TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty Pursuing Justice

Spring 2016

Admiralty and Maritime Law Committee

Chandris, Inc. v. Latsis "30% Rule" for Seaman Status: 20 Years Later

By: Captain Robert L. Gardana, Esq.[1]

Authored while riding circuit,[2] Supreme Court Justice Story's quote from an 1823 decision accents the historical view of mariners in the law:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provisions be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer

Continued on page 19

1 Captain Robert L. Gardana, Esq. practices maritime law in Miami, Florida. He is rated AV Preeminent in Admiralty and Maritime Law by Martindale Hubble; Board Certified in Admiralty & Maritime Law by The Florida Bar, USCG Master 100GT, and AMLC Vice Chair for Solo and Small Initiatives; Email: Gardanalaw@gmail.com. *The author gratefully acknowledges the assistance and collaboration of AMLC member Professor Attilio Costabel of St. Thomas University School of Law, and Brett Rogers, Esq., J.D. 2015 University of Miami School of Law, in preparing this article.*

2 *In the Beginning, etc.* Richard E. Berg-Andersson (The so-called "Circuit Courts", which would function as the Federal court of intermediate appellate jurisdiction- between the District Courts below and the Supreme Court above. The 11 Districts based on States *per se* were grouped into "Circuits" (New Hampshire, Massachusetts [without Maine], Connecticut and New York would form the "Eastern Circuit"; New Jersey, Pennsylvania, Delaware, Maryland and Virginia [*sans* Kentucky] would make up the "Middle Circuit"; while South Carolina and Georgia would make up the "Southern Circuit"); Maine and Kentucky- like the non-State colloquially named "Northwest Territory"- would, even though they were parts of States, have direct appeal to the Supreme Court in matters which would have otherwise gone first to the Circuit Courts.) *See*: http://www.thegreenpapers.com/Hx/JusticesExplanation.html

IN THIS ISSUE:

Chandris, Inc. v. Latsis "30% Rule" for Seaman Status: 20 Years Later 1
Message From The Chair 3
Letter From The Editors 5
Trade Talk: William ("Bill") Donohue, RLI Marine 6
Don't Let Your Weight Get You Down: How To Be Ready For IMO's New Ocean Container Weight Rule By July 1st 10
When Is A Maritime Non-Testifying Expert's Work Not Safe From Prying Eyes Of Opposing Counsel? 11
Compliance And Enforcement In Italy Consistent With International Provisions To Prevent Marine Pollution 13
2016-2017 TIPS Calendar 27


DON'T LET YOUR WEIGHT GET YOU DOWN: HOW TO BE READY FOR IMO'S NEW OCEAN CONTAINER WEIGHT RULE BY JULY 1ST[1]

By: Stephanie S. Penninger and Brittany L. Shaw[2]

The International Maritime Organization ("IMO") adopted new amendments to the Safety of Life at Sea ("SOLAS") convention that will apply to international shipments and go into effect on July 1, 2016. This amendment will mandate a "verified gross mass" for all shipping containers to which the IMO's convention for safe containers applies prior to loading aboard a containership. The purpose of this adoption is to further the IMO's safety mandate because, in the past, intentional and accidental misdeclarations of container weights have been the source of various marine casualties.

Who is responsible?

Under the new SOLAS requirements, the party named as shipper on the ocean bill of lading is responsible for providing the maritime ocean carrier and the terminal operator with the verified gross mass of a packed container. The carrier and the terminal operator cannot load a packed container aboard a ship until the verified gross mass for that container has been received. If a container is empty, the regulations will not require weight verification. Carriers and terminal operators are not required to double check the verified gross mass that has been provided to them.

What methods may be used to obtain the verified gross mass of a packed container?

There are two methods by which a shipper may obtain the verified gross mass of a packed container. The first option allows for a shipper to weigh, or arranged for a third party to weigh, the entire packed container. The second option, which may be impractical for certain types of cargo, and flexitanks, allows a shipper, or a third party, by arrangement of the shipper, to weigh all packages and cargo items individually, including the mass of pallets, dunnage and other packing and securing material, and add the tare mass of the container to the sum of the single masses of the container's contents. A shipper may not estimate the weight of a container's contents. Additionally, the party packing the container cannot use the weight someone else provided unless it meets a specific set of defined circumstances where the cargo has been previously weighed and that weight is clearly and permanently marked on the surface of the goods. In both methods, the equipment or any other device used to verify the gross mass must meet the applicable accuracy standards and requirements of the country in which the equipment is being used. IMO has not provided specific requirements at this time. However, the U.S. Coast Guard is expected to publish further guidance soon on obtaining verified gross mass.

