MARITIME YEAR IN ENGLAND
A REVIEW OF THE YEAR
1996/97

BY

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INDEX

Maritime Law in England:

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Introduction

Two themes emerge from changes in English Maritime Law over the past 18 months. The first and more dramatic shift is one of focus in the wake of the Woolf report in the summer of 1996, and, independently, of the long-awaited consolidation of Arbitration law and practice in the Arbitration Act 1996. Both of these developments constitute a counter-offensive upon negative perceptions of escalating costs and increasing delays in English litigation. The former seeks to underscore cost-effectiveness and efficiency in dispute resolution whether litigated or mediated, the latter to achieve a flexible and commercially effective nexus for London arbitrations.

A second, more perhaps an emerging trend than a theme, is that of the Court's increasingly international eye. The Arbitration Act itself is of course shaped in part by international law and practice, but in a number of decisions during the period, the Courts appear to be intensifying their awareness of other jurisdictions, seeking to place decisions within a wider context and to lend support to proceedings outside England.

There have of course been a number of key cases, perhaps the most eagerly awaited decision being that in the "NAGASAKI SPIRIT", which finally put paid to Salvors'

* With the great assistance of Dr Alison Marriott, the most highly qualified trainee solicitor I have ever persuaded to work with me.

hopes of being awarded a profit element under Article 14(3) of the Salvage Convention 1989.

The piecemeal implementation of the compulsory ISM code began for Ro-Ro vessels plying EU routes. Implementation of the Code will be of greater concern this time next year, after the next tranche of vessels have become subject to the code on July 1st 1998, so although not yet a live issue in litigation, the issue is very much a matter of concern for shipowners and P & I Clubs.

What follows is necessarily a truncated, perhaps an eclectic, and possibly even partial account of changes in English Maritime Law over the past 18 months. I shall look at changes brought about by the Arbitration Act, at the shift towards mediation, at a range of decisions taken throughout the period, and, briefly, at a few of the changes which the ISM code is likely to bring about.

Arbitration, Litigation, and Mediation

(a) The Arbitration Act 1996

In force since 31st January 1997, the Arbitration Act 1996 has made significant (even revolutionary, according to some commentators) and substantive changes to the law and procedure of arbitration in England, all in the name of increased speed and effectiveness. Its gestation has been described as "elephantine"[1], having first been mooted in 1989 when Mustill LJ, as then Chair of the Departmental Advisory Committee, recommended that the UNCITRAL Model Law, adopted in June 1985 by United Nations, should not be incorporated in its entirety into English law. The new Act was to reflect, though not replicate, the Model Law. It was intended to be user friendly, accessible and comprehensive. To this end, in the final version of the Act, the statutory framework has been simplified, the language clarified and the limited circumstances in which the courts will intervene has been spelt out.

[1] Steyn L.J. 'England's response to the Model Law of Arbitration' (1994) 60 J.C.I. .Arb. 3, 184

There are a number of drafting innovations in the Act. Other statute law to which it refers, such as the Civil Jurisdictions and Judgments Act 1982, is incorporated into the Act so that the Statute acts as a stand alone handbook of relevant legislation. Further, the Act begins with the equivalent of a mission statement - something of a departure for English Statute law - and identifies three principles of construction which are to have overriding effect in case of any ambiguity:

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) the court should not intervene except as provided.

Major innovations in the Act include the following.

(i) Jurisdiction

The Act introduces into English statutory law the concept of the "seat" of an arbitration - the place where the arbitration is geographically based, irrespective of whether elements of an arbitration are conducted abroad. This codifies a concept previously accepted by the Courts (James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd [1970] AC 583; Sumitomo Heavy Industries v Oil and Natural Gas Commission [1994] 1 Lloyd's Rep.45). S.3 provides that the seat can be expressly agreed, implied where the choice of law or procedure is English, determined by the Arbitrators where powers to do so are delegated to them by the parties, or failing any of the above, implied from all the circumstances.

Section 2 (3) enables the court in appropriate circumstances to exercise powers in support of arbitration proceedings based outside the jurisdiction. This provision gives parties to overseas arbitrations the potential to apply to the English Courts for interim relief - such as a Mareva injunction - where there are assets within the jurisdiction.

This element of the Act mirrors a wider movement within the judicial process. On the 1st April 1997 the Civil Jurisdiction and Judgments Act (Interim Relief) Order (SI 302) came into effect and extended the court's powers to grant interim relief in support of overseas proceedings. Indeed in June of this year, in Credit Suisse Fides Trust SA v. Cuoghi (The Times, July 3rd 1997) the English court granted a *world-wide* Mareva injunction against the assets of a defendant domiciled in England in support of Swiss substantive proceedings where relief was impossible in Switzerland.

It is no longer obligatory to apply to the Court to decide whether the Arbitrators have jurisdiction over an arbitration. Sections 30 and 31 of Act give the Arbitrators themselves the power to rule on whether or not they have jurisdiction in the arbitration. However, an application can still be made to the Court for a ruling if all the parties agree, or with the arbitrators' permission, provided the court is satisfied, first, that substantial costs saving will be made, second, that the application was made without delay and third, that there is good reason for the court to decide the issue.

(ii) Time Limits

The Court's ability to extend time for the commencement of an Arbitration has been curtailed. S. 27 of the 1950 Act provided that time could be extended if otherwise "undue hardship" would be caused to a party. This has been replaced by a new provision, S. 12, which applies not only to limitation clauses which would bar a claim, but also to those which extinguish it altogether. Undue hardship has been replaced with two alternative grounds:

(a) where the circumstances relating to the extension of time are outside the reasonable contemplation of the parties at the time of the agreement, and it would be just to extend the time.

(b) where the conduct of one party makes it "unjust" to hold the other party to the strict terms of the time bar.

"Undue hardship" was interpreted liberally by the courts (The "ASPEN TRADER" [1981] 1 Lloyd's Rep 273, 279 C.A.; Comdel v Siporex [1991] A. C. 148, 166) and initial expectations were that the new clause would be applied more restrictively.

However, a recent application of the section in Vosnoc Ltd v Transglobal Projects Ltd, (23rd July 1997) does not appear to support this. The case concerns whether a dispute over a contract of affreightment had been validly referred to arbitration within the one year time limit imposed by Article III r. 6 of the Hague Rules. It also addresses what must be done to commence an arbitration.

