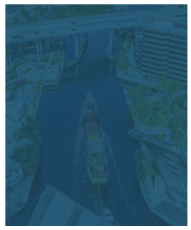
Shipping

December 2014

MARINE INSURANCE BULLETIN



Welcome to the December edition of our Marine Insurance Bulletin.

The *ALEXANDROS T* litigation in relation to the interpretation of settlement agreements continues with the Commercial Court handing down judgment in relation to the rights and remedies available to the individual employees or agents of Lloyd's Syndicates and insurance companies, who had also been sued in their personal capacity by the assured.

HFW Associate Tessa Huzarski considers the application of interests rates under Lloyd's Open Form salvage arbitrations and in particular the correct approach when the contractor operates in more than one currency, which, when larger awards are made, can have significant effects.

The Court of Appeal has recently handed down judgment in the appeal of the *DC MERWESTONE* in relation to the use of fraudulent devices in support of an otherwise valid claim under an insurance policy. This judgment is currently under appeal to the Supreme Court.

Lastly, HFW Partner Andrew Chamberlain reviews whether Autonomous Marine Vehicles are to be considered "ships" for the purposes of the Merchant Shipping Act 1995, and therefore whether they fall within international conventions, such as the Convention on Limitation of Liability for Maritime Claims 1976.

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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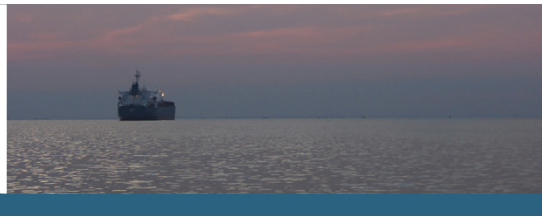

Starlight shipping

In the latest and, potentially, final substantive decision in the English court proceedings arising out of the loss of the *ALEXANDROS T* in 2006, the Commercial Court[1] has considered the interpretation of settlement agreements, and the remedies available to underwriters where an assured and related entities commenced fresh proceedings in relation to the loss against the underwriters in Greece.

The background

The dispute concerns proceedings brought by underwriters in England to enforce agreements settling a coverage dispute. Years later, notwithstanding those settlement agreements, the assured commenced fresh proceedings in Greece in relation to the original insurance claim.

In July 2014, the Court of Appeal[2] had held that the settlement clauses in the settlement agreements should be interpreted so as to give a sensible commercial meaning. That Court went on to find that the Greek proceedings fell within the settlement and indemnity provisions of the settlement agreements. They granted damages to underwriters accordingly.

The proceedings in the Commercial Court in September 2014 concerned the rights of and remedies available to the individual employees or agents of the Lloyd's Syndicates and insurance companies in question, who had also been sued by the assured in Greece in their personal capacity.

1 *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG & Ors* [2014] EWHC 3068 (Comm)

2 *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG & Ors* [2014] EWCA Civ 1010

Underwriters' servants and agents

It was argued on behalf of these individuals that the true construction of the word "underwriters" in the settlement agreements covered underwriters' servants and agents. The intention of the settlement agreements was to give the parties a "clean break", but this intention would be defeated if individuals faced claims, as they would then turn to their employers or principals for an indemnity. Such an interpretation would also be commercially unreasonable. Further, although the term "underwriters" was defined in the agreement's preamble in such a way as not to refer to servants and agents, it was necessary to consider what a reasonable person would have understood the parties to have meant by the use of the term and, if there were two possible constructions, to adopt the construction consistent with business common sense.

The Court agreed, and stated that to exclude servants and agents from the term "underwriters" defied business common sense.

Remedies available to underwriters

The Commercial Court also ordered specific performance by the assured of the agreement to accept the settlement sum in "full and final settlement", holding that such an order by an English court was not incompatible with EU law.

The remedies available in the case of a breach of an English law and jurisdiction clause have therefore, helpfully, been clarified by the various *ALEXANDROS T* decisions, as including damages, indemnities, and orders for specific performance. Anti-suit injunctions, however, remain unavailable where there are parallel proceedings in more than one EU state.

The Court agreed, and stated that to exclude servants and agents from the term "underwriters" defied business common sense.

JENNY SALMON, ASSOCIATE

Conclusions

The Courts have adopted a practical approach to the interpretation of the settlement agreements in this case, seeking to apply a construction consistent with business common sense. It is hoped that this approach, combined with the confirmation that damages, declarations and orders for specific performance are available for breaching English jurisdiction clauses, should discourage parties to settlement agreements from seeking to re-open settled issues by commencing proceedings overseas.

However, this case turned on the interpretation of the particular words used in the settlement agreements, and each case will therefore turn on the wording of the agreements under dispute.

