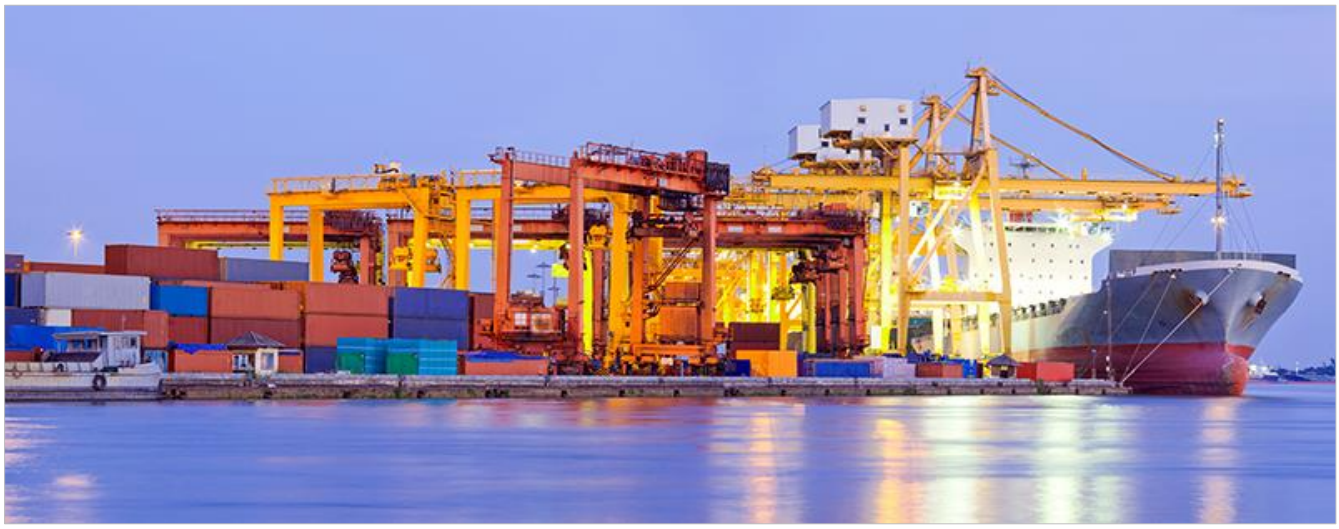
ONC The Voyager
December 2017



Cover Story

When Does a Ship Owner Have an Absolute Obligation to Commence a Voyage?

It is a well-recognised principle established in *Monroe Brothers Limited v Ryan* [1935] 2 KB 28 that an absolute obligation would be imposed on a ship owner to commence the voyage by a date when it is reasonably certain that the ship would arrive at the port of loading on or around the "expected readiness to load date" ("**ERTL Date**") if the owner has a duty under a charterparty to proceed with all convenient speed to the loading port and the charterparty gives a date when the ship is expected to load (the "**Monroe Obligation**"). The same would also apply to the situation where the charterparty provides an estimated time of arrival ("**ETA**") at the load port. Nevertheless, it had been unclear in law whether such a stringent duty would also exist even if there is no provision concerning an ERTL Date or an ETA.

Background

In *CSSA Chartering and Shipping Services S.A. v Mitsui O.S.K. Lines Ltd* [2017] EWHC 2579 (Comm), the claimant is a charterer who entered into a charterparty with a ship owner to charter the vessel, "Pacific Voyager", to perform laden voyages at various locations. For reasons not being the fault of any parties, the ship had suffered unpreventable rapid water ingress in its tank and it hit a submerged object in Suez Canal. As a result, the ship was required to be drydocked for repairs for a period of time before it could continue to perform any future charter voyage.

The charterer terminated the charterparty on 6 February 2015 and commenced legal action against the ship owner for recovery of damages. However, the charterparty did not provide an ERTL Date but only a common express power for the charterer to terminate the charterparty if the ship failed to arrive before the cancelling date, which was agreed as 4 February 2015. As such, the major battle line of the parties before the Court was whether in the absence of an ERTL Date in the charterparty the Monroe Obligation would still be imposed on the ship owner.

