



## SUBSEA CABLE DAMAGE CLAIMS: THE LEGAL APPROACH

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Subsea cables have a long history reaching back almost two centuries, starting with the first international subsea cable, which was laid across the English Channel in 1850. Over recent years, the number of cables has considerably increased. In a world which relies heavily on digital telephony, internet, and the transmission of electricity, subsea cables have gained an important and essential role.



97% of global communications are transmitted by subsea cables, and there is no alternative to using them as satellite technology cannot effectively handle the communication requirements of the modern digital economy and society. Financially, the cables are essential, carrying over US\$10 trillion of financial transfers and processing some 15 million transactions daily<sup>1</sup>.

Whilst the majority of recently installed cables are buried beneath the seabed, a percentage of them are unburied, which risk being scoured out by tides and currents, or being snagged by fishing gear or ship anchors. Crucially, in recent years there have been an increasing number of claims for cable breaks, which can be expensive and disruptive. This article focuses on why those claims arise, and how a cable owner or operator may pursue those claims.

### How are Subsea cables damaged?

#### Fishing vessels

Fishing vessels with towed gear, bottom and beam trawls, and dredges are one of the most common causes of damage to

subsea cables, and account for over a third of all cable damage<sup>2</sup>. Although there was no damage to a subsea cable in this case, the loss of the trawler WESTHAVEN in 1997<sup>3</sup> remains a stark illustration of the risk posed by obstructions on the seabed. One of the WESTHAVEN's trawl doors passed under, and subsequently became snagged on, an oil pipeline in the North Sea. Whilst attempting to free the net, the vessel capsized, and all four crewmembers lost their lives. This casualty followed a succession of fishing vessels sinking in the late 1980s including GAYLORD, MHARI L and GREY FLAMINGO, which were lost when their gear became fouled on subsea cables, and resulted in damage to the cable systems themselves.

#### Ship anchors

A large proportion of reported accidents that have resulted in damage to subsea cables relate to anchors, including from fishing vessels, and other merchant vessels such as tugs and anchor handlers. Statistics show that anchors account for nearly a fourth of subsea cable damage.<sup>4</sup> Most of these accidents

tend to be caused by fishing or merchant vessels anchoring outside the designated areas, and recent fault records show that merchant ships often fail to secure their anchors securely during short passages.

#### Intentional and mistaken cut

In the 2014 Canadian case of *The REALICE*<sup>5</sup>, a fishing vessel's nets snagged on a fibre-optic subsea cable. Thinking that the cable was non-functioning, and intending on freeing the gear, the skipper raised the cable to the surface and cut it with a chainsaw. The skipper was found liable for damages of almost US\$1 million.

There was also an instance of intentional cut in 2013, when the Egyptian navy arrested three scuba divers alleged to have attempted to cut the SeaMeWe-4 subsea cable off the port of Alexandria, which provided one-third of all internet capacity between Europe and Egypt<sup>6</sup>. The cut reportedly caused a drop of 75% to internet speeds across Egypt<sup>7</sup>.

1 Rishi Sunak MP, 'Undersea Cables: Indispensable, insecure', a Policy Exchange Report, 2017.

2 'The various threats to subsea cables' (*Ultramap*) <[www.ultra-map.org/news/the-various-threats-to-subsea-cables](http://www.ultra-map.org/news/the-various-threats-to-subsea-cables)> accessed 9 March 2020.

3 Marine Accident Report 4/98, *Report of the Inspector's Inquiry into the loss of the Fishing Vessel WESTHAVEN AH 190 with four lives on 10 March 1997 in the North Sea*, November 1998.

4 'The biggest threat to subsea cables and what to do about it' (*Ultramap*) <<http://www.ultra-map.org/news/the-biggest-threat-to-subsea-cables-and-what-to-do-about-it>> accessed 4 March 2020.

5 *Peracom Inc & Ors v TELUS Communications Co & Ors (The Realice)* [2014] 2 Lloyd's Rep. 315.

