



THE MARITIME LAW ASSOCIATION OF SINGAPORE

Newsletter Vol. 3 - 2023

INSIDE THIS VOLUME

MLAS HIGHLIGHT

- Message from MLAS President 3
- Message from Chairperson of Publication Subcommittee 4

ARTICLES

- Shipbuilding Contracts: Practical Issues And Considerations 5
Rafizah Gaffoor, Joseph Tan Jude Benny LLP
- ESG And Shipping: Navigating Towards A Sustainable Maritime Industry 7
K. Murali Pany and Nicola Loh,, Joseph Tan Jude Benny LLP
- Maritime Arbitration – Wet Disputes 9
M. Jagannath, NAU Pte Ltd
- General Average – Freightforwarders & Containers 11
M. Jagannath, NAU Pte Ltd
- Apportionment of Liability for Maritime Collisions 15
Leong Kah Wah and Dedi Affandi, Rajah & Tann Singapore LLP



The Maritime Law Association of Singapore

1003 Bukit Merah Central #02-10
Inno. Centre Singapore 159836

Tel: (65) 6278 2538
Email: mail@mlas.org.sg
URL: www.mlas.org.sg

Publication Subcommittee

Chairperson

Bazul Ashhab Bin Abdul Kader

Members

Kelly Vouvoussiras
Prakaash Silvam

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.



Newsletter

MLAS President's Message



Dear Members,

I hope my message finds you well, and that 2023 has been a successful year for you.

It has been a busy year for all maritime law practitioners. The maritime industry is bracing itself for big changes as the world moves rapidly towards green and sustainable energy, the policies, regulations and laws surrounding decarbonisation and sustainability are constantly evolving and changing. There is also the challenge of cyber security as the maritime industry is moving towards the digital age, and with digitalisation, the risk of cyber security lapses and breaches is enhanced. In these new and evolving areas, it is important that our association stays in the forefront of these developments and maintain close ties with our parent organisation, the Comité Maritime International (CMI), and other international maritime organisations and bodies.

It is along these lines that our Publications committee is dedicated to keeping our members abreast of the latest developments on our core areas as well as the newer areas of maritime law. I hope you will enjoy this latest edition of our newsletter. If there is something newsworthy or an update or development that you want us to cover, feel free to reach out to our Secretariat. At the same time, this platform is for our members to profile themselves within the membership and I strongly encourage you to submit articles or case updates for publication in our future editions.

As the year draws to an end, my Committee and I would like to wish you a Merry Christmas and a Happy New Year. All the very best in 2024.

Leong Kah Wah
MLAS President
2023-2024



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.

There have been several landmark decisions which have come out of the courts, and there will likely be more in the coming year. We have also seen Singapore become a signatory to the Beijing Convention on the Judicial Sale of Ships.

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 towards future publications.

Lastly, as we approach the end of the year, I wish all of you a Merry Christmas and a Happy New Year.

Bazul Ashhab Bin Abdul Kader

Chairperson of MLAS Publication Subcommittee
2023-2024

SHIPBUILDING CONTRACTS: PRACTICAL ISSUES AND CONSIDERATIONS

Rafizah Gaffoor



In very recent years, there has been an increase in the number of shipbuilding contracts for the first time following the 2008 financial crisis. Many vessels commissioned around the shipping boom of 2005 are now approaching middle age. The push for greener shipping (along with the incentives that follow) also provide an incentive for companies to invest in newer and greener vessels using new fuel technologies. These factors, among others, have caused a rising market for newbuilds.

In such a rising market, it is not surprising that many yards put forward their standard form of contract and are often unwilling to compromise on the terms. As with any contract negotiation, it is imperative for purchasers to identify the key clauses and tailor a negotiating strategy accordingly to safeguard their interests. This article identifies some of the key clauses in shipbuilding contracts and practical tips in the negotiation of such clauses.

A. Ensuring Performance and Work Quality

More registries are offering incentives to owners through discounts in tonnage fees if the vessel meets such requirements. For example, the Maritime and Port Authority of Singapore administers a Green Ship Programme (GSP) where owners enjoy discounts on the Initial Registration Fees (IRF) and rebates on Annual Tonnage Tax (ATT) payable every year where the vessel uses low-carbon or zero-carbon fuels. Purchasers

therefore have a strong interest in ensuring that the vessel achieves the specifications contracted upon with the shipyard.

A shipbuilding contract will contain performance guarantees in relation to, inter alia, speed and fuel consumption. Where the vessel is unable to meet these guarantees, the contract usually provides that the shipyard pays liquidated damages up to a cap at which point the purchaser can terminate the contract or take the vessel at a reduced contract price. However, these remedies may not be feasible or sufficient for the purchaser.