Ship Owner's Arguments

Before the Court, the ship owner accepted that it would have had a Monroe Obligation if the charterparty included an ERTL Date, but the ship owner argued that it should not have such an obligation if the charterparty only included a cancelling date. It contended that estimation could not be made without an express ERTL Date for there to impose the ship owner a Monroe Obligation. The ship owner accordingly took the stance that cancelling of the charterparty was merely a contractual option for the charterer to exercise if it thought fit but does not automatically impose a Monroe Obligation on the ship owner. The ship owner further contended that the only obligation could have been implied on it would be the duty to exercise due diligence to manage the ship to arrive at the loading port on or before the cancelling date.

Court's Analysis

While the ship owner tried to shift as much obligation as it could, the Court rejected the contention that the Monroe's Obligation would only arise if both an ERTL Date and all convenient speed/utmost despatch are present and the duty to proceed was merely a due diligence one in the absence of an express ERTL Date or an ETA.

In this case, the charterparty in fact contained several estimated time of arrival for the completion of the previous charter, which could be seen as equivalent to an ETA at the loading port and thus could be taken into account to ascertain the expected time when the ship could be expected to begin the approach voyage. The Court made it clear that that the voyage should have commenced immediately or at least within a reasonable time from the date of the charter even if in the absence of any express clause stipulating the time for the voyage to begin. A reasonable period of time would be judged by referring to the expectations of the parties as to when loading would commence.

The Court also acknowledged the concern of risk allocation between the charterer and the ship owner and the conflicting interests thereof, because the latter would have to bear the risk of delay before commencing the service under the charterparty if it had another intermediate voyage, but plainly the charterer would like to know as accurately as possible the date on which the ship could arrive at the target loading port for the purpose of performing subsequent tasks. Therefore, a so-called "due diligence obligation", as advanced by the Counsel acting for the ship owner, would in fact provide an undesirable commercial uncertainty for the parties. An obligation to proceed would certainly arise at the time when it was reasonably certain that the vessel will arrive at the loading port on or around the ERTL Date and the obligation would have arisen at a reasonable period of time by reference to the relevant charterparty terms.

Conclusion

This novel but remarkable decision clarifies the ship owners' obligation to proceed with the voyage whether or not the ERTL Date or an ETA was stated in the charterparty. As such, ship owners must bear in mind that the Monroe Obligation would exist even if without a provision concerning an ERTL Date or an ETA.

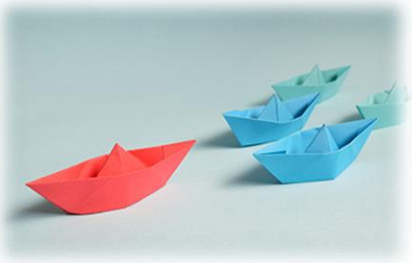
Hong Kong-based Port Operator in United Arab Emirates

Hutchison Ports, one of the world leading Hong Kong-based port, has signed a concession agreement on 6 November 2017 to develop and operate container activities at Saqr Port in Ras Al Khaimah, a major commercial port located at around 25km from the Ras Al Khaimah city centre and is close to the industrial areas of UAE, for a period of 25 years.

Though Hutchison Ports Group declined to give any indication as to any development plans at the said terminal, which is estimated to have a capacity of 350,000 TEU, the Middle East and Africa managing director of the Hutchison Ports has commented that the UAE economy has been growing and thus they expect that there would be a great demand for terminal facilities in that part the Emirates. The company's managing director, Mr. Eric Ip, also indicated that Ras Al Khaimah has a solid export base, and by establishing a port there, those well-established shippers of ceramics, pharmaceuticals, glass, cement, crushed rock and other products would be able to enjoy a less crowded and more supportable shipping route to Jebel Ali and other destinations.

