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Cross-undertaking in damages for ship arrest : an opportunity missed

The recent decision of Teare J in Natwest Markets plc v Stallion Eight Shipping Co SA (MV Alkyon) *[2018] EWHC 2033 (Admlty) highlights, yet again, the fundamental injustice of English law concerning the arrest of ships. Sir Bernard Eder raises this issue again in light of this judgment.*

I have spoken and written about this topic repeatedly (some say ad nauseam) for some 30 years. Although my attempts to change the law have (so far) failed, my views remain unchanged and my campaign remains as vigorous as ever. I do not intend to repeat at length what I have said before. Those interested can read the articles referred to by Teare J in para 9 of his judgment. However, it may be convenient to summarise briefly the reasons why the law is, in my view, unjust, viz:

i. *NO requirement to give advance notice of intention to arrest*. The law allows a claimant to arrest a ship without notice and without following any pre-action protocol.

ii. *NO necessary link*. The claim need have no connection with the jurisdiction of the English court or otherwise be governed by English law. It is sufficient that the claim is of a specified type and the ship in question is physically within the jurisdiction even for a short period of time.

iii. *NO requirement of proportionality*. There is no particular relationship between, on the one hand, the size of the claim (eg £100) and the value of the ship (eg £20 million) or the potential losses that may be caused as a result of the arrest (eg loss of time).

iv. *NO requirement to show "good arguable case"*.

v. *NO requirement for an affidavit in support of arrest to be "full and frank"*.

vi. *NO requirement to show "risk of dissipation"*.

vii. *NO discretion*. The arrest is (or at least is said to be) as "of right", ie provided the claim is one of a specified type and the claimant issues the appropriate documents, the claimant will be "entitled" as of right to effect the arrest. In other words and unlike the grant of an injunction, the remedy is not one which involves the discretion of the court.

viii. *NO requirement by the arresting party to provide cross-undertaking still less cross-security*. This is, of course, in stark contrast to any applicant for a freezing injunction.[1]

ix. *NO entitlement to release of the vessel if the claimant does not provide cross-undertaking or cross-security*.

x. *NO liability for wrongful arrest without bad faith or crassa negligentia*.

[1] The standard wording of the cross-undertaking is: "If the court later finds that this order has caused loss to the respondent, and decides that the respondent should be compensated for that loss, the applicant will comply with any order the court may make".

September 2018
Volume 18 • Issue 7

In my view, the law is nothing if it does not (or at least does not seek to) provide a fair balance between the interests of different parties; and, to my mind, these cumulative features of the law of arrest of ships fail to achieve that essential balance.[2]

The facts

In *The MV Alkyon*, the claimant was a bank which had arrested the ship on the basis of an alleged default under the loan documents, viz a failure by the shipowner to cure an alleged shortfall in the value-to-loan ratio. In essence, the shipowner submitted that there had been no default; that it was suffering potentially catastrophic losses during the continued arrest of the ship; and that the ship ought to be released unless (at the very least) the bank gave a cross-undertaking in damages similar to that required to be provided by any applicant for a freezing injunction. The judge refused to release the ship or to require the bank to provide a cross-undertaking.

The decision

In reaching this conclusion, the judge (rightly) accepted that the court had a discretion whether or not to release the ship. But he gave three main reasons for refusing to exercise such discretion in favour of the shipowner.[3]

First, he noted that a claimant who satisfies the statutory criteria for arrest is entitled as of right to arrest the ship in question without providing a cross-undertaking. On that basis, his view was that to accede to the shipowner's application "... would run counter to the principle that a claimant in rem may arrest [as] of right ...". This argument has a superficial attraction but, in my view, suffers from numerous flaws. First, it is worth emphasising that the underlying premise, viz that a claimant is entitled to arrest a ship "as of right", is not some immutable *grundnorm* of admiralty practice but an entirely modern invention which, at least so far as English law is concerned, appears to have been created by the Rules Committee in 1986[4] in response to the decision of the court in *The Vasso.*[5] Secondly, it is too simplistic to say that a claimant is entitled to arrest a ship "as of right". Any claimant will be required to provide the Admiralty Marshal with a cross-undertaking for his expenses etc as a precondition to the issuance of a warrant of arrest; and, if that is so, why not also a cross-undertaking in favour of the shipowner? Thirdly, even if the original arrest is or may be said to be "as of right", I see no reason in principle why the court may not, in a proper case, exercise the discretion which it undoubtedly has to require a cross-undertaking to enable the claimant to maintain the arrest. In my view, there is no anomaly. Fourthly, it is well established that if the shipowner pays into court the amount recoverable on the plaintiff's best reasonably arguable case together with interest and costs, including an estimate of the future interest and costs of obtaining judgment after trial, the court will normally order the release of the vessel from arrest.[6] In making that order, the court will have to consider the strength of the claimant's case. At the very least, this serves to illustrate that the exercise which the court carries out when considering whether or not to release the vessel is very different from the original act of arrest.

