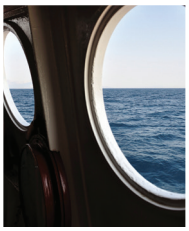
Shipping

April 2015

SHIPPING BULLETIN



Welcome to the April edition of our Shipping Bulletin.

In this edition we cover four cases. Two of the cases are widely considered to return English law back to a more traditional position, one that shows how courts can help protect and one that changes the York Antwerp Rules.

The first case, Spar Shipping, sees a controversial 2013 decision (the *ASTRA*), that the obligation on a charterer to pay hire is a condition, revisited and not being followed. Both cases were first instance decisions and so it is not clear which will be followed in future.

The next case, Stena Bulk, relates to the protective use of the courts following OWB's insolvency in November 2014.

Then we take a brief break from cases to look at the impact of illegal migration on shipping and the role Owners and Charterers are sometimes forced to accept.

The third case concerns the yacht *CANDYSCAPE*, a bust up between client and lawyers, and ultimately, a helpful discussion of the often used broking term "as is where is". This is the second case that moves English law back to a more traditionally understood position.

Finally, we review a case, the *LONGCHAMP*, that has altered the landscape of general average. In this case the judge allowed Owners to recover in general average various additional expenses that had been incurred in substitution for a saving in a ransom payment.

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.

David Morriss, Partner, david.morriss@hfw.com
Nick Roberson, Partner, nick.roberson@hfw.com

holman fenwick willan hfw

ASTRA rocked: Charterers' failure to pay one hire instalment held not to be breach of condition

Introduction

Almost two years have passed since the controversial decision in the *ASTRA*[1] where it was held, albeit obiter, that a charterer's obligation to make punctual payment of hire under clause 5 of the NYPE 1946 form is a contractual condition, which if breached entitles an owner to terminate the charter and claim damages for future loss of earnings.

Whilst some arbitration tribunals in London are known to have followed the Astra line, this issue faced its first High Court test in the recent decision in *Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd*[2]. This new judgment supports the traditional approach that a failure by charterers to make timely payment of a single hire installment is not a breach of condition but rather a breach of an innominate term.

The facts

Spar Shipping concerned long term time charters for three Supramax bulk carriers on amended NYPE 1993 charterparties. In April 2011, charterers began to default on their hire payments and, in September 2011, owners withdrew the vessels and terminated the charters pursuant to the charterparties' withdrawal provisions. Owners subsequently claimed damages for the difference between the charter and market hire rates for the balance of the unexpired charter period.

The question before the judge was one of construction; was the obligation to pay hire on time, as stated in the charterparty, a condition, or simply an intermediate term. If as was held in the *ASTRA*, payment of hire is a condition of the charterparty, then an owner's failure to terminate promptly following a single missed payment could expose him to arguments that he had affirmed the charterparty. Conversely, a charterer could also run the risk of giving his owner a right to terminate whenever he made a wrongful deduction from hire.

If, however, the obligation to pay hire on time was simply an intermediate term, then Owners would only be entitled to damages with no automatic right to terminate unless the breach was sufficiently serious.

The decision

Following a detailed review of the authorities relating to the payment of hire, the judge accepted that the previous authorities did not "speak with one voice" with differing opinions from "greatly experienced" judges. Ultimately, however, the judge concluded that the payment of hire was not a condition for a number of reasons, the most important of which may be summarised as follows:

1. The inclusion of an express right allowing the owner to withdraw the vessel from the charter for failure to pay hire does not elevate the obligation to pay hire to that of a condition. In fact, the inclusion of the right to withdraw suggested that in its absence there would be no such right.
2. In mercantile contracts, unless there is a contrary indication, provisions as to the time of payment are not to be treated as of the essence, and are therefore not conditions.
3. Breaches of punctual hire payments may range from the trivial to the serious, and therefore carry the hallmarks of an innominate term.
4. Whilst certainty is important, it must be counterbalanced with the need not to impose liability for trivial breaches. Commercial parties routinely face some uncertainty, and since their contracts commonly contain innominate terms this is an unavoidable commercial reality.

