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Maritime and Transport Law News

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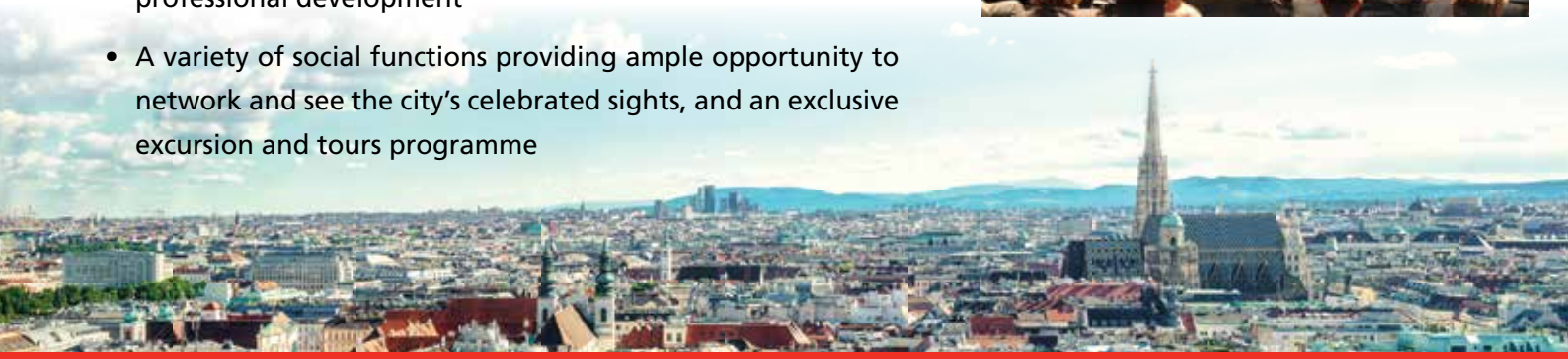
Vienna 4–9 October 2015
ANNUAL CONFERENCE OF THE
INTERNATIONAL BAR ASSOCIATION

In October 2015, the IBA Annual Conference will be held in the baroque splendour of Vienna, with its Hofburg Palace, Spanish riding school and famous Viennese coffee houses. More importantly, Vienna is the hub for Central and Eastern European business, with more than 1,000 international companies coordinating their regional activities from Austria. Over 300 international companies have their CCE headquarters in Vienna and it is the seat of several international organisations such as OPEC and the third United Nations Headquarters. With these links and connections Vienna is a fitting and inspiring setting for the International Bar Association's 2015 Annual Conference.

What will Vienna 2015 offer?

- The largest gathering of the international legal community in the world – a meeting place of more than 6,000 lawyers and legal professionals from around the world
- Nearly 200 working sessions covering all areas of practice relevant to international legal practitioners
- The opportunity to generate new business with the leading firms in the world's key cities
- A registration fee that entitles you to attend as many working sessions throughout the week as you wish
- Up to 25 hours of continuing legal education and continuing professional development
- A variety of social functions providing ample opportunity to network and see the city's celebrated sights, and an exclusive excursion and tours programme



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This newsletter is intended to provide general information regarding recent developments in maritime and transport law. The views expressed are not necessarily those of the International Bar Association.

From the Chair

Ricardo Rozas
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As this is my first year as Chair, I feel a great honour and responsibility in conducting our Committee, which has always been guided by great chairs and leaders. Thus, I have a very high standard to meet. Therefore, it is appropriate that my first act is to acknowledge and thank all of the past chairs for making our Committee the best forum for sharing knowledge, contributing to the industry and making friends.

Before looking ahead to the events coming up this year, I would like to spend a couple of lines on the IBA Annual Conference in Tokyo. The Conference was a fantastic opportunity to learn more about Japan, its culture and its always amazing blend of ancient traditions and high-tech industries. The Conference set a new attendance record and we had a remarkable opening ceremony with the presence of the Emperor and Empress of Japan, as well as Japan's Prime Minister, Shinzō Abe.

The session on hot topics in the maritime industry featured superb presentations on several interesting issues, including the handling of financial crisis, alternative dispute resolution (ADR), new developments in logistics and recent changes in maritime law. We once again collaborated with the Insurance Law Committee for the session on insurance concepts for the maritime industry, which generated an interesting and lively discussion. The session on new concepts in vessel status reminded us of the permanent changes affecting the maritime industry and the need for shipping law to be alert to catch up with ongoing developments and anticipate future trends. Our Land Transport Subcommittee hosted a session on multimodal transport in East Asia and its interplay with sales contracts, which successfully focused on the regional peculiarities with a practical and interactive approach. I would like to thank all session chairs, speakers and contributors for their efforts in organising and presenting the programme, the great success of which was reflected in the number of attendees at each session.

Our traditional joint excursion with the Insurance Law Committee, a day spent visiting the Tokyo Port Museum followed by a boat trip within Tokyo Bay, proved to be another highlight. Special thanks go to Shigeno Yamaguchi for organising this excellent trip.

I would be remiss if I did not mention the Law Rocks concert after our Committee dinner. Many of our members turned out to cheer on our own Maritime Committee band – which won the competition! A good time was had by all.

As you are aware, the midterm conference, Shipping and Chartering in Challenging Times, will be held in a few days (7–8 May 2015) in Geneva, and I anticipate a great event. It is supported by the IBA European Regional Forum and the sessions are on very interesting topics, including the restructuring and insolvency trend in the shipping sector, its legal implications and cross jurisdictional strategies; new challenges relating to the commodity trade in volatile markets; an analysis of the Costa Concordia case from a salvage perspective; and the challenges of spiralling wreck removal costs caused by 'mega' ships. We will also have a session dealing with topical issues and an update on recent developments within key jurisdictions for the shipping and trading industry. I would like to thank Elizabeth Leonhardt, Erik Linnarsson, Neil Klein and Claudio Perrella for putting together this conference. I am sure we will enjoy it very much.

As to our Annual Conference taking place at the Austria Center, Vienna on 4–9 October 2015, our sessions will focus on tax for shipping and whether or not tax haven jurisdictions are the best choice for shipowners and vessel operators, maritime arbitration and emergency interim relief, food transportation and logistics, and our hot topics in the maritime industry. There are still speakers' slots available for some of the Vienna sessions, and I encourage you to approach me or any of our officers in case you want to participate as a speaker.

I would also like to thank our Newsletter Editors, Richard V Singleton and Johannes Grove Nielsen, for their fantastic work in putting together this newsletter. This edition includes very exciting topics and reflects what we do and the knowledge we have; I trust you will enjoy them.

Finally, I take the opportunity to give special thanks to our past Chair Jan Dreyer for his remarkable leadership of the Committee, which is reflected, among other ways, in the outcome of the Boston 2013 and Tokyo 2014 conferences. Jan, you did a great job and I will do my best to follow your steps!

I wish you all the best and look forward to seeing you both in Geneva and Vienna.

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From the Editors

Dear readers,

Welcome to the spring 2015 edition of the IBA Maritime and Transport Law Committee Newsletter. Richard thanks Elinor Dautlich for all of her hard work during the two years she served as Editor and for the guidance she provided last year when she overlapped with Richard as Editor. Her keen wit, writing skills and sound understanding of the law, as reflected in the Newsletter's 'Divided by a Common Language' feature, made her a pleasure to work with.

Richard also welcomes his new Editor, Johannes Grove Nielsen. Johannes' work in preparing this edition has demonstrated that this Newsletter will thrive during the next two years.

We have a very interesting selection of high quality articles in this edition. They include articles on maritime and land transport issues written by lawyers from the four corners of the globe, including Japan, Malaysia, France, the United States, Italy, Denmark, the United Kingdom, Costa Rica, the UAE, Ukraine and the Netherlands. The subjects include wrongful arrest, pilotage clauses, force majeure, insurance issues in offshore construction projects, the CMR Convention, and issues arising from the OW Bunker Group's demise, among others.

We also invite you to learn more about Elizabeth Leonhardt in her 'Meet the Officer' interview. Her personal history and insights into the profession and practice of law are extremely interesting and a source of inspiration for young legal professionals, particularly women.

Finally, this newsletter is all about you, our committee members and readers, and it is only as good as the contributions we receive. We have begun planning for the autumn edition, which should be published just before the Vienna Conference. We encourage all of you to take time to write an article and submit it for publication.

We look forward to seeing you at the Geneva conference, Shipping and Chartering in Challenging Times, from 7–8 May 2015.

Meet the Officer

Elizabeth Leonhardt
Maritime and Transport Law Committee Secretary
General Counsel, SwissMarine Services, Geneva

In this edition of the IBA Maritime and Transport Law Committee Newsletter, we find out more about the Committee's Secretary, Elizabeth Leonhardt, in our 'Meet the Officer' feature. If you have a question for the officers of the Committee, please email **editor@int-bar.org** with your question, name, firm, city and position in the IBA.

How did you get into the law?

I finished high school at the age of 16. Selection for a Brazilian university requires a separate entry test for each university (usually lasting three days) and a substantial fee for each test. The leading universities in Brazil were state universities and their students were generally selected from private schools as they were better prepared to take the three-day test.

My family was very poor and my parents could not afford private education. Since I did not think that I would be able to get into a university, when I finished high school I decided to get a job and study part-time at night. Before I started looking for a job, however, my father agreed to pay for one test. Of course, I chose the most competitive course. To my surprise, I passed and was accepted into the State University of São Paulo (UNESP), which was one of the leading universities and law schools in Brazil. That is how I became a lawyer in Brazil, and later a solicitor in the UK.

If you were not a lawyer, what would you do?

I would be a journalist or a professional athlete. I was a champion marathon swimmer in the state of São Paulo and represented my club and Brazil for many years at an international level.

What advice would you give to someone wishing to become an international lawyer?

To be an international lawyer, a person must be prepared for many cultural, educational and professional challenges, including having to qualify in another jurisdiction. As the competition is fierce, you must strive to do better than the next person, keep your head up and learn when criticised, and convert cultural differences into an asset for your firm or company. In summary, work hard and aim high.

How has your role changed post-financial crisis?

Not much, if at all. I was in private practice in 2008 and my practice – shipping, insurance and reinsurance in Latin America – was a growing area. Since then, we do not seem to have made it out of the financial crisis. Today, as in-house legal counsel, given the financial problems in the market, I must be more proactive and ensure my legal analysis – and the analysis of outside counsel I instruct – fully supports the company's commercial goals. This means more involvement at management level and strategic planning.

What do you enjoy the most? The least?

This could be an endless list! One thing I really enjoy is sharing legal knowledge and experience, and introducing people and bringing them together for that purpose. To that end I organise my own events and seminars in Geneva, which today attract attendance from law firms and trading companies from around the world. On the other hand, as can be expected, initiative and/or organisation – even in Switzerland – often are met with excessive bureaucracy and all the attendant delays and problems that come with it. So advance planning or anticipation is a good thing.

And, as I am writing this answer and the sun is finally shining in Geneva, it occurred to me that one of the things I like least is enduring the cold weather in the winter months. One would think that after being in Europe for more than 20 years I would have adjusted to it. But I have not, and luckily cold weather was not one of the

challenges I had to 'expressly' overcome to become a solicitor or achieve professional success outside my country. Being from Brazil, I do love hot weather and the sun. In any event, the sacrifice, if I can put it like that, has been worth it!

