

RISK WATCH

MAY 2022

LOSS PREVENTION ROUND-UP SUMMARY OF RECENT ARTICLES

CONTAINER CONTENTS WARNING OF CARGO BEING MISDECLARED

BEWARE OF THE BIRDS BULK CARGO ATTRACTS ATTENTION

HSFO BUNKERS RECENT ISSUES IN SINGAPORE

ARTIFICIAL INTELLIGENCE HOW AI CAN HELP TO AVOID COLLISIONS

CLAIMS AND LEGAL IMPORTANT CASES DISCUSSED



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A MESSAGE FROM THE EDITOR



In our last Risk Watch we introduced the Britannia Loss Prevention department and you will see in this edition that the team has been busy providing advice and guidance on a wide variety of topics. The choice of topics is often driven by incidents and claims reported by our Members, or prompted by Member requests for advice. The full versions of the articles are available on the Britannia website.

Recent topics include passage planning and the carriage of refrigerated cargo in containers. The Loss Prevention team also continue to publish case studies as part of the award-winning **BSafe** campaign. The case study featured in this edition focuses on the potential dangers of carrying fertiliser cargo. In this particular case the cargo caught fire; a theme that is explored in greater detail in the article dealing with misdeclaration of cargo in containers.

Our claims teams have used recent experiences to write about cargo incidents, including how flocks of birds can potentially damage bulk cargos – perhaps a scenario more reminiscent of the famous Alfred Hitchcock film, *The Birds*. We also look at how using Artificial Intelligence on the bridge can help avoid collisions.

Last, but by no means least, the FD&D team provides Members with summaries of a few recent interesting cases that raise important legal questions.

As always, we welcome our readers' comments and feedback and so do feel free to contact myself or the marketing and communications team with your suggestions.

CLAIRE MYATT
Editor



We hope you enjoy this copy of Risk Watch. We will be looking for ways to maintain and increase the usefulness, relevance and general interest of the articles. If you have any ideas or comments please send them to: britanniacommunications@tindalriley.com

BRITANNIA LOSS PREVENTION TEAM

ROUND-UP OF RECENT PUBLICATIONS

PASSAGE PLANNING – AN OVERVIEW FOR THE MARITIME SECTOR

A detailed passage plan is an essential part of ensuring the safe navigation of a vessel and a defective passage plan, or a failure to execute a plan correctly, have often been identified as contributing factors leading to groundings.

The recent court rulings in the *CMA CGM LIBRA* case <http://ow.ly/QfEa30siq4Z> stated that a defective passage plan can render the vessel unseaworthy and this may have significant consequences for a vessel's liability in the event of an incident. This highlights the importance of a robust and well-implemented passage plan.

Britannia has recently published a Loss Prevention Insight which looks at the issue of passage planning, setting out the SOLAS requirements, looking at all the publications and information required to produce a comprehensive passage plan and finally analysing how the plan should be executed and monitored.

The full text of the Insight is available on our website: <http://ow.ly/3oFw30siq68>

REFRIGERATED CONTAINER CARGO CLAIMS

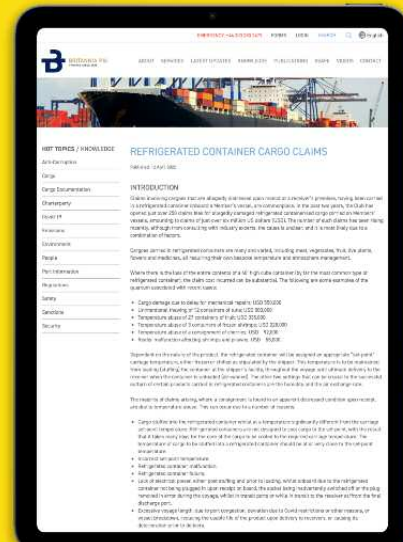
The Club sees a number of claims where cargo is allegedly distressed when it arrives at a receiver's premises. The cargo has been carried in a refrigerated container under a bill of lading issued by a Member.

In the past two years, the Club has opened just over 250 claims files for allegedly damaged refrigerated containerised cargo carried by Members, amounting to claims of just over USD6million. The number of such claims has been rising recently, although our consultations with industry experts suggest that the cause is unclear, and it is most likely due to a combination of factors.

Cargoes carried in refrigerated containers are many and varied, including meat, vegetables, fruit, live plants, flowers and medicines, all requiring their own bespoke temperature and atmosphere management.

Where there is a loss of the entire contents of a 40' high cube container (by far the most common type of refrigerated container) the cost of the claim can be substantial.

