



SPOTLIGHT CMFH

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The “MSC FLAMINIA” – Court of Appeal Affirms High Court’s Position On Who Can Limit Liability

Case reading of the “MSC FLAMINIA” (No. 2) [2023] EWCA Civ 1007

❖ Factual Background

- On 14th July 2012, while the containership “MSC Flaminia” was in mid-Atlantic from Charleston to Antwerp, an explosion occurred in the no.4 cargo hold which led to a large fire onboard. The casualty caused extensive damage to the ship, destroyed hundreds of containers and resulted in loss of three crewmembers’ lives.
- The explosion was caused by some chemical divinylbenzene (“DVB”) cargo, which underwent “auto-polymerisation” process and built up heat and pressure within the containers.
- The Owners of the ship suffered substantial loss related to salvage, permanent repair, disposal of contaminated cargo and burnt metal, and removal of firefighting water. Conti brought arbitration against the charterers of the vessel, Mediterranean Shipping Co (“MSC”), and the arbitration tribunal held that MSC was liable to Conti and were ordered to pay damages of approximately USD200 million in July 2021.
- MSC sought to limit its liability for claims arising from the casualty pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims, as amended by the Amending Protocol of 1996. If successful, MSC would have been able to limit their liability to around GBP28 million, based on the tonnage of the vessel.

The “MSC FLAMINIA” – Court of Appeal Affirms High Court’s Position On Who Can Limit Liability (Cont’d)

❖ The Law

Under the LLMC, a “shipowner” includes charterer for the purpose of the convention (Article 1.2), and shipowner can limit its liability for claims listed in Article 2.1. The most common limitable claims are (emphasis added):

“(a) claims in respect ... loss of or damage to property ... occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom; ...”

In the “*CMA Djakarta*” case ([2004] EWCA Civ 114), which also concerned a large container ship fire, it was established that Article 2.1(a) only covers claim in respect of loss of or damage to property, other than the ship itself.

In consideration of “*CMA Djakarta*” case, MSC’s principal argument was that the damage to the ship was a “consequential loss” resulting from “loss of or damage to property” (the DVB cargo), therefore they can limit their liability for the purpose of Article 2.1(a).

❖ The High Court’s Decision

It was held in favor of Owners that the claim against MSC was a claim for damage to the ship and consequential losses arising from that damage, not a claim for loss of or damage to the property (other than the ship itself) or consequential losses of the same, therefore Owners’ claim did not fall under Article 2.1 of LLMC and MSC cannot limit their liability to that.

The “MSC FLAMINIA” – Court of Appeal Affirms High Court’s Position On Who Can Limit Liability (Cont’d)

❖ The High Court’s Decision (Cont’d)

The reasoning is that Article 2 of the LLMC was concerned with “claims categorization” and not with the more complex matter of factual causation. MSC’s submission sought to mischaracterize the Owners’ claim by reference to causation, but the proper approach, as according to the judge, was to characterize them by reference to their nature. The judge said “*the causal contribution of cargo damage in the damage to the ship does not turn a claim for damaging the ship into a cargo claim.*”

❖ The Court of Appeal Decision

MSC appealed the case, some of the main grounds are that the High Court judge was wrong to hold that Owners’ claims did not fall within Article 2.1 of LLMC, and wrong to treat the arbitration award as a single claim in respect of damage to the vessel, as opposed to a group of claims, some of which were limitable.

Owners argued that a charterer can only limit in respect of claims that originate from an “outsider” (as opposed to “insiders” being those within the extended definition of “shipowner” in Article 1.2, i.e. owner, charterer, manager or operator). In essence, a charterer is not entitled to limit claims where the underlying loss or expense was suffered by the owner itself.

The “MSC FLAMINIA” – Court of Appeal Affirms High Court’s Position On Who Can Limit Liability (Cont’d)

❖ The Court of Appeal Decision (Cont’d)

Court of Appeal dismissed the appeal and held that Owners’ interpretation was in line with the Vienna Convention on the Law of Treaties 1969 and the judicial authority including the case law the “*CMA Djakarta*”.

