

SHIPPING

The International Code for the Security of Ships and Port Facilities and new technology to combat terrorism

In Issue 42 p 1 we commented upon some of the provisions of the International Code for the Security of Ships and Port Facilities. The Code, to which 147 governments are signatories, came in to force on 1st July. Vessels run the risk of being turned away from ports if they do not have their security plans in order and ports could face financial ruin if they fail to comply with the Code.

The IMO, which adopted the Code, reports that security plans for some 86% of its members' ships and 69% of port facilities have been approved. The figures are rising but smaller ports and less developed nations are experiencing difficulties in implementing the rules.

With well over 200 million cargo container movements between major seaports each year, it is clear that tighter security at the place of origin is likely to have the most impact, the key being to determine what is in each container prior to shipment.

The ability to track containers throughout their journey is obviously highly desirable. The attainment of that will be greatly helped by the new electronic container e-seals which in time are likely to supersede the standard mechanical models. The radio frequency identification electronic versions presently under development are considered the best long-term means of combating container related terrorist threats as well as reducing theft, smuggling and fraud.

The battle against modern-day pirates

Piracy still continues to cast a long shadow over some of the world's most important trade routes, recent attacks having been reported from Indonesia, Malacca strait, Sarawak, Brazil, Guinea, Nigeria and Bangladesh. The International Maritime Bureau has long collated reports on attacks and does so through a specialist bureau dedicated to piracy reporting in Kuala Lumpur.

The problem is particularly rife in the Malacca strait, used as it is by 50,000 ships a year and carrying over a quarter of the world's trade. As a result, the governments of Malaysia, Indonesia and Singapore are set to launch regular co-ordinated armed patrols at sea and in the air.

Technology too may help with effective defence against pirate gangs. "Secure-Ship" is a recent innovation. This provides a non-lethal, electrified fence adapted for maritime use that surrounds a ship, delivering a 9000-volt shock to any unauthorised boarder and also activating alarms, sirens and floodlights. Another aid is the "ShipLoc" tracker, allowing shipping companies to monitor the exact location of vessels. It is an inexpensive satellite tracking system which has potential for further development.

Newly agreed regulations to curtail pollution via ballast water

The International Convention for the Control and Management of Ships' Ballast Water and Sediments, promoted by the IMO, was adopted in February 2004 (but not yet in force). It is estimated that between 3 and 10 billion tonnes of ballast water are transferred globally each year, potentially moving from one location to another species of sea life that may prove ecologically harmful when released into a non-native environment. The Convention will require all ships to implement a

Ballast Water and Sediments Management Plan, carry a Ballast Water Record Book and carry out detailed ballast water management procedures.

SALE OF GOODS

Two interesting points were recently considered by the Court of Appeal in the sale of goods case *Fal Oil v Petronas* (The "DEVON").

F agreed to sell to P a cargo of fuel oil on C&F terms. The contract provided that the oil should contain no more than 1% water and sediment. The oil was loaded in Saudi Arabia on board the "CENTAUR" and then transferred at sea to the "DEVON" in a ship to ship (STS) transfer. At discharge, the oil was found to contain water, mainly seawater, well in excess of the contractual 1% level and also well in excess of the quantities found in the shore tanks prior to loading. P rejected the cargo and refused to pay for it.

F claimed the sale price of the oil. At first instance, the judge concluded that there must have been a "deliberate substitution of water for oil", but also that it was impossible to determine whether the substitution had occurred on the "CENTAUR" or the "DEVON". Accordingly, he decided that P had failed to establish that any excess water was in the cargo loaded at the STS point. It followed that P had failed to establish any defence to F's claim for payment. P appealed that finding.

The Court of Appeal held that the critical question for consideration was whether the cargo which was transferred to the "DEVON" at the STS point in fact contained the excess water. The Court said that the judge had gone "too far" in considering that the ultimate issue should depend upon whether P could prove that the presence of the water was more probably due to deliberate substitution of water for oil on the "CENTAUR" as opposed to the "DEVON". There were other possibilities and the case was a mystery. However, it still remained necessary to consider whether P had established as a matter of probability that the water was present and was loaded on the "DEVON" during the STS transfer. On the evidence, it was impossible to say as a matter of probability that the excess water was loaded on to the "DEVON" by or at the STS point. P had simply failed to prove its case. P's appeal was dismissed and F was entitled to payment.

