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Trade & Transport News

WELCOME TO THE LATEST EDITION OF PIPER ALDERMAN'S TRADE & TRANSPORT NEWSLETTER. WE DISCUSS BELOW SOME RECENT DECISIONS IN THE TRADE & TRANSPORT INDUSTRY AND HOPE THAT YOU WILL FIND THEM OF INTEREST AND RELEVANT TO YOUR BUSINESS.

Maritime Arbitration Commission set up in Australia

By Frazer Hunt

The Australian Maritime and Transport Arbitration Commission (**AMTAC**) has been established in Sydney and is made up of a panel of maritime lawyers, arbitrators, judges and academics drawn from Australia and overseas, particularly from the Asia Pacific region. The initiative has the support of the Federal Court of Australia (which currently hears most of the maritime disputes) and the Maritime Law Association of Australia and New Zealand (MLAANZ) and will give parties the option to resolve their maritime disputes in Australia, rather than the traditional centres of New York or London.

In announcing the establishment of AMTAC, the Federal Attorney General, Philip Ruddock, noted that Australia's skills in terms of lawyers, judges and arbiters and its proximity to Asian ports makes the Commission a practical alternative for arbitration, particularly as approximately 12% of world trade by volume either comes into Australia or out of Australia by sea.

Whilst there will be savings in legal costs and disputes will be dealt with relatively quickly when compared to some other arbitration centres, the international shipping community will need to be persuaded that it is worthwhile to refer their disputes to arbitration in Australia. Realistically, AMTAC will be competing with LMAA in London where most maritime disputes are currently conducted. Broadly speaking, the LMAA rules provide for a structured arbitration within strict timeframes which are similar to courts in common law countries (such as UK, New Zealand and Australia) whereas the ACICA rules (under which AMTAC operates) allow the tribunal to be more flexible to tailor the procedures for each arbitration. As most practitioners in Australia are used to conducting arbitrations with rules similar to the LMAA rules, it is unclear how far parties will be willing to depart from traditional procedural steps in such arbitrations. In that context, parties should consider adopting the MLAANZ arbitration rules which can accessed from www.mlaanz.org.

Case Note: *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2007] FCAFC 115 (1 August 2007)

By Maurice Lynch

The Full Court of the Federal Court of Australia recently heard an appeal by salvors regarding a common law salvage award.

The Full Court of the Federal Court of Australia had to consider an appeal from an award of salvage of A$850,000 assessed through the operation of Article 13 of the *International Convention on Salvage* (entered into force 14 July 1996). Article 13 provides the criteria for fixing the award for salvage. It is incorporated into Australian law by Section 315 of the *Navigation Act 1912* (Cth). The salvors had sought an award of A$4.4-6.6 million. The appeal dealt with three issues:

1. The operation of the ambiguously worded Article 13(1)(d) of the convention. It provides that when taking into account the reward for salvage the nature and degree of the danger should be considered. The appellant

submitted that the court failed to give appropriate consideration to the skill and effort of the salvors in preventing damage to the environment and exposure to third parties for liability. They then further argued the court should have found the risk of a global failure was not fanciful.

2. The operation of Article 13(1)(f) and whether taking account of the time used and the expenses and losses incurred by the salvors involved using the actual costs and expenses of the salvors as a starting point from which to assess salvage award. The appellant submitted that the court failed to take proper account of the value of the vessel and had used, inappropriately, the cost of the salvage services as a starting point for the award. The salvors submitted the award was not at a level which would encourage the provision of salvage service.

3. The beneficial ownership and the status of the Lloyd's register as evidence of this.

Facts

On 27 March 2002, *La Pampa*, a capsize bulk carrier with a value of US$20 million, grounded in Gladstone harbour. The vessel was loaded with approximately 161,000 metric tonnes of coal with a value of US$5 million and bunkers with a value of approximately US$390,000. Shortly after its release by the pilot tugs, *La Pampa* began to experience steering problems. The main steering gear of the vessel failed, the vessel swung to port and grounded on the northern side of the Auckland Channel. A co-ordinated salvage operation commenced with the help of the three tugs. The *Kuttabul* pushing on the port shoulder of *La Pampa*, the *Tom Tough* pushing on her portside aft and the *Wistari* towed on the vessel's starboard shoulder. These efforts refloated *La Pampa*, however, considerable difficulties were encountered with the unexpected movements of *La Pampa* and the need to position her to accommodate changes in the ebb tide, which set the vessel starboard. The vessel at one stage during the salvage appeared to ground briefly in way of her portside forward and then again as the water rose. The possible risks of the salvage operation entailed the release of oil, blockage of the channel, damage to adjoining structures and at worst, break up of the vessel. The salvage operation took 17 hours. The vessel had a salved value of $38 million. Dealing with the issues in turn:

