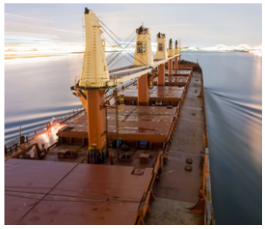
Shipping

December 2016

# SHIPPING BULLETIN



## Welcome to the December edition of our Shipping Bulletin.

We start this bulletin with a Privy Council case concerning the ability of a shipowner to limit their liability, the *CAPE BARI*. The case raised the interesting question as to whether owners could contract out of the Convention on Limitation of Liability for Maritime Claims 1976 and, if they could, then had they done so.

Following this we review a Supreme Court case, the *GLOBAL SANTOSH*, which highlights the need for charterparties to stipulate clearly how the risk of an arrest and events of delay are allocated between owners and charterers. It also considers the role of agents and which party should bear responsibility for their acts.

Next we focus on the 2016 York Antwerp Rules, which are the culmination of a drafting process which began in 2012. Having been approved by BIMCO these rules stand a good prospect of being adopted in place of York-Antwerp Rules 1994. The main changes that the 2016 Rules bring, and which are covered in the article, mostly concern improving the processes by which general average is adjusted and contributions collected.

The fourth article is about *WEHR TRAVE*, a case which answers the question as to what a charterer who charters a vessel for a trip from A to B promises to do? Is he obliged to undertake to load cargo only at the specified loadports, for discharge at the specified disports or does he have greater flexibility?

The final article concerns ship recycling, the Hong Kong Convention and the EU Ship Recycling Regulation and the attempts made by both the IMO and EU to ensure that ship recycling is carried out in an environmentally sensitive manner.

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## Limitation of liability – can you opt out?

**The importance of a shipowner's ability to limit their liability in the context of commercial maritime operations cannot be understated. As such, whether the law permits the waiver of this right is of the upmost significance. This key issue was recently considered by the Privy Council in the landmark case of the *CAPE BARI*[1].**

In the *CAPE BARI*, the vessel in question collided with a sea berth at Freeport in Grand Bahama causing substantial damage to the facility. The owners of the vessel (the Owners) claimed that they were entitled to limit their liability to 11,012,433 SDR, plus interest, on the basis of the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976) which was incorporated into Bahaman law.

The owners of the berth, BORCO, denied that Owners were entitled to limit their liability on the grounds that they had waived their right to do so. The Master of the vessel had signed the Conditions of Use for the facility which stated at Clause 4 that Owners would be responsible for *"any and all loss or damage"* caused by the vessel to the facility.

In the Court of First Instance, it was held that the Owners were not entitled to limit liability in light of Clause 4. However, the Bahaman Court of Appeal reversed the decision concluding that Owners were not permitted to contract out of the statutory right of limitation under the local legislation nor the LLMC 1976.

Permission to appeal was granted and the matter was heard before the Privy Council. The Privy Council held that it was permissible for the Owners to contract out of the LLMC 1976. The judgment explained that there is nothing in the wording of the LLMC 1976, or the incorporating domestic legislation, which made contracting out impermissible. However, in the matter in hand, the indemnity provision in Clause 4 was not sufficiently clear to waive the Owners' right to limit their liability.

In the absence of conduct preventing an owner from being able to limit, such as that demonstrated in the recent case of *THE ATLANTIK CONFIDENCE*[2], for a shipowner to waive the valuable right to limit liability it must be clear from the wording of the agreement that this is what is intended.

However, despite this ruling, the need for the consideration of the issue by three courts, and the increasing number of contracts which try to exclude or vary an Owners' right to limit, demonstrates that Owners need to be careful not to inadvertently waive their rights to limit either by their conduct or those who can bind them e.g. the master.

For more information on the issues raised in this article and how to deal with them please contact Paul Dean, Partner, London, on +(0)20 7264 8363 or paul.dean@hfw.com or Matthew Dow, Associate, London, on +(0)20 7264 8784 or matthew.dow@hfw.com, or your usual contact at HFW.