The second issue concerned demurrage. The sale contract provided for demurrage "as per charterparty per day pro rata". F made a claim for demurrage on the basis that P had failed to discharge the "DEVON" within the permitted lay days in breach of the contract. The judge rejected F's claim and held that the demurrage provision in the contract operated as a contract of indemnity rather than as a free-standing provision. F appealed.

The issue for the Court of Appeal was to decide the true nature and effect of the demurrage provision. That must depend upon the context and wording of the particular provision. In the absence of any cross-reference in the sale contract to a charterparty (or other contract under which demurrage could arise), the natural inference was that the sale contract constituted an independent code. If there was such a cross-reference, then its nature, purpose and effect became critical.

Applying these principles in this case, it was clear that the demurrage clause (above) constituted an independent code. The sale contract was independent of the charterparty.

When did cargo contamination occur and what was the true meaning of a demurrage provision?

The demurrage clause did no more than refer to the charterparty rate: its natural reading and effect was as an independent obligation.

F's appeal was allowed and F was entitled to its demurrage.

INSURANCE

Were insurers liable for damage arising during sea carriage?

In the recent Commercial Court case *Mayban General Assurance v Alstom Power Plants*, an insurance company M sought a declaration that it was not liable on a policy covering carriage of goods by sea. These were the facts.

APP manufactured an electrical transformer for a power station in Malaysia. During the first leg of the sea voyage, from Ellesmere Port to Rotterdam, the vessel carrying the transformer underwent two periods of gale force winds lasting 46 hours. On arrival in Malaysia, the transformer was found to be seriously damaged, requiring repairs exceeding £1m.

APP believed that the damage had been caused by some unusual event during the voyage and made a claim on its policy with M. However, M rejected the claim, maintaining that the loss was caused by inherent vice, namely the inability of the transformer to withstand the ordinary incidents of carriage by sea from the UK to Malaysia in the winter months. It was common ground that the immediate cause of the damage was the violent movement of the vessel due to the actions of the wind and sea.

On those facts, was M liable? No, said the Court. The damage was caused by the prolonged "working" of some of the transformer's joints, brought about by the motion of the vessel. Whilst it was unusual for a vessel making the passage in January to encounter such a long continuous spell of bad weather on the first leg of its voyage, nonetheless any commercial man with experience of such voyages would not regard the conditions encountered as unexpected for that time of year. Even if such conditions were "extraordinary", it would not have been unusual or unexpected for the transformer to be exposed to similar spells of bad weather at various stages of the voyage to the Far East. A cargo that could not withstand prolonged exposure to conditions of that kind could not be regarded as fit for the voyage. It followed that the loss was caused by the inability of the transformer to withstand the ordinary conditions of the voyage rather than by the occurrence of conditions that it could not have reasonably been expected to encounter. APP's claim under the policy must fail.

Were insurers liable for the loss of goods bailed to their insured?

The facts in the case *Ramco v International Insurance Co of Hannover* were straightforward. R occupied industrial premises. Certain goods were bailed to R by their owners and stored in the premises. A fire occurred and the goods were damaged or destroyed. It was common ground that the fire occurred without fault on the part of R.

In those circumstances, R made a claim on its all-risks policy issued by IHH. Liability in respect of property owned by R was not disputed, but IHH argued that it was not liable in respect of the bailed goods because the policy expressly covered goods

"held by the insured in trust for which the insured is responsible".

At first instance, the Court decided the issue of interpretation in favour of IHH on the basis that those words restricted the liability of IHH to those goods which were damaged in a way that imposed liability on R as a bailee. R appealed.

The Court of Appeal disposed of the matter swiftly. On the authorities going back many years, it was clear that the inclusion of words (in a policy) such as "for which he is

responsible" had the effect of restricting the insurers' liability for damage to goods held by a bailee for a third party to circumstances when the insured bailee was **liable** for the damage. The wording in the policy quoted above had a settled meaning and there was no reason to depart from that. On the facts, R was not legally liable for the damage and it followed that IHH was not liable under the policy.

