



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 the year has gone well for all of you.

I am pleased to write this message, in support of the 2nd edition of our newsletter. With the pandemic now in the endemic stage, it has been difficult for us to find spare time to put this edition together. In the past 6 months, most of you would have been busy with work, traveling for business and also, leisure, and catching up with fellow industry colleagues. We are close to resuming pre-Covid levels and that is good news for everyone.

We must nevertheless continue the good work of the Publications committee led by Bazul, Hui Tsing, Kelly and Prakaash. It is our objective to publish updates and articles which would be thought provoking and of assistance to increasing our knowledge on matters which we are passionate about. I hope that we can continue to receive your support in providing us with materials for our newsletter. It is also a platform for you to share your views which will be heard and seen by our maritime community.

Lastly, I wish to take this opportunity to wish you and your colleagues and families, Happy New Year. All the very best for 2023.

Leong Kah Wah

MLAS President

2022/2023



Chairperson of Publication Subcommittee's Message



Dear Members,

Once again, in my capacity as the Chairperson of the MLAS Publication Committee, I am pleased to introduce the latest edition of the MLAS e-publication.

This edition is a highly informative publication that touches on some of the interesting developments in the maritime sector. As always, those contributing to the publication are highly experienced and well-regarded in the industry. I would like to thank all the contributors and the rest of the MLAS Publication Committee members for their invaluable input.

I hope that you will find this edition a useful resource and look forward to seeing your continued contributions toward future publications.

Bazul Ashhab Bin Abdul Kader

Chairperson of MLAS Publication Subcommittee
2022/2023

STARBOARD: DRAFT CONVENTION ON THE EFFECT OF JUDICIAL SALES OF VESSELS APPROVED BY UNCITRAL

Lawrence Teh, Jen Wei Loh



20 July 2022

The United Nations Commission on International Trade Law (UNCITRAL) approved on 30 June 2022 a draft convention (the Draft Convention) on the effects of judicial sales. The Draft Convention will now be put to the United Nations General Assembly to consider signature. The Draft Convention originated from a long-standing project of the Comité Maritime International (CMI) commenced in 2007 and eventually known as the ‘Beijing Draft’¹ which was adopted by the CMI in its 2014 Hamburg Conference. In 2018, the Draft Convention was accepted by UNCITRAL into its work programme.

The object of the Draft Convention is to achieve international recognition by one country of orders by the courts of another country for the judicial sale of a vessel. It is a common feature in the domestic laws of many countries that when a ship is sold by judicial order, all claims against the ship, including any maritime liens or mortgages, are extinguished and transferred to her sale proceeds. The purchaser also acquires a clean and unencumbered title to the vessel. However, the CMI discovered that due to the divergence in approaches in each jurisdiction on the administration and conduct of judicial sales, problems often arise in deleting and re-registration of vessels, and in other situations where judicial sale orders made in one country were not recognised in other countries. This lack of legal certainty created

obstacles to an international understanding that all former claims against the ship were extinguished, which in turn slowed down international trade and commerce.

The Draft Convention aims to be an international instrument that address the need for an international understanding regarding foreign judicial sale orders but adopting a model borrowed from the New York Convention of obligated recognition save for instances where there have been due process failures. Also, issues such as the deletion of foreclosed vessels from their prior registries after the judicial sale and subsequent re-registration of the vessel are expressly addressed within the Draft Convention.

Starboard will continue to monitor this development closely and provide readers with the latest updates in this regard.

Senior Partner Lawrence Teh was part of the International Working Group established by the CMI to discuss and work on the Draft Convention. The Singapore delegation to UNCITRAL was an early supporter of the Draft Convention in the UNCITRAL sessions through to final approval.

Dentons Rodyk thanks and acknowledges Associates Arina Rashid and Kavitha Ganesan and Intern Martin Liao for their contributions to this article.

¹ After the CMI Beijing conference in 2012

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SNAPSHOTS – A DIGEST OF THREE IMPORTANT SHIPPING CASES IN 2021

K. Murali Pany, Samuel Lee



When is a Bill of Lading Not a Bill of Lading?

The Luna [2021] SGCA 84

Brief facts:

The respondent (R) was in the business of trading and supply of bunker fuel. The appellants (A) were the demise charterers / owners of various bunker barges

R sold bunkers on FOB terms to subsidiaries of OW Bunker (the “**Buyers**”) under which payment for the bunkers would only be due after a 30 days credit period.

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.

Due to the insolvency of OW bunkers, 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:

1. The Court held that the parties never intended the Vopak BLs to have contractual force and to operate as a document of title.
2. The Vopak BLs were only endorsed to the Buyers after the expiry of the 30 days credit period (and sometimes as late as 72 days after such expiry). However, 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. The Vopak BLs were never regarded as the “key which unlocks the door of the warehouse”.