6 Charles Arthur, 'Undersea internet cables off Egypt disrupted as navy arrests three', *The Guardian* (28 March 2013).

7 Ian Thomson, 'Egyptian navy captures divers trying to cut undersea internet cables' (*The Register*, 27 March 2013) <[https://www.theregister.co.uk/2013/03/27/egypt\\_cables\\_cut\\_arrest/](https://www.theregister.co.uk/2013/03/27/egypt_cables_cut_arrest/)> accessed 9 March 2020



## Natural causes

Other typical causes of damage to cables include the scraping of cables against rocky surfaces, natural disasters, and seabed movement.

## Shark bites

Although an uncommon cause of damage, there have been instances where sharks have damaged unburied subsea cables. It is understood that sharks are attracted by the cables' electromagnetic fields, which they confuse with fish or other prey. Several of these attacks have been recorded by subsea monitor cameras. Despite the fact that attacks are infrequent, to limit the risk of damage, it has been reported that companies, including Google, are choosing to reinforce their cables as a precautionary measure.

## The consequences

The financial consequences of a subsea cable break can be serious and very expensive for all parties involved. The cost of repairing a subsea telecoms cable averages US\$1 million<sup>8</sup> and can be up to US\$13 million for a power cable<sup>9</sup>. Given their importance, the consequential losses resulting from cable breaks are equally significant. For instance, in 2017 a cable break led to loss of power to the Isles of Scilly, while in 2016 a break severed Britain's main power link with France. If a ship is the cause of such damage, and the cable operator can prove negligence of that ship, then the operator may well succeed in recovering substantial sums in damages from the shipowner.

Loss of connectivity and data access, or reduced connectivity, is a typical consequence of a cable break to a fibre optic or telecoms systems cable. This can affect entire continents, as mentioned in the example above and is a reasonably common occurrence. Most recently, in January 2020, a breakage occurred to the West Africa Cable System (WACS) due to dense

and heavy sediment. WACS runs along the coast from South Africa to the UK, and major outages were caused, leaving the majority of South Africa with slower access speeds for over a month until the system was finally repaired.

As demonstrated by the WESTHAVEN sinking, at worst, where a ship's fishing gear snags on subsea infrastructure, it can result in loss of life and of the ship itself.<sup>10</sup> In the case of the WESTHAVEN, the Marine Accident Investigation Board concluded that attempting to pull the gear free, rather than the snag itself, caused a loss of stability and ultimately the capsizing of the vessel. The consequences can therefore be very serious.

## The importance of evidence

When a cable has been damaged, it is essential for the cable operator to ensure that all precautionary steps are taken to preserve and collect evidence. Should the operator decide to bring a claim against the party that has caused damage to a cable, such evidence will be extremely valuable for the purpose of establishing the factual background to the case. The starting point is to collect real-time shore side signal monitoring to establish exactly when and where the break occurred.

Typically, following an incident, the cable will be inspected and / or repaired with the assistance of Remotely Operated Underwater Vehicles (ROVs). All footage taken by the ROV should be retained and preserved as the ROV footage will be relevant if a claim is issued against the party that damaged the cable. Images will show where the cable was positioned when the damage occurred and such information may be crucial in cases where the location of the cable is in dispute (e.g. where a cable is not in the position stated on the relevant charts). Accurate plotting data should also be included in the video.

Similarly, vessel tracking information is extremely valuable to determine which ships were present in the area when the damage occurred. To this end, cable operators should, where possible, gather Automatic Identification System (AIS) data as it may enable them to identify the party responsible for the damage. It is important to note that not all ships keep their AIS on and some vessels smaller than 15m are not equipped with AIS systems.<sup>11</sup> In the case of UK flagged fishing vessels, even if they are not transmitting AIS data, they will be transmitting Vessel Monitoring System data to the Marine Management Organisation. We have in appropriate cases obtained data from them by way of Freedom of Information<sup>12</sup> requests.

Once the potential culprit ship has been identified, the cable operator will need to seek disclosure of the navigational data held by the ship and the shipowner, such as data located on the Electronic Chart Display and Information System (ECDIS), the Voyage Data Recorder (VDR), and in the case of a fishing vessel, on the fishing plotter (also an electronic system).

