



BY BRIAN GLOVER,
DIRECTOR OF CLAIMS
(BARRISTER)
+44 (0) 20 7522 7417
Brian.Glover@ctcplc.com

Standard Bulletin

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SPECIAL EDITION - DEFENCE AND LEGAL

Welcome to this special edition of *Standard Bulletin*, which focuses exclusively on Defence Class issues.

Whilst P&I cover insures liabilities owed to third parties, as well as the legal costs of defending those claims, Defence cover insures the member for legal and other costs in pursuing and resisting commercial claims, relating to entered ships. Each year, the Defence Class recovers several million dollars on behalf of its members and successfully defends members against a wide range of unmeritorious claims.

Risks covered include disputes relating to freight, hire, demurrage, detention, loss of use, breach of charterparty, property damage, negligent repairs and supply of bunkers. The Club will support members in disputes with agents, stevedores, chandlers and underwriters. Also, by special agreement, cover can be extended to include newbuildings.

It should be stressed that Defence cover is discretionary, on a case-by-case basis. This will involve an examination of the merits and quantum of the claims and the likelihood of achieving a successful outcome. The Club will want to ensure that the actions proposed are appropriate, proportionate and financially viable.

The majority of Defence claims are subject to English law and the Club's Managers employ a large number of lawyers qualified in English law, as well as a number qualified in other jurisdictions.

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Charles Taylor & Co. Limited
International House
1 St. Katharine's Way
London, E1W 1UT
England

Telephone: +44 (0) 20 7488 3494

Fax: +44 (0) 20 7481 9545

Emergency mobile:

+44 (0) 7932 113573

E-mail: p&l.london@ctcplc.com

www.standard-club.com

Please send any comments
to the Editor –
Edward.Dempster@ctcplc.com
Telephone: +44 (0) 20 7522 7559

The information and commentary herein are not intended to amount to legal or technical advice to any person in general or about a specific case. Every effort is made to make them accurate and up to date. However, no responsibility is assumed for their accuracy nor for the views or opinions expressed, nor for any consequence of or reliance on them. You are advised to seek specific legal or technical advice from your usual advisers about any specific matter.

Defence/Legal Special Issue

- SUING THE PORT
- OFF-HIRE & DETENTION
- SPEED & PERFORMANCE
- CORRECT MEASURE OF DAMAGES
- RECOVERING YOUR COSTS
- US - RULE B ATTACHMENTS
- CHINESE MARITIME LAW

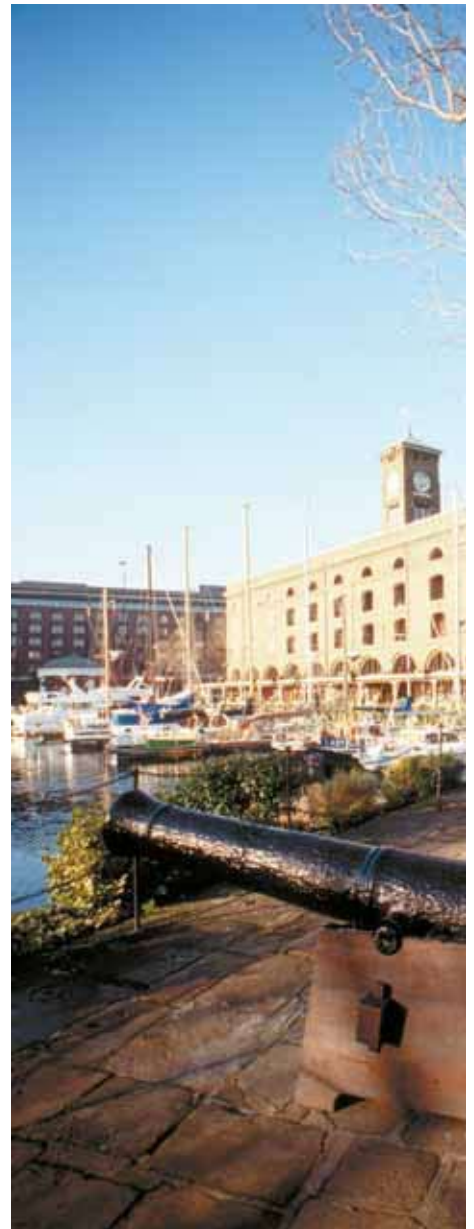


BY JOHN WHITE-THOMSON, SYNDICATE DIRECTOR (SOLICITOR)
+44 020 7522 7479
John.White-Thomson@ctcplc.com

