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Introduction

Welcome to No 2 of Volume 1 of the Malta Maritime Law Association Journal. The aim of the Journal is to present issues which are topical and which can provide further food for thought. In this edition you will find three articles on Seafarers' Employment Agreements under the Maritime Labour Convention 2006 from a Maltese perspective, Regulation 392/2009 and the Maltese Cruise Industry and an interesting case commentary about the Norbel Bulk – Court of Appeal Judgment delivered in November 2012.

The Association is firmly of the view that the publication of its journal will continue to reinforce one of its very “reasons for being” which is the dissemination of information about Maltese and Foreign Maritime law issues with a view to widening the discussion amongst practitioners on the subject.

To this end the Association has continued to increase its participation at CMI events including the Beijing Conference where the Association participated in a number of the committees discussing various issues ranging from Salvage to Judicial Sales of Vessels. We are committed to maintaining our healthy level of activities with a view to increasing them during 2013.

Ann Fenech - *President*

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Under the Spotlight - Seafarers' Employment Agreements under the Maritime Labour Convention, 2006 and from a Maltese perspective

Suzanne Shaw

Introduction

The adoption of the Maritime Labour Convention, 2006 (MLC) has been heralded as a monumental step towards protecting seafarers' rights on a formal level. The MLC has been designed to become a global legal instrument that will constitute the "fourth pillar" of international regulatory regime for quality shipping, alongside SOLAS, STCW and MARPOL.

Traditionally, seafarers have always been a vulnerable group - "Seafarers work in often hazardous conditions. As mobile workers they are highly vulnerable to ill treatment, exploitation, abuse and injustice. They operate within and across different national jurisdictions and are subject to different international and national laws. In some cases, there may be doubt as to what if any law is applicable or enforceable."¹

The MLC sets out seafarers' rights to decent living and working conditions based on standards already contained in individual maritime labour conventions which have now been updated and consolidated through the adoption of the MLC with a new certification and enforcement mechanism. The MLC is meant to be globally acceptable, easily understandable, readily updatable and uniformly enforced.

Many areas covered by MLC have already been regulated by individual ILO Conventions which have been ratified by Malta and are therefore part of Maltese law by direct inclusion in the Merchant Shipping Act (the "MSA") or in subsidiary legislation issued in terms of the MSA. Still, a detailed exercise needs to be carried out to pinpoint the areas which require to be clarified and/or regulated further to ensure that Maltese law

¹ Launching Seafarers' Rights International, Deirdre Fitzpatrick
- <http://www.seafarersrights.org/>

is in line with MLC.

The MLC is wide reaching in that it applies to all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks.² In principle, Maltese law already applied the working and social conditions of seafarers contained in the individual ILO conventions to Maltese ships engaged in international trade.

The question as to how the MLC will apply to superyachts is an open question. In view of the requirement for the ship to be engaged in commercial activities for the MLC to apply, one particular Flag State has considered that a yacht which is chartered for 183 days or less per calendar year is not engaged in commercial activities and thus does not fall to be regulated by the MLC. The position adopted by other Flag States on this point remains to be seen.

The obligation for compliance with the MLC once this is transposed into national law is on the Shipowner being the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with the Convention, regardless of whether any other organizations or persons fulfill certain of the duties or responsibilities on behalf of the shipowner.

The intention of the drafters of MLC was to have one contact person - the shipowner - responsible for all duties and obligations concerning seafarers employed on the ship.

Seafarers Employment Agreements

The provisions relating to Seafarers Employment Agreements (SEA) have been flagged as one area where each Shipowner should pay extra special attention in order to ensure that the current contractual agreements

² MLC Article II, Para 4.

with the persons employed onboard the vessel comply with the MLC provisions.

Under Maltese law, there have been slightly differing definitions of who is to be considered a seafarer depending on the scope of the legislation. Thus, the MSA³ provides that “seaman” includes every person (except masters, pilots and apprentices) employed or engaged in any capacity on board a ship whilst the Merchant Shipping (Protection of Seamen) Regulations⁴ provides that “seaman”, shall include every person employed or engaged in any capacity on board a ship as part of the ship’s crew, including the master of the vessel and any apprentice and excluding inter alia persons employed on board by an employer other than the ship owner. On the other hand, the Merchant Shipping (Hours of Work) Regulations⁵ provide for a blanket definition of “seafarer” being any person who is employed or engaged in any capacity on board a sea-going ship, on the business of the ship. At first sight, the MLC brings about uniformity in the sense that it provides a definition as to “Seafarers” being “all persons who are employed or are engaged or work in any capacity onboard a ship to which the Convention applies”^{6,7} but such definition is not without its ambiguities as questions still arise as to certain categories of persons employed onboard a ship such as security staff engaged to deter acts of piracy or guest entertainers on a cruise ship. In case the status of a particular category of persons as seafarers is not entirely clear, it will be up to the flag state to decide on this after consultation with the local national shipowners’ and seafarers’ union.

