

# Newsletter

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## Expert legal advice in uncertain waters

Written by legal experts, Clyde & Co’s Shipping Newsletter is a regular publication which reports recent legal developments within the marine sector.

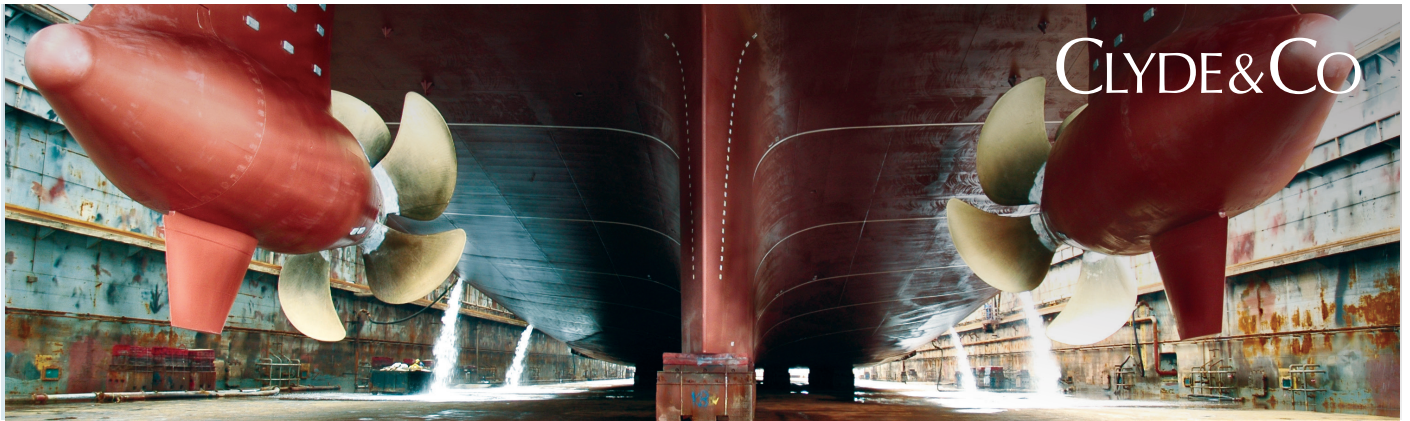
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For further information about any of the issues raised in this newsletter, please do not hesitate to speak to your usual contact or the authors listed herein. You can also email us at [info@clydeco.com](mailto:info@clydeco.com)



## The “SANKO MINERAL” – Claim in rem issued following a court order to sell vessel held to be valid

Peter Ward

A party with a statutory right to an admiralty claim *in rem*, which had issued its claim after the Admiralty court had ordered the sale of a vessel, did not lose its right to enforce the claim<sup>1</sup>. The claim *in rem* could be enforced against the sale proceeds provided that the person liable *in personam* was the beneficial owner of the sale proceeds.

### Facts

The Defendant, Sanko Mineral (Sanko), owner of the MV “SANKO MINERAL” (the Vessel), applied for the strike out or withdrawal of a caution against release of the sale proceeds of the Vessel, which had been requested by Glencore, and for payment out of the same proceeds of sale.

The Vessel was the subject of various attachments, in Baltimore, by Sanko's creditors, and was thus delayed on her voyage from Bulgaria to New Orleans, whilst carrying Glencore's cargo. On 7 May 2012, while the Vessel was delayed, Glencore commenced a claim in the local court for breach of contract of carriage. It was Glencore's position that, as a consequence, it obtained a maritime lien over the Vessel. Pursuant to the charterparty, any claim would be deemed to be absolutely disbarred unless made to an arbitrator within 12 months of cargo discharge. Such claim was never made. The Vessel was released from its attachments on 2 August 2012, having been delayed by almost four months.

Meanwhile, Sanko petitioned in Tokyo for the commencement of insolvency proceedings and, thereafter, entered into reorganisation proceedings on 23 July 2012. The English court recognised those proceedings as the main foreign proceedings under the Cross-Border Insolvency Regulations 2006. Glencore subsequently submitted two claims in those proceedings which were rejected by Sanko's Trustee. Glencore petitioned against that decision, and these petitions remained outstanding at the time of this hearing.