Club Support for Members' Defence Claims

Commercial disputes in the shipping industry can be lengthy, complex and costly; when something goes wrong or a relationship breaks down, it can leave a member frustrated and out of pocket. For an owner then to have to pursue a charterer for unpaid hire or seek a recovery from stevedores for damage to cargo is at best an irritation and at worst an activity that takes up an enormous amount of management time and effort. In such situations, it can be a great comfort to a member (and prove invaluable in negotiations with the other side) if the matter is covered by, and handled in conjunction with, the Standard Defence Club.

Our philosophy is simple: to support the reasonable legal costs of a member who has a valid claim or who is facing an invalid claim. This support can be given in a number of ways: at the outset, it will take the form of a review of the documentation by one of the dedicated Defence claim handlers at the Club. All of our specialist Defence handlers are either solicitors or barristers with a great deal of experience both at the Club and in private practice. If the case involves a foreign law element, the Defence handler can utilise the Charles Taylor overseas office network and obtain relevant advice at short notice.



THE MAJORITY OF DEFENCE CASES ARE SUBJECT TO ENGLISH LAW, WITH THE FORUM BEING LONDON ARBITRATION



(Continued from p1)

Once this initial review has taken place, the Club will be in a position to comment on the merits of the claim, confirm the cover position and discuss future strategy with the member. If the decision is that the Club should continue to handle the claim 'in-house', we would then continue negotiations with the other side. The lawyers working at the Club are able to draft pleadings and handle arbitrations themselves, without having to use external legal resources. If, on the other hand, the decision is that external solicitors need to be instructed, the Club will discuss with the member who would be an appropriate firm/individual to handle the case and liaise with that person very closely as the matter progresses. Once the lawyer has provided an initial opinion on the merits, the Club would then determine, in conjunction with the member, the most appropriate future strategy.

Although every case is different and needs to be analysed and treated as such, there are certain questions and issues that arise each time.

The most important are:

- If the member is the claimant, does the defendant have assets, and could any judgment be enforced?
- If the member is the defendant, can we obtain security for costs?
- In all cases, would mediation be helpful?

The Club believes that commercial settlements that maintain the working relationship between the parties are usually preferable to court judgments, which can often destroy a relationship.

If, however, there is no option other than to litigate to a hearing, then (so long as the merits are favourable and the steps to be taken are proportionate to the quantum and costs involved) so be it.

As Defence cover is discretionary, it is important for all concerned that a decision on the extent of Club support is taken as soon as practically possible. The Standard Club's Defence Class Rules, in common with those of other clubs, provide that costs and expenses covered by the Club are those authorised by the Board in relation to the claim. The Rules also provide that the Board has a general discretion as to support for claims and can take into account the merits and quantum of the particular claim. In a rare number of cases, the Board would also have to bear in mind the interests of the other members of the Club and the impact the claim could have on the overall financial position of the Club. As a result, the Board keeps a close eye on claims as they develop to ensure that continuing support remains appropriate. However, in straightforward cases, the Managers, on behalf of the Board, are able to indicate the extent to which they believe that the claim is deserving of support and the action plan which they believe is appropriate to be adopted in pursuing or defending the claim. This approach means that the Club can move very quickly on cover issues and confirm ongoing support without delay. Members, therefore, usually know right from the start where they stand and can plan the handling of a claim safe in the knowledge that they will have the expertise of the Club at their disposal, although of course the Managers will keep the conduct of the case under constant review to ensure that actions proposed remain appropriate and proportionate as the case develops.



BY JAMES BEAN, CLAIMS EXECUTIVE (SOLICITOR)
+44 (0)20 7522 6459
James.Bean@ctcplc.com

An Alternative Remedy for a Breach of Safe Port Warranty

The CHARLOTTE C (in the English Admiralty Court)

This case demonstrates the standard of care owed by ports and is a useful reminder of the alternative remedy that owners may have to bringing an unsafe berth/port claim against charterers.

