

March 2010

soundings

In this issue: Maritime Arbitration – is the SMA on the way back? | Fuel for Thought - EU Sulphur Directive

Maritime Arbitration – is the SMA on the way back?

As many Members will be aware shipping cases in the US are generally conducted under the auspices of the Society of Maritime Arbitrators (“SMA”) and its rules which differ in a number of respects from the LMAA. Over the years concerns have been raised with regard to SMA arbitrations with the result that the number of SMA arbitrations has declined. There are however signs that this might now be changing.

One of the major long-standing criticisms of SMA arbitrations has been the issue of recoverability of costs. The successful party would generally not be able to recover its costs in an arbitration. There is however now a power within the SMA rules to award costs. This change occurred in 2003 when section 30 of the SMA rules was amended to provide the arbitrators with the power to award reasonable legal fees and other costs and expenses necessarily incurred in the conduct of the arbitration. This award can be made in whatever apportionment the arbitrators consider fair under the circumstances. Usually they would award somewhere between 60% and 80% of the prevailing party's fees and costs and this would form part of the final award.

Section 30 was recently affirmed by the Courts in the appeal case of “The EOS” (Andorra Services Inc.; Chemoil Corp. v Venfleet, Ltd and M/T Eos. US Third Circuit Court of Appeal Decision 2009). In this case the sole arbitrator Mr Jack Berg awarded 92% of the Owners' total request for reimbursement which included interest. This position was upheld on appeal to the Circuit Court of Appeal.

The SMA rules also provide for early case management conferences between the arbitrator and the parties. Under Rule 21, a non-substantive scheduling conference will take place where the parties will provide an outline of their claim and any counter-claim and give an indication of the witnesses and hearing requirements. The panel then sets the hearing dates by way of a Scheduling Order and adjournments are not permitted without valid reasons.

SMA arbitrations are generally customised to suit the needs and schedules of the parties involved in the

dispute. However, an area of criticism has been that witness evidence has for the large part been given orally and witness statements are not the norm. That however does not need to be the case as the parties have the flexibility to agree on how the arbitration should be conducted. An LMAA style approach could therefore be adopted where there is an exchange of pleadings and witness evidence is disclosed in advance.

The arbitrators also have powers to order affidavit statements or depositions especially from witnesses who cannot testify in person. They have power to issue subpoenas to non-parties to compel attendance at a hearing or for the production of documents. The arbitrators also have discretion over the admissibility of evidence and there is no right for pre-arbitration discovery depositions, unless agreed by the parties in advance.

[Continued overleaf >](#)



Fuel for Thought – EU Sulphur Directive

World shipping is under increasing pressure to provide environmentally safe operations. As Members will be aware the 1st January 2010, marked the introduction of EU Directive 2005/33/EC (“the Directive”). This Directive required all ships operating within the European Union (whilst at berth) to use a marine fuel with a sulphur content not exceeding 0.1 %. As a consequence of this, the Managers have received a number of questions regarding the extent to which an Owner needs to complete storage tank and diesel engine modifications to ensure compliance with the Directive. In particular, many older ships (which have older style diesel engines and which were built with only one storage tank) cannot burn lower sulphur fuels and only have capacity to store one grade of bunkers.

In the circumstances, the only viable long term solution (to ensure compliance with the Directive) is to ensure the ship is modified by adding a second storage tank or to subdivide the existing storage tank to ensure two grades of bunkers can be carried. In respect of modifications to the diesel engine, if Owners have warranted their ship is able to consume fuels of the required sulphur content, it may be necessary for Owners to carry out modifications to ensure the ship’s engine can burn reduced sulphur content fuels. In addition, it is often essential the piping system and boiler receive suitable modifications to ensure they can utilise the low sulphur fuel. In each case, the modification work (whether it be storage tank or engine) is likely to be expensive and must be carried out in dry-dock strictly in accordance with Class approval and requirements. All these issues raise one key question; i.e. who should pay for the modification costs?

Although certain contracts may deal specifically with the issue as to who

should pay, many will not. Generally speaking unless there are any special conditions incorporated into the fixture, there may be nothing to compel a charterer to contribute to the modification costs.

If modification works are undertaken for ships that trade between zones which have different sulphur fuel limitations it is essential that detailed low sulphur fuel changeover procedures are prepared and all on-board crew trained so they are familiar with the new operating procedures. Specifically, the crew should be aware that the flashpoint of low sulphur fuel may be lower and have poor ignition or combustion properties, which can cause fouling and engine damage. Adequate training is therefore a necessity.

In addition as low sulphur fuel can only be loaded if the existing supply of ordinary bunkers is depleted or has been transferred to a further storage tank, this will add additional costs to a voyage. It is important that the charterparty is clear as to who is responsible for these additional costs.

Other specific clauses might include fixture termination if, for example, the ship is unable to comply with the Directive. If a specific clause was not included in the fixture then it is likely that it will be difficult to imply such a term.

With regard to newbuilding contracts it is important that clauses are included which provide that the ship will be able to burn low sulphur fuels. If adaptations are not included (and the ship is unable to operate utilising low sulphur content fuel) Members could find themselves liable to pay penalties imposed by an EU Member State or facing claims from charterers who may have the right to place the ship off-hire whilst modification work is being carried out.

The impact of the Directive has been widely reported in the maritime press and has resulted in a number of shipping organisations (i.e. BIMCO and Intertanko) redrafting their charterparty fuel sulphur content clauses, to ensure compliance with the Directive. However, whilst these clauses are helpful, strict compliance poses a challenge to all Members and therefore the Managers recommend that Members scrutinise each new fixture to ensure their duties and responsibilities are understood before the fixture is concluded.

Maritime Arbitration

continued

Under section 8 of the SMA rules, which has been affirmed by the Courts, the arbitrators also have the power to order security in the form of an arrest or attachment of the other party’s vessel or assets, including bank accounts. This can be obtained at the start of the arbitration or at any time during its course.

The SMA rules also provide that after completion of evidence an award must be rendered within 120 days (30 days under the SMA short form procedure). The awards are usually final and binding and there are very few specific grounds under which an award can be appealed. It may also be recalled that SMA awards are published in the SMA Award Service and are available to commercial shipping interests and on various platforms.

Although the number of Members choosing SMA arbitrations has decreased over the years, the steps that have been taken to address some long running concerns are pleasing and will go a long way in assisting the SMA to reverse this trend and possibly once again become a real alternative to the LMAA.

The UK Defence Club

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
tel: +44 207 283 4646 fax: +44 207 204 2131
email: tmdefence@thomasmiller.com web: www.ukdefence.com