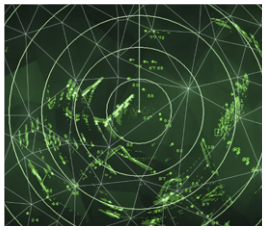
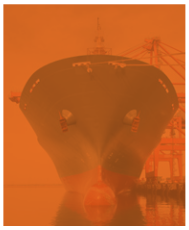
Shipping

September 2015

SHIPPING BULLETIN

Welcome to the September edition of our Shipping Bulletin.

We start the September bulletin with an article from our Perth office concerning a recent appeal court case that considered the issue of precisely when a new build vessel becomes a ship and when ownership passes in relation to the vessel.

In the next article two cases are reviewed that emphasise both the power and the limits of the English Court to assist a party where its opponent has progressed a claim in another jurisdiction in breach of an exclusive English law and jurisdiction clause.

The next two articles consider two risks that can commonly arise in shipping – damage to cargo, and delay. The first article, *SFL HAWK*, explains the reasoning of the English Court in deciding that the carrier was obliged to pay twice for damage to the same cargo. In the second, an arbitration, the vessel was delayed because she was undergoing repairs, however, the charterers were neither able to place the vessel off-hire nor claim demurrage from their sub-charterers.

Finally, we look at new risks that the maritime industry is facing from cyber crime/attacks and highlight some examples of those risks.

Should you require any further information or assistance with 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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Is that your "ship"? Australian courts consider surrogate ship arrest proceedings against a vessel under construction

The Federal Court of Australia recently rejected an attempt by a dissatisfied newbuild ship buyer to proceed in rem against another vessel under construction as security for the buyer's claim against the shipbuilder (i.e. as a surrogate or sister ship).[1] The case considers whether/when a newbuild vessel under construction is a "ship" under Australian admiralty law and the concept of ownership for the purpose of surrogate ship claims.

Facts

In 2010, Austal Ships (**Austal**) delivered to Virtu Fast Ferries (**Virtu**) the *JEAN DE LA VALETTE*, a ferry to be operated between Italy and Malta carrying 800 passengers and 156 cars. After delivery, Virtu alleged that the ferry had latent defects caused by poor welding/workmanship. Virtu commenced arbitration against Austal in London alleging breach of contract.

The *CAPE LEVEQUE* was a customs patrol boat under construction by Austal for the Commonwealth Government. The *CAPE LEVEQUE* had been launched, but not yet delivered to the Government. In February 2015, Virtu commenced arrest proceedings against the *CAPE LEVEQUE* as a surrogate ship seeking security to satisfy any award in the arbitration.

To commence proceedings against a ship under the Admiralty Act 1988 (Cth), the plaintiff must have a recognised maritime lien or claim, which includes *"a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched)"*.

Under section 19 a plaintiff can commence *in rem* proceedings against a surrogate ship where the following applies:

- The relevant person (i.e. the party who would have been liable in proceedings in personam) was the owner, charterer, possessor or controller of the "ship" to which the claim relates when the cause of action arose.
- The relevant person is the owner of the surrogate ship when proceedings were commenced.

Austal applied to set aside the writ on the grounds that:

- Austal was not the owner of a "ship" to which the claim relates when the cause of action arose (because the cause of action arose pre-launch when the ferry was a vessel but not a "ship", or alternatively because the claim arose after Virtu became the owner).
- At the time of the writ, Austal was not the owner of the *CAPE LEVEQUE*.
- At the time of the writ, the *CAPE LEVEQUE* was a "government ship" and so exempt from the Admiralty Act.

Outcome

The trial judge considered that ownership of the surrogate ship means the right of dominion and true ownership (i.e. the right both to use the vessel and to sell and keep the proceeds). The *CAPE LEVEQUE* was almost complete and the government was in a position to seek a court order requiring Austal to finish performance of its contractual obligation to deliver the completed boat. While property may not have passed, the government

> Prospective buyers should consider seeking alternative forms of security for performance such as extended warranties, latent defect guarantees and performance bonds.
>
> HAZEL BREWER, PARTNER

1 *Virtu Fast Ferries Ltd v Ship "Cape Leveque"* [2015] FCA 324; *Virtu Fast Ferries Ltd v The Ship "Cape Leveque"* [2015] FCAFC 58.



was the beneficial owner of the *CAPE LEVEQUE* and so the court set aside the writ.

On appeal, the court struck out the writ as Virtu's claims lacked a reasonable prospect of success. In commenting on the merits of a surrogate claim, the court noted that causes of action arising out of defective works pre-launch arise prior to the vessel being a "ship" for the purpose of the act and therefore not capable of supporting a surrogate claim:

"If a vessel under construction were contemplated to be a "ship" for the purposes of s 19(a), then there would be clear words indicating that."

