

RISK WATCH

AUGUST 2019

CLUB NEWS BRITANNIA JOINS THE MACN

HONG KONG MEET THE BRITANNIA TEAM

COLLISION ANALYSIS OF A RECENT INCIDENT

B SAFE THE LATEST POSTER ABOUT ENCLOSED SPACES

LEGAL UPDATE RECENT DECISIONS EXPLAINED



BRITANNIA P&I
TRUSTED SINCE 1855



A MESSAGE FROM THE EDITOR

BRITANNIA'S MISSION IS TO BE **THE FINEST P&I CLUB IN THE WORLD.**

It has been another busy Spring for Britannia.



We are very proud to be the first P&I Club to be accepted as a member of the Maritime Anti-Corruption Network (MACN). This organisation is working towards the elimination of all forms of maritime corruption, by cooperating with many stakeholders to create a culture of integrity within the maritime community. We have already had several Britannia colleagues involved and on the opposite page Wing Wai from Hong Kong reports back from the recent MACN meeting in Shanghai.

Hong Kong is also the subject of our latest 'Meet the Team' feature. Following on from the article about our Singapore office in the last edition we now introduce you to our team in Hong Kong, where Chief Executive Tim Fuller takes the helm in this exciting, and vibrant city.

June saw our annual Training Week which has now been going for more than 20 years. Once again, we welcomed around 40 delegates from 12 different countries, with staff from our overseas hubs participating as delegates and speakers. Despite having to put up with the wettest June on record, the delegates and the Britannia hosts enjoyed a lively programme of lectures and social events.

Our Greek office also hosted a successful Loss Prevention seminar in June, led by our head of Loss Prevention, Neale Rodrigues with Shajed Khan, Ella Hagell and Konstantinos Samaritis also speaking. Capt. Kai from our Hong Kong office was also on hand to answer queries arising in China.

Loss Prevention continues to be the driving force behind Risk Watch and we continue our BSafe poster campaign – we enclose a poster reminding everyone about the dangers of entering enclosed spaces without taking proper precautions. Despite many regular articles and reminders, the casualties and deaths continue. We urge Members to do all they can to continue to raise awareness of this important safety issue.

Looking forward to the months ahead, the Loss Prevention department is currently in the process of completing a review of its future strategy. The intention is to move towards adopting a more proactive and risk-based approach to the services provided, with a greater emphasis on analytical and research-based activities. Watch this space for further details!

CLAIRE MYATT
Editor

BRITANNIA JOINS THE MARITIME ANTI- CORRUPTION NETWORK

The Maritime Anti-Corruption Network (MACN) was set up in 2011 by a group of committed maritime companies who were working towards a vision of a maritime industry free of corruption to enable fair trade for the benefit of society as a whole. The MACN has now grown into a global business network of over 100 members, all working towards these goals.

Britannia is proud to be the first P&I Club to have been accepted as a member of the MACN. Britannia recognises the importance of tackling corruption to ensure that companies in the maritime sector can protect their crew and staff, reduce operational risk, and trade fairly and on an equal footing. In fact, the Club is often called for support when one of our Members resists unlawful demands and when the liberty of the ship or crew is threatened. By becoming a member of the MACN, the Club hopes to provide the network with input from an insurance sector perspective.

The first event in which Britannia participated as a member was MACN's spring meeting in Shanghai in March 2019 with Wing Wai from the Hong Kong hub as the Club's representative. More than 70 MACN members sent delegates to the two-day event where there was a combination of full group sessions and smaller working group activities. These included a workshop on best practices where MACN members shared their views and experiences on the challenges and successes they have had in fighting corruption. There were also small group sessions where the delegates were given the opportunity to exchange views and experiences on practical issues relating to corruption, as well as industry-specific and area-specific working groups.

maritime-acn.org



MACN
Maritime Anti-Corruption Network

BRITANNIA P&I TRAINING WEEK 2019

For more than 20 years, Britannia has been holding its annual training week of lectures and workshops in our London office. This has grown in popularity over the years and in June we were delighted to welcome another 40 delegates. The week is aimed at our Members worldwide and the various lectures and workshops introduce them to all aspects of P&I and FD&D as well as the work of our various Britannia offices and regional hubs. Some of the delegates are relatively new to the world of P&I, while others had been working in the sector for many years and use the course as a good 'refresher' about all things P&I.

During the week the delegates got to know and socialise with all the Britannia staff with whom they work on a day to day basis. The fact that the event is held in our own office allows delegates and staff to mix over meals and coffee breaks.



There was also a lively social programme including a night out at the theatre – this year we were lucky enough to see 'Aladdin' in the heart of London's West End. The farewell dinner also had a great location – in a room overlooking the distinctive Tower Bridge.

