LAW TIDES

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Issue 1

Welcoming Note

Welcome to the 1st Issue of Law Tides. We hope that you embrace it with enthusiasm!

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The OW Demise:
No end to an Innocent Owner's Woes

In a nerve-racking judgement, the English Court of Appeal unanimously rejected the owner's appeal to the extent that the failure of OW to transfer title in the bunkers does not release them from their obligation to pay for them.

Although the implications of the decision are still far from clear, fears of double payment to bunker supplying and/ or selling entities have increased substantially especially when the leverage of vessel arrest comes in to play.

The owners of the *Res Cogitans* placed an order for bunkers with OW Bunker Malta Ltd. (OWBM). The order confirmation stated that the physical supplier would be "Rosneft" and that payment was due within 60 days from the date of delivery upon presentation of OWBM's invoice. OWBM's right to payment was assigned to its bank, ING Bank N.V. (ING).

OWBM placed an order for the bunkers with OW Bunker and Trading AS (OWBAS). OWBAS in turn placed an order with Rosneft, who placed an order with its subsidiary, RN Bunker Ltd, the latter being the physical supplier of the bunkers.

Pursuant to the terms of each of the contracts, OWBAS was to pay Rosneft within 30 days after delivery, while Owners were to pay OWBM within 60 days. Neither invoice was paid. Both ING and Rosneft claimed payment from Owners of their invoices. Owners did not object to paying for the bunkers, but did not want to pay twice. The High Court decided that the Owners were obliged to pay ING (as assignees of OWBM). The Court of Appeal upheld the decision of the High Court.

The problems stem from the retention of title clauses contained in the agreements between owners with OW and OW with third party suppliers down the chain. Owner's contended that as OW did not have title to the goods as it had not paid its own supplier down the chain, ING could not claim for payment of the bunkers in question. That argument was rejected by the Court in both instances and held that the Sale of Goods Act did not come into play in bunker supply contracts and hence, ING was entitled to claim for payment of bunkers even though it did not have title to them (which would have happened had it paid its own supplier).

Instead, both Courts have construed bunker supply contracts to be akin to a license to use and consume bunkers pending final payment. It goes without saying that given the finding that the Sale of Goods Act does not apply to bunker supply contracts, purchasers are not afforded the statutory right that goods should of satisfactory quality.

Multiple Threats of Arrest

Many owners have recently found themselves exposed to threats from physical suppliers who have not been paid by the OW entity that contracted with the owners in question. In some cases, ING (as assignee of OW in the liquidation proceedings) may threaten arrest as security for the outstanding debt.

So who has the legitimate right for arrest?

The answer to the question depends on the jurisdiction in which security by way of arrest is sought.

In jurisdictions that have ratified the Arrest Convention, physical suppliers of bunkers are given the right to arrest a vessel as their claim falls within the closed list of claims pursuant to which a lien is created, that being of "*any claim in respect of goods or materials supplied to a ship for her operation and maintenance*".

In case OW has not physically supplied the bunkers to the vessel, it is doubtful that OW could have a legitimate right to arrest a vessel. Physical suppliers that have not been paid by OW could have a right to arrest a vessel. Owners may thus be faced with a case in which they have to pay the physical supplier to release their vessel from arrest and yet still be liable to pay OW for money owed to it under the supply contract. Pending clarification of the matter before the Supreme Court, English law has yet to follow a commercial approach in resolving the sticky aftermath surrounding the bankruptcy of OW.

Other jurisdictions however have been far more equitable. For example, Canadian courts upheld a decision in which time charterers who had paid physical suppliers of bunkers were discharged from their obligation to also pay OW. Israeli and Dutch courts adopted a similar reasoning.

In case owners are faced with competing claims by both OW (or ING as its assignee) and physical suppliers, the UK P & I Club has advised sending out a notice to both parties the wording of which can be found at: http://www.ukpandi.com/knowledge/article/faqs-relating-to-ow-bunkers-130742/

The Wreck Removal Convention

The *Nairobi Convention* is the result of several years of preparatory work in the Legal Committee of the IMO. The Convention is the first international tool providing for strict liability, compulsory insurance and direct action in relation to wrecks located beyond the regional sea of coastal states. It forms part of a framework of conventions dealing with liability and compensation for maritime casualties.