Under the Limitation Act 1980 (S.34(3)), to commence an arbitration, one party must serve upon the other a notice requiring the appointment of an arbitrator. In this case, a letter had been despatched which stated only that the dispute was referred for arbitration to three arbitrators in London. The court held that there was a difference in approach between the UNCITRAL Model law and English law. Some further step must be taken in English law, beyond requesting that the matter be referred to arbitration. A step towards appointing the tribunal is necessary, and this would also be the case under the new s. 14 of the Arbitration Act 1996. The requirement that the notice should call upon the other side to appoint its arbitrator is a primary element, and without it, proceedings do not commence. The judge exercised his discretion to extend time under the first head of s.12 - namely that the circumstances were outside the parties' reasonable contemplation and it would be just to extend the time for commencement. He recognised that the Arbitration Act intended to make it more difficult for extensions to be granted, but assumed that as subsection (a) does not limit the circumstances which should be considered, all the circumstances fell to be reviewed. On the justice point, he considered persuasive the fact that the irregularities in the letter were probably attributable to a foreign party unfamiliar with English requirements on a point of law not finally determined by authority, that the party's intention to commence proceedings was clear, and that the claim was substantial.

(iii) New powers for the arbitrators

Section 34 (1) of the Act grants to the arbitrators powers to determine matters of procedure and evidence, subject to the parties' rights to agree them in writing. This places a slightly different emphasis than is to be found in Article 19 (1) of the Model Law, which sees the parties in control of procedure, with the Arbitrators having powers in default where the parties fail to agree. However, read in the light of the overriding principles of s. 1 of the Act, the effect is perhaps not altogether different.

The section sets out examples of the kind of matters which the Arbitrators - or the parties - may decide. New departures include that, unless the parties have agreed otherwise, the Arbitrators need not adhere to the strict rules of evidence. Indeed, under s. 46 (1) (b) the Arbitrators can, with the agreement of the parties, decide the dispute in accordance with "such other considerations as are agreed by them or determined by the tribunal". This enables Arbitrators to take account of "equity" or "honourable engagement" clauses which provide scope for an Arbitrator to decide a dispute on equitable or "fair play" principles.

In the recent case of American Centennial v INSCO, [1996] L.R.L.R. 407, decided before the new Act became law, the Court determined that the arbitrator had exceeded his discretion in applying an honourable engagement clause, to the extent that "the words used will not fairly bear the meaning [...] given to them". The award was varied by the court on this ground. This decision remains relevant for agreements concluded before the new Act came into force - where the Courts are asked to review a decision taken on the basis of an honourable engagement clause, they will reconsider the basis on which the decision was made.

Other innovations include the fact that the Arbitrators are no longer required to adhere to the traditional adversarial approach to procedure. Instead, they can choose to adopt an inquisatorial role more familiar in continental Europe and take the initiative in establishing the facts. A further departure from English custom is that under s. 37, the Arbitrators have the power to appoint experts to report to it - again, a procedure more familiar in the European context.

Arbitrators are given the power to cap costs (s.65) , unless the parties agree otherwise. They can likewise order security for costs under s.38 (3). Previously, unless the parties consented, security for costs was a matter for the courts.

Under s.49, unless the parties have agreed otherwise, the arbitrators can now award interest either on a simple, or on a compound basis, reckoned from whatever date is just in the circumstance of the case interest can be awarded either on the amount (or

any part of it) awarded, or on any sum claimed in the arbitration but paid before the award was made. They can also award compound interest on any outstanding amount of an award, a development designed to meet the problem where a party wrongfully withholds payment from the successful party. The Arbitrators' freedom to set the rate of interest, and also to award compound interest on outstanding sums, should operate to speed up the payment of awards.

(iv) New powers for the parties

The parties can agree in writing matters of procedure and evidence in the running of the arbitration rather than leaving it to the Arbitrators. Furthermore, they may now agree at the time of concluding the contract that there will be no right of appeal from an arbitration decision. Shipping disputes are no longer a special case for the purposes of appealing an award. This will permit parties to agree in advance that they will abide by an arbitration outcome, which should in turn limit the number of cases litigated after all following arbitration. An exclusion clause to that effect could in theory be incorporated into a standard arbitration clause, although it may be that the shipping industry is too accustomed to the potential for a second bite at the cherry to wish to concede its right to appeal.

Alternatively, the parties may wish to draft into their arbitration clause a provision enabling an appeal to be made to the Court without leave. A recent case in the Commercial Court (August 1997, unreported), Poseidon Schiffahrt GmbH -v- Nomadic Navigation Co, The "NOMAD", sought to challenge the validity of such a clause in the Shelltime 4 Form, by which the parties consent to an appeal on any question of law arising from arbitration award. The action was brought under s.1 (3) of Arbitration Act 1979, which states that an appeal may be brought by any of the parties to the reference either with the consent of all parties, or with the leave of the court. The Owners argued that consent to an appeal could necessarily therefore only be given once the arbitration had begun, and not at the time the contract was concluded. The challenge failed and the court ruled that a consent included in an arbitration clause was valid. The "NOMAD" decision is expected to apply equally to the new act, as the relevant clause (s.69(2)) is not materially different. Indeed, it is

rather less ambiguous, as it does not refer to the word "reference" but instead to the word "proceedings".

The wide-ranging issues upon which the parties can agree suggest that their lawyers will need to consider carefully the scope of powers which the Arbitrators are to be accorded. Negotiating the shape of the arbitration on behalf of their respective clients may turn out to be a key role in future for legal representatives.

(v) Criticisms of the Act

Abandonment of distinction between domestic and international arbitrations

The Act was conceived as maintaining a distinction between domestic and international arbitrations, so that in domestic arbitrations, the court retained discretion as to whether to stay legal proceedings brought in defiance of an arbitration clause. This aspect of the Act has not been implemented, as it was deemed contrary to European Community Law in discriminating against nationals of other European Union countries. Both British and non-British parties who have subscribed to an arbitration agreement will now be kept to that bargain unless the agreement proves to be void or incapable of performance. To criticise the Act on this basis appears a residual desire for special treatment - a position indefensible on any sensible analysis.

Summary judgment

Under s.9 of the Act it is no longer possible to apply to Court for summary judgment as a means of subverting an arbitration clause. Summary judgment under Order 14 of the Rules of the Supreme Court offers a swift and cheap procedure for dealing with a claim to which there is no arguable defence. However, s. 9 (4) provides that proceedings commenced in breach of an agreement to arbitrate will be stayed as of right.

The major criticism, that "unanswerable" claims will now need to go to arbitration, has been answered by Saville L.J., the Chair of the Departmental Advisory Committee on Arbitration Law, who played a key role in drafting the Act ('An Answer to some

criticisms of the Arbitration Act 1996', the Arbitration and Dispute Resolution Law Journal, [1997] 155-157). In his opinion, there is no basis for a court to disregard the bargain made between the parties that any disputes will be arbitrated. Further, it cannot be argued that if there is no arguable defence, there is therefore no dispute to be resolved by arbitration. If this were the case, Arbitrators would have no jurisdiction to decide disputes in which no proper defence is put forward, and the loser would have the right to challenge any arbitration award on the basis that the arbitrators lacked jurisdiction. Prior to the Act, Mustill and Boyd on Commercial Arbitration (2nd ed. 1989, pp.122-124) pointed out that

> *"this makes commercial nonsense and so far as we are aware, no court has ever suggested that it is correct. For practical reasons, the law simply proceeds on the hypothesis that in cases where the defence is very weak, both the Court and the arbitrator can properly assume jurisdiction over the claim."* (p.124).

