FIRE ON BOARD A SHIP: REPERCUSSIONS IN MARITIME LAW AND MARINE INSURANCE LAW

by

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To delve into the present topic, it is relevant to present a concrete example, a situation where major principles of maritime law and marine insurance law were put into operation facing a burning ship.

THE FACTS

On January 3, 2019, the Ship YANTIAN EXPRESS, owned by Hapag Lloyd, a German company domiciled in Hamburg, caught fire during her voyage from Colombo, Sri Lanka destined for the Port of Halifax, Nova Scotia, Canada. It is of interest to point out that Hapag Lloyd owns in excess of two hundred ships, all of which are exclusively owned by Hapag Lloyd. This company does not believe in one ship companies registered in flags of convenience jurisdictions such as Vanuatu or Marshall Islands or Liberia.

When the vessel caught fire during her voyage, immediately salvage vessels came to her rescue and particularly the rescue of her crew. It is one of the most terrifying experiences to be a crew member when a ship catches fire. Just think about it. Where can the crew member find a safe place to avoid the fire? In the explosion and fire which occurred on the MSC FLAMINIA in July, 2012, three crew members died instantly.

In any event, the crew on the M.V. YANTIAN EXPRESS (8 officers and 13 crew) was evacuated entirely on January 7 by the tug SMIT NICOBAR with no injuries. The fire was eventually controlled by SMIT with the assistance of 5 crew members who reintegrated the vessel.

The fire occurred on deck at the bow section of the ship and subsequent investigation showed that the cause of the fire was spontaneous combustion of a cargo of coconut pellets in one container which spread throughout the bow section of the vessel.

The vessel was towed to Freeport, Bahamas as port of refuge on February 4, 2019. On January 25, Hapag Lloyd declared General Average and Richards Hogg Lindley was appointed as the Average Adjuster.

GENERAL AVERAGE LOSS

This leads us to the first maritime law and marine insurance law principles.

General Average was practiced many centuries ago by the Phoenicians who understood what it meant to apportion the risk in a maritime adventure. General Average contribution by jettison was referred to in the Digest of Justinian of the sixth century A.D. citing the Law of Rhodes or Rhodian Law which stated:

> "The Rhodian law decrees that, in order to lighten a ship, merchandise has been thrown overboard, that which has been given for all should be replaced by the contribution of all."

Now, the potential liabilities of both shipowners and cargo owners to contribute to general average losses have themselves become insurable risk in marine insurance law.

It is not possible for me at this stage to delve in detail into the law of General Average, but suffice it to state that it deals with an ocean marine loss, composed of the voluntary sacrifice to save the cargo, the vessel and life, and is subjected to extraordinary expenses which may include towing, extinguishing a fire or the jettison of the cargo.

Practically speaking, all the cargo is seized. The amount of General Average loss is determined and all parties contribute to the loss based on their cargo's value whether their shipment was damaged or not.

The adjustment of the General Average is based on the York Antwerp Rules.

So, once the Average Adjuster Richards Hogg Lindley was appointed, all the cargo interests had to either pay a cash deposit for uninsured cargo or, through their cargo underwriters, had to provide a general average security and a salvage security.

In Freeport, it was determined that close to 200 containers were a total loss and in excess of 460 containers were suspected as damaged. The M.V. YANTIAN EXPRESS carried close to 4,000 containers.

The Average Adjuster determined that the General Average Security was to cover 28% of the value of the cargo and the Salvage Security was to cover 32.5% of the value of the cargo.

In cash, the total amount of the deposit was 60.5% for the uninsured cargo.

Thus, a cargo owner who may have had a cargo valued at $100,000.00 was obliged to pay $60,500.00 to obtain delivery of his cargo.

Three forms were required to be provided by the Average Adjuster, Richards Hogg Lindley:

1. Salvage Security (32.5% cash deposit for Insurer's guarantee);
2. Average Bond form (promise to pay future adjustments);
3. A copy of the cargo Invoice.

Note the relevant forms exhibited herein.

This then is the first part of the application of maritime law and marine insurance law. No release of cargo was possible unless Underwriters provide Salvage and General Average Guarantees or cash.

The General Average claims will take several years to resolve.

P & I CLUB LETTER OF UNDERTAKING

The second stage of the involvement of maritime law and marine insurance deals with the voyage to the port of Halifax.

After the M.V. YANTIAN EXPRESS arrived in Freeport, Bahamas, it took more than four (4) months for her to finally complete her voyage and discharge at the Port of Halifax. She arrived in Halifax on May 21, 2019 and was faced with the task of discharging 3,200 containers. When she arrived in Halifax, 1/3 of the containers that survived the fire did not put up security or pay cash as per the Average Adjusters determination.

As of today there are less than 10 containers that remain unclaimed at the Port of Halifax.