Secondly, the judge expressed the view that to require a cross-undertaking would be inconsistent with the court's "long-standing" practice that such a cross-undertaking is not required. Here, the learned judge may be right – at least in part. Certainly, I am not aware of any case where such a cross-undertaking has been required by a court. But there may be good reasons why this is so. As already noted, the suggestion that a claimant is entitled to arrest "as of right" is of recent origin – so it may be that until the 1980s and the decision of the Court of Appeal in *The Varna*, weak cases were filtered out at the initial arrest stage. Since then, there has been a sharp drop in the number of ship arrests and I would guess that, in most cases in the last 30 years, the arrests will have been lifted by consent on provision of a P&I Club letter of undertaking or other security by or on behalf of the shipowner[7] – so the question which arose in *MV Alkyon* has never (so far as I am aware) been squarely before the court. Be all this as it may, I have never been much persuaded by an argument based simply on past practice. There is no reason to adhere to a past "practice" if it is wrong or unjust. The English courts have never been so hidebound. The invention of the *Mareva* injunction in the 1970s is probably the best recent example of the ditching of so-called past practice – stretching back almost 100 years to *Lister v Stubbs*.[8]

In passing, it may also be noted that the practice around the world is varied: see the excellent comparative analysis undertaken by the IWG of the CMI[9] under the chairmanship of Dr Aleka Sheppard. So any suggestion that the present features of English law with regard to ship arrest embody some general international admiralty practice is incorrect.

Thirdly, the judge felt bound by authority viz the decision in *The Bazias 3 and Bazias 4*.[10] Being bound by authority is occasionally the unhappy lot of any puisne judge. However, it is at least arguable that the dicta referred to by the judge in that case did not constitute binding authority and I hope that the learned judge (who has been, it should be said, one of our great Admiralty judges) will not mind if I say (with great respect) that he missed a golden opportunity to put the law a'right.

I do not know what has happened to the *MV Alkyon* – either the case (has it gone/is it going to the Court of Appeal?) or the ship itself (is it still languishing under arrest?). But, if the Court of Appeal does not do the right thing, I would hope that the matter will be taken up by the Rules Committee.

As I have been saying for some 30 years, the law needs to be changed. The sooner it is done, the better.

Sir Bernard Eder

The appeal in this case is listed for hearing on 6 November 2019.

[2] ~~According to my former pupil, Peter Duffy QC,~~ it would seem at least arguable that a law that prevents an innocent shipowner from recovering compensation for the detention of its ship in the absence of being able to prove mala fides or crassa negligentia on the part of the arresting party falls foul of the Human Rights Act 1998 because it fails to satisfy the "fair balance" test. However, it does not appear that this argument was raised in this case.

[3] See para 57 at the end of the judgment of Teare J.

[4] See *The Varna* [1993] 2 Lloyd's Rep 253.

[5] [1984] 1 Lloyd's Rep 235.

[6] ~~*The Moschanthy* [1971] 1 Lloyd's Rep 37.~~

[7] It is worth noting that this did not happen in *The MV Alkyon* because, it would seem, the claim in question was not a P&I risk.

[8] (1890) 45 Ch D 1.

[9] International Working Group of Comité Maritime International, http://comitemaritime.org/work/liability-for-wrongful-arrest/

[10] [1993] 1 Lloyd's Rep 101, CA.

The Renos – a Trojan Horse in the LOF citadel?

In Connect Shipping Inc and Another v Sveriges Angfartygs Assurans Forening (The Swedish Club) and Others (The Renos) *[2018] EWCA Civ 230; [2018] 1 Lloyd's Rep 285, the Court of Appeal ruled that SCOPIC expenditure could be included in ascertaining whether a casualty was a constructive total loss. The author considers that conclusion against the historical background to and purpose of the SCOPIC clause, suggesting that it cannot have been intended by the authors of either SCOPIC or the Marine Insurance Act 1906, and that it may weaken the support of the London market for the Lloyd's Open Form Salvage Contract.*

Insurance

Most if not all commercial vessels will carry insurance to cover against the risks of (amongst others) damage to the ship itself (hull and machinery, or "H&M" cover) and to the environment (protecting and indemnity, or "P&I" cover). H&M cover will typically provide for an indemnity against physical damage to the vessel caused by marine perils, as well as the cost of measures taken to avert or minimise a loss, once a marine peril is at least imminent (so-called "sue and labour" expenses). P&I insurance covers against certain classes of liability to which shipowners are commonly exposed. The two most relevant for present purposes are liability for pollution and for wreck removal.