During a call at Bird Port, Newport, Wales alongside at a NAABSA berth ('not always afloat but safely aground') where it was expected the ship would safely take the ground, the *CHARLOTTE C* suffered damage to her hull. Because of the damage, the shipowner suffered a number of losses, including loss of freight and hire.

There was no dispute that the operator of the NAABSA berth owed a duty of care to ensure that procedures were in place to enable those using the

berth could do so safely. Steel coils were regularly loaded and discharged at the port. The admiralty judge held that, on a balance of probabilities, the bottom damage was caused by the ship resting on a steel coil. As a result, the port operator was found liable for failing in its duties to keep the berth free of obstructions and to carry out regular inspections.

A charterer, who has given a warranty in respect of the safety of a berth, would invariably be found liable to the shipowner for this type of incident. Where the charterer becomes insolvent or where there is no warranty as to safety in the charter, the *CHARLOTTE C* shows how the English law of negligence can provide the shipowner with alternative means to recover damages from the port owner/operator. Furthermore, a charterer who is found to be in breach of a safe-port warranty could, in turn, have a right to recover an indemnity in negligence in the same way.

The possibility to recover will vary widely, depending on both the jurisdiction of the claim and whether the berthing contract between owner and operator contains exclusion clauses in the port owner/operator's favour. Nevertheless, the decision in the *CHARLOTTE C* should be borne in mind if an alternative remedy for breach of safe port warranty is required.



BY SIMON WOLSEY, PARTNER, BENTLEYS, STOKES & LOWLESS,
SOLICITORS, LONDON
+44 (0)20 7782 0990
SimonW@bentleys.co.uk



Off-Hire and Detention

The DORIC PRIDE (in the English Court of Appeal)

In this important case, the Court of Appeal recently ruled on who should bear the costs of detention in the US under the charterparty.

Background

The ship was chartered under a long-term NYPE contract to owners and subchartered on back-to-back terms to charterers for a trip from the US Gulf to South Korea, 65 to 75 days without guarantee. Charterers had then subcontracted on voyage terms.

Orders were given to load the ship at New Orleans. On arrival, she was designated a high interest vessel (HIV) and ordered to wait pending coastguard (USCG) inspection. The court accepted that, following the events of 9/11, a security regime had been put in place in the US and that the USCG used HIV status to describe a commercial ship intending to enter a US port as one that might pose a high relative risk to that port. The inspection was severely delayed due to a collision having closed the Mississippi, which diverted USCG resources, and she was only inspected and cleared six days later.

Charterparty Terms

Was the ship off hire under clause 85?:

Capture, seizure, arrest

Should the vessel be captured or seized or detained or arrested by any authority during the currency of this charterparty, the payment of hire shall be suspended until the time of her release ... unless such capture or seizure or detention or arrest is occasioned by any personal act of omission or default of the charterers or their agents or by reason of cargo carried or calling port of trading under this charter.

Based upon the *JALAGOURI* [2000] the owners accepted for the appeal that the ship had been 'detained' by an authority. The main dispute concerned the proviso to the first part of clause 85 and whether the detention had been caused by *calling port of trading under this charter*.

Commercial Court's Decision

The judge held the proviso could apply to a detention at New Orleans as long as the reason related specifically to that port and the exercise of the charterers' trading discretion to call there, as opposed to other ports in the US Gulf. He accepted that New Orleans is a strict port for the application of HIV criteria, but that a reason for detention at any US port was the first-time caller issue, albeit this almost guaranteed detention at New Orleans.

The judge had approached the proviso on the basis that this was dependent upon the exercise of charterers' trading discretion within the trading range agreed and that as the risk was common to US Gulf ports, it was not therefore caused by 'calling port of trading'.

The judge proceeded as if the charter was similar to a voyage charter and he analysed clause 85 in a manner consistent with cases on implied safe port/berth warranties.

The ship was held to be off-hire under this contract, but a different conclusion was possible under the head charter despite an identical clause 85 due to that broader trading range.

