Insurance Marine News

IUMI Blog – Day Four, Legal & Liability Workshop

By admin On September 8, 2021 In Cargo, Insurance Marine News, Keep, Legal, Marine Hull, Marine Liability

There were several presentations on day four of IUMI's annual conference, which was hosted by Charles Fernandez (Chairperson, Legal & Liability Committee, IUMI, UK-London, joint global head of marine at Canopius in London).

In his introduction Fernandez mentioned five topics that had been covered by the committee over the previous year, each of which would merit and article on their own:

- Common interpretation on the test of breaking limitation (e.g., the Prestige case)
- Australia has suggested a methodology for reviewing the limitation of liability in conventions
- Unmanned vessels and what amendments need to be made to the current conventions
- The judicial sale of ships (Uncitral). Working on convention to recognize cross-border sale of ships. Final draft of convention expected to be completed later this year.
- Certain non-IG insurance not compliant with CLC. Canada plans paper at next IMO legal liability of non-compliance of some non-IG insurers on liabilities.

The first speaker was **Dror Salzman, intelligence research manager at Windward,** gave a presentation on global navigation system manipulation, who gave a brief talk on the evolution of deceptive shipping practices.

Salzman noted that AIS was deeply embedded in the shipping industry, but that the technology, introduced in the 1980s as an anti-collision system, had now become the major tracking technology system. It was used to understand shipping routes as well as individual shipping behaviour. Sectors of the marine industry used AIS for claims investigation and loss prevention.

All of this had created significant dependency on a technology that was somewhat outdated and vulnerable, and this had inevitably led to bad actors willing to take advantage of this.

After a brief timeline on how these hacks had progressed in the past decade (Salzman noted that many of the investigations into this involved military rather than commercial shipping), 2021 had seen the biggest leap in activity. He said that there had been systematic flag-manipulation. “Deep Dark Activity” for longer periods of time, and finally, location tampering.

In 2014 Black Hat had showed that it was possible to spoof online providers to generate fake paths, and then in 2019 C4ADS published a report exposing GNSS spoofing.

However, Salzman presented the beginnings of what looked like a systematic abuse of AIS involving a number of vessels, many of which were far larger than earlier examples of a fake location, and many of which were entered with Group P&I clubs.

The disturbing discoveries began earlier this year when Windward detected manipulation of the location of crude oil tanker Berlina (IMO 9224453) was confirmed to have visited Jose Oil Terminal, but whose AIS showed it to be near Guadeloupe, several hundred miles to the north. The vessel was also behaving erratically according to these AIS signals, performing 180 degree turns within a couple of minutes. Windward’s investigation “led us to feel that there was an orchestrated operation to do with specific owners. They were based off Greece and Cyprus. All 10 vessel were sailing under a Cyprus flag.”

Other manipulations were taking place in several parts of the world, not just near Venezuela. Salzman said that the profile of vessels had changed, with during the past 8 to 10 months 110 unique vessels doing manipulation, with 78 of them built since 2000.

Salzman said that in all these cases there had been no suspicions of the vessels prior to the current suspicious activity. He conceded that the investigation had turned out to be tougher than anticipated.

2002-built, Cyprus-flagged, 81,085 gt Berlina is owned by Highmedsea Shipping Ltd care of manager Virosa Shipping of Piraeus, Greece. It is entered with West of England on behalf of Highmedsea Shipping Ltd. As of September 7th, it was anchored off Port of Spain, between Trinidad & Tobago and Venezuela.

Containers Falling Off Container Vessels –Where Do the Losses Fall? Michael Hird (Director, WK Webster, UK-London)

In the second presentation Michael Hird of WK Webster covered the complex topic of where liability would fall in the case of containers falling off vessels while in transit.
As is frequently the case when it comes to allocation of losses after incidents involving large vessels, the situation is complex. Both Hird and Richard Neylon in a subsequent talk made broadly similar points – that most cases were heavily fact-

dependent (making it difficult to draw general principles) and that the position could vary under different regimes.

Hird observed that during a three-and-a-half-month period last winter the northern hemisphere experienced six incidents of large container ships losing a total of more than 3,000 containers (with the One Apus alone losing 1,800), all of them plying the same trade route over the north Pacific to US west coast.

Hird said that the approach of this winter therefore was a cause for concern when it came to container vessels. Would we see more events of this nature, or were last year's events simply bad luck?

One possible cause hypothesized by Hird was that, following the dislocation and macro-shift in trade caused by Covid-19, by last winter freight rates were high, capacity was limited, and there were fewer empty containers on VLCCs travelling from China to the US through the North Pacific. In other words, the system was being tested to the maximum. Should there be a repeat of this situation in 2021/22, could there be a repeat of the accidents we saw last winter?

Hird then went through the process of cargo losses, with cargo underwriters paying first and then being subrogated for any further claims against the carrier.

At every step in the process, Hird mentioned complications. Even at stage one you had ICA, ICB and ICC terms of carriage, plus an estimated 10% to 15% of containers that were not insured at all.

As the cargo underwriter heads to the carrier, the legal complications multiplied, with various types of liability often not hard to indicate, but which then were subject to a large number of restrictions, which varied from convention to convention and from protocol to protocol.