Salvage

Where a ship is in the grip of a marine peril and beyond self-help, she is often referred to as a "casualty". Her owner may choose to engage a third party to assist. Such third parties are known as "salvors", whether or not salvage is in fact their profession.

Salvors may be engaged upon terms akin to towage contracts, ie providing for a daily rate of remuneration which is payable whether or not the salvage effort succeeds. Alternatively, no remuneration may be fixed. In the latter case, a salvage award will only be payable if and to the extent that the salvage effort is successful. This is sometimes referred to as the "no cure, no pay" principle. It applies whether or not the salvage service was rendered voluntarily or pursuant to the terms of a contract. We are concerned in this case only with this latter form of arrangement, ie not with the one in which remuneration is fixed in advance.

"No cure, no pay" has a long history, and was part of the English law of salvage well before the earliest international conventions. Enshrined in the Brussels Convention on Salvage 1910, it was also the bedrock of the world's oldest standard form of salvage agreement: the Lloyd's Open Form ("LOF").

The "no cure, no pay" principle had benefits from the shipowner's (and hull underwriter's) point of view. If the salvage effort was unsuccessful, nothing needed to be paid to the salvor. And even if it succeeded, the amount payable to the salvor could not exceed the "salved fund": the total value of the property salved as at the termination of the salvage services, ie the casualty (including her stores and fuel) and any cargo (taking into account any damage to them).

The corollary to the "no cure, no pay" principle was this: where a salved fund was more than adequate to reward a salvor for his efforts, he could expect a handsome reward. Just how handsome would depend upon various factors, such as:

- the size (in monetary terms) of the salved fund;
- the difficulty and duration of the salvage services;
- the nature and severity of the dangers which the salved fund had faced;
- the level of out-of-pocket expenditure incurred by the salvor in rendering the services; and
- the professional status of the salvor and his investment in salvage (if any). This factor reflected the benefit to shipowners (and their hull underwriters) in general of the existence of a professional class of salvors.

As is consistent with the cover extended to sue and labour expenses, H&M insurance generally covered shipowners against any liability incurred in salvage.

Salvage and the environment

Historically, the law of salvage took no account of the environment: a salvage award was not increased merely because the salvage had prevented pollution. If a salvor removed the bunkers from a stranded casualty, he might well have prevented a serious incident. But he could expect no reward beyond the value (if any) of the bunkers removed, if he was otherwise unsuccessful in salving the casualty. That was so, even though the pollution incident averted might have cost very large sums to clean up.

However, in the 1960s and 1970s there were a number of high-profile casualties involving very large crude carriers, such as *Torrey Canyon*, wrecked off the coast of Cornwall in 1967; and *Amoco Cadiz*, wrecked off the Brittany coast in 1978.

A consensus developed that the framework of the law of salvage required overhaul. A number of factors lay behind that consensus. They included:

- The reality that the salvage industry was the industry sector best placed and most suitable to intervene in marine casualties threatening serious pollution incidents.
- The fact that the "no cure, no pay" principle was at least capable of operating as a disincentive for professional salvors to intervene in those cases which most urgently required intervention if pollution was to be averted, eg a badly damaged ship (which, even if salved, might have a low or no salved value), presenting a difficult and thus expensive challenge to the salvor in removing pollutants which might themselves already be contaminated with

seawater (and thus be of low or no value), particularly where the chances of any sort of "cure" were perceived to be low.

- The perceived iniquity that where salvage services were effective in minimising pollution, nothing was paid by one of the parties which derived the greatest benefit of the services, namely the ship's P&I insurers.

In the 1980s, that consensus led to two distinct (though related) developments: the publication, in 1980, of a new edition of the LOF ("LOF 1980"); and the International Convention on Salvage 1989 ("the 1989 Salvage Convention").

LOF 1980

LOF 1980 contained for the first time in the history of the LOF form an exception to the principle of "no cure, no pay". The exception only operated where the casualty was a laden oil tanker; in such cases the contractor assumed the obligation – in addition to the traditional obligation that he use his best endeavours to salve the property at risk – to exercise his best endeavours to prevent the escape of oil from the casualty.

