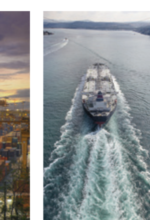
Shipping

April 2014



Welcome to the April edition of our Shipping Bulletin.

We begin by examining a recent attempt to challenge an arbitration award in favour of a Chinese shipyard in the English High Court, on the grounds that the tribunal had not dealt with all of the points raised. We analyse the Court's decision and look at the lessons to be learned.

The *PRESTIGE* casualty was one of the most expensive maritime disasters in history and continues to generate litigation. We review the implications of the recent English High Court decision in respect of the arbitration claim brought by the *PRESTIGE*'s P&I Club against France and Spain. We then look at new French legislation relating to the civil liability of shipowners for pollution incidents.

The 2002 Protocol to the Athens Convention will enter into force on 23 April 2014. We look at the major revisions made to the Athens Convention by the Protocol, including the significant increase in passenger liability limits. We then turn to emissions regulation and the legislation which the Hong Kong Government plans to introduce later this year, which will require all ocean-going vessels at berth in Hong Kong to switch to low sulphur fuel oil.

Finally, we include a salvage update and review an important recent decision which has clarified the meaning of the wording *"immobilised until professionally assisted."*

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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No hope for affirming buyers: the difficulties of serious irregularity challenges

Put bluntly, the losing party never has any right of appeal from an arbitration award simply because he disagrees with the decision; he needs to show that there has been a failure by the tribunal to consider an issue.

A recent decision of the English Court shines a light on a topical issue: how comprehensively must a tribunal deal with the parties' arguments in its award so as to be sure of preventing an appeal from a losing party who claims that the arbitrators did not deal with all of the issues put to them?

The Court recently dismissed an appeal from a London arbitration award[1] which was made by the buyers under two shipbuilding contracts concluded with a Chinese yard for the construction of two Kamsarmaxes. In the arbitration, the buyers alleged that from 19 October 2007 the yard were in anticipatory breach of contract in refusing to deliver the vessels by the 2011 contract delivery dates, and that the buyers were therefore entitled to terminate the contracts and claim damages.

The tribunal dismissed the claims, having found that, even if the yard had been in repudiatory breach, the buyers had affirmed those breaches so that the shipbuilding contracts continued.

The buyers appealed. They argued that, whilst the arbitrators had addressed the question of repeated renunciation by the yard, they had failed to recognise that the Yard had continuously renounced the contracts. The buyers said that the yard's continuing renunciation inevitably meant that the buyers were entitled to terminate and claim damages.

The basis of the buyers' arguments was that the tribunal had not dealt with all of the points which had been put to it in argument under s.68 of the Arbitration Act 1996. The Court stated that, to justify interference with the award findings, the buyers would need to show that the tribunal had gone so wrong that justice called out for correction of the award. This was not the case here, and the buyers' appeal was a *"scarcely veiled attempt"* to challenge the tribunal's factual findings.

The Court also held that there was no doubt that the tribunal had addressed the issue of renunciation in its award. And if that was right, this was the end of the matter. The Court commented: *"Provided the tribunal has dealt with it, it does not matter whether it has done so well, badly or indifferently".*

The decision is a useful reminder of the many potential pitfalls for an innocent party faced with a situation in which his counterparty may be in repudiatory breach. He must take care to ensure that, after he has accepted a repudiatory breach as bringing the contract to an end, he does not do or say anything that could objectively be construed as an affirmation of the contract, as in fact happened here.

The case also reinforces how difficult it is to mount a s.68 'serious irregularity' appeal. The judge described it as *"a long-stop available only in extreme cases".* The Court also emphasised that the focus of s.68 is due process – an arbitral award should therefore be viewed reasonably and not by *"nitpicking and looking for inconsistencies and faults".* Put bluntly, the losing party never has any right of appeal from an arbitration award simply because he disagrees with the decision; he needs to show that there has been a failure by the tribunal to consider an issue.

A final point is that whilst some Chinese yards have in the past suspected that London arbitration tends to favour European buyers, this decision should provide some reassurance that disputes with European buyers will be heard impartially in London arbitration. Conversely, this judgment may make it more difficult for yards, at the time the shipbuilding contract is being negotiated, to resist a buyer's insistence on London as the dispute resolution forum.

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...this judgment may make it more difficult for yards to resist a buyer's insistence on London as the dispute resolution forum.

