

# Marine & Transit

## July 2010

In this quarterly instalment of our newsletter, we review a number of topical shipping law cases, and consider the impact for marine insurers of some recent Law Commission proposals for the reform of English insurance law.

### Piracy and time charters: no off-hire for detention

Does hire remain payable when detention by pirates prevents a vessel from trading? Terry Donaghy reviews the Commercial Court decision in **The "Saldahna"** on this issue of market importance.

### "Please remove your cargo": compensation for storage afloat?

Following a valid withdraw of a vessel from charter service, what are owners' remedies for lost time while cargo is discharged? Mike Burns reviews the Court of Appeal decision in **The "Kos"**.

### "There goes the deck cargo": who carries the can?

Owners may still have responsibility for deck cargo losses, regardless of contrary indemnity provisions in the charter. Terry Donaghy considers shifting cargoes and liabilities in this review of the recent judgment in **The "Socol 3"**.

### The last chance saloon: hire default and anti technicality notices

When hire payments are delayed, can owners afford not to give a period of grace before terminating? Mike Burns considers the Commercial Court decision in **Owneast v Qatar Navigation** and guidance on the use of anti technicality notices.

### Insurance law reform: Bad faith and increased remedies for the policyholder?

The Law Commission's latest recommendations suggest the possibility of insurers paying damages for wrongful refusal or delayed payment of claims. Emma Rice considers the implications for the marine market.

Newsletter

## Piracy and time charters: no off-hire for detention

### Vessel not off-hire while seized by Somali pirates

#### **Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The “Saldanha”) [2010] EWHC 1340 (Comm)**

This recent important decision of the Commercial Court has ruled that a vessel that had been seized by pirates remained on-hire during that time. The terms of the time charterparty did not entitle the charterers to put the vessel off-hire.

The “Saldanha” was seized by Somali pirates while proceeding through the transit corridor in the Gulf of Aden laden with a cargo of bulk coal for Slovenia. The vessel was taken to waters off Eyl in Somalia where she remained until released following payment of a ransom. The charterers refused to pay hire for a period of about two and a half months corresponding to the period the vessel was detained.

The matter went to arbitration and the Tribunal awarded in favour of the owners, holding that the charterers were not entitled to put the vessel off-hire while detained by pirates. The charterers appealed to the High Court.

The vessel had been chartered on an amended NYPE 1946 form which included the well known Clause 15, with some additions, the material terms of which were as follows:

“That in the event of the loss of time from default and/or deficiency of men ... detention by average accidents to ship or cargo ... or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost ...”

The charterers accepted that the vessel remained on-hire unless they could rely on one of the specific exemptions in Clause 15. They argued that detention by pirates was “detention by average accidents to ship or cargo”; alternatively that the ship’s officers had failed to take adequate anti-piracy measures to prevent the vessel’s detention and that this comprised “default and/or deficiency of men”; or alternatively that seizure by pirates came within the sweeping-up provision of “any other cause” in Clause 15.

Regarding the first argument, Mr Justice Gross agreed with the arbitration tribunal that this could not be categorised as an accident, let alone an “average accident”. While this was a fortuity as far as the ship was concerned, there had been deliberate and violent intent on the part of the pirates which could not reasonably be described as an accident. Reliance was also placed on the dictum in the decision of Mr Justice Kerr in **The Mareva A.S. [1977]**, that an “average accident” necessarily means an accident that causes damage to the ship – which had not occurred in this case.

As for “default and/or deficiency of men”, the Judge also agreed with the tribunal that a narrow construction should be applied to the words. This was in line with the history of the provision, which was squarely aimed at the deliberate refusal by officers and crew to perform their duties. The provision in the clause had never been understood to apply to more general negligent or inadvertent failure by officers or crew to carry out duties on the ship. The Judge was concerned that to give the provision a much wider interpretation would radically alter the usual bargain reached between owners and charterers in a time charter concerning the risk of delay.

