

Marine & Transit

May 2008

In this edition we review a number of recent court decisions on maritime and related law issues, including notable decisions on the exercise of liens on sub freights, a failed anti-suit injunction, and the possible implications for cargo interests following the publication of the MAIB report into the “MSC Napoli” casualty.

In this edition

“MSC Napoli”: Claim implications of MAIB report

With the recent MAIB Report into the January 2007 casualty, identifying design vulnerability as a major causal factor, what might this mean for cargo interests in seeking recovery of losses from the vessel owners? Terry Donaghy considers the possible implications.

Charterparty lien on sub freights: Timing is everything

Does a shipowner’s contractual lien on sub freights offer true security? Mike Burns examines the lessons to be learned in **Samsun v Oceantrade**, where the effectiveness of a lien on sub freights was successfully challenged by a third party.

Marine insurance policy: Fisherman’s blues?

Are the courts moving towards a more simplified approach to policy construction? Emma Rice reviews the decision in **Pratt v Aigaion Insurance** involving the total loss of a trawler following a fire.

Losing the right to arbitrate: Delay fatal for anti-suit injunction

Anti-suit injunction to restrain Belgian cargo recovery proceedings fails. Mike Burns examines the decision in **Verity Shipping v Norexa** and considers the lessons to be learned by shipping interests in protecting the right to arbitrate or litigate in England.

Hague or Hague Visby? Unravelling the paramount clause

The Court of Appeal decision offers useful guidance to marine claims handlers in relation to understanding whether Hague or Hague Visby Rules may apply to a particular carriage. Terry Donaghy reviews this further aspect of the decision in **Trafigura v MSC**. (See also our January 2008 newsletter).

Newsletter

“MSC Napoli”: Claim implications of MAIB report

MAIB report on “MSC Napoli” – Bad news for cargo interests?

The Marine Accident Investigation Branch has recently published its full report into the casualty involving the “MSC Napoli” in January 2007. While on passage in the English Channel the vessel encountered heavy seas causing the ship to pitch heavily in waves of up to nine metres. A catastrophic hull failure occurred in way of the engine room causing the crew to abandon ship. The vessel was later beached in Branscombe Bay in Dorset.

The vessel was laden with 2,318 containers, many full of cargo. In view of the MAIB’s findings identifying hull design vulnerability as a major factor of the casualty, what are the prospects of the cargo interests succeeding with claims against the carrier in the matter?

The MAIB’s investigation identified a number of factors contributing to the failure of the hull structure, including:

- The hull did not have sufficient buckling strength in way of the engine room
- The classification rules applicable at the time of the vessel’s construction did not require buckling strength calculations to be undertaken beyond the vessel’s midships area
- No, or insufficient, safety margin between the hull’s design loading and its ultimate strength
- The load on the hull was likely to have been increased by a whipping effect
- The ship’s speed was not reduced sufficiently in heavy seas

The MAIB’s findings point to serious design vulnerabilities with the structural strength of the “MSC Napoli’s” hull, that were not recognised by the vessel’s classification society. The findings are not likely to provide much comfort or encouragement to cargo claimants in pursuing claims against the carrier.

The contracts of carriage for the containers and cargo on the vessel are likely to contain provisions incorporating the Hague or Hague Visby Rules. These provisions will to a great extent regulate the responsibilities and liability of the carrier. Under the Rules the carrier is bound to exercise due diligence, before and at the commencement of the voyage, to make the ship seaworthy (Article III rule 1 (a)).

Case law has confirmed this means the vessel must be structurally sound – that is sufficiently strong to withstand the weather and sea conditions likely to be encountered on the particular voyage (**The “Toledo” [1995] 1 Lloyds Rep. 40**). The “Toledo” was on a voyage from Canada to Denmark with a cargo of potash when bad weather was encountered. A failure of the shell plating on one of the cargo holds led to ingress of sea water. The vessel had to be abandoned in the Atlantic with the total loss of the cargo. The court found that the failure of the vessel’s shell plating had arisen because of the shipowner’s failure to properly maintain the vessel, in particular in failing to rectify stevedore damage caused to the hull structure from the vessel’s usual trade in carrying logs.

