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In this issue of *The Arrest News:*

The Commercial Court of Montenegro Grants Ship Arrest for Non-monetary Claims

by Peter Djurovic, Abaco Ltd and Filip Milosevic, Law Office Milosevic

In its recent practice the Commercial Court of Montenegro accepted the application for ship arrest for securing the non-monetary claim - *regaining of ownership title and actual possession over* a 42m LOA superyacht. In the said decision, the Court also prohibited alienation and disposal of the yacht while the arrest was in place.

When applying for the ship arrest, the applicants pointed out that they had already filed a lawsuit against the opponents, for the purpose of regaining property title and actual possession of the yacht before the High Court of Justice of the British Virgin Islands. They also submitted the judgement of the High Court of Justice of the British Virgin Islands as evidence that the opponents were already prohibited to sell or otherwise dispose of the yacht. The applicants particularly explained the existence of danger for their (non-monetary) claim because there was an obvious intention of the opponents to sell the yacht, considering that its sale had already been published on several online yacht brokers' platforms.

The Court found that the applicants made probable the existence of their claim, as well as the danger that, without a certain provisional measure (ship arrest), the opponents, by their attempts to sell or dispose of the yacht, concealing it, removing it or otherwise, will

frustrate or significantly impede the later realization of the applicants' claim. Furthermore, the panel of judges as the Court of the second instance, accepted the reasoning of the first instance Court and denied the opponents' appeal. Consequently, the decision on ship arrest for the non-monetary claim became final.

Ship arrest in Montenegro is considered to be a provisional measure for securing maritime claims and it is regulated both by Brussels 1952 International Convention Relating to the Arrest of Sea-Going Ships (the "1952 Arrest Convention") and subsidiary application of the law of the forum – Montenegrin Law on Maritime and Inland Navigation and the Law on Enforcement and Security.

The claims for which the Court may decide to allow ship arrest are aligned with the ones prescribed by Article 1 of the 1952 Arrest Convention, considering that Montenegro is a party to the Convention. However, Montenegro has also made reservation to the Convention according to Article 1, paragraph (1)(o) of the Convention for the disputes concerning the title to or ownership of a ship. That means than in this particular case, the Court had to apply domestic law, i.e. the Law on Maritime and Inland Navigation and the Law on Enforcement and Security, which led to the application of subsidiary rules relating to securing of non-monetary claims.

In both first and second instance proceeding, the applicants were represented by the Abaco Ltd and Law Office Milošević.

Filip Milosevic
Law Office Milosevic, Montenegro
w: www.lawmilos.com
e: f.milosevic@lawmilos.rs
t: +381 11 3448 398

Peter Djurovic
Abaco Ltd, Montenegro
w: www.abaco.co.me
e: p.djurovic@abaco.co.me
t: +382 30 311 890

Can a Defective Passage Plan Affect Seaworthiness? by Kenra Parriswhittaker, Parriswhittaker (Bahamas)

For a ship to be deemed seaworthy it must pass all relevant safety tests. At the end of the day these compliance requirements are all designed to ensure a vessel completes its journey without incident. While the notion of seaworthiness encompasses ideas such as precise engineering in construction and observance of health and safety rules in chartering and shipping contracts it also extends to passage planning. If a plan contains errors or is not followed correctly, the vessel could be considered unseaworthy with all the financial implications that holds for the ship owner.

The UK Supreme Court's judgment in *CMA CGM Libra* (November 2021), which will be heavily influential in cases decided here in the Bahamas makes clear that passage plans are not just a paper or box-ticking exercise. They have huge practical implications too. ParrisWhittaker is a leading maritime law firm based in the Bahamas. Our specialist team provide comprehensive advice to ship and yacht owners and others on their obligations when it comes to passage plans, due diligence and seaworthiness checks and compliance.