Whereas under the MSA, the master of a Maltese vessel engaged in international trade is required to enter into an agreement with the crew⁸ showing the place at which it is made, signed by each seaman, being dated at the time of the first signature, with signatures of substitutes being engaged subsequently to the first departure of the ship being added on,

3 Chapter 234, Section 2.

4 S.L. 234.28

5 S.L. 234.27

6 The Master is now given full protection as a seafarer in his own right.

7 On the assumption that an apprentice is performing work on the ship, although under training, he/she would be considered as a seafarer. ILO, FAQ, B3.

8 Section 114 of the MSA.

in terms of the MLC is it now necessary to have an individual seafarers employment agreement signed by each seafarer and the shipowner (or his representative – such as manager, bareboat charterer, etc).

In terms of the MSA, the Master is implicitly the Shipowner's attorney and so the Master is responsible to enter into the agreement with the crew; the Master may, in the absence of the owner, incur expense, or bind the owner by contract, for necessary repairs to the ship or for the supply of necessaries, and may borrow money on the credit of the owner to pay for necessaries to be supplied⁹ whilst the Master is bound to give to the owners a true and faithful account of all dealings and other matters relating to the ship at such reasonable times as he may be directed so to do¹⁰. However, in order to ensure that one is in line with the MLC, in case the Master will be signing the SEA with the seafarer, it is recommended that the Master be given a signed power of attorney from the shipowner to execute any such SEA on behalf of the shipowner.

Whilst in terms of Maltese law, the Master is obliged to post a copy of the agreement with the crew onboard so that it is accessible to the crew and whilst the seafarer is permitted to bring forward evidence of the agreement with the crew in any legal proceeding without actually having to produce the agreement, the position under the MLC in giving the seafarer the right to have an original signed SEA for his own records will undoubtedly give seafarers a stronger position in asserting their rights and bringing forward their claims.

The MLC stipulates that seafarers must be given the opportunity to examine and seek advice on the SEA before signing - in reality, this may pose a problem when a seafarer is employed from a foreign port with little advance notice. Still, the Shipowner is obliged to ensure that the seafarers have understood their rights and responsibilities on entering into the agreement.

Information as to the conditions of employment has to be easily obtainable onboard by the seafarers whilst a copy of the SEA has to be

⁹ Section 101(1) of the MSA.

¹⁰ Section 100(5) of the MSA.

available onboard for review by officers of a competent authority who will be responsible for ensuring enforcement, including port state control officials. Furthermore, where a collective bargaining agreement forms all or part of a seafarer's employment agreement, a copy of that agreement shall be available onboard.

In terms of the MLC, seafarers are entitled to be given a document recording their employment onboard the ship which will presumably also help them to secure employment in the future or to satisfy sea-going experience to advance further in his career. Under Maltese law, the obligation on the master to provide a certificate of discharge specifying the duration of his service onboard is already provided for¹¹.

The MLC lists a number of points which each Member State has to indicate as mandatory in any SEA governed by its national law. Most of these points are already obligatory in the agreement with the crew which each Master on a Maltese sea going vessel is required to enter into with his crew. The MLC recognizes that the amount of seafarers wages and seafarers entitlement to annual leave may be either stated or instead a formula for calculating same may be stated - the important thing is that the seafarer can calculate his wages and entitlement to leave. In case of an indefinite contract, the MLC states that the conditions for termination by either party are to be clearly stated as well as the required notice period where the seafarer is put on a par with the shipowner in the sense that any notice period for the seafarer cannot be more than for the shipowner. The SEA must contain the health and social security benefits to be provided to the seafarer by the shipowner such as sickness and injury benefits, the right to medical care whilst onboard the vessel and the shipowner's obligations in case of death occurring onboard or ashore during a voyage.

