Issue 11

Shipping law update

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Introduction

This edition includes some welcome clarification on the law on late redelivery under a time charter. There is comment on an unusual collision, subcharterers' right to limit liability in New Zealand and an item of interest to cruise operators. Legal eagles will be scanning the press for developments in the law of maritime security and post-*Prestige* issues over the coming months.

Time charters and legitimate last orders

Petroleo Brasileiro SA v Kriti Akti Shipping Co SA sub nom Kriti Akti Shipping Co SA v Petroleo Brasileiro SA [2003] 2 Lloyd's Rep.584

Concerning the legitimacy of final voyage orders, two key considerations are the latest date for redelivery of the vessel and the estimated length of the final voyage. Charterers can have a tough time in enforcing final voyage orders where disagreement has arisen over the date for redelivery of the vessel. Some degree of certainty on this issue has now been provided following the *Kriti Akti.*

The *Kriti Akti* was chartered on an amended Shelltime 3 Form. The charter incorporated three key clauses relevant to the latest time for redelivery: the basic period clause, stated to be 11 months plus or minus 15 days at charterers' option; a typed extension clause allowing the charterers to extend the charter by a period equal to the total of any off-hire time; and a printed final voyage clause entitling the vessel to complete any voyage the vessel had already commenced at "the expiry of the period of this charter".

The Court was asked to address two questions: (i) whether the "period of this charter" in the final voyage clause includes or excludes the off-hire extension and (ii) if so, whether the extended charter also includes the tolerance of 15 days.

Owners sought to rely on the Court of Appeal decision in *Aspa Maria* [1976] 2 Lloyd's Rep.643, which they contended was binding authority that the 15 day "option" period should not be included. In that case, the vessel was chartered for 6 months, 30 days more or less at charterers' option but with an express option for the charterers to continue the charter for a further period of 6 months, 30 days more or less. The question was whether the maximum charter period was 12 months, plus or minus 60 days, or 12 months, plus or minus 30 days.

The key part of Lord Denning's judgement, which came under scrutiny in the *Kriti Akti,* is as follows:

> *"If the "30 days more or less" were not mentioned, the law would imply a reasonable margin of tolerance before or after the 6 months. … But the parties can expressly stipulate what the margin of tolerance is… So here the 30 days is not an extension of the charter. It is simply an express agreement as to the tolerance permitted."*

This reasoning led Lord Denning to conclude that the maximum charter period was in fact 12 months plus or minus 30 days. Accordingly, Owners of the *Kriti Akti* sought to argue that the 15 day option was in fact merely a tolerance and so should not count as part of "the period of this charter". This is as against the earlier decisions of the Court of Appeal in The *Dione* [1975] 1 Lloyd's Rep.115 and also the House of Lords in The *Peonia* [1991] 1 Lloyd's Rep.100.

The Commercial Court has now sought to clarify any uncertainty which might arise from these three earlier decisions. Moore-Bick J, in his judgment, has recognised that the "option" periods in both the The *Dione* and The *Peonia*, akin to the 15 days more or less in the *Kriti Akti,* are periods occurring prior to the final termination date of charters. Rather than simply being a margin to protect charterers from unforeseen overrun, they constitute part of the period in which charterers are entitled to make use of the services of the vessel. Furthermore, the Court agreed that where the basic charter period is extended (e.g. the off-hire extension), such tolerance periods will nevertheless apply to the total, extended period, albeit only once. The decision in the *Kriti Akti* is an important step in giving certainty to charterers of how they are entitled to utilise the services of their chartered vessel when redelivery looms, a matter of particular relevance to both owners and charterers in times of market highs and lows.

New Zealand: A sub-time charterers' right to limit liability

Tasman Orient Line CV v Alliance Group Ltd and Ors (The *"Tasman Pioneer"*)
High Court of New Zealand

This was an action brought by the sub-time charterers of a vessel for a decree limiting their liability for cargo damage resulting from a grounding. The application was challenged by the cargo interests and the issue for determination by the High Court of New Zealand was whether under the Maritime Transport Act of New Zealand there was, in principle, a right to limit exercisable by a vessel's sub-time charterers and, if so, whether that right was barred on the facts.

Section 85 of the New Zealand Act provides that "Owners of ships" are entitled to limit their liability and Section 84(b) provides that, in cases where the ship is chartered, "owner" means the "charterers". The Court accordingly accepted that the sub-time charterers were indeed entitled to limit. In relation to conduct barring the right to limit liability for a particular loss, the criteria in Section 85(c) of the New Zealand Act are:

> "the personal act or omission … with intent to cause the loss or recklessly and with knowledge that the loss would probably result".

