

TM HELLAS

WINTER 2006 ISSUE 15



London Underwriting Team: Paul Collier, Julie Page, Nigel Brooks, Lily Soesen, Christopher Gimson

HiLights

Our presence in Piraeus gives us extensive opportunities to meet with Members on a regular basis and discuss the various issues that arise and generally maintain contact with you.

As Regional Director for Greek Members, Nigel Brooks travels frequently to Greece to maintain the same level of relationship and contact with Members regardless of whether they deal with the London or Piraeus offices.

However, in addition to the claims services, our Greek Members are supported by a dedicated underwriting team. Whilst it is not always possible for members of that team to meet our Members face to face, they are always fully engaged in servicing underwriting related issues.

The underwriting team is led by Nigel as one of the Senior Underwriting Directors of the Club's underwriting department. Assistant underwriter Paul Collier joined the Underwriting Department in 2001 after previously spending five years as a P&I broker. He is assisted by Chris Gimson who is the underwriting support executive.

Julie Page, the team documentation specialist joined in 1985. She deals with enquiries on certificates of entry and other Member documentation, also setting up Members' ClaimsTrac access, US Pollution Certification and development and compliance of the ISO procedures. Lily Soesan supports the team with secretarial assistance.

This team is always on hand to deal with Members' queries on various risk issues either for P&I or FD&D and for both owned and chartered entries. The variety of our Members' ships and the wide range of trades in which they are engaged frequently requires specialist tailoring of cover to ensure the best protection possible. Nigel, Paul and Chris are able to deliver the aggregate experience of our Greek Members as individual expertise to specific queries. Indeed, frequently they are there to assist Members who wish to discuss the risk issues that could potentially arise from a new business venture or trade that they may wish to enter.

The full contact details for the team can be found on the UK Club website at www.ukpandi.com in the Making Contact section.

INSIDE THIS ISSUE	PAGE
H1 Team out and about.	2
French Court Revolution.	3
Inter-Club Agreement.	4
Chinese Cargo Claims.	5
UKDC Seminars.	6



UK P&I CLUB



Iannis Beblidakis & Costas Zoides

problems are tackled in China. (This is explained in more detail on page 5.)

In early October, H1 arranged seminars for our Defence Club Members, taking advantage of the performing capabilities within the team, a number of keen volunteers acted out how a problem with a self-heating coal cargo might be handled. (A fuller report on this event is on page 6.)

Our tanker Members will have noted that the 2nd Tanker Operator Conference on TMSA was held at the Metropolitan Hotel on 18th October. Nick Milner was there, along with about 100 delegates from tanker companies, class societies and suppliers. The panel included Captain Panos Hadjikyriakos, head of quality, safety and environmental issues at OSG, addressing topical issues concerning this TMSA.

Philip Clacy attended the Greek Shipping Summit, jointly organised by Tradewinds and Seatrade, on "Consolidation in Greek Shipping". Many H1 Members were present and will have enjoyed the debate between the attendees and panellists.

Most recently, H1 was joined by the Thomas Miller P&I Chairman Luke Readman and Deputy Chairman Hugo Wynn-Williams, Claims Director Graham Daines, Regional Director Nigel Brooks and underwriter Paul Collier from London for the traditional Club Dinner reception at the Hilton. We were pleased to see so many of you there.

H1 team out and about

Despite the autumn deluge and local election fever, H1 has maintained its traditionally busy activity schedule.

Occasionally, effective handling of a claim requires a Club executive to attend on the scene in person. In August, Alexandra Couvadelli, was despatched to Oregon, together with a member's representative and lawyer, to investigate the aftermath of a tanker grounding. The matter continues but Alexandra's attendance has already proved useful in developing a better understanding of the issues.

Apart from handling the usual array of claims, we have continued to visit our Members and catch up with the issues that currently concern you.

A notable individual effort has been made by Costas Zoides, who not only travelled down to Chania to see ANEK at their new premises but also took the opportunity to spend a day aboard a Member's ship that called at Piraeus for a routine survey.

