UK CLUB

Thomas Miller Americas - Bodily Injury Team

Prompt Notification of Potential Claims

Club members have an obligation to promptly notify the Club of any potential claim on the Club. The objective is two fold, firstly to ensure that the full scope of the Clubs expertise may be used on the member's behalf in either defending or settling the claim and secondly to allow the Club to properly estimate the claims exposure which is essential for sound underwriting practice. The U.K.Club, the largest P&I Club, has experience of every type of claim and has by far the most Bodily Injury expertise of any Club in the International Group.

Bodily Injury Claims brought in the worlds most expensive claim jurisdiction require concerted effort and experience to minimize the exposure of the shipowner. Dealing fairly and cost effectively with these claims is the main priority of the TMA Bodily Injury Team which collectively boasts 87 years of front line claims handling. This experience is backed up by the substantial Bodily Injury expertise available to members from other Miller offices around the world. In addition to the 13 Miller offices around the world, the Club has a network of over 400 Correspondents who have many years of experience in handling bodily injury claims and advising members on particular local issues. We would encourage all members to make sure that each entered ship has on board an up to date List of U.K.Club Correspondents (extra copies may be easily obtained from your local Miller office).

Early notification of potential claims leads to prompt investigation and allows the Member/Club/Correspondent (and/or Attorney where necessary) to evaluate the appropriate action for a cost effective resolution. Great care must be exercised in the choice of attorney or other expert appropriate to the particular nature of the case and the written instructions specifying the scope and extent of the instruction. If claims are not promptly reported to the Club, an investigation conducted at a later date may prevent the team from making decisions based on facts, this will generally work to the claimants advantage!

Under the Clubs Value For Money (VFM) initiative we have developed the Early Case Assessment (ECA). This provides for a collective (Member/ Club/Attorney if required) assessment of the exposure at or near the beginning of the case so that the appropriate strategy may be agreed. This proactive case management can only work properly if the Club is promptly notified of all potential claims on the Club.

Mike Jarrett
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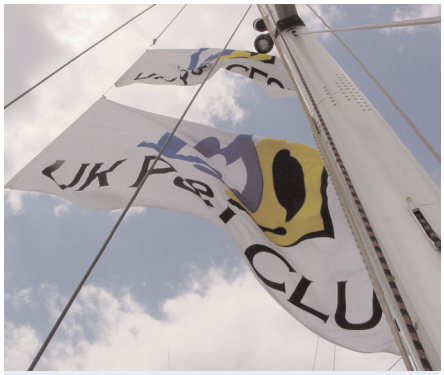

In This Issue.....

Crew visa restrictions redux

In our last issue we detailed some of the possible problems for foreign crewmembers who do not have United States visas. Though we have heard many anecdotal stories concerning the U.S. enforcement of those laws and regulations the facts of which we have been unable to confirm, a recent case handled by the Club illustrates just how sensitive this issue is with the U.S. agencies responsible for such enforcement.

A foreign flag vessel called at a U.S. port recently; none of its crewmembers had U.S. visas in their possession. A crewmember does not need a visa to sail to the U.S., but once he is there he will not be able to leave the vessel. Accordingly, a U.S. Customs and Border Protection Officer cleared the vessel but ordered the crewmembers detained on board as they did not have U.S. visas.

Shortly after the Officer departed the vessel, stores and provisions meant for the vessel were delivered to the dock alongside. At that moment the stevedores working the vessel took their lunch break. Rather than leave the stores and provisions on the dock, several crewmembers left the vessel and worked on the dock to load the stores and provisions aboard the vessel using the vessel's crane. Another crewmember hooked up the fresh water pipe from the dock to the vessel. This all took approximately 20 to 30 minutes. After this was done the crew immediately returned to the vessel and remained on-board for the remainder of the vessel's stay in the U.S. However, the Customs and Border Patrol Officer, who had boarded another vessel berthed nearby, witnessed the crewmembers on the dock.

A Notice of Intention to Fine Under the Immigration and Nationality Act was issued to the vessel's agent naming the crewmembers involved and assessing a substantial penalty for failure to detain an alien crewmember pursuant to Section 254 of the Immigration and Nationality Act. Fortunately the vessel had already sailed or security would have had to have been deposited with the U.S. Customs and Border Protection Service in order to allow the vessel to depart.