Ideally, purchasers should be satisfied that the shipyard will be able to achieve the performance guarantees prior to execution of the shipbuilding contract. The purchaser should also include opportunities for reviews and inspection within the construction timeline and ensure that it exercises such inspection rights to identify any potential issues so that remedial action can be taken early. The purchaser should also oversee and ensure that the shipyard has sufficient time to prepare the design and engineering before commencement of construction. This also ensures that no issues (whether technical or cost) arise later.

B. Risk of Delays

Generally, most shipbuilding contracts will stipulate a date for the completion and delivery of the vessel. If the shipyard does not meet this date, liquidated damages are usually paid by the shipyard to the purchaser (sometimes after a grace period). The purchaser may terminate the contract once the liquidated damages reaches the cap. However, this may not be desirable for the purchaser in a rising market as doing so may mean that the purchaser would have to wait even longer to secure another vessel at higher prices.

SHIPBUILDING CONTRACTS: PRACTICAL ISSUES AND CONSIDERATIONS

The alternative for the purchaser is to elect to accept delivery at a later date, often with no additional liquidated damages payable. Such delay may also be significant. One way to mitigate the possibility of such delays is for the shipbuilding contract to stipulate payments based on milestones accomplished as opposed to mere dates.

C. Inflationary Pressures

With inflationary pressures being felt worldwide, it is important for the purchaser to ensure that the shipyard does not attempt to pass any rising costs to the purchaser under the guise of “variations” to the agreed scope of work. Shipyards may face rising costs from its suppliers and subcontractors which may only be felt some time into the construction. The purchaser should consider safeguards such as requiring the shipyard to obtain approval for any variations before commencement of such works.

Conclusion

Overall, the market for newbuilds is a crucial aspect of balancing the demand and supply of ships especially in a time when other modes of transport are thriving. Coupled with the push for greener shipping and utilisation of newer and greener technology, we expect to continue to see an increase in orders for newbuilds over the years. It is important for any purchaser to carefully review the terms of the shipbuilding contract to ensure that their interests are safeguarded.

About the Author:

Rafizah Gaffoor

Partner,

Joseph Tan Jude Benny LLP

ESG AND SHIPPING: NAVIGATING TOWARDS A SUSTAINABLE MARITIME INDUSTRY

K. Murali Pany, Nicola Loh



While Environmental, Social and Governance (ESG) may not be on every shipping company board's agenda, this is likely to change very soon.

Maritime transport represents a significant source of greenhouse gas (GHG) emissions, accounting for about 3% of global GHG emissions annually. The United Nations International Maritime Organization (IMO) has adopted an initial strategy on the reduction of GHG emissions from vessels and aims to phase them out as soon as possible in this century. Key strategic objectives include (i) the reduction of carbon intensity of international shipping by 40% by 2030, pursuing efforts towards 70% by 2050, compared to 2008 levels and (ii) the reduction of total annual GHG emissions by 50% by the year 2050, compared to 2008 levels.

Regulations

In accordance with the latest European Union (EU) proposal, the shipping sector will be included in the Emissions Trading Scheme (ETS) by 2024. The measures have an extra-territorial reach and will also affect the movement of cargo outside of the EU's borders. When the new proposal comes into force, a 'shipping company' (which will be defined under the new regulation), will have to purchase allowances for 50% of emissions produced by ships of 5,000 gross tonnage or over for voyages connecting EU and non-EU ports, (unless the distance is less than 300 nautical miles, in which case 100% of emissions). In this regard, some players have taken steps in advance to manage this

compliance cost. For example, one shipping line has announced that they will be imposing surcharges on their customers from next year, in anticipation of the revisions to the legislation.

From 1 January 2023, all vessels will be required to calculate their attained Energy Efficiency Existing Ship (EEXI) to measure their energy efficiency and to initiate the collection of data for the reporting of their carbon intensity indicator (CII) and CII rating. The EEXI will apply to existing vessels of 400 gross tonnage and the CII will apply to vessels of 5,000 gross tonnage and above. This is pursuant to the IMO regulations to introduce carbon intensity measures that entered into force on 1 November 2022. The CII and EEXI regulations are in the Annex VI of the International Convention for the Prevention of Pollution by Ships (MARPOL). As of 1 November 2022, MARPOL Annex VI has 105 Parties, representing between them 96.81% of world merchant shipping by tonnage.

Emphasis on Sustainability

The increasing number of ESG regulations is a reflection of the emphasis that investors, customers and other stakeholders are placing on the sustainability agenda of shipping companies. Investors are integrating ESG risk factors in their decision-making processes. It is no longer uncommon for ESG criteria to be adopted in the evaluation of a shipping company's ability to achieve long-term sustainable growth and therefore access to financing.