For the first time, this year, we moved the date from September to June. We have always prided ourselves on providing sunshine for our visitors, but this year the Britannia-branded umbrellas really came into their own as London experienced the wettest June in recent history! Luckily the sun shone for our last day and our trip to Lloyd's, which allowed for photographs on a rooftop overlooking the City.

If you are interested in taking part in next year's Training Week, please contact us and we can send further details to you:

scarvalho@tindallriley.co.uk

BRITANNIA AND TINDALL RILEY IN HONG KONG

THINKING GLOBALLY, ACTING LOCALLY...

THE BRITANNIA HONG KONG BRANCH

IN DECEMBER 2018 BRITANNIA OBTAINED ITS CERTIFICATE OF AUTHORIZATION FROM HONG KONG'S INSURANCE AUTHORITY WHICH ALLOWED THE CLUB TO UNDERWRITE BUSINESS FROM ITS HONG KONG BRANCH. THAT PROCESS SAW THE CLUB'S HONG KONG TONNAGE BEING RENEWED THROUGH THE BRANCH ON 20 FEB 2019. TIM FULLER HEADS THE BRANCH AND DAY-TO-DAY MANAGEMENT, INCLUDING UNDERWRITING AND CLAIMS HANDLING, IS CARRIED OUT FROM HONG KONG WITH THE FULL WEIGHT OF THE LONDON HEAD OFFICE'S SENIOR MANAGEMENT AND SUPPORT STAFF ALSO AVAILABLE. THIS REINFORCES THE AIM OF BRITANNIA'S REGIONAL HUBS, BEING A LEADING PROVIDER OF GLOBAL P&I AND FD&D INSURANCE WHILE ALSO DELIVERING THE HIGHEST QUALITY LOCAL SERVICE.



TIM FULLER is the **Chief Executive of the Britannia Hong Kong branch** and has been resident there since 1 January 2018. He also has overall responsibility for the running of the Hong Kong Hub office. Previously Tim was the Chief Operating Officer of Tindall Riley (Britannia) Limited in London, originally joining Tindall Riley in 1987 as a claims handler and prior to that sailed up to the rank of 2nd Officer, serving on general cargo ships and geared handy size bulkers.



GORDON MCGILVRAY is a **Divisional Director and Head of Claims** in the Hong Kong branch and has over 25 years of experience in handling claims in Britannia for Asian Members. Having gained sea-going experience as a navigator, he has concentrated on casualty work. In addition to having worked in ship operations for a London based ship owner, Gordon has acquired several academic qualifications including degrees in law and in business (maritime).



KAMAN WONG is **Head of Finance** and is a qualified public accountant with PwC Hong Kong's assurance services, specialising in insurance audits. In recent years, Kaman has gained extensive financial reporting and internal control experience by working with a wide range of companies. Kaman has also started to engage in IFRS 17 projects for general and life insurers by providing training, conducting gap assessments and defining accounting rules.



RICHARD INMAN is an **Associate Director** and moved from our London office to Hong Kong in August 2018, taking up the role of Head of Underwriting for the branch. He provides day-to-day underwriting services to our Hong Kong, Taiwan and Mainland China members. He joined Tindall Riley in July 2012. He was born and brought up in Asia, studied at the University of Cambridge and has completed the industry-standard P&IQ qualification.

TINDALL RILEY (BRITANNIA) HONG KONG (TR(B)HK)

TR(B)HK IS THE CLUB'S REGIONAL HUB AND MANAGES BRITANNIA'S HONG KONG BRANCH WHILST OVERSEEING ITS WIDER BUSINESS INTERESTS IN MAINLAND CHINA, TAIWAN AND KOREA. THE OFFICE HAS A SIZEABLE CLAIMS TEAM OF EIGHT STAFF, WITH GORDON MCGILVRAY HEADING UP P&I AND WING WAI HEADING UP FD&D. RICHARD INMAN TAKES CARE OF THE UNDERWRITING OF BRANCH BUSINESS AND GENERAL UNDERWRITING ENQUIRIES FOR THE REGION. TR(B)HK ALSO ACTS AS BRITANNIA'S PORT CORRESPONDENT IN HONG KONG WITH THAT TEAM, HEADED BY CAPTAIN KAI, HELPING ALL BRITANNIA MEMBERS WITH SHIPS NEEDING ASSISTANCE IN HONG KONG OR SUPPORTING THE CLUB'S CORRESPONDENTS IN MAINLAND CHINA.



CAPTAIN CK KAI is an Associate Director and Master Mariner, having sailed on a variety of ships including general cargo, log, bulk and container. He worked as an independent surveyor for many IG Clubs in PR China before joining Sureness Marine Services Co., Ltd., the former Exclusive Correspondent of Britannia in Hong Kong, in 1999. Captain Kai handles a wide range of P&I matters with particular expertise gained on salvage and anti-oil pollution works in Hong Kong and PR China. He is also a qualified Arbitrator with CMAC.