Owners' Points of Appeal

Owners appealed and argued that risks of detention arising under the HIV policy, which were accepted as connected with safety of the port (and not through 'fault' of owners), were risks arising as a result of 'calling ports of trading'. Owners contended it was neither appropriate, when interpreting an express clause, to apply the test for implied warranties of safety (rather the analogy was with express safety clauses) nor to treat a trip-time charter as similar to a voyage charter.

Owners also sought to rely on London Arbitration *2/04 LMLN 635* where the costs of employing security guards at New Orleans to monitor Pakistani crew, ordered under the HIV policy, were held to be normal port expenses for charterers under a time charter.

Court of Appeal's Judgment

The Court of Appeal accepted that the judge erred in treating the charter as essentially a voyage transaction and in construing clause 85 by reference to the authorities on implied safe port warranties. The court accepted that the fact that the owners had agreed to go to New Orleans did not prevent them relying on the proviso if the cause of the detention could properly be said to have been charterers' requirement for the ship to go to that port.

The Court of Appeal went on to hold that, having ascertained the underlying cause of the detention (first-time caller), it was then a matter of impression as to whom the risk was allocated. It held, based upon the overall structure of the charterparty, that the type of risk was on the owners' side of the line and equated it to the owners' risk of not having valid certificates in place to proceed through the Panama or Suez Canals (there were of course no certificates an owner could obtain here). Accordingly, it upheld the judge's decision.

The Court of Appeal did however indicate that if it had been called upon to form a view, it may have reached the same conclusion that it was also an owner's risk in the back-to-back contracts up the line.

The court declined to comment further on *2/04 LMLN 635*, but there is perhaps a contradiction that a ship may be off-hire under a standard detention clause awaiting HIV inspection, but that the additional costs of complying with criteria imposed by the HIV regime are normal port costs for charterers' account. **The answer might be to clause your time charters for the express consequences of US calls.**



GIVEN THE INCREASED FREQUENCY OF USCG INSPECTIONS, IT IS RECOMMENDED THAT MEMBERS SHOULD ENSURE THAT THEIR CHARTERPARTIES EXPRESSLY DEAL WITH THE COST OF DELAYS IN US WATERS (SEE PREVIOUS PAGE)



BY STUART KEMPSON, CLAIMS EXECUTIVE (SOLICITOR)
+44 (0)20 7522 7484
Stuart.Kempson@ctcplc.com

Speed & Performance: Good Records Pay Dividends

In a recent London arbitration decision, the arbitrator found in favour of the member in a speed and performance dispute with charterers. **The question for the arbitrator was whether data from the ship's log books or independent weather reports relied on by charterers should be preferred in determining periods of good weather, as defined by the charterparty.**

The relevant provision in the time charterparty was as follows:

Evidence of weather conditions to be taken from the vessel's deck logs and independent weather bureau reports. In the event of consistent discrepancy between the deck and independent bureau reports, then an independent weather report to be taken as ruling.

The principle under English law is to assess performance on good weather days only and to apply this across the entire voyage inclusive of good and bad weather periods. Both parties relied on weather-related performance reports supplied by two firms, which they had each instructed. The member's report relied on weather data recorded exclusively by the ship; whereas the charterers' report assumed that the weather reported by the master was correct unless it was found to be incompatible with data reported by other ships in the immediate vicinity as well as extensive satellite observations.

There were discrepancies between the weather conditions on several days contained in each party's weather reports, and the reference boiled down to a battle between the two experts. The arbitrator preferred the

ship's records and consequently found in favour of the member. There have been decisions in the past where tribunals have preferred independent weather records, but in this case, it is thought that, because the ship's records were so well completed, this was a factor in persuading the arbitrator that the ship's data was accurate and that the charterers' independent weather report figures should be rejected.

This case is a helpful reminder to members of the need for master and crew to be meticulous about completing log book entries, particularly on good weather days when any speed/performance warranties would be applicable, as it will be those days from which the ship's performance will be measured.



