

**Shipping**

**October  
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# **SHIPPING BULLETIN**



Welcome to the October edition of our Shipping Bulletin.

This edition of the Bulletin focuses on risk management. It considers the recent Costa Concordia casualty and analyses risk management and best practice in the cruise market. On a similar theme, the following article looks at the issues raised by the next generation of mega containerships, reviewing the likely consequences of a serious incident involving one of these vessels. The article raises several relatively recent near misses and considers the salvage, logistical, regulatory and environmental challenges.

Both articles highlight current concerns about ship design risks and the increasingly demanding legal environment in which large casualties must be handled. We then turn to legal risks and consider the continuing risk of industrial action, looking at how owners and charterers can best protect their positions when fixing.

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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## What can we learn from the Costa Concordia?

Almost exactly 100 years after the sinking of the *Titanic*, the *Costa Concordia* disaster has been cited as one of the worst maritime insurance losses ever. The fallout from the *Costa Concordia* is likely to have a worldwide impact, not only on cruise operators, but also on insurers and all vessel owners and operators. According to analysts, the total insured loss could be nearly US\$1 billion, including the salvage and hull costs, and it was initially estimated that the claims from passenger deaths, injuries and loss of property will exceed US\$8 million, before even considering any environmental damage or wider loss of business to the whole cruise market. Claims filed to date are understood to seek more than US\$1.4 billion in compensation. The size of the claim means that it will resonate throughout the insurance world and into the wider shipping industry.

Claims are still emerging in the aftermath of the *Costa Concordia* incident, with claims for loss of life, personal injuries from passengers and crew alike. Four of the musicians and dancers employed on the vessel have recently launched claims for US\$200 million, alleging that they can no longer work due to physical and emotional injury, and the family of the Hungarian violinist who died while helping other passengers has launched a claim for US\$400 million. In such a case as this, claimants are flocking to the US, where punitive damages are awarded and the Athens Convention (which limits liability for passenger claims) does not apply.

Claimant personal injury solicitors called upon all regulators, including the IMO, to improve safety through the design and management of vessels in order to avoid death and serious injury, and to do so proactively, rather than just learning "after the event", a call which was backed by the EU Transport Commissioner, Slim Kallas. Modern cruise ships are very different from their predecessors and changing all the time, primarily to maximise the number of passenger cabins, and it is therefore essential that regulators keep up with the changes to both ships themselves and the nature of their use.

It is apparently undisputed that the *Costa Concordia* incident occurred for a number of reasons. Chief among these is the fact that the vessel deviated from the planned route in order to "salute" the island of Giglio and struck rocks, causing the vessel to capsize and lie heavily on her side. The catastrophe was compounded by the high number of passengers and crew on board, the lack of safety drill and the fact that the vessel's list meant that almost half the lifeboats were ineffective. It has subsequently been suggested that the high centre of gravity found on a modern cruise ship means that capsizing is inherently much more likely.

This incident emphasises several key risk factors including:

- Design of the vessel.
- Crew error.
- Emergency procedures - under SOLAS ships are required to be able to evacuate within

30 minutes, rather than the six hours it took on the *Costa Concordia*.

- Practical issues - location of lifeboats and life jackets and importance of safety briefings.
- Environmental risk (after the event), such as oil spills and damage to reefs.

These risk factors need to be managed as far as possible in order to prevent a disaster of such magnitude occurring again. There is also the added factor, more significant perhaps with passenger vessels than cargo ships, of risk to reputation.

Cruising is now a significant part of the tourism industry, and cruise ships carry huge numbers of passengers each voyage, with large crews comprising not only seamen, but also entertainment, catering and housekeeping staff. The considerations to be taken into account are therefore very different from 100 years ago. Modern cruise ships are considerably taller than the old-style liners such as the *Titanic* and are designed with a large number of decks above the waterline, with a large superstructure accommodating more passenger cabins and balconies, and a flattened hull to allow them to enter more harbours and carry more passengers. As a result, they have a relatively shallow draft and a very high air draft, which leads to the higher centre of gravity (increased by the fact that the swimming pools are generally at the top of the vessel) which has been partly blamed for the *Costa Concordia* incident. As a result, the wind heeling moment



is also high, which has to be compensated for with heeling tanks transferring ballast from side to side to maintain stability and promote passenger comfort.