The Loss Prevention team have been analysing the claims and have produced a summary of the things to look out for when carrying refrigerated containers. The full text is available on the Britannia website: <http://ow.ly/mVj130siq6o>



BSAFE CASE STUDY NO. 15

INCIDENT CAUSED BY CHEMICAL

REACTION OF FERTILISER

CAUSES SERIOUS FIRE

A 23,401 GT MULTI-PURPOSE CARRIER WAS ABOUT TO ANCHOR AFTER LEAVING PORT CARRYING A CARGO OF VARIOUS TYPES OF FERTILISER IN BULK AS WELL AS GENERAL CARGOES WHEN WHITE SMOKE WAS NOTICED EMITTING FROM CARGO HOLD NO.3. AFTER A FAILED ATTEMPT TO EXTINGUISH THE SUSPECTED FIRE USING THE SHIP'S FIXED CO² SYSTEM AND WITH THE RISK OF AN EXPLOSION DUE TO THE DECOMPOSITION OF THE FERTILISER, THE SHIP WAS EVACUATED AND LATER DECLARED A TOTAL LOSS.

After loading the ship was proceeding to anchorage before continuing its voyage. The master noticed some white smoke emerging from the aft part of hold no. 3 and soon after also from the starboard side of the hold.

The crew identified the cargo in hold no. 3 to be ammonium nitrate based fertiliser in the lower hold and machinery parts and metals packed in wooden crates on the tween deck. After consulting owners' designated person, it was decided to release the hold's fixed CO² system. Immediately after all the CO² had been released, the smoke visibly reduced to a minimum. Openings on the hold's hatch cover where smoke was still visible were sealed by the crew. They believed the situation was now stable.

However, after firefighters arrived on board, they found that the fertiliser was decomposing. They opened the hatch covers to flood the hold with water but a large quantity of yellow smoke emerged from the cargo hold. This raised concerns about the potential risk of an imminent explosion on board and it was decided to evacuate the ship completely. The fire was extinguished. Luckily there were no injuries, but the ship was declared a total loss.

In the Britannia Commentary, the Loss Prevention team analyse the various issues and set out the steps that should be taken when carrying such cargoes. The full text of the case study, together with the reflective learning form, is available in the BSafe area of the website: <http://ow.ly/iU1130siq1y>





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MISDECLARATION OF CARGOES IN CONTAINERS

INTRODUCTION

On 4 March 2022 a fire broke out in the terminal at the quay in San Pedro Port at Long Beach, USA. The United States Coast Guard reported that the fire started in a container¹. The bill of lading for the container stated that the cargo inside was 'synthetic resins,' a non-hazardous material. However, the subsequent investigation revealed that the cargo was misdeclared and the contents of the container were used lithium-ion batteries, which are classed as hazardous materials with a high risk of fire.

According to the United Nations Conference on Trade and Development (UNCTAD), the throughput of global containers was around 815.6 million TEU in 2020². Approximately 10% of all transported containers loaded onboard ships contained dangerous cargo.

Container vessels are exposed to the risk of container fires as usually the containers are stuffed in advance, with the carriers having limited or no information about the contents when they receive them for shipment on board. The carrier may sometimes impose a higher surcharge for transporting hazardous cargo, and impose more stringent rules for transportation or may even prohibit transportation of certain cargo on board their vessels. This may discourage those shipping the containers to provide an accurate description of the cargo inside the containers.

The carriers are trying to prevent cargo being misdeclared by introducing more stringent rules and by investing in technology. They are also encouraging the drafting of industry-wide best practices to tackle the risks created by misdeclaration of cargo in containers.

¹ US Coast Guard Marine Safety Alert - 'Lithium Battery Fire' on the container fire due to misdeclaration of cargoes involving used lithium batteries

² World container port throughput conducted by United Nations Conference on Trade and Development, published under Review of Maritime Transport 2021

MISDECLARATION OF CARGOES IN CONTAINERS CONTINUED

RISKS ASSOCIATED WITH MISDECLARED CARGO

The carrier is relying on the cargo to be correctly declared in order to be certain what cargo is actually being carried inside the container. In cases where a container catches fire, it is also essential for the carrier and the crew on board to know exactly what the container is carrying so the right firefighting strategy can be implemented.

The situation is often made more complicated by the fact that some of the cargoes have similar shipping names, trade names or synonyms. A common example is 'calcium hypochlorite' which is normally used to treat swimming pools or drinking water, and has stringent regulations imposed when it is loaded on board for shipment. The cargo has been misdeclared using trade synonyms not listed by the IMDG code such as 'whitening agent', 'white or yellowish chemical solid', 'chlorinated lime', 'bleaching powder' or 'calcium chloride'.