WING WAI is an Associate Director and a dual-qualified Hong Kong and English solicitor. She spent seven years in an international maritime law firm in Hong Kong before joining Tindall Riley in 2014. She is now working with the Club's Chinese, Hong Kong and Taiwanese Members, helping them with a wide range of P&I, FD&D and CLH issues.



AMANDA CHEUNG is a Fleet Manager. She is a dual-qualified English and Hong Kong Solicitor and spent nine years with an international maritime law firm in Hong Kong before joining Tindall Riley in 2017. Amanda has been working with the Club's Chinese, Hong Kong and Taiwanese Members team and handles P&I, FD&D and CLH cases.



PHIL LEUNG is a Claims Manager and a dual-qualified English and Hong Kong solicitor. He joined Britannia in 2018 having worked in international law firms for seven years based in England, Singapore and then Hong Kong, acting predominantly for shipowners, charterers, cargo interests and their insurers. He has a Master of Law from Manchester University and a Mini MBA from Manchester Business School. Phil works with our Korean Members on P&I and FD&D matters.



NICOLE TSUI is a Claims Manager. She joined Tindall Riley in 2015 after completing her Master's degree in Maritime Law at the University of Southampton. Before that, she worked in the Legal and Compliance Team in an international shipping company. She now handles a range of P&I, FD&D and CLH claims for the Club's Taiwanese, Hong Kong and Chinese Members.



EDWARD ALLSOP is an Assistant Claims Manager and a Master Mariner, having sailed for 12 years at sea on a variety of ships including container, tanker and offshore vessels. He worked as a marine consultant based in Hong Kong and Shanghai and carried out a wide range of investigations and surveys. He has a Master's degree in maritime law from Swansea University and now handles P&I claims for Members in Hong Kong, Taiwan and China.



JASON HO is an Assistant Claims Manager. After graduating with a degree in International Shipping, Jason worked as an average adjuster for seven years and as a local P&I correspondent. During this time he was seconded to an IG P&I Club to handle P&I claims. Jason joined Tindall Riley in 2017 and now handles a wide range of P&I and CLH claims for Members in China, Taiwan and Hong Kong.



SUNG PIU is an Assistant Claims Manager and Correspondent and joined TR(B)HK in July 2019. He has a law degree from Zhe Jiang University and a Master's degree in International Maritime Law from Swansea University. Prior to joining TR(B)HK Sung Piu worked as a trainee and paralegal at Chinese Maritime law firms as well as acting as the Legal Manager for an online retail company in China.

COLLISION IN DENSE FOG AND TRAFFIC



Graham Wilson, Associate Director
gwilson@tindallriley.com

A RECENT CASUALTY INVESTIGATION REPORT PUBLISHED BY THE TRANSPORT SAFETY INVESTIGATION BUREAU (TSIB) OF SINGAPORE (<http://ow.ly/51fM30peIFL>) HAS HIGHLIGHTED SOME SADLY ALL TOO FAMILIAR LESSONS REGARDING THE APPROPRIATE ACTIONS TO BE TAKEN BOTH BEFORE AND AFTER A COLLISION.

On 15 March 2018, the 9850 TEU container ship *APL SOUTHAMPTON* was on passage between the ports of Xiamen and Ningbo in China, when she collided with a 46m Chinese fishing vessel, *ZHE LING YU 52035* (hereafter referred to as *ZHE LING YU*) during the hours of darkness and dense fog. The traffic in the area was also dense, with *ZHE LING YU* one of a large number of fishing vessels operating in the vicinity at the time.

Tragically, the collision resulted in the capsizing and sinking of *ZHE LING YU*, with one of her crew killed, a further crew member reported missing and eight of the crew injured. There were no injuries on *APL SOUTHAMPTON*, which sustained minor damage to her bulbous bow.

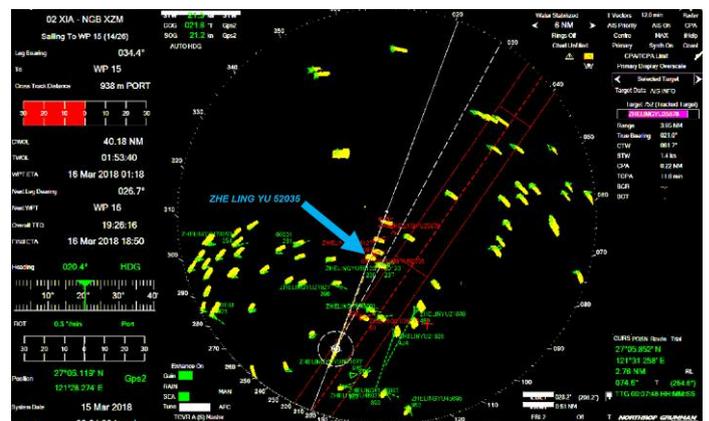
The investigation identified that *APL SOUTHAMPTON* had departed Xiamen pilot station at about 1100 on 15 March with an estimated time of arrival at the Ningbo pilot station at 0830 the following morning, a distance of 460nm. This required an average speed of about 21kts to be maintained as per the passage plan.

