THE CHARTERER

THE CHARTERERS P&I CLUB NEWSLETTER

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'A wet wolf in a dry sheep's clothing' - The carriage of dangerous goods

By Julian J Clark – Partner & Menelaos Nicolaou – Trainee Solicitor of Campbell Johnson Clark LLP

A POTENTIAL FOR SIGNIFICANT EXPOSURE AND LOSS

Charterers' exposure to claims, whether arising under contract, international convention or otherwise, are vast and cover virtually every aspect of the transport chain. Bearing in mind that transporting cargo is exclusively what a charterer does and that certain obligations which originally rested with the shipowner have, both by commercial convention and legal development, shifted to the charterer, the exposure to claims from the charterer's perspective is clearly enhanced. One such area of exposure arises out of the carriage of Dangerous Goods. A high proportion of international packaged cargoes are potentially dangerous to transport; this article aims to provide an overview of the statutory, contractual and common law principles governing the carriage of such goods and the inherent risks faced by charterers.

Julian J Clark

Dangerous goods claims continue to represent one of the most common claims brought by shipowners, often being the most serious in nature both in terms of costs/ complexity and potentially catastrophic consequences. Where shipowners are able to establish breach in terms of cargo not complying with the terms of the charterparty, charterers may be liable for any damage resulting to the vessel, or to other cargo, and any costs (if reasonably incurred) attributed to a delay, the discharging and reloading of the cargo. Where in the case of a voyage charter the shipment of such goods is excluded, the shipowner may, if he so wishes, terminate the charter. It is also important to remember that the level of losses involved in dangerous goods incidents can quickly run into tens of millions of dollars due to the damage to cargo, ship and potential loss of life. For example in the case of The Avala [1996] amongst other losses the shipowners (and subsequently charterers) faced the charges of the Durban Fire Brigade who managed to spend that years entire budget on fighting the fire on board the vessel!

REGULATION AND THE DEFINITION OF DANGEROUS GOODS

The IMDG code sets out in detail the regulatory requirements for the carriage of dangerous goods cargoes for all interested parties in the transport chain, with particular reference to shippers and carriers. All dangerous goods are identified by a unique UN reference number and are assigned a hazardous risk class. The packaging of the goods must be to UN-approved standards and labelled according to the regulations.

The courts have taken a wide approach to the question of what comprises dangerous goods to the extent that danger can be found in the surrounding circumstances rather than in the inherent nature of the goods themselves. The House of Lords in The Giannis NK [1998], a case which concerned the infestation of a cargo by Khapra Beetle, held that the expression 'goods of a dangerous nature' should be given a broad interpretation and should not be restricted to goods of an 'inflammable' or 'explosive' nature. Nor should its application be confined to goods which are liable to cause direct physical damage to the vessel or other cargo. Even if a particular cargo is not usually considered dangerous it can become dangerous if its own particular characteristics endanger the ship and other cargoes on board. The Rotterdam Rules are the first convention to provide a definition by classifying dangerous goods as goods which 'by their nature or character are, or appear likely to become, a danger to persons, property or the environment'.

At common law a shipper impliedly undertakes not to ship dangerous goods without first notifying the carrier of their particular characteristics. The question

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however remains as to whether the carrier had such notice, or knowledge, or means of knowledge of the hazards as to justify the conclusion that it had consented to accept the risk. The Athanasia Comninos [1990] suffered substantial damage with four seamen seriously injured by an explosion caused through the ignition of a mixture of air and a quantity of methane gas, emitted from a coal cargo after loading. The shipowners claimed an indemnity (implied under clause 8 of the NYPE form) against the time charterers for physical damage and loss of earnings in the sum of U.S$1,331,557.71. The case was founded on the assertion that the gassiness of each cargo on shipment was such as to create a danger, which the carrier had not consented to run when they agreed to carry a cargo described as "coal". This is irrespective of whether the goods are shipped under a bill of lading or a charterparty.

This common law position will often be reinforced by an express clause in the charterparty itself. For example the "*BALTIME 1939*" *Uniform Time-Charter (as revised 2001)* provides that: '*… No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar, or any of their products) shall be shipped*'. By contrast the NYPE 1946 contains no provision forbidding the shipment of dangerous cargo. It is however usual to insert an exclusion in the space provided in Lines 24 - 25 of the form: "*…to be employed in carrying lawful merchandise, including petroleum or its products, in proper containers, excluding_____*' The 1993 revision contains a Dangerous Cargo clause; this permits the carriage of dangerous cargo when in accordance with the requirements of specified national authorities and limits the cargo that may be carried while obliging the charterer to comply with the IMO regulations.

"Where goods are shipped without notice of their dangerous qualities the shipper or charterer will be liable for any damage resulting either to the vessel, or to any other cargo on board"

A WET WOLF IN DRY SHEEP'S CLOTHING – THE OBLIGATION TO PROPERLY DESCRIBE DANGEROUS GOODS AND THEIR CHARACTERISTICS

In Micada Compania Naviera v Texim [1968] the Agios Nicolas was ordered to load iron ore under a Baltime 1939 Uniform Time charter, which by reason of its moisture content was a dangerous cargo. The master was however misled as to the moisture content of the cargo by the shippers. Shipowners were successful in their claim for expenses incurred and for hire withheld by charterers in respect of the period involved in discharging and reloading the cargo. Donaldson J commenting; '*what [the master] was being offered was a wet wolf in a dry sheep's clothing and there was nothing to put him on notice that the cargo was something radically and fundamentally different from that which it appeared to be*'.

Where goods are shipped without notice of their dangerous qualities the shipper or charterer will be liable for any damage resulting either to the vessel, or to any other cargo on board. Such liability is strict and in no way depends on the knowledge available to the shipper and/or charterer as to the nature of the goods: '*It seems much more just and expedient that, although they were ignorant of the dangerous qualities of the goods, or the insufficiency of the packing, the loss occasioned by the dangerous quality of the goods and the insufficient packing should be cast upon the shippers than upon the shipowners*'. (per Lord Campbell in Brass v Maitland (1856)) Consequently, a strict duty unavoidably means that ignorance of the nature of the goods can be no defence to the non-suspecting, non-shipper charterer. (confirmed obiter in The Giannis NK).

