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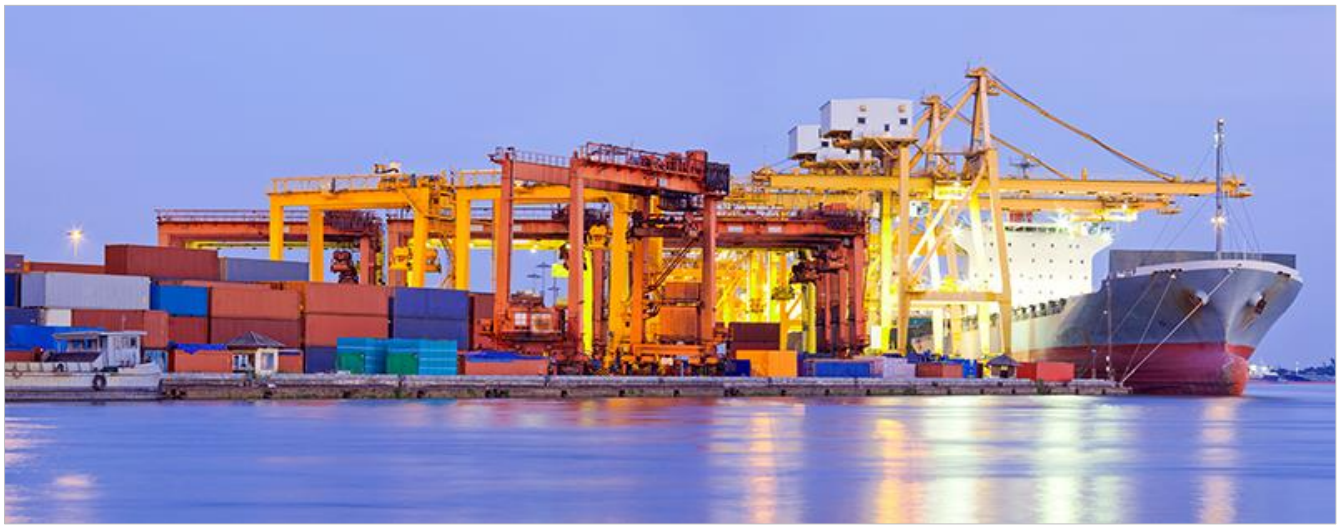

Cover Story

How may "disembarkation" affect your potential claims for personal injury against the carrier?

Introduction

Disembarkation refers to the process whereby a person moves from a vessel to a safe position on the shore. Potential legal issues may arise where a passenger gets injured during his or her disembarkation due to the malfunction of the equipment used to facilitate the disembarkation but that particular equipment in fact belongs to a third party. More importantly, the occurrence of a disembarkation could affect the limitation period available for pursuing a personal injury claim against the carriers. This is the situation in *Colins v Lawrence* [2017] EWCA Civ 2268, to which the Athens Convention 1974 (the "**Convention**") applied and in which the Court rejected the claimant's claim due to the lapse of the limitation period.

Facts

The incident of the case happened in November 2010 when the claimant was about to finish his fishing trip on a fishing boat owned by the defendant. While the claimant was disembarking from the boat, he fell and suffered injuries at his left knee joint and his quadriceps tendon.

The claimant commenced legal proceedings against the defendant in respect of his injury in September 2013. The court below found that the claim was time-barred given the two-year limitation period under the Convention. Whether or not the Convention applies to a particular scenario would depend upon whether the claimant had "disembarked" from the relevant ship at the time of the incident. If he did, then the Convention would not apply and thus there would be no issue of limitation period.

In that case, it was found that for a passenger on the fishing boat to disembark, the necessary procedures that the passenger had to take was to winch the fishing boat up onto a shingle beach and then use the freestanding steps, which were merely a semi-permanent structure on the beach, to descend thereon. The claimant alleged that the reason

why he was injured was because while he was using the freestanding steps to descend from the fishing boat onto the beach, there was a wet wooden board at the bottom of the freestanding steps where he slipped and thus caused him loss of balance. As such, the court below ruled that disembarkation had not completed as the claimant only slipped on the wooden board and thus the claimant's claim was effectively time barred under the Convention.