A reorganisation plan was approved on 17 October 2013, under which the Trustee was to sell Sanko's vessels, and the proceeds of sale were then to be paid in satisfaction of the secured reorganisation claims. Glencore's claims were, at the time of the hearing, still pending, and as such Glencore had not yet accrued a right to be paid out of the proceeds of sale.

In 2014, the Bank of Tokyo-Mitsubishi UFJ Ltd (the Bank), which held a mortgage on the Vessel, issued an *in rem* claim in the English Admiralty court, and the Vessel was arrested in May 2014. The Bank subsequently obtained judgment on its claim, and the sale of the Vessel was advertised.

Glencore maintained that its alleged maritime lien, or its statutory lien in Japanese law, took priority over the Bank's mortgage. On 22 August 2014, it applied to commence an *in rem* claim against the Vessel, and requested the issue of a caution against the release of the proceeds of sale. The Trustee subsequently applied to have the caution struck out, or withdrawn, on the grounds that (i) Glencore had not commenced an arbitration within 12 months of discharge, and (ii) as Glencore had not issued an *in rem* claim form before the Vessel had been sold, it was no longer able to enforce its claim *in rem* pursuant to the Senior Courts Act 1981 s.21(4), which required that when the action was brought, the person liable *in personam* had to be the beneficial owner of the vessel.

<sup>1</sup> Bank of Tokyo Mitsubishi UFJ Ltd (Claimant) v Sanko Mineral (Defendant) and Glencore Limited (Cautioner) – sub nom The “SANKO MINERAL” [2014]

## Decision

### The time bar issue

The court held that there was no doubt that in English law Glencore's claim was barred. However, the court decided that it would not be appropriate to determine the question of whether Glencore could advance its claim in Tokyo notwithstanding its failure to have commenced arbitration. That was found to be a matter for the Tokyo court.

### The *in rem* claim issue

It was accepted that the English court would recognise and give effect to a judgment in the Tokyo court, pursuant to either the principles governing the recognition of insolvency proceedings, or the provisions of the Cross-Border insolvency Regulations, or the ordinary English rules of private international law.

However, there remained the question of whether Glencore's was a claim *in rem*. On that question, the court found that it was not an *in rem* claim within the meaning of the order for the sale of the Vessel.

The court, therefore, had to consider whether a claimant with a statutory right of action *in rem* may enforce that claim against the proceeds of sale of the Vessel, notwithstanding that the Vessel had been sold by order of the Admiralty court, and no action *in rem* had been commenced before the sale. The court had regard to the established principle that when a vessel is sold by the Admiralty Court, rights *in rem* are transferred to the proceeds of sale. By contrast, where a vessel is sold by an individual, a maritime lien can be enforced against the vessel in the hands of the new owner. The court noted that the operation of s. 21 of the Senior Courts Act 1981 (SCA) must be understood in this context.

On considering the relevant principles, the court held that where the person liable *in personam* is the beneficial owner of the proceeds of sale he is to be regarded as the beneficial owner of the vessel for the purposes of section 21(4) SCA. That conclusion was reached because of:

- (a) The long established principle of Admiralty law that when a vessel was sold by the Admiralty Court, rights *in rem* were transferred to the sale proceeds
- (b) The reflection of that principle in CPR r.61.10(2)(a) concerning notices of sale by the court, and in PD 61 para.3.6(3) which provided that a claim was not served on the vessel but was to be filed at court
- (c) The fact that orders pursuant to CPR 61.10(2)(a) were intended to protect, not harm, the interests of those with rights *in rem*; and
- (d) The need to interpret the court's order pursuant to CPR 61.10(2)(a) in a manner that was not misleading

Therefore, it was found that Glencore had not lost its statutory right of action *in rem*, although in light of the Court's finding on the arbitration point, Glencore's claim for breach of the contract of carriage was absolutely barred.

### Payment out

Ordinarily, the court's findings would lead to an order for payment out to the Trustee. However, as Teare J noted, the reorganisation in Tokyo had been recognised as the foreign main proceeding, and the court did not wish to hinder those proceedings. The court stated that it would only be willing to make payment out on terms that the Trustee kept the proceeds of sale in a separate account and held them to the order of the Tokyo court.