Express contractual provisions setting out the duties of charterers are common in many forms of charterparties. Clause 4 of the NYPE 93 for example provides that '*if IMO-classified cargo is agreed to be carried, … the Charterers shall provide the Master with any evidence he may reasonably require to show that the cargo is packaged, labelled, loaded and stowed in accordance with IMO regulations, failing which the Master is entitled to refuse such cargo or, if already loaded, unload it at the Charterers' risk and expense*'. If charterers therefore wish to load a dangerous cargo it is they who are required to comply with all the relevant regulations, including the IMDG Code (The Aconcagua [2011]). Moreover, The Marie H [1998] has held that the shipowners were entitled to an implied indemnity arising from their obedience to the charterers' orders to load dangerous cargo, covering refund of deducted off-hire, damages for delay, and expenses, to the extent that the delay and expense has been exacerbated by the presence of dangerous cargo. Charterers who also wear the hat of a disponent owner can attempt to pass down the line any such claims. But if the chain ends at the charterer, no such hat will be available and significantly arguments of the nature that charterers' implied duty is not strict but of one of due diligence have been firmly rejected.

THE ROLE OF INTERNATIONAL CONVENTION

Express provision for the carriage of dangerous goods is found in Article IV Rule 6 of the Hague/Visby Rules, which will often be incorporated into the bill of lading and/or charterparty. Articles 13 and 15 of the

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Hamburg Rules introduce three new requirements for the shipment of dangerous goods: the goods must be marked in such a way as to indicate they are dangerous, the carrier must be informed and an express statement to such an effect must be included in the bill of lading. In this regard, the Rotterdam Rules provisions for the carriage of dangerous goods are broadly in line with those contained in the Hamburg Rules.

Importantly, clause 8 of the NYPE 93 provides that '*charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging, and tallying, at their risk and expense, under the supervision of the Master*'. The House of Lords in Court Line v Canadian Transport [1940] established that the words 'under the supervision of the Master' do not prevent the charterers having primary responsibility under the NYPE form for cargo handling. It is not uncommon for the words '*and responsibility*' to be inserted after '*supervision*', where it is intended by the parties that responsibility for the operations shall be upon the shipowners. The addition of these words has been held to transfer liability for the entire cargo handling back to shipowners, unless charterers have intervened in such a way as to cause the relevant loss or damage.

Menelaos Nicolaou

It must be stated however, that any claim by shipowners under Article IV, rule 6 Hague/Visby Rules will not succeed if they are in breach of their overriding obligation under Article III, rule 1 to exercise due diligence to make the ship seaworthy (The Fiona [1994]). Proving that negligent stowage amounts to unseaworthiness is a high burden, it being insufficient simply to show that the manner of stowage has created a potential risk of casualty. It appears that the risk must be 'immediate', either in the sense of the circumstances pertaining at the outset of the voyage, or made inevitable as a result of predetermined, or necessary, operational decisions. The Court of Appeal in The Kapitan Sakharov [2000] upheld the judgment of Clarke J that the stowage of the cargo in question had rendered the vessel unseaworthy but that the shipowner was not in breach of his duty of due diligence. It was not part of the shipowner's duty to ensure that there was no undeclared dangerous cargo on board.

THE RIGHT TO REFUSE TO CARRY

Where dangerous goods are expressly prohibited from carriage, it is clear that the shipowner would be justified in refusing to load.

In the absence of an express prohibition however, the issue will depend upon the manner in which the cargo is described in the charterparty. If described in general terms, and where the precautions required to ensure safe carriage would cause unreasonable delay or cost, the carrier would again be entitled to reject the cargo.

Where a specific description has been made, but the cargo presents unusual high risks there would seem to be two possible approaches: Evans J in The Amphion [1991] took the view that, in such a situation, the shipowner is entitled to refuse the goods on the ground that they fall outside the charterparty description. However, The Atlantic Duchess [1957] and The Fiona [1994] both seem to suggest that, having received the appropriate notice, the shipowner is obliged to carry the goods although it should be subject to the caveat that if it is impossible to carry the goods safely, the owner is justified in refusing them. Ultimately the question should be whether the cargo tendered for shipment is a reasonable cargo having regard to the terms of the charter and all the circumstances of the case. (Stanton v. Richardson (1875))

SUMMING UP

Charterers bear a heavy burden in relation to the carriage of dangerous goods and must ensure shipowners are notified of any dangerous goods to be carried on the vessel. When acting in the position of a disponent owner the charterer should insist on a clear and complete cargo declaration and certification so as to avoid later claims. However, the difficulty frequently encountered is that charterers cannot always be in a position to know that the cargo is in fact dangerous, or exhibits some unusual characteristic. Despite the many industry guidelines cargoes are frequently mis-described both in the containerised and bulk trade. In the case of the former there have been recent examples of Calcium Hypochlorite being intentionally mis-described in order to avoid IMO regulation, with at least one shipper actually giving such advice on their web site as a way in which "to save costs". In the case of the latter the most recent examples of this can be seen in the spate of iron ore, nickel ore and sinter feed incidents where certification showing apparent moisture content has been shown to be wholly incorrect and cargoes that are subject to liquefaction have, and continue to be, categorised as IMO Class C "cargo not liable to liquefy nor present chemical hazards".

Campbell Johnson Clark LLP was founded in September 2010, with the aim of becoming the number one boutique shipping law firm in the London and international markets. The firm provides a one-stop service to its clients covering all aspects of shipping, ranging from the provision of legal advice, handling of arbitration and litigation, contractual drafting to comprehensive casualty handling and investigation, marine insurance, corporate, transactional and finance work.