Searches in the International Maritime Dangerous Goods (IMDG) Code for the term 'calcium hypochlorite' identify six different United Nations (UN) numbers, where each one matches a slightly different set of requirements.

Another issue that results in cargoes being misdeclared is that some shippers may not be aware of the provisions of the IMDG Code or they might purposely take advantage of the special provisions that exempt the testing of certain goods when transporting them in a particular physical form.

PREVENTIVE MEASURES

The carrier should have in place a comprehensive set of due diligence and Know Your Customer (KYC) procedures, with the objective of thoroughly assessing the shipper in order to mitigate the risk of accepting cargo from shippers who may misdeclare or undeclare cargo.

Visual inspection is difficult and continues to be an obstacle for the carrier due to the fact that the construction of a standard steel container prevents the carrier from seeing the cargo contained inside. It would not be practical for the carrier to check or open every single container to verify its contents and it would require specially trained personnel to be able to verify whether the cargo actually matches the declared description, especially for cargo booked at the last minute.

Those dealing with IMDG bookings and with dangerous goods must be trained in order to provide them with the proper skillset that, together with experience, can enable them to better identify some of the red flags commonly seen when a container cargo is identified as being potentially misdeclared.

Another approach is to use technology to tackle the cargo misdeclaration. Software can be used to scan bookings and identify certain key words. A key word search would highlight suspicious containers and then these containers can be subjected to further investigation to see whether the actual cargo matches the shipper's booking declaration. This technology is being continuously developed and is becoming more sophisticated as the use of artificial intelligence (AI) is now being implemented by some carriers to try and identify undeclared cargo.

SOME OF THE RED FLAGS THAT MAY INDICATE MISDECLARED DG CARGO INCLUDE:

- **DOCUMENTATION IS INCOMPLETE, FOR INSTANCE IF THERE IS NO PACKING SURVEY REPORT**
- **SHIPPING NAME SOUNDS SIMILAR TO DANGEROUS CARGO, TRADE NAMES OR SYNONYMS**
- **LAST MINUTE BOOKINGS OR AMENDMENTS TO CURRENT BOOKINGS**
- **THERE IS NO HARMONISED SYSTEM (HS) CODE, OR IT IS A FAKE CODE SIMILAR TO A DANGEROUS CARGO (E.G. STARTS WITH 2828)**

In 2018, Safety4Sea published an article in which the Lloyd's Register Foundation advocated the establishment of Maritime Blockchain Labs³ (MBL) to build an ecosystem within the maritime sector. There would be development of an industrial standard to improve collaboration between industry actors and blockchain practitioners to share best practices, knowledge and solutions, using a prototype with ledger database technology. This would involve various stakeholders and would lead to better transparency and accountability which could eventually be used to help track dangerous goods, using smart containers and radio interface level.

The Cargo Incident Notification System (CINS) issued their 'Safety Considerations for Ship Operators Related to Risk-Based Stowage of Dangerous Goods on Containerships' published in 2019 which carriers may use as a reference to help them improve safety when a container catches fire on board.

CONCLUSION

Due to the nature of a standard container, its contents are not visible and so they cannot be easily verified or inspected. Therefore, the shipping of containers is very much a question of trust between the carrier and the shipper. The risk of misdeclaration can be mitigated by having in place comprehensive KYC and training procedures, combined with cargo identification software.

In addition, it is always important for the carrier to engage with the shippers or forwarding agents to stress the importance of proper cargo declaration and follow the advice set out above to mitigate the risk of container fires.

When all interested stakeholders cooperate to improve the traceability of the cargo and minimise the risk of misdeclaration, this will reduce the burden for our Members and reduce the risks of expensive claims.

³ Safety4Sea published Lloyd's Register Foundation funding Blockchain Labs for Open Collaboration



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BIRDS ON DRY BULK CARGO



A RECENT CASE REPORTED TO THE CLUB INVOLVED A DRY BULK CARGO OF WHEAT AND A LARGE FLOCK OF PIGEONS. WHILE THE CARGO WAS BEING DISCHARGED, A FLOCK OF PIGEONS LANDED ON THE CARGO. THE MASTER WAS CONCERNED AND ASKED THE CLUB FOR ADVICE.