A Notice of Intention to Fine allows for a written defense under oath to be submitted, setting forth reasons why a fine should not be imposed, or if imposed, why the amount should be mitigated. Such a written defense was provided in this instance, noting the circumstances described above, that the violation was inadvertent, the actions taken were to attend to the immediate needs of the vessel and there were no other incidents involving this vessel and crew.

The U.S. Customs and Border Protection Service acknowledged the circumstances of the incident and the lack of specific intent to violate the law. However they refused to withdraw the fine, though it was reduced substantially.

High Risk Crewmembers

As described above, The United States Customs and Border Protection Service determines whether foreign crewmembers will be allowed to disembark a vessel upon its arrival into the U.S. The Customs and Border Protection Service and the U.S. Coast Guard have set up standard operating procedures (SOP) to identify high risk crewmembers and ensure effective security measures are in place so they cannot leave the vessel once ordered detained. The SOP includes a list of 25 countries. Aliens from these countries have been identified as warranting additional monitoring in the interest of U.S. national security. It is likely crewmembers from these countries will be ordered detained on board as high risk and security will need to be retained to ensure they do not abscond from the vessel. However, any crewmember deemed a security risk will be ordered detained on the vessel, not just those from the listed countries.

Extra security measures will be required to be taken by the vessel owner/operator, master and/or agent to be sure such crewmembers do not illegally gain entry into the U.S., which means guard service will be required at the expense of the ship owner/operator. The SOP sets forth the minimum standards for such security service as well as standard operating procedures for that security service to provide a visible reminder to detained crew.

Passenger and crew manifests

The Department of Homeland Security has issued its final rules requiring electronic transmission of manifest information for passengers and crewmembers onboard commercial vessels arriving in and departing from the United States (8 CFR Parts 217, 231 and 251; 19 CFR Parts 4, 122 and 178; April 7, 2005). The comments to the rules note that the reason for the rules is the continued threat of terrorist attack and the possibility of attacks on commercial vessels. The hope is not just to protect innocent lives, but to protect the industry itself from substantial disruption which would effect the global economy.

Time for submission varies depending in length of voyage. Generally, the information required includes full name and address, date of birth, gender, citizenship, status on board the vessel as well as vessel information and travel documentation details.

Karen C. Hildebrandt

Who is onboard? What is your legal duty to them?

Summary of Recommendations for Visitors/Stowaways

- Members may be required to provide the U.S. Captain of the Port with a fax from the Master:
- Confirming that a thorough search for stowaways was conducted upon getting underway from a foreign port and whether or not stowaways were found;
- Whether or not the rudder compartment was checked during the search;
- Stowaway history for past 24 months.

Members are referred to the following Loss Prevention Bulletins regarding Stowaways: Loss Prevention News, November 2004 (preventative measures); Bulletins 118 11/99; 398 1/05; 406 3/05 and 362 5/04 (ISPS Code/ MTSA inspection requirements of USCG).

It is common for invitees, licensees, and stowaways to be grouped together because they are neither passengers nor crewmembers. But the three classes have always received different legal treatment. This is due in part, to the fact that invitees and licensees are to some extent, wanted, and stowaways never are.

Until 1959, maritime law, following land law, drew a sharp line between the duty of care owed to "invitees" and "licensees". Troubled by this fact, many courts sought to avoid the distinction by relying on creative or fanciful legal interpretations. In general, an invitee is someone who is on the premises of another by express or implied invitation through a business or an activity conducted by or with the permission of the owner. The duty of care owed an invitee by the owner is the duty to protect them, not only against dangers of which he knows, but also against those which with reasonable care he might discover.

In contrast, a licensee, is one who enters another's property with permission but for his or her own purposes (rather than those of the owner). While older case law provided that a licensee was not owed as high a duty of care as an invitee, it is now settled that a licensee is owed a duty of reasonable or due care.

