MLAS
SINGAPORE

THE MARITIME LAW ASSOCIATION OF SINGAPORE

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MLAS HIGHLIGHT

ARTICLES

The Maritime Law Association of Singapore

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About MLAS

The Maritime Law Association of Singapore (MLAS) aims to promote the study and advancement of maritime law and its administration in Singapore, and to promote and consider with other associations proposals for the unification of maritime law and practice of different nations.

The MLAS is a member organization of the **Comite Maritime International (CMI)** a non-governmental international organization devoted to the same object of the unification of maritime law and is the only organization in Singapore entitled to attend the International Conferences of the CMI.

MLAS President's Message

Dear Members,

I hope my message finds you well and safe.

I am pleased to launch our inaugural MLAS e-publication, which I hope you will find to be of interest. This publication allows our members to share their knowledge, and it doesn't have to be confined to legal knowledge. I strongly encourage commercial and technical knowledge relevant to our maritime and shipping industry be shared in future editions of our publication. In the new normal, knowledge and information sharing will be contactless and via platforms, webinars and recorded videos. This will be your channel in reaching out to fellow members and on behalf of the Publications' committee, I urge you to contribute your articles, updates and even learning videos for the committee's consideration.

Lastly, I wish to acknowledge the hard work and dedication of our Publications' committee, Bazul, Hui Tsing, Kelly and Prakaash. Thank you for your efforts, keep up the great work in future editions of our e-publications!

Leong Kah Wah
MLAS President
2021/2022

Chairperson of Publication Subcommittee's Message

Dear Members,

I am extremely grateful for the tremendous support you have shown which has culminated in the launch of our inaugural MLAS e-publication.

The publication is a compilation of articles from you which touch on interesting developments of the law in the maritime sector. Our hope is that the this publication will provide a platform for Members to learn from and collaborate with each other, wherever we may be in the world. This is all the more important in the present times, where it remains challenging for us to come together to share ideas and host discussions. This publication will help to bridge the distance between Members and give them a voice where it is not possible to hear them in person.

I extend my sincere thanks to the rest of the MLAS Publication Committee members, Hui Tsing and Kelly for their hard work. Your contributions and insights have been instrumental in making this project a reality.

Speaking on behalf of the MLAS Publications' committee, we look forward to seeing your continued contributions toward future publications.

Bazul Ashhab Bin Abdul Kader
Chairperson of MLAS Publication Subcommittee
2021/2022

THE CO-INSURANCE QUANDARY

K Murali Pany, Samuel Lee

The economics of insurance have been reliant on the doctrine of subrogation which allows the insurer to sue the "guilty" party on behalf of the insured. Two recent English cases highlighted situations where such rights of subrogation may be lost based on the terms of the contract between the insured and the "guilty party".

"The Ocean Victory"

[Gard Marine and Energy Ltd v China National Chartering Co Ltd and another; China National Chartering Co Ltd v Gard Marine and Energy Ltd and another; Daiichi Chuo Kisen Kaisha v Gard Marine and Energy Ltd and another [2017] UKSC 35]

The first case in 2017 involved the Ocean Victory, which was owned by Ocean Victory Maritime Inc. and demise-chartered to a related company, Ocean Line Holdings Ltd. The demise charterer then sub chartered the vessel. Each charterparty in the chain contained a safe port warranty.

The demise charterparty contained a co-insurance clause that required the demise charterers to keep the vessel insured against, *inter alia*, marine risk in the joint names of the demise charters and shipowners. Further, the shipowners were to approve such insurance.

The vessel subsequently became a total loss due to grounding. The hull insurers paid out to the shipowners and issued proceedings against the sub charterers (as assignees of the demise charters) for breach of the safe port warranty.

The UK Supreme Court, in a narrow 3:2 majority, adopted the position that the "guilty" co-insured's liability to pay damages was excluded by the terms of the co-insurance clause in the contract and that parties had agreed to look to the insurance funds as the sole recourse for any breach of the safe port warranty. As such, the demise charterers, not being liable to the shipowners, had no claim to pass on to the sub charterers. It followed that the hull insurers, as assignees, had no greater right and the same would have been true if the insurers had brought a subrogated claim against the sub charterers in the name of the demise charterers.

While much turned on the interpretation of the wording of the co-insurance clause, Lord Mance (speaking for the majority) highlighted that the insurance was to be taken out in a fixed amount (US$70 million). At the date of her total loss, the vessel was said to have been worth some US$15 million more than that amount. Lord Mance opined that it was implausible to suggest that having developed a comprehensive insurance scheme (and having paid for it), the demise charterers would accept being potentially exposed to paying additional damages.

"The Polar"

[Herculito Maritime Limited and others v Gunvor International BV and others [2020] EWHC 3318]

The second case in 2020 involved a time chartered vessel which was seized by pirates in the Gulf of Aden and released after a ransom of US$7,700,000 was paid. General average ("GA") was declared and a claim was made by the shipowners (the insurers through a subrogated claim) against the cargo owners.

The time charterparty included clauses that required specific insurance concerning piracy risk whilst transiting the Gulf of Aden be paid for by the charterers.

THE CO-INSURANCE QUANDARY

The cargo owners argued that the shipowners agreed to look solely to their insurance cover and not to their counterparties for general average.

The Judge held that since the cargo owners have not paid the insurance premium, there was no agreement between the shipowners and the cargo interests for the shipowners to look only to the insurance policy. As such, the cargo owners were liable to pay for their portion of the GA.

However, the Judge went on to observe that as between the shipowners and the charterers (who paid for the insurance), the shipowners' insurers would prima facie have no right of subrogation against the charterers. However, the charterers were not involved as the claim was against cargo owners for GA. *[We understand that permission to appeal this decision to the English Court of Appeal had been granted]*

Comment

The outcome of *The Ocean Victory* and the position taken by the cargo owners in *The Polar* (although rejected by the English High Court) are departures from the general norm that insurance recoveries are ignored in the assessment of damages arising from a breach of duty.

That said, it appears that the impact of *The Ocean Victory* and *The Polar* may be quite limited.

The holding in *The Polar* was that the B/L holders could not take advantage of the insurance or the insurance clause in the charterparty as they did not pay the premiums. As such, the insurers (of the shipowners) could still claim against the B/L holders.

Whilst the outcome of *The Ocean Victory* was not beneficial to the insurers, both the minority and the majority, took pains to highlight that there were other possible claims (such as bailment and/or the principle of transferred loss) on which a demise charter might be able to claim damages from a sub charterer. These other claims were not considered on appeal as the insurers did not argue these alternative claims in the Courts below.

Implicitly, the UK Supreme Court recognised that the sub-charterers should not be allowed to get off "scot-free". Whilst these other heads of claim will need to be elucidated in due course, it shows that the Court is cognizant of the need to preserve the right of insurers to claim against the party causing the loss.

Nonetheless, parties should be aware of the potential impact of co-insurance clauses and consider carefully what exactly they intend when agreeing to such clauses.

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CONTAINER SHIPPING – SEPARATE YORK ANTWERP RULES?