CONTRACT – SALE OF SHIP

In a recent London Arbitration, S and B entered into a contract for the sale (by S to B) of a vessel which S were expecting to buy in a Court sale. The MOA provided in summary and in part:

1. Price US\$1.58million
2. Deposit 10% to be paid to escrow agent
3. Balance of purchase price to be paid to S within four days of finalisation of Court sale and notice of readiness for delivery to B
4. In exchange for full purchase price, S shall submit to B the following documents:
 - Bill of Sale (transferring title to B, free from encumbrances)
 - Deletion Certificate, from previous register
 - Commercial Invoice
 - Certificate of ownership and nationality
 - Certificate of safety radio and safety manning
5. S shall deliver the vessel "as is, where is" but all conditions of cl 4 shall remain in force
6. The vessel has been accepted by B after inspection and "deal is thus outright and definite"
9. Should the purchase money not be paid (as per 3 above) S has the right to cancel the contract in which case the deposit shall be forfeited to S

B duly paid the deposit but did not pay the balance of the purchase price. They asked to see the documents listed in the MOA before doing so. S replied that, by cl 4 of the MOA, the money must be paid before the documents were handed over. B then demanded certified copies of all the documents and said that failure to provide them would be treated as a repudiatory breach of the contract. S replied by saying that B's demand was itself a repudiation of the contract and purported to accept it, thus terminating the contract. S also cancelled the contract under cl 9 and sought release of the deposit.

The dispute was referred to arbitration. B argued that there was an implied term in the MOA that they should be permitted to inspect copies of the documents listed in cl 4 prior to paying the purchase price. S denied that there was any such implied term.

The Tribunal found that the MOA was not exhaustive of every term agreed by the parties. It went on to hold that it was necessary, in a business sense, to imply the term contended for by B "in order to give efficacy to the contract". Without the implied term, B would be at an unfair disadvantage. B would be required to hand over the full price without even knowing if the documentation existed. Without advance inspection, B would risk paying a substantial sum with no guarantee of getting the agreed vessel.

The implied term was not only reasonable but necessary. The fact that B were aware of the general condition of the vessel was irrelevant. The reason that S had insisted on simultaneous exchange of the purchase price and documents was because S knew that they could not produce all the

Was a term in favour of buyers to be implied in a ship sale contract?

documents required by cl 4.

It followed that S were in breach of the implied term by refusing to make the documents or copies available to B. But were B entitled to the return of their deposit? Yes, said the Tribunal. S's conduct in purporting to terminate the contract was itself a repudiatory breach which, on the evidence, was accepted by B, so bringing the contract to an end. B were also entitled to damages as a result of S's breach although not at the level claimed.

CONTRACT – BAILMENT

Was there a contractual bailment and if so what were its terms?

Interesting and important issues were decided in the Commercial Court case *Frans Maas v Samsung Electronics*. F brought a substantial claim against S for unpaid warehousing services over a long period. S counterclaimed to recover some £2.6million arising from the theft of 25,000 mobile phones from F's warehouse. S submitted to summary judgment in respect of F's claim and so the trial was solely concerned with F's liability if any in respect of S's counterclaim.

Six main issues were considered and decided by the Court as follows:

(1) What, if any, standard terms governed the relationship between S and F?

On the evidence, there was a contractual bailment. F gave S sufficient notice of the BIFA terms which were accepted by conduct or a course of dealing. BIFA terms were applicable (rather than UKWA) because the bailment of the phones was more in the nature of transit than storage.

(2) Was there an oral agreement to provide security guards and if so what was its impact?

On the evidence, S failed to prove that there was any agreement relating to the provision by F of security guards. It was not necessary therefore to consider what effect such an agreement might have had on the BIFA terms.

(3) Was the theft an inside job and/or did it result from F's negligence?

The facts and circumstances indicating that the theft was an inside job were overwhelming. The absence of a forced entry, the ability to open the front door lock and the knowledge of the alarm code all spoke for themselves. All questions of F's liability, and entitlement to limit liability, must be assessed in the light of this conclusion.

(4) Was F liable to S in respect of the theft?

Yes. F was vicariously liable for the "wilful default" of its warehouse employees. The conclusion as to wilful default was sufficient to establish F's liability for the loss of the goods but F was also liable to S on the basis of negligent failures in its security arrangements which were causative of the loss.

(5) Was F's liability to S limited by any of the terms governing their relationship?

The application of the BIFA limitation provisions gave rise to a limit of approximate £25,000 as against S's counterclaim of £2.6million. F was entitled to limit its liability under BIFA clause 27A in respect of negligence and wilful default of employees. That was the effect of the clause, which expressly referred to "liability howsoever arising". The wording was not only capable of extending to wilful default of employees but was intended to do so.