SHIP ARRESTS IN SOUTH AFRICA ON THE RISE

By Gavin Fitzmaurice of Webber Wentzel in Cape Town, South Africa

The past year or two has once again seen a resurgence of international interest in the South African jurisdiction because of its ship arrest remedies both for enforcement and for security. There are a number of reasons for this, not least being the global financial crisis which hit the world in the fourth quarter of 2008 and which continues to take a devastating toll not least on shipping markets in all sectors. It is well known that, between June 2008 and December 2008 capesize day rates dropped from over USD230,000 to USD2,316, which was an all time low and represented a 99% loss of value in just six months, bringing to an end a seven year cycle during which ship owners had enjoyed considerable good fortune. The past three years have not seen notable improvements in charter rates which remain particularly challenged in respect of container ships, tankers and capesize bulk carriers. The delivery of a considerable number of new ships, ordered before the crash, into a depressed market has hardly improved matters.

The inevitable result of these market forces has been an inability of many charterers to continue paying above market rates and consequent breaches, as well as breaches by owners of ship building contracts, and of asset cover covenants in loan agreements. These breaches have given rise to a relentless wave of international litigation.

Gavin Fitzmaurice

Of course, particularly in such times as these, it would be unwise for litigants to expend considerable sums pursuing their claims - whether by way of arbitration or court proceedings - no matter how good their prospects of success, unless they are first able to obtain good security in respect of their anticipated eventual award or judgment.

When in October 2009 the United States Court of Appeals for the Second Circuit, in *The Shipping Corporation of India Ltd v Jaldhi Overseas Pte Ltd*, overruled the court's 2002 *Winter Storm Shipping v TPL* decision on the attachability of electronic fund transfers an important means of obtaining security for maritime claims was lost to litigants at precisely the time that it was most needed.

It was not long before the shipping world rediscovered the South African Admiralty Court as being a reliable and largely predictable forum not only for the purposes of obtaining security for maritime claims but also to enforce claims including arbitration awards and judgments, and to gather and preserve evidence.

One of the unique, well known aspects of the South African ship arrest regime is the availability of the so-called "associated ship" arrest which permits a claimant to arrest a vessel other than the one in respect of which the claim arose providing that the arresting party is able to demonstrate the existence of the requisite "common control" between the owner of the so-called "ship concerned" and the owner of the associated ship. There is now a considerable body of developed precedent enabling South African maritime lawyers to give generally clear guidance regarding how the South African court is likely to deal with a particular case.

Of notable assistance to international litigants in the present climate is the provision in the associated ship arrest legislation (contained in section 3(7)(c) of the Admiralty Regulation Jurisdiction Act 105 of 1983) which deems a charterer or sub-charterer of a ship to be its owner for the purposes of any maritime claim for which the charterer or sub-charterer - and not the owner - is alleged to be liable. The result is a legal fiction enabling a claimant to arrest a vessel which is under the control of the charterer or sub-charterer against whom the claim lies, on the grounds that it is a ship associated with the ship concerned.

The recent judgment of Blignault J in the Cape (in the matter of *Gulf Sheba Shipping Ltd v mv "F Elephant"*) has extended this deeming provision further than some thought it could go. The court found that the phrase "if at any time a ship was the subject of a charter-party", which introduces the deeming provision, has the effect of permitting a claimant to arrest an allegedly associated ship under the control of a former charterer of the ship concerned even in respect of a claim against that charterer which arose after the charter-party had come to an end. Leave to appeal this judgment was refused and it presently stands as binding authority in the Cape and persuasive authority in the other Admiralty courts within the South African federal system. Whilst this may not be the last word on the subject, it is clear that the South African arrest jurisdiction is again on the rise and that the South African Court is amenable to its extension.

Gavin is a partner and head of the Shipping, Marine Insurance and Transport Practice at Webber Wentzel. He has been involved in major maritime litigation resulting from disasters and casualties on land and sea since 1992. Gavin is the chairperson of the Cape Chapter of the Maritime Law Association, a position which he has held since 2006 and is a member of the national executive committee of the Association. To his credit Gavin has been listed as highly recommended by Legal 500 2011 (Shipping) and is described as 'always approachable', 'lightning fast' with 'encyclopaedic knowledge'.

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THE IMPLICATIONS FOR CHARTERERS WHEN THEIR SHIPOWNERS SEEK U.S. BANKRUPTCY

By Jeremy J.O. Harwood of Blank Rome LLP

The recent filing of the bankruptcy petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code ("Code") by Omega, Marco Polo and, most notably, General Maritime and its affiliates will no doubt be followed by others. Attention to one essential party to the shipowners' business, the charterer, is often omitted in the focus on the shipowners' financial and trade creditors. A shipowner bankruptcy raises several questions for charterers – the answers to which may be contrary to their expectations under the law governing the charter.

1. THE AUTOMATIC STAY

First, and most importantly, the shipowner debtor obtains the immediate protection of the "automatic stay" protecting its property anywhere in the world from attachment or seizure. (Note that this does not apply in Chapter 15 cases where their protection is limited to property in the U.S.) Court actions and arbitrations in the U.S. and abroad are likewise stayed (subject to obtaining relief to continue from the U.S. Bankruptcy Court) and no actions arising from a dispute prior to the filing (i.e. pre-petition) may be commenced.

Jeremy Harwood

The "automatic stay" may be enforced by contempt sanctions if the U.S. Court can assert personal jurisdiction over the party breaching the stay. To the extent that even a foreign shipowner has qualified to be a Chapter 11 debtor such personal jurisdiction over a charterer is likely to be extended by virtue of the business dealings under the charter and the direct and foreseeable impact in the United States on the debtor's reorganization efforts of a charter termination or seizure of a vessel. In the U.S. Lines case, a bunker supplier was fined $5,000 per day for its arrest of vessels as security for its claim. Similarly, in Lykes Lines an attempt to evade the court's personal jurisdiction by assignment of the claim to a breaching party, supposedly without jurisdictional connections, did not save either from a contempt order.