M. Jagannath

The London Shipping Law Centre ("LSLC") conducted a webinar on Containership Casualties on 22nd Feb 2021 in which the speakers discussed on various issues in this industry. During the Q&A session, Keith Jones of Aon commented "*The Rhodian's could not have envisaged a casualty which might concern some 2000 interests. And surely the container industry should find their own solutions to a large casualty problem as opposed to relying on a costly and no doubt lengthy general average security collection and adjustment….*". We entirely agree with the comments given the size of container vessels, the large number of parties involved together with the resultant contractual complexities, and perhaps the time has come to consider a separate set of York Antwerp Rules("YAR")[i] for General Average("GA") for Container Shipping. As we write this article, another Container Vessel Casualty, The Ever Given, is developing and we may well see a repeat of the issues which occurs in a Container GA.

1. The first question we must ask is whether is it necessary to consider any changes for container shipping? The basic difference between Bulk and Container Shipping is the the number of parties involved in the adventure (the number of cargo interests involved in Bulk shipments would be in low single or double digits whereas in Container ships, this would easily number to a few thousands!) Additionally, for container shipping, there would invariably be a chain of contracts (Owner – Charter – Slot Operator – NVOCC – Freight Forwarder) making it necessary to navigate through these contracts. This being the case, whenever a GA / Salvage situation arises in a Container vessel, enormous costs and time are spent not only collecting securities but also in adjusting the General Average and which can run to a few years.

2. We had written earlier on the possible improvements to the York Antwerp Rules 2016. In this article, we will focus on what can be accomplished to make the collection and adjustment in Container Shipping more efficient. Accordingly, we would suggest the following:

a. Definition of GA: GA exists independently of the contract of carriage. However, the Bills of Lading ("BL") issued for container shipments invariably incorporate the York Antwerp Rules 1994[ii]("YAR '94) to deal with the adjustment. While the YAR 2016[iii] is the latest edition of the York Antwerp Rules and is considered to be much "fairer", it appears to us that it would require another few years for it to become a standard for use in the container industry.

i. The Rule of Interpretation[iv] of the YAR 2016 provides that if the facts support a claim for GA under the numbered rules, it does not matter as to whether it would fall within the definition of GA as provided in Rule A Para 1[v]. Accordingly, if the GA falls under any of the numbered rules, there is no requirement for the loss being extra-ordinary in nature.

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ii. General Average declaration should be far and few and not a regular event. It should only be declared if the losses are truly extra-ordinary[vi] in nature. However, as mentioned above, under the numbered rules, there is no requirement for the sacrifice or expenditure to be extra-ordinary in nature. We would therefore prefer for this aspect to be changed in the numbered rules i.e. the requirement the loss being "extra-ordinary" in order to seek a contribution under GA.

iii. What is extra-ordinary is a question of fact and should be decided considering the size and value of the vessel and the specific trade lanes in which she is involved. It would therefore be preferrable to define the specific monetary limits that could be considered as "extra-ordinary" in nature. By way of an example, an expenditure exceeding say USD 500,000 by a feeder vessel (nominal capacity of say 500 TEU's) and USD 10,000,000 by a Main Line Vessel (nominal capacity of 15,000 TEU's) should, we submit, only be considered as extra-ordinary. Any losses below these amounts should be borne by the Owners and who could consider dealing with these losses under a GA absorption clause[vii](which we understand are generally for a lower amount and may not be sufficient to deal with the limits which we have proposed above). Accordingly, the Rules of Interpretation or the Rule Paramount of YAR 2016 (or any later editions) should also be amended to provide for a specific monetary limit to determine as to whether the loss is extra-ordinary[viii].

b. Provision of Security:

i. Salvage: Salvors are entitled to demand security for the value of the property when the vessel reaches a point of safety. Although this article is focussed on GA, invariably it would be coupled with a Salvage. The requirement to provide security by cargo interests may be much before completion of voyage and which may result in delays in the collection of security. In order to avoid these delays, it would be best to contractually provide for bridging security to be provided by the overlying carriers (Owners to the Salvors, and in turn Owners would be entitled to seek from the Time Charterers and so on so) so that the cargoes can continue with the intended voyage. The terms of the bridging security should require the contractual carriers to only release the cargo to the consignee on receipt of adequate security as may be demanded by the Salvors. This contractual provision will be of benefit to all parties given that not only that cargoes reach the intended destination at the earliest thus avoiding any drop in values but also that it would result in higher values for the cargoes leading to less chances of the cargoes being abandoned, a matter that would be of interest to Salvors.

ii. General Average: Owners of the GA vessel are entitled to adequate security from cargo interests when the cargo is ready and available for delivery. As some of the containers would be on-carried in other vessels, we submit that the Owners of the "GA" vessel is entitled to reasonable security before the containers/cargo are discharged from their vessel. Accordingly, the situation would be similar to the Salvage situation as listed above.

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ii. Hence, a similar procedure as suggested for Salvage should be contractually provided for i.e., if GA securities have to be provided before the containers reach the intended port of delivery, it should be the responsibility of contractual parties (Charterers, Sub-Charterers, NVOCC's, etc.) to provide interim / bridging security.

c. Non-Separation Allowance ("NSA") – Rule G:

i. Para 3[ix] of Rule G York Antwerp Rules 2016 allows Owners to seek contributions to GA even when the cargo has parted from the vessel, provided that it was justifiable for the voyage to continue in the original ship.

ii. The fact is that most of the cargoes loaded in container vessels are time sensitive such that any delays would adversely impact their values. This being the case, we submit non-separation allowances in container shipping are not justifiable, particularly, if the voyage for some cargoes would either be frustrated (e.g. Goods which need to be available for a specific season) or the values adversely impacted. Accordingly, we would suggest the deletion of the NSA provisions from this Rule

d. Loss of Freight – Rule XV: The Bills of Lading contracts issued for container shipments invariably provide for freight to be earned on loading[x]. This being the case, the freight is no longer at risk and instead is merged with the cargo value. Hence, this rule is a mere surplusage and should be deleted.

e. Contributory Values of Cargo – Rule XVII:

i. Under the present rules (YAR 2016), the value of the cargo is ascertained from the commercial invoice rendered to the receiver or if there is no such invoice, from the shipped value. The intention of using commercial invoice was to reduce the time and work necessary to ascertain the contributory values. However, this does lead to an iniquity as detailed below.

ii. Let us consider a casualty such as "The Maersk Honam" and say following the casualty, 5000 containers are discharged and loaded on other vessels by operators and for which they incur say an average freight costs of USD 500 i.e. a total freight of USD 2,500,000.00. If the contribution due is say for 54%, then other interests (Owners and Charterers) have benefited by the contribution of USD 1,350,000 (54% X USD 2,500,000) borne by the Liner Operators in completing the voyage.

iii. In order to ascertain the contributory values of cargo, we would suggest deduction of the additional costs incurred after parting from the "GA" vessel to complete the voyage. We admit that it may be problematic for the adjuster to ascertain the freight costs following a GA incident but this issue could be better dealt with by having an agreed schedule of freight / slot rates in the common trade lanes provided jointly by the Container Operators (this schedule could be amended say on a yearly basis).

iv. Accordingly, wordings of Rule XVII ought to be amended so as to provide that the additional freight costs incurred in completing the voyage be deducted from the contributory value of cargo, provided these costs are agreed and available.