Circumstances sometimes make it difficult to determine a party's status. As an illustrative example, a magician's assistant was injured when she fell through an opening in the ship's hold. Although the plaintiff's on board social status was that of a ship's officer, she had not signed ship's articles, was paid by the magician, and appeared on the ship's manifest as a passenger. Given these conflicting facts, the Second Circuit Court of Appeals ruled that it would be up to the jury to determine whether she was a passenger, seafarer or business invitee.

Another example is a case where the plaintiff had been a passenger on the ship during a voyage from Buffalo to Duluth, she became friendly with two of her fellow passengers. Although she was staying on at Duluth, her friends were returning to Buffalo the next evening. The three women agreed to gather aboard the ship before it sailed to say goodbye. When the plaintiff arrived to meet her friends, she tripped over some unattended luggage in front of the purser's desk and was injured.

By definition, the plaintiff was a licensee. Nevertheless, the Minnesota Supreme Court, noting that the case was one of first impression for it, held that she was an invitee. Admitting it was troubled by the lower duty of care owed to licensees, the court reasoned that inasmuch as it was common for friends to go aboard to say goodbye to passengers, it was only fair to require shipowners to extend to them a duty of reasonable care.

The confusion arising from the application of land-based concepts to the visitors of ships was finally put to rest in 1959 in the landmark case of Kermarec v. Compagnie Generale Transatlantique. The plaintiff had gone to visit a friend aboard the steamship Oregon. As he was leaving the vessel, he fell and injured himself on the ship's stairway. In his law-suit he alleged negligence and unseaworthiness because a runner had been defectively attached to the stairway.

At trial, it was determined that New York State law applied to the action and the unseaworthiness claim was dismissed. As for the negligence count, the court instructed the jury that the plaintiff was a "gratuitous licensee" who could not recover unless the shipowner had known of the dangerous condition and failed to warn him of it. The court also instructed the jury that any negligence on the part of the plaintiff would bar recovery.

When the jury returned a $7,500 verdict in Kermarec's favor, the court set it aside and dismissed the complaint because it found that there was no proof that the shiponwner had been aware of the defective condition. The Supreme Court vacated the judgment and ordered the jury's verdict to be reinstated. Noting the conflict and dissension amongst the lower courts, caused by admiralty courts applying land-based concepts of invitee and licensee, and recalling the maritime tradition of "simplicity and practicality," the court adopted a single consistent standard.

In what is now regarded as a classic statement of maritime jurisprudence, the court wrote: "We hold that the owner of a ship in navigable waters owes to all who are onboard for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." As a result of Kermarec, the amount of litigation over visitor "status" was greatly reduced. What litigation does take place now tends to arise in highly unusual factual settings in which Kermarec does not provide an immediate answer.

Stowaways

It is generally agreed that a stowaway is one who conceals himself aboard a ship so as to obtain free passage. Although all stowaways are trespassers, not all trespassers are stowaways. The duty of care owed to a stowaway is that of humane treatment.

Exactly what constitutes humane treatment depends to a large degree on the particular circumstances as demonstrated in a case where three Jamaican stowaways were discovered shortly after the ship had departed Kingston, Jamaica on the way to Boston. After being fed, they were put ashore on Great Inagua Island.

Upon arrival in the United States, the ship's master was charged with mis-treating the stowaways by putting them ashore on an inhabited island. The Hearing Examiner disagreed, finding that the master had not treated the stow-aways in a wanton and reckless manner in disregard of their safety and well being. As a result, the charges against the master were dismissed.

An example of a trespasser who was not determined to be a stowaway, a long-shoreman went aboard a ship looking for his co-worker and decided to take a nap as the result of "some drinks". He failed to wake up until the ship was at sea.

The court concluded that the long-shoreman was not a stowaway because he had been carried off accidentally and did not have the intent to conceal himself so as to obtain free passage.

Nancy L. Jennings

Maritime personal injury and death in Venezuela - applicable law and prescriptive periods.

Venezuela recently reformed its maritime law. No maritime personal injury or death claims have been brought under the new laws, therefore, judicial precedents are not available for guidance in their interpretation, however, we can expect such cases to receive the following treatment.