Indeed, since the Act came into effect a breach of charterparty case on this point has already been decided at first instance. On 7th July of this year in Halki Shipping Corp v Sopex Oils Ltd [1997] 3 All ER 833, Clarke J. held that, where the parties to a contract had agreed to refer a dispute to arbitration, any subsequent claim which the other party refused to admit or did not pay, was a relevant dispute which the claimant was bound to refer to arbitration whether or not the respondent had a sustainable defence to it. It is no longer the case that both the Court and the arbitrator can assume jurisdiction over the claim. "In harmony with the underlying philosophy of the act", according to Clarke J, the matter "must be left to the arbitrators".

According to Saville LJ there is no reason why arbitrators should not be able to deal with interim awards yet more quickly than a court where a dispute reveals no proper defence. He suggests that if Arbitrators are fulfilling their duties under s. 33, which requires them to act fairly, impartially, and to adopt procedures suitable to the circumstances of the case, they should be able to "issue an award more or less at once". In other words, the Arbitrators have a duty to dispense a similar remedy where it is clearly warranted. However, this assumes that Arbitrators are sufficiently confident that such an award is warranted, and are sufficiently familiar with summary

procedure not to insist upon hearing arguments in full from both sides. It is after all a further requirement under s. 33 (1) (a) that each party should have a reasonable opportunity to put his case. Further the Courts retain power under s. 68 (1) to overturn awards where there is a 'serious irregularity' affecting the procedure or award, and this may perhaps also act as a brake upon the use of a procedure equivalent to summary judgment.

Honourable Engagement Clauses

If an Arbitrator honours a contractual equity or honourable engagement clause and determines a dispute according to general principles of fairness, as he may do so under s.46, then one of the major grounds upon which an award can be appealed falls by the wayside. S.69 provides that unless otherwise agreed, a party can appeal an award on a point of law. An honourable engagement clause will fall into the category of contrary agreement. Clearly, if the dispute is not decided on strict points of law, but on equitable principles, then there will be no right of appeal against an error of law. This is a point which should be brought to the attention of contracting parties at the time the agreement is concluded.

We await further developments as the new law is tested in the Courts.

(b) Mediation/Alternative Dispute Resolution

The impetus within the Arbitration Act 1996 is for issues to be arbitrated rather than litigated in cases where the parties had agreed to arbitrate. There is a parallel shift from litigation to mediation and alternative methods of dispute resolution even where the parties are content to litigate, as the effect of the Woolf Report of 1996 begins to bite.

The goals of Lord Woolf's report were to make access to justice easier, more cost-effective and more efficient. The report accorded to alternative dispute resolution a major role in achieving these goals and suggested that the procedure should become central to the legal process, with parties obliged to consider its potential within the

legal process as a matter of course. Recommendation 39 of the report is that at all pre-trial reviews and case management conferences, the parties should be required to state whether ADR has been discussed, and to provide reasons if it has not. Recommendation 41 proposes that when considering costs, the court should take into account a party's unreasonable refusal to enter into mediation, or lack of co-operation in the course of mediation.

This support for ADR has met with positive resonances from the judiciary. A practice direction was issued in the Commercial Court by Waller J. on 7th June 1996, signalling a change in policy in the Court. In the views of the Commercial Court judges, ADR cuts costs, avoids delays, and helps to maintain reputations and existing relationships. Consequently, judges would henceforth consider recommending ADR at the pre-trial stage in all appropriate cases. Within the first six weeks of the policy, up to 30% of all cases were referred to ADR.

As a result, parties making a straightforward application for further security for costs up to trial may return from Court clutching a referral to mediation, as happened recently in a Hill Taylor Dickinson case.

Such a shift presages changes in the skills base of litigation lawyers, who now need to develop and market conciliation and mediation skills in addition to adversarial skills. Mediation and ADR in general are far more established in other jurisdictions than they are in the UK, and the initiatives of the judiciary may now bring procedures in the UK in line with what we understand to be the automatic consideration of ADR which operates here in Australia.

Changes in Case Law

(a) Admiralty

(i) Salvage

Semco Salvage and Marine PTE Ltd v Lancer Navigation Co Ltd (THE "NAGASAKI SPIRIT") [1997] 2 WLR 298; [1997] 1 All ER 502

According to Geoffrey Brice, Q.C, representing the Salvors, the "NAGASAKI SPIRIT" was a "test case of international importance" concerning Article 14.3 of the 1989 International Convention on Salvage. At the time of the incident, the Convention had been incorporated into the Lloyd's Open Form 1990 under which salvage services were provided. The Convention now has the force of law in the UK, initially by the Merchant Shipping (Salvage and Pollution) Act 1994, which came into force in UK domestic law on January 1st 1995 and then by s. 224 of the Merchant Shipping Act 1995, in force from January 1st 1996.

The Facts

Salvage services under LOF 90 were provided to two vessels in the Malacca Strait, following a collision in September 1992 in which the "NAGASAKI SPIRIT" spilt part of its cargo of crude oil into the sea and both vessels caught fire. The Salvors extinguished the fire on board the NAGASAKI SPIRIT, transhipped what remained of the cargo, and redelivered the vessel to her Owners in Singapore. Article 14 of the Convention provides that special compensation is payable where a vessel threatening the environment is salved, but the Salvors' reward is insufficient to meet their expenses. Article 14.3 defines the expenses as the Salvors' out of pocket expenses, together with a "fair rate for equipment and personnel actually and reasonably used in the salvage operation".

At arbitration it was held that the fair rate to be received by Salvors for use of their own equipment and personnel in salvage operations should consist of a rate of remuneration. It was held that the rate should ordinarily be encouraging to the Salvor. In assessing the rate the Arbitrator took into account evidence relating to commercial

rates of hire which the tugs could have earned and which, it might be assumed, would ordinarily include an element of profit.

The matter proceeded to appeal before the Lloyd's Form Appeal Arbitrator. He held that the fair rate should be restricted to a reimbursement of expenses incurred by the Salvor in having his equipment ready and available for use in salvage operations together with the costs of the operation itself. It was held that the fair rate could not include an element of profit and need not of itself provide encouragement to the Salvor. Although a number of other important issues also arose, including a dispute over the period for which special compensation should be payable, it was the fair rate point on which the subsequent litigation largely turned.

The Dispute

The arbitration decision on expenses was intended to encourage Salvors to prevent damage to the environment by adequately remunerating their endeavours and by contributing in some measure to future investment. The case was consequently of interest to Salvors operating on LOF terms worldwide. However, it was also of considerable import to P & I Clubs, who under the Montreal agreement were to bear the cost of any special compensation awarded under Article 14.3. The Salvors took the case to the High court, arguing that a fair rate meant a rate of remuneration that was fair in all the circumstances of the case, and which would ordinarily include an element of profit; that special compensation was not limited to direct and indirect costs; and that only a profit element in the fair rate would act as an incentive to encourage Salvors to attempt to prevent damage to the environment.

