

Shipping Law

Fifth Edition

Simon Baughen

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Preface to the Fifth Edition

The publication of the fifth edition sees a number of important developments in the world of maritime law. In the field of international conventions the most significant development has been the conclusion of the 2010 Protocol to the HNS Convention, which it is hoped will pave the way to this much needed Convention coming into force. Denmark has led the way by becoming the first party to sign the Protocol. The position is more advanced with the 2009 Rotterdam Rules with their ratification by Spain – one down, nineteen to go! Much will depend on whether the US decides to ratify. In the current political climate this looks unlikely.

The situation within Europe has been dominated by twists and turns in the saga of the ‘Italian torpedo’, where a party to an English arbitration agreement runs off to commence litigation in the courts of another EU Member State. In *The Front Comor* proceedings were commenced in Italy in breach of an English arbitration party which led to the issue of an anti-suit injunction in the High Court. On 10 February 2009 the European Court of Justice (Grand Chamber) held that the courts of a Member State should not make such an order when proceedings were under foot in another Member State in accordance with Brussels Regulation – Case C-185/07; [2009] 1 AC 1138. This ruling was then followed by *The Wadi Sudr*, [2009] EWCA Civ 1397, [2010] 1 Lloyd’s Rep 193, where the Court of Appeal declined to grant a declaration that there was a binding arbitration agreement, following the decision of a Spanish Court that there was no arbitration agreement. The Spanish court’s judgment fell within the Brussels Regulation and had to be recognised by the court of another Member State under Article 33(1).

However, what if an English arbitration award were to be obtained before a judgment in the court of another Member State? This was the case in *West Tankers Inc v Allianz SpA*, [2011] EWHC 829 (Comm); (2011) 161 NLJ 551, where the shipowners obtained a final arbitration award in England declaring that they were under no liability to the insurers in respect of the collision. They then sought to convert the award into a judgment against the insurers under s 66 of the Arbitration Act 1996 with the aim of preventing recognition in England of any subsequent Italian judgment in favour of the insurers. Field J held that the shipowners were entitled to convert the declaratory award into a judgment. The case is understood to be proceeding to the Court of Appeal so this is a saga which is set to run and run. Developments in the litigation may, however, be overtaken by amendment to the Brussels Regulation. On 2 December 2010 the Commission put forward a legislative proposal regarding the Regulation which contains new proposals as regards jurisdiction clauses and as regards the arbitration exception.

Conflicts of law issues relating to contractual and non-contractual obligations are now dealt with by the Rome I and Rome II Regulations respectively. Rome I covers contracts made on or after 17 December 2009. There was, however, some uncertainty as to what was the start date for Rome II. In *Homawoo v GMF Assurance SA*, [2010] EWHC 1941 (QB); [2011] ILPr 12, Slade J referred this issue to the European Court of Justice. On 6 September 2011 Advocate General Mengozzi gave an opinion that the Regulation applied only to events giving rise to damage which occurred on, or after, 11 January 2009 – [2011] EUECJ (Nyr) Case C-412/10.

Back in England the courts have been far from idle in deciding shipping law cases. In *The Cendor MOPU*, [2011] UKSC 5; [2011] 1 Lloyd’s Rep 560, the Supreme Court has clarified what constitutes ‘inherent vice’ under an all risks marine insurance policy, holding that only where the fortuity

operating on the goods came from the goods themselves could the proximate cause properly be said to be the inherent vice of the subject matter insured. In *The Eagle Valencia*, [2010] EWCA Civ 713; [2010] 2 Lloyd's Rep. 257, the Court of Appeal has held that, unless stated to the contrary in the charterparty, NOR need not be in any specific form. There must merely be an accurate statement that a vessel is ready to load or discharge as the case may be, and a requirement that NOR be in writing is satisfied by giving NOR by email. In *The Kos*, [2009] EWHC 1843 (Comm); [2010] EWCA 772 (Comm); [2010] WLR (D) 173, the Court of Appeal turned its attention to the relationship between shipowners and charterers following a withdrawal when cargo remained on the vessel and had to be discharged. It held that the shipowners could not claim against the charterers for remuneration for the costs of discharge, either on the basis of an indemnity or under the law of bailment. The shipowners were, however, entitled to recover the costs of the bunkers consumed during the discharging operations.

There have also been two important developments in two industry standard form agreements. First, on 9 May 2011 LOF 2011 was introduced and contains important new provisions in the accompanying LSSA as regards salvaged cargo consisting of laden containers. Secondly, the 1996 Inter-Club Agreement was amended with effect from 1 September 2011 and grants a party which has given security to a cargo claimant the right to claim security from the other party to the charterparty, regardless of whether a right to apportionment has arisen.

Finally, this fifth edition sees the addition of two new sections. The first, prompted by the massive oil leak from the *Deepwater Horizon* rig in April 2010, is a section in Chapter 17 on the liability for oil pollution of operators of oil rigs. The second is a section in Chapter 18 on arbitration.

This edition takes account of the law as of 1 October 2011.

Simon Baughen
October 2011

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