In general terms, the law that will govern a claim arising out of a maritime personal injury or death will depend on whether or not the victim was an employee of the vessel. If the victim was an employee (whether Venezuelan or foreign) and the incident results from a labor accident, the Organic Labor Law ("OLL") will apply; the claim will be governed by the OLL, and will be heard by a labor tribunal or a labor-claims administrative body.

Compensation for personal injuries or deaths is "tariff" in the OLL, and will be based on the victim's salary on the date of the incident. The compensation for injuries will depend on whether it results in a total or partial disability and whether that disability is temporary or permanent. In addition, if the employee can show employer's negligence, he/she will be entitled to compensation for "moral" damages referred to as "mental anguish" and "emotional distress" in other jurisdictions. There are no legal "tariffs" for these damages, and the awards are left to the Court's discretion.

Additional compensation for injuries and deaths are contemplated in the law governing safety in the workplace. It is important to note that this law also imposes criminal sanctions on employers (Directors and Managers, where the employer is a company) in extreme situations.

Under the Organic Labor Law, the time limitation is two years for claims arising out of personal injury or death sustained by employees, counting from the date of the accident or the determination of the illness.

If, on the other hand, there exists no labor relationship between the victim and vessel interests, the claim will be governed by general maritime law (now codified in the Venezuelan Maritime Commercial Law), and will be heard by the Maritime Court that sits in Caracas, with nationwide jurisdiction. The claim will be governed by general tort principles (comparative fault - contributory negligence), and the victim - or his/her next of kin- will be entitled to damages in an amount "that will put the claimant - or his/her next of kin - in the position he/she/they would have been had the accident not occurred".

Because there is no specific time limitation for maritime torts in the Law on Maritime Commerce, the general time-limitation of 10 years for tort claims will apply.

Under the Venezuelan Law on Maritime Commerce, maritime tort claims give rise to a "maritime privilege" (akin to a maritime lien) and to a "maritime credit", which allows the claimant(s) to arrest the tortfeasor-vessel. Maritime privileges are extinguished after a year counting from the date when they arose. However, extinction of the lien does not entail extinction of the credit (the right to claim). In addition, the law does not provide for a time limit regarding "maritime credits". The Maritime Court will have to interpret these rules and determine whether the one-year limitation applicable to "maritime privileges" also applies to "maritime credits".

Under the recent "PETROLAGO" Supreme Court decision, the Supreme Court of Venezuela ruled that vessels may only be arrested for claims that give rise to "maritime liens" or "maritime credits". Thus, if the "maritime privilege" and the "maritime credit" were extinguished, the claimants would not be allowed to arrest the offending ship. Venezuela recognizes the doctrine of "sister-ship arrest, provided the person - or company - liable for the tort, i.e., the vessel's owner, owns the "sister ship" at the time she is arrested.

Finally, because of the recent changes in Venezuelan law governing maritime personal injuries and death, it is of particular importance that members immediately contact the Club when they receive notice in such cases in order that an attorney may be appointed to investigate the matter. Immediate action is of the utmost importance, as it will allow lawyers to obtain and preserve evidence that may prove crucial in the defense of member's interests.

Carlos De La Vega

U.S Courts Send Filipino Seamen's Actions to Philippines for Arbitration

In what will hopefully become a trend and eventually the majority view of Federal Courts in the United States, recent decisions from the 11th and 5th Circuit Courts of Appeal have enforced arbitration clauses in Philippine employment contracts.

All Filipino crew are employed pursuant contracts regulated by the Philippine Government under the Philippine Overseas Employment Administration (POEA). Crewmembers typically sign a one-page standard employment agreement, which refers to a POEA Department Order. The POEA order, in turn, refers to the Standard Terms and Conditions Governing the Employment of Filipino Seafarers. The Standard Terms contain a clause requiring arbitration "in cases of claims and disputes arising from the seaman's employment", through submission of the claims to the National Labor Relations Commission (NLRC), voluntary arbitration or a panel of arbitrators. It is this clause that recent Federal Appellate Court decisions address.