During the evening of 15 March, *APL SOUTHAMPTON* was proceeding on a general North East course at 21kts on autopilot off the coast of Zhejiang province in the East China Sea. The 3rd Officer (3/O), who was a Malaysian national, was on the Bridge, assisted by a Filipino Able seaman (AB) as lookout. As the evening progressed, the ship encountered intermittent fog, reducing the visibility to less than 1nm at times. Varying concentrations of fishing vessels were also being encountered. The 3/O used the autopilot to pass them at a distance of between 0.2nm and 0.4nm at times.

At around 2313, the Taizhou vessel traffic system (VTS) broadcasted a Securite message on VHF regarding the heavy fishing traffic in the area as the ship proceeded towards a further group of such vessels. One of these was *ZHE LING YU*, which had been acquired on *APL SOUTHAMPTON*'s automatic radar plotting aid (ARPA) radars. The target data confirmed that *ZHE LING YU* was heading east at a speed of 1.4kts, with a bow crossing range of 1.3nm about 15 minutes later.

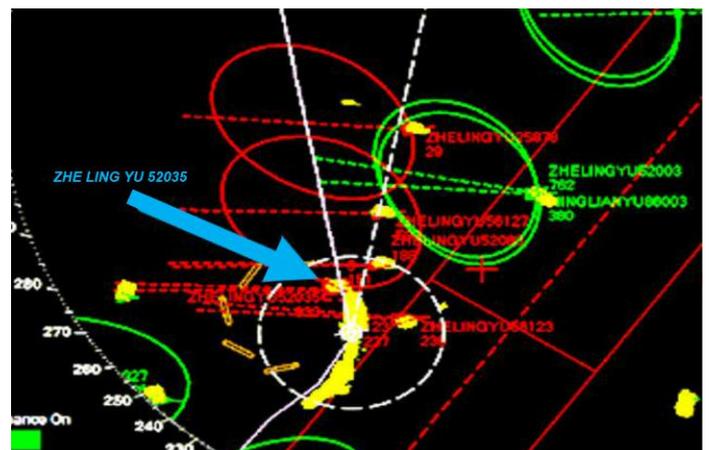
At about 2323, an unidentified automated collision warning was directed to *APL SOUTHAMPTON* by VHF. The AB subsequently asked whether he should call the master, who was a Romanian national, but the 3/O declined to do so.

Around this time, *APL SOUTHAMPTON* was proceeding to the port side of her planned passage (red dotted line in the image below) in way of the 0.5nm cross track safety margin (solid red line). By about 2325, the visibility had dropped to almost zero and the 3/O reportedly activated the automatic fog signal. At the same time another automated collision warning was addressed to *APL SOUTHAMPTON* by VHF, repeated at 2328.



At 2329, the steering was changed to manual and the 3/O initially altered course to starboard in an attempt to increase the closest point of approach (CPA) with a group of fishing vessels on the starboard beam. He then instructed the helm to be put to port, followed by starboard, then back to hard port to attempt to pass astern of a second group of fishing vessels, which included *ZHE LING YU*. Around the same time, the latter's speed increased gradually to about 5.7kts without any significant change in course, reducing the CPA with *APL SOUTHAMPTON*.

At about 2333, (see image below) the 3/O reportedly saw one of the fishing vessels cross ahead at close range on the radar, coinciding with a sound of "clattering" on the VDR. The AB recalled briefly observing a green light subsequently passing on the ship's starboard side.



The 3/O and AB discussed whether they might have hit one of the fishing vessels, and at 2335, the 3/O called the master, who arrived on the bridge two minutes later. The 3/O briefed the master on the poor visibility, heavy traffic and close-quarter situation with the fishing vessel, whose AIS icon and radar target acquisition symbol were no longer visible. The master took over the con, and instructed the AB to steer clear of some nearby fishing vessels, but the ship otherwise continued on passage, with the steering reverted to autopilot at 2343.

Although no distress alert was received, subsequent messages were received on *APL SOUTHAMPTON*'s radar indicating a possible collision. Despite conversations between the master and 3/O regarding the likelihood of the collision, no apparent attempt was made to try to contact *ZHE LING YU* or report the situation to shoreside authorities.