1 Bahamas Oil Refining Co International Co Ltd v Owners of the Cape Bari Tankschiffahrts GmbH & Co KG [2016] UKPC 20

2 http://www.hfw.com/ATLANTIK-CONFIDENCE-Cargo-Insurers-break-limits-in-unprecedented-judgment-October-2016

## Cargill successfully appeals the Court of Appeal's interpretation of an off-hire clause

**The recent decision in the *GLOBAL SANTOSH*[1], which many in the shipping industry will already be familiar with, is an important one which highlights the need for charterparties to clearly stipulate how the risk of an arrest and events of delay are allocated between owners and charterers. It also raises an interesting question as to the role of agents and which party bears responsibility for their acts.**

### Background

NYK BULKSHIP (ATLANTIC) N.V (NYK) time-chartered the *MV GLOBAL SANTOSH* to Cargill, she was then subsequently sub-chartered and sub-sub-chartered. The sub-sub-charterer (Transclear) entered into a contract of sale as seller for a cargo of cement. The discharge of the cargo was delayed due, partly as a result of the breakdown of the buyer's (IBG) off-loader. IBG was liable to pay demurrage under the contract of sale. Transclear arrested the cargo (and also accidentally the vessel) for security for its demurrage claim. As a result of the arrest of the vessel, there was a delay in the discharge of the cargo.

Cargill as time charterers withheld hire from NYK for the period of arrest, in accordance with the following off-hire clause in the charterparty: *"Should the vessel be captured or seizure (sic) or detained or arrested by any authority or by any legal process*

1 *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] UKSC 20.



*during the currency of this Charter Party, the payment of hire shall be suspended until the time of her release,* ***unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents…****"* (our emphasis).

NYK took the view that the proviso emphasised in bold applied and so hire was payable for the duration of the arrest order. The case went first to London arbitration (where Cargill succeeded), to the High Court[2], the Court of Appeal[3] (in both of which NYK succeeded) and subsequently to the Supreme Court.

### The decision and the position of "agents"

The Court of Appeal stated that the vessel was on hire during the period of arrest as *"the acts, omissions or defaults in question, culminating in the detention or arrest of the vessel involved Cargill's delegates and fell on its side of the line"*[4]. This was controversial as under this analysis, charterers' liability would have no boundary. It raised the question of how far charterers would be responsible for the acts of any party it has directly/indirectly delegated to that fell on "its side of the line".

The Supreme Court recognised the difficulty with the Court of Appeal's analysis and ultimately preferred the reasoning of the original London arbitrators. They found that the proviso in the off-hire clause had not been triggered because the arrest was not "occasioned" by parties acting as charterers' agents. This was because there was an insufficient "nexus", or a disconnect, between the occasion for the arrest and the charterers' functions being performed by parties acting as charterers' agent:

It is now clear that a rogue agent acting on its own accord can never be charterers' responsibility, regardless of which party's "side of the line" they fell into.

*"...not everything that a subcontractor does can be regarded as the exercise of a right or the performance of an obligation under the time charter. There must be some nexus between the occasion for the arrest and the function which Transclear or IBG are performing as "agent" of Cargill."*[5]

The vessel was therefore held to be off-hire throughout the period of arrest.

It is now clear that a rogue agent acting on its own accord can never be charterers' responsibility, regardless of which party's "side of the line" they fell into. The test is now whether the agent is performing the obligations given to him and also whether there is a sufficient nexus of the performance of those obligations to the occasion for the arrest.

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## York-Antwerp Rules 2016: a summary

**On 5 May 2016 a new version of the York-Antwerp Rules, the contractual regime governing general average contributions, was agreed. The new rules, entitled the York-Antwerp Rules 2016 (the 2016 Rules[1]), are the culmination of a drafting process which began in 2012. Having been approved by BIMCO these rules stand a good prospect of being adopted in place of the York-Antwerp Rules 1994 (the 1994 Rules). In so doing, the 2016 Rules will fill the gap created by the failure to adopt the 2004 Rules.**

The main changes that the 2016 Rules bring are mostly concerned with improving the processes by which general average is adjusted and contributions collected.

