

## Detention on US first call – the ‘High Interest Vessel’

Following “9/11”, the United States enacted the Marine Transportation Safety Act 2002 to ‘*establish a program to ensure greater security for United States seaports*’. In essence, it is designed to protect US waters and ports from terrorism. The full impact of this legislation on general trading to the US is not, at first sight, clear. In recent times the Association has supported, to the English Court of Appeal, a Member’s claim concerning this legislation. The case concerned who pays for detention when the US Coastguard designates a ship a ‘High Interest Vessel’. This briefing examines that case, why ships may be classed as ‘High Interest’ and how to provide for that eventuality in a fixture to avoid disputes.

### The DORIC PRIDE

In January 2004, time charter Members chartered the DORIC PRIDE from her disponent owners, on an amended NYPE form, for a time charter trip from the US Gulf to South Korea. The ship was a relative new build, and this was to be her first trip to a US port. When she was ordered to load in New Orleans, local agents therefore warned that that she might be designated ‘High Interest’ and would therefore be prevented from entering port until such time as the US Coastguard had conducted a security boarding.

On her arrival at the South West Pass to New Orleans on 19<sup>th</sup> February, 2004, the master received an order from the US Coastguard that the ship had been targeted as ‘High

Interest’ and was prohibited from entering the lower Mississippi River. Instead she had to proceed to a specific anchorage to await inspection. The following day, the South West Pass was blocked due to a collision in the Mississippi. The river re-opened on the 25<sup>th</sup> and the inspection took place on the 26<sup>th</sup>, following which the ship was cleared to proceed. The time charterer Member claimed it was entitled to place the ship off-hire for the period of ‘detention’ between 20<sup>th</sup> and 26<sup>th</sup>, relying on clause 85 of the charterparty:

*‘85. Capture, Seizure, Arrest*

*Should the vessel be captured or seized or detained or arrested by any authority or by any legal process during the currency of this charterparty, the payment of hire shall be suspended until the time of her release, and any extra expenses...shall be for Owners account unless such capture or seizure or arrest is occasioned by any personal act or default of the charterers or their agents or by reason of cargo carried or calling port of trading under this charter’*

The ship’s disponent owners relied on the ‘port of trading’ proviso in the clause and claimed that both the inspection and the collision were extraneous events which did not put the ship off-hire. The ship was not therefore ‘detained’ for the entire period. It could have sailed elsewhere other than US waters. The amount in dispute exceeded US\$250,000.

In the English High Court, Mr Crane QC upheld the Member’s position. Relying on the authorities of the leading cases of the MAREVA A/S [1977] 1 Lloyd’s Rep 368 and the JALGOURI [1999] 1 Lloyd’s Rep 903, he found that the DORIC PRIDE was ‘detained’

as she was prevented from proceeding on the voyage ordered under the charter. He found that the owner had accepted the risk of trading to the US (including the risk of being exposed to the legal regime of security inspections). He found that the risk of a security boarding was:

***‘a generic feature of US ports rather than a peculiarity of New Orleans. In no sense can that risk and its consequences be said to have arisen from charterers nomination of New Orleans’***

This was an ordinary incident of trading to the range of ports specified in the charter and the ship had been ‘detained’ within clause 85. The disponent owners appealed. The Court of Appeal, also found in favour of the Member, ruling that the cause of the delay was ship related and therefore owner’s responsibility.

### USCG Safety and Security Regime

In December 2003, the USCG published a circular, ‘Coastguard ports state control targeting and boarding policy for vessel security and safety’. The circular contains some guidance as to the factors which contribute to the risk of non-compliance with both international conventions and domestic rules which apply in US waters, for example:

- Shipowner, charterer or operator
- Flag state
- Last port of call
- ISPS/MTSA compliance history.

A 17 point score or higher makes the ship a Priority I and requires boarding at sea prior to entering port. A 7-16 point score results in examination in port and a score of 6 or below is Non-Priority and does not warrant

examination unless selected randomly. Boarding is a general check of the security regime in place on board and of the flag state's audit of that process. The USCG each year will target ships that are registered in countries with substandard maritime security or uncertain records of implementation of international security measures. For example, a Honduran flagged ship will this year attract 7 points; a Cypriot one, 2 points.

Details of targeted owners, flag states etc can be found on the USCG website: <http://www.uscg.mil/uscg.shtm>. The full circular can be downloaded at <http://www.uscg.mil/hq/g-m/mp/nvic.html>.

#### What is a High Interest Vessel?

Separately, the US Coastguard assesses each ship to ascertain if it presents a **security risk** requiring a **security boarding**. If so, a ship will be designated a **High Interest Vessel**, or **HIV**:

*'a commercial vessel intended to enter a US port that may pose a high relative risk to that port'*

Of their nature, factors which contribute to a security boarding decision are classified. Ultimately the captain of the port makes the final decision to board and inspect. Whilst it may be possible to deduce the reason for detention from the evidence (as with the DORIC PRIDE), no reason is given to the ship concerned – this also remains classified information.

#### What is a Security Boarding?

The USCG describes a security boarding as:

***'A security sweep and limited examination by an armed boarding team of a vessel (including the cargo, documentation, and persons on board) designated by the Captain of the Port ("COTP"), arriving (or on rare occasions departing) a US port, to deter acts of terrorism, and/or transportation security incidents.'***

According to the USCG circular it will involve:

- Observation of the vessel prior to boarding;
- Verification of the information submitted in the NOA and collection of information intended to assist the COTP in deciding whether to permit the vessel to enter or leave port;
- Verification that the vessel and crew are operating in a manner consistent with the stated purpose of the vessel and its intended destination;
- Clarify, verify, and act on any intelligence that may have prompted the security boarding or HIV designation.

Since October 2004, the USCG also has adopted a **random boarding policy** to inject an element of unpredictability. This includes security boardings for ships which have *not* been designated High Interest.

We know from the DORIC PRIDE that a ship is likely to be designated High Interest on its first trip to the US. However, it is clear from the above that any ship may be delayed by such a boarding, either due to designation as High Interest, or by random screening. The court in the DORIC PRIDE held that such detention was a risk inherent in the agreed trip time charter loading in the US Gulf. Owners were not therefore entitled to hire for the period of detention, or for expenses, including the cost of bunkers consumed.

Without knowing the underlying reason for a security boarding it may be impossible to distinguish whether it is caused by owner or, charterer-related issues. For example, the security boarding may be due to a first time call (as in the DORIC PRIDE) or activities of the crew, which have attracted attention, or to the charterer's previous trading pattern. It is therefore imperative that provision is made in the charter for the consequences of a security boarding. This may include delays, any fines imposed or the costs of any measures the US Coastguard requires to be taken before the ship is permitted to enter, or, on rare occasions, leave US waters.

#### Period or time lost off-hire clause?

Attention should also be paid to the off-hire provision, to whether it is a 'period' or 'time lost' clause. In the DORIC PRIDE, the period clause worked in the time charterer Member's favour. A 'time lost' clause would have required a separate analysis of time lost by reason of the security boarding and other causes. These would have included the diversion of available USCG resources to deal with the collision that occurred in the Mississippi during the period of delay.

For further information on any matters covered by Soundings, please contact the Managers

The UK Defence Club  
c/o Thomas Miller Defence Ltd  
International House  
26 Creechurch Lane  
London, EC3A 5BA

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Tel: +44 7000 333362  
Facsimile: +44 20 7204 2131  
Email: [tmdefence@thomasml.com](mailto:tmdefence@thomasml.com)  
Website: [www.ukdefence.com](http://www.ukdefence.com)