1 In *Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm)

hfw State immunity and arbitration: the *PRESTIGE*

The *PRESTIGE* was a tanker that broke up off the coast of Spain in November 2002 causing significant oil pollution damage to the Spanish and French Atlantic coasts. With the resulting claims valued at over €4.3 billion, the *PRESTIGE* is one of the most expensive maritime disasters to date; it is also one of the most protracted, with investigations into the incident alone taking nearly eight years.

In 2010, following the conclusion of the investigatory stage of the criminal proceedings, civil claims were brought by Spain against the P&I insurers of the *PRESTIGE* (the Club). In May 2003, the Club had acknowledged its liability pursuant to the Convention on Civil Liability (the CLC) and constituted a fund of €22,777,986. Broadly, the CLC imposes strict liability on the owners of ships to compensate persons who suffer oil pollution damage and, to ensure that a ship owner is in a position to meet his obligations under the CLC, an owner is obliged to arrange insurance up to the CLC limit. However, Spain argued that the limits enshrined within the CLC should not apply in circumstances where the pollution damage resulted from a criminal offence.

Accordingly, the Club refused to participate in the Spanish proceedings and commenced arbitration against the respondent governments of France and Spain seeking declarations that the respondents were bound by the terms of the Club Rules, including (i) the arbitration clause providing for English law; and (ii) the contractual defences available to the Club, including the "pay to be paid" provision.

Broadly, the CLC imposes strict liability on the owners of ships to compensate persons who suffer oil pollution damage and, to ensure that a ship owner is in a position to meet his obligations under the CLC, an owner is obliged to arrange insurance up to the CLC limit.

TARA JOHNSON

Both France and Spain refused to participate in the arbitration proceedings. In both references, the tribunal held that the respondent was bound by the arbitration clause; and that the "pay to be paid" provision was applicable with the result that the Club was not liable to pay the respondent in the absence of prior payment. It was also held that the Club's liability against Spain was not to exceed the policy limit of US$1 billion.

The Club sought to enforce the arbitration award against Spain as a judgment of the High Court. The government of Spain resisted the application on the grounds that it had state immunity, and as a matter of discretion. Spain also challenged the substantive jurisdiction of the tribunal (under sections 67 and 72 of the Arbitration Act 1996) on the grounds that it was not bound by the arbitration agreement as its direct action rights were independent rights under Spanish law rather than contractual rights.

The Court ultimately held[1] that the direct action right conferred by Spanish law was in substance a right to enforce the contract – in this case the insurance policy. Accordingly, Spain, in bringing a claim under the policy which contained an arbitration clause, became party to an arbitration agreement. This constituted an exemption to the state immunity otherwise afforded to them.

The English High Court therefore upheld the CLC limitation of liability. There were concerns that the Spanish Court's decision would conflict with the High Court decision with the result that there would be great uncertainty in the insurance market and the maritime industry. However, Spain has similarly abided by the CLC and upheld the CLC limit of €22,777,986.

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1 The London Steam-Ship Owners' Mutual Insurance Association Ltd v (1) The Kingdom of Spain (2) The French State [2013] EWHC 3188

Transport of oil: French Decree on the limitation of liability for pollution

On 18 March 2014, the French government enacted a Decree in relation to the civil liabilities of shipowners for damages resulting from oil pollution. This Decree defines the procedure for establishing a fund in order to limit liability in respect of victims of an oil spill.

The CLC 1969/1992 Convention, which establishes the principle of strict liability of the owner of a vessel carrying a cargo of oil in case of pollution damage, sets out owners' entitlement to limit their liability, provided they establish a fund. The Convention allows States to define the conditions for the establishment of the fund. Despite having ratified the Convention in 1976, France had never issued legislation specifying precisely how funds were to be constituted and distributed.

In the absence of specific provisions on this issue, when the shipowner of AMOCO CADIZ wanted to establish a fund in 1981, the French courts were inclined to follow the procedure laid down in Decree No. 67-967 dated 27 October 1967, relating to the limitation of liability for maritime claims. The Cour d'appel of Rennes, approved by the Cour de Cassation, dismissed the judgment of the first instance Commercial Court of Brest, considering that the procedure of the 1967 Decree could not apply to the limitation of liability of an oil tanker owner for pollution damage. It was therefore necessary to apply the common law procedure (jurisdiction of the Commercial Court and not that of the President, ad hoc administrator, etc.).