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f. Damage to ship – Rule XVIII: The aim of considering new rules is to expedite the process for calculating the contributions due. Accordingly, it should be a requirement that only those sacrificial repairs accomplished within say 6 months should be considered for inclusion in the average adjustment. We admit that this may not always be the best way but there has to be some compromise to ensure that delays are minimised, particularly when the Owners are holding securities and for which cargo and their insurers would be liable for interests or bearing costs.

3. Other issues not covered under YAR 2016:

a. Cash deposits: At present, uninsured cargo interests are required to make payment of cash deposits to Owners or the average adjusters' nominated bank. Often, these bank accounts are sited in another jurisdiction far from the intended voyage. Hence, uninsured cargo interests would have to incur expenditure for the transmission of funds. If the amounts in question are huge, then the costs of transmission would pale in comparison. However, if the cash deposit is for say a figure of USD 1,000 or so, then the costs of transmission may well exceed USD 70 or so i.e. 7%. We submit that the industry should find a way to minimise the transmission costs. One of the ways to accomplish this is to use a bank or a financial institution such as Mar-Trust or Western Union and which would allow for payments in multiple jurisdictions.

b. Counter-security from Owners:

i. Owners are entitled to and have an obligation to seek security from all parties involved in the adventure. If GA costs are incurred by the Owners, then this would invariably be more than the security demanded by Owners from the other parties. However, if the GA is related to say a jettison and exceeds the costs incurred by the Owners, it would be appropriate for securities to be also provided by Owners as a course to the Average Adjusters.

ii. If the claim for General Average is defeated due to an "actionable fault"[xi] defence, the question is whether parties could also pursue Owners for recovery for their losses arising from the provisions of such securities i.e. interest costs. The problem is while the "actionable fault" defence may entitle a party to deny Owners entitlement to GA contributions, this may not be of assistance to counter-claim for losses unless the time allowed for action has been preserved.

iii. In order to preserve equity, it would be appropriate for Owners to also provide counter-security for such losses so that such security could be realised should the claim for GA be defeated by say "an actionable fault" defence. Given that this is a liability issue, we submit that the Owners P&I policy should be construed to cover for this exposure and the P&I Club ought to issue the relevant counter-securities.

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c. Law and jurisdiction clause:

i. The BL's issued by Container Carriers[xii] incorporate a law and jurisdiction clause. The BL's also incorporate a clause dealing with GA[xiii] and which provide for the GA to be adjusted and settled at any port or place at the Carrier's / Vessel Owners option. Under English Law, the law of the place of adjustment, in the absence of contractual agreement, would govern the adjustment of GA[xiv]. Accordingly, basis the GA clause, Owners could, arguably, adjust the GA in any jurisdiction where the laws are more favourable to them i.e. at a jurisdiction where delay plagues the court process together with limited development in the law to deal with such issues.

ii. The question would be whether the provisions of the GA Clause override the law and jurisdiction clause in the B/L. While we have seen no specific case law dealing with this issue, we submit that the law and jurisdiction clause of the Bill of Lading should override any provisions in the GA clause, particularly if this (Law and Jurisdiction) clause is on the face of the B/L[xv].

iii. In order to avoid issues cropping up at a later date and to preserve equity, we would suggest that the YAR for Container Shipping should provide for some mechanism for the place of adjustment / law to deal with the adjustment. While majority of Law and Jurisdiction clauses in BL's gravitate towards English Law, we would prefer for the adjustments to be closer to where the cargoes are traded i.e. centres could be chosen depending on where the GA occurs – say Hong Kong / Shanghai for China Sea, Singapore for SE Asia, Dubai for Middle East, London/Rotterdam for Europe, New York / Vancouver for North America and so on.

4. We believe that there would be other provisions of the YAR 2016 which could also be tinkered to facilitate Container GA's. The YAR's are a continuous work in progress and therefore we must adopt methods which could assist in expediting the process. We obviously welcome comments and suggestions on what could be further amended/ added to make the YAR more suitable for Container Shipping so that this can be discussed further with the powers to be when the next iteration of York Antwerp Rules is discussed and considered.

i. We do not suggest entirely new rules but instead to make suitable amendments to the York Antwerp Rules 2016 to facilitate quick adjustment and resolution of GA claims.
ii. https://www.jus.uio.no/lm/cmi.york.antwerp.rules.1994/doc.html
iii. https://comitemaritime.org/wp-content/uploads/2018/06/2016-York-Antwerp-Rules-with-Rule-XVII-correction.pdf
iv.In the adjustment of general average the following Rules shall apply to the exclusion of any law and practice inconsistent therewith.
Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.
v.There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.
vi. Rule A of the YAR (and the earlier editions) states "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure".
vii.See Clause 40 of International Hull Clauses and which can be viewed at http://www.fortunes-de-mer.com/documents%20pdf/polices%20corps/Etrangeres/Royaume%20Uni/International%20Hull%20Clauses%202003.pdf
viii. The Rule Paramount came about due to the disquiet following the decision in Corfu Navigation v Mobil Shipping (The Alpha) [1991] 2 Lloyd's Rep. 515. The Rule provides for a requirement of reasonableness and which would also apply for the numbered Rules. The Rule Paramount can be easily amended to also provide for the requirement of the sacrifice or adventure being "extra-ordinary".
ix."When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the common maritime adventure had continued in the original ship for so long as justifiable under the contract of carriage and the applicable law"
x.See clause 16.2 of the Maersk BL terms, clause 16.2 of the MSC BL terms, clause 12.1 of the CMA-CGM BL terms.
xi. See The CMA CGM Libra in which both the English High Court and the Court of Appeal held that cargo interests could deny contribution to GA on the basis of actionable fault. This decision has been appealed and will be heard at the English Supreme Court and who will have the final say in this matter.
xii.See clause 26 of the Maersk BL terms, clause 10.3 of the MSC BL terms, clause 31 of the CMA-CGM BL terms.
xiii. See clause 24 of the Maersk BL terms, clause 22 of the MSC BL terms, clause 14 of the CMA-CGM BL terms.
xiv.Para 30.06 of Lowndes & Rudolf, XV edition.
xv. Para 30.31 of Lowndes & Rudolf, XV edition where the authors comment on Arbitration Clauses and GA on similar basis.

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YORK ANTWERP RULES 2016 – POTENTIAL FOR FURTHER CHANGES?

M. Jagannath

1. Due to the different practices in the adjustment General Average, there was clamor for uniformity and which led to the establishment of the York Antwerp Rules, commonly known as YAR (it started with The York Rules 1864 followed by The York Antwerp Rules 1877, 1890, 1924, 1950, 1974, 1990 amendment to the 1974 Rules, 1994, 2004 and the latest being the 2016 Rules). Which rules would apply would depend on what is incorporated into the contract of affreightment (Charter party and / or Bills of Lading). Given that Owners are invariably in a stronger bargaining power vis-à-vis the Charterers / Cargo Interests, the contract would invariably incorporate YAR most favorable to Owners. Perhaps, this is the reason why YAR 2004 failed to take up and the majority of contracts continued to incorporate either YAR 1974 or YAR 1994.