And then there was the complex issue of who would be defined as the carrier? Hird said that on container ships there would be many contractual carriers, citing one recent event in which WK Webster was dealing with 30 to 50 carriers in several jurisdictions.

On the plus side, Hird concluded that in most cases "my suspicion is that after some argument the various parties will separate the claims amicably and I think this might be a beneficial outcome for all parties".

Blocking of An International Waterway –Liability Issues Arising

Richard Neylon (Partner, Shipping, HFW, UK-London), said that he would not be talking about the obvious case, the Ever Given, because (a) his company HFW was representing the owners and (b) it was an open case, and it was never wise for lawyers to discuss open cases where some of the audience might have an interest.

Instead, he looked at a real (and potential) scenario that hit Southampton a few years ago when a car carrier went sideways on a Sunday night at Brambles Bank in the entrance to the port of Southampton.

Generally speaking, this turned out to be a near miss. As the scenario unfolded it transpired that the vessel had not grounded. But it still took three weeks for the vessel to be salvaged.

Neylon went on to cover the myriad of legal areas that would arise as a result of an incident that led to a complete blockage of the channel into Southampton. Suppose it had grounded a couple of miles north? This was a car carrier 180-190 metres. Suppose it was a 400-metre container ship?

Three areas are fairly standard:

- Cargo claims
- Claims under charterparty
- H&M, Salvage and GA

While three others are more bespoke:

The first would be claims from port/terminal authority
The second would be third party claims (vessels and cargo onboard)
The third would be tort of negligence, where no contract exists between the plaintiff and the defendant.

After a detailed analysis of the manner in which such cases could pan out, Neylon concluded that when waterways are blocked there were all the usual casualty liabilities. There were in addition potential additional risks (and protections) as a result of any contracts with the relevant terminal, there was a risk of claims from vessels and cargo subject to an emergency situation which are physically damaged (Pure “economic loss” is not normally claimable under English law).

And if all else fails there is the tonnage backstop. As Michael Hird had observed previously, this high-level protection is rarely deployed, but in the case of the largest event last winter, the ONE Apus, Hird said that the tonnage value of an estimated $85m, while it should be sufficient, could be the closest of all recent such events.

Social Inflation in Marine Insurance
Peter Cridland (Vice President, Claims, TransRe, USA)

Peter Cridland gave a background to “social inflation”, the situation whereby claims levels increased in a non-linear fashion, beyond what would be expected because of the gradual decline in the value of money.

He noted that for many years in Australia, Canada, the US and the UK, actual claim results had exceeded expected claims results. He said that the factors were:

- Rising jury verdict awards
- Changing attitudes towards corporations / the corporate role in society
- Mass adoption of new tactics by plaintiff's counsel (particularly, the reptile theory)
- The growth in the number of for-profit litigation funding companies (third-party funders)

There isn't the space here to go into all of these in detail, but Cridland's discussion of "reptile theory" on the part of plaintiffs (estimated to have achieved an additional $10bn in awards in recent years) was fascinating.

Reptile theory invites jurors to put themselves in the shoes of the plaintiff, engaging "the primeval reptile part of the brain" to provoke feelings that the defendant's actions put the community and/or the jurors and their families at risk.

Although technically out of order, the theory attempts to replace legal standard with a non-legal, but moral "safety rule", requiring the defendant to have taken the "safest" action possible.

Cridland noted that, even though this was technically a violation of legal rules, it had achieved wide success.

As Cridland observed, the legal rules are not the absolute safest rule, for the simple reason that requiring everybody all the time to always follow the safest action would make society non-functional. Technically, defendants should be held to the legal standard, not to the safest standard.

However, reptile theory plaintiffs try to get the defendant to repeat the line "no I did not take the safest action". And it could be difficult for the defendant's legal representatives to draw the judge's attention to this.

In a recent case a trucking company in inland marine got hit with a $1bn award. The plaintiffs had overtly followed the "failure to follow the safest course" line Cridland said that there were now defence strategies against this, but he warned that some defence side attorneys still got blindsided." Insurance claims side people need to be familiar with it", he said, recommending the recruitment of specialty counsel when defending such cases. "Investing $10,000 to save $100,000 is a good business move", he said.

The final speaker was **Nick Shaw (CEO, International Group of P&I Clubs, UK-**London), who talked to Charles Fernandez on **the insurability of financial penalties**, i.e., fines, particularly on why, if fines were only imposed if the law had been broken, they continued to be covered by the Group Clubs.
Shaw gave a brief history of the development of this cover.

Initially they were reviewed in the 1990s and they were concertinaed down to three categories, with all others being discretionary.

These consisted therefore of two main categories

1. Accidental infringements difficult to avoid in course of normal trade, and which therefore are mutual risks shared by all
2. infringements that, while not deliberate, the owner should have taken steps to avoid but are not mutual.

Any reckless or unlawful conduct would prejudice the cover.

Shaw noted that most fines would likely fall within the individual member's own deductible, and the vast majority of the rest would be within the $10m club retention. And those which went through to the group would be very unlikely to head up into the reinsured GXL sector.

Shaw said that the deductibles meant that a member was hugely incentivized to avoid such fines. No moral hazard involved.

In the discretionary area rulings are on a case-by-case basis for each individual club board.

"We want to try to facilitate global trade and to keep business moving", said Shaw**.**