

How well do you know the origin of the cargo you carry?



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The club has more than 50 qualified lawyers and barristers working in house on defence class claims, spread across London, Piraeus, New York, Singapore, Rio de Janeiro and Hong Kong.

For more information on our New York office and the president of that office, LeRoy Lambert, see the club [website](#).

This article covers the successful defence of a potential United States cabotage violation.

The Jones Act

The United States Jones Act prohibits any foreign built or foreign flagged ship from engaging in coastwise trade within the United States. The federal courts have given a very wide interpretation to the term 'coastwise trade', whereby it applies to a voyage beginning at any point within the United States and which discharges commercial cargo to any other point in the United States. Any breach of the Jones Act, in respect of these cabotage rules, can attract significant penalties, including large fines, as well as possible confiscation of the ship.

Background

A member of the club chartered a ship, as owner, on a voyage basis, adopting the GENCON 1994 form (the charterparty), which was subject to English law and arbitration. The cargo to be carried from a port on Mexico's Pacific coast to a United States port in the Gulf of Mexico consisted of motor and sailing yachts, including a tug.

The tug was loaded on board the member's ship at the Mexican port during October 2015. The ship then proceeded to an interim United States port to discharge part of her cargo of yachts. The tug was discharged and reloaded during this operation, which was controlled by the charterer. At or about this time, it transpired that before arrival at the Mexican port of origin, the tug had recently been

towed from another port in the United States, unbeknown to the member. The United States Customs and Border Protection (CBP) regarded the movement of the tug as a whole as a 'coastwise' movement and therefore a breach under the Jones Act by a non-United States flagged ship.

The problem

The CBP advised the member that the tug could not be discharged at the intended port of discharge, nor at any other United States port, as this would be regarded as a breach of the Jones Act.

The Standard Club acted swiftly and engaged the assistance of the club's New York office to work with the member's local office in that region. United States lawyers were also appointed. However, the United States lawyers were unable to advise categorically that discharge of the tug at another United States port would not be a breach of the Jones Act. The member was in a difficult position, as there was a real risk that discharge of the tug at any United States port would lead to a Jones Act violation and financial sanctions. Consideration was even given to alternative discharge outside of the United States. This, however, was not a very satisfactory option either since it could not be confirmed that discharging the tug outside the United States would protect the member if the tug re-entered the United States at a later stage.

The involvement of the CBP and the potential Jones Act violation, which led to significant delays in discharge, stemmed from the charterer not declaring the true port of loading of the tug. As a result, the member made a claim for detention against the charterer for the consequent delay in discharging the tug.

Legal analysis

The club sought legal advice from English lawyers, given that the charterparty was subject to English law. The issues for consideration were:

1. the member's options for alternative discharge; and
2. the charterer's liability for consequential loss and delay.

Practically speaking, the tug could not be delivered without violating local (United States) law. English law does not and will not compel the violation of foreign law (unless it violates public policy). Accordingly, the cargo had to go elsewhere.

So far as the position against the charterer was concerned:

- The charterer was considered to be in breach of warranty that carriage of the cargo would not expose the member to an undisclosed legal danger. The pre-carriage of the tug rendered the discharge at a United States port unlawful. The charterer was under a duty to disclose this fact. In these circumstances, the member had the right to take steps to mitigate the loss brought about by the charterer's breach, by proceeding to a port where the cargo may lawfully be discharged.
- The charterparty provided that the member was to carry the cargo to and discharge it at the agreed port 'or so near thereto as she may safely get'. Where the ship was not permitted to carry the cargo to and discharge it, the member was at liberty under this provision to select an alternative and lawful port of discharge.

Solution

The charterer refused to engage in finding a solution for discharge of the tug and also declined to put up security to cover the detention/delay claim.

In exploring possible discharge solutions with United States and English lawyers, the member managed to negotiate with the cargo consignee, who urgently wanted to receive delivery of the tug, a sufficient indemnity for any potential Jones Act fine levied against the ship by the CBP if the member discharged at a United States port.

Once the cargo had been discharged, following receipt of the indemnity from the consignee, the member still had an unsecured claim for detention against the charterer for delay.

Working closely with United States lawyers, the member then successfully applied for a Rule B attachment where the charterer's bank was located. The Rule B attachment was a sufficient pressure point to force the charterer to promptly settle the member's claim for detention in full.

Conclusion

This case demonstrates the need for all members to carry out sufficient due diligence checks on their commercial counterparts and understand, so far as possible, the true origin of any cargo to be carried.

The case is also an illustration of the club's support of a member in a challenging situation, spanning two jurisdictions. It demonstrates the club's willingness to provide continuous support for its members in defence class claims where there are good merits and the costs of all steps taken are reasonable and proportionate to the sum in dispute.

For more information on defence cover provided by the club, see the [special article](#) available on the club's website.

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