The Concept Of Seaworthiness

The concept of seaworthiness applies to vessels large and small, and it permeates all aspects of shipping and maritime law. For example:

· In voyage insurance policies the person seeking insurance warrants that the vessel is seaworthy

· A party using a vessel to ship goods will insist on a similar warranty of seaworthiness from the carrier

· A ship owner will warrant to anyone chartering its ship that it is seaworthy

· A shipbuilder will warrant that a ship will be constructed in a manner that renders it seaworthy

Background To The *CMA CGM Libra* Case

If a passage plan is defective – as in the *CMA* case – it can have the effect of rendering a vessel unseaworthy

in the same way that defective construction of a vessel can. The case of *CMA* has already had huge implications, with insurers UKP&I reporting a significant increase in claims against ship owners based on defects in passage plans – even before the Supreme Court examined the issues.

The incident that gave rise to *CMA* litigation took place in 2011. The decade it took to reach a final decision is proof indeed of the cost, delay and uncertainty complex maritime disputes like this can cause.

The CMA CGM Libra was a large container ship with almost 6000 containers on board. Shortly after its departure from a Chinese port in May 2011 it deviated from the pre agreed route, sailing outside of an area marked by safety buoys. It grounded almost immediately.

Crucially, the CMA CGM Libra grounded next to a shallow shelf whose existence had been the subject of a formal Notice to Mariners (NTM) just weeks before. However the ship's electronic charts did not indicate the shallowness of the water in the relevant area and the paper charts the crew used to navigate failed to show the full extent of the shallow shelf.

An older NTM, dating from 2010 also cautioned that depths outside of the area marked by buoys were inconsistent and potentially shallower than indicated on the relevant charts. Significantly the CMA CGM Libra passage plan and paper charts onboard the vessel did not reflect this warning.

The cost of refloating the ship ran to $13 million, and the ship owners claimed general average against all those with cargo on the vessel at the time of the grounding. While some of those with cargo interests discharged their general average obligations, others refused. These parties argued that:

· The defective passage plan meant the vessel was unseaworthy

· The defects had caused the grounding

· This meant they had a legitimate defence to the claim for general average

What Did The Supreme Court Decide In *CMA CGM Libra*?

When the case reached the Supreme Court the main issue for the judges to decide was whether or not a defective passage can of itself render a ship unseaworthy.

In a unanimous decision the court agreed with the High Court and Court of Appeal that the defective passage plan in this case (the omission of warnings about the shallow waters outside the buoyed area) was a result of the ship owners lack of due diligence to ensure the vessel was seaworthy.

Passage planning is crucial for safety in navigation. If a ship leaves port with a defective passage plan the Court indicated it is likely to be unseaworthy. As one judge noted:

"A source of danger when leaving (port) was not clearly marked as it ought to have been."

The link between the omission of the NTM on the passage plan and the grounding of the ship was made clear by the ship's Master in his evidence. In court he confirmed that had he known of the NTM contents he would not have left the channel marked by the safety buoys.

Comment

The requirement for carriers to exercise due diligence at the start of a voyage to ensure a vessel is seaworthy applies to vessels large and small. The *CMA* case demonstrates that this principle applies as much to passage planning as it does to any other element of seaworthiness.

A passage plan is not simply a compliance document prepared ahead of sailing. It is an important process encompassing appraisal, planning, execution and monitoring that enables those in charge to make rational and informed decisions about the ship's navigation.

As we mentioned above the ramifications of the decision for ship owners and carriers was felt even before the decision of the Supreme Court. Following the lower court's decision (which the Supreme Court

upheld) UKP&I noted that more than $100million worth of claims relating to passage planning had been made.

Kenra Parriswhittaker
Parriswhittaker, Bahamas
w: www.parriswhittaker.com
t: +242.352.6110
e: info @ parriswhittaker.com

Celebrating 40 Years of Panama's Maritime Jurisdiction by Joaquín de Obarrio, Patton, Moreno & Asvat Lawyers

Law 8 of 1982 which creates the Maritime Courts of Panama, establishes the maritime rules of procedure, and effectively granted jurisdiction over maritime procedures to the Republic of Panama, has now been in place for four decades. With this important anniversary, the maritime vocation of the Republic of Panama is further cemented, confirming our commitment to global trade.