Going forward, the new Decree creates a procedure for the constitution and distribution of the fund for damage caused by oil pollution which is very similar to that specified in the 1967 Decree, apart from some differences particular to the CLC regime (time limits for appeals, and the possibility for indemnities by the IOPC Fund). This Decree should in principle be incorporated into the French Code of Transports once the regulatory part is published, as was the 1967 Decree.

To read the French Decree No. 2014-348, dated 18 March 2014 on the civil liabilities of shipowners for damages resulting from oil pollution, click here.

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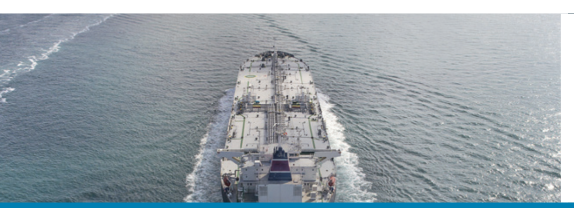
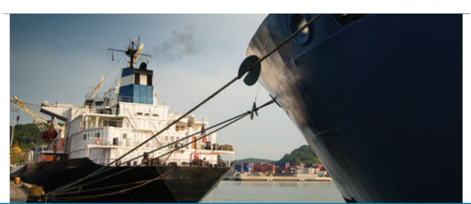
MONA DEJEAN

Athens Convention 2002: increased burden on carriers and their insurers

The 2002 Protocol (the Protocol) to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (the Convention) will enter into force on 23 April 2014. The Convention, as significantly amended and added to by the Protocol, will constitute and be called the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 2002.

Background

The Protocol significantly revises and updates the passenger liability regime for seagoing vessels. The Convention applies to the international carriage of passengers and luggage where the ship is flying the flag of or is registered in a state party to the Convention, the contract of carriage has been made in a state party to the Convention or the place of departure or destination (according to the contract of carriage) is in a state party to the Convention.

The Convention renders a carrier liable for damage or loss suffered by a passenger where the incident giving rise to the damage occurred during the carriage and was caused by the fault and/or neglect of the carrier, but allows carriers to limit their liability except where the carrier acted with the intention of causing the damage, or recklessly and knowing that the damage that was caused was the likely result of its actions. In respect of liability for the death of, or personal injury to, a passenger, this limit was capped at 46,666 Special Drawing Rights (SDRs) per carriage (approx US$71,800 at current rates).

Key provisions of the Protocol

From 23 April 2014, the following limits apply to the carrier's liability for passenger injury and death, per passenger, per occasion:

- Strict liability for claims of up to 250,000 SDRs (approx US$385,000), unless the incident was intentionally caused by a third party, or resulted from an act of war, hostilities, civil war, insurrection or force majeure.
- For claims above this limit, there is a further limit of 400,000 SDRs (approx US$616,000), unless the incident occurred without the fault or neglect of the carrier.

The Protocol also increases the limits for loss of or damage to luggage or vehicles per carriage as follows:

- Cabin luggage claims limited to 2,250 SDRs per passenger (approx US$3,500).
- Vehicle claims (including all luggage carried in/on the vehicle) limited to 12,700 SDRs per vehicle (approx US$19,500).
- Other luggage claims limited to 3,375 SDRs per passenger (approx US$5,200).

Finally, the Protocol introduces compulsory insurance of 250,000 SDRs per passenger. The ship's registry must issue a certificate to evidence this, which is largely happening through the "Blue Card" system.

Effect of entry into force

The Protocol was ratified by the EU and has been in force there since 31 December 2012 via the EU Passenger Liability Regulation 392/2009. Outside the EU, the Protocol has been ratified by Albania, Belize, Norway, Palau, Panama, Saint Kitts and Nevis, Serbia and Syria.

> The most significant change introduced under the Protocol is undoubtedly the increase in passenger liability limits.
>
> ELEANOR AYRES

The most significant change introduced under the Protocol is undoubtedly the increase in passenger liability limits. Although some countries (including the UK) had already increased the limits for their own national carriers, many countries had not and either relied on the limits set out in the Convention or on other national limits. The increases may therefore have a significant impact.

The Protocol will also affect insurers, given the compulsory cover requirement. It remains to be seen whether the Protocol is adopted more widely outside the EU, but in any event a wide number of carriers will be affected, particularly those involved in the ever-popular European cruise market, wherever the vessel is actually registered.