2. The CMI, who are the custodians of the YAR since 1950, initiated a revision in 2012 so as to try and achieve consensus on the next revision of the Rules so as to achieve "buy in". The YAR 2016 appears to have achieved the "buy in" of at least the owners and therefore we believe that future contracts will start incorporating these rules. However, the impression we get is that the parties involved in considering the changes were mainly representing Owners interests[1]. Accordingly, we would suggest that other stake holders (Cargo owners, Time Charterers, Intermediaries (Operators / NVOCC's)) be invited to participate in any future revisions of the YAR. This would lead to early buy-in of the new YAR by other participants and also go a long way to avoid any challenge or litigation[2] to deny the General Average (GA for short) adjustment.

2. We believe that the YAR 2016 could be further improved to ensure equity (and which was the basis for the development of GA). Some aspects of GA as provided in the YAR 2016 (and also the earlier versions) allow the costs incurred by Owners to be recovered and which would not be allowed say under English Law. This is obviously a result of the stronger bargaining power of Owners. However, in an inter-connected world, changes would have to be made to achieve the right balance between the interests of Owners and other parties. Otherwise, there would be renewed clamor for removing GA[3]. Having said that, it is submitted that GA plays a very important role, and the absence of it, would in fact, be detrimental to trade. Accordingly, we would prefer GA to be available but with changes allowing for it be more "fairer".

3. We would suggest the following amendments for consideration for future revision of YAR 2016:

a. Rule C (3): Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be allowed as general average *provided the parties declaring general average have done everything possible to ensure that voyage is not disrupted and that actions necessary for the*

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common benefit have been taken promptly (words in italics added by us): We would suggest these additions given that if Owners or any other party delay in taking reasonable actions, then they should be held responsible for the losses arising from this delay[4].

b. Rule F: Any additional expense incurred in place of another *or similar* expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided (words in italics added by us). The UK Supreme Court decision on The Longchamp[5] reveals that the Court took a purposive instead of a literal approach. As the YAR 2016 were published prior to the judgement, we would suggest that the wordings be amended to ensure that there is no further disagreement in the effect of this Rule.

c. Rule VI (b) (iii) on Salvage Remuneration – salved values are manifestly incorrect and there is a significantly incorrect apportionment of salvage expenses *and with the additional costs which may be incurred for the adjustment to be borne by the parties who have declared the manifestly incorrect details* (words in italics added by us).

d. Rule XI (a) allows for the inclusion of Wages and Maintenance in the GA Kitty. We would prefer to limit this allowance to a fixed sum say up to a maximum of USD 2,500 per day or on the basis of a scale depending on the type and tonnage of the vessel. We make this suggestion considering that some vessels, in the liner Industry, are deliberately flagged in some jurisdictions for other considerations such as allowing the vessel owner to participate in government cargo. While the reasons for flagging is understandable, the effect is that the crewing costs are not in line with other vessels flagged in different jurisdictions i.e. the wages and maintenance differ depending on the nationality of the crew[6]. In the Market Briefing[7] of 21st March 2017 provided by Mr Willum Richards, the present Chairman of the Association of Average Adjusters, he stated that the Italian Insurance Market provided for a standard amount for reimbursement for the costs of superintendent's expenses. Using this as an example, we would prefer that the sums charged for Wages and Maintenance be "fixed" instead of it being affected by the flag in which the vessel is registered.

e. Rule XIII (a) – New for Old – This provides for a reduction of 1/3 on the costs of material used if the vessel is more than 15 years to cater for betterment. While this may have been correct in wooden ships, this may not be correct for the vessels constructed of steel. Accordingly, this rule can be done away with for ships constructed of steel or a more appropriate standard be considered to remove the aspect of betterment.

f. Rule XVII – Contributory Values:

i. (a) (iii) The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty to which the ship may be committed *and with the valuation being submitted by the Owners* (words in italics added by us):

YORK ANTWERP RULES 2016 – POTENTIAL FOR FURTHER CHANGES?

We suggest the addition of these wordings given that it is the practice for the costs incurred for vessel valuation to be included in the GA. However, with respect to the other parties, the onus is on them to provide the value to the Average Adjusters. Accordingly, it is only correct that Owners should also be held to the same standard.

i. Consideration of other equipment such as Containers: *The value of equipment such as containers shall be assessed on the basis of the replacement value of the equipment at the place where the adventure would terminate for the equipment without considering any beneficial or detrimental effect to its use which it may be committed* (words in Italics added by us)[8]: The Advisory Committee of the Association of Average Adjusters provided an opinion in 1975 (G 13) on the value recommended to be adopted for Contributory Values and Amounts Made Good. The opinion suggests that the value to be adopted should be the current replacement costs less depreciation. For simplification purposes, the Committee suggested the use of the Insured value of the container. Given that containers may be underinsured and further container values, at least for specialized containers (Reefers, Tank Containers, etc), may be of significant value, we would submit that it should be based on the replacement costs (and not with depreciation) as is the case of a vessel. Alternatively, the Association of Average Adjusters Advisory Committee should be asked to revisit this topic given that their advice was provided 43 years earlier.

g. Rule XXII – Treatment of Cash Deposits: Addition of the below:

(e) *If excessive cash deposits have been collected, Owners to be liable for the losses arising from the collection of the excessive deposits sought together with the interest rate as provided in Rule XXI (b)* (words in italics added by us): We make this suggestion as we have seen requests for excessive security and which puts unfair pressure on the other interests.

(f) *Any cash deposit collected will be used for expenditure and interests until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests provided Owners and other claimants or their Insurers provide counter-security for the expenses / sacrifices which they have incurred. Failure to provide any counter-security would result in the cash deposits being maintained in an interest bearing account and with the parties not being entitled to any interests as provided in Rule XXI*: We think it appropriate that cash deposits should be used to fund the GA and, in this way, allow these funds to earn interests as would be earned by losses allowed in GA (Rule XXI).

h. An additional clause for Dispute Resolution for resolving disputes arising from the average adjustment: If a party is unhappy with the adjustment provided by the Average Adjuster, a dispute would arise and which which would frequently lead to litigation. Given that the YAR are meant for adoption worldwide, we would prefer that such disputes be arbitrated instead of litigated (such as provided for Salvage by way of Lloyds Salvage Arbitration).

YORK ANTWERP RULES 2016 – POTENTIAL FOR FURTHER CHANGES?

Accordingly, we would prefer the development of a "free standing" arbitration clause as suggested in Point 4 of our earlier article – Arbitration Clause in Liner Bills of Lading – Is it Workable?[9]. We would prefer that the wordings of the arbitration clause together with the procedure be discussed and adopted by consensus.

5. While there may be many other points / suggestions to ensure that future revisions of YAR are fit for purpose, we have listed some points which could make the adjustment of GA more equitable. It is submitted that there is always scope of improvement. We would be also grateful if readers would comment with their thoughts on this aspect. As the revisions are now paced at around 10-12 years, it would be preferable to test the latest YAR i.e. YAR 2016 and consider further amends / additions to make the YAR more fit for purpose.

We are aware that there are more qualified people to comment on these issues and we would be happy to hear their comments and publish their views. The views expressed here together with all errors are entirely ours.