In applicable cases, the salvor was entitled – as a top-up, or "safety net" to the conventional salvage award, if any – to be paid up to 115 per cent of his reasonably incurred expenses. The "safety net" applied only if and to the extent that the conventional salvage award did not itself cover that amount. The "safety net" payment was the responsibility of the shipowner alone: no part of it could be recovered from the cargo owner. In practice, it was covered by the shipowner's P&I Club – as the owner's pollution liability insurer – rather than by hull underwriters. That was so, even though some or potentially all the salvors' expenses had been incurred in attempting to salve the casualty and her cargo, rather than in a direct attempt to prevent the escape of oil from the casualty.

At the same time, LOF 1980 also introduced the concept of an "enhanced award", by which the conventional salvage award could be "enhanced" where the salvor had also prevented pollution. Like the "safety net", this operated only where the casualty was a laden oil tanker.

In terms of the allocation of insurance risk as between hull (and, indeed, cargo) underwriters and P&I insurers, the "enhanced award" marked something of a shift. For the first time, property insurers would have to pay something – how much exactly is near-impossible to determine – towards efforts made to protect the wider environment. That area had historically been covered by P&I insurers.

The 1989 Salvage Convention

The 1989 Salvage Convention came into force in July 1996, though several of its key provisions had already been incorporated in the 1990 and 1995 editions of the LOF contract. The Convention fundamentally revised salvage law. Its most important provisions, both generally and for present purposes, are articles 13 and 14.

Article 13 – "Criteria for fixing the reward"

Article 13 sets out the factors to be taken into account in assessing a conventional salvage award (now known as an "article 13 award"). For the first time in the history of the general law of salvage, one of those factors (indeed, the second listed: article 13.1(b)) was "the skill and efforts of the salvors in preventing or minimising damage to the environment".

Article 13.1(b) provided the basis for remunerating the salvor for the express obligation, introduced by the 1990 and continued in subsequent editions of the LOF contract, that he exercise his best endeavours not just to salve the property in danger, but "while performing the salvage services[,] to prevent or minimise damage to the environment" – a somewhat wider duty than that provided for in LOF 1980.

An article 13 award is payable by **all** of the property interests in proportion to their respective salved values (article 13.2), thus embedding the shift already noted above.

Article 14 – Special compensation

Article 14 contained a further innovation for the law of salvage: "special compensation", payable for preventing or minimising damage to the environment – also known as an "article 14 award". Like the LOF 1980 "safety net", "special compensation":

- Is payable only if and to the extent that it exceeded the article 13 award.
- Is calculated on the basis of the expenses incurred by the salvor, though the notion of "expenses" was widened to include "a fair rate for equipment and personnel".
- Provides for an uplift on the salvor's expenses. The article 14 uplift is more generous: it can be as much as 100 per cent of the expenses incurred.
- Is the sole liability of the shipowner and, in practice, has been paid by P&I insurers. Again, that is so, even though some or potentially all the salvors' expenses may have been incurred in attempting to salve the casualty and her cargo, rather than in a direct attempt to prevent or minimise damage to the environment.

Unlike the LOF 1980 "safety net", an article 14 award was available – but available only – in any case in which the vessel "by itself or its cargo threatened damage to the environment" (article 14.1) *and* the salvage operations "prevented or minimised damage to the environment" (article 14.2).

Article 14 was a well-meaning but flawed attempt at balancing the competing interests at stake. In practice, its provisions resulted in uncertainty and enormous legal costs:

- In relation to the requirement that damage to the environment should both have been threatened and averted (or minimised): this necessitated expert environmental impact reports.
- On the question of what amounted to a "fair rate". In *The Nagasaki Spirit* [1997] 1 Lloyd's Rep 323, the House of Lords decided that "fair rate" referred to indirect or overhead expenses, rather than a (higher but more readily identifiable) commercial rate for the employment of the personnel or equipment in question. This necessitated very detailed, intrusive and expensive accountancy reports into the salvor's business operation.

The resulting dissatisfaction with the article 14 regime led to discussions between the International Salvage Union

(the "ISU"), the International Group of P&I Clubs (the "IG") and representatives of hull and cargo insurers (the property insurers). Those discussions culminated in 1999 in a further industry solution: SCOPIC.

SCOPIC

SCOPIC – or the "Special Compensation P&I Clause" – was thus conceived as a solution to the problems experienced in practice with article 14. In order to avoid the expense associated with the issues outlined above:

- SCOPIC applies whenever it was incorporated into the LOF salvage contract and invoked by the salvor. There is no need to demonstrate that any damage to the environment has been threatened or averted.
- In place of the "fair rate" debacle, SCOPIC provides a pre-agreed tariff of rates for different types of vessel, equipment and personnel.
- Accordingly, "the method of assessing Special Compensation under Convention Article 14 ... [is] substituted by the method of assessment set out hereinafter".