Most accidents resulting in shipwrecks occur in territorial waters often due to groundings (Lloyd's of London statistics show that 45% of the major casualties between 2000 and 2010 were due to groundings, which tend to occur closer to the shore, more than likely within the 12-mile range, and not in the EEZ).

The Convention applies to all seagoing vessels of any type or size, including fixed or floating platforms except when such platforms are engaged in the exploration, exploitation or production of seabed mineral resources.

However, the Convention does not apply to warships and state owned or operated ships.

The Convention came into force in April 2015 and as of August 2015, 24 states have ratified the convention including Antigua & Barbuda, Bulgaria, Congo, Cook Islands, Denmark, Germany, India, Iran, Liberia, Malaysia, Marshall Islands, Morocco, Nigeria, Palau and the UK.

How the Convention Works

If a ship is involved in a maritime casualty and becomes a wreck within a state's EEZ, the master or the ship's operator must report it without delay to the affected state. The Convention defines a 'wreck' as a sunken or stranded ship or any part or any object from a sunken or stranded ship. The definition includes any object from a ship that is stranded, sunken or adrift at sea, such as lost containers. It also includes ships that may reasonably be expected to sink or strand.

An assessment by an affected state that a wreck poses a navigational or major environmental hazard triggers the Convention's provisions. Once a hazard is declared, states have powers to locate and mark wrecks, warn mariners and "facilitate the removal of wrecks". Shipowners and their insurers can take some comfort from the fact that the Convention provides that owners may contract with whichever contractor they choose, and that if measures are in hand then states may do no more than set "a reasonable deadline in writing" for removal. Non-compliance permits the state to remove the wreck at the owner's expense, but only by "the most practical and expeditious means available".

Liability of the Owner

The Convention holds the ship-owner strictly liable for the costs of locating, marking and removing the wreck unless the owner can provide that the wreck:

- resulted from an act of war or similar hostilities; or
- resulted from a natural phenomenon of an exceptional, inevitable and irresistible character; or
- was wholly caused by acts or omissions by third parties done with intent to cause damage; or
- was wholly caused by the negligence or other wrongful act of any Government or authority responsible for the maintenance of navigational aids.

Since the costs and complexity of wreck removal are one of the major concern of ship-owners (and therefore of insurers), the Nairobi Convention provides legal basis for States to remove shipwrecks that may have the potential to affect adversely the safety of lives, goods and property at sea, as well as the marine and coastal environment. It will make ship-owners financially liable and require them to take out insurance or provide other financial security to cover the costs of wreck removal. It will also provide States with a right of direct action against insurers.