The Appeal Procedure

The subsequent chain of decisions in the High Court and Court of Appeal interpreted a fair rate as taking account of indirect and overhead expense, and the cost of maintaining salvage facilities on standby, but not including any element of remuneration or profit. This was to be covered, if at all (and only where a benefit to the environment was achieved) under an enhancement formula in Article 14.2.

Commercial hire rates were held to be irrelevant in the assessment of the fair rate. In this case, the revised calculation resulted in a figure less than that awarded as salvage under Article 13, and as a result, no special compensation would be payable.

The House of Lords Decision

The Salvors again appealed, Lord Mustill delivering the leading judgment in the House of Lords in February 1997. His analysis of the concept of "expenses" confirmed that recompense rather than reward was to be the basis of a fair rate. He then placed his linguistic analysis within the context of the aims of the convention, referring to the working documents used in the preparation of the Convention, and concluding that the Convention had not intended profits to be written into expenses under Article 14. Article 13 instead provides for the Salvor to receive a generous award covering both direct and indirect costs (thus yielding a profit) where the salvage services successfully protect the environment. Even where no environmental benefit is secured, the Salvor receives an indemnity against outlay and a contribution to standing costs.

Secondly, Lord Mustill confirmed that expenses under 14.3 are not to be calculated on the same generous scale which operates in Article 13. References in Article 14 to Article 13 criteria such as promptness, availability, efficiency and state of readiness would not transform an expense - ie something incurred and borne - into something other than an expense, ie something earned or gained. Any increment in the special compensation payable was to be assessed only under Article 14.2 in recognition of damage averted.

Finally, the Convention did not create a new category of "environmental salvage" intended to finance a worldwide fleet of vessels held in readiness to deal with environmental threats. The only incentive intended was to give financial recognition to traditional salvage services where a new kind of incidental benefit was rendered to the environment.

The Salvor, then, was not meant to make a profit under Article 14.3. Expenditure on costs and overheads form the basis of a fair rate and the policy is to provide recompense, not reward.

Implications for calculating special compensation

Lord Mustill recognised that the judgment was not one which would clarify the process of calculating special compensation. This did not deter him.

> *"The assessment of salvage has never been an exact science, and the embellishment added by art. 14.3 is well known to have been an uneasy compromise."*

A "fairly broad brush approach" - though a brush applied less broadly than in calculating any award under article 13, would result in a workable practice. It was accepted that the exercise was likely to be one for an accountant.

For P & I Clubs, then, the potential exposure to claims under Article 14 has been limited. Whilst in the case of successful salvage which prevents damage to the environment, an uplift on expenses under 14.2 can still be awarded under the enhancement formula, the threat of having to pay an additional profit element under 14.3 has for the present been removed by the "NAGASAKI SPIRIT".

However, one aspect of the judgment did go the Salvors' way: on the facts of this particular case at least, special compensation could be claimed for the duration of the salvage operation, not simply for the period during which the threat to the environment endured.

The operation of Article 14 is being closely monitored by IMO and the CMI. To this end the CMI has established a sub-committee to consider the issue in general and to make recommendations as it thinks fit. It remains to be seen how other countries will react to the fair rate. In South Africa at least, legislation has been passed confirming (contrary to the decision of the House of Lords) that the fair rated should be assessed as a rate of remuneration.

(ii) Inchmaree Clause

Promet Engineering (Singapore) PTE Ltd v Sturge (THE "NUKILA") [1997] 2 Ll Rep. 146

Much discussed in the press was a judgment delivered in March 1997 dealing with the Inchmaree Clause in an insurance policy on Institute Time Clauses terms. The clause covers damage caused by any latent defect in the machinery or hull. The discovery of a latent defect itself does not trigger a loss under the policy. Recovery is possible only where consequential damage has occurred to the subject matter insured within the policy period as a result of a latent defect which is undiscoverable by exercising due diligence. However, it may be difficult to distinguish between consequential damage and the defect itself.

The claim concerned an accommodation platform which stood on three legs. Extensive fatigue cracking developed, which threatened the platform with collapse by the time it was discovered. Repair costs were approximately US $630,000.

The court held that it was necessary to establish some physical change to the vessel in order to prove damage. Discovery simply of the latent defect itself is insufficient to establish a loss. The issue turns on whether the subject matter insured is defective, or whether it has sustained damage through a defect. This is a matter of fact and degree in each case, The damage must occur during the life of the policy.

The case further decides that, contrary to earlier interpretations of the clause, under an Inchmaree Clause recovery can be made for damage to the defective part of the vessel itself.

However, a problem still remains in circumstances in which the defect and damage interrelate. Fatigue cracks, for example, are both the cause and the consequence of metal fatigue. On the decision in the "NUKILA", it will be difficult without extensive factual investigation for an underwriter to say in any given case that recovery under the latent defects clause will be possible.

(iii) Counter security

Profer A.G. v The Owners of the Ship "TJASKEMOLEN", now renamed "VISVLIET" 5th November 1996, unreported.

From the Shipowner's perspective, the remedies under English law for wrongful arrest are limited. An action for wrongful arrest rarely succeeds as malice must be proved on the part of the arresting party and this is notoriously difficult to do. However, the decision in the "TJASKEMOLEN", much discussed but yet to be reported, has radically affected that situation where a vessel is released from arrest in a jurisdiction with more liberal remedies for wrongful arrest, and is then rearrested in England.

The "TJASKEMOLEN" was arrested in Holland in support of a charterparty dispute. The court considered the merits of the case and released the vessel on the ground that the arrest was ill-founded, ordering the Charterers to provide security for the Shipowner's claim for wrongful arrest. The vessel sailed to England, where the Charterers re-arrested. It was physically released when Owners gave provisional security in the form of a Bank guarantee. Whether Charterers were entitled to security went before Clarke J, who, on the application of Owners ordered a preliminary hearing on whether the vessel had changed ownership before the Charterers issued their writ. If Charterers succeeded, as they did, the second application, on entitlement to security, would go ahead.

The Owners argued that the Dutch judgment meant that the vessel could not be re-arrested and that the security in England should be released. Clarke J rejected this argument, holding that the Dutch judgment related only to the arrest in Holland and that neither the Arrest Convention 1952, nor the Brussels Convention 1968 on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, as amended, required him to order the release of the security put up in England. The Charterers had put before the English Court evidence which had not been before the Dutch Court. On the basis of that evidence, he held that the Charterers had a good arguable case, and that the second arrest was not vexatious or oppressive.

