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JOURNAL OF THE INSTITUTE OF SEATRANSPORT

Law Column -
Washington State Supreme Court Rules Punitive Damages Are Available In Seamen's General Maritime Law Claim For Unseaworthiness.

航海札記

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Law Column -
Washington State Supreme Court Rules Punitive Damages Are Available In Seamen's General Maritime Law Claim For Unseaworthiness.

Philip Lempriere, Molly Henry, Igor Stadnik

In a unanimous ruling, the Washington State Supreme Court recently held that seamen may recover punitive damages in an unseaworthiness claim under general maritime law. The Court relied on the U.S. Supreme Court's opinion in *Atl. Sounding Co. v. Townsend* to hold that punitive damages are broadly available in general maritime law claims. Finding no indication that unseaworthiness claims were excluded from this general rule, the Court reasoned that punitive damages are available for unseaworthiness claims. Although the Court considered the restriction on damages recoverable in seamen's actions as identified by the U.S. Supreme Court in *Miles v. Apex Marine Corp*, the Washington Court ultimately determined that the reasoning in *Miles* did not apply because that decision was limited to wrongful death actions. The Court's decision was heavily guided by the special protection afforded to seamen who have been historically considered wards of admiralty.

Facts and lower court ruling in *Tabingo v. American Triumph LLC:*

Tabingo was a deckhand trainee aboard a fishing trawler, a vessel that catches and hauls fish onto its deck using large nets. Once the fish are on the deck, a hatch is opened and deckhands shovel the fish through the hatch for processing. To remove the final fish off the deck, a deckhand gets on all-fours and uses their hands to place the remaining fish in the hatch. Tabingo was on his knees gathering the fish when another deckhand started closing the hatch. The deckhand noticed that Tabingo's hand was near the hatch, but the hatch's hydraulic control was broken so he could not stop the hatch from closing. It closed on Tabingo's hand, severing two of his fingers. Tabingo alleged that the vessel operator had known about the broken control handle for two years before the incident yet failed to repair it.

Tabingo filed suit against the vessel operator. He asserted Jones Act negligence and general maritime law unseaworthiness claims. General maritime law is a body of common law developed over time by the courts. He sought compensatory damages for all of his claims and punitive damages for his unseaworthiness claim.

The trial court ruled that under *Miles v. Apex Marine Corp.*, the Jones Act circumscribes the damages available under an unseaworthiness claim and dismissed the punitive damages claim. The Washington State Supreme Court accepted direct review.

The Washington Supreme Court's Analysis:

The Court began its analysis by noting that the general maritime law claim for unseaworthiness has a long history that predates Congress's enactment of the Jones Act negligence claim. The two claims remain independent causes of action. The Court also found that neither the United States Supreme Court nor the Washington Supreme Court has ruled on whether punitive damages are available under a general maritime law unseaworthiness claim.

In the absence of any such precedent, the Court relied heavily on *Atl. Sounding Co. v Townsend*, the U.S. Supreme Court's 2009 decision that found punitive damages are available under general maritime law where a seaman's employer willfully disregards its maintenance and cure obligation. Three points were central to the *Townsend* court's decision: (1) the pre-existing availability of punitive damages under common law; (2) the tradition of extending punitive damages to maritime claims; and (3) the intent (or lack thereof) to exclude punitive damages for a particular maritime claim.

The Washington Supreme Court concluded that all three factors support the availability of punitive damages in a general maritime law unseaworthiness claim. Punitive damages have historically been available at common law and those common law damages extend to general maritime law. Moreover, the Court read *Miles v. Apex Marine Corp.* as applying only to wrongful death actions, so the Court did not find any intent to exclude punitive damages for unseaworthiness claims relating to injuries. The Court also distinguished *McBride v. Estis Well Service*, an *en banc* Fifth Circuit decision that held punitive damages were unavailable for an unseaworthiness claim, by insisting that the *McBride* court misinterpreted both *Miles and Townsend.*

Finally, the Court found that the longstanding policy of treating seamen with particular care would be advanced by allowing recovery of punitive damages for injuries caused by "reckless to malicious conduct." An award of punitive damages would also serve as an example to other vessel operators.

The Potential Impact of the Ruling:

The Washington State Supreme Court's ruling is binding precedent only in state courts in Washington. Nevertheless, claimants will rely on today's ruling as persuasive authority in federal and state courts around the country.

Notably, the Court found punitive damages may be warranted where the defendant's conduct was "reckless," which in the scale of culpability is less egregious than willful, malicious or intentional. Thus, vessel owners can expect to see plaintiffs routinely alleging reckless conduct to support a punitive damages claim when in reality the claim involves simple negligence, or less. And, due to the fact issues involved in determining the level of culpability, it may be difficult to prevail on summary judgment on the punitive damages issue.

Plaintiffs' attorneys will likely be emboldened to take unreasonable positions during settlement negotiations, at least in Washington. We expect they will attempt to exploit the availability of punitive damages by creating tension between vessel owners and their insurers, because punitive damages are generally not covered by insurance.

