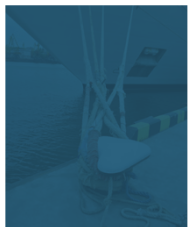
Shipping

July 2014

SHIPPING BULLETIN



Welcome to the July edition of our Shipping Bulletin.

This month, our Bulletin leads with the recent and significant judgment of the English Court of Appeal that under the LLMC 1976 owners are entitled to constitute a limitation fund by providing a guarantee. We analyse the decision, which is likely to be welcomed by the industry.

The English Commercial Court recently granted Gard a freezing order over the assets of the 1971 International Oil Pollution Compensation Fund in relation to the 1997 casualty involving the *NISSOS AMORGOS*. We review the implications of the injunction, which was granted in circumstances where there is not enough left in the Fund to settle this or the other four outstanding compensation cases.

We examine a recent decision in relation to diminution of vessel value which may surprise some in the industry. The English High Court has recently decided that it is possible to claim damages for diminution of vessel value and then subsequently also take the benefit of a sale or repair windfall.

We then look at a recent English High Court case in relation to Gulf of Aden transit, where it was unsuccessfully argued that owners were in repudiatory breach of charter for having stated they would only consent to charterers' transit orders if head owners also consented.

Finally, we feature our regular Case Update, which provides a brief summary of the other major recent English court cases relevant to shipping law.

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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Limitation fund by guarantee: *ATLANTIK CONFIDENCE*

On 6 March 2014, the English Court of Appeal (Civil Division) handed down their judgment of *Kairos Shipping Limited v. Enka & Co. LLC (and Others)*[1]. Lady Justice Gloster, giving the leading judgment, ruled that as a matter of English law, pursuant to the Convention on Limitation of Liability for Maritime Claims 1976 (as amended by the 1996 Protocol) (the LLMC 1976) owners are *"entitled to constitute a limitation fund … by means of the production of a guarantee"*. Given the forthcoming increase to the 1996 Protocol limits (on 8 June 2015), this decision takes on even more significance.

An owner is given a clear choice under Article 11.2 to constitute a fund either by depositing the sum or by producing a guarantee acceptable under the legislation. The production of a guarantee was therefore a legitimate choice, with the remainder of the LLMC 1976 being expressly subject to this Article.

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Gloster LJ took as her starting point the construction of Article 11.2 of the LLMC 1976, which effectively determined the issue. Gloster LJ held that *"the ordinary meaning of the words could not be clearer"*. An owner is given a clear choice under Article 11.2 to constitute a fund either by depositing the sum or by producing a guarantee acceptable under the legislation. The production of a guarantee was therefore a legitimate choice, with the remainder of the LLMC 1976 being expressly subject to this Article. This meant that there were only two constraints on the right to constitute a fund by guarantee:

- Is it acceptable under the state party's legislation?
- Will it be considered adequate by the court?

Gloster LJ dealt with the first issue and overturned Simon J's first instance judgment addressing the three bases of his judgment:

1 The fact that the guarantee had to be *"acceptable under the legislation of the State party"* did not *"require specific additional enabling legislation"* permitting the use of a P&I Club LOU for this purpose. It simply meant that if a guarantee did *"not contravene any relevant statutory provision"* it would be acceptable. Simon J's error in analysis was looking for specific legislation permitting a guarantee for use in constituting a fund.

2 CPR 61, whilst providing for *"payment into Court"*, did not preclude the use of a guarantee. In any event, had it done so, Gloster LJ would have struck out that provision as being *ultra vires* as secondary legislation should not override primary statute nor the LLMC 1976.

3 The "acceptable" v "enforceable" distinction was too technical. The Statute of Frauds had to be construed in the *"context of the aim and intention of the 1976 Convention"*. Therefore, if the Statute's requirements for "enforceability" are complied with, a guarantee is "acceptable".