## The “NISSOS AMORGOS” - Court dismisses P&I Club’s claim for indemnity from the IOPC Fund 1971

Maurice Thompson and Joel Cockerell

In a recent decision<sup>1</sup>, the English High Court held that the 1971 International Oil Pollution Fund was immune from a P&I Club’s claim for indemnity as there was no contract between the parties that amounted to a loan or a transaction for the provision of finance. This decision, and the subsequent conduct of the 1971 International Oil Pollution Fund, will affect oil pollution compensation payments until a legally binding agreement can be reached.

### Background

Assuranceforeningen Gard Gjensidig (the Club) commenced legal proceedings in England and Venezuela against the 1971 International Oil Pollution Compensation Fund (the Fund) seeking declarations that the Fund should be liable to indemnify it in respect of liability the Club had incurred towards Venezuela, courtesy of a judgment at first instance in Venezuela in which the Club and its member, owners of the vessel “NISSOS AMORGOS”, were found liable for some USD 60 million plus indexation and costs for the 1997 grounding of the vessel and resulting oil pollution.

As previously [reported](#), the English Court had granted the Club a freezing order in respect of the assets held by the Fund, finding that the Club had “a good arguable case” in respect of its English proceedings.

The Fund’s subsequent challenge of the jurisdiction of the court is the subject of this legal update. The challenge was brought on the grounds that the Fund was immune from the jurisdiction pursuant to article 6(1)(c) of the *International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979* (the Order). The court accepted this argument and held that the Fund was immune from the Club’s action, and that the court had no jurisdiction over the claim.

### The decision

The Club argued that it had a contract with the Fund, made partly orally and partly in writing, so that the established practice and procedure would be followed in relation to the “NISSOS AMORGOS”, whereby the Club would fund the agreed interim payments and joint costs, up to an amount equivalent to the limit under the *Convention on Civil Liability for Oil Pollution Damage of 1969* (CLC Limit), following which the Fund would meet any further payments, up to the limit of the *International Fund for Compensation for Oil Pollution Damage 1971*.

The Club argued that the contract was a loan or an agreement for the provision of finance, and, as a result, the Fund was not immune from suit and legal process pursuant to article 6(1)(c) of the Order.

### Existence of the Agreement

The court held that the alleged contract was neither an express written agreement, nor one that arose wholly through conduct. The alleged contract arose out of what was said in meetings, and in writing, and was allegedly accepted by the Club’s conduct in paying claims.

However, the court held that it was not appropriate to approach the matter with the presumption that there was an intention to create legal relations. It held that, in a hybrid case such as this, where there was no expressly stated offer to contract in the terms alleged, the onus was on the party claiming the existence of a binding agreement to prove that there was an intention to create legal relations.

<sup>1</sup> Assuranceforeningen Gard Gjensidig v International oil Pollution Compensation Fund [2014]

The court distinguished between a promise and a statement of policy, and held that it was impossible to construe the facts to support an argument that an offer had been either expressly or impliedly made. The court considered that the conduct alleged was equally consistent with the creation of a non-contractual expectation. Accordingly, the court held that although there was an expectation that the consecutive payment arrangement would be followed, there was no legally binding contract, and the Fund was entitled to rely on its strict legal rights if it chose to do so.

The court, therefore, held that there was no offer or agreement as alleged and, even if there was, there was no intention to create legal relations.

#### **Exception to immunity from jurisdiction**

The court held that the Fund enjoyed immunity pursuant to the Order, “no more, no less” and that, as the alleged agreement fell within the scope of the Fund’s “official activities”, the Fund had a prima facie right to immunity AND it was for the Club to establish that the agreement fell within one of the exceptions.

The court concluded that, even if there was a “consecutive payment arrangement”, it was not a loan. Moreover, the court determined that such an agreement was for the payment of claims, and was not for the provision of funding, so it could not be held to be a “transaction for the provision of finance”. Accordingly, the court held that the Fund was immune from the Club’s action, and that the court had no jurisdiction over the claim.

#### **Comment**

In the week following this judgement, the Fund’s Administrative Council passed a resolution to wind up the Fund with effect from 31 December 2014. In responding to the decision, the Fund’s Director stated: “*that it was with great regret that the International Oil Pollution Compensation (IOPC) Funds’ relationship with the P&I Clubs had been damaged*” and expressed his sincere hope that, notwithstanding the judgement, the IOPC Funds and the P&I Clubs could reach an agreement to continue to work together to compensate the victims of oil pollution damage.