The legal issues

The claimant filed an application for permission to appeal the decision. The key question that the English Court of Appeal had to consider was whether the application has a real prospect of success, which means that whether the claimant had completed his "disembarkation" from the fishing boat at the time when the incident occurred. After considering the submissions of the parties, the Court of Appeal ruled that though the freestanding steps which were used to assist the claimant to disembark did not form part of the fishing boat, they, including the board, did constitute to part of the "disembarkation equipment" which was essential to the process of disembarkation. Accordingly, the Court ruled that a passenger's disembarkation from the defendant's fishing boat was not completed until the claimant stepped off that disembarkation equipment.

The Court also drew an analogy to a situation where disembarkation is to be facilitated by a gangway offered by the shore side. Though such a gangway would normally be independent of the ship and does not belong to the shipowner, the gangway would nevertheless be regarded as a disembarking equipment, by which a passenger of the ship will use to disembark from the ship to a shore. Disembarkation would only be considered to be completed until the passenger had already stepped off the gangway.

The fact that the freestanding steps in *Colins v Lawrence* were semi-permanently fixed to the beach and the fishing boat could move away from the steps independently would not affect the legal position that the claimant's disembarkation was not regarded to be completed until he had arrived safely on the beach. The Court of Appeal agreed with the lower court's decision that the process of disembarkation should be regarded as covering the entire period that the passenger moves from a ship to a safe position on the shore, and hence while the claimant in that case was still using the steps and board to assist him in disembarking from the fishing boat of the defendant to the beach, the claimant was still in the process of disembarking. As such, there was no real prospect of success in respect of the appeal and the claimant's application for permission to appeal was therefore rejected.

Conclusion

For the passengers, it should be noted that unless the injury was caused at the time when the disembarkation has already been completed, any such claim for personal injury against the carrier must be made within the two-year limitation period under the Convention (if applicable) instead of the normal three-year limitation period for usual personal injury claims.

For the carriers, the Court expressly acknowledged the reality that it was usually the carriers which choose to adopt what kinds of equipment for the purposes of disembarkation, whether gangway or freestanding steps. Therefore, if the equipment that a carrier chooses is not safe for the purposes of disembarkation from its ship, what the carrier should have done is to identify and offer an alternative method of disembarkation in order to enhance the safety for the passengers.

Collision near Shanghai in January 2018

On 6 January 2018, a Panama-flagged crude oil tanker, Sanchi, with its 136,000 tonnes of fuel on its way to South Korea, collided with a Hong Kong-flagged carrier, CF Crystal bulk, which was carrying 64,000 tonnes of grain from the US off Shanghai.

The Shanghai Maritime Safety Administration confirmed that, with the assistance of various rescue vessels and an aircraft from the US Navy, the search and rescue operation had been carried out. While all the crew members of the Hong Kong carrier have been rescued and the carrier itself only sustained minor damage; 29 crew members of the tanker are still missing and the tanker itself has sunk with oil spill. Experts from the rescue group considered that the gas emitted from the fire was toxic and could cause injuries for the rescue workers.

Investigations have been carried out by the Iran's Ports & Maritime Organization and the National Iranian Tanker Company.

Illegal oil trade with North Korea

The South Korean authorities have seized a Hong Kong-flagged tanker, the Lighthouse Winmore, for secretly trading oil with North Korea via a ship-to-ship transfer operation in breach of the United Nations sanctions. The seizure has triggered the US president adverse comments on China disregarding the UN sanctions.

The spokesperson of the company that owns the Hong Kong-flagged tanker said that the company did not know the tanker had been used to trade oil with North Korea as the tanker was under a time charter hire to another company at the material times. Nevertheless, a senior vessel chartering expert in China noted that under a time charter agreement, the shipowner still has the obligations to review and approve the information of the counterparty vessel before a ship-to-ship transfer operation takes place. He also revealed that though a charterparty could decide when to turn off the automatic identification system for commercial confidentiality reasons, this would however constitute a direct breach of the International Regulations for Preventing Collisions at Sea and the Safety of Life at Sea Convention.