The Decision

There was no doubt that the salvage operation had been completely successful; the salvor's skill and effort was of high order and they had acted promptly. The court also affirmed, that when considering a reward for salvage, the court has a very wide discretion to look at a variety of circumstances including those beyond the facts of the particular case. The amount though is what the court considers is fair and reasonable after considering the circumstances of the case and industry practice. An appellate court will not interfere with the award unless the court has applied the wrong principles or misapprehended the facts.

1. The danger that Article 13(1)(d) refers to is a high risk. The section imposes a high threshold requirement to satisfy the notion of danger. A real risk not a remote possibility is required for the article to play a significant role in the assessment of a salvage award. In the circumstances of this particular case there was no real risk that the vessel could break, it was just a possibility. The evidence in the case supported the judge at first instances opinion that there was a remote not a real risk of danger. Further, there was little risk of damage to the environment as the vessel's fuel and oil was stored in areas distant from where the vessel suffered damage. The potential liability to third parties was identified as a remote risk and not one falling within the ambit of Article 13(d).

2. Salvage is not mere compensation for labour and service, instead it is a question of public policy and private right which is important to all nations. Under Article 13(1)(f) in determining the award, account can be had to the time used, as well as the expenses and losses incurred by the salvors. As the task of the court is to consider all of the criteria in Article 13(1), the costs and expenses of the salvors could be used as a starting point to assess a salvage award. However, the weight to be given to the actual expenses will vary according to the facts and the courts' discretion. Whilst the value of the salved vessel and property is an important consideration, this value cannot be allowed to raise the award for salvage to an amount altogether out of proportion to the services rendered. The court concluded that the value of the services rendered does not have to bear a close relationship to the value of the salved property, rejecting the salvor's argument that the salved value of the vessel and its property was the benchmark for an award of salvage. What is sure is that if the salvage operation is complex, lengthy, had avoided higher risks to the vessel, property, and environment or had exposed the salvors to great danger then the award for salvage is likely to be a substantial amount.

3. A beneficial owner can be sued for salvage reward. This is because an award for salvage is a legal liability arising from the fact property has been saved, even where the owner of the property has not entered into a contract for the salvage. The owner of the property must pay remuneration for the benefit that they have received. The court maintained that if you are going to bring an action against the beneficial owner, then substantial evidence of beneficial ownership must be adduced. It is not sufficient to rely upon the Lloyd's Register-Fairplay to obtain information of beneficial ownership, because it is an information service, not a statutory register of title.

As a result the appeal was dismissed and the trial judge's salvage award of A$850,00.00 was maintained.

Significance:

The case is significant in a number of respects. It suggests that the courts will have complete regard to all of the subsections of Article 13(1) in quantifying an award for salvage and that the value of the vessel and property salved is important but not determinative. This approach reinforces the discretionary nature and case by case approach of the courts to salvage awards and that dangerous, lengthy, complex and risky salvage will probably result in a higher award. It is likely that salvors will be less inclined to provide salvage services unless the owners sign a salvage agreement (eg LOF 2000), requiring the award to be arbitrated in London.

United Kingdom Standard Conditions of Towage overruled by Australian Court

By Amanda Lazarou

Most harbour tugs on the Australian coast operate under the United Kingdom Standard Conditions for Towage which make the shipowner responsible for all liabilities and exclude the tug's liability for losses, even where the tug is negligent. The Supreme Court of Queensland has held that contracts for harbour towage services are subject to a compulsorily implied warranty under section 74 of the Trade Practices Act 1974 that the services be provided with "due care and skill" and that the exclusion clauses in the UK Standard Conditions for Towage are void under that Act.

PNSL Berhad v Dalrymple Marine Services Pty Limited and *PNSL Berhad v The Owners of the Ship "Koumala"* [2007] QSC 101 involved a collision off Hay Point, Queensland, between the tug *Koumala* and the motor vessel *Pernas Arang* on 28 February 1995. In essence, *Koumala* collided head-on with the starboard side of the *Pernas Arang* after her steering failed manoeuvring to secure a line. The Court found that both the Captain and Chief Engineer of the tug were negligent in causing the collision.

