

SIGNALS

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Signalling a new Initiative

Initially scheduled to be a twice-yearly publication, Signals seeks to provide a medium through which Members can exchange information and experience.

Not a publicity exercise - but an initiative in loss prevention. Signals will highlight developments of both a legal and commercial nature; whilst summarising and interpreting recent case law, the emphasis will be squarely on the implications for the shipowner and the provision of practical advice to Members.

Similarly, Signals will alert Members to problems arising at specific ports, or in connection with particular commodities or charterers, providing recommendations wherever possible.

As the need arises, special editions of Signals will be issued, distributing information and advising of problems or circumstances demanding the attention of Members.

Making it Work

Signals will only succeed if it is able to reflect and respond to the experience of the Membership. We ask that Members regularly pass on details of information and/or problems which may form the basis of an article for inclusion in Signals.

Please direct your contributions to Stephen Purvis, Julian Clarke or Graham Anderson.

We are relying on you!

Avoiding Additional Discharging Costs - Bulk Cargoes

The Association has on numerous occasions been consulted by Members in cases where charterers have alleged that owners misdescribed their vessels, by describing them as self-trimming bulk carriers, or by warranting them as "suitable for grab discharge" where the vessels in question had remains of tween decks or protrusions in the holds. In a recent case where the vessel had originally been fitted as a car carrier, the Member was exposed to additional discharge costs at the port of Ghent.

Notwithstanding the fact that the vessel's physical shape was that of a self-trimming bulk carrier and that the remains of the car decks had trimming holes drilled through them, the owner faced a substantial additional stevedoring charge.

Port of Ghent

One of the reasons for the size of this charge is due to a custom at the Port of Ghent that where stevedores are called in to shovel cargo trapped on such ledges or protrusions then the rate charged to the shipowner is calculated in proportion to the cargo as a whole and not the cargo actually removed from the shelves.

It is therefore clear that the cost of removing small portions of trapped cargo may well be considerable at Ghent when a large parcel of cargo has already been discharged.

Members are urged to consider such problems especially if discharge is to take place at Ghent and ensure that charterers are, at the time of fixing, made fully aware of the presence of any obstructions in the vessel's holds in order to avoid any later misdescription claim.

Warranted "Suitable for Grab Discharge"

As far as the warranty "suitable for grab discharge" is concerned, problems have arisen at a number of ports where stevedores are entitled to demand significant

additional payments for discharging cargo from spaces not directly accessible to grabs.

Disputes relating to the reasonableness of such charges are more often than not best resolved on the spot as and when they arise and it is strongly recommended that Members who warrant their vessels to be "suitable for grab discharge" attempt to obtain charterer's agreement to include in their charterparties a clause such as the following:

"Any disputes concerning the vessel's suitability for grab discharge or concerning whether (and if so, how much) time used and expenses incurred should be regarded as over and above time used and expenses incurred in normal grab discharge to be referred to the binding arbitration of an independent surveyor to be appointed jointly by owners and charterers and whose fees and expenses to be split 50/50 between owners and charterers."

Beware Canadian Tackle Inspectors!

The Association has recently found itself contacted by Members experiencing difficulties when calling at Canadian ports concerning the very strict line taken by local Port Authorities and their appointed Tackle Inspectors.

Under the 1970 Canada Shipping Act the Governor in Council has the power to appoint persons to act as ship's Tackle Inspectors. The Appointees are often already working for the local Port Authority and may even be the Harbour Master. The Inspector once appointed would

seem to have a wide range of powers which include a power to suspend loading or discharging operations if he suspects that those involved in such operations may be exposed to undue risk.

These Inspectors view their powers very strictly and repeatedly err on the side of caution, suspending loading and/or discharging operations when there is the slightest hint of defect to ship's gear.

The Association would therefore advise its Members to make sure that adequate inspections and safety checks are carried out to all loading apparatus before calls at Canadian ports.

Furthermore, it is important that relevant certification including full record of such inspections and maintenance in the logs are readily available in order to avoid any delay to the vessel.

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Bunker Quality Disputes

Advice To Owners

Unfortunately for the shipping industry, problems with bunkers are here to stay. Changes in modern refining methods will inevitably lead to problems with viscosity, density and carbon residue of fuel oils becoming more frequent and the likelihood of a problem arising with abrasiveness or instability will also increase.

It goes without saying that problems with the quality of fuel can cause significant losses to owners in terms of loss of time and even engine damage.

It is therefore becoming all the more important for shipowners to take reasonable precautionary steps to try to avoid problems with bunkers turning into lengthy and costly disputes with time charterers or bunker suppliers.