Impact

Some may argue that Spar Shipping goes some way to redressing the balance between owners' and charterers' rights with respect to the obligation to pay hire and the decision is more likely to be followed in the future. However, what is clear is that the two cases are almost diametrically opposed, and that it is therefore unlikely that the debate has been finally settled.

For more information, please contact Jonathan Webb, Partner, on +44 (0)20 7264 8549 or jonathan.webb@hfw.com, or Menelaus Kouzoupis, Senior Associate, on +44 (0)20 7264 8482 or menelaus.kouzoupis@hfw.com, or Wole Olufunwa, Senior Associate, on +65 6411 5344 or wole.olufunwa@hfw.com, or your usual contact at HFW.

1 Kuwait Rocks Co v AMN Bulkcarriers Inc [2013] EWHC 865

2 [2015] EWHC 718 (Comm)

Raising the stakes: *Stena Bulk AB v Copley and others*

The insolvency of the OW Bunkers group (OWB) in November 2014 has catalysed a swathe of actions in multiple jurisdictions. Those charged with recouping payments due to OWB (notably ING) – as well as unpaid physical suppliers - have taken an aggressive approach towards OWB's former counterparties.

OWB's insolvency in their role as an intermediary party in bunker deliveries has had significant repercussions. OWB's former customers (many of whom are willing and able to pay for the bunkers supplied) face the unpalatable prospect of multiple claims for payment – from OWB under their original contracts, as well as unpaid physical suppliers seeking direct recovery. In many cases, the parties' leverage has been enhanced by the threat of vessel arrest.

Options

What options are open to OWB's former customers to protect themselves from the risk of arrest, or paying out twice for one bunker supply?

This is a question that the claimants in the recent *Stena Bulk AB v Copley and others*[1] sought to answer. They comprised owners, charterers and managers of vessels that had purchased bunkers from OWB entities. The defendants were, broadly, (i) the OWB entities, ING and their Receivers and (ii) various physical suppliers.

Dispute

The claimants did not dispute their liability to pay for the bunkers, however, they asserted that they could not be liable to pay the same sum of money to several parties. The claimants commenced action in the Admiralty Court as "stakeholders", and applied without notice for an order authorising payment into court of US$3,921,176.73 (the value of the bunkers under dispute).

The rationale for the application was that money paid into court would secure the defendants' claims, so as to make arrest of the vessels chartered or operated by the claimants less likely. The ultimate objective was to oblige the competing parties to resolve in relation to each supply transaction who was properly entitled to payment from the claimants. If the various parties could not reach amicable agreement as to who was so entitled, the court would determine the correct beneficiary through so-called "interpleader" proceedings.

Admiralty Court

In the event, the Admiralty Court authorised payment into court, considering that the order requested was both in the interests of justice and consistent with the overriding objective. In summary, payment was consistent with the powers of the court; amongst other things:

- To make any order for the purpose of managing the case and furthering the overriding objective.
- The order was not dissimilar from an interim order for a specified fund to be paid into court or otherwise secured where there is a dispute over a party's right to a fixed sum of money.
- There was respected authority[2] which states that in interpleader proceedings the court can order money to be paid into court in aid of an arbitration.
- Similarly, a shipowner that anticipates the arrest of his vessel may enter a caution against arrest to prevent disruption before it occurs.

That the court was prepared to permit the payment in will be of some comfort to those trying to protect themselves from competing claims for payment, who will hope that the courts will adopt the same approach to any similar stakeholder applications in the future. However, whether they will in fact do so is far from certain, especially in light of the formal recognition of OWB's insolvency proceedings by the English courts. Most importantly, this measure provides only a modicum of protection, and would not, for example, be capable of preventing altogether an arrest of a claimant's assets.

