W&T argued the plaintiff's alleged injury occurred on a fixed platform, which is not part of navigable waters under maritime law and the connection test should fail because the activity which caused the plaintiff's injury did not bear a significant relationship to traditional maritime commerce.

The District Court agreed with W&T that work on a fixed offshore platform bears no significant relation to traditional maritime activity.

Therefore, W&T was entitled to summary judgment in its favour on each of the claims brought under the Jones Act, seaworthiness obligations and general tortious maritime law.

Comment

This decision is a reminder of the fundamental tests that have been established in order to receive the remedies available under both the Jones Act and general maritime law. In this instance, the plaintiff could not meet these requirements. ■

Philippines: Progress Towards Claims Under Appeal in POEA System

Efforts by the International Group to encourage changes in the Filipino legal system.



Paul Brewer
Syndicate Manager
Americas Syndicate
paul.brewer@simsl.com

The International Group (IG) of P&I Clubs has many roles, not least of which is to provide a collective industry voice to engage with

governments and regulatory bodies, to assist in fostering fair and balanced policies for the protection of both ship-owner and seafarer alike.

Against this backdrop our Members might be interested to hear that the IG has been working hard over the years to try to encourage changes in the Filipino legal system and the way in which Philippine Overseas Employment Administration (POEA) claims are dealt with.

Previously such efforts have resulted in improvements to the system which have been to the benefit of IG Members and their crew. By way of example, the Seafarers Protection Act was created to address the problem of the legal representatives of crew imposing excessive legal fees in cases they handle for their clients, thereby eroding the compensation the seafarers were due to receive.

In addition to this there was an amendment made to the 2016 POEA Rules and Regulations to prevent permanently disabled seafarers from appearing on the National Seafarer Registry and their Seafarer's Record Book and Seafarer's Identity Document are now no longer being issued.

However, efforts continue to try to improve the system, with the IG heavily involved in attempting to progress matters via their Philippines Working Group. Particular focus has been upon finding a solution to the problems caused by garnishment and restitution; garnishment meaning the collection of a judgment on behalf of the claimant from the defendant and restitution being recompense for the injury or loss sustained.

As things stand, once a ruling has been made by the National Labor Relations Commissions (NLRC) or the National Conciliation and Mediation Board (NCMB), if the defendant wishes to appeal they can do so but must first pay the sum of the judgment. The only way to avoid this is to obtain a temporary restraining order, which in practice is very difficult to do. Consequently this can result in the defendant having to satisfy the judgment even where the case remains pending before the Court of Appeals.

It is believed that the cost to shipowners, as a result of garnishment being allowed prior to the appeal process being exhausted, has resulted in millions of dollars of unrecovered payments. It is believed that the cost to shipowners as a result of garnishment being allowed prior to the appeal process being exhausted has cost the industry millions of dollars of unrecovered payments. Not to mention the fact that in many cases the defendant forgoes their right to appeal, fearing such an action to be futile, and so agrees to a settlement under duress.

With this problem in mind the IG working group has submitted proposals to the Department of Labour and Employment, along with various other interested parties, to offer a solution which would be equitable to all parties; the suggestion being the creation of an escrow account. The basic idea being that where a case is elevated from either the NLRC or NCMB to the Court of Appeals, the award which has been made shall be deposited into an escrow account, where it will be administered by a mutually agreed custodian until such time as final judgment is entered.

It is clear that acceptance of the escrow proposal will bring benefits to both ship-owner and seafarer alike. POEA deployment records suggest that the current situation is having an adverse effect on the local maritime manning industry and the employment of Filipino crew abroad.

This should be a concern for all parties because Filipino seafarers undoubtedly play an extremely valuable role in commercial shipping the world over. However, the current system often results in shipowners having to pay compensation when ultimately it is held that none was due, or at least not to the extent of the award from the lower court. This has a huge impact on a shipowners insurance premium, and further effects on employers and employees alike. ■

“...it is unlikely that the defendant will see a return of the monies previously paid.”





Miscellaneous

Recent Developments in Salvage

An overview of recent changes to LOF and SCOPIC and the consolidation of guidance documents for SCRs.



Ian Freeman
Syndicate Manager
Americas Syndicate
ian.freeman@simsl.com

In late 2016, Lloyd's of London, the custodians of LOF (Lloyd's Open Form salvage agreement) and SCOPIC (Special Compensation P&I Clause), initiated a review of both SCOPIC and the LOF forms to ensure they remain relevant and viable in the current market. This culminated in the publication of the SCOPIC 2018 form, a revision of the SCOPIC security standard wording and a consolidation of all the guidance documentation provided to SCRs.

SCOPIC 2018

First incorporated into the LOF 2000 form, and with some relatively modest modifications since, the SCOPIC Committee of Lloyd's came to the conclusion that SCOPIC had worked well for the past eighteen years. As a replacement to Article 14 of the International Convention on Salvage 1989 (Special Compensation), SCOPIC continues to enjoy broad support from all sectors of the industry. However, an inequality was identified related to SCOPIC security and a contractor's rights to terminate.

Having signed an LOF with SCOPIC incorporated, the salvage contractor may invoke SCOPIC at any time. On doing so, the contractor is entitled to SCOPIC security of US\$3 million in the form of a bank guarantee or a P&I Club letter^a to be provided within two working days of SCOPIC being invoked. This is the so named 'Initial Security'. If the owner of the vessel fails to provide the requisite security the contractor has the option to withdraw from SCOPIC and continue the salvage operation under LOF as though SCOPIC had not existed. This is an incentive to the owner to provide security in order to avoid the vagaries of an Article 14 claim by the contractor.