The grounding had been caused by the master's error in following the wrong course in the prevailing conditions. He had done this without reference to the sub-time charterers and the Court held that, although the sub-time charterers directed the master with regard to matters such as ports of call and, broadly, routing, the detailed navigation and management of the ship were up to the master who was, in turn, responsible to the owners and not to the sub-time charterers. Accordingly, even though the casualty may have been caused by the master's negligent navigation, the master's actions were not attributable to the sub-time charterers so as to bar their right to limit.

Can charterers arrest a vessel whilst on charter to them and place the vessel off-hire whilst she remains under arrest?

Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic); [2003] 2 Lloyd's Rep.693

A bulk carrier carrying cement and clinker from China to the United States was due to be redelivered in the US Gulf under a time charter trip under the NYPE Form. Whilst discharging cargo during her last voyage under the charter the vessel was arrested by her charterers to obtain security for performance claims. Following completion of discharge the vessel was shifted to an anchorage where she remained under arrest for some two weeks.

A number of issues arose namely as to when redelivery took place and whether there had been any repudiatory breach by the charterers. Of particular interest was a clause in the charter that provided:

> "Should the vessel be arrested during the currency of this charterparty at the suit of any persons having, or purporting to have, a claim against or any interest in the vessel, hire under this charterparty shall not be payable in respect of any period whilst the vessel remaining under arrest or remains unemployed as a result of such arrest. However if the arrest is the consequence of an act or omission by charterers and/or their agents and/or their servants hire to continue".

The matter went before an arbitrator who decided that the charterers' performance claims should be dismissed. He also held that the arrest was a consequence of an act by the charterers and that charterers could not rely on the clause to place the vessel off-hire because the clause was primarily directed to arrest by third parties. Charterers could not rely on their own arrest to avoid an obligation to pay hire. He also found that the purported redelivery (whilst the vessel was under arrest) was not a valid redelivery and that charterers were in repudiatory breach.

The matter was appealed and the High Court confirmed that the clause was not intended to protect charterers where they themselves arrest the vessel during the currency of the charter. Much clearer words would be required to allow them to do so and place the vessel off-hire.

The result appears to be correct and indeed in many ways unsurprising. It is notable however that the arbitrator and the Court agreed that the arbitration reference would have benefited from a short hearing to canvas the points of law which arose rather than to allow the matter to proceed to an award on documents only.

Cruise business - is the shipowner liable for negligence of the ship's doctor?

The Ecstasy: District Court of Appeal of Florida August 2003

A 14 year old girl was taken ill during the course of a cruise. She was treated by the ship's doctor and told she was suffering from flu. The girl and her family decided to curtail their cruise and return to their home in the United States where the girl was diagnosed as having a ruptured appendix. Her appendix was removed and as a result of the rupture and subsequent infection the girl became sterile. Proceedings were brought by the girl and her parents against the owner and against the ship's doctor. It was alleged that the doctor had acted negligently and that the shipowner should be vicariously liable for the doctor's alleged negligence. Proceedings were brought in Florida. The carrier argued that he should not be vicariously liable because the shipowner was unable to control the doctor/patient relationship, did not have the expertise to control the doctor in the practice of his profession and that the ship was not a floating hospital. The First Instance Judge accepted these arguments and held the carrier not liable.

The Appeal Court decided that the doctor was a member of the crew, the doctor was in the nature of an employee or servant and because the carrier is liable for the acts of his employees the shipowner was therefore liable. The Court also took into account the fact that the carrier in this case had control over the doctor's medical supplies, selected nursing staff, and was involved in the running of the onboard infirmary. It was foreseeable that some passengers would fall ill and there was in effect no alternative other than to turn to treatment by the ship's doctor. There was in fact an element of control over the doctor/patient relationship. Thus the first decision was reversed and the carrier was held liable for the acts of the doctor.

Collision between vessels dragging their anchors. Who is to blame?

Owners of the Pearl v Owners of the Jahre Venture [2003] EWHC 838; [2003] 2 Lloyd's Rep.188

The *Suezmax Pearl* and the ULCC *Jahre Venture* collided at Fujairah Anchorage in March 2000. At the time of the collision the wind was Force 8-9, visibility was good and the collision occurred in daylight. *Pearl* was lying to her starboard anchor with 10 shackles in the water. *Jahre Venture* was lying to her port anchor, also with 10 shackles in the water. The vessels were between 8 cables and 1 mile apart.