PHOTO COURTESY OF THE UK HYDROGRAPHIC OFFICE



BY SHARMINI MURUGASON, CLAIMS EXECUTIVE (BARRISTER)
+44 (0)207 522 7434
Sharmini.Murugason@ctcplc.com

Damages Recoverable due to Repudiatory Breach of Charter

Golden Strait Corporation –v– Nippon Yusen Kubishika Kaisha (*The GOLDEN VICTORY*)

The English Court of Appeal has recently held that when quantifying damages for charterers' repudiatory breach of charterparty, the court could take into account an event occurring after the termination, even if the occurrence of that event was uncertain at the time of termination. The court held that damages should be restricted to the owners' actual losses and not the so-called 'market substitute rule' for the remainder of the full term of the charter.

Background

By a charterparty dated 17 July 1998, the owners chartered the *GOLDEN VICTORY* to charterers for a period of seven years with one month more or less at charterers' option. The earliest date on which the ship could be redelivered was 6 December 2005.

Clause 33 of the charterparty (the war clause) provided that:

If war or hostilities break out between any two or more of the following countries: USA, former USSR, PRC, UK, Netherlands, Liberia, Japan, Iran, Kuwait, Saudi Arabia, Qatar, Iraq, both owners and charterers shall have the right to cancel this charter...

On 4 December 2001, charterers redelivered the ship to owners who accepted this as a repudiatory breach terminating the charter. The charter had a period of just less than four years to run. Subsequently, on 20 March 2003, the second Gulf War began, some 14 months after the repudiation and about 32 months before the period when the charterparty would have expired. At the time of repudiation, there was an available market for chartering substitute ships.

Owners' Arguments

The claimant shipowners argued that there was a long-established rule for assessment of damages in a situation where there was an accepted repudiation of a long-term charterparty and where there was an available market at the date of repudiation. That assessment was based on the difference between the contract rate and the market rate for chartering a substitute ship for the balance of the charter period as of the date of repudiation (market substitute rule). The owners submitted there were powerful considerations of commercial certainty in favour of adhering to this rule: the rationale being that the innocent party's duty of mitigation required him, at the time of the breach, to go out into the market to obtain a substitute charter for the balance of the charter period. This would provide certainty in that damages could be ascertainable at a fixed date and both sides (the innocent party and the guilty) would know what they would respectively pay and receive, that amount not being subject to fluctuation and radical change as events develop. The guilty party would not be able to delay in the hope of some event reducing its liability.

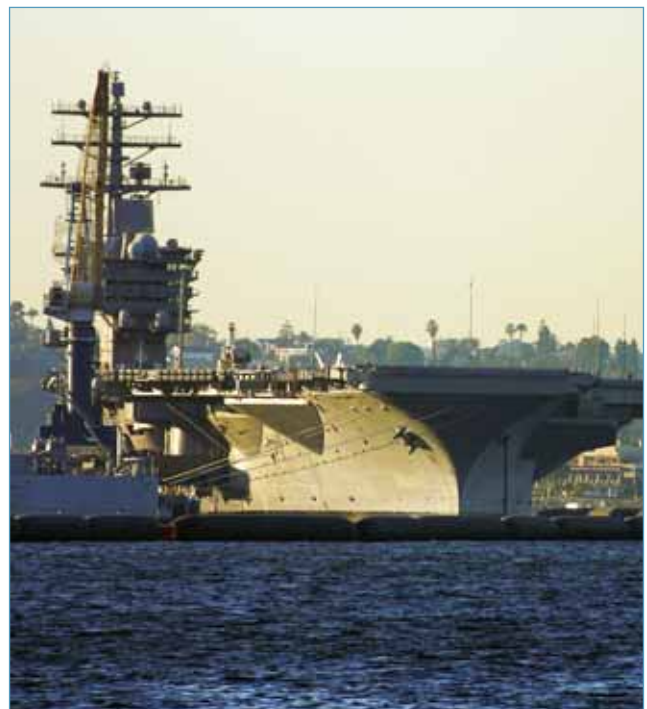
Charterers' Arguments

The defendant charterers submitted that the market substitute rule was no more than a basic comparison of rates for the balance of the charter period. If it became clear that the original charter would not run its full term, then account should be taken of that fact. Certainty and finality should not be allowed to prevail over what they saw as an injustice, namely that owners be compensated for a loss they did not suffer.