Classification society surveyors visiting the vessel for annual and other surveys had not reported on deficiencies in the hull or required any repairs. Nevertheless the court held there was an obligation on the shipowners to draw to the surveyors’ attention any damage of which they were aware. The owners should have been aware of the progressive nature of the damage that was occurring to the hull, accordingly the vessel was unseaworthy and the cargo claimants succeeded with their claim.

However, the “MSC Napoli” was fully in class and it is difficult to see how it could reasonably be said that the shipowners should or ought to have been aware of the design weaknesses in the hull. This vulnerability was

only exposed by the failure caused by the severe loading stresses of the heavy seas on the voyage and was not something the owners could have exercised due diligence to detect or rectify before the voyage started.

The weakness is in the nature of a latent defect. The shipowners then may also be able to rely on Article IX Rule 2(p) of the Hague-Visby Rules to avoid liability. This exempts the carrier from liability from latent defects not discoverable by due diligence. An example of this is the case of **The “Yamatogawa” [1990] 2 Lloyds Rep. 39**, where the owners were not liable for claims arising from the breakdown of the vessel’s reduction gear. The breakdown arose from a design defect, but no extent of visual examination would have disclosed such defect.

The MAIB also considered the speed of the “MSC Napoli” was not reduced sufficiently in the severe sea conditions and this was also a contributory factor in the hull failure. As a result the MAIB made a recommendation to the vessel’s managers to review the safety management system to ensure that guidance to masters regarding speed in heavy weather should take into account the lessons learned from the casualty.

However this potential failure by the crew to reduce speed may also not assist the cargo interests. Article IV Rule 2 (a) of the Hague-Visby Rules provides that the carrier is not responsible for any loss resulting from negligent navigation of the ship.

Charterparty lien on sub freights: Timing is everything

Lien on sub freights: a tale of two charters

Valid exercise of lien and determination of priorities between creditors

Samsun Logix Corporation v Oceantrade Corporation – Commercial Court (Gross J) – [2007] EWHC 2372 (Comm)

The contractual right of lien on sub freights under many time charters is an important weapon in a shipowner's armoury to secure time charter hire. However this decision is a useful reminder not only as to the proper requirements for exercising such a lien – particularly as to timing – but also how such right can be trumped by competing third party claims.

The Commercial Court was asked to consider a tale of two charters. The first (“charter 1”) concerned the vessel **“Orhan Deval”** which was owned by Deval, time chartered to Oceantrade Corporation (OTC) on an amended NYPE form, and voyage chartered to Helm AG. Clause 18 of that charter gave the owners a lien on sub freights.

The second (“charter 2”) concerned Samsun who as disponent owners, time chartered the vessel **“Nord Monaco”**, also to OTC.

Both charters were performed in parallel: however, OTC entered Chapter 11 bankruptcy proceedings in the United States, and defaulted on their charter obligations. That left Deval being owed hire under charter 1, and Samsun under charter 2 with substantial claims for damages for premature re-delivery by OTC.

Samsun sought to protect their position by obtaining a Commercial Court freezing order against OTC. This prohibited OTC from dissipating assets (including money and freight received) out of the jurisdiction. In August 2005 the injunction was varied to permit freight due from Helm to OTC under charter 1 to be paid to OTC's solicitors, Mills & Co (“Mills”) and thereafter to be held by Mills with permission to pay hire due to Deval in the sum of US\$272,125, together with any other OTC business expenses.

On 7 September Helm duly paid the freight, about US\$660,000, under charter 1 into the Mills account. Hire was then paid to Deval as permitted by the Court. After payment of ordinary business expenses, there remained a balance of US\$236,000 in the Mills account.

Against this background, in respect of further outstanding sums Deval purported to exercise a lien on sub freights (i.e. freights payable by Helm) under charter 1 by serving notice on OTC on 9 September.