This is the stage at which the P & I Club and the cargo interests clash swords.

As soon as the vessel arrived at the Port of Halifax, we, as cargo lawyers representing more than 1,000 containers, threatened to arrest the M.V. YANTIAN EXPRESS.

Although it is not customary in our practice to threaten arrest or, in fact, arrest *in rem* a liner vessel (we usually only arrest tramp vessels), in this particular case, due to the magnitude of the claim, we were prepared to arrest the vessel.

The lawyers for Hapag Lloyd and its P & I Club appeared, and we settled with obtaining of Letter of Undertaking based on the value of the ship, in excess of US$11.5 Million.

We were contemplating the eventual arrest of other Hapag Lloyd vessels that would sail into Canadian waters, but we were faced with the 2014 Canadian Federal Court

decision of *Westshore Terminals Limited Partnerships v. Leo Ocean, S.A.*, 2014 FCA 231, which held that one can arrest the defaulting ship or a sister ship, but not both. Thus, even though many Hapag Lloyd vessels berth in Canada, we could only arrest one Hapag Lloyd vessel, and in this case, the defaulting ship, namely the M.V. YANTIAN EXPRESS.

Out of the 3,300 containers that were discharged in Canada, a considerable portion of the containers were destined to the United States of America. Although, according to section 46 of the Canadian Marine Liability Act, we had jurisdiction to handle all of these claims, we decided to keep jurisdiction over the containers to be ultimately delivered in Canada and to pass on to our American colleagues the containers that required final delivery in the United States, principally New York.

Our American colleagues were immediately faced with an action in limitation of liability according to an American limitation of liability statute, and the limit was set at approximately US$15 Million based on the tonnage of the vessel. This claim is presently pending in the New York Court.

In Canada, we have ratified the 1976 Limitation Convention, but Hapag Lloyd has not created a limitation fund either in Canada or any other jurisdiction which is a signatory to the 1976 Limitation Convention. This means that for the time being, all the claims being asserted in Canada are not, for now, subject to limitation.

Presently, we are faced with attempting to solve time bar issues and deciding whether to sue the owners of the cargo which caused the fire.

There is one very important issue emanating from this fire which is directly related to marine cargo insurance.

MARINE CARGO POLICY

In general the cargo on the M.V. YANTIAN EXPRESS emanated from Southern Asia, including Indonesia, Bangladesh, India and Sri Lanka. This cargo was mainly garment cargo: seasonal fashions for men, women and children, but principally women.

As you are well aware, marine cargo policies do not cover for delay. Thus, in many cases, the marine cargo policies did not cover the losses claimed by consignees of

cargo when invoking the delay in delivery. Remember that the delay was as long as four months. A good portion of the garments were destined for the St. Valentine's Day consumer. Special garments are purchased and worn for this feast day which occurs mid-February.

However, a few valued marine cargo policies have within their terms and conditions a Seasonal Unmerchantability Clause.

The valuation clause usually covers FOB value of the goods (or cost) plus 100%.

A classical Seasonal Unmerchantability Clause would read as follows:

> "In consideration of premiums as charged, this Policy is extended to cover the insured's actual loss in sales caused by a delay in the arrival of goods insured under this Policy. It is understood that this coverage applies only if the delay in arrival is directly caused by a peril insured against by this Policy and that the insured peril occurs after the goods have commenced transit as defined under the Warehouse Clauses of the Policy.
>
> It is warranted that no claim shall be payable under this Clause unless the delay is greater than thirty (30) days from the anticipated arrival date of the goods insured. It is further warranted that the assured must report to this Company any delay which may lead to a loss by the clause as soon as the delay is known to the Insured, but

> no later than fifteen (15) days after the anticipated arrival date of the goods at their final destination. The measure of the loss shall be the value of the goods insured as determined by the Valuation Clause of this Policy, less the salvage value of the goods."

In a particular instance, a consignee of garments (ladies' apparel) had in its Marine Cargo Policy the above valuation clause and Seasonal Unmerchantability Clause.

The garments were delivered at the end of May, 2019, when they should have been available in the retail market at the end of January, 2019. This is somewhat similar to the arrival of Christmas trees for sale after December 25.

The garments only arrived at the end of May, 2019. It was a bit similar to the arrival of Christmas trees after December 25.

The consignee claimed the FOB value of the garments plus 100%, less the salvage, as per the terms of the policy. The Insurer wished to establish the actual loss in sales for 17 weeks (the delay incurred) which meant that only 70% of the garments would have been sold, based on the sales of the last two years. Thus, it deducted 30% of

the FOB value plus 100% and furthermore deducted the salvage. At the end of the day, the matter was settled on a 50-50 basis of the difference.

This is a example of the problems which arise in cases of fire on board a ship and delays in the delivery of the cargo where there is no direct physical damage to the cargo.

Thank you for your attention.

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