Finally the charterers’ argument as to the sweeping-up provision of “any other cause” also failed. The Judge concluded that seizure by pirates was a completely extraneous cause, one that had no relation to the other

specified exemptions in Clause 15. The addition of the word “whatsoever” to the phrase in the clause may have made a difference; but that word was not present in the provision in question.

Significantly, there was in fact a separate additional clause in the charter that dealt with risk of seizure, arrest, requisition and detention by parties having a claim against or interest in the vessel. The terms of that clause did not extend to seizure by pirates, and the Judge considered it would have been open to the parties to quite easily amend or adapt this clause to cover piracy if that is what they had intended.

A further salutary warning of the need for owners or charterers to very carefully examine the wordings and provisions of standard form charterparties upon which they contract and seek to ensure that any particular issues that may arise are adequately covered in the provisions.

**Terry Donaghy, Partner**  
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## “Please remove your cargo”: compensation for storage afloat?

### Charter termination – no compensation for waiting time

**ENE Kos v Petroleo Brasileiro S.A (The “Kos”)**  
**[2010] EWCA 772 (Comm)**

The Court of Appeal has now overturned this Commercial Court decision, reported in our September 2009 newsletter:

[http://www.weightmans.com/library/newsletters/marine\\_\\_transit\\_-\\_sept\\_2009/charter\\_termination.aspx](http://www.weightmans.com/library/newsletters/marine__transit_-_sept_2009/charter_termination.aspx)

The issue was whether a ship owner, who has validly terminated a time charter due to charterer default, is entitled to be compensated for the time the vessel is “detained” after withdrawal until the charterers’ cargo has been discharged.

The “Kos” was a VLCC time chartered for 36 months, but which was withdrawn by owners following charterers delaying payment of the first hire instalment. Owners claimed damages corresponding to the 2.64 days the vessel spent holding the cargo post-termination, or about US\$410,000 based on the daily rates.

After dismissing (see below) a number of owners’ arguments based on charter construction, the Commercial Court had settled upon the owners being entitled to damages on principles of bailment. Although the contract under which owners were bailees of the cargo came to an end, the judge concluded that owners remained bailees of it pending discharge, and as such were entitled to recovery of expenses and “reasonable remuneration” for effectively providing a floating warehouse. The authority for that was **The “Winson” [1982] AC 939**, a salvage case where salvors had looked after and safely stored cargo until collection for the benefit of the cargo owners.

The Court of Appeal has rejected that analysis and confirmed that owners have no entitlement to be compensated waiting time at the market rate. The reasoning (to large measure agreeing with the Commercial Court, but disagreeing on the crucial bailment point) was that:

- No claim arose under the employment & indemnity clause: discharging time was not a direct consequence of charterers ordering the vessel to load the cargo – “it is not a natural consequence of

ordering it to be loaded that it would have to be discharged at the self same port". The causal connection was too remote.

- Neither did the loss flow from charterers' breach in the late payment of hire; rather it was the owners' own action in deciding to withdraw that directly caused the loss.
- There could be no implication of a contractual term giving owners rights to damages: if the charter was silent on the issue "any court should be slow to give owners by operation of law what they had failed to achieve by agreement".
- No entitlement to *quantum meruit* arose since the owners had not performed any service for the charterers. The cargo had not been carried to its contractual destination and it could not be right to award a quantum meruit to the owners who had never purported to perform (or partially perform) the voyage contemplated.
- There was no new contract based upon owners' acceptance of charterers' request to remain at the Port and to discharge the cargo. It was inevitable the vessel would have to remain at the load port, and it was the owners who were demanding (as they were entitled to do) that charterers discharge the cargo, not charterers requesting owners' services.

However, the Court of Appeal decided the Commercial Court's reliance on **The "Winson"** was wrong. That case concerned the stranding of the vessel on a reef in the South China Sea following which six parcels of wheat were salvaged and taken by salvors to Manila for storage at their expense. In that case the vessel's master was an agent of necessity and had authority to create a contract between the cargo owner and the salvor. The salvors could recover actual expenses incurred for the cargo owners' benefit (i.e. land storage costs) but the decision was not authority giving general entitlement to damages, even in extreme circumstances. It was quite a narrow point.