### Time limit beware

The 2016 Rules has the same time bar contained in the 2004 Rules. This extinguishes rights to general average contribution unless an action is brought within a period of one year after the general average adjustment is issued. There is then a "long stop date" for commencement of proceedings within six years from the date of termination of the common maritime adventure. This rule also applies to claims under average bonds and guarantees and the use of the "long stop date" foreshortens the limitation period which could otherwise be applicable to claims under average bonds and guarantees.

### Treatment of salvage

There has been a question whether or not to allow salvage remuneration

2 [2013] EWHC 30 (Comm);

3 *NYK Bulkship (Atlantic) N.V. v Cargill International S.A* [2014] EWCA Civ 403

4 [2014] EWCA Civ 403, per Lord Justice Gross at 41.

5 *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] UKSC 20, per Lord Sumption at 21.

1 Both the Rules and the CMI Guidelines may be found on the website of Comité Maritime International at www.comitemaritime.org

"Any cargo may be excluded from contributing to general average should the average adjuster consider that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution."

ALEX KEMP, SENIOR ASSOCIATE[2]

in general average as it may give rise to additional cost and delay. Whilst, in the 1994 Rules, salvage was generally allowable, under the 2004 this allowance was radically curtailed.

In the 2016 Rules an attempt has been made to reach a compromise. If the parties to the adventure have a separate contractual or legal liability to salvors, then salvage remuneration will only be allowed in general average if one or more stipulated criteria are fulfilled.

The intention of the new rule is to avoid the cost of re-apportionment if the difference in result would not merit it.

## Express recognition for the discretion of the adjuster

Rule XVI of the 2016 Rules states that the average adjuster may deem the commercial invoice to reflect the value of cargo at the time of discharge irrespective of the place of final delivery– a provision which may assist in cases of multimodal bills. Even more significantly, under this Rule it is now provided, "Any cargo may be excluded from contributing to general average should the average adjuster consider that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution."

## Resolving points of uncertainty

The 2016 Rules also provide clarification and confirm the operation of the cap (the Bigham clause) on cargo's contribution to general average allowances made under the Non-Separation Agreement element in Rule G.

## Financial matters

Principal amongst cargo's complaints about the 1994 Rules was the high interest rate (a rate of 7% per annum) and the allowance of a commission for the provision of funds (2% on general average disbursements).

The 2016 Rules has removed the commission, and has pegged the interest rate at 4% above ICE LIBOR (or US Dollar ICE LIBOR) and is therefore floating.

In addition, new provisions have been made for the treatment of cash deposits through the constitution by the average adjuster of a special account to be held separately from its own funds, thereby removing the need for a joint account.

## Conclusion

A drafting process of three and a half years' duration has concluded with the formulation of the 2016 Rules. The new rules withdraw certain advantages from shipowners but they have also reinstated some allowances which had been restricted in the 2004 Rules. It is suggested that no radical change has been made to the principles on which general average is adjusted. Rather, the achievement of this project has been to negotiate a compromise with which representatives of ship and cargo are in principle content. It remains to be seen whether these rules will now become universally adopted.

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This article was co-written with Richard Sarll, Barrister at 7, King's Bench Walk and first appeared in Shipping & Trade Law on 15 July 2016, and is reproduced with permission. (http://www.shippingandtradelaw.com/practice-and-policy/regulation/york-antwerp-rules-2016-a-summary-118407.htm)

2 The authors, who are both Associates of the Association of Average Adjusters, are, respectively, a barrister at 7, King's Bench Walk and a solicitor at Holman Fenwick Willan LLP. They were appointed to sub-committees of, respectively, Association of Average Adjusters and British Maritime Law Association which were convened to respond to consultations by the CMI Working Group.