Upon Panama's independence in 1903, the new republic's first international action was signing the Hay–Bunau-Varilla Treaty with the United States of America, officially establishing the Canal Zone and the construction of the Panama Canal. The new Treaty granted the United States *"all the rights, power and authority within the zone mentioned which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority".*

This included the exclusive jurisdiction over maritime matters arising from Panama Canal traffic, commerce, and ports. In 1914 the United States District Court for the Canal Zone was formally established with appeals heard before the United States Court of Appeals for the Fifth Circuit, located in New Orleans, Louisiana.

For years, Panama requested a review of the conditions of the Hay–Bunau-Varilla Treaty, which eventually led to the signing of 1977 Torrijos–Carter Treaties, which substituted the 1903 Treaty. The new Panama Canal Treaty, which entered into force in October 1979, granted a thirty-month transition period for the closure of the District Court for the Canal Zone and transfer of the jurisdiction to the Panamanian Judiciary.

To address this need for a Panamanian maritime jurisdiction, President Basilio Lakas appointed a commission of attorneys, members of Panama Bar and the Canal Zone Bar led by Woodrow De Castro. The product of this commission was Law 8 of 1982, our Maritime Procedure Code, which created a jurisdiction that could hear maritime cases arising from matters occurring in Panama, involving Panama-flagged vessels or those in which a vessel was arrested in in Panamanian waters. Law 8 was approved by the legislature and ratified by the President on March 30, 1982. On March 31, 1982, the United States District Court for the Canal Zone was officially closed. Thus, Panama's maritime jurisdiction was born.

Law 8 of 1982, remains a novel legislation, incorporating U.S., British, German, French, Spanish, Argentine, Colombian, and Panamanian legislative influences. The most important of these being the possibility of trying cases under Panamanian rules of procedures with the merits decided under a foreign substantive law. As a premier jurisdiction Panama remains at the forefront of maritime trade, ready to resolve global shipping disputes.

Joaquin de OBarrio
Patton Moreno & Asvat, Panama
w: www.pmalawyers.com
t: +507 306 9600
e: jdeobarrio@pmalawyers.com

Marine Accidents Investigation in Poland

by Bartosz Biechowski, Attorney-at-Law

In Poland, we have the following institutions dealing with marine accident investigations - State Marine Accidents Investigation Commission (SMAIC) and Maritime Chambers. They mainly examine marine accidents and casualties that happen in Polish ports, Polish internal sea waters, Polish territorial waters and accidents of Polish-flagged vessels, boats and yachts - regardless of where the accident has occurred.

SMAIC also has the right to examine the accidents outside Polish territorial waters if Poland is a "concerned party" here (this primarily relates to objects located in Polish exclusive economic zone - especially offshore wind turbines and related objects which are to be soon built off the Polish coast).

Apart from that, Polish Maritime Administration - i.e. Directors of the Maritime Offices (as the first instance) and the Ministry of Infrastructure (as the second instance) deal with environmental issues such as sea contamination, oil spills, use of the maritime fuels containing unacceptable sulphur levels etc. (and other similar breaches of MARPOL convention and Polish environmental regulations) but not every case here has to be related to a maritime accident.

1. State Marine Accidents Investigation Commission (SMAIC)

SMAIC is a governmental agency composed mainly of experienced officers and master mariners. It focuses on technical and navigational factors which led to the accident and **does not rule on anybody's personal liability.**

SMAIC reports usually contain extensive photographic documentation, maps, AIS charts, technical analysis, drawings etc. Involved parties rarely have the opportunity to submit their comments during the investigation, therefore SMAIC reports are generally based on findings and evidence gathered by SMAIC inspectors.

The conclusion of the report contains not only the description of the accident, its reasons and consequences but may also contain recommendations for the concerned parties. However, it is strictly forbidden by law to use the SMAIC reports as evidence of anybody's liability in further civil and criminal proceedings as well as in the proceedings before the Maritime Chambers.

In my opinion, however, it is still acceptable to use these reports as official statements of facts of an objective nature (for instance such as speed, position of vessel, weather conditions, technical condition of the vessel prior and after the accident, documentation of damages etc.).