The International Group’s Chief Executive has stated that, as a minimum, a new legally binding and enforceable agreement would be needed if streamlined claims handling was to continue. The judgment will have ramifications for oil spill compensation in the short term, as shipowners and P&I Clubs will be faced with little choice but to follow the prescribed approach where there is a risk that the CLC limit will be exceeded. This may delay payment of compensation.

This decision to wind up the Fund also throws into question the continued co-operation between the Clubs and the remaining IOPC Funds.



## The “GOLDEN ENDURANCE” – Court considers anti-suit injunction against Moroccan proceedings

Simon Culhane and Conor McStravick

In the “GOLDEN ENDURANCE”, the court held that it was at least seriously arguable that an English law clause contained in an unsigned charterparty was incorporated into bills of lading, thus allowing for English proceedings to continue where there were associated foreign proceedings.

### Facts

The Claimant was the owner of the “GOLDEN ENDURANCE”<sup>1</sup> (the Vessel), which had been chartered to ship a cargo of wheat bran pellets to Morocco from three locations in Gabon (Owendo), Togo (Lomé), and Ghana (Takoradi) in June and July 2013. It became apparent, upon the Vessel’s arrival at Casablanca, on 2 August 2013, that the cargo was damaged due to the presence of live insects and wet, black mould.

Each shipment was subject to its own individual bill of lading, and all provided for “freight payable as per Charter-Party dated 11 June 2013”. However, the charterparty dated 11 June 2013, which was attached to an email recap, was both unsigned and only partly completed. Both, the email recap and the unsigned charterparty provided for arbitration in London and for English law.

Each of the bills of lading cited the 1978 edition of the conditions of carriage on their front pages, and then set them out on the reverse page, except for the Lomé bill, which cited the 1978 edition on its front page, but set out the conditions of the 1994 edition on the reverse.

### The claim

The first, second and third defendants (subrogated insurers of the fourth defendant, the buyer) commenced proceedings against the shipowners (Claimant) in the court in Morocco, seeking a recovery in respect of the cargo damage. The claimant obtained an interim anti-suit injunction from the English Court, restraining all defendants from continuing the Moroccan proceedings. The claimant also sought a declaration of non-liability,

damages for breach of the contracts of carriage resulting from the fourth defendant’s failure to discharge the cargo, and a final anti-suit injunction.

In addition, the claimant commenced London arbitration in respect of the Lomé bill of lading. The arbitration was contested by the defendants who sought, before the English court, to rely on the bill’s reference, on its front side, to the 1978 edition which they said did not incorporate an English law and London arbitration clause.

The defendants also challenged the English Court’s jurisdiction.

### Issues

Several issues were identified by the court, including (but not limited to):

1. Were the defendants’ correct to submit that the 1994 edition terms were not incorporated into the Lomé bill of lading, and hence, that the arbitration provisions in the email recap/unsigned charterparty could not be incorporated?
2. Did the email recap and unsigned charterparty, which provided for arbitration in London and English law, govern the bills of lading?
3. Could the claimant show that England and Wales was clearly the more appropriate forum to deal with the claims, and not Morocco?

<sup>1</sup> Golden Endurance Shipping SA v (1) RMA Watanya SA (2) AXA Assurance Maroc SA (3) WAFA Assurance SA (4) Dalia Comedex SA [2014]

## Decision

### Lomé bill of lading

The court held that the conditions on the Lomé bill of lading were set out clearly on its reverse. The Judge held that, if construing the bill in a business sense, the conditions incorporated were those set out in the bill itself (1994 edition), rather than those incorporated by a reference on the front page (1978 edition).

Despite there being a number of blank sections within the charterparty, it was held that none of these were significant enough to suggest insufficient consensus for there to be a contract. The Judge was satisfied that the charterparty was the document to which the conditions of carriage, on the reverse of the bills, referred. The charterparty was said to have been documented in such a way that its terms were deemed to be “readily ascertainable”. This is a reference to the “EPSILON ROSA”<sup>2</sup> which held that, in the event a bill of lading includes incorporating words, then it suffices that the charterparty has been documented in such a way that its terms are “readily ascertainable”, even if no formal charterparty has been drawn up.

The court granted a final anti-suit injunction with regard to the Lomé bill of lading (1994 edition) which incorporated a London arbitration agreement.