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). Where a “bill of lading” is not used in a typical manner, commercial parties should reconsider whether other forms of contract can more appropriately govern their rights, obligations and allocation of risk.

Can a defective passage plan render a vessel unseaworthy?

Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra) [2021] UKHL 51

Brief facts:

1. The CMA CGM Libra grounded off the coast of Xiamen on a shoal.

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2. The shipowner tried to claim general average while the cargo interest alleged that the cause was unseaworthiness of the vessel caused by a defective passage plan which did not indicate the full extent of the shoal on which the vessel grounded and had not been updated with warnings regarding uncharted depths outside of the buoyed slipway.

Key Issue:

1. Whether negligence in passage planning was a navigational fault and exempted the shipowner from any liability under Article IV, Rule 2(a) of the Hague Rules.
2. Whether the defective passage plan rendered the vessel unseaworthy under Article III, Rule 1 of the Hague Rules.

Decision:

1. The preparation of a passage plan is a matter of navigation and the failure to note or mark the uncharted depths warnings could be regarded as an act, neglect or default in the navigation of the ship within article IV rule 2(a) of the Hague Rules.
2. However, where loss or damage is caused by a breach of the carrier's obligation to exercise due diligence to make the vessel seaworthy under article III rule 1, the article IV rule 2 exceptions cannot be relied upon, including where the excepted matter (i.e. negligent navigation or management of the ship) is the cause of the unseaworthiness.
3. The passage plan/working chart was an important navigational tool.
4. The fact that the passage plan was defective at the beginning of the voyage rendered the vessel unseaworthy within the meaning of article III, rule 1 of the

4. Hague Rules. This was a case in which the negligent navigational act caused the unseaworthiness and as such, the Article IV, rule 2a exception was no defence to a claim for loss or damage caused by unseaworthiness

Takeaway:

The concepts of seaworthiness and due diligence can be viewed broadly and may be affected by seemingly ancillary or exempted factors.

Is a shipowner entitled to an indemnity from the charterer where it incurs liability as a result of misdescription in a draft bill of lading prepared by or on behalf of the charterer?

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

Brief facts:

Noble Chartering Inc (the “Owners”) were the disponent owners of the Tai Prize and sub-chartered the vessel to Priminds Shipping Hong Kong Co Ltd (the “Charterers”).

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.

At arbitration, the arbitrator found that the damage found at the discharge port was

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pre-shipment damage (although this appears, prima facie, to differ from the view of the Chinese courts). There was no express indemnity provision in the charterparty between Owners and Charterers in this regard.

Instead, the Owners' case was that by presenting the draft bill of lading (apparent good order and condition) to the master for signing, the Charterers, (who, through their agents, would have been able to discover by reasonable means the condition of the cargo before they were loaded) had provided a warranty or representation to the Owners as to the apparent condition of the cargo.

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:

1. A statement in a bill of lading as to apparent order and condition of cargo is a statement made by the master and based on his own examination of the cargo at the time of shipment.
2. It is ultimately the master's responsibility to decide whether to sign the bill in the form in which it is tendered to him.
3. 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

3. 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.

[However, this case should not be seen as a green light for shippers/charterers to misdescribe the condition of the cargo in draft bills of lading.

While on the whole, the decision of the English Court of Appeal was not controversial, Males LJ expressly left open the possibility that an implied indemnity may arise in a situation where the charterers/shippers had actual knowledge of the pre-existing damage to cargo but nevertheless tendered a draft bill of lading stating that the cargo was shipped in apparent good order and condition.]

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MARITIME ARBITRATION – WET DISPUTES

M. Jagannath



Dry shipping disputes generally relate to contractual breaches with respect to charter partiesⁱ, contracts of carriage, sale & purchase and insurance/reinsurance contracts etc. whereas Wet shipping disputes relate to accidents at sea such as collisions, general average, salvage etc. The main difference is that Dry shipping disputes are contractual whereas Wet shipping disputes are generally bereft of any contract and are generally Tortⁱⁱ based. Given that Wet disputes generally arise without any contract, the opportunity for arbitrationⁱⁱⁱ as a dispute resolution process is limited. This article will argue that perhaps the time is right for a change for Wet disputes to be arbitrated.

The question must therefore be as to whether Arbitration is indeed suited for Wet disputes and if so, the procedure to ensure that these are arbitrated instead of litigated.

