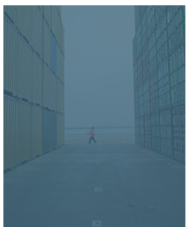
Shipping

June
2014

MARINE INSURANCE BULLETIN



Welcome to the June edition of our Marine Insurance Bulletin.

While insurers are not generally able to recover from one co-assured by making a claim in the name of another, the recent insurer-friendly *OCEAN VICTORY* case in the English High Court has demonstrated the circumstances in which an insurer will be able to recover in this way. We look at the impact of the decision.

Insurers have consistently warned that misdeclared container weights present safety hazards to vessels, crews and cargo. We analyse the IMO's new container weighing proposals, due to go before the IMO's maritime safety committee in May.

We review what happens where cargo is lost or damaged and there are several different potential causes of the loss, following a recent English Court of Appeal decision in this respect.

Finally, we provide a sanctions update, covering the risks insurers need to be aware of in light of the recent sanctions relating to Ukraine.

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Weightwatchers: container weighing developments

The eighteenth IMO subcommittee meeting on Dangerous Goods, Solid Cargoes and Containers (DSC 18) concluded in September 2013 with a controversial compromise solution to the question of container weighing.

The issue

Insurers have long noted that misdeclared container weights present safety hazards to vessels, their crews and cargo, as well as port facilities and logistics workers.

The solution?

Shippers will be required to verify the gross weight of containers and state these values in shipping documents. Failure to provide weight values will result in a container not being loaded onto the ship. However, containers carried on chassis or trailers driven on or off Ro-Ro ships engaged in short international voyages will be exempt from weighing. New paragraphs will be added to SOLAS (Safety of Life at Sea Convention) Regulation VI/2 Cargo Information to this effect.

DSC 18 proposed by way of compromise two methods for weight verification. The first is weighing each packed container using calibrated and certified equipment. The second is weighing all packages and cargo items, pallets, dunnage and other constituent parts, then adding the tare weight of the empty container, using a certified method approved by the competent authority of the state in which the container is packed.

The latter method affords flexibility to the shipper, as not every container must be weighed, thus reducing the time and cost of compliance. On the other hand, sceptics such as the ITF point to the higher error margin of this technique, which they say undermines the proposal. Despite the apparent compromise, the ESC, in opposition to DSC 18's decision, has suggested that the matter of proper stowage has been overlooked.

For its part, the insurance market has generally welcomed the amendments to SOLAS as a step in the right direction, though a number of industry bodies, such as the International Union of Marine Insurance, have stated that they would prefer to see the weighing of all loaded containers become compulsory.

What next?

The proposals will go before the IMO's maritime safety committee this month, with final adoption expected in November 2014. Formal regulations are expected to take effect in July 2016.

Plenty is left to be finalised before the amendments are implemented. There are concerns about the lack of guidance regarding how and at what stage container weight will be certified, and by whom, in order to ensure a standardised method of calculation and to avoid creating pinch points in the supply chain. There is also no consensus on repercussions for those who misdeclare. Industry representatives agree that parties need to co-operate to reach a solution acceptable to all.

Shippers will be required to verify the gross weight of containers and state these values in shipping documents. Failure to provide weight values will result in a container not being loaded onto the ship.

Overall, the DSC 18 proposal is likely to improve container safety, despite its perceived weaknesses. All eyes will be on the IMO to ensure the effective implementation – and enforcement – of the new measures. Insurers should take comfort from the steps which have been taken to address this serious matter, although it remains to be seen whether compromise is the correct answer in the circumstances.

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The *OCEAN VICTORY*: subrogated claims against co-assureds

In general, an insurer cannot pursue a claim in the name of one co-assured against another. However, as the recent *OCEAN VICTORY* case[1] has demonstrated, in some circumstances an insurer will be able to recover from a co-assured.

In 2006, the *OCEAN VICTORY* (the vessel) became a total loss. The vessel's registered owners, Ocean Victory Maritime Inc, demise-chartered her to Ocean Line Holdings Ltd on a charterparty which contained a safe port warranty. The demise charterers then time-chartered the vessel to Sinochart, the defendant, who in turn sub-chartered the vessel to Daiichi. Both these charters also contained a safe port warranty.

Gard Marine & Energy Ltd (Gard), the hull insurers, suing as assignees of the registered owners and demise charterers (having paid out to the registered owners), brought a claim against Sinochart for breach of the safe port warranty. Sinochart brought proceedings against Daiichi for breach of the same warranty. The English Commercial Court decided that the port was unsafe. A further issue arose as to whether the hull insurers could claim the loss of the vessel from Sinochart, the head time charterers, in light of the insurance provisions in the demise charterparty.