## How can a cable operator bring a claim against a shipowner for cable damage?

### Where to bring a claim?

Where a party wishes to issue proceedings against a prospective defendant shipowner, the first step will be to determine which country has jurisdiction to hear the dispute. The question as to whether a specific country will have jurisdiction has to be considered in accordance with private international law.<sup>13</sup>

Where the prospective defendant is domiciled in an EU member state, or in a state that is a party to the Lugano Convention, the general rule is that the defendant should be sued in the country where it is domiciled. As a derogation to this rule, pursuant to Article 7(2) of the

<sup>8</sup> Converted from GBP 750,000. See Nicholas Kazaz, 'Subsea cable damage claims — a legal perspective' (*IUMI Eye Newsletter*, June 2018) <<https://iumi.com/news/iumi-eye-newsletter-june-2018>> accessed 6 March 2020

<sup>9</sup> Converted from GBP 10 million to USD. See Mike McLachlan, 'Subsea cable and damage claims', (*IUMI Eye Newsletter*, March 2018) <<https://iumi.com/news/iumi-eye-newsletter-march-2018/subsea-cable-and-damage-claims>> accessed 9 March 2020

<sup>10</sup> Marine Accident Report 4/98 (n 3).

<sup>11</sup> Kazaz, 'Subsea cable damage claims — a legal perspective' (n 8).

<sup>12</sup> A request made to a public authority under the Freedom of Information Act 2000.

<sup>13</sup> S. Derrington, and J. M. Turner, *The Law and Practice of Admiralty Matters*, (2nd edition, Oxford University Press 2016) at para. 6.32. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

# “An attack on the cables’ control systems could devastate the world’s economies – presenting a different kind of internet ‘kill switch’ altogether – shutting down world commerce, and doing it all with the click of a mouse.”

Brussels Regulation Recast<sup>14</sup> and Article 5(3) of the Lugano Convention<sup>15</sup>, the defendant may be sued in the place where the cable damage has occurred<sup>16</sup>. However, some jurisdictions are reluctant to derogate from the general rule. For example, the English courts have interpreted the derogation narrowly, and the Court will have jurisdiction to hear the matter only where the damage has occurred within UK territorial waters<sup>17</sup>. In those circumstances, claims relating to subsea cable damage are within the jurisdiction of the English Admiralty court. However, even if the damage occurs within the UK’s Exclusive Economic Zone, the jurisdiction of the English courts will not necessarily be engaged and the defendant’s domicile rule will apply. Brexit is likely to affect the legal framework in the future.

If the prospective defendant is domiciled outside of the EU or in a state that is not a counterparty to the Lugano Convention, the English Admiralty court will not have jurisdiction unless the parties intend to rely on in rem jurisdiction, or some Act of Parliament or other regulation, which explicitly gives jurisdiction to the English courts. Accordingly,

to engage the jurisdiction of the Admiralty court, the damage must occur within the UK territorial waters, alternatively, the claim must be brought on an in rem basis.

Finally, it always remains open to the parties to agree to English jurisdiction.

## Limitation of liability

Tonnage limitation is a form of limitation of liability, which is designed to limit the shipowner’s liability based on the gross tonnage of the vessel<sup>18</sup>. Where a vessel causes damage to a subsea cable, the maximum liability of a shipowner will be calculated on the basis of Article 9 of the LLMC 1996, which provides that “*the limits of liability...shall apply to the aggregate of all claims which arise on any distinct occasion.*” In order to determine the extent of the limitation of liability, it is essential to ascertain whether the damage to the cable has been caused by a “*distinct occasion*”. The answer to this question will depend on whether the damage was the result of separate events, which will vary on a case-by-case basis.

A cable operator may find it very difficult to avoid the consequences of tonnage limitation and the effect it will have on their ability to seek compensation following damage to a subsea cable. It is extremely difficult to break limits, and there are only limited occasions on which this has been possible previously.

## Arrest

Where a cable operator has suffered damage to its subsea cable, it may be able to arrest the ship responsible in order to obtain security for its claim. This is available at the outset of the claim and avoids the uncertainty and potential difficulty of eventual enforcement of a court judgment against a defendant in a foreign jurisdiction.

A cable operator wishing to arrest a vessel should be mindful of the potential costs that the arrest may involve. For example, the arresting party will be responsible for the costs of keeping the vessel arrested and those costs would most likely only be recouped upon the judicial sale of the vessel, which may take place at a later stage, leaving the operator liable for the costs.

<sup>14</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

<sup>15</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 and published in the Official Journal on 21 December 2007 (L339/3).