The investigation was unable to ascertain any information regarding the watchkeeping arrangement on *ZHE LING YU*, nor the availability of lights onboard or its ability to make sound signals. The China Maritime Safety Administration (MSA) later reported that it had been fishing at the time of the collision.

LESSONS LEARNED

These fall into two broad categories, relating to the actions before and after the collision:

• **Failure to comply with the COLREGs** - The accident reiterates the importance of effective bridge watchkeeping and compliance with the collision regulations. Neither ship properly assessed the risk of collision nor took appropriate actions to avoid the collision:

- There was no evidence to confirm that *ZHE LING YU* complied with requirements of COLREGs, such as keeping a proper lookout or assessing the risk of collision. The investigation noted anecdotal evidence that the crew of fishing vessels in this area may lack familiarity with the COLREGs; watchkeepers on board merchant ships therefore need to recognise the possible hazards of navigating in close proximity to such fishing vessels.

- *APL SOUTHAMPTON* did not comply with various aspects of the COLREGs, including not proceeding at a safe speed appropriate to the traffic density (Rule 6); not taking appropriate actions when navigating in restricted visibility. This included incorrectly altering course to port for a vessel forward of its beam which should be avoided as far as possible (Rule 19); and not using the appropriate sound signals of one prolonged blast every 2 minutes or less (Rule 35). The coaming lights had also not been switched on to increase visibility, contrary to the master's night orders.

• **Failure to reduce speed** – Had the 3/O of *APL SOUTHAMPTON* reduced speed when encountering restricted visibility and large concentrations of fishing vessels, this would have provided greater time and opportunity to take appropriate and effective action to avoid a collision. It is possible that the 3/O's decision was influenced by the master's night orders, which stated "Keeping required speed for arrival at pilot station". This was contrary to the requirement in the company's Navigation in Restricted Visibility checklist that required confirmation of "Safe speed adopted". This accident highlights the importance of commercial considerations not being allowed to override navigational safety.

• **Ineffective passage plan** – The area of the collision was widely known to be associated with high concentrations of fishing vessels and fog, with safety notices having been published in May 2016 and September 2017 by the China MSA and Ningbo MSA respectively. Had such information been taken into account while preparing *APL SOUTHAMPTON*'s passage plan, then consideration could have been given, for example, to reducing speed over certain legs of the voyage; increasing the bridge team manning; or altering the route to the east.

• **Inadequate bridge manning** – The investigation concluded that the bridge team composition on *APL SOUTHAMPTON* at the time of the collision was inadequate and that the 3/O was likely overwhelmed by the amount of information to be processed. This would have been exacerbated by the high workload associated with navigating in an area of restricted visibility and high concentration of fishing vessels. The investigation was unable to determine why the 3/O did not call for assistance before the collision, despite the AB advising him and which was also required in the SMS and master's standing orders. Had he done so, then additional support would have been available to help increase situational awareness and deal with the developing situation.

• **Failure to render assistance** ('Hit and Run') – Various international conventions, including SOLAS¹ and UNCLOS², place a duty on a master to render assistance to a ship in distress, including following a collision. The other fishing vessels in the area may have been best placed to assist *ZHE LING YU*, but the bridge team on *APL SOUTHAMPTON* failed to establish whether there had been a collision, and whether the crew of *ZHE LING YU* were safe, as well as not reporting the situation. This is disappointing and against the moral traditions of the sea.

¹ Safety of Life at Sea, Chapter V, Regulation 33

² United Nations Convention on the Law of the Sea, Article 98

BSAFE



Shajed Khan
Loss Prevention Manger
skhan@tindallriley.com

OUR BSAFE POSTER CAMPAIGN CONTINUES WITH A REMINDER OF THE DANGERS OF ENTERING AN ENCLOSED SPACE WITHOUT TAKING PROPER PRECAUTIONS



Our readership is very aware of the dangers of entering an enclosed space. However, despite all the warnings, there are still cases where crew have entered a confined or enclosed space and have been killed or seriously injured. Such spaces can quickly become lethal when there is a build-up of noxious fumes or gases or there is insufficient oxygen in the atmosphere to sustain life. Often these gases have no odour and cannot be seen, so it is easy to forget that the space can be deadly.

The IMO has published a list of examples of enclosed space and in many cases these are obvious – cargo spaces, fuel and ballast tanks, chain lockers etc. However, there are other less obvious spaces. For example, the cargo itself can cause toxic gases to build up, such as on deck between structures.

The cause of these incidents is often a lack of training – crew go into a space to perform a routine task without checking the atmosphere first and therefore do not consider the need for appropriate precautions. They can then quickly lose consciousness in the oxygen-depleted atmosphere. Often the senior officers then act on instinct and emotion – ignoring procedures to try and rescue their unconscious colleagues without stopping to check the atmosphere first.