Westerly winds broke out in the early hours of March 3. *Jahre Venture* was yawing about 100° between 235° and 335°(T) and *Pearl* was yawing about 20° between 310°(T) and 330°(T). *Jahre Venture* began to drag her anchor in an easterly direction such that her starboard bow came in contact with the forward portside of the *Pearl.*

The *Pearl* alleged that the *Jahre Venture* had dragged down on to the *Pearl,* had failed to prepare or use her engines in due time to keep clear of the *Pearl* and should be 100% to blame for the collision. *Pearl* also argued that, being a ship at anchor, she was not bound to alter her position until it became apparent that the *Jahre Venture* as a ship underway could not avoid the collision unaided. The *Pearl* was unable to raise her anchor due to a defect affecting her steamline which was repaired as soon as it had been detected.

Jahre Venture asserted that it was the *Pearl* that was 100% to blame, arguing that no fault could attach to the *Jahre Venture* because her manoeuvring was hampered by the presence of a bunkering barge, that the *Pearl* had failed to appreciate that the *Pearl,* too, was dragging anchor and that in any event she could not take any action because of the defect in her steamline. *Pearl* was not therefore a ship at anchor but she was underway when dragging anchor.

The Admiralty Court held that *Pearl* was dragging her anchor and that it was known to *Pearl* that both the *Jahre Venture* and the bunkering barge were dragging anchors. There was an inherent likelihood that *Pearl* would also be dragging her anchor and thus there was a failure on the part of *Pearl* to appreciate her true situation. Moreover the Judge was not persuaded that the defect in the steamline could not have been detected prior to that morning.

The failure of the *Jahre Venture* to use her engines was a valid criticism and causative of the collision. However the failure of the *Pearl* to appreciate that she was dragging anchor at an earlier stage and her inability to take action because of the defect in the steamline was also causative of the collision. Whilst the *Pearl* was dragging anchor she was not a ship "at anchor" but equally until the *Jahre Venture's* anchor was free of the seabed *Jahre Venture* was not a ship "underway".

Based upon these unusual circumstances the Court decided that there was serious fault on the part of both vessels and apportioned liability on a 50/50 basis.

New Secretary General for IMO:

Efthimios Mitropoulos has been elected to take over as Secretary-General of the International Maritime Organisation (IMO) when William O'Neil retires from the post at the end of 2003. Mr Mitropoulos, 64, has been IMO Assistant Secretary-General since 2000. He started his career at sea, joining the Greek Merchant Navy in 1957. With the secretariat since 1979, he has previously held permanent positions in its Navigation Section and Maritime Safety Division.

Bill of Lading – whether an exclusive jurisdiction clause in a charterparty is incorporated by general words of reference

Siboti K/S v BP France SA; 1278; [2003] 2 Lloyd's Rep.364

The vessel was chartered for the carriage of clean petroleum from India to France. The charterparty contained an English law and exclusive jurisdiction clause which also stipulated that all bills of lading issued under it "…shall incorporate this exclusive dispute resolution clause". Cargo was shipped under a bill of lading which referred expressly to the charterparty and provided that "…all terms whatsoever of the said charter apply to and govern the rights of the parties concerned in this shipment". The charterers failed to pay the freight. Consequently the owners asserted a lien over the cargo and brought proceedings in the English Court against the cargo receivers, a French domiciled company, alleging liability under COGSA 1992 as endorsees and lawful holders of the bill.

The receivers applied to set aside the action arguing that, in accordance with Article 2 of Council Regulation (EC) 44/2001 (the successor to the Brussels Convention) any proceedings against them should be brought in their country of domicile. In response the owners argued that the receivers were to be treated as parties to the bill of lading contract which incorporated by reference the exclusive English jurisdiction clause in the charterparty.

Deciding in favour of the receivers, the Court held that, since general wording including "all terms" was insufficient to incorporate an ancillary charterparty arbitration clause into a bill of lading, the same result must follow with regard to a charterparty jurisdiction clause. The addition of the word "whatsoever" made no difference and, had the original parties intended to incorporate the exclusive jurisdiction clause they would, and could, have done so expressly with words such as "including the dispute resolution clause".

Are owners liable to charterers for "carrying charges"?