Comment

Given that many claims in respect of poor design, construction and workmanship will most likely arise prior to launch and most launched ships will likely be nearing completion and so beneficially "owned" by the buyer the case makes it very difficult for a dissatisfied buyer to arrest a surrogate vessel under construction as security for their claim. Prospective buyers should consider seeking alternative forms of security for performance such as extended warranties, latent defect guarantees and performance bonds.

For more information about shipping issues in Australia, please contact Hazel Brewer, Partner, on +61 (0)8 9422 4702 or hazel.brewer@hfw.com, or Peter Clay, Associate, on +61 (0)8 9422 4791 or peter.clay@hfw.com or your usual contact at HFW.

Anti-suit injunctions – the limits of the court's protective powers

In the recent cases of *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores SA*[1] *(Hin–Pro)* and *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd*[2] (SBV) the Court of Appeal and High Court considered their powers in determining the jurisdiction of disputes where one party has breached an English jurisdiction clause and commenced proceedings elsewhere.

Hin-Pro background

Hin-Pro International Logistics Ltd (**Hin-Pro**), a freight-forwarder registered in Hong Kong, commenced proceedings against Compania Sud Americana De Vapores SA (**CSAV**) in China for the alleged misdelivery of several consignments of cargo delivered under straight bills of lading. The bills of lading provided for English law and jurisdiction.

CSAV submitted that no misdelivery had taken place and alleged that the actual C&F sellers had been paid in full, therefore Hin-Pro's Chinese proceedings were dishonest.

"Exclusive" jurisdiction clause

CSAV sought and obtained both an anti-suit injunction and a worldwide freezing order against Hin-Pro from the English Commercial Court. Hin-Pro appealed the anti-suit injunction to the Court of Appeal, alleging that the jurisdiction clause was not exclusive and they were entitled to bring proceedings in China. The clause stated:

CSAV submitted that no misdelivery had taken place and alleged that the actual C&F sellers had been paid in full, therefore Hin-Pro's Chinese proceedings were dishonest.

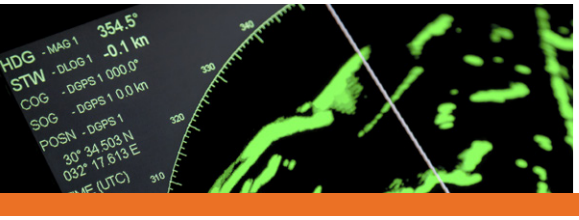
MENELAUS KOUZOUPIS, SENIOR ASSOCIATE

"...any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice... If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceedings shall be referred to ordinary courts of law."

Dismissing Hin-Pro's appeal, the court found that this was an exclusive English jurisdiction clause for the following reasons:

1. The words "shall be subject to" are imperative and directory.
2. The commercial purpose of the clause is to stipulate what law will govern and which court will have jurisdiction.

1 [2015] EWCA Civ 401
2 [2015] EWHC 999 (Comm)



3. As the governing law was English, England is the best forum.
4. The phrase *"notwithstanding the foregoing"* is a recognition that the first sentence requires litigation in England.
5. The second sentence will only apply where the first sentence is ineffective.
6. As it is not clear which party would benefit from English jurisdiction the clause could not be interpreted against either party (contra proferentem).

Accordingly, the court ruled that the anti-suit injunction should be maintained. This judgment shows the lengths the court will go to protect the commercial workability of contracts.

In contrast, the judgment of Spliethoff's Bevrachtingskantoor BV (**SBV**) is illustrative that the court's powers can only extend so far.

SBV background

The dispute related to two shipbuilding contracts between SBV and shipbuilders. The ships had not been delivered on time. Arbitration proceedings were commenced by SBV in London in accordance with the contract and awards obtained in its favour.

The shipbuilders brought proceedings against SBV in the Qingdao Maritime Court in China, alleging fraud. SBV sought and obtained from the tribunal in the London arbitration proceedings interim anti-suit orders restraining the shipbuilders from advancing the Qingdao proceedings. SBV also initially challenged the jurisdiction of the Qingdao court and then participated in the Chinese proceedings. The Chinese court found in favour of the shipbuilders.

Proceedings were brought in the English High Court by SBV in respect of claims under refund guarantees issued by the Bank of China. The bank's defence against SBV relied on the Chinese judgments. SBV claimed that the judgments should not be recognised as they were obtained in breach of arbitral anti-suit orders and English law and jurisdiction clauses.