2. A CHARTER IS AN EXECUTORY CONTRACT

Under U.S. bankruptcy law, a charter is an "executory contract", meaning that continuing obligations exist for both parties to the contract.

A specific provision of the Code governs a debtor's obligations under an unexpired executory contract. Under Section 365, the debtor may, subject to the Court's approval, assume or reject an executory contract. A "reasonable" period is supposed to be imposed for this decision but in many cases that election comes with the confirmation of the reorganization plan.

The reality for a time charterer, whose charter does not expire prior to plan confirmation, is that the shipowner will wait until then to see which way the market moves. If, as is likely, the charter is above market, the charter will be assumed and may then be assigned if the vessel is sold "whether or not such contract ... prohibits or restricts assignment" subject to whether "applicable law excuses a party, other than the debtor, to such contract...from accepting performance..." If a below market time charter is rejected, the charterer is left with an unsecured claim, subject to its mitigation obligations.

3. "IPSO FACTO" CLAUSES ARE INVALID

Clauses triggered by "the event itself" of the bankruptcy (hence ipso facto) are invalid. Accordingly, "any right or obligation" under an executory contract "may not be terminated or modified by any contractual provision conditioned, among other things, on the "insolvency or financial condition of the debtor" or the filing of the bankruptcy petition. The right to obtain immediate redelivery of bunkers based on bankruptcy is likely to be invalidated by this provision.

In the recent Probulk/Eastwind cases two P&I Clubs' cancellation of the debtors' insurance policies, based on the "cesser clause", was held to be ineffective and a violation of the automatic stay. The court held that there was "no question that the debtors' insurance rights continued notwithstanding the insurer's attempt to deem them terminated" based upon a similar provision in the Code's section dealing with "property of the estate" that invalidates the same ipso facto clauses as in executory contracts.

Provided the shipowner continues to perform, the time charterer is left with Hobson's choice – none at all in continuing with the charter. Asking the shipowner to evidence payment of its critical vendors, such as port agents, so that interruption of the voyage by foreign creditors' self-help tactics, or refusal to provide credit, is advisable.

Jeremy Harwood has been listed for several years in " International Who's Who Legal " section on Shipping & Maritime Lawyers and is one of its ten "most highly regarded individuals" in that category in the 2010 and 2011 editions.

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Blank Rome LLP is one of the largest and most experienced maritime practices in the United States. It is part of a full service law firm with 11 offices, including Delaware, Houston, New York, Washington , D.C. , Hong Kong and Shanghai. The firm has acted in numerous maritime and other bankruptcy cases including the presently pending Daewoo and Containership cases under Chapter 15 and for the Official Creditors' Committee in Marco Polo.

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LIFE ON THE MISSISSIPPI FOR INTERNATIONAL CHARTERERS

By Tom Forbes and Derek Walker

This article is a broad overview of some of the unique navigational characteristics of the Mississippi River and of the practical and legal consequences which may arise as a result. The article was submitted by the Chaffe McCall law firm, which has offices in New Orleans, Baton Rouge, and Houston, Texas and is the first in a series of articles which Chaffe plans to submit pertaining to navigational, commercial, and legal issues in the Gulf of Mexico and the Mississippi River, or of topics of general interest to charterers and the shipping community. The article was prepared by Tom Forbes, a 30 year Chaffe lawyer and retired United States Coast Guard officer who has years of experience investigating marine casualties on the river, with some assistance from Derek Walker.

Tom Forbes

The Mississippi River is the "drainage system" for approximately two-thirds of the United States, which brings with it a bounty of inbound and outbound cargo, flowing through the system past Baton Rouge and New Orleans, and into the Gulf of Mexico. The Mississippi River system carries approximately one-third of the total tonnage of all cargoes carried by water in the United States. The majority of the cargo from the "heartland" of America is dry bulk or wet bulk – oil, petrochemicals, coal, and grain, typically shipped downriver by barge and then transshipped onto seagoing vessels. Since the river is composed primarily of "transit" ports, where mostly bulk cargo is transferred from shallow draft inland traffic to deep-draft ships and vice-versa, there is a great need for anchorages, wharf space, and, where there are not enough of either, "midstream" mooring facilities where ships are made fast to mooring buoys and the cargo is handled by floating rigs to or from river barges.

In the lower river and Gulf of Mexico approaches there are many petroleum drilling and production platforms and the related "oilfield" vessel traffic. There is also barge traffic crossing the river as part of the east-west Gulf Inland Waterway ("GIWW") system. All of this makes for what the New Orleans Port Authority calls "the busiest waterway in the world". The river also carries two other "natural cargoes", water and soil, or, to a mariner, current and silt. These two "cargoes", combined with subtropical weather patterns which can create squalls, seasonal fog, storms and hurricanes, add to the unique characteristics of transiting the Mississippi river area and make the carriage of merchandise on ships all the more challenging. These elements present charterers with difficulties and hazards which many times result in delays, incidents, or disputes and claims of "unsafe berth", general average, or the like. The distance of the major ports from the ocean (New Orleans 115 miles, Baton Rouge, 230 miles), gives such incidents more time and river in which to occur.

Many (but not all) of these challenges are set forth quite well in Volume 5 of the United States Coast Pilot. Shipmasters are aware of this publication, but it is a valuable read for charterers as well. Some hazards are common to navigation in any river, but some are unique to the Mississippi as described in this non-exhaustive list of some of these challenges:

The Approaches to the River: All river traffic enters and exits through the river's Southwest Pass. The Continental Shelf surrounding Southwest Pass is filled with many brightly-lit platforms and other structures through which an inbound ship must navigate in order to reach the sea buoy. Although there are designated navigational fairways giving a path between the platforms, the array of shore and platform lights can mask the navigation lights of other vessels and of government aids to navigation. If a very careful lookout is not kept, especially at night, collisions often occur, typically between ships just outside the pilotage area. For instance collisions have happened when a ship turns to make a lee to drop or pick up a pilot, and another ship misunderstands the maneuver. Because there is a sharp turn of about 45° at the Southwest Pass Jetty Channel, inbound vessels typically wait outside if there is a downbound ship within a couple of miles of crossing out of the Jetties. On rare occasion the inbound vessel fails to wait and collisions near the Jetty entrance have resulted, or groundings in the spoil bank near this turn in the dredged channel, known locally (and for good reason) as "No Man's Land".