London Arbitration 12/03 (LMLN 620)

The vessel was chartered on the NYPE form for a one time charter trip from the US Gulf to the Mediterranean carrying grain products. The charterparty required the vessel to tender at the first loading port with all holds clean to the satisfaction of the local authorities.

Prior to entering into the charter, the charterers had entered into a purchase contract for the grain which provided that the charterers were to bear the cost of any "carrying" (i.e. cargo storage) charges if the vessel did not tender a valid NOR within the agreed shipment period.

The vessel failed inspection by the local authorities in the US Gulf and was put off hire by the charterers. Cleaning and hatch cover repairs were then carried out. By failing to provide the vessel in a satisfactory state to load grain, the owners were in breach of the charterparty. The question however was whether owners were liable to the charterers for the "carrying charges" in accordance with the purchase contract, and which the charterers sought to recover from the owners as damages for breach of charterparty.

Charterers contended that the charges were reasonably within the parties contemplation as a probable result of the breach because the Charter indicated a specific window in which the grain had to be lifted, the laycan dates being specified. Owners asserted that the provisions of the charterers' purchase contract were unknown to them and that the loss was too remote to be recoverable.

The Tribunal noted that the charterers' obligations with regard to the cargo were not stated in the charterparty, nor was the owners' experience in the Mississippi grain trade.

The Tribunal found that the owners could not be expected to have contemplated that the charterers' purchase contract contained a provision of liability for carrying charges, and owners could not reasonably have foreseen that the charges were likely to be incurred as a result of their breach.

Accordingly, despite the fact the owners were in breach, it was held the charterers could not recover the carrying charges as they were too remote from the breach.

The Tribunal noted, in passing, that had the charterparty contained a provision comparable to an "expected ready to load" provision in a voyage charterparty, an owner might be held to have had carrying charges in his reasonable contemplation and therefore be liable to charterers for this kind of charge.

Who is responsible for delayed berthing if original Bills of Lading are unavailable?

London Arbitration 11/03 (LMLN 0619)

A vessel arrived outside Swinoujscie and anchored. The bills of lading were not available and owners delayed entry into the berth for a day until owners were persuaded to send the vessel alongside.

Owners tendered two NOR's, one upon arrival at the anchorage, and a second when the vessel was alongside the berth.

Charterers argued that the first NOR was invalid because the berth was available and the owners had declined to enter.

The charter was a berth charter and provided that NOR was to be tendered at the berth unless the port was affected by congestion.

Owners accepted that the first NOR was invalid (there was no congestion) but claimed damages for detention on the basis that keeping the vessel outside the port was the only way of keeping control over the cargo in the absence of the original bills of lading.

The Tribunal found that it is not unusual for bills to arrive late, and their late arrival could be attributed to banking delays rather than to fault of the shippers, receivers or charterers.

The owners were not entitled to refuse to enter the berth, charterers were not liable for the delay or for damages for detention.

The arbitrators indicated that the vessel could have entered the berth and kept the hatch covers closed until the original bills of lading arrived. This may be seen as a harsh result for owners and it remains to be seen whether a Court would adopt the same approach.

Fumigation of cargo - are charterers entitled to fumigate grain cargo at sea?

London Arbitration 14/03 (LMLN 0622)

A charterparty for the carriage of grain in bulk contained a fumigation clause which gave charterers "…liberty to fumigate the cargo on board at loading and discharging port(s) or places en route", but provided that time lost by fumigation should count as laytime or time on demurrage. A dispute arose as to whether the charterers were entitled to call for cargo fumigation during the vessel's sea passage between the loading and discharging ports. The charterers argued that the phrase "places en route" was synonymous with "in transit", thus giving them the right to conduct cargo fumigation at sea. The owners, however, contended that fumigation was only permissible "at" places, and not "between" places and was thus not allowed on the voyage itself. Finding in favour of the owners, the Tribunal held that although the modern trend is to interpret contract wording with business efficacy in mind thus avoiding the restricted reading of typed or printed contract clauses, the wording of the clause here was clear and, had the charterers wanted the right to fumigate cargo in transit they could have requested this when negotiating the fixture and called for the words "in transit" or "at sea", or such like. However, such words were not included in the contract clause and the clause should not be read as if they were.

Laytime - effect of WIPON/WIBON and time lost waiting for berth provisions

London Arbitration 8/03 (LMLN 0615).