SMAIC runs its own website where all its reports are published in Polish and English and are available to the public: pkbwm.gov.pl

2. Maritime Chambers

Maritime Chambers (one in Gdynia and one in Szczecin plus the Appellate Maritime Chamber in Gdynia) are quasi-judicial institutions associated with the Regional Court in Gdansk and the Regional Court in Szczecin. They examine accident cases during the open hearings (very similar to court hearings) presided by a judge of the respective regional court with two assessors who are usually experienced masters or senior officers / chief engineers. The Maritime Chamber has its own procedure (with supplementary application of the Polish Code of Criminal Procedure) and many actions of the Chamber are taken ex officio.

The preparatory proceedings before the Maritime Chamber are conducted either by the investigative inspector of the Chamber or by Polish Maritime Administration bodies (mainly employees of the Maritime Offices in Gdynia or Szczecin). If an incident takes place onboard a ship that is to leave Poland in a short time, they usually secure all evidence such as testimony of witnesses, photographic documentation or records from the ship's recorders. However, in order to double check their activities, it is recommended to have the agent, a P&I representative or a lawyer on board just after the incident happens.

All parties involved in the proceedings before the Maritime Chamber have a status of "interested parties" - there are no defendants or accused parties and no prosecutor (there are investigation inspectors and the delegate of the Ministry of Infrastructure but they do not have the power to accuse anybody). The interested parties may take part in the hearings, submit evidence of any type and remarks to other parties' evidence, ask the questions to the witnesses and other interested parties etc. If an interested party cannot take part in the proceedings (which happens mainly to non-Polish masters or officers who were on the vessel in the time of the incident), the Chamber cannot decide on their fault (however, their actions may be declared as "inappropriate").

The decision of the Maritime Chamber can be challenged by appeal of any of the interested parties which is lodged to the Appellate Maritime Chamber.

Decision of the Maritime Chamber contains similar elements as the SMAIC report. However, the Maritime Chamber may also determine the personal liability for the accident and the level of contribution to the accident and take disciplinary steps towards Polish officers and seafarers involved in the accident (it is however rather impossible to take disciplinary measures against non-Polish officers and seafarers).

Maritime Chambers do not have competence of civil and criminal courts and do not solve any financial disputes between the parties. If it is not entirely possible or completely impossible for the Maritime Chamber to determine the reasons of the maritime accident this information is explicitly stated in the decision.

The decision of the Maritime Chamber is not a court judgement and does not bind Polish courts. However, official findings of the Maritime Chamber submitted in the court will be regarded as a strong evidence because the Polish law provides for a presumption that official findings of the public authorities are true.

Other functions of the Maritime Chambers are registration of Polish vessels (and mortgages) and accepting of the sea protests but this is a completely different story.

3. Environmental issues

Proceedings concerning breach of environmental protection regulations are conducted by the Directors of the Maritime Offices (as the first instance) and the Ministry of Infrastructure (as the second instance) and are completely independent from the proceedings before SMAIC or Maritime Chambers. To make a long story short, most of the environmental proceedings end up with the fine for the perpetrator - even up to 1.000.000 SDR. Of course, the amount of the fine depends on the level of the contamination, degree of fault of the perpetrator and other issues.

Administrative decisions regarding fines are usually instantly enforceable even when the owner has the possibility to lodge an appeal. Failure to pay the fine may lead to detention of the vessel in Poland.

The procedural rules to be applied here are the Polish Code of the Administrative Proceedings which is used by almost all Polish administrations (except fiscal administration). The parties have the right to submit their argumentation and evidence practically until the decision of the organ of the second instance is issued. A party not satisfied with the decision of the organ of the second instance can lodge an appeal to the Regional Administrative Court (mainly in Warsaw as the Ministry is situated there). Judgement of the Regional Administrative Court can also be challenged by cassation to the Supreme Administrative Court.

Judgements of the administrative courts (if they are favorable to the party) usually do not change the challenged decisions as to the merits but just repeal them. In practice this means that the organ of the second instance has to complete proceedings again - taking in mind instructions from the court.

This may be time consuming and sometimes a bit frustrating, but this is typical for Polish procedures – on one hand they guarantee your rights in an efficient

way, and on the other are bureaucratic and highly formalized.

Bartosz Biechowski – attorney-at-law, Gdynia, Poland, maritime lawyer since 2003 highly experienced in representation of Clients in conflict situations in Poland (oil spills, vessels arrests, vessels collisions, cargo claims, shipyard disputes, insurance claims, environmental issues etc.)