This had been taken further in recently revised class actions in the US, which allege that the *Costa Concordia* had a flawed design and maximised passenger-carrying capacity at the expense of seaworthiness. The suit suggests that safety was compromised in order to maximise passenger numbers and stated that the shallow draught “made it unstable, and susceptible to tilting during the collision with the rock, rendering many of its lifeboats useless”. It also alleges that the internal architecture made evacuation difficult, turning the vessel into “a deadly maze and labyrinth”. This internal architecture can also lead to an increased instability, with a high shear force and bending moment, due to the nature of the structure, with lots of small internal walls (in cabins) and spaces. Conversely, there are also large open spaces on cruise ships, such as the centrepiece grand atrium and theatres. These open spaces (which have a structural effect more like cargo holds than the rest of a cruise ship) cause different stresses and strains, and present different risks in the event of fire in those spaces, as they need to be able to be easily evacuated.

However, experts have commented that the broad beam of these “floating hotels” promotes stability, despite the higher centre of gravity. Furthermore, modern vessels are designed to stay afloat, even in the event of a significant hull breach, due to large numbers of watertight

compartments. Fire on board is perhaps a more likely event than collision or grounding, and fire on a balcony can spread very quickly down the side of a vessel due to wind. It is therefore important that fires can be isolated and smoke cleared promptly. Fundamentally, the ship itself is designed to limp back to port (under tow if necessary) if disaster strikes. Consequently, cruise ships are significantly safer than many other modes of transport.

The sheer size of modern cruise ships (which have been likened to a small town at sea - the *Costa Concordia* was carrying more than 4,000 passengers and crew) mean that any incident is likely to affect a large number of people, and present major challenges for evacuation, rescue and salvage. It is therefore crucial that all emergency requirements are complied with, and evacuation procedures are properly implemented.

During the evacuation of the *Costa Concordia*, the lifeboats appear to have caused particular problems as many of them were unavailable due to the angle at which the vessel came to rest (about 70°). This angle will also have affected access to emergency corridors. The International Convention for Safety of Life At Sea (SOLAS) (which was developed following the sinking of the *Titanic* and added to following other major incidents such as the sinking of the *Estonia*, in 1994) sets out the requirements for life jackets and lifeboats/rafts (a major issue for the *Titanic* which notoriously did not have enough), as well as their locations and distribution around the ship, and states that lifeboats should be able to be launched at lists of

up to 20° for new vessels. Marine evacuation systems (i.e. chutes for speedy evacuation) and freefall lifeboats (launched at the stern) may deal with some of these problems, but there are concerns over their suitability for the very young and very old. SOLAS also requires that emergency drills for passengers are to take place within 24 hours of the ship leaving the embarkation port, and requires that a sufficient number of crew are trained to handle life boats and deal with passengers. Unfortunately, the *Costa Concordia* incident took place only two hours after leaving the embarkation port, and an emergency drill had not taken place.

The shipping industry is already highly regulated and safety-aware (with conventions such as SOLAS and the Convention on Standards of Training, Certification and Watchkeeping), but in the immediate aftermath of the *Costa Concordia* incident, the Cruise Lines International Association (CLIA) called for a comprehensive evaluation of safety regulations by the IMO, although a fuller investigation would have to wait until the Italian police investigation was complete. The CLIA (which has a North American focus) and the European Cruise Council (ECC) carried out a review of operational safety following the accident, and has now launched new policies as a result. Significantly, the new muster policy is that all passengers must receive their muster drill before the ship sails. They have also prescribed that extra life jackets must be carried (in excess of the SOLAS requirements), voyage planning procedures are tightened and passenger nationality information



must be logged, to be kept ashore, in order that this information can be easily available in the event of an emergency. Bridge access is also to be limited to those with operational functions unless senior management approves otherwise. Another notable addition is to add certain additional requirements to the muster policy to be provided to passengers as required by SOLAS.