(Philip Lempriere, Molly Henry, Igor Stadnik of Keesal, Young & Logan, Seattle WA)

兩岸三地航運物流研討會 2017
海運學會（香港）主辦
海運協會（深圳）及中華航運學會（台灣）協辦

主題 – 開創兩岸三地合作契機

第十屆「兩岸三地航運物流研討會」將於 2017 年 11 月 20 日在香港舉行。該研討會已在兩岸三地成功舉辦了九屆，增加了兩岸三地航運之間的瞭解、交流和合作，增進了同行業之間的友誼，促進了兩岸三地航運業的可持續發展。經過多年的發展，研討會已在當地政府和業界享有一定的影響力，並得到各方的肯定。今年的研討會由香港海運學會主辦，深圳海運協會和中華航運學會協辦。詳情如下：

1. 日期：2017 年 11 月 20 日 (星期一)
2. 時間 : 上午 9:00 至 下午 5:00
3. 地點：紀利華木球會 － 香港跑馬地黃泥涌道 188 號
4. 費用 : $1000 / 位

請各位會員密切留意有關此次會議的最新消息 , 屆時踴躍參加

Cross-Strait Conference 2017

Institute of Seatransport (Hong Kong) (Host organizer)
Maritime Shipping Association (Zhenzhen) (Co-organizer)
Maritime Institute (Taipei) (Co-organizer)

THEME **Breaking New Grounds in Cross-Strait Cooperations**

As you may be aware, this is an important event jointly organized with the Maritime Shipping Association in Shenzhen and Maritime Institute in Taipei. This year, the Institute of Seatransport will be the host organizer of the Cross-Strait Conference.

Details of the Conference :

Date: 20 November 2017 (Monday)
Time : 9:00 am to 5:00 pm
Venue: Craigengower Cricket Club, 188 Wong Nai Chung Road, Happy Valley, Hong Kong.
Charge per person: $1000

We hope that this Cross-Strait Conference will provide participants with a channel for an in-depth discussion and to exchange of views on the role of the cross-strait shipping and logistics industries in the region and in the world. Apart from enhancing closer and more vibrant cross-strait economic ties, it is hoped to create opportunities for the shipping and logistics industries.

Members are requested to tentatively mark their diaries so as not to miss this important event, full details of which will be circulated in due course.

Building a Universal Ship Trading Platform ("USP")

Peter Chu

1. Introduction

Facing a mushroom of Fintech innovations in online trading nowadays, can we trade ships on the Internet? The answer is positive. It will bring down trading costs and operational costs substantially. Moreover, it can avoid most disputes arising from ambiguous terms. Paradoxically, these terms are drafted by both parties (often represented by brokers) with an original intent to complete a deal. These newly drafted terms have often transformed a well-tested standard contract into distorted terms giving rise to arguments. One primary objective of the USP is to avoid or at least minimize such ambiguity. I shall explain the idea in more details below, by quoting some contractual terms and illustrating operational problems commonly encountered in the existing system.

2. USP Operation Flow

a) Sellers will compile the specifications, certificates, and other key information together with the Standard Contract all in the form prescribed by the USP. Standard terms are important. Fortunately, with IMO, BIMCO and other existing organizations, we have good support.

b) In the process of "negotiation", USP serves to accommodate Sellers' preference on selling modes. For example, by setting all terms fixed, Buyers are only able to offer/bid on price alone, or are invited to make an offer based upon the Main Terms (see 5 below). In the former, only the price is open for bidding, while in the latter, all the Main Terms. However, the rest of the contract is in a standardized form and are allowed to be changed unless terms are specifically not applicable to the transaction or, in rare cases, unacceptable terms are spotted. Since sufficient material information is made available beforehand, there is presumably less discrepant information which generally is the main source of disputes.

c) The standard contract will not be substantially changed, either when there are a number of bidders for one single ship where the highest bid will get the ship, or when it is a one-on-one transaction where the Seller will only be dealing with one Buyer at each time online. In both cases, the negotiation can be very fast, say within one day or even can be shortened to one hour. It is much more efficient than the traditional way of negotiation which can take many days, or even weeks to conclude a transaction. The USP process is designed to exclude as many non-genuine Buyers and Sellers as possible

as there is limited space for pondering given that an offer has been made. Both parties are both committed and bound by any terms offered on the USP.

d) Since the standard agreement (i.e. MOA) is made available to both parties for perusal before the transaction kicks off, a contract will be concluded once the parties reach agreement as to the price or the Main Terms. This works in a way different from the traditional negotiation process of an MOA where price or the Main Terms have to be agreed on at first, which can sometimes be time consuming if the parties eventually find out that they are not willing to concede on the remaining terms. In a USP process, limited flexibility is provided for in a standardized contract, such as due authorization by Board of Directors, finance, and other miscellaneous details etc., as these terms are usually tailor-made for one party's advantage rather than for mutual need. However, a party who is in need of more specific terms is able to include such terms at certain costs.

e) Deposit can be held by USP acting as an escrow agent.

f) The USP will carry out a due diligence search on the Sellers before Sellers can list their ship on the USP for sale. A similar search may also be conducted on the Buyers, in particular, their capability to pay deposit. The reason is, once the ship is offered on line, the deal can be done immediately once the Buyer concerned pays the deposit. This helps to accelerate the process of deposit payment, as a failure, may result in cancellation and costly proceedings for both parties.

g) When it comes to the closing and delivery of the ship, Buyers can also remit the balance of the consideration and amount for ROB to the USP. The USP is also capable of coordinating all issues related to mortgagee discharge. Buyers and Sellers may negotiate the procedure for closing according to their own practice and preference.

h) Once the deal is concluded, the Sellers and Buyers will proceed to all operational matters in a normal and traditional way. The USP is always able to assist as a trustworthy third party where needed, for example, in the discharge of registered encumbrances.