SCOPIC also obliges the owner to increase the initial security if it proves insufficient to cover the contractor's reasonably projected SCOPIC remuneration¹, but SCOPIC does not provide the contractor with any remedy if the owner fails to provide the increased security. The option to withdraw from SCOPIC is no longer available to the contractor because this only applied if initial

security at the commencement of the salvage operation was not provided. Similarly the termination provisions of SCOPIC² provide the contractor with no remedy as no mention is made of an owners failure to meet their security obligations.

With no automatic right to withdraw from or terminate SCOPIC in the event an owner fails to increase security when it is reasonable to do so, the contractor is left in the difficult position of having to prove the owner is in breach of the security provisions and obtain an arbitration award to terminate SCOPIC. Recognising this problem, SCOPIC 2018 now includes a right of the contractor to terminate both SCOPIC and the main agreement if, having been agreed amicably or determined by an arbitrator, the increased security is not provided within two working days.³

While addressing the question of increased security, focus fell on the termination provisions of the contractor⁴. Originally designed to give the contractor a right to terminate in a situation in which the contractor is making a loss and had no real prospect of making up that loss^b, the termination provision was found to be incomprehensible and of little practical value. As a result the provision was simply dispensed with and, save for the new right of a contractor to terminate SCOPIC in the event increased security is not timely provided, the only right to terminate SCOPIC is limited to the owner on giving five days' notice⁵.

ISU 5 Salvage Guarantee Form – voiding provisions

The ISU 5 Salvage Guarantee Form – so numbered as the fifth of a suite of five standard guarantee forms published by the ISU – is the agreed form to be used when a Club provides its letter of undertaking as SCOPIC security. In the ordinary course of providing security the Club concerned is unlikely to have the opportunity to investigate within the two working day time frame if there is any reason why the Club should not give its security. One possible reason could be the existence of a side-agreement to the LOF salvage contract (see the Club's previous note on <https://www.steamshipmutual.com/publications/Articles/use-of-side-agreements-lof.htm>).

With the apparent growing use of side-agreements, a provision⁶ has been added that voids the security in the event the salvage operation is being conducted on terms other than an un-amended LOF with

“Over the years SCRs raised a number of questions for the SCOPIC Committee to consider...”



“If the owner of the vessel fails to provide the requisite security the contractor has the option to withdraw from SCOPIC and continue the salvage operation under LOF as though SCOPIC had not existed.”

SCOPIC incorporated. The option remains for the Club concerned to re-instate the provisions of the security once it has satisfied itself that any side-agreement, or any other variation of the standard LOF/SCOPIC forms, does not constitute a barrier to providing cover.

Consolidated guidance notes on the role of the Special Casualty Representative (SCR)
On implementation, SCOPIC created an entirely new role in salvage operations, that of the SCR. The role and duties of the SCR are set out comprehensively in SCOPIC⁷, but it was evident as experience was gained that the role and responsibilities would require further clarification. Over the years SCRs raised a number of questions for the SCOPIC Committee to consider and the Committee’s decisions and guidance were published in the form of digests, of which there were five. Further clarification was provided in two documents, the SCR Guidance Notes and SCR Guidelines. Naturally, there was an element of duplication in these seven documents which has now been entirely superseded by the stand-alone Consolidated Guidance Notes.

The Consolidated Guidance Notes have been designed to be a living document. Although questions to the SCOPIC committee are now less common given the role of the SCR has become well defined and understood, the intention is for the document itself to be amended or added to in the event a circumstance arises that requires guidance from the committee.

The Consolidated Guidance Notes cover all aspects of the position of SCR, from setting out the application process to join the SCR panel, to providing pro-forma documents such as the daily salvage report, cost schedule and the SCR final report⁸. It addresses technical issues over costs that are allowable in SCOPIC and those excluded, as well as guidance in the production of the final report and the procedure if the SCR has a contrary view on the conduct of the operation.

In providing guidance to the SCR the document acts as a reminder to all parties to a salvage operation of the role of the SCR and the responsibilities of the respective parties. This ranges from what the SCR can expect in terms of co-operation and decision making from the contractor, to limitations on the SCR in respect of non-salvage matters.

The Consolidated Guidance Notes seek to emphasise the independence of the SCR and their primary duty, alongside that of the contractor, to use best endeavours to salvage the vessel and any property on board and to prevent or minimise any damage to the environment. As a result, the document makes a good companion to anybody involved in a casualty where salvage services have been engaged on LOF terms with SCOPIC incorporated and invoked.

LOF 2019(?)
What of the LOF review? The final review of LOF was temporarily suspended pending completion of the SCOPIC review. Now that SCOPIC 2018 has been published the LOF review is anticipated to complete within 2019. As a sneak preview, expect to see a consolidation of the Lloyd’s Standard Salvage and Arbitration Clauses (LSSA) and the Procedural Rules into one document.

For copies of the revised documents discussed above and all documentation related to the LOF and SCOPIC Agreements see <https://www.lloyds.com/market-resources/lloyds-agency/salvage-arbitration-branch> ■

¹ SCOPIC – Clause 3(iii)

² SCOPIC 2014 – Clause 9(i)

³ SCOPIC 2018 – Clause 4(ii)

⁴ SCOPIC 2014 – Clause 9(i)

⁵ SCOPIC 2018 – Clause 9(i)

⁶ ISU5 – Clause 6

⁷ SCOPIC – Clause 12 & Appendix B

⁸ SCOPIC – Appendix B, clause 5(e)

^a Pursuant to a Code of Practice between the International Group of P&I Clubs (IG) and the International Salvage Union (ISU), a contractor will accept, if offered, a Club Letter of Undertaking (LOU) in the standard form ISU5. However, this is not automatic and the Club concerned may decline to offer its LOU if it has good reason not to, but the Club will not decline to offer its LOU solely because the contractor has no other means of obtaining security.