By reference to the *travaux préparatoires* of LLMC 1957 which was the predecessor of the LLMC 1976, the 1957 convention provided no right to the charterer to limit in respect of claims by an owner to recover losses suffered by that owner. The Court of Appeal determined that the primary purpose of LLMC 1976 was to provide a higher limit of liability, and neither the object nor the purpose of the convention was to extend a charterer’s right to limit beyond the right already conferred to them under the LLMC 1957.

❖ Comment

It remains to be seen whether MSC will appeal the judgment to Supreme Court. Insofar, the precedent is set to disallow an entity classified as “shipowner” under the LLMC from limiting its own liability against claims by another entity that falls within the same category.

The case is also a useful reminder that the Court will interpret international conventions with reference to the international principles of interpretation, particularly those set out in Articles 31 and 32 of the Vienna Convention, which include reference back to predecessor conventions.

Israel-Gaza Conflict: Contractual Implications

The Israel-Gaza conflict has escalated significantly after Hamas launched a major attack in Southern Israel on 7th October. Two important Southern Israeli ports – Ashkelon and Ashdod are being affected, and there may be repercussion of global trade in that region if the conflicts continues and spreads. Below are FAQs relating to charterparty as general guidance only and subject to English law.

❖ Issue of safe port

1. If the charterparty contains a safe port warranty can orders to Israeli ports be refused?

- In relation to port of Ashkelon, the answer is likely to be “yes” as the port has been bombed and the port operation suspended. The position in Ashdod is more ambiguous. It was reported that the port is still working normally, and the Israeli navy maintain a substantial presence in the area. Therefore, Ashdod is unlikely to be considered unsafe. The situations of the ports has to be reviewed on a daily basis.

2. If the charterparty contains a safe port warranty can an order to ports in neighbouring countries be refused?

- There is currently nothing to suggest that the conflict has spread to other neighbouring countries like Lebanon and Egypt, and orders to the ports in these countries cannot be refused on grounds of safety.

3. If there is no express safe port warranty in the charterparty, can one be implied?

- It can be implied but this is difficult. It is most likely to be implied in a time charter with wide trading limits, but not in a voyage charter or time charter trip with named ports. Please consult with claim handlers before making assumption.

4. What if the charter does not include an express or implied safe port warranty?

- There may be other clauses such as war risk clause that would enable owners to refuse calls to affected Israeli ports.

5. Can the owner ask for revised orders if the port becomes unsafe?

- Yes, if it is a time charter. In the case of a time charter the charterer must provide revised orders.
- No, if it is a voyage charter. In the case of a voyage charter there is no automatic right to re-nomination but the parties usually reach an agreement to cancel the charterparty; in the absence of an agreement the vessel would have to wait outside the port until the charter became frustrated (see below).

Israel-Gaza Conflict: Contractual Implications (Cont'd)

❖ FRUSTRATION

- ❑ Charterparties may be frustrated if it is impossible to be performed or their principal purpose is radically changed. It is very difficult to prove frustration under English law. It seems the conflict in Israel is not yet to the stage where frustration argument could start to bear any weight.

❖ CONTRACTUAL CLAUSES: WAR RISK, CANCELLATION etc.

- ❑ Contractual clauses on allocation of war risk will vary, discussion is confined to below some common clauses.

6. **Can an owner refuse voyage orders given by a time charterer to proceed to an Israeli Mediterranean port by relying upon a CONWARTIME 2013 clause?**

- ❑ There is risk exposure for commercial vessels in Southern Israeli ports but there has been no damage to any vessels so far. At current stage, the clause can be arguably relied upon in relation to orders to Ashkelon, but reluctantly to apply in relation to orders to Ashdod. If owners attempt to refuse orders to Ashdod on ground of this war risk clause, it may turn out to be a repudiatory breach of contract.
- ❑ As things currently stand, this clause could not be relied upon to refuse orders to any other Israeli ports.

