UKDC
UK DEFENCE CLUB

Issue 4, October 2008

soundings

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Message from the Managers

UKDC Seminar in Hamburg

Exploding containers, dangerous cargoes, and charterparty termination were among some of the issues raised at an evening presentation in Hamburg earlier this month. Over 60 members of the German shipping industry heard representatives from the Managers explore the issues which can arise following a casualty, in the form of a dynamic role play scenario.

The cast recounted the misfortunes which befell the MV ATLANTIC after a container of cigarette lighters exploded causing serious damage to the ship, lengthy repair delays and eventually the cancelling of a long term charter. The event culminated in a mock arbitration involving heated argument between the parties' lawyers, Andrew Wright of MFB and Julian Clark of Holman Fenwick Willan, and the cross examination of an expert witness, John Third of Brookes Bell Jarrett Kirman. Order was finally restored and the dispute resolved through LMAA arbitrator Michael Baker Harber. The evening concluded with a drinks reception, during which a lively debate over the outcome ensued.

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IS MANAGED
BY **THOMAS MILLER**

RightShip Approval

The Managers have received a number of queries concerning owners' obligations in respect of the RightShip vetting scheme, a joint venture formed in 2001 between BHP Billiton, Rio Tinto and Cargill, which describes itself as "a boutique ship vetting specialist, promoting safety and efficiency in the global maritime industry."

The English High Court has now handed down a judgment on the dispute as to whether an owner was obliged to secure RightShip approval throughout the course of a charterparty in the absence of any express contractual obligation to do so.

The charterparty was concluded in November 2003, between the Association's Member, the owner of the SILVER CONSTELLATION, and Glencore International A.G. The charterparty did not contain any express term regarding RightShip approval. Moreover, during the fixture negotiations, Glencore asked the Member to agree to a clause requiring RightShip approval to be maintained throughout the currency of the charter. The Member refused, after which Glencore confirmed that it would proceed with the charter without the RightShip clause.

Four years into the charterparty period, Glencore commenced arbitration proceedings against the Member alleging that it had suffered substantial damages as the ship was not RightShip approved. Whilst Glencore acknowledged that there was no specific requirement in the charter for the ship to be RightShip approved, it argued that RightShip approval is essential for the iron ore and coal trade, and without such approval the ship's trading would be severely limited. It claimed that the Member was in breach of its charterparty obligation that the ship be "in all respects eligible for trading", and that it should comply with "all applicable laws and regulations" for such trade.

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ACHILLEAS

The House of Lords has recently handed down its decision in the ACHILLEAS, which was commented upon in a previous edition of Soundings.

In summary, following the charterer's tender of a 10 day notice of redelivery, the owner of the ACHILLEAS refixed the ship on a 6 month charter at a rate of $39,500 per day. However there was a delay in the ship's final voyage under the existing charter, and as a result the ship was redelivered late, and did not meet the cancelling date under the next charter. Following a substantial fall in the market in the interim, the owner had to renegotiate its next charter at a $8,000 per day reduction.

It was previously assumed that following the charterer's breach, the owner could only recover the difference between the charter rate and the market rate for the period of overrun – which would result in a claim for $158,000. However the arbitrators allowed the owner a claim for loss of profit of $8,000 per day over the entire period of the next charter, on the basis that the loss of a subsequent fixture was a "not unlikely" result of late redelivery. This decision was upheld by the High Court and by the Court of Appeal.

The House of Lords has now overturned this ruling, and limited the owner's claim to the period of overrun only. However, the opinions of the five Law Lords, whilst reaching the same end result, were surprisingly different in their reasoning.

What appears to have concerned the law lords was the idea that a rule of law which would allow an owner to claim for the loss of a subsequent fixture, would expose a charterer to unquantifiable and potentially large risks. Lord Hoffman suggested that the price of the contract was a relevant factor – if a charterer was to take on such risk he would expect some premium in exchange. The other law lords were equally concerned that a charterer could not be expected to know how an owner would use the ship on a subsequent fixture. It was suggested that the owner's loss was not so much a result of the charterer's late redelivery but because of the extremely volatile market conditions at the time, and that the charterer might have been liable had the owner's loss not been so large.

The debate over the ruling will continue. Lord Hoffman's speech gives some support to the notion that claims for the loss of a follow on fixture may not now succeed. However Lord Roger's opinion suggests that the result may have been different had the fall in the market been less substantial. Whatever the viewpoint, it seems unlikely that this case is the last of its kind.

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RightShip Approval Continued

The arbitration tribunal agreed with Glencore and found that the Member was obliged to allow a RightShip inspection and to obtain and maintain RightShip approval.

The High Court has now overturned the award in part. It decided that in the absence of specific wording, the charterparty contained no obligation to obtain and maintain RightShip approval, and that obligations of eligibility to trade relate to legally imposed requirements only, and not those of a private vetting scheme such as RightShip. However, the Court did uphold the tribunal's finding that the Member was obliged to permit a RightShip inspection, in order to fulfil its obligation to follow the "orders and directions of the charterer as regards employment" of the ship under clause 8 of the NYPE form.

This is not the end of the story, as the judge granted permission to appeal to the Court of Appeal on both issues. In the meantime, it would seem that in the absence of any express clause requiring RightShip approval, an owner will not be obliged to obtain it. However, an owner may be obliged to permit RightShip inspection if a charterer requests it. Should that inspection not result in an approval, a charterer will have no grounds for complaint, however all information on the RightShip database is available to subscribers, and an adverse RightShip rating may affect the future trading of the ship.