Bartosz Biechowski
Attorney-at-Law, Poland
w: www.biechowski.com
e: bartosz@biechowski.com
t: +48 504 628 929

Salvage Claims Arising Out of Towage Contracts by Cherie Gopie and Gregory Pantin, M. Hamel-Smith and Co. (Trinidad and Tobago)

In the past few years, one case in Trinidad and Tobago provided an opportunity to examine the law as it relates to salvage claims, particularly arising from a contract for towage. In that particular matter, a contract was made between the ship's local agent, the Defendant in the matter and the owners of the KP Rambler, the Claimant, to procure towage services for vessel M/V Edmell 11 which was in the waters of Trinidad and Tobago with disabled engines and drifting toward a gas platform and in danger of colliding with same.

Trinidad and Tobago is a common law jurisdiction and our Courts are guided by English law principles with the highest court being the Judicial Committee of the Privy Council.

In this matter, the Defendant, provided the Claimant with full particulars of the size, tonnage, registration details and location of the Edmell, and informed him that her engines were disabled and she was drifting with no lights and power. However, the agent did not inform the Claimant of the exceptional circumstances facing the Edmell, namely, that she was listing to port, unmanned and taking in water. Upon arrival, the Edmell was drifting in rough sea and in danger of colliding with nearby gas installations which could have resulted in the destruction of both the vessel and platform. Further, the Edmell was unmanned, she had no power and lights, she was listing heavily to port and she was taking in water which was destabilizing her. As such, the Edmell was in danger of marine peril and the Rambler voluntarily undertook to perform salvage services thereby rescuing the Edmell, its cargo and freight.

A claim was made by the owners of the vessel for loss and damage by reason of performing the salvage services including damage to the towage hawser, loss of fuel and loss of profits due to post-salvage operations. The Defendant counterclaimed alleging that the services provided were within the scope of services agreed upon under the oral salvage. Further several items left on board during the exercise by the Defendant was not returned by the Claimant.

Three key questions the court was tasked to answer was whether the agreement entered into between the Defendant and the Claimant was in respect of towage or salvage; whether the agreement made between the Defendant and the Claimant was a towage contract that was converted to a salvage operation by virtue of the services provided by the Claimant, and if it was so converted, what fee was due to the Claimant for performing these services.

Legal Analysis

In determining the first question, the Court applied the following legal principles:

From **Halsbury's Laws of England**, in relation to towage:

"587. In an ordinary contract of towage, the owner of the tug contracts that the tug is to be efficient for the purpose for which she is employed, and that her crew, tackle and equipment are to be equal to the work to be accomplished, in the weather and in the circumstances reasonably to be expected..."

As to salvage, **Halsbury's Laws of England** outlines that salvage services may be rendered in several different ways, including the following:

"... towing, piloting, navigating or standing by a vessel in danger; landing or transhipping cargo or persons belonging to that vessel; floating a stranded vessel raising a sunken vessel or cargo; saving a derelict or wreck; setting in motion, fetching or bringing assistance to a vessel in danger; giving advice or information in order to save a vessel from a local danger; supplying officers or crew or tackle to a vessel in need of them; rescuing persons who have had to take to the boats; removing a vessel from a danger such as a vessel or wreck which has fouled her, an ice floe or an impending collision; putting out a fire on board; saving property or life from a vessel on fire; removing a vessel or cargo from a position in which it is in imminent danger of catching fire; protecting or rescuing a vessel, her cargo or persons on board from pirates or plunderers; recovering and restoring a captured ship or the recovery of a vessel from capture by revolutionaries; and dispatching an aircraft to search for and transmit the position of a derelict vessel."

Lord Bruce in **The Hestia** stated as follows:

"But salvage claims do not rest upon contract. Where property has been salved from sea perils, and the claimants have effected the salvage, or have contributed to the salvage, the law confers upon them the right to be paid salvage reward out of the proceeds of the property which they have saved or helped to save. No doubt the parties may by contract determine the amount to be paid; but the right to salvage is in no way dependent upon contract, and may exist, and frequently does exist in the absence of any express contract, or of any circumstances to raise an implied contract. The way in which an agreement affects the question of salvage is laid down by Kennedy J. thus(1): "A salvage agreement is an agreement which fixes, indeed, the amount to be paid for salvage, but leaves untouched all the other conditions necessary to support a salvage award, one of which is the preservation of some part at least of the res, that is, ship, cargo, or freight." ..."