Even where excellent procedures have been set down by the owners/operators at management level, human error frequently plays a significant role in accidents in any industry, and is likely to have been a significant factor in the *Costa Concordia* incident. As part of several safety measures introduced by the vessel's operators since the *Costa Concordia* incident (including those recommended by the CLIA), they have announced that they have launched a safety monitoring system which is overseen in real time by land-based staff, thus enabling unexpected changes of direction to be readily identified. Voyage planning will also be discussed before departure.

In addition to this kind of monitoring, regular review of planned maintenance systems, class surveys and claims records can perhaps provide an indication of when something is not quite right, and it is then up to the owners/operators to ensure that all safety procedures are properly implemented, and, if necessary, reviewed and updated. For all vessels, whether cargo, passenger or other types of vessel, there have been suggestions that minimum requirements, whether set by the flag state, classification society or the IMO, are not enough.

Minimum crew requirements, for example, do not take account of the vast amounts of paperwork now required to be completed, or the number of port calls that a cargo ship might make in a short period of time, leading to crew exhaustion and with no time for maintenance to be completed. Crew exhaustion, in particular, has been blamed for major accidents such as the *Exxon Valdez* oil spill. It is not possible to avoid all accidents, but perhaps closer monitoring can reduce their likelihood. Further regulation may also lead to increased costs, but may lead to increased safety and a reduced potential for loss of life.

With accidents such as that of the *Costa Concordia* or other cruise ship incidents such as fires or serious food-poisoning outbreaks, it will be the owners or operators who face many of the subsequent legal claims, whether as a tour operator under the Package Travel Regulations (for EU customers), as an employer (for crew claims) or simply as the provider of the cruise. Given the size of the claims, there is no merit in these claimants seeking recourse from the Captain himself, even if it can be said that it was his negligence that caused the accident. The latest actions launched by passengers in Florida cite inadequate training of crew (as well as the failure to carry out muster drills) as being the root of the negligence leading to the incident. Cruise and tour operators must also consider the reputational aspects of dealing with passenger claims in a reasonable and appropriate manner. However, there may be scope, under English law at least, for defending or passing on claims where a crew member has acted outside his

employment or the accident was actually the responsibility of a third party (perhaps port operatives or stevedores). It is difficult to see how this might be proven, particularly where passage-planning is concerned, as a Master of a ship has considerable freedom to determine this (as he should), and it may be difficult to draw a line as to where he has acted outside his employment. In cases where the Package Travel Regulations apply, the customer can always make the claim against the tour operator in the first instance and it is then up to the tour operator to make an indemnity claim if appropriate.

Fundamentally, ship owners and operators must put in place (and actually apply) all appropriate measures and safety management systems, particularly for passenger ships, where there will be many passengers with no experience of life aboard ship. Crew must be selected and trained appropriately, and following major incidents there need to be systems in place to deal with the injured passengers and their families, and the inevitable claims that follow.

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## Are we about to see history repeating itself?

It took several disastrous casualties in the late 60s and early 70s, including the *Torrey Canyon*, for improved standards and sensible international liability regimes to be introduced for VLCCs. In the same way, it seems likely that the *Deepwater Horizon* incident in the Gulf of Mexico will finally result in real change to the way the oil industry operates. Three relatively recent casualties involving modest size containerships serve as a timely warning that the shipping industry may well soon be facing its own *Deepwater Horizon*.