Recognising Chinese court judgments

Notwithstanding that the Chinese proceedings had been commenced in breach of the arbitration clauses and arbitral anti-suit orders, the court found that the Chinese court judgments were to be recognised, as SBV had voluntarily submitted to the proceedings[3]. SBV were also unable to contend that the Chinese judgments should not be recognised on the grounds of public policy.

Summary

The difference in the outcome of the cases is an important reminder to be aware of the governing law and jurisdiction clauses in contracts. The CSAV case shows that, if a party wishes to rely on the jurisdiction clause in its contract, he will need to take active steps to enforce it if his opponent starts proceedings elsewhere.

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SFL HAWK and the rotten swordfish

The carrier of a damaged shipment of swordfish faced a claim from the receiver of the cargo, despite having already settled a claim from the shippers. The court examined the chain of sale contracts and found that the receivers were the owners of the cargo at the relevant time and therefore had title to sue.

The facts

This recent Commercial Court[1] case concerns a cargo of frozen swordfish which was damaged during shipment from Indonesia to Spain. The shipper of the cargo, PT Awindo had entered into a sale contract with Fishco on CFR terms. The contract stipulated that payment was to be made under a letter of credit 45 days following shipment and also gave Fishco the right to reject the cargo in the event that it was rejected by the authorities. Fishco then onsold the cargo to Carlos Soto, the receivers, on terms which were similar but did not include a rejection clause.

Following shipment the bill of lading, issued to order, was endorsed and transferred to Fishco and then Carlos Soto. However, before payment was made, the cargo arrived in Spain and was rejected by the port authorities. Fishco rejected the cargo, but Carlos Soto, who believed the cargo to be at their risk, did not reject, and sold it for 10% of its undamaged value.

PT Awindo brought a claim against the carrier, Maersk, in respect of the damage. The carrier settled the claim with PT Awindo, who signed a settlement agreement stating that they acted on behalf of all parties interested in the cargo and that no other party had title to sue.

3 In accordance with S. 32 of the Civil Jurisdiction and Judgments Act 1982.

1 [2015] EWHC 458 (Comm) Carlos Soto SAU v AP Moller-Maersk AS (the *SFL HAWK*)



Following this Carlos Soto brought their claim against the carrier, asserting that they were the party who in fact had title to sue in respect of the cargo.

It was established that Carlos Soto were the holders of the bills of lading, and the court therefore had to decide whether or not Carlos Soto were the owners of the goods and had suffered losses as a result of the damage.

Decision

- The first issue was whether title had passed under the contract between PT Awindo and Fishco. The test for whether property has passed under a CIF or CFR contract is whether that was the parties *"actual intention"*. The fact a bill of lading has been endorsed and delivered to the buyer is prima facie evidence of an intention to pass title, but it is not conclusive. The judge found that, as payment was not due under the letter of credit for 45 days following shipment and Fishco had a right to cancel during this period, the parties' intention was that title would not pass until payment was made. Therefore, as Fishco had never paid for the cargo, they had never obtained title.
- The second issue was whether Carlos Soto could nevertheless have obtained good title as a result of section 25(1) of the Sale of Goods Act 1979. In summary, this provision states that where a buyer obtains goods or documents of title in good faith and without notice of the interest of any third party, then the buyer is entitled to be regarded as the owner of the goods. The judge found that Carlos Soto had not been aware that PT Awindo still owned the cargo when it took delivery of the bill of lading. Therefore Carlos Soto was entitled to be regarded as the owner of the cargo and had title to sue in respect of the damage.

Comment

The important lesson from this case is that there is a risk that a carrier may have to pay out twice in respect of the same damaged cargo – once to the shipper and once to the receiver. Whilst it ought to have been possible for the carrier in this case to recover damages from the shipper for breaching its promise in the settlement agreement that it alone had title to sue, this depends on the financial strength and location of the shipper, and could prove costly. This judgment therefore highlights the importance of ensuring that a party has title to sue, and has actually suffered the loss, before settling a claim.

For more information, please contact Jamie Robinson, Associate, on +44 (0)20 7264 8384 or jamie.robinson@hfw.com, or your usual contact at HFW.

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JAMIE ROBINSON, ASSOCIATE

London Arbitration 5/15 – laytime and off-hire – never the twain shall meet?

London Arbitration 5/15 illustrates the risks a charterer can face when fixing a vessel on a time-charter, and sub-letting it on a voyage charter.

Facts

The vessel was chartered on a NYPE form and then sub-chartered on a Gencon form, for a voyage from Argentina to Kenya.

