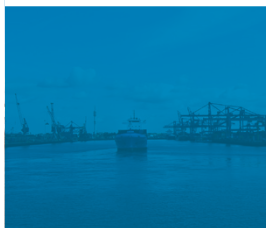


Shipping

March 2015

# MARINE INSURANCE BULLETIN



## Welcome to the March edition of our Marine Insurance Bulletin.

The Commercial Court has recently handed down judgment in the first stage of the *BRILLANTE VIRTUOSO* trial where the issue of quantum was considered and liability was held over. The judgment primarily deals with questions of whether the vessel was a constructive total loss, with the liability hearing currently expected to be heard in early summer 2015.

Our Paris office then considers a recent decision of the French Supreme Court which addressed questions of the enforceability of insurance terms and conditions under French law.

Michael Ritter summarises the proposed changes to the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims 1976, which will be subject to an automatic increase of the limits as of 8 June 2015.

Lastly, Tom Walters and Chris Garley consider the effect and implementation of the Nairobi International Convention on the Removal of Wrecks which will enter into force on 14 April 2015.

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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## **hfw** The **BRILLANTE VIRTUOSO**: part one

**The High Court has recently issued its judgment in a claim brought by the owner of the *BRILLANTE VIRTUOSO* (the vessel) against a number of London market insurers for an indemnity for the constructive total loss (CTL) of the vessel under a hull insurance policy (the policy).**

The judgment is not determinative of liability under the policy because the Court ordered a split trial on policy cover (where the defendant insurers are arguing a breach of a warranty relating to piracy) and quantum issues. It is the latter issues that are the subject of this judgment.

The Court was asked, amongst other things, to consider whether the vessel was a CTL and in doing so gave some useful guidance on how the quantum of such claims should be approached, which will be relevant in the context of inter-ship damages claims, as well as claims under hull insurance policies as was the case here.



**The Court held that the costs of repair in Dubai were about US\$64.4 million, and the equivalent figure in China was US\$53 million, which was below the vessel's insured value under the policy.**

MATTHEW WILMSHURST, ASSOCIATE

### **The background to the claim**

The vessel was hijacked by pirates on 5 July 2011 whilst at anchorage off Aden and proceeded to the coast of Somalia. Sometime after that the vessel's main engine stopped and could not be restarted. The pirates detonated an explosive device causing a fire which engulfed the engine room and accommodation.

Upon the vessel's release, quotations were obtained for repair of the vessel in Dubai and in China. The Court held that the costs of repair in Dubai were about US\$64.4 million, and the equivalent figure in China was US\$53 million, which was below the vessel's insured value under the policy. Both quotations included a 10% contingency figure. The owners maintained that they were entitled to the more expensive cost of repair at Dubai when taking into account whether the vessel was a CTL.

### **Was the vessel a CTL?**

#### **Cost of repairs**

The Court held that the prudent shipowner must not necessarily elect for the cheapest place of repair, and is entitled to take into account a number of factors including:

- The risk of the long towage of a dead ship, particularly of damage to the vessel, pollution, grounding or collisions with other vessels.

- The ability of the respective yards to carry out the repairs on time and on budget.
- The quality of workmanship of the respective yards.
- The financial consequences to the owners of the repair location on future earning potential.

The Court held on the facts that the owners were entitled to the more expensive costs of repairs at Dubai.

### **The 10% contingency**

The Court held that in circumstances where a full determination of the extent of damage to machinery and equipment is not possible, a shipowner is entitled to a "large margin" to recognise that it was not possible to fully determine the extent of the damages and the fact that other items may have to be replaced.

### **Conclusion**

The judgment of the Court is a useful addition to the English law precedents on quantum. Although in its judgment the Court indicated that it was likely that the parties would be able to resolve their differences once the parameters of the recoverable amount were known, the stage two trial will arguably be of even more interest to the marine insurance community if it results in judicial consideration of best management practices to deter piracy and, from a neutral perspective, it is eagerly awaited.

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## **hfw** Right for underwriters to invoke insurance terms and conditions

**In a decision dated 13 May 2014, the French Supreme Court had the opportunity to re-state the principles applying to (1) the enforceability of insurance terms and conditions, and (2) “faute inexcusable” of an assured (“faute inexcusable” is the equivalent of the gross negligence of owners who acted recklessly and with the knowledge that a loss might occur).**

Following the wreck of a trawler in 2013, hull underwriters declined cover, firstly because owners had not notified them of a mortgage on the vessel and, secondly, due to owners’ *“faute inexcusable”* and failure to act with “due diligence”.

