LAW TIDES

November, 2016
Issue 3

Welcoming Note

Welcome to the 3rd Issue of Law Tides. We hope that it will continue to meet your expectations as an one-glance legal and insurance beacon!

Zoe Lappa – Papamatthaiou
Legal Director
Danaos Shipping Co. Ltd.

In this issue:

Amendments to the Liberian Associations Law

On May 6th, 2016, revisions to the Business Corporations Act, the Partnerships Act, Limited Partnership Act, Limited Company Act and Private Foundation Law of the Republic of Liberia became effective.

Pursuant to the section 8 of the Amendment to the Associations Law stringent requirements for keeping accounts records, minutes and records of shareholders are imposed to individuals or companies constituting the Address of Record ("AOR") for Liberian non-resident business entities.

LISCR, in a circular sent out earlier this month provided a list of those guidelines. We have selected a few of those guidelines:

A. The AOR shall not seek to form any entity or make any filing with the Registrar of Corporations if the AOR has any reason to believe, after making a reasonable inquiry, that the entities for which it is responsible are intended to be used for any unlawful purpose or any immoral transaction, including, but not limited to, fraud, embezzlement, extortion, dealing in prohibited substances, terrorism or money laundering. If the AOR learns that an entity for which it is responsible, or an owner of one of the entities for which it is responsible, is involved in any such illegal activities or transactions, the AOR agrees that to the extent the AOR is permitted under applicable laws and rules (including rules involving attorney-client privilege), the AOR shall immediately inform The LISCR Trust Company and withdraw from the provision of any services to such owner or on behalf of such entity.

B. The AOR shall not provide any instructions or orders to The LISCR Trust Company that it has reason to believe, after making reasonable inquiry, involve any unlawful act, contain any falsehood or are inaccurate. To the extent the AOR is permitted under applicable laws and rules (including rules involving attorney-client privilege), the AOR will inform the Trust Company of any changes in such information and provide corrections to any false or inaccurate information previously provided.

C. The AOR will advise the corporations to maintain books of account, minutes and records of shareholders for a minimum of five (5) years in accordance with Section 8.1 of the Associations Law, as amended on May 6, 2016. The documents are not required to be filed with the Registrar. However, the Registrar may request any records as the Registrar shall deem necessary to ensure that the corporation is in compliance with applicable law. A failure to comply with the request shall result in involuntary dissolution of the corporation.

Article 6 of section 8 further provides that any corporation which knowingly fails to keep, retain, or maintain records as required under this section shall be liable to a fine not less than Three Thousand United States Dollars (US$3,000) but not exceeding Five Thousand United States Dollars (US$5,000), or subject to revocation of the corporation's articles of incorporation, certificate to do business, or dissolution, or any combination of the penalties herein prescribed.

Res Cogitans: An unwanted climax for many Shipowners

You may recall our commentary on the case of the *Res Cogitans* in the first issue of Law Tides. At the time of its publication, we discussed the decision handed down by the Court of Appeal in the aftermath of the OW liquidation bringing shockwaves to shipowners faced with competing demands for payment of the same stem of bunkers. At the time of publication of the first issue, the Court of Appeal 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 OW for them.

In May 2016, the matter reached the UK Supreme Court upholding the decision of the Court of Appeal and the Arbitration Tribunal ruling that bunker supply agreements do not constitute contracts under the Sale of Goods Act 1979.

To refresh our reader's memory, 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.

Before the UK Supreme Court, shipowners argued that they weren't liable to pay OW as it had not paid its own physical supplier either. Shipowners further emphasised that they were exposed to the possibility of claims from both physical supplier and OW's assignee, namely ING.

The UK Supreme Court was not impressed by those arguments and instead affirmed the decisions of the lower Courts ruling that a contract for the supply of bunkers is not one governed by the Sale of Goods Act 1979 and as such, OW's right to claim remuneration for its services is not dependent on it paying its own supplier. As such, shipowners had to pay OW or its assignee even though they may have competing claims for payment of the same stem from the physical supplier.