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Throwing interest rates into the mix

In a recent LOF arbitration, in which HFW acted for the contractors, the following question arose: what is the correct interest rate to apply to sums awarded by way of salvage remuneration under Lloyds Standard Salvage Arbitration (LSSA) Clause 8.1? The Arbitrator held that interest should be awarded at a rate that reflects the contractor's own currency of account. This has been upheld on recent appeal.

Under LSSA Clause 8.1, the interest rate applicable to sums awarded by way of salvage remuneration is left to the discretion of the Arbitrator[1]. Where the contractor operates in more than one currency, traditionally, the practice of Lloyd's Arbitrators has been to award interest at a rate that reflects the contractor's commercial operations, rather than the currency of the award (i.e. US dollars). The logic behind this argument is that the contractor would have had to borrow at a foreign commercial interest rate and therefore the compensation awarded should reflect the rate at which the contractor has had to borrow while it has been out of pocket pending the award.

Notwithstanding the above, in this arbitration, cargo interests attempted to argue that the correct interest rate to apply is the rate of the currency of the award. The contractors, on the other hand, argued that the Arbitrator should follow tradition and award a blended interest rate reflecting their commercial operations.

The Arbitrator was not persuaded to depart from the traditional practice. He considered the practice both sensible and fair, since the contractor would have to find the equivalent sum from other sources in the currencies in which it operates during the time it was out of pocket. The Arbitrator also considered it significant that the contractor's key expenditure had been in a currency other than the currency of the award.

A similar issue has come before the English courts previously. The key English law authority dealing with this issue is *Helmsing Schiffahrts GmbH v Malta Drydocks Limited*[2]. In this case, the English courts adopted a similar approach to that taken by the Arbitrator above. The English law position was succinctly summarised by Mr Justice Kerr, who gave the leading judgment in this case, as follows:

"The English principles governing an award of interest are clear. The jurisdiction is discretionary under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934. The discretion is normally exercised on the basis that the successful party is to be compensated by an award of interest for having been kept out of his money by the losing party from the time when the money should have been paid until judgment. The rate of interest awarded is usually based on commercial borrowing rates prevailing during this period."

The approach of both the English courts and Lloyd's Arbitrators in awarding interest at a rate reflecting the currency used by the claimant is significant and should be borne in mind by parties to such proceedings. Parties will need to remain alive to the commercial borrowing rates of the parties with which they transact and any fluctuations in same, in order to factor the difference in to the overall interest compensation amount.

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The contractors, on the other hand, argued that the Arbitrator should follow tradition and award a blended interest rate reflecting their commercial operations.

TESS HUZARSKI, ASSOCIATE

1 LSSA Clause 8.1 reads as follows: "Unless the Arbitrator in his discretion otherwise decides the Contractors shall be entitled to interest on any sums awarded in respect of salvage remuneration or special compensation (after taking into consideration any sums already paid to the Contractors on account) from the date of termination of the services until the date on which the Award is published by the Council and at a rate to be determined by the Arbitrator." [our emphasis added]

2 [1977] 2 Lloyd's Rep. 444



English Court of Appeal extends "fraudulent claims" rule to "fraudulent devices"

To the relief of insurers everywhere, the Court of Appeal has held that an assured who uses fraudulent devices in support of an otherwise valid claim will forfeit the entire claim.

Background

In January 2010, the *DC MERWESTONE* (the vessel) suffered water ingress off the coast of Poland, flooding the engine room and incapacitating the vessel[1].

The owners presented a claim of EUR 3,241,310.60 to the underwriters. In the High Court[2], underwriters defended the claim on numerous grounds, all of which failed except one. The Judge ruled, with obvious reluctance, that owners must forfeit their claim due to a *"reckless truth, not a carefully planned deceit"* told on behalf of owners.

His decision was influenced in large part by the earlier Court of Appeal case *The Aegeon*[3], where it had been suggested (*obiter* and "tentatively") that the "fraudulent claims" rule, whereby an assured who makes a fraudulent claim forfeits the whole claim, should apply equally to an assured who uses fraudulent devices in support of an otherwise wholly valid claim.

Appeal

Owners appealed on a number of grounds. The Court of Appeal focused on two key issues:

1. Should the fraudulent claims rule be extended to apply to fraudulent means or devices?
2. If so, can the rule stand in light of Article 1 of the First Protocol to the European Convention on Human Rights?

Extension of the fraudulent claims rule

Owners argued that the fraudulent claims rule is itself disproportionately harsh, and in seeking to penalise and deter, it usurps the function of criminal law, but with a lower burden of proof and fewer safeguards. The rule also *"provides insurers with a windfall and a powerful weapon"*. In any event, there is a crucial difference between a fraudulent or fraudulently exaggerated claim, where the assured is seeking to obtain a benefit to which he is not entitled, and a fraudulent device employed in the context of an otherwise valid claim. The "fraudulent claims" rule should therefore not be extended to fraudulent devices.