Recent market trends and demands by customers for a net zero supply chain are pushing shipping companies to prioritise ESG and provide investor grade ESG disclosures. This is further accelerated by recent initiatives, such as The Poseidon Principles which are adopted by leading

ESG AND SHIPPING: NAVIGATING TOWARDS A SUSTAINABLE MARITIME INDUSTRY

banks and shipping finance providers. The Poseidon Principles is an industry framework used for assessing and disclosing the climate alignment of ship finance portfolios. It is not unusual for signatories to the framework, mainly with a significant exposure to shipping, to choose to finance a shipping company with an established ESG strategy and published ESG report over a company without one.

The 'S' component of ESG includes traditional shipping risks such as accidents, pay, crew safety and welfare issues. It pertains to the measures adopted by the company in terms of managing stakeholders such as the customers and employees, including the crew. The IMO's International Safety Management (ISM) Code provides an international standard for the safe management and operation of ships and for pollution prevention.

Apart from corruption, ownership transparency is also a pertinent issue for the shipping industry. A shipping company that prioritises the 'G' component of ESG will have to put in place processes and policies that will assure their stakeholders that these ESG-related risks are being dealt with by the management. Companies also need to be aware of the changing sanctions landscape and the impact of laws such as the UK Bribery Act and the US FCPA on their operations. It is critical for shipping companies to take the necessary measures to mitigate those risks in order to avoid non-compliance resulting in fines and loss of reputation.

What shipping companies can do to stay ahead

Companies should set out their sustainability goals and the steps they plan to take to achieve the outcomes. It is important to engage stakeholders and to set specific, achievable targets. For shipping companies, the pressure is on addressing the 'E'

component in ESG, in light of the upcoming regulations. Apart from switching to fuels that generate lesser carbon emissions, shipping companies can also consider incorporating climate clauses into charterparties, such as the following:

- Encouraging the parties to consider opportunities and cooperate to maximise the laden ratio of the vessel and minimise repositioning voyages in ballast during the charter period.
- A contractual duty in charterparties for both parties (charterers and owners) to take all reasonable steps to maximise energy efficiency.
- An optional mechanism for time charterparties, to share the cost (between owners and charterers) of upgrades which improve the fuel efficiency of time chartered vessels.

Companies should start planning ahead and be prepared to meet the increasing stakeholder demands and comply with the upcoming regulations. This will require the effort of the entire organisation and importantly, buy-in from management to render the necessary time and resources to navigate towards a sustainable future.

About the Authors:

K. Murali Pany
Managing Partner,
Joseph Tan Jude Benny LLP

Nicola Loh
Partner,
Joseph Tan Jude Benny LLP

MARITIME ARBITRATION – WET DISPUTES

M. Jagannath



In our earlier article, [The Ever-Given Mela – II](#), we mentioned that the appointed Average Adjusters collected GA Guaranteesⁱⁱ from insured cargo interests which incorporated a LMAA arbitration. With respect to the wordings of the GA Bond sought from the uninsured cargo interests (which should be together with a cash deposit), it appeared to us that it would be on a similar basis i.e., with a LMAA arbitration clause. Given that the use of an arbitration clause is not provided in standard GA Bonds and Guaranteesⁱⁱⁱ and that the arbitration clause, in our opinion, may be detrimental to containerized cargo interests, we did not understand why cargo interests agreed to provide security on this basis. We are writing this article to state our thoughts on this subject and also invite cargo interests to advise as to why they agreed to the wordings of the security sought.

1. Dispute Resolution:

- a. Invariably, charter parties and/or the BL would provide for a specific law and form of dispute resolution to deal with disputes arising from the contract of carriage. Absent any other law or dispute resolution provisions provided in the GA Clause^{iv}, parties would be bound to resolve their disputes including GA^v in this manner. This should not be an issue, say in voyage charters, given the limited number of parties involved and further the underlying/overlying charter parties are generally on a “back-to-back” basis. However, this will indeed be an issue in container shipments given the multitude of parties involved together with BL’s having differing Law and Dispute Resolution Clauses.
- b. If the charter parties/Bills of Lading do not provide for arbitration, in theory, following the incident, parties can freely negotiate and agree to arbitration as the dispute resolution process. The question would then be whether cargo interests must agree to the security wordings sought by the Owners, particularly when they are not in line with the common wordings and which may also be detrimental to their interests? We submit that there is only a duty on the cargo interests to provide reasonable and adequate security. What is reasonable is a question of fact and would depend on the circumstances of each case including the terms of the charterparty/BL’s. This being the case, if the security sought is unreasonable, cargo interests can refuse to provide the security sought and instead propose reasonable security. If unfortunately, owners and cargo interests are unable to reach an agreement, then parties can always make an application to court who has jurisdiction to hear this matter.
- c. In the case of Ever-Given, we are not aware as to whether the cargo interests had an option of agreeing to the wordings of the security demanded. Even if the cargo interests voluntarily agreed for arbitration as the dispute resolution process, then the arbitration process should be fit for purpose. In the case of Ever Given, there were about 18,000 containers such that if all or some of the parties involved are to arbitrate, there would be considerable number of concurrent arbitrations^{vi} leading to increased costs. Additionally, most disputes would not be for substantial sums^{vii} such that costs of arbitrating would also be a barrier in considering whether to challenge the contributions sought? This could have been avoided if the arbitration process provided for consolidation^{viii}. While it is technically possible for LMAA