Court of Appeal's Ruling

The Court of Appeal found in the charterers' favour. They accepted that certainty, finality and ease of settlement were important general considerations but found that there was an element of uncertainty in this charterparty resulting from clause 33 (the war clause), which meant that the owners would never have absolute confidence that the charter would run its full seven-year period. The Court of Appeal held that the start of the second Gulf War entitled charterers to cancel the charterparty, thereby bringing the period of the charter to an earlier end. Whilst the market substitute rule was a starting point for the calculation of damages, **if it became apparent that the original charter would not have run the balance of its period then this contingency should be factored into the assessment of damages.** Damages should reflect the actual loss that owners suffer and can be calculated at whatever date of assessment and not necessarily the date of the repudiation.

We understand that the owners are appealing this decision to the House of Lords.



THE BENEFIT OF HINDSIGHT: THE COURT RESTRICTED DAMAGES TO THE PERIOD UP TO THE OUTBREAK OF THE SECOND GULF WAR



Recoverability of Members' Costs

Litigation is an increasingly costly business. That is why the Club always strives to help its members to avoid litigation wherever possible, either by directly assisting in amicable negotiations or by promoting mediation.

There will be occasions, however, where litigation is unavoidable. In these situations, the Club's primary objective is to ensure that the member makes a successful recovery of its claim, but it is important both to the Club and the member that incurred legal costs and expenses are recovered from the losing party. This article discusses the recovery of legal costs and expenses under English law.

When are Costs Recoverable?

The general rule is that an unsuccessful party will be ordered to pay the costs of the successful party, but in practice, it is unlikely that a successful party will recover all of its costs. The court has an overriding discretion as to whether costs are payable and how much of those costs will be recoverable. In deciding what order to make in respect of costs, the court will have regard to all the circumstances of the case including:

- the conduct of the parties;
- whether a party has succeeded on part of its case, and;
- any payment into court or admissible settlement offer made by a party which is drawn to the court's attention for the purpose of protecting a party's position on costs.

The court will pay particular attention to the conduct of the parties when considering an order for costs. This will include:

- the conduct of the parties before and during the proceedings;
- whether a party was reasonable in pursuing or contesting a particular issue;
- the manner in which a party pursued or defended the case or a particular issue;
- whether a claimant exaggerated his claim.

Subject to the above, the court may order that the party must pay a proportion of the other party's costs, costs from or until a certain date, costs incurred before proceedings began, or costs relating to only a distinct part of the proceedings.

What Types of Costs are Recoverable?

A successful party will be entitled to recover its legal costs, experts' fees, court or arbitrator's fees.

How are Recoverable Costs Assessed?

The court will disallow costs that are unreasonably incurred or disproportionate to the amount in dispute. Factors include:

- the conduct of the parties before and during proceedings;
- efforts made by the parties to try to resolve the dispute;
- the importance of the dispute to the parties;
- the complexity of the dispute.

Arguments as to how much is recoverable are typically over solicitors' hourly rates, duplication of time, amount of time spent on a case, and whether the costs claimed are relevant to the particular issue in dispute.

Settlement Offers

Under court procedures, if a claimant tenders a formal settlement offer to the defendant, which is declined and (subsequently) the claimant does better at trial than he proposed in his offer, then the court has a discretion to award indemnity costs from the date when the offer expired. The assessment will be made on the basis that where there is any doubt that the costs were unreasonably incurred or unreasonable in amount, then this will be resolved in favour of the recovering party. Interest can be awarded on both costs and damage at up to 10% above the base rate from the same date.

Recovery of Costs in Arbitration

Like court litigation, arbitration costs will normally follow the event subject to the discretion of the arbitrator. An arbitrator will determine which costs are recoverable based on the tests of reasonableness and proportionality. Factors taken into consideration by an arbitrator are in general similar to those used by the courts. If there is any doubt as to the reasonableness of the arbitrator's decision, the parties can apply to the court to determine what are reasonable costs.

Security for Costs

Obtaining security for the principal claim will be of paramount importance, but security for costs should not be overlooked either.