^b The sole right of a contractor to terminate relates only to a situation in which the predicted cost of the salvage operation to the contractor will exceed the salvaged value of the property plus SCOPIC remuneration projected to the end of the operation (SCOPIC 2014, Clause 9(1)).

Bunker Time Bars: Buyers Beware

Common issues surrounding notification of off-specification bunker disputes.



Rebecca Penn-Chambers
Syndicate Executive
Eastern Syndicate
rebecca.penn-chambers@simsl.com

Bunker quality disputes are not a new phenomenon, but there has been an upward trend in the number of disputes. The consequences of burning off-specification bunkers can be severe, in extreme cases leading to the breakdown of, or damage to, the vessel’s engines and/or the time and expense of de-bunkering.

This article discusses some common issues surrounding notification of off-specification bunker disputes and practical ways to protect against short time bars.

Who is responsible for bunkering?
Responsibility for bunkering will depend on how the subject vessel is employed.

If a vessel is employed by an owner for its own account, bunkers will be purchased by the owner. Under most voyage charterparties, the vessel should be delivered with sufficient and adequate bunkers to complete the voyage, allowing a reasonable margin for contingencies to which the vessel may be subject. Therefore, in both these scenarios, the owner will directly contract with the bunker supplier to stem bunkers.

The position is different under most time charterparties where the supply of bunkers is generally the responsibility of the charterer. An owner will usually be required to deliver the vessel with an agreed quantity of bunkers on board, which the owner might have stemmed for his own account, or which might be remaining onboard from a previous charter. Thereafter, it will be the responsibility of the charterer to supply any bunkers necessary throughout the charter and to ensure the vessel is redelivered with the agreed quantity of bunkers on redelivery. Due to the nature of this arrangement, it will ordinarily be the charterer who contracts with the bunker supplier and so an owner will not be privy to this contract and will not be aware of the terms.

A timecharter will also typically specify quality parameters, for example Clause 9(d) of the NYPE 2015 form states:

“The Charterers shall supply bunkers of the agreed specifications and grades. The bunkers shall be of a stable and homogeneous nature and suitable for burning in the Vessel’s engines and/or auxiliaries and, unless otherwise agreed in writing, shall comply with the International Organization for Standardization (ISO) standard 8217:2012 or any subsequent amendments thereof.”

Where the time-charterer has contracted for the supply of bunkers, they will want to ensure that they can pass any liability they may face under the charterparty for provision of bunkers which are not of the agreed specifications and grade on to the bunker supplier.

Check your terms – what is the time bar period?
Where possible, a buyer, whether this is the owner or charterer of a vessel, should obtain the bunker supplier’s terms and condition in advance to be aware of any restrictive clauses and to ensure that they can be complied with. While bunker suppliers are often reluctant to vary their terms, a buyer should exercise caution when agreeing to onerous terms and should act prudently in selection of suppliers.

Bunker suppliers often seek to impose strict terms as regards the notification of claims and there are usually very short time bars. The time limit for raising a claim in respect of quality is often 30 days (although sometimes as short as 15 or 21) from delivery, with very strict procedural steps to be followed by the buyer.

In some cases, a ship might not have started to consume the fuel before the time limit for making a claim.

Where there are short time bars and a potential delay in the use of bunkers, fuel sampling and analysis is essential for verification of the quality of the fuel

“The consequences of burning off-specification bunkers can be severe.”

received on board. Some owners utilise on-board fuel testing kits to undertake initial checks for compatibility/stability of the bunkers on-board. Most prudent owners have arrangements in place to ensure that representative samples of fuel are taken at every bunkering operation, with samples being sent to a competent laboratory for analysis before any of the fuel is consumed. See www.steamshipmutual.com/publications/Articles/Bunkering_collecting_samples0514.htm

If this analysis shows that the fuel does not match the required specification, in the bunker supply contract or timecharter, then the owner should immediately put the suppliers, or time-charterers, on notice of a claim, and request their acknowledgement.

Check your terms – what is required to interrupt time?

It is important to consider what is required to interrupt the time bar in order that any claim can be protected. It may be that the claimant is required only to notify the relevant party of the claim, however there could be a more burdensome requirement, e.g. that the claim must be “filed and documented” within the time limit. The contract may also expressly provide for a particular sample analysis to be carried out prior to a claim being advanced.

Parties often expressly prescribe in their contracts for a particular test process, including the samples to be tested and the laboratory in which this is to be undertaken.

How to protect against short time bars

Complying with time bars is even more challenging in situations where any defect in the fuel may only be discoverable once the vessel starts consuming it. Depending on the bunker tank configuration, bunkers may be onboard for the vessel for some considerable time before they are used.

A time-charterer might be in a more difficult position, because, while a time-charterer is responsible for the supply and quality of bunkers, he might have no control over when the ship consumes any particular bunkers onboard.

Clauses such as BIMCO’s Quality Control Clause for Time Chartering seek to protect an owner when the unsuitability of the charterers’ fuel may not be immediately detected, and an owner should be wary of any rider clauses in a timecharter which state that any bunker quality claims will be deemed as “waived and absolutely time barred” after a specific period of time.