[1]. If we are wrong on this aspect, we are happy to be wrong. Perhaps, future revisions could clearly mention participants together with the stake holders they represent, and which will go to the early adoption of the revised Rules.
[2]. See General Average Judgements of 2017 published by Thomas Miller Law.
[3]. See article of Gard "General Average – To abolish or not to abolish, that is the question and Paper of Nick Gooding on General Average – Time for a Change.
[4]. We had commented on the delay in our earlier article – General Average – Issues arising in Container Shipping.
[5]. The Supreme Court Judgement of The Longchamp can be viewed here. See also our earlier articles on General Average Back to Basics & General Average Back to Basics – 2.
[6]. See comparison of US and Foreign Flag operating Costs.
[7]. See page 9 of the IUA-AAA Market Seminar 21 September 2017.
[8]. See our earlier article on Value of Containers.
[9]. See our earlier article on Arbitration Clause in Liner Bills of Lading – Is it workable?

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THE "BILL OF LADING" SEEN IN THE SINGAPORE BUNKER INDUSTRY IS NOT THE KEY TO THE WAREHOUSE

Kelly Yap, Gregory Toh

In the very recently delivered landmark decision of The "Luna" and another appeal [2021] SGCA 84, the Singapore Court of Appeal held that a document titled "bill of lading" issued by local bunker barge operators was neither a contract of carriage nor a document of title and was, therefore, not a true bill of lading.

In a modern re-telling of the story of David versus Goliath, local bunker barge owners/charterers successfully resisted claims brought in the Singapore courts by Phillips 66 for misdelivery of bunkers.

The bunkers were sold by Phillips 66 to subsidiaries of OW Banker A/S. Following OW Bunker A/S' insolvency in 2014, which left Phillips 66's invoices unpaid, Phillips 66 arrested the barges, which had delivered the bunkers to various oceangoing vessels.

The claims were brought by Phillips 66, as the alleged shipper, on the basis of documents titled "bill of lading". The face of these documents bore what superficially appeared to be the usual hallmarks of bills of lading, which were prepared by the loading terminals but signed and stamped by representatives of the barges after loading. Phillips 66 argued that it had procured the issuance of such "bills of lading" as part of its risk management measure against its buyer's non-payment.

At the risk of over-simplification, the Singapore Court of Appeal adopted a substance-over-form approach and held that these documents were not true bills of lading. The Court of Appeal found that no contracts of carriage existed and these documents were not intended to be documents of title. That is why Phillips 66's misdelivery claims failed.

In arriving at this conclusion, the Court of Appeal emphasised the fact that the bunkers were consistently delivered by the barges to the ships shortly after loading, without any original bills of lading being surrendered, and well before the expiry of the 30-day credit period which Phillips 66 had given its buyers. This indicated that neither Phillips 66 nor the barge operators could have intended for delivery of the bunkers to be made only upon presentation of an original "bill of lading".

It was also telling that there was a conspicuous absence of any reference to bills of lading in the bunker sale contracts between Phillips 66 and its buyers. Phillips 66 also never once gave any instructions to the barges to make deliveries to specific oceangoing vessels.

Ultimately, the Court of Appeal found that it was untenable that the barge owners/ charterers would have agreed to assume the risk of non-payment by Phillips 66's buyers. Therefore, the documents titled "bills of lading" that Phillips 66 had relied on to sue and to arrest the bunker barges were not true bills of lading, in the usual sense as understood in the shipping industry, and they did not bestow any rights of suit.

THE "BILL OF LADING" SEEN IN THE SINGAPORE BUNKER INDUSTRY IS NOT THE KEY TO THE WAREHOUSE

This decision is highly relevant to players in the local bunker industry as it is not uncommon to see such "bills of lading" in circulation. Parties who procure the issuance of such "bills of lading" will have to reconsider their modus operandi and risk management strategies. The decision also serves as a timely reminder to barge owners/operators to exercise care when authorising masters or cargo officers to sign documents at loading.

Kelly Yap and Gregory Toh successfully represented the bunker barge operator of the "Luna" together with Managing Partner Bazul Ashhab and Partner Prakaash Silvam.

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COVID-19 OUTBREAK: IMPLICATIONS FOR INTERNATIONAL TRADE AND SHIPPING

Prakaash Silvam

Introduction

Businesses around the world are affected by the COVID-19 outbreak.

The fact that manufacturing has ground to a halt in China is likely to have an impact on the global supply chain along with a consequential impact on construction projects and other downstream industries. The disruption may spread indirectly to other markets, including key commodity markets like copper, iron ore, zinc, nickel, lithium, oil and LNG.

The shipping industry is likely to be impacted in several ways: not only through disruption to voyages to and from China, but also from delays in other countries as a result of quarantine and port checks due to cases, or suspected cases, of COVID-19 amongst crew on board vessels. Delivery of cargo may be delayed, or cargo may need to be discharged at alternative ports, with significant logistical and insurance implications. The construction of newbuilding vessels and scheduled ship repairs and upgrades are being delayed as a result of the impact of outbreak on the Chinese workforce which could adversely affect operating schedules.

We consider below some of the relevant contractual provisions and risk management strategies which may be invoked in the wake of the crisis.

Does your contract contain a force majeure clause?

Affected parties should consider whether their contracts make provision for force majeure clauses and whether the outbreak falls within the protection offered by the relevant clause. Force majeure events are, broadly speaking, unexpected circumstances outside of a contracting party's reasonable control that, having arisen, prevent it from performing its contractual obligations.

Release from performance as a result of force majeure is not recognized as a standalone principle under Singapore law. It is therefore a matter for parties to deal with expressly in their contracts and the protection afforded by the clause will depend on the precise drafting. In the event of a dispute as to the scope of the clause, the Singapore courts will apply the usual principles of contractual interpretation.

In the shipbuilding industry, there have already been reports that Chinese yards have declared force majeure under some of their shipbuilding contracts as a result of the delays caused by the outbreak. The force majeure clause and the surrounding circumstances will need to be evaluated on a case by case basis, as will the effect of any resulting disruption in planned employment for the vessel.

Not all contracts will have force majeure provisions: for example charterparties may not have these clauses, although they will contain other provisions specifically drafted to deal with situations where the voyage is affected by an infectious disease (such as the BIMCO Infectious or Contagious Diseases Clause) which may be triggered and/or relevant as a result of the outbreak. These contracts will require additional consideration as to the nature of the impact of the outbreak on the contract and the effect that this might have on the parties.

COVID-19 OUTBREAK: IMPLICATIONS FOR INTERNATIONAL TRADE AND SHIPPING

Can the outbreak amount to frustration of the contract?

Under Singapore law, if a contract becomes impossible to perform as a consequence of the outbreak, it may be open for a party to argue that it has been frustrated. The financial consequences of a contract being frustrated are complicated but the parties are discharged from further performance of their obligations. However, it is very difficult to establish frustration. In particular, it cannot be used (a) where the parties have contractually agreed the consequences of the supervening event, for example, by the use of a force majeure clause, (b) an alternative method of performance is possible, (c) because performance has become more expensive, or (d) because a party has been let down by one of its suppliers.