The judgement usefully summarises the principles of construction to be applied to international conventions, i.e. they must be *"considered as a whole"*, should receive *"purposive construction"*, and should be attributed a meaning which was *"consistent with the common intention of the State parties"* which led to a *"generally acceptable result"*.

1 [2014] EWCA Civ. 217.

Gloster LJ did not address the second issue, but left the adequacy of a P&I LOU to be determined by the Admiralty Court. This has the potential to be hotly contested and requires an assessment of:

a **The financial standing of the guarantor:** many would expect an IG P&I Club to qualify as "adequate". Whether other insurers/guarantors with less certain financial standing will be adequate is unknown.

b **The practicality of enforcement:** an address for service in England will likely be required.

c **The terms of the guarantee:** this is disputed in many cases, and the wording of the only known precedent (the RENA) may not be accepted. The guarantee will likely need to be irrevocable, unlimited in time and may need to address the possibility of limits being broken. One solution might be for a standard wording to be prepared by the Admiralty Solicitors Group.

The judgment should be welcomed as a commercially sound solution recognising the "financial and practical benefits" to owners, P&I Clubs and the shipping industry in allowing a fund to be constituted by way of guarantee. It also maintains England's position as a sensible forum for maritime matters.

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hfw Freezing injunctions and pollution claims: the *NISSOS AMORGOS*

The Commercial Court has granted Gard a freezing order over the assets of the 1971 International Oil Pollution Compensation Fund in support of a claim brought by the Club against the Fund in England.

Following changes to the compensation regime in the early nineties, many states ceased to be parties to the 1971 Convention which set up the Fund. The Convention ceased to be in force on 24 May 2002. The Fund is to be wound up, but it is still obliged under the Convention to pay compensation for spills which occurred before 2002.

The *NISSOS AMORGOS* is one of five outstanding oil pollution compensation cases involving the 1971 Fund.

The vessel grounded in Venezuela's Maracaibo Channel in 1997, spilling 3,600 tonnes of oil. Owners and their P&I Club, Gard, established a limitation fund in Venezuela and paid approximately US$6.5 million to settle claims until December 2000, when the Fund took over. This reflects the usual practice between P&I Clubs and the Fund, to facilitate quick settlement. Once all claims have been agreed or determined, there is usually a balancing payment from the Club to the Fund or vice versa so that each has contributed up to its prorated liability.

The Convention ceased to be in force on 24 May 2002. The Fund is to be wound up, but it is still obliged under the Convention to pay compensation for spills which occurred before 2002.

The Venezuelan Republic obtained a judgment against owners and Gard for US$60.25 million plus interest and costs. The Fund intervened in the proceedings, but was not a defendant. It is common ground between the Fund and Gard that the Republic's claims are inadmissible and time barred. However, the Venezuelan Court did not agree.

Consequently, Gard brought proceedings in Venezuela and in England against the Fund, seeking (among other things) an indemnity from the Fund in respect of any liability it has to the Republic in excess of the CLC limit.

Meanwhile, the process of winding up the Fund continued. At a meeting between Gard, the International Group and the Fund on 18 March 2014, the Fund's Director advised of his intention to recommend at the Fund's next meeting, to be held on 6-9 May 2014, that the money left in the Fund (about £4.6 million) should be returned to contributors.

This prompted Gard to apply to the English High Court for a freezing order. The application was heard before Mr Justice Hamblen on 1 May and judgment was handed down on 7 May 2014.

The Fund argued that the Court lacked jurisdiction because:

a The Fund had immunity from the grant of freezing order relief.

b The Fund had immunity from Gard's claims (i) in England and (ii) in Venezuela.

There is not enough left in the Fund to settle this or the other four outstanding compensation cases. The Fund has applied to the High Court to set the claim in England aside and the case could progress to an appeal and ultimately the Supreme Court, which could prevent the winding up of the Fund for some time.