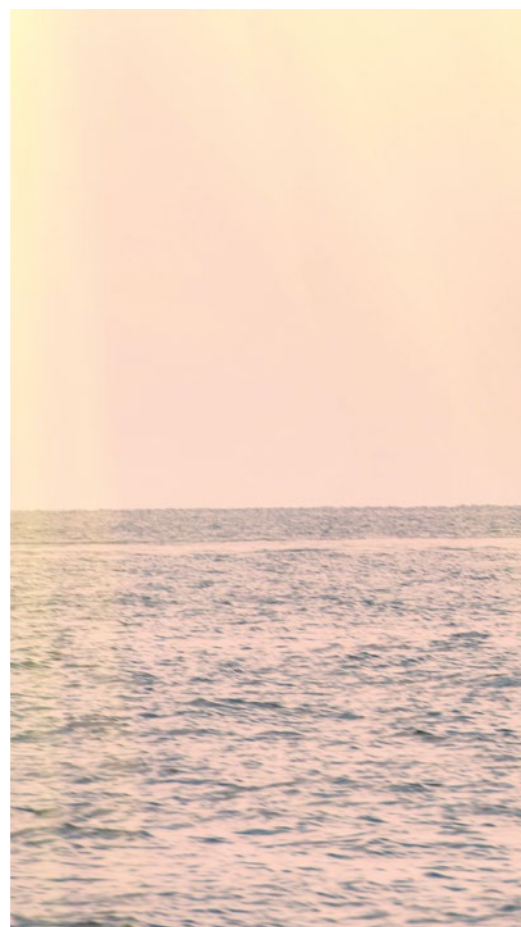
Check, check and check again

Any purchaser, whether an owner or a charterer, should carefully consider all provisions before signing a bunker supply contract. Whilst there is often limited scope to negotiate these terms, it is important that the buyer is fully aware of any onerous provisions, including time limits for claims.

When an off-specification bunker dispute arises, there are often differing views between an owner and a supplier as to whether the fuel meets the required specification. If the ship is in a timecharter, there may be different contractual provisions, between the bunker supply contract and the charterparty, as to what analysis will be determinative. It is therefore important to issue any necessary contractual notifications as soon as it becomes known that a fuel may be off specification.

We also recommend that a Member’s usual Club contact is notified without delay in order that assistance can be provided to protect any rights or defences. ■

“Bunker suppliers often seek to impose strict terms as regards the notification of claims and there are usually very short time bars. The time limit for raising a claim in respect of quality is often 30 days...”



Cyber Security and Data Protection

Countering the digital risks faced by shipping companies.



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

A cyber risk is a threat to infrastructure and communications systems, and the data within those systems that form the framework of any business enterprise, including the marine transportation sector. Such a threat could result in loss of life, loss of or damage to property, financial loss and reputational damage. For the most severe cyber attacks, the effect on their recipients could be catastrophic.

A cyber incident could be caused by a targeted cyber attack, or arise from an unintentional threat as a result of infection by a virus such as malware, the accidental loss of data, or the mis-operation of an operating system for various reasons, including improper configuration or a conflict between software dependent systems.

The sheer number of cyber related incidents and attacks such as Wannacry and NotPetya, some of which have claimed high profile victims, and the number of phishing attempts experienced on a daily basis, demonstrate the importance of having a defence to prevent a major incident. Cyber security should be taken very seriously and should form a core part of a company's safety and security policies.

A shipboard cyber threat is two-fold, categorised broadly as a threat to Information Technology (IT) and to Operational Technology (OT). The former includes storage and sharing of data (personal, operational, and commercially sensitive) and communications systems, while the latter is concerned with, among other things, navigation systems, propulsion control systems, and cargo control and monitoring systems. Companies now have regulatory obligations with respect to both IT and OT security, which are detailed below.

In both IT and OT infrastructure the vulnerability risk increases when these systems are interfaced with the internet. Some systems are also more vulnerable depending on the underlying software platform on which they operate and the availability of tools for disruption (some of which can be procured from the 'dark web'), as are legacy systems that do not have any support available to render the systems resilient to continuously morphing cyber-attacks.



Vijay Rao
Loss Prevention Executive
vijay.rao@simsl.com

The traditional methods of anti-virus software and fire walls are not considered sufficient for an effective cyber defence and a more holistic approach is required. For new vessels this approach should be pursued from initial design through to installation, testing and operation. For existing vessels segregation of systems may need to be considered based on a risk assessment and vulnerability testing. Existing or planned features such as the integration of a ballast treatment system or an exhaust gas cleaning system should be taken into consideration when carrying out risk assessment.

Air gapping systems (a security measure whereby a computer or network is isolated to prevent it from connecting wirelessly or physically with any other computer or network device) are an effective way of segregating but there is the potential risk of introducing malware or other software corruption while routinely updating or maintaining the system or when infected portable or wireless enabled devices are plugged into it. Rigorous procedures for controls and checks will therefore be necessary.

The human aspect of vulnerability cannot be underestimated as it is estimated that 80% of cyber incidents feature an element of human error. Training in privacy and security practices, control of access (through user ID and password policies) and account management, logging of events and security reviews will be required.

Cyber security regulatory framework

The International Maritime Organisation (IMO) has issued Resolution MSC428(98) providing, as part of the International Safety Management Code (ISM Code), guidelines for Flag administrations to enforce a cyber security policy and procedure to be implemented before the 1st anniversary of the Document of Compliance (DoC) after 1 January 2021. MSC 428(98) further affirms that ships' SMS should include cyber risk management that takes into consideration the various relevant elements of the ISM Code.

Linking the date to the DoC is intended to require that the Cyber Security Management (CSM) is

verified during companies' annual audits and that implementation should be fleet wide and requiring a strong commitment from senior management.

As per the objectives of the ISM Code all risks to ship, personnel and environment should be assessed and appropriate safeguards should be established. Cyber risks should therefore be considered as one such risk and need to be addressed within the Safety Management System.

There are elements in the ISM Code that should be applied to cyber security management, such as the requirement for a risk assessment, policies on cyber resilience, work procedures, contingencies, maintenance of systems to ensure operational reliability, record keeping, verification and audit, designation of responsibility and training of personnel.

