

CMMH SPOTLIGHT

February 2023

Publication by CM Holder Insurance Brokers Limited
a China Merchants Group subsidiary.

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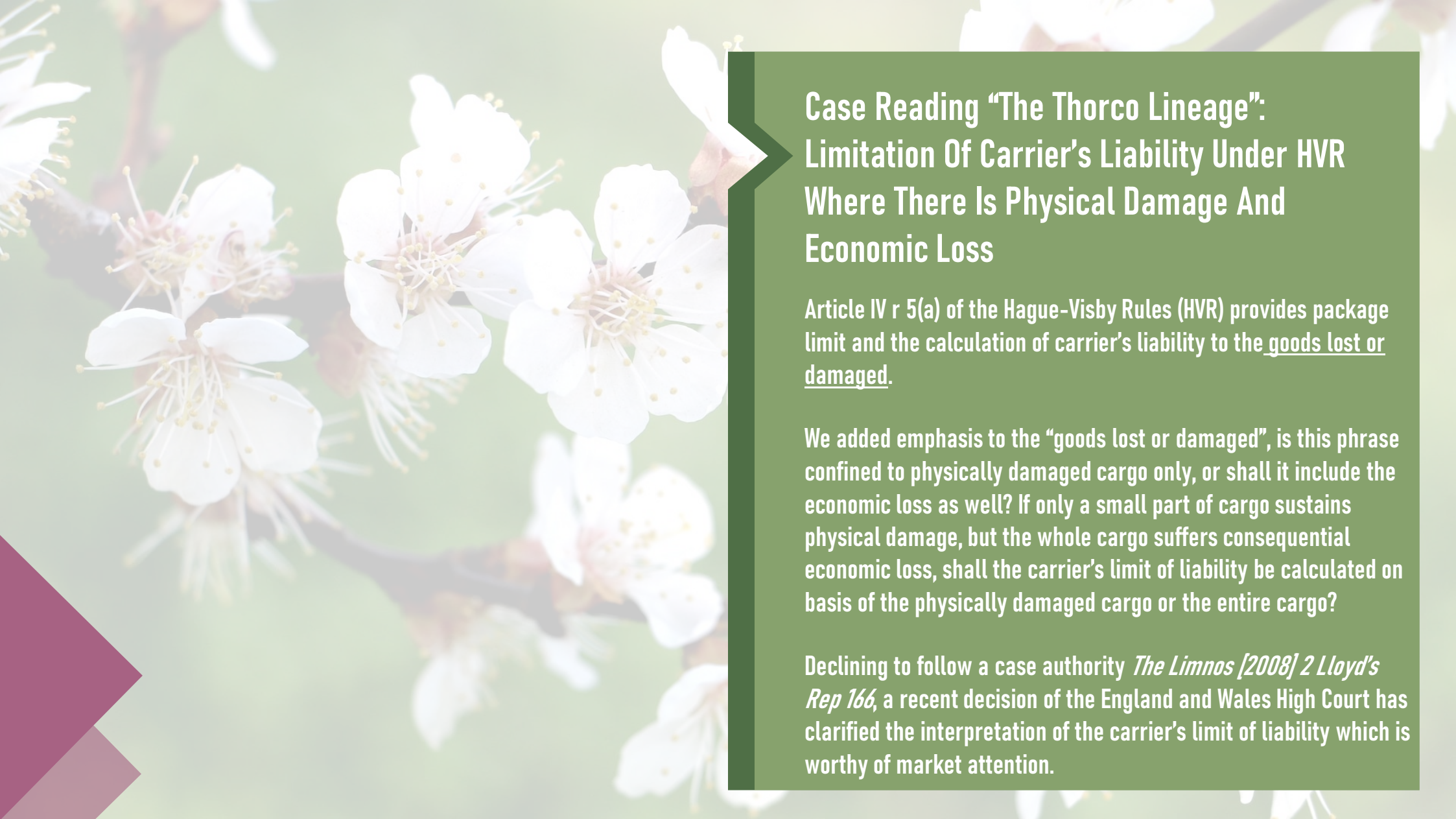
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Case Reading “The Thorco Lineage”: Limitation Of Carrier’s Liability Under HVR Where There Is Physical Damage And Economic Loss

Article IV r 5(a) of the Hague-Visby Rules (HVR) provides package limit and the calculation of carrier’s liability to the goods lost or damaged.

