INSIDERS VIEW

(review of certain cases in the Maritime Arbitration Commission at the Chamber of Commerce of the Russian Federation)

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In December 2011, the author of this article was registered on the list of arbitrators of the Maritime Arbitration Commission at the Chamber of the Russian Federation.

As a maritime lawyer I have repeatedly represented clients in courts and arbitration in Latvia, Germany, England, as well as working for clients in close cooperation with American and European lawyers.

However, the way that a lawyer representing his/her client, whether plaintiff or defendant, considers the case is completely different from how an arbitrator or judge considers it.

Therefore I would like to share some interesting aspects of the cases heard before the Maritime Arbitration Commission and to emphasize that the preparation and collection of evidence must be approached very carefully and thoroughly.

Defendant refused to execute the award of the MAC voluntarily - plaintiff forced to go back to arbitration to recover the MAC interest and legal costs

In 2011 MAC made an award in favour of a ship owner against an insurance company.
Despite the fact that the Rules of MAC calls for voluntary compliance by the parties, the insurance company refused to recognise the award of the Tribunal and the ship owner was forced to appeal to the Moscow Arbitration (state) Court for a writ of execution. The insurance company paid the ship owner the amount due under the MAC judgment only after receiving the writ.

As a result the ship owner incurred additional losses and appealed to MAC with a claim for the recovery of interest for failing to meet the deadline for payment and legal expenses.

During the hearing the arbitrators heard the representatives of the insurance company and the ship owner. The representative of the insurance company was unable to present any valid reasons for the non-payment of the first MAC judgment to the panel.

After the hearing the arbitrators started to discuss the draft decision.

During the discussion the Tribunal came to the conclusion that the requirement to pay interest for the delayed fulfillment of a monetary obligation relates to the requirement of the contract and is covered by the arbitration agreement in the contract. That is, the dispute in this case has emerged from the insurance contract and not from the failure of the judicial act, subject to the satisfaction of the claim.

While arbitrators were discussing the draft decision the plaintiff and the defendant agreed to sign the settlement agreement, which was eventually approved on terms agreed by the parties.

Conflicting survey reports. Whom to believe?

In another case the ship owner filed a claim in arbitration against the H&M Underwriters in respect of a claim made on the policy.

After a scheduled repair the vessel left the shipyard where after the crew discovered a problem with the oil supply to the bearings of the main engine's turbochargers. The crew managed to restore the oil supply and the vessel anchored. Representatives of the factory inspected the turbochargers and discovered significant damage.
The ship owner reported the damage to the H&M Underwriters and requested them to send a surveyor on board to participate in identifying the cause of failure.
However, the H&M Underwriters did not send a surveyor to the vessel immediately. As such the owner stepped in and appointed a surveyor himself. Having arrived on the ship a few days after the damage was detected, the surveyor appointed by the ship owner examined and documented the damage.
The H&M Underwriters sent a surveyor to the vessel only two months later when the vessel called at a Russian port.

The costs of repairing damage to the hull, machinery or equipment were covered according to the terms of the H & M policy, while losses that occurred as a result of wear or corrosion were not covered.

The surveyor appointed by the ship owner had concluded that the damage was caused by the negligence of ship's engineer, who failed to make sure

that the turbochargers were sufficiently lubricated. This had resulted in the destruction of bearings.
Such damages fell under the insurance case and were subject to compensation.

The surveyor appointed by the H&M Underwriters arrived on the vessel, interviewed the crew, received copies of the vessel's documentation and concluded that the failure was due to wear and tear of the turbochargers . H&M Underwriters refused to compensate the ship owner based on the report of their surveyor.

The ship owner brought arbitration before MAC.

While investigating the case the Tribunal analyzed the circumstances of the case and the contradicting reports of the surveyors.

The arbitrators found that the insurance company was aware of the age of the vessel (over thirty years) at the moment of entering into insurance contract and had to take into account that the main engine would have a certain degree of wear. The surveyor representing the H&M Underwriters failed to prove that the losses caused by the damage to the bearings on turbochargers were due to normal wear and tear.

Arbitrators also considered the current practice of MAC, particularly with regard to the award in the case number 8/2008. In this case the report of the surveyor who inspected the vessel immediately after the accident also differed from the findings of the surveyor appointed by the insurer who conducted the inspection within 2 months after the accident. The arbitration award in this case was that "expert reports prepared in the course of the arbitration may have less probative value than the findings and reports made by the direct inspection of the vessel after the accident."[1]

As a result the position of the insurance company who claimed that it was not liable for damages due to wear (as defined in the insurance contract) was rejected as unfounded.

The ship owner’s claim was upheld.

“Surveyor’s error is peril of the seas entitling to the insurance compensation”

The vessel was carrying a bulk cargo from a Russian port to China .

[1] Сборник «Из практики МАК при ТПП РФ 2005-2010 годы», издательство «Статут», Москва, 2011, стр. 148-154

The amount of cargo on board was determined by a surveyor who carried out a draft survey at the load port. At discharge in China a further draft survey established and documented a shortage of about 700 tons or a claim under the policy of about US$150,000.
The consignee arrested the vessel. The ship owner had to hire lawyers in order to obtain the release of the vessel, sign a settlement agreement with the consignee and eventually pay the agreed amount of the settlement agreement.
All of these actions caused additional losses for the ship owner.

The ship owner made a claim under its P&I Liability policy. However, the P&I Club refused the claim on the grounds that the Club rules only provided cover for loss caused by perils of the sea and not errors of navigation. Therefore loss in weight caused due surveyor's error and not caused by a peril of the sea was not covered.

