

Shipping

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SHIPPING BULLETIN



Welcome to the March edition of our Shipping Bulletin.

The new MARPOL regulations came into force on 1 January 2013 and largely prohibit vessels disposing of garbage at sea. We set out what owners, operators, charterers and shippers need to know.

The rest of the articles in this edition of the Bulletin cover recent significant English High Court decisions in relation to charterparties and bills of lading. We review a new owner-friendly case which has established how the courts will treat off-hire claims on the NYPE form where there is equivalent delay after an off-hire event.

In the off-shore sector, a judgment has confirmed that under SupplyTime '89, as soon as hire becomes outstanding, owners may suspend performance without notice and we analyse this decision. We also look at the operation of liens on sub-freights under the NYPE 1946 from the Chinese perspective, in light of a recent decision which increases the likelihood of a sub-charterer being required to pay twice. Finally, we look at the latest decision on the operation of 'Retla clauses', which re-emphasises the risks of issuing clean bills for steel cargoes with more than superficial rust or moisture damage.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin or your usual contact at HFW.

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Marpol Annex V Regulations - new regulations for owners, operators, charterers and shippers to contend with

On 1 January 2013, new Marpol Regulations came into force with regard to the disposal of garbage from ships at sea and largely prohibit the practice. As a result, it will become common practice for ships to send their garbage to shore based reception facilities.

Marpol Annex V Regulations not only impact on what could be classed “traditional garbage” but also concern the issue of hold washing water removal and discharge of “cargo residues”. Remains of cargo in wash water are defined in the regulations as “cargo residues.”

Summary

As the Marpol Annex V Regulations are voluminous, this article will only focus on their impact in relation to discharge of cargo residues and hold washing water. As this is very new legislation the law is yet to develop fully.

The starting point

The starting point to understanding how this new regulation impacts on shipowners, operators, charterers and shippers is to consider the nature of the (1) cargo carried; and (2) the hold cleaning chemicals used.

It is necessary to consider:

1. Is the cargo “harmful” to the marine environment?
2. Are the hold cleaning chemicals “harmful”?

If the answer to either question is positive then Marpol Annex V will have an impact.

Is the cargo harmful?

The Annex V guidance notes state that, if the cargo meets certain criteria listed in the UN Globally Harmonized System for Classification and Labelling of Chemicals, then the cargo is harmful to the marine environment.

IMO Guidelines state the shipper has an obligation to declare whether or not the cargo is harmful when providing the information required by section 4.2 of the IMSBC Code.

If the cargo is classified as harmful to the marine environment, then the hold washing water (i.e. “cargo residues”) has to be kept onboard and safely discharged into reception facilities ashore in all cases.

If cargoes that are harmful are carried, then this has to be fully documented in onboard records/the garbage book.

Non-harmful cargo and bilges

If the vessel is laden with non-harmful cargo and liquid is being collected in the vessel’s bilges whilst laden, then this liquid can be discharged at sea, subject to any other Marpol requirements.

Harmful cleaning chemicals

Whether hold cleaning materials are harmful depends on whether they contain any carcinogenic, mutagenic or reprotoxic components. This should be clear from the Material Safety Data Sheet (MSDS)/product information.

If the cargo is not harmful, but the holds were cleaned with hold cleaning chemicals which are harmful, then it is likely that the hold washing water would have to be kept onboard and discharged into reception facilities ashore.

Non-harmful cargo and cleaning chemicals

If the cargo (and any cleaning chemicals used) are not harmful to the marine environment then hold washing water can be discharged at sea, within areas in which discharge is allowed, subject to any other Marpol requirements.

If the ship is in a Marpol “Special Area”, discharge into the sea is only permitted (i) if the port of departure and next port of destination are both within a Special Area AND (ii) no adequate reception facilities are available at the port of departure and destination.

Marpol Special Areas are the Baltic Sea, North Sea, Mediterranean, the Gulfs Area, Wider Caribbean Region and the Antarctic Sea. Eventually, once shore reception facilities are available in the Black Sea and Red Sea, these regions may be classified as Special Areas for the discharge of garbage.

Developing standard clauses

It is clear that that this regulation will have a major impact on owners, operators, charterers and shippers. As a result, over time new clauses will be created to try and clarify between the parties on whose risk non-compliance with Marpol Annex V falls.



Owners, operators and charterers may be aware of BIMCO's August 2006 "BIMCO Hold Cleaning/Cargo Residue Clause". However, as this was produced prior to Marpol Annex V coming into force, it does not address the new issues raised by this particular Annex.