What has been the biggest challenge of your career? How did you overcome it?

My initial challenge was how to pay for my university tuition, books and housing, among other things. Since I was a nationally ranked swimmer, I gave lessons and swam competitively for a top club, which helped pay for some of my costs, but it was really tough. My next challenge was to go to England, learn to speak English at a proficient level, qualify as a solicitor and then find a job with a London firm! And then I had to focus on finding a practice area in which I could use my cultural upbringing as the asset.

Being a woman solicitor from Brazil, I was told by my friends and colleagues that I would not make it. I decided to prove them wrong. Actually, I had no choice but to find the best job with a top firm, work harder than my competition, and grow a new practice dedicated to Latin America. That led me to becoming a partner in London at a leading international law firm, at a time when there were still only a few female partners. Latin America became the 'new black' and, with hard work, many long hours and a lot of air miles, my practice developed really well.

My professional success with a leading London law firm paved the way for the next stage in my professional career – being in-house. I am now the General Counsel of SwissMarine in Geneva, a position that took me to another level in the legal profession – to management in the shipping/trade and commodities industry.

If you could put together a wish list of changes you would bring about in the profession or your area of practice, what would you include?

Very broadly I would say:

- opportunities for international legal transfer tests in key jurisdictions to allow for recognition of foreign lawyers who play a key role in the 'international' law firms (law firms should work with their local law societies); and
- more opportunities for young, talented lawyers.

What do you do in your free time?

Switzerland is a sport and fitness inspired country, so I run, cycle, gym and swim as much as I can! I also love organising dinner parties and receptions at my home, soirees to bring the 'best of the best' people together, where I do all the cooking (paired with great wines, of course!).

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Vienna 4–9 October 2015
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Maritime and Transport Committee sessions

Monday 0930 – 1230

Hot topics in the maritime industry

Presented by the Maritime and Transport Law Committee

This traditional session will deal with topics moving the maritime and transport industry, from new developments in the logistics industry to recent changes in maritime law.

Wednesday 1430 – 1730

Maritime arbitration and emergency interim relief

Presented by the Maritime and Transport Law Committee

The need for and importance of interim relief in maritime arbitrations should not be overlooked. Where a party is unable to arrest a vessel for security, many will naturally turn to consider what other forms of interim relief are available, for example, an injunction or preservation order, which can be obtained in order to exert some immediate pressure on the other party. The rising trend in the appointment of emergency arbitrators, and the recent introduction by various institutions of suitable provisions to allow for the appointment of emergency arbitrators, bears testament to the importance of interim reliefs. We will kick off this session with a mock hearing where the tribunal will consider an urgent application for an injunction. This will be followed by an interesting panel discussion on related topics such as the appointment of emergency arbitrators, the applicable test when considering an application for interim relief, and the enforcement of such orders.

Thursday 0930 – 1230

Food transportation and logistics

Presented by the Maritime and Transport Law Committee and the Healthcare and Life Sciences Law Committee

Transport and distribution are key elements in the international trade of food products. Refrigerated cargoes are invariably perishable to a greater or lesser degree, and their safe carriage depends on maintaining suitable storage conditions during transportation. Proper packaging is required, and the slightest error may be detrimental either to the preservation of the goods or to the insurance cover. The regulatory aspects related to labelling, packaging and food safety are equally paramount. The session will focus on issues related to logistics in the food industry (liability regimes, role of agents and freight forwarders, consequences arising from contamination and deterioration of food products during transit and storage, latest developments in case law and legislation) with a practical and interactive approach.

Thursday 1430 – 1730

Tax for shipping – are tax haven jurisdictions really the best destination for shipowners and vessels operators?

Presented by the Maritime and Transport Law Committee and the Taxes Committee

Taxation has always been a major aspect to be assessed when dealing with vessel and offshore units ownership and chartering activities. In a context of difficult financial times for the shipping industry since the 2008 economic crisis, a tax wise planning has been even more crucial for the maritime industry as the profitability margins have dropped substantially. Maritime lawyers when structuring vessels' ownership and finance schemes, and also when tailoring contractual chartering chains, are often joining forces with tax lawyers and consultants for a more appropriate contractual design to reduce the tax burdens. Cross-border shipping transactions are always a troubled and challengeable sea to navigate and the traditional tax heaven flag structuring and bareboat 'ownership' registries are sometimes no longer an option when dealing with vessels operating in certain jurisdictions. Customs rules for temporary importation of such assets, cabotage restrictions and corporate local taxes applicable to shipping companies (including the tonnage tax methods), charter hire international flow and taxation, transfer pricing rules and international crew salary payments are among the topics that will be covered during this interactive joint session of the Maritime and Transport Law Committee and the Taxes Committee.

During the first half, the session will have panellists speaking from the most traditional shipping jurisdictions, including the most favourable tax jurisdiction, explaining their experiences, pitfalls and challenges. The second half will be dedicated to a quick-fire panel format where the panellists will respond to a straightforward 'How to do a tax wise shipping in their jurisdiction' by means of a questionnaire prepared by the moderators, and will also interact with the audience.

FEATURE ARTICLES

The mirage of a wrongful vessel arrest claim in the UAE

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This article explores the possibility of the impossible – a claim for wrongful vessel arrest in the United Arab Emirates (UAE).

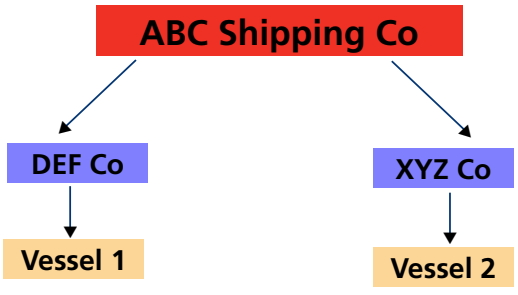
Every day, ships are arrested in the UAE and lawyers flood the courts with petitions to arrest ships for various claims and debts. The respective Courts of Cassation and Union Supreme Court have analysed the many facets of arresting ships under UAE Federal Law No 26 of 1981, concerning the Commercial Maritime Law (CML). However, by our count, and subject to a recent judgment,[1] there has not been a single case of wrongful ship arrest in the UAE. This, of course, cannot be mistaken to mean that there has never been a wrongful ship arrest.

It has been said among maritime lawyers that UAE courts are reluctant to hold a party liable for wrongfully arresting a vessel. Some of that thinking may stem from the lack of any definition of wrongful vessel arrest or its standards or elements in the CML, or any other UAE law for that matter.

At the same time, many shipowners request legal advice as to whether their vessel was wrongfully arrested and what remedy they may have, if any. Most law firms usually advise that, even though the arrest was based on weak or even frivolous maritime claims, the high level of uncertainty does not justify the fees in pursuing a wrongful vessel arrest claim.

Perhaps it is time to consider to what extent a UAE court would grant a claim for wrongful vessel arrest and shatter the notion that a wrongful vessel claim is impossible in the UAE.[2]

Consider the following:



- ABC Shipping Co owns 100 per cent of the shares of DEF Co and XYZ Co;
- DEF Co is the registered owner of Vessel 1; and
- XYZ Co is the registered owner of Vessel 2.

A dispute arises between charterer GHI Co and Vessel 1, along with her owners DEF Co.

While Vessel 2 is in Dubai discharging her cargo, GHI Co petitions the Dubai Court to arrest Vessel 2. GHI Co's petition claims its right to arrest Vessel 2 is pursuant to CML Article 116(1), which states: '[a]ny person seeking to recover the debts referred to in the preceding Article may arrest the vessel to which the debt relates, *or any other vessel owned by the debtor if such other vessel was owned by him* at the time the debt arose [emphasis added].' GHI Co knowingly misrepresents evidence to the Dubai Court stating that both Vessel 1 and Vessel 2 are actually owned by ABC Shipping Co.

As a result of GHI Co's misrepresentation, the Court orders the arrest of Vessel 2, which is thereby banned from leaving the UAE for several months. During Vessel 2's arrest, she is unable to operate, unable to collect revenue and forced to renege on previously agreed contracts, causing a loss of profits and future earnings.

Basic legal principles

Beneficial owner versus registered owner

A beneficial owner is an entity enjoying the benefits of ownership of a vessel, for example, through receipt of income; however, actual title of ownership is in the name of another entity, called the registered owner.

The aforementioned is no different from the legal relationship between holding and subsidiary companies. Without delving into a prolonged academic discussion with regards to corporate legal personalities, simply stated, the beneficial owner of a vessel is treated as a separate legal entity from the registered owner of a vessel, unless its existence is a mere sham, it is used as an instrument for concealing the truth, or its organisation and control is a mere instrumentality of the registered owner.

Sister ships versus associated ships

Sister ships, in the legal context, refer to two or more ships that are or are deemed to be in common registered ownership, that is, they are the registered property of the same owner. In our previous example, if XYZ Co also owned Vessel 3, then Vessel 2 and Vessel 3 would be considered sister ships (part of the same immediate family of ships).

Associated ships are indirectly controlled by the same person, that is, associated ships can be traced back to the same beneficial owner. Thus, in our previous example, Vessel 1 and Vessel 2 are associated ships because they have the same beneficial owner (if sister ships are siblings, associated ships are cousins).

Arresting 'non-guilty ships'

The International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships of 1952 (the '1952 Arrest Convention') and the International Convention on Arrest of Ships of 1999 (the '1999 Arrest Convention')[3] permit the arrest of a ship other than that giving rise to the cause of action (the 'non-guilty ship'). Article 3(1) of the 1952 Arrest Convention states: 'a claimant may arrest... any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship.' Similarly, the 1999 Arrest Convention permits arrests of non-guilty ships under Article 3(2): '[a]rrest is also permissible of any other ship or ships which, when the arrest is affected, is or are owned by the person who is liable for the maritime claim.' The 1952 Arrest Convention deems ships to be under the same ownership 'when all the shares [of the ship] are owned by the same person or persons'.[4] Therefore, the international arrest regimes limit the arrest of a non-guilty ship to sister ships, namely, ships under the same registered ownership.

The UAE has not signed or ratified the 1952 or 1999 Arrest Conventions. However, the CML uses similar language under Article 116(1): '[a]ny person seeking to recover the debts... may arrest the vessel to which the debt relates, or any other vessel owned by the debtor if such other vessel was owned by him at the time the debt arose.' Accordingly, pursuant to UAE maritime law, only ships under the same registered ownership are deemed sister ships. In other words, only siblings can be arrested, not cousins. In fact, the majority of jurisdictions share the same legal concept for ship arrests with a handful of notable exceptions.[5]

The legal dilemmas

Compare and contrast legal standards

The 1952 and 1999 Arrest Conventions do not deal with wrongful ship arrest. The Conventions leave that matter to be decided under the law of the country in whose jurisdiction the ship is arrested. Under English law, the test for wrongful arrest, as held in *The Evangelismos*[6] and *The Strathnaver*,[7] requires proof by the owner of the arrested ship of *mala fides* (malicious negligence) or *crassa negligentia* (a form of gross negligence implying malice) on the part of the arresting party. This is the terminology frequently cited to represent the test derived from these decisions, although it has been elaborated on by subsequent case law. Similarly, an arrest will be deemed wrongful in France if the arresting party acted in bad faith or with malice.

