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Introduction

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INTRODUCTION

Contributed by: Yoav Harris and John Harris, **Harris & Co Shipping & Maritime Law Office**

MASS – Heading Towards the Future

Noting that the maritime sector was witnessing an increased deployment of Maritime Autonomous Surface Ships (MASS) to deliver safe, cost-effective and high-quality results, the (Marine Safety Committee) MSC 98 (which took place on June 2017) agreed to include in its agenda an output on "Regulatory scoping exercise for the use of Maritime Autonomous Surface Ships" (RSE) with a target completion of the year 2020.

For the above purpose, a MASS could include ships with different levels of automation, from partially automated systems that assist the human crew to fully autonomous systems which are able to undertake all aspects of a ship's operation without the need for human intervention.

During the proceedings of MSC 103 (May 2021), the RSE was finalised and its outcome was approved. The outcome provides the degree to which the existing regulatory framework might be effected in order to address Mass operations. On 5–6 September an international two-day virtual conference took place, named as the IMO MASS Seminar. Its purpose was "to bring together thought leaders from research, academia, business and government to discuss the big challenges and new approaches needed to create a new regulation, namely MASS code".

While presenting the latest and future developments in technology related to autonomous vessels, which can be either a remote-controlled vessel operated from a remote operation centre at shore, or a navigation assistant system, to autonomous small unscrewed surface vehicles having their propulsion based on ocean-energy sources (waves, wind) and sunlight and capable of a long routine mode operation (as there are no personal crew members which need to be either fed, rested or replaced) both in coastal and open-ocean areas, the spokesman of the IMO MASS Seminar pointed at the current gaps in the existing regulatory framework in view of addressing MASS operations as were introduced in the RSE's outcome. These could be either the need to define and to set the requirements from a Remote Control Station and of a Remote Operator, or whether the qualification requirements according to UNCLOS Article 94 (4) (b), (c) are required also from shore-based personnel controlling or supervising an autonomous vessel. Or how can a flag state exercise its jurisdiction on the Master, officers and crew of a ship flying its flag if the vessel is remotely controlled from another jurisdiction? Or can the Look-out requirement of Rule 5 of the International Regulations for Preventing Collisions at Sea, 1972, which requires that "every vessel shall at all times maintain a proper look-out by sight and hearing" be fulfilled with computerised look-out controlled from shore?

According to EMSA's annual overview of marine casualties and incidents 2022, from 2014 to 2021, some 562 lives were lost in 376 marine casualties, and there was a total of 6,155 injuries in 5,395 marine casualties and incidents. In 2021, 14 ships were lost, 650 were damaged, and 219 ships were considered unfit to proceed. "Human Action" was the main accident event type, with 68.3% of the contributing factors, followed by "System/equipment failure" with 18.8% of all the contributing factors. It might be that the entry of autonomous ships into the industry will reduce these figures. Listed as number 5 of MSC 107 provisional agenda is "Development of goal based instrument for Maritime Autonomous Surface Ships (MASS)". It will be

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interesting to view how this conference (scheduled to be held from 31 May to 9 June 2023) will result in this regard.

Russia's Invasion of Ukraine – Back to Days of War in Europe

However, while the latest developments in autonomous vessels both in technology and regulation seem to be a current presentation of what the future might look like, on 24 February 2022 all of a sudden the people of Ukraine were thrown back around 83 years, finding themselves in a massive war imposed on them from the East.

As a response, the United States, the European Union and the United Kingdom imposed a series of sanctions on Russia, by actually increasing the restrictive measures taken since 2014 "in Response to Moscow's invasion of Ukraine and other malign activities" (Congressional Research Service (CRS), INSIGHT 11869). According to the (US) President Executive Order 14066 of March 8, 2022 the importation of crude oil and other petroleum and coal products of Russia Federation origin has been prohibited. Similar restrictions are to be found also in the UK's Russia (Sanctions) (EU Exit) (Amendment) (No 4) Regulations 2022 (made under Part 1 of the Sanctions and Anti-Money Laundering Act 2018) which prohibit port entry to any ship flying the flag of Russia or registered in Russia or being owned, controlled, chartered or operated by persons connected with Russia. On 16 December 2022, by virtue of Council Regulation (EU) 2022/2474, the EU Regulation No 833/2014 "concerning restrictive measures in view of Russia's destabilising the situation in the Ukraine" was amended to include also a prohibition (subject to some temporary derogations) to import crude oil from Russia, whether by pipeline or via maritime transport. According to CRS Insight 11869: "The United States has joined the EU, the UK, Canada, Japan, and Australia in setting a global price cap of US$ 60 per barrel on Russian oil exports by banning nationals from providing maritime transport services for transactions above that price."