The port with the highest connectivity – Shanghai

Shanghai, followed by Ningbo and Singapore, has scored 168 weekly mainline services and 6 world regions and achieved the top with 100 points in the "Drewry's Global Container Port Connectivity Index". The Hong Kong port, with its very busy daily business, also ranked within the top 10 in the said Index. Nine of the top 10 ports are located in Asia, the only one exception is the north European port of Rotterdam.

There are two variables that constituted the said Index, being the number of mainline services required at that port every week and the number of regions in the world that port is directly linked to. According to Drewry, the Index did not include vessel size as one of the considerations, because larger ships can in general handle more volumes, but this does not necessarily mean that it would provide a better port connectivity, which, according to Drewry, is a very important aspect for shippers.

UK Maritime Services and the imminent Brexit

While Brexit seems to be imminent and the negotiators from both UK and EU have resorted to all possible means to attempt to finalise their respective favourite terms of the Brexit agreement, including access to the single market as well as the freedom of movement of their citizens, the maritime professional services in the UK have confidence on their solid expertise in the industry and they do not consider that Brexit would affect their businesses in the international marketplace.

For example, a promotional body, Maritime London, considered that the primary markets for UK professional maritime services are in fact non-EU countries. With its plan to merge with International Maritime Industries Forum, a maritime financial services trade association, Maritime London would have an additional 28 corporate members, reaching around 130-135 members in total. Further, Maritime London would like to cooperate with the Department for Transport and Department for International Trade to establish a member-led professional services forum, which is an invitation-only event tailored for discussions to high-growth professional services areas. As such, the UK maritime professional services have little concerns on the potential increasing competition from other rival jurisdictions.

Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Co Ltd

[2017] EWCA Civ 2107

This is an appeal from the High Court Queen's Bench Division Commercial Court ([2016] EWHC 3132 (Comm)) (please refer to *ONC The Voyager* - February 2017 Issue).

To recap, the claimants were the owners of the vessel, mv Yangtze Xing Hua, which they chartered to the respondents under a charterparty dated 3 August 2012 for carrying soya bean meal from South America to Iran. The vessel arrived at the discharge port in Iran in December 2012, but the cargo had not been paid and the respondents ordered the vessel to wait for over four months. It was not until May 2013 when the vessel was discharged. However, the cargo, or part of it, was found to have overheated during the waiting period and become lumpy and discoloured.

The parties accepted that the liability was to be settled in accordance with the Inter-Club Agreement 1996 (the "**ICA**"), the clauses of which were incorporated into the charterparty. Clause 8 of the ICA provided various scenarios under which cargo claims would be apportioned in accordance with the prescribed percentages. The key issue in the case was the correct interpretation of clause 8(d) of the ICA, which read:

> *"All other cargo claims whatsoever (including claims for delay to cargo):*
> *50% Charterers*
> *50% Owners*
> *unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim."*

The question was what were the cause of the damage and whether the vessel owners should be blamed for failing to monitor the temperatures of the cargo properly.

The arbitration tribunal found that the damage to the cargo was caused by the prolonged period waiting at the discharge port. In addition, the inherent nature of cargo in question was just too moist to be capable of withstanding the prolonged delay. The arbitration Tribunal therefore held that the word, "act", under the clause 8(d) of the ICA did not on its face have any indication of fault, breach of contract or neglect. Before the Commercial Court below, Counsel for the respondent contended that the word, "act", should refer to "culpable act" and that the phrase "act or neglect" under the clause 8(d) of the ICA should contain an element of fault. However, such proposed interpretation of the words in clause 8(d) of the ICA was not accepted by both the English Court of Appeal and the court below. In particular, the Court of Appeal considered that ICA should instead be regarded as a mechanism for assigning liability for cargo-claims by reference to the cause of the damage to the cargo regardless of fault.