There are two main hurdles to establishing a wrongful vessel arrest claim in the UAE: (1) no UAE statutory definition of what constitutes a wrongful vessel arrest; and (2) virtually no case law dealing with this particular legal issue.[8] For these reasons, to determine whether a ship arrest was wrongful, we must analyse UAE statutes and case law analogously. The most relevant statute is Federal Law No 5 of 1985 (the 'Civil Code'), in particular Part 3 concerning acts causing harm.

Harm caused

Article 282[9] states that '[a]ny harm done to another shall render the doer thereof, even though not a person of discretion, liable to make good the harm'. Article 282 thus conditions the liability to make compensation arising out of any harm on three elements: (1) a harmful act or omission to another; (2) damages sustained; and (3) a causal link between the harmful act or omission and the damages suffered. The usage of the word 'harm' in Article 282 does not limit liability to unlawful acts or acts contrary to law. Legal commentary provides that what constitutes harm is a determination for the judge, who should be guided by the legal prohibition against causing harm. UAE law imposes upon every person the obligation not to cause harm to others, as does the law in many other jurisdictions. This obligation requires the judge to examine the defendant's conduct in

a manner similar to the 'duty of care' under common law for negligence.

The phrase 'make good' was translated from the Arabic word '*daman*'. '*Daman*' is a concept under Islamic jurisprudence that, for actions or omissions causing loss, imposes on a wrongdoer the basic duty to restore the value of the loss. Many jurisdictions recognise similar legal concepts for losses sustained.

Therefore, it appears that UAE law recognises liability for harm sustained. However, the more important question is how a party satisfies the court of the elements required to establish a party's liability for the harm that party has done.

Direct versus indirect causation

Article 283 states that '(1) harm may be direct or by causation; (2) if the harm is direct, it must unconditionally be made good, and if it is consequential, there must be a wrongdoing or a deliberate act or the act must have led to the harm'. It is important to understand that in English, as in Arabic, the words 'deliberate' and 'wrongful' are not one and the same. Under Article 283, 'deliberate' refers to a deliberate act that causes harm, rather than the deliberate doing of the act itself. A person may deliberately perform an act without the intention of causing harm, but harm nevertheless is the result of the deliberate act. A wrongful act is where the person has the right to perform the act, but where damage to another results from the act.

Legal commentary on Article 283 sets the Islamic jurisprudence's criterion for distinguishing between direct damage and indirectly causative damage. It is considered direct damage if the damage is an independent cause and reason for the damage in and of itself. In such a scenario, the claimant is not required to show a deliberate or wrongful act. However, damage is considered indirect causative damage where the act is not the direct cause of the damage. In that event, the claimant has the burden to prove an element of deliberateness or wrongdoing for the court to find liability.

The UAE Union Supreme Court has held that '[i]ndirect causation is the doing of an act which is a cause leading to the occurrence of the harm, and where such cause would not, in the ordinary course of events, lead to the occurrence of such harm, or contribute to it, and would not have done so but for the fact that it was followed by the direct causative act, which was alone the direct cause connection between the wrongful act and the harm'.[10]

The preceding paragraphs are often a spider web of confusion, even for the most astute of legal minds. Let us analyse it through the famous (or infamous) 'digging a hole' example. If a person digs a hole on a public road without permission and another person is injured, he or she will be the indirect causer of damage and will be held liable because he or she acted wrongfully and the damage was a causative result of the wrongful act. However, if a person digs a hole on his or her private property and another is injured, he or she will not be liable because he or she was not acting wrongfully since he or she owns the property. But, if a person digs a hole on his or her private property with the intention of causing harm to another and a person is injured, he or she will be found liable as an indirect causer of harm because he or she acted deliberately in causing the damage, although the act itself was not wrongful. However, assume a person digs a hole in a public road without permission and another person pushes someone into the hole causing injury, the person who pushed another is the direct cause of harm, while the person that dug the hole is the indirect cause of harm. Thus, 'direct' means a positive action to cause harm (pushing another into a hole), whereas 'indirect' means an action leading to harm (digging the hole).

The example above of digging holes is relevant to claims for wrongful vessel arrests. The paramount question in wrongful arrest cases is whether the arresting party was the direct cause or the indirect cause of the damage. The arresting party will petition the court to arrest the vessel. Based on that petition, the court will issue its order to arrest the vessel. In such cases, did the court directly cause the damage with the arresting party being the indirect cause of damage?

Some have argued that, in a wrongful vessel arrest claim, the damage would not occur separately and apart from the court's order. As such, the court, the argument goes, is the direct cause of harm, while the arresting party is the indirect cause of harm.

The aforementioned legal analysis is flawed for several reasons. First, under a vessel arrest petition, the court merely reviews the petition as a procedural matter rather than delving into the merits or substantive claims (hence why parties must file substantive claims apart from their arrest petitions). Secondly, what recourse does a ship owner have against the court that issued the arrest order (we have not heard of the case *Shipowner Company v Dubai Court of First*

Instance!)? Thirdly, what would be the public policy message sent when the defence of an arresting party is simply 'if you don't like it, go sue the court'?

Putting aside the above considerations, for argument's sake assume an arresting party is the indirect cause of harm. A party's misrepresentations to the court with regard to the ownership structure of two vessels (as in our previous example) is both a wrongful and deliberate act. In our example, GHI Co had no right under UAE law to arrest Vessel 2. Stating to the court that ABC Shipping Co is the owner of both Vessel 1 and Vessel 2 is a clear misrepresentation of the facts. It is only through misrepresenting the facts to the court that the court ordered the arrest. Misrepresentation of facts to a court should be considered no differently than the forgery of documents submitted as evidence. In both circumstances, a party has deliberately and wrongfully misled the court to a decision it would otherwise rule against. If misrepresentation of material facts to the court does not suffice for a wrongful vessel arrest claim, then it is difficult to imagine what does.

On the other hand, where a party has a legal right to arrest a vessel, but innocently misstates a fact, this situation would be similar to digging a hole on your private property. The arresting party had a rightful maritime claim and a right against the vessel under the CML, but innocently misstated a material fact that resulted in the wrongful arrest. Here, harm was done to the shipowner, but the arresting party should not be liable under Article 283 because he or she was not acting wrongfully or deliberately in filing the petition.

Direct always beats indirect

The aforementioned analysis seems to support holding an arresting party liable for wrongfully arresting a ship even though the arresting party is the indirect cause of harm. But Article 284 of the Civil Code must also be considered. Article 284 states that '[i]f the same harm is caused by a direct actor and an indirect actor, judgment shall be against the direct actor'. The Dubai Court of Cassation has held that '[i]f two acts combine to cause damage, one of them direct and the other indirect, then the basic rule is that compensation will be payable by the doer of the direct act'.[11] Consider once again the 'digging a hole' example, where a person digs a hole in a public road without permission and another person pushes someone into the hole causing injury. Pursuant to Article 284, the person who pushed another is liable, but the digger of the hole is not liable because digging the hole (although wrongful) did not directly lead to damage. Absent the direct act of pushing another into the hole, there would be no injury, and the digger is absolved of liability. However, had the person fallen into the hole on his or her own, the person that dug the hole would be liable as the indirect causer of damage.

Following the rationale that the arresting party is the indirect causer of a wrongful vessel arrest and the court is the direct causer, liability for a wrongful vessel arrest will be against the court that issued the arrest order. Put another way, under the aforementioned reasoning, an arresting party will never be liable for wrongfully arresting a ship because it will always be the court that directly caused the ship to be arrested!

There is no way to believe this was the intention of the drafters of the Civil Code. The courts have held that the question of whether an act was the direct or indirect cause of harm sustained is a matter of fact to be determined at the discretion of the trial court.[12] The trial court must also determine whether there has been fault, and the causal connection between fault and the harm suffered. Such a decision must be based on 'sound grounds sufficient to support' the judgment.[13]

As a result, the trial court should find that the arresting party is the direct causer of harm in the situation of a wrongful vessel arrest. Otherwise, UAE law will effectively provide complete immunity to parties that may misrepresent and even forge evidence in obtaining ship arrest orders.

Conclusion

UAE law did not intend for arresting parties to have blanket immunity for arresting vessels, especially where the arrests are frivolous or otherwise based on misrepresentations of material facts to the court. The existing law and the discretion afforded to the courts provide the framework for judges to hold those who wrongfully arrest accountable for their wrongdoing – and it is time the courts did so.

Notes

1 Prior to publication of this article, a case for wrongful vessel arrest was handed down by the Court of First Instance in favour of the shipowner. The author has not had the opportunity to review the judgment as it has not yet been published at the time of this article's publication. However, it is understood that the judgment is based on the legal analysis discussed in this article. The judgment is appealable to the Court of Appeal.

2 See endnote 1.
3 The 1999 Arrest Convention is a modification of the 1952 Arrest Convention; however, it has thus far only been signed by 11 countries.
4 Article 3(2) of the 1952 Arrest Convention.
5 France and South Africa.
6 [1858] 12 Moo PC 352.
7 [1875] 1 App Cas 58.
8 It is important to note that the UAE legal system is not precedent-based and case law, though used as a guideline, is not binding.
9 From here, all Articles refer to the Civil Code, unless otherwise stated.
10 Union Supreme Court, Decision 66 of Judicial Year 22, 20 November 2001.
11 Dubai Court of Cassation, 188/2009, 18 October 2009, para 4.
12 *Ibid.*
13 Union Supreme Court, Decision 155 of Judicial Year 20, 19 November 2000, para 4.

Insurance issues in offshore marine construction

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This article will discuss insurance issues that are likely to arise in the event of a marine casualty during an offshore construction project. Many scenarios can be imagined, but assume for the purpose of the following discussion that the project owner has hired a general contractor to perform the work, who in turn has hired any number of subcontractors to handle various elements of the project under the contractor's control and supervision.

Two insurance models

A major concern in offshore projects – as with any construction project – is what happens when something goes wrong. Even the simplest offshore construction is always more complicated than analogous work onshore, and the potential consequences of a casualty can include personal injury and death claims, damage to the project itself, damage to assets being used to perform the work, damage to third-party property and damage to the environment. Potential exposures – especially in the case of environmental damage – can run to billions of dollars. Given this fact, it should be obvious that insurance is a critical element of any marine construction endeavour. So, how are construction insurance packages set up?

The 'traditional' arrangement was for the principal, general contractor and all subcontractors each to have a separate insurance package to cover its risks and liabilities. Any coverage would then have to be resolved based on who was liable for any given loss, with each party's insurance covering legal expenses for its insured and the insurance of the liable party ultimately responding for the loss.

In many instances, this arrangement is modified, with parties agreeing to so-called 'knock-for-knock' provisions in their contracts, by which each party assumes the risk of injury, loss or damage to its personnel and equipment, even if caused by another party's negligence or fault. The purpose of this arrangement is to reduce the likelihood and cost of disputes among the contracting parties over whose insurance should cover a loss. Insurers are often willing to insure on this basis because it reduces their overall costs, even if it exposes the insurer to the possibility of covering its insured on the basis of a third party's fault.