During the time-charter but prior to the voyage charter, the vessel sustained hull damage as a result of contact with a berth in Uruguay. The tribunal found that the damage was not the fault of the vessel.

The vessel arrived at Necochea on 24 June and tendered notice of readiness (**NOR**) 1 at 06:00.

At the time of arrival the intended loading berth was unoccupied but due to bad weather and strikes the vessel was prevented from berthing until 4 July. Allegedly there was also no cargo available.

The vessel was instructed to berth on 3 July, however, she was incapable of loading until repairs were carried out. As a result the terminal refused to allow the vessel to berth. The repairs were completed on 10 July at a lay-by berth. At this point the Master tendered NOR 2.

Three issues arose for determination by the tribunal:

1. Whether the vessel was off-hire from her arrival at Necochea on 24 June, until the completion of repairs on 10 July.

2. When laytime began to count.

3. Whether charterers were entitled to claim damages from owners due to the hull damage.

Issue 1: Off-hire

Clause 15 of the NYPE form provided that payment of hire shall cease for time "thereby lost" if damage to hull occurred and the "full working of the vessel" was also prevented. Accordingly the vessel would not go off-hire unless it was incapable of performing the service required of it by charterers.

Hence the tribunal found that the vessel remained on hire whilst waiting at anchorage, despite the hull damage. She eventually went off-hire on 4 July, when the port re-opened and she was instructed to berth, but berthing was refused by the terminal.

Issue 2: Commencement of laytime

Charterers were liable to pay hire until 4 July and could not look to sub-charterers for demurrage accruing during that period because both NORs were found to be invalid:

- NOR 1: the vessel was not physically ready to load due to the hull damage.
- NOR 2: being a "berth charter" the vessel needed to be at the loading berth when tendering NOR, which she was not.

The default position therefore applied that laytime ran only from the commencement of loading

Issue 3: Charterers' claim for damages

Charterers sought damages from owners on the grounds that the hull damage prevented them from any of the following:

1. Claiming demurrage from their sub-charterers.
2. Claiming damages for detention from sub-charterers when cargo was unavailable.
3. A claim for "consequential loss of time" because of the delays.

Charterers argued the hull damage constituted a breach of clause 7, on the grounds that the whole reach of the vessel was not available to them, and clause 8, for failing to prosecute the voyage with utmost despatch. However, the tribunal considered there could be no breach of clause 7 when the unavailability of the vessel was due to owners doing what was required, i.e. repairs.

As for clause 8, it was held that charterers had to show fault on the part of vessel resulting in a failure to proceed with utmost despatch, which was not possible.

The tribunal also found that there was no consequential loss attributable to any breach of charter or fault of owners. The delays after the completion of repairs were due to another vessel occupying the berth.

Comment

Owners and charterers need to consider carefully during negotiations the provisions of the charterparty. In particular, a charterer in the middle of a contractual chain is less likely to be the party bearing the loss of delays if contracting on back-to-back terms.

For more information, please contact Rory Grout, Senior Associate, on +44 (0)20 7264 8198 or rory.grout@hfw.com, or your usual contact at HFW.

Cyber security for shipping

It may come as a surprise to many that one of the greatest risks to companies may be hackers accessing and manipulating their computer systems. However, according to the World Economic Forum's 2014 Global Risk Report, cyber attacks are one of the top five risks facing the global economy.

The maritime industry is by no means immune to this threat and is, in fact, considered by many to be one of the most obvious targets. This article considers the potential vulnerabilities of ships, oil rigs, ports and terminals and the potential damage that a cyber attack could cause.

Reliance upon computer systems

The shipping industry, like the rest of the world, is becoming increasingly dependent on electronic systems which play a role in navigation, engine control, steering control and cargo handling. Almost all major shipowners, port operators, freight forwarders and logistics companies consider information technology as one of the most important systems in their businesses.

To take some obvious examples:

- Automatic identification systems (**AIS**) exchanges vessel tracking and identification data with other vessels, ports and the coast guard.
- A ship's position report and speed are displayed on the Electronic Chart and Display Information System (**ECDIS**), the data for which is updated from the internet. (Under SOLAS all ships must have ECDIS electronic charts by 2018).
- Ships and container ports rely on electronic Global Positioning

It is widely felt that the marine industry is, for the most part, totally unprepared to deal with existing and emerging cyber threats.

MATTHEW MONTGOMERY, ASSOCIATE

Systems (**GPS**) to identify vessel positions, steer port cranes and stack containers.

There is concern in the industry that, rather than reducing risk, the improper use and over-reliance on electronic systems may have actually increased the risk.