In addition, though Counsel for the respondent tried to lead the Court of Appeal to consider the historical background of the ICA which in the respondent's opinion was to be construed with an element of fault, the

Court ruled that the previous incarnations of the ICA should not be referred to. The Court considered that what was relevant should be the cause of the damage, whether there is any fault of the party in question should not be a factor under clause 8(d) of the ICA. The Court also ruled that the critical question is one of causation, which is whether the claim "in fact" aroused out of the act, operation or state of affairs in question. The answer to this question would certainly not depend on any culpability.

Accordingly, the English Court of Appeal confirmed the rulings of the arbitration tribunal and the lower court that the word "act" under the ICA should be given its natural meaning, which simply means that something which is done, and it should not be confined to "culpable act" as advanced by the respondent.

Agarwal Coal Corporation (S) Pte Ltd v Harmony Innovation Shipping Pte Ltd

2017 WL 05660825

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Disputes arose among Agarwal Coal Corporation (S) Pte Ltd ("**Agarwal S**"), being the plaintiff, and Harmony Innovation Shipping Pte ("**Harmony**"), being the defendant and a Singapore-registered company which is in the business of chartering vessels, and another company connected to the Agarwal S ("**Agarwal I**"), in relation to the non-performance of fixtures due under two contracts of affreightment.

Harmony commenced arbitration proceedings against both Agarwal I and Agarwal S, by serving notices of appointment to each. An arbitration award was made thereafter. However, Agarwal S lodged with the English Commercial Court an application to vary an arbitration award under the section 67 of the Arbitration Act 1996 by challenging that the arbitrations were not constituted properly as it should have been one single tri-partite arbitration among Harmony, Agarwal S and Agarwal I instead of having two separate arbitrations. The crux of the challenge was the correct interpretation of the notices of arbitration sent by Harmony to both Agarwal S and Agarwal I.

Before the Court, Agarwal S submitted that there were no special rules for interpreting an arbitration notice and it contended that the court should interpret the arbitration notice by reference to what a reasonable person would understand that particular notice to be. Agarwal S sought to emphasise that what the arbitration notice stated, being "*formal notice of owner's commencement of arbitration against both of the above referent companies*", which is in singular form, must be construed with its natural meaning of one arbitration and thus Agarwal S's proposed correct interpretation should be that one single tri-partite arbitration should be constituted to resolve the disputes between Harmony and Agarwal S as well as between Harmony and Agarwal I. Harmony in response argued that the notice of arbitration should be interpreted widely and not in a strict or technical manner as advanced by Agarwal S.

The Court ruled that the requirement of having arbitration proceedings commenced under the relevant section would be satisfied if the notice of arbitration sufficiently identified the disputes concerned and made it clear that the party giving the notice intended to refer the disputes to be resolved through arbitration. In considering whether such requirements were met, the court considered that the substance was more important than the form of the arbitration notice. Therefore, the appropriate question to ask was how a reasonable person in the position of the recipient would have understood the arbitration notice in light of its terms and the relevant circumstances in which it was written.

Ultimately, the English Commercial Court considered that the way that Agarwal S proposed to interpret the clause had put too much weight on the literal analysis of the arbitration notice and had ignored the context. The court noted that different approaches were required to interpret different types of contracts. It is the circumstances that might require a different analysis. In determining how a reasonable person would have understood the arbitration notice in that case, the court could consider the factual matrix. More importantly, it was also held that the use of the singular in the arbitration notice was not unusual and if the parties intended to have a tri-partite arbitration as suggested by Agarwal S, the arbitration notice should have be expressly stated. As such, the Court held that the notice was effective to commence arbitration, and that two arbitration references were commenced: one between Harmony and Agarwal S, and one between the Harmony and Agarwal I.

Oddy v Waterway Partnership Equities Inc.

