Standard Bulletin

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Bunkers Convention – Certification requirements and issuance of Blue Cards and State certificates

In the last edition of the Bulletin, we reported that the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (the "Bunkers Convention") has now been ratified by the required number of states, with the requisite combined gross tonnage, and will enter into force in states that are party to the Convention (State Parties) on 21 November 2008. Registered owners of any seagoing vessel and seaborne craft over 1,000 gross tons, of any type whatsoever, and registered in a State Party or entering or leaving a port in the territory of a State Party, will be required to maintain insurance that meets the requirements of the Convention and to obtain a certificate issued by a State Party attesting that such insurance is in force.

The Club will issue Blue Cards under the Bunkers Convention to enable State Parties to issue certificates. Due to the number of ships that will require Bunker Blue Cards, members should start the application process for a certificate as soon as possible. Members have recently been contacted by the Club for the information that we require to issue a Bunker Blue Card, and we urge members to provide the required information without delay. We have already started to issue the Blue Cards to members.

Ships registered in a State that has ratified the Convention need only obtain a certificate from that State, and the Club will provide a Blue Card addressed to that State. Ships registered in States that have not ratified the Convention will need to obtain a certificate from another State Party to the Convention; since Blue Cards are addressed to the authority that will issue the certificate, members who require Blue Cards for ships that are registered in non-Convention states will need to advise the Club which Convention State will issue the certificate before a Blue Card can be provided.

Discussions with State Parties would suggest that the majority are prepared to issue certificates to such ships if calling at a port in their territory or arriving at or leaving an offshore facility in their territorial waters after the entry into force date of the Convention. Alternatively, in the event that this is not possible, certificates for ships registered in non-State Parties can now be obtained from the Liberian, UK or Cypriot authorities. In addition, a number of Convention States, including Germany, have already indicated that they will issue certificates for ships owned by companies which are physically based in or have an economic link to the jurisdiction but are flagged elsewhere.

States that are party to the Convention are:

Bahamas, Bulgaria, Croatia, Cyprus, Estonia, Germany, Greece, Hungary, Jamaica, Latvia, Lithuania, Luxembourg, Norway, Poland, Samoa, Sierra Leone, Singapore, Slovenia, Spain, Tonga and the UK. The Convention has now been ratified by Liberia, the Marshall Islands and Denmark, where it will also enter into force on 21 November 2008. Panama and Korea have both indicated that they will ratify the Convention in the very near future.

Further details about these arrangements, and about a revised Pollution Charterparty Clause to reflect the Bunkers Convention, can be found in our circular dated 29 August 2008

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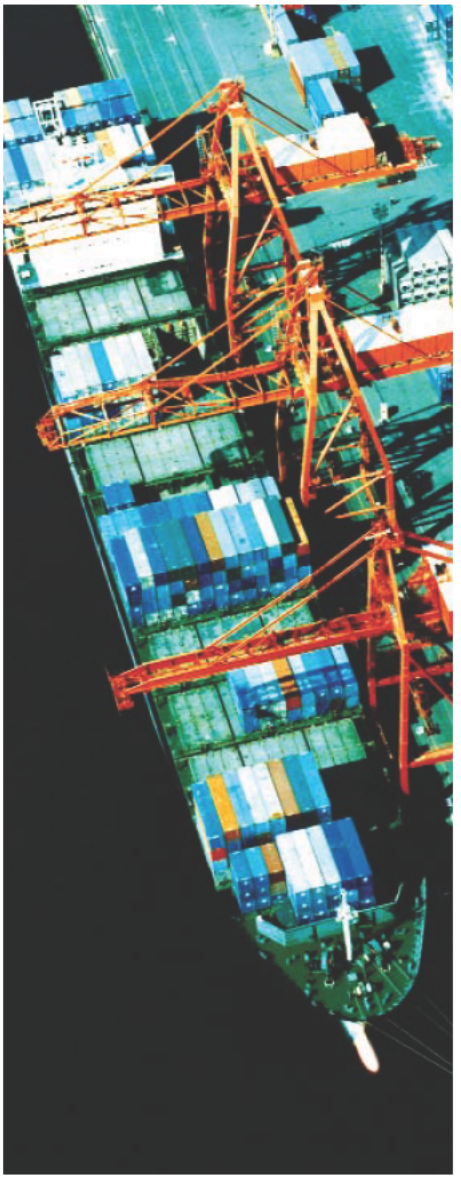

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Late Delivery: House of Lords – The Achilleas "Overruled"

