The costs of US Security Guards – owners' negligence and charterers' liability

Simon Johnson, Partner
MFB Solicitors
+44 7795 385428
sjohnson@m-f-b.co.uk

In the current market, disputes over liability for disbursements can mean the difference between loss and profit.

Comment
- Careful attention should be paid to which clause is incorporated.
- Parties are free to amend standard clauses to clarify liability in specific circumstances and should consider doing so.
- The burden of bringing charterers within the exception wording rests firmly on charterers.
- A lack of US visas is unlikely to constitute owners' negligence or render the costs of security guards for their account.

Liability for the costs of mandatory security guards at US ports remains a common issue of dispute. The pro-forma clauses provide for the possibility of owners being liable in cases of, for example, owners' negligence. Owners may also be liable for the costs of compliance with the ship security plan. However, there has been minimal guidance on when such liabilities arise. The recent decision in London Arbitration 5/14 sheds some light on the issue, confirming that in the normal course of events, security guards are a charterers' liability.

Case study

The case concerned a voyage chartered vessel with a non-US crew. The fixture provided:

'Bimco ism/isps clauses for voyage charters to apply...'

The first question was, which BIMCO clause was incorporated? The owners argued for the BIMCO ISPS clause, which provides that security guards are for the charterers' account "unless such costs or expenses result solely from the owners' negligence" and that "all measures required by the owners to comply with the ship security plan shall be for the owners' account".

The charterers argued for the later, more charterer-friendly BIMCO ISPS/MTSA clause, which provides that owners are liable if 'such costs or expenses result solely from the negligence of the owners, master or crew or the previous trading of the vessel, the nationality of the crew or the identity of the owners' managers'.

The tribunal held that the original BIMCO ISPS clause was incorporated as the parties were free to contract on such terms as they wished.

However, it was considered that the owners were not liable under either clause. The charterers argued that the owners had been notified that security guards may be required at US ports unless sufficient crew had visas and that the failure to ensure that sufficient crew had visas constituted negligence. They further argued that the requirement for guards was directly linked to the advance information provided by owners to the US authorities. However, the tribunal disagreed. It is not mandatory for crew to have US visas, the only requirement being that the crew remain on board. Thus it was not negligent for the vessel to arrive without a minimum number of crew visas. The tribunal further considered that there was no clear link between the advance crew information provided and the ordering of security guards. The charterers were therefore liable and would have been even applying BIMCO ISPS/MTSA.