The MLC imposes an obligation on countries ratifying the MLC to provide for repatriation provisions in any SEA governed by the law of the ratifying country. The MLC requires ratifying member states to provide a minimum notice period which will be applicable in case of early

¹¹ Section 126 of the MSA.

termination of an SEA. In deciding the length of such minimum notice period, the member state has to consult the Shipowners' and Seafarers' organization but such notice period shall not be shorter than seven days unless in cases recognized by law which justify the termination of the SEA at shorter notice or even without notice. When allowing an SEA to be terminated earlier with shorter notice or without notice, member states are obliged to ensure that the seafarers will not be penalized when they may need to terminate such employment contracts for compassionate or other urgent reasons.

The MLC permits member states to add on other mandatory requirements which an SEA is to contain. Additional provisions may be included by the Shipowner in the SEA as long as such provisions are not contrary to Maltese law or contrary to any international conventions ratified by Malta. In this respect, the MSA requires the agreement with the crew to stipulate regulations as to conduct onboard and as to fines and other lawful punishment for misconduct which the Maltese Minister for shipping may have approved. Shipowners would do well to preclear any additional provisions which they would like inserted in the SEA and in respect of which they may have some doubts with the Flag Administration.

Whilst the MLC makes it compulsory for a shipowners complaint procedure to be in place, the MSA already caters for the making of a complaint by a seaman or apprentice against the master (and thus indirectly against the owner) or the crew¹². Shipowners would do well to review existing complaint procedures to bring them in line with MLC. In terms of the MLC, the complaint procedures should begin at the 'lowest level possible'. However, 'in all cases, seafarers shall have a right to complain directly to the master'. It would make sense for the shipowners complaint procedure to be referred to in the SEA.

As a result of the impending adoption of the MLC in Malta, it is still unclear at the time of writing as to whether the SEA will replace the current agreement with the crew and signing on articles or whether the agreement with the crew will continue to exist, side by side with

¹² Section 155 of the MSA.

the SEA , with the agreement with the crew being possibly modified to avoid duplication and containing provisions common to all seafarers. Undoubtedly, the articles may still fulfill a valid role in for instance laying down company policy on drugs and alcohol and conduct onboard.

The MLC, 2006 provides for general entitlements for repatriation and requires member states to adopt detailed provisions on repatriation which should be made available to seafarers thus empowering seafarers by informing them of their precise rights in case of repatriation. Information as to repatriation rights is mandatory in the SEA.

Conclusion

One cannot over emphasize the need to review the MLC to ensure that one is in compliance with the provisions. One possible consequence of default in complying with the MLC is failure to obtain the Certificate for Maritime Compliance in the first place. Compliance with MLC is yet another additional duty for masters as it is an ongoing process which masters will have to demonstrate to the satisfaction of PSC for the vessel not to suffer delays or possibly detentions due to non-compliance.

One of the reasons why the MLC is ground breaking and which may contribute to its future success is that it contains “no more favourable treatment” clause, which means that any ships registered under the flag of a state which is not a member to the MLC will still have to maintain MLC standards which will be checked by Port State Control Inspectors round the world. A level playing field has been created for shipowners in employing seafarers, independently of the flag of the vessel and this will hopefully also lead to more Member States adopting the MLC.

One can only hope that this revolution by Convention will in practice result in better rights for seafarers on whom the shipping community depends to operate the world fleet.

Regulation (EC) No. 392/2009 and the Maltese Cruise Industry

Norman A. Martínez Gutiérrez

1 Introduction

The European Parliament and the Council adopted on 23 April 2009 Regulation (EC) No. 392/2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents – hereinafter the “Regulation” – which incorporates and makes binding the provisions of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002 – hereinafter the “Convention” – and parts of the IMO Guidelines for the Implementation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002 – hereinafter the “IMO Reservation and Guidelines” – into European Law. Although the Regulation entered into force on 29 May 2009, it will only become applicable on 31 December 2012.

The applicability of the Regulation will be a landmark development for Malta, which is a country that has a strong passenger carrying industry. For illustration purposes it may be noted that during 2011 there were 557,585 cruise passengers visiting Malta and there were 207,754 passengers carried by ferry in Malta. Notwithstanding these figures, Malta is still not a Party to the Convention and therefore lacks the necessary legal framework governing the carriage of passengers and their luggage by sea.