## WEHR TRAVE

**What does a time charterer who charters a vessel for a trip from A to B promise to do? Does he, for example, undertake to load cargo only at the specified loadports, for discharge at the specified disports? Or is the description of the "trip" effectively irrelevant, so that as long as the charterer redelivers within the contractual redelivery range, he can during the stated duration trade the vessel wherever he likes? This issue was fully explored in the judgment in the *WEHR TRAVE*[1].**

The vessel was chartered on an NYPE form for one time charter trip "via East Mediterranean/Black Sea to Red Sea/ Persian Gulf/India/Far East always via Gulf of Aden". The charter duration was "minimum 40 days". Redelivery was to be Colombo/Busan range, including China. On the day she was delivered, the charterers gave voyage instructions showing loading ports in the Black Sea and Turkey, a probable discharge port rotation of "Jeddah + Muscat + Hamriyah + Jebel Ali + Dammam".

Having loaded her cargo, the WEHR TRAVE proceeded to discharge ports in the Red Sea, the Gulf of Oman (Sohar), and the Persian Gulf. The last of the cargo was discharged in Dammam, and during discharge, the charterers ordered the vessel to load further cargo at Sohar for discharge in India.

The owners refused. They stated that the order to sail to Sohar was illegitimate because the charterers were not entitled to load additional cargo once the initial cargo had been completely discharged. The charterers persisted with their orders, arguing that they were entitled to employ the vessel as they wished, provided they did not infringe any of the restrictions in the charter.

The vessel undertook the voyage and in due course an arbitration progressed. Charterers succeeded in the arbitration, the arbitrators finding that they were entitled to employ the vessel for the further voyage.

The owners appealed this decision to the High Court, deploying two main arguments. First, they argued that "one time charter trip" meant a voyage from one place, or range of places, to another, and that "one" such trip clearly meant a single voyage of this kind. The charterers therefore had the right to load in the "Eastern Mediterranean/ Black Sea" and to discharge at ports in the "Red Sea/Persian Gulf/India/Far East". Therefore the charterers were not entitled to load in the latter range, and hence not in Sohar.

Second, owners argued that the "trip" defined the duration of the charter which came to an end with the conclusion of the cargo-carrying leg, and that the right to load cargo therefore came to an end with that trip. If not, then there was a risk that a one trip time-charter would become "open-ended".

The court decided in favour of the charterers. It held that the trip conducted under a trip time charter could reflect a number of permutations, including loading at a single port and discharging at a single port, but also a series of loading and discharging operations at different ports along the contractual route.

It also found that as charterers were only permitted to give orders that were lawful (i.e. within the trading limits and on the contractual route) the charterparty would not be open-ended. It was, after all, open to the parties to agree the trading limits and contractual route.

Whilst some have argued that the Court's decision is controversial, it is in

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EDWARD WAITE, ASSOCIATE

line with previous English cases (e.g. The *ARAGON*[2]). In terms of restrictions, if a vessel is chartered under a time charter trip to a specific place, the charterer is entitled to send the ship only to places which are broadly speaking "on the way". However, the charterer otherwise has a great deal of freedom where he can order the vessel to go.

Boiled down to the essentials, it seems that as long as the charterer redelivers within the contractual range, and the route he has taken there from the place of delivery was substantially on the way to that destination, he will have complied with the terms of the charter.

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1 *SBT Star Bulk and Tankers (Germany) GmbH Co KG v Cosmotrade SA* [2016] EWHC 583 (Comm)

2 [1975] 1 LLR 628

## How to be green and recycle

**As any shipowner knows, when a vessel's revenue earning capacity drops too far there is only one realistic option, which is to sell the vessel for recycling.**

### Why ship recycling?

Ships are acquired by shipbreakers for their intended resale value, in the form of their machinery, fittings and ferrous and non-ferrous content; however scrapping a ship is highly energy and labour intensive and is only undertaken on a large scale in four countries: namely India, Pakistan, Bangladesh and China.

### The impetus for an enforceable international standard

The current principal international regime covering the exporting of waste is the Basel Convention[1]. This convention provides the framework for the transboundary movement of hazardous wastes and their disposal and all EU member states have ratified it through the EU Waste Shipments Regulation[2] (the WSR).