Implications under funding arrangements

Businesses affected by the outbreak will also need to review their credit agreements with funders to assess the implications under the terms of these agreements. It is likely that funders will require the provision of information under their often widely drafted information undertakings. If the loan is not fully drawn, the parties will be examining whether the circumstances will result in a draw-stop, particularly if force majeure has been triggered under key contracts for the business or project. Ongoing analysis will be required to determine whether any event of default has been triggered.

Practical steps that businesses can take

The potential business disruptions from the outbreak cannot be underestimated given the importance of Chinese exports, labour and demand for goods to the global economy.

Risk management measures which businesses should consider include:

- Inserting express infection disease/epidemic wording into new contracts (and amending existing contracts if possible).
- Checking the terms of existing contracts for protection, including force majeure clauses.
- Check insurance arrangements, especially where cargo needs to be delivered to an alternative port.

The above content is for general information purposes only. It is not and does not constitute nor is it intended to provide or replace legal advice, a legal opinion or any information intended to address specific matters relevant to you or concerning individual situations.

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PRACTICAL TAKEAWAYS FOR COMMODITY TRADERS - RISKS INVOLVED IN ISSUING LETTERS OF INDEMNITY

Prakaash Silvam, Tan Yu Hang

It is common practice for commodity traders who have chartered vessels to instruct the shipowner to discharge cargoes without production of the original bills of lading and to agree to indemnify the shipowner against the consequences of doing so. This is done by providing a Letter of Indemnity ("**LOI**"). It is often the case that LOIs are given by traders without a full appreciation of the risks involved or consideration as to how those risks might be minimised. These issues have recently been brought into the spotlight because of the collapse of major oil trading entities including Hin Leong Trading (Pte) Ltd and Hontop Energy (Singapore). In this article, we identify the risks involved in the use of LOIs from the trader's perspective and look at what steps might be taken to minimise those risks.

When are LOIs used?

The bill of lading is commonly known as the "key to the warehouse". This is because the carrier's paramount obligation under a negotiable bill of lading is to only deliver the cargo on production of the original bill of lading. If the carrier delivers the cargo without production of the bills of lading, he may potentially face a claim for the value of the cargo from the holder of the bills of lading (including possible future holders of the bills of lading). Having said that, for the sake of commercial expediency, most carriers will agree (either at the time of entering into the charter or after) to give delivery of cargo without bills of lading if they are provided with an LOI in the standard P&I Club form. This is because the bill of lading's progress through the sale chain, especially where banks are involved, is often slower than the vessel's progress to the discharge port. In such circumstances, large demurrage claims would arise if discharge had to wait for the bill of lading to catch up. Therefore, in order to avoid demurrage liabilities, traders often instruct the carrier to discharge the cargo without bills of lading by issuing an LOI in favour of the carrier. The risks of doing this are limited so long as the trader issuing the LOI is reasonably confident that (i) he will be paid for the cargo (if he is the seller) and (ii) there will be no call under the LOI. Unfortunately, on certain occasions, confidence that there will be no call under the LOI proves to be misplaced. We will discuss that further below.

Terms of the LOI

The vast majority of LOIs are issued in the standard wording recommended by the shipowners' P&I Clubs. The key features of such wording are that the party giving the indemnity will:

a. indemnify the shipowner in respect of any third party claims they may face by reason of delivering the cargo in accordance with the LOI issuer's request (i.e., without production of the original bills of lading);
b. provide security in respect of any third party claims brought against the shipowner for delivery without bills of lading should the vessel or any vessel or property in the same or associated ownership, management or control be arrested or threatened with arrest; and
c. provide sufficient funds to defend any third party claims brought in connection with the delivery of cargo without bills of lading.

PRACTICAL TAKEAWAYS FOR COMMODITY TRADERS - RISKS INVOLVED IN ISSUING LETTERS OF INDEMNITY

Therefore, if a third party comes along claiming to be the holder of the bill of lading following delivery of the cargo, and makes a claim against the carrier backed up with a threat to arrest his vessel, the trader who has issued an LOI will be contractually required to:

i. arrange security for that claim;
ii. provide the carrier with the funds to defend the claim;
iii. in the event that the carrier does not succeed in defending the claim, indemnify the carrier in respect of that claim. In this regard, it bears mentioning that the third party's claim will almost invariably be for the full value of the cargo.

In circumstances where a trader puts up security and is also funding the defence of the claim from the third party, he will still have to rely upon the carrier to properly defend the claim in circumstances where the carrier no longer has any financial interest in the outcome of it. This is because the P & I Club standard form LOI wording does not give the party issuing the LOI any right to take over the handling of third party claims against the carrier, even after he has posted security in respect of that claim. In this respect, it is common for the trader to enter into a litigation cooperation agreement or a claims handling agreement at the time that security is put up with a view towards taking over conduct of the defence of the misdelivery claim, whether this is in arbitration or court proceedings.

Risks to be assessed when issuing an LOI

The obvious risk of instructing a carrier to discharge cargo without bills of lading is that it renders the bills of lading worthless in the hands of the CFR seller issuing the LOI. This is because if the CFR seller were to subsequently bring a claim, as holder of the bills of lading, against the carrier for wrongful delivery of the cargo, that claim will rebound back at him under the LOI – the trader would have to indemnify the carrier against his own claim. Any trader who issues an LOI should, before doing so, be sure that he is going to be paid. In this regard, the fact that payment is to be received under a letter of credit often provides traders with what they believe to be a certain degree of comfort. However, we have seen cases where a seller, having issued an LOI, has been unable to obtain payment under the letter of credit due to a discrepancy in the documents that must be presented under the letter of credit. In that situation, the "unsecured" seller will be left chasing his buyer for payment.

The other risk of issuing an LOI is the risk of that LOI being called upon. That can happen in circumstances where the bills of lading do not make their way through the sale chain to the receiver to whom delivery of the cargo has been facilitated by the LOI. We have seen this happen on a number of occasions where the bank, who has paid the seller under the letter of credit, is not paid by its customer and thus retains the bills of lading. The bank then knocks on the door of the carrier, holding the bills of lading, and asks for delivery of the cargo. The carrier will then inevitably make a call under the LOI which will result in the seller, who has issued the LOI, having, in effect, to pay back the value of the cargo delivered. Furthermore, in those circumstances, the seller may have no remedy at all against the buyer. The seller has, after all, been paid for the cargo under the letter of credit. His loss will result from having entered into a separate contract (i.e. the LOI) with a third party to facilitate the early discharge of the cargo from the ship to minimise his demurrage exposure and not from any contractual failure by the buyer under the sale contract.

PRACTICAL TAKEAWAYS FOR COMMODITY TRADERS - RISKS INVOLVED IN ISSUING LETTERS OF INDEMNITY

Seeking to avoid the pitfalls when using LOIs

LOIs are an instrument commonly deployed in international trade to remove bottlenecks in the supply chain. It would, therefore, be uncommercial to suggest that LOIs should be avoided at all costs. LOIs have been used for decades and are here to stay. However, a careful scrutiny of a trader's security for payment and of the risk of the bills of lading not making it through the sale chain to the end receiver should be conducted before any LOI is issued.