MARITIME ARBITRATION – WET DISPUTES

arbitrations to be consolidated basis S 35 of the English Arbitration Act 1996, it would require the agreement of all parties, and which would be rare^{ix}. However, if the procedural rules did provide for consolidation^x, then the arbitrations could be consolidated such that there would be a savings in costs and time for all.

2. Equity: As stated in the CMI Guidelines relating to GA^{xi}, “the principle of GA has its origin in the earliest days of maritime trade and is based on *simple equity*:

a. English Arbitration: English Law provides for an implied confidentiality of arbitration proceedings^{xii}. If the intention to incorporate an English GA clause was to tactically take advantage of this fact, then we submit that equity^{xiii} is not maintained. Accordingly, if English arbitration is agreed as the dispute resolution process for Container GA’s, this duty should be removed, say by providing for it contractually. This will not only preserve equity but also lead to the development of soft law, say by way of published GA arbitration awards.

b. Challenges: Some jurisdictions may not allow for the enforcement if the arbitration clause is not freely negotiated (similar to a jurisdiction clause in a BL). However, in the case of GA, given that the parties had an implied choice to either agree or disagree, we submit that it would be difficult to now deny the use of arbitration as the agreed dispute resolution process.

c. Appropriate Dispute Resolution process:

- i. While we are indeed in favor of Arbitration to deal with shipping disputes including GA, we submit that any dispute resolution process should be appropriate for the issues at hand. In this regard, if arbitration is being considered for Container GA’s, then at the very least, the arbitration process

should provide for consolidation.

ii. The York Antwerp Rules (“YAR”), incorporated in the Charterparties/BL’s, are regularly updated. This being the case, the better way to consider the appropriate dispute resolution process for GA including jurisdiction is to discuss with all the stake holders and incorporate this in the next edition of the YAR. This may result in a well-crafted dispute resolution clause to deal with GA’s keeping in mind the interests of all parties.

- i. We had written a series of articles following the Suez Canal incident and which are [The Ever-Given Mela](#), [The Ever-Given Mela – II](#), [The Ever-Given Mela – III](#) and [The Ever-Given Mela – IV](#).
- ii. GA Guarantees would be provided by the Cargo Insurers whereas GA Bonds would be provided by the Cargo Owners.
- iii. See Average Bond – LAB 77 and Average Guarantee in Appendix 4 in Lowndes & Rudolf – XV edition.
- iv. While the entitlement to GA is an independent right and recognised in common law, contracts of carriage (both charterparties and BL’s) incorporate a clause which allows the GA to be adjusted on the basis of the York Antwerp Rules (the latest edition of the Rules is 2016 whereas the most popularly used remain 1994). The York Antwerp Rules are therefore contractually agreed to and in some instances allow for GA allowances even though they may not fall under the common law definition of GA.
- v. See 30.31 of Lowndes & Rudolf – XV edition.
- vi. See Article of Richard Sarll on [The “Ever Given”: not your average dispute](#).
- vii. We believe that the average cargo value in a container would not exceed USD 50,000.00. Given that the security sought cannot exceed the cargo values, we submit that most shippers will be deterred to pursue further considering the costs of pursuit and which would include the engagement of their solicitors, fees to the arbitrators, etc.
- viii. See an article from HFW which can be viewed at <https://www.hfw.com/downloads/003468-Core-issues-in-international-arbitration.pdf>
- ix. See <https://lmaa.london/proceeding-with-an-lmaa-arbitration/#:~:text=IP%20so%2C%20how%3F,the%20parties%20may%20agree%20it>.
- x. See Rule 8 of the SIAC Rules 2016 which do provide for Consolidation.
- xi. See [CMI Guidelines](#)
- xii. <https://arbitrationblog.kluwerarbitration.com/2022/08/18/the-english-approach-to-the-law-governing-confidentiality-in-international-arbitration/>
- xiii. [What Is Equity?](#) (uolb.com)

About the Author:

M. Jagannath
Director,
NAU Pte Ltd

Related posts

The Bigham Clause

JAGAN - SEPTEMBER 29, 2023

All about Freight

JAGAN - AUGUST 30, 2023

Bill of Lading – Effective Security?