Although still a very common method of arranging insurance for offshore construction – at least for smaller projects – this model has several potential downsides. First, it is more expensive commonly for multiple parties to have separate but essentially identical policies rather than a single insurance package covering all involved parties. Moreover, when several parties all have separate insurance policies, the risk substantially increases that there will be gaps in coverage – either within one party's insurance package or between multiple parties. Where multiple insurance policies are potentially implicated, the risk increases substantially of litigation between contracting parties over liability or coverage. In addition, where each party is responsible for obtaining and maintaining its own

insurance, it becomes significantly more difficult for the hiring company to ensure that its contractor and all subcontractors are fulfilling their obligations to obtain good quality insurance and to maintain all required insurance.

Given the many problems with this multi-insurance model, the market began to develop a model in the 1980s and 1990s by which the parties would procure one comprehensive Construction All Risks (CAR) insurance package for the entire project that covers all involved parties against all risk and losses, irrespective of fault. In 2001, the WELCAR insurance form was developed as an industry standard. It provides first-party insurance against 'all risks of physical loss of and/or physical damage' to covered property and third-party coverage for legal or contractual liability to third parties for bodily injury or property damage.

Although CAR coverage is very broad, it still does not cover all risks – particularly including many maritime risks ordinarily falling within protection and indemnity (P&I) type coverage. This issue is further complicated because P&I policies exclude coverage for 'specialist operations', which means that vessel owners have to obtain special cover for these risks. The WELCAR policy also does not cover loss or damage to the insured's property, such as an adjacent oil well or platform, although typically this coverage can be included for an additional premium.

Which policy responds?

The 'traditional' insurance model is fertile ground for many problems. A typical insurance package will include a commercial general liability (CGL) policy, a workers' compensation policy, P&I coverage and hull and machinery (H&M) coverage, if the party owns any vessels, and then 'bumbershoot' and excess liability coverage, which is intended to fill any coverage gaps and extend the policy limits on the main policies. One of the common complications in a marine casualty situation is determining where the coverage line stands between the CGL, P&I and H&M policies.

The CGL policy normally covers liability for damage to third-party property caused by one's negligence, and if the casualty is caused by a subcontractor's vessel, then any exposure of the general contractor – say, for instance, for negligently planning the project or hiring an incompetent subcontractor – probably falls under that policy. But CGL policies ordinarily exclude liability relating to ownership or use of a vessel, so if the casualty involves a vessel belonging to the contractor rather than a subcontractor then there is probably no coverage under this policy.

If the contractor owns or charters vessels, then it should have P&I coverage. As noted above, however, P&I coverage ordinarily excludes 'specialist operations', which includes pipelaying and other marine construction activities. Moreover, P&I rules typically exclude liability for risks covered by standard hull and machinery policies, which includes at least 3/4 coverage for collision and may or may not cover liability for damage to 'fixed and floating objects'. In addition, if the member has obtained 4/4 collision coverage under its hull policy, as is common in many continental insurance policies, then there is arguably no P&I coverage at all, unless the P&I coverage becomes excess to the H&M policy limits.

Additional insureds

In many circumstances, one party to a construction contract will require that it be named as an additional insured on the other party's insurance. This arrangement is really trying to simulate the solution reached by the WELCAR policy by giving the principal comfort that it will be covered directly by its contractor's insurance rather than having to invoke its own insurance to sue the contractor for indemnity based on its negligence or breach of contract. It is an arrangement, however, that has some potential risks.

First, a contractor has to have the right to add parties to its insurance as additional assureds. This is a contractual right governed by the terms of the insurance and, while most third-party liability policies will allow it in this context, it is not always automatic. The insurer may have a requirement that it pre-approve additional assured exposure and, in particular, that it review and agree to the proposed contract.

More problematic may be language in the policy that provides that any coverage to an additional insured is 'limited to those risks covered by Contractor's insurance for which Contractor has agreed under the Contract to assume responsibility or indemnify Company'. Here, the principal may have expected that it would be covered under the contractor's policy, even for liability for its own negligence or fault, but this language only guarantees

that the insurer will directly cover the principal for the contractor's insured negligence or fault.

A big problem is that parties usually rely solely on certificates of insurance to certify the types and policy limits of the coverage obtained, but without actually reviewing the policies to see whether they provide adequate coverage. In addition, if the contractor undertakes in the construction contract to provide more coverage than is actually provided, then the company may have a claim for breach of contract on the grounds that the contractor failed to procure adequate insurance, but that may be small consolation if the contractor becomes insolvent.

An important component of 'sharing' policies between the company and contractors is that to realise the benefits, the parties need to agree to waive indemnity claims between themselves. For instance, if the company is going to be an additional insured under the contractor's insurance it would make little sense for the parties to fight between themselves over who is actually at fault for a given incident. In addition, it makes less sense for the contractor's insurer to pursue a subrogated claim against the company if it is also insuring the company against the very same loss. Therefore, it is common for construction contracts with additional insured provisions to also include 'waiver of subrogation' clauses. Here again, however, this is a matter that needs to be addressed properly between the insurer and insured because if the insured has waived subrogation in a context where the policy does not allow it, then the insured is jeopardising its own coverage by impairing the insurer's right of subrogation improperly.

Another context where waiver of subrogation arises is where knock-for-knock clauses are used. Recall that these are clauses that provide that each party will bear its own risk of loss for injury to its personnel or loss of its property. Obviously, the purpose of such clauses would be defeated if the insurer could nevertheless pursue a subrogated claim against the other party. However, each party needs to be certain that its insurance will accept a knock-for-knock contractual arrangement because such an agreement substantially alters the risk the insurer is undertaking.

Conclusion

Insurance matters can become complicated quickly when there is a casualty in a marine construction project and problems can arise easily, even when the parties had the best intentions of drafting their construction contract to avoid internal conflicts on liability. In addition, while there are many good reasons to opt for a CAR policy instead of the traditional insurance model, even the all-risks option is not without its perils. Indeed, a movement to amend the WELCAR policy is currently under way, and many of the proposed amendments would further limit its coverage. In any event, it is clear that when it comes to insurance structure analysis, an ounce of prevention is worth far more than a pound of cure.

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ARTICLES

Ship arrest procedure in Costa Rica

Due to our proximity to the Panama Canal, the rest of the world tends to ignore our piece of history within the maritime community. With fewer than 60,000km^2 of land, Costa Rica has three active ports. The main port is Puerto Moín in the Province of Limón, a town in the Atlantic Coast that receives over a million twenty-foot equivalent units (TEUs) a year. On the Pacific Ocean coast we have Puerto Caldera, with over 250,000 TEUs a year, and a third specialised port that is used only for sugar and derivative products, such as molasses and ethanol.

Ship arrests are regulated and governed by the International Convention Relating to the Arrest of Sea-Going Ships (Brussels, 10 May 1952) (the 'Convention') and are executed domestically as preventive or precautionary attachments. The Convention was ratified by Costa Rica in 1954 and has been in force and effect since then.

Although Costa Rica ratified the Convention, it made two important caveats. First, Costa Rica only recognises the arrest of a ship that is owned by the person or legal entity that appears as the actual registered owner at the time at which the arrest is filed. The Convention provides – without taking into consideration the identity of the actual owner of the vessel – that a claim can be filed against the owner of a ship at the time that the maritime claim arose (as per Article 3, paragraph 1 of the Convention). As such, under Costa Rican law a claimant cannot arrest a ship for maritime claims that arose under the control of a previous owner.

Secondly, under Costa Rican procedural law, the only courts with sufficient jurisdiction to determine the case upon its merits are those pertaining to the vessel's flag or those in which the defendant is domiciled, with the following exceptions: (1) maritime claims related to disputes of which the subject matter is the title or ownership of any ship; (2) disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship; and (3) and the mortgage or hypothecation of any ship.

The preventive attachment under the Convention constitutes a physical arrest of the ship. Under the precautionary attachment process in civil proceedings, the claimant holding a legitimate maritime claim is compelled by law to post a cash bond equal to 25 per cent of the total value of the claim or 50 per cent for non-monetary pledges (such as letters of credit or bank warranties). The holder of a *título ejecutivo*, together with a formal ruling from a court of law, exonerates the claimant from posting any type of bond or warranty. Some examples of a *título ejecutivo* in Costa Rica are: public deeds; registered public deeds; judicially recognised documents; judicial admissions; final non-appealable judgments; promissory notes; and checks and invoices duly signed by the registered debtor.

Costa Rican law requires that the claimant filing a preventive attachment file the merits of the claim within one month following the arrest. It is imperative that a claimant complies with this requirement. Failure to do so could result in loss of the posted bond in favour of the alleged defendant. Likewise, although Costa Rica does not have a legal vehicle technically known as a *saisse conservatoire*, the precautionary attachment as regulated by our procedural Civil Code has the same effect, but is not as extensive as the United States Federal Rule B Attachment.

Some other aspects of Costa Rican arrest law deserve a mention. Costa Rican law allows the arrest of a ship irrespective of its flag, but considers the relationship between the debtor, sister ships or ships in associated ownership. As a procedural condition, there has to be a legal and economic link between the claim and the defendant, and proof of ownership or use rights must be presented to the court within one month following the precautionary arrest. The same principle applies to bareboat and time-chartered vessels.

Under normal circumstances, a vessel can be arrested within seven days from the

moment the file is delivered to a law firm, provided that all preparatory steps have been completed (ie, having possession of *prima facie* evidence that the claim is valid, consular apostille, official translations and a draft of the initial claim). On the filing of the preventive attachment, the court will issue an arrest notice to the harbour master, who executes the arrest.

Since Costa Rica follows a preventive or precautionary attachment process, in which posting a bond or counter-security is mandatory, the initial filing only requires sufficient evidence so as to create a presumption of the alleged maritime claim. However, within one month following the precautionary arrest, the claimant must file the merits of its claim and all the supporting legal evidence. All supporting documents have to be presented with all the formalities of the law (notarised, apostilled and translated into Spanish). As of today, no documents can be filed electronically. Any claimant with the intention to arrest a ship in our country has to understand that Costa Rica is a civil law jurisdiction and formalities are just as important as the merits. Non-compliance with formalities can provide grounds for dismissal. As part of such formalities, the issuance of a judicial power of attorney appointing a licensed lawyer to represent the claimant is absolutely necessary.

In addition, there are the following particularities in the Costa Rican system:

- courts have acknowledged wrongful arrests, and a claimant bears the risk and consequences of arresting a ship without a just cause;
- courts also recognise the piercing and lifting of the corporate veil, but only under very restrictive circumstances and only in cases in which a criminal offence has been committed; and
- our courts do not allow the sale of a ship *pendente lite*.

Article 3.4 of the Arrest Convention in Italian case law: the debate continues

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Italy is a signatory to the Brussels Convention 1952 (the 'Convention').* If a ship is flying the flag of a state party to the Convention, arrest in Italy can be sought only with respect to maritime claims listed under Article 1.1. If the ship is not flying the flag of a contracting state, she can be arrested for Article 1.1 claims as well as any other claim for which arrest is allowed under Italian law. This includes virtually any credit or claim against the owner of the vessel, even those not mentioned in the list of maritime claims set out by Article 1 of the Convention.[1]

Italian courts generally apply the Convention to ships flying the flag of a non-contracting state based on a rather extensive construction and application of Article 8.2.[2] However, an issue proving controversial is whether a ship arrest may be based on Article 3.4 of the Convention if the claim is not secured by a lien. A few decisions[3] have denied such arrests on the grounds that Article 9 makes it clear that the Convention does not create maritime liens, and that an arrest based on Article 3.4 in the absence of a lien, therefore, could not be subject to further enforcement against the registered owners and the ship.