The position in **The "Kos"** was very different. There was no accident or emergency. The need for dealing with the cargo on board the vessel only arose because charterers missed a single hire payment, and owners had chosen to exercise the rights to terminate. After withdrawal, owners required charterers to discharge the cargo but, at the same time, invited them to make a new contract at the increased market rate. The reason why the cargo remained on board was owners were hoping for a new contract. They could not be expected to be paid in advance something that never materialised.

It was therefore a contradiction to suggest that a ship owner who exercises a right to terminate a time charter continues as a bailee for reward, when he has by his own decision brought the contract to an end. There was no injustice in charterers retaining a small incidental benefit which had only arisen from owners' action in terminating the charter for their own motives.

The decision illustrates that whilst the English courts will allow ship owners to have their contractual cake in exercising rights to terminate, they cannot expect to be able to eat it as well.

**Mike Burns, Partner**  
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## “There goes the deck cargo”: who carries the can?

### Owners liable under charter for deck cargo losses

#### **Onego Shipping & Chartering BV v JSC Arcadia Shipping (The “Socol 3”) [2010] EWCA 777 (Comm)**

This recent decision in the Commercial Court shows that owners may not have the protection they imagined under specific exclusion clauses contained in a time charterparty.

The “Socol 3” was on a voyage from Finland to Egypt with a cargo of timber packs, some of which were carried on deck. The vessel encountered heavy weather and some deck cargo was lost overboard. The remaining cargo had to be discharged at a nearby port of refuge. The vessel had been chartered on an amended NYPE 1993 Form, and various claims arose between the owners and charterers concerning the loss of the cargo, loss of time, bunker consumption and port of refuge expenses.

The matter went first to arbitration in London. The Tribunal found that the cause of the casualty arose from an inadequate method of stowage of the deck cargo and use of unsatisfactory lashing equipment for which the charterers were responsible under the charter. However there had also been inadequate care of the lashings by the crew during the voyage. Further, the vessel was in fact unstable and accordingly unseaworthy following the loading of the cargo and for this aspect the owners were responsible.

Nevertheless the charter contained a standard NYPE clause 13(b). This provided that the owners were to be fully indemnified by the charterers for any consequences in the event any deck cargo was carried. The Tribunal held this provision applied and found in favour of the owners. The charterers then appealed to the court.

The charter also had a Clause Paramount incorporating the Hague-Visby Rules. The charterers argued the Rules applied and the owners had not complied with the obligation to provide a seaworthy ship. However Mr Justice Hamblen found that the Rules did not apply to the deck cargo. The relevant bills of lading all had “on-deck” statements. The court considered that under Article 1(c) of the Rules, the bills were to be considered as the “contracts of carriage” for the deck cargo. On this basis the Rules did not govern deck cargo carried under the charter.

The Judge then considered the exclusion clauses relied on by the owners. The charter also had a standard NYPE clause 8 providing that the charterers were to perform among other things all cargo handling, loading, stowing, lashing and securing of the cargo at their risk and expense under the supervision of the master.

Although in this instance the clause did not have the additional words “and responsibility” after “supervision”, the court still found the owners responsible for the deck cargo shift. In this case the improper stowage of the cargo had affected the vessel’s fundamental stability. This was an aspect that only the chief officer and master would have known about, not the charterers. There had been a failure on the part of the master to supervise the cargo stowage properly with the ship’s stability and ultimate seaworthiness in mind.

Finally the owners sought reliance on NYPE clause 13(b), providing for charterers to indemnify owners where deck cargo was carried. However the court was not prepared to allow the owners to escape liability under this provision.



Applying the guidelines in the House of Lords' authority of **Canada Steamship [1952]**, the court considered this was a type of exclusion clause that had to be read restrictively.

In this case the owners had in effect been negligent causing the vessel to be unseaworthy by reason of the unstable stowage. Such a provision as clause 13 (b) would only exempt the owners for negligence if clear words to this effect were used. Such clear words were not to be found in clause 13(b) and accordingly the owners could not seek an indemnity from the charterers and remained liable for the deck cargo claims and losses.