The Court ruled that the determination of the first issue was one of fact and that from the language of the emails adduced into evidence by the Claimant, the Judge took the view that the parties contemplated that towage services only were to be provided by the Rambler.

In looking at the next issue of whether the towage contract had converted to a salvage operation by virtue of the services provided by the Claimant, the Court applied the following principles:

For a claim for salvage to succeed a salvor must establish four essential elements (as set out in The Law of Tug and Tow). Firstly, there must be a subject of salvage. Secondly, the subject of salvage must be in a position of danger from which it must be salved in order to preserve it from loss or damage and bring it to a position of safety. Thirdly, the salvage service must be voluntary, that is to say, a service rendered by a person who is not under a pre-existing contract or duty to perform that service and fourthly, the salvage services must be successful in, or at least meritoriously contribute to, the preservation of the subject of the salvage from danger or peril.

The Court also applied the test for conversion of towage to salvage which was succinctly set out by Hill J. in **The Homewood**. Therein Hill J. was of the view that while the towage contract to tow a ship without means of propulsion, contemplated that there may be bad weather, that the hawser may part and the tow may have to anchor on the way, it would not have been contemplated that the vessel would be unmanned and that a crew would have to board and hence be exposed to danger. He said:

"To constitute salvage service by a tug under contract to tow, two elements are necessary:

(1) that the tow is in danger by reason of circumstances which could not reasonably have been contemplated by the parties; and

(2) that risks are incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract."

Applying the law to the evidence, the Court ruled that The Edmell properly constituted the subject of a salvage. Further, The Edmell was in a position of real and appreciable danger since there was a strong possibility of her sinking due to her condition, namely, being unmanned, listing to port and taking in water. Added to this were the prevailing weather conditions (gusts, squalls and swells) which would have exacerbated the situation and increased the probability of her sinking. Further, the undisputed fact is that the Edmell was drifting and had no lights. These factors placed the Edmell in a position of danger from which she need to be salved in order to bring her to safety as well as prevent her from loss and damage. The Court also found that the circumstances of the Edmell when she was located by the Rambler were such that the services required to be performed by the crew of the Rambler were more extensive than the services required for towage, having regard to the condition of the vessel, the absence of any crew thereon, the danger of boarding her and towing her in that condition. Accordingly, having regard to the exceptional circumstances in which the Edmell was found by the Rambler, towage under the pre-existing contract came to an end and was superseded by the performance of salvage operations. Further, the evidence establishes that the salvage service was voluntary, the Rambler not being under any duty to salve the Edmell at that time and the salvage services were successful. The towage contract was therefore converted to salvage.

With respect to the quantum of award, the Court noted although Trinidad and Tobago is not a signatory to the International Convention on Salvage 1989, which provides a list of factors to be considered when assessing the salvage award, these factors are consistent, for the most part, with those traditionally considered under the common law. These factors are:

As regards the salved property:

(1) The degree of danger, if any, to human life.

(2) The degree of danger to the property.

(3) The value of the property as salved.

B. As regards the salvors:

(1) The degree of danger, if any, to human life.

(2) The salvors' (a) classification, (b) skill, and (c) conduct.

(3) The degree of danger, if any, to the property employed in the salvage service and its value.

(4) The (a) time occupied and (b) work done in the performance of the salvage service.

(5) Responsibilities incurred in the performance of the salvage services, such e.g., as risk to insurance, and liability to passengers or freighters through deviation or delay.

(6) Loss or expense incurred in the performance of the salvage service, such e.g. as detention, loss of profitable trade, repair of damage caused to ship, boats or gear, fuel consumed etc."

Having already found that the nature of services provided by the Claimant to the Defendant amounted to salvage in respect of the Edmell, the Court additionally found that the Claimant was entitled to be compensated for salvage of same.