Visitors to our office have been numerous. Among the throng of lawyers, we have also received a number of surveyors and experts. John Fairclough, formerly of Brookes Bell Jarrett Kirman and now consulting on his own as JF Marine Ltd, gave a presentation to the team on "Cargo problems at ports of refuge". We also received a delegation from Cargo Marine Services Co Ltd. They provided us with a useful picture on how cargo inspection and oil pollution



Captain Panos Hadjikyriakos



UK Club Dinner : Hugo Wynn-Williams, Captain Panagiotis Tsakos, Costis Kertsikoff



Dinos Caroussis, Luke Readman, Nick Efthymiou

French court revolution

Incorporation of charterparty clauses accepted

Over the years, French cargo interests have insisted that their claims for loss be governed by French law and jurisdiction in order to take advantage of the French courts' supportive approach. Their efforts to recover from carriers have benefited as a consequence.

Legal challenges by carriers seeking to rely upon clauses denoting specified jurisdictions, even if the clause is incorporated into the contract of carriage, have repeatedly failed. As a result, carriers have found themselves either negotiating from an inferior position or facing proceedings in a partisan environment.

However, there are signs that the tide may be turning. Firstly, several court decisions in favour of UK Club members suggest that increasingly the French judiciary are recognising that charterparty terms should be incorporated into the contract of carriage.

Whilst it is impossible to detail all the various court decisions here, a brief explanation of how the precedents have evolved may be of interest.

One UK Club case concerned a ship chartered by a French commodity trader to carry wheat from Rouen to Cuba. A CONGENBILL bill of lading was issued upon completion of loading. This referred on its face to a charterparty, the terms of which were incorporated into the contract of carriage by virtue of the standard clause printed on the reverse of the bill. Although the charterparty specified that disputes should be referred to Paris arbitration, cargo interests commenced proceedings in the Rouen Commercial Court.

In the first instance the court accepted the Carrier's argument and refused to accept jurisdiction, referring the matter to arbitration in accordance with the charterparty provisions. Cargo underwriters appealed.

In December, 2003, the court of appeal in Rouen surprisingly held that only the arbitrators themselves were allowed to rule on their own jurisdiction. This decision was unique in that it was the first time a French court had accepted that a third party receiver could be bound by a

jurisdiction agreement in a charterparty without having specific knowledge of that agreement. Prior to that decision, French law had consistently rejected carriers' arguments unless the charterparty was physically attached to the bill of lading.

In another case concerning a bagged rice discharge in Lomé in 2003 and involving an H1 Member, the issue was addressed again. The question of jurisdiction was ultimately referred to the French supreme court ("Cour de Cassation"). The Cour de Cassation held, in accordance with the charterparty terms, that LMAA Arbitration was the appropriate forum for the dispute. Whilst the court's decision in favour of the Member may have been influenced by the presence of an assignment of rights from the receiver to the claimant charterer, a subsequent recent decision by the same court serves to confirm this shift in interpretation.

On 11th July, 2006, the Cour de Cassation approved a decision against a French cargo underwriter claimant by the Court of Appeal in Bordeaux declining jurisdiction in favour of London arbitration. Building upon previous judgments, that precedent should now bind first instance courts and enable carriers to press for unsecured cargo claims to be referred to London arbitration in future.

Members will, of course, continue to face difficulties when a Club letter is sought while the ship is still in port.

Detaining a ship is relatively simple in many West African jurisdictions and arranging its release can be time-consuming. Thus, if the claim is presented while the ship is in port, making concessions to cargo underwriters over the security terms may be viewed commercially by many Members as "the lesser of two evils". The result is often that a Club letter is issued expressly stipulating that French law and jurisdiction are to apply to the cargo claim. Obviously, the imposition of a jurisdiction considered by many to be unfavourable for a carrier can detrimentally affect the carrier's prospects at a later stage.

Given those circumstances, however, we would generally prefer to steer the dispute towards Paris Arbitration where, compared to the French Courts, more dedicated marine experience is to be found.

This is echoed in a separate development. French cargo underwriters, AXA, have agreed with the International Group to adopt a standard LOU wording specifying that disputes should be referred to Paris arbitration. The draft applies French law and refers the substantive dispute to the Chambre Arbitrale Maritime de Paris.