Initiating formal proceedings remains a drastic step for former OWB customers, who in the circumstances have limited options to avoid arrest. It remains to be seen what tactic, if any, will prove to be most cost-effective (and provide the most protection) for those affected by the fallout from the OWB insolvency.

For more information, please contact Max Thompson, Associate, on +44 (0)20 7264 8230 or max.thompson@hfw.com, or your usual contact at HFW. Research by Gabriella Martin, Trainee Solicitor.

1 [2015] 1 Lloyd's Rep. 280

2 17/5/8 in the 1999 RSC White Book, volume 1

hfw Maritime refugees: obligations on the Merchant Navy

2015 has seen increased reporting of maritime casualties in the Mediterranean, as vessels carrying refugees from North Africa and the Middle East get into difficulties. The problem is not new. Refugees have been attempting to leave their home nations by sea for millennia. In the Mediterranean, migrants have been leaving Libya on a regular basis since 2013.

However, the scale of the problem (and heightened attention from the media) is at a new level. For example, at the start of 2015 alerts were issued to assist *BLUE SKY M*, and over 2000 migrants were rescued from 12 vessels on the weekend of 14-15 February 2015. More recently, up to 900 migrants are feared dead following the tragic capsize of another vessel on 19 April.

The international and national legal framework

Pursuant to Article 98 of UNCLOS[1], *"in so far as he can do so without serious danger to the ship, the crew or the passengers"* the Master of a merchant vessel has a duty to "render assistance to any person found at sea in danger of being lost". This obligation is replicated under SOLAS[2] Chapter V Regulation 33 which provides that absent *"special circumstances"* a vessel is *"bound to proceed with all speed"* to assist persons in distress[3]. Failure to do so can result in a fine or up to two years imprisonment.

It is likely that commercial shipping will need to continue to go to the aid of migrant refugees in distress where national authorities have not targeted sufficient resources at this problem

MICHAEL RITTER, ASSOCIATE

A Master is therefore under a general duty to answer a distress call, whether received from a vessel directly or via an order of a competent maritime authority.

Position of Governments: tension

The above conventions also detail the obligations on the maritime State coordinating the rescue. Of note to the industry are Resolutions MSC167(78) and MSC153(78) which provide that a *"ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea, therefore coastal States should relieve the ship as soon as practicable"* and with *"minimal further deviation"* from its voyage. This guidance had been intended to prevent a repeat of the situation in 2001 where Australia initially refused access to TAMPA after she had rescued 440 asylum seekers from a distressed vessel. Notwithstanding these resolutions, in 2013, Malta refused the *SALAMIS* permission to enter Maltese waters after she had rescued 102 migrants.

Lady Anelay, a Foreign Office Minister in the House of Lords stated last year that: *"We do not support planned search and rescue operations in the Mediterranean"* as the prospects of assistance was a *"pull factor … encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths"*.[4] Such a stance means that it is likely that commercial shipping will need to continue to go to the aid of migrant refugees in distress where national authorities have not targeted sufficient resources at this problem.

1 http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (the 1982 United Nations Convention on the Law of the Sea)

2 International Convention for the Safety of Life at Sea (SOLAS) Convention regulation V/33.1 and https://mcanet.mcga.gov.uk/public/c4/solas/solas_v/Regulations/regulation33.htm, which was brought into force under the Merchant Shipping (Safety of Navigation) Regulations 2002 (SI 2002 No. 1473) Section 5(2) (as amended)

3 Also of relevance is the International Convention on Maritime Search and Rescue 1979 as amended by Resolution MSC 70(69)