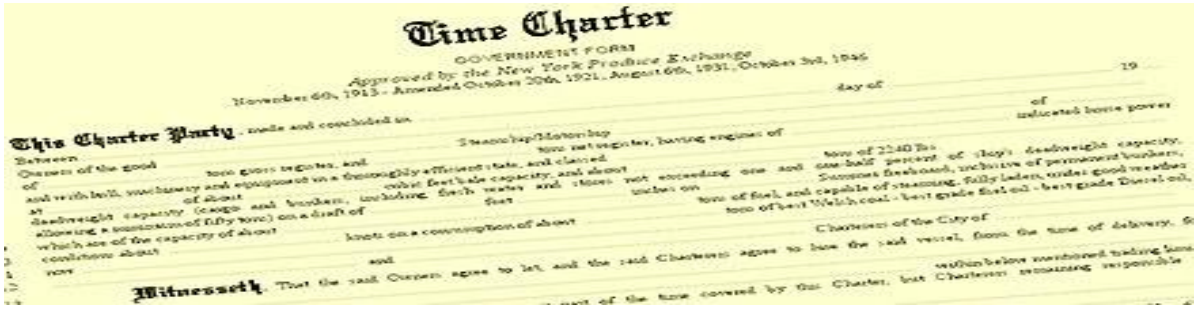
Other features

The Convention also provides that all ships over 300 GT must carry insurance up to the limits of the 1996 Protocol to the London Convention on tonnage limitation and provides for direct action against insurers up to this limit. This will allow states to recover at least some costs even when vessels belonging to single ship companies with no other assets are wrecked. Ships must also obtain certificates to prove their insurance cover and the UK, Germany, Denmark, Liberia, Malta and the Marshall Islands are taking the lead in issuing certificates to ships flagged in countries that are not parties to the Convention. The International Group of P&I clubs have all agreed to issue "Blue Cards", which demonstrate that ships have the cover mandated by the Convention and thus allow them to apply for the required certificate. The International Group has also signed memoranda of understanding with the Australian and South African governments, as part of an outreach program aiming to raise awareness of the role of P & I clubs and improve relations with state authorities. As at 20 January 2015, discussions were also ongoing with the US, Canada, Malaysia, Singapore and EU states grouped together as the European Maritime Safety Agency.

To balance the heavy obligations placed on ship-owners, the Convention also provides that measures taken by states shall be proportionate to the hazard, and "shall not unnecessarily interfere with the rights and interests of other States including the State of the ship's registry, and of any person, physical or corporate, concerned".

Significance of the Convention

Where it applies, the Convention may lead to owners being able to take a more assertive approach when faced with a wreck removal situation. Although questioning the decisions of state bodies through legal review or the administrative courts is often a difficult struggle, the Convention gives clear grounds for resisting unreasonable actions taken by states. The strict liability regime may also help to reduce the number of wrecks that occur in the first place by encouraging states to provide ports of refuge rather than turn ships away, because they will be more likely to provide refuge when they are confident that someone will pay if they do become wrecks.


Time Charter

GOVERNMENT FORM

Approved by the New York Produce Exchange

November 6th, 1913 - Amended October 20th, 1921; August 6th, 1931; October 3rd, 1946

This Charter Party, made and concluded in

Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery,

***The Astra* Revisited**

In 2013 Mr. Justice Flaux in *The Astra* delivered a ground breaking judgement in which it was held that payment of hire is a condition of the contract and that failure to pay hire (even once) entitled Owners to withdraw the vessel and claim for loss of profit for the remaining charter period.

Mr. Justice Flaux focused his analysis on two of the three categories of contractual terms, namely, conditions and innominate terms. A condition is defined as a promise that is so fundamental any breach of which entitles the innocent party to terminate the contract and claim for damages. A breach of innominate term on the other hand merely gives the innocent party the right to terminate if the breach is so serious that it deprives the innocent party of substantially the whole benefit of the contract.

The Astra however was not followed in *Spar Shipping AS v Grand China Logistics Holding Group Co. Ltd.* (2015) in which Mr. Justice Popplewell chose instead to treat the non-payment of hire as an innominate term.

Background facts

Three supramax bulkers were let to defendant charterers using long-term time charters, on amended NYPE 1993 forms. On or about April 2011, the charterer fell behind on hire payments, and despite its consistent apologies, the situation did not improve for the next six months. Owners were regularly sending out anti-technicality notices until September 2011, when they finally gave notice of withdrawal with immediate effect.

Under guarantees Owners had obtained from the parent company of the charterers, the owners claimed for (a) the balance of hire due prior to termination and (b) loss of bargain damages for the remainder of the charter term. The latter claim could generally be claimed if the breach amounted to a breach of a condition or the repudiatory breach of an innominate term.

The Judgement

Mr. Justice Popplewell dismissed the reasoning followed by Mr. Justice Flaux in *The Astra* and ruled against finding that payment of hire amounted to a condition of the contract.

In summary, it was held that:

1. The existence of a right to terminate in a charterparty is not in itself conclusive evidence that the parties intended that punctual payment of hire to be a condition.

2. In the absence of a right of withdrawal, payment of hire would not be treated as a condition. It could not have been intended that any breach of the hire obligation would have the consequence of allowing the Owners to terminate even for a trivial breach.