### Owendo and Takoradi bills of lading

With regard to the two remaining bills of lading (1978 edition) which were governed by English law, but which contained no choice of forum (i.e. in respect of which the London arbitration clause was not incorporated), the anti-suit injunction was denied, because the court would not restrain a party from bringing foreign proceedings on the sole ground that the foreign court would not apply the proper English law of the contract. Following the approach adopted in the “LUCKY LADY”<sup>3</sup> and the “CHANNEL RANGER”<sup>4</sup>, the court held that England was the natural forum because the Moroccan Courts would apply the Hamburg Rules whereas the English Court would apply English law (as the law governing the contracts of carriage chosen by the parties) which would be more favourable to the owners, if it led to the application of the Hague Rules.

The court stated that the statutory incorporation of the Hague Visby Rules, by virtue of the Carriage of Goods by Sea Act 1971, had not created a separate matter of public policy (the claimant’s counsel submitted that there was a public policy that the English Court should protect its jurisdiction, where a foreign court would not apply the English proper law of the contract, by reference to Lord Goff in *Airbus Industrie G.I.E v Patel*<sup>5</sup>), nor incorporated those rules into a kind of contractual provision which created an exception to the principles that an English law clause, unaccompanied by an English jurisdiction clause, did not ensure an English forum. Neither did it turn a choice of another appropriate forum into unconscionable conduct, or conduct evasive of English public policy.

## Comment

Several points arise from the decision in this matter. Firstly, in relation to the Lomé bill, the court was not prevented from incorporating the arbitration clause of the charterparty despite the conflicting references to the 1978 conditions and the 1994 conditions. It would therefore appear that, so long as the relevant clause is set out clearly, then any potentially conflicting references to another set of conditions will not take precedence.

Secondly, the anti-suit injunction was discharged for the Owendo and Takoradi bills, but maintained for the Lomé bill of lading in support of the London arbitration agreement. The court refused to uphold the anti-suit injunction for the first two bills merely on the grounds that the foreign court would not apply the English law, being the proper law of the contract.

Finally, in relation to the Owendo and Takoradi bills, although the anti-suit injunction was discharged, it was nevertheless held that the English Court had jurisdiction and was the natural forum (not Morocco) because it would apply English law (specifically, the Hague Rules) whereas the Moroccan Court would apply Moroccan law (i.e. the Hamburg Rules), which would be less favourable to owners, and would deprive them from the benefit of their bargain. Mr Justice Burton declined to uphold the anti-suit injunction, but also refused to set aside the English proceedings in relation to those two bills, leaving the door open for both the English and the Moroccan proceedings to continue.

<sup>2</sup> [2003] 2 Lloyd’s Rep 509

<sup>3</sup> [2013] 2 Lloyd’s Rep. 104

<sup>4</sup> [2014] 1 Lloyd’s Rep. 2014

<sup>5</sup> [1999] 1 AC 119

## Recast Brussels Regulation – EU Regulation 1215/2012

*Marcia Perucca*

New rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters apply in the EU from 10 January 2015. EU Regulation 1215/2012 (the recast Regulation) replaces EU Regulation 44/2001 (the Brussels I Regulation) for proceedings commenced on or after that date.

### Changes to the *lis pendens* rules

One of the most heavily criticised aspects of the Brussels I Regulation related to the interpretation of Article 27, which provided that, where proceedings were brought first in one EU Member State, all other EU courts had to stay any proceedings involving the same parties and same cause of action (pending the decision of the first seised court on jurisdiction), even when proceedings were brought in breach of an exclusive jurisdiction clause. This encouraged “torpedo” actions whereby proceedings were commenced in one EU court to delay proceedings in the court expressly chosen by the parties in an exclusive jurisdiction clause.

Under the recast Regulation, where there are concurrent proceedings in the courts of two or more Member States, generally it is the court in which proceedings are commenced first which takes priority. However, the new rules give the court which is seised of the proceedings by virtue of an exclusive jurisdiction agreement the freedom to decide on its jurisdiction, and progress the litigation regardless of whether or not it is first seised; and any other EU court is required to stay its proceedings, effectively reversing the “first in time” rule in such cases.

### Interface between the recast Regulation and non-EU matters

There are, broadly speaking, three aspects to such matters: 1) jurisdiction agreements involving non-EU courts or between non-EU parties; 2) the existence of non-EU proceedings; and 3) non-EU defendants.