Sinochart and Daiichi (the charterers) argued that the relevant clause in the demise charterparty (clause 12) contained a complete code for the treatment of insured losses as between the parties in the event of a total loss. They relied on the fact that, as per the charterparty, the demise charterers would be paying for the insurance and the insurance was for the protection of the interests of the owners and the demise charterers. In addition, the charterparty stated that the demise charterers, having effected insured repairs, would be reimbursed by the hull insurers and that in the event of the total loss of the vessel, all insurance payments would be paid to the mortgagee who would then distribute the monies between themselves, the owners and the demise charterers. They argued that in these circumstances the parties could not have intended that the demise charterers would be liable to the insurers by way of a subrogated claim under the safe port warranty.

construing the demise charterparty as a whole, it was intended that the demise charterers would be liable to the registered owners for breach of the safe port warranty, even though they were co-assureds.

The Court found in favour of the hull insurers. It was held that the existence of an express safe port warranty, the lack of a code of rights and obligations in clause 12 with regard to insured losses caused by a breach of the safe port warranty and the absence of express wording precluding the right of subrogation in clause 12 indicated that, construing the demise charterparty as a whole, it was intended that the demise charterers would be liable to the registered owners for breach of the safe port warranty, even though they were co-assureds.

The Court therefore concluded that the demise charterers were liable to the registered owners in damages for breach of the safe port warranty even though the value of the vessel was recoverable and had in fact been recovered by the registered owners from the hull insurers. Accordingly, Gard was entitled to the sums claimed from Sinochart and Sinochart was in turn entitled to the sums claimed from Daiichi.

This was an insurer-friendly decision, but there has been some criticism of the reasoning. In particular, it has been suggested that the decision effectively operated to deprive the demise charterers of their rights under the policy. The decision has been appealed to the Court of Appeal so further guidance can be expected. More generally, whether or not a co-assured can be held liable will be dependent on the precise terms of the relevant contract, for example whether the contract envisaged that one co-assured may be liable to another despite the insurance cover, or whether there was any express wording ruling out such liability and the right of subrogation.

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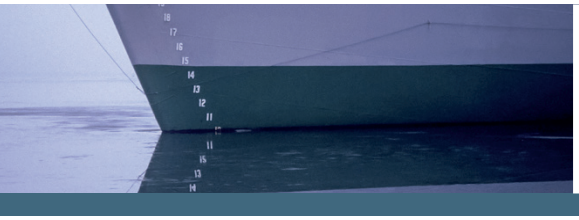
1 Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory) [2013] EWHC 2199 (Comm).[Note:1]



Cargo damage where cause of loss is unclear: can the balance of probabilities be satisfied by process of elimination?

Where cargo is lost or damaged the cause of loss is often clear. It is also common for there to be several different causes that could have caused the loss. This often leaves the court with the difficult task of determining causation. The English Court of Appeal has grappled with this issue recently and has emphasised that a claimant cannot establish its own preferred theory of causation merely by ruling out the other causes.

First instance

In *Ace*[1] the dispute concerned whether damage suffered by economisers intended for use in a waste facility was the result of vibrations caused during transit by road, or by wind following delivery, where the economisers had been left outside for some time.

The High Court held that the correct approach was to examine the theories of damage and determine whether it was more likely than not that one was the cause. The judge found that there was sufficient evidence to establish that the road's roughness caused the damage and held this to be the cause. The decision was appealed.

A different tack was taken in *Nulty*,[2] which concerned a fire in a recycling centre owned by a Council (the Council). The Council sued the estate of Mr Nulty, a deceased engineer working at the centre on the day of the fire, arguing that the fire had been caused by Mr Nulty discarding a cigarette. Mr Nulty's insurers countered that the fire had been caused by either (1) an intruder or by (2) arcing from an electric cable.

The Court concluded that it was highly improbable that the fire had been caused by an intruder or by arcing, but that there was nothing physically or scientifically implausible about the discarded cigarette explanation. Since none of the suggested causes were "inherently likely" to have caused the fire and the two causes put forward by Mr Nulty's insurers were very unlikely, the probable cause of the fire was Mr Nulty's discarded cigarette. This decision was also appealed.

> To succeed with its claim, the claimant must demonstrate that the particular version of events being relied upon is more likely than not to have occurred. It is not sufficient to show that by process of elimination, the claimant's version of events is the cause.

Appeal decisions

In both appeals the Court was guided by the House of Lords decision in *The Popi M*[3]. Here the House of Lords specifically rejected the "Sherlock Holmes dictum" approach to causation *("when you have eliminated the impossible, whatever remains, however improbable, must be the truth")*.