2 Scope of Application

In accordance with Article 2 of the Regulation, it shall apply to any international carriage within the meaning of Article 1(9) of the Convention and to carriage by sea within a single Member State on board ships of Classes A and B under Article 4 of Directive 98/18/EC, where:

- (a) the ship is flying the flag of a Member State or is registered in a Member State;
 - (b) the contract of carriage has been made in a Member State;
- or

- (c) the place of departure or destination, according to the contract of carriage, is situated in a Member State.

Member States may, however, apply the Regulation to all domestic seagoing voyages. This may allow Malta to apply the Regulation to inter-island transport.

The Regulation will also apply commercial carriage undertaken by States or Public Authorities under contracts of carriage (Article 21 of the Convention), but will not apply when the carriage is subject, under any other international convention concerning the carriage of passengers or luggage by another mode of transport, to a civil liability regime under the provisions of such convention, in so far as those provisions have mandatory application to carriage by sea (Article 2(2) of the Convention). Similarly, nuclear damage, particularly if such damage results in liability under international conventions or under national law is expressly excluded from the scope of the Convention and consequently from the Regulation (Article 20 of the Convention).

3 Liability and Insurance

In accordance with Article 3 of the Regulation the liability regime in respect of passengers, their luggage and their vehicles and the rules on insurance or other financial security will be mainly governed by Articles 1 and *1bis*, Article 2(2), Articles 3 to 16 and Articles 18, 20 and 21 of the Athens Convention and by the provisions of the IMO Reservation and Guidelines. The main rules regulating these topics are summarized hereunder.

3.1 Liability of the Carrier

Article 3 of the Convention prescribes the legal basis for the carrier's liability (this also applies to the performing carrier in relation to losses that occur during the part of the carriage performed by him). As a general rule, the carrier's liability under the Convention only relates to loss arising from incidents that occurred in the course of the carriage. Whether this liability is strict or based on fault depends on the nature of the incident causing the loss.

If the loss suffered as a result of the death of or personal injury to a passenger is caused by a shipping incident (e.g. shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship), the carrier is strictly liable up to 250,000 special drawing rights – hereinafter “SDRs” – per passenger on each distinct occasion. However, the carrier may avoid liability by proving that the incident:

- (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (b) was wholly caused by an act or omission done with the intent to cause the incident by a third party.

If and to the extent that such losses exceed 250,000 SDRs, the carrier’s liability is no longer strict, but is based on fault or neglect. In such cases, this fault or neglect is presumed.

Article 6 of the Regulation extends the provisions of the Convention and declares that where the death of, or personal injury to, a passenger is caused by a shipping incident, the carrier who actually performed the whole or a part of the carriage must make an advance payment “sufficient to cover immediate economic needs on a basis proportionate to the damage suffered within 15 days of the identification of the person entitled to damages. In the event of the death, the payment shall not be less than EUR 21 000”. This provision also applies where the carrier is established within the Community. It is also clear that any advance payment does not amount to recognition of liability and may be offset against any subsequent sums paid in accordance with the Regulation.

If, on the other hand, the death or personal injury to a passenger is not caused by a shipping incident, Article 3 of the Convention states that the carrier will only be liable if the incident which caused the loss was due to his fault or neglect. The burden of proving the carrier’s fault or neglect lies with the claimant. The same is true for cases of loss or damage to cabin luggage, except that, the fault or neglect of the carrier will be presumed where the loss is caused by a shipping incident (Article 4 of the Regulation extends this rule to loss or damage to mobility equipment

or other specific equipment used by a passenger with reduced mobility. In such cases, the compensation shall correspond to the replacement value of the equipment concerned or, where applicable, to the costs relating to repairs). Moreover, in relation to loss or damage to luggage other than cabin luggage, the fault or neglect of the carrier will always be presumed.

However, in accordance with Article 6 of the Convention, the carrier may avoid or mitigate his liability if he proves contributory fault of the passenger. Similarly, the carrier will not be liable for any loss or damage to valuables, unless these valuables have been deposited with the carrier for the agreed purpose of safe-keeping (Article 5 of the Convention). Where the valuables have been so deposited, the carrier will be liable up to the limit stipulated in Article 8(3) of the Convention, unless the parties have agreed a higher limit.

3.2 Limitation of Liability

Pursuant to Article 7 of the Convention, the liability of the carrier for death or personal injury to a passenger is limited to 400,000 SDRs per passenger on each distinct occasion. However, States Parties may determine by specific provisions of national law the limit liability for death or personal injury to passengers, provided that the national limit of liability, if any, is not lower than that prescribed in the Convention.