3. USP is feasible

The USP also benefits the Buyers by making available sufficient and updated information. The standards on ship building, operation, repair and maintenance, registration and supervision are internationally recognized and transparent. The USP aims to serve not only as a middleman but also as an information databank for the trading of a ship where Buyers can obtain all sorts of information through the USP. It is not uncommon, in some odd cases, that Buyers may become aware of something Sellers (owners) themselves do not even know.

If requested, Buyers can also carry out a physical inspection before purchase to make sure they know exactly what they are buying. Seller's background can also be disclosed on the USP. In simple words, there is much more certainty to both parties by using the USP.

4. Contract

Although there are about 16 Clauses in the MOA, the battlefield is usually the Main Terms, as the rest are standard clauses. Thus, the traditional way of negotiation is to deal with the Main Terms first. However, there are occasions where the transaction blows up because of the failure to agree on the "standard" clause. One reason is when the ship price fluctuates during the negotiation (on the standard clauses) which takes too long and therefore induces the parties concerned to bargain and leverage on price fluctuation. Therefore, the longer it takes for the negotiation, the higher the chance it fails. Other samples of failure are delay in information or defection. These can all be sorted out by a USP.

5. Main terms of MOA

a) Price - The offer price as well as the counter offer will be sent to the USP which serves as a platform of negotiation for both parties. There are no potential delays caused by the usage of brokers or messaging errors. Neither is there any doubt of authority to act as both parties have undergone a due diligence check by USP. The deal can be done in a very efficient way, e.g. within one day. There is no reason why one party needs substantial time to think once they have decided to go ahead with the sale/purchase. The records on the USP clearly evidence the details of the negotiation, providing no room for mistakes or misunderstandings with the presence of a reliable witness, i.e. the USP, in the case of any dispute.

b) Deposit -- Deposits are usually paid within 2 to 3 days, at an amount of about 10% of the total consideration, or above as may be required. There had not been any problem in the old days for arranging deposits. However, after 911, the KYC (Known Your Client) requirements imposed by banking authorities to the banks make it quite difficult to open any offshore account for paying deposits, particularly in joint names. Even it goes smoothly with the banks, it generally takes 3 to 4 weeks at minimum, which completely deprives the purpose of a deposit. The USP, acting as an escrow agent, can solve all these troubles.

c & d) Delivering period, laycan, delivery port.

The delivery period is always proposed by the Sellers because they are operating the ship. They know when and where the last voyage will be. Buyers may have to consider the finance applications. Nevertheless, bear in mind that any time and location other than as designated by the Sellers may give rise to additional costs as the Sellers would have to reposition the ship.

e) Dry docking/underwater inspection.

Once dry docking is preferred, the contract will be quite complicated as it may lead to a variety of conditional events. There are too many "if" situations. This is a scenario where USP may have to re-draft the standard contract.

f) Bunker remains onboard.

Disputes can arise from price, particularly when supplies are from different locations, times and prices. Besides, the rebate can be quite high for lubricating oil. USP is able to act as a mediator in case of disputes as to the quantity and quality.

g) Documentation.

Almost in all sales and purchases, documents are taken lightly initially, being put into appendices etc. In practice, the process of notarization, legalization and COE (certificate of encumbrance) are all connected in one way or another and inter-related. In some places, it is difficult or even impossible to fulfill some of the formalities. Therefore, documentation can be one of the main problems, though most problems can be sorted out without affecting the delivery of the ship. This pressure on both parties is very damaging. The USP will be a great helping hand in this aspect, as it has all the expertise for going through all procedures to get the documents correct.

h) The condition of the ship upon Delivery.

There is usually a term providing for the condition of the ship as "inspected on dd/mm/yyyy, tear and wear excepted". USP can provide a condition report for reference when in dispute.

i) Arbitration

The 3 standard steps in dispute resolution are amicable negotiation, arbitration and court proceedings. Arbitration is supposed to be fair, simple, quick, and cost effective. Many who have the experience will learn that this often is not the case. The USP can provide one additional choice, i.e. a pre-arbitration meditation held by the USP. This will save many effort, time and money for both parties.

j) Important One

Virtually all terms, conditions, can be traded-off by price. Therefore, there is no reason not to accept the Buyers' MOA (which still has to follow strictly with the USP's standard MOA) and bargain only on the price. Having said that, there are sometimes alternations that can be beneficial to both parties. In such cases, the USP will actively intervene. After all, this is the purpose of the USP.

6. Contract details.

USP will insist on using a standard MOA. In any case, the USP will require Sellers to put their amended MOA (with all highlights to changes) on the USP platform for Buyers to review and to accept before talking about the Main Terms. In other words, Buyers will commit to the Sellers' MOA (as mentioned above, can be changed if justified) before bidding on the price (which many Buyers would do at the same time) or negotiating on the Main Terms (when dealing with one single buyer at a time, but time involved can be very short, say, each round 10 minutes). Once the terms are accepted online, the deal is done. A combination of both approaches to shorten the time is also possible.

7. Above is my working initiative for the USP. After the deal is done online, all operational matters shall be dealt with directly between Sellers and Buyers. The USP can always co-ordinate, and act as a mediator, if necessary.