The IMO has provided high level guidelines for the implementation of cyber security management based on a risk assessment methodology. There are more detailed guidelines and publications that companies are encouraged to consult for the implementation of the CSM within their organisation. Some of these standards and publications are listed below:

- BIMCO – The Guidelines on Cyber Security Onboard Ships for the implementation of the IMO resolution MSC 429(98), which include elements from various industry recognised standards and the US NIST cyber security frame work.
- ISO/IEC Standards 27001.
- IEC 62443 Security Levels in Industrial Control Applications.
- IACS has published 9 of planned 12 recommendations for making vessel systems resilient and further a unified recommendation UR E22 for On Board Use and Application of Computer based systems.
- European Network and Information Security Agency (ENISA) Good Practice Guide for cooperation in the form of Public Private Partnerships.
- United Kingdom Code of Practice: Cyber Security for Ships.
- The OCIMF SIRE VIQ 7.0 now includes under Section 7.0 the verification of the implementation of a Cyber Security Policy and Procedures as part of the ships' SMS and verification that the company is actively promoting cyber security awareness.
- The Tanker Management Self-Assessment 3 has included implementation of cyber security policies and procedures as a key performance indicator under Element 13 and a further software management procedure under Element 7.

- It is also important to take due note of local rules, regulations and reporting obligations that may be applicable such as the Network and Information System Directive of the European Union for essential services which includes the marine transport sector.
- Specific industry sector practices and threats also need to be taken into consideration for the risk assessment and development of the safety procedures.
- A questionnaire in the Club's condition survey report has also now been included for the attending surveyor to verify the implementation of cyber security management on board vessels.

Cyber security and industry support

Some elements of cyber security management to be taken into consideration include:

- Risk assessment – safety, legal and financial based on known incidents, motives and threats
- Company policy – portable devices, software management, data privacy, access, vendor
- Vessel infrastructure interface and connectivity to internet
- Vulnerability testing – penetration testing
- Vessel specific implementation
- Operational procedures
- Change management
- Logging events and detection
- Data protection
- Contingency planning – system and data recovery
- Training and awareness of personnel

Cyber vulnerabilities are continuously evolving and therefore information on risk events and the threats to cyber security is crucial. Sharing information on risk events is important for appropriate counter measures and also encourages companies to take corrective action.

Reporting incidents such as navigational interference, jamming or the spoofing of GPS and AIS to local authorities and service providers will help the agencies taking appropriate corrective action and also cascade information to others. Such efforts to collate data are important for assessing the impact on the maritime industry and making a realistic threat assessment.

Where external expert assistance is sought, it is important that the agencies offering such assistance



are evaluated and their expertise and experience are verified before providing access to systems.

There are various hardware and software solutions on offer, some based on the principles of machine learning capable of autonomous safeguarding action or alerts for manual intervention.

Implications

Although P&I Club cover has no general exclusion of claims arising from cyber risks, owners, charterers, managers or operators of ships ought to be able to demonstrate appropriate steps to identify and safeguard against cyber threats and vulnerabilities as required, including having a cyber risk policy and systems, to avoid any potential risk of cover being prejudiced.

BIMCO is expected to issue a cyber security clause in 2019 reportedly *'to raise awareness of cyber risks among owners, charterers and brokers. ...to provide a mechanism for ensuring that the parties to the contract have procedures and systems in place, in order to help minimize the risk of an incident occurring in the first place and, if it does occur, to mitigate the effects of such an incident'*.

Early implementation of cyber security management is therefore encouraged.

Data protection

In addition to the threats to a company's operational systems, companies should also consider how best to look after the data they hold within those systems. There is now a raft of data protection legislation across the world for companies to comply with. Notably, in May 2018 the European Union brought into force the General Data Protection Regulation (GDPR).

The GDPR is concerned with the handling of personal data – any data that identifies an individual or relates to an identifiable individual. Its purpose is to give data subjects greater rights with respect to their personal data, and requires those handling personal data to be able to justify using and keeping them, and to have in place appropriate security to protect the personal data they hold.

Vessel owners and operators will process a wide variety of personal data, with respect to crew, passengers and staff. This may include medical information, passport details, or salary and job data.

The GDPR applies not only to European individuals and entities (wherever in the world they process data) but also to the processing of personal data:

- of data subjects who are in the EU by an entity or individual based outside the EU, where the processing activities relate to:
 - a. the offering of goods or services to data subjects in the EU; or

- b. monitoring their behaviour as far as their behaviour takes place within the EU;
- by an entity or individual not based in the EU, but in a place where Member State law applies by virtue of public international law.

There are significant penalties for breaching the GDPR. For the most serious breaches, companies could face fines of up to (the greater of) €20 million or 4% of worldwide group turnover. As well as this, the reputational damage to companies that suffer data leaks can be very substantial.

Companies should carry out a detailed audit of their data processing, among other things, assessing the types of data received, what they are used for, where and how they are stored, how long they are kept and who they may be sent to. Policies, procedures and practices that cover the use of personal data should be reviewed in light of the requirements of the GDPR and other applicable data protection legislation, and where appropriate combined with a company's cyber security measures.

Companies have an obligation at all times to minimise the data they collect, and to hold them only for as long as necessary. It is expected that companies will embed the principles of privacy by design (putting in place appropriate technical and organisational measures to implement the data protection principles and safeguard individuals' right) and privacy by default (only processing personal data necessary for each specific processing purpose) into their procedures.

