Shipping

July 2013

SHIPPING BULLETIN

Welcome to the July edition of our Shipping Bulletin

As claimants know only too well, winning the case is only part of the battle, as the judgment or award then needs to be enforced. We look at a recent US decision, which has clarified the remedies available from the US courts in relation to securing claims. We then examine a case that involves issues of global application – in Canada, the courts have recently reached the landmark decision that a shipowner was not entitled to limit liability for damage to submarine cables.

It is well known that many maritime accidents arise out of navigational errors, poor watch-keeping and/or failures in passage planning, and the International Maritime Organisation have therefore brought into force rules which will increase use of Electronic Chart Display and Information Systems (ECDIS). We look at whether it is now a breach of IMO rules to use paper charts as a primary means of navigation.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin or your usual contact at HFW.

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Enforcement: a case development update from across the Atlantic

In the current financial climate, enforcement of judgments or arbitration awards is an ongoing concern for claimants. Since the collapse of Lehman Brothers in the last quarter of 2008, we have seen a rise in the number of London Arbitration proceedings and elsewhere, with the London Maritime Arbitrators Association reporting 4445 appointments in 2009, an increase of approximately 800 from the previous year, and last year an increase of 300 appointments from 2011.

However, in circumstances that defendant companies hold assets (if at all) in jurisdictions where it is hard to enforce, litigation can be a costly exercise followed by a bitter experience of fruitless enforcement.

Claimants are encouraged at an early stage to consider options for security for both their costs and the sums claimed. For those claimants not so fortunate to have obtained security before reaching the stage of a court judgment or arbitration award, then the options for enforcement are often limited and include the unattractive prospect of seeking to enforce the judgment or arbitration award in the defendants' home courts, or as a last resort, to apply to wind the defendant company up.

It is with interest, therefore, that the international litigant has been following developments in the New York courts, no doubt roused by the success of the short-lived 'Rule B' phenomenon, which until March 2010, presented maritime claimants the possibility of attaching electronic funds transfers passing through New York clearing houses as security for their claims.

In circumstances that defendant companies hold assets (if at all) in jurisdictions where it is hard to enforce, litigation can be a costly exercise followed by a bitter experience of fruitless enforcement.

This more or less coincided in time with the possibility raised in *Koehler v Bank of Bermuda Ltd* (12 NY3d 533 [2009]) which appeared to announce the lengthening of the long arm of the New York court judges.

In *Koehler* the United States Court of Appeal for the Second Circuit held that it had jurisdiction to order the Bank of Bermuda, which had a branch in New York, to turnover stock certificates held in its Bermuda branch belonging to the judgment debtor, despite the fact that the certificates themselves were located outside of the United States.

This potentially significant decision gave judgment creditors the hope that, armed with a judgment against a defendant, the defendant's foreign bank could be forced to turn over property held in the name of the defendant debtor, even in circumstances where both the defendant and their bank account are located outside the jurisdiction, as long as the bank held a branch in New York (i.e. both branches being part of the same legal entity). Clearly, if this were so, it would be a powerful weapon in the arsenal of a judgment creditor otherwise struggling to enforce their judgment; the theory being that a London or foreign arbitration award or judgment could be registered in New York and enforced in this manner.

However, it appears that despite the initial buzz and possibilities raised by *Koehler*, the decision has been of limited practical impact for the international litigant.

The optimism in the wake of the *Koehler* decision was short-lived and as far as the writers are aware the theory not successfully put into practice. Strenuous objections from banks including Commerzbank, State Bank of India and Bank of China, and an apparent caution on the part of New York courts not to allow the opening of the floodgates have seemingly contributed to the fact that '*Koehler* Orders' have not become as widely used as one might have expected amidst the arbitration awards and judgments obtained in the years after the collapse of Lehman Brothers.

Notably, in one case, the Clearing House Association and the Institute of International Bankers presented policy arguments in favour of Bank of China's motion to dismiss an attempt by claimants to extend the principles in *Koehler* to attach "any property" which may be in the banks' possession located outside of New York. They argued that banks would *"bear the administrative burden and cost of searching for information responsive to broad, invasive discovery requests for confidential banking information, and [...] also would potentially violate local laws".* This argument appears to have been accepted by the New York courts.