Clearly an unwelcome decision for the shipping community as equitable issues were not addressed let alone resolved.

By Michael Alexiou

A look at the 2016 version of The York Antwerp Rules

The York-Antwerp Rules ("YAR") can be considered as the designated Rulebook of General Average. They have not been enacted by any legislature and only become effective when incorporated in contracts of carriage but are nevertheless still deemed to be the only attempt at uniformly codifying the principle of General Average.

Many revisions have been made to the YAR since 1877 when they were first introduced, the most popular being the 1994 amendments, colloquially referred to as the "ship owner friendly" ones. The broad usage of this moniker came after the 2004 revision of the YAR, instigated by the International Union of Marine Insurance.

The 2004 YAR revision was supposed to be a more "cost effective" version of the Rules, eliminating certain provisions previously allowed under General Average, the most important ones being the commission on general average disbursements (Rule XX), salvage remuneration (Rule VI)[1] and the wages of the master and crew (Rule XI (b)) when the vessel is undergoing repairs necessary for the safe prosecution of the voyage.

Naturally the aforementioned "trimming" of the general average expenditure allowance in the 2004 YAR (save for the abolishment of commission), was not favorably viewed by the shipping community, with a prime example of that being BIMCOs refusal to incorporate the new revision in its contracts.

Following the debacle of the 2004 revision, various attempts were made to find a common denominator that would be fair to both the shipping and marine insurance community. The result of those endeavors came in the form of a new revision to the YAR which was finalized and accepted on May 6th, 2016. Though it is still too early to ascertain whether or not the 2016 revision will prove to be a success, it has at least gone one step further than its predecessor by obtaining BIMCOs approval, who will be replacing the 1994 YAR version with the 2016 one in all its contracts[2].

The primary base of the 2016 YAR version is the 1994 one, with the 2004 version contributing mostly to fine tuning the time frame of the adjusting process, rather than significantly reducing the scope of the general average expenditure as per its initial design.

The most noteworthy changes in the 2016 YAR version are:

- Bigham Clause (Rule G)-The cap for cargo's contribution to expenses relating to transshipment costs shall not apply to expenses made under rule F (i.e substituted expenses).
- Salvage remuneration (Rule VI)-a new paragraph has been added for cases where parties (i.e. cargo/ship) have entered into separate salvage agreements. In these cases, salvage will only be taken into account if the costs incurred are so significant that their disallowance will prove to be "inequitable".
- Crew Wages (Rule XI)-These have been restored as per the 1994 YAR version.
- Commission (Rule XX)-The 2% commission is no longer allowed.
- Interest (Rule XXI)-The interest rate has changed from the fixed rate of 7% and from now on interest will be calculated at an annual rate of ICE Libor plus 4%.
- Contributory Values (Rule XVII)-The Average Adjuster can exclude cargoes of low value, if the cost of including them will be more than their contribution to the overall adjustment.

A table with all the amendments (compared to the 1994 YAR and 2004 YAR) of the 2016 YAR version can be found at https://www.ctplc.com/media/409139/York-Antwerp-Rules-2016-Tabular-Format-Final-Clean-.pdf

---

[1] Exception to the rule: Salvage will be accounted for in the General Average adjustment under the YAR 2004 revision only if "one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party

[2] Refer to the BIMCO circular found at www.bimco.org/Chartering/Clauses_and_Documents/Clauses/General_Average_Clause/General_Average_York-Antwerp_Rules_2016.aspx

By Xara Tsochlas

The effect of non-payment of hire

A highly anticipated judgment has been handed down by the Court of Appeal resolving **two conflicting first instance decisions** and generating considerable interest just as the trial judgments did.