The applicability of the Basel Convention/WSR to the export of end of life ships is, however, a matter that has been of debate.

### The Hong Kong Convention[3]

In response to these concerns the IMO charged the Marine Environment Pollution Committee to develop a more workable legislative framework, leading in May 2009 to the holding of a diplomatic conference in Hong Kong at which 63 States, including the key recycling states, flag states, and as observers the European Commission and important NGOs all participated.

This conference led to the signature of the Hong Kong Convention, which aims for the complete and exclusive 'marinisation' of the inspection, survey, permission and policing of the process of the recycling of ships and their disposal: a process which is currently the responsibility of environmental agencies founded on land-based export criteria[4].

It will do away with the concept of 'export and import' and instead impose responsibility for the surveying and certification of the vessel on the vessel's flag state obliging it to certify that the ship recycling plan has been duly authorised by the relevant agency in the recycling state[5], imposing on such states the responsibility for the licensing of the relevant recycling facilities.

Under the Convention the hazardous materials on a vessel will need to be identified *throughout* its working life and not just at the time it is scrapped. It also prohibits the installation or use of Hazardous Materials[6] on both new and existing ships.

### The process of implementation and ratification

The Convention will not take effect until it has received the support of a sufficient number of both high volume, ship operating and ship recycling states.

1 The Basel Convention on the Control of Trans-Boundary Movements of Hazardous Wastes and their Disposal, 1989

2 Regulation ( EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

3 The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009

4 The Hong Kong Convention is the first IMO instrument to impose mandatory rules on working practices, environmental standards, rules on worker health, safety and training (down even to headwear and clothing) in relation to land-based facilities. The regulations annexed to the Convention contain a comprehensive agenda of items to be legislated and regulated for.

5 The Convention itself is remarkably short, just 21 articles of agreement requiring the signatory states to:

1. *"…require that ships entitled to fly its flag or operating under its authority comply with the requirements set forth in this Convention and to take effective measures to ensure such compliance."*
2. *"… require that ship recycling facilities under its jurisdiction comply with the requirements set forth in its convention and to take effective measures to ensure such compliance".*

To the Convention are attached, as an annex, regulations for safe and environmentally sound recycling of ships setting out the key contents of the so-called "green passport" and giving guidelines to state parties on factors deemed relevant for the authorisation of ship recycling facilities, namely *"to establish management systems, procedures and techniques which do not pose health risks to the workers concerned or to the population in the vicinity of the ship recycling facility and which will prevent, reduce, minimise and to the extent practicable eliminate adverse effects on the environment caused by ship recyclying, taking into account guidelines developed by the organisation".*

Particular emphasis is placed on the key steps to be taken to prevent death and injury, e.g. ensuring the establishment throughout the ship recycling process of safe-for-entry/safe-for-hot-work conditions and procedures and prevention of accidents; and from the environmental standpoint, proper procedures for identifying and labelling of potentially hazardous liquids/residues/sediments and hazardous materials such as PCBs, CFCs and asbestos.

The Convention also imposes quite onerous duties on the relevant flag states, which, for the purpose of the Convention means the flag state of the relevant "shipowner": a duty which may well prove difficult if not impossible to fulfil if, as frequently occurs in the context of ship recycling, the "shipowner" is an entrepreneur or "cash buyer" of the vessel selling it to the eventual recycling facility rather than original operating shipowner

6 The "Hazardous Materials" are listed in Appendix 1 (Control of Hazardous Materials) and include Asbestos, Ozone-depleting substances, Polychlorinated Biphenyls (PCBs) and Anti-fouling components and systems.

Under the Convention the hazardous materials on a vessel will need to be identified *throughout* its working life and not just at the time it is scrapped.

STEPHEN DRURY, PARTNER

### European Ship Recycling Policy

Following the signature of the Hong Kong convention, the European Commission produced the EU Ship Recycling Regulation[7] (the SRR).

