IRISH MARITIME LAW ASSOCIATION

WINTER 2017

EDITOR'S COMMENT

Welcome to the Winter 2017 edition of the IMLA's newsletter, which coincides with our 2017 Christmas Lecture.

Inside, you will find details of our recent CPD on maritime law and drug trafficking, delivered by Thomas Creed S.C. on 29th November 2017.

This issue also features some interesting developments in maritime law in England and Wales, which may be application in this jurisdiction.

If you have any feedback or queries regarding the newsletter, please do not hesitate to contact me at hugh.mcdowell@lawlibrary.ie

DOES DUBLIN STAND TO BENEFIT FROM BREXIT?

British ship insurer Standard Club is setting up a new European Union subsidiary in Dublin in case Britain loses access to the single market after Brexit. North P&I Club, another UK regulated ship insurer, has also chosen the Irish capital for its EU subsidiary.

Britain dominates the global marine insurance market and losing access to specialist Protection and Indemnity (P&I) clubs such as Standard and North could weaken other parts of the country's multi-billion pound shipping services sector.

Europe represents over 40 per cent of both North and Standard Club's global business

There are 13 major global P&I clubs, of which six are regulated in Britain and are estimated to account for over half the total market share of an industry that insures about 90 per cent of the world's ocean-going tonnage.

Insurers are making contingency plans after Britain's vote to leave the EU means they risk losing "passporting" rights that allow UK financial services firms to trade in Europe without the need for locally regulated entities.

INSIDE THIS ISSUE:

POWER TO ORDER SALE OF CARGO: WHEN IS CARGO THE SUBJECT OF ARBITRAL PROCEEDINGS?

A recent decision of the Commercial Court in the U.K. considered the question of when a cargo is the "subject of the [arbitral] proceedings", so as to give rise to a power to order the sale of the cargo under Section 44(2)(d) Arbitration Act 1996 – *Dainford Navigation Inc v PDVSA Petroleo SA* [2017] EWHC 2150.

Whilst rejecting an argument that the phrase "*the subject of the proceedings*" requires no more than that the proceedings in question should relate to or concern the goods in question, it was held that there is sufficient nexus between the cargo and the arbitral proceedings in circumstances where a contractual lien is exercised over a defendant's goods as security for a claim which is being advanced in arbitration. Notably, that does not depend on there being a claim in the arbitration for a declaration that the claimant is entitled to exercise such a lien; it is sufficient that the lien is being exercised in support of the arbitral claim.

In this particular case, the defendant was also the owner of the cargo, and the Court made no finding as to what the position would be if the cargo was owned by a third party not a party to the arbitration.

The decision will be welcomed by owners who can otherwise face the difficulty of liened cargo remaining on board their vessels for many months, without payment of hire, whilst incurring operating costs.

RECOVERABILITY OF OPERATING EXPENSES UNDER RULE F OF THE YORK-ANTWERP RULES 1974

On 25th October 2017, the English Supreme Court handed down judgment in *Mitsui & Co Ltd and Others v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG and Another (The "Longchamp")*. The case provided the Supreme Court a rare opportunity to consider and interpret the York Antwerp Rules 1974 (in particular Rule F), which are more commonly applied in accordance with the practices of General Average adjusters practices which, as the court was quick to point out, do not constitute law.

The Longchamp was commandeered by pirates off Somalia in 2009, who demanded a US$6 million ransom. After a 51 day negotiation, the vessel was released against a payment of $1.85 million. The owners of the vessel sought to recover both the $1.85 million ransom payment (under Rule A) and certain vessel operating expenses incurred during the period of negotiation (some $160,000), under Rule F. The Advisory Committee of the Association of Average Adjusters, in line with the views of leading commentaries on the subject, was of the opinion that these latter expenses were irrecoverable under Rule F.

The Supreme Court disagreed that the operating expenses were irrecoverable under GA. Where an owner negotiates with a third party to reduce expenses allowable in general average, it now appears likely that operating expenses incurred during that period will be included in the adjustment under Rule F, provided the expenses do not exceed the amount of the general average expense avoided.

The decision is likely to be welcomed by owners, allowing them to approach post casualty negotiations from a position of greater strength. Conversely, however, the decision may also give rise to uncertainty surrounding previously accepted orthodoxy, and heightened scrutiny of adjustments made under the York Antwerp 1974 Rules.

China-backed port sparks Sri Lanka sovereignty fears

In October, Sri Lanka signed a $1.1bn deal with China for the control and development of the southern deep-sea port of Hambantota. The deal had been delayed by several months over concerns that the port could be used by the Chinese military.

The Sri Lankan government, which says money from the deal will help repay foreign loans, has given assurances that China will run only commercial operations from the port, on the main shipping route between Asia and Europe. Under the proposal, a state-run Chinese company will have a 99-year lease on the port and about 15,000 acres nearby for an industrial zone.

After its 2015 election, President Maithripala Sirisena's government showed signs of coolness towards Beijing, having campaigned on a promise to scrutinise recent foreign investments. But it found no good alternative to the port's Chinese takeover.