The case emphasises the rule that if a party wishes to exclude liability for his negligence in an exclusion clause, then very clear words to this effect must be employed in the contract.

Something for owners and charterers to bear in mind when fixing such charters.

**Terry Donaghy, Partner**  
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## The last chance saloon: hire default and anti technicality notices

### Compliance with anti technicality clauses

#### **Owneast Shipping Ltd v Qatar Navigation QSC** **[2010] EWHC1663 (Comm)**

Charter termination and withdrawal has been a feature of the shipping landscape since the 2008 market slump. This Commercial Court decision (on appeal from a London arbitration award) illustrates the importance of ship owners adhering to the correct contractual notices as and when termination situations arise.

So called anti-technicality clauses are found in many time charters. Their purpose is to avoid a situation where owners could otherwise withdraw a vessel for a breach of any obligation (e.g. to pay hire on time) however minimal or inconsequential, and to give the charterer some measure of relief against possible forfeiture in allowing opportunity to rectify inadvertent breaches.

Here, owners had time chartered a vessel on an amended NYPE form for a period of 48 months. The charter contained an anti-technicality clause which provided that:

“Where there is any failure to make punctual and regular payment due to errors or omission of charterers' employees, bankers or agents or otherwise for any reason where there is absence of intention to follow to make payment as set out, charterers shall be given by owners three banking days notice to rectify the failure...”

The charterers had a patchy payment record, with 17 of 30 semi monthly payments having been paid late. Matters came to a head in August 2006 when the semi monthly advance hire fell due on 24 August.

Earlier in the month the vessel had been discharging a log cargo at Kandla when there had been a series of breakdowns. Charterers had been awaiting the statement of facts so as to deduct lost time from that payment,



but there were delays in production of the documentation. As a result, charterers' personnel deferred from putting in place the timely approvals and payment requests which their internal processes required. By the time payment was in hand (so as to factor in the deductions) it was evident that remittance would not reach owners' bank by 24 August. Accordingly, owners terminated with immediate effect, citing charterers' persistent failure to pay hire on time.

Charterers argued the termination was wrongful, since owners had failed to give them notice to rectify the breach.

Owners, however, contended an anti-technicality notice was not required: charterers purposely delayed payment while awaiting documents to support an off hire deduction. This delay, together with their internal approval hurdles, made it obvious that if payment was not sanctioned by 22 August, then its arrival by the 24<sup>th</sup> would be unlikely. In fact, the payment request was not filed with the bank until after hours on the deadline day. There was therefore an "intention to fail to make payment" that disentitled charterers being granted a three day grace period.

Further, if the deduction from hire was unjustified (lacking good faith) it could not be "regular payment" as the clause required.

The court, as at the majority tribunal, rejected owners' arguments relying upon authorities including **The "Libyaville" [1975] 1 Lloyd's Rep 537** and **The "Rio Sun" [1981] 2 Lloyd's Rep 418** which showed that the court looked favourably on anti technicality clauses and did its best to give effect to them.

Intention had to be interpreted narrowly, equating to a wilful and deliberate decision to pay late. It could not be extended so as to encompass recklessness.

On balance, it did not appear that charterers *knew* there was a specific deadline by which the payment instruction had to be given to the Bank, and with that knowledge consciously decided not to send the instructions so as to meet it. Nonetheless Christopher Clarke J. acknowledged that "the dividing line between serious incompetence and deliberate delay amounting to an intention not to make punctual payment is sometimes thin".

In relation to the deduction, **The "Libyaville"** decision provided guidance. There, despite the deliberate payment of a lower and disputed rate of hire (which owners have previously warned against), there was no intention to fail to make a "regular" payment in the absence of evidence of bad faith. In the present case, there was no suggestion that charterers' deduction was not bona fide.

Therefore, Owners had wrongfully terminated: charterers has been entitled to service of the anti-technicality notice.