SCOPIC leaves the article 13 regime unaffected (SCOPIC clause 6(ii)). Like article 14 and the LOF 1980 "safety net", SCOPIC:

- Is payable only to the extent that it exceeds the article 13 award.
- Is calculated on the basis of the expenses incurred by the salvor, but in place of the article 14 "fair rate" in respect of the salvor's own equipment and personnel, the tariff referred to above applies. (In fact, the same tariff can also apply to some or all of the genuinely "out-of-pocket" expenses, but that is irrelevant for present purposes.)
- Provides for an uplift on the total of the salvor's expenses and tariff rates. The standard SCOPIC uplift is 25 per cent.
- Is the sole liability of the shipowner (clause 14) and, in practice, has been paid by P&I insurers – even though some or all the salvors' expenses may have been incurred in attempting to salve the casualty and cargo. This last characteristic is no coincidence: SCOPIC was intended to cover precisely the same gap as the LOF 1980 "safety net" and article 14: the gap in environmental protection which existed under the old "no cure, no pay" regime. That gap, in the absence of article 14, would have continued, largely unaffected by the introduction of environmental factors into the assessment of the article 13 award.

All three of these regimes (the LOF 1980 "safety net", article 14 and SCOPIC) thus provide a financial incentive, to those who are best placed to do so, ie the professional salvage industry, to intervene and prevent maritime accidents from resulting in environmental catastrophe.

The Codes of Practice

At the time the SCOPIC clause was negotiated by the industry, it was recognised that neither P&I Clubs nor hull and machinery insurers would ordinarily be parties to a salvage contract. It followed that they would not strictly speaking be bound by, or in a position to enforce the terms of a new clause of this type incorporated into a salvage contract.

To capture the agreements reached, two Codes of Practice were agreed:

- The first was a Code of Practice between the IG, property underwriters and the ISU, concerning who would pay for the "special casualty representative" ("SCR") ("the SCR Code").[1] Against the background that liability and property underwriters required day-by-day information as to the progress of the salvage operation itself, it was agreed that it would be fair for the SCR's costs to be split between hull underwriters and P&I insurers.
- The second was a Code of Practice between the ISU and the IG. It deals with various matters, including:
  - prompt advice by the salvor to the P&I Club "if they consider that there is a possibility of a Special Compensation claim arising" (clause 1);
  - prompt advice by P&I Club to salvor as to whether the shipowner is covered for "Special Compensation or SCOPIC Remuneration" liability (clause 3);
  - the provision and acceptance of security in respect of such liability (clauses 4 to 7);
  - termination of the salvage contract under SCOPIC clause 9(ii) (clause 8); and
  - exclusion of SCOPIC claims from general average (clause 9).

The industry consensus

Both of the Codes of Practice are agreed not to be legally binding. Nevertheless they embody and reflect the perception and agreement of the industry – consistent with the history and scheme of remunerating salvors for protecting the environment when a conventional salvage award is unavailable or inadequate – that:

- article 13 awards, like the LOF 1980 "enhanced awards" before them, would continue to be covered by property insurers; and
- SCOPIC awards, like the LOF 1980 "safety net" and article 14 before them, would continue to be covered by liability (ie P&I) insurers.

The industry consensus has held up well: *The Renos* apart, the author is aware of only one claim where the P&I insurer has attempted to recoup its payment of SCOPIC remuneration from a property underwriter.

That consensus is clearly reflected in (at least) two other provisions. The first is rule VI(c) of the York-Antwerp Rules 2004, which provides that SCOPIC compensation is not allowable in general average. The second is para 15 of SCOPIC itself, under the heading "General Average":

> "SCOPIC remuneration shall not be a General Average expense to the extent that it exceeds the Article 13 award; any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and *no claim* whether direct, indirect, by way of indemnity or recourse or otherwise *relating to SCOPIC remuneration* in excess

[1] The SCR is intended to function as an independent observer (hull and cargo insurers have the option of appointing their own special representatives, SCOPIC para 12, App C) and to report to all parties on the progress of the salvage operation. The SCR is in practice appointed whenever SCOPIC is invoked and this may be before the stage where it is clear that there will actually be a SCOPIC award (since the amount of the salved fund for example may well not be clear at that early stage).

> of the Article 13 award *shall be made* in General Average or *under the vessel's Hull and Machinery Policy* by the owners of the vessel." [Emphasis supplied.]

The consensus is also reflected in the Institute Time Clauses (Hulls), which exclude article 14 special compensation claims and any other claims "similar in substance", such as SCOPIC claims.