#### Jurisdiction agreements

Article 25 of the recast Regulation provides that where the parties have agreed that a court of a Member State is to have jurisdiction, then that court shall have jurisdiction. Under Article 25, the parties’ domicile is irrelevant, widening the scope of jurisdiction agreements caught by the recast Regulation.

If a non-EU court is specified in a jurisdiction clause, then such an agreement will still fall outside the Regulation.

The absence of an express provision in the recast Regulation allowing Member State courts to decline jurisdiction where parties have contractually agreed that the courts of a non-EU state have jurisdiction means that proceedings may continue in an EU court (for example, on the basis that the defendant is domiciled in that state) in breach of a jurisdiction clause.

#### Non-EU proceedings

Articles 33 and 34 provide EU courts with discretion to stay proceedings where the same or related matters are already before the courts of a non-EU state.

However, this discretion can only be exercised where the non-EU proceedings are first in time, and where jurisdiction in the EU proceedings is based on Articles 4 (domicile), 7, 8 and 9 (special jurisdiction). In addition, the judgment of the non-EU court must also be capable of recognition and enforcement in the EU Member State seised.

#### Non-EU domiciled defendants

Generally, the local law of the EU court seised will continue to apply to determine whether that court has jurisdiction over a defendant domiciled outside of the EU. Article 25 is one of the important exceptions, and an EU court will have jurisdiction over a defendant domiciled in a non-EU State, in cases of jurisdiction clauses in favour of EU courts.

However, key alternative grounds for jurisdiction remain restricted in scope to defendants domiciled in Member States. For example, Article 7(1), which provides that, in respect of contractual claims, the courts of the place of performance may have jurisdiction, and Article 7(2), which provides that claims in respect of torts may be brought in the courts of the place where the harmful event occurred or may occur.

### **The arbitration exception**

Following the ECJ decision in *Allianz SpA v West Tankers Inc.* [2009], the interface between the Brussels I Regulation and arbitration became problematic as the ECJ held that the English court could not issue an anti-suit injunction to protect a London arbitration agreement where proceedings had been commenced in Italy, and also held that the Italian court could determine issues relating to the applicability of the arbitration agreement.

The recast Regulation restates the arbitration exception and confirms that proceedings relating to arbitration fall outside of its scope. In addition, a new article provides that the Regulation shall not affect the application of the New York Convention and a new Recital 12 emphasises the free-standing nature of arbitration.

Recital 12 expressly excludes certain judgments on arbitration agreements from the scope of the Regulation, particularly those determining whether or not an arbitration agreement is null and void

On the other hand, Recital 12 also provides that “*where a court of a Member State...has determined that an arbitration agreement is null and void...this should not preclude that court’s judgment from being recognised or...enforced in accordance with this Regulation.*”

It follows that any court proceedings brought to support an arbitration (including enforcing or challenging an award and deciding the validity of an arbitration agreement) fall outside the scope of the Regulation, and the court which is not first seised can decide the matters in relation to this arbitration. On the other hand, other EU courts will remain permitted to reach their own decisions as to the validity of an arbitration agreement and, in case they decide that the agreement is not valid, proceed to issue a judgment on the merits. Whilst their decision on the validity of the arbitration agreement will not be enforceable under the recast Regulation, the judgment on the merits will. Importantly, the recast Regulation does not appear to authorise an EU court to grant an anti-suit injunction in relation to proceedings in another EU court brought in breach of an arbitration agreement.

As a result, there is still a risk of irreconcilable judgments on the same cause of action if a EU court reaches one conclusion on the merits (after ruling the arbitration agreement invalid) and an arbitral tribunal reaches a different conclusion elsewhere. Potentially, both the court judgment could be enforced (under the Regulation) and the arbitral tribunal decision (under the New York Convention). It would appear from the wording of the recast Regulation that the arbitral award would prevail as it provides that the New York Convention takes precedence, but, ultimately, it may be up to the ECJ to rule on this in the future.



## Emission Controlled Areas – New regulations for 2015

Martyn Haines

From 1 January 2015, all vessels operating in emission controlled areas (ECAs) are prohibited from burning fuel with a sulphur content of more than 0.1%. Prior to 1 January, the limit was 1%, so a considerable decrease.