Deval then obtained an arbitration award against OTC which awarded Deval about US\$83,000, together with a declaration confirming that Deval had validly exercised their lien on sub freights as from 9 September.

Meanwhile, Samsun under charter 2 obtained their own arbitration award against OTC awarding Samsun damages of US\$1.2 million, which the English court then granted permission to enforce.

This situation led to both Samsun and Deval claiming priority over the money remaining in the Mills account. Samsun applied for an order that Deval did not have a lien over the charter 1 freight and Deval made a counter application requesting dismissal of Samsun's assertions.

Regarding the status of payment by Helm, the arbitrator had concluded that this had not been paid to OTC at all, but instead had been paid to Mills as stakeholder, to the order of the High Court. Gross J disagreed. The

proper scheme of the injunction meant that the freight payment made by Helm on 7 September was to Mills as OTC's agent. Although subject to the terms of the freezing injunction, the funds were nonetheless OTC funds and the order simply regulated the uses which could be made of them.

Therefore, the matter turned on the timing of the exercise of the lien which was two days after the funds had been paid by Helm to OTC. Under English law a lien on sub freights operated by giving owners a right to intercept sub freights before they were paid by a shipper or a third party to charterers or their agents: it did not confer a right to follow the money paid for freight into the pocket of the person receiving it. Thus, if the shipowner's notice to pay came too late, and the sub freight had already been paid, the lien would fail to bite on anything (**The "Spiros Sea"**).

The Court therefore held that the Deval lien had been exercised too late. Further, the existence of an arbitration award declaring the validity of lien did not assist Deval: whilst it was binding opposite OTC, it was quite open for Samsun to challenge the validity so far as it affected Samsun as a third party; the lien was only of contractual effect but did not bind anybody other than the parties to Deval charter 1 arbitration.

Therefore, Samsun had priority over Deval in relation to the money held by Mills, but remained subject to whatever the US Bankruptcy Court decided was the general status of funds.

The decision illustrates the importance of timely service of lien notices, and is a reminder that the right will remain subject to challenge by third party interests. Commonly this may be bill of lading holders (e.g. in the case of a lien over cargo) but, as here, may extend to other creditors.

Marine insurance policy: Fisherman's blues?

Marine Insurance: Construction of policy wording

Insurers entitled to rely on natural meaning of policy wording

John Pratt v Aigaion Insurance Company SA (The "Resolute") – Admiralty Court (Mackie J) – [2008] EWHC 489 (Admlty)

In this recent Admiralty Court decision the standard wording of a crewing warranty in a trawler policy was construed by reference to the natural meaning of the words used and their commercial context, consistent with the approach adopted in **The "Milasan"** and **The "Newfoundland Explorer."** Insurers were therefore entitled to decline cover in circumstances where the policy wording expressly provided so.

The warranty provided:

"Warranted Owner and/or Owner's experienced Skipper on board and in charge at all times and one experienced crew member."

The crew of four (including Owner) were all either at home, visiting friends or at a local pub when the fire started. The insurance value of the vessel given in the policy was £120,000. The estimated cost of repairs was higher.

Insurers declined to pay relying on the "at all times" warranty. The Owner argued that the clause was obviously directed to periods when the vessel was navigating or working and, if applied literally, would lead to absurd results – it was not how a reasonable person with the relevant background knowledge would understand it and was not how it was understood by those in the industry at the time. The Owner therefore contended that the clause should be read to include "but only while the vessel is underway or working."

However, the Admiralty Court held there was no ambiguity in the wording – "at all times" meant all the time. The clause should only be extended for emergencies or requirements of crewing duties as was set out in case of **The "Newfoundland Explorer."**

Following **Charter Reinsurance Co Ltd v Fagan (1997) AC 313 HL**, Mackie J said:

"The qualification to the literal wording should be only that required by commercial common-sense not a means to arrive at what in retrospect the Claimant and perhaps others see as a more advantageous bargain... We all make unwise bargains from time to time but the fact that we incur burdens that later seem folly does not relieve us from our legal obligation."