7. **Who is liable to pay the significantly increased Additional War Risk Premiums (AWRP) in respect of calls to Israeli Mediterranean ports?**

- ❑ If CONWARTIME 2013 or VOYWAR 2013 is included in the charter, then charterers will be responsible for the AWRP.

❖ Delay

8. **If the vessel is on time charter, does she remain on hire during delays?**

- ❑ Yes, unless there is an express clause in the charter providing otherwise (e.g. any force majeure provisions in the charter).

9. **If the vessel is on voyage charter, can Owners claim for the loss of time/delay to prosecution of the voyage?**

- ❑ During cargo operations laytime and demurrage run as usual unless there are specific laytime or demurrage exceptions clauses which are triggered.
- ❑ Once cargo operations have been completed and the vessel's documents have been returned, owners will only be able to claim against charterers for the delay by way of detention where charterers must be in breach of the charter which they would not be if the delay was the fault of neither party.

Israel-Gaza Conflict: Contractual Implications (Cont'd)

10. If cargo operations are delayed does the ASBATANKVOY exceptions clause interrupt the running of laytime or demurrage?

- ❑ No, unless specifically referred to the general exceptions clause does not apply to the running of laytime and demurrage.

❖ FORCE MAJEURE

- ❑ Under English law, there is no common law concept of ‘force majeure’, so the application and effect of a Force Majeure Clause will depend entirely on what the clause states.
- ❑ If there is no such clause, both parties will potentially have to fall back on the English law doctrine of frustration which is notoriously difficult to argue successfully.

11. If the Member has a force majeure clause in the charterparty are owners and charterers obligations suspended?

- ❑ It depends on the specific wording of the clause. Taking example of BIMCO Force Majeure Clause 2022, it defines “actual, threatened or reported war, act of war” and “warlike operations” as being among the Force Majeure events.
- ❑ The formalities of the clause must be followed and applied. The clause does not operate to suspend payment obligations such as hire payment.

- ❑ The clause will permit termination of the charterparty where the parties have agreed to this option and there is no cargo on board.
- ❑ As things stand, the conflict is unlikely to constitute a Force Majeure event unless the vessel had orders to load at Ashkelon and they could not be complied with.

❖ CARGO ISSUES

12. Are owners likely to be liable under any bills of lading issued for any damage to the cargo as a result of the delay to the voyage and the ensuing delayed arrival of the cargo at destination?