Ship with Iran flag Ran Aground Hong Kong with No One Injured

A heavily-loaded Iranian containership, "Touska", with a capacity of nearly 5,000 TEU crashed into the eastern tip of Magazine Island in Hong Kong at about 9:00 p.m. and had grounded on 5 November 2017.



According to Lloyd's List Intelligence, the ship was on its route to Shenzhen from Taiwan but when it was heading toward the Hong Kong harbour, it suddenly turned around and ran into Magazine Island. Though domestic media reported and image revealed that there had been sparks coming from the bow of the ship when it approached Magazine Island, an official from the Hong Kong Marine Department and the Fire Services Department confirmed that there was no fire on the ship or any oil leaks so far and that 28 crews of the ship were unharmed.

While the investigation of the crash has been carried out, the officials from the Marine Department would like to coordinate with the ship owner and/or its agent to come up with a way of refloating the ship and remove it from its current position.

Upcoming CO2 Measures 2018

The intersessional meeting on the reduction of greenhouse gas emissions organised by the International Maritime Organisation ("**IMO**") was convened in London in November 2017, whereby IMO intended to achieve an initial decarbonisation strategy for the maritime sector. Though progress was not entirely satisfactory, significant achievement has been unlocked.

Member states to the IMO have agreed on the duration of short, medium and long-term measures, which would be at least offer some clarity as to the timeline to ship owners, operators, ports and other market participants. Though the agreement is only a provisional one as a ratification process has to be gone through before the Marine Environment Protection Committee, the institutional body that is responsible for environmental matters, in April 2018, it is expected that a 5 years emissions control plan would be drawn up next year, which will be followed by a comprehensive strategy later. As such, the maritime industry may expect a new decarbonisation measure would arrive in 2018 despite of the divided views on greenhouse gas emissions obligations among different countries, industry representatives and non-governmental organisations.

Amendment on Domestic Legislation to Align Maritime Liability Limits with the IMO

The Transport and Housing Bureau of Hong Kong has proposed to amend the city's current Merchant Shipping Ordinance (Cap. 281) to increase to limit of liability for claims for loss of life or personal injury on ship as well as that for property claims, which is to reflect the incorporation of the International Maritime Organisation's convention on limitation of liability for maritime incidents. The spokesperson indicated that the proposed amendments of the law would certainly expose ship owners a higher financial liability limits for maritime claims, but it is the intention of the domestic legislative counsel panel to align the relevant law with the requirements of International Maritime Organisation.

Facing increasing competition from other ports in Asia, Hong Kong has been improving itself to attract more business to the maritime industry. The recent decision of the city's antitrust watchdog, the Competition Commission, in disallowing voluntary discussion agreements, by which carriers discuss sensitive commercial terms relating to the price and shipping routes, to fall within coverage of the block exemption order might further pose challenges to the industry.

Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore

[2017] EWCA Civ 1703

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The charterer entered into a contract of affreightment (the "**COA**") with the ship owner whereby carriages of about 275,000 mt of iron ore would be carried out by five shipments from Venezuela to China from June to October 2013. It was not disputed that no shipments had ever been made under the COA because of the political instability in Venezuela. The ship owner then purported to commence arbitration against the charterer by serving the notice of arbitration to one Mr. DC, whom the ship owner had been wrongly identified to be the charterer's staff. In fact, the charterer itself played no part in the negotiation and/or in performance of the COA, the charterer only signed the COA on behalf of and "lent its name" to one Mr. Zhou, the Director and owner of Beijing XCty Trading Limited ("**BX**"). In fact, all communications were only between the ship owner and Mr. DC, who was a mere representative of BX.

What happened was that the charterer did not respond to or participate in the arbitration proceeding in which the arbitrator made an award in the ship owner's favour. The charterer subsequently successfully argued before the High Court of England which set aside the arbitral award. It was held that the notice of arbitration was not validly served on the charterer because Mr. DC had no authority whatsoever to accept the service of the notice of arbitration and thus the arbitral award was improperly constituted. The ship owner appealed this decision to the Court of Appeal.