Regarding claims for loss or damage to luggage and vehicles, Article 8 provides the following limits of liability:

- (a) for loss of or damage to cabin luggage – 2,250 SDRs per passenger, per carriage.
- (b) for loss of or damage to vehicles (including all luggage carried in or on the vehicle) – 12,700 SDRs per vehicle, per carriage.
- (c) for loss of or damage to luggage other than that mentioned in (a) and (b) above – 3,375 SDRs per passenger, per carriage.

Notwithstanding the above limits, the carrier and the passenger may agree that the carrier's liability is subject to a deductible. This deductible shall not exceed 330 SDRs in case of damage to a vehicle and shall not exceed 149 SDRs per passenger in the event of loss or damage to other luggage. On the other hand, it is also possible for the carrier and the passenger to agree, expressly and in writing higher limits of liability than the limits prescribed by the Convention (Article 10 of the Convention).

In accordance with Article 13 of the Convention, the aforesaid rights of limitation of liability shall be available to the carrier unless it is proved that the damage resulted from his act or omission done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

3.3 The Reservation and Guidelines

The Regulation incorporates and makes binding parts of the IMO Reservation and Guidelines. In accordance with these, Malta may reserve the right to and undertake to limit liability under Articles 3(1) or (2) of the Convention, if any, in respect of death of or personal injury to a passenger caused by war and terrorism risks (listed in paragraph 2.2 of the IMO Reservation and Guidelines) to the lower of the following amounts:

- 250,000 units of account in respect of each passenger on each distinct occasion;
- or
- 340 million units of account overall per ship on each distinct occasion.

The liability of the performing carrier, as well as that of the servants and agents of the carrier or the performing carrier will be limited in the same manner. Malta may also apply the aforesaid limits of liability as the limits to the compulsory insurance for death or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2 of the IMO Reservation and Guidelines. Hence, the insurer's limit of liability shall also be calculated using the figures above.

Additionally, Malta may reserve the right to and undertake to issue insurance certificates under Article *4bis*(2) of the Convention so as to reflect the limitations of liability and the requirements for insurance cover referred to in paragraphs 1.2, 1.6, 1.7 and 1.9 of the IMO Reservation and Guidelines, and to include such other limitations, requirements and exemptions as it finds that the insurance market conditions at the time of the issue of the certificate necessitate.

For this purpose, the Merchant Shipping Directorate should issue a certificate of insurance covering the carrier's liability for both war risks and non-war risks. In so doing, the Directorate should base the certificate on one insurance undertaking for war risks and another for non-war risks. As may be reasonably expected each insurer will only be liable for the risks and the amount he is insuring. The Directorate should issue certificates following the rules (and model) provided by the IMO Reservation and Guidelines.

3.4 Compulsory Insurance

Article *4bis* of the Convention prescribes that, when passengers are carried on board a ship registered in a State Party that is licensed to carry more than twelve passengers, any carrier who actually performs the whole or a part of the carriage must maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under the Convention in respect of the death of and personal injury to passengers. The limit of this compulsory insurance is set by the Convention at 250,000 SDRs per passenger on each distinct occasion.

Accordingly, each ship must obtain a certificate which confirms that insurance or other financial security is in force in accordance with the provisions of the Convention. In Malta, this certificate will be issued by the Merchant Shipping Directorate, Transport Malta after it has determined that the requirements of Article *4bis*(1) of the Convention have been complied with (the Merchant Shipping Directorate may also issue or certify certificates with respect to a ship not registered in a State Party to the Convention). The certificate must be carried on board the ship and a copy shall be deposited with the Merchant Shipping

Directorate. The certificate must follow the model set out in the annex to the Convention, which follows certificates required by other liability conventions. The model certificate is thus not alien to Maltese legislation (similar certificates are required by the Oil Pollution Act).

In Accordance with Article 4*bis* of the Convention Malta must accept certificates issued or certified under the authority of other States Parties to the Convention and must regard such certificates as having the same force as certificates issued or certified by the Merchant Shipping Directorate. In reciprocity, other States Parties must, likewise, recognize and accept certificates issued by the Merchant Shipping Directorate.

Once the Regulation enters into force, the Merchant Shipping Directorate will have an obligation not to permit passenger ships flying the Maltese flag to operate at any time without the corresponding certificate. Likewise it must ensure that the required insurance is in force for passenger ships entering or leaving Maltese ports (this requirement also applies to ships flying the flag of a State not a Party to the Convention).