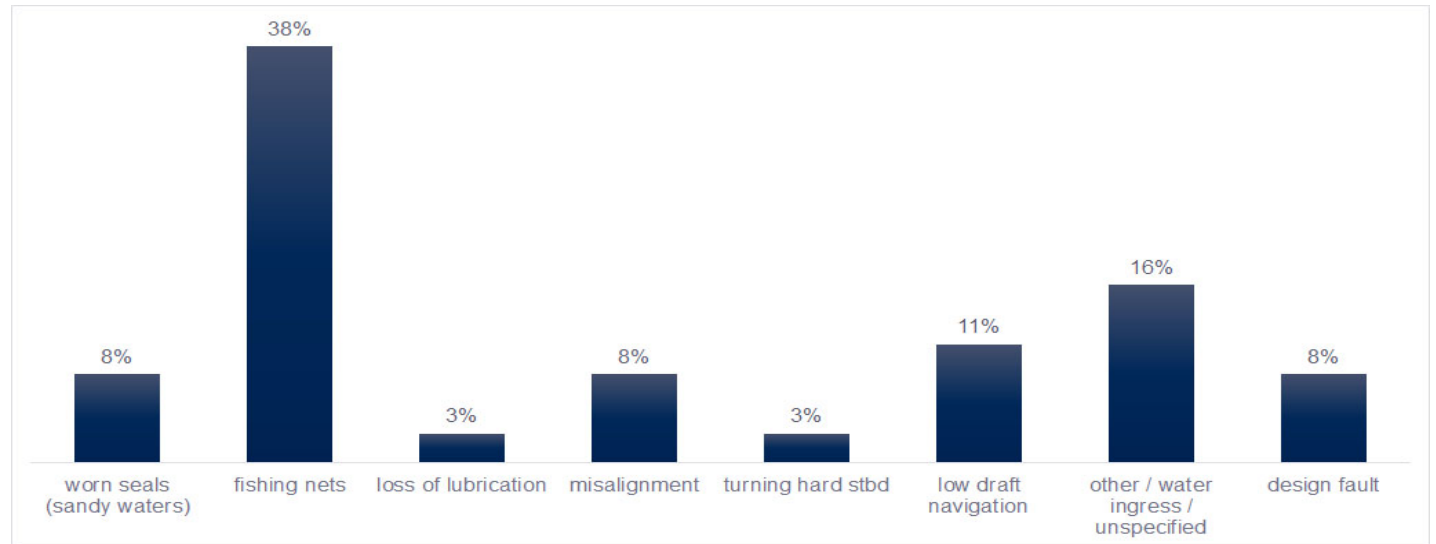
- ❑ On the basis that the bills of lading should incorporate the Hague or Hague Visby Rules, owners will most probably be able to rely upon the defences set out in Article IV r 2, such as (e) Act of war or (q) Any other cause arising without the actual fault or privity of the carrier.
- ❑ Many standard form bills of lading also qualify the discharge port with the protective wording “or so near thereto as she may safely get” which entitles the owners to discharge the cargo at an alternative port where the contractual discharge port is no longer safe. Owners should be able to rely on the wording in defence of any claims for late or non-delivery.
- ❑ Shipowners should undertake an outturn survey to capture the condition of the cargo upon discharge in case it is subsequently damaged.

Loss Prevention: Increase in Stern Tube Damages – A Concerning New Trend

Stern tube-related damage claims are said to have increased considerably over the recent years and such damages are now one of the most frequent claim types in H&M insurance segment.

❖ Root Cause Analysis

- Damage to stern tube used to be considered a straightforward casualty, as it is often caused by contact with a floating object. As per one major H&M insurer's internal investigation regarding all the stern tube damage cases encountered from 2013-2023, the types of vessels that suffer most from such damages are bulkers and containerships, accounting for 53% of the occurrences; and among these 53% cases, the root causes are categorized in the below chart:-



Loss Prevention: Increase in Stern Tube Damages – A Concerning New Trend (Cont'd)

- From the data reflected in the chart, it could be seen that external factors (i.e. fishing nets entanglement, groundings due to low draft navigation etc.) represented 49% of incidents.
- Other than the external factors and design fault, insurers believed there were other factors that greatly affect the life span and condition of the tailshaft.

❖ **A New “Thorn” Of Stern Tube Damages? - The Use Of Environmentally Acceptable Lubricants**

It is observed that, the increase in stern tube damage claims after 2013 may have coincided with the introduction of the revised Vessel General Permit (VGP) requirements by the U.S. Environment Protection Agency (EPA), which require vessels over 79 feet trading in U.S. waters to use Environmentally Acceptable Lubricants (EALs) in all oil-to-water interfaces.

According to the insurers’ analysis, as many as 80% of the incidents investigated involved stern tube seals’ failure with EALs oil in use, whilst the average age of the related vessel was 12 years. A study performed in 2019 by DNV GL discovered key features of EALs’ difference from the traditional mineral oils:

- **Pressure / viscosity coefficient:** under high load operations, the EALs operate with a lower safety margin of the minimum oil film between the tailshaft and the bearings.
- **Viscosity index:** EALs’ viscosity index is significantly higher than mineral oils, and they operate with lower viscosity under lower temperatures.
- **Poor hydrolysis stability:** compared with the traditional mineral oil, even minor water quantities can trigger the hydrolysis reaction of the EALs and affect its characteristics including stability, which could damage the seals resulting in even greater sea water ingress.

