SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Ship collision damages

The Hong Kong High Court issued a Judgment on 10/12/2012 dealing with a collision between two vessels off Shanghai. [HCAJ 218/2009]

On 4/3/2008 the container vessel *OOCL China* collided with the vessel *Darya Bhakti* off Shanghai in the Mainland.

As a result of the collision separate Admiralty actions were commenced by the 2 ship interests. The claims of the *Darya Bhakti* had been agreed.

By the Admiralty action in the Hong Kong High Court, the OOCL China's owners and/or demise charterers ("OOCL") claimed against the Darya Bhakti's owners and/or demise charterers ("Darya") for damages and/or loss and/or expenses incurred or suffered by OOCL by reason of the collision which collision was caused by the negligence and/or breach of duty of Darya and/or their employees and/or agents, with interest and costs. The parties had agreed to deal with the assessment of the claims of the *OOCL China* in the reference before the Judge and then to separately address issues of liability which the Judge was not concerned with. OOCL's claims in the reference was filed on 12/8/2011. The defence was filed on 7/10/2011. OOCL's reply was filed on 2/12/2011. OOCL's filed an amended claim on 21/6/2012.

At the time of the collision the *OOCL China* was on time charter to Malaysian International Shipping Corporation ("MISC") under a time charterparty dated 20/5/2005 and in the course of a voyage from Shanghai to Busan in South Korea. She was carrying 2,572 containers. MISC was at that time a member of the Grand Alliance under the Grand Alliance Operating Agreement ("GAOA") between members of the Grand Alliance consisting of the linear consortium of OOCL, MISC, Hapag-Lloyd ("HL") and Nippon Yusen Kaisha ("NYK"). Pursuant to the GAOA, members of the Grand Alliance provided ships for the various services operated by the Grand Alliance with a view to maximize profits and minimize expenses. MISC had time chartered the *OOCL China* for the purpose of providing a suitably sized ship for Grand Alliance's Trans-Pacific Central China Express service ("CCX") under the terms of the GAOA. Under the terms of the GAOA, the operating carriers chartered out slots on their ships to other Grand Alliance members. Although the *OOCL China* was chartered out by OOCL to MISC, 45.97% of the total slots were chartered back to OOCL. Of the total slot capacity, OOCL was allocated 45.97%, HL was allocated 22.18% and NYK was allocated 31.844%. MISC itself took no slots on the *OOCL China*.

As a result of the damage sustained in the collision the *OOCL China* was refused permission by her Class Society to complete the voyage and was required to undergo immediate repairs. On 13 and 14/3/2008 the containers were unloaded from the *OOCL China* at the Yangshan Container Terminal in Shanghai and then transshipped onto the *OOCL Japan* which was a reserve ship which had been standing by off Taiwan. The *OOCL Japan* was a sister ship of the *OOCL China* they being of the same size and build. There were temporary repairs carried out in Yangshan. The *OOCL China* then sailed in ballast to Kaohsiung in Taiwan where it was permanently repaired. The *OOCL China* was out of service for a total of 44.58 days.

By the order of the Court made on 22/6/2012 it was ordered, *inter alia*, that the parties filed a list signed by the parties of the items of OOCL's claims which are not disputed, stating the amount which the parties agreed should be allowed in respect of each such item. Pursuant thereto, a List of Undisputed Claim Items ("the List") dated 31/10/2012 was signed by the solicitors for the parties. The List was filed on 1/11/2012. The List contained a total of 56 Items. A large number of items had been agreed and that there were only a few disputed items:

(1) In respect of items 1 to 8 inclusive and Items 34 to 48 in the List. These were described as the transshipment costs.
(2) In respect of item 31 (loss of hire) in the List. The amount claimed was amended at the hearing to US$1,427,273.28.

The transshipment costs

On the evidence of OOCL, the Judge was satisfied as to the reasonableness of the quantum of the transshipment costs as claimed in the List. The collision occurred shortly after sailing from Shanghai. The Judge accepted, that there was no option available to the *OOCL China* other than to discharge her entire containers of cargo at the port of Yangshan in Shanghai as this was the nearest port that the *OOCL China* could seek refuge in after the collision. The Shanghai

Shendong International Terminal ("the terminal") was the only container terminal in Yangshan. This was not a simple container discharge operation but an emergency operation involving a damaged container ship with damaged containers which had toppled on deck. Also there were containers containing dangerous cargo.