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The Headquarters Agreement between the Fund and the UK and the International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979 set out immunities on which the Fund can rely in the UK. The Order contains a specific exception to immunity in respect of *"a loan or other transaction for the provision of finance"*. The Judge held that Gard had a good arguable case that the practice of payment between the Clubs and the Fund fell under this head. Consequently, he ruled that the Court did have jurisdiction to decide the application. He also found that Gard had met the legal test for a freezing order by establishing a good arguable case that they were entitled to an indemnity because of this practice, and demonstrating a real risk that the Fund would dissipate its assets by returning the funds to the contributors.

Accordingly, the Judge granted a freezing order in respect of the claims in the English proceedings. However, he did not accept that Gard had a good arguable case that the Fund did not have immunity in Venezuela.

There is not enough left in the Fund to settle this or the other four outstanding compensation cases. The Fund has applied to the High Court to set the claim in England aside and the case could progress to an appeal and ultimately the Supreme Court, which could prevent the winding up of the Fund for some time. If the 1971 monies are depleted, this raises the question of whether the Fund could levy further contributions under a Convention which is no longer in force.

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hfw Diminution of vessel value: having your fishcake and eating it?

Is it possible to have your cake and eat it? It would appear that the answer is "yes" if you are claiming "diminution of value" for damage to your vessel, and subsequently obtain a windfall when selling or repairing it.

In *Waterdance Ltd v Kingston Marine Services Ltd*[1], the claimant (Waterdance) owned and operated a commercial fishing vessel. In 2007, the vessel suffered damage to its engine, which Waterdance argued had been caused by negligence or breach of contract by Kingston Marine. The value of the vessel was no more than £680,000, but repairing her would have cost £435,000. However, without carrying out repairs, Waterdance decommissioned the vessel under a government scheme in return for a grant payment of £1,119,000.

Waterdance subsequently claimed damages from Kingston Marine for diminution in the value of the vessel and for loss of use. Kingston Marine resisted the claim, arguing that Waterdance had not suffered any loss because they had decommissioned the vessel, and the Court was asked to consider this question as a preliminary issue.

The Court ruled that Waterdance had suffered an immediate and direct loss at the time the damage had occurred. The measure of that loss was the reasonable cost of the repairs required to put the vessel back into the condition in which it had been before the damage had occurred. This was so, even though the vessel had never been repaired. Neither had

1 [2014] EWHC 224 (TCC), [2014] BLR 141, [2014] All ER (D) 65 (Feb)



Waterdance's loss been avoided or mitigated by the receipt of the grant payment.

The judge made clear that events which took place after the damage had occurred were irrelevant when calculating the diminution in value in order to assess damages. As a result, the subsequent scrapping of a vessel, or a decision to delay repairs, or even the opportunity to perform the repairs at a reduced price, will not prevent a claimant recovering the diminution in value to his vessel caused by another party's negligence.

The Court made clear that diminution in a vessel's value does not have to be assessed by reference to her open market value. Moreover, the cost of repairs was only evidence of the extent of any diminution in value itself, not the loss actually suffered. In short, the key principle was that the diminution in value had been caused by the damage, not what the un-damaged value may have been.

The Court recognised that there could be circumstances in existence at the time of the damage which would mean that, even though the vessel had suffered physical damage, there was in fact no diminution in value.

However, the burden of proof was on the defendant to show this, and the defendant had failed to do so here. This was because whilst the decommissioning scheme was well known by the time the damage occurred, there was no certainty at that time that the vessel would be accepted under the scheme or, if so, what would be offered under it.

Importantly, the level of the decommissioning grant was assessed by reference to the value of the vessel in its undamaged state. Because of this, it could not be said that a damaged vessel would necessarily have the same value to its owner before and after the damage occurred.

This case will clearly be of great interest to any shipowner whose vessel is damaged and who wishes to claim damages equivalent to the reduction in her value. The judgment demonstrates that the owner should be entitled to damages at this level even if he subsequently manages to sell the vessel at a higher value (due to, for instance, a rising market), and that a defendant will not ordinarily be able to persuade the court that any such windfall should be taken into account when assessing damages.