These actions require companies to increase their sanctions compliance before entering any transaction relating to purchase and maritime transport of crude oil and its products, and providing services to vessels. The sanctions lead also to the shifting of vessels to ports and markets which do not impose the above-mentioned sanctions, such as China, India and Gulf states where transactions relating to Russian oil and its maritime carriage can take place.

The Manner in Which Taking Over of a Breaching Vessel Ended

On July 2019, while heading towards Syria, the Iranian Tanker named *Grace 1* was taken over by British commandos off the shores of Gibraltar on the grounds of its intended violation of Council Regulation (EU) No 36/2012 imposing sanctions against Syria due to the continuous violation of civil rights by the Syrian government. The *Grace 1* was carrying oil intended for the "Banias Refinery Company", which was listed in the above-mentioned sanctions as being part of the Syrian Ministry of Petroleum. The capture of the *Grace 1* was upheld by the Court of Gibraltar and, on 19 July 2019, the Gibraltar Supreme Court extended its arrest. A few hours later, while navigating its way to Saudi Arabia through the Hormuz strait, the British tanker *Stena Impero* was captured by the Iranian Islamic Revolutionary Guards forces, after it allegedly "had an accident with a fishing boat on its way and according to the law, the reason and other issues related to be studies" as stated by Mr Allah Morad Afifipour, Iranian Director General of the Ports and

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Maritime Organisations' office in Hormozgan province.

As a result, soon after, the Gibraltar Court was satisfied with an Iranian commitment that the *Grace 1* would not deliver its fuel to the Syrian refinery and released the tanker. A few weeks later, the *Stena Impero* was also released (from its Iranian detention). After its release, the *Grace 1* changed its name to *Adrian Darya* and, after it switched off its tracking devices near Iskenderun, it probably delivered its USD140 million-worth cargo (around 2 million barrels of oil) to the Syrian refinery.

Will the above-mentioned sanctions against Russia lead to capture of vessels violating the sanctions (for example, a tanker carrying Russian crude oil in a transaction selling the oil for more than USD60 per barrel) and will the Russian-Iranian co-operation include also counter-capture of tankers navigating the Hormuz strait by Iranian forces? This is one of the matters relating to maritime transportation that should be taken into consideration this year.

The Development in Misdelivery Claims

While the maritime arena is tilting between future and technology on one side, and war and sanctions on the other, the bill of lading reminds us all that it is here to stay. According to Chester B McLaughlin, JR,"The Evolution of the Ocean Bill of Lading" (1926) 35(5) Yale Law Journal 548, the modern bill of lading was introduced in the 11th century with the rise of commercial cities in the Mediterranean, as the transportation of goods between ports was accompanied with disputes between the shippers and the Masters as to what exactly was handed on board for the marine carriage and at which quantities. In 1063, statutes were passed by various cities requiring every Master to take with him a clerk and, in his presence and that of the shipper, to register in a book a record of entries of the goods received from the shipper which should be the evidence of their receipt. The clerk was not the agent of the shipper nor of the Master. He was a public officer, representing the interests of both and the Master could not load anything on the vessel except in his presence. According to a statute enacted in 1350: if the clerk was found to be making a false statement in the book of the entries, "he should lose his right hand, be marked on the forehead with a branding iron, and all his goods be confiscated" (Chester B McLaughlin, at page 551). Up until the year 1397, in the event of loss of the vessel the book of entries, which was the only evidence of the cargo loaded, was lost (too). In 1397, a statute of the city of Ancona required every clerk to give a copy of his register to those having the right to demand it and that a copy would also be deposited at the port of departure "so that in an event of an accident to the clerk or his books, proof of that which was laden on the vessel, of its quality and quantity could be found in the copy so deposited" Chester B McLaughlin, at page 551). Chester B Mc Laughlin, JR further explains, that "This statute marked the beginning of the 'bill', as distinguished from the 'book' of lading". A similar statute was passed in France in 1552 (Ordinance de Charles V), requiring the clerk to enter the shipment in the book of lading and to furnish a copy to the shipper.

A form of the bill of lading used in the 16th century can be found in the matter of *The Thomas* (1538) (before the Court of Admiralty):

"*This bylle intended made the xxijti daye of October in XXXti yere of our sovereigne lorde Knyg Henri the viijth Wytnessith that I Rovert Man servant to Syr Oswald Wylstrop knght heth delivered to john Halmdry merchaunt of the Newe Castell*

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and lays in his shyp called the Thomas of New Castell xxvjti weye salt of the measure of Blythe to carye to London to Dyce Kye as shortly as wynde ans wether wyll sarve after daye above-named and ther to delyver the sayd salt to my master his assigney or lawful attorney."