Stating Minimum Specifications of Bunkers

It is of the utmost importance that owners stipulate in their contracts (whether time charterparties or bunker supply contracts) that the bunkers shall meet certain minimum specifications.

Merely stipulating that the fuel to be supplied to the vessel shall be of a certain viscosity does not provide adequate protection to the shipowner should a problem of a

different nature arise. Owners should try wherever possible to provide a full specification of the fuel which they wish to be delivered to the vessel.

Owners may be forgiven if they are confused by the multiplicity of standards which have been drawn up by the British Standards Authority, the International Standards Organisation, the Engine Manufacturers Association (CIMAC) and many of the major oil companies and it is therefore all the more important that, in doubt, owners should consult with their engine manufacturers as to which specifications they should insist on.

Preservation of Evidence - An Agreed Sampling Procedure

Realistically however, even if owners do provide their time charterers or bunker supplier with a comprehensive specification of the bunkers to be supplied to the vessel, it may be unavoidable that off-specification bunkers be supplied and that problems of incompatibility arise.

It is therefore important that proper steps are taken by those on board vessels both to preserve evidence and to use the fuel handling

system correctly. Representative samples of bunkers supplied should be taken using a sampling procedure which should be agreed in the charter party or bunker supply contract.

If possible, drip samples should be taken at the manifold throughout the supply. It is essential that such samples should be correctly marked and the sampling and sealing should be witnessed by an employee of the bunker supplier who should be asked to sign each sample. Sufficient samples should be taken and retained on board for further analysis in the event that problems should arise leading to disputes.

Serious consideration should also be given to the need for carrying out tests and analyses of the bunkers supplied, prior to using those bunkers, either on board the vessel or in a laboratory. Owners can subscribe to the fuel quality testing services of Veritas Petroleum Services or the Fuel Oil Bunker Analysis Service (FOBAS) run by Lloyd's Register. The costs of subscribing to such a fuel quality testing programme should properly be regarded by owners as a form of insurance against bunker problems arising.

In addition to being trained in the importance of following proper procedure in taking samples and gathering evidence, it is important that vessel's engineers should be trained in the proper use of the fuel handling systems as well as in performing tests to diagnose the nature of problems arising.

Whilst some tests can be carried out equally well in a laboratory as on board the vessel to determine the stability of bunkers supplied, more often than not it will

be more convenient to carry out compatibility tests on board the vessel. In addition, those on board should pay special attention to the following:

- Centrifuge efficiency must be checked periodically;
- Centrifuge discharge cycles should be monitored daily;
- The sludge tank must be emptied regularly;
- The settling tank must be checked and drained regularly.

- It goes without saying that an accurate log of all such work should be maintained

Should problems be encountered with the quality of bunkers supplied, it is also essential that owners should be aware of the terms and conditions governing the contract of sale with the bunker supplier. More often than not such standard terms and conditions contain onerous restrictions and limitations on liability such as time bar clauses for notification of claims etc.

Recommendation at Time of Contracting

It is therefore strongly advisable that owners obtain the standard terms and conditions of those bunker suppliers with whom they do business, at the time the bunker supply contract is placed. If any of the terms and conditions are objectionable to owners, any objection should be made before contracting.

Whilst it must be recognised that there are practical limitations to the extent to which shipowners can eliminate the risk of suffering losses arising out of bunker quality problems, there is much that can be done.

STEEL CARGOES - Warning Against Steel Strapping Bands

Members are warned against Masters agreeing to the use of steel strapping bands to secure steel consignments, for which the bands are inadequate. We have experience of steel bands being used to secure steel slabs, each weighing 11MT which, as should have been anticipated by the Master, shifted in stow during the voyage. During loading, the Master expressed his concern to charterers Supercargo regarding the inadequacy of the strapping bands.

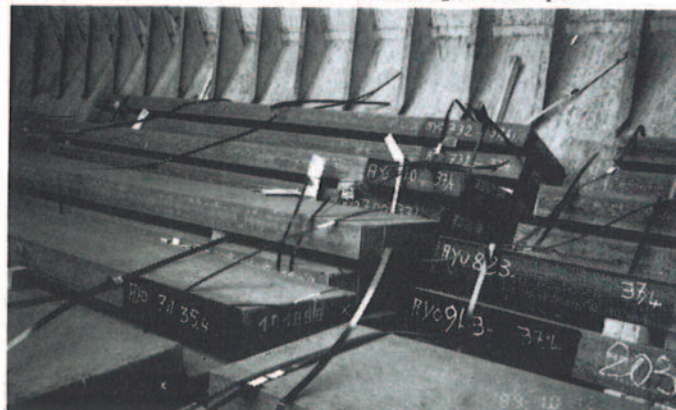
Even where charterers remain responsible for stowage, owners and more especially the Master on the spot, remain responsible for the seaworthiness of the vessel and therefore the Master cannot disregard the stowage arrangements on the basis he is only under an obligation to supervise rather than retain responsibility for the stow. Steel slabs are clearly incapable of being adequately secured by

means of strapping bands and experience has shown that, soon after completion of stowage the dunnage compresses and the bands become slack and unable to be tightened.