As to the terms of LOIs issued, carriers tend to religiously demand for LOIs to be issued in the wording recommended by their P&I Club when asked to deliver without bills of lading and this wording is naturally very carrier-friendly. There is therefore little, if any, scope for seeking to negotiate on that wording by, for example, seeking the addition of a provision entitling the indemnifying party to take over the defence of any claim which is subject to the indemnity under the LOI.

Having said that, one area where there is scope to reduce risk through drafting is in the wording of the sale contract itself. As we have said above, there may well be no right of recourse against a buyer in the event that the carrier makes a call under an LOI. Such a route can, however, be created by a provision in the sale contract providing for an indemnity. Alternatively, this can be done by getting a back-to-back LOI from the buyer in suitable terms and ideally counter-signed by a bank. While obtaining a back-to-back indemnity from the buyer may mitigate the risk, this will ultimately depend on the financial state of the buyer at the time that the seller calls on the LOI.

In cases where the buyer has become insolvent, it will not assist the CFR seller to have a back-to-back LOI. The only way for a trader to completely eliminate against such risk would be to sell on FOB terms and buy on CFR terms and also to decline providing any back-to-back LOIs when requested to do so. This will mean that the trader is completely out of the arrangements for the shipment of the cargo.

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FALSE STATEMENTS IN BILLS OF LADING

Prakash Nair

This Article discusses the decision of the English Court of Appeal in "TAI PRIZE" [2021] EWCA Civ 87 **("Tai Prize")** on the industry practice of Masters signing bills of lading containing statements about the condition of the cargo, the threshold of the Master's inspection, whether they amount to representations and the consequences of the statements turning out to be false.

STATEMENTS IN A BILL OF LADING

Whenever cargo is shipped on board a vessel, it is usual for a Master of a vessel to sign a bill of lading **("BL")** containing statements about the condition of the cargo. It is also usual for a shipper to prepare a draft BL containing such statements (including a statement that the cargo is shipped in "apparent good order and condition") which is then handed over to the Master who usually signs it without fully inspecting the condition of the cargo.

If the shipment is governed by the Hague Rules **("HR")** or Hague Visby Rules **("HVR")**, there are some safeguards to the Master if incorrect information is given to the Master but the issue that arises is whether these safeguards are sufficient to protect the Master if the condition of the cargo in the BL turns out to be false.

This issue among others was addressed by the English Court of Appeal in the Tai Prize.

TAI PRIZE

Facts

In the Tai Prize, the vessel "TAI PRIZE" **(Vessel)** was under two charterparties. The first charterparty was a time charterparty between the Head Owner **(Head Owner)** and the Disponent Owner **(Disponent Owner)**. The second charterparty was a voyage charterparty **(VCP)** between the Disponent Owner and the charterer **(Charterer)**.

After a cargo comprising soya beans **(Cargo)** was loaded into the Vessel, the Head Owner's agents signed a BL on behalf of the Master containing the following statement:

"SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge or so near thereto as she may safely get the goods specified above.

Weight, measure, quality, quantity, condition, contents and value unknown."

When the Vessel arrived at the discharge port, the Cargo was found to be damaged. The Cargo Receiver **(Receiver)** commenced an action against the Head Owner and succeeded in their claim. The Head Owner in turn made a claim against the Disponent Owner seeking compensation on the amounts paid to the Receiver. A settlement was reached under which the Disponent Owner agreed to compensate the Head Owner. The Disponent Owner then sought compensation from the Charterer and commenced arbitration proceedings against the Charterer.

FALSE STATEMENTS IN BILLS OF LADING

DECISION

At first instance, the arbitrator found in favour of the Disponent Owner. On appeal to the High Court, the decision of the arbitrator was set aside. On further appeal to the Court of Appeal, the decision of the High Court was affirmed.

Representation

There was an issue as to whether the statement in the BL was a representation. The arbitrator held that the statement was not a representation. The High Court and the Court of Appeal **("English Courts")** decided differently and held that once the Master signed the BL, it is a representation from the Master on the facts stated in the BL including the condition of the Cargo. As for the shipper, the English Courts held that the conduct of the shipper was nothing more than an act of inviting the Master to make a representation of fact in accordance with the Master's own assessment on the condition of the Cargo.

HR and HVR – Rule 3

The decision of the English Courts was on the basis that the Charterparty incorporated the HR. Under Article III Rule 3 of the HR (there is an identical provision in the HVR) **("Rule 3")** a Master is to present a BL showing among other things, the apparent order and condition of the cargo. As a BL is to include a statement on the apparent order and condition of the cargo, it amounted to a representation by the Master on the condition of the cargo.

"Apparent" to whom?

The Court of Appeal also confirmed that when a BL says that the cargo is in *"apparent good order and condition"*, it means that it is "apparent" to the Master only and this confirmation is made at the time when the Cargo was loaded on board the Vessel and not earlier.

The Court of Appeal also held that the apparent good order relates to its external condition as would be apparent on a reasonable examination by a Master and that the question as to what amounts to a reasonable examination will depend on the actual circumstances prevailing at the load port. While a Master is to take reasonable steps to inspect the cargo, he is not required to disrupt the loading process just to inspect the cargo. Since the arbitrator made a finding that the damage was not reasonably visible to the Master, this meant that the representation by the Master on the apparent good order of the Cargo was not false. Hence there was **no misrepresentation** by the Master on the statements in the BL on the condition of the Cargo.

Guarantee/indemnity - Rule 5

Under Article III Rule 5 of the HR (there is an identical provision in the HVR) **("Rule 5")** a shipper is deemed to have guaranteed to the ship owner on the accuracy of the marks, number, quantity and weight, as furnished by the shipper. Further, under Rule 5 a shipper is to indemnify the ship owner against all loss, damages and expenses arising or resulting from such inaccuracies.

The Court of Appeal held that the cumulative effect of Rule 3 and Rule 5 is that the Master is to provide a BL with the details set out in Rule 3 which includes "the apparent order and condition of the goods" but the guarantee and indemnity from the shipper under Rule 5 does **not** cover any inaccurate details about the apparent order and condition of the goods under Rule 3.

Implied representation by shipper

The Court of Appeal said that it would not rule out the possibility that there **could** be an implied representation **by the shipper** on the statements contained in the draft BL but as it was not argued in the arbitration and on appeal, the Court of Appeal chose not to say

FALSE STATEMENTS IN BILLS OF LADING

anything further except that it would not, on the facts in SK Shipping Case hold that there was such a representation and this is because the arbitrator did not make any finding that the shippers did have actual knowledge of the condition of the Cargo before loading.

LESSONS LEARNT

The lesson to be learnt is that when a Master signs a BL, it becomes his representation of the facts on the condition of the cargo. If it turns out to be false, he may not have a recourse against the Shipper under the HR and HVR. Arguably, there may be room for argument that there are implied representations by a shipper whenever a shipper furnishes a draft BL to a Master but this is yet to be tested by the courts.

APPLICATION TO SINGAPORE LAW

Although the Tai Prize is a decision of the English Courts, its decision is a persuasive authority under Singapore law.

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RESCISSION OF CONTRACT UNDER THE MISREPRESENTATION ACT

Prakash Nair

This Article discusses the decision of the English High Court in SK Shipping Europe LLC v Capital VLCC 3 Corp (5) Capital Maritime and Trading Corp [2020] EWHC 3448 (COMM) **("SK Shipping")** in the context of a rescission of a contract under claim for misrepresentation under the Misrepresentation Act 1967 **("MA")**, its consequences and its application under English law and Singapore law.