8. Conclusion.

The USP will need some sub-systems to support. My observation is that we do have the resources in HK to construct a USP, initially for sale and purchase of ships, and with the next step, chartering. The rule set by the USP will be as both the pioneer and leader in this field. I hope that related organizations such as Classification Societies, Maritime Publishers, Ship Valuation Parties, Maritime Research Institutes, Marine Insurance and Ship Financing, E-commerce developers, ship registries and related Institutes can jointly take part to make the USP become a reality.

(Capt. Peter Chu: Director of South Express Ltd.)

《航海札記》1

方威

過去六載，前後總共九次投稿於《海運季刊》，記述作為一名甲板實習生在海上生活的點點滴滴。回首一看，那些經歷彷彿就像昨天所發生的一樣，在腦海中仍舊揮之不去，歷歷在目。見習生除了跟隨的副船長有所不同之外，其實在每艘船的工作體驗大同小異，學習新事物要靠自己去細心留意身邊週遭的事物，發掘更多學習機會。由於未能發掘更好的寫作題材，故出現脫稿的情況，還望各位讀者及前輩見諒。

去年十月下旬，我在香港放船回家休假，等待公司安排赴往浙江省舟山市東方海外海事學院 (OOCL Maritime Academy) 參加電子海圖顯示及資訊系統 (Electronic Chart Display and Information System, ECDIS) 培訓課程。完成培訓課程後，公司於今年二月初通知我三月二日在香港登上東方舊金山輪 (M.V. OOCL SAN FRANCISCO)， 擔任第三副船長 (Navigating Officer – Third，俗稱「三副」)。經過二十四個月二十八天的磨練後，見習生的生涯終於要劃上休止符。上船的時候，另一篇樂章——第三副船長正式開始了。在制服方面，除了與見習生沒有太多區別之外，最大的分別是在於肩章的圖案有所變化。肩章上有一個菱形，另有一條橫條貫穿著。肩章上的圖案除代表自己所屬的崗位外，還象徵著船東、船長、公司、貨主對自己的信任，皆因船舶的航行安全及人員的生命都在自己手上。此外，所有船員的的家庭幸福也由自己掌握，可想而知責任有多大。肩章的重量雖然輕，不過它所帶來的是要對工作有承擔、負責任、使命感。

回顧過去，曾經因為躊躇不定，未能一氣呵成完成實習期，甚至萌生退意。惟每當看見各類的參考書籍、學習筆記、證書、執照、海員僱用登記簿，再想想這些年來所積累的人際網絡，不忍心一下子把全部心血推垮。想到這裡，惟有咬緊牙關，硬著頭皮幹下去，盼望將來能夠達到目標。有時候在社交網頁裡看到別人比自己更快達到目標，內心不免感到失落。但是，正好有這些成功的例子作為借鑒，再加上有家人、朋友、同事、前輩的支持和鼓勵，使我增強信心去迎接每一個挑戰。經過二十五個月的訓練後，終於可以獨當一面成為值班駕駛員 (Officer On Watch, OOW)。

作為新任三副的第一段航程，是由香港開往上海外高橋。未啟航時據說中國沿海漁船的數量相當多，經驗較淺的駕駛員未必能夠應付得了。此時，船長安排大副在駕駛台監視及指導船舶操縱技巧。每當遇上比較複雜的局面，便需要大副協助，作出適當的行動作出避讓。在中國沿海航行時，整個值班時段要比平時加倍留神，注意附近漁船的動態。陪同我一起值班的舵工老鄭，來自福建泉州，年輕的時候協助家人出海捕魚。他告訴我中國漁民有一句話：小船過大船船頭，一輩子吃喝不愁。漁民為了漁獲網網千斤，不但罔顧航行安全，還故意挑遠洋商船駛至的時候加速行駛試圖橫越船艏。更甚者部份漁船航向左搖右擺，飄忽不定。此舉對於遠洋商船的航行安全有很大的影響，令部份駕駛員無所適從。大副此時建議把船稍為偏離原定航線，待漁船船群過去了再回復航向。而船長給我的忠告是採取避碰行動最

好是一個動作能夠把對自己有危險的目標讓開，不要為了在領導面前炫耀船舶操縱技巧而故意在漁船堆裡左穿右插，謹記航行安全為值班的首要原則。經過船長和大副四十二天的監視與指導，基本上我對於密密麻麻的漁船有信心可以應付。不過，一旦有猶豫的時候，還是要趁早拜託船長上駕駛台幫忙拆解局面。

根據三聯書店出版的《做海做魚——康港漁業的故事》所記載，漁民除了利用擊水法使魚兒集中一起以便捕撈，晚上更利用強光照明誘使魚兒聚集，然後再利用圍網法圍捕。在夜間航行時，有部份漁船開啟高亮度的照明燈捕魚，令強光背後的漁船不能被看見。遠洋商船駕駛員在白天可以看到漁船船艏的方向以判斷漁船是駛近或駛離船艏，到了晚上則靠漁船舷燈的顏色 (左舷燈：紅色，右舷燈：綠色) 協助分析漁船的動向。舷燈的燈光被強光所蓋過，很難看得清，幸好中國漁船皆安裝自動識別系統 (Automatic Identification System, AIS)，以便其他船在雷達上把他們設定為監察目標，然後利用雷達的自動標繪輔助功能 (Automatic Radar Plotting Aid, ARPA) 辨別哪一條漁船與本船有碰撞風險。不過，再先進的科技也比不上人類大腦的反應來得快，還是靠維持適當瞭望、及早採取行動避免產生碰撞風險方為上策。