In about 1600, a statute was passed in France defining the bill of lading as an acknowledgement given by the Master of the vessel of the number and quality of the goods loaded on the vessel: meaning that, in fact, the bill of lading was no longer prepared by the clerk. Although a French Ordinance of 1657 required that a bill of lading would be accepted as evidence only if executed before a notary public or registered in a special registry, this requirement was not enforced because in practice it put a burden on commerce. At that time, Mediterranean trade also conformed its practice to that of England and France, leading to the disappearance of the requirement that a bill of lading be issued by a clerk. From that point and up to the time the Hague and Hague-Visby Rules were concluded, the concept of the carrier issuing a bill of lading, prima facie evidencing the quantity and quality of the cargo loaded and the contract of carriage, entitling (only) its holder to demand the cargo upon the presentation of its original, remained in fact the same.

Tetley, at "Marine Cargo Claims", describes the bill of lading as "a document of great commercial importance both locally and internationally, it should be treated with dignity and respect". Further, he repeats Woolsey J's words from *The Carso*: "A bill of lading is a document of dignity and the courts should do anything in their power to preserve its integrity in international trade, for there, especially, confidence is of the essence".

Nowadays, bills of lading play an essential role in trade financing. As a document of title to the goods, it is common for banks to take the bills of lading as security for the financing advanced to their customer to purchase the goods. Save for unusual or exceptional circumstances, case law has generally upheld the financing bank's right to assert its security in the fact of a defaulting customer, and to call for the delivery of the goods to which the bill of lading relates. This has serious implications for a ship-owner responsible for the carriage of goods, as it is settled law that a ship-owner who delivers goods without production of the bills of lading does so at his peril and is typically liable for any consequential losses suffered by the holder of the bills of lading: see "*TheStar Quest* and other matters" [2016] 3 SLR 1280 at [4] (which sets out the opening paragraph of the decision rendered in *The STI Orchard*, 23 May 2022, High Court, Singapore).

In relation to the extent to which a financing bank can be secured by bills of lading, the judgment in *The STI Orchard* further provided the following:

"A pledge on the bills of lading would only constitute a pledge on the goods. If the possession of the bills of lading constitutes a constructive possession on the goods themselves... Hence, to enjoy the security conferred by a pledge a bank that finances the shipment of the goods by letter of credit must ensure that the bills of lading are made out to the bank's order or indorsed in blank. Otherwise, the transfer of the bills of lading to the bank would be ineffective to constitute a pledge as the bank does not gain constructive [possession] of the underlying goods. Accordingly, the bank's right to sell the goods to meet the financing would be prejudiced..."

Hin Leong Trading (Pte) (HLT) was one of Asia's top oil traders. Its collapse in April 2020 togeth-

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er with its tendency to finance its transactions through financing banks, as well as (some of) the financing banks' tendency to provide finance and to pay HLT's sellers according to the letter of credit (L/C) issued without presentation of bills of lading, provided three Singapore court cases dealing with matters relating to misdelivery of cargo and the rights and entitlements of financing banks to recover from the carriers.

The first matter is that of ING Bank Singapore branch, which found itself with a shortage of USD8.5 million being the invoice amount issued by Aeturnum Energy International Ltd (AEI) acting as HLT's seller in its purchase of light naphtha cargo (ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel *Navig8 Ametrine* [2022] SGHCR 5).

At the material time, the demise charterer of the vessel (the carrier) time chartered it to a time charterer who, in turn, voyage chartered the vessel to AEI by way of voyage charterparty. Both the time charterparty and the voyage charterparty contained clauses which bound the demise charterer and the time charterer to discharge and deliver the cargo without presentation of the bills of lading against indemnities furnished under the respective charterparties.

Also at the material time, upon the application of HLT, ING Bank issued a letter of credit to finance HLT's purchase of the cargo from AEI. The letter of credit was advised to AEI and provided: that documents required for payment thereunder include the full set of 3/3 original clean onboard bills of lading plus three non-negotiable copies issued or endorsed to the order of the Bank; and that, in the event that such documents are not available, payment will be effected against presentation of AEI's letter of indemnity under which includes AEI's undertaking to make all reasonable efforts to obtain and surrender to the Bank a full set of 3/3 original bills of lading, as soon as possible.