In 2013, the Commercial Court in the **The Astra** [2013] EWHC 865 (Comm) held controversially that the obligation of charterers to make punctual payment of hire was a condition. Owners would therefore be entitled to withdraw the vessel, terminate the charter and claim a loss of bargain for the remaining period of the charter, in case payment of hire was delayed, even though only for a few minutes.

In 2015, the Commercial Court in Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd (**Spar v GCL**), declined to follow the decision in the ASTRA and resumed back to the approach that punctual payment of hire by the charterers was not a condition but an innominate term.

According to several views and legal approaches, the relevant legal framework was insufficient at that stage, both in relation to how to classify the term as to payment of hire in a time charterparty and in relation to the various tests formulated to determine whether non-contractual performance of the payment obligation by charterers was sufficiently serious to permit the owner to terminate the contract and claim damages. Many of the reported cases were in conflict with each other.

On Friday 7 October 2016 the **Court of Appeal** handed down its judgment in **Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS [2016] EWCA Civ 982**, dismissing the appeal of Grand China Logistics Holding (Group) Co Ltd ("GCL").

In brief, the underlying dispute concerned the non and/or late payment of hire under three long-term NYPE 1993 charterparties during the period April 2011 to September 2011 and a claim for damages for loss of bargain in respect of the substantial unexpired period on each of the charterparties.
The Court of Appeal has upheld the judgment of Popplewell J. at first instance by which Spar Shipping AS ("Spar") was awarded substantial damages in respect of (1) hire earned but not paid by a subsidiary of GCL known as Grand China Shipping Co Ltd ("GCS") and (2) damages for loss of bargain in relation to the three charterparties that had been renounced by GCS.

There were two issues before the Court of Appeal for decision:

1. The Condition Issue,
i.e. whether a charterer's failure to pay an instalment of hire punctually and in advance under a time charterparty is a breach of condition.
The Court of Appeal unanimously held that the ASTRA was "wrongly decided" on this issue and the answer to that question is "no" and that, without more, such a failure merely entitles the shipowner to withdraw the vessel from service in accordance with the withdrawal clause.

The Court of Appeal decision was based on the following reasoning:

The withdrawal clause:

The inclusion of an express right for the owners to withdraw the vessel does not indicate that the obligation to pay punctual hire is a condition, but only provides the owners with an option to cancel the charter should the charterers fail to pay hire on time.

Whether a clause is a condition:

As a matter of contractual construction, the hire payment clause will not be a condition unless there is express wording to that effect.

Time of payment:

In mercantile contracts, time is presumed to be of essence but such a presumption does not generally apply to the time of payment unless expressly stated. The hire payment clause in the charters did not make it clear that it was to be classified as a condition.

Anti-technicality clause:

The clause does no more and no less than stating reasons due to which payment of hire might fail to be on time and entitling charterers to a grace period to remedy this failure. It is devised to protect the charterers from the serious consequences of a withdrawal, as opposed to making time for payment of the essence.

Market reaction:

The general market view has been that the obligation to make timely payment of hire is not a condition, nor does the shipping market require it to be since the parties could have achieved it by appropriate express wordings if they so wish to.

2. The Renunciation Issue,

i.e. whether or not the conduct of the charterers on the facts of the case and applying the correct test in law amounted to a renunciation by GCS of the charterparties.

While accepting that punctual payment of hire is an innominate term, the Court of Appeal concluded that the charterers nevertheless renounced the charters by their repeated failure of punctual payment of hire, thus entitling the owners to claim loss of bargain.

The test for renunciation, which was not in dispute, is essentially similar to that for repudiation, namely whether the owners have been deprived substantially the whole benefit of what they are intended to receive as consideration in the contract, i.e. their entitlement to receive regular, periodical advance payment of hire so as to meet the expenses of rendering the services they have undertaken to provide under the charter.

A breach of the hire payment clause would not, absent express provision, entitle the owners to claim a loss of bargain, unless the breach is so substantial that it goes to the root of the charters.