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The advent of AIS and electronic charts, which facilitate identification of vessels by name, seems to have reduced the number of collisions.

The Lower River: A bar pilot will take the ship up Southwest Pass and then into the "big river" before handing the ship off to a Crescent pilot who will take her up to New Orleans. While Southwest Pass is narrow, the lower river is a half mile to a mile wide.

There is also considerable smaller traffic around the oilfield tributary port of Venice. Occasionally crew boats and supply boats, coming out of this brightly-lit port area, lack good night vision with which to see a northbound ship, so caution and good communications are required. The lower river is also a prime candidate for fog, especially in the spring when cold river water from northern snowmelt meets warm Gulf water and warmer and wetter Gulf air, creating thick convection fog, especially at night. When this happens, the pilots will typically agree not to take vessels into the river out of Southwest Pass, and downbound ships will have to round up and go to anchor, which can be a challenging maneuver without tugs. Cruise ships will typically take two pilots and navigate through the fog anyway in order to make it up to New Orleans in time to discharge or pick up passengers. While the pilots are experienced, some of the oil field operators lack local knowledge, and collisions have resulted, typically at night.

Derek Walker

The Middle River: From Venice to about ten miles below New Orleans the river has few shore side facilities and anchorages. Except at several coal terminals, there is little barge or oil field traffic. As ships approach New Orleans there are many anchorages under constant use as ships await turns at local facilities, bunker, or await orders. Anchorages in the confines of a river present their own set of problems, which in the Mississippi depend on the river stage. In high river, the current can reach as high as six knots, and ships sometimes drag anchor out into the channel or into other ships. Anchors can also become "silted over" if the ever-present river silt chooses to form a "mud lump" on top of one. Sometimes the chain parts, but other times the anchor simply cannot be raised, remains stuck, and the chain has to be cut and the anchor abandoned. In either case, the Coast Guard will require vessels search for the anchor, with the consequent challenges this will entail. Although there are several derrick barges that specialize in attempting to find and retrieve lost anchors the search can be difficult. Often, because of the depth and cloudiness of the water, and speed of current, and silting, the anchors are not retrieved, and are not even marked on charts. On occasion an abandoned anchor and chain has snagged the next anchor dropped there, causing the situation to repeat itself.

NAVIGATION PECULIARITIES ON THE "BIG RIVER"

"**The Point-Bend Custom**": The Mississippi is a twisty river, with a strong current. From the early days, the upbound steamers would come up underneath the point, where there is less head current, while downbound steamers would run the bend, where the following current is swifter. This custom has endured into the modern era. A vessel navigating a "right-hand" bend, will still meet red-to-red, but in a "left-hand" bend, will meet starboard-to-starboard. The pilots know this, but it can be confusing and counterintuitive to the uninitiated.

"Flanking" the Bend": There are some huge barge tows on the river, slow-moving and slow to maneuver. When navigating downriver in high water, they may have to "flank" the point, which means that they put engines in reverse, keep the stern of the towboat toward the point, the bow of the tow toward the bend, and "drift" around the point using the current. This maneuver uses up the entire river width and stops traffic below it. Upbound ships, stemming the current and going slowly, can maintain control, but it is harder for the downbound ships above the flanking tow, with following current, to maintain maneuverability.

Flying Downriver at 20-Plus Knots - - Welcome to High River: During times of flood current downbound ships still have to maintain their speed through the water to ensure good flow over the rudder for maneuvering in the bends. In a six-knot current a loaded downbound bulk carrier could be making-good 20 knots over the ground. This reduces the available time and margin for error in meeting other vessel traffic, staying clear of shoreside obstacles, and could mean poorer steering response if engine speed has to be reduced quickly. Further, at that speed dropping or dragging an anchor to slow or stop a ship in an emergency may be ineffective and could result in the loss of the anchor and chain or even possible injury to the forecastle crew.

LOW WATER DELAYS

Low water presents a different set of problems for anchored ships in ballast waiting for cargoes. Loaded ships will lie with the rather weak current, but empty ships can "weather vane" across the river away from the near shore, if there is a strong wind. Or, if the anchorage is adjacent to a shore side barge fleet, as many are, an onshore wind may swing a ship's quarter into a barge fleet, resulting in a call for tugs and the need to re-anchor the ship, or occasionally causing a barge breakaway and more serious consequences. Ships anchored farther out from the shore may afford safety to a barge fleet,

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but windshifts could swing the stern out into the middle of the river, encroaching on the traditional channel and resulting in an order from the Coast Guard to re-anchor closer to shore. ("Damned if you do, damned if you don't.") Staying "in" the anchorage can be a tricky proposition for an empty Panamax.

COAST GUARD RIVER CLOSURES, SHIP RESTRICTIONS, SECURITY ZONES, HIGH WATER PRECAUTIONS.

Although, the local Coast Guard Captain of the Port (also known as "Commander, Sector New Orleans") does a good job of keeping river traffic moving and minimizing delays and river closures, the latter does happen. Fog, a grounded ship, a security zone around a "high value" vessel, a "dead ship" being towed, levee operations, construction, dock repairs, oil spills and cleanup, and the like, may result in a security zone, a river closure, a slow-bell-only zone, temporary one-way traffic, or temporary "daylight-only" restrictions.