The SRR purports to bring into EU law the following principles for ships flying the flag of EU Member States:

1. Ships will have to establish and maintain an inventory of hazardous materials (IHM).
2. Ships will have to be dismantled "in safe and environmentally sound ship recycling facilities".
3. The amount of hazardous waste on board will have to be minimised and other steps taken to prepare for recycling prior to delivery to a recycling facility.

### The 'European List' and application

A "European list of ship recycling facilities" that are acceptable will be prepared and all EU flagged ships will have to be recycled in facilities that are on this list.

The SRR has already entered into force but will not be applicable until the earlier of 31 December 2018 and the date which is 6 months after the EU Commission has approved a sufficient number of Ship Recycling Facilities. In April 2016 the European Commission issued 'Technical Guidance' for facilities seeking approval.

### The effect of the SRR

While the SRR is directed to those ships flying the flag of EU member states, Article 12 will, when it comes into force, require any ship that is present in European waters to have in place a current and compliant IHM.

### Where to go from here

There are standard contract forms, in particular the BIMCO 'Recyclecon' form, which can accommodate the concerns of the owner in relation to ship recycling. However, ship recycling is for many, an unfamiliar area and the guidance of an experienced professional adviser is recommended.

For more information, please contact Stephen Drury, Partner, London, on +44 (0)20 7264 8395 or stephen.drury@hfw.com, or your usual contact at HFW.

7 Full Title: Regulation (EU) No 1257/2013 of the European Parliament and of the Council on ship recycling, 20 November 2013

## HFW will merge with Legge Farrow Kimmitt McGrath & Brown LLP

**We are pleased to advise that, with effect from 3 January 2017, HFW will be merging with Houston based energy and marine firm, Legge Farrow Kimmitt McGrath & Brown LLP.**

We have been working successfully with Legge Farrow for a number of years and this move, which provides us with our first physical presence in the US, will have significant benefits to our clients, in particular the local market insight combined with in-depth industry expertise and commercial pragmatism which you already know us for.

To read more about the merger, please visit: http://www.hfw.com/HFW-merges-with-US-firm-Legge-Farrow.

## hfw Conferences and events

**Le secteur de la logistique confronté à son principal risque: l'incendie**
Paris
12 January 2017
Ghislain Lepoutre will discuss the issues related to fires in warehouses

***ATLANTIK CONFIDENCE*, une première: la limitation de responsabilité remise en cause par les juridictions britanniques**
Paris
17 January 2017
Presentation and discussion on the *ATLANTIK CONFIDENCE* case and on the limitation of liability in the UK and in France.
Presenting: Stanislas Lequette and Alex Kemp

**Presentation on Hanjin collapse and legal implications**
Dubai
22 January 2017
Presenting: Yaman Al Hawamdeh

**UK Chamber of Shipping Event: How to negotiate with the EU, with Norman Lamont**
London
24 January 2017
Attending: Marcus Bowman, Craig Neame and Toby Stephens

**India Maritime Summit 2017- Emerging Opportunities in India's Seaborne Oil, Chemicals & Gas Tanker Trade**
Mumbai
3 February 2017
Presenting: Paul Dean

## Related publications

We also recommend to readers the recent briefings detailed below:

**The Corporate Veil, porous or impenetrable? November 2016**
http://www.hfw.com/The-Corporate-Veil-porous-or-impenetrable-November-2016

**Offshore projects – visas required again, October 2016**
http://www.hfw.com/Offshore-projects-visas-required-again-October-2016

**Arrest of the *SAM HAWK*: reversed on appeal and Australian position on maritime liens falls back into line with English and Singaporean law, October 2016**
http://www.hfw.com/Arrest-of-the-SAM-HAWK-October-2016

***Volcafe Ltd v Compania Sud Americana de Vapores SA* (T/A CSAV)1, December 2016**
http://www.hfw.com/Volcafe-Ltd-v-Compania-Sud-Americana-de-Vapores-SA-December-2016

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