The Plaintiffs argued that exclusion clauses in the *United Kingdom Standard Conditions for Towage* (revised 1974) attempted to contract out of the statutory warranty in section 74 of the Trade Practices Act so were rendered void by virtue of section 68 of the Act. In response, the Defendant argued that the Act did not apply because section 74(3) exempts contracts "for or in relation to the transportation or the storage of goods".

The court considered that if a ship was not being actually carried by another vessel, then this was not transportation of goods in the ordinary sense. In other words, towage was a distinct action outside the scope of section 74(3) and ought not to be subject to the exclusion. Additionally, in adopting the reasoning in *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd & Anor* (2005) 148 FCR 68, the Court held that a towage contract was not a contract in relation to the transportation of a ship or cargo. In that case, the Full Federal Court found that there was no relevant relationship between pilotage services and the transportation of goods. In this case, the Supreme Court of Queensland concluded that section 74(3) was intended to include such contracts in the realm of section 74(1) and (2). Accordingly, the defendant towage operator was unable to rely on the exclusion clauses in the *United Kingdom Standard Conditions for Towage* (revised 1974) because section 68 of the *Trade Practices Act* made those conditions void.

Alternatively, the plaintiffs had argued that the damage did not occur "whilst towing" as the *Koumala* was not in a position to actively receive orders direct from the *Pernas Arang* to commence towing operation, so the provisions of the *United Kingdom Standard Conditions for Towage* (revised 1974) did not apply. Whilst the Court did not strictly have to decide this issue, they followed *The Uranienborg* [1936] P.21, *Australian Steamships Pty Limited v Koninklijke-Java-China Lynen* [1955] VLR 108 and *The Apollon* [1971] 1 Lloyds Rep. 476 which all held that the phrase "whilst towing" meant that a tug must be actively able to take and act upon direct orders received from the vessel that they were assisting to berth. Accordingly, any damage that results during manoeuvres that tug must complete in order to be in a position to actively receive orders would not be considered manoeuvres that would be undertaken "whilst towing". In this case the *Koumala* was not in a position to receive and act upon direct orders at the time that the steering failed and therefore she would not have been entitled to the protections of *United Kingdom Standard Conditions for Towage* (revised 1974) in any event.

Towage contracts are not considered "transport" contracts for the purposes section 74 of the *Trade Practices Act* and the exclusion clauses in *United Kingdom Standard Conditions for Towage* (revised 1974) are void as a matter of Australian law. The decision is on appeal.

Case Note: *Brambles (trading as CHEP) & Ors v Tatale & Anor* [2007] NSWSC 378

By Ryan Lynch

The recent decision of the New South Wales Supreme Court in favour of major logistics group, Brambles, permitting them to recover 1200 Chep pallets from two food companies who were not customers or bailees of Chep, sends a warning to other companies who may unlawfully possess Chep pallets and other transport modules.

The distinctive blue Chep pallets are widely used in the transport industry and are made available to hirers under a "pooled pallet" system. The hirer retains possession of the pallets until no longer required, after which they are returned to the owner. For many years, hirers have passed on pallets to non-hirers, in which case the hirer would remain liable for charges under the terms of the hire agreement. However, due to mismanagement of the "pooled pallet" system, there has been a significant surplus of missing pallets in the market which have, in effect, fuelled a black market for Chep pallets. As a result of this surplus, it has been possible for hirers to return the required number of pallets, and those pallets which make up the surplus often end up in the hands of non-hirers.

Brambles sued two food companies in detinue and conversion, which are possessory remedies that required Brambles to show that they had a right to immediate possession of the pallets. If goods are hired or bailed for a term, the bailor (Brambles) will not normally have a right of immediate possession during that term, unless a right of immediate possession vests by virtue of the terms of the bailment. However, since the two food companies were not contractual bailees of the pallets, they relied on the defence of *jus tertii* (the right of a third person to property), on the basis that they had obtained the pallets from hirers that had a contractual right to possession of those pallets. However, the food companies were not able to show that they had a better right to possession than Brambles. Through the terms of bailment, Brambles had a right to immediate possession of the pallets from the hirers, which was sufficient to support the claim against the two food companies in detinue and conversion.

On the back of Brambles 39% plunge in profits in 2003 and the apparent mismanagement of the "pooled pallet" system, it seems that new Brambles' management has made a marked effort to pursue companies who may unlawfully possess Chep pallets.

Companies who possess other companies' transport modules without having a superior possessory right to them may face significant costs in compensating companies who have a right to immediate possession.

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