A court can order security for costs be given if the claimant is resident outside the EU or has taken steps in relation to his assets that will make it difficult to enforce an order for costs against him. Where a defendant brings a counter-claim, a claimant will be entitled to security for his costs in defending the counter-claim, subject to the same conditions.

The Arbitration Act 1996 places the duty in dealing with applications for security for costs on the arbitrator, subject to the prior agreement of the parties. An arbitrator will be guided by the general principles of arbitration, namely to obtain the fair resolution of disputes without unnecessary delay or expense. In practice, an arbitrator will have regard to the same considerations as the court.

Conclusion

Recovery of costs is not solely dependent upon success in court or arbitration. Consideration is also given by the court to factors including the conduct of the parties before and during the proceedings. Arbitrators apply a similar philosophy when awarding costs.

To help facilitate the recovery of costs, members are advised not to withhold from an opponent any information relevant to the case, to participate meaningfully in pre-action negotiations and to avoid bringing claims that are unsupported or unlikely to succeed. **Members are also reminded to consider the making of formal settlement offers to protect their position on costs in appropriate circumstances.**



BY LEROY LAMBERT, PARTNER, HEALY & BAILLIE LLP, NEW YORK
+1 212 943 3980
llambert@healy.com



Obtaining Prejudgment Security in the US: It's Easy as A, B, C... EFT

On any given day, some three trillion dollars' worth of dollar-denominated 'electronic funds transfers' (EFTs) pass through New York banks on their way to and from points around the world. Your company is likely to be making or receiving such transfers every day. As EFTs pass through New York, are they property of one of your maritime debtors that you can attach to secure debts owed to your company? Are they property that can be attached by one of your company's maritime creditors?

Under recent court decisions in New York, the answer is 'yes' if certain conditions are met. If you have a maritime claim and if your debtor cannot be 'found' in New York, you have the right, in the first instance, to obtain an order from a federal judge in New York directing any bank in New York to seize any EFTs, in the name of your debtor, that pass through the bank, whether the EFT is 'outbound' from the debtor or 'inbound' to the debtor. Equally, of course, your creditors have the right to such an order if your company cannot be 'found' in New York.

This procedure is based on Rule B of the Supplemental Rules of the Rules of Federal Procedure for Certain Admiralty and Maritime Claims. The attachment procedures of Rule B are as old as maritime law in this country.

In order to obtain the attachment in the first instance, the creditor must show that the defendant debtor is not doing business in Manhattan and has no agent or person here upon whom service can be made. **Once such a showing is made, the court issues an order directing that the defendant's property in Manhattan be seized and held as security pending the resolution of the claim on the merits, even if the merits are being resolved in a foreign forum by arbitration or litigation. Any funds attached here remain frozen pending the outcome of the foreign proceedings.**

In order to be entitled to a maritime attachment under Rule B, the claim must also be a 'maritime' claim. With respect to contracts, claims for breach of a charterparty, an ocean bill of lading, and a passenger ticket on a cruise ship are maritime claims for purposes of Rule B. Under US law, maritime claims do not include claims arising out of the breach of a contract to build or to sell a ship. Breach of a guarantee to perform a charterparty is a maritime claim, while breach of a guarantee to pay amounts due under a charterparty is not. These are the types of claims about which we are typically asked in connection with a Rule B attachment, but there are of course many other types of 'maritime' claims that will support a maritime attachment under Rule B.

The courts breathed new life into Rule B by holding that it could be applied to EFTs passing through intermediary banks in New York. The debtor does not need to have an account at the bank. The bank does not have to be the source, or the destination, of the EFT. It suffices that the EFT is in the possession of the bank at the time the order is served on the bank.

Rule B is a powerful procedure in the context of EFTs because the attachment order is obtained and served on the banks without notice to the other side and also because the attachment occurs prejudgment, that is, before there has been any adjudication of the liability or its amount. Time and again in maritime disputes, a case is truly won or lost for the client by the obtaining, or the failing to obtain, prejudgment security.