- i. As Wet disputes are generally bereft of contract, parties would, as and when an issue arise, consider the best jurisdiction available to pursue the other party. If there is no contractual provision^{iv}, say as is provided for salvage conducted on Lloyds Open Form, then the option would be to pursue at a jurisdiction where parties are able to found jurisdiction to deal with the matter.
- ii. In our view, the main duty of any national court is to provide succor to the society at large. By society, we mean the persons both living and artificial seated in that specific jurisdiction. Given that wet matters may involve parties foreign to the

- ii. jurisdiction, the question is whether this should be heard in the courts? Some jurisdictions are happy to hear such matters as this is a source of revenue generation to the state. We submit that unless the incident occurred within the territorial waters of the state hearing the matter, it is not appropriate for the court to hear the matter. This is because any court will deal with the issue using the processes available within their law and which may well be alien to the location where the incident occurred. Instead, it would be more appropriate to consider the law of the place where the tort/cause^{vi} was committed or arose and which could be easily accomplished by Arbitration given the flexibility available in this process. We say this because arbitrators engaged could be chosen for their specific expertise and which coupled with the flexible arbitral processes could result in better “justice”.

- iii. Most jurisdictions, such as Singapore and England & Wales, have provided for the use of ADR within the pre-trial civil justice process i.e., the parties are encouraged to consider ADR processes such as Arbitration or Mediation and should a party be unwilling to consider these processes, the courts could impose cost sanctions against them. This being the case, if an arbitration process is indeed available to deal with Wet disputes, parties will be duty bound to consider this as a part of their pre-action protocol and may choose arbitration after having founded jurisdiction.

- iv. Given that Wet disputes deal with various types of disputes, we consider the main ones below:
 - a. Salvage: The main two arbitration rules available for Salvage are of the Lloyd’s Salvage Arbitration Clauses which is provided in the Lloyds Open Form, the

MARITIME ARBITRATION – WET DISPUTES

- a. latest edition being of 2020 and the Salvage Arbitration Rules of the Society of Maritime Arbitrators, New York. Lloyd's had initially announced in April 2021^{vii} that it was considering closing its Salvage Arbitration Branch and which would have severely impacted the LOF. Following representations, Lloyd's subsequently confirmed that it would continue to operate both the Lloyds Salvage Arbitration Branch and the LOF. While this has been indeed welcomed by the industry, we believe that the industry should consider having more institutions/rules for salvage arbitrations and perhaps, this could be accomplished geographically. In this way, hopefully, salvage arbitrations will continue to be the preferred choice and together with competition, would also develop the processes further.
- b. General Average: Although General Average arises by operation of law, the fact is that invariably, the contracts for and of carriage provide for the General Average to be adjusted contractually based on the York Antwerp Rules ("YAR" – the most commonly used version being of 1994). Given the above, if there is a provision in the YAR for GA claims to be dealt by Arbitration, then parties involved in the GA would have to arbitrate instead of litigate. Accordingly, as and when the YAR comes forth for revision, stake holders should consider whether a new rule can be included to deal with dispute resolution process. In the meantime, parties can provide in their contracts (C/P and BL's) for GA disputes to be arbitrated on the basis of LMAA, SCMA, SMA and any other available Rules.
- c. Collision: With respect to collisions, the Singapore Chamber of Maritime Arbitration ("SCMA"), had earlier formulated Rules for the Expedited Arbitral Determination of Collision

- c. Claims (SEADOCC). We are not aware of any other arbitral institution who have formulated rules to deal with collisions. We believe that the SCMA SEADOCC could, if required, be amended to provide for other juridical seats and laws so as to allow for increased use of these rules.

The way forward:

- i. While most of the Wet disputes are invariably pursued through the courts, we submit that this (court process) is not the best given that the process may be alien to some of the parties and further may be chosen for tactical advantages.
- ii. In order to ensure fairness and transparency in the dispute resolution process, it would be best for Wet disputes to be arbitrated.
- iii. To deal with the potential increase in Wet arbitrations, arbitral institutions and associations should formulate rules to assist in dealing with such disputes. This may lead to disputes being dealt more nearer to the location where the incident occurred and which in turn would result in reduced costs, time, and more sensitivity to the local practices.
- iv. Finally, having more Rules / Jurisdictions available to deal with Wet disputes would lead to more choices to the users and this should promote healthy competition leading to further developments in the arbitral processes.

ⁱ. A charterparty is a "contract for carriage" – see The TORENTIA [1983] 2 Lloyd's Rep. 210

ⁱⁱ. See Tort – Wikipedia

ⁱⁱⁱ. Arbitration is a creature of the contract i.e., it should be provided in the contract for arbitration to be the dispute resolution process.

^{iv}. If salvage is conducted on LOF terms, then they provide for arbitration (Lloyd's Salvage Arbitration Clauses 2020) and which allow for the reward to be decided by arbitration.