However, in order to ensure that the Charterers were not placed in a better position by being entitled to arrest a second time, Clarke J. took the innovative step of ordering the Charterers to provide counter security to the Owners. This was to ensure that Owners would be no worse off than if the original arrest had been maintained in Holland. It would be oppressive, he held, to permit the Charterers to retain security for their claim if this would put them in a better position than they would have had in Holland. Unlike under English law, under Dutch law, a remedy is available for wrongful arrest without proof of malice or gross negligence, and security for such a claim is also available.

This, then, is yet another example of how the English judges are beginning to look beyond the boundaries of the jurisdiction and to view their decisions within a wider European context.

(b) Carriage of Goods

(i) The meaning of "dangerous cargo" under The Hague Rules: Article IV r. 6

The "GIANNIS NK" [1996] 1 Lloyd's Rep. 577

A decision early in 1996 addressed the meaning of dangerous cargo in the context of the Hague Rules (Article IV r. 6), which makes the shipper liable for damages and expenses arising from the disposal of dangerous goods which the carrier has not consented to transport. The goods in question aboard the "GIANNIS NK" were groundnuts, infested with Khapra beetle. English law distinguishes between physically dangerous cargoes and legally dangerous cargoes. The Court held that the correct test of a physically dangerous cargo under Article IV r.6 is whether the cargo constitutes a danger to something other than itself. As the other cargo on board the ship was threatened with jettisoning as soon as the infested cargo was loaded, the groundnuts constituted a dangerous cargo. The fact that the Shippers were unaware of the infestation, and had no reasonable means of finding out, is irrelevant. Liability under Article IV (6) is strict. Article IV r. 3, which states that the Shipper is not liable for loss or damage unless there is some act, fault, or neglect on his part, apparently

contradicts this provision. However, the very act of loading the cargo constitutes an "act" which prevents the Shipper from relying upon the exclusion.

The Owners argued in the alternative that the Shippers were liable under the common law implied undertaking that they will not ship legally dangerous goods, defined as likely to involve delay or detention to the vessel. Common law liability is likewise strict in this respect, following a venerable string of cases dating from Brass v Maitland (1856) 6 El & Bl. 470. The Hague Rules themselves do not address this question, so the incorporation of the Rules did not exclude the common law contractual term.

The Shippers failed in their argument that under section 1 of the Bills of Lading Act 1955, they had transferred liability to the buyers of the cargo, the Court preferring the view that liabilities were concurrent, even though rights of suit had passed to the consignee or endorsee of the bills.

(ii) The Limits of Liability: Article IV r.5

The "RIVER GURARA" [1996] 2 Lloyd's Reports 53 & 62-63 [1997, unreported]

The "RIVER GURARA" addressed the issue of what constitutes a unit or package under the Hague Rules. Owners' liability is fixed at £100 per package or unit, unless the nature and value of the goods carried within that package or unit are separately entered on the bill of lading. The bill of lading further provided, in clause 9 (b) that the containers constitute the package or unit, notwithstanding anything enumerated on the face of the bill. The Cargo Owners argued that Clause 9 (b) was ineffective because of Article II r.8, which renders invalid any provision in the contract of carriage which seeks to lessen the carrier's liability.

Under the Hague-Visby Rules, (Article IV rule 5 (c)), the situation is clear: the separate items enumerated on a bill of lading and carried inside a container constitute a package for the purposes of calculating the limit of liability.

On a trial of preliminary issues at first instance, Colman J preferred the arguments of the Cargo Owners, namely that the separate packages contained within each container according to the bill of lading constitute the relevant unit. His decision therefore brought the application of the Hague Rules into line with the Hague-Visby Rules. In an appeal judgment delivered on 15th July 1997, two judges upheld the decision, but offered an alternative reasoning whilst the third affirmed the first instance decision in full.

By reference to the travaux preparatoires of the Convention, Phillips J dismissed the argument that an underlying object of the Rules was to enable the shipowner to verify the extent of his potential liability. He agreed that a figure of £100 was absurdly low in relation to a modern container, though it might have been fair as an average figure for a package in 1924. He further agreed that to describe a container as a package was an unnatural use of the word. His findings were substantiated by decisions made in other jurdisdictions, particularly in the United States but also in Australia, Canada, France, Holland, Italy, and Sweden.

He concluded that unless the description in the bill of lading is to the contrary, the unit of calculation is the individual packages within the container, not the container itself. Statements on a bill of lading, however, do not constitute agreement between the parties as to the identity of the cargo. Shipowners left to agree a definition of a package would ensure that the number of containers appeared on the bill, thus evading the minimum limit of liability intended under the rules. In contrast to the US decision in Binladen BSB Landscaping v "Nedlloyd Rotterdam" (1985) F.2nd 1006 , he found that the limit of liabilty should be calculated not by reference to the description in the bill of lading, but by reference to the numbers of packages proved to have been loaded. Where the description of the cargo is claused by the words "weight, number and quantity unknown", or "contents unknown", the bill of lading cannot constitute even prima facie evidence of what was shipped, and the parties must adduce extrinsic evidence. If the words "said to contain" are equivalent to "weight, number and quantity unknown", the same applies. If it is no more than a record of the number of packages as furnished in writing by the shippers, then the description may be relied upon as providing prima facie evidence of the contents of the containers.

Hirst LJ dissented from the reasoning, but not from the outcome of the decision: he agreed fully with Colman J's first instance application of the approach used in other jurisdictions, on the grounds that the importance of international uniformity outweighed any shortcomings of the approach applied.

(iii) Hague-Visby Rules: Article III r.1: Due Diligence

Meredith Jones & Co Ltd v Vangemar Shipping Co Limited, (the "APOSTOLIS") [1996] 1 Lloyd's Rep. 475 & 482-4; [1997] 3 Lloyd's Rep. 241

The Facts

The case concerned a fire on a vessel loading a cargo of cotton bales under a contract of carriage subject to the Hague-Visby rules. The cargo in one of the holds was damaged in the fire, and the Charterers argued that because the fire was caused by a spark from welding at some point above the hold. The Owners were therefore in breach of their duty under Article III rule 1 to exercise due diligence at the beginning of the voyage to make the vessel seaworthy and to make the holds fit and safe for the reception, carriage and preservation of the cargo. The Owners contended that the most probable cause of the fire was a discarded cigarette end for which Charterers were liable, and counterclaimed.

First Instance

At first instance, the onus was on the Charterers to prove on the balance of probabilities that welding was the cause of the fire and on Tuckey J's finding, succeeded in doing so. He found that No. 5 hatch cover was closed but not dropped, leaving a 2 centimetre gap through which sparks from welding entered the hold, igniting the cotton cargo. There was therefore a breach of Article III r. 1 duties. He also found on the evidence presented by Charterers' witnesses, that a programme of welding had continued, and that the Manager and "alter ego" of the Owners was consequently privy to the welding which was carried out on the day in question. As a result, the Owners could not rely on the Article IV r. 2 fire exemption, being caught

by 2 (b), which imposes liability for damage caused by a fire caused "by the actual fault or privity" of the Carrier.