Given the history of the charterers' repeated late payments, the amounts and delays involved and the absence of any concrete or reliable reassurance from the charterers as to their future payment, it was reasonable for the owners to conclude that they could have no expectation to receive future punctual hire payment in advance. The Court of Appeal concluded that the charterers' prospective non-performance and evinced intention not to pay hire punctually in the future went to the root of the charters, thus entitling the owners to claim loss of bargain damages.

The conclusion is that it is very much business as before when it comes to ship withdrawal cases. Having rejected The Astra and affirmed the judgment of Popplewell J. the Court of Appeal has confirmed that, despite what most owners would probably regard as the fundamental nature of the charterer's obligation to pay hire in full and on time, there is no automatic right to damages for loss of bargain where the charterers are in breach of the hire payment clause. In order to recover a loss of bargain, the owners must be able to prove renunciation by demonstrating that they have been deprived of substantially the whole benefit of the charters.

Owners should be aware of the fact that they will face a difficult legal and factual assessment before filing any claim for damages, if they withdraw. An owner wishing to be able to terminate for any failure to pay hire and claim damages in addition, will now have to contract on special terms to this effect.

A term in the relevant charterparty, should, therefore be included to the effect that the obligation to pay hire is a condition, as the one provided in the NYPE 2015 form.

By Pantelis Papalymperis

Lease accounting: The long-awaited FASB standard has arrived

On February 25, 2016, the Financial Accounting Standards Board ("FASB") issued its long-awaited revision to lease accounting under accounting principles generally accepted in the United States of America ("US GAAP"). There are elements of the new standard that could impact almost all entities to some extent, although lessees will likely see the most significant changes.
The International Accounting Standards Board ("IASB") issued its new IFRS lease accounting standard on January 13, 2016, with some significant points of divergence from US GAAP. Despite the differences, both Boards noted that their respective standards fulfil the key objectives of lessee recognition of lease-related assets and liabilities on the balance sheet and enhanced transparency.

What are the key provisions?

Lessee accounting model

Lessees will need to recognize a right-of-use asset and a lease liability for virtually all of their leases (other than leases that meet the definition of a short-term lease). The liability will be equal to the present value of lease payments. The asset will be based on the liability, subject to adjustment, such as for initial direct costs. For income statement purposes, the FASB retained a dual model, requiring leases to be classified as either operating or finance. Operating leases will result in straight-line expense (similar to current operating leases) while finance leases will result in a front-loaded expense pattern (similar to current capital leases). Classification will be based on criteria that are largely similar to those applied in current lease accounting, but without explicit bright lines.

Lessor accounting model

Lessor accounting is similar to the current model, but updated to align with certain changes to the lessee model (e.g., certain definitions, such as initial direct costs, have been updated) and the new revenue recognition standard. Similar to today, lessors will classify leases as operating, direct financing, or sales-type. Leveraged lease accounting has been eliminated, although grandfathered for existing arrangements.

Embedded leases

An arrangement contains an embedded lease if property, plant, or equipment is explicitly or implicitly identified and its use is controlled by the customer. This differs in certain respects from today's risks and rewards model and may result in the identification of fewer embedded leases compared to the current guidance.

Lease term, variable lease payment, discount rate, incentives

Lease accounting will continue to require significant judgments, including when making estimates related to the lease term, lease payments, and discount rate.

Similar to today, the term of the lease will include the non-cancellable lease term plus renewal periods that are reasonably certain of exercise by the lessee or within the control of the lessor.

Variable rent payments are generally excluded, except those based on an index or rate, which are included based on the index or rate at lease commencement. Subsequent changes to the index or rate and other variable payments will be treated similar to contingent rent today. When calculating present value, the applicable discount rate will be determined similar to existing leasing literature, except that lessors will be required to include deferred initial direct costs in their calculation of the rate implicit in the lease. For lessees, lease incentives will be included in the cash flows used to determine the lease liability.