There have been numerous decisions in the past two years in which the courts have applied Rule B in specific cases involving EFTs. The case law remains in flux on many technical points. On some points, district court decisions have reached opposite results. Nevertheless, there is no doubt that the merits of many cases have been resolved sooner, and more cost-effectively, than they would have been but for the Rule B attachment of an EFT in New York. **At least one district court case has held that Rule B can be used to obtain security for a foreign arbitration award after it has been issued.** The award represents a determination of the liability and the amount of the debt. If the defendant still does not appear and stipulate that the attached amount may be turned over to the claimant, the claimant must apply for a default judgment from the court in New York. Obtaining a default judgment may take time in some cases, depending on the location of the defendant.

As a result, Rule B attachments in New York have become, and promise to remain, an important procedural remedy that all persons in shipping should be aware of, whether as a claimant or a defendant.





BY MARK SACHS, PARTNER, THOMAS COOPER & STIBBARD,
SOLICITORS, LONDON
+44 (0)207 481 8851
Mark.Sachs@tcssl.com



Some New Teeth to Enforcement and Obtaining Security in China

China's maritime courts have been in place since the late 1980s and the *China Maritime Code*, adopted in 1993, gives some flesh to the bones of substantive Chinese maritime law. However, the scope of judges' power to make orders, other than for damages, has been limited or unclear. Indeed, enforcement of judgments generally in China has been patchy, particularly when the enforcing party is foreign or even from another part of China. This has to do with the limited independence and consequent lack of prestige that Chinese courts have so far enjoyed in China and the lack of specific enforcement mechanisms. Of course, China is undertaking a monumental task in attempting to create a modern legal system from the ground up, and 20 years is a very short time to instil rule of law in a society previously governed by rule of man.

Ship Arrest

One exception in the maritime law area has been arrest of ships. China has had specific regulations that allow for arrest of ships since the mid-1980s and, previously, Chinese harbour masters simply withheld sailing clearance until claims were dealt with (a practice that unfortunately continues today). Foreign shipowners (and their underwriters) who have had claims in China know only too well that there is an efficient system for arrest and obtaining security for claims that makes enforcement virtually automatic as against them. However, there has not been a level playing field when it comes to foreign maritime claimants attempting to enforce claims against Chinese parties.

Enforcement of Foreign Awards

One area that has caused particular difficulty is the enforcement of foreign arbitration awards. Despite China being a signatory to the New York Convention on the Reciprocal Enforcement of Arbitral Awards 1958 (the 'NY Convention'), the enforcement of awards in China has been fraught. Large awards have gone unenforced, or by the time they have wound their way through lower courts, assets have been dissipated. The Supreme People's Court has tried to address this problem by directing that any lower court ruling not to enforce NY Convention awards must receive Supreme Court approval. Major problems remain, particularly as the general mechanisms for enforcement of judgments remain weak.

With the adoption of the Maritime Procedure Law (the 'MPL') in 2001, some of the balance is being redressed. The MPL gives Chinese maritime courts broad powers to issue injunctions (freezing orders). These are being used effectively to obtain security in a variety of maritime claims by seizure of bank accounts and other assets. In particular, it is proving useful in obtaining security from Chinese parties in charterparty claims.

The law allows a freezing order to be issued even when the dispute is governed by an arbitration clause and the law of another jurisdiction. It is now therefore possible to obtain security prior to, or during, arbitration proceedings from the Chinese courts and to continue with the arbitration according to the contract. Security, in the form of a bank guarantee, avoids the need to rely on post-judgment

enforcement procedures. Accordingly, the difficulty in China with enforcing foreign arbitration awards can to some extent be addressed by seeking security under the MPL.

There are barriers to obtaining a freezing order. Chief amongst these is that counter-security is required. This can be substantial and up to 50% of the claim. Basic claim documents need to be provided, and there is the problem that foreign documents for use in Chinese courts must be notarised and then legalised (apostilled) by the Chinese Embassy or Consulate where the documents originate. However, those with claims against Chinese parties should give serious consideration to whether the MPL can assist them.

Time is of the Essence

Having raised the issue of enforcement of foreign arbitration awards in China, a major health warning needs to be given: **under China's Civil Procedure Law, there is a very short time period - six months where both parties are business organisations and one year where one party is an individual - within which enforcement proceedings must be brought.** Accordingly, parties who do wish to enforce arbitration awards in China must make application to the Chinese courts within a very short period of time after having obtained an award.