The only large vessels that stop at Hambanota carry cars, which are forced to do so by state directive. But the port's proponents argue that under the management of CMP, one of the world's largest operators, expertise and industry connections could turn it into a serious operation.

If Chinese shipping companies embrace the new port, it could bolster Sri Lanka's status as a South Asian hub for seaborne cargo. CMP already operates a vast container terminal at the country's biggest port in Colombo, which is being expanded in a $1.4bn Chinese-funded project — Sri Lanka's biggest foreign direct investment to date.

IMLA hosts CPD event

The IMLA was privileged to receive a lecture from Thomas F. Creed S.C. on drug trafficking by sea and the legal powers and provisions available in the State to detect, prevent, investigate and prosecute the same.

The lecture was hosted in the Dublin Arbitration Centre and forms part of a series of evening lectures organised by the IMLA designed to give practitioners practical information in respect of specific areas of maritime law. The previous lecture hosted in the same venue related to the regulatory control of fishing in Ireland.

Tom Creed S.C. gave a fascinating lecture on the regulatory and legislative framework which permits the interdiction of foreign flagged vessels, in the territorial sea, the exclusive economic zone (to the extent that the same may be considered relevant) and on the High Seas. Tom spoke from extensive experience having been involved in most of the prosecutions arising out of significant interdictions of Vessels in recent years. As well as receiving invaluable insight into the practical operation of ship interdictions, Tom gave us a clear summary of the legal background for the same stretching from the provisions of UNCLOS III which provide for the operation of exceptions to freedom of navigation on the High Seas to the 1988 Vienna Convention and domestic legislation such as the misuse of drugs provisions under the Criminal Justice Acts.

The Association extends its thanks once more to Tom for a fascinating and practical lecture, and to Darren Lehane B.L. for organising the same.

THE APPROACH VOYAGE – *PACIFIC VOYAGER* [2017] EWHC 2579

The ***Pacific Voyager [2017]* EWHC 2579** is a recent decision which considers the often neglected approach voyage; identifying the moment when the duty to proceed with utmost despatch to the loadport arises under a voyage charter; and whether that obligation is an absolute one or one to exercise due diligence.

In ***Monroe Brothers Limited v Ryan* [1935] 2 KB 28**, the Court of Appeal held that "*where a voyage charter contains an obligation on an owner to proceed with all convenient speed to the loading port and gives a date when the vessel is expected to load, there is an absolute obligation on the owner to commence the approach voyage by a date when it is reasonably certain that the vessel will arrive at the loading port on or around the expected readiness to load date*" (and also that the exceptions in the charter only apply once the approach voyage is commenced). The decision in the ***Pacific Voyager*** extends this beyond the situation where there is an ETA in the charter (so as to give a reference point to the estimated date that the parties must have intended the obligation to proceed to the loading port with all convenient speed to attach), to one where there is an agreed laycan / cancelling date.

On the fact of this case, the charter also contained ETAs which Owners gave re the estimated time of arrival of the Vessel at the intermediate ports for the cargo operations on the previous voyage, all subject to the usual "IAGW / WP" provisions.But the judge held that even without the ETAs for the intermediate ports he would have held that there was "*an absolute obligation to commence the approach voyage by a date when it was reasonably certain that the Vessel would arrive at the loadport by the cancelling date*". Whilst accepting the differences between an ETA and a cancelling date, the judge held that they could be treated as being the same for the ***Monroe*** obligation – they both represent the expectation of the parties as to when the vessel will arrive at the loading port. The judge held that a cancelling date is also the parties' anticipated time of arrival at the loading port and so defines the owners' obligations in relation to such time of arrival.

If one looks at the textbooks on this, as the judge did, it can be seen that Voyage Charters alludes to this approach: 4.12: *It is unclear whether, under those charters which do not contain any "expected ready" date or "estimated time of arrival" but merely a cancelling clause, the owner is under an obligation to commence the approach voyage in such time that the ship, if proceeding normally, will be able to meet the cancelling date. The reasoning in the decisions on the "expected ready" provision suggests that such an obligation probably does arise, and this view has been adopted by London arbitrators.*

The arbitration referred to is London Arbitration 15/93 in which the original cancelling date under a charter was not met and an addendum was drawn up substituting another vessel on the same terms and conditions. Clause 1 of the charter provided*: Loading port(s) 1. That the said vessel, being tight, staunch and strong, and in every way fitted for the voyage shall with all convenient speed proceed to 1_2 safe berth(s) 1 safe port US Gulf including. . . .* It was held that the owners' argument that for clause 1 to be an absolute obligation there had also to be an ETA in the charterparty would be rejected. If that argument were correct, it would result in the illogical position that the obligation to sail would be absolute in cases where an ETA *was* stated in the charterparty but only qualified, *i.e.* subject to due diligence by the owners, when an ETA was not. Accordingly, the obligation in clause 1 was an absolute one.

What does this mean for Owners / Charterers?

- A laycan / cancelling date provision can give rise to the absolute obligation referred to in ***Monroe***, and an exposure for damages if it is not met.
- Owners cannot be complacent that the effect of missing the cancelling date will simply be termination of the charter with no exposure for damages. This may make it more difficult for Owners to retain flexibility with regard to fixing intermediate voyages.