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MARINE LAW FIRM

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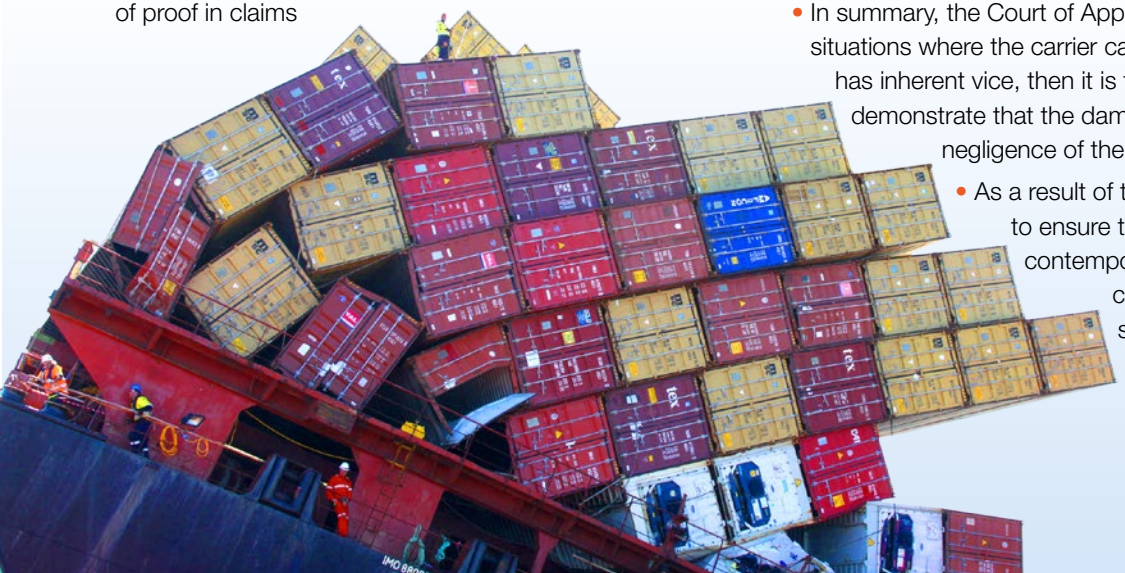
Winter Round-Up

This autumn there have been several recent English Court decisions which affect the world of shipping, cargo and marine insurance.

Below we look at a few of the most significant case law developments.

Volcafe Ltd and others v CSAV [2016] EWCA Civ 1103

- The Court of Appeal has ruled that where a carrier can demonstrate a 'prima facie' case of inherent vice, the burden of proof is then on the cargo interests to establish that the carrier has not meet its obligations pursuant to the Hague/Hague Visby Rules.
- The judgment of Mr Justice Flaux confirmed that the burden of proof in claims involving the Hague Rules is consistent with the common law position, namely that the party alleging must prove. The carrier therefore does not need to disprove negligence before he can rely on the exception in Rule 2 (m) of the Hague/Hague Visby Rules.
- The second important point is the analysis of a 'sound system' of care. Article III Rule 2 of the Hague/Hague Visby Rules places on the carrier an obligation to carry the goods to destination 'properly and carefully'. One indication that the carrier has used a 'sound system' is that it accords with general industry practice. Furthermore, the carrier should also not omit to take the reasonable precautions which an ordinary carrier would take.
- Thirdly, the judge also considered that there was sufficient evidence to support the carrier's defence that damage is inherently inevitable when coffee in bags is carried in unventilated containers.
- In summary, the Court of Appeal has clarified that in situations where the carrier can demonstrate the cargo has inherent vice, then it is for the cargo interests to demonstrate that the damage was caused by the negligence of the carrier.
- As a result of this decision, it is important to ensure that there is good contemporaneous evidence of the condition of the cargo on shipment and on arrival. If the cargo was indeed shipped sound, the burden of proof will generally not be reversed onto the cargo interests.



The 'AQASIA' [2016] EWHC 2514 (Comm)

- The Commercial Court has confirmed that the limitation provision at Article IV Rule V of the Hague Rules, which limits the carrier's liability to £100 per package, does not apply to bulk cargoes.
- A bulk cargo was not classified as a 'package' or unit' so the limit was not applicable. This is on the basis that a 'unit', as defined in the Hague Rules, was not intended to be a unit of measurement, merely a physical item.
- In the Hague Visby Rules, the limitation regime applies to packages or units, and also to the weight of the cargo. Consequently, in the case of bulk cargo, it is clearly only now the weight which should be used to calculate the limit.

'SPAR SHIPPING' Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS [2016] EWCA Civ 982

- The Court of Appeal determined that a charterer's failure to pay an instalment of hire punctually and in advance under a time charter allows the owner to withdraw the vessel from service, but does not entitle them to damages for the loss of the balance of the charterparty.
- The obligation to pay hire in advance is not a condition of the contract but an innominate term. Payment of hire is the essence of the bargain because it enables owners to render the services. Late payment would put owners into a position of uncertainty such that they would be deprived of

Continued overleaf

the benefit of the contract. Consequently, owners would be entitled to terminate.

- If an owner wishes to claim damages in addition to termination, they can possibly only do so if they have contracted on the new NYPE 2015 charterparty.

The 'ATLANTIK CONFIDENCE' [2016] EWHC 2412 (Admiralty)

- Cargo insurers successfully broke the limits for the first time in the UK under the Convention on Limitation of Liability for Maritime Claims 1976 (as amended 1996).
- Following a fire and sinking of the vessel, owners sought to limit their liability by establishing a limitation fund.
- Cargo insurers had the burden of proving that the vessel was deliberately scuttled by owners. On the basis of the evidence, they were able to demonstrate that the owner's version of events was implausible and the judge denied them the right to limit.

In the world of insurance, August was the month for change with the following key developments:

Insurance Act 2015

- Applies to English Law insurance contracts made on or after 12 August 2016.
- The key changes being:

I. the introduction of a new duty of fair presentation of a risk;
II. reforms in the law relating to knowledge of insured and insurer for the purposes of defining what must be disclosed before the inception of a policy;
III. new, proportionate remedies available to an insurer if there is a breach of the duty of fair presentation; and
IV. breach of warranty by an insured will no longer completely discharge an insurer's liability.

- Whilst contracting out is possible, the need to make clear the full effect of the more disadvantageous term has led to less than initially anticipated.

The Third Parties' (Rights Against Insurers) Act 2010

- In force since 1 August 2016 making it possible to claim directly against the insurer where the party the claim is against is insolvent.
- It also gives improved rights to request and obtain information in respect of the identity of the insurer, the terms of the insurance from the insolvent party itself, or from others such as brokers.
- Insurers have the benefit of the insured's liability defences and coverage defences.

Enterprise Act 2016

- Now on the horizon, with the date in force being 4 May 2017.
- Prompt payment of claims becomes increasingly important because damages will be payable by an insurer where a policyholder suffers additional loss because of the insurer's unreasonable delay in payment.