We added emphasis to the “goods lost or damaged”, is this phrase confined to physically damaged cargo only, or shall it include the economic loss as well? If only a small part of cargo sustains physical damage, but the whole cargo suffers consequential economic loss, shall the carrier’s limit of liability be calculated on basis of the physically damaged cargo or the entire cargo?

Declining to follow a case authority *The Limnos* [2008] 2 Lloyd’s Rep 166, a recent decision of the England and Wales High Court has clarified the interpretation of the carrier’s limit of liability which is worthy of market attention.

❖ Warm-Up Before “The Thorco Lineage” Case Reading

Before diving into the case reading, here is a briefing of *The Limnos* judgment.

- When interpreting the carrier shall not “...become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 667.67 units of account per package or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher”, the English High Court held that the phrase “any loss or damage to or in connection with the goods” (the subject) and the phrase “of the goods lost or damaged” (the basis of limit calculation) are both confined to the goods which are physically lost or damaged.
- In this reasoning, as long as there is physical damage, no matter how minor it can be and how great the economic loss is, the entire claim might be limited to the package limit of the physical damaged cargo only; however, if there is purely economic loss but no physical damage to the cargo, HVR Art IV r 5(a) does not apply and the claim against carrier is not subject to any limit.

❖ “The Thorco Lineage” Background

- The vessel “Thorco Lineage” suffered an engine failure while carrying a bulk cargo of zinc calcine from Baltimore, USA to Hobart, Australia in May 2018. The vessel was re-floated by salvors under an LOF agreement, and a relatively small proportion of cargo was lost or physically damaged.



HVR Limitation: “The Thorco Lineage” Case Reading & Insights (Cont’d)

❖ “The Thorco Lineage” Background (Cont’d)

- Cargo owners incurred loss amounting to more than USD8.5 million including contribution to salvage, on-shipments costs, physical loss or damage of cargo and costs relating to the disposal of damaged cargo. Cargo interest claimed indemnity from the carrier as the grounding was alleged to be caused by the unseaworthiness of the vessel.
- By relying on the case authority *The Limnos [2008] 2 Lloyd’s Rep 166*, the carrier raised a limitation defence in the arbitration, that his liability ought to be limited by reference to the weight of the cargo which suffered physical damage, that is around USD800,000 only.
- Cargo interest argued that *The Limnos* is wrongly decided, the words “goods lost or damaged” in Art IV r 5(a) covers both physical damage and the economic damage, therefore the limit should be based on the weight of whole cargo.
- The proper construction of operation of Art IV r 5(a) of HVR was removed to the High Court to be determined as a point of law under the UK Arbitration Act 1996.

❖ High Court Decision

- It supported cargo owners, holding that Art IV r 5(a) relates to claims for both physical and economic loss of cargo, and the limits in the article should be calculated by reference to “goods lost or damaged physically or economically”.



❖ High Court Decision (Cont’d)

- The court examined the text of the Hague Visby Rules, the *travaux préparatoires* to the conventions leading to Visby Protocol, and held that the aim of Art IV r 5(a) is to limit the carrier’s liability to loss arising from both physical and economic loss or damage, and the delegates to the conventions cannot have intended to devise working of the limit with a pre-condition of physical damage to the goods.
- The Court rejected the reasoning of *The Limnos* that without physical damage to cargo, carrier’s liability to pure economic loss is unlimited.
- Even if the decision in *The Limnos* is correct, the entire cargo in this case can be considered physically “damaged”, because the salvor’s maritime lien had the effect of damaging the cargo owners’ proprietary title to the cargo.
- Consequently, claims for pure economic losses such as diminution in market value and quasi-physical losses such as those due to imposition of a lien for salvage or general average are limited under Art IV r 5(a), regardless of the presence of conventional physical damage arising from the same incident. The limit will be calculated by reference to the full weight of cargo to which the losses relate.

Carrier’s leave to appeal was denied so the High Court’s decision for this case stands.



❖ Comment

- There are now two conflicting first instance decisions on the same legal issue, it remains to be seen which of the two decisions will be followed in future. Some observers viewed it is not good for those who value English law for its certainty of outcome.
- Some legal industry players considered that more likely the *Thorco Lineage* now represents the law, as the judgment was more fully set out than *The Limnos* by analyzing the ordinary meaning used in the HVR, the *travaux préparatoires*, the case authorities (by deconstruction of *The Limnos* itself) and the textbooks.
- On facts of the *Thorco Lineage*, it is a significant win to cargo interests, as the weight of the entire cargo was such that the limitation figure exceeded the total sum claimed.
- The judgment is not completely bad news to carriers, although it sets a higher limit of liability where there is a mixture of economic and physical losses, it avoids the possibility that a carrier cannot invoke package limit at all when cargo is only economically damaged, without physical loss or damage.