The poster enclosed with this magazine reminds crew of the dangers and we urge you to display it onboard. If you have not received the poster or would like additional copies, please contact us: publications@tindallriley.com

ALWAYS REMEMBER

- Before entering an enclosed space, consider whether the atmosphere inside can support human life, testing with properly calibrated equipment.
- Never enter a confined space if there are safer alternatives for carrying out the work.
- If entry is unavoidable, a 'Safe System of Work' should be followed which would include issuing a 'Permit-to-Work' to ensure that all controls are in place to eliminate (or reduce to a safe level) all of the dangers highlighted in the risk assessment.
- This 'Safe System of Work' should also ensure adequate supervision and establish clear lines of communication.
- The atmosphere within an enclosed space can change quickly and become lethal as conditions change.
- Only properly trained and equipped personnel should perform rescue operations in enclosed spaces.
- Regular drills should include the checking and use of PPE; communication equipment and procedures; rescue equipment and procedures; and instruction in first aid and resuscitation.
- EEBDs (emergency escape breathing devices) provide a short-term air supply for crew to escape a hazardous atmosphere but should NEVER be worn to enter, re-enter or work in a hazardous atmosphere.

CLAIMS AND LEGAL

CARGO CARRIED ON DECK – DAMAGE DUE TO HEAVY WEATHER



Christine Vella, Fleet Manager
cvella@tindallriley.com

THE ELIN [2019] EWHC 1001 (COMM)

IN *THE ELIN* CASE, THE ENGLISH COURT RECENTLY CONSIDERED THE EFFECT AND CONSTRUCTION OF LIABILITY EXCLUSION CLAUSES FOR CARGO CARRIED ON DECK AND THEIR APPLICATION WHERE IT IS ALLEGED THAT THE CARGO IS DAMAGED OR LOST AS A RESULT OF THE SHIP'S UNSEAWORTHINESS AND/OR THE OWNERS' NEGLIGENCE.

The case arose from loss and damage to various pieces of project cargo carried on deck on a voyage from Thailand to Algeria. The bill of lading for the cargo contained the following wording:

"The Carrier shall in no case be responsible for loss of or damage to the cargo howsoever arising... in respect of deck cargo."

[Cargo] "loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising".

The ship encountered heavy weather during the voyage and part of the deck cargo was damaged and/or lost overboard. The following preliminary issue was considered by the Court: "Whether, on a true construction of [the Bill of Lading], the Defendant is not liable for any loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or the Defendant's negligence."

Cargo interests claimed that the owners failed:

- (1) to deliver the deck cargo in the same good order in which it had been shipped;
- (2) in their contractual obligations under Article III Rule 2 of the Hague Visby Rules to properly and carefully load, stow, carry, care for and discharge the deck cargo;
- (3) to properly lash and/or stow the deck cargo for the voyage;
- (4) to exercise due diligence to make the ship seaworthy at the commencement of the voyage, (particularly to ensure that her holds were fit for reception, carriage and preservation of the deck cargo stowed on them).

Cargo interests argued that the seaworthiness obligation is a "fundamental and overriding obligation" and any exclusion clauses in the bill of lading would not affect it, unless "specific and precise" words of exclusion were included. On the issue of negligence, cargo interests argued that the words of exclusion were not sufficiently clearly drafted so as to exclude liability for the carrier's negligence.

Cargo interests, therefore, sought to interpret the exclusion wording narrowly so that owners would be liable for any loss of or damage to deck cargo caused by any of the following:

- (1) unseaworthiness of the ship;
- (2) owners' negligence;
- (3) owners' failure to exercise due diligence to make the ship seaworthy at the commencement of the voyage.

In arguing their case, cargo interests relied on Canadian and Singaporean court judgments, which they said supported the view that an owner could not avoid liability if questions of unseaworthiness and negligence arose.

Owners' argument was that the wording in the bill of lading was clear in excluding all liability for carriage of deck cargo and that the words "howsoever arising" referred to all causes of loss or damage.

The Court found, based on construction alone, that owners were correct in their argument that the words of exclusion were effective to exclude liability for negligence and seaworthiness. The Court said that it was clear from the wording that owners, therefore, had no responsibility for cargo carried on deck whatever the cause of loss or damage (i.e. regardless of whether negligence or unseaworthiness was involved).

Therefore, whilst in some jurisdictions exclusion clauses may not apply in cases where negligence and/or unseaworthiness was the main cause of the loss and/or damage, it seems that under English law, a properly drafted exclusion clause will have the effect of excluding an owner's liability "howsoever arising" such that all liability is excluded, including loss and damage caused by unseaworthiness and/or negligence, and that this certainly appears to be the case for cargo carried on deck.

CAPTURED BY PIRATES – IS THE SHIP OFF HIRE?