Issues that arise

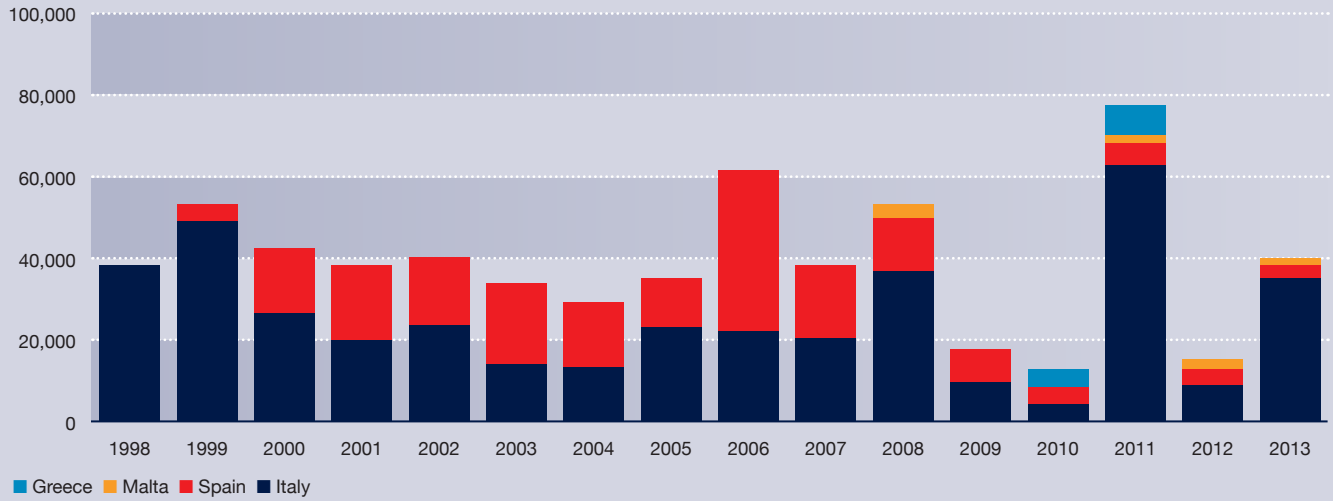
The migrant issue poses many immediate issues for a shipowner, particularly where States do not offer immediate assistance, practical, commercial and legal – these include concerns that:

1. The rescue vessel will be unseaworthy through taking on large numbers of migrants.
2. The vessel's certificates which regulate authority to carry passengers/limits on number of people safely permitted onboard will be compromised.
3. There is a potential threat of terrorism, piracy or to the security of the crew generally (including health) in the face of 200+ migrants.
4. The vessel will experience commercially significant delays, or will need to deviate, giving rise to potential disputes under contracts of carriage.
5. Delay will impact time sensitive cargoes or even render them dangerous.
6. The vessel will have insufficient supplies (e.g. bunkers).

It remains unclear however, whether any of the above will amount to a *"special circumstance"* within the meaning of SOLAS Chapter V Regulation 33. Many of these considerations may not do so although this will be fact dependent in each case.

For more information, please contact Michael Ritter, Associate, on +44 (0)20 7264 8449 or michael.ritter@hfw.com, or your usual contact at HFW.

Figure 1: Irregular migrant arrivals on maritime routes to the EU, 1998–2013



Source: MPC Report 2013

4 http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/141015w0001.htm

hfw "As is where is" or "as she was"... where's the difference?

When Michael Hirtenstein bought the luxury yacht *CANDYSCAPE*, rather than getting a sweet deal, he got a bill for US$ 2.5 million when the starboard engine suffered a major failure 12 miles out to sea. The ensuing High Court case has provided some helpful guidance on the meaning of "as is where is".

When the yacht's engine broke down within an hour of completion, Mr Hirtenstein instructed his lawyers to prepare claims against Candyscape Ltd and then, after Candyscape Ltd went into liquidation in March 2011, against Mr Candy. In June 2011, the lawyers advised Mr Hirtenstein that they had made a mistake, and that the terms of the personal guarantee did not cover any breach of warranty by Candyscape Ltd.