The major battle line was whether BX, through Mr. DC, had implied actual or ostensible authority to receive the service of the notice of arbitration on behalf of the charterer. After considering the unusual circumstances of the case, such as the charterer had assumed liability under the COA notwithstanding the fact that it has no interest therein and charterer had not imposed any requirements on BX as to the terms of the contract or its performance, the inference that could be drawn from such relationship was that BX should be viewed as having implied actual authority to accept service of the notice of arbitration. BX was expected to protect the charterer from any losses it would suffer by "fronting" of the COA. The Court also considered that it would be unrealistic to suggest that the charterer would have required the notice to be served on it as the charterer would expect that any notice of arbitration would be served on BX which would then handle it as it did the same in other aspects of the COA.

Given the unusual feature of the relationship between the charterer and BX in the case, the Court ruled that BX also had the ostensible authority to receive the notice on behalf of the charterer and thus the charterer should be responsible for and acquiesced in BX's conduct with regard to the receipt of the notice. Since the ship owner knew nothing about BX, it would only be fair and just that the charterer should bear the risk of BX's failure to honour its commitments as stipulated under the COA.

Mitsui & Co Ltd and ors v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG and anor

[2017] UKSC 68

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On 29 January 2009, some pirates boarded the chemical carrier, "Longchamp", which was transiting the Gulf of Aden, and commanded the ship master to alter course towards Somalia. The pirates demanded a ransom of US$6 million. After almost 2 months of negotiations, the ship owners agreed a ransom in the amount of US$1.85 million. The sum was paid on 27 March 2009 and the carrier continued her voyage thereafter.

The cargo on the ship was carried by the Respondents under a bill of lading which stated on its face that any general average shall be settled in accordance with the York-Antwerp Rules 1974 (the "Rules"). "General Average" is an arrangement under maritime law whereby sacrifices of property made, and loss and expenditure incurred, as a direct result of actions taken for preserving a common maritime adventure from peril, are rateably shared between all those whose property is at risk. Such law was incorporated for the purpose of achieving uniformity in determining whether losses fall within the principle of general average, the method of calculating those losses and deciding how they are to be shared.

The major issue of the case was whether the operating expenses of the ship incurred during the negotiation period of negotiation, such as the crew wages, bonus paid as a result of the detention in Gulf of Aden, food and supplies and bunkers consumed (collectively the "**Negotiation Period Expenses**"), should be covered by the general average under Rule F of the Rules which provides that "*any extra expenses incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided*".

The ship owner successfully argued before the English Supreme Court that the Negotiation Period Expenses did fall within the expression "expense incurred" under Rule F and were incurred in place of another expense, being the US$4.15 million "saved" after negotiating with the pirates. The Court also agreed that the Negotiation Period Expenses were less than the "general average expense avoided" and thus they should be allowed pursuant to Rule F. Remarkably, the Court found that the lower courts mistakenly considered that the ship owners should have to first establish that it would have been reasonable to accept the pirates' initial demand of US$6 million so as to justify that the Negotiation Period Expenses were allowable under Rule F. The Court also rejected the Respondents' submission that the Negotiation Period Expenses should not be covered by Rule F on the basis that the payment of $1.85 million, being the amount of the reduced ransom, should not be regarded as an "alternative course of action" to the payment of the ransom originally demanded but was only a variant. It was instead held that such amount was an alternative course of action from the payment of US$4.15 million, being the amount by which the ransom was reduced.

Further, the Court noted that the Rules are established under an international arrangement, it should therefore be given its ordinary meaning without adopting an approach to their interpretation. To imply qualification like requiring the Negotiation Period Expenses must be incurred so as to achieve an "alternative course of action" would not be appropriate and indeed "very dangerous".