New Orleans to Baton Rouge: This is the busier, narrower, and shallower part of the river, and brings aboard a "Baton Rouge pilot", the third inbound pilot (and there may be a fourth pilot halfway up to Baton Rouge if the river is high and the current strong). This, the more "snake-like" section of the river, meanders back and forth and the points and bends below Baton Rouge can be "hairpin turns". Many of the straightaways have dredged "crossings", which require frequent maintenance by the Army Corps of Engineers, who may lack the budget to do this as often as they would like. This brings up the almost ever-present question for charterers below.

How Deep to Load Your Ship? The high water keeps the silt moving, but low water and slower current allows the silt to drop out and creates shoaling, which may not be dredged immediately. Combine "marginal under-keel clearance", vessel squat, and known or unknown shoaling or "mud lumps", and ships do ground. The Coast Guard requires immediate notification and the prompt presentation of a refloating plan, which typically involves gathering tugs for the effort and, in serious cases, may require lightering of cargo. Hull damage is rare, but delay is common - and so are general average claims.

High Water: High water typically happens in the spring, as a result of winter and spring storms and snowmelt in the middle of the country. High water precautions go into effect and assist tugs are hard to find because most are already engaged. Sometimes tugs are needed to hold a ship in at a dock where strong river currents tend to pry her away, or while moored at a "midstream" buoy facility. The latter can be a bit complicated even in moderate river conditions (with a ship setting out lines to buoys forward and aft, as well as setting her own anchors), and in high river, can be quite tricky. Some ships yaw in the berth, some don't. Some require assist tugs to keep the ship steady, some do not. If the charterer has a choice whether to use a midstream buoy or a shore side dock during extreme high water, the dock is the more stable choice. There have been occasions where ships have parted lines and broken away from the mooring system altogether, leading to claims of unsafe berth, though they are not usually successful. Again, "hold-in" tugs and "babysitting" pilots may prove cost-effective in spite of the considerable expense. Some docks are new, some are old, some are "stiff", some are flexible. Some have good fendering systems, some do not, some are well maintained, others are not (claims for dock damage typically require sorting out the "new" from the "old"). Though less frequent in recent years, breakaways of moored barges from fleets, either individually or en masse, do happen. There is little an anchored ship can do to protect herself from a breakaway.

Is it "Unsafe"? The Federal Circuit Court covering the Mississippi River and Texas, Louisiana, Mississippi, (the Federal Fifth Circuit) has taken a more "charterer-friendly" view of the "safe port, safe berth" clause in a typical charter party than has the Second Circuit, which has jurisdiction over ports in New York and New Jersey. Under the Fifth Circuit jurisprudence and the principal case, *Orduna v. Zen-Noh Grain* (913 F.2d 1149), a charterer must use due diligence in selecting a safe berth, but beyond that does not "warrant" the safety of a port, berth, particular midstream mooring system at dock, or the river in general. The court left the responsibility of determining safety of a berth to the shipmaster (advised by his pilot and agent), who would have a better appreciation of the situation firsthand than would a distant charterer.

Conclusion: Navigating, anchoring, and mooring in the Mississippi River can be a challenging proposition, especially when the forces of nature such as current, silting/shoaling, fog, and squalls or tropical storms, either individually or in combination, act upon vessels. However, accidents are relatively rare considering the volume of traffic, but they do happen, and the precautions which are necessary to avoid or respond to such incidents (river closures, speed restrictions, tug escorts) can cause delays for non-involved traffic. Usually these are short-lived and the cargo vessels are quickly moving again. "Life on the Mississippi" then goes on, always productive, but never uninteresting.

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THE NEW TURKISH COMMERCIAL CODE

By Dr Haci KARA of Kara & Ulutas Law Office

The Draft Turkish Commercial Code dated 28th February 2005 has been sanctioned at the General Meeting of the Grand National Assembly of Turkey on 14/01/2011. It shall come into force on 1st July 2012 pursuant to article 1534 of the new Turkish Commercial Code (TCC) no. 6102 published in the Official Gazette on 14/02/2011. The new TCC has brought important changes to the maritime commercial and insurance law with special emphasis on the Fourth Book which deals with maritime commerce. The Fifth Book of the Law has been allocated to the maritime trade and in this article we review changes such as liability of the carrier, liability for oil pollution damages and prohibition of the ship from navigation.

Dr HACI KARA

1) LIABILITY OF THE CARRIER

The system adopted in the New Code is a mixture of Hague Visby Rules and the Hamburg Rules. Liability of the carrier has been arranged in article 1178. Accordingly:

- In the implementation of the charter party, the carrier is obliged to pay strict attention as expected from a prudent carrier for the loading, stowing, handling, transportation, protection, observance and unloading of the cargo;
- The carrier is responsible for the losses arising from the loss of or damage to the goods or late delivery of them (in line with the Hamburg Rules). However, in order to hold the carrier liable, the loss, damage or delay in delivery should occur during the goods are in possession of the carrier.

Period of Responsibility of the Carrier: Liability of the carrier continues to be in effect as of the date on which the goods are received by the carrier from the shipper or the person acting in the name of the shipper or from the authorities to which the goods should be delivered pursuant to the laws and regulations in effect at the port of loading up to the date on which:

- they are delivered by the carrier to the consignee; or
- they are made available for delivery to the consignee in accordance with the provisions of the charter party or the law or the commercial practice applied at the port of unloading in cases where the consignee refrains from taking delivery of the goods; or
- they are delivered to the authorities or third persons to whom the goods should be delivered pursuant to the law and regulations in effect at the port of unloading.

Duration required for acceptance of the existence of delay and the loss of goods: If the goods are not delivered at the port of unloading within the time period explicitly decided in the charter party or within a time period during which the delivery of the goods is reasonably expected from a prudent carrier according to the characteristics of the occurrence in cases where there is no duration which is explicitly decided, it shall be assumed that there is a delay in the delivery. The person who is capable to claim compensation based on the loss of goods may assume that the goods are lost if they are not delivered within an uninterrupted period of 60 (sixty) days following expiration of the above mentioned delivery period.