Impact of an attack

The potential damage that a cyber-attack could cause to a shipowner or port operator is hard to quantify.

There is some evidence that attacks may already have occurred:

1. There is anecdotal evidence of a cyber-security company accessing and modifying the electronic charts in some ECDIS software to highlight the risks. Obviously if there was malicious modification of the charts, and nobody was aware, then it could result in a collision or a grounding.
2. Hacking of a vessel's or port's GPS system. It is reported that one US port suffered a seven hour GPS signal disruption that crippled container movement operations.
3. Hacking of port computers that track and control the movement and location of containers. There are reports of criminal gangs accessing port computers in order to identify and steal particular containers.
4. Evidence of a cyber-attack on a floating oil rig, causing the rig to tip and ultimately shut down for several days.

Financial loss

All of the above examples result in fairly obvious financial losses, however, in addition there are the potential business interruption losses which could arise out of a cyber attack[1].

Reputational damage

It is thought that one of the reasons why so few cyber attacks have been reported is that companies are fearful of the reputational damage that such a disclosure could cause. Companies do not want to alarm investors, regulators or insurers.

However, increasingly regulators in the US, EU and elsewhere are obliging companies to disclose any data breach that occurs.

Conclusion

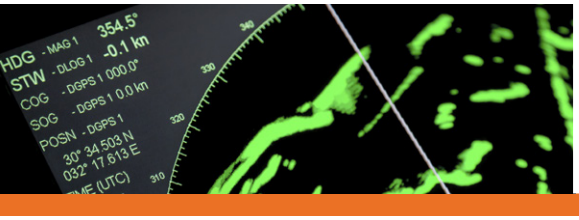
It is widely felt that the marine industry is, for the most part, totally unprepared to deal with existing and emerging cyber threats.

This has been recognised by organisations such as BIMCO, Intertanko and Intercargo who announced on 15 April 2015 that they are developing standards and guidelines to address the major cyber security issues facing the shipping sector. These guidelines are intended to minimise the risks of an attack and advocate the development of contingency plans should an attack take place.

In the meantime, we would recommend that shipping companies give careful consideration to the systems they have in place to prevent and respond to a cyber attack, and that they routinely test their internal governance system and supply chain, and monitor it for intrusions.

For more information, please contact Matthew Montgomery, Associate, on +44 (0)20 7264 8403 or matthew.montgomery@hfw.com, or your usual contact at HFW.

1 A recent report from Lloyd's and the University of Cambridge Centre for Risk Studies has estimated that an organised cyber-attack on the US power grid could cause losses running into the hundreds of billions of dollars.



Reminder

We also recommend to readers the recent briefings detailed below:

Dubai court issues landmark judgment recognising and enforcing a foreign arbitral award, September 2015 (http://www.hfw.com/Dubai-court-issues-landmark-judgment-recognising-and-enforcing-a-foreign-arbitral-award-September-2015)

Bunkers International Corporation, September 2015 (http://www.hfw.com/Bunkers-International-Corporation-September-2015)

SOLAS amendments – mandatory verification of container weights: the clock is ticking... July 2015 (http://www.hfw.com/SOLAS-amendments-mandatory-verification-of-container-weights-July-2015)

Australian cabotage update – July 2015 (http://www.hfw.com/Australian-cabotage-update-July-2015)

Nigeria bans 113 tankers, July 2015 (http://www.hfw.com/Nigeria-bans-113-tankers-July-2015)

hfw Conferences and events

14th Annual Marine Money Singapore Ship Finance Forum
Singapore
22-23 September 2015
Attending: Tony Rice, Tien Tai, and Ian Chung

IMCC
Dublin
23-25 September 2015
Attending: Toby Stephens and Richard Neylon

Asia Law Awards
Hong Kong
24 September 2015
HFW have taken a table at this event. We have been nominated for the following:

- Best in construction & real estate
- Best in insurance
- Best in shipping & maritime

Lloyd's List global awards 2015
London
1 October 2015
HFW have taken a table at this event. We have been shortlisted for the following awards:

- Corporate Social Responsibility
- Best Maritime Lawyer

Offshore & Marine Finance Forum
Dubai
7 October 2015
Presenting: Tien Tai

IBA Annual Conference
Vienna
4-9 October 2015
Attending: Elinor Dautlich and Alex Kyriakoulis

HFW Conference on current trends in the Indian market
Mumbai
14 October 2015
Presenting: Paul Dean, David Morriss, Ashwani Kochhar, Alistair Mackie, Brian Perrott and Damian Honey
Attending: Hari Krishna and Paul Wordley.

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