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Fair winds: emissions regulation in Hong Kong

In his recent policy address, The Chief Executive of Hong Kong, Leung Chun-ying, confirmed the Hong Kong Government's intention to introduce legislation during 2014 requiring all ocean-going vessels at berth in Hong Kong to switch to low sulphur fuel oil. According to Hong Kong Government statistics, the emissions of ocean-going vessels while at berth account for some 40% of their total emissions within Hong Kong waters.

In this regard, under the Fair Winds Charter, established in January 2011 by the Hong Kong Liner Shipping Association, the Hong Kong Shipowners Association and the Civic Exchange, a number of shipowners voluntarily agreed that their vessels would switch to fuel with a sulphur content of less than 0.5% while at berth. While the scheme is widely regarded as having been a success (the scheme is the only one of its kind and was renewed for a further year in 2013), the decision to make the use of low sulphur fuel oil mandatory has generally been well received by industry and other stakeholders.

> The expectation is that vessels berthing (including anchoring) in Hong Kong will be required to initiate a switch to low sulphur fuel oil, defined as fuel oil with a sulphur content of less than 0.5%.

There has been a detailed consultation process in relation to the proposed legislation, and the expectation is that it will require vessels berthing (including anchoring) in Hong Kong to initiate a switch to low sulphur fuel oil, defined as fuel oil with a sulphur content of less than 0.5%, no later than when the vessel has finished with the main engine, and to continue using low sulphur fuel oil until not earlier than one hour before departure. There are likely to be exemptions in cases where the switch poses a risk to the vessel, an unexpected delay in departure occurs, or the vessel is expected to berth for less than two hours.

In terms of penalties for breach, they are likely to be consistent with those under the Air Pollution Control Ordinance (Cap. 311) and its subsidiary regulations and comprise a maximum fine of HK$200,000 (about US$25,000) and/or imprisonment for up to six months.

Obviously, it will be important for shipowners to be aware of their obligations under the legislation once it comes into force, which is expected to be in 2015. Further, while the likelihood is that the provisions in most standard form period charters dealing with the charterers' obligation to provide and pay for bunkers would oblige the charterers to provide sufficient low sulphur fuel oil for calling in Hong Kong, the obligation is certainly not beyond doubt. Shipowners should therefore consider insisting on clauses that specifically deal with this obligation.

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> Penalties for breach of the forthcoming low sulphur fuel oil legislation are likely to comprise a maximum fine of HK$200,000 (about US$25,000) and/or imprisonment for up to six months.

FERGUS SAURIN

Salvage update: the meaning of "immobilised until professionally assisted"

HFW recently acted for one of the interested parties in Lloyds Open Form (LOF) arbitration proceedings following a casualty in the Mediterranean. This decision is of particular interest when considering the meaning of the words *"immobilised until professionally assisted."*

The facts of the case were straightforward. The ship in question, a modest general cargo vessel, sustained a main engine breakdown. It was accepted that there was no prospect of repairing the vessel at sea.

The vessel owners entered into a LOF 2011 contract with salvors, following which the vessel was towed into a port of safety by an anchor handling tug. After a tow of approximately 300 miles, the vessel was handed over to a harbour tug for the final 30 mile tow into port. The weather and sea conditions were very good throughout the salvage services. The case went before a LOF arbitrator to determine the remuneration due to the salvors.

The arbitrator considered that the salvage services amounted to a simple pick and tow in benign wind and sea conditions. He said that these services were *"well within the capabilities of any relatively modest tug with a towing capability",* such as the harbour tug which brought her into port. Having made his finding of fact regarding the nature of the salvage services, the arbitrator rejected the salvor's argument that professional assistance was reasonably required.

The salvors appealed the decision... arguing that the arbitrator had wrongly dismissed their case on the nature and degree of the danger in finding that the service was within the capability of a harbour tug.

Under Article 13 of the Salvage Convention 1989, one of the criteria for determining the quantum of a salvage award is *"the nature and degree of the danger".* Salvors will often advance a case that the salved vessel was *"immobilised until professionally assisted."* Arbitral tribunals have, for some years, differentiated between the risk of immobilisation until assisted and the risk of immobilisation until professionally assisted. Indeed, the LOF Digest Issue 17 stated that for some years it had been the practice in salvage arbitrations *"to differentiate between the risk of immobilisation until assisted and the risk of immobilisation until professionally assisted."*

The salvors appealed the decision to the LOF Appeal Arbitrator, Sir David Steel, arguing that the arbitrator had wrongly dismissed their case on the nature and degree of the danger in finding that the service was within the capability of a harbour tug. The central feature of the appeal was the alleged distinction between an immobilised vessel in need of assistance and an immobilised vessel in need of professional assistance. They said that given the nature, length and route of the tow and applying the correct legal test the casualty was immobilised until assisted by a professional salvor.