A charterparty on an amended Africanphos 1950 Form for the carriage of a cargo of bulk phosphate from one safe berth Sfax to one safe berth Setubal provided that NOR might be tendered whether in port or not ("WIPON") and whether in berth or not ("WIBON"). It also contained a rider clause that "time lost in waiting for berth to count as laytime provided that all excepted periods for loading/discharging itself would also apply". NOR was tendered when the vessel arrived at the pilot station at Setubal although she was not actually in the port at the time. Upon arrival of the pilot the vessel shifted to the inner roads where, due to congestion, she remained for almost three days until finally berthing.

In response to owners' claim for demurrage, charterers contended that the NOR was invalid because it could only be given upon arrival at the usual waiting place at which the vessel could be described as an "arrived ship" – namely, the inner roads. Owners, however, argued that the effect of the quoted provisions of the charterparty was to shift to charterers the risk of delay for congestion.

The Tribunal held that the WIPON/WIBON provisions did not affect the paramount requirement that before tendering NOR owners should have done as much as possible to place the vessel at charterers' disposal, and this was at the inner roads, not the pilot station. The NOR was therefore invalid. However, the rider clause was independent of the WIPON/WIBON provisions and time waiting began to count as laytime from arrival at the inner roads although it was subject to the express charterparty exceptions, as for weekends etc.

Limitation of Liability and letters of undertaking

ICL Shipping Limited and Steamship Mutual Underwriting Association (Bermuda) Ltd.,Claimants - and - Chin Tai Steel Enterprise Co Ltd. and Others [2003] EWHC 2320 (Comm)

Limitation of Liability under the 1976 Convention and whether a Letter of Undertaking can be released following the establishment of a Limitation Fund in England.

Following a collision in the Malacca Strait the ICL *Vikraman* sank with the loss of 26 lives and her cargo. One of the cargo interests arrested a sister-ship of the ICL *Vikraman* in Singapore and a Letter of Undertaking was issued by the owners' P&I Club responding to a decision of the Singapore Courts or of a London Arbitration Tribunal.

Cargo interests then commenced arbitration proceedings against the owners in London in respect of claims under the bill of lading. Before the Arbitration Tribunal had published their award the owners commenced limitation proceedings in London under the 1976 Convention and constituted a Limitation Fund. Having done so the owners applied to the English Court for an order for return of the Letter of Undertaking pursuant to Article 13(2) of the 1976 convention. Article 13(2) gave the Court power, after a limitation fund had been established, to order the release of "and ship or other property... which has been arrested or attached within the Jurisdiction of a State Party... or any security given." Owners also obtained an injunction preventing the cargo interests from making a claim under the LOU.

Cargo interests applied to set aside the injunction and argued that they were not bound by the establishment of the Limitation Fund or the limitation proceedings commenced in England. One of the issues was whether there were any "legal proceedings" underway in England, a necessary requirement in order to establish a Limitation Fund in England. The Court decided that the arbitration proceedings commenced by cargo in London were "legal proceedings" for the purposes of the 1976 Convention.

Cargo interests also argued that they should be entitled to enforce the Letter of Undertaking because, although the Limitation Fund had been set up in England, the Fund was not "available" to them because the owners had not yet obtained a Limitation Decree. The Court held (strictly speaking obiter) that the absence of a Limitation Decree was not a determining factor. The Limitation Fund had been constituted and was therefore available within the meaning of Article 13(3) of the Convention even though no Limitation Decree had been made (applying the *Bowbelle* [1990] 1 Lloyd's Rep.532).

The question which determined the issue however was the location of the security pursuant to Article 13(2) of the Convention. In the present case the Letter of Undertaking was provided in order to ensure the release from arrest of a sister-vessel in Singapore. The Letter of Undertaking was provided in a form prescribed by the Singapore Court and stood as security in the *in rem* proceedings in Singapore. The English Court therefore concluded that it had no jurisdiction under Article 13(2) of the 1976 Convention to order release of the security. The Letter of Undertaking could only be released by order of the Singapore Court pursuant to whose order the arrest had been released and the security provided and the owners would therefore have to apply to the Singapore Court for release of the security.

This case serves to underline the fact that, notwithstanding the now fairly widespread adoption of the 1976 Convention, different considerations can apply in circumstances where an arrest takes place in, as was the case here, a 1957 Convention country. Moreover the terms of implementation of the 1976 Convention by signatory States into domestic law can vary to a wide degree giving rise to inconsistent results even under the 1976 Convention itself.

Judgewatch:

Thomas J. was elevated to the Court of Appeal in July, 2003.

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