In an apparent effort to gain clarity on the availability of *'Koehler* Orders' the court was asked in the recent case of *Commonwealth of the Northern Mariana Islands v Millard* [2013] whether, if the debtor's property is in the possession of a subsidiary of the bank (i.e. a separate legal entity within the same corporate group) which has a branch in New York, a turnover order can be made.

The case involved substantial claims for unpaid taxes against a couple, the Millards, brought by the Commonwealth of the Northern Mariana Islands, a US territory of volcanic islands in the north-western Pacific Ocean. Judgments were obtained against the Millards, registered in New York and proceedings commenced for a turnover order. The proceedings were brought by the Commonwealth against Canadian Imperial Bank of Commerce (CIBC), a Canadian bank headquartered in Toronto with a branch in New York, on the basis that the Millards maintained bank accounts in subsidiaries of the Canadian bank and its affiliates in the Cayman Islands. The Commonwealth alleged that CIBC had the *"control, power, authority and practical ability to order [its subsidiary] to turn over funds on deposit in the name of the Millards."*

The court was asked to determine whether a turnover order could be made where the defendant's assets are held by the bank's subsidiary company, rather than by another branch of the bank, on the basis that the assets are still arguably in the bank's 'control'.

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It was held that the legislative provisions for turnover orders neither used the word 'control' nor intended for 'control' of assets, rather than possession, to be sufficient grounds for an order. It therefore seems that assets in the possession of a bank's subsidiary cannot ordinarily be the subject of a turnover order.

Whilst this decision, as it notes itself, does not change the *Koehler* decision, in which the bank had actual possession of the assets and so no consideration of subsidiaries was required, it does offer some further guidance as to the restricted availability of turnover orders.

It seems that on this occasion, the New York courts have not offered the elixir hoped for by the judgment creditor and in turn the Banks as well as judgment debtors may breathe a sigh of relief.

As such, the international litigant must continue to watch for the development of opportunities in the New York courts and elsewhere, to try and add to the limited number of enforcement options available for consideration on a case-by-case basis.

In the meantime, the message remains the same for any claimant: to try and obtain security for both its claims and legal costs from the outset.

Readers are asked to note that this article is not intended to give advice on US law, and for a definitive position US lawyers must be consulted.

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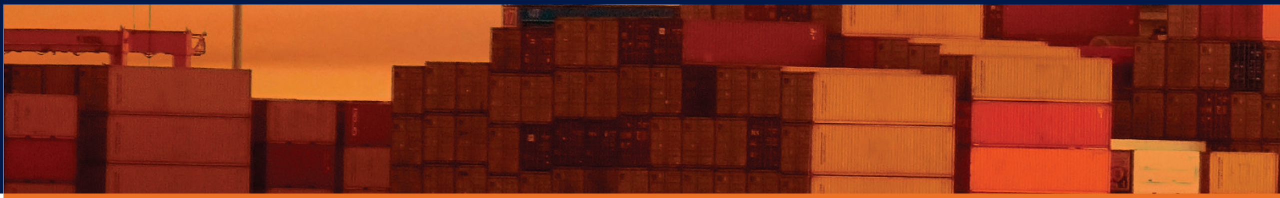

Submarine cables and limitation of liability

The appeal of a landmark decision involving limitation of liability in Canada will examine issues of global application in cases where ships cause damage to submarine cables.

The vast majority of the world's international communications are transmitted through submarine cables. A significant number of cable systems are damaged each year by ships' anchors and fishing gear, even though vessels are strictly required to sacrifice their gear or anchors in order to avoid damaging these cables (in return for compensation from the cable owners). Often, extensive disruption and financial loss ensues.

In *Société Telus Communications v Peracomo Inc.*, the Canadian Federal Court of Appeal deprived an owner of his right to limit liability in respect of such losses, leaving him exposed to the full financial consequences of his error. The Canadian Supreme Court has now agreed to hear his appeal.