In a decision that has surprised many but vindicated the dissenting view of the original arbitrator, the House of Lords has overturned the previous decisions in *The Achilleas*, which had exposed charterers to potentially unlimited damages for loss of a subsequent fixture following a late redelivery. The Court of Appeal decision was reported in the *Standard Bulletin* in June 2007 (www.standard-club.com/pdf/StandardBulletin/StandardBulletin-Jun07.pdf)

The changing tides of law

The accepted and commercially recognised position under English law prior to the arbitration, High Court and Court of Appeal decisions in *The Achilleas* was that the obligation upon a charterer to redeliver by a given date was absolute (unless the reason why the date was missed was due to some default on the part of the owner) and that where a charterer was in default of this obligation, the damages recoverable would be calculated by taking the market rate as against the charter rate for the period of the overrun. The view of the earlier tribunals was that there was nothing in the previous reported decisions to preclude an owner from a right to claim damages for loss of a subsequent fixture, not least as it would have been known to a charterer that a vessel would be engaged in a subsequent fixture following redelivery and that a failure to meet the delivery date could expose owners to loss.

The decision of Mr Justice Christopher Clarke in the High Court upholding the previous arbitration decision was ground-breaking and seen by many as one of the most significant legal decisions in relation to contract law and damages for some considerable time. This position was supported by Lord Justice Rix in the Court of Appeal. As a result, charterers became exposed to significant damage claims where they failed to meet a redelivery date. Indeed, there was a general increase in the number of claims brought by owners in such circumstances. Charterers were therefore left in the very difficult position of either having to ensure that on no account did they miss the redelivery date, or else trying to build into a charterparty a limitation provision restricting damages to any market rate difference for the period of the overrun.

The House of Lords to the rescue

In what some consider to be an unsatisfactory and unclear judgement, the House of Lords has effectively supported the view of the original arbitrator Christopher Moss by saying that while it was perfectly reasonable to say that a charterer would have within contemplation the fact that a vessel would most likely be subsequently engaged following redelivery, the charterer could have no idea as to the duration of such subsequent fixture or its terms.

Lord Hoffman formed the view that the Courts should not render a judgement contrary to the standard commercial understanding in the market place: namely, that damages for late redelivery should be restricted to the difference between market rate and the charter rate for the period of the overrun. This is not the first time that the House of Lords has taken such a "commercial" approach preferring to support market practice rather than coming to a legalistic conclusion (see *The JORDAN* II [2004) UK HL 49]).

However, what is slightly unsatisfactory about the judgement is that the Law Lords arrived at their conclusions by different routes. Lords Hoffman and Hope based their decision on the responsibility that had been assumed by the contracting parties. Accordingly, while charterers should be aware that charter rates were subject to market variation and that an owner may suffer a loss as a result of late redelivery, this was not a risk for which charterers had assumed responsibility. The owners could have rejected the final orders if they had been aware that there would be an overrun. It was owners that assumed this sort of risk.

Lord Rodger and Baroness Hale took a different route by looking at what was in the contemplation of the parties. The normal mitigation route that would be taken by an owner who had lost a fixture would be to seek an alternative fixture. In this case, the "loss contemplated" would be the difference between market rate and charter rate. Wider financial loss was not something that would have been foreseen by the charterer. Baroness Hale expressly stated that she was not persuaded to follow the assumption and responsibility route followed by Lords Hoffman and Hope – leaving this area to be considered in future cases. Lord Walker, while following a similar route to that of Lord Hoffman, appears not to have gone quite as far. Accordingly, the door that the Lords attempted to slam shut in relation to owners' rights to recovery has been left slightly ajar and may well be the subject of future litigation.

Practical Effect

For now, the House of Lords has turned back the clock to the position that existed prior to *The Achilleas* arbitration Award. Where charterers are in breach due to late redelivery, damages will be limited to the difference between market rate and charter rate for the period of the overrun. However, the way in which the House of Lords has arrived at this decision has left a number of cracks that no doubt will be tried, tested and challenged in future cases. One particular route that owners are likely to follow is to attempt to bring to the knowledge of the charterer details of any subsequent fixture so as to be able to maintain that charterers have been put on notice and therefore have "assumed responsibility" (The Hoffman /Hope test), or did have the risk directly in their contemplation (the Rodger / Hale approach).

The decision could well lead to owners being more cautious when considering approval of final voyage orders.

The full judgement can be viewed on the following website:-
www.bailii.org/uk/cases/UKHL/2008/48.html

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Punitive Damages under US Maritime Law

In a recent landmark decision, the US Supreme Court, in *Exxon Shipping Co ET AL. v Baker ET AL*, considered whether a shipowner could be liable for punitive damages arising from the actions of its managers and, if so, how such awards should be determined and whether any limits should be placed upon them.