2017 BCSC 1879 (CanLII)

Ms Oddy, the plaintiff in this case, suffered injuries while she was on a vacation on a houseboat, the Annalise, hired from the defendant, Waterway Partnership Equities Inc ("**WPE**").

In one night when the Annalise was supposed to be moored with the taut lines and beaching stakes near the beach, the port side of the Annalise mooring line became slack and Ms Oddy tried to start the engine in order to stop the Annalise from drifting. Unfortunately, the starboard beaching stake was also pulled loose by tension on the starboard mooring line and thus both the mooring line and beaching stake were catapulted at high speed back towards the Annalise. The accident happened when one mooring line struck Ms Oddy on her left side and caused her significant injuries.

Ms Oddy then commenced legal proceedings against WPE alleging that the catapulting of the mooring line and beaching stake was the result of WPE's failure to take reasonable care to equip the Annalise with the appropriate type of mooring line. In particular, Ms Oddy contended that the line used on the Annalise was too "elastic".

The Court held that WPE was reasonable to rely on the advice given by the reputable dealer of mooring lines which specialised in providing marine equipment. Further, WPE would not have known the risk of having the mooring line catapulted at the time when the mooring line was purchased. The standard of care WPE should have had was to provide the Annalise with a mooring system that was reasonably fit to perform the intended purposes. Particularly, it was found that WPE would not have had the knowledge that the elasticity of a mooring line would be relevant. Accordingly, the Court held that WPE in fact had no duty to consult an engineer or other marine expert before purchasing the mooring line and had no duty to warn Ms Oddy of a risk that the mooring line and beaching stake could be catapulted.

Remarkably, the Court considered that even if there had been a breach of the duty of care by WPE, the damage caused was still regarded as too remote and the accident which caused Ms Oddy to be injured was not "reasonably foreseeable". As such, the Court considered such an accident would not have occurred to the mind of a reasonable man in the position of WPE.

What should I be aware of to prevent cyber attacks on my ship? (Part II)

As mentioned in our previous issue of *The Voyager*, due to the rapid development of technologies and the use of digital communication onboard, cyber security has become a significant area to be considered in the maritime industry. The risk of cyber attacks has given rise to serious concern throughout the market. As such, the Guidelines on Cyber Security Onboard Ships (the "Guidelines"), which was complied by various international shipping organisations, have been published to assist market participants to develop resilient approaches to cyber risk management.

We have discussed the first three steps of cyber risk management recommended by the Guidelines in our last issue, including identifying threats, identifying vulnerabilities and assessing risk exposure. In this article, we continue to explore the remaining three major steps recommended by the Guidelines.

How to develop protection measures?

The Guidelines consider that there are two major types of cyber security protections measures, being technical and procedural.

In general, technical protections measures focus on ensuring that the design of the onboard systems is able to resist cyber attacks. Examples given by the Guidelines include limited access to and control of network ports, protocols and services; configuration of network devices (e.g. firewalls, security gateways, routers and switches, etc.); physical security such as restricted access to a particular area within the vessel; detection, blocking and alerts of threats/malicious activity and code; wireless access control; secure configuration for hardware and software; email and web browser protection; and data recovery capability (the ability to restore a system and/or data from a secure copy or image thereby allowing the restoration of a clean system), etc.

The Guidelines acknowledge that it would be more straight-forward to implement technical cyber security controls on new vessels than on existing ships. Nevertheless, existing shipowners are still recommended to install practical and cost effective technical cyber security measures.

In respect of procedural protections measures, they mainly focus on how personnel should use the onboard systems. In general, plans and procedures that contain sensitive information should be kept confidential and handled strictly in accordance with the company's policies. Examples for procedural protections measures given by the Guidelines include internal training of staff; restriction on computer and internet access for visitors (e.g. government authorities, technicians, agents, port officials, and owner representatives, etc.); regular upgrades and maintenance of hardware and software of the vessel; regular updates on anti-virus and anti-malware tools; clear guidelines on who could have remote access to the onboard system, and when and what they could have access to; use of administrator privileges for only trained personnel to gain access to certain information; and

effective equipment disposal and data destruction to ensure that the data destroyed could not be retrieved howsoever, etc.