The North of England P&I Club has produced specific clauses for both voyage charters and time charters that aim to respond to the new Annex V. In due course, it is naturally likely that further bespoke clauses will be created that will reflect both the risks of non-compliance, as its meaning comes to be clarified, and the negotiating strengths of the parties to the contracts.

Practical steps

For owners and operators it will be important that a proper protocol is put in place not only to ensure that the precise nature of the cargo is known, but also the hold cleaning chemicals used. Ideally this protocol would require the shippers not only to provide a declaration that the cargo is not harmful, but also provide supporting data such as MSDS.

Owners and operators will also have to maintain a proper and detailed record of this information (and the usage of any hold cleaning chemicals) onboard the vessel.

While shippers are obliged to declare whether the cargo is harmful, in some circumstances it may be prudent for owners and operators to obtain expert verification of the cargo.

If on the other hand you are the shipper (or for that matter a charterer passing on the cargo designation

from a shipper to an owner) you should recognise that this declaration of cargo is important information and that you may have an exposure if inaccurate information is given to the owner.

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Time lost later? Off-hire under NYPE 1946

Minerva Navigation Inc v Oceana Shipping AG [2012] EWHC 3608 (Comm) (the Athena)

The interpretation of off-hire clauses is often not clear cut and this ambiguity often leads to disputes. The High Court decision in the "Athena" establishes that as clause 15 is a "net loss of time" clause, the vessel will not be off-hire where an off-hire event occurs, but the facts show that equivalent time would have been lost in any event at a *later* stage of the venture, so that overall, the off-hire event does not cause any net loss of time. This decision could therefore prove to be helpful to owners facing off-hire claims from their charterers.

By way of background to the facts, Minerva Navigation Inc (Owners) time chartered the "Athena" (the Vessel) to Oceana Shipping AG, who in turn sub-chartered her to Transatlantica Commodities SA (Charterers). The Vessel loaded cargo for discharge in Syria; however the cargo was rejected at the discharge port due to an allegation of contamination.

On 5 January 2010, Charterers ordered the Vessel to proceed to Benghazi in Libya as a substitute port. The bills of lading were originally issued showing discharge ports in Syria. Pursuant to the terms of the charterparty, to change the discharge port, Charterers had to return the original bills of lading to Owners for them to be reissued.

On 16 January, the Vessel proceeded towards Libya. On 19 January, Charterers ordered the Vessel to proceed to anchor at Benghazi but not berth or discharge. The Vessel continued towards Libya but stopped in international waters about 50 miles from Libya and drifted until the 30 January, when the problems with the bills of lading were resolved and acceptable LOIs were given to Owners. The Vessel then continued to Benghazi in accordance with Charterers' orders, waited for a berth until 3 February, and then discharged the cargo. The arbitrators found that even if the Vessel had proceeded directly to Benghazi without stoppage, the bill of lading problems would not have been resolved any earlier than they were, and the Vessel would not have berthed any earlier than she did.

Charterers claimed that the Vessel was off-hire for the period she spent drifting rather than proceeding to Benghazi. Owners countered that because of the issue with the bills of lading, even if the Vessel had proceeded to port immediately upon Charterers' orders, she would not have been able to commence discharging any sooner, as had been found as a fact by the arbitrators; therefore there was no net loss of time in the performance of the charter service, and the Vessel



remained on-hire for the disputed period.

Following an arbitration on documents only, the majority of the Tribunal held that although there was no overall loss of time because Charterers had not established that the Vessel would have berthed any sooner at Benghazi even if Owners had obeyed Charterers' orders, the Vessel was off-hire for the period in question. In the majority's view the relevant test was, following *"The Berge Sund"* [1993] 2 Lloyd's Rep. 453, whether there was an "immediate loss of time" in relation to the service then required.

However, the High Court allowed Owners' appeal, on the basis that the correct test under clause 15 of NYPE 1946 form was whether there had been a "net loss of time" in the overall progress of the adventure.

This is an important decision which accords with common sense notions of causation, in that the correct approach is to undertake an inquiry as to the time "thereby lost" i.e. the causal effect of the vessel not rendering the service then required. This approach is supported by the authors of *Time Charters* and also the decision in *"The Ira"* [1995] 1 Lloyd's Rep. 103.

Nevertheless, it is important to consider the specific wording of the off-hire clause in every case and the burden is, of course, upon charterers to establish facts which justify the non-payment of hire.

It should be noted that the issue is still ongoing and Charterers have been given leave to appeal to the Court of Appeal. It is expected that

the Court of Appeal will hear the appeal this summer.

HFW acted for the successful party, Minerva Navigation Inc.