JAGAN - AUGUST 14, 2023

GENERAL AVERAGE – FREIGHTFORWARDERS & CONTAINERS

M. Jagannath



Liability of a Freight Forwarder / NVOCC for a General Average:

- a. We had the opportunity to attend a webinar on “Simplifying General Average: An Insurer Guide” conducted on 11th May 2023 by the Middle East branchⁱ of the Institute of Chartered Shipbrokers where Mr. Abdul Fahlⁱⁱ of TTMS shared his views. One of the points he discussed was on the liability of a Freight Forwarderⁱⁱⁱ (“FF”) for a General Average (“GA”). He advised that as the FF are more often involved in arranging the shipment and do not have any assets on board the vessel, they should not be concerned or worried over providing any GA Guarantee to the Average Adjuster. The Average Adjuster may however contact the FF if they had issued BL’s and in which case, the FF should provide their BL so that the Average Adjuster can liaise directly with the cargo interests. This is sound advice given that the parties contributing to a GA should have some interest in the property or freight, if at risk^{iv}, involved in the adventure.
- b. The issue then would be whether the FF should be cautious whenever a GA is declared?
 - i. If the cargo interests make payment of the GA contributions due and take delivery of the cargo on completion of voyage, then there would be no exposure. However, if the cargo interests refuse to provide security or take delivery of the cargo, say due to damage to the cargo, then the issue would be whether the Overlying Carrier (“OC”) is entitled to seek recovery of the container

detention/demurrage and expenditure incurred to deal with the abandoned cargo from the FF/NVOCC (A FF in our view acts as an agent and do not issue their own B/L’s. As and when a FF issues their B/L’s, they become a NVOCC for that specific operation. Accordingly, we are considering the exposures for both FF and NVOCC).

- I. FF: We submit that there would be no exposure to a FF for GA contributions either under common law or York Antwerp Rules 1994^v (or later versions) given that the FF has no interests in any property involved in the adventure. However, some Carrier’s booking note^{vi} may provide for the FF to be a party to the contract of carriage (B/L) such that they (FF) are jointly and severally liable for any and all claims. This being the case, it may be possible for a Carrier to pursue a FF for both the container detention/demurrage and costs of disposal should the cargo interests refuse to provide security and take delivery of the cargo resulting in additional costs for container detention/demurrage and disposal.
- II. NVOCC: The main difference between a FF and NVOCC is in the role i.e. the NVOCC is in a contractual relationship both with the cargo interests and the OC. In addition, a NVOCC may use his own equipment (containers) in which case, they would also need to provide security and contribute to any GA for the value of their containers. If a claim is pursued by an OC against a NVOCC, they (NVOCC) should, in turn, pursue their contractual party below for recovery. If the party below (cargo interests) do not respond, then the NVOCC would have to deal with the claim pursued by the OC. A possible defence available to both the cargo interests and NVOCC is when

GENERAL AVERAGE – FREIGHTFORWARDERS & CONTAINERS

the cargo is no longer in specie and in which case, it could be argued that container detention/demurrage are only applicable if the cargo is in specie and that the costs for abandonment should be solely borne by the OC.

- ii. Transport Liability Policies provide cover to their insured for GA contributions^{vii} which they may be held liable for. This being the case, a NVOCC/FF should notify their liability insurers of any GA in which they (NVOCC/FF) may have an interest in so that they (liability insurers) can maintain a watching brief and step in should the situation warrant, say by forcing the OC to take mitigatory steps to reduce the exposure arising from the cargo not providing security/ abandoned. Additionally, container detention/demurrage and cargo abandonment charges are strictly not GA but liability exposures and for which the liability policy is meant to deal with.

Contributory Values for Containers:

- a. We had written earlier in our article, [GA & Salvage – Value of Containers](#), that the containers should be valued on the basis of their replacement value^{viii}. In that article, we focused on laden containers (containers with cargo) and did not consider empty containers^{ix} which we may be on board the vessel and are shipped to locations of demand either on payment of freight/slot charter or as property of the Operator/Owners.
- b. In the container freight industry, contracts invariably provide for the freight to be earned on loading. This being the case, the freight is not at risk and will be due to the carrier irrespective of whether the voyage is completed or not. In this case, the freight becomes merged with value of the cargo. What about freight paid for empty containers?