除了航行值班外，三副的職責是處理港口報關文件、免稅品管制及銷售、救生與消防設備維修及保養。剛上來的時候，船長安排我去負責首兩項工作，這兩項工作其實沒有太多要求，主要是靠自己細心檢查和核對清楚。如果遇上一星期內掛靠幾個港口，就得多花點時間去準備，及早交給船長發送給港口代理服務公司。另外，每位船員的個人證件及證書要核對清楚有效日期，避免造成不必要的麻煩。至於免稅品方面，則要留意每位船員所訂香煙及酒精類飲品的數量是否超出船長所設定的限制。此外，還要預留一定數量的飲品作港口招待用途。

話說回來，重回東方舊金山輪對於我而言是美事一樁。幸好去年在這艘船擔任實習生，今年再次回來履新不需要太長的時間去適應。船上部份的船員曾經一起並肩作戰，在遇上困難的時候得到他們的協助，內心感到無比的溫暖。以前還是實習生的時候，每逢不用去駕駛台值班可以與其他船員舉杯淺酌，談天說地。但是升職了以後，晚上下班的時候已是子夜時分，船員已經魂縈夢鄉，此時只好獨個兒回到房間，打開電腦聽聽音樂、觀看娛樂節目，或者舒卷閱讀，緩解一下工作的壓力及疲憊。除了上述的工餘節目之外，每當遇上種類特殊的船舶或美麗迷人的景象，立刻拿出智能手機把眼前的一刻捕捉下來，留為紀念。

在岸上休假的時候，很多人覺得當海員枯燥乏味，過著單調的生活，在船上無所事事。其實，每位船員要負責的工作也相當多，每天要為工作作出規劃，按工作的緩急先後作出編排。值班完畢要抽出時間處理好個人工作，才能享受工餘時間帶來的樂趣。航行值班中沒有船舶在周圍的時候，除了維持適當瞭望，白天可以觀察不同種類的雲，晚上就可以利用星圖去比對夜空上的星宿，學習辨認不同的星座及星體，從而豐富自己的氣象及天文知識。另外，寂靜的環境可以令我內心沉澱下來，思考一下在生活上所遇上的人和事，回憶在岸上與家人及好友相處的快樂時光，想想在休假的時候要陪伴家人去哪裡遊玩，把握時機與家人好好相聚。

為期四十二天的航程很快結束了，四月中再次回到上海的時候公司已安排更

換航線，目的地是北美洲的溫哥華與西雅圖。新任船長把業務重新分配，我被委派去負責救生與消防設備的維修及保養。至於更換航線後及新任務所遇上的一切，且留待下次再向各位一一道來。

(方威先生：東方海外貨櫃航運有限公司第三副船長)

AN ADJUSTERS' NOTE ON SUBSTITUTED EXPENSES AND RANSOM PAYMENTS

RHL

Editor's Notes: The following notes are contributed by Richards Hogg Lindley, Average Adjusters and Marine Claims Consultants.

Mitsui & Co. and others v

Beteiligungsgesellschaft LPG Tankerflotte

"THE LONGCHAMP" [2016, EWCA Civ 708]

The Court of Appeal has reversed the 2014 High Court judgement that crew wages and fuel consumed during lengthy ransom negotiations with Somali pirates could be allowed as general average under Rule F. The Court of Appeal held that Rule F cannot be applicable because there was only ever one course of action available – to pay the ransom. The position under English law therefore reverts to the position taken in 2012 by the majority on the Advisory Committee of the Association of Average Adjusters that such costs were not allowable under Rule F. The judgement also makes some interesting points on the requirement of reasonableness under Rules F and XIV of the York Antwerp Rules.

The case involved a chemical tanker that was seized on 29 January 2009 by Somali pirates. A ransom demand of US$6 million was made by the pirates. After negotiation, a final ransom of US$1.85m was agreed on 22 March 2009 and the vessel was released. During the period of negotiation the shipowner incurred expenditure totalling US$181,604.25 which was claimed and allowed in an adjustment as General Average under Rule F. The majority of the disputed expenditure related to crew wages (including high risk area bonus) and maintenance, and the cost of fuel consumed during the detention period.

High Court Judgement

The High Court decision upheld an adjustment of general average, arising out of seizure by Somali pirates, in which wages and fuel during the period of negotiation of the ransom were allowed under Rule F of York Antwerp Rules 1974 as an expense incurred in substitution for the higher cost of paying the initial ransom demand. It was also held that payment of the original ransom demand of US$6 million without negotiation would have been reasonable. Court of Appeal Judgement Lord Justice Hamblen addressed the grounds of the appeal, of which 2 issues are of particular interest:

Issue 1

Whether the Judge ought not to have concluded that the expenses were incurred in adopting a course of action undertaken as an alternative to one where the expense would have been allowable as General Average.