How to establish contingency plans?

When establishing contingency plans in response to cyber incidents, it is vital to ascertain the significance of the incident and to prioritise actions accordingly.

In normal circumstances when cyber attack only targets on the IT systems on board, it would only affect the commercial aspect but not the safety of the operation of the vessel. That said, the impact on business could be highly destructive to the market participants. The Guidelines therefore recommend that if encountering a cyber attacking touching upon only the IT systems of the vessel, the priority should be on investigation and recovery plan. However, the loss of an OT system could have imposed a considerably adverse impact on the safe operation of the vessel. In such circumstances, the Guidelines recommend that effective actions must be taken to ensure the immediate safety of the crew and the ship as well as the protection of the marine environment.

The safety management system of a vessel should provide operational and emergency procedures and contingency plans for cyber incidents, such as an alternative mode of operation in the event that the ship suffers loss of a critical system. The safety management system should cover procedures for incidents or hazardous situations reporting and state clearly about the levels of communication and authority for decision-making.

The Guidelines also provide a non-exhaustive list of actions in response to the type of cyber incidents that should be considered in contingency plans on board such as the loss of availability of electronic navigational equipment; the loss of essential connectivity with the shore; and the loss of availability of industrial control systems, including propulsion, auxiliary systems and other critical systems, etc.

The Guidelines consider that it would be critical for the onboard personnel to realise that the loss of OT systems due to a cyber attack must be treated as any other equipment failure. It is also essential to ensure that a loss of equipment or reliable information due to a cyber attack would not in effect render the emergency plans and procedures redundant, because it would be entirely meaningless if one must be able to gain access to the internet to learn about the emergency plans when the cyber incident just destroys the entire internet connection onboard. As such, it is of utmost importance that any contingency plans and other related information are accessible through non-electronic forms.

If, due to the complexity or severity of the cyber incident, the situation is beyond control and beyond the competencies of the personnel on board or at head office, the assistance of external experts should be considered.

How to respond to and recover from cyber security incidents?

Once a vessel has encountered any cyber attacks, a team of onboard and shore-based personnel and/or external experts should be able to restore the IT and/or OT systems back to their normal operations. Such team should make initial assessment in order to ascertain what the appropriate response should be. Once such an assessment is done, the team would be able to identify which parts of the systems of the vessel have been damaged and thus proceed

to recover the systems and data.

Further, the response team should conduct investigation on the incident so as to understand the causes and consequences of the cyber incident. Once such information is available, the response team should implement the necessary arrangements to prevent any re-occurrence of similar cyber attacks. In particular, the team should consider taking actions to address any inadequacies in technical and/or procedural protection measures.

In addition, the Guidelines again mention that recovery plans should be made available in hard copy onboard and ashore, the purpose of which is to restore the IT and/or OT to an operational state. Nevertheless, the Guidelines remind the market participants that the recovery of OT could be much more complicated especially when no backup system is available and recovery may require the assistance from ashore.

Conducting Investigation on a cyber incident could potentially provide valuable information. A detailed investigation may of course require external expert support, but one may appreciate that the information distillated from an investigation could be adopted to enhance the technical and procedural security measures which may ultimately improve the vessel's capability to defend further cyber incidents.

In respect of the loss resulting from a cyber attack, though specific non-marine insurance cover may be wide enough to cover data loss and the resulting fines and penalties resulting from equipment failure, companies should be aware of the requirement(s) to demonstrate that they have acted with reasonable care in managing cyber risk and protecting the vessel from a cyber incident. Companies are recommended to check with their insurers as to whether their insurance policies cover claims caused by cyber incidents.

Concluding remarks

The above are only some aspects of the issues of a cyber risk management to which the shipping industry should pay attention. In any event, readers should bear in mind that the Guidelines itself does not constitute an exhaustive list of what should be done in order to establish an effective cyber risk management.

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