HELEN MCCORMICK, ASSOCIATE

Facts

Mr Hirtenstein bought the yacht in July 2010 for a "steal", without a survey or sea trial but with a warranty of her condition given by the selling company Candyscape Ltd, a single purpose company with no assets. Mr Hirtenstein believed, following advice from his lawyers, that the warranty was backed by a personal guarantee from Mr Candy, the beneficial owner of the selling company.

When the yacht's engine broke down within an hour of completion, Mr Hirtenstein instructed his lawyers to prepare claims against Candyscape Ltd and then, after Candyscape Ltd went into liquidation in March 2011, against Mr Candy. In June 2011, the lawyers advised Mr Hirtenstein that they had made a mistake, and that the terms of the personal guarantee did not cover any breach of warranty by Candyscape Ltd.

"As is where is"

Mr Hirtenstein claimed against his lawyers for negligence.[1]. The judge in the case observed that the yacht was offered and sold "as is, where is" which *"clearly signified that the buyer would acquire the yacht in whatever condition the boat was in at the time of purchase with no right to complain".*

This was consistent with Mr Hirtenstein's understanding, and is consistent with the standard form of addendum to the MYBA Memorandum of Agreement which is used for "as is where is" sales.

The judge went on to consider the decision (of Mr Justice Flaux) in the "UNION POWER"[2]. Prior to that decision, many considered that the words "as she was at the time of inspection"[3] were equivalent to "as is where is", and that those words excluded the condition of satisfactory quality implied under the Sale of Goods Act[4]. However, the judge in the "UNION POWER" found that "as she was" did not exclude the implied condition. He also expressed the provisional view that the words "as is" were not by themselves sufficient to exclude an implied condition, but only the right to reject the goods for breach of those conditions.

Having your cake and eating it

Returning to the *CANDYSCAPE* judgment, the lawyers argued that, as the deal was "as is where is" and at such a low price, a personal guarantee from Mr Candy as to the

1 Hirtenstein v Hill Dickinson LLP [2014] EWHC 2711 (Comm).
2 Dalmare SPA v Union Maritime Ltd [2012] EWHC 3537 (Comm)
3 Clause 11 of the Norwegian Saleform 1993
4 s. 14(2) of the Sale of Goods Act 1979

yacht's condition would have been "having your cake and eating it". The judge accepted that they had probably advised Mr Hirtenstein accordingly.

He also found that, although the lawyers were negligent, both parties understood the meaning of buying the yacht "as is where is" and Mr Hirtenstein would still have proceeded with the sale if he had known that the personal guarantee did not cover any breach of warranty. Mr Hirtenstein had therefore suffered no loss and was awarded only nominal damages.

The judge's comments are arguably more in line with the market understanding of the meaning of "as is, where is" than the views expressed in the "UNION POWER". His comments also cast doubt on the correctness of that decision, given that it is difficult to distinguish between "as is" and "as was", save for the time when the test applies. Whether the implied term of satisfactory quality will apply where those words are used will regrettably remain uncertain as long as there is conflicting guidance on this issue. Therefore, although the terms of the 2012 version of the Norwegian Saleform probably exclude the statutory implied terms, vendors wishing to be certain of doing so would be wise to strengthen the wording in the form.

For more information, please contact Helen McCormick, Associate, on +44 (0)20 7264 8464 or helen.mccormick@hfw.com or your usual contact at HFW.

The *LONGCHAMP*

Introduction

In the recent case the *LONGCHAMP*[1] the English High Court considered whether certain expenses incurred in negotiating a ransom payment following a hijacking were recoverable under Rule F of the York-Antwerp Rules 1974 (the Rules). This is the first English authority on the meaning of Rule F and it represents an important decision expanding the "categories" of expenses which Owners may recover in general average after a piracy event.

Background

On 29 January 2009, the chemical carrier *LONGCHAMP* was hijacked by Somali pirates. The vessel was fully laden and the cargo was carried under a Bill of Lading incorporating the Rules. The pirates demanded a ransom of US$6 million, which the Owners negotiated down to US$1.85 million. During the negotiations, the Owners incurred expenses of about US$182,000, including media costs, crew wages, costs and bonuses, bunkers and other miscellaneous charges.