The *MSC Napoli* was, when she was built in 1991, lauded for a few months as the largest container vessel in the world, with a 4,688 TEU capacity. Famously though, the *MSC Napoli* came to grief in the English channel in January 2007 and was beached at Branscombe Bay in Dorset, becoming the subject of a huge salvage, container recovery and wreck removal project. This project took over three years to complete and the total claim is likely to be in excess of US\$250 million. The *MSC Chitra* casualty occurred after a collision in Mumbai Port in August 2010. Again, by modern standards she is a containership of modest proportion, with a 2,312 TEU capacity. She became a total loss and again salvage, container recovery and wreck removal operations lasted over nine months, with total claims likely to be in excess of US\$200 million. More recently, and perhaps even more controversially, the total loss of the *Rena* after grounding on the Astrolabe reef in New Zealand, is further evidence that even modest containerships can give rise to huge claims. Increasingly, the expectation of

national governments, local and other relevant authorities is that there must be complete removal of all debris including cargo and the vessel itself, almost irrespective of costs.

All of this comes at a time when there is something of a perfect storm taking place. There is a global recession that, if anything, is affecting the shipping industry even more harshly than most sectors; ever larger untested vessels, including container vessels; giant bulk carriers and very large cruise ships; increasing environmental concerns and increasing public and government awareness. The *MSC Napoli* appears to have led to a real sea-change in terms of public awareness and knowledge of shipping casualties (what is often referred to as the *MSC Napoli* effect). Modern communications and instantaneous media reporting means that there is less time than ever to deal with such incidents and the pressure on those trying to manage casualties has never been greater.

In parallel with this, we have seen real struggles in the salvage industry and there are relatively few global players remaining with relatively limited and ageing resources. Whilst the Lloyds Open Form contract remains the preferred contract of choice for major casualties, given the best endeavours obligations that the contract imposes it is quite possible that salvors themselves will become increasingly risk adverse.

Further complications and pressures come from the disposal and recycling of damaged vessels or wrecks. The 1996 Protocol to the London Dumping Convention effectively moved the legal framework from a permissive to restrictive regime and

the Oslo Paris (OSPAR) Convention, which applies to the geographical area of Northern Europe, effectively makes dumping a vessel completely impossible. Costs of wreck removal operations are spiralling upwards at an alarming rate.

There are also logistical challenges in managing casualties on this scale. One particular problem with the salvage of large containership casualties is identifying and having in place a proper system of management so that the costs incurred are paid for by property owners and/or insurers or, in a disposal and recovery operation, damaged and worthless cargo and ultimately removal and disposal of the ship are covered.

Increasingly, we are seeing government and local authority intervention in the management of casualties, with often direct consequences on the costs of these operations. For those involved in these cases, the sheer number of parties to deal with is bewildering. All of the stakeholders need to be engaged with and kept informed and their particular agenda satisfied.

As already discussed, the environmental challenges of casualties on this scale are also enormous. There is increasingly a “zero tolerance” policy towards oil pollution at sea or on beaches, which must be cleaned-up irrespective of cost. We have seen exorbitant claims arising from claimants such as local fishermen and hoteliers, and the cost of cleaning the seabed of debris is also increasingly dramatic. Even where the vessel is dismantled, as with the *MSC Napoli*, there are now huge challenges in meeting the



bureaucratic requirements of various waste recycling directives, which require the provision of all manner of licences and permissions. All of this comes at a time when there are relatively few local recycling options and far stricter requirements in traditional scrapping markets.

The very largest container vessels now are of 14,000, 16,000 or even 18,000 TEU, with even larger vessels on the drawing boards. In the UK, the Port of Felixstowe is investing in excess of £1 billion to ensure that it is well equipped to accommodate the next generation of 20,000 TEU containerships. For anyone who has been involved in recent container casualties like the *MSC Napoli*, *MSC Chitra* or *Rena*, the scale of the claims that would arise from a serious casualty involving one of these behemoths is hard to imagine.

In conclusion, there is an increasingly demanding legal environment for the management of major marine casualties. The cost of salvage of the *Costa Concordia* is likely to exceed US\$300 million which will make it comfortably the largest wreck removal project ever undertaken. The technical challenges faced will be huge and the consequences of failure are quite unimaginable.