The Court first stated that the contractual conditions of the policy could only be invoked against the assured if underwriters could prove that the former knew them and accepted them.

It was not enough that those terms and conditions were consistent with the standard or market hull policy for fishing vessels (in particular with their requirement that the assured disclose the mortgage on the vessel). Underwriters could not plead that the policy was null and void by reason of the assured’s failure to notify them of the mortgage unless it was proved that the conditions were accepted by owners/the assured.

The Court went on to analyse underwriters’ argument that owners committed *“faute inexcusable”* and failed to act with “due diligence” to protect the assured’s goods by deciding to sail with invalid navigation documents due to technical problems of the ship.



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PIERRE-OLIVIER LEBLANC, PARTNER

Pursuant to article L 172-13 of the Insurance Code, losses resulting (1) from the failure of an assured to act with due diligence in relation to the vessel or (2) from a *“faute intentionnelle”* (would be equivalent to wilful misconduct in the insurance field i.e. intentional damage caused by a deliberate act) or a *“faute inexcusable”* of the assured (the main difference between the two being the intention to cause the loss) are not covered. As a matter of fact *“faute inexcusable”* will also deprive shipowners of their right to limit their liability pursuant to LLMC.

In this case, the Court held that underwriters could not deny their cover under the all risks policy since they had failed to prove that the fault of the assured had actually caused the loss. Under the current law insurers do not need to prove the causal link between the loss and the fault of an assured if the insurance contract clearly stipulates an exclusion clause (Cass. 1ère civ. 7 April 1999). However in this case underwriters were not relying on any contractual exclusion clause but on article L 172-13 of the Insurance

Code which allows insurers to refuse cover if it can be proved that *“loss was caused by the lack of due diligence of the Insured”*.

Finally the Court considered the possibility for underwriters to invoke the second limb of article L 172-13 of the Insurance Code enabling insurers to deny cover in case of *“faute inexcusable”*. It was held that in this instance the assured’s conduct did not amount to gross negligence since owners were not aware of the probability of the risk of the ship sinking due to sailing with invalid navigation documents.

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## hfw Liability limits to increase by 51%

**On 8 June 2015, the limits of an owners' liability for a maritime incident under the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 will rise by 51%<sup>1</sup> under the "tacit acceptance" procedure pursuant to Articles 8.7 and 8.8 of the 1996 Protocol to the LLMC.**

Member States voted to increase the limits at the 99th session of the IMO (16-20 April 2012), driven partly by the view that the existing limits are insufficient to cover likely claims, in particular the consequences of a bunker spill. The *PACIFIC ADVENTURER* spill in Queensland (2009) was specifically cited as justification, and the rise was deemed necessary to "keep pace with the real costs of compensating victims" and for "limits to be sufficient to meet demands". Calls for a higher increase were rejected on the grounds any increase had to be reasonable to ensure affordable insurance was available. Further the concept of limitation requires some claims to exceed limit to avoid the LLMC being rendered redundant.

No enabling domestic legislation is required to bring the Amended 1996 Protocol limits and for incidents after 8 June 2015, the higher limits shall automatically apply in any contracting State. The limits cannot, however, be reviewed again until 2020, meaning there should be no further increase until 2023.

### Illustrated Examples

Physical Damage			
Vessel Tonnage	1976 LLMC Limit	1996 Protocol Limit	June 2015 Protocol Limit (51% Increase)
GT: 2,000	417,500SDR US\$589,238.63	1,000,000SDR US\$1,411,350.00	1,510,000SDR US\$2,131,138.50
GT: 30,000	5,093,500SDR US\$7,188,711.23	12,200,000SDR US\$17,218,470.00	18,422,000SDR US\$25,999,889.70
GT: 100,000	12,583,500SDR US\$17,759,722.73	30,200,000SDR US\$42,622,770.00	45,602,000SDR US\$64,360,382.70