Limits of carrier's liability: The right to limit the liability of the carrier and the limits thereof have been set forth in article 1186 and are similar to that contained in the Hague-Visby Rules namely error in navigation, fire.

- In relation to any and all losses of or damages to the goods, the carrier shall not be liable for any loss exceeding the Special Drawing Right of 666,67 per parcel or unit or the loss exceeding the amount meeting two (2) Special Drawing Rights per each kilogram of the gross weight of the goods which are lost or damaged, provided that the limit which is higher is applied (and provided that the type and value of the goods are stated by the shipper prior to the loading and the same is written on the maritime bill of lading). The right to limit can only be broken by (a third party) proving misconduct or gross negligence.
- If the goods are wholly placed in a container, pallet or similar means of conveyance, each parcel or unit written as content of the means of conveyance on the bill of lading shall be considered as a separate parcel or unit. Otherwise, such a means of conveyance shall be considered as a single parcel or unit.
- Liability of the carrier arising from delay is limited to two and half times of the freight to be paid for the goods delayed. This amount cannot exceed the amount of total freight to be paid pursuant to the charter party.
- Total liability of the carrier due to all kinds of loss or damage and delay cannot exceed the amount which he shall be obliged to compensate in case of his liability for total loss. The parties may decide on such amounts which are higher than the limits envisaged here in above.

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Time Charters are included in the new Code as a separate type of contract that is they are not integrated with other type of contracts of affreightment such as voyage charters on the basis that Owners transfer the right of use of commercial spaces on the vessel to the charterer for a specified time and do not undertake to carry cargo under time charters. This chapter also covers aspects such as securing hire, minimum time of off-hire and redelivery.

2) LIABILITY FOR OIL POLLUTION DAMAGES

It has been arranged in article 1336. The provisions of this Charter Party and the International Convention Concerning Establishment of an International Fund for Compensation of Oil Pollution Damage dated 27/11/1992 shall apply for the "pollution damage" defined in article 1, paragraph 6 of the International Convention Concerning Legal Liability for Oil Pollution Damage dated 27/11/1992. The New Code provides that liabilities with respect to maritime claims can be limited in accordance with the 1976 LLMC and its 1996 Protocol.

3) SHIP ARREST

The provisions of the International Convention on Arrest of Ships dated 12/03/1999 and the International Convention Regarding Privileges and Mortgages on Ships dated 06/05/1993 regarding arrest of ships have been taken as basis for making an arrangement in the Law regarding cautionary arrest of ships. A fixed amount of Euros 10,000 has been fixed by the new Code as counter security for arresting a vessel though the amount of counter-security may be increased subject to consideration by the Court. In order to protect arrest for small claims a proposal has been made whereby after providing counter-security claimants will have the right to ask the court to reduce its amount.

The New Code accepts the posting of Letters of Undertaking but subject to claimants accepting the same and informing the Court accordingly.

Dr. Haci KARA is founding partner of the Kara & Ulutas Law Office and performs duty as Arbitrator in the Arbitration Office of the Istanbul Chamber of Commerce. Kara & Ulutas Law Office is engaged in Maritime Commercial law including general average, towage & salvage, marine insurance (P&I, FD&D, H&M), liens, shipbuilding contracts and ship finance.

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Clients' Forum

Many of our articles over the years have focused on risk and/or issues primarily analysed from a legal or technical perspective and therefore written either by outside lawyers or experts or by the Club itself. There has been to date no active contribution or participation from clients insured with the Club and it is therefore with thanks that we are publishing the following article by Yiannis Magdalinos of Waveblue which provides a brief history of the current piracy scourge from a practical perspective. We hope this article will be the first of many of this Clients' Forum and would like to encourage existing clients to contribute to our Newsletter with issues and topics pertaining to their day to day operations that are worth covering for the benefit of our greater readership. Clients interested in participating with an article for The Charterer please contact Carlos Vazquez at:-

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"Piracy at sea - reflections from a Charterer"

By Yiannis Magdalinos of Waveblue

During the last two or three years the increase of piracy in the Gulf of Aden has changed the marine insurance landscape and created an increasingly insecure shipping environment. While piracy itself has always been a foreseeable risk, the increase of the pirates' range of activity and their capability has had a marked effect both on premiums and the coverage itself.

The typical three insurance covers that a vessel usually carries (H&M, P&I, War), and their clauses in their most common forms will either cover to a limited extent or expressly exclude piracy. Furthermore, a new style of piracy is carried out by Somali pirates who are motivated purely by ransom payments rather than the value of the vessel and the cargo. This has brought to the surface complications regarding the vessel's insurance status.

The insurance industry had to react quickly by creating special products in order to provide protection to its clients and confront these new 'grey areas' that arose from the modern nature of piracy. These products have taken into consideration both the procedural needs that a shipowner will have when one of his vessels is

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hijacked and also the financial risks to which he can be exposed. Marine Kidnap and Ransom (K&R) and Loss of Hire (LOH) insurance covers are specifically designed to support Shipowners, managers and operators and even Charterers in the event of a pirate hijack.

K&R and LOH are traditionally available from most Lloyd's Underwriters with a few syndicates leading the market. At the beginning of the piracy 'phenomenon' the LOH cover was provided mainly by the H&M Underwriters of the vessel, with only a few Underwriters, that concentrated on Special Risks, being in a position to offer K&R insurance. However, due to the expansion of piracy and an enhanced market capacity, a greater number of insurance companies that are active in the Corporate Kidnap and Ransom and /or the Marine Insurance sector, have looked for 'a slice of the pie' by providing their clients with an ad hoc policy as a separate product. Additionally, the cover that had been provided up until then by the H&M Underwriters tended to fall under the umbrella of the vessel's War insurance. This was done mainly because under the H&M insurance policy there is no existing mechanism to charge a Shipowner for the risk of transiting or approaching piracy risk areas, while with the War insurance this is easily done by way of an additional premium charge. It would be unfair to say that War Underwriters did not respond to the risk of piracy by adapting their covers. However, as it is explained below, they were unable to mirror the degree of flexibility that bespoke K&R policies have. The question that therefore springs to mind is why purchase a separate Marine Kidnap and Ransom (K&R) and Loss of Hire (LOH) insurance cover product?