Guidelines

In A Nutshell

Deviation And P&I Cover

Deviation generally means a departure from the contractually agreed voyage or venture. Geographically diverging from the agreed voyage is the most straightforward type of deviation, whilst dry dock with cargo on board or carriage of cargo on deck other than customs or by agreement also constitutes deviation. This article will focus on the geographical deviation, the most common type in practice.

❖ Unjustified Deviation

If deviation is solely a result of carrier's commercial decisions, the mutuality principle of IG P&I Clubs does not allow liability arisen from such commercial decisions to be covered under P&I insurance.

Shipowners will have to arrange a special deviation insurance cover for the liability aspect arising from this type of deviation.

❖ Justified Deviation That Fall Within The Scope Of P&I Insurance

- To save life (including response to a distress call), the ship or cargo/property at sea.
- To search for a crewmember or other persons lost overboard.

- To land persons saved at sea.
- To embark/disembark security personnel or reduce the risk of piracy.
- To secure treatment of an injured or sick person.

❖ Minor deviations approved at Clubs' discretion

- Normal mutual P&I insurance can still cover minor deviations where Clubs accept that the extent is not be of sufficient magnitude to violate the principle of mutuality, such as bunkering, crew change, taking on spares / supplies, landing stowaways, necessary repair for safe prosecution of the voyage, subject to Club's prior approval. Additional premium may also be required.
- For deciding whether the minor deviation can be covered, the IG Pooling Agreement has set out a criterion for the clubs which is to consider the commercial benefit for the carrier undertaking the deviation must be proportionate and relative to the commercial disadvantage or risk to the other parties to the venture.
- That is to say, the greater the commercial advantage to the owners in comparison with the inconvenience to the venture, the less a club will exercise its discretion in favour of the member.

The IMO's Unified Interpretations Of The LLMC And CLC Conventions Clarify The Right To Limit Liability

❖ Background

The Convention on Limitation of Liability for Maritime Claims (LLMC) of 1976, the LLMC Protocol of 1996, and the Civil Liability Convention (CLC) of 1992 require the shipowner and their insurers to accept strict liability, irrespective of fault, and with mandatory insurance cover in exchange for the right to limit liability to an amount set by the conventions.

These conventions all contain a materially identical exception that the shipowner shall not be entitled to limit his liability if it is proved that the loss or pollution damage results from the shipowner's own personal act or omission, committed with the intent to cause such loss, or committed recklessly and with knowledge that such loss may occur.

This exception was intended to be virtually unbreakable, so to enable the insurance market to continue to cover the relevant liabilities without being exposed to the prospect of unlimited liability.

In recent years shipowners and insurers have increasing concern over the tendency that national courts are more willing to break shipowners' limitation of liability by triggering the exception. In 2002 *Prestige* oil spill, the Spanish Supreme Court judged the master's criminal misconduct is sufficient to trigger the exception to limitation under Article V(2) of the CLC, even though the express wording requires personal wrongdoing on the part of the shipowner.

The IMO's Unified Interpretations Of The LLMC And CLC Conventions Clarify The Right To Limit Liability (Cont'd)

❖ IMO Clarification

To reduce the risk of national court decisions like *Prestige*, the IMO General Assembly issued resolutions to give “unified interpretations” to the exception and affirmed that the test for breaking the right to limit liability as contained in LLMC 1976, its 1996 Protocol and CLC was to be interpreted:

- Breakable in very limited situations and based on the principle of unbreakability;
- The level of culpability is analogous to wilful misconduct:
 - ❑ a higher culpability than gross negligence;
 - ❑ a level of culpability that would deprive the shipowners of the right to be indemnified under their marine insurance policy;
 - ❑ the loss of entitlement to limit liability under the conventions should correlate with the loss of the shipowners’ insurance cover.
- In interpreting “recklessly and with knowledge”, a combined totality of both “recklessly” and “knowledge” should be considered in order to establish a level of culpability, i.e. “recklessly” and “with knowledge” should not be considered in isolation from one another.
- The conduct of parties other than the shipowner, for example, the master, crew or servants of the shipowner, is irrelevant and should not be taken into account when determining whether the test has been met.