Joanna Morgan, Fleet Manager
jmorgan@tindallriley.com

ELENI SHIPPING LTD V TRANSGRAIN SHIPPING BV
(*THE ELENI P*) 2019 EWHC 910 (COMM)

THIS CASE INVOLVED A SHIP ON TIME CHARTER WHICH WAS ORDERED TO LOAD CARGO IN UKRAINE FOR DISCHARGE AT A PORT IN CHINA. AFTER LOADING, THE SHIP PROCEEDED THROUGH THE SUEZ CANAL AND THEREAFTER THE GULF OF ADEN, THROUGH WHICH SHE SAILED WITHOUT INCIDENT. AFTER ENTERING THE ARABIAN SEA, THE SHIP WAS CAPTURED BY PIRATES AND WAS NOT RELEASED FOR SEVEN MONTHS.

Owners claimed hire for the period during which the ship was detained by pirates. However, charterers argued that the ship was off hire pursuant to clauses 49 and 101 of the charterparty, which provided as follows:

"49. Should the vessel be capture[d] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost..."

"101. Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by vessel's Underwriters, if any, will be reimbursed by Charterers... in case the vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended."

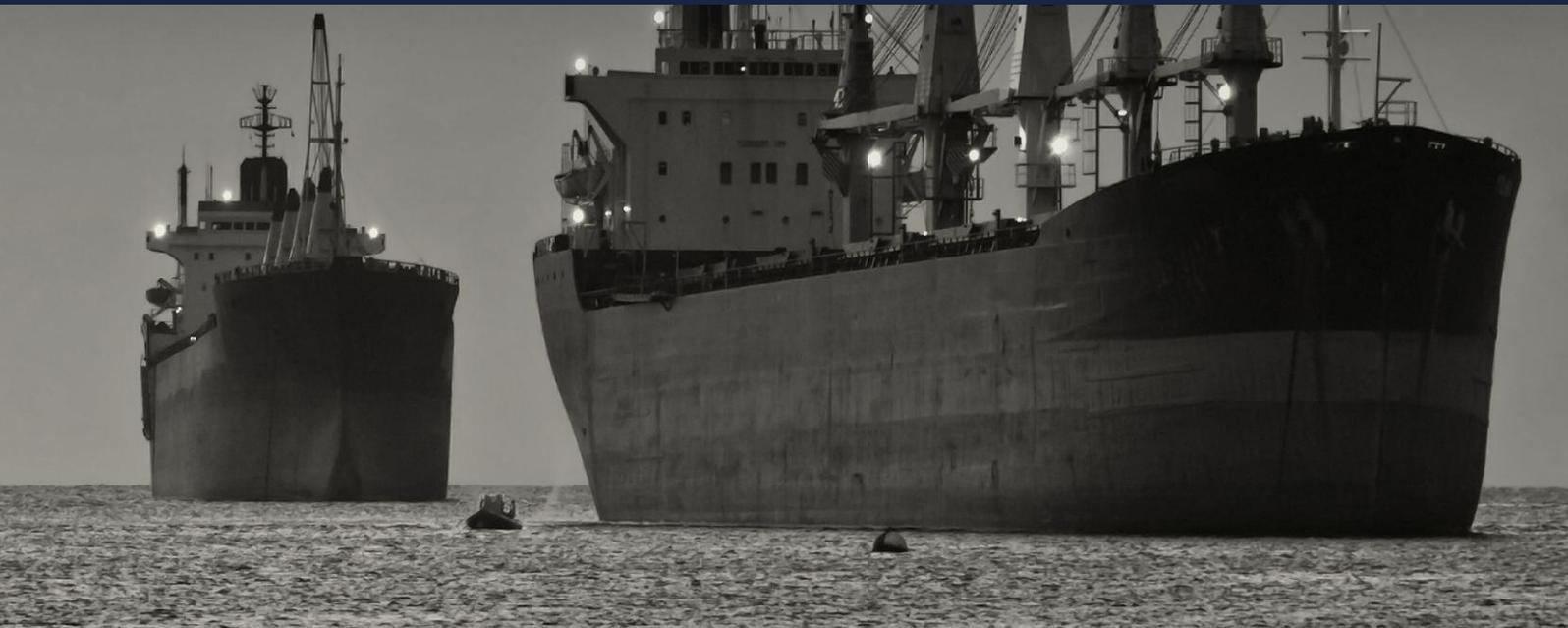
The arbitration tribunal sitting in London rejected the owners' claim on the basis that the ship was off hire under these two clauses. The owners appealed to the High Court which held

that clause 49 was not applicable to the present case as it only applied when the capture of the ship was carried out by an official authority or using legal process. The use of the word "or" between each of the listed off hire events in clause 49 meant that they were all qualified by the words "by any authority or by any legal process". This was because the words which followed them, i.e. "during the currency of this Charter Party", were clearly meant to govern all four events. The ship was, therefore, not off hire under clause 49. The court went on to consider clause 101 and, on this clause, preferred the charterers' view that it applied where the kidnapping arose as a consequence of the ship sailing through the Gulf of Aden rather than owners' argument that the kidnap had to happen within the geographical area of the Gulf of Aden.