In truth, the only surprising aspect of the debate on containership casualties is that there has not been a massive disaster already. There were two new near-misses in 2011, both involving a container vessel in excess of 10,000 TEU, and it can only be a matter of time. The scale of losses and claims from a very large container vessel may run into the billions of dollars. The consequences of such an accident may well result in a complete change in the accepted liability regimes and

even the traditionally accepted marine insurance arrangements for such large vessels. It will be to the enormous credit of the shipping industry if it could accept the inevitability of a major incident on this scale and encourage all stakeholders to see if protocols and procedures can be drawn-up that will ease the pain as and when disaster strikes.

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## Strikes: understanding the risks

Strikes have once again made shipping industry headlines as an almost month-long strike of workers at the Fenoco railway in Colombia began in late July. The strike led to a number of major Colombian coal producers declaring force majeure, halting exports accounting for over 50% of national coal output and leaving vessels waiting for cargo. This is only one of a number of strikes affecting shipping over the course of the last few months, including a Brazilian customs strike, which impacted both exports from and imports to Brazil into August.

In light of the ever-present risk of delays and expense resulting from strike action, both owners and charterers would be well advised to revisit the terms of their charterparties and review the strike clauses. This is emphasised by

the recent English Court of Appeal judgment on strike clause wording in *Carboex S.A. v Louis Dreyfus Commodities Suisse S.A.*<sup>1</sup>. The High Court judgment on this case was considered in detail in the January edition of this Bulletin. The dispute centered on the effect of the inclusion in the amended AmWelsh 1979 charterparty of a WIBON (whether in berth or not) provision. Clause 9 contained the following provision:

*“...in case of strikes, lockouts, civil commotions or any other causes included but not limited to breakdown of shore equipment or accidents beyond the control of the Charterers consignee which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage.”*

However, owners argued that the WIBON provision at Clause 40 of the charterparty meant that laytime would commence in any event, because charterers took the risk of the delay caused by the congestion at the port. They suggested that Clause 9 was intended to cover a situation where the vessel was already in berth but was delayed in discharging due to a strike in progress. Since the strike was concluded once the vessel finally berthed, no period stood to be deducted from the laytime and demurrage was therefore due.

The owners succeeded in arbitration, but the charterers won on appeal to the High Court. On further appeal by the owners to the Court of Appeal, the court found in favour of the charterers, holding:

1. Clause 9 was clearly intended to transfer the risk of some delay caused by strikes from the

<sup>1</sup> [2012] EWCA Civ 838.



charterer to the owner and there was nothing in the language of the clause to indicate that its operation was restricted to time lost while the vessel was alongside the berth.

2. The natural meaning of Clause 9 showed that it was concerned only with the consequences of the excepted causes, not with their duration, and there was nothing in Clause 9 to support the conclusion that its operation was limited to interruptions and delays occurring during the period of the excepted causes - and there was already authority for the proposition that "such time" in Clause 9 meant time lost to the vessel in completing discharging by reason of one of the excepted causes.
3. In order to obtain the protection of Clause 9, the charterer simply had to establish that the event on which he relied fell within the clause and was the effective cause of delay to the vessel.

This latest judgment has upheld the commonly accepted industry view on the effect of the wording. However, the case demonstrates the importance of ensuring that the risk of strikes is properly considered at the fixing stage and clear wording inserted. This is neatly illustrated by another relatively recent decision of the English High Court (*Frontier International Shipping Corp. v Swissmarine Corporation Inc. and another*)<sup>2</sup>. Clause 9 of the relevant charterparty (again an amended AmWelsh 1979) provided:

*"If longer detained, consignee to pay vessel demurrage...dispatch money*

*for lay time saved...In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignee [our emphasis] which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage..."*

The vessel arrived at the discharge port and discharge commenced the next day. Four days later a strike of personnel, employed by the consignee of the cargo, broke out and did not end until almost a month later. Discharge was only completed the day after the strike ended. The arbitrators upheld a claim by the owners for demurrage, finding that although the charterers could not have avoided the strike, it was not outside the control of the consignee. The owners submitted, and the arbitrators agreed, that in order to rely upon Clause 9, the charterers had to prove not just the existence of a strike which prevented or delayed discharging, but also one which was beyond the control of the consignee.