Loss Prevention Advice – Navigating The Risk Of Soybean Transportation

Forecasts predict that Brazil will yield a record-high harvest of soybean crop during the season mid-February to mid-May 2023. In the Brazil-China soybean trade, the main types of cargo damage are 1) mould and self-heating, 2) wet damage and 3) heat damage.

❖ **Mould and self-heating**

When moisture and temperature levels are optimal, mould can grow and raise the temperature of the soybeans which contain high oil contents. Loss prevention suggestions include:-

- During loading, ask for laboratory results that indicate moisture content, even such are not provided.
- Engage a local surveyor to take temperature at regular intervals during the loading, and if possible, take in-situ moisture measurements of representative samples.
- Maintain accurate records of the loading process, the color of beans, loading methods, etc..
- During the voyage, condensation can cause mould growth but usually limited to the surface layer of the cargo only. Communication with the receiver can help prevent misunderstanding and ensure that the rest of the cargo can still be used for its intended purpose.
- Proper ventilation is crucial to prevent the combined effect of self-heating within the cargo and the condensation damage. Ventilation records should include the periods of time when ventilation was undertaken for each hold, reasons for not ventilating (weather condition such as rain and fog).
- Ventilation at night is a debated issue as it is important but may be unsafe for crew. It is recommended to have a weather forecast record and assess the conditions before deciding whether to ventilate or not at night. It is also essential that the weather conditions and the reasons behind the ventilation decisions are also marked own in the ventilation record.

❖ **Mould and self-heating (Cont'd)**

- If ventilation is restricted by fumigation for the entire voyage, it is advisable to get the instruction in writing from charterers who are usually responsible for arranging the fumigation.

❖ **Wet damage**

- Keep records of hatch cover testing using methods such as water hose and ultrasound tests.
- Maintain robust PMS documents detailing completed maintenance and inspections, as well as periodic service and manufacturer inspection.
- If hatch cover leaks water to enter the cargo hold, it usually results in localized damage. Such damage can be remedied through hand segregation or a grab without affecting the rest of the cargo.

❖ **Heat damage**

Hot surfaces such as fuel tanks and engine rooms can transfer heat to the beans and cause self-heating. It is essential to minimize heat exposure by monitoring heat sources.

- With VLSFO fuels, the fuel tanks need to be heated at very high temperature and will potentially damage a particular batch of the cargo. It is suggested to have written correspondence with charterers if they are responsible for the fuel supply.
- Keep adequate maintenance on the fuel tank heating systems to prevent heat damage, and document detailed records on the fuel heating system, temperature records for each tank, job description of the tasks performed, their duration and any observation.



Market Snapshot

The Price Cap On Russian Petroleum Oil

- After a price cap was implemented on the Russian crude oil last December, the Russian petroleum exports falling under CN code 2710 are subject to following price caps since 5th February 2023:
 - USD 45 per barrel for petroleum products traded at a discount to crude oil;
 - USD 100 per barrel for petroleum products traded at a premium to crude oil.
- The voyages carrying Russian petroleum products before 5th February 2023 are still lawful irrespective of the cargo purchase price, if the voyages will be completed and the cargo discharged by latest 01:01 GMT on 1st April 2023.
- For IG P&I Clubs, members that intend to transport Russian petroleum product cargoes after 5th February will need to provide its P&I Club with an attestation that it will not for the duration of the period of insurance carry Russian petroleum product cargoes which have been sold at a price that for the period it is on board the vessel has exceeded the Price Cap. The attestation should be provided to the Clubs on an annual basis at the start of each new policy year.
- Some H&M insurers of G7 countries also demand signed Attestation in the insurers' own format and requirement, if the assureds transport Russian oil.

Cost of Shipping Gasoline Jumps 405% After Russia Sanctions

- Freight of tankers moving gasoline and other fuels is soaring days after sanction measures targeting Russia's petroleum sales came into force.
- On 9th February alone, daily earnings for tiny tankers delivering refined fuels in the Atlantic ocean have surged by 58%; the whole 2nd week of February saw the freight soared more than 400%, reaching USD55,857.
- The surge is mainly because a big number of ships are currently engaged to carry Russian petroleum products; in turn there are fewer tankers available to serve other oil exporters and this resulted in the freight increase as well.
- Another reason of the spiked rate is that EU lifted its purchasing of refined products from elsewhere, such as West Africa.