The ransom payment of US$1.85 million was included within the expenditure permitted by the average adjusters in general average and the US$182,000 was considered recoverable under Rule F. This was contested by cargo interests.

English High Court proceedings

Cargo interests commenced proceedings against the Owners and the Court was asked to consider whether the expenses of US$182,000 were recoverable under Rule F, which provides:

"Any extra expense incurred in place of another expense which would have been allowable as general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."

Under this Rule, a substituted expense is only permitted in general average if there is a hypothetical alternative course of action which, had it been available, would have involved expenditure claimable in general average.

Cargo interests argued that Rule F was not engaged since:

- The expenditure was not incurred in substitution of the expense of a ransom payment, but rather in addition to it.
- The initial ransom amount demanded would not have been permitted in General Average because it would not have been reasonably incurred under Rule A of the Rules.
- The expenses incurred were not "extra" expenses.
- The consumption of bunkers was not an "expense", but a loss.

Judgment

The judge allowed the Owners to recover the additional expenses. He considered that the expenditure had been incurred in substitution for the saving in ransom payment (i.e. the difference between the ransom originally demanded and the ransom ultimately paid) and that Rule F had therefore been engaged.

1 [2014] EWHC 3445 (Comm)

The judge also rejected cargo interests' arguments concerning the reasonableness of the ransom. He commented: *"Pirates are not reasonable people. In the minds of most right-thinking people their behaviour is seldom rational…"* and therefore *"save in exceptional circumstances…. it would not be reasonable to say… that the payment of a ransom was not "reasonably...incurred""*.

The judge also considered that fuel and crew wages could fall within Rule F as "expenses". These items have not previously been permitted as recoverable expenses in general average by the Average Adjusters Association.

Comment

The judge's decision is contrary to current average adjusting practice and it has the potential to allow substantial recoveries by Owners against cargo interests. Given that a large number of general average recovery actions relating to hijackings during 2011/2012 remain unresolved, the judgment could have a significant impact. However, cargo interests have been given permission to appeal, with a hearing expected in the next few months. No doubt the industry will be awaiting the outcome with interest.

For more information please contact Tessa Huzarski, Associate, on +44 (0)20 7264 8122 or tessa.huzarski@hfw.com, or your usual contact at HFW. Research by Gabriella Martin, Trainee Solicitor.

Reminder

We have recently released Briefings concerning three important cases which we recommend to readers of the Bulletin. They concern the *OCEAN VICTORY* (http://www.hfw.com/Abnormal-occurrence-clarified-in-the-OCEAN-VICTORY-Court-of-Appeal-decision-January-2015), which defines "abnormal occurrence"; the *GREAT CREATION* (http://www.hfw.com/Throwing-the-keys-back-April-2015) concerning re-delivery notices from Charterers; and the *SB SEAGUARD* collision with *ODYSSÉE (*http://www.hfw.com/Beware-of-time-bars-April-2015*)*, which is about time bars. We also recommend a recent article published in Bunkerspot about financing through the shipping cycles (http://www.hfw.com/Predictably-unpredictable-April-2015).

hfw Conferences and events

Offshore Technology Conference 2015
Houston
4-7 May 2015
Attending: Paul Dean/Jonathan Martin

IBA – Maritime and Transport Law Conference
Geneva
7-8 May 2015
Presenting: Andrew Chamberlain

5th AqabaConf 2015: Transportation & Marine Insurance New Risks – New Challenges
Jordan
11-13 May 2015
Presenting: Yaman Al Hawamdeh
Attending: Rami Al Tal

India Dry Bulk Cargo Summit 2015
Mumbai
5 June 2015
Presenting: David Morriss
HFW is sponsoring this event

Comité Maritime International
Paris
12 – 13 June 2015
Attending: Christopher Brehm

Lawyers for international commerce hfw.com