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Non-payment of hire: clarity under SupplyTime '89

The English Commercial Court recently handed down a judgment that will be of great interest to those operating in the offshore sector. It concerns the BIMCO SupplyTime 1989 form of charterparty, one of the most commonly used forms for offshore work, which includes a clause stating owners are required to give charterers "five banking days" notice before suspending performance of the charterparty for non-payment of hire. In the current financial climate, charterers falling behind with payments has become a more regular occurrence. With five banking days being a substantial period of time to continue operating often expensive vessels, such as pipe layers, without guarantee of payment, this judgment was eagerly watched. In *Greatship (India) Limited v Oceanografia SA de CV* [2012] EWHC 3468 (Comm) the Commercial Court gave judgment on a shipowner's entitlement to suspend performance for non-payment of hire under clause 10(e) of the SupplyTime '89 charterparty.

Clause 10(e) stated:

"...[2] If payment is not received by Owners within 5 banking days following the due date Owners are entitled to charge interest ... from and including the due date until payment is received.

[3] In default of payment ... Owners may require Charterers to make payment of the amount due within 5 banking days of receipt of notification from Owners; failing which Owners shall have the right to withdraw the vessel...

[4] While payment remains due Owners shall be entitled to suspend the performance of any and all of their obligations hereunder..."

Several times during the charterparty, Owners suspended performance for late and non-payment of hire by Charterers. Charterers argued in arbitration that Owners' suspensions were defective and in breach of the charterparty because Owners were required, either expressly, or by an implied term, to give five days written notice before exercising this right, and had not done so. The Tribunal found in Charterers' favour. Owners appealed to the Commercial Court and won.

The Judge (Mrs Justice Gloster) concluded:

"...in order for Owners validly to exercise their right to suspend performance of any and all of their obligations under the Charterparty pursuant to ... Clause 10(e), Owners are not required to give Charterers five banking days notice of the suspension".



Clause 10(e) fills a lacuna seen in many other charterparties by enabling owners to put immediate legitimate pressure on charterers to make payment by suspending performance but stopping short of actual withdrawal. In difficult economic times this is of comfort to owners who require a regular cash flow and do not wish to terminate the charterparty currently being performed.

The Judge stated “I accept that the right to suspend performance of owners’ obligations may have serious consequences”, but noted that the right to suspend was not as “draconian” as the right to withdraw. The Court also took the view that there was “no commercial reason why owners should be potentially obliged to provide the services of the vessel without payment for a period of seven to eight days (i.e. because of intervening weekends) before any notice of suspension became effective ... in circumstances where the Charterers have failed to honour their payment obligations.” The Court found that there was no lack of fairness in not requiring yet a further notice provision and yet a further lapse of time before Owners could exercise their suspension rights.

The judgment puts beyond doubt that under SupplyTime ‘89, as soon as hire becomes outstanding, owners may suspend performance without notice. It also emphasises the risk for parties seeking to rely on implied or assumed meanings in what are clearly worded contracts, particularly (as the Court acknowledged) when the contract is based on a well known standard form such as SupplyTime.

Charterers were refused permission to appeal.

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A version of this article previously appeared in Lloyds List.

Liens on sub-freights: a Chinese perspective

The lien on sub-freights under NYPE 1946 clause 18 is an increasingly important debt recovery weapon for shipowners. The recent Commercial Court *Bulk Chile* decision¹ accentuates the risks of a sub-charterer being required to pay twice.

Given the increasing involvement of Chinese charterers in the bulk shipping market, it is important to be aware that the application of liens generally under English law differs from the position under Chinese law. However, the relevance of Chinese law to the application of liens on sub-freights, as opposed to cargo, is likely to be minimal, given that most charterparties continue to provide for English law and jurisdiction. We consider the Chinese law position at the conclusion of this note.

The “*Bulk Chile*” was time chartered by disponent owners, Dry Bulk, to KLC. KLC then trip chartered her to Fayette, which in turn voyage chartered her to Metinvest. There was also a COA between Fayette and Metinvest. Three bills of lading were issued on Congenbill 1994 terms in respect of the cargo. The shippers were Metinvest and the consignees were “to the order of” different banks. The bills stated

“freight payable as per [the voyage charterparty]”. The bills were marked “freight prepaid”, however, the freight was not prepaid.