Reassessment (excluding modifications)

In certain circumstances, the lessee is required to remeasure the lease payments. Remeasurement of the lease payment may be triggered by a reassessment of the lease term. The lease term is required to be reassessed when, for example, the lessee elects to exercise or not exercise an option contrary to initial expectation. Remeasurement is also required when, for example, the contingency associated with a variable lease payment is subsequently resolved such that the variable lease payment now meets the definition of a lease payment or when there is a change in the amounts probable of being paid by the lessee under a residual value guarantee.

When the lessee remeasures the lease payments, variable lease payments based on a rate or index will need to be remeasured.

Remeasurement of the lease payments requires a remeasurement of the lease liability. When remeasuring the lease liability, the lessee is required to use an updated discount rate, except in specified circumstances. A lessor will not be permitted to reassess its determination of lease term, variable rent, or discount rate.

The remeasurement to the lease liability results in an adjustment to the right-of-use asset until it is reduced to zero, after which any remaining adjustment is recorded in the income statement.

Sale-leaseback transactions

Existing sale-leaseback guidance, including guidance applicable to real estate, is replaced with a new model applicable to both lessees and lessors. A sale-leaseback transaction will qualify as a sale only if (1) it meets the sale guidance in the new revenue recognition standard, (2) the leaseback is not a finance lease or a sales-type lease, and (3) a repurchase option, if any, is priced at the asset's fair value at the time of exercise and the asset is not specialized. If the transaction fails sale treatment, the buyer and seller will reflect it as a financing.

Disclosures

Extensive quantitative and qualitative disclosures, including significant judgments made by management, will be required to provide greater insight into the extent of revenue and expense recognized and expected to be recognized from existing contracts.

Effective date and transition

The standard is effective for US GAAP public companies for fiscal years, and interim periods within those fiscal years, beginning after December 15, 2018. For private companies (i.e., those not meeting the FASB's definition of a public business entity), the standard is effective for fiscal years beginning after December 15, 2019 and interim periods beginning the following year. Early adoption is permitted. The new standard must be adopted using a modified retrospective transition, and provides for certain practical expedients. Transition will require application of the new guidance at the beginning of the earliest comparative period presented.

Why is this important?

Since lessees will be required to reflect virtually all leases on their balance sheet, they will need to ensure that they have an appropriate process to gather and report their leases. A first step is ensuring that their inventory of leases is complete and accurate. Leases may be embedded in service arrangements or provided alongside other goods or services. This process may take considerable time and effort, depending on the volume, complexity, availability of existing data and system capabilities, and level of decentralization within an organization. In addition to the

Transition to the new standard will have impacts beyond just financial reporting that should be considered when developing a transition strategy. As a result of changes to the balance sheet, transition may impact debt covenants, apportionment of income for state taxes, and lease versus buy decision making.

By Andrea Bohmanova Kelaidi

eIDAS and E-Signature: A Legal Perspective

The 2014 Regulation on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market1 ("eIDAS") comes into effect throughout the European Union ("EU") on 1 July 2016, replacing the 1999 Directive on electronic signatures.

Key highlights of the eIDAS Regulation :

eIDAS is much broader in scope than the Directive since in addition to signatures it also encompasses

- electronic identification,
- archive services,
- website authentication.

eIDAS defines the same three categories of e-signatures as did the Directive.

- Electronic signatures ("ES"),
- Advanced electronic signatures ("AES"),
- Qualified electronic signatures ("QES").

Under eIDAS, any of the three categories of e-signature can be legally effective. The difference between them is only what evidence it will take to reassure a court that the signature is genuine and intentionally applied to the particular document. Similar to the Directive, eIDAS does not affect the validity of existing signature arrangements within closed systems, and is silent on the question of public administration.

➢ Electronic Signatures ("ES")

The electronic signature must be:

1. Applied by the person associated with the signature.
2. Applied in a manner that demonstrates the intent of the signer.
3. Associated with the document or data the signer intended to sign.