The carrying vessel arrived at discharge port in Singapore and the demise charterer discharged and delivered the cargo at the Universal Oil Terminaling Hub (a storage facility which was partly owned by HLT) to HLT, as the receiver. This was done without the presentation of the bills of lading by HLT, on the instructions of and against an indemnity issued by the time charterer. Following the invoice presented by AEI, the Bank paid AEI the invoice sum, fulfilling its obligation and commitment under the letter of credit. (This scenario of the financing bank paying HLT's seller without presentation of the bills of lading and after the cargo had been delivered to HLT, repeated itself in all three cases considered.)

Soon after, the Bank received the full set of bills of lading and its solicitors wrote to the demise charterer and informed it that the Bank was the lawful holder of the bills of lading and sought confirmation that the demise charterer was holding the cargo and would deliver the cargo to the Bank on presentation of the bills of lading. In reply, the demise charterer's solicitors informed that the cargo had been delivered and that the bills of lading no longer carried the right of possession of the cargo. The Bank commenced an admiralty action and arrested the vessel for misdelivery of the cargo. A security was provided, the vessel was released and the High Court of Singapore delivered its summary judgment in the context of the Bank's claim for misdelivery without presentation of the original bills of lading.

The demise charterer's (now the defendant) position was, that the Bank (now the plaintiff) did not hold the bills of lading in good faith

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because it had represented the bills of lading as "bona fide security" for its financing of the cargo, when it did not actually view the bills of lading as security. As a person becomes a lawful holder of the bill of lading whenever he has become the holder of the bill in good faith, the triable issue put forward by the demise charterer was whether a person who has no genuine interest in the cargo underlying a bill of lading who takes the bill of lading purely for bare rights of suit has acted "honestly" for the purpose of the good faith requirement.

This argument was denied by the Court as, following the Singapore case of "UCO Bank", the requirement of good faith was "obviously to preclude the case where possession is obtained unlawfully, or by other improper means", and while an argument similar to that of the demise charterer according to which it is contrary to good faith for a holder to take possession of bills of lading to obtain bare rights of suit against a carrier without any real interest in the goods under the bill of lading, has already been advanced and rejected in the matter of *The Yue Tou*. The demise charterer further argued that the delivery of the cargo to the shore terminal constituted the accomplishment of the bills of lading, meaning that when the Bank become the holder of the bills, those have already been "spent" or "exhausted". This argument was also rejected by the Court, which held that "the well established position in case law over the past century and a half is that delivery to a person not entitled does not render a bill of lading spent".

However, on the quantum issue, the Court was more favourable towards the demise charterer. While the Bank's position was that the damages should be awarded by reference to AEI's invoice value, the Court denied existence of the proposition that the court will, in cases involving misdelivery of cargo, invariably award damages by reference to the invoice value. In relation to the quantum issue, the Court set the following triable issues: Should the invoice value be accepted as the quantum of damages, or is the market value of the cargo a more appropriate measure? What is the date on which the cargo should have been delivered? How will the value of the cargo (at the delivery date, which has to be determined) be assessed considering the defendant's arguments and evidence showing substantial fluctuations in the marker price of the cargo during the period of time after the purchase was concluded?

The position of the carrier in the matter of Standard Chartered Bank (Singapore) Ltd v Maersk Tankers Singapore Pte Ltd [2022] SGHC 242 (which also concerns a misdelivery of a cargo of oil product to HLT which was financed by a financing bank) (an appeal against the decision of the Assistant Registrar (AR) who (also) granted summary judgment for the Bank (the plaintiff) against the carrier (the defendant) on the issue of liability, but with damages to be assessed), was even better. In that matter, it was argued by the carrier that at the time at which the HLT applied to the financing bank for the L/C and the Bank agreed to finance the purchase of the oil product (gasoil), the Bank knew, or at least ought to have known that the gasoil cargo was already in the custody of HLT (also in this matter the cargo was discharged at Universal terminal Singapore into HLT's tanks, without presentation of the bills of lading).

The Court held that, if this was the case, that could indicate that the Bank did not regard the bill of lading as security. Meaning, that if the Bank were aware that the gasoil cargo has already been delivered to HLT (at the terminal), he could not expect that the carrier (the defendant) would

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deliver up the gasoil cargo upon presentation of the bills of lading. The Court further held that:

"viewed from the prism of a causation of loss analysis, that would mean that, while there was a breach of contract of carriage because the defendant misdelivered the gasoil cargo to HLT, that breach was arguably not the proximate or effective cause of plaintiff's loss. Instead, the plaintiff's loss would have been caused by HLT's financial collapse at April 2020, which rendered HLT unable to repay its loan owed to the plaintiff."