MISREPRESENTATION ACT

Under the MA, if a representation of fact is made by one contracting party **("Party A")** to another contracting party **("Party B")** and if Party B is induced by the representation to enter into the contract with Party A and if it turns out that the representation was false and if Party B did not affirm the contract, then Party B has a cause of action against Party A for misrepresentation under the MA.

Under section 2(2) MA, Party B may apply to court for an order that the contract is rescinded but the court has a discretion and may, instead of rescinding the contract, award damages in lieu of rescission.

RESCISSION BEFORE THE COURT MAKES A DECISION

As there is a discretion by the court, if Party B rescinds the contract before the court makes a decision under section 2(2) MA, the issues that arise are whether the court still has a discretion to award damages in lieu of rescission (since the contract is rescinded by Party B) and if so, what happens to the contract if the court, in exercising its discretion, is of the view that there should not be a rescission and instead there should only be damages in lieu of rescission.

These were some issues that were considered by the English High Court in SK Shipping.

SK SHIPPING

Facts

In SK Shipping, a letter dated 22 November 2016 **(22 November 2016 Letter)** was sent on behalf of the owner **("Owner")** of the vessel "C CHALLENGER" **(Vessel)** containing details about the speed and fuel consumption of the Vessel in its last three voyages. The letter was sent out for the purposes of finding potential charterers to charter the Vessel.

The charterer **(Charterer)** of the Vessel was one such recipient of the 22 November 2016 Letter and this led to negotiations between the Owner and the Charterer. After a series of exchanges, on or about 6 December 2016 a binding time charterparty **(Charterparty)** was concluded between the Owner and the Charterer.

One of the clauses in the Charterparty was clause 24 **(Clause 24)** which states that if there is any increase in fuel consumption of the Vessel as a result of the Vessel falling below the guaranteed performance, then these expenses were to be borne by the Owner. This was an important clause because under the Charterparty (which was a time charterparty) normal fuel expenses are to be borne by the Charterer.

RESCISSION OF CONTRACT UNDER THE MISREPRESENTATION ACT

After the Vessel was delivered to the Charterer, the Charterer noticed that there was excessive fuel consumption. This led to numerous exchanges between the Owner and the Charterer including messages that were sent by the Charterer to the Owner on 24 March 2017 **(24 March 2017 Message)** and 20 July 2017 **(20 July 2017 Message)** under which the Charterer alleged that the Owner misrepresented the actual fuel consumption of the Vessel. There were also other exchanges from the Charterer alleging that the Owner had breached the contractual terms of the Charterparty for various reasons including the excessive fuel consumption of the Vessel under Clause 24.

The Charterer continued to maintain their allegations but at the same time the Charterer also continued to give orders to the Vessel to proceed with long voyages.

In a message from the Charterer to the Owner dated 19 October 2017 **(19 October 2017 Message)** the Charterer put the Owner on notice that the Charterparty was: (a) Rescinded on the basis of the Owner's misrepresentations; and (b) Terminated on the basis of the Owner's repudiatory breaches of the Charterparty.

On 20 October 2017, the Owner terminated the Charterparty on the basis that the 19 October 2017 Message was a repudiatory breach of the Charterparty by the Charterer.

The Charterer stopped paying hire and the Owner commenced a court action against the Charterer seeking recovery of the unpaid hire. The Charterer filed a counterclaim alleging that: (a) There were false representations made by the Owner in the 22 November 2016 Letter which induced the Charterer to enter into the Charterparty; and (b) The Owner was in repudiatory breach of various clauses of the Charterparty including Clause 24.

DECISION OF THE COURT

The claim under the MA

The High Court held that the 22 November 2016 Letter contained false representations. However, the High Court also held that the Charterer was **not induced** by the 22 November 2016 Letter when it entered into the Charterparty. Further the High Court also held that the Charterer had, by its conduct **affirmed** the Charterparty after having knowledge of the speed and fuel consumption issues because as early as March 2017 (when the 24 March 2017 Message was sent) the Charterer knew that there were issues on the speed and fuel consumption and these were repeated in the 20 July 2017 Message and that despite this knowledge, the Charterer proceeded to give orders to the Vessel to go on a voyage and further gave discharge instructions for that voyage. Such conduct, according to the court amounted to a decision on the part of the Charterer to affirm the Charterparty.

The claim under contract

The High Court held that there was no repudiatory breach of the Charterparty by the Owner. This was because, whilst the Owner was in breach of some of the clauses in the Charterparty, these breaches were not such that they amounted to repudiatory breaches. As they were not repudiatory breaches, it did not give rise to a right to the Charterer to terminate the Charterparty.

Repudiatory breach by Charterer

As the Charterer terminated the Charterparty on the basis of the alleged misrepresentations and alleged repudiatory breaches and as the Charterer failed in their claims, the High Court held that it was the Charterer (and not the Owner) who was in repudiatory breach of the Charterparty.

RESCISSION OF CONTRACT UNDER THE MISREPRESENTATION ACT

Rescission and damages in lieu of rescission

As the Charterparty was terminated by the Charterer, the court went on to consider whether there is still be a live issue before the court on awarding damages in lieu of rescission under section 2(2) MA since the contract was already terminated. The court answered this in the affirmative and said the following:

- Usually if a misrepresentation was said to "strike the root of the bargain", it is more likely that the court will exercise its discretion to rescind the contract but if otherwise, it will only award damages in lieu of rescission.

- On the facts, the misrepresentation did not "strike the root of the bargain" and accordingly the High Court would not have rescinded the Charterparty.

- Although the Charterer had already terminated the Charterparty, this was not a relevant consideration when deciding whether to rescind the Charterparty or award damages in lieu and this was because the effect of not rescinding a contract (and awarding damages instead) is to be considered in the context of the actual losses suffered by the Charterer as a result of the misrepresentation and not losses that follow from the refusal of rescission.

Peril

The High Court went on to say that if a party rescinds the contract on its own, it does so at its peril because the order to be made under section 2(2) MA is discretionary and therefore the party must be aware that a court may exercise its discretion to award damages in lieu of rescission thereby keeping the contract alive.

LESSONS LEARNT

The lesson to be learnt from SK Shipping is that care must be taken when considering what is to be done as a result of a misrepresentation.

The first thing for Party B to consider is that it should not act in a way that is inconsistent with its stand. If it acts inconsistently with its stand it will be deemed that it had affirmed the contract and this will defeat a misrepresentation claim.

The second thing for Party B to consider is whether it wishes to take a risk by rescinding the contract before the court makes a decision. Here the first risk to Party B is that the court may decide that the requirements for a misrepresentation claim have not been met and the second risk is that even if the requirements are met, the court may nonetheless exercise a discretion to award damages instead of rescinding the contract.

APPLICATION TO SINGAPORE LAW

Although SK Shipping is a decision of the English courts, its decision on inducement, affirmation and damages in lieu of rescission are persuasive authorities under Singapore law because Singapore has an identical section 2(2) MA. Hence the decision of SK Shipping is useful under Singapore law.

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