YIANNIS MAGDALINOS

To avoid confusion by analysing the traditional marine insurance clauses which refer to piracy, we will just briefly present the advantages of K&R and LOH in comparison with the traditional insurances wherever this is possible. Firstly, it is important to note that traditional insurances are designed to work in a reactive way and do not provide any immediate, active and related services, such as negotiators, other than the reimbursement of the financial claim after the event has concluded. On the other hand, a K&R contract is activated as soon as the hijack is confirmed, usually by notifying the Security Consultants attached to the producer of the policy.

Secondly, traditional insurances (when they do not exclude piracy losses) will try to cover ransom through 'general averages', which are time consuming and will not cover the peripheral costs that are generated following a pirate attack. The coverage in that case can also be uncertain since insurers may not respond (promptly or at all) and it certainly jeopardises the Shipowner's commercial relationships with third parties involved in the marine adventure. On the other hand, K&R is in most cases a primary insurance cover reimbursing the assured, shortly after ransom has been paid. This results in protecting the assured's loss record since the rest of the Underwriters participating in the adventure of a vessel will not be called in to contribute. LOH cover operates in a similar fashion and the Owner is indemnified for the hire covering the number of days he has purchased in regular intervals i.e. every 15 or 30 days. As mentioned above, the 'peripheral costs' that occur during a hijack are not usually included in detail under a traditional Hull policy and the Assured needs to negotiate with Underwriters for these to be reimbursed. Such costs may include crew's medical expenses, fuel oil expenses, port authorities' expenses for calling at unscheduled ports, costs of travel of victims, legal liability costs, salaries, interests on loans etc. These costs are outlined in a Marine K&R and LOH policy and the Assured knows exactly what he is going to be reimbursed for and up to what limits.

Thirdly, when a hijack occurs shipowners and operators are directly faced with a wide range of issues that they have never encountered before and which are naturally not included in their daily routine job, such as (i) how do they find all the necessary help from specialist negotiators (ii) how do they enter into effective communication with the hijackers (iii) how do they deal with threats to their crew, vessel, and cargo (iv) how do they raise and deliver the ransom? These questions have answers which form part of a procedure that these tailor-made insurance products have taken into consideration when they were designed. As a result, both services and costs occurring from a hijack are predicted and usually covered by such policies. For example, when purchasing a K&R and LOH cover, the Shipowner makes sure that he will have priority service from the kidnap negotiators/security consultants that have entered into a contract with the insurance company he has purchased the policy from.

It is very important to briefly look at what happens when a hijack occurs. Very likely, as soon as the name of a vessel that has been hijacked is publicised, dozens of emails will flood the Shipowner's 'Inbox', many from ex-military specialists offering their services in negotiations. It does not come as a surprise for a Shipowner not to be able to distinguish who to choose and what criteria to set. Making the wrong choice at this level can lead to great financial losses or, even worse, lead to the loss of human lives. It has happened that Shipowners who chose to handle such a delicate issue on their own, by employing their own negotiators straight from the shelf, have ended up paying extremely high amounts in ransom. This can have a two-fold result: firstly, it can result in the Shipowner's suffering a substantial financial loss and, secondly, in negatively affecting the pirates' ransom demands which immediately shift upwards. Hence, the argument is that thinking only logically, an insurance company will have the time to

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search the market and employ a security consulting firm / negotiator that will meet the necessary requirements to reach the best possible 'deal' with the hijackers, when it comes to paying millions of dollars in ransom.

The piracy phenomenon is still evolving. Pirates come up with new methods of attack, and the shipping community tries to defend itself. The more secure the fleets become, the more the pirates will differentiate their methods in order to achieve their target. We do not see an early end of their activity and, until the moment that hijacking a vessel will become extremely difficult and pirates will have to resort to other methods in order to make their money, piracy will remain a potentially serious risk.

Waveblue was established in Piraeus in 2007 and services chartering clients and related activities with a team of consultants, lawyers, ex-Master Mariners and technical experts. Mr. Yiannis Magdalinos joined Waveblue in early 2010 as a marine insurance broker dealing with various insurances within the shipping industry but with a special interest in piracy related matters. He read European Studies and French at Durham University and holds an MA in International Conflict Studies from King's College London and a Master in Relations Internationales from Université Paris Panthéon-Sorbonne.

INDIAN SEMINAR

The Charterers Club held its first seminar in India on Friday 2 December in Mumbai to which 65 delegates attended. The daylong event saw charterers, brokers and shipbrokers from all round India and from as far away as Dubai participate in what proved to be a rather successful event.

Opening remarks were provided by the Club's Underwriter, Gavin Ritchie; however the focus of the day was on education where two of our senior lawyers, Edward Turner (from our London office) and Vivek Jain (from Shanghai), provided the papers.

Vivek's experience at sea and as a lecturer meant he was able to put life into the topics of damage to hull and cargo claims and a spirited debate followed both talks. Edward, on his part, concentrated on liquefaction of cargo and the always complex subject of liens also achieved some thought proving debate from the audience.

The Club has a growing book of experienced Indian charterers and it was interesting to listen to the views and concerns from the chartering community. We are hoping to run similar seminars in Singapore and Shanghai in 2012 and if you would like to be kept informed in relation to these events please e-mail Carlos Vazquez at:-

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NEW APPOINTMENT

We are pleased to announce the following appointment:

Xin (Ashley) Xu joined the Shanghai office on 13 September to work as a claims executive. She is a qualified Chinese lawyer and has a master's degree in maritime law from University College London. Ashley previously worked in private practice and for an insurance company in China.

Xin (Ashley) Xu

With the appointment of Ashley, the Shanghai office now has a full complement of three lawyers and a commercial claims handler.

THE CHARTERER NEWSLETTER

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