The Renos

The factual background to and other issues in the case have been ably summarised elsewhere. The issue relevant for present purposes was whether the shipowner's liability in SCOPIC could be taken into account in assessing whether the casualty was a constructive total loss. Hamblen LJ addressed this issue at paras 86 to 94 of his judgment (with which the other members of the court agreed).

There was no difficulty in identifying the SCOPIC costs: they are set out, alongside the distinct (though notional) article 13 award, in para 86.[2] H&M underwriters argued that the SCOPIC costs could not be taken into account as "costs of repairs" for the purposes of the constructive total loss (CTL) calculation. They took two points: that such costs were not a "cost of repair" for the purpose of section 60(2)(ii) of the Marine Insurance Act 1906; and that such a claim was precluded by para 15 of SCOPIC.

On the first point, underwriters argued that SCOPIC was "conceptually distinct from the article 13 award payable to salvors as the reasonable cost of their services in saving the vessel" (para 89). The difficulty with that argument, whatever the background to and purpose of SCOPIC, is that the obligation upon the salvor is precisely the same under SCOPIC as it is under the LOF contract (of which it forms part): to exercise best endeavours to salve the casualty. That was not, however, the reason given by Hamblen LJ for rejecting the argument: his reason was that the whole amount due to salvors had to be paid for the owners to recover the vessel, so whether it was salvage or SCOPIC remuneration made no difference.

On the second point, the obvious problem with reliance on para 15 of SCOPIC is that the underwriters were not party to the salvage agreement. Underwriters sought to escape their privity difficulty by relying on the Contracts (Rights of Third Parties) Act 1999. Hamblen LJ acknowledged the argument but made no finding on it. He appears simply to have assumed that para 15 could be invoked. Instead, he rejected underwriters' argument at para 93 on the ground that:

> "The claim in the present case is for the total loss of the vessel. No claim for an indemnity or recourse or otherwise is made relating to SCOPIC remuneration. Its only relevance is as part of the cost of repair which is to rank for the purpose of determining whether the vessel is a CTL. Ranking costs for the purpose of a CTL do not have to be incurred. They may be future or hypothetical. No indemnity or recourse is sought in relation to such costs. ..."

2 The article 13 award will have been payable in respect of the cargo which was successfully salved. Even if a settlement has been entered into between salvors and cargo interests, the Lloyd's arbitrator hearing a SCOPIC claim would always need to determine the notional article 13 award as SCOPIC is only payable to the extent that it exceeds the article 13 award.

Commentary

Hamblen LJ's reasoning is – with respect – not wholly convincing. Without the SCOPIC claim counting, there would have been no CTL, with the shipowner confined instead to a claim for the cost of repair (in relation to which SCOPIC could not be claimed). With the SCOPIC claim brought into account, there *was* a CTL and the whole insured value (typically well in excess of the vessel's actual value) could be claimed. It is very difficult – standing back from the tangled thicket of hypothetical CTL componentry – to see this as anything other than an indirect claim relating to SCOPIC remuneration. If that is right, then the claim is squarely barred by para 15 of SCOPIC (always assuming – as Hamblen LJ did – that underwriters can invoke it).

Moreover, the result in the case is one that the architects of neither the 1906 Act nor SCOPIC could have intended:

- In 1906, there would have been no question of a shipowner being liable to pay salvors amounts that – then and now – could not be recovered as salvage remuneration.
- In 1999, whatever the "shift" embodied by article 13(1)(b) of the 1989 Salvage Convention, there was no question of hull underwriters' exposure being affected (other than by way of a potential slight increase in the article 13 salvage award) by either article 14 or the SCOPIC replacement of it.
- The outcome of *The Renos*, however, shows that hull underwriters may be exposed to a CTL claim which in the past could never have been brought.

Could P&I underwriters recover from their assured (by way of subrogation) "their" share of the CTL payout from the vessel's owners? After all, the CTL payout would (in the great majority of cases) comfortably exceed the vessel's value immediately before the casualty. Why should the owners "scoop the pool", leaving the P&I insurer (whose outlay helped them to scoop it) out of pocket?

That question did not feature in the Court of Appeal's judgment, but probably it was not argued. That is (no doubt) because it is very difficult to see that P&I should be able to reach into the payment of an agreed sum for loss or destruction of property in order to recoup its outlay in relation to (in effect) avoided liability for environmental damage. To that extent, there may be little danger that *The Renos* will dim the bright line of the industry consensus described above – although the very fact that the oil and water of property and liability insurance do not mix grates with Hamblen LJ's reasoning.