KLC went into Korean insolvency proceedings in January 2011 and failed to pay the first two hire invoices. On 1 February 2011 Dry Bulk sent Fayette and Metinvest a notice of lien requiring them to pay any hire due under “charters, bills of lading, or other contracts of carriage” to Dry Bulk directly. Dry Bulk also demanded that Metinvest pay freight due under the bills of lading directly to Dry Bulk and not Fayette in accordance with the voyage charterparty (under the rule that an owner can require redirection of payment under a bill of lading and demand payment directly to himself, displacing the provisions incorporated in the voyage charter, so long as he does so before the freight is paid). On 5 February 2011 a further notice was sent to extend the lien to cargo onboard. The result? Metinvest now owed freight under the bills of lading to Dry Bulk (courtesy of the redirection rule) but it also owed freight in the same sum to Fayette under the voyage charterparty (which had been caught by the lien over sub-sub-freight).

On 26 February 2011, Dry Bulk withdrew the vessel from KLC’s service for non-payment of hire. On 12 April 2011, Metinvest paid freight to Fayette. There was no suggestion that Metinvest paid freight before 12 April 2011. Hire for the period up to withdrawal on 26 February 2011 remained unpaid.

Dry Bulk claimed (1) that Metinvest were liable to pay freight under the bill of lading contracts; and (2) relying on clause 18 NYPE, hire from Fayette and freight from Metinvest in respect

¹. *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd* [2012] EWHC 2107 (Comm).



of the period to 26 February 2011; and (3) that Fayette and Metinvest were liable to pay hire after the vessel was withdrawn from KLC because they had either agreed to pay hire for the voyage to be completed or by way of a quantum meruit claim in unjust enrichment.

Andrew Smith J held that Dry Bulk were entitled to intervene to receive freight directly under their contract with shippers, provided that they had given effective notice that Metinvest could not discharge their obligations by paying freight to Fayette (which on the evidence they had). Dry Bulk's right to intervene to have freight under their contract with shipper paid direct to themselves was distinct from any right that they might have to a lien over freight under clause 18 of the head charterparty. (*The Spiros C* considered).

Andrew Smith J also held, in line with *The Cebu* (No.2) [1990], that a right to lien "sub-freights" did not include a right to lien sub-hire payable by Fayette under the trip charterparty. However, the lien claim against Metinvest would be upheld. The contractual post-withdrawal claim against Fayette for hire would be rejected on the evidence. However, the contractual post-withdrawal quantum meruit claim would be upheld.

The impact of Andrew Smith J's decision was that Metinvest had to pay freight twice. The result of this case highlights a possible flaw in the current law. It cannot be right, as a matter of objective construction, that a party ever envisaged making a double payment of freight. It seems that there is certainly scope for revisiting the redirection rule and looking at the way in which the voyage charter

is construed so as to prevent an apparent double-debt accruing.

Unsurprisingly, Metinvest have appealed Andrew Smith J's decision. Dry Bulk have cross-appealed on the issue of sub-hire due to KLC from Fayette. The appeal was heard by the Court of Appeal on 7 February 2013 and judgment is awaited

In view of this decision, Owners may wish to consider seeking to amend the standard NYPE clause 18 so that the right of lien expressly extends also to sub-hire (as it does in the 1993 version of the NYPE time charter).

Insofar as Chinese law is concerned, Article 141 of the Chinese Maritime Code provides that "if the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the shipowner shall have a lien on the charterer's goods, other property and earnings from the sub-charter". The wording of Article 141 suggests that both time charter sub-hire and voyage charter sub-freight will be susceptible to the shipowner's lien, although it is not clear whether such lien would extend to sub-sub hire or sub-sub freight. In any event, as noted above, the position under Chinese law is not likely to be relevant when Owners are seeking to lien sub-hire or sub-freight pursuant to a right to do so under a charterparty governed by English law.

Chinese law is more likely to become relevant where Owners seek to exercise a lien on cargo in China. In that regard, Article 87 of the Chinese Maritime Code restricts the right of lien to cargo owned by the debtor and the lien can only be exercised to a "reasonable extent". If the cargo does not belong to the debtor, the cargo owners can sue the Owners in tort to

recover damages and can also apply to a Chinese maritime court for an injunction preventing the exercise of the lien.

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Clousing the bills and 'Retla clauses'

Every Master knows that issuing clean Bills covering steel cargoes which exhibit more than superficial rust/moisture damage on shipment could expose the carrier to liability. Receivers taking up the bills, who are unlikely to have seen any loadport survey report, will routinely complain that the cargo description in the bills, on which they relied when contracting with the shippers, does not accurately represent the shipment condition of the steel.

These issues were examined in the recent case of the "SAGA EXPLORER", which concerned the shipment from Korea to ports in North America of steel pipes, which were found on outturn to be rusted.

