

and when considering the title to sue of the claimant, if the power of attorney is not perfectly executed and in time, "you may not succeed in your defence".

The range of people who can be sued is wide, including the master, owners, managers and liability insurers. Argentine courts accept jurisdiction, and a foreign jurisdiction clause is null and void if the cargo has to be delivered in Argentina, or a foreign vessel is arrested there.

If a foreign vessel is arrested in Argentina, the action on the merits must be brought by the claimant in Argentina. However, court fees are high — often 3% of the amount claimed — and in the case of foreign plaintiffs the court will normally require a guarantee of 20%-25% of the amount of the claim.

As far as environmental claims are concerned, Argentina has adopted the 1992 CLC and Fund Convention protocols, has incorporated the 1910 International Salvage Convention into its Navigation Act, and has signed the Collision Convention of 1910 and the 1972 Regulations. The

is extremely important that the master files a letter of protest because failure to do so will usually be considered to be an admission of liability for any damages, Mr Leech said.

"You will need to establish quickly how you can take maximum advantage of some of the local uncertainties, which can also pose problems for the claimants, but generally as a defendant you may wish to seek to avoid having to face a very lengthy fight in the lottery of the local courts"

Clyde & Co partner Stirling Leech

in international cases, although Brazil is a signatory of CLC 1969, there have been first-instance cases where this has been ignored.

Chile is arguably the most forward-looking country in South America in terms of enactment of new maritime laws, Mr Leech said. The new Book III of the Commercial Code gives effect to key clauses in the Hamburg Rules, and maritime law provisions clearly favour cargo interests.

Foreign jurisdiction and arbitration clauses will be ignored if claims involve loading and discharge in Chile.

Sistership arrests are possible in Chile and associated ship arrests in some cases, although the claimant needs to demonstrate that there is sufficient link between his/her claim and the common operators or managers in question.

As far as limitation is concerned, Chile has the larger 1976 amount of limitation but the 1957, easier to break, test on losing the right to limit.

Mexico introduced the Hague-Visby Rules in August 1994 as part of the Law of

Venezuelan law, she said, and foreign jurisdiction clauses are not recognised under Venezuelan maritime law.

As to liability, not only the contractual carrier may be liable to the original claimant but also the actual carrier if the carrier has derogated the contract to someone else.

Venezuela is party to the CLC and Fund Conventions and the 1992 protocols. However, in the 1997 *Nissos Amorgos* case the claimants persuaded the courts to ignore the provisions of the conventions for a considerable time, Ms Turnbull said.

"If you are an owner, avoid spilling oil in Venezuelan waters," she said, adding that the master was likely to find himself on an "enforced holiday" in the country for several months.

Colombia has not adopted the Hague, Hague-Visby nor Hamburg rules and has its own domestic regime enshrined in the Colombian Commercial Code, which provides the owner with certain defences, including force majeure, fire and perils of the sea. Colombian law does not entirely

limit liability beyond what is permitted under the law.

Amendments to the Code of Maritime procedure include Panamanian jurisdiction over matters within the territory. In the case of matters outside the territory, a foreign jurisdiction clause will be respected if expressly agreed.

In the case of arbitration, arbitrators will have their own powers in issues of jurisdiction, and in rem and in personam actions will be streamlined.

In collision cases, parties' experts will be subject to cross-examination with the aim of promoting greater transparency. Reports of state experts will no longer be binding on the parties, Ms Turnbull explained. It is hoped that cases at the new Maritime Appeal Court will be more streamlined.

Arrests will continue to be easy in Panama, but given the size of the registry, there is a wish that it favours the owner more than cargo interests, Ms Turnbull said.

Dutch law can provide easy access to survey reports

Helen Hill

SURVEY reports and other documents of evidence, such as a stowage plan or log-book, can play a vital role in settling cargo damage claims. Richard Latten, a partner at the Rotterdam law firm Smallegange, van Dam & van der Stelt, and Julian van de Velde, an attorney at the same law firm, say that obtaining a survey report is relatively easy under Dutch law.

During the discovery procedure in the Common Law jurisdictions and the US, each party can request documents and other evidence, but most survey reports are privileged, and do not have to be dis-

closed. In the Netherlands, a similar procedure can be found in Articles 22 and 843a of the Dutch Civil Code of Procedure.

Unlike the discovery procedure, survey reports are not privileged under Dutch law and delivery of these documents can be ordered by the court or claimed by one of the parties.

When an incident occurs, the shipowner normally instructs a surveyor to carry out an inspection. This means that besides the ship's documents, the shipowner has access to the facts surrounding the causes of the incident. But the surveyor instructed by a freight forwarder or charterer will not always have the same access and they are not aware of the exact details of the incident. This clearly makes it difficult when parties are faced with a claim from cargo interests.

As "the party in the middle" such parties can claim an indemnity from the actual shipowner when faced with a claim from cargo interests. Consequently, when the shipowner can, for example, successfully rely on one of the exceptions enu-

merated in the Hague-Visby Rules, these parties can turn around and invoke the same defence against cargo interests.

From that point of view, it is extremely important for such parties to have access to the relevant facts and information regarding the causes of the incident. These parties can then avoid a situation in which they settle the claim with cargo interests and when subsequently trying to seek an indemnity from the actual shipowner, will be confronted with a shipowner who can successfully rely on one of the exceptions included in the Hague-Visby Rules.

In the event of a claim already pending in main court proceedings, Article 22 of the DCCP means that the court can order the parties to explain their positions or to disclose certain documents. The parties can ignore this order if they can demonstrate they have significant reasons not to. A significant reason could be that a document contains confidential personal or professional information.

On the basis of Article 843a DCCP, one

of the parties can claim mandatory delivery of a document. But the following cumulative conditions have to be fulfilled: i. a lawful interest of the applicant in relation to delivery of the document; ii. the motion must clearly set out which document it relates to; and iii. the document must relate to a contractual relation to which the applicant is a party to.

In the *Hanjin Pennsylvania* case on May 19, 2004, the Court of Rotterdam held that the applicant had a lawful interest in the delivery of a survey report, as the findings in the survey report could be decisive for the course of action the applicant would take in respect of the cargo claim.

The second condition of Article 843a DCCP is included to prevent "fishing expeditions" by the applicant. The third condition provides that the document must relate to a contractual relation to which the applicant is party. A bill of lading or the booking confirmation is sufficient evidence to demonstrate the survey report relates to a contractual relationship.

However, where there is no contractual relation, such an action could also be instituted based on a tort of negligence.

An Article 843a DCCP action can be instituted during the main court proceedings or through an injunction procedure. This means that such action could be instituted prior to the main proceedings on the merits of the matter.

When claiming mandatory delivery based on Article 843a DCCP, the applicant could further claim that the document has to be provided subject to a penalty payment due each day the respondent is in breach. This penalty payment could easily be executed in the Netherlands through arresting a ship, or attaching the freight that has been paid into the account of the ship's agents.

As the above demonstrates, under Dutch law it is relatively easy to demand delivery of a survey report. This could prove extremely helpful for the freight forwarder or charterer who does not have access to the details of the incident and is faced with a claim from cargo interests.

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