Sir David Steel, after hearing the parties' arguments, granted the salvor's appeal. He found that, when considering dangers, it was not possible to differentiate between a vessel needing assistance and a vessel needing professional assistance. He said that it was not possible to make this demarcation in any reliable or coherent manner and that the distinction was *"unreal or at least as lacking any useful specificity".*

In passing, Sir David Steel recognised that it may once have been possible to draw distinctions between the various degrees of towage skill. For example, a distinction could previously be drawn between companies on the one hand who tendered for towage both in ports and at sea and companies who maintained station tugs which seldom engaged in anything other than salvage. Nowadays, however, even the smallest harbour tug would have a skilled and experienced crew able to exhibit "professional" towage skills significantly higher than the crew of a typical cargo vessel.

Sir David Steel's decision should, for now at least, remove the need for future debates on this distinction which history has shown was so difficult to define.

HFW Partner James Gosling and Associate Matthew Montgomery were instructed in this matter.

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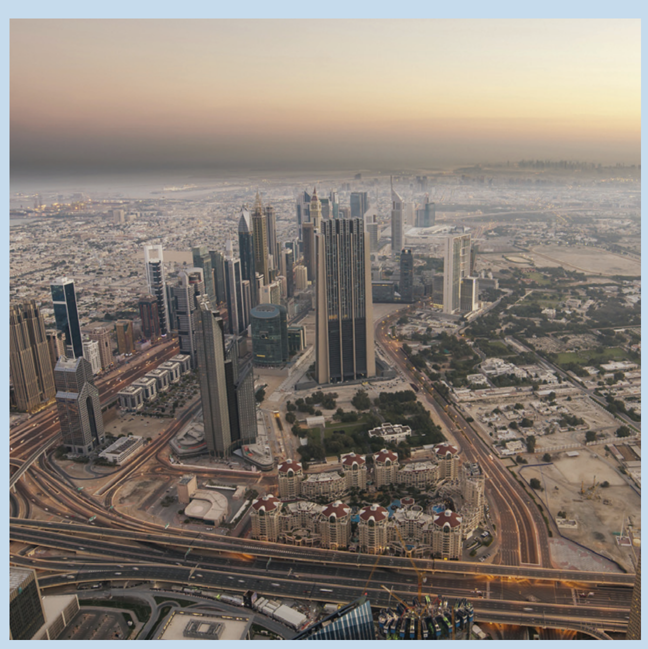
News

ADPC internship with HFW's Dubai office

A lawyer from Abu Dhabi Ports Company (ADPC), Shaima Shaheen, recently completed a two-month internship with HFW's Dubai office. This internship formed part of ADPC's UAE Emiratisation initiative and enabled Shaima to work closely with specialist maritime lawyers and gain hands on experience.

HFW's Dubai office has been supporting the development of talented young Emirati maritime lawyers and other practitioners throughout the GCC marine community, including assisting UAE maritime companies and governmental institutions with their training programmes. Partners Simon Cartwright and Yaman Al Hawamdeh also lecture on shipping law at the Abu Dhabi Higher Colleges of Technology's Executive MBA (Transportation) programme.

HFW is currently developing a programme of short-term internships for UAE nationals from both UAE private and government entities.



Conferences and events

BIMCO Perspectives in Shipping
Dubai
29-30 April 2014
Attending: Hugh Brown, Simon Cartwright, Yaman Al Hawamdeh

FLNG 2014
29-30 April 2014
Kuala Lumpur
Presenting: Matthew Blycha

SCEG Conference
14 May 2014
London
Presenting: Elinor Dautlich
Attending: Richard Neylon, William MacLachlan

IBA Maritime Conference
4-5 June 2014
Geneva
Attending: Elinor Dautlich, Andrew Chamberlain

LMA Bills of Lading
16-18 June 2014
London
Chaired by: Nick Roberson
Presenting: James Mackay, Wagner Mesquita, Matthew Wilmshurst

LMA Tanker Charterparties
17 June 2014
London
Presenting: Helen McCormick

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