The Judge summarised the requirements of Rule F:

1. First, the Rule is concerned only with "expenses";
2. Second, it is only those expenses which can be described as "extra" which qualify;

3. Third, there must have been an alternative course of action which, if it had been adopted, would have involved expenditure which could properly be charged to general average; and

4. Fourth, the extra expenses must have been incurred in place of the alternative course of action.

Lord Justice Hamblen found that Rule F was never engaged because in this case there was no alternative course of action available to owners. He concluded that there was no difference between paying the ransom immediately or in negotiating the ransom down.

"Is a short negotiation with pirates for payment of ransom leading to the release of the vessel a different course of action to a long negotiation with pirates on the same ends? In my judgement it is not; both fundamentally involve doing the same thing."

On this basis, Lord Justice Hamblen agreed with the conclusion and underlying reasoning of the majority of the Advisory Committee of the Association of Average Adjusters.

Although the express reasoning of the majority of the Advisory Committee in reaching their conclusion is different, the underlying point being made is similar. The majority are making the point that there is only one road open to owners, namely negotiation, and that road leads to wherever the negotiation ends. It is a single track road with no forks in the road and it ends in the eventual ransom payment agreement.

This reiterates that Rule F requires that the substituted expense is incurred "in place of" another expense which would have been allowable as general average. In this case the same expense (payment of ransom) was going to be incurred, the only difference being the extent of that payment.

Issue 2

Whether the judge was wrong to conclude that payment of the initial ransom demand without attempting to negotiate would have been a reasonable course of action.

Lord Justice Hamblen gave a detailed analysis, also touching on the various judgements in the "Bijela" which dealt with the question of alternative courses of action in the context of Rule XIV and temporary repairs.

In making an allowance under Rule F, you must demonstrate that it is cheaper than the alternative course of action which would be allowable in general average. Rule A requires proof that the expense of the alternative course of action would have been "reasonably" incurred. This can lead to a circular argument whereby if the alternative course of action is so much more expensive than the actual action taken, the alternative action becomes unreasonable and cannot then be relied on to justify the allowance under Rule F. A similar issue arises under Rule XIV whereby the cost of temporary repairs may be allowed to general average in substitution of the expenses allowable under Rule X which would have been incurred had temporary repairs not been effected and permanent repairs had been effected instead. However, the allowance under Rule X requires proof that the repairs were necessary for the safe prosecution of the voyage. If temporary repairs are sufficient to allow the safe prosecution of the voyage then the basis of an allowance under Rule X falls away, as does the basis for an allowance under Rule XIV.

The judgement in the "Bijela" worked around this problem by stating that Rule XIV requires you to make the assumption that temporary repairs were not an available option, and to then consider which costs would arise, thereby giving the Rule practical effect. The respondents in "Longchamp" maintained that the same reasoning should apply to Rule F, ie. you must assume that the alternative course of action was not available. However, Lord Justice Hamblen disagreed, setting out five basic principles that should guide the approach to the question.

1. Rule A requires proof that the expense of the hypothetical alternative course of action would have been "reasonably" incurred. That wording cannot be ignored.

2. The requirement of reasonableness under Rule A imports more flexibility than the test of necessity under Rule X(b). Often there may be more than one reasonable course of action available.
3. The wording of Rule XIV and Rule F is materially different. In particular, as the House of Lords held, the second paragraph of Rule XIV requires an assumption to be made.

4. The general context and applicability of Rule F is different to the specific context of Rule XIV.

5. There is no necessity to make assumptions in order to give Rule F business efficacy. The Rule is workable and in most cases works without difficulty.

This brought Lord Justice Hamblen to the question of whether an immediate payment of the ransom without negotiation would have been reasonable. He upheld the decision of the High Court in finding that it would have been reasonable to pay the ransom without first attempting to negotiate.

Points to note

1. This judgement provides a helpful clarification of the test for establishing an allowance under Rule F. With regards to the Rule, the position under English law reverts to the position taken in 2012 by the majority on the Advisory Committee of the Association of Average Adjusters.

2. The decision also makes it clear that Rule F has no application regarding detention expenses during a salvage negotiation, because whether the payment demanded by salvors is made immediately or after being negotiated downwards it is, like a ransom payment, the same course of action.
3. This clarifies the different approaches to the question of reasonableness which must be taken when applying Rule F and Rule XIV.

Readers can now go to the LinkedIn page https://www.linkedin.com/company/richards-hogg-lindley-rhl-?trk to review this and look at other articles as well.

(Richards Hogg Lindley: Average Adjusters and Marine Claims Consultants)

現代航海不再靠日月星辰

林傑

一九九八年十一月廿三日晚觀看了RTHK的鏗鏘集有關海員的工作過程，令我回味多年航海生涯的苦與樂。

片中介紹某公司旗下的「Sabrina Venture百樂勇士」輪，由台灣航往澳洲甘巴港，那是一艘頗新的船舶，在香港註冊。船上設備既先進又現代化，所以旁述員說：「現代航海，無需依賴日月了。」所以片中不見甲板見習副船長，練習如何觀測日、月、星辰來為船舶定位。

其實，現代航海雖有先進設備，但可有想過，若然全部儀器壞掉，不能開啟和使用，例如全船BLACK OUT，無電無水，儀器如何運作？駕駛員如何定出船舶位置？相信老航海者，如片中的船長和大副仍然知道這些技術。但新入行者，如不勤勞和多些練習日、月、星辰的觀測，沒有積累天文航海的經驗，恐怕書到用時才知缺乏這類經驗，定出船舶的位置恐怕不在地球，而是飛上太空宇宙了。