The implementation of the provisions of Annex VI to IMO MARPOL 73/78 Convention, on 1 January 2015, highlights the need for shipowners and operators to monitor the correct delivery of bunker fuels to avoid the risk of port stay control sanctions and fines, as well as the risk of possibly prejudicing any claims against the oil suppliers.

Presently, there are four IMO adopted ECAs: the Baltic Sea, the North Sea and the English Channel, North America and Canada. Other areas are under consideration, including: Australia, Japan, the Mediterranean and Norway, and these may be proposed as ECAs in the future.

Whilst there are various solutions to meeting the new regulations, such as passing the ship's main engine exhaust gas through a scrubber to remove sulphur before emission from the funnel or using an alternative fuel, such as LNG, the most common method will most likely be to burn low sulphur fuel oil. These distillate fuel oils are more expensive to purchase, and this could result in financial pressure on shipowners and operators, and possibly lead to consideration being given to sourcing fuels from less traditional suppliers offering cheaper fuel bunker sale contracts.

The IMO has implemented regulations to ensure that supply, as well as the actual burning of the fuel, is in compliance with the new rules, as they recognise this is the first level of control. Irrespective of what is said to be purchased, upon delivery to the ship, the bunker delivery must state information including the name, address, and telephone number of the marine fuel oil supplier, product name(s), quantity, density and sulphur content. Also, and importantly, a declaration signed and certified by the fuel oil supplier's representative "that the fuel oil supplied is in conformity with the applicable subparagraph of regulation 14.1 or 14.4 and regulation 18.3 of Annex VI" must be provided.

All vessels are required to retain the bunker delivery note on board for a minimum of three years.

The second level of control is the ship's crew who are there to ensure, in respect of the ECA compliant fuel oils, that bunkers are not loaded into part filled storage, settling all service tanks, and that such fuel oils do not become mixed with other high sulphur content fuel oils. This fuel could actually be used within the ECAs and would exceed the applicable limit.

The third level of control is bunkering sampling which protects both the shipowners and operators, and can also be used to identify rogue suppliers.

Guidelines have been issued to enable the correct sampling of fuel oil for determination of compliance with MARPOL Annex VI. Details of specific actions to be taken by the ship are provided, along with a caveat that local regulations may dictate sampling procedures, including location of the sample being taken. In the absence of both a correct delivery note and a representative sample, flag states are to be advised.

The vessel's crew have to be made fully aware of the correct sampling procedures and trained in their application.

There are three sets of samples:

- A. **Representative**, which is an average for the total volume sampled
- B. **Primary**, which is the representative sample of the fuel delivered to the ship, and throughout the bunkering period, obtained by the sampling equipment positioned at the bunker manifold of the receiving ship
- C. **Retained**, sample which is taken and tested in accordance with MARPOL regulations, and is derived from the primary sample

The regulations are thorough and include the correct use of sampling equipment, cleanliness of the sample container to avoid contamination, sealing of the manifold collection container, and the requirement for the retained samples to have a tamper proof security seal. The seal must have a unique means of identification, and should be installed by the supplier's representative in the presence of the ship's representative.

The sample container must be labelled with the following information, and should be secured to the retained sample container:

1. Location at which, and method by which, the sample was drawn
2. Date of commencement of delivery
3. Name of bunker tanker/bunker installation
4. Name and IMO number of the recipient ship
5. Signatures and names of the supplier's representative and the ship's representative
6. Details of seal identification
7. Bunker grade

To facilitate cross-reference, details of the seal identification may also be recorded on the bunker delivery note.

Representative fuel oil samples are to be retained until the subject fuel is substantially consumed, but not less than 12 months from the date of delivery

The shipboard practice does not end with the sampling. Outside the ECAs, fuel oils with a sulphur content exceeding 0.1% may be burnt, but this brings in the need for vigilance by the ship's crew to clearly document the time and location of the switch-over of fuels, ready for inspection by the port authorities.



## What's new?

A series of our most recent briefings on the latest legal developments within the marine sector.

### **The “LONGCHAMP” – Expenses incurred negotiating down a pirates’ ransom demand allowable in general average**

The “LONGCHAMP” case examined how Rule F of the York-Antwerp Rules (on substituted expenses) should be interpreted when assessing whether the substituted expenses of negotiating down a ransom demand should be allowed in general average.