Although this was a win for Insurers on the day, the Judge warned that no underwriter should assume the words "at all times" had thereby received judicial blessing. The words, when used on their own without emphasis or explanation, have often given rise to misunderstanding with smaller vessels. The Judge also observed that the Owner's insurance brokers may have questions to answer as to the suitability of the cover they had arranged.

Nevertheless, claims handlers can be reassured that the courts will interpret express exclusions and warranties with reference to the natural meaning of their wording and their commercial context. Other background factors should not prevent cover being declined.

Losing the right to arbitrate: Delay fatal for anti-suit injunction

Cargo damage claim: Belgian court proceedings oust London arbitration

Shipowners fail to obtain anti-suit injunction to protect right to arbitrate

Verity Shipping SA & Another v NV Norexa & Others – Commercial Court (Teare J) – [2008] EWHC 213 (Comm)

For shipowners and cargo interests alike, this decision is a reminder that although in recent years the English courts have shown great willingness to hold parties to their agreements to arbitrate in London or refer disputes to the English courts, the courts may be reluctant to assist if parties are slow to seek anti-suit remedies.

This was a claim which concerned the carriage of fresh fruit on board the owners' vessel "**Skier Star**" from Argentina to Antwerp under a Gencon voyage charter dated December 2004.

Bills of lading issued pursuant to the charter stated that the terms, conditions and law and arbitration clause of the charter were incorporated. The charter contained a London law and arbitration provision.

The cargo was discharged in January 2005. However the Belgian Federal Agency for Food Safety ("FAVV") condemned the cargo alleging oil vapour contamination: a loss of some €2.3 million.

Cargo interests were quick off the mark in applying to the Antwerp court to appoint a surveyor on their behalf. At the same time a summons was served on the shipowners ("Verity") alleging the carrier's liability for the loss. The proceedings were then adjourned pending production of the court surveyor's report. Meanwhile Verity started proceedings in Antwerp against FAVV in respect of any liability towards cargo interests.

It was not until April 2006 that the court surveyor's preliminary report was published. Verity participated in raising questions of the surveyor, and by March 2007 the surveyor provided his final responses. Towards the end of 2007 a court timetable was then issued for the future of the action and the FAVV indemnity claim.

When cargo interests served written points of claim on 17 December 2007 – almost two years after discharge – Verity applied to the Commercial Court in England for an injunction restraining cargo interests from taking any further steps in the Antwerp proceedings, on the basis the claim had been commenced in breach of the agreement to arbitrate.

The court had jurisdiction to hear the application to enforce an arbitration clause in the face of EC proceedings, pending the awaited ECJ decision as to whether such jurisdiction is compatible with the Brussels Regulation – **The "Front Comor."**

The court's starting position was that it would grant an anti-suit injunction unless there was strong cause or good reason why cargo interests should be permitted to break their contract – **"El Amria"**.

The court had little hesitation in finding there was good reason. First, the court felt there was a risk of inconsistent decisions between arbitration in London and the Antwerp court. Whilst Verity were willing to risk possible prejudice by defending the claim in arbitration (i.e. cargo interests might win in London but fail in Belgium) the real risk of prejudice was to FAVV. They could well suffer injustice if cargo interests succeeded in a London arbitration (which might not be the case in Belgium) and FAVV were then subsequently found liable to Verity in Antwerp.

The second reason was the delay in obtaining the anti-suit injunction. It was well established (**The “Angelic Grace”**) that an anti-suit injunction could be granted “provided that it is sought promptly and before foreign proceedings are too far advanced.” Verity knew from January 2005 that the Antwerp proceedings were in breach of the arbitration clause. Although those proceedings had been adjourned for a substantial period, that did not excuse the delay. Substantial progress had already been made in the Antwerp proceedings by the time the surveyor’s report was produced.