Ace

The Court of Appeal agreed with the first instance judge and held that there was enough evidence to conclude that the damage was caused by the road. The first instance judge had been correct in directing that where there are two competing theories, and one had been eliminated, the other could be the proximate cause if there is sufficient evidence to establish this on the balance of probabilities.

Nulty

The Court of Appeal concluded that the balance of probabilities test requires *"that the court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger than the case for not so believing"*. Although eliminating all other potential causes may lead to the conclusion that a particular explanation is more likely than not to be true, there is no rule of law as a matter of English law that it must do so.

Conclusion

To succeed with its claim, the claimant must demonstrate that the particular version of events being relied upon is more likely than not to have occurred. It is not sufficient to show that by process of elimination, the claimant's version of events is the cause. Obtaining early expert evidence on causation will therefore be critical.

For more information, please contact Craig Neame, Partner, on +44 (0)20 7264 8338 or craig.neame@hfw.com, or your usual contact at HFW. Research by Tessa Huzarski, Trainee.

1 Ace European Group v Chartis Insurance UK [2013] EWCA Civ 224.

2 Nulty v Milton Keynes Borough Council [2013] Lloyd's Rep IR 243.

3 The Popi M [1985] Lloyd's Rep 1.

Sanctions update: what should insurers and brokers do in light of recent developments?

Recent developments relating to Ukraine show that sanctions remain a favourite diplomatic tool of governments in the EU and the US, and that disruption of economic relations continues to be used as a way to put pressure on foreign governments.

The imposition of sanctions against individuals and entities in Russia demonstrates the potentially unlimited reach of international trade sanctions and serves as a timely reminder to insurers and brokers in the EU and the US that they need to be aware of sanctions developments and carry out appropriate checks to be sure that they are not breaching applicable laws.

At the moment, the sanctions imposed by the EU and the US following events in Ukraine are limited to the usual asset freezing provisions and do not include any specific prohibitions on the provision of insurance. However, diplomats have stressed that any further deterioration in Ukraine will result in wider restrictions being imposed and it is understood that there have already been discussions about the type and extent of further restrictions which could be imposed.

It therefore appears that more widespread sanctions could be imposed relatively quickly, meaning that insurers and brokers should be looking closely at their sanctions policies and procedures, to check that they have the right protective measures in place, in advance of any escalation.

Prudent insurers and brokers will conduct detailed due diligence as part of the underwriting decision, and obtain as much information as possible, in order to satisfy themselves that their assured is not engaged in a prohibited trade which could expose insurers and/or brokers.

Depending on the level of risk, that due diligence may include some or all of the following:

- Checks to ensure that the assured and any other person who benefits from the insurance is not subject to the EU or US asset freeze and that no prohibited payments will be made, either by way of premium or payment of claims.
- Checks to ensure that the assured is not a person or entity which, whilst not subject to the EU or US asset freeze, is subject to the wider prohibitions on the provision of insurance (e.g. the Government of Iran, its public bodies, corporations and agencies, or an Iranian person, entity or body, other than a natural person).
- Consideration of whether any wider issues arise in respect of payments (e.g. because of the currency, or specific bank policies).
- Due diligence to ensure that the underlying transaction is not prohibited (e.g. by reason of the cargo which is being transported).

In addition, measures may need to be adopted to take account of any US restrictions which apply (whether because the insurer or broker has a US connection, or to address sanctions with extra-territorial effect). At present there are no US sanctions against Russia which have a direct effect on non-US companies, but insurers and brokers should keep this under review, not least because future US restrictions against Russia might be more onerous than the EU equivalents.

An appropriate sanctions clause should of course be included in the policy, but insurers should also consider the risks which would arise if they were asked to provide security for claims, and/or if they need to pursue subrogated rights to make a recovery.

Where reinsurance is obtained, insurers should satisfy themselves that the reinsurer is not subject to the asset freeze, and therefore premium can be paid and claims pushed. Likewise, if the insurer is in the EU but the reinsurer is in the US, the insurer needs to be sure that he has not inadvertently retained some of the risk.

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Conferences and events

Impact on Swiss traders of recent developments in international trade sanctions
12 June 2014
Geneva
Presenting: Daniel Martin and William Hold

YMLA Committee Maritime International
14-17 June 2014
Hamburg
Attending: Mona Dejean and Christopher Brehm

Lloyd's Maritime Academy – Tanker Charterparties
17 June 2014
London
Presenting: Helen McCormick

FLNG World Congress 2014
25-26 June 2014
Singapore
Presenting: Matthew Blycha
Attending: Paul Aston

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