There is, however, a non-legal aspect to this: it is no secret that LOF is not universally popular in the London insurance market. The reasons why are beyond the scope of this article (and in some respects disputed). The relevant point is this: for as long as the decision in *The Renos* stands, it has obvious potential to reduce market support for the LOF contract. That is because a property insurer may feel that it can far better control its exposure by insisting upon daily rate contracts, improving its chances of managing – and thus avoiding – the risk of a back-door CTL if LOF and SCOPIC are used.

The architects of SCOPIC (and, indeed, the 1989 Salvage Convention) sought to protect and support LOF. As *The Renos* shows, though, it is hard to contract out of the law of unintended consequences. SCOPIC, as it now appears, may after all be a Trojan Horse in the LOF citadel. It will be ironic and tragic if, as those who support LOF would claim, that contributes in turn to the long-term decline and disappearance of the salvage industry and, with it, the enhancement in environmental protection which the developments described above were supposed to deliver.

The Court of Appeal gave permission to appeal on this issue. The Supreme Court is expected to hear the appeal in the first half of 2019.

James M Turner QC, Quadrant Chambers.

Case update

Terms of letter of indemnity

Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The "Songa Winds")
[2018] EWCA Civ 1901

The facts

Under a pool agreement dated 27 November 2013, *Songa Winds*, which was an oil and chemical tanker, was time-chartered to Navig8, on time-charter terms based on an amended Shelltime 4 form. On 2 February 2016 Navig8 fixed the vessel on voyage terms based on an amended Vegoilvoy form to Glencore, to carry a minimum of 19,000 mt of crude sunflower seed oil from Ilyichevsk, Ukraine to New Mangalore/ Kakinada, India at Glencore's option.

The vessel was chartered by Glencore, in part, so that it could fulfil a contract concluded in late January 2016 to sell 6,000 mt of crude edible grade sunflower seed oil in bulk to Agritrading, a subsidiary or affiliate of Ruchi. The delivery terms of this contract was C&F pumped out at New Mangalore or Kakinada. The sale contract provided for property to remain with Glencore until payment.

The vessel loaded under the voyage charter at Ilyichevsk on 13 March 2016 and bills of lading consigned to order were issued with that date, naming Ruchi as the notify party. Subsequently, Glencore's contract of sale with Agritrading was replaced by a contract to sell 6,000 mt of sunflower seed oil to Aavanti on terms materially back-to-back to those of two contracts dated 18 February 2016 by which Aavanti had contracted to sell 6,000 mt to Ruchi.

At the commencement of delivery, it was clear that the original bills of lading were not going to be available in time for the commencement of the discharge operations, and delivery otherwise than against bills of lading was requested on the terms of letters of indemnity ("LOI") on the International Club's standard form. The two LOIs issued by Aavanti to Glencore were for delivery to Ruchi, or to such party as Glencore believed to be, to represent, or to be acting on behalf of Ruchi. In contrast, the two LOIs issued by Glencore to Navig8 and the LOIs deemed to have been issued by Navig8 to Songa (the registered owners of the vessel) requested delivery to be made to Aavanti, or to such party as the beneficiary under each set of the LOIs believed to be, to represent, or to be acting on behalf of Aavanti.

The vessel arrived at New Mangalore on 29 March and discharged 4,000 mt of cargo between 7 and 9 April 2016. The vessel then sailed to Kakinada arriving on 14 April where, between 14 and 15 April, 2,000 mt of cargo was discharged. At each port, discharge and delivery of the cargoes followed Glencore's instructions to Navig8 and was made into shore tanks without production of original bills of lading.

Société Générale (SocGen) had financed the purchase by Aavanti. As neither SocGen nor Aavanti received payment for the cargo, from either Agritrading or Ruchi, SocGen initiated arbitration proceedings against Songa claiming damages under the bills of lading arguing that it was the lawful holder of the bills of lading and that the cargo was mis-delivered to Ruchi. In response, Songa launched a claim against Navig8 under the Navig8 LOIs, and Navig8, in turn, presented a claim against Glencore under the Glencore LOIs, both claimants seeking to argue that the LOIs were triggered by the deliveries to Ruchi.

First instance decision and appeal On 2 March 2018 Andrew Baker J as the first instance judge concluded ([2018] 2 Lloyd's Rep 47) that the claim of Navig8 was not defeated by the operation of a time bar clause in the voyage charter between Navig8 and Glencore (for detailed discussion, see Liu, "A sequence of letters of indemnity", *Lloyd's Shipping & Trade Law*, (2018) 18 LSTL 6 8).