(6) Did the BIFA limitation provisions satisfy the

reasonableness requirement of the Unfair Contract Terms Act 1977?

Yes. BIFA clause 27A did satisfy the reasonableness requirement in the UCTA. As between F and S there was no inequality of bargaining power. Terms such as clause 27A were routinely met in the freight industry. Further, it was open to S to have negotiated a higher limit with F upon payment of additional charges, pursuant to BIFA clause 27D. It followed that UCTA had no impact upon F's entitlement to limit its liability.

CHARTERPARTY – DEMURRAGE

The tanker "Afrapearl" was chartered on amended Asbatankvoy form to carry oil to Dakar. One parcel of cargo was to be discharged at the M'bao sealine. The demurrage provision in the charter read:

8. Demurrage. Charterer shall pay demurrage... at the rate specified in Part I... If, however, ... demurrage shall be incurred at ports of loading and/or discharge by reason of... **breakdown of machinery or equipment** in or about the plant of the Charterer... or consignee of the cargo, such delays shall count as half laytime or, if on demurrage, the rate of demurrage shall be reduced (to) one half of the amount stated in Part I...

The M'bao sealine was a series of steel pipes. At its end was the pipeline end manifold (PLEM) which connected the pipeline with flexible hoses. When "Afrapearl" arrived in July 2001 the sealine was in poor condition. It was poorly maintained, corroded and the PLEM had leaked on a number of earlier occasions since 1999, including after three separate incidents when damage had occurred and when no proper repairs had been carried out.

"Afrapearl" berthed at the M'bao sealine on 10th July. Discharge began but was suspended after 15 minutes by order of the terminal as oil was observed on and coming to the surface of the sea. A diving inspection revealed that the source of the leaking oil was a gap in the flange connecting a section of the pipeline before the PLEM with its neighbour. Over the next 19 days attempts were made to carry out repairs. The vessel left and returned to the berth on three occasions. Finally on 29th July she was ordered back, reberthed and discharge commenced. No leakage of oil was observed.

Owners brought proceedings (*Portolana Compania Naviera v Vitol*) against charterers claiming, inter alia, demurrage in the sum of US\$455,800. Charterers contended that in relation to certain periods between 10th and 29th July, neither laytime nor demurrage ran or counted against them. Alternatively, laytime or demurrage should only run or count at half rate (as per cl 8). At first instance, the judge rejected charterers' contentions, holding that there had been no "breakdown" of equipment as per cl 8. Charterers appealed.

The Court of Appeal held that the pipeline was "equipment" and certainly equipment in or about the plant of the consignee. But was there a breakdown of the equipment? A distinction must be drawn between a breakdown and its cause. A breakdown occurred when the discharge pipe no longer functioned as a pipe: the cause might be a hole in the pipe or, as in this case, a gap in the flange preventing the pipe from operating.

On the evidence, it was more probable than not that failure of the pipe occurred after the arrival of "Afrapearl", during her manoeuvres or the connecting process. That amounted to a breakdown. Alternatively, a breakdown occurred sometime before the vessel arrived, perhaps caused by another vessel.

Was a pipeline malfunction a "breakdown of machinery or equipment"?

Once it was recognised that the pipe was “equipment” and that there was a “breakdown of equipment” if it malfunctioned, whatever the cause of the malfunction it was difficult to conclude that there was no “breakdown of equipment” within the meaning of cl 8. The only way a contrary conclusion could be reached would be to say that the defect in the sealine was not fortuitous or was a characteristic of the port outside what the parties intended to be treated as a breakdown.

Accordingly, given the finding that the pipe malfunctioned rendering it unusable, there was indeed a “breakdown of equipment” within cl 8. Charterers appeal was allowed and owners were only entitled to half demurrage in respect of the whole period in dispute.

INSURANCE – MARINE

The extent of coverage under a fleet loss of income policy

S owned and operated cruise ships. It was insured by P under a “loss of income and extraordinary costs” policy. Claims under the policy arose as a result of the terrorist attacks in the US on September 11th 2001. P disputed liability and the claim went to the Commercial Court. (If P&C Insurance v Silversea Cruises)

The policy contained three separate covers: Ai for loss of income, Aii for loss of anticipated income and B for passenger compensation. Covers Ai and B were closely related and expressly subject to the same conditions and also rated together. The judge dismissed S’s claims under covers Ai and B but held that the claim under Aii succeeded in the maximum amount of US\$5million on the basis that the limit under that cover was \$5m for the fleet as a whole and not per vessel. S appealed.