Loss Prevention: Increase in Stern Tube Damages – A Concerning New Trend (Cont'd)

❖ A New “Thorn” Of Stern Tube Damages? - The Use Of Environmentally Acceptable Lubricants (Cont'd)

Apart from the potential shortcomings of EALs, insurers concluded that several additional factors play a significant role either in the initiation of damage or in the aggravation of damage, such as:

- Crew awareness and monitoring procedures, especially the presence of water in the EALs.
- Allowable percentage of water as per IACS suggested limits, which do not fully take into consideration the certain types of EAL oils that are prone to give accelerated wear of seals.
- Mixing of EALs with mineral oil during topping up of the aft seal tank.
- Other factors such as sailing for prolonged time with partially-immersed propeller; selection of EALs type; improper past repairs (i.e. seals' bonding); use of non-original / after-market seals.

❖ Loss Prevention Advice: During Vessels' Routine Repairs Or Newbuildings

- Air-type seals are preferred together with use of traditional mineral oil.
- Modify aft seal oil system to the continuous circulation type rather than the static / gravity type. Note some stern tube seals manufacturers have reduced the provided warranty from 5 to 2.5 years for single piping s/t lub oil arrangements for EAL oil.
- Use of multi-sloped bearings' modification at first opportunity in dry dock to ensure better hydrodynamic lubrication between bearings and the tailshaft.
- Verification of shaft alignment from M/E flange to aft end via laser and jack load tests.

Loss Prevention: Increase in Stern Tube Damages – A Concerning New Trend (Cont'd)

❖ Loss Prevention Advice: During Vessels' Operation

- Selection of proper EALs viscosity (for example, EALs in one grade up have higher viscosity) and thoroughly consider the various qualities of EAL being offered in the market to ensure minimum risk of failure.
- Frequent testing of representative oil samples from aft / fwd seals' tanks and stern tube system.
- Retrofit installation of filtering / surveillance systems available in the market.
- Continuous monitoring of bearings' temperature.
- Close monitoring of aft seal oil circulation if such a system is fitted.
- Frequent monitoring of the drain tank in case air-type seals are used.
- Change of aft seals' oil once sea water presence has been confirmed even for minor quantities. Drain water if non-emulsifying EAL is used and water contamination was swiftly spotted.
- Keep a close eye of elevated levels or increasing trend of water content, TAN, bearing / shaft material elements (Tin, Lead etc.) in the lub oil analysis.
- Avoid continuous sailing with partially immersed propeller (if unavoidable, propeller to be used with reduced rpm).
- Properly check condition of rope guard and net cutter during underwater surveys, if these are fitted.



Market Snapshot

Marine War Risk Underwriters Reviewing Israel Exposure

- After hit by a missile attack in early October, Ashkelon, an Israeli southern port with the terminal nearest to Gaza, has been closed. Ships continue to trade to another southern Israeli port Ashdod where the waiting time increased due to tighter security checks and labour shortages.
- According to market sources, the northern Israeli port Haifa is still operating with the maximum operational and manpower as possible, for receiving all types of cargoes including those that was diverted from the direction of Ashdod.
- As per industry sources, war risk underwriters are calculating their exposure to the Israeli war; until mid-October, rates have surged more than tenfold since the attacks.
- While Ashdod and Haifa represent Israel's biggest ports, they account for merely 0.4% of global container throughput; however, any expansion of hostilities beyond Israel's border could introduce risks to vital shipping chokepoints in the region; some underwriters were reviewing cover provisions for Ashdod although Haifa remained unaffected at this stage.