TS Singapore (Owners) v Xin Nan Tai 77 (Owners)

[2017] 3 HKLRD 387

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Two simultaneous collisions happened near the termination of the East Lamma Channel Traffic Separation Scheme of Hong Kong on 14 May 2011. The first collision took place between "Xin Nan Tai 77" ("**XNT**") and "Jakarta". The second collision occurred just 3 minutes later between Jakarta and a third container ship namely "Singapore".

After considering the relevant legal principles and the testification of the parties' witnesses, the Court held that in respect of the first collision, the liabilities of XNT and Jakarta should be apportioned at 8:2 in Jakarta's favour on the ground that the failure of XNT to take early and substantial action to give way to Jakarta to avoid the collision in accordance with the International Regulations for Preventing Collisions at Sea was the "significant" cause of the first collision. Though it was found that Jakarta had also technically failed to comply with same, the faults of XNT's were much more significant. More importantly, even if Jakarta had reduced her speed before the collision it would not have prevented the first collision anyway. In view of the circumstances, the Court held that an 8:2 apportionment of liability between the two vessels would be reasonable. In respect of the subsequent collision between Jakarta and Singapore, the Court fully accepted the opinion of the nautical assessor that Jakarta could have done nothing more in order to avoid the second collision due to her size and speed right before the first collision. As such, it was reasonable to simply apply the same 8:2 apportionment to the liability between XNT and Jakarta in relation to the second collision in Jakarta's favour.

In this case, the Court of First Instance of Hong Kong provided some guidelines on the role of a nautical assessor in court proceedings. The Court considered that a nautical assessor is to provide his/her expertise to assist the Court for specialised issues such as navigation and seamanship, but he/she should not be considered as part of the Court. Similar to any other expert, a nautical assessor is merely a technical advisor, and his/her expertise is only evidence or sources of evidence which the Court might follow or reject as it thinks fit, but it must not be seen as conclusive as to the legal issues in dispute. Depending on what fairness would require, the Court still retains a wide discretion as to how to seek assistance from a nautical assessor. Nevertheless, in light of the parties' fundamental right to a fair and public hearing as enshrined in the Hong Kong Bill of Rights, before the Court concluded the case, it would have to know whether the parties would like to say anything regarding the issues and evidence that the nautical assessor put to them. More importantly, the parties should at least have a chance to dispute whether the Court should accept or reject the advice given from nautical assessors in collision cases.

Although the Hong Kong Court accepted that the admiralty practice in the UK do provide some valuable guidance, the Court considered that the domestic judicial system must establish its own practice and procedures that fit its unique local environment.

What Should I Be Aware of to Prevent Cyber Attacks on My Ship?

Due to the 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 unauthorised access or malicious attacks to a ship's IT or OT systems and networks has given rise to serious concern throughout the market as the consequences of suffering from a cyber-attack could have adverse impact on the commercial interests of market participants and even affect the safety of the crew members. As such, various international shipping organisations including Baltic and International Maritime Council, International Association of Dry Cargo Shipowners and International Union of Marine Insurance, etc. have jointly developed the Guidelines on Cyber Security Onboard Ships (the "**Guidelines**") to assist companies to develop resilient approaches to cyber risk management.

What is Cyber Risk Management?

The Guidelines reveal that the senior management of every shipping company should be responsible for conducting cyber security assessment. Management must also realise that certain budget should be allocated to carry out the risk assessment.

Six major elements are set out and should be included in a cyber risk management, namely (i) identifying threats, (ii) identifying vulnerabilities, (iii) assessing risk exposure, (iv) developing protection and detection measures, (v) establishing contingency plans and (vi) responding to and recovering from cyber security incidents. This article gives a brief introduction to first three steps recommended by the Guidelines.

How to Identify Cyber Attacks?

Given that there is little historic data available to allow an accurate estimation on the scale and frequency of cyber incidents targeted on ships, market participants should be aware of the specific areas that would expose their business or operations to a higher vulnerability. In order to kick off an effective risk management process, the shipping industry should proactively acquire a better understanding of the types and stages of cyber attacks.