The slabs should be stowed athwartships and winged out to the slope plating of the side tanks and

arranged in overlapping tiers. The stow should then be locked into place by means of wire rope tightened with turnbuckles and all gaps wedged with timber.

If in any doubt as to the quality of the stow, the Master should consult an experienced surveyor. *Footnote: The subject of a Master's obligation during loading and stowage of steel cargoes, and extent of his intervention will be dealt with at length in the coming Annual Report.*



KYZIKOS - A Restricted Definition of "Whether in Berth or Not?"

In a House of Lords decision that has been questioned by the industry, Lord Brandon found that the meaning of "whether in berth or not" was limited to cases where a berth was not available due to the risk of congestion or like circumstances, but did not extend to other situations where a berth could not be reached for other reasons.

In the "Kyzikos" the ship could not proceed to her berth because of fog and it was held that the insertion of Wibon did not enable the owner to argue that laytime should count for the period of the delay.

The practical outcome of this case is that Members should be aware they must also state expressly that time lost waiting for berth is to count as lay time or time on demurrage.

MONTANA

Importance of Collecting Evidence - Quality of Tallying

Each year, a considerable number of cargo claims are pursued by recovery agents in the UK on behalf of Saudi Arabian cargo interests which, in the past, have relied heavily on Shortage Certificates issued by Customs Authorities. A High Court decision in the "Montana" delivered in January of this year has served to highlight the fallability of such Shortage Certificates, based on what was held to be an inaccurate tally, for which the shipowner could not be held responsible.

This decision will serve to assist the Association, on behalf of Members, to mitigate and reject bagged cargo claims arising in Saudi Arabia (and potentially elsewhere in parallel cases) should evidence be available to the carrier that, on the balance of probability, the tallying of cargo was inaccurate.

The Association would seek to enlist the help of Members in capitalising on this decision, in compiling information concerning the quality of tallying at outturn.

In the case of the "Montana" cargo presented a claim for an alleged shortage and slackage, supported by a final outturn tally figure and a Customs Shortage Certificate based on the tally; daily tally sheets were unavailable. The Court dismissed the claim on the basis that all the bags had been discharged, that there was no evidence to indicate how the short-landing had been calculated and that the claimant was unable even to provide a possible explanation as to where the discrepant cargo had gone.

The Court remained "totally unconvinced that defendants failed to deliver any of the cargo" and dismissed the Customs Shortage Certificate, having assessed the tally on which it was based, to be inaccurate.

On this occasion, under the terms of the charterparty incorporated in the bills of lading, stevedores at Jeddah were servants of the receivers and the Court held that stevedores' refusal to discharge a quantity of sweepings from the vessel and which remained on board on departure from Jeddah, was not a responsibility for which the shipowner could be liable. Whilst the carrier may well have borne liability should the shipment have been on liner terms, the Court's attitude towards short-landing would have remained unaltered, as this turned on the inaccuracy of the tallying

arrangements.

Under liner terms, whilst it may be the responsibility of the shipowner to arrange tallying, this does not impose an obligation concerning the accuracy of tallying and, should evidence be produced to establish the inaccuracy of tallying arrangements, the shipowner would remain in a strong position to reject liability.

Assessing the Quality of Tallying

In the interests of loss prevention and mitigation, the Association is presently compiling a questionnaire which will appear either in this year's Annual Report or the next issue of Signals and which is designed to assist owners in compiling evidence to establish the quality of tallying.

The "Montana" decision drew attention to such aspects as all holds being worked simultaneously and continually over 24 hour periods (the vessel being lit at night), tally clerks counting the number of slings rather than bags and not necessarily one tally man per hold, stevedores paid according to tonnage discharged rather than on a time basis - producing an incentive to discharge as quickly as possible and conflicting evidence regarding the number of bags in each sling.

Such aspects are by no means characteristics only of the port of Jeddah, but serve to indicate the inherent flaws involved in the tallying operation of any bagged cargo.