While both developments may not reduce the incidence of cargo claims in difficult areas, they are positive for those carrying cargoes to areas where French cargo interests traditionally function, such as West Africa. Time will tell how all this will be received by the cargo interests.



Palais de Justice, Paris (Cour de Cassation)

Inter-Club Agreement: Properly settled and in time?

Ask a lawyer and you will be told that cases are mostly decided on their facts. Occasionally though, technicalities are pivotal. H1 has recently seen several cases which have turned on whether owners had "properly settled" a receiver's cargo claim and whether recovery from the charterer was sought within the Inter Club Agreement time limit. In one of these counsel was asked to scrutinise the ICA wording to facilitate a favourable recovery for the member.

In September 1996, owners fixed to load bagged rice in the Far East for shipment to Senegal on an amended NYPE Form. The 1984 version of the ICA was incorporated. On completion of discharge in Dakar, receivers claimed losses of US\$35,000 arising from stevedore damage, pilferage, mishandling and inadequate stowage. Proceedings were commenced in the Senegalese courts and owners, as carriers, put up a guarantee for US\$50,000. Notification of this claim to the charterer seeking recovery of the apportionment due under the ICA was made in April 1997.

In February 1999, charterers' P&I Club confirmed that charterers would "honour their obligations" under the ICA "if their liability is involved". They did not mention any ICA time bar.

Senegalese lawyers advised that settlement for USD27,000 was possible. Owners indicated that they would offer USD18,000 to receivers provided that charterers agreed. The charterers refused, so owners offered only USD10,000 which was rejected by the receivers. At first instance, receivers successfully obtained judgement for a full recovery.

After an unsuccessful appeal to the court of appeal in Dakar, owners were held liable to receivers for US\$58,000. Subsequently, receivers enforced their judgment against the bank guarantee and, despite a small shortfall, accepted that as full settlement.

In January, 2005, owners invited charterers to pay their due proportion in accordance with the ICA. Charterers contended that the level of owners' settlement with receivers was too high, and therefore improper. Charterers sought to apply a six year contractual limitation period from the date of discharge. In their view, recovery under the ICA was time barred.

"Proper settlement"

Charterers' Club criticized owners for failing to negotiate settlement in 1999 despite there being no guarantee that settlement for USD27,000 would have been accepted. The case should not have been allowed to proceed through the Senegalese courts. Quite apart from the increased principal liability, charterers objected to the increased legal bill.

Counsel disagreed with that view. Case law and judicial comment indicated that the ICA intended to overcome the investigative difficulties which would otherwise plague a claim if issues of fault were allowed to arise. By analogy, questions as to the reasonableness of settlements should not be posed (The Strathnewton [1983] 1 Lloyd's Rep. 219). In that decision, Kerr L.J. stated that "settled" merely means "paid" or "dealt with" or "disposed of" and that the object of the ICA is "to proceed directly from the proper settlement or compromise of the claims of the bill of lading holders to the more or less mechanical apportionment of financial responsibility as between the owners and the charterers under the Inter-Club Agreement". So the ICA is not intended to trigger an exhaustive analysis of whether the compromise of a claim was, or was not, reasonable.

Relevant ICA Clauses

- (2) the provisions of Clause (6) (time bar) shall apply notwithstanding any provision of the charterparty or rule of law to the contrary...
- (4) Apportionment under this Agreement shall only be applied to Cargo Claims where:
 - (c) the claim has been properly settled or compromised and paid.
- (6) Recovery under this Agreement by an Owner or Charterer shall be deemed to be waived and absolutely barred unless written notice of the Cargo Claim has been given to the other party to the charterparty within 24 months of the date of delivery of the cargo or the date the cargo should have been delivered ...

As the claim had arisen under a bill of lading and had been compromised and paid on the basis of an actual or apprehended legal liability rather than, for example, a simple ex-gratia payment, counsel concluded that owners could seek recovery under the ICA from charterers.

Time bar

Counsel also looked at the time bar issue. He confirmed that no other time bar is effective under the ICA provided the two-year notification requirement in Clause (6) is observed.

Taken together, Clauses (2) and (6) of the ICA work so as to evidence an agreement between the two parties not to rely upon any limitation period for which the law, or the contract would normally provide.