Appeal

There were two reasoned judgments on appeal. Leggatt L.J. found that there was no justification for the finding that the hatch cover was closed, but not dropped, and consequently no basis for the finding that sparks from welding had caused the fire. He further rejected the evidence which supported the Charterers' case that the Manager was privy to welding carried out. Such evidence as was offered, he found, contained improbabilities and inconsistencies, and was uncorroborated.

Phillips J held that in the face of conflicting evidence, the appropriate finding at first instance should have been that the Charterers had failed to discharge the burden of proving on the balance of probabilities that the fire was caused by welding. There was no breach of Article III rule 1 because no attribute of the vessel itself rendered it unseaworthy. As to the Manager's privity, the first instance judge should have found the Owners entitled to rely on the Article IV, r. 2 exemption because the finding of privity depended upon evidence that a programme of repairs continued, and this evidence could not be sustained.

A petition has been presented to the House of Lord, seeking leave to appeal this decision, so the last has not yet been heard of these issues.

(c). Marine Insurance

(i) The Duty of Good Faith and the Meaning of Privity

Manifest Shipping Co. Ltd v Uni-Polaris Shipping Co. Limited (THE "STAR SEA") [1997] Lloyd's Rep. 360.

The "STAR SEA", decided in the Court of Appeal in December 1996, addressed two main issues: the scope of the post-contractual duty of utmost good faith, specifically in the presentation of a claim, and the meaning of "privity" in s. 39 (5) of the Marine Insurance Act 1906.

The Duty of Good Faith

The "STAR SEA" was lost through a fire which could have been contained had the Master properly used the carbon dioxide system on board. Two further ships in the fleet had previously been lost by fire, and two expert's reports into one of those losses existed. One of the reports was mislaid, and discovered only during the trial, whereupon it was immediately disclosed. Privilege would in any case have been waived as witnesses referred to the reports in witness statements. The defendants amended their defence to claim that the policies were void for breach of the duty of utmost good faith, and for fraud.

The Court rejected the defence. The duty of utmost good faith could be breached by concealment or by non-disclosure of material facts, but only if this was fraudulent. On the facts, this was not the case. As a matter of principle, the duty not to make a fraudulent claim should not be extended to encompass culpable or misleading non-disclosure in the presentation of a claim. In deciding this, the Court agreed with a similar finding at first instance by Rix J. in the Royal Boskalis NV v Mountain (1995) (unreported, but forthcoming) and overruled comments to the contrary by Hirst J in Black King Shipping Corp v Massie (the "LITSION PRIDE") [1985] 1 Lloyd's Rep. 437.

Furthermore, any duty of disclosure owed post-contractually by the Assured is supplanted, once litigation has commenced, by the Rules of the Supreme Court which govern disclosure. As Tuckey J. found at first instance, there was no reason why the adversaries should be under a duty to provide ammunition to one another.

The decision limits the extent of the duty of post-contractual good faith to the duty not to make a fraudulent claim. However, in practice, any casualty is investigated by experts and legal representatives on both sides. Underwriters appoint agents specifically to investigate claims and do not rely on a wide duty of disclosure being fulfilled by the Assured.

Privity of the Assured

S. 39 (5) of the Marine Insurance Act 1906 provides a defence to a claim where it can be demonstrated, first, that the vessel was sent to sea in an unseaworthy state with the privity of the Assured, and second, that the unseaworthiness was causative of the loss. According to "THE EURYSTHENES" [1977] Q.B. 49, privity can be either actual or "blind eye" knowledge. For there to be blind eye knowledge, a "Headman" must suspect that the vessel is unseaworthy in the specific respect that is causative of loss, and must make a conscious decision not to enquire further so as to avoid confronting the truth.

The Court found that the judge at first instance was entitled to find the Master incompetent in not knowing how to use all the available fire-fighting equipment, and that this incompetence rendered the vessel unseaworthy. However, the finding that there was blind eye knowledge on the part of the Assured was not justified: it was not established that any of the relevant individuals suspected or realised that the Master was incompetent.

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The decision therefore confirms that the Courts will not assume "blind eye" knowledge lightly. Whilst the concept of privity has been extended to encompass awareness or suspicion, coupled with a culpable decision not to act on that suspicion, such awareness or suspicion will not be presumed, but must be demonstrated if the defence is to come into play.

The underwriters have applied to the House of Lords for leave to appeal, which has provisionally been granted. The debate appears set to continue.

(ii) Non-Disclosure and Misrepresentation

Fraser Shipping Ltd v Colton (the "SHAKIR III") [1997] 1 Lloyd's Rep 586.

The issue of non-disclosure is explored further in the "SHAKIR III", which also addresses the issue of the meaning of "actual total loss" within a hull policy. The vessel was insured against actual total loss only whilst being towed to Shanghai. The vessel had been sold for demolition , and the sale contract gave the purchasers the

option to have the vessel delivered to Huang Pu, which they exercised. The Owners' brokers informed the underwriters of the change only after the vessel had arrived at its destination, whereupon the Underwriters scratched the endorsement presented to them.

By then, Typhoon Koryn was approaching the area, the anchorage was congested, and the vessel was anchored very dangerously off Huang Pu, awaiting entry to the port. The authorities had instructed the vessel to reduce its draught, for which it needed deballasting assistance which was not forthcoming. It had already collided with another vessel at anchorage. In the face of the approaching typhoon, the vessel put to sea. Tug and tow parted, and the vessel drifted 45 miles before stranding on the uninhabited island of Wuzhu Zhou.

The main issues to be decided were whether the vessel was an actual total loss within the terms of the policy, and whether the Underwriters were entitled to avoid the policy for material non-disclosure of matters relevant to the variation of the insurance contract.

Actual Total Loss

An actual total loss under s. 57(1) occurs when the vessel is destroyed, or so damaged as to have lost its essential identity, or where the assured is irretrievably deprived of the vessel. The damage to the vessel was not such as to annihilate it. The vessel appeared almost to be broken in two, and on this basis, the Assured argued that it was no longer possible to deliver it as per the sale contract, in one piece and substantially intact. They further therefore argued that it had ceased to be a thing of the kind insured. The Underwriters argued that the generic characteristics of the vessel were unchanged - it was a dead ship being towed for scrap. This was accepted. The Assured further argued that the costs of salvage would exceed the vessel's insured value. However, the Court held that this argument went only to constructive total loss, whereas the vessel was insured against actual total loss.

Material non-disclosure

S. 18 of the MIA requires the Assured to disclose all material circumstances which, objectively assessed, would have influenced the mind of a prudent insurer in estimating the risk involved. It is also necessary to demonstrate that, subjectively assessed, the non-disclosure induced the Underwriters to vary the contract on the terms they did. The change of voyage endorsement was agreed at a time when the Assured was privy to information from the Master that the vessel was subject to delay because the port authorities had required it to reduce its draught before proceeding to berth, that its anchorage was hazardous, and that a typhoon was approaching. The court held that such facts were material and should have been disclosed.