A recent and detailed decision of the Court of Genoa[4] opted for the full applicability of Article 3.4 in arrests arising from claims against the charterer. The judge pointed out (a comment that may sound rather questionable to many readers) that owners are 'aware of the likely employment of the ship' and can, therefore, foresee the liabilities arising from employment by the charterer. The Court went on to say that the owner should seek some form of protection from the risk of arrest, such as asking the charterer

to provide a suitable performance guarantee. The Court furthermore held that the claimant is entitled to security in the form of a bankbook (also known as a passbook) issued 'to the order of the Court', and can cash the sums deposited as security as soon as the claimant has obtained a judgment liquidating the claim.

The decision thus bypasses the notoriously thorny issue of the wording of the security to be issued for the release of the ship when the arrest originates from a claim against the charterer and the party seeking the release is the registered owner.

A few recent decisions confirm that the debate remains open. In 2011, the Court of Venice[5] confirmed the view previously expressed by the same Court in 2010 that the existence of a maritime claim is sufficient to allow the arrest of a ship regardless of whether the claim is secured by a lien. The Court acknowledged the existence of different positions in Italian case law and in judgments handed down by the same Court of Venice.

The Court opted for the applicability of Article 3.4 of the Convention in arrest cases where no lien exists, arguing that the uniformity sought by the Convention would be undermined if ships flying different flags were subject to a different regime based on the existence of a lien (an issue which under Italian law is governed by the law of the flag). The Court further held that if the Convention had required the existence of a lien it would have so specified and that Article 3.4 would be redundant if a lien was necessary because in this case the creditor would already be entitled to arrest a ship not belonging to the debtor.

A very recent decision of the Court of Udine,[6] however, has opted for the restrictive view. According to the Court, since the Convention does not create new liens, the options are either to reject the arrest application based on Article 3.4 if the creditor without a lien is unable to enforce the claim on the ship or to consider the arrest just as a tool to exert pressure to settle the claim to obtain the release of the ship. The Court argued that the wording of the Convention is, in principle, consistent with the latter interpretation, as the only requirement stipulated by the Convention is the existence of a maritime 'claim'. The Court also observed that Article 31.1 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) provides 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objective and purpose'. The Court noted that the aim of the Convention is to enable the claimant to recover a maritime claim successfully.

However, even assuming that the arrest can be conceived as a tool to exert pressure to obtain a settlement, the owner of the ship may be unable to settle the claim, and the goal of the arrest thus would be frustrated. The Court furthermore pointed out that the action brought by the claimant could be defeated by providing security to release the ship from arrest. The claimant would be unable to enforce a judgment against the security because a judgment could only be obtained against the actual debtor (the disponent owners).

The Court concluded it was not conceivable that the Convention permitted arrest of the ship independent of the subsequent enforcement, which is, according to the Court, 'the natural development and prosecution of the arrest'.

It, therefore, appears that the courts in Italy (and even judgments handed down within the same court) will remain divided for the foreseeable future on whether a lien is required to arrest a ship under Article 3.4 of the Convention.

Notes

* This article was first published on www.mondaq.com.

1 Court of Appeal of Genoa, 12 February 2000, *Morsviazputnik Satellite Communications Navigational v Azov Shipping Co*; Court of Venice, 6 October 1999, *Elmar Shipping Agency v Turkmen Shipping*.

2 Court of Genoa, 22 March 1994, *Galaxy Energy International Ltd v Soc agenzia maritt Dolphin*.

3 Court of Ravenna, 23 March 2000, *Jakil v International Transportation Co Ltd*; Court of Ravenna, 4 August 2001, *Aagaard Euro Oil v Sea Frantic Co Ltd*; Court of Venice 5 June 1998, *Exnor Craggs Ltd v Companie Navigatie Maritime Petromin*.

4 Court of Genoa, 19 February 2010, *Alpha Trading v Venezia Shipping*.

5 Court of Venice, 2011, *Istanbul Shipping Inc v Happy Cruise Sa, M/V Happy Dolphin*.

6 Court of Udine 'the Anagenisi', 2014.

Claims against the pilot in Japan

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In Japan, as in many countries, certain waters are designated as 'compulsory pilotage areas'. Ships entering such areas are required to take a pilot. If they do not, the ship's master is under the criminal penalty of one year imprisonment or a fine of less than ¥1m. However, there are no provisions in the law of pilotage concerning the liability of a pilot or pilots' association when marine accidents occur due to the pilot's negligence.

Pilotage contracts generally provide as follows:

Pilotage agreement, Article 21 (Exemption)

1 Should the vessel, its master or crew, or a third party suffer any damage or loss resulting from an error made by the pilot in the performance of his duties, the master or owner of the vessel will not hold the pilot personally responsible nor ask him for compensation, and in return the pilot will not ask the master or owner of the vessel to pay pilotage fees.

2 The master or owner of the vessel shall indemnify the pilot against the amount exceeding the total pilotage fee paid or payable to the pilot should a third party institute an action or claim for liability directed at the pilot by reason of his making an error in the performance of his duties when piloting the vessel. Such indemnification, however, shall not exceed the amount to which the owner is entitled to limit its liability to a third party under the applicable law (or the remainder after deducting the indemnification paid directly to the third party by the master or owner of the vessel from the indemnification to be paid), when the master or owner of the vessel must directly indemnify the third party.

3 The above two provisions shall not apply when such personal liability of the pilot arises by reason of his intentions or gross negligence.

This liability exemption clause is provided only by the pilotage contract. It is not provided by the law itself.

The validity of this term has been debated as it is unfavourable to the user. The exemption clause gives the benefit to the pilot to relieve him of any liability unless he causes the accident with 'wilful misconduct' or 'gross negligence'. Some contend that this kind of exemption clause has lost its basis and comment that such a clause now should be invalid in Japan.[1]

'Gross negligence' means excessive lack of the duty of care. A pilot must be a professional with a high degree of capability to undertake the safe navigation of the vessel. Therefore, the standard of navigational care must be more exacting for a pilot than for an ordinary seaman. For example, a pilot who proceeds at an excessive speed in heavily restricted visibility, misunderstands the buoy indicating dangerous rocks, collides with another vessel despite the port captain's order to stop, proceeds on the opposite side of the passage in the narrow channel, grounds by proceeding in restrictive visibility knowing that the radar will fail, and so on, would be found to have committed 'gross negligence'.

Pilot services cannot be carried out as a pure personal business. Pilotage is a public service carried out by the pilots' association. The pilots' association receives requests for pilotage and dispatches individual pilots to the vessels as per the shift table. The pilots' association makes the necessary arrangements for the pilot boat and tugboats. After the dispatched pilot finishes his job, the pilots' association sends an invoice to the owner or agents and collects pilotage fees plus transportation charges, including the pilot boat costs. Each local pilots' association deducts various expenses, such as wages to employees, operational costs of the pilot boats and member fees to the Central National Pilots' Association, and then distributes the remaining money to each individual member of the pilots' association. Considering this provision of services and collection of pilotage fees, the pilotage services provided by the individual pilots are the business of the pilots' association itself.[2]

Ships are becoming increasingly large, and port facilities are becoming bigger and more modernised and complex. The importance of pilot services, therefore, is increasing. It is natural and reasonable to think that pilot

services are now undertaken not by individual pilots, but by pilots' associations. If so, pilots' associations should assume full responsibility for accidents caused by the negligence of a member pilot.

To manage this exposure, pilots' associations should seriously consider arranging for liability insurance. In this respect, some limitation of liability for pilots' associations is reasonable. We sometimes have the issue where a pilot's actions in responding to a situation exceed the normal course of the pilot services. If the legal elements of salvage can be established, in such case, the pilot's position would be the same as the position of a salvor who renders salvage services without a vessel. In such case, the salvor is entitled to limit its liability at SDR1m, as per Article 7(3) of the Shipowner's Limitation of Liability Act (1996 Protocol to 1976 LLMC). This limitation of liability will soon be increased by 1.51 times. If personal injury or loss of life claims are involved, this limitation becomes three times greater. This might suggest an appropriate method of limiting liability of pilots' associations for the negligence of a member pilot.

In any case, given the increasing importance of pilot services there is no justification for exempting the pilot from liability, arguing that he is a self-employed professional businessman and a paid navigational adviser to the master. Accordingly, the pilot and the pilots' associations to which he belongs should be liable for his negligence. Considering liability otherwise is an anachronism, from which we should graduate immediately.

Notes

1 Professor Shin Henmi of Tokyo University of Marine Science and Technology, 'Civil Liability of the Pilot', *The Journal of Japan Institute of Navigation*, No 126, p 123.

2 Lawyer Motosuke Gohara, ex-board member of the Licensed Inland Sea Pilots' Association.

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VAT rules in France: French commercial exemption – the importation procedure

Under French law, specific rules apply to allow value-added tax (VAT) exemption for the commercial activities of yachts cruising in France. The applicable provisions under French law are mainly Article 262-II-3 of the French Tax Code and Article 190 of the French Customs Code with the administrative decisions (BOI No 168 dated 22 October 2003 and BOD No 6603 dated 24 June 2004).

Essentially, French tax and customs authorities have decided to classify yachts as commercial yachts if they comply with the following requirements:

- the vessel must be registered as a commercial yacht on the registration documents;
- the vessel owners must employ a permanent crew member on board; and
- the vessel must be used exclusively for commercial purposes, that is, under charter agreements.

In particular, the administrative decision (BOD No 6603 dated 24 June 2004) provides that in order to facilitate customs inspection, users of vessels are required to keep on board a copy of the charter agreement and to enter details of the agreement in the log book (duration of the charter and name of the charter or charterers). Note that if the vessel is used/chartered by one of her beneficial owners, a charter agreement must (also) be signed.

The French exemption offers various advantages, such as duty-free fuel supplies, VAT exemption on supplies of goods relating to the yacht (regardless of the flag of the vessel), on supplies of services (repairs or refit) and on charters.

Nevertheless, the European Commission has required France to change its legislation. According to the European Commission, France contravened the meaning of Article 148 of the VAT Directive 2006. Essentially, the European Commission has decided that not all vessels used for commercial purposes are eligible for VAT exemption. The French Commercial Exemption (FCE) requires navigation on the high seas.

As a consequence, Article 262 of the French

Tax Code was amended by a statute on 22 December 2010, which includes this fourth criterion (navigation on the high seas, ie, navigation beyond the limit of territorial waters (12 miles) from the coast).

As the French tax authorities issued an explanatory ministerial note stating that the VAT exemption still applies to commercial vessels that comply with the three requirements laid down in the administrative note dated 24 June 2004, the European Commission lodged a claim against France on 26 April 2012. Based on a decision given on 21 March 2013, the European Court of Justice found that France was in breach of Article 148 of the VAT Directive. As a consequence, owners have to comply with this criterion.