China's Oil Demand Expected To Slow Down In 2024

- China is by far the world's largest importer of crude oil. The International Energy Agency (IEA) forecasts China's oil demand for 2023 would reach 16.29 million barrels per day, that is 1.6 million barrels per day higher than 2022 figure and 1.2 million barrels per day higher than that in 2021.
- Market data showed that by far China has been the largest support for oil demand growth and tanker market. This year China has used VLCCs for 83% of its seaborne crude imports from countries other than Russia, and only 5% on aframax. For Chinese imports from Russia, 63% were carried by aframax and 6% by VLCCs.
- It is expected that 2023's oil demand is a one-off post-covid boost, and 2024 may see slowdown in demand growth. The IEA took a cautious approach with an oil demand increase of only 0.6 million barrels per day for 2024. However, regardless of the forecast of weakening increase, China is still expected to account 50% of global growth in oil demand next year.

Maritime Cyber Risk Report: Shipping Industry Remains "Easy Target", Pays Average USD3.2m In Cyberattacks

- New research conducted by law firm HFW revealed that the maritime industry remains an “easy target” for cyber criminals:-
 - ❑ The average cyber attack in 2023 costing the target entities USD550,000, up from USD182,000 in 2022.
 - ❑ The demands for ransom have also increased, and the average ransom payment in 2023 is USD3.2 million, up from USD3.1 million last year.
 - ❑ 24% of the victims were tricked into transferring funds to criminal organisations.
- In the meantime, it is found that most shipping organisations significantly under-invest in cyber security management. According to the research, a third of the companies spend less than USD100,000 per year, and 25% of the respondents did not have insurance to cover cyber risks.
- As the maritime operational technology and fleet operation management are now almost entirely digital, market observers hope to raise the overall levels of preparedness for cyber security in shipping industry.

Rise In Piracy Incidents In Gulf Of Guinea And Singapore Straits Raises Concern

- According to latest piracy report from ICC International Maritime Bureau (IMB), there were 99 reported incidents of piracy and armed robbery against ships in the first 9 months of 2023, marking an increase from 90 incidents compared to the same period of 2022.
- Among the 99 incidents, 85 vessels were boarded, 9 had attempted attacks, 3 were hijacked and 2 were fired upon. The perpetrators successfully boarded 89% of the targeted vessels, with most incidents occurring at night.
- Although reported violence towards crew is relatively low compared to the past decades, there is still real risk. During the 9 months in 2023, 69 crewmembers were taken hostage, 14 kidnapped, 8 threatened, 3 injured and 1 assaulted.
- The report showed an increase in reported incidents in the Gulf of Guinea, where most of the violence incidents to crew also occurred. There are also worrying signs for the Singapore Straits, Indonesian Archipelago and South America areas as numbers of incidents increased slightly year on year compared to 2022.

Container Carriers Await Relief As Demand Improves On Key Tradelane

- Market analysts expected signs of improving demand for containerships on the transpacific routes and other secondary tradelanes from Asia starting from Q4 2023, as inventories start to be replenished.
- It was forecast that in the first half of 2024, Asia-Europe westbound trade would see growth of 2.9%, and transpacific eastbound trade to grow by 4.6% year on year.
- It was noted that the key secondary trades ex-Asia to Latin America, Africa and the Middle East and Indian sub-continent continued to grow at impressive rates, with August expansion year-on-year at 18.6%, 26.1% and 27.6%, respectively.
- However, the downside issue is the over-capacity, as another 2.6 million TEU of newbuild capacity is to be delivered by the mid-2024, and many of these deliveries are ultra-large vessels to be deployed on Asia-Europe service. Analysts considered strict capacity discipline and massive scrapping will be of critical importance if owners want to prevent further erosion of freight rates.