The arrival of the birds was not due to any fault on the part of the shipowner – the birds were naturally attracted to the cargo being discharged. While we may all appreciate the wonders of the natural world, having birds on the cargo does raise some claims concerns:

- **CARGO SHORTAGE CLAIMS** The birds are eating the cargo which can lead to cargo shortage, especially when the number of birds is significant.
- **CONTAMINATION FROM BIRD EXCREMENT** Birds will, of course, defecate in the cargo which is particularly unpleasant when the foodstuff is for human consumption.
- **CONTAMINATION FROM THE BIRDS THEMSELVES** Any birds that die, either naturally or because they become buried in the cargo, cause contamination. Some sanitary authorities, such as those in the EU and Australia, take an extremely strict approach to such contamination.

To try and avoid possible claims, it is recommended that if large numbers of birds are observed on dry bulk foodstuff cargo, either at the discharge or load port, photographs should be taken as evidence and included in Letters of Protest.

There are steps that the crew can take in locations where large numbers of birds are often present on dry bulk foodstuff cargo:

- **Only fully open the holds where cargo operations are taking place. Keep other holds closed. If the holds need to be open for ventilation reasons, only open them part way so that the birds are less likely to enter the hold space.**

- **Crew members can try walking along the deck, waving their arms to scare away the birds, which might encourage the birds to leave the cargo. This should only be done when and where it is safe to do so.**

- **If the problem persists, the ship could use decoy kites or imitation hawks or owls to scare the birds away. Alternatively they could consider installing sonic bird scarers which emit high frequency sounds to deter the birds, or they could place inflatable scarecrows on the main deck next to working holds.**

IF BIRD INFESTATION IS ENCOUNTERED, AND THERE IS A POSSIBILITY OF CLAIMS ARISING, DO NOT HESITATE TO SEEK ASSISTANCE FROM THE LOCAL CORRESPONDENT.



WEST AFRICA RECENT CARGO & STEVEDORE ISSUES



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ROUGH HANDLING OF BAGGED CARGO

BAGGED CARGOES, SUCH AS RICE, CAN OFTEN BE DAMAGED BY STEVEDORES IF THEY TAKE A ROUGH APPROACH TO CARGO HANDLING. THE CLUB HAS RECENT EXPERIENCE OF PROBLEMS IN WEST AFRICAN PORTS, PARTICULARLY IN THE IVORY COAST PORT OF ABIDJAN.

The use of metal hooks to spear, pull and manoeuvre bagged cargoes into the discharge slings is common practice. The tearing of the bags can lead to spillage and mixing of different grades of cargo. Losses can often be minimised through collection and re-bagging of the cargo sweepings. But any rough handling of cargo during discharge should be recorded in a Letter of Protest. This will have two main effects:

- It keeps stevedores alert and therefore helps to minimise the losses.
- There is a record of the damage made at the time. Often the charterer is responsible for the losses arising from stevedore handling. This will of course depend on the charterparty terms but charterer responsibility is common. So any rough handling and other related losses (such as bags falling from slings into the sea) should be recorded in contemporaneous Letters of Protest.

The Club can help arrange any discharge tally surveys required, although these are precautionary surveys and must be paid for by the Member themselves. The surveyor can also help to bring rough cargo handling to attention of stevedores or the port office and can help with any protests to record the rough cargo handling facts.

ALWAYS LET THE CLUB KNOW OF ANY ISSUES OR PROBLEMS AND CONTACT THE LOCAL P&I CORRESPONDENT IF IMMEDIATE ASSISTANCE IS REQUIRED.

STEVEDORE SAFETY WHEN CLOSING HOLDS IN RAIN

A SAFETY ISSUE WITH STEVEDORES AT DOUALA. STEVEDORES WERE WORKING IN THE HOLD WHEN RAIN WAS FORECAST. THE MASTER WANTED TO CLOSE THE HOLDS TO PROTECT THE CARGO FROM WET DAMAGE BUT THE STEVEDORES SEEMED COMFORTABLE INSIDE THE HOLDS AND SO THEY IGNORED THE MASTER'S REQUEST TO LEAVE AND STAYED IN THE HOLDS.

The dangers associated with enclosed spaces are well-documented, particularly the risks of oxygen deprivation, and so the master only partly closed the hatch covers as he was concerned for the safety and well-being of the stevedores. Some of the cargo was damaged by the rain.

Letters of Protest were issued and the topic was also raised at the port office by the attending P&I surveyor. When it rained again some days later, the stevedores were again very reluctant to come out of the cargo holds but eventually were persuaded to leave.