On the other hand, some changes result from the *Bacino* court case (dated 22 December 2010) served by the European Court of Justice, which held that:

- 'Article 15 of Sixth Council Directive 77/388/EEC of 17 May 1977... must be interpreted as meaning that the exemption from value added tax provided for by all provisions does not apply to services consisting of making a vessel available, for reward, with a crew, to natural persons for purposes of leisure travel on the high seas'; and
- 'In order for such a hiring service to be capable of exemption under that provision, the lessee of the vessel concerned must use it for an economic activity'.

Bearing this in mind, VAT is payable on the charter hire (whether or not the yacht is used on the high seas) when the charterers are private individuals who are chartering the vessel for leisure. Therefore, VAT has to be collected by the owners, and/or by the brokers, if the yacht is chartered under charter agreements (Mediterranean Yacht Brokerage Association (MYBA) charter contracts mainly). VAT applies also to brokers' commissions.

Nevertheless, pursuant to Article 262-II-2 of the French Customs Code, no VAT shall apply to services provided to the vessel if the owners are able to evidence that she is registered as a commercial vessel (with permanent crew and for commercial use) and that she navigates on the high seas.

If you decide to import a vessel into France (during the charter period – high season, for example), a *document administratif unique* (DAU) will have to be issued in order to let the vessel cruise and charter without paying VAT on the value of the boat during the short stay of the vessel in France. Once the vessel is imported into France, no VAT will apply on the value of the vessel.

The duration period will have to be specified from the beginning (at the issuance of the DAU). Various documents are required to import a vessel into France. Mainly, you will have to disclose a certificate of registry of the vessel, the insurance policy of the vessel and the charter agreement (if already signed).

The importation of the vessel will only be completed upon customs' written approval. Inspection of the vessel could be requested by the customs authorities.

All documents regarding the status of the vessel (DAU, certificate of the yacht as commercial yacht and charter contracts) must be kept on board the vessel to evidence the correct status of the vessel in case of customs control.

Regarding the income from the charter contracts, except if you plan to register and/or to base/locate a company in France during the stay of the vessel, the owner of the vessel will not have to pay corporate income tax on the amount earned from the various charters concluded. Nevertheless, the appointment of a *représentant fiscal* will be useful for all the VAT aspects during the stay of the vessel (on charter contracts and yacht brokers' commissions).

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Charterparty trends: Supplytime update

The emerging offshore wind industry has taken much inspiration from the more mature offshore oil and gas industry, including in regards to legal concepts and contracting formats, such as the use of Supplytime. There is an interesting trend of cross-pollination back to the oil and gas industry from renewables, including a recent initiative by the Baltic and International Maritime Council (BIMCO) to update, and possibly rebalance, the owner/charterer risk split in Supplytime as a result of the success of the new BIMCO Windtime charterparty. It remains to be seen to what extent this cross-pollination and 'tail wagging the dog' phenomenon between the two industries will migrate to other legal areas.

Arguably, the offshore wind industry is currently at a similar stage of development as the offshore oil and gas industry in the mid-1970s. Both started onshore and faced similar challenges when they migrated to sea. Although there are large differences between the industries, such as the related environmental risks, climate impact, market price sensitivity, risk and reward and so on, there are many similarities, in particular the marine, energy and construction aspects. The oil and gas industry looked towards shipping for guidance substantially in its early days. Due to the additional common energy and construction elements, the offshore wind industry, arguably, has been able to piggyback on the oil and gas industry to an even greater extent.

There has been general tension in both industries between the original onshore and newer maritime culture and thinking. One of the most prominent examples involves the two fundamentally different liability profiles in the two main types of contract format commonly used at various levels in the contract chain on an offshore wind project. Inspired by the oil and gas industry, Supplytime has generally been used for time chartering of vessels further down the contracting chain, and sometimes in a heavily amended form for lump sum-like installation work. FIDIC-like contracts, usually Yellow Book, are generally used for construction and main component supply higher up the chain. In Supplytime, owners face limited or no liability if they do not deliver vessels on time or do not operate properly. Property damage and personal injury or death are handled through a knock-for-knock concept. There is a consequential loss disclaimer, but no cap. By contrast, contractors under FIDIC-like contracts face heavy financial liabilities if they do not deliver projects on time or there are defects (liquidated damages for delay and breach of performance or availability warranties). There are negligence-based indemnities for property damage and personal injury or death. There is a consequential loss disclaimer and caps (overall and sub-caps for liquidated damages). The tension is much less prominent in the oil and gas industry, which over time has developed industry-specific construction and service contracts, such as the LOGIC suite of contracts in the United Kingdom sector, and the Norwegian forms (NF, NTK etc) in the Norwegian sector of the North Sea. These include FIDIC-like liability for delay and defects and Supplytime-like knock-for-knocks for damages and injuries.

As a result of various offshore wind industry participants expressing an interest in BIMCO developing a wind industry-specific time charterparty, BIMCO developed Windtime, which was released in 2013. A driving factor for the initiative was the concern of certain owners, including of crew transfer vessels, who felt that they were forced to accept charterer-developed charterer-friendly forms. This is similar to BIMCO's development of the original Supplytime in the mid-1970s, largely in response to major operators' use of their heavily charterer-friendly forms.

Windtime is a Supplytime-based wind industry-specific time charterparty for crew transfer and other service vessels. It can be adapted easily for other and larger vessels (in particular the 12-hour operation needs to be adjusted to a 24/7 operation), such as jack-up installation vessels. In the same

way that Supplytime is used in the oil and gas industry, in theory Windtime could also be used in the oil and gas industry.

Windtime fundamentally rebalanced the risk split between owners and charterers. As a default, owners face liquidated damages in the amount of the day rate for late delivery and risk paying damages if the vessel is not as agreed. As a counterbalance, Windtime introduced a monetary cap on liability. It maintains a traditional knock-for-knock clause. Windtime also includes clarified drafting on several points in order to bring them in line with recent case law and current practice, such as the details and mechanics of the termination clause and an update of the knock-for-knock clause and consequential losses clauses.

Windtime has been well received in the market; it appears that any fears that it would not be accepted by owners due to the increased potential liabilities were not warranted. By contrast, it has lead certain main charterers, such as Siemens, to shift generally from internally developed charterer-friendly forms to the more balanced Windtime, at least for crew transfer vessels, reducing time for negotiation and, arguably, the risk that owners accept risks they cannot manage or terms they do not understand.

Following hot on the heels of the success of Windtime, a revision of Supplytime 2005 is scheduled to begin later in 2015. BIMCO believes that Windtime introduced a number of useful amendments to the Supplytime wording that may be worthwhile incorporating into Supplytime. There appears to be an increasing perception at BIMCO, and in the industry, that the owner/charterer risk balance in Supplytime is ripe for an overhaul. Many of the updates resulting from recent legal developments, clarifying drafting and other minor changes should be relatively uncontroversial. It will be interesting to see to what extent the new Windtime concepts are fed back into the 'mother' form.

The offshore wind industry can be expected to continue to implement legal concepts from the oil and gas industry. For example, the knock-for-knock concept may be embraced more generally, which should benefit the industry as a whole. A step in that direction would be FIDIC adopting a knock-for-knock concept in any new contract format or principles it may develop as part of its currently ongoing renewables contracting initiative. We are part of the working group, so we are actively taking part in that process in a similar way to our participation in the development of Windtime. It remains to be seen to what extent the recent trend of cross-pollination, rather than one-way fertilisation, will continue in general. We expect this to take place on a case-by-case basis when there are good reasons and mutual benefits for both industries, rather than wholesale.

The fallout from the OW Bunker Group collapse

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On Thursday 6 November 2014, Denmark woke up to news that would shock not only the small kingdom in northern Europe, but the entire shipping world. The OW Bunker Group had collapsed, and the main Danish companies within the group had filed for restructuring.

The OW Bunker Group, which can be traced back to the mid-1950s, was taken over by the Swedish hedge fund Altor in 2007. In 2013, group revenue was close to DKK100bn and in volume only surpassed by the AP Møller Mærsk Group in Denmark. After its initial public offering in the spring of 2014, it was traded publicly on the Copenhagen Stock Exchange from 28 March 2014.

The reasons for the collapse are still being investigated, but the main reasons seem to be: (1) a one million tonne gas/oil position that went sour, resulting in losses of US$150m when closed; and (2) simultaneous losses of US$125m in the Singapore subsidiary Dynamic Oil Trading. The restructuring trustees gave up trying to save the group after only 36 hours, and late on 7 November 2014 they filed for liquidation.

The collapse not only resulted in angry

shareholders and busy lawyers. It also sparked an industry shock unlike anything seen before. While bankruptcies are certainly not unheard of in the shipping industry, and while it is not uncommon for a shipowner to be met with a bunker claim due to the bankruptcy of a former time charterer that had not paid its bunker debt, the large number of competing claims that followed in the wake of the OW Bunker collapse was something the world shipping industry had not seen before.

The players and the legal situation

When a shipowner purchased bunkers from an OW Bunker company, in many instances the actual stem would be performed by another company on behalf of the OW Bunker company. In other words, the OW Bunker company would purchase bunkers from a local physical supplier, who would then carry out the stem. The OW Bunker company would issue an invoice to the shipowner, typically with 30 days' credit, and the physical supplier would issue its own invoice to the OW Bunker company that had ordered the bunkers, also with a credit period.

In the one to two months prior to the 6 November 2014 announcement of the OW Bunker Group collapse, thousands of stems on behalf of OW Bunker companies were carried out by physical suppliers around the world and the invoices (in the hundreds of million US$) relating to such stems remained unpaid by the OW Bunker Group. While the policy of the estate is that the shipowners should still pay OW Bunker and the physical suppliers should file their claims with the estate, the reality is, of course, different.

The potential losses for the physical suppliers are enormous. The best example is Belgian supplier Wiljo, which had around US$10m caught in the OW Bunker collapse and within weeks had to file for bankruptcy itself as a direct consequence of the OW Bunker Group collapse. Consequently, these physical suppliers have looked to shipowners to secure their outstanding amounts. Since the OW Bunker collapse, hundreds, if not thousands, of vessels have been arrested or met with threats of arrests by physical suppliers in order to secure payment from the shipowners instead of from OW Bunker. These arrests most often take place in arrest-friendly jurisdictions that, for instance, provide a lien for bunkers supplied to vessels and allow arrest of the vessel, even if the owner is not the debtor.

The problem for the shipowners is that payment to the physical suppliers does not eliminate the shipowner or charterer's debt to OW Bunker, and the shipowner or charterer thus risks having to pay twice for the same stem.

While paying someone else's debt due to a lien is not unheard of in the maritime industry, the degree to which the OW Bunker collapse has impacted some shipowners is certainly new. Some shipowners have reported more than 50 threats of or actual arrests since the OW Bunker collapse. Given an average stem price of perhaps US$500,000, this is more than just a nuisance.

Shipowners and charterers are not left completely without rights. But it is hard to navigate the waters of maritime claims and liens in conjunction with Danish and foreign bankruptcy law.

Some shipowners have gone on the offensive by filing interpleader actions in, for instance, London and New York. While an interpleader, in theory, will leave the shipowner discharged after paying the amount owed to the court, the interpleader defence has an obvious limitation, in that it only protects the shipowner in the jurisdiction covered by the court. Thus, if the interpleader is carried out by a British shipowner, who has purchased bunkers from a British OW Bunker company, which had a British physical supplier carry out the stem, and if the British shipowner is only engaged in short-seas shipping around the British Isles, the interpleader is a fantastic solution. Unfortunately, this is not often the case and a British interpleader will not protect the vessel from arrest in a large number of the world's jurisdictions outside Europe.

