UK DEFENCE CLUB

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soundings

Message from the Managers

Daniel Evans, Club Manager

Welcome to this new look UKDC Soundings. As ever we are keen to provide Members with up to date information on recent judgments, arbitration awards and other legally related information. Soundings will also provide further insight into the day to day activities of the Association and the Managers.

I trust you find this and future Soundings a useful and informative point of reference and of assistance in your business activities. If Members require more detailed information on any of the areas covered please feel free to contact your Area Group. A pdf of this issue is also available on the Association's website, ukdefence.com.

UKDC
IS MANAGED
BY **THOMAS MILLER**

Members need to be aware of a recent English High Court decision concerning demurrage.

Many standard charter wordings require demurrage claims to be submitted within a limited time following discharge and supported with a number of specified documents.

In Waterfront Shipping vs. Trafigura, ([2008]1LLR 286), the court concluded that a claim for demurrage was time barred, because although the claim was submitted within the time limit, the pumping logs produced to support the claim were not signed either by the terminal or any of the ship's officers, as was required by the charter.

The owner's argument that the absence of signatures on the logs was trivial and had not caused the charterer any prejudice was rejected.

Moreover, although the content of the pumping logs were only relevant to part of the owner's claim, the court concluded that the owner's failure to produce signed logs had the result of invalidating the entire claim, even those elements to which the pumping logs were irrelevant.

Demurrage claims rarely reach the English High Court - the vast majority are decided by London arbitrators, who will now be bound by this rather harsh finding. Distinctions could be drawn depending on the facts of each case, however the clear conclusion is that Members will need to ensure that documentary provisions of demurrage clauses are strictly complied with – both by crews and shore staff.

Failure to do so could result in valid claims - whether of the owner or a time charterer - falling foul of technicalities.

The shipping world has produced two notable cases on the law of damages in the last year - the Golden Victory and the Achilleas.

In the GOLDEN VICTORY, a charterer was able to limit the damages payable to the owner after it breached a charter by redelivering a ship four years early, on the basis that it would ultimately have been entitled to cancel the charter in 2003 when the US invaded Iraq, even though this occurred nearly a year and a half after the breach.

In the ACHILLEAS, ([2007]2LLR 555), an owner was entitled to recover the loss of a subsequent fixture after a charterer failed to redeliver the ship within the maximum charter period. The previous perceived wisdom was that in such circumstances an owner could claim damages for the period of overrun only.

Both cases reveal an apparent shift by the court away from legal orthodoxy towards a reflection of commercial realities. But the decisions have not been universally welcomed. Starting with the GOLDEN VICTORY, ([2007]2LLR 164) – the traditional approach was that the damages payable by the charterer crystallised at the time the ship was redelivered, and that later events should not be taken into account, unless they were inevitable at the time of breach. The House of Lords concluded however that to allow the owner to claim damages for the period following the Gulf war would be inconsistent with what it described as an overriding "compensatory principle" as it would put the owner in a better position than he would have been in had the charter been performed in full.

However two of the five law lords dissented, and argued forcefully that the decision undermined the quality of certainty which was a traditional strength and major selling point of English commercial law.

The decision in the ACHILLEAS has also caused disquiet from those within the chartering world who feel the ruling exposes them to unacceptable risks, when a late redelivery may be caused by matters out of their control. It is clear that a charterer who redelivers late now does so at his peril, though this can always be addressed by drafting clauses which limit liabilities. The ruling is however set to be reviewed by the House of Lords.

From the Club's viewpoint, both decisions could also result in an increase in the scope and length of litigation. Take the GOLDEN VICTORY for example – a party in breach of long term charter may be tempted to delay litigation in the hope that by the time damages come to be assessed it can rely on some external event to limit its liability to the other. The finding in the ACHILLEAS may encourage claimants to seek to apply the same rationale to other consequential claims – for instance loss of sub-charter hire due to a speed claim. What is encouraging however is the court's apparent willingness to be pragmatic, at the expense of precedent.

The UK Defence Club
Thomas Miller Defence Ltd, International House, 26 Creechurch Lane, London EC3A 5BA
tel: +44 7000 333362 fax: +44 207 204 2131
email: tmdefence@thomasmiller.com web: www.ukdefence.com

AIC Ltd v Marine Pilot Ltd ("The Archimidis") [2008] EWCA Civ 175 – "one safe port [named]" – is it a safe port warranty?

The Court of Appeal has recently handed down a decision clarifying the law on this issue. It has held that this phrase constitutes a safe port warranty.

The ARCHIMIDIS was on a three consecutive voyage charter to "load one safe port Ventspils". The charterer argued in arbitration that this did not constitute a safe port warranty by the charterer, but rather it was merely reflecting the parties agreement that the port was safe. The tribunal dismissed the charterer's argument and held that it did constitute a warranty as to the safety of the port by the charterer. The High Court upheld the decision on appeal and now the Court of Appeal has also upheld the decision. The Court of Appeal ruled that the reference to "load one safe port Ventspils" did not stand alone. The words "discharge one/two safe ports" imported a warranty by the charterer that the port or ports of discharge were or would be safe. They said it would be odd to construe the words "load one safe port Ventspils" as having any different meaning and in particular as meaning that it was agreed that Ventspils was or would be safe. The Court also said that the word "safe" had to have some meaning and that there would be no need to describe Ventspils as safe if that was what was agreed.

This decision will hopefully clarify beyond doubt that on construction the naming of a port in the context of a safe port warranty is a warranty and should be applied as such.