Protection of data is a key concern, and companies should ensure they have suitable electronic and physical security measures in place to look after the data in their own systems, and to make sure data is sent and received in a secure way. Although the GDPR is only concerned with personal data, the imposition of appropriate security measures will ensure that operational and commercially sensitive data is also more secure. These measures may include using appropriate security software, passwords and other user authentication measures, the anonymising of data, and the use of secure or encrypted email servers when transferring emails and attachments containing personal data.

Where personal data is held on devices that leave company premises (such as laptops, tablets, mobile phones or mass storage devices), or such devices are used by staff to remotely access company systems, it may be necessary to use encrypted and password protected devices, and to put in place robust guidelines covering the use and security of such devices.

Physical security considerations may include appropriate entry systems and locks for premises and internal storage facilities such as filing cabinets, and measures to ensure hard copy documents containing personal information are not left lying around.

Companies that process personal data should have in place suitable privacy notices, detailing the types of data they hold and how and why they process them. For companies subject to the GDPR whose core activities require the large scale, regular and systematic monitoring of individuals, a Data Protection Officer (DPO) must be appointed. Where the appointment of a DPO is not mandatory, having a DPO may nonetheless make it easier to properly manage one's data protection obligations.

With the increase in data protection and cyber security obligations, it is good practice to ensure staff are given the necessary training with respect to their own and the company's responsibilities. If staff are trained to handle personal data in an appropriate way and to be aware of cyber security threats such as phishing emails and malware, companies will minimise the human error risk inherent in all security procedures and ensure their data are protected and their OT and IT systems free from unwanted interference.

Steamship has published two Circulars (L312 and L314, <https://www.steamshipmutual.com/About-Us/circulars/Club-Circulars.htm>) which give further background on the GDPR and consider various best practice ideas. These can be found on our website.

Members are also encouraged to view our other film on the topic:

- Cyber Security, Smart, Safe Shipping: <https://www.steamshipmutual.com/loss-prevention/cybersecurity.htm> ■

“Due to the complexity of cyber security management it is encouraged that expert assistance is sought, but it is important that the agencies offering such assistance are evaluated and their expertise and experience are verified...”

Blockchain: The New Kid on The Block

An overview of blockchain, the technology that could herald a sea change in the shipping industry.



Constantin von Hirsch
Syndicate Executive
Eastern Syndicate
constantin.vonhirsch@simsl.com

The potential impact of blockchain technology has been described by some commentators as the biggest revolution in shipping since the introduction of the container in the 1950s. It may be a while yet before there is widespread adoption – or even interest – but the technology is already being used in shipping as well as other industries, and has already proved to be a success.

This article will provide a basic overview of what blockchain is and how it promises to benefit the world of shipping. It will also highlight some of the potential issues raised by the nascent technology.

What is blockchain?

Blockchain as a database

A blockchain is essentially a decentralised digital database (or ‘ledger’). Data is stored in ‘blocks’ that contain information about a transaction. These blocks are then ‘chained’ together to form a record of the information, hence the name ‘blockchain’.

In order for one block to be added to the next, it has to be validated by all the participating computers or nodes in accordance with mutually agreed conditions. Once a block has been confirmed in this way, it is uniquely identified and cryptographically connected to the one before and after it, thus creating a permanent chain that can be traced all the way to the origin and that is updated in real time.

All parties have identical copies of the whole ledger (though individual elements of the transactions are encrypted and not publicly visible), and this ledger provides an accurate record of all the information contained on the blockchain, and of the history and validity of all the transactions. This record cannot be amended without permission of the participants, thereby creating a system of trust based on proof of validity.

Blockchain as a platform for ‘smart contracts’

As well as acting as a database that records transactions, blockchains can also process

transactions, by acting as a platform on which code can be executed: so-called ‘smart contracts’. A smart contract is essentially a self-executing contract. It is a computer program that contains coded instructions about what the parties have agreed, and then automatically executes those instructions on the occurrence of an event (if ‘x’, then ‘y’) without the need for any human involvement.

How could blockchain benefit the shipping industry?

Blockchain as a database

One of the most significant potential benefits of the ‘database’ function of blockchain is that it promises to streamline the current paper-based trade processes, thereby generating considerable efficiencies in time and money. Current paper-based trade processes are slow and cumbersome because of the sheer volume of different documents generated by any shipment, which all need to be forwarded to and approved by a long chain of different parties. This necessarily costs money, takes time and can lead to delays. It is not uncommon, for example, for a vessel to arrive at the discharge port before the Bills of Lading, and Members will be aware of the issues this causes.

Blockchain could go a long way to tackling these problems. It is estimated that blockchain could eliminate up to 80 percent of the paper documents currently used during the shipment of goods, which would instead be stored digitally on the ledger. This would mean that procedures that currently take weeks could be completed in mere minutes, and the costs related to those procedures would fall away.

We remind Members of Club Circular L262 of November 2015 about Electronic Trading Systems with FAQs <https://www.steamshipmutual.com/Circulars-London/L.262.pdf>, where the Club provided guidance on the International Group's position with regard to paperless trading and the scope of potential liabilities and Club cover arising therefrom.

Enhanced security is another potential benefit of blockchain. All information stored on the blockchain is encrypted, which makes it more secure. As only the participants have access to the blockchain – and even they cannot amend the information without the notification and

“How do you determine the jurisdiction and choice of law for a dispute where the transaction could theoretically fall under the jurisdiction and be subject to the laws of each node on the network?”

agreement of the other participants – the risk of fraud and documentary manipulations is reduced.

Blockchain as a platform for smart contracts

The ability of smart contracts to immediately and automatically perform a set of instructions on occurrence of a given event – and without human intervention – has significant ramifications.