The charterers then appealed to the English High Court, arguing that they were entitled to rely on the existence of a strike provided that it was causative of the delay in discharge and that they did not have to prove that the strike was beyond the consignee's control. The court dismissed the appeal, confirming the decision of the arbitrators. It held:

1. The natural construction of Clause 9, and the use of the word "other", was that the phrase "beyond the control of the consignee" applied not only to "any other causes or accidents" but also to the specified events of strikes, lockouts and civil commotions.

2. It made sense to exclude from the running of laytime events which were beyond the control of the consignee, but did not make sense to exclude from laytime causes which were within the control of the consignee.

In light of this case, charterers entering into voyage charterparties on the AmWelsh 1979 will want to consider amending Clause 9 so as to omit the phrase "*beyond the control of the consignee*", if this is commercially achievable. In this way, charterers will be able to rely on the strike exception, provided that they can prove that the strike was causative of the delay in discharge, without having to prove in addition that the strike was beyond the consignee's control. Appropriate adjustments can of course be made to other printed forms to ensure idle time due to striking by consignees' employees is excluded from laytime. In order to protect their interests, owners entering into voyage charterparties on the basis of the AmWelsh 1979 might consider amending Clause 9 so as to expressly provide that laytime will only be excepted for time lost in the duration of any strike.

When reviewing or drafting strike clauses generally, both parties need to be aware that the general rule remains that an exception clause must expressly state that it applies to laytime or demurrage, otherwise it will not apply to those provisions of the charterparty. It is also important for all those involved in fixing vessels to remember that any strike clause will be construed against the party seeking to rely on it and any ambiguity will therefore be read in favour of owners. For example, the

2. [2004] EWHC 8 (Comm).



English court has held<sup>3</sup> that Clause 28 of the Sugar Charter Party 1969 was not sufficiently clearly worded to apply to laytime or demurrage. The clause stated that "Strikes... or any other force majeure clause... occurring beyond the control of the shippers...which may prevent or delay the loading and discharging of the vessel, always excepted". However, the court decided that the clause was merely a mutual general exception in favour of both owners and charterers in the event that either had a claim against the other for damages.

In conclusion, whilst both owners and charterers will also want to review the terms of existing charterparties to ascertain who bears the risk of any delays caused by strikes, careful attention to the relevant wording at the time of fixing vessels can also pay dividends in mitigating the effects of such delays.

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<sup>3</sup>. [2002] 1 AER (Comm) 214.

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## Conferences & Events

### Lloyds List Middle East Awards Dinner

Dubai  
(16 October 2012)

### Insights and solutions for Australian Chartering Seminar

Sydney  
(17 October 2012)  
Stephen Thompson

### Insights and solutions for Australian Chartering Seminar

Melbourne  
(18 October 2012)  
Hazel Brasington

### Seacare Conference and Awards

Sydney  
(24-25 October 2012)  
Peter Leslie and Ben Buckhurst

## News

### World Ocean Council expands

The membership of the World Ocean Council (WOC) has continued to grow and now includes A P Moller-Maersk and Zodiac Maritime, along with founder members Rio Tinto and Exxon Mobil. HFW are a founder member of this international leadership alliance on Corporate Ocean Responsibility.

WOC convened an Arctic Business Leadership Council Meeting and Business Dialogue with the Arctic Council's Sustainable Development Working Group in Reykjavik last month, with the aim of creating common dialogue between the business community and the Arctic Council, which is the main forum for governmental cooperation in the region.

### Choice of law? Not if chartering for shipments to or from Australia

Foreign law and jurisdiction clauses in voyage charters are now void and unenforceable in Australia. To view this article please go to: <http://www.hfw.com/publications/client-briefings/choice-of-law-not-if-chartering-for-shipments-to-or-from-australia>

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