Bautista v. Star Cruises, Norwegian Cruise Line, Ltd., (11th Cir. Jan. 18, 2005) (Civil Docket No: 03-15884) involved suits brought by injured Filipino crew members and the heirs of crew members killed when a steam boiler exploded aboard the SS NORWAY on May 25, 2003. Plaintiffs filed identical individual suits in Florida state court alleging Jones Act negligence, un-seaworthiness of the NORWAY, failure to provide maintenance and cure and unearned wages. NCL removed the cases to Federal District Court pursuant to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958). The particular section of the Federal legislation implementing the Convention permitted NCL to remove the case before the start of trial when the dispute relates to an arbitration agreement or award covered by the Convention.

Generally, removal to Federal Court must be accomplished within 30 days of a defendant's notification of the complaint, not service of the complaint. NCL then moved to compel arbitration in the Philippines pursuant to the employment contracts.

NCL presented evidence establishing that all of the crewmembers signed or initialed the Standard Terms and Conditions containing the arbitration clause. In addition, NCL produced evidence that manning agencies explained the documents to the crew in their native language and that the crew had an opportunity to review the Standard Terms. Lastly, NCL presented evidence that all crew were required to attend a pre-departure orientation conducted in both English and Filipino language. The orientation included a review of the Standard Terms and Conditions and dispute settlement procedures in the employment contract.

The District Court compelled arbitration in the Philippines reserving jurisdiction to enforce or confirm any resulting arbitration award. Plaintiffs appealed contending the arbitration clauses could not be enforced because seamen's employment contracts were exempt from arbitration under the U.S. Federal Arbitration Act (FAA); that NCL was obligated and failed to demonstrate the crew had notice of the arbitration agreement and gave knowledgeable

consent to it; and, that the arbitration clause was unconscionable and the underlying dispute was not arbitrable.

In an issue of first impression in the Eleventh Circuit, the Court of Appeals affirmed the order compelling arbitration citing a strong presumption in the Convention in favor of arbitration of international commercial disputes.

Addressing each of the plaintiffs' arguments in turn, the Appellate Court ruled that the language and context of the Convention on Foreign Arbitral Awards precluded the application of the seaman's employment contract exemption under the FAA.

Secondly, the Court rejected the argument that NCL was obligated to prove the crew had notice of and knowingly consented to the arbitration clause. Lastly, the Appellate Court found the arbitration clause neither null and void nor unconscionable; nor was the arbitration incapable of being performed in the Philippines.

In Lim v. Cabanlit and Offshore Specialty Fabricators (5th Cir. March 24, 2005) (Civil Docket No. 03-30380) a Philippine resident and citizen filed suit in Federal Court in Louisiana for violations of the minimum wage and maximum hour (overtime) requirements of the U.S. Fair Labor Standards Act. Approximately 100 other similarly situated Filipino seamen opted into Lim's action.

Defendant Offshore moved to dismiss the suit on the grounds the Federal District Court lacked subject matter jurisdiction to hear the dispute and on the grounds the suit was filed in an improper venue. Offshore's motion was based on the POEA employment contract containing the arbitration provision and the fact that the terms of the Convention on Foreign Arbitral Awards required enforcement of the arbitration clause.

Plaintiff contended that the Fifth Circuit's prior decision, applying the Convention to seamen's contracts, was in error and the Convention should not apply, and that the arbitration clause was unenforceable. Plaintiff claimed the clause was un-enforceable because arbitration had never before been required in seamen's wage litigation; the clause was contrary to Louisiana public policy; and, the clause was invalid under the terms of the Convention because plaintiff's claims were based on U.S. wage law and could not be resolved through foreign arbitration in the Philippines.

The District Court denied Offshore's motion finding that the arbitration clause violated Louisiana State law against forum selection clauses in employment contracts (of which arbitration clauses are deemed to be a subset) which rendered the arbitration clause unenforceable. Offshore moved for a rehearing and the District Court certified the issues for appeal.

The Fifth Circuit held that because the Convention on Foreign Arbitral Awards and the Supremacy Clause of the United States Constitution[1] required the enforcement of the arbitration clause. Further, the Court of Appeals for the Fifth Circuit determined there was no exception to the required enforcement of the clause including Louisiana state law against forum selection clauses.

[1] The Supremacy Clause of the U.S. Constitution provides that the laws and treaties arising under the Constitution shall be the supreme Law of the Land and the Judges in every State shall be bound thereby.

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Bodily Injury Team

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