<sup>16</sup> “A person domiciled in a Member State may be sued in another Member State...in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”

<sup>17</sup> *Virgin Media Ltd v Joseph Whelan T/A M & J Fish* [2017] EWHC 1380.

<sup>18</sup> This was introduced by the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol (LLMC 1996) and was incorporated into English law by the Merchant Shipping Act 1995.



However, it is usually unnecessary to carry out an arrest, as a shipowner's insurers (their Protection and Indemnity Club, known as a "P&I Club") may put up a letter of undertaking on the basis that the operator agrees not to arrest the ship.

### Civil liability

Civil proceedings may be brought against the party allegedly responsible for the damage to the subsea cable. To be successful, the claimant operator will have to show the owner of the ship failed to comply with its duty of care causing losses that were reasonably foreseeable. As suggested above, it is likely that in order to demonstrate the breach of duty occurred, a considerable amount of evidence will be required. From the shipowner's perspective, a possible defence would be to claim that the cable operator failed adequately to bury or protect the cable, in other words, that it contributed to the negligence.

A civil liability claim is likely to rely heavily on factual and expert evidence. It is essential that where damage has occurred and that claim is reasonably contemplated,

the cable operator takes all the precautionary steps to ensure that evidence is preserved and that the evidence gathering process is carried out adequately. The English courts can order a shipowner to provide access to the ship for a survey to be undertaken and to preserve contemporaneous documents.

### Criminal liability?

Aside from civil liability, damage to subsea cables can expose a shipowner to criminal liability. Under English law, the Submarine and Telegraph Act 1885 permits the prosecution of persons who deliberately or negligently damage cables. The high burden of proof has meant that few, if any, reported prosecutions have been brought<sup>19</sup>. However, in light of substantive technological advances allowing for the identification of accused ships, and the scale of damage caused by breaks, we may see future prosecutions brought against shipowners.

### The Future

Although this article has focussed predominantly on claims a cable operator may bring against a

shipowner, it is worth considering briefly that there may, in the future, be potential claims against individuals, in particular cyber hackers.

In a Policy Exchange report in 2017, Rishi Sunak MP outlined the considerable risk in cyberspace of attacks on network management systems, quoting Michael Sechrist, a former International Relations Associate at the Harvard Kennedy School<sup>20</sup>:

*"An attack on the cables' control systems could devastate the world's economies – presenting a different kind of internet 'kill switch' altogether – shutting down world commerce, and doing it all with the click of a mouse."*

In this modern age, subsea cable systems are vulnerable to interference by hackers, who could effectively shut down large portions of data traffic in multiple states causing mass disruption. The legal implications of such claims are beyond the scope of this paper, but it is anticipated that a cable operator would be entitled to sue the hacker for damage caused.

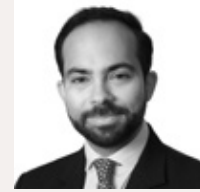
<sup>19</sup> It is suggested that the "insignificant maximum criminal penalty provides little incentive for enforcement authorities to assign full-time legal and investigative personnel to prosecute vessel owners caught damaging a submarine [cable]". See R. Beckman, 'Protecting Submarine Cables from Intentional Damage – The Security Gap' in D. Burnett (ed.), 'Submarine Cables: The Handbook of Law and Policy', (Martinus Nijhoff, 2014), p. 287, quoting S. Coffen-Smout and G. J. Herbert, 'Submarine Cables: A Challenge for Ocean Management' (2000) 24 Marine Policy at 444. See also I. Bantekas, International Criminal Law, (Cavendish, 2003), p. 102.

<sup>20</sup> Rishi Sunak MP, 'Undersea Cables: Indispensable, insecure', (n 1) p. 26.

As for the three scuba divers who allegedly damaged the SeaMeWe-4 cable in Egypt, it is unknown whether civil claims were brought by the cable operators against those individuals, and the case remains shrouded in mystery.

Cable damage claims are by their nature multi-jurisdictional, and require a strategic approach to be taken by the parties involved and their lawyers, bearing in mind the various jurisdictions potentially involved. As the number of incidents of cable damage increase, cable operators should ensure at the outset of any claim that they adequately collate the relevant evidence as contemporaneously as possible.

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