航海的基本功夫是地文和天文航海，先進的儀器只能發揮協助的功能，所謂Navigational Aids是也。Aids= 協助，如沒有Aids的時候，駕駛員是否變成棟督笑呢？

天、地文航海，理論上可從書本上學習得到一定的知識，但觀測經驗只可從多做多累積得來，以及如何付諸實行；正所謂工多藝熟，不可不知。

我曾聽聞過有一類航海駕駛員被稱為”Electronic Navigators”，即是說，如沒有任何電子導航儀器的協助，他們就成為棟督笑了。

現代的導航儀器真的是百分之百可靠嗎？事實上，存在著誤差、電離層的變化和影響、人造衛星地面控制站的錯誤傳輸數據等等，均可影響導航儀器的準確性。因此，最準確的東西，就是我們的肉眼；為什麼不可以把儀器當作為瞭望？因為，瞭望者必須是人的肉眼。為什麼甲板部航海人員必須符合有關的視力測驗？因為，無近視、無色盲，才能說是擁有一對航海眼睛。

基本功夫不可少，練功夫也要先學紮馬，才能奠下良好的根基，不要被先進的發明洩蓋了最基本的功夫。正如，數學根基不好，只靠科學計數機，那就叻極有限。

(林傑船長 : Master Mariner, F.I.S., MH.)

萬 邦 集 團

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AA TALK

Cause And Timing Of Damages - Which Policies Pay?

Raymond Wong

IFSPA 2017

The Institute of Seatransport participated in the IFSPA 2017 (International Forum on Shipping, Ports and Airports), conducting an Industrial Session at PolyU on Wednesday afternoon, 24th May 2017 when the day started with yellow rain at 0615, followed by red at 0930 and black at 1130 before returning to yellow at 1230. It was most encouraging to see the majority of those enrolled turn up on time.

The session began at 1330 and finished at 1800 with (a) the Editor presenting a 2.5-hour workshop on practical aspects of marine hull insurance claims with emphasis on General Average, Particular Average and Constructive Total Loss, and (b) Mr. C H Wong, a well-known logistics & projects consultant and director of Five Oceans Marine Ltd., presenting on the role of Hong Kong as an international maritime centre under BRI. A couple of interesting issues on the hull insurance claims were discussed, which the Editor would like to share with readers.

Casualty

One of the case studies involved a container carrier on liner service trading between Far East/American ports which lost steering control on 1st December 2012, necessitating towage to a port of refuge where underwater inspection revealed that the vessel's rudderstock had a fracture which appeared to be beyond repair. All laden containers were discharged (to enable repairs to be effected in dry-dock) and forwarded to destinations by a sister-ship.

Insurance Conditions

The vessel was insured on hull and machinery, etc., for 12 months commencing from 1st April 2012, subject to Institute Time Clauses – Hulls 1/10/83 [referred to "ITC" here] and Institute Additional Perils Clauses – Hulls 1/10/83 [referred to "IAPC" here]. The insurance is subject to English law and practice and the relevant insurance conditions applicable to claim for the damage to the rudderstock are:

- Clause 6.2 of the ITC which provides that "This insurance covers loss of or damage to the subject-matter insured caused by .... 6.2.2 .... any latent defect in the machinery or hull..."

- IAPC which extends the insurance to cover

1.1 the cost of repairing or replacing ....

1.1.2 any defective part which has caused loss or damage to the Vessel covered by Clause 6.2.2 of the Institute Time Clauses – Hulls 1/10/83

1.2 loss of or damage to the Vessel caused by any accident or by negligence, incompetence or error of judgment of any person whatsoever

Both ITC Clause 6.2 and the IAPC are subject to due diligence proviso: "Provided such loss or damage has not resulted from want of due diligence by the Assured Owners or Managers."

Particular Average

Particular Average is a partial loss of the subject-matter insured caused by peril insured against, which is not a general average loss (as defined by section 64(1) of the Marine Insurance Act, 1906).

The effect of the wording, "This insurance covers loss of or damage to the subject-matter insured caused by" is that the Policy which will respond for a claim for Particular Average will be the Policy current at the time when the loss occurred or the damage was sustained. The incorporation of the IAPC in addition to the ITC allows exception for latent defect cover (IAPC Clause 1.1.2), let alone that the extension (in particular, "any accident" cover) affords the less weighty burden of proof.

It is worth noting that whilst IAPC Clause 1.1.2 only uses the words "defective part", the link to ITC Clause 6.2.2 must mean that the word "latently" is implied. Furthermore, a "latent defect in the machinery or hull" is not only confined to a flaw in material but can include wrongly assembled parts provided that they satisfy the usual test of latency - "defect which could not be discovered by a person of competent skill and using ordinary care" , definition given by Carver approved in the "Dimitrios N. Rallias" (1922).

Taking into the familiar "Nukila" test (1997), it is suggested that, for processing Particular Average claim, the following questions should be borne in mind:

- *What is the cause of damage under the policy?*
- *When did the damage occur – which policy pays?*
- *How many accidents and deductibles are involved?*
- *What can be claimed - the reasonable cost of repairs?*

We are considering the first two questions herein.