- c. The YAR 1994 makes mention of Cargo, Freight and Vessel but does not mention containers. Instead, it refers to property^x. The question would be whether containers would fall under the definition of cargo, vessel or property?
 - i. While containers bear similarity to both Vessel and Cargo, given that they are not expressly stated in the numbered rules (which are strictly construed to and take precedence over the lettered rules), we submit that containers should be considered as property.
 - ii. Rule XVII of YAR 1994 deals with contributory values and refers to property. The first line of this Rule states “The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure except that the value of cargo shall be the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value”. Given that we have argued that containers are not cargo, the question would then be as to what would be the actual net value of the container at the termination of the adventure? Would this be the Depreciated Value (“DV”) or Replacement Value (“RV”) ? Although it could be argued that the correct value to be considered is the RV (as suggested in our earlier article [GA & Salvage – Value of Containers](#)), we believe that this would be incorrect given that the empty containers are being shipped to not only avoid expenditure (container storage) but also to earn freight for future voyages. Accordingly, we submit that the correct value for these empty containers should be the RV + freight / slot hire paid for the movement of the empty containers.

GENERAL AVERAGE – FREIGHTFORWARDERS & CONTAINERS

d. The question would then be who should contribute for the freight element?

i. We submit that given that freight is not at risk, the receiver of the freight need not contribute to the freight element. Instead, the freight becomes merged to the value of the container (as stated in 2cii), the contributions will be due from the Container Owners^{xi}.

ii. Container Owners as slot charterers:

I. Voyage charter forms such as the [Slothire](#) provide that the hire is earned upon the commencement of voyage^{xii}. Accordingly, the charter hire is not at the risk of the overlying contractual party (who may be the Operator or Owners). The situation is similar to cargo (freight is not at risk and becomes merged with the value of the cargo) and therefore we submit that the freight/charter hire paid becomes merged with the value of the containers.

II. The issue is something different when the Container Owners who have a slot charterparty but have not loaded any containers say due to weight or cargo/container restrictions/availability). In this case, there is no container/property to merge the freight with. However, the slot charterer would continue to pay the charter hire. While an argument can be made that the hire earned should contribute, the fact is that the hire is not at risk as it is earned on commencement of the voyage. Hence, we submit that as there is no property on risk, there is nothing for the hire to be merged with. Accordingly, no contributions will be due for such payments made.

iii. If the Container Owners are the Operators of the vessel, then they (Operators) may have chartered the vessel either on a voyage or time

basis. If the vessel is chartered on voyage basis, then the same provisions as suggested in 2dii would apply. With respect to Time Charter, it is not treated as a contributing interest although the shipowner / deponent owner may be obliged to participate in making contributions in respect of voyage freights under a bill of lading contract of a sub-charterparty^{xiii}. If the Charter Party provides for the hire not to contribute to GA^{xiv} (which is usually the case) then Owners will not make any contributions. Instead, the contribution will be borne by the party receiving the freight.

e. We do admit that in most voyages, the value of containers and freight involved for empty containers may be insignificant compared to the value of the other property involved in the voyage. This being the case, the freight element for the empty containers may not have a significant effect on the contributions due from the other parties. However, the freight for empty containers in some voyages do have an impact and therefore it is appropriate that the freight element also be considered in order to preserve equity.

^{i.} [The Middle East Branch of the Institute of Chartered Shipbrokers](#) is one of the most active branches and regularly conducts various professional talks/events. We must appreciate the zeal of the office bearers who are doing a wonderful job developing the next generation of Shipping professionals.

^{ii.} <https://www.ttclub.com/contact-us/offices/dubai/abdul-fahl/>

^{iii.} TT Club takes an expansive view of a Freight Forwarder in that it includes both a Freight Forwarder acting as an Agent (who does not issue their own Bills of Lading) and one who issues their Bills of Lading (in which case they become, in our view, a NVOCC).

^{iv.} Freight is never at risk given that the contract of carriage invariably provides for the freight to be earned upon loading.

^{v.} The Bills of Lading issued by contractual carriers would generally provide for the General Average to be adjusted on the basis of York Antwerp Rules 1994 ("YAR 1994"). However, there are later versions of the York Antwerp Rules such as 2004 and 2016 which are yet to have to same acceptance as the YAR 1994.

^{vi.} Invariably the Bills of Lading issued in the Liner Industry have a Merchant Clause which allows the Carrier to pursue a party who may have an interest in the shipment. While the scope of the Merchant Clause is very wide, we submit that the actual application of this clause will depend on whether 3rd parties (who are not listed in the Bills of Lading) were advised of the terms of the Bill of Lading and had agreed to the same prior to the carriage.

^{vii.} See Clause 1.6 of T5 Costs of the TT Club Wordings 2023 and which provides "General average & Salvage – Cargo's contribution for which you are liable and which you cannot recover from your customer".

^{viii.} The advisory committee of the Association of Average Adjusters, UK had considered that the method most correct in principle was to adopt the current replacement cost, less depreciation for age etc. We do not quite agree given that the current replacement cost would actually have factored the depreciation. The Association further suggests that on grounds of simplicity, the insured values could well be adopted. Again, we do not quite agree and would prefer if this is settled say by a court judgement or by the provisions in a numbered rule and which would then strictly apply – this perhaps can be one of the amendments in future editions of YAR.