A pre-shipment survey report stated that the steel was 'in apparent good order & condition with the following damage/exception', then listed 16 pages of qualifying remarks, including that the steel was 'partly rust stained'. The report recommended that those comments be cloused in or appended to the Mates Receipts. The Mates Receipts, and the Bills issued subsequently, also contained a 'Retla



clause', which provided that where steel goods were shipped, the phrase: *"apparent good order and condition ... does not mean the Goods were received ... free of visible rust or moisture"*. The clause also stated that, if the shipper desired, he could request a substitute bill omitting this clause and setting out any notations appearing in the Mates Receipts.

Whilst the Mates Receipts recorded that the condition of the cargo was 'as per survey report', the Bills included no such remark. The Bills, which stated that the pipes were *'shipped in apparent good order and condition'*, had been issued against provision of a Letter of Indemnity in the carrier's favour.

The receivers claimed the goods were damaged on arrival. The Carrier argued that the steel on outturn was as recorded in the bill. The judge observed that precise definition of pre-shipment condition of steel is difficult - the experts in the case did not agree on this, nor as to how the rust should be described using the guidelines laid down in the widely-used 1993 North of England P&I Club circular on steel pre-shipment surveys. However, the judge noted that it was common ground between the parties that there was no significant deterioration of the cargo during the voyage, and that none of the disport surveyors considered that the damage was 'normal' or 'to be expected'. He pointed out that the Carrier would not have needed any LOI if the cargo had truly been in apparent good order and condition. He therefore concluded that the Bills ought to have been claused.

The Carrier additionally argued, following the 1970 "Retla" case which gave the clause its name, that where

the Bills contained a Retla clause, there would never be any need to issue claused bills since all surface rust of whatever degree would be excluded from the representation of apparent good order and condition.

The judge rejected this, saying that the Retla clause should not be construed as a contradiction of the representation regarding good order and condition, but merely as a qualification that the cargo exhibited superficial oxidation of a kind which could be expected to appear on any such cargo, and which was difficult (if not impossible) to avoid. To decide otherwise would render the representation as to good order and condition meaningless. He also rejected the argument that it was always open to the shipper to request a substitute bill which omitted the Retla clause and spelt out all of the remarks in the Mates Receipts, pointing out that it was commercially unrealistic to expect the shipper to do so, since he had a vested interest in obtaining clean bills.

The judge concluded that the Carrier had not provided an honest and reasonable non-expert view of the cargo as was required, but made a *'deceitful calculation'*, and issued a false and untrue representation on which it intended the receiver to rely. The judge accepted the receivers' evidence that they would have rejected the Bills if they had known that they misrepresented the condition of the cargo.

It is likely that many will welcome this clarification of the scope of Retla clauses. It is no longer open to a carrier to argue for the literal interpretation which would have permitted him to issue clean bills

where this would plainly not have been justified in the case of a bill without such a clause.

Retla clauses have not, however, been deprived of all practical effect. The fact that precise categorisation of pre-shipment condition remains difficult means that disputes regarding whether clean bills are justified are unlikely to go away, whether or not there is a Retla clause. And where the line regarding whether bills should or should not be claused is difficult to draw, it is possible that clauses of this kind will in practice still operate to help the Master to justify any decision to issue clean bills.

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News

Limitation of liability: landmark decision in France

In an important decision pronounced on 14 January 2013, the Court of Appeal in Bordeaux has finally recognised the right of the owner of the German flagged vessel "Heidberg" to limit its liability for maritime claims - in what was, when it commenced, the first case in France to examine the right to limit liability under the terms of the 1976 London Convention.

The decision, which adopts a strict application of the terms of the 1976 London Convention, is likely to be of great significance in the development of the law relating to the limitation of liability for maritime claims, notably



in civil law jurisdictions, including in particular in those jurisdictions which look to French law as their source of law.

Holman Fenwick Willan acted for the shipowner.

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To read HFW's full briefing on this decision, please visit: <http://www.hfw.com/Limitation-of-Liability-French-Judgment-Jan-2013>

Conferences & Events

Tradewinds Ship Recycling Forum

Dubai
(4-5 March 2013)
Presenting: Stephen Drury

Marine Money Gulf Ship Finance

Dubai
(6 March 2013)
Attending: Tony Rice and Ian Chung

Sea Asia

Singapore
(9-11 April 2013)
Presenting: Paul Aston

Multimodal Seminar

HFW, London
(16 April 2013)
A number of HFW Partners and Associates will present during this full day seminar.

2nd Annual Conference on Marine Salvage and Wreck Removal

India, Mumbai
(7 May 2013)
Presenting: Paul Dean, Dominic Johnson and Hugh Livingstone

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