Two competing interests had to be balanced. The approach Counsel advocated would not unduly burden the party against whom a claim under the ICA is pursued. Provided the notification requirement of Clause (6) is satisfied, reasonable notice of the claim is given and respondents are not faced with a stale claim brought without notice many years after the relevant events have taken place. Similarly, a claimant only permitted to bring a claim under the ICA once the underlying cargo claim has been paid or compromised, is not unduly prejudiced by virtue of delay within a foreign judicial system over which he has no control.

Conclusion

The case evidences both the good and bad sides of the ICA. While the ICA provides a straightforward mechanism for the apportionment of claims between two parties involved in the carriage of goods, it is nevertheless simply a contractual agreement. Therefore it appears open to varied interpretations and may be exploited, as in the above instance, for the purpose of disputing liability.

On this occasion, H1 relied upon counsel's advice to argue successfully on the Member's behalf with the result that the appropriate apportionment in respect of principal and costs was recovered. Fortunately, charterers were still in business after almost a decade and were also represented by another International Group club. Experience would suggest that this is not always the case.

A new force in Chinese cargo claims

If you are a frequent carrier of bulk cargoes to the People's Republic of China, you will probably have experience of cargo claims. You will probably also be aware that, despite being the most significant importing nation in the world, it has not adopted any recognised cargo conventions. Their law seeks to mirror the Hague-Visby Rules and Hamburg Rules in certain respects, but application by the domestic courts is frequently unpredictable. Therefore some operators load bulk cargoes for Chinese ports with a certain level of trepidation.

A recent visit to H1 by China Marine Services Co. Ltd. has helped us to temper our pessimism. Established in 2002, CMS is a joint venture between CCSI, China's classification society, and Thomas Miller P&I Ltd. Formed to assist in resolving marine claims, its focus is on inspection activity. It draws equally on the CCSI service network and Thomas Miller's transport insurance expertise to engineer a more internationally-recognised approach. In addition to its own offices in Beijing and Shanghai, it uses CCSI offices in Dalian, Tianjin, Qingdao, Guangzhou and Shenzhen.

From a claims handler's perspective, gathering suitable evidence when faced with a cargo claim in China is a

frustrating problem. Inevitably, the claimant receiver or cargo underwriter supports the shortage or damage with a CIQ Certificate. This is produced by the Import/Export Inspection and Quarantine Bureau (CIQ), a government agency mandated to inspect all goods, packaging, storage facilities and cargo holds used for the transport of foodstuffs and to apply governmental quality standards. No import or export to, or from, China can occur without a CIQ inspection. So, when a claim arises there is always a CIQ report in support.

The difficulty, from the carrier's point of view, is that the Chinese courts overvalue the CIQ reports. The result is that cargo claims are invariably resolved in favour of the claimant.

In response to pressure to partly redress the imbalance, China Certification and Inspection Group (CCIC) was established in 1980 to carry out voluntary inspections. It is a fully certified company authorised by the Government to carry out unofficial inspections and survey work on request. Further, CCIC is not independent.

However, CMS is licenced to inspect vessels, marine products and equipment and to assess and consult in the event of marine related casualties and

investigations. It already commands respect and trust among the Government surveying fraternity. Indeed, in the field of oil pollution, it already advises at central Government level and is consulted in matters of policy.

"If there's a cargo problem, CMS would be my first choice in China. They are doing their utmost to protect the carrier's interests."

Mr Chen Keyu, CMS General Manager and Managing Director, is confident that the inspection market will soon open up, enabling CMS to operate as CCIC's competitor in the near future.

Obtaining the license to inspect cargoes will at least allow reports to be tendered as evidence which, on the face of it, disagree with the CIQ findings. The enhanced status of CIQ's reports means this may not successfully resolve your cases. However, in time, it may well be possible to convince the decision makers within China that companies like CMS, operating in accordance with national rules and regulations, have views which should be considered.

"The opening of the inspection market is unavoidable. CMS is approaching the stage where it will be granted an inspection license for cargo. Thereafter, our reports will be admissible in court", says Mr Keyu. Once that happens, it will be up to owners, clubs and other maritime organisations to press for evidence to be weighed more objectively.