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...events which took place after the damage had occurred were irrelevant when calculating the diminution in value...

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Head owners' consent and repudiatory breach

Where a party's ability to perform is dependant on the actions of a third party, does that party's inability to perform amount to an anticipatory breach? This question arose in a dispute between the disponent owners of the *BULK URUGUAY* (DBHH) and their time charterers, Geden[1]. The charter provided that the vessel could transit the Gulf of Aden (GOA) without DBHH's consent. In fixture negotiations, Geden had indicated this was essential, because she could then be marketed as "GOA OK" and command a better hire rate. However, the head charter still required head owners' express permission to transit the GOA.

Just before delivery, Geden indicated that the vessel was required to transit the GOA on her maiden voyage. DBHH therefore requested permission under the head charter which head owners granted for that voyage only, but also making clear that consent might not be given every time a request was made. Subsequently, DBHH informed Geden that whether in future they gave permission to transit the GOA would be dictated by whether or not head owners did so. Geden alleged DBHH were in anticipatory breach and terminated the charterparty. DBHH in turn accepted Geden's termination as a repudiatory breach.

In arbitration, the tribunal found that GOA transit was not subject to DBHH's consent under their charter with Geden, but that head owners' consent was required under the head charter. They nevertheless held: (i) that DBHH had not shown an intention not to perform

1 Geden Operation Ltd v Dry Bulk Handy Holdings Inc (The *Bulk Uruguay*) [2014] EWHC 885 (Comm)

the charter, merely that they needed permission from head owners, and (ii) that, even if DBHH had unambiguously declared they could not comply with an order to transit the GOA, this did not substantially deprive Geden of the whole benefit of the contract, and was not therefore repudiatory. Charterers appealed, arguing that the arbitrators were wrong in law on both questions.

Geden argued that when DBHH made plain that their consent was dependent on what head owners decided, the fact that DBHH had put it out of their power to perform demonstrated their intention not to be bound by the charter.

The Court disagreed, stating that DBHH had not renounced the contract, since they had not said they would not go on with the charter. Neither had DBHH indicated categorically that they could not perform the charter, and just because there was uncertainty as to whether DBHH could perform in future, this did not amount to a repudiation, since a breach by DBHH was not inevitable. The judge noted that there were other types of contracts in which a party's performance depended on the decisions of third parties (for example a seller's supplier up the contractual chain), but it could not be suggested that assuming such obligations in these circumstances would put that party in anticipatory repudiatory breach.

Given the Court's determination on the first issue, the second question did not need to be decided, but was nevertheless considered. The Court rejected Geden's argument that a declaration by DBHH that they could not comply with a lawful voyage order to transit the GOA was repudiatory. The correct approach was (i) to identify the benefit Geden would have derived for the remainder of the charterparty if the vessel could have traded via the GOA, and (ii) whether Geden were deprived of substantially that whole benefit.

> In arbitration, the tribunal found that GOA transit was not subject to DBHH's consent under their charter with Geden, but that head owners' consent was required under the head charter.

In fact, Geden were not deprived of the whole benefit - they could trade the vessel elsewhere and had only lost the opportunity to market the vessel as "GOA OK", which Geden themselves had quantified at c.US$1,250 per day.

Both owners and charterers will welcome this important guidance on the effect of the actions of a third party on a party's ability to perform, and which also provides a good illustration of the approach an English court will take in analysing a breach to decide whether or not it amounts to a repudiation of the contract.

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hfw Quarterly case update

1 Cosmotrade SA v Kairos Shipping Ltd (the *ATLANTIK CONFIDENCE*)[1]

Limitation fund may be constituted by Club LOU.

2 St Maximus Shipping Co. Ltd v A.P. Moller-Maersk A/S (the *MAERSK NEUCHATEL*)[2]

GA guarantee on terms "pay now, argue later".