China And Australia: Coal Shipments Resumed After Two Years Of Hiatus

- China's trade relations with Australia showed signs of thawing with coal shipments resuming after more than two years' hiatus. At least two shipments of coal arrived China in February.
- As the world's biggest coal producer and consumer, China relies on coal to generate almost 60% of its electricity power.
- Australia used to be second largest coal supplier to China. China purchased more than 30 million tonnes of coking coal and nearly 50 million tonnes of thermal coal from Australia before the buying stopped in 2020.
- The Commerce / Trade Minister of both governments are in dialogue to resolve the trade impediments, and it is also expected the trade of lobster and wine will restart in near future.

Freeport LNG Ready to Restart Commercial Operations

- In January 2023, the regulators approved Freeport's plan to start cooling parts of the plant, after the plant having been idled since the breakout of fire in June 2022.
- Freeport LNG is now applying permission from US federal government to restart commercial operation at its plant in Texas, but it is estimated that it would still take a few months for the plant to resume full operation.
- Gas flow to the plant was tracked to reach 0.5 billion cubic feet per day (bcfd) in mid-February; however, it is only a fraction of the 2.1 bcfd which can be produced at full power.
- Some big buyers of Freeport said they do not expect to get LNG from the plant until after March, although a few has dispatched tankers to the facility to pick up LNG, so to create space in Freeport's storage tanks for new LNG to be produced.

International Group Of P&I Clubs - Reinsurance Arrangements For The 2023 Policy Year

- The overall structure of the cover reinsured through the Pool is the same as in the 2022 policy year:
 - Individual Club retention (ICR) remains USD10 million;
 - Pool retention remains USD90 million in excess of ICR;
 - In excess of the USD100 million, there is General Excess Loss Cover of USD2,000 million;
 - In excess of the above, there is Common Overspill protection of USD1,000 million.
 - Oil pollution limit remains USD1,000 million in aggregate of Owners' and demise charterers' liability any one ship arising of any one event each Owner's entry.
- The overall limit of cover for charterers named as co-assured under an Owner's Entry will increase from USD 350 million to of USD 500 million, a combined single limit for both pollution and non-pollution claims each incident or occurrence, each ship each entry.
- Special excess war risks P&I cover with a limit of USD500 million remains unchanged, however, a Territorial Exclusion clause for vessels trading in Russia and Ukraine waters is added as a consequence of the reinsurers' underwriting contraction.
 - The IG negotiated with reinsurers for a sub-limited cover in order to "buy-back" this exclusion, and was able to confirm before 20th February that for vessels transiting and/or calling within the areas listed in the Territorial Exclusion clause, cover is now provided with reinsurance support, but with a sub limit of USD80 million any one event, each vessel.
 - This limited "buy-back" applies only to mutual cover, and remains excess of the amounts recoverable under the Owners' war risk policies, subject to a minimum of the proper hull value or USD500 million, whichever is the lesser.
- Another main change is that Malicious Cyber, COVID and Pandemic risks are covered for claims up to USD 650 million in excess of USD 100 million. Excess of USD 750 million there is up to USD 1.35 billion of annual aggregated cover. Excess of that the Group has decided to pool between Group Clubs the unreinsured risks, resulting in no change to Members' cover.

Panama Canal Authority - New "Disruption Charges" Tariff

- With effect from 1st January, 2023, the Panama Canal Authority has imposed complementary tariffs including disruption charge, change-in-booking-date charge, substitution charge, swapping charge, high demand surcharge.
- Ship operators are asked to take note of the disruption charge which is applicable once a vessel presents deficiencies during the transit and causes disrupts or impedes the scheduled transits of other vessels.
- Common deficiencies which may give rise to the disruption charge includes anchor / windlass problems, inadequate boarding facilities, engine failure, excessive draft, slow winches, etc.. In order to avoid the disruption charge, the vessels will have 30 minutes to correct the deficiency from the time when such is reported or detected.
- The disruption charges will be classified as “low impact” or “high impact”, and determined according to the size of the vessel. According to the local resource, such charge cannot be negotiated nor appealed, although its applicability may possibly be challenged on the facts.