However, there was a serious dispute between the parties as to whether Darya were liable to OOCL for the transshipment costs. Undoubtedly the claims against Darya were in tort and not in contract.

In *The "Mineral Transporter"* [1985] 2 Lloyd's Rep. 303 it was held that the general proposition was that a time charterer was not entitled to recover for pecuniary loss caused by damage by a third party to the chartered vessel because a time charterer had no proprietary or possessory right in the chartered vessel and his only right in relation to the vessel was contractual.

The Judge was unable to accept Darya's submission that the claim for the transshipment costs amounted to a claim for economic loss in tort which was not recoverable. The Judge agreed with OOCL that the claim for the transshipment costs was clearly not a claim for economic loss. The transshipment costs were port of refuge expenses arising out of the physical damage to the *OOCL China* as a result of the collision. This was not a claim for loss of profits or earnings but for costs which were necessarily incurred to repair the damaged vessel and to ensure that the cargo arrived at its destination. OOCL made it plain that the claim for the transshipment costs was made as owner in its own right and not in a derivative capacity on behalf of cargo owners or on behalf of MISC.

OOCL relied on *Morrison Steamship Company Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265. In that case two ships having been in a collision, one was afterwards held one-fourth to blame and the other three-fourths to blame. The latter had to put into port for repairs and there discharge and re-load her cargo, whereby a general average expenditure was incurred. The cargo owners who became liable to their shipowners for general average contribution, brought an action against the owners of the colliding ship, claiming one-fourth of this contribution. It was held by a majority of the House of Lords that the cargo owners had a direct claim against the owners of the colliding ship, for a proportion of the general average contribution, on the ground that their obligation was to share in that expenditure *ab initio* even though that responsibility might be divested or diminished by the subsequent chances of the voyage, and was not merely an obligation to contribute by way of indemnity towards the expenditure of the owners of the cargo-carrying ship; the cargo owners, being thus under a primary liability for their share of the expenses, had a direct claim against the appellants, not a derivative claim by way of subrogation. OOCL relying on *Greystoke Castle* submitted that a ship owner had an independent claim in its own right for port of refuge expenses.

There was no claim by the cargo owners in the case in question. However, there was a claim by MISC against Darya as a result of the collision on 4/3/2008. In May 2010 MISC arrested the vessel *Darya Shakti* being an associated vessel of the *Darya Bhakti* in the Republic of South Africa pursuant to a warrant of arrest in the Admiralty action brought by MISC in that jurisdiction. The claims made by MISC were, *inter alia*, for damages suffered by MISC in the nature of costs and expenses incurred by MISC in respect of, *inter alia*, the discharge, survey and transshipment of containers carried on board the *OOCL China*. The *Darya Shakti* was eventually released when the vessel's hull underwriters provided a letter of undertaking by way of security. The South African proceedings had not been discontinued and the security had not been returned. OOCL also submitted that to prevent the situation arising where Darya would be paying twice for the transshipment costs, OOCL would undertake not to claim against MISC for the transshipment costs in the pending arbitration proceedings that they had brought against MISC in London.

The Judge accepted that a shipowner could make its own independent claim against the colliding ship for the port of refuge expenses. This was a claim in its own right and not a derivative claim on behalf of the cargo owners.

The problem with OOCL's claim against Darya for the transshipment costs was that OOCL had neither incurred nor paid for the transshipment costs on the evidence before the Judge. At a meeting held in Shanghai on 20/3/2008 following the container discharge operation in Shanghai it was agreed by the representatives of OOCL, MISC, HL and NYK that the transshipment costs would be settled by MISC. MISC was no longer a party to the GAOA. As MISC was leaving the GAOA, there was a final accounting process in 2012 whereby MISC was due to pay OOCL the sum of US$7,912,960. However, on or about 21/2/2012 MISC paid OOCL the sum of only US$2,120,282.75. In arriving at this sum it seemed that MISC deducted certain sums which included the sums of US$37,584.78 (Items 1 to 8 in the List) and US$930,184.30 (Items 34 to 48 in the List). MISC deducted the transshipment costs which MISC had incurred and paid for in 2008. Apparently, in 2012 MISC were adopting a stance that the agreement that it had reached with OOCL on 20/3/2008 was only an interim arrangement.