The facts of the Exxon case are well known. In 1989, the supertanker Exxon Valdez grounded on a reef off Alaska, spilling millions of gallons of crude oil into Prince William Sound. The accident occurred after the tanker's captain, Joseph Hazelwood, who had a known history of alcohol abuse and whose blood alcohol level was still high eleven hours after the spill, inexplicably left the bridge shortly before the tanker was due to perform a difficult course correction. His departure left only the third mate on the bridge when two officers were required at all times, and Hazelwood was the only one on the entire ship licensed to navigate in that part of Prince William Sound. Hazelwood also put the tanker on auto-pilot, speeding it up, and making the turn trickier and a mistake harder to correct. The tanker therefore failed to make the required turn back into the shipping lane and ran aground on Bligh Reef.

In the aftermath of the disaster, Exxon spent around $2.1bn in cleanup efforts, pleaded guilty to criminal violations occasioning fines of $25m, and paid restitution of $100m. A civil action by the United States, and the State of Alaska, for environmental harm resulted in a further settlement of $900m, and Exxon paid a additional $303m in voluntary settlements with fishermen, property owners and other private parties.

The remaining civil cases were consolidated into one, comprising commercial fishermen, native Alaskans and landowners. All parties to the class action sought punitive damages. The jury found Exxon and Hazelwood to have been reckless and awarded $287m in compensatory damages to some of the plaintiffs, with a further $5,000 in punitive damages against Hazelwood and $5bn against Exxon. On appeal, the jury verdict of recklessness and corporate liability was upheld, but the punitive damages against Exxon were reduced to $2.5bn.

By way of judicial review, the Supreme Court was asked to consider three questions of maritime law, namely:

- Whether a shipowner could be liable for punitive damages based upon acts of employees in a managerial capacity whilst acting within the scope of their employment.
- Whether punitive damages are barred implicitly by federal statutory law (in this case the Clean Water Act), which makes no provision for them.
- Whether the award of $2.5bn in punitive damages is greater than maritime law should allow in the circumstances.

Punitive Damages under US Maritime Law

Shipowner's liability for punitive damages based on the acts of managerial agents

Exxon asserted that it was an error to instruct the jury that a corporation is responsible for the reckless acts of employees in a managerial capacity while acting within the scope of their employment, unless the corporation had directed, countenanced or participated in such actions. The Supreme Court was divided on this issue and therefore decided to uphold the Ninth Circuit ruling undisturbed, thus establishing the basis of liability for an award of punitive damages against Exxon.

Effect of the Clean Water Act on the availability of punitive damages under maritime law

Here the Supreme Court decided that the Clean Water Act's water pollution penalties did not pre-empt punitive damage awards in maritime spill cases. It was common ground that this legislation did not displace civil claims for compensatory remedies and, in the absence of a clear intention to the contrary, there was no reason why it should displace claims for punitive damage for private harms.

Measure of punitive damages in maritime law

In what is probably the most important part of the judgment, the Supreme Court went on to consider the fundamental issues of when punitive damages should be awarded and whether limits should be placed on such awards.

Punitive damages have been awarded in US Courts since the mid-19th century. They are confined to cases of "enormity" in which the defendant's conduct is "outrageous" owing to "gross negligence", exhibiting "wilful, wanton and reckless indifference to the rights of others". The aim is retribution and to deter future harmful conduct.

The amount of punitive damages awarded has always been the subject of much debate. The rules in individual States vary with some jurisdictions imposing an absolute monetary cap while others favour a maximum ratio of punitive to compensatory damages. Jury verdicts are also reviewed on appeal in order to determine whether they are reasonable.

The Supreme Court noted that awards in the US are generally higher than in many other countries. Despite the constraints imposed by State legislation and appeal courts, they also appear to be unpredictable, with a wide range of awards that do not show a consistent approach to cases involving similar claims and circumstances.

There is no inherent logic to the amount of punitive damages in terms of the extent of the loss or damage that regulates compensatory awards. They are meant to signify and punish egregious conduct but without a tariff designed to produce a consistent outcome in similar cases. Of course, jury instructions do attempt to offer guidance based upon reasonableness and proportionality but, in the opinion of the Supreme Court, this had not achieved systematic consistency.

In considering how to promulgate a common approach to the assessment of maritime punitive damages the Supreme Court rejected the idea of general verbal formulations based upon the rationale behind such awards. The alternative approach of set financial limits by reference to a hard dollar cap was also rejected as being too crude. The Supreme Court therefore decided that the correct approach should be to peg punitive to compensatory damages using a ratio. It decided that this ratio should be 1:1 so that punitive damages should henceforth be limited to an amount equal to the compensatory damages. On that basis a punitive award of $507.5m was made. Such an approach is more practical than principled but does factor in an historical analysis of what juries have regarded as reasonable and will also take into account inflation.