We have found that CMS now have the know-how to offer real assistance. As Bruce Hung of Thomas Miller (Hong Kong) Ltd explained: "If there's a cargo problem, CMS would be my first choice in China. They are doing their utmost to protect the carrier's interests."

Should you wish to find out more about the services offered by China Marine Services or the activities in which they are involved, please feel free to contact H1 or browse the CMS website

www.cmsonline.net



Gu Ming Xiang, Nick Milner, Sheilin Kuang, Chjen Keyu



Marie Kelly, Paul Kaye, Cedric Chatteley, Cliff Mullins

UKDC seminars in Athens

Since our last edition, H1 has hosted two more UKDC seminars. The first, at the Athens Hilton on 10th October, portrayed the Club's involvement in a dispute with the charterer when a coal cargo caught fire during carriage. The second, at the Pentelikon and Piraeus Marine Club on 23rd and 24th November, examined some of the legal and insurance issues which arise in newbuilding, with a particular emphasis on China.

At the Hilton in October, the audience were given a dynamic 'role play' presentation by Nigel Brooks, Paul Kaye, Marc Jackson, Cedric Chatelleyn, Alexandra Couvadelli and Dominic Hurst from Thomas Miller Defence. They were ably assisted by John Elvey (Ince & Co), Marie Kelly (Norton Rose) and Cliff Mullins (Minton Treharne). The cast of characters enacted the fictional voyage of the MV Floga, carrying a cargo of coal from the Far East to Europe. Six days into her voyage, the Master reports an explosion.

Re-enacting the conversations between owner, charterer, their clubs, lawyers and expert, the cast explored the practical and legal pitfalls of carrying dangerous cargo. They examined seaworthiness, cargo descriptions, carriage requirements, responsibility for trimming, measure of damages, market losses. The case concluded with an enactment of the closing submissions by counsel and judgment in the High Court action. The event was followed by a reception with a lively discussion about the issues that had arisen.

In the seminars on 23rd and 24th November, UKDC teamed up with niche lawfirm Curtis Davis Garrard (CDG) to present a range of issues to the Kifissia and Piraeus groups.

Justin Turner of CDG emphasised that potential risks could be managed, and therefore reduced to a large extent, by taking particular care during the contract negotiation. He expressed his view that

specialist legal advice at that vital stage was well worth the expense.

It was then the turn of H1's Paul Kaye, who stressed the benefits of taking out Defence cover from the signing date of the newbuild contract in order to protect the Member's exposure. Although the Club is mostly asked to support disputes arising directly with shipyards, Paul helpfully took the audience through the rudiments of Builders' Risks insurance, highlighting tabled revisions to the 1988 terms. To illustrate how Club cover can be used to offset litigation risks in this area, he referred to a number of examples such as the dispute which arose out of the devastating fire on board the near-complete DIAMOND PRINCESS.

Simon Curtis, founding partner of CDG with over 20 years dedicated experience in the industry, then turned the focus on China's shipbuilding plans. Already in third place behind Japan and Korea in shipbuilding terms, China is committed to developing its capacity and outstripping the competition within a decade. He told us about the categories of shipyard in China and explained how their expertise has grown. He identified the areas from which disputes usually arise.

The seminar closed with a talk by CDG's Xiaomei Qin. Born in Dalian but educated in Japan and the UK, she provided us with a few rules of thumb for business dealings in China and highlighted a number of things to avoid.

The subsequent round of seminars are due in 2007.

H1 Christmas

During the Christmas and New Year office closures the following executives will be on duty

From 20th December - **Anthony Fielder**
Mobile 30 6944 39 43 43
Home 30 210 41 83 173

From 27th December - **Dominic Hurst**
Mobile 30 6944 79 16 23
Home 30 210 96 53 373

Thomas Miller Hellas has made a Christmas donation to the cancer charity foundation The Smile of the Child in place of Christmas cards this year.

The organisation was established 11 years ago as a children's charity and has a diverse range of activities, it runs a hostel network, organises emergency medical care and operates a lost child helpline. It just received the Non-governmental

Organisation of the Year award from the Ministry of Health and Social Services.

H1 would like to wish all Club Members and friends a happy and prosperous 2007.

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