The master and owner of the fishing vessel "Realice", Mr Réal Vallée, was fishing for crab when one of his fishing anchors caught on an underwater cable. Consulting a chart in a local museum which showed a line drawn running through the area and had "abandonné" written on it by hand, Mr Vallée concluded that the offending cable was abandoned. On this basis, when his gear snagged again in 2006, he proceeded to cut the cable with an electric saw and buoyed the end with the caught anchor. Returning a day or two later, he freed the anchor and cut the cable again.

It transpired that, far from being abandoned, the cable was in fact the Sunoque I cable, owned by Société Telus Communications and Hydro-Québec, two of the three Respondents in the appeal. The third Respondent had a right of use in it. The Respondents filed a suit against Mr Vallée and his shipowning company to recover the costs of repairing the severed cable.

Mr Vallée raised a number of defences, including the defence of limitation under LLMC 1976 (as amended by the 1996 Protocol). If successful, this would have limited the damages to US$500,000.

In this regard, the court focused on Article 4 of LLMC 1976 which provides:

"A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."

The burden is on the claimant to prove that Article 4 applies. LLMC 1976 limits are notoriously difficult to break (Gross J commented in The *"Saint Jacques II"* [2003] Lloyd's Rep. 203, that any real prospect of doing so would arise only in *"truly exceptional cases"*). This was apparently the first time Article 4 has come under judicial scrutiny in Canada.

In analysing the requirement for intent, the Court drew an analogy with battery:

"One might push another out of the way not intending to cause harm. The person might slip and fall and become seriously injured or die. In that case, the loss arose from a personal act or omission with the intent to cause the battery, even though the consequences were not intended."

In the present case, Mr Vallée intended to cut the cable. It is irrelevant for the purposes of Article 4 that he did not thereby intend to cause the losses that in fact resulted.

Out of an abundance of caution, the Court also considered the recklessness requirement, citing The *"Eurysthenes"* [1976] 2 Lloyd's Rep 171 (a decision on whether a ship was sent to sea in an unseaworthy state "with the privity of the assured"). That case made it clear that "knowledge" includes *"not only positive knowledge but also the sort of knowledge expressed in the phrase "turning a blind eye"."*

On this basis, Article 4 does not permit the master to "turn a blind eye" to the existence of a charted cable. Accordingly, acting recklessly under Article 4 includes ignoring facts that the master knew or ought to have known, such as consultation notices prior to installation of the cable, notices in local newspapers, various notices to mariners and notices to shipping, and amendments to the two applicable marine charts.

Having established that the master acted with intent to cut the cable, the Court went on to decide that this constituted wilful misconduct under the Canadian Marine Insurance Act, thereby voiding the master's insurance cover and rendering him personally liable for the full amount of damages and legal fees.

Although the incident took place in Canadian waters, the decision was determined on the basis of LLMC 1976, to which over 70 states are parties, and could therefore have a wide-reaching impact on commercial maritime law internationally.

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EMILIE BOKOR-INGRAM

Mandatory ECDIS carriage requirements: are paper charts no longer acceptable as a primary means of navigation?

It is well known that many maritime accidents arise out of navigational errors, poor watch-keeping and/or failures in passage planning. The International Maritime Organisation (IMO) have therefore brought into force rules which will increase use of Electronic Chart Display and Information Systems (ECDIS). Against this background, it is being suggested that it may now be a breach of IMO rules to use paper charts as a primary means of navigation.

On 1 January 2011, IMO resolution MSC.282(86) entered into force, which introduced a rolling timetable from 1 July 2012 until 1 July 2018 making the carriage of ECDIS mandatory for all large vessels on international voyages.

The specific requirements are contained in paragraph 2.10 of SOLAS Chapter V Safety of Navigation Regulation 19 – Carriage requirements for shipborne navigational systems and equipment.

The requirement initially took effect for all newly constructed passenger ships and tankers of 500 and 3,000 gross tonnage respectively, soon to be joined by newly constructed cargo ships[1] (other than tankers) of 10,000 gross tonnage and upwards. By 1 July 2018, the regulations will apply to almost all large merchant vessels with implementation for existing vessels based on the first survey[2] following the relevant date.

There are two important exceptions. Existing cargo ships of less than 10,000 gross tonnage are not included, and flag states have discretion to exempt ships which are due to be taken out of service within two years of the implementation date.