The above case highlights the importance of having a clear contract for services as well as the unpredictability that may be encountered in dealing with a vessel in some distress. The decision also shows that whether a contract legally becomes one of salvage, having not originally been contemplated as such, can be largely beyond the parties' control.

Cherie Gopie, Partner
e: cherie@trinidadlaw.com

M. Hamel-Smith & Co.
Trinidad & Tobago
w: www.trinidadlaw.com
t: (868) 299-0981

Gregory Patin
e: gregory@trinidadlaw.com

Noble Chartering Inc v Priminds Shipping Hong Kong Co Ltd (The Tai Prize) (2021) EWCA CIV 87

Brief facts: A bill of lading was executed on behalf of the master, stating that the cargo was shipped in apparent good order and condition. It was later found that some of the cargo was damaged and the Chinese Courts subsequently ordered the head owner to pay over US$1 million to the cargo receivers. The head owners then claimed a contribution from the Owners who paid up and then sought an indemnity from the Charterers at arbitration.

Key Issue: Where an owner incurs liability as a result of a misdescription of the apparent condition of the cargo in a draft bill of lading presented to the master for signature by or on behalf of the charterer, and the charterer knows or should know of the misdescription, is the owner entitled to an indemnity from the charterer if the master did not have reasonable means of discovering that the description was inaccurate?

Decision: The draft bill of lading stating apparent good order and condition did not amount to a representation or warranty by the Charterers as to the apparent condition of the cargo observable prior to loading. It is no more than a request to the master to satisfy himself that the bill in these terms can be properly signed and does not give rise to any right of indemnity.

Takeaway: Owners should consider including express indemnity terms in charterparties and/or requiring letters of indemnity when issuing clean bills of lading in situations where the condition of the cargo is suspect or unknown to them.

The Luna (2021) SGCA 84

by K. Murali Pany and Samuel Lee, JTJB (Singapore)

Brief facts: R sold bunkers on FOB terms to subsidiaries of OW Bunker (the “Buyers"). The Buyers nominated various bunker barges (of which A were the demise charterers/owners) for loading of bunkers at Vopak Terminal on various dates in October 2014.

After the loading of the bunker barges, Vopak Terminals generated, inter alia, a document issued in triplicate titled "Bill of lading" (the "Vopak BLs") which were kept by R until payment was received from the Buyers. In the meantime, the bunkers were delivered to various vessels without the production of any BLS.

The Buyers defaulted on payment and R as holders of the Vopak BLs demanded delivery of the bunkers from A. Various bunker barges owned or demise chartered by A were subsequently arrested by R.

Key Issue: Did the Vopak BLs function as contracts of carriage and/or as documents of title?

Decision: The Court held that the parties never intended the Vopak BLs to have contractual force and to operate as a document of title. All parties conducted themselves on the basis that the Buyers could direct the bunker barges to deliver bunkers to various ocean-going vessels immediately after loading, without any involvement of R and without any presentation of the Vopak BLs, which, before the 30 days credit period, were still in R's possession.

Takeaway: It is not the case that any document titled "bill of lading" will have the same legal effect or function as a typical bill of lading (i.e. as a memorandum of the terms of contract of carriage and as a document of title).

K Murali Pany, Managing Partner
e: murali@jtjb.com

JTJB, Singapore
t: (65) 6220 9388
w: www.jtjb.com

Samuel Lee, Associate
e: samuellee@jtjb.com

The Exclusion of the Compulsory Application of the Hague Visby Rules in Canada by Marc de Man, De Man Pillet

On a motion by the Carrier to stay proceedings to invoke the applicability of a forum selection clause found in the contractual documents between the Carrier and the Cargo interests, the Federal Court of Canada, in a very lengthy and recent decision (Arc-en-Ciel Produce Inc. vs Great White Fleet F.C. Nos. T-2184-18 and T-2185-18, cited as 2022 FC 843, judgment date June 7,2022) decided to impose on Cargo the forum selection clause found in the contractual carriage of goods documentation issued by the Carrier based on a very narrow interpretation of article 1 (b) of the Hague Visby Rules (HVR) appended to the Canadian Marine Liability Act (MLA) and sections 43 and 46 of the MLA.