At Douala, or anywhere else for that matter, whenever the cargo holds need to be closed for rain, the following steps should be taken:

- Try to give stevedores as much warning as possible of the need to vacate the holds, always bearing in mind that conditions can change suddenly and it may not be possible to give much notice.
- Before closing holds/hatches, make sure that all stevedores have left the hold. In certain conditions (and especially at night) it can be hard to see if everybody is out. Use whatever torches and lights are available and communicate with each other to ask if anybody is left in the hold.
- If stevedores refuse to leave the holds, do not close them in but make every effort to cover the cargo and then issue a protest.



HIGH SULPHUR FUEL OIL (HSFO) BUNKERS: RECENT ISSUES IN SINGAPORE



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THE CLUB HAS RECENTLY EXPERIENCED 13 CASES WHERE VESSELS HAVE ENCOUNTERED MAIN AND AUXILIARY MACHINERY PROBLEMS AFTER STEMMING BUNKERS IN SINGAPORE.

Issues are being experienced after the use of HSFO provided to vessels using scrubbers in order to comply with MARPOL sulphur emission limits. No cases have been experienced with Very Low Sulphur Fuel Oil (VLSFO) or Ultra Low Sulphur Fuel Oil (ULSFO). To date only residual fuel oil has been affected, with no issues with distillate fuels reported.

The fuel oil, when tested against ISO 8217 (the standard for marine distillate and marine residual fuels), may be found to be on specification. However, samples when subjected to more investigative analysis utilising Gas Chromatography – Mass Spectrometry (GC-MS), have been found to contain chemicals, variously referred to as chlorinated hydrocarbon, volatile organic, or organic chloride compounds.

Damage has been reported to various fuel oil components affecting both main and auxiliary engines, with fuel pumps either damaged or with degraded performance and fuel injector components affected. Occasionally the result of fuel oil supply issues has been main engine and/or auxiliary engine failures and blackouts.

Members are reminded to ensure that samples of HSFO stemmed in Singapore are subject to testing in accordance with the applicable ISO 8217 standard and it is recommended that GC-MS is added to the testing regime to check for the presence of any chemicals. Fuel oil should not, regardless of where it is stemmed, be used until the test results have been received and reviewed. In one of the cases above this simple precautionary measure had not been taken.

Although a fuel oil sample may be on specification for the various parameters listed on the applicable ISO 8217 specification, where chemical components are found this is contrary to the requirements of clause 5 of the ISO standard. Although clause 5 differs slightly between the various iterations of ISO 8217, the basic premise is that the fuel oil should not contain any material in a concentration that could affect the performance of machinery, is harmful to people, or could affect the safety of the vessel.

It should also be considered that the use of contaminated fuel oil is in contravention of MARPOL Annex VI, Regulation 18.3, which states:

3 Fuel oil for combustion purposes delivered to and used on board ships to which this Annex applies shall meet the following requirements:

.1.3 the fuel oil shall not include any added substance or chemical waste which:

- .1.3.1 jeopardizes the safety of ships or adversely affects the performance of the machinery, or*
- .1.3.2 is harmful to personnel, or*
- .1.3.3 contributes overall to additional air pollution.*

MEMBERS REQUIRING ANY ADDITIONAL INFORMATION SHOULD CONTACT THE LOSS PREVENTION DEPARTMENT.

CAN ARTIFICIAL INTELLIGENCE (AI) HELP PREVENT COLLISIONS?



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TODAY THERE ARE SEVERAL COMPANIES DEVELOPING ARTIFICIAL INTELLIGENCE (AI) SYSTEMS FOR SHIPS, DESIGNED TO WORK TOWARDS PREVENTING COLLISIONS. THIS TYPE OF TECHNOLOGY IS INCREASINGLY BEING TESTED BY SHIPOWNERS AND MAY ASSIST THE MASTER AND HIS CREW IN GETTING A BETTER OVERVIEW OF THE SURROUNDING ENVIRONMENT AND IMMEDIATE RISKS. HAVING MORE ACCURATE REAL TIME INFORMATION AVAILABLE TO THEM WILL HELP THEM TO MAKE THE CORRECT DECISIONS.


JACOB DAMGAARD FROM OUR LOSS PREVENTION DEPARTMENT LOOKS AT SOME OF THE ISSUES THAT ARE RAISED BY THE USE OF AI ON THE BRIDGE.

TRAINING

The users (deck officers) need to understand and be confident in how to use the AI and, very importantly, understand its limitations. The initial training should, ideally, be conducted in a simulator, so that the officers can become familiar and confident with the system and how it interacts with other bridge equipment in a controlled environment. If training is conducted on board, risk assessments must be carried out and a detailed training plan set out to determine where and when it is safe to carry out the training.