Article 4*bis* also recognizes the right of direct action (i.e., a claim for death or personal injury may be brought directly against the insurer or provider of financial security). It is curious that, notwithstanding the limits of liability set out elsewhere in the Convention, if a direct action is pursued, the limit of liability of the insurer or provider of financial security is 250,000 SDRs per passenger on each distinct occasion.

3.5 Global Limitation of Liability

Article 5(1) of the Regulation states that it shall not modify the rights or duties of the carrier or performing carrier under national legislation implementing the International Convention on Limitation of Liability for Maritime Claims, 1976 – hereinafter the “LLMC Convention”, as amended by the Protocol of 1996, including any future amendment thereto. In the case of Malta the amended Convention has been implemented through the Limitation of Liability for Maritime Claims Regulations (Subsidiary Legislation 234.16) – hereinafter the “LLMC Regulations”.

In this respect, Regulation 9(3) of the LLMC Regulations lays down the following limit of liability for claims relating to loss of life or personal injuries to a passenger on a “non-seagoing ship”:

In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof in respect of each passenger shall be an amount of 175,000 Units of Account.

It must be noted that, although this provision seems to apply Article 7 of the amended LLMC Convention to non-seagoing ships, this is not the case, namely because the Convention provides a “global” limit of liability, whereas Regulation 9(3) provides a “per capita” limit. Thus in Malta there is no global limitation of liability for passenger claims in respect of non-seagoing ships. The same will be true for seagoing ships as from 31 December 2012. The reason for this is that, Regulation 9(2) of the LLMC Regulations states that “Article 7 of the Convention shall not apply in respect of any seagoing ship”, and in accordance with Regulation 9(4):

The provisions of this regulation shall only apply to claims covered by the Athens Convention relating to Carriage of Passengers and their Luggage by Sea, 1974, or any amendment or Protocol to that Convention, which arise from occurrences which take place after the coming into force of that Convention as part of the Law of Malta.

Therefore, once the Regulation (and thus the Convention) becomes applicable on 31 December 2012, Article 7 of the amended LLMC Convention will no longer be applicable to seagoing ships, thus removing global limitation for claims in respect of loss of life or personal injuries of passengers under Maltese legislation and leaving these claims to be governed exclusively by Article 3 of the Regulation.

On the other hand, the global limit of liability for claims for loss of or damage to luggage or vehicles is the amount prescribed in Article 6(1)(b) of the amended LLMC Convention with the most recent amendments introduced by Resolution LEG.5(99) adopted by the IMO Legal Committee on 19 April 2012. Accordingly, the new limits of liability in respect of “any

other claims" are the following:

- (i) 1.51 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,
- (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):
 - for each ton from 2,001 to 30,000 tons, 604 Units of Account;
 - for each ton from 30,001 to 70,000 tons, 453 Units of Account; and
 - for each ton in excess of 70,000 tons, 302 Units of Account.

In this respect it must be noted that the Schedule to the LLMC Regulations includes the limits of the amended LLMC Convention (as at 1996). It now thus required that the Schedule is updated so as to include the 2012 limits of liability.

4 Information to passengers

Article 7 of the Regulation requires the carrier and/or performing carrier to ensure that passengers are provided with appropriate and comprehensible information regarding their rights under the Regulation. Pursuant to this Article, the information must be provided at the latest on departure, provided however that where the contract of carriage is made in Malta, that information shall be provided at all points of sale (including sale by telephone and via the Internet). Furthermore, where the place of departure is Malta, that information shall be provided prior to departure.

5 Conclusions

With the Regulation becoming applicable on 31 December 2012, the Convention and parts of the IMO Reservation and Guidelines will have force of law in Malta. Accordingly, passengers on board Maltese passenger ships as well as those onboard foreign ships visiting Malta will be able to rely on a solid legal framework that ensures them a proper level of compensation in the event of maritime accidents.

Case Commentary – The Norbel Bulk

Nicholas Valenzia

Dr. Kris Borg noe v. Dagfinn Halvorsen noe of the 9th November 2012 - Court of Appeal

The decision given by the Court of Appeal in Malta on the 9th November 2012 in the names 'Dr. Kris Borg noe v. Dagfinn Halvorsen' (which I shall hereinafter refer to as 'the Norbel Bulk case') made some very interesting reading in that it reiterated and confirmed certain important principles in the definition of the nature and extent of certain maritime liens under Maltese law. The Court also had the opportunity to look into and to concisely reconfirm the notion of 'droit de suite' pertaining to maritime liens pursuant to the sale of a ship against which a right in rem existed at a particular time.