➢ Advanced Electronic Signatures (AES)

This form of e-signature adds four additional requirements. It must:

1. Be uniquely linked to the signer.
2. Identify the signer.
3. Be under sole control of the signer.
4. Detect changes to the document or data after the application of the AES.

➢ Qualified Electronic Signatures (QES)

This is an advanced electronic signature that, in addition, must be:

1. Created using a QES creation device.
2. Supported by a qualified certificate

QES creation devices are largely the same as secure signature creation devices under the Directive, with an added requirement that the confidentiality of the electronic signature creation data is reasonably assured.

❖ **The legal effect of the different types of signatures, and their impact in the court**

Where the signature has legal effect to bind the signatory, lower risk will arise if a more formal mode of signature – AES or QES – is used, since the formalities of these signatures automatically capture much of the evidence necessary to assure a court of their authenticity .

- eIDAS has no impact on national legal requirements regarding what documents require signature to give them legal effect since this is a matter of a wide variety of laws.
- eIDAS does, however, override national laws on the admissibility of evidence on the specific point of admissibility of electronic signatures. Regardless of national rules of evidence in all other respects, under Article 25(1) a court cannot deny an e-signature admissibility of evidence in legal proceedings solely on the grounds that it is in electronic form or does not meet the criteria for QES.

❖ **Regulation of Trust Service Providers ("TSP")**

A key objective of eIDAS is to enable Trust Service Providers ("TSPs") of all kinds to offer cross-border services, including suppliers of certificates to support e-signatures, since eIDAS concerns a wider range of electronic services, including validation and preservation services for signatures. Consequently a legal and technical operational standards for all TSPs was necessary.

2 categories of TSPs: ordinary and qualified ("QTSP"). A QTSP is a TSP providing one or more qualified trust services, such as creation, verification and validation of qualified e-signatures.

- eIDAS imposes liability on TSPs for any damage caused intentionally or negligently to any person through the TSP's failure to comply with its obligations.

All TSPs must conform to appropriate security standards to prevent and minimize the impact of any security incident and inform stakeholders of the adverse effects of any incident.

Moreover QTSPs are subject to further requirements, including:

- Undergo regular audits
- Apply procedures appropriate under national law to tasks such as verifying identities
- Employ suitably qualified staff and use trustworthy systems both for processing and storing data
- Maintain liability insurance
- Keep proper records; and maintain an up-to-date termination plan to ensure continuity of service if the QTSP goes out of business
-

❖ **Format Standards**

Under eIDAS Article 27, the European Commission is empowered to establish additional technical standards and reference formats for AES. The European Telecommunications Standards Institution (ETSI) signature standards include:

- Cryptographic Message Syntax Advanced Electronic Signature (CAdES)
- XML Advanced Electronic Signature (XAdES)

Most recently, PDF Advanced Electronic Signature (PAdES)

❖ **Best legal practices**

eIDAS does harmonise the status of all documents in electronic form as admissible evidence:

- no court can refuse to admit a document solely on that basis. In addition, the legal recognition of electronic registered delivery services is advanced in that courts are prohibited from denying legal effect and admissibility to data sent or received using such a service solely on the grounds that the service is purely electronic in form.

Notably, the Regulation elevates qualified electronic registered delivery services beyond equivalence with public postal services to equate to transmission of materials by courier. A qualified electronic registered delivery service confers:

- The integrity of the data it transmits.
- Sending of the data by the identified sender and receipt by the identified addressee.
- Accuracy of the date and time of sending and receipt indicated by the service.

Compliance with the Regulation

eIDAS contains many different provisions for compliance, under eIDAS, an electronic signature in its broadest sense includes any data in electronic form which is attached to, or logically associated with, other data in electronic form and which is used by the signer to electronically sign.

By Isidoros Kollias