^v. See [https://www.judiciary.gov.sg/civil/admiralty-proceedings-\(from-1-april-2022\)/admiralty](https://www.judiciary.gov.sg/civil/admiralty-proceedings-(from-1-april-2022)/admiralty) with respect to Admiralty jurisdiction of the Singapore courts.

^{vi}. Lex loci delicti commissi

^{vii}. See article by Kennedy's and which can be viewed at <https://kennedyslaw.com/thought-leadership/article/is-lloyds-open-form-on-borrowed-time/>

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DOES AN ALL-RISKS MARINE CARGO POLICY COVER FRAUDULENT BILLS OF LADING?

Prakaash Silvam, Ng Guang Yi



This is an interesting question which has cropped up more frequently in recent times. There are no reported decisions from the Singapore Courts dealing with this issue. Having said that, the position under English law, upon which most marine insurance policies are based, is that this risk is not covered by the standard wording of an all risks marine cargo policy. In order for the policy to cover financial losses that do not result from physical loss or damage, the policy wording must contain clear words to that effect.

The English position on the matter is contained in the case of *Engelhart CTP (Us) LLC V Lloyd's Syndicate 1221 And Others* [2018] EWHC 900. The Commercial Court held that an all risks marine cargo insurance would generally only cover losses flowing from physical loss or damage. The commercial significance of this is that if parties intend for their marine insurance policies to cover non-physical losses, then they must make this explicitly clear through the clauses of the policy. This is particularly important with the noticeable rise of cases dealing with fraudulent documents, where there is no underlying cargo.

Brief Facts

In *Engelhart*, the Claimant bought 7,000 mt of copper ingots and resold them on the same day. However, when the containers were subsequently opened, it was discovered that no copper ingots were shipped and that the containers only contained slag of nominal commercial value. The bills of

lading, packing lists and quality certificates were found to be fraudulent.

It was assumed that no copper was ever shipped and that the Claimant in good faith had paid for and taken up fraudulent bills of lading and other shipping documents.

The Claimant submitted a claim under their Marine Cargo Insurance Policy with the Defendant, who were the underwriters of the policy, for loss of the cargo and insured expenses. The Defendant underwriters refused the claim.

The policy included a number of conditions, including fraudulent document clauses. The phrases of 'shortage' and 'loss of damage' were highlighted as particularly relevant to the dispute before the Court.

The Parties' Arguments

The Claimant argued that the provisions in the policy should be read to the effect that it would cover the broadest possible scope. In furtherance of this, the Claimant argued that the phrase 'shortage' in the policy should include situations be read to include situations where no goods were shipped and cover both partial and full shortages of cargo.

The Claimant further argued that the fraudulent document clause covered losses that were caused through the acceptance of fraudulent documents and non-existent shipment.

The Defendant underwriters resisted these claims and argued that on a plain reading of the policy, it did not cover any loss resulting from the acceptance of fraudulent documents for non-existent cargo nor did it cover situations where goods were never shipped.

DOES AN ALL-RISKS MARINE CARGO POLICY COVER FRAUDULENT BILLS OF LADING?

Decision

Sir Ross Cranton, sitting as the judge of the High Court, rejected the Claimant's interpretation that the policy should be ready to cover a wide scope.

Instead, he adopted a textual interpretation of the policy, and used the plain words of the policy to decide the scope of coverage. The Court stated that generally all risks marine cargo insurance was to be read as only covering losses flowing from physical loss or damage to goods and that did not cover cases of pure economic loss.

If the parties had intended for there to be a broad scope of coverage by the policy, then they had to make such an intention explicitly clear through the wording of the policy, by including specific provisions or clauses.

The Court further held that based on the facts in *Engelhart*, no goods had ever been shipped. Consequently, there could be no loss or "shortage" since the shipment never existed in the first place. Applying a plain interpretation of the clauses, the Court held that 'shortage' did not cover cases of non-existent cargo.

Significance

The decision in *Engelhart* makes it clear that courts will only look at the plain meaning of phrases such as "shortage" and "physical loss or damage" when deciding the scope and coverage of the policy. The result of this is that all risks marine cargo insurance coverage will only cover physical loss or damage, unless otherwise expressly stated by the parties.

This is particularly significant to traders and trade finance banks who very often rely on documents, including bills of lading, to conduct their business. Prudent parties

should ensure that the terms of the marine cargo insurance extends to such cases or risk left having to bear the burden of loss in the event of fraudulent documents being presented. This is especially the case given that the general clauses within an all-risk marine cargo policy will not have the same scope and coverage provided by specific provisions and clauses. Therefore, some types of losses (as in *Engelhart* with fraudulent documents and non-existent goods) will be excluded.

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