A third reason was proffered, namely that cargo interests’ claim in London arbitration would now be time barred. The court agreed that would be a strong reason if it could be shown that cargo interests had acted reasonably in failing to preserve their right to sue in the agreed contractual forum. However, the court discovered that cargo interests had not tried to obtain a copy of the charterparty and were not aware of the London arbitration provision. As it would have been prudent to obtain a copy of the charter, the court decided the presence of a time bar defence could not amount to a “strong cause or good reason” to refuse an anti-suit injunction. The point was however, academic, given the court’s findings as to (i) the risk of prejudice by inconsistent decisions and (ii) the delay in seeking the injunction.

This decision serves as a stark reminder that although the English courts will seek to enforce agreements to refer disputes to the English courts (or arbitration, pending a ECJ decision in **The “Front Comor”**) there is no room for complacency. Once a party is on notice of foreign proceedings commenced in breach, the onus is on that party to take appropriate prompt action to restrain such proceedings: delays may well (as here) be fatal.

Hague or Hague Visby? Unravelling the Paramount Clause

Trafigura Beheer BV v Mediterranean Shipping Co SA (The “MSC Amsterdam”) – Court of Appeal (Tuckey, Longmore and Lloyd LJ) – [2007] EWCA Civ 794

The Court of Appeal’s judgment in **Trafigura Beheer BV v Mediterranean Shipping Co** has given helpful clarification of the issue of whether the Hague or the Hague–Visby Rules may apply to the claim under a contract of carriage.

In many cases, the Rules will be incorporated by virtue of a “Clause Paramount” or paramount clause that specifically brings one or other of the Rules into force in the contract. The Court of Appeal’s judgment has shown how important it is to carefully consider not only the specific wording of such clauses, but also the particular circumstances regarding the compulsory application of the Rules in relation to the ports where the vessel loads and discharges the cargo.

In this case cargo owners pursued a claim against the carrier for failure to deliver a cargo of 18 containers of copper cathodes shipped on the vessel at Durban, South Africa for carriage to Shanghai in China. The relevant paramount clause in the bill of lading relevantly provided:

“For all trades... this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX or, if compulsorily applicable, subject to the 1968 Protocol (Hague–Visby) or any compulsory legislation based on the Hague Rules and/or the said Protocols. Where Hague–Visby or similar legislation is compulsorily applicable, the Hague Visby 1979 Protocol (“SDR” Protocol) shall also apply whether or not mandatory...”

The contract of carriage was also expressly made subject to English law and the cargo claim was brought in the English court. The Hague Rules provided for a lower package limitation in the particular bill of lading than the Hague–Visby Rules, so naturally the carrier was anxious to rely on the former.

The Hague–Visby Rules are part of directly enacted statute law in the United Kingdom in respect of any carriage from a port in any contracting state (Carriage of Goods by Sea Act 1971). The Rules are also part of directly enacted statute law of the Republic of South Africa in respect of carriage from a South African port (Carriage of Goods by Sea Act 1986). However, although South Africa had enacted the Hague–Visby Rules, it had never signed the 1968 Protocol and was therefore not a contracting state within the meaning of the UK’s 1971 Act.

The Court of Appeal found that on the true construction of the clause, the shipowners in the first instance accepted the Hague Rules obligations, described as “the default position.”

They only accepted the Hague–Visby Rules obligations if they were compelled to do so. They could only be forced to do so if the proper law of the contract compelled it, or if the place where the cargo owners chose to sue the owners compelled it. On the facts of the case, neither law compelled it. English law did not make compulsorily applicable the South African enacted Hague–Visby Rules.

Accordingly the Hague Rules, rather than Hague–Visby, were applicable. The court expressed the view that the outcome of the issue may have been quite different if the claim had been brought in the South African courts.

However the shipowners were in the event not able to successfully limit liability for the claim. On a separate issue, the Court held that the Hague Rules did not apply to the period after the cargo had been discharged from the ship. The loss had occurred while the cargo was still in the shipowner’s custody in the container yard and they could not limit liability for the claim.

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