There has been substantial debate as to whether the mandatory requirement to carry ECDIS automatically assumes that ECIDS must then be the primary means of navigation. The revised paragraph 2.1.4 of Regulation 19 (which refers to the carriage requirements) does not appear to be that prescriptive, merely stating the following (emphasis added):-

"Nautical charts and nautical publications to plan and display the ship's route for the intended voyage and to plot and monitor positions throughout the voyage. An electronic chart display and information system (ECDIS) <u>is also accepted</u> as meeting the chart carriage requirements of this subparagraph. Ships to which paragraph 2.10 applies shall comply with the carriage requirements for ECDIS detailed therein."

For ECDIS to be used as a primary means of navigation, as envisaged by Regulation 19.2.1.4 the following additional criteria (importantly, not contained within Regulation 19.2.10) must also be met[3]:-

(i) The equipment is type approved, as stated in Regulation 19.5.3.2.

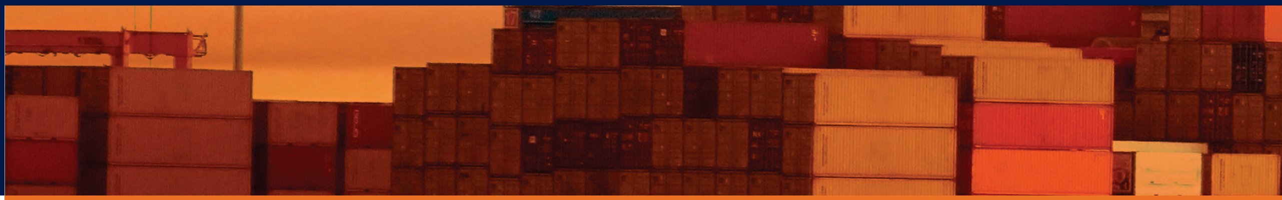
(ii) The equipment operates with official Electronic Navigational Charts (ENC) or, with certain conditions being satisfied as in paragraph 19.5.5, if using official Raster Navigational Charts (RNC).

(iii) The navigating officers are qualified and competent in its use (having completed both generic, and type specific training).

1 With keel laid on or after 1 July 2013.

2 As defined by MSC.1/Circ.1290, the first annual/periodical/renewal survey, whichever is due first after the date specified or any other practicable survey if the Administration deems it to be reasonable and practicable (for example, an unscheduled dry docking).

3 With reference to the UK published Marine Information Note No.445.



(iv) The carriage and use of the equipment as primary means of navigation is to be correctly annotated in the Record of Equipment which accompanies the relevant ship safety equipment certificate (indicating Flag State Approval).

(v) The ship's safety management system (SMS) includes relevant requirements and procedures associated with the carriage and operational use of the ECDIS.

(vi) The ECDIS is capable of displaying the current version of the International Hydrographic Organization (IHO) Presentation Library for ECDIS.

Despite the above, some flag/port states (including the United Kingdom Maritime & Costguard Agency) are interpreting the mandatory carriage requirements to require ECDIS to be used as the primary means of navigation by affected vessels.

This may appear to be an extremely narrow interpretation of the new requirements. However, the rationale behind adopting ECDIS was to contribute to safe navigation, reduce the navigational watch keepers' workload and provide an efficient method of passage planning to include the recognised steps of appraisal, planning, execution and monitoring. It is therefore not altogether surprising that flag/port states are keen to embrace and promote the use of ECDIS instead of a paper chart folio as a primary means of navigation.

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CLAIRE WOMERSLEY

Conferences and Events

London International Shipping Week, London
9–13 September 2013

As part of this event we shall be:

Hosting: Piracy Seminar, London
10 September
Speaking: James Gosling, Elinor Dautlich & Richard Neylon

Sponsoring: Cocktail reception at the Gala Dinner
12 September
Attending: Paul Dean, James Gosling & Elinor Dautlich

IUMI, London
16–18 September
Speaking: Richard Neylon

IMCC, Dublin
25–27 September
Speaking: Alex Kemp
Attending: Toby Stephens & Richard Neylon

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