Recommendation to Members

It is clear that evidence compiled at discharge, serving to highlight inherent weaknesses in the tallying system, will greatly assist the Association in contesting claims of this type. Observations made by the Chief Officer and crew should be recorded in the vessel's logs and a separate report compiled, with protests submitted to the stevedores, with copies to the vessel's agent.

The Association would welcome contributions from Members concerning standing instructions given to vessels relating to observations made during tallying (and discharge generally), which would serve to assist in our drafting of the questionnaire, which we recommend be retained on board vessels, providing guidelines as to that information which will constitute valid evidence as to the quality of tallying.

MEXICO 1-

The Value of Re-issuing a Notice of Readiness

This case concerned a question as to the validity of a notice of readiness at a discharge port when the cargo in question was overstowed with another cargo and was not accessible at the time when the notice of readiness was given. The charterers argued that the notice was of no effect.

The owners argued that the notice became effective as soon as the vessel was in fact ready, which in this case was when the overstowed portion of the cargo had been removed.

The Court of Appeal held that the purpose of a notice of readiness was to show that a ship was ready in all respects to either load or discharge her cargo. To imply that the meaning of such a notice was to give an advice that the ship had arrived and would be ready at some future date, was beyond the

scope of the notice and would create difficulties and cause confusion.

The fact that the charterers had accepted this notice was of no legal effect as the Court held that their acceptance must have been given in reliance upon the Master's implied assurance that the ship was ready for discharge when it clearly was not.

The result of this decision is that for the avoidance of doubt, whenever any question arises as to whether or not a notice of readiness is valid, the Master should give further notices of readiness and not merely rely upon the first.

In this case, the Master should have issued a notice of readiness as soon as the overstowed cargo had been removed and the ship was in fact ready.

If in doubt, the Master should give a second, third or fourth notice stating expressly that the notice is entirely without prejudice to the validity of the previous notice(s).

Cash Bonds Required at Dutch Ports

Members continue to experience difficulties with regard to security requirements at Dutch ports.

The position in the Netherlands is different from most other jurisdictions in that, whenever damage is caused by a vessel to property of the Dutch Government (quay wall, lock gate, dolphins etc...) the Dutch Rijkswaterstaat are entitled to and invariably insist on, security in the form of a "deed of guarantee" for the estimated amount of the damage.

This guarantee is equivalent to a cash bond, as it provides that the Rijkswaterstaat are entitled to

obtain payment under the guarantee on demand, whilst at the same time stipulating that such payment is without prejudice as to the question of liability. In other words, the authorities can exact payment without the necessity of a Court Order and the carrier is then left to commence proceedings in order to recover the amount, should it be considered liability is not involved, or the cost of repairs is excessive.

Despite approaches by the International Group, the Rijkswaterstaat insist on such guarantees which are valid under an act of 1891.

While further approaches on behalf of the International Group may be advisable, Members' attention is drawn to particular difficulties arising at Terneuzen, where the local authorities are especially strict.

ESICUBA SEMINAR, HAVANA

Over two hundred delegates from over twenty different countries attended the Second International Insurance Seminar held in Havana, Cuba between 5th-8th June. The Seminar, sponsored by Esicuba, included a speaker from the Association; Nick Tonge presented a paper concerning oil pollution. The paper entitled "Oil Pollution - Can Lessons be Learnt?" contended that States with shorelines exposed to oil

tanker traffic should ensure that they have an adequate contingency plan to deal with oil pollution incidents.

Somewhat ironically, the paper was given in the week leading up to the explosions occurring on board the "Mega Borg" in the Gulf of Mexico.

Other papers given during the Seminar covered topics from Aviation, Construction and Employers Liability, Insurance.



Burden and Standard of Proof - Oil Shortage Claims

The burden and standard of proof is a complicated area:

A Legal Pendulum

In general terms, "he who alleges must prove" and, in the first instance, the legal burden rests with the claimant, who must produce evidence to establish a case.

As the defendant attempts to forward evidence to reject the claimants arguments, the evidential burden swings between the two parties, as evidence and counter evidence is produced.

Standard of Proof - Civil and Criminal

The question of the degree and quality of evidence required is defined as the standard of proof. In civil cases, the standard is roughly defined as "on the balance of probabilities."

A stricter standard exists in criminal cases, where a claimant must prove the case "beyond all reasonable doubt."

The Court of Appeal in London recently delivered a useful explanation of the doctrine, but in so doing raised a practical hurdle, which may cause shipowners, in certain situations, to face a criminal standard of proof in a civil case.