The Assured argued that while the circumstances were material, they were not required to disclose them in the absence of inquiry by the underwriters, on grounds provided by section 18 (3). The Assured need not disclose anything which diminishes the risk, anything which the underwriters ought to know in the course of their ordinary business or which is "notorious", anything which the underwriters waive their right to know, or anything which express or implied warranties make superfluous. All s.18 defences were rejected.

The Court further held on the facts that the non-disclosure of these circumstances had induced the Underwriters to accept the risk, and that consequently they were entitled to avoid the policy.

The decision upholds the distinction between actual and constructive total loss. Where there is an agreement to exclude constructive total loss with a concomitant reduction in premium, the commercial considerations which apply to constructive total loss should not be applied to determine an actual total loss. It also furthers the debate on the meaning of "material circumstances", which the judge determined included communications received by the Assured from the Master, whose assessment of the prevailing situation and concerns are matters which should be brought to the attention of the underwriters.

The decision is to be tested in the Court of Appeal.

(iii) Sue and Labour Expenses

Royal Boskalis Westminster NV v Mountain [1997] 2 All ER 929

The Royal Boskalis or "Dutch Dredgers" case went to the Court of Appeal in February of 1997. At first instance the Court had found that the seizure of a fleet of Dutch dredgers by the Iraqis in retaliation against sanctions imposed on them by the United Nations during the invasion of Kuwait did not on the facts constitute a Constructive Total Loss. This finding did not figure in the Appeal. The focus of the appeal was whether it was possible to recover under a sue and labour clause the value of claims for extra payment (some 84 million Dutch guilders) which had been waived under a finalisation agreement under which the plaintiffs had also paid illegally to the Iraqis the sum of 24,250,000 Dutch guilders in return for the safe repatriation from Iraq of the personnel and the fleet. There was further a cross-appeal against the first instance decision to apportion the sue and labour "expenses" so that only 50% of the claim was recoverable for the release of the insured fleet, whilst the balance, for the uninsured personnel, was irrecoverable.

On principle, the value of the waived claims could be recovered as a suing and labouring charge where the insured party agrees to waive claims under a contract in order to prevent the loss of the insured property. However, the insured party must be able to establish their loss which could only be done if the agreement was recognised as enforceable. The Court held that this agreement was unenforceable for duress.

The defendants were not discharged from liability to the plaintiffs on the grounds of illegality under s. 41 of the Marine Insurance Act 1906, because neither the finalisation agreement, nor the payment, were part of the insured adventure. However, on the grounds of public policy, the clauses relating to the illegal payment would not be severed from the contract, and consequently the plaintiffs' claims under the dredging contract were not affected by the waiver. They were therefore unable to establish any loss.

On the cross appeal, in the words of Phillips LJ, salt was further rubbed into the plaintiffs' wounds. Had the plaintiffs been able to establish their loss, the Court of Appeal would have conceded that the full sum would be payable under the sue and labour clause. Notwithstanding the fact that the clause applied only to property and not to human lives, the Court regarded it as undesirable and unsound to penalise an Assured whose concern was not only to preserve property, but also to preserve life.

(iv) Third Party Costs

Tharros Shipping Co. Ltd and Den Norske Bank PLC v. Bias Shipping Ltd. Bulk Shipping A. G. And Bulk Oil A. G. No. 3 (The "GRIPARION") [1995] 1 Lloyd's Rep 541; [1997] 1 Lloyd's Rep 246.

The case considers whether a P & I Club could be made liable for a successful plaintiff's costs.

Non-party liability to costs derives from s. 51 (1) of the Supreme Court Act 1982

> *Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal and in the High Court ... shall be in the discretion of the court, and the court shall have full powers to determine by whom and to what extent the costs are to be paid.*

The key provision is that the court has full discretion to determine by whom and to what extent the costs are to be paid. The House of Lords in Aiden v Interbulk [1986] 1 AC 965 stressed that if only parties were intended to be liable to costs, the Statute would have read "**by which party** ... costs are to be paid", rather than "by whom". They consequently awarded costs against a non-party.

The provision applies only to litigation in the High Court and above, not to arbitrations, although if an arbitration award is appealed in the Courts, the issue becomes relevant.

The courts look for exceptional circumstances which make it just and reasonable to order costs against a non-party. Recent decisions on general legal expenses cover

have developed the guidelines which courts will apply when considering whether to award costs. Murphy v Young [1997] All ER 518 and Chapman and Benson Turner v Christopher and Sun Alliance and London Insurance PLC June 1997, CA (currently unreported), both address the issue of whether a general legal expenses insurer can be made liable for costs beyond the contractual limitation of cover.

Murphy confirmed the analysis in Giles v Thompson [1994] 1 AC 42 that where insurers were concerned, the following factors came into play:

1. Funding
2. An implied obligation owed to the Member/Assured that the liability insurer will pay the successful party's costs.
3. An interest on the part of the insurer in supporting and being seen to support the Member's/Assured's claim
4. Responsibility for
   - the decision to pursue the case
   - the conduct of the case
5. The expectation, based on convention, that the insurer will bear the costs of the successful party if the Member/Assured loses.

Two further key points arose. First, funding alone is not sufficient to trigger an order against the funder. This has since been applied in Tharros. Second, where a non-party has supported an unsuccessful party on terms that place the non-party under a clear contractual obligation to indemnify the unsuccessful party against his liability to pay the costs of the successful party, an order for costs may be appropriate.

Whilst Murphy was decided in favour of the non-party underwriters, Chapman went against them. According to the judge in Chapman, the underwriters were the defendants in all but name, were contingently liable under The Third Parties (Rights against Insurers) Act 1930 to the relevant policy limit, took the decision to contest the litigation and conducted the defence as a means of avoiding or reducing liability.

In Tharros, the Club had originally held Bias, the defendant, covered as regards its defence, though not as regards its counterclaim. The club withdrew cover before trial

when it became clear that the Bias was relying on insupportable evidence. A proviso in the Club rules excluded liability for costs occasioned through the member's personal neglect.

Tharros was argued on three points: first, contractual obligation, second, unlawful maintenance, and third, funding. The court looked at the Club rules to establish whether the Club had a binding contractual obligation to indemnify Bias for its liability in costs to Tharros. It concluded that the Club's liability to indemnify was co-extensive with its contractual liability to the defendant. The Court of Appeal referred the matter back to the High Court to establish whether the Defendant's behaviour amounted to personal neglect so that the proviso would provide the Club with a defence. It could alternatively have been resolved through a claim by the Tharros under the Third Parties (Rights against Insurers) Act.