Andrew Nicholas and Stephanie Morton

### **The “CHANNEL RANGER” – The Court of Appeal examines the incorporation of Law and Jurisdiction charterparty clauses into negotiable bills of lading**

The Court of Appeal confirms some flexibility is to be retained over the incorporation of Law and Jurisdiction charterparty clauses into negotiable bills of lading.

Andrew Bicknell and Jennifer Wheeler

### **Ebola: effects on shipping**

The outbreak of the Ebola virus has been causing widespread international concern. This paper discusses the repercussions on the shipping sector.

Ed Mills-Webb and Harriet Thornton

### **New US sanctions against North Korea**

On January 2, 2015, President Obama issued an Executive Order imposing new sanctions against North Korea. According to a Treasury Department press release, the sanctions were issued in response to the North Korean government's “numerous provocations, particularly the recent cyber-attack targeting Sony Pictures Entertainment and the threats against movie theaters and moviegoers.”

Douglas Maag

### **President Obama announces significant easing of Cuba sanctions**

President Barak Obama has announced that his Administration “is taking steps to chart a new course in [US] relations with Cuba.”

Douglas Maag

### **EU clarifies its sanctions against Russia**

The Council of the European Union has introduced amendments to its sanctions contained in Regulation 833/2014, which target “Russia’s actions destabilising the situation in Ukraine”.

John Whittaker



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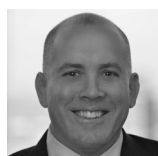
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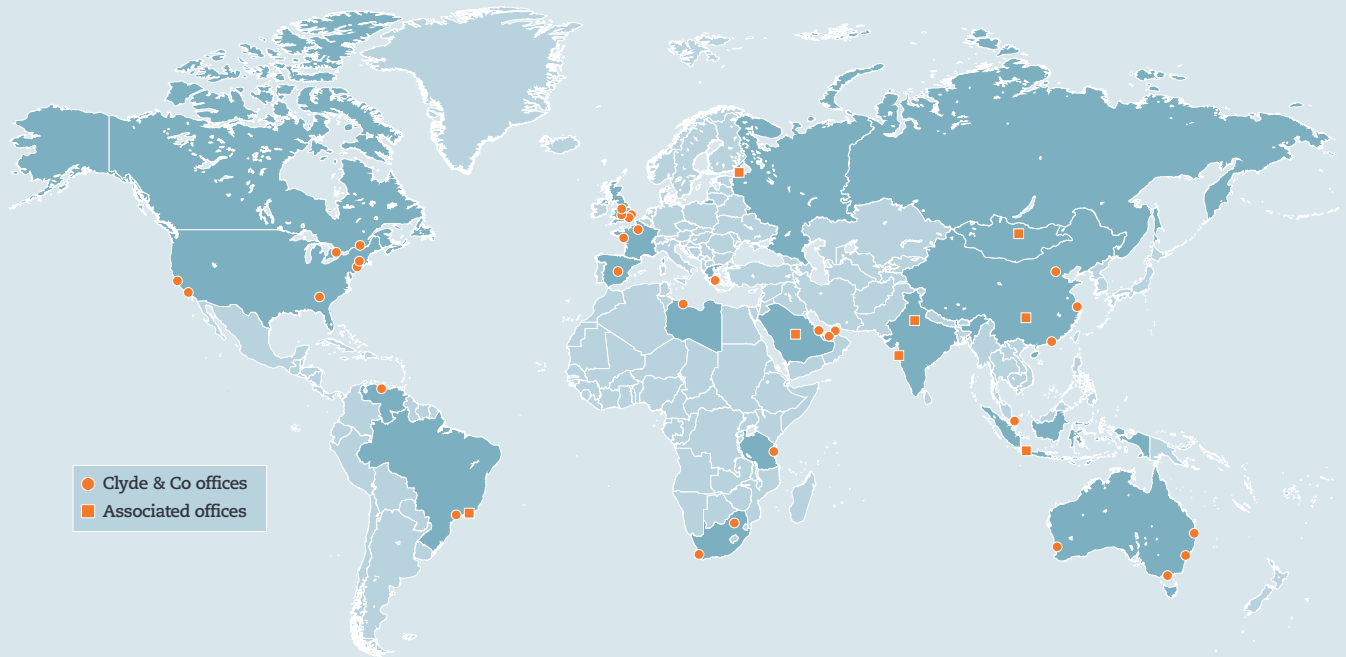


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