More particularly, article 1(b) of the HVR defines the contracts of carriage to which the Rules apply as "contracts of carriage covered by a bill of lading or any similar document of title".

Section 43 of the MLA provides that the HVR have force of law (of compulsory application) in Canada with respect to "contracts for the carriage of goods by water".

Section 46 of the MLA permits a claimant to institute proceedings in Canada despite a forum selection clause in a "contract for the carriage of goods by water" provided certain conditions are met, which conditions were satisfied by the Cargo interests in the present case.

The MLA does not define a contract of carriage.

Cargoes of produce from Central America were shipped by sea and inland to the Province of Ontario, Canada. The contractual documents issued by the Carrier, Great White Fleet (GWF) were a Shipping Document and a Service Contract. The Shipping Document was headed "International Bill of Lading" and provided for a forum selection clause granting exclusive jurisdiction to claim in the US District Court , Southern District of New York, U.S.A.

The nature and characterization of the Shipping Documents became central to the motion to stay.

The Court provided a thorough analysis of the historical role and basic characteristics of a bill of lading. Particular emphasis was placed on the transferability of bills of lading. The Court further analyzed the HVR. How these Rules came about, what they covered and the mischief they sought to remedy.

It concluded that the words "contract for the carriage of goods by water" found at sections 43 and 46 of the MLA must mean a contract of carriage covered by bill of lading or any similar document of title.

The Court then analyzed the Carrier Shipping document and Service Contract and pointed out that it was not signed by the Carrier, that it was non-negotiable, that it did not require presentation to obtain delivery of the cargo. Only one copy of the Shipping Document was issued and the delivery was express. The attestation clause on the face of the document was left blank.

The fact that the Shipping document was headed "International Bill of Lading" by the Carrier prompted the Court to conclude that the Shipping document was ambiguous and therefore a hybrid document which invites errors and spawns litigation.

Notwithstanding this ambiguity, the Court held that the Shipping document was akin to a waybill or sea waybill, not subject to the HVR and by extension sections 43 and 46 of the MLA did not apply to documents akin to waybills.

Cargo claimant focused on the purpose of section 46 of the MLA. It argued that it exists to protect the Canadian medium and small shippers and receivers permitting them to pursue their claims in Canada rather than in a foreign jurisdiction. It argued for a broader interpretation of this section.

The Court acknowledged the purpose of section 46 of the MLA to redress the imbalance between carriers operating in the liner trade and shippers and consignees whose cargo was being carried by liner carriers, but reiterated that the shipping document involved in the case before it was akin to a waybill, and therefore outside the ambit of the HVR and sections 43 and 46 of the MLA.

The Court described how other countries have dealt with the problem through national legislation and added that the Hamburg Rules and the Rotterdam Rules did not present the problems experienced with the HVR. In fact, the Court went as far as to suggest that Canada has remained behind modern times and the remedy rested with Parliament and not with the Court.

Finally, by applying the "strong cause" test (The Eleftheria), the Court allowed the stay and the application of the forum selection clause under specific conditions to protect the time bar.

This decision, although well articulated, has serious consequences for cargo interests and admiralty law practitioners in Canada. In the liner trade, the use of sea waybills has become common place, and Cargo claimants are now left at the mercy of Carriers who, absent the protection of the HVR, will be subjected to the presence of exculpatory clauses and foreign selection clauses which will seriously prejudice cargo's rights to claim in its own jurisdiction. The situation facing Cargo claimants will be similar to that experienced by them at the turn of the 20th century, prior to the creation of the Hague and subsequently, the HV Rules. In fact, the level playing field and safety net created by the Hague and the HVR has been destroyed.

The Canadian Maritime Law Association in conjunction with Transport Canada will be presenting amendments to Parliament in the near future to remedy the situation.

Marc de Man, Barrister and Solicitor
Senior Partner, **De Man Pillet**
Montreal, **Canada**
w: demanpillet.com
t: (514) 958 2262
e: mdeman@demanpillet.com

"Who's New" Legal Members

USA

Maloof & Browne LLC
USA
w: https://maloofandbrowne.com
t: +1 914 921 1200
e: litsupport@maloofandbrowne.com
Contact: David T. Maloof, Esq.

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