The court also decided that clause 101 had been added to the charterparty to accommodate charterers' requirement to sail through the Gulf of Aden. It allocated the risks of doing so by providing that charterers had to pay any extra war risk premiums while owners had to face the consequences of delays from a possible detention by pirates.

Clause 101, therefore, had the effect of putting the ship off hire and the owners' appeal failed.

Although the court's decision was based on the particular wording of the clauses in the charterparty, it illustrates the wider point that, when interpreting charter party clauses, the courts will take into account the intended allocation of commercial risks at the time that the parties enter into the charterparty.



THE FIRE DEFENCES UNDER THE HAGUE-VISBY RULES



Wing Wai, Associate Director
wwai@tindallriley.com

THE ENGLISH COURT OF APPEAL'S JUDGMENT IN *GLENCORE ENERGY UK LTD V FREEPORT HOLDINGS LTD (THE LADY M)* [2019] EWCA CIV 388 PROVIDES HELPFUL GUIDANCE ON THE SCOPE AND CONSTRUCTION OF THE DEFENCES UNDER ARTICLE IV RULE 2(B) (THE "FIRE" DEFENCE) AND RULE 2(Q) (THE "ANY OTHER CAUSE" DEFENCE) OF THE HAGUE-VISBY RULES.

A fire started in the engine control room of the *LADY M* during a laden voyage from Taman, Russia to Houston, USA. It was assumed that the fire was started deliberately by the chief engineer. As a result of the fire, the owners engaged salvors and declared general average. Cargo interests incurred liability to the ship's salvors and sought to recover their loss from owners by way of a claim under the bills of lading subject to the Hague-Visby Rules ('the Rules'). Owners denied liability and counterclaimed for a general average contribution.

The issues before the first instance court were:

- (1) whether the assumed conduct of the chief engineer constituted barratry^{*};
- (2) whether Article IV rule (2)(b) was capable of exempting the owners if the fire was caused by barratry; and
- (3) whether the owners were exempt from liability under Article IV rule (2)(q).

Article IV of the Rules provides:

- (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
 - (b) Fire, unless caused by the actual fault or privity of the carrier.
 - (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier; but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents of the carrier contributed to the loss or damage.

On the first issue, the Court held that whether or not the conduct of the chief engineer constituted barratry depended on further facts about his relevant state of mind but that, in any event, the issue did not determine whether the owners were exempt from liability for the fire under Article IV rules 2(b) or (q).

On the second issue, the Court held that the owners could rely on the Article IV rule 2(b) defence even if the fire was caused deliberately or by barratry. Barratry was wrongdoing against, rather than on behalf of, the carrier.

On the third issue, the Court held that the owners could not rely on the exemption under Article IV rule 2(q) because the chief engineer was acting within the scope of his employment and his conduct occurred in the course of him performing a function in respect of the ship or cargo as a servant acting on behalf of the owners.

Cargo interests appealed to the Court of Appeal on two issues:

- (1) Whether the defence under Article IV rule 2(b) was available where fire was caused by an act of barratry; and
- (2) Whether the actions of the chief engineer constituted barratry and whether it was necessary to establish his state of mind when the act of barratry was committed.

The first instance Court's decision that the owners could rely on the Article IV rule 2(b) fire defence was upheld on appeal. The Court of Appeal decided that, provided there was no breach of the seaworthiness obligations under Article III rule 1, even when a fire is deliberately caused, the owners can rely on the fire defence unless the fire was actually caused by the owners' own fault or privity.

The Court of Appeal did not decide on the issue of whether the chief engineer's conduct constituted barratry as it was only a hypothetical and unpleaded assumption, which would not determine whether owners were exempted under Article IV rule 2(b) in any event.

This case is a helpful decision for carriers as it confirms that the Article IV rule 2(b) fire defence will be available to them even where the fire is deliberately caused by the crew.

^{*}Barratry, an act of misconduct by a master, officers or crew of a ship resulting in damage to the ship and/or cargo without the knowledge of the owners.



MANAGERS: TINDALL RILEY (BRITANNIA) LIMITED
Regis House, 45 King William Street,
London EC4R 9AN
United Kingdom
T: +44 (0) 20 7407 3588
britanniapandi.com

THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED
Registered Office: Regis House, 45 King William Street, London EC4R 9AN United Kingdom
Registered in England and Wales No.10340
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