ALARM FATIGUE

This was an issue that became relevant when the ECDIS was first introduced. ECDIS has many different alarm settings and there is a risk that the OOW may miss alarms that require immediate attention when too many alarms are sounding. It is important that this new AI system is set up correctly so that it helps the OOW and does not become simply another distraction. A clear company policy should be implemented to ensure the AI system is used in a prudent way.

An aerial photograph of a port area with a large ship docked at a pier. The scene is overlaid with a network of glowing blue arcs and dots, representing radar or collision avoidance technology. The arcs connect various points across the sky and water, suggesting a complex system of tracking and prediction. The background shows a clear blue sky and distant landmasses.

FOR COLLISION AVOIDANCE, THE TRADITIONAL METHODS OF VISUALLY ASSESSING THE BEARING AND DISTANCE OF THE OTHER SHIP AND ALSO THE USE OF RADAR AND ARPA STILL APPLY.

ERGONOMICS

The system should be installed so that it is easily accessible from the ship's main conning area, and that its displayed information can be easily seen without distracting the OOW's attention from other bridge equipment.

MALFUNCTIONING

The technology behind the AI system is quite complex and rectifying any malfunction may not be within the scope of the onboard crew. Crew training should cover the basic process of how to identify and rectify malfunctions, following the manufacturer's instruction, which will allow the crew to assess whether the fault affects the reliability of the system and whether its use should be discontinued until the fault is rectified. Furthermore, shoreside support should be available to assist the crew.

It is also important to note that any AI system is not a statutory requirement and should only be used in addition to other bridge equipment required by SOLAS regulations. For collision avoidance, the traditional methods of visually assessing the bearing and distance of the other ship and also the use of RADAR and ARPA still apply. If a ship does become involved in a collision, or other incident, and it is found that there was overreliance on the AI system leading up to the incident, this may be used against Members and could be seen as a contributing factor to the incident.

CLAIMS AND LEGAL

WAKE DAMAGE TO MARINA AND PLEASURE BOATS



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THE CLUB RECENTLY HANDLED A CASE WHERE A 40,000GT CONTAINER SHIP CAUSED WAKE DAMAGE TO A MARINA AND TO MOORED PLEASURE BOATS.

FACTS

The ship was transiting a major river on the way to a nearby port when the ship caused wake damage to a marina and moored pleasure boats at a smaller port.

Three river pilots were on board during the incident – the pilot and two trainees. The trainees alternated hourly in directing the navigation of the ship under the pilot's supervision. The river transit took place at night in clear weather and light winds.

The speed of the ship was under the pilot's direction. According to the pilot's report, his usual practice on passing the small port was to reduce the speed to about 10 knots. However, on this occasion he was aware that there was no ship at the nearby grain terminal and therefore maintained a speed of about 15 knots.

The pilot card completed during the pilot-master exchange (MPX) indicated the planned passage speed of 14 knots. The particular section of the river did not have a designated speed limit. Instead, the inland 'safe speed' rule of navigation applied: the ship was required to consider such factors as visibility, traffic density, manoeuvrability, weather, sea conditions, and vessel draft while determining the 'safe speed'.

Upon berthing at the final port, the pilot was advised of the wake damage sustained by the marina. The incident resulted in a large claim for property damage to the marina, including physical damage to the dock structures, as well as a number of non-contact damage claims by owners or insurers of pleasure boats moored at the marina.

REVIEW OF THE INCIDENT

After conducting a review of the available information it is plausible that a number of factors may have contributed to the incident:

Given the pilot's usual practice was to pass the smaller port at a reduced speed of about 10 knots, the decision to proceed at about 15 knots on this occasion was reportedly on the basis that there was no ship at the nearby grain terminal. However, it would appear that in doing so the pilot had not recognised the possible risk of damage to the marina and moored pleasure boats resulting from the ship's wake while transiting at this speed. The available evidence did not elaborate on the possible reasons for this oversight by the pilot, nor whether the presence of the two trainee pilots on the bridge may have contributed in any way to the decision to proceed at the chosen speed.

LESSONS LEARNED

From the incident, there are certain key learnings which Members should take into account to help prevent similar incidents from occurring:

Awareness of wake and surge - A ship underway has a duty to consider the anticipated effects of its speed and motion through the water: a ship proceeding with excessive speed can generate serious wave effects which can result in damage to shore structures/installations or ships alongside, even if the ship remains relatively distant from these objects. Such damage can occur even if there is a speed limit set in the area and the ship is proceeding with a speed below the limit. This effect can be exacerbated in narrow sections of the waterway and on deep draft ships. In such situations, the ship is required to proceed carefully to avoid creating swell or hydrodynamic suction that might cause damage. It must also take reasonable precautions to minimize the effects of its wake, including a reduction in speed or change of course.