Another possible strategy for the shipowner is to pay the physical supplier and then set off that amount against the bankrupt OW Bunker company with whom the shipowner (or charterer) had contracted. The likely success of this strategy, however, depends on local bankruptcy law, and set-off in bankruptcy situations is notoriously complicated. For example, in Denmark, where many of the main OW Bunker bankruptcies are pending, set-off in a bankruptcy situation is difficult, but not impossible. The most important thing to know is that while there is a ban against acquiring claims for set-off against a bankrupt estate, it is possible to set off a claim if it arises out of pure subrogation – although many tests must be passed before

set-off will be allowed.

Consequently, it may be possible under Danish law for a shipowner to avoid having to pay for the same stem twice by paying the physical supplier, subrogating into the physical supplier's claim against a Danish OW Bunker company, and then using that subrogation to set off that same OW Bunker company's claim against the shipowner.

Establishing set-off to avoid having to pay twice is not easy, but life, shipping and cross-border insolvencies seldom are.

Calling at a Crimean port may cause arrest and confiscation of the vessel in Ukraine

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After the annexation of Crimea, Ukraine has adopted the law 'On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine' (the 'TOT Law') in April 2014, establishing regulation of the status of Crimea, in addition to the procedure of entry into Crimea.

In accordance with Article 10(2) of the TOT Law, the entry of foreigners into Crimea is allowed subject to special permits and only through the checkpoints located at the administrative border of the Kherson region of Ukraine and Crimea.

Violation of the procedure of entry into Crimea is an administrative offence entailing a fine or detention up to 15 days, in addition to deportation and prohibition against entering Ukraine for up to three years. If it is committed with the intent to cause damage to the state of Ukraine, it will be punished as a crime and may result in imprisonment for up to eight years with confiscation of the transport vehicle used for entry.

It should also be noted that on 19 May 2014, Ukraine informed the International Maritime Organization (IMO), its Member States and representatives from foreign companies accredited by the IMO that Ukraine is not able to fulfil its obligations to ensure navigation safety in Crimean ports. The State Inspection of Ukraine on Security of Maritime and River Transport announced that all Crimean ports should be considered closed, as Ukraine is objectively unable to fulfil its obligations on providing safety of shipping in the waters of Crimean ports. Moreover, Ukrainian legislation provides for no penalty regarding the vessel itself for calling at Crimean ports.

Recent practice

On 24 March 2015, the Pechersky District Court of Kiev arrested the vessel 'Kanton' (flying the flag of Tuvalu) calling at the Port of Kherson. The Court accepted an application submitted by the General Prosecution Office as regards criminal proceedings against the master of the vessel, who was charged with being in violation of the entry procedure into temporarily occupied territory, specifically, in calling at the Port of Sevastopol in July 2014.

Comments

According to Article 170 of the Criminal Procedural Code of Ukraine, any property can be arrested in order to ensure confiscation as criminal punishment. Since Article 332(1) of the Criminal Code of Ukraine, which establishes criminal liability for the violation of the entry procedure into Crimea, provides for the confiscation of the transport vehicle (including vessels), the Ukrainian court has formal ground to arrest the vessel involved in illegal entry in order to ensure further confiscation of it.

This arrest is completely different from the arrest on maritime claims. Unlike the latter, arrest in a criminal procedure cannot be removed by presentation of security, such as a bank guarantee or a protection and indemnity (P&I) Club letter. As the vessel is deemed as the instrument of the crime, the

purpose of arrest is not (only) to enable reimbursement of damages, but mainly to facilitate criminal punishment in the form of confiscation. In such case, the arrest would probably be valid until criminal proceedings are finished and a sentence is issued either on confiscation or on release of the arrested property.

Conclusion

The Kanton case shows that Ukrainian authorities have begun to put pressure on shipowners calling at Crimean ports, despite the prohibition established by Ukrainian laws. The General Prosecution Office representative has officially stated that interrogation officers are investigating various facts of foreign vessels calling at Crimean ports.

Ukrainian law allows confiscation of vessels involved in navigation in Crimea as criminal punishment, regardless of who the vessel belongs to and which flag it flies.

In this regard, few recommendations may be given to shipowners and charterers. In general, Crimean ports should be avoided. Unless a strong necessity exists, it is better to avoid calling at both Ukrainian and Crimean ports with the same vessel.

Finally, it should be noted that the vessel can be the instrument of crime, but it can never be the subject of it. Consequently, confiscation of the vessel is the supplementary punishment to the imprisonment of the master (or other crew member) charged with violating the entry procedure into Crimea, and the former cannot be applicable separately from the latter. Appropriately, the crew and, first of all, the master should be replaced after the vessel has called at a Crimean port. In that case, the Ukrainian authorities cannot charge the new master (or other crew members) with being in violation of the entry procedure into Crimea. It will not guarantee that the vessel will not be arrested, but may help to avoid the confiscation of it.

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Consequential losses in long-term contracts of affreightment under Malaysian law

In today's climate of fluctuating freight rates, shipowners and charterers would be wise to examine their exposure to damages for breach carefully when entering into contracts of charter and, particularly, long-term contracts of affreightment. The damages at stake can be considerable and usually are measured by the difference between the contract price and: (1) should the freight rate go down, the price for which the shipowners could hire out their ships; or (2) should the freight rate rise, the price for which the charterers had to hire ships for the same period of time under a similar contract.

Malaysia is the biggest importer of coal in the Asia Pacific region. This article examines the allowable damages for breach of long-term contracts of affreightment under Malaysian law.

Section 74 Contracts Act 1950

Section 74(1) of the Malaysian Contracts Act 1950 provides for the basic principle on which damages for breach of contract are to be calculated. It states that: 'When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.'

Illustration (g) of Section 74 of the Contracts Act 1950 further explains that:

'A contracts to let his ship to B for a year, from the 1st of January, for a certain price. Freights rise, and, on the 1st January, the hire obtainable for the ship is higher than the

contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the 1st January'. Therefore, the breach of contracts of hire of ships was recognised half a century ago in the Contracts Act 1950 as a classic example of a breach of contract, whether because freight has risen, as in the illustration provided by the Contracts Act 1950, or because freight has dropped and one or other party exits from the contract of hire of the ship on this basis.

Section 74 actually restates the two principles laid in the landmark English case *Hadley v Baxendale*,[1] which defined the kind of damage that is the appropriate subject of compensation and excluded all other kinds as being too remote.

The main Malaysian textbook on contract law, *Law of Contract* by Andrew Phang Boon Leong, says that: '[t]he decision was concerned solely with what is correctly called remoteness of damage, and it will conduce to clarity if this expression is reserved for cases where the defendant denies liability for certain of the consequences that have flowed from his breach.' Furthermore: '[t]he second issue concerns the principles upon which damage must be evaluated or quantified in terms of money', that is, the measure of damages. Finally: '[t]he principle adopted by the courts is that of restitution in integrum, which is, if the plaintiff has suffered damage that is not too remote, he must, so far as money can do it, be restored to the position he would have been in had that particular damage not occurred.'

Phang further states that: 'The yardstick could either be loss of profits or, in the alternative, compensation for capital loss and expenses rendered futile by the breach, *Teoh Kee Keong v Tambun Mining Co. Ltd* [1968] 1 MLJ 39 at 41.'

The loss that will be applicable in a long-term contract of affreightment is expectation loss, which is the loss of the profit that the shipowner would have received if the long-term contract of affreightment had been properly performed. The damages adjudged to be due to the plaintiff are usually assessed at the time when the contract is breached.[2]

The *Selva Kumar* case

The Malaysian classic case on damages for breach of contract is *Selva Kumar Murugiah v Thiagarajah Retnasamy*,[3] in which the Federal Court, the highest court in the land, stated that:

> 'a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v Baxendale* (1854) 9 Exch 341; [1843–60] All ER Rep 461. Any failure to prove such damages will result in the refusal of the court to award such damages. However, for cases where the court finds it difficult to assess damages for the actual damage as there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently which is not too remote, the words in question will apply. The court ought to award substantial damages as opposed to nominal damages which are reasonable and fair according to the court's good sense and fair play.'

The Federal Court's decision established three important principles. First, the Federal Court held that the damages for a breach of contract are governed by Section 74 of the Malaysian Contracts Act 1950. The rule of assessment contained in Section 74 covers any loss or damage that arose naturally in the usual course of events from the breach. Secondly, the Federal Court held that where contractual liability is successfully established, in assessing damages, no compensation should be awarded for damages that are too remote. Finally, the Federal Court ruled that loss of profits will be recoverable if such loss was the natural and probable result of the breach and the loss was within the contemplation and knowledge of the party in breach. The loss will be awarded if it is not too remote and the loss can be proved and quantified.

The *Selva Kumar* case is still good law and followed most recently this year by the Court of Appeal in *Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor*,[4] as well as last year by the same Court in *Foo Yee Construction Sdn Bhd v Vijayan a/l Sinnapan*.[5]

In applying the *Selva Kumar* case to loss of profits or expectation loss in long-term contracts of affreightment, the loss of profits in the form of expectation loss will be recoverable if it was the natural and probable result of the breach and the loss was within the contemplation and knowledge of the party in breach. The loss will be awarded if it is not too remote and the loss can be proved

and quantified.

The dissenting judgment of Gopal Sri Ram in the Court of Appeal case of *Government of The State of Sabah v Suwiri Sdn Bhd*[6] states clearly that expectation loss is recognised under Malaysian law, quoting Lord Bridge in the English Court of Appeal case *Ruxley Electronics & Construction Ltd v Forsyth*;[7] a Malaysian high court case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan;*[8] and even Indian cases: *Sharma Transport v Government of Andhra Pradesh*[9] and *Union of India v Anglo-Afghan Agencies Ltd.*[10]

The Golden Victory[11]

It is necessary for our purpose to consider the English House of Lords decision on contracts of affreightment of *The Golden Victory* (*Golden Strait Corpn v Nippon Yusen Kubishka Kaisha*).[12] The charterers repudiated a long-term time charter with four years left to run. The charter contained a war cancellation clause that would have been triggered by the war in Iraq, which occurred 16 months after the acceptance of the repudiation.

The case is important for its qualification to the *prima facie* rule that contract damages are to be assessed at the date of breach, as exemplified in cases in which damages are assessed on the basis of obtaining a substitute contract in the market. In *The Golden Victory*, the House of Lords held that this rule gives way to the general compensatory principle that the purpose of an award of damages is to put the injured party into the same position financially as if the contract had not been broken. The majority of the House of Lords applied the general compensatory principle in preference to the breach date rule, holding that in the case of an accepted repudiation of a long-term contract, if an unexpected event later occurs, which means that the original contract would not have run its full term, damages are to be measured by taking into account that the innocent party would, in fact, only have had the benefit of the charter for that shorter term rather than for the full contractual term.

In reaching this decision, the courts (and the House of Lords by a majority) have thus declined to follow the dicta of Megaw LJ in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH The Mihalis Angelos*[13] that reliance could only be placed on subsequent events where it could be shown that the events in question were predestined or certain to occur at the time of the acceptance of the repudiation.