The unlawful maintenance argument was dismissed with despatch: on the authority of Giles v Thompson [1994] 1 AC 42 there could be no question of club support constituting unlawful maintenance, even where, as here, a Club could refuse to indemnify the member if costs became payable by the personal neglect or default of the Member.

As to funding, the mere provision of funds is not of itself sufficient to make it just and reasonable for the funder to pay the costs of a successful adverse party. There has to be something further. The question then remained as to whether there were special circumstances which made it just and reasonable to order costs.

Factors which might have swayed the judge to order costs included that the Club supervised the trial preparations, even if it did not appoint or instruct the lawyers in the case and that it was normal Club practice to pay the costs of the successful adverse party in litigation which it covered.

The factors which persuaded the judge not to order costs were that the Club had no interest in the litigation other than as a provider of a specific class cover, the proviso under which the Club sought to shelter was a common one, and it was not proven that

P & I Clubs universally pay the costs of a successful adverse party, whatever the circumstances.

The general principle, reiterated in Tharros, is that if there is a contractual obligation to indemnify the Member, then that obligation will be upheld by the Courts.

In the latest decision on the matter, Pendennis Shipyard Ltd v Margrathea (Pendennis) Ltd (in liquidation), reported in *The Times* on 27th August 1997, the Court decided that the decisive factor was that the insurers took over the defence and conducted it for their own benefit, and could properly be said to be the real defendants. Insurers in such circumstances "could ordinarily expect to pay the costs of the plaintiff if the defence were unsuccessful", the Court stated (emphasis added).

(v) Jurisdiction under the Lugano Convention 1988

Agnew & Ors v Länsföräkringbolagens AB (CA, Judgment July 1997)

In a judgment delivered on 31st July 1997, the Court of Appeal upheld the first instance decision on jurisdiction under Article 5 (1) of the Lugano Convention1988 [1997] CLC 245. The decision, which has major implications for the London insurance market (though possibly not for Pacific Rim lawyers) establishes that an action which claims to avoid an insurance or reinsurance contract on the grounds of non-disclosure or misrepresentation was "a matter relating to contract" within Article 5 (1) of the Convention. At first instance, Mance J had found that the duty of good faith was both a pre-contractual duty and also a duty simultaneous with the conclusion of the contract and that it accordingly related to the contract.

Article 5 (1) of the Convention states that a party can be sued in the place where the obligations arising under the contract are to be performed. It does not distinguish between obligations which arise while negotiating a contract, and those which arise under the contract itself. In any event, pre-contractual duties fall to be considered by a court claiming jurisdiction under Article 5 (1). The duty of good faith is itself the "obligation in question" under Article 5 (1), and the place of performance of that obligation is London. The Court of Appeal further found that Articles 7-12 of the

Convention, which set out the jurisdiction rules where contracts of insurance are concerned, do not apply to reinsurance.

The decision means that jurisdiction in the English courts is secured as of right for claims for misrepresentation and non-disclosure put forward by the London market against Assureds domiciled in contracting Lugano countries.

The ISM Code

The benchmark industry safety code was implemented for Ro-Ro ferries operating regularly between member states by a regulation directly effective within the European Union as from 1st July 1996. The EU directive predates by two years mandatory implementation for all other passenger ships, oil tankers, and chemical tankers, and for high speed cargo craft, bulk carriers, and gas carriers of 500 g.r.t upwards. It predates by six years implementation for all other cargo ships of 500 g.r.t. and upwards, and for mobile offshore drilling units.

The Code requires a safety management system (SMS) to be in place, which will ensure safety at sea, prevent injury or loss of life, and avoid damage to the environment. Shipowners will be required to have in place a Safety Management Certificate and a Document of Compliance by the implementation date, renewable every five years. Each vessel will carry a Safety Management manual documenting the vessel's SMS procedures. These must include :-

- a policy on Safety and environmental protection, including instructions and procedures for the safe operation of the vessel and the protection of the environment;
- channels of communication from ship to shore, and the designation of a responsible person with access to top level management through whom information is to be channelled;
- procedures for reporting accidents and "non-confirmities" with the Code;
- emergency procedures;

- auditing and management review procedures.

Some of these requirements, in particular those relating to an on-shore designated person and the manual which documents safety and pollution prevention elements of the vessel's operation, have been operative for British flagged ships since domestic regulations were put in place following the Herald of Free Enterprise disaster.

Effect of the Code on Future Litigation

The primary effect upon litigation will be felt where shipowners' liability defences under the Hague or Hague-Visby rules, or insurers' privity defence under s.39 (5) of the MIA 1906 arise.

Article III r. I of the Hague-Visby Rules imposes upon the carrier a non-delegable and overriding obligation to provide a vessel which is seaworthy and properly outfitted and crewed. However, if the carrier has exercised due diligence to comply with this requirement, then Article IV exempts him from liability. To successfully run an Article IV (2) exclusion defence, (exclusion of liability for crew negligence), a shipowner would currently need to demonstrate, for instance, that the crew was properly certificated, that the crew member's prior employment history implied competence, and that he had used reasonable care in recruiting the crew member. Under the new Code, the shipowner would in all likelihood need to demonstrate due diligence in relation to the crew's training in the vessel's operational systems and understanding of them. Evidence would be provided through the improved reporting procedures which will produce a paper trail not only of incidents, but also of near-misses and of non-compliances with the code, and will document any loopholes in training or procedures. In subsequent litigation this documentation will in all likelihood be discoverable. Due diligence may be much more difficult to establish.

As regards privity under s. 39 (5), as outlined above, to establish the defence it has previously been necessary to ascribe to a "headman" knowledge or blind eye knowledge of unseaworthiness. Such a person has traditionally been someone at

board level - to whom such detailed knowledge of a vessel might very well not be available. The Code's requirements for a reporting system via a designated person may well change this: if the reporting system works, the designated person should be privy to all instances of non-conformity with the code. Either the designated person may in future be regarded as a "headman" for the purposes of safety, or else, through the requirement that this officer have access to the highest levels of management, it may be far easier to impute knowledge to the relevant headman.

There will be far more in the way of extant evidence as a result of the new reporting procedures, and far more intensive scrutiny of the newly available records - for good or for ill - to establish issues of due diligence and privity. But this is in the future and will doubtless be a prime focus of our deliberations at the next conference.

Conclusion

1996-1997 has seen a number of major developments in the field of maritime law. Some, such as the effect of the Arbitration Act, and of the English Courts' determination to shift commercial cases out of the courts and into mediation where appropriate, go beyond shipping. Others are more narrowly focused such as the decision in the "NAGASAKI SPIRIT". However, we have probably not heard the last of many of the issues raised. Changes to the LOF form cannot be ruled out at this stage, and a number of the cases reviewed above are going to Appeal. By this time next year a range of decisions will have come on stream in relation to the Arbitration Act, and the ISM code will have become mandatory for large section of the world's tonnage. Next year's review will have more to report on these very issues.

Cases

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