^{ix.} For instance, the Chittagong / Singapore or Malaysia trade in which the movement ex Chittagong consists of equal number of laden and empties. If the empty freight is say USD 300/20', based on the vessels which ply this trade, the total freight for Chittagong / Singapore would be USD 150,000 or so (say 500 or so containers X Freight of USD 300)

GENERAL AVERAGE – FREIGHTFORWARDERS & CONTAINERS

- x. There are 10 references to Property in the YAR 1994 (RA, RC, RII, RV, RVI, RVIII & RXVII).
- xi. We admit that our thoughts on this subject are different from the majority view and are happy to hear comments on why our thoughts are incorrect on this aspect.
- xii. See Clause 5 on the Slot Charter Hire
- xiii. See Para 17.69 of Lowndes & Rudolf, XV edition.
- xiv. As provided in Clause 25 of the [NYPE 1993](#)

About the Author:

M. Jagannath
Director,
NAU Pte Ltd

© 2020

Related posts

The Bigham Clause
JAGAN - SEPTEMBER 29, 2023

All about Freight

Apportionment of Liability for Maritime Collisions

Leong Kah Wah, Dedi Affandi



Introduction

In *Owner of the vessel "NAVIGATOR ARIES" v Owner of the vessel "LEO PERDANA"* [2023] SGCA 20, the Singapore Court of Appeal had the task of determining the apportionment of liability in a collision between two vessels. The decision involved an assessment of an intricate set of facts and how the collision aligned with international navigation rules.

Disputes involving ship collisions are often challenging, both for litigants and for courts. In terms of evidence, they require the consolidation of technical evidence, factual accounts and expert reports. This then has to be applied in the context of the relevant legislation, regulations and international conventions.

However, the Singapore courts have demonstrated that they are fully equipped at both the trial and appellate level to decide on collision cases. They have established a body of case law that covers an array of complex issues, including the allocation of collision liability and – as shown in this case – incidents involving manoeuvring in a narrow channel.

In this decision, two vessels collided in the Surabaya Strait. The Court of Appeal ("**Court**") determined that the immediate cause of the collision was port sheer due to the "bow cushion effect" experienced by one of the vessels. Following from this, the Court had to determine the proper apportionment of liability between the two

vessels, based on a range of factors, including the vessels' breaches of the International Regulations for Preventing Collisions at Sea 1972 ("**COLREGS**"), their causative impact, the course of events and the vessels' actions prior to the collision. Ultimately, the Court held that liability for the collision should be split 50:50 between both vessels.

This Update provides a summary of the key points of the decision and how the Court reached its determination.

Brief Facts

The appellant's vessel, the Navigator Aries ("**NA**"), collided with the respondent's vessel, the Leo Perdana ("**LP**"), in the Surabaya Strait while travelling on reciprocal courses. The Surabaya Strait was marked by lateral buoys, and the parties agreed that the buoyed channel represented a narrow channel to which Rule 9 of the COLREGS applied.

The pilots for both vessels had agreed that their vessels would pass port-to-port. However, the *LP*'s pilot subsequently gave a "midships" rudder order, which entailed taking off her starboard helm, followed by a "steady" order, which left the helmsman to decide how to steer the vessel to maintain the existing heading. The *LP* also started to experience a port sheer, which was a relatively slow, but ultimately uncontrollable, swing to port. The *LP*'s pilot gave various orders to correct this, and those on board the *NA* also took avoidance action by altering hard-to-starboard. However, the manoeuvres failed to prevent the collision.

Holding of the High Court

The High Court judge ("**Judge**") found the collision's proximate cause to be the *LP*'s port sheer, which resulted from a "bow cushion effect" – a hydrodynamic interaction between the *LP* and a bank lying on her

Apportionment of Liability for Maritime Collisions

starboard side. Further, the *LP* had been travelling at an excessive speed, which contributed to the bow cushion effect.

However, the Judge found that it was the *NA* which created the situation of difficulty or danger by failing to comply with Rule 9 of the COLREGS and forcing the *LP* to a position where she would experience the bow cushion effect. The Judge further found that the *NA* was in breach of Rules 5 and 7 of the COLREGS.

The Judge determined that the *NA*'s faults bore greater causative potency and culpability, and apportioned liability at 70:30 in the *LP*'s favour. The approach of the High Court is understandable as it is consistent with the view that the party which created the dangerous situation should bear most of the blame. In this case, on one view, the *NA* precipitated the chain of events leading to the collision through her breach of Rule 9, which in turn brought about the agreement between the vessels to pass port-to- port, and ultimately led to the port sheer and ensuing collision.

Holding of the Court of Appeal

The Court found that both parties were equally to blame in the collision and revised the apportionment of liability to 50:50.