The Court disagreed, finding *"several powerful reasons"* why *The Aegeon* should be followed and the fraudulent claims rule applied. The basis for the rule is the duty of utmost good faith between insurer and insured. It is well-established that an assured who fraudulently exaggerates his claim forfeits the whole claim and there is no reason why an assured who uses a fraudulent device should be treated differently.

The Court also noted that the public policy justification that the rule's draconian consequences affect only assureds who are dishonest applies equally to fraudulent devices - and honesty is key in the claims process where insurers rely heavily on information provided by insureds (though less so than during placing).

Proportionality and Human Rights

Owners submitted that if a fraudulent device were to forfeit a valid claim, it should do so only where the fraud in question is sufficiently serious and/or forfeiture is just and proportionate.

The basis for the rule is the duty of utmost good faith between insurer and insured.

EMILIE BOKOR-INGRAM, ASSOCIATE

Underwriters accepted that forfeiture of an insurance claim must comply with the European Convention on Human Rights. Owners argued that the fraudulent devices rule is disproportionate, since it ignores the culpability of the device and makes no distinction between *"a reckless untruth… told on one occasion"* and a *"carefully planned deceit"*.

The Court held, dismissing the appeal, that the relevant question was not whether the consequence in a given case is proportionate to the fault, but whether the rule is, overall, a proportionate means of fulfilling the aim of deterring insurance fraud. On this basis, it was satisfied that the fraudulent devices rule is just and proportionate.

Owners have sought leave to appeal to the Supreme Court.

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For more information, please contact Emilie Bokor-Ingram, Associate, on +44 (0)20 7264 8463 or emilie.bokor-ingram@hfw.com, or your usual contact at HFW.

1 The detailed background to the casualty is set out in our Marine Insurance Bulletin January 2014 edition http://www.hfw.com/Marine-Insurance-Bulletin-January-2014

2 [2013] EWHC 1666 (Comm)

3 *Agapitos v Agnew* [2003] QB 556

Autonomous Marine Vehicles

The use of Autonomous Marine Vehicles (AMVs) is becoming increasingly common in the oil and gas industry for exploration initiatives. They have also been used for military purposes, as well as oceanographic and geological research. With their increasing popularity and presence, the question which arises from both a legal and insurance perspective is where AMVs fit into the pre-existing legal framework. This is of particular importance for the purposes of determining operators' ability to limit their liability and get cover for their risk.

AMVs are unmanned, submersible crafts, which are not mechanically linked to an operational station, capable of on board decision making. The level of autonomy of the AMV depends on its function.

For the purposes of English Law, the ability of an AMV operator to limit their liability will depend on whether or not the AMV, on the basis of its individual characteristics, can be considered as a "ship" for the purposes of Section 313 of the Merchant Shipping Act 1995. It is unlikely that AMVs will qualify as ships under the MSA or most existing international maritime, conventions, and as such will generally be unable to limit their liability.

In addition, historic provisions allowing the Secretary of State the power to determine whether or not a craft was a ship, even if it may not have naturally been categorised as one, have now been repealed. This raises the difficulty as to how operators can commercially allocate the risk inherent in operating the AMVs and how that risk can be quantified.

One way of doing this is by ensuring that an operator is contractually indemnified for any liability arising out of any commissioned operations, therefore limiting the scope of the risk.

It is also important to ensure that the AMV operator utilises an appropriate company structure to limit the level of liability to the value of the assets owned by the company. However, if there is a large scale incident, it may be difficult from a political and commercial perspective for larger operators, who operate other businesses in the affected jurisdiction, to avoid liability in this way.

HFW are currently providing pro bono legal advice to the Autonomous Marine Vehicle Legal Working Group, a cross industry initiative organised and sponsored by the Society for Underwater Technology.

For more information, please contact Andrew Chamberlain, Partner, on +44 (0)20 7264 8170 or andrew.chamberlain@hfw.com, or your usual contact at HFW. Research by Matthew Dow, Trainee Solicitor.

Conferences and events

UK Chamber of Shipping Annual Dinner
London
2 February 2015
HFW have taken a table.

Global Law Summit
London
23-25 February 2015
HFW is pleased to be a gold sponsor.

European Shipping Week
Brussels
2-6 March 2015
Presenting: Konstantinos Adamantopoulos and Anthony Woolich
HFW is pleased to be a platinum sponsor.

AMVs are unmanned, submersible crafts, which are not mechanically linked to an operational station, capable of on board decision making. The level of autonomy of the AMV depends on its function.

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