What documentation is required and how must it be communicated?

SOLAS regulations require the shipper to communicate shipping containers' verified gross masses, as determined by one of the two specified methods, in a shipping document. The document, which should clearly specify the "verified gross mass," can be part of the shipping instructions or in a separate communication, such as a declaration, including a weight certificate. The verified weight may be expressed in kilograms or pounds, depending upon the measure commonly used in the originating jurisdiction. Irrespective of its form, the document must be signed by a person duly authorized by the shipper. SOLAS does not mandate the form of communication between parties when exchanging the verified gross mass information; therefore, the information and signature may be transmitted electronically.

Continued on page 26

1 Editor's Note: This article was first published in February 2016 by the law firm, Benesch, Friedlander, Coplan & Aronoff LLP in *Currents: Keeping in Tow with Maritime Legal Updates*, and reproduced herein with the permission from the firm.

2 Stephanie S. Penninger and Brittany Shaw are Associate Attorneys at *Benesch, Friedlander, Coplan & Aronoff LLP* (Indianapolis, Indiana), and may be contacted at spenninger@beneschlaw.com and bshaw@beneschlaw.com, respectively.

DON'T LET YOUR WEIGHT...

Continued from page 10

How is the regulation enforced and what penalties may parties face?

Noncomplying containers that are too heavy or without weight verifications cannot be loaded aboard the ship. Additionally, containers inadvertently or otherwise loaded onto vessels after July 1, 2016 which are not weight verified may not be covered by the shipper's maritime insurance. Additionally, possible penalties that could be assessed against a shipper include fines, repacking costs, administration fees for amending documents, demurrage charges, and delayed or cancelled shipments. SOLAS imposes an obligation on the carrier and the terminal operator not to load a packed container aboard ship for which no verified gross mass has been provided or obtained. If carrier and terminal operator do not comply with the regulations, commercial and operational penalties, such as delayed shipment and additional costs, may apply if the shipper has not provided the verified gross mass for the packed container and it is loaded onto a vessel.

How can you prepare?

Shippers and carriers must work together to establish and implement processes to ensure that the verified container weights are provided to the necessary parties in a timely fashion. Carriers need to provide shippers with "cut-off times" within which the carrier must receive the weight verification. This information is necessary to prepare the stowage plan of the ship prior to loading. While deadlines will differ, shippers should request cut-off times from carriers, in as much time in advance of the vessel's sailing as possible, to ensure that the deadline is met particularly for just in time shipments. Carriers and shippers should also evaluate their current service agreements, terms and conditions, bills of lading and tariffs to protect themselves against delayed shipments and additional costs associated with shippers not providing the weight verification on time. Shippers should determine which method is best suited for verifying gross mass, taking into consideration the types of cargo being shipped, and make advance preparations to ensure timely delivery of the verified gross mass to the carrier in the form requested by the carrier. Finally, U.S. importers should develop procedures for verifying that their foreign sources are in compliance with the new SOLAS amendment.

WHEN IS A MARITIME...

Continued from page 11

at his opinions, the Court reasoned that Nautical satisfied the heavy burden of demonstrating exceptional circumstances as per Rule 26(b)(4)(D). To overcome this burden, Nautical was required to show the existence of either of two situations: "1) the object or condition observed by the non-testifying expert is no longer observable by an expert of the party seeking discovery, or 2) although it is possible to replicate expert discovery on a contested issue, the cost of doing so is so 'judicially prohibitive'".[7]

In concluding that Nautical satisfied the first situation, the Court noted that this was a "close call". The Court explained that because a portion of the Clifford Report included a chart, which reflected temperatures taken at various locations on the M/Y Claire by crew, to be factual in nature, and not the opinion work product of either Clifford or counsel, it would not be possible for Nautical to obtain these readings via any other means and/or source. This was enough to tip the scale in favor of warranting disclosure with respect only the portion of the Clifford Report pertaining to the temperature readings.

7 Cooper v. Meridian Yachts, Ltd., No. 06-61630-CIV, 2008 WL 2229552, at 5 (S.D. Fla. May 28, 2008).