In the Norbel Bulk, the Norbel Bulk was deregistered from its Norwegian registry pursuant to its sale to third party owners. Following the de-registration and sale, the vessel was re-registered in St. Vincent and the Grenadines. Prior to such sequence of events, the said vessel was potentially liable in rem for the payment of dues consistent in the provision of parts and equipment.

Plaintiff, the supplier of the aforementioned goods brought an action in rem in Malta in order to ultimately recover amounts due. Defendants from there end pleaded that the claim could not be entertained in view of the fact that since the claim was not privileged under article 50(m) of the Merchant Shipping Act (Chapter 234 of the Laws of Malta) then a particular provision of the law (article 37D (3) of the Merchant Shipping Act), stating that claims in rem survived the sale of the vessel for a limited period, was not applicable.

The said Article 50(m) states that, 'moneys due to creditors for provisions, victuals, outfit and apparel, previously to the departure of the ship on her last voyage: Provided that such privilege shall not be competent where

the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner.'

Article 37D (3) reads as follows 'Without prejudice to any other cause which may at law extinguish an obligation the special privileges specified in article 50 are not extinguished by the sale of the vessel, except in case of a sale made pursuant to an order or with the approval of a competent court made according to the forms prescribed by law, or where, subsequent to a voluntary sale a period of one year has elapsed from the date of the registration, recording or annotation of that voluntary sale in the registry to which the ship belongs or where no such registration, recording or annotation are entered in that registry from the date of closure of the register of the ship in such registry subsequent to such voluntary sale, unless within such period of one year an action for the recovery of the claim secured by such privilege has been brought before a competent court.'

The First Hall of the Civil Court determined the issue by stating that in view of the fact that the vessel's sale was registered after the date in which the action in rem was instituted, then article 37D (3) did not apply and an action was directly entertainable against the vessel provided that it was proven that the nature of the claim qualified as a special privilege in terms of Article 50. By daringly widening the interpretation of article 50(m), the First Hall of the Civil Court determined that the claim was justified and due.

At Appeal stage defendants requested the reconsideration of the First Hall's decision on the basis of the fact that the claim was not privileged, as Article 50(M) only applied to claims which were made immediately prior to the departure of the ship on its last voyage and not to antecedent claims. The claim in dispute was contracted prior to such departure. In determining the issue and quoting English Law doctrine the Court of Appeal stated that article 50(m) covered specified debts contracted immediately prior to the departure of the ship on her last voyage. The First Hall's view that 50(m) was referring to all claims arising prior to the departure of the vessel on its last voyage, was erroneous. It was stated

that giving such an interpretation would have rendered the inclusion of the 'last voyage' qualification superfluous.

In giving judgment the Court of Appeal also delved into the legal consideration as to when the sale of a vessel was validly completed. It was stated that in determining such a point one had to consider a particular jurisdiction's rules relating to the transfer of movables. The registration of a Bill of Sale with a public registry authority did not per se constitute the transfer of the ship but was simply evidence of such transfer. In this particular case it was stated that the date on the Bill of Sale and not its date of recordation with the public registry authority was the date when the vessel was transferred.

Comment

The Norbel Bulk has shed all important fresh light on certain aspects of maritime asset protection and recovery procedures in Malta. The strong confirmation of the correct interpretation of article 50(m) will serve the purpose of laying to rest any unorthodox interpretation of the 'last voyage' theory which may serve as a bargaining plea in future litigation scenarios. This confirmation is particularly important in the light of a similar sub-article existing in the list of privileges specified in Article 50 of the Merchant Shipping Act. On the other hand one might have expected a deeper consideration of the obtaining legal position relating to when a sale of a vessel is validly effected. The Court of Appeal fails to distinguish between various multijurisdictional and practical scenarios at hand. The Court's statements in this regard might be interpreted as a general rule. A more detailed consideration of the facts at hand might have avoided what was stated from being quoted as a general rule in the future. Furthermore, the application of article 32 of the Merchant Shipping Act might not be totally correct as this and related articles in fact only apply to locally registered vessels and not vessels registered in other jurisdictions.