George S - Ships or Shore Figures

A claim for compensation by cargo interests for an alleged shortlanding of oil was rejected by the High Court on the basis that cargo had not sufficiently proved their case.

The High Court reasoned that whilst in theory shore figures may be more reliable, ships' figures had the advantage in limiting calculations at the beginning and end of a voyage to the same container, i.e. the ship's tanks.

The Court felt that a reliance on ship's figures would avoid inaccuracies due to variations in calibration between shore facilities at loading and discharge, as well as potential loss prior to loading or after discharge; for example, due to problems with the pipeline or the diversion of cargo to alternative tanks.

The Court held that, on the balance of probabilities, the cargo owners had not shown that the loss had occurred due to any act of the owners and that, therefore, the claim failed.

Court of Appeal - Shore Figures - A Criminal Test

The Court of Appeal took a different view. The Court held that the High Court judgement was erroneous: "the shore figures pointed inexorably to a short delivery, unless there was some evidence pointing to diversion after discharge or loss in the pipeline, of which there was none. It was for the shipowners to counter this evidence and they did not do so. In the absence of such evidence, their only remaining defence was to establish, beyond all reasonable doubt, that a short delivery was impossible."

In this case, all that the owners had done was to show that it was no more probable that the loss had occurred after discharge than it was that the loss occurred by some other reason. This, said the Court of Appeal, was not sufficient.

Beyond All Reasonable Doubt

This appeared to mean that in cargo shortage claims, cargo owners would simply need to demonstrate a paper shortage and it would then be for the shipowner to counter this evidence and satisfy the higher standard of "beyond all reasonable doubt."

A parallel case before the High Court has, to an extent, diluted this interpretation. In the "Filiatra Legacy" cargo owners relied on the "George S" decision saying that, if the shore figures clearly pointed to a short delivery, then unless the shipowners could produce evidence demonstrating a diversion after discharge or problems with the pipeline, the shipowner would have to satisfy the higher standard of proof and counter the evidence of the cargo owners, beyond all reasonable doubt.

A Standard Restored ?

The High Court felt that in the "George S" the Court of Appeal had not established a once and for all burden of proof to be used in such cases, but was merely reiterating the position that the standard of proof should be commensurate with the case in question.

The Court of Appeal interpreted the High Court decision in the "George S" as a special case on its own facts, where the shore figures clearly pointed to a short delivery, whereas in the

"Filiatra Legacy" no such clear evidence existed and the Court felt the position should be that the standard of proof should depend upon the nature of the issue. The effect of the "George S" was that "...the degree of probability demanded of the party by whom for the time being, the evidential burden is borne, may be heightened by the strength of the case which, if he is to succeed, he must overcome."

The Court found that, on the facts of the "Filiatra Legacy" the standard to be used was that of the balance of probabilities, i.e. the reduced standard, as is usual in civil cases; and that, when this standard was applied, cargo owners succeeded.

A Clouded Issue - Our Advice to Members

As a result of these two decisions, what were already grey areas concerning the burden of proof have not been clarified and owners should be most prudent, when carrying oil cargoes, especially with a view to potential shortage claims. It would be advisable to agree, prior to fixing the

charterers, how calculations are to be made.

The Association would recommend that prefixture agreement be reached that load and discharge quantities are to be calculated by an independent surveyor based on draft and/or ullage surveys. This would achieve the certainty of comparing like with like by reference to a constant (the vessel's tanks). The surveyor at both the ports of loading and discharge should be agreed by owners and charterers and costs of such survey divided equally.

Importance of Accurate Records

The case of the "Irene M" illustrated the necessity owners maintain clear and accurate records throughout the voyage, evidencing how load calculations made, details of bunkering throughout the voyage and any transfer of cargo between tanks prior to arrival at port of discharge.

Any deficiencies in the vessel's own records may serve to weaken or prejudice the ability of shipowners to rely on the vessel's calculations as a constant.

WELCOME ABOARD !

We would like to introduce Julian Clarke, who joined the Association in March of this year.

Julian qualified as a Barrister in 1988, then worked for two years in Piraeus and Istanbul for a legal and management consultancy firm during which time he handled a wide range of marine disputes, but predominantly dry work.

Having joined the Association's FD & D department, Julian will continue to work alongside Stephen Purvis.



Julian Clarke

New Assistant Manager

We are pleased to report the promotion of Stephen Purvis to Assistant Manager with effect from the 1st of July.

Since joining the Association in October 1989, after four years with Gard P&I, Stephen has been responsible for the day to day management of the FD & D class.

(New home telephone number 0661 852720)