Ignoring Seafarer Mental Health Could Lead to Legal Claims

- A French Court upheld its lower court’s decision which convicted CMA CGM of corporate manslaughter, as CMA CGM was breaching its obligation to ensure safety and protection of a deceased crewmember’s mental health and contributed to the latter’s suicide.
- The deceased crew was a captain working on a CMA CGM’s containership “Laperouse”. In December 2010, “Laperouse” collided with a coastal general cargo ship “Thebe” near the Netherlands. The captain committed a suicide in February 2011 after CMA CGM handed down disciplinary sanctions on him.
- The court found the process leading up to the dismissal of the captain created uncertainty, with cancelled interviews, no timetable and a lack of following procedures, and it was a struggle for the affected captain.
- According to social voices, seafarer’s mental health and suicide tendency are serious issues in maritime industry. Back to 2017, a research showed seafarers’ suicide due to mental issues accounted 15% of deaths at sea; but the statistics were said to be under-reported as there is no framework for recording such suicides and it is difficult to recover from insurance.
- It is advisable that owners shall pay more attention to seafarers’ mental health and take positive steps to support seafarers at difficult times, as ignoring and neglecting could lead to tragedies or even legal claims.

ECER Incentive For Norwegian Hull Club's Oil & Gas Clients

- From this year, Norwegian Hull Club (NHC) has introduced Environmental Care & Emission Reduction (ECER) criterion into its underwriting guidelines to reinforce its commitment to the energy transition.
- Under ECER, NHC will assess the measures the Oil & Gas assureds have taken in respect of environmental standards, emission reduction and energy efficiency so to set the rating model for them.
- To enable such evaluation, NHC entered a partnership with a data supplier in offshore rig industry - Esgian Greenpact Rigs.
- NHC will offer an ECER allowance based on estimated CO₂e and NO_x reductions due to installed emission reducing and energy efficiency systems, for example, Selective Catalytic Reduction Systems (SCRs), Closed Bus Tie Systems, Enclosed Flare Systems and Waste-heat Recovery Solutions.

DP World Wins Bid To Develop Mega-Container Terminal At Deendayal Port

- DP World won major concession to develop Tuna Tekra mega-container terminal at India's Deendayal port in Gujarat on a Build-Operate-Transfer basis through a Public-Private Partnership.
- The Tuna Tekra terminal will include a 1,100-metre berth, and will be capable of handling vessels carrying more than 18,000 TEU. The total capacity of the terminal will be 2.19 million TEU.
- The terminal will connect with the hinterland of Northern, Western and Central India through the network of roads, highways, railways and the Dedicated Freight Corridors.
- By counting in Tuna-Tekra terminal, DP World's six Indian terminals will have a total capacity of 8.19 million TEU.

BIMCO: Chinese Shipyards Achieve Market Share Record 2022

- According to BIMCO, Chinese shipyards hitting a record high of 47% market share in 2022, delivering ships in total of 14.6 million Compensated Gross Tonne (CGT), which represents half of the global CGT delivery.
- 2022 is also the first year that Chinese shipbuilders exceeds the combined market share of Japanese and South Korean shipyards, the latter delivered 4.8 million CGT and 7.8 million CGT respectively.
- China's market share keeps growing over the past 20 years, starting from holding less than 10% market share in 2000 and emerged to become one of the market leaders in 2009, with overall 45% share of the global order book.
- China's success started from maintaining a leading position in dry bulk building, but in this sector, BIMCO pointed out that with costs increasing, other countries (e.g. Vietnam and Philippines) which can build ships in lower cost might become China's competitors in the future.
- With investing in more productive systems and process, China continued its success by entering into high-value and more complex segments such as containerships, LNG ships and cruises which were dominated by the South Korean and European shipyards.
- For building LNG carriers, South Korean shipyards remain the market leaders with 79% of order book, and Chinese shipyards hold 15%. For containerships, China has recently delivered two of the world's largest containerships, each with a carrying capacity over 24,000 TEU.

The Suez Canal Authority Is Increasing The Surcharge For Laden Product Tankers

- Suez Canal Authority (SCA) will increase surcharge on the product tankers transiting the Suez Canal, as this sector has been enjoying its best markets in years benefitted from the impact of sanctions on Russia regarding longer tonne-miles.
- For laden product tankers transiting the canal from both directions, the SCA will impose a 25% surcharges with effect from 1st April, 2023, which is an increase from 15% levied since May 2022.
- For product tankers in ballast transiting from either direction, the surcharge over normal transit fees will remain at the 15% level.
- In addition, tolls have been increased by the SCA from January 2023 on various vessel types, but excluding the poorly performing sectors such as bulk carriers and cruises, which might otherwise divert to longer route to save costs.

Happy Reading, See You In March !

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