OOCL submitted that although OOCL did not initially pay for the transshipment costs, OOCL had now paid for the costs by the deductions made by MISC. The Judge was unable to accept OOCL's submission. OOCL gave evidence that the agreement reached with MISC on 20/3/2008 was a binding agreement. On OOCL's evidence it was certainly not an interim arrangement, as suggested by MISC only in 2012 about 4 years after the meeting on 20/3/2008. Following the meeting on 20/3/2008 OOCL were proceeding on the basis that the transshipment costs were incurred and paid by MISC as there was a binding agreement with MISC. The Judge accepted that OOCL did not incur and was

not liable for the transshipment costs. OOCL also did not pay the terminal the transshipment costs. OOCL also said that MISC was not entitled to make the deductions of the transshipment costs that it made in the final accounting process with OOCL. The Judge found that MISC made the deductions without the authority or consent of OOCL. The Judge was satisfied that there was a binding agreement between OOCL, MISC, HL and NYK that MISC would be liable for the transshipment costs. That being so, MISC was not entitled to deduct the same from payments due to OOCL in the final accounting process in February 2012. There was no reason why OOCL shouldn't claim these back from MISC. Indeed OOCL intended to do so in the pending arbitration proceedings in London.

In the Judge's judgment OOCL failed to establish the claim for the transshipment costs against Darya. This claim was disallowed.

Loss of hire

This was in respect of Item 31 in the List. The amount claimed was amended at the hearing to US$1,427,273.28. This was based on the loss of hire of the *OOCL China* for the off hire period which was agreed at 44.58 days. The daily loss was US$32,016 based on the financial capacity slot concept in the GAOA. The market rate was more or less the same. The Judge accepted, the vessel was earning hire at the rate of US$32,016 per day. OOCL therefore claimed US$1,427,273.28 (44.58 days x US$32,016).

Whilst OOCL was entitled to receive charter hire at the rate of US$32,016 per day from MISC, MISC was entitled to receive slot hire from OOCL for 45.97% of the total slot capacity of OOCL. There was no dispute that the slot hire payable by OOCL to MISC was calculated at the same rate as the charter hire payable by MISC to OOCL. Therefore, but for the collision OOCL would have been receiving a daily sum of US$32,016 but would also have been paying a daily sum of US$14,717.75 (US$32,016 x 45.97%).

OOCL submitted that the full cost of hire without deductions should be assessed as the loss of hire to OOCL. The Judge was unable to accept OOCL's submission. *OOCL Japan* was the substitute vessel during the off hire period of the *OOCL China*. The containers that would have been carried on the *OOCL China* were all carried on the *OOCL Japan*. OOCL became entitled to 45.97% of the slots on the *OOCL Japan*. However, because the *OOCL Japan* was its own vessel OOCL did not have to pay any slot hire for the 45.97% of the slots on the *OOCL Japan*. Whereas OOCL had to pay MISC for the 45.97% of the slots on the *OOCL China*, it did not have to pay any slot hire for the 45.97% of the slots on the *OOCL Japan*. This represented a saving to OOCL. OOCL agreed that when the *OOCL Japan* was substituted as the vessel during the off hire period of the *OOCL China*, OOCL still managed to earn freight on the containers that were shipped on the *OOCL Japan*. There was, therefore, no loss of freight earning capacity. Instead of earning freight from the *OOCL China*, OOCL earned freight from the *OOCL Japan*.

The Judge found that the proper approach in assessing the loss of hire as a result of the collision was to deduct the saving that OOCL made by not paying slot hire for the 45.97% slot capacity for the containers shipped on board the *OOCL Japan* from the loss of hire during the off hire period. In the Judge's view, this represented the real loss to OOCL. The Judge would assess the claim for loss of hire in the sum of US$771,156 ($32,016 - $14,717.75 x 44.58 days).

Conclusion

The Judge assessed OOCL's claims in the total sum of US$5,158,561.16 made up as follows:

(1)	The agreed items	US$ 4,094,864.25
(2)	Item 32 in the List (bunkers consumed)	US$ 241,466.05
(3)	Item 31 in the List (loss of hire)	US$ 771,156.00
(4)	Item 56 in the List (agency, agreed at 1% of assessed amount)	US$ 51,074.86

		US$ 5,158,561.16
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Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com