3 Owners of the Astipalia v owners/demise charterers of Hanjin Shenzhen (the *HANJIN SHENZHEN*)[3]

Assessment of damages for loss of use following collision – knock on loss of use.

4 Waterdance Ltd v Kingston Marine Services[4]

Measure of damages for diminution of value of vessel/cost of repairs.

5 Geden v Dry Bulk (the *BULK URUGUAY*[5])

No anticipatory breach by disponent owners where head owners' consent was required to transit GOA.

6 Global Maritime Investments Cyprus Limited v Gorgonia di Navigazione[6]

Maintenance of freezing order and discussion of asset disclosure obligations.

1 [2014] EWCA Civ 217
2 [2014] EWHC 1643 (Comm)
3 [2014] EWHC 210
4 [2014] EWHC 224
5 [2014] EWHC 885
6 [2014] EWHC 706


7 American Overseas Marine Corporation v Golar Commodities Limited (the *LNG GEMINI*)[7]

Injurious cargo – requirement of damage to the vessel.

8 NYK Bulkship (*ATLANTIC*) NV v Cargill International SA (the *GLOBAL SANTOSH*)[8]

Appeal decision – whether vessel off hire when arrested – allocation of risk.

9 Yemgas FZCO v Superior Pescadores SA Panama (the *SUPERIOR PESCADORES*)[9]

Cargo claim – Hague/Hague Visby Rules package limitation – can you pick and choose the higher limit?

10 Yuzhny Zavod Metall Profil LLC v EEMS Beheerder B.V (the *EEMS SOLA*)[10]

Appeal decision – strike out, security for costs and "significant intervention" issue.

11 Trafigura Beheer BV v Navigazione Montanari SpA (the *VALLE DI CORDOBA*)[11]

Cargo loss due to piracy – claim under In Transit Loss clause.

12 Assuranceforeningen Gard Gjensidig v The International Oil Pollution Compensation Fund (the *NISSOS AMORGOS*)[12]

Claim by P&I Club against IOPC 71 Fund and obtaining freezing order over assets.

13 Feest v South West SHA *CELTIC PIONEER*[13]

Athens Convention and time bar.

14 Brockton Capital LLP v Atlantic-Pacific Capital, Inc.[14]

Rare successful appeal under section 68 Arbitration Act – serious irregularity.

15 The post-Jackson and post-Mitchell landscape with reference to the cases of: Lakatamia Shipping v Nobu Su[15] and Summit Navigation v Generali Romania Asigurare Reasigurare SA[16].

The Court of Appeal Denton v White judgment earlier this month in three conjoined appeals[17] has provided guidance on how the courts will now approach applications of this kind. This judgment will be covered in a future Bulletin.

7 [2014] EWHC 1347 (Comm)
8 [2014] EWCA Civ 403
9 [2014] EWHC 971
10 [2014] EWCA Civ 335
11 [2014] EWHC 129
12 [2014] EWHC 1394 (Comm)
13 [2014] EWHC 177 QB
14 [2014] EWHC 1459 (Comm)
15 [2014] EWHC 275 and [2014] EWHC 796
16 [2014] EWHC398 (Comm)
17 [2014] EWCA Civ 906

News

NYPE 2014

As many in the shipping industry will be aware, BIMCO – supported by ASBA and the Singapore Maritime Foundation – are in the process of preparing a new version of the NYPE Time Charter, which they hope will be published later this year. A key feature of the new form will be the incorporation of many of the usual rider clauses into the body of the charterparty itself, while maintaining the look and feel of the existing NYPE forms with which the industry is familiar. We will keep a close eye on developments and provide a further update in due course.

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hfw Conferences and events

Lloyd's Maritime Academy – Managing Maritime Accidents and Emergencies Seminar
London
16–17 September 2014
Presenting: Alex Kemp

IMCC
Dublin
24–26 September 2014
Attending: Toby Stephens and Richard Neylon

15th FPSO Congress 2014
Singapore
30 September – 1 October 2014
Presenting: Paul Aston

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