The Court also held that the fact that the financing Bank was willing to permit payment under the L/C it had issued without presentation of the bills of lading by the seller, and, instead, to accept a letter of intent (LOI), could mean that the Bank was prepared to accept the scenario where the gasoil cargo would be delivered to HLT without presentation of the Bills of lading, and as such the Bank never looked at the Bills of Lading as security. These matters – regarding the questions of causation and whether the Bank itself considered the bills of lading as security – were to be answered properly at the trial. Therefore, it was held that the Bank is not entitled to a summary judgment – not even on the issue of liability – and the defendant was granted unconditional leave to defend the action. The Court, however, emphasised that its judgment considered the carrier's argument in relation to causation only, and that it did not determine any of the matters concerning whether the plaintiff was a lawful holder of the bills of lading and whether they were spent, which were dealt with by the JR below.

Whether indeed in such situations the bank can be considered as not being in possession of the bills of lading in good faith was considered by the High Court of Singapore in the similar matter of The *STI ORCHARD* (Overseas-Chinese Banking Corporation Ltd v Owner and/or Demise Charterer of the vessel *STI ORCHARD* (Winson Oil Trading Pte Ltd, intervener) [2022] SGHCR 6). In this matter, when the financing bank (OCBC) issued the L/C it acceded to HLT's request for the bills of lading to be issued or endorsed to HLT's order, and, subsequently, when OCBC granted a Trust Receipt Loan it also did not arrange for the bills of lading to be indorsed to OCBC's order or indorsed in blank. Furthermore, the Bank knew, or at the very least was put on notice, that HLT intended to blend the cargo and then sell it on as a different product (Gasoline 92 Ron Unleaded); and in such case the bills of lading could not have been used as documents of title for the sale of the new product as, for the selling (and carrying) of the new product to HLT's buyer, new bills of lading should be issued. It was also revealed, according to the judgment, that OCBC had the bills of lading delivered to it and indorsed in its favour only after it was informed of HLT's financial difficulties.

In light of the rather unique circumstances of this case, the Court held that it is at least arguable that OCBC did not meet the threshold of "honest conduct" because it did not look to the bills of lading as security at the time it financed HLT's purchase of the cargo and it was now attempting to bring a claim on such purported security. The Court further examined the matter of whether the bills of lading were spent. At the time of delivery, the bills of lading were endorsed to the order of HLT and were in the possession of the Bank. At a later stage, OCBC applied to court and, following the Court order obtained, HLT by its judicial managers indorsed the bills of lading in favour of OCBC. In the Court's view, this meant that when HLT became the holder of the bills of lading (for the purpose of endorsing them in favour of

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OCBC), the bills of lading became spent as they were transferred to the person who was entitled to and had earlier obtained delivery of the cargo. However, due to the fact that the transfer of the bills of lading was pursuant to the contractual obligations entered into before the bills of lading became spent (when the judicial managers of HLT became the holders of the bills of lading for the purpose of endorsing them to OCBC), the Court held that, had it not been for the issue of good faith (which should be examined in trial), it would have found that OCBC had the rights of suit under the bills of lading. In its conclusion, the Court held that the bank's title to sue is not beyond doubt and the owner should be granted unconditional leave to defend as there is a fair probability of a bona fide defence (against the OCBC's misdelivery claim).

Conclusion

The year 2022 clearly provided additional commercial implementations and more significant judgments relating to shipping and maritime law. However, the manner in which shipping and maritime law navigates between technology and sanctions, and developments in well-known legal concepts is always fascinating, and will continue to be fascinating in 2023.

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Harris & Co Shipping & Maritime Law Office was established in 1977 and the firm is dedicated to the practice of maritime and admiralty law, receiving instructions from the foremost shipping and maritime law departments of international law firms. Harris & Co provides legal advice relating to the various contracts of carriage, and attends to matters relating to the chartering, sale and purchase of ships and the financing of ship purchases. The firm represents ship-owners, charterers, agents, freight forwarders, P&L clubs, oil refineries and other entities in shipping and maritime law matters. Harris & Co is ranked consistently by Chambers and Partners, among other observers of the legal market. The firm is published widely on maritime and admiralty law, including contributing articles to the Chambers & Partners Global Practice Guides (including the Shipping Introduction and the chapter on Shipping Trends and Developments in Israel). Additional articles by Adv Harris are published in the Israeli monthly magazine "The Cargo".

Contributing Editors

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John Harris is a founding partner of Harris & Co, with more than 48 years of experience. He is consistently highly recommended with a "top tier" rating for shipping and maritime law (transportation) in Israel by the leading international legal rating institutions.

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