Compare the position of a simple contract between a buyer and seller for the delivery of goods, where the contract stipulates that payment is to follow immediately on delivery. Under a traditional contract, it might be in the buyer's interest to delay payment and he could simply choose to breach the contract and take the consequences. If, however, the transaction were governed by a smart contract, the seller would be paid automatically once the goods were delivered to the buyer. Smart contracts therefore reduce both the risk of non-compliance, and also the need to spend time and money (e.g. lawyers' fees) enforcing compliance.

Whilst the same principle could also be applied to charterparty obligations, there are limits to the usefulness of smart contracts in this context. Firstly, the “if x, then y” logic of smart contracts leaves no room for complexity or flexibility. Blockchain is therefore more suitable for executing basic transactions and obligations that are binary in nature, and is less suited to situations involving ambiguity or a more complex interdependence of facts. Secondly, the self-executing nature of smart contracts can be both a blessing and a burden in that it denies the parties the freedom to resolve a matter commercially by negotiation. Moreover, the inability to interfere with the blockchain means that any special charterparty terms that the parties wish to include must be incorporated into the blockchain from the outset.

Potential issues surrounding the use of blockchain

i. Dispute resolution

The fact that blockchains are decentralised – i.e. no single entity controls it – is one of the features that makes blockchain attractive as a technology. However, the flip-side is that this lack of regulation

raises tricky questions about what happens in the event that something goes wrong. How do you determine the jurisdiction and choice of law for a dispute where the transaction could theoretically fall under the jurisdiction and be subject to the laws of each node on the network? If no one controls the blockchain, who – if anyone – is liable in the event that the system fails, or if a smart contract self-executes wrongly?

ii. Security

Does the fact that information on the blockchain is publicly available to all the participants raise potential issues in relation to confidentiality and privacy in light of regulations such as the GDPR?

If more and more information is shared digitally more and more parties are connected digitally, does that increase the susceptibility to cybercrime? And would the consequences of a cybercrime event be all the more catastrophic for that reason?

At present, these issues pose more questions than answers. However, this reflects the fact that the law invariably lags behind technological change. There is no reason why, in time, both the law and commercial practice cannot develop to accommodate the new technology.

Conclusion

Blockchain is a revolutionary technology, but it remains unfamiliar. It is no surprise that both the shipping community and the wider public remain ambivalent and even somewhat sceptical of it. However, the technology has the potential to bring about significant efficiencies and other benefits to the shipping industry. As these benefits become more apparent, it is likely that the technology will become more pervasive in the shipping industry – and indeed the world in general.

In this way, blockchain is perhaps not dissimilar to the Internet. After more than 30 years, who really understands how the Internet works? Yet we all know how the Internet has changed the world. Maybe one day we will look back on these pre-blockchain days in a similar way to the days before the widespread use of the Internet. ■



News



Visit of Spanish University Students

Regular readers of Sea Venture will recall that Steamship Mutual regularly hosts visits from students of maritime studies at several universities interested in learning about the importance of P&I Clubs in the shipping industry and what we actually do for our Members.

This year we received visits from two universities in Spain. On 28th March 2019 Steamship Mutual received a visit from 20 students from the Masters in Shipping Business Degree at Barcelona University accompanied by the Director, Mr German De Melo, and Professor Concepción Girona. This was the eighth consecutive year that the Barcelona students have visited us at Steamship Mutual. On 16th April 2019 Steamship Mutual also hosted a visit of 30 students from the Masters in Intermodal Transport and Port Management at Valencia University accompanied by the Director, Mrs Anna Rumbeu. This was the seventh year that the Valencia University has opted for Steamship Mutual as their P&I visit during their London week.

Steamship Mutual Syndicate Manager, Juan Zaplana, hosted the visits and Syndicate Managers David

Archard (Underwriting) and Simon Boyd (Claims) made presentations to the students on claims handling and underwriting. Juan, Simon and David explained to the students the basis of the P&I structure, organisation of the International Group and succinctly discussed the different services that the Club renders to ship owners and charterers. There were also open discussions as to the handling of claims and the day-to-day work at the Club.

We expect to host more students next year during their annual visit to London. ■

“This was the eighth consecutive year that the Barcelona students have visited us...”



Steamship Mutual Welcomes SAPIC South American P&I Correspondents

P&I Clubs rely heavily on their networks of correspondents to be able to provide their members with the claims service they expect. Our article “The importance of correspondents” <https://www.steamshipmutual.com/publications/Articles/SSMCorrespondents-0917.htm> tells of the importance we attach to the Club’s correspondents. So Steamship Mutual was proud to welcome the SAPIC organisation to Steamship in May 2019. SAPIC is an informal association of South American P&I Correspondents founded in 2001. Considering the common interests and similar work conditions, the original South American area of SAPIC was extended to include other countries in Latin America and North America. They meet from time to time to discuss matters of common interest and to promote high standards of quality in the servicing of their principals’ needs. Their website www.sapic.org contains news about developments in various jurisdictions as well as information about the members of SAPIC.

Their Annual General Meeting usually takes place in one of the SAPIC organisation’s offices, but occasionally they hold meetings elsewhere. In May 2019 SAPIC’s AGM took place in London hosted by Steamship Mutual. After their AGM, they took

the opportunity to meet correspondent managers from many of the IG Clubs and discussed matters of mutual interest, and in the evening claims handlers from all International Group clubs were invited to a reception. Additionally, in the evening they will invited claims handlers from all IG Clubs to a reception. This was an excellent opportunity for claim handlers from clubs to catch up on news from the many jurisdictions represented by the SAPIC organisation. The close cooperation between correspondents and claim handlers helps to promote the smooth handling of claims to the benefit of members. ■

“SAPIC is an informal association of South American P&I Correspondents founded in 2001.”