As indicated in the Guidelines, there are two main categories of cyber attacks, namely "untargeted attack" and "targeted attack". Criminals that adopt the former approach would use techniques such as malicious software, phishing (junk emails) or water holing (fake website) to randomly locate, attract or exploit potential victims. For the latter approach, criminals would use more complicated and advanced techniques to specifically attack the targeted ship. Common techniques include brute force (passwords-guessing) and DoS (prevent legitimate and authorised users from accessing information).

Insofar as the stages of cyber attacks are concerned, the Guidelines suggest that there are four main stages. First, the attacker will utilise the information

available in the public such as the company's website and publications to gain information about the target. Second, the criminal would try to gain access to the ship's systems by sending malicious files and/or links or establish fake official webpage of the company to attract the personnel to provide their user accounts and other details. Third, the attacker would "breach" the ship system, including but not limited to make changes to the system control operations, interrupt and/or manipulate the information stored therein, gain access to confidential information and even obtain full control over the system onboard. Fourth, depends on the objectives of the criminals, they may want to steal sensitive data about the cargo, cause complete denial of service on the IT system of the ship or disrupt the operation of the ship by deleting the schedule records and the database which stores the cargo information.

What are the Vulnerabilities?

After knowing the threats that the shipping industry is facing, the Guidelines recommend the market participants to conduct vulnerability assessments, which means to understand to what extents the systems and the onboard procedures of the ship are likely to be subject to cyber attack. In particular, it is advisable to have the various systems onboard separated to avoid a complete breakdown of an integrated operation system in one go.

A total of 8 onboard systems are identified by the Guidelines, namely (1) cargo management systems, (2) bridge systems, (3) propulsion and machinery management and power control systems, (4) access control systems, (5) passenger servicing and management systems, (6) passenger facing public networks, (7) administrative and crew welfare systems and (8) communication systems.

To mitigate the vulnerabilities, the Guidelines suggest that the industry should be aware of the OT and IT systems on the ship and how they integrate with the shore side operations. The shipboard computer networks should be designed with adequate access controls and obtain frequent updates on the antivirus software and security configurations. It is also advisable to connect the safety critical equipment of system with the shore side and to check frequently to see if there are any obsolete and unsupported operating systems which should be replaced or updated.

What is the Risk Assessment Process?

In respect of the risk assessment process, the Guidelines provide four major phases which the industry should take into account.

The first phase is to conduct pre-assessment such as locating the ship's key systems and functions and their respective impact levels, reviewing detail documentation regarding the maintenance of the ship's IT and OT infrastructure, considering the contractual obligations of the ship owner that may provide for the support of the ship's networks and engaging with external expert to establish comprehensive plans to support the risk assessment. In the second phase, the ship owner should assess the weaknesses of the network and the systems of the ship which would effectively lead to compromise or the loss of the onboard operation or even of the ship itself. During phase three, the identified weaknesses would be evaluated against the potential consequences and the likelihood of its exploitation.

More importantly, a cyber security assessment report should be generated to precisely reveal the technical findings and data which include a detailed breakdown of the discovered vulnerabilities and a summary of

the recommendations and steps to be taken to strengthen the overall security of the onboard system of the ship. The proposed protective measures should also be prioritised to provide the most effective means to address the risk. In the last phase, any findings that are approved by the ship owner could be further analysed by external experts who should then be allowed to work together with the cyber security producer to ensure that any remedial action taken are able to sufficiently eliminate the weaknesses identified. It may be also advisable to engage a third party such as IT experts to conduct a risk assessment analysis for the market participant. For example, the experts may test the IT and OT systems of the ship by simulating a cyber attack or by adopting passive measures such as data scanning.

Concluding Remarks

The above are only some aspects of the issues of a cyber risk management to which the shipping industry should pay attention. There are other issues in the Guidelines to which the shipping industry should pay attention which will be discussed in our next issue. 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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