Personal Injury			
Vessel Tonnage	1976 LLMC Limit	1996 Protocol Limit	June 2015 Protocol Limit (51% Increase)
GT: 2,000	1,083,000SDR US\$1,528,492.05	2,000,000SDR US\$2,822,700.00	3,020,000SDR US\$4,262,277.00
GT: 30,000	10,574,000SDR US\$14,923,614.90	24,400,000SDR US\$34,436,940.00	36,844,000SDR US\$51,999,779.40
GT: 100,000	25,584,000SDR US\$36,107,978.40	60,400,000SDR US\$85,245,540.00	91,204,000SDR US\$128,720,765.40

US\$1.41135:1SDR (20 February 2015)

### Comment

Insurers should keep the increased limits in mind when managing a major maritime claim, in particular when setting an appropriate reserve for their maximum likely exposure on any file. It may also be that when assessing potential jurisdictions for limiting one's liability, questions of "what" claims can be limited may become more important than simply to what level. Finally, in the context of cargo claims, one should not forget the package limitation defence available under Article IV 5(a) of the Hague-Visby Rules, in addition to the global tonnage limitation regime under the LLMC.

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**No enabling domestic legislation is required to bring the Amended 1996 Protocol limits and for incidents after 8 June 2015, the higher limits shall automatically apply in any contracting State.**

MICHAEL RITTER, ASSOCIATE

<sup>1</sup> [http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-\(LLMC\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx)



## **hfw** The Nairobi International Convention

**The Nairobi International Convention on the Removal of Wrecks will enter into force on 14 April 2015 and will be incorporated into the MSA 1995 by the Wreck Removal Convention Act 2011 which also comes into force next month in the UK.**

The Convention aims to replace a patchwork of legislation surrounding wreck removal, which is said to have created legal uncertainty and lack of transparency in this area. But will the Convention be a “game changer” for the industry, further increasing risk exposure for owners, underwriters and P&I Clubs but introducing desirable certainty, or will the practical impact of the Convention be minimised by its limited application where wrecks are most likely to occur?

By way of reminder, the key features of the Convention are as follows:

- The Convention applies to contracting states’ Exclusive Economic Zone (EEZ) which usually starts at the seaward edge of the territorial sea and extends 200 nautical miles from the coastal baseline. States may extend the scope of the Convention to their own territorial sea, which normally extends 12 nautical miles from the coastal baseline. If states choose not to do so, incidents in their territorial waters will remain subject to domestic law and the provisions of the Convention (including the compulsory insurance regime) will not apply.
- Compulsory insurance is required for wreck removal liabilities for all ships trading internationally and over 300 GT (up to the 1976 Liability Convention limits (as

amended) as implemented in the relevant state). In simple terms, a vessel will not be allowed to enter ports of a ratifying state unless she is properly insured and has a certificate to prove it. Coupled with this compulsory insurance requirement is the state’s right to bring a direct action against the insurer.

- The Convention gives coastal states the right to demand removal if the wreck creates the potential for substantial damage to the environment (i.e. not just where the wreck is deemed a hazard to navigation).

The UK is one of the few states which has opted to extend the application of the Convention to territorial waters. With wrecks likely to occur closer to the shore (and therefore within territorial waters), quickly establishing whether or not the relevant state has extended the application of the Convention to territorial waters will be crucial.

Another issue will be the link between the Nairobi Convention and the 1976 Limitation Convention in the context of compulsory insurance limits. Many of the countries ratifying the 1976 Limitation Convention (including the UK and, most recently, Malaysia), have excluded the right to limit liability for wreck removal - we would expect these states to ensure that the Nairobi Convention does not change that position, such that apparent limits to wreck removal liability for insurers under the compulsory insurance regime may not, in practice, be available. No doubt insurers are already wary of the requirement to sign up to another line of compulsory insurance, seemingly without limits.

In conclusion, the landscape of management of wreck removal seems to be entering a new phase, with the

provision of stronger and more overt powers for coastal states in their battle against wreck abandonment by uninsured or impecunious owners. That said, where coastal states do not uniformly extend the application of the Convention to territorial waters, and insofar as there remains a link to national limitation of liability regimes, there will remain a patchwork of legislation which leaves significant scope for confusion and, ultimately, disputes.

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## **hfw** Conferences and events

### **Ports & Terminals Seminar**

HFW London

28 April 2015

Presenting: Matthew Wilmshurst and  
Craig Neame

### **Marine Terminal Finance & Investment Summit 2015**

New York

5–6 May 2015

Presenting: Alistair Mackie

### **IBA – Maritime and Transport Law Conference**

Geneva

7–8 May 2015

Presenting: Andrew Chamberlain

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