The trial judge dealt with a number of issues, but the issues on the present appeal were relatively confined: were the obligations and rights contained in the Glencore LOIs subject to the limitation provisions of clause 38 of the voyage charter? Clause 38 stated:

> "The period of validity of any letter of indemnity will be 3 months from date of issue. The period may be extended, as necessary, upon owners written request for further extension and confirmation (at time of extension request) that 1/3 original bills of lading have not been surrendered to owner. In absence of extension requests the indemnity will expire at the end of initial three-month period, or any further extension period."

The Glencore LOIs did not refer to the voyage charter, nor the above terms in clause 38. However, Glencore submitted that these terms (with its reference to the indemnity expiring at the end of three months) must be read into the Glencore LOIs and that its effect was to bar Navig8's claim made after 6 April 2016. Navig8, on the other hand,

submitted that the Glencore LOIs were standalone agreements and that, in any event, clause 38 of the voyage charter did not have the effect of excluding a claim made after 16 April, as a matter of construction of the clause.

The law

Simon LJ, with whom the other Law Lords agreed, gave the sole speech of the Court of Appeal. His Lordship firstly dealt with the issue whether the provisions in clause 38 in relation to the expiry of the indemnity were incorporated into the Glencore LOIs. He expressly rejected the argument raised by Glencore that the material rights and obligations in clause 38 were to be regarded as being transposed into the Glencore LOIs due to the following reasons:

(1) the Glencore LOIs contained a provision that limited Glencore's liability, with no reference to any extraneous terms that might impact on the time limit of that liability;

(2) the voyage charter and the Glencore LOIs were quite distinct agreements with separate and discrete rights and obligations, with disputes under the former to be resolved by arbitration and disputes under the latter to be resolved by litigation in the High Court; the parties implicitly agreed that any dispute as to the meaning and effect of clause 38 was to be resolved by arbitration, which militated against Glencore's argument that clause 38 was to be treated as "carved out" of the voyage charter and construed as part of the Glencore LOIs;

(1) the Glencore LOIs, which were made on the terms of the International Group form, neither made any reservation for nor reference to the voyage charter or its provisions; nor did it contain any time limits for the exercise of indemnity rights; and

(1) the Glencore LOIs were documents which set out self-contained obligations and rights and it was common ground that they could be relied on by third parties as against Glencore.

His Lordship agreed with the trial judge, dismissing the appeal, that the Glencore LOIs neither provided in terms, nor were to be treated as including, any limitation on their validity.

Although unnecessary following that conclusion, his Lordship went on to deal briefly with the second issue, namely if the answer to the first issue was that the provisions in clause 38 were incorporated into the Glencore LOIs, was the effect of clause 38 such that no claims could be made after the expiry of three months from the date of issue?

The trial judge had held that the relevant part of the wording meant that the period during which the requested delivery of the cargo must take place without the original bills of lading was three months from the date of delivery. However, his Lordship disagreed and considered that the intent of clause 38 was to provide a primary (but unilaterally extendable) time limit of three months for the making of claims which runs from the date of the letter of indemnity. The underlying purpose of a letter of indemnity was to secure prompt delivery, and a clearly defined time limit enabled the giver of the indemnity to calculate its contingent liabilities, always subject to the beneficiary of the indemnity being able to extend its validity. Thus, his Lordship decided the second issue in favour of Glencore.

Comments

Thefewjudgments to date on LOIs based on the IG standard form for delivery of cargo without production of original bills of lading include *The Laemthong Glory* [2005] 1 Lloyd's Rep 632, *The Bremen Max* [2009] 1 Lloyd's Rep 81, and *The Zagora* [2017] 1 Lloyd's Rep 194. In the present case, the key question at the appellate stage concerned whether the bespoke rights as agreed by the parties under the charterparties in relation to LOIs outside of the IG standard terms are enforceable or not. English courts have consistently chosen to interpret the terms of LOIs in a straightforward way and such rights will not be given effect if they are not expressly included in the LOIs that are ultimately issued. In other words, in negotiations, the parties need to be aware that LOIs will generally be taken on their wording.

Bearing in mind that LOIs are specifically designed to be back-to-back, the inclusion of charterparty terms from a charterparty in which many of the LOI beneficiaries will be completely uninterested would be very unlikely to happen. Instead, the IG form is designed to have as few essential terms as possible, so that agreement can be reached quickly even in a charter chain. Therefore, the decision of the Court of Appeal may serve as a reminder to the parties who wish to rely on any additional rights under the charterparties that they should carefully check with legal advisors and expressly incorporate those charter terms into the LOIs.

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