US Eases Venezuela Sanctions

- U.S. sanctions were in place on Venezuela since 2019 for producing, selling and exporting oil to its chosen markets. The sanctions largely blocked Venezuela's state-run oil company PDVSA. In mid-October 2023, U.S. lifted most restrictions for six months.
- The U.S. decision is made relating to the presidential election in Venezuela, and some market observers expected that the current temporary relaxation was not strong enough to boost Venezuela's oil production and exports significantly.
- Venezuela can now receive direct payment for goods or services under the license issued by the U.S. Treasury's Office for Foreign Assets Control; however, it would take some time to win clearance from buyers' compliance departments and negotiate prices.
- U.S., European and Asian refining firms including Reliance Industries, Tipco Asphalt, Valero Energy, PBF Energy, and Eni are in talks with PDVSA to resume or expand imports of Venezuelan crude. Other potential buyers especially those on the spot market will most likely be requested to prepay for their cargo.

Japan's 'Big Three' Shipping Companies Team Up To Supply Liquid Hydrogen

- Japan is committing to supply 3 million tonnes of hydrogen per year by 2030, 12 million tonnes per year by 2040 and 20 million tonnes per year by 2050.
- Mitsui OSK Lines (MOL), Kawasaki Kisen Kaisha (K Line) and Nippon Yusen Kabushiki Kaisha (NYK) together with Japan Suiso Energy (JSE) have agreed to join JSE Ocean to establish a liquefied hydrogen supply chain in a bid to increase the use of the fuel.
- JSE will establish the world's first large-scale hydrogen liquefaction and transportation technology, involving an initial 30,000 tonnes of hydrogen per year before upscaling.
- JSE will also demonstrate a comprehensive and reliable global liquefied hydrogen (LH2) supply chain, covering hydrogen production, liquefaction, export from Australia, marine transportation, and import.
- The estimated cost to supply the clean energy is about JPY30 per cubic metre in 2030 and JPY20 per cubic metre in 2050 at the point of arrival in Japan.

Singapore To Roll Out Electronic Bunker Delivery Notes From November

- Singapore's Maritime and Port Authority (MPA) will launch a digital bunkering initiative on 1st November, making the city-state the first port in the world to use electronic bunker fuel delivery notes.
- The digital notes will replace physical documents containing information on fuel oil deliveries. Under the initiative, fuel suppliers, ship owners, operators and crew will be encouraged to use mobile and cloud-based applications approved by the MPA to complete and issue bunkering documents.
- The bunkering documents for pre-delivery and post-delivery were transmitted to all parties before the ships departed, the applications will also automatically relay bunkering-related information required by the MPA, reducing compliance costs and improving productivity.
- Over 100 trials involving more than 20 companies have been conducted in Singapore since January this year, and MPA planned to make digital bunkering notes mandatory by end of 2024.

Speculators Snapping Up Bargain Detained Ships In Ukraine

- Market observes that third parties have been moving in to buy ships detained in Ukrainian ports that have been declared constructive total losses (CTLs) after first anniversary of the outbreak of the war on 24th February 2022.
 - Compared to the vessels which declared CTL after major casualty, these vessels' CTLs under war insurance are made arising from detention, and the vessels are often in reasonable condition and maintained by crew. It makes more financial senses for insurers to take over the interests of the assured.
 - The potential dispute is whether the vessel is a genuine CTL. Under the Black Sea Grain Corridor Initiative, there is possibility that a ship can get out from the three designated Ukrainian ports, and such will technically eliminate the constitution of CTL.
- Insurers might opt to settle claims under “compromised total loss”, agreeing with the insured to pay a proportion of the insured value, and sell the vessel to a third party. However, there are challenges on potential crew liability, cargo liability, outstanding liens and mechanics of the sale.
 - Another option is after constructive / compromised total loss settlement, assureds arrange to sell the vessel directly to the third party. Nevertheless, selling a ship is a complex process, and there will be ongoing obligations such as paying running costs, manning required crew and arranging insurance before the title of vessel being transferred.
 - According to the law firm HFW which is said to be engaged in negotiations of 18 of the detained CTL ships, the total loss amount is close to USD700 million. It is observed that quite some speculators are interested in purchasing these detained ships, and they need to undertake a risk analysis to estimate the likely length of lock-up and the value of the ship after being free of detention.

Happy Reading, See You In November!

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Acknowledgments

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