This decision should be welcomed as a clear statement of the law in a difficult area. It arises from a consideration of the extent of corporate responsibility for environmental impairment but is of far more general application.

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MSC NAPOLI – Safety Recommendations for Container Operators

The UK Marine Accident and Investigation Branch (MAIB) issued its final report regarding the loss of the container ship the *MSC Napoli* in April 2008. Its conclusions are of considerable interest and we recommend that vessel operators should keep a copy of the report on board their ships for reference purposes.

On 18 January 2007, the *MSC Napoli* experienced severe weather conditions in the English Channel and suffered a catastrophic failure of her hull in way of her engine room bulkhead. After the Master and crew had safely abandoned the vessel, it was taken under tow and deliberately beached on the UK south coast, in order to prevent it from sinking.

The MAIB investigation identified a number of factors that contributed to the failure of the vessel's hull structure:

- The vessel's hull did not have sufficient buckling strength in way of the engine room.
- The Class rules applicable at the time of the vessel's construction did not require buckling strength calculations to be undertaken beyond the vessel's amidships area.
- There was no safety margin between the hull's design loading and its ultimate strength.
- The load on the hull was likely to have been increased by 'whipping effect' (this occurs when the hull impacts heavily with the sea, causing significant vibration of the hull girder).
- The ship's speed was not reduced sufficiently in the heavy seas.

The MAIB identified with the assistance of the International Association of Classification Societies, 30 container ships of similar design that could potentially be vulnerable in a similar way. These vessels' classification societies have identified 12 vessels that may require remedial action.

Safety Conclusions

1. The incorrect loading weights of containers is an ongoing industry concern, but not one that was considered significant on this occasion. The discrepancies of the container declared weights would not have had sufficient effect to cause of the structural failure of the *MSC Napoli*, it would have reduced the bending moment safety margin.
2. Although it is likely that the wave loading experienced by *MSC Napoli* was increased by whipping effect, classification societies are unable to predict its magnitude or effect on a ship's structure with any certainty.
3. The change of hull framing from longitudinal to transverse in respect of the engine room of the *MSC Napoli* is a possible weakness in the vessel's structure. Regular checks should be carried out as part of a vessel's inspection programme for structural deformation and fatigue cracking.
4. Notification of structural damage as required by Class Rules and repairs required and/or undertaken to rectify that damage need to be understood and not overlooked by ship's staff. Owners and operators should report to Class significant repairs to cracks and structures.
5. Although the vessel's speed was considered to be appropriate in the conditions, it is almost certain that a reduction of speed would have significantly reduced the risk of hull failure. Masters should ensure that an appropriate safe speed is used in heavy weather conditions.
6. Masters and owners should ensure that critical machinery items are operational before departure.
7. Owners should ensure Masters and officers understand the increased bending moments caused by the whipping effect in a seaway.

The Master was praised for the manner in which the ship's personnel safely abandoned the vessel in very heavy weather conditions.
It was noted that the Master was particularly keen on lifesaving drills. Owners should actively promote a culture where the Master can make decisions on safety grounds with the full knowledge that he will have their full support.

Club News

Member Training Week

The Standard Club's Member Training Week was held in London from 23 to 26 June 2008. 60 delegates from 32 shipowning groups attended the sessions over the four days.

This is the second year the Club has run a training week for its members, and the 2008 event was a great success. The mix between presentations and workshops allowed participants to share their individual experiences and learn from others in the industry. The first day covered pollution, the second personal injury, the third major casualty response and the fourth offshore. The speakers were drawn from the Managers, together with shipping industry experts and lawyers based in the UK and the US.

We will publish details of the third Standard Club Member Training Week in early 2009.

In the meantime, The Standard Asia Member Training Week and third offshore forum will be held in Singapore from 9 to 11 December 2008.

Contact John White-Thomson John.White-Thomson@ctcplc.com or Suzie Máté suzie.mate@ctcplc.com

Member survey

Over the past few months, the Club has been conducting a survey of members and their brokers to gauge their views on the Standard Club and the P&I market. We would like to thank those who have taken the time to participate in the survey.

We wanted to find out where you thought the Club was performing well and in which areas improvement might be needed. We commissioned an independent research company, Consensus Research, to undertake the survey to ensure confidentiality and encourage frank responses. The survey consisted of a mix of telephone and online interviews from members and their brokers around the world.

We will report on the survey's conclusions in October 2008.

Staff News

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