The international shipping community has seen serious property and environmental (shoreline) damages caused by wake wave and wash, compounded by increasing marine traffic consisting of faster and bigger ships. There has been a significant amount of research to reduce wake effect through improved ship designs, which may help address the issue in the long term.

Although masters/officers generally have a broad understanding of the causes and implications of ship's wake, it does not come intuitively unless they regularly operate in inland waterways and canals. As the impact of the wake wave may occur several hundred metres away from the ship, detecting it through physical observation may be difficult or impossible. This subject is generally not dealt with in formal training and competency exams and is seldom discussed in industry seminars. Therefore, ship operators should consider providing additional guidance and training in cases where they identify the need to develop adequate perception of wake wave and wash in order to prevent incidents and losses.

Passage planning and master's intervention - A passage plan should identify speed limits where they apply, as well as areas sensitive to wake damage, such as small craft berths and waterfront property. This is of particular relevance on a relatively large and high-powered container ship which can create a significant surge during a river passage. If any such risks are identified, the concern about the safe speed should be addressed by planning an appropriate speed reduction and/or by the bridge team raising the matter with the pilot and, if necessary, for the master to intervene.

Speed considerations during the MPX - While discussing the passage and manoeuvre plan, it is recommended to verify with the pilot whether his local knowledge can further contribute to the passage plan. This could help indicate any areas where a speed reduction may be required. However, it should be borne in mind that, depending on local practices, a pilot may not fully consider the potential damage for which the ship may be ultimately held responsible.

Bridge Resource Management (BRM): situational awareness and passage monitoring - When navigating with pilot trainees under supervision, the master should take this into account and use additional caution in monitoring of the passage in order to detect and correct any errors.

Detection of excessive wake/surge - As a matter of good BRM practice, excessive wake should be detected and reported to the master and/or the bridge team. At night, the use of a search light may assist in identifying any such surge, in particular in proximity to the shore line, jetties or berths. Detecting excessive wake prior to passing moorings should result in an adjustment of the ship's speed in order to mitigate against any property damage.



THE IMPORTANCE OF 'SUBJECTS' PROVISIONS TO THE CONCLUSION OF A BINDING CHARTERPARTY



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IN A RECENT JUDGMENT THE ENGLISH HIGH COURT HAS SET ASIDE AN ARBITRATION AWARD, HOLDING THAT THERE WAS NO BINDING CONTRACT OR ARBITRATION AGREEMENT AS THE FIXTURE 'SUBJECTS' HAD NOT BEEN LIFTED.

In *DHL Project & Chartering Ltd v. Gemini Ocean Shipping Co Ltd (The NEWCASTLE EXPRESS)* [2022] EWHC 181 (Comm), the Court considered the issue of whether a binding contract and agreement to arbitrate had been concluded between the owners and claimants who were seeking to charter the NEWCASTLE EXPRESS pursuant to a fixture recap contained in an email sent on 25 August 2020 by brokers through whom the charterparty was being negotiated.

The fixture recap started with the words 'SUBJECT SHIPPER/RECEIVERS APPROVAL WITHIN ONE WORKING DAY AFTER FIXING MAIN TERMS & RECEIPT OF ALL REQUIRED CORRECTED CERTIFICATES/DOCUMENTS...' and then set out a further 20 clauses, including a London arbitration clause. The recap also stated that an inspection of the ship by the vetting organisation Rightship would take place at Zhoushan on 3 September 2020 and that owners would provide certificates before the ship had left Zhoushan. However, on 3 September, the claimants notified the owners that the shippers were not accepting the ship as Rightship's certificate had not been provided and 'released' the ship. The ship had not left Zhoushan at that stage.

The owners commenced arbitration against the claimants in London, contending that they were in repudiatory breach of the charterparty. The claimants did not participate in the arbitration. The tribunal held that the claimants were in repudiatory breach and awarded damages to the owners.

The claimants applied to the English High Court to challenge the tribunal's jurisdiction to determine the arbitration.

The claimants submitted that the effect of the 'subjects' provision in the fixture recap was that there was no concluded charterparty until and unless the subjects were lifted. In response, the owners argued that, even if the charterparty had not been fixed, it should not affect the separate enforceability of the agreement to arbitrate.