SAPIC members with Club Correspondent Manager Neil Gibbons at Steamship’s London office

Steamship Mutual in Brazil

Steamship Mutual's office in Rio was established in 1985. In the years since then, the office has been assisting Members and the Club with a variety of matters related to P&I, claims and loss prevention.

Our Brazilian colleague Katia Oliveira is the manager of the Rio office and she has worked at Steamship Rio since its opening. Brazil is an important country for the Club and indeed Brazilian Portuguese is one of the language options on the Team Effort App. Katia's duties are many and varied. She provides a claims handling service for local members as well as keeping other Steamship Mutual offices updated on maritime developments in Brazil. The Steamship Mutual office in Rio is also listed as a Club Correspondent and Katia has a good knowledge of local surveyors and experts suitable for a variety of P&I claims.

"Brazil is an enormous country and the story of how exports reach their intended vessel is impressive..."

Meeting local Members and understanding their operations and fleets is important for all of us at Steamship Mutual, and this includes Katia, who makes time to visit local members in Brazil. In April 2019, she paid a visit to see members Louis Dreyfus Company's (LDC) and Cargill's operations in Santarem and Itaituba northern Brazil.



Katia on board Cargill's pusher tug CARGILL TUCUNARE sailing in Santarem.



On the road to Itaituba



Katia Oliveira (2nd right) and the team get ready for their trip.

Brazil is an enormous country and the story of how exports reach their intended vessel is impressive, involving huge distances by a variety of different forms of transport. Cargoes, generally soya and corn, leave the farms by truck or train and go to terminals in one of Brazil's seaports, or to loading facilities such as those at Itaituba, on the Tapajos river, where cargoes are loaded onto barges for a voyage of approximately 300km downriver to Santarem port on the River Tapajos.

The journey for people and cargoes is not easy. The road to Itaituba is in poor condition and the journey takes a long time. At Itaituba, cargo is loaded on barges by conveyor belt for delivery in convoy to Santarem. At Santarem, the cargoes are discharged by grabs and loaded on to ocean going vessels. Import cargoes, often fertilisers, follow the reverse route.

It is important for the Club to meet Members and to understand Members operations. Even when an office is local, the distances involved can be huge, but it is rewarding for us to see Members and how they work to help promote a good understanding between the Club and Members. ■

Meet the Legal Team

Introducing the first instalment of our new 'meet the team' feature, a regular piece that will turn the spotlight on Steamship teams that Members might not typically meet with, but provide vital services helping the smooth running of the club. Up first is our Legal team...

"I quickly found out that the key part of the role is to support the business in providing a great service to the Members and their brokers" says John Hamlyn, the newest member of Steamship's legal team. John became the third member of the team in 2016 and together with Sacha Patel and Graham Jones they handle a wide range of legal issues for the Club. About half of the team's time is spent on matters which have a direct impact on Members, most notably sanctions. Sacha Patel originally worked in the claims department and has become the Club's sanctions specialist. Steamship's claims handlers and underwriters receive numerous queries every day about the potential sanctions implications of voyages, cargoes or trading partners and Sacha is their primary in-house resource. *"Our members come from all over the world and engage in international trade"* he says *"so it is important that we can help them navigate through complex sanctions regimes. We have to stay on top of any developments so that we can provide quick, clear and helpful assistance. As each Member has its own specific concerns we work closely with the claims handlers and underwriters to ensure our guidance is relevant and comprehensive."*

"We also do a lot of work of which Members might not be aware, but which still support the strategic objectives of the Club and enhances

the experience of the Members" notes Graham Jones. For example, the legal team was heavily involved in the opening of offices in Singapore and Tokyo and obtaining a licence in Hong Kong which you will have read about in Issue 30.

With the coming into force of the General Data Protection Regulation (GDPR) the legal team saw an opportunity to help Members protect their data. As well as publishing circulars with suggestions to Members for best practice in the management of their data, and fielding Members' GDPR queries, they were a driving force behind updating data transfer practices between Members and the Club to ensure data processing is GDPR compliant.

Internally, the team is involved in ensuring the Club complies with relevant laws – things like the Bribery Act and the Modern Slavery Act – and its regulatory obligations. Also, like any legal department they review contracts with third parties, assist with any legal query no matter how unusual and provide training to staff on a variety of issues. ■

"We also do a lot of work of which Members might not be aware..."



(L-R) John Hamlyn, Graham Jones and Sacha Patel.

MSC Bellissima Visit

Gary Rynsard and Bill Kirrane of the Club's London office were among the 2,000 guests invited to attend the naming ceremony of MSC Cruises' latest newbuilding, the MSC Bellissima in Southampton on 2nd March 2019.

MSC Bellissima, 171,598gt, is the latest ship in the MSC Cruises fleet to be entered with Steamship Mutual. It has accommodation for 5,686 passengers,

cared for by a crew of 1,536. Its features include a 96 metre long internal promenade deck with an 80 metre LED sky screen overhead, and "ZOE", the world's first virtual cruise assistant.

The ship was named by Sophia Loren, following a gala concert that featured Andrea Bocelli. While the concert took place in a specially constructed marquee at the cruise terminal, bad weather

and strong winds meant that all guests had to transfer back onboard the safety and warmth of the MSC BELLISSIMA to witness her naming.

The ship sailed from Southampton soon after, for warmer waters. It will be cruising in the Mediterranean during the summer of 2019, before sailing towards Asia for its 2020 schedule of cruises. We wish it many safe and enjoyable voyages! ■

"The ship was named by Sophia Loren, following a gala concert that featured Andrea Bocelli."





STEAMSHIP MUTUAL

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

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

www.steamshipmutual.com

@SteamshipMutual

in Steamship Insurance Management Services
Download our two apps:
Steamship Mutual and A Team Effort