This decision illustrates the exposure to owners in cutting corners, rather than erring on the side of caution in adhering to contractual notice requirements. Making assumptions will often import a heavy risk since – where intention is under scrutiny – it will only be after the event that intention (or in the case of deductions, bad faith) can be established, even if, at the time, it looks like charterers appreciate what they are (not) doing. The courts will always seek to construe such clauses in charterers' favour, absent wording which softens/widens the meaning of intention in the context of a failure to pay hire.

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## Insurance law reform: Bad faith and increased remedies for the policyholder?

### Law Commission proposes damages if insurers breach duty of good faith

What remedies does a policyholder have if an insurer does not pay a valid claim or only pays the claim after protracted delay? Current insurance law in England and Wales is not in line with the general law on damages for breach of contract. Insurance law is an exception to the usual rule that where a party breaches a contract, the other party can claim damages for any actual or foreseeable losses suffered. So, while a policyholder can sue the insurer for the actual money owed under the policy plus interest, the policyholder cannot claim damages for any further loss arising from the delay in payment.

The Law Commission has been considering this issue and has published a paper proposing changes to the law in this area. The Law Commission believes the law in England and Wales should be changed to bring it more in line with that applying in Scotland and other jurisdictions such as Australia, Canada and the United States, where an insurer is under an implied obligation to pay a proper claim following a reasonable period for investigation. The paper can be found at <http://www.lawcom.gov.uk> under the link to “consultations”.

Presently under English law, **Sprung v Royal Insurance (UK) Ltd [1999]** establishes that no additional damages can be claimed for a wrongly refused claim. Insurers rejected a policyholder’s claim for damage to a factory by vandals. The policyholder succeeded in establishing that the damage claim should have been paid. However by then his business had been lost and the English court rejected a claim for separate damages for lost opportunity to sell the business during the period. The reasoning behind the authority is that under an insurance contract, the insurer undertakes to hold the policyholder harmless. If there is a covered claim, the insurer is thereby in breach of contract and accordingly a payment under the policy is in fact a payment in damages. However the law does not provide for damages for failure to pay damages.

The related aspect is that there is a mutual obligation on the parties to an insurance contract to observe the utmost good faith. While an insurer’s refusal to pay or delay in paying a claim may certainly be a breach of good faith, the court has held that damages are not payable for such breach (**Banque Financiere v Westage Insurance Co**). Section 17 of the Marine Insurance Act 1906 (which applies also to general insurance) provides that, if the obligation of utmost good faith is not observed, the contract can be avoided by the other party. This has been regarded as the only remedy available for such a breach, however this can be potentially unfair to policyholders as in such a case the premium only is refunded rather than the (usually much higher) claim paid.

Consumers and small businesses have an alternative remedy, by way of the Complaints Procedure to the Financial Ombudsman Service. The FOS can compensate for late payment of claims by awarding interest, by damages for distress and inconvenience and in appropriate cases, by damages for financial loss. However, this remedy is not available to larger commercial interests. Insurers generally can also be penalised by the FOS for breach of statutory duty under the industry’s applicable rules for handling and paying insurance claims. However that will be of little assistance to a policyholder who has suffered loss as a result.

The Law Commission concludes that the law on this issue is out of line with usual contract principles and those applying in other significant comparable jurisdictions. It also appears unfair to policyholders and could be seen as undermining confidence in insurance law and the insurance industry.



Two approaches are proposed by the Law Commission to change the law in this area. The first would be to provide specific legislation containing guidelines on how insurers must deal with claims, such as investigating and deciding claims fairly and paying claims within a reasonable time once established and agreed. Such legislation could also contain the remedies where the insurer is in breach, such as damages for other foreseeable losses.

The other approach would be to reverse the decision in **Sprung v Royal Insurance**. However, the Law Commission is not convinced this would be the best way forward. The Commission otherwise recognises that (subject to the application of the Unfair Contract legislation for consumers) in commercial insurance this area is generally best left to freedom of contract. The Commission considers that while insurers must be able to refuse invalid claims, the default position should rather be that the insurer bears the risk of unreasonable conduct in refusing a claim, unless this liability is properly excluded by a specific contract term.

The period of consultation has now closed and the further views and conclusions of the Law Commission on this issue are awaited with interest in due course.

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