The Court of Appeal held as follows. S’s primary claim under cover Ai failed because it did not meet the policy requirements of some interference with the scheduled itinerary of a vessel. Cover Ai was not designed to cover against loss of market (which was the province of cover Aii) but to compensate S for interruptions in the operations of individual vessels in the course of cruises. Thus under cover Ai, loss of time had to be proved. On the judge’s findings, there had been no cruise cancellations due to safety, only (allegedly) due to market conditions. In those circumstances any claim belonged under cover Aii alone.

As to cover Aii, that was concerned with loss of market on the whole range of future cruises and was measured on an ascertained net loss basis. The cover was expressly stated as limited to “US\$5million in the annual aggregate and in all” and the judge was right that the limit of the cover was US\$5million across the whole fleet. The argument of S that the US\$5million limit applied to each vessel in its fleet was based on the general provision that “each vessel to be a separate insurance”. The judge was correct in rejecting that argument: the premium provision for Aii was a fleet premium that operated across the fleet as a whole.

It followed that S’s recovery from P was limited to US\$5million under cover Aii.

Footnote: Did the terrorist attacks of 9/11 amount to acts of war or armed conflict?

If S could have proved a cruise cancellation, due to safety, in its claim under Ai, then the Court would have had to consider whether the loss fell within the listed perils in the policy. Specifically, the Court would have been asked to rule whether the events of 9/11 amounted to acts of war or armed conflict. (This question did not arise under cover Aii as the listed perils in that cover included US Government warnings, which were held to have triggered the claim.) Many in the insurance market had hoped for a ruling on the point but it was not to be.

However, the Court did, rather unusually, express a “tentative” (and non-binding) view. One member of the Court said that he did not believe that men of business, underwriters and the insured themselves would have said as they watched the aircraft smashing into the twin towers, “That’s an act of war!” They would have concluded that they were terrorist acts from extremist groups harbouring grievances against the US. He also considered that “armed conflict” had to have an air of continuity about it, not present in what were essentially random attacks. But the question whether a particular terrorist attack can ever amount to an act of war or armed conflict must await a ruling on another day.

IN BRIEF

A group of experts meets twice yearly at the United Nations to discuss all aspects of the transport of dangerous goods. Their conclusions are published every second year as the latest edition of “Recommendations on the Transport of Dangerous Goods – Model Regulations”, a publication often referred to as the Orange Book. It is the basis for all the specific regulations for each mode of transport (road, rail, sea and air). The modal provisions coming from the UN are given legal force in the UK by legislation. The latest legislation affecting road (and rail) carriage is the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2004. They came into force on 10th May 2004 and expressly revoke many earlier Regulations.

A vessel was chartered on Gencon Form for a voyage from the Black Sea with a mixed cargo. Disputes arose under the charter. At times, rain and snow had affected loading. The charter provided for laytime measured in weather working days. The question for the arbitrator was: what was the situation where charterers had arranged with a number of different shippers to load various cargoes (some of which were more weather sensitive than others) but there was a single laytime allowance, and the weather allowed some cargoes to be loaded but not others? It was held that a weather working day was a working day or part during which it was possible to load without interference from the weather. Laytime continued to run if any single one of the intended cargoes could be loaded even though the weather did not allow the loading of some or all of the others.

In Issue 36 p 1, we reported upon two cases involving ADR. Both indicated the likelihood of an adverse costs order being made against a party who had refused ADR even though he had gone on to succeed in litigation. The Court of Appeal has again considered this matter (Halsey v Milton Keynes NHS Trust with another case) and has laid down some important guidelines indicating a marked change in the Court’s approach. First, the burden lies with the unsuccessful party to show why, when ADR has been refused, the successful party should be penalised in costs. Secondly, there is no basis for the Court to discriminate against successful public bodies when deciding if a refusal to agree ADR should lead to a costs penalty. Thirdly, the Court’s role is to encourage not to compel ADR. It is likely that compulsion would be regarded as an unacceptable constraint on the right of access to court and would therefore fall foul of the European Convention on Human Rights 1950 Art 6.

For further information on any of the summarised cases and other articles in this newsletter or for initial advice on any marine legal matter, please contact in the first instance David Padovan at our office.

The Carriage of Dangerous Goods

Weather working day and the running of laytime

Alternative Dispute Resolution and costs