3. Commercial certainty does not mean that payment of hire should be treated as a condition. That could be achieved by the withdrawal clause which offers Owners a right to cancel.

4. By treating the obligation to pay hire as a condition, Owners are granted a right to damages that could be subject to abuse.

The decision in *Spar Shipping* restored a previously held view that payment of hire does not amount to a condition. However one should be wary of treating the Commercial Court's decision as settled law as it may be subject to appeal.

Thought you could claim damages? Think again!

Parallel Debt Clauses

It is a well-known fact that syndicated loans are designed to be traded. In a debt ridden market such as the one we are currently in, debt portfolios regularly change hands between lenders. Under English law, syndicated loans can be traded either by assignment or novation. Whichever the method of trading, the asset-based security that guarantees repayment of the loan usually remains in the hands of one of the lenders who holds the security on trust for the remaining ones.

In syndicated loan agreements, it is common practice for one of the lenders to be appointed as the Security Agent who is to hold the security on trust on behalf of the lenders. A trust is in essence a legal device in which one person holds property (moveable or not) on behalf of a defined class of beneficiaries. So the trust property is held and/ or managed by the Security Agent but only available to the beneficiaries if the need arises.

Trusts are a English law novelty and employed by countries that follow the common law legal system such as the United States and the countries of the Commonwealth. A number of civil law jurisdictions however do not recognize the concept of the trust and especially a trust purporting to cover assets located in their own jurisdictions.

This problem has been tackled by the inclusion of “parallel debt” clauses in syndicated loan agreements. In essence, the borrower acknowledges the existence of a debt owed to the Security Agent in parallel with the debt owed to the lenders for an amount equal to the amount of the loan.

The debt owed under the parallel debt clause is then amortized in parallel with the debt owed to the lenders under the syndicated loan agreement by providing that any payment by the borrower to the security agent in respect of the parallel debt discharges the borrower’s debt towards the lenders and vice versa.

Foreign Account Tax Compliance Act

Only two things are certain in this life: Death and Taxes. Abiding by this quote, July 1st, 2014 was the deadline for implementing all changes required under the Foreign Account Tax Compliance Act (FATCA). Concerned that US taxpayers were evading tax by holding accounts in non-US banks, FATCA was enacted by the United States Treasury and the Internal Revenue Service in its attempt to combat tax evasion. FATCA purports to strengthen the information reporting and compliance regimes with respect to United States nationals who have invested money outside of the US or who have accounts with offshore financial institutions.

As of 1st July 2014, a non-US financial institution will suffer a 30% withholding tax on US source income and gross proceeds from the sale or disposition of certain US assets if found not to be in compliance with the monitoring and reporting regime imposed by FATCA. Draconian penalties can also be imposed on US nationals who also fail to comply with the rigorous reporting mechanism established under the rules.

The New NYPE 2015

After a revision process that lasted for three years, BIMCO launched the NYPE 2015 on 15th October 2015.

In a lengthy document, industry practitioners attempted to align the agreement with current industry standards as well as with legal developments ever since the form's last revision in 1993.

The following is a selected list of the changes brought about by NYPE 2015:

1. The revised form provides that Owners have an obligation to provide and maintain for the entire duration of the charter such Certificates of Financial Responsibility for oil pollution to permit the vessel to trade within the agreed limits as may be required at the commencement of the Charter. It is debateable whether upon change of trading limits after commencement of the Charter, such obligation shall be maintained.

2. Hull fouling is one of the form's novelty. Clause 30 provides that if fouling of the vessel's hull is a result of her stay due to Charterer's orders, the warranties of speed and performance are suspended.

3. The bunkers clause in the form spans across two and half page making provision for quality, quantity, sulphur contents and sampling.

4. It appears that *The Astra* (discussed above in page 4) was attempted to be codified as a right to damages is noted in clause 11 of the NYPE 2015 in the event of a withdrawal for non-payment of hire. The wording of clause 11 purports to make the payment of hire as a condition to the charterparty.