At the time when the contract came to an end, the war was merely a possibility. Nevertheless, it was held that the charterers could rely on the war as limiting the owners' claim for damages to a period up to the outbreak of the war and not to the end of the charter period. The damages could, therefore, only be claimed for the period of 16 months rather than the full four years remaining at the time of breach.

The Glory Wealth

Last year, the compensatory principle in *The Golden Victory* was applied by the Queen's Bench Division (Commercial Court) in *Flame SA v Glory Wealth Shipping Pte Ltd; The Glory Wealth.*[14] The Court was asked to assume that the innocent party would have been able to perform, rather than to consider what was likely to have happened in the event that there had been no repudiation.

As such, the Court might well put the innocent party in a better position than it would have been in had the contract been performed. Teare J held instead that when assessing what the innocent party would have earned had the contract been performed, the Court had to assume that the party in breach had performed his obligations.

Interestingly, and pertinently for long-term contracts of affreightment providing for vessels 'to be nominated', the Court also held that the charterer did not need to know at the time of nomination what the relationship was between the owner and the vessel. What mattered to the charterer was that the vessel in fact arrived and loaded the charterer's cargo. If the vessel had not, then the disponent owner would be liable because he had failed to do what a disponent owner is required to do, namely, provide the nominated vessel.

Notes

1 [1894] 9 Ex 341, pp 641–64.
2 *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672.
3 [1995] 1 MLJ 817 at 818, FC.
4 [2015] 2 MLJ 24 Court of Appeal.
5 [2014] MLJU 507 Court of Appeal.
6 [2005] 4 CLJ 72.
7 [1996] AC 344.
8 [1999] 3 CLJ 65.
9 AIR [2002] SC 322.
10 AIR [1968] SC 718.
11 By statute, the common law of England and the rules of equity apply in the states of West Malaysia as administered

in England on 7 April 1956, and apply in the states of East Malaysia as administered or in force in England on 1 December 1951 or 12 December 1949 (Section 3 Civil Law Act 1956). By virtue of the same statute, English law in commercial matters, namely the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance and with respect to mercantile law generally, applies, as if such question or issue had arisen or had to be decided in England on 7 April 1956 in most states in West Malaysia, but in others, and in the states of East Malaysia, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law (Section 5 Civil Law Act 1956).Therefore, English cases are at least of strong persuasive value if not applicable law in Malaysia. Likewise, Commonwealth jurisdiction cases are of strong persuasive value.

12 [2007] UKHL 12, [2007] 2 AC 353.

13 [1971] 1 QB 164.

14 [2014] 1 All ER (Comm) 1043.

Force majeure: practical legal consequences

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Clear contractual terms usually guarantee a successful transaction. But sometimes force majeure events negatively impact the parties, who encounter problems in fulfilling their contractual obligations. Usually such problems entail additional financial liabilities.

Concept of force majeure

The term 'force majeure' is commonly understood as 'irresistible force' or 'incidental event', which impedes the party's performance of contractual obligations. The terms 'incidental event' and 'force majeure' are not exhaustive and were not identified specifically by Ukrainian legislators until recently.

As we know, in English legislation force majeure is purely a contractual term. If terms on force majeure are included in a contract, the party may be exempt from liability. Force majeure clauses require special attention. Typically, such a clause consists of two parts: the first specifying the force majeure events, usually emphasising the inexhaustible character of those circumstances; the second defining possible legal consequences. Proving force majeure is the responsibility of the party who is not willing or able to fulfil its obligations. That party must prove that the circumstances prevailing are force majeure and subject to the force majeure clause.

Changes in Ukrainian legislation

Recent developments in Ukraine – the Crimea occupation and war in the Donbas region – necessitated the introduction of specific rules related not only to the performance of the banking system and the suspension of some businesses, but also to other changes in public and private law and regulation.

The concept of force majeure is expressed differently in contracts governed by English and Ukrainian law. The difference lies in the fact that in English law force majeure is a concept of contractual nature only and is normally specified, but may vary in different contracts.

In the national legislation of Ukraine, an unambiguous and consistent definition of force majeure was missing until the recently enacted Law of Ukraine 'On Temporary Measures for the Duration of Anti-terror Operation' and amendments to the Law of Ukraine 'On the Ukrainian Chambers of Commerce and Industry'.

Those changes determine force majeure as: 'extraordinary and unavoidable circumstances that make it impossible to objectively perform obligations under the terms of the agreement (contract), or obligations under the laws and other regulations, namely the threat of war, armed conflict or serious threat of such conflict, including but not limited to enemy attacks, blockades, military embargo, acts of foreign enemies, general military mobilisation, war, declared or undeclared, acts of public enemies, disturbances, acts of terrorism, sabotage, piracy, riots, invasion, blockade, revolution, rebellion, insurrection, curfews, expropriation, forced removal, takeovers, requisition, public demonstrations, strike, accident, wrongful acts of third parties, fire, explosion, prolonged outages of transport regulated by relevant decisions and acts of

public authorities, closure of the Straits, embargo, prohibition (restriction) for export/import, etc, and emergency events caused by exceptional weather conditions and natural disasters, namely epidemic, severe storm, cyclone, hurricane, tornado, flood, snow accumulation, ice, hail, frost, freezing sea, canals, ports, passes, earthquake, lightning, fire, drought, subsidence and landslide and other natural disasters, etc.'

Although the concept of force majeure is clearly defined, the list of extraordinary and unavoidable circumstances is certainly not exhaustive.

Also, the innovations authorise the Ukrainian Chamber of Commerce and Industry (UCCI) and the new Regional Chambers of Commerce and Industry to certify force majeure events upon request of the persons concerned. The fact of force majeure is confirmed by the relevant certificate from the UCCI, issued within seven days from the date of application.

The competence of the UCCI on the testimony of force majeure, as defined in the law, was previously partial, as it was limited to certification of force majeure only in terms of international trade contracts, international treaties of Ukraine and at the appeals of business entities engaged in housing (developing) contracts.

Practical value of changes

Until recently, it was possible to speak of a certain complexity of the procedure to confirm the presence or absence of force majeure in Ukraine. In practice, the parties used to simplify this procedure for themselves by including in contracts a condition under which documents issued by relevant government authorities or agencies authorised to certify certain circumstances, according to their powers and jurisdiction, were accepted as sufficient evidence of force majeure.

Disputes often arose in terms of admissibility of such evidence, and such documents were only taken into account by the parties who had agreed to it in the first place.

Today, the procedure for confirmation of force majeure is more simple and unified. The UCCI and its regional chambers are the only institutions in Ukraine that are authorised to issue certificates to evidence force majeure.

Conclusion

The changes in civil legislation of Ukraine entrenched the concept of force majeure in the Ukrainian legal framework. The description here is not exhaustive, but the presented list of force majeure events is fairly complete and specific, allowing more clear and unambiguous interpretation of force majeure in contractual relations and in disputes.

Also, the procedure for recognition of force majeure by the UCCI has been improved and standardised. That should save time and money for contracting parties involved in force majeure situations.

Exclusive jurisdiction clauses and the CMR

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Carriers of goods by road should be aware of a recent, singular decision of the Rotterdam Court that an exclusive jurisdiction clause in a framework contract between a carrier and its principal was null and void pursuant to the terms of the Convention on the Contract for the International Carriage of Goods by Road (CMR).

The dispute arose from an alleged lack of customs documentation required in connection with the transportation of goods by road from Italy to Russia. The Dutch multimodal carrier and its Italian subsidiary claimed damages of €111,646 from their Italian principal. The principal argued that the Rotterdam Court lacked jurisdiction to hear the claim, but the carriers maintained that the Rotterdam Court was competent, pursuant to an exclusive jurisdiction clause in the framework contract between the parties.

Declining jurisdiction, the Rotterdam

Court, in what appears to be the first interpretation of its kind in the Netherlands, held that, insofar as the CMR applied to the claim, the exclusive jurisdiction clause in the contract was null and void pursuant to Article 41 of the CMR.

CMR provisions

Article 41 provides that 'any stipulation which would directly or indirectly derogate from the provisions of this convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract'.

Meanwhile, Article 31.1 of the CMR stipulates that legal proceedings involving CMR cases can be brought before several courts, including: (1) a court designated by the parties in their contract; (2) the place where the defendant is registered or located; (3) the place of taking over the goods; and (4) the place of discharge of the goods. The plaintiff decides in which of these courts it wants to hear the legal proceedings.

In this case, notwithstanding the existence of an option to agree upon the competence of a designated court, the Rotterdam Court held that the entire jurisdiction clause in the contract was null and void, since it referred to the exclusive competence of the Rotterdam Court, which was a derogation from Article 31.1 of the CMR within the meaning of Article 41 of the CMR. This would seem to depart from previous Dutch case law on the subject.

There are, however, two ways in which the Dutch courts may be prevented from declaring themselves incompetent in this manner. The first involves the incorporation of a non-exclusive jurisdiction clause valid under Article 31.1 of the CMR, although it should be noted that Dutch carriers need to start declaratory proceedings in the Netherlands before their principals begin proceedings in another jurisdiction. The second possible solution involves the incorporation of an exclusive arbitration clause valid under Article 33 of the CMR.

Revised Brussels 1 Regulation

The revised Brussels 1 Regulation (the 'Regulation'), the key European instrument on jurisdiction and enforcement issues in civil and commercial matters, could meanwhile provide opportunities for carriers looking to secure the Netherlands' jurisdiction for CMR disputes. The extensively reviewed Regulation is now being applied by European Union Member State courts.

Article 31.2 of the revised Regulation states that 'where a court of a member state on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another member state shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement'.

This means that, unlike the situation under the old Regulation, the court mentioned in an exclusive jurisdiction clause can continue the proceedings even if another party has already started proceedings before another court. However, the unaltered Article 71 of the revised Regulation stipulates that 'this regulation shall not affect any conventions to which the member states are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments'.

It could, therefore, be argued that Article 31 of the CMR should prevail over Article 31.2 of the revised Regulation in the event that the CMR applies to a particular dispute. This would mean that a court mentioned in an exclusive jurisdiction clause, seised subsequent to another court competent under Article 31 of the CMR, could not continue the proceedings on the basis of Article 31.2 of the revised Regulation.

EU Court of Justice rulings

The party invoking the exclusive jurisdiction clause, however, could maintain that this interpretation is invalid in view of the European Union Court of Justice judgments of 19 December 2013 in *Nipponkoa v Inter-Zuid* and of 4 May 2010 in *TNT v AXA*. In these disputes, it was held that Article 71 of the Regulation precludes an international convention from being interpreted in a manner that fails to ensure, under conditions at least as favourable as those provided for by that regulation, that the underlying objectives and principles of the regulation are observed.

It could be argued that the objectives and principles of the revised Regulation would not be adhered to if a court appointed under an exclusive jurisdiction clause had to stay

its proceedings pursuant to Article 31.1 of the CMR. Then the position of the claimant would be less favourable than would be the case under Article 31.2 of the revised Regulation, and the claimant could invoke *TNT v AXA* and *Nipponkoa v Inter-Zuid* to argue that it could rely on its exclusive jurisdiction clause within the meaning of Article 31.2 of the revised Regulation in CMR cases. In that case, the court mentioned in the jurisdiction clause would no longer have to stay CMR proceedings, even if another court had already been seised.