In reaching its decision, the Court had to wade through a mass of technical and expert evidence to determine the course of events, the cause of the collision, and how the vessels' respective actions contributed to the eventual collision.

General law

The Court highlighted that under section 1(1) of the Maritime Conventions Act 1911, liability is apportioned based on a broad, commonsensical and qualitative assessment of the culpability and causative potency of both vessels. Culpability is concerned with

the nature and quality of each vessel's faults, and not the number of faults as such.

However, only causative fault is relevant. In turn, causative potency is concerned with two aspects of causation: (a) the fault's extent of contribution to the collision; and (b) the fault's extent of contribution to the damage resulting from the casualty.

Assessment of culpability

Based on the expert evidence, the Court held that the immediate cause of the collision was the *LP*'s port sheer, the physical cause of which was the bow cushion effect experienced by the *LP*.

The Court then weighed the causative factors as summarised below:

Causative faults of the <i>LP</i>	Causative faults of the <i>NA</i>
• The <i>LP</i> pilot's "midships" order substantially contributed to the port sheer and was in breach of Rules 8(a), 8(c) and 8(d) of the COLREGS. • The <i>LP</i> breached Rules 6 and 8(e) of the COLREGS by travelling at an excessive speed and failing to slow down sooner, which increased her blameworthiness by contributing to the bow cushion effect.	• The <i>NA</i> breached Rule 9(a) of the COLREGS, which carried causative fault as it limited the navigable sea room available to the <i>LP</i> and constrained the ability of both vessels to execute the agreed port-to-port passing safely. • The <i>NA</i> was in breach of Rules 5 and 7 of the COLREGS by taking insufficient action despite her radar showing that she would not achieve the agreed

Apportionment of Liability for Maritime Collisions

Causative faults of the LP	Causative faults of the NA
	passing, and by taking too long to react to the LP's port sheer. • The NA breached Rule 6 of the COLREGS by travelling at an excessive speed.

Based on the above, the Court determined that the appropriate apportionment of liability was for both vessels to bear equal blame. Significantly, although the Court found that the NA had breached Rule 9(a) of the COLREGS (which resulted in less sea room for the LP), it was of the view that the NA's breach did not present a serious threat to the vessels' ability to achieve a safe passing because both vessels had reached an agreement in advance to pass port-to-port. It was the LP's port sheer which unexpectedly brought the vessels rapidly towards a collision. In this regard, the LP had failed to detect and react to the bow cushion effect earlier. Instead, the LP deliberately and erroneously removed her starboard helm, which sent the LP on an irreversible sheer to port.

Rule 9(a) of the COLREGS

The Court also took the opportunity to examine the proper interpretation of Rule 9(a) of the COLREGS, which provides that *"[a] vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable."*

The Court held that Rule 9(a) of the COLREGS represents a departure from its predecessor, Rule 25(a) of the International Regulations for Preventing Collisions at Sea

1960. Under Rule 9(a), it is no longer necessary or sufficient for a vessel in a narrow channel to navigate on the "lane" to her starboard side of the channel. A vessel is now required to keep as near to the outer limit of the narrow channel on her starboard side as is safe and practicable.

Concluding Words

The decision of the Court of Appeal is well-founded, based on the findings that the LP ought to have detected and reacted to the bow cushion effect earlier. These were found to be causative as the starboard helm (which had counteracted the bow cushion effect) was subsequently erroneously removed through her pilot's "midships" order, which sent the LP on an irreversible sheer to port. Ultimately, this was a difficult situation for both bridge teams involved and it would likely be difficult to blame one side more than the other, resulting in the 50/50 outcome.

As demonstrated in this decision, disputes involving ship collisions require the effective management of a number of moving parts. Technical evidence has to be utilised to construct a factual narrative, conflicting expert evidence must be assessed, and the legal principles must be duly applied. Further, the VHF communications between the vessels must be scrutinised carefully, as they can play a crucial role in the apportionment of liability, as in this case.

The Singapore courts have shown themselves to be adept at managing such issues, combining the necessary technical expertise as well as the procedural framework necessary to air out the dispute. For example, at the trial level of this dispute, the court managed the conflicting expert evidence by hot- tubbing the parties' respective experts, demonstrating the robust tools of determination at its disposal.

For further queries, please feel free to

Apportionment of Liability for Maritime Collisions

contact our team below.

About the Authors:

Leong Kah Wah

Partner,
Shipping & International Trade
Senior Accredited Specialist
(Maritime and Shipping),
Singapore Academy of Law

T +65 6232 0504

kah.wah.leong@rajahtann.com

Dedi Affandi

Partner,
Shipping & International Trade
Accredited Specialist
(Maritime and Shipping),
Singapore Academy of Law

T +65 6232 0768

dedi.affandi.ahmad@rajahtann.com