The Court agreed with the claimants, holding that the commercial purpose of the 'subjects' provision was that the claimants would not wish to enter into a binding contract until both the shipper and receiver had approved the ship which the claimants were proposing to use and would reserve their position in full until such time. The 'subjects' provision in this case, as a condition precedent to formation of the contract, was never lifted so there was no binding or concluded contract.

The Court also held that the 'subjects' provision extended to the agreement to arbitrate. The effect of the provision was to negate the claimants' intention to enter into **any** contract at all, and the arbitration agreement was part of the proposed contract.

The use of 'subjects' or 'conditions' provisions is very common in the negotiation of charterparties. The Court's decision in this case is a useful reminder that the English Courts will treat 'subjects' provisions as conditions precedent to the conclusion of a binding charterparty.



Neutral Citation Number: [2022] EWHC 181 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Case No: CL-2021-000071

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 31/01/2022

Before :

MR JUSTICE JACOBS

Between :

DHL PROJECT & CHARTERING LTD
- and -
GEMINI OCEAN SHIPPING CO., LTD

Claimant

Defendant

ENFORCEABILITY OF LETTERS OF INDEMNITY



Rishi Choudhury,
Associate Director, Denmark
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IN A RECENT JUDGMENT THE ENGLISH HIGH COURT HAS UPHELD A CLAIM BY THE BENEFICIARY OF A LETTER OF INDEMNITY FOR LOSSES ARISING FROM THE DELIVERY OF CARGO WITHOUT PRESENTATION OF ORIGINAL BILLS OF LADING (*ARAMCO TRADING FUJAIRAH FZE V GULF PETROLEUM FZC* [2022] EWHC 288 (COMM)).

The buyer (an Aramco company) under a purchase contract agreed to pay for a cargo of fuel oil against the sellers' commercial invoice and the original bills of lading or, if the original bills of lading had not reached the discharge port at the time of the ship's arrival, in exchange for a letter of indemnity (LOI) from the sellers.

When the ship arrived at the discharge port the original bills of lading were not available, so the sellers issued an LOI (the 'Sellers' LOI'). The LOI warranted that the sellers were the owners of the cargo and that they agreed to indemnify and hold the buyers harmless from any third party claiming an interest in the cargo. The buyers paid for the cargo in exchange for the Sellers' LOI.

The buyers were also the voyage charterers of the ship. They, in turn, issued an LOI (the 'Buyers' LOI') to the shipowners indemnifying them for discharging the cargo without production of the original bills of lading.

A few weeks later, a bank which had provided credit to the sellers but had not been reimbursed by them claimed that it was the lawful holder of the original bills of lading and that the shipowner had unlawfully delivered the cargo to a party other than the bank. The bank arrested the ship in Singapore and, to release the ship, the shipowners provided security to the bank of SGD7.9 million.

The shipowners claimed an indemnity from the buyers under the Buyers' LOI. In compliance with the Buyers' LOI, the buyers issued counter-security to the shipowners by making a cash payment of SGD7.9 million into the Singapore court to replace the security provided by the shipowners to the bank.

The buyers then claimed an indemnity from the sellers under the Sellers' LOI. The sellers refused to comply, alleging that the Sellers' LOI had been issued by an employee of the sellers who had not been authorised to issue the LOI. The sellers also argued that the Buyers' LOI had not been issued by the buyers but by a different Aramco entity and furthermore that the buyers were not the voyage charterers and therefore had no obligation under the Buyers' LOI to indemnify the shipowners.

The buyers applied to the English court for an order that the sellers should pay them SGD7.9 million under the terms of the Sellers' LOI.

The court granted the order. The allegation that the sellers' employee was not internally authorised to issue the Sellers' LOI was dismissed on the grounds that the LOI was issued with the apparent authority of the sellers: the LOI was on the sellers' letterhead with the sellers' corporate stamp fixed to it. The fact that the sellers' employee had access to the sellers' email system and stamp in order to issue the LOI indicated that the employee did have internal authority. The sellers had then presented the LOI to the buyers in order to collect payment for the cargo. Such apparent authority made the Sellers' LOI binding upon the sellers.

The sellers' argument that the Buyers' LOI had not been issued by the buyers was also rejected. The name of the entity by which the Buyers' LOI had been issued appeared to be a clerical error, as confirmed in contemporaneous correspondence between the shipowners and buyers. There was also no dispute between the shipowners and the buyers that the buyers were in fact the voyage charterers and liable for indemnifying the shipowners under the Buyers' LOI.