Onus of proof

Burden of proof is on the Assured to show on a balance of probability that the loss was caused in the way alleged. The degree of proof required is to show a balance in favour of an accidental loss by peril(s) insured against. If, as in the "Popi M" (1985) case where an old vessel sailing in calm seas with fair weather developed a fracture allowing seawater to enter and sank, the occurrence of the event, collision with a submarine, as alleged, is extremely improbable, on basis of common sense, the true cause being in doubt, the Assured has failed to prove.

In practice, most accidents are straight forward having known causes, and the claim for loss or damage would then be based on that known cause, e.g. fire, collision, contact, grounding, etc. However, machinery damages often require technical investigations on both cause and timing, necessitating, on occasions, metallurgical and/or other special tests.

Cause of damage to the rudderstock

There is suggestion that fatigue failure of a rudderstock is not an event that can be expected in the normal operation of the vessel, hence the rudderstock damage would not be a result of normal wear and tear and the damage being "accidental" in nature would fall within the wide cover by IAPC. However, in practice, Underwriters would expect that the words "any accident" (which probably cover event without apparent cause) are likely to be used only when the cause of loss or damage is obscure or unexplained. Furthermore, whilst one can insist that the Assured have proved prima facie that the damage was caused by a peril insured against, he would probably be expected to demonstrate that the whole damage occurred during the currency of the policy in force, since it is not uncommon that the fatigue fracture would be of a progressive nature, i.e. damage occurs and develops, without becoming apparent, over a period of time that spans more than one policy.

It is also believed that for other good reasons, e.g. loss prevention, it would be advisable for a prudent Ship-owners to be aware of the cause of damage.

Results of the investigations

- The nature of the crack suggested that it had developed over a period of time until the rudderstock was finally unable to resist the forces put on it.

- The vessel was last previously in dry-dock during July 2010 when the rudder and underwater parts were surveyed;

- The attending Surveyors agree that:

  – the damage arose from loss of a retainer ring (forming a latent defect in machinery) allowing displacement of the lower pintle bush, causing cyclic stress to be set up which led to fracturing of the rudderstock due to fatigue;

- the rudderstock retaining rings were either not fitted at all or were incorrectly fitted by the Repairers in July 2010 (constituting negligence of Repairers);

- the initiation of the fracture probably occurred some 3 to 6 months after the loss of the retaining rings which would probably have occurred in July 2010 or sometime thereafter;

- the rudderstock would have been condemned well before April 2012;

- there was an equal chance of the rudderstock becoming condemnable prior to and after April 2011.

Which policies pay?

During the material time covered in this case study, there was a policy change on 1st April and accordingly the claims arising therein would involve 3 policies, namely: (a) 2010/11 Policy (1st April 2010/31st March 2011), (b) 2011/12 Policy (1st April 2011/31st March 2012) and (c) 2012/13 Policy (1st April 2012/31st March 2013).

There was negligence of repairers in July 2010 (2010/11 Policy) resulting in a latent defect causing damage to the rudderstock culminating in a breakdown in December 2012 (2012/13 Policy). On the agreed fact that, if the true facts had been known, the rudderstock was already damaged beyond repairs, would have been condemnable, and was worth only scrap before 1st April 2012, i.e. prior to the inception of the 2012/13 Policy, no claim in respect of the cost of replacement of the rudderstock can lie against this policy year, since the rudderstock was incapable of being damaged any further. The damage to the rudderstock would be treated as progressive over the 2010/11 and 2011/2012 policy periods, being reasonably split 50/50 in the circumstances (as agreed by the Surveyors).

General Average

The ITC Clause 11.4 provides that "No claim under this Clause 11 shall in any case be allowed where the loss was not incurred to avoid or in connection with the avoidance of a peril insured against." It is the peril which is operating or which will operate which determines the matter. Hence, the claim for general average falling on the vessel arising from the loss of steering control on 1st December 2012 would fall on the 2012/13 Policy insuring the vessel when the peril was operative.

Deductible

All claims, General Average and Particular Average, arising out of the same accident are subject to one Deductible in terms of ITC Clause 12. The Deductible is divided between the three policies over the respective claims attaching thereto.

Summary

2010/11 Policy pays 50% of the reasonable cost of replacing the rudderstock less 50% of its scrap value (if any) and proportion of Deductible;

2011/12 Policy pays 50% of the reasonable cost of replacing the rudderstock less 50% of its scrap value (if any) and proportion of Deductible;

2012/13 Policy pays the general average claim falling on the vessel less proportion of Deductible.

Conclusion

It is advisable to pay proper attention to (a) the plain sense of the policy wording, which may all require a different approach to the same set of facts and (b) the facts of each case. "In practice, average adjusters are required to produce equitable and practical solutions based on the facts of individual claims and the theoretical difficulties endemic in the topic are generally settled by agreement with underwriters." (Mr. Donald O'May)

INTERDISCIPLINARY MARITIME PRACTICE WORKSHOP SERIES II

The 9th Workshop on Casualty Management will be held on Thursday evening, 20th July 2017 at PolyU (lecture room to be advised). For details, please contact Ms. Catherine Chow at Tel: 2771-6180 or info@hklmsa.org.hk

LAW CASE

Readers are reminded that the "Longchamp" case where the Court of Appeal has reversed the 2014 High Court judgment is coming up for trial in the Supreme Court.

(Editor: Raymond T C Wong
Average Adjuster)

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