The ship owner filed an arbitration claim before MAC.
Reason for the claim: The shortage determined by draft surveys at loading and discharge of the vessel. Draft surveys were conducted after a contract of carriage had been made, therefore under the framework of the Carriage Conventions and the Merchant Shipping Code of the Russian Federation. Therefore even if there was a mistake by surveyors, it was made in the framework of Carriage by Sea. Circumstances beyond the control of the ship owner, that is errors by the surveyors which occurred during accepting the cargo for shipment and are errors of navigation. If this was so, it was an insurance matter and the losses were recoverable.
The ship owner did not obtain the agreement of the P&I Club because it had refused to settle the case at an early stage.

After the first hearing two arbitrators were unable to agree and appointed a third arbitrator - the chairman of the panel.
After the second hearing the tribunal concluded that the owner should not have signed a settlement agreement for claims that fall under the Club cover without their prior written consent. Grounds for such conclusion – the insurance cover was in force and the ship owner should have assumed that he would apply for compensation from his P&I cover when signing a settlement agreement and paying under the settlement agreement.

As for the surveyor's error being classed as an error in navigation - arbitrators analyzed the provisions of the International Convention Bills of Lading, the Merchant Shipping Code of the Russian Federation, the current practice of the Maritime Arbitration Commission and concluded that the error of the surveyor could not be qualified as an "error of navigation ." Perils of the sea are natural disasters that may occur during the vessel's navigation (storm, grounding, fire, etc.). There was no evidence that any of these

circumstances occurred during the voyage from the port of loading to the port of discharge.
Given all the above the ship owner's claim was denied.

Limitation period - 2 years. What's the starting date?

During the voyage the vessel's main engine broke down. The ship owner decided to tow the vessel and repair the engine. The vessel was inspected in the nearest port by the representatives of the insurance company and the Register. Their decision was that the main engine had to be replaced.
The ship owner confirmed the option to purchase and replace the necessary parts with a surveyor of the insurance company and repairs were made.

For the next two years ship owner, the surveyor of the insurance company and the insurer exchanged information and documents about the event and future actions to reduce losses. During this time the ship owner believed that there was an active involvement on the part of the insurance company in the investigation of the engine's damage. Meanwhile the insurance company avoided the ship owner's request to cover at least part of the damages, i.e. a payment on account.

The ship owner applied to MAC with a claim for arbitration to recover their losses.

In their points of defense, and during the course of hearing the defendant insurance company stated that the ship owner contacted them with demands for the recovery of monies paid before the investigation under the insurance contract was completed, without providing the requested documents in full. Therefore the insurance company was deprived of the opportunity to make any decision for reimbursement.

However during the debate on the case the defendant filed a request for dismissal of the case due to the fact that the plaintiff's claim was out of time, and the starting period of 2 years had to be calculated from the date of the insured accident. The ship owner had filed a lawsuit two years and 15 days after the incident.
Such statements of the defendant were articles 199, 966 of the Civil Code of the Russian Federation.
The case was adjourned.

It should be noted that the defendant's decision to change its position and its request to dismiss the case because of the expiration of time bar did not create a precedent as the issues regarding the calculation of the limitation period had been repeatedly considered by the Maritime Arbitration

Commission, the state arbitration courts and by Constitutional Court of the Russian Federation.

Marine insurance is, by its very nature, aleatory (risky). For this reason the legislator has established a shortened limitation period and provided a special procedure for calculating this term. But the question of establishing the start of the period of limitation in cases related to marine insurance does not have a sole answer – state courts and arbitrations have different interpretations of the initial articles about the start of the limitation period - Article 200 of the Civil Code of the Russian Federation (limitation period starts from the day when the person found out about it or should have known about the violation of their rights) and article 409 of the Merchant Shipping Code of the Russian Federation (from the date of the right to sue) .

Very important to determine the beginning of the limitation period are the key rules of insurance for vessels operating in each insurance company. These rules establish the terms of insurance allowing the policyholder to hold the insurance company liable for claims covered under those terms.

In this article I do not aim to establish the initial moment of calculating the limitation period. This is impossible since in certain circumstances the limitation period may be interrupted.
I only want to draw the attention of interested parties to the ambiguities raised by this issue and to indicate that its complexity and different options for the parties should be taken into account at the investigation of the insured event.

Is the manager of the vessel who filed a lawsuit on the H & M insurance on his own behalf an improper plaintiff ?

The H & M insurance policy as co- insurers listed ship owner and manager of the vessel as co-insured. The terms of the policy provided compensation in case of loss or damage of the insured vessel, reimbursement of damages for dealing with the loss and mitigating damages.

During the voyage the vessel's main engine turbine was damaged and lost power. Coastal authorities decided to salvage the vessel and tow her to a safe place.
Later repair of the turbine was completed and coastal authorities filed a claim for compensation of expenses for salvage and towing the vessel.
Repair costs and legal support resulted in a large sum of money being claimed.

Due to non-payment by the insurance company the vessel's manager filed a claim in arbitration before the MAC.
During the hearing the insurance company stated that the manager was paid to provide the ship owner with ship management services, and therefore according to Article 930 of the Civil Code of the Russian Federation, had no interest in the preservation of the insured vessel. Therefore the insurance contract concluded with the manager of the vessel in his favor was invalid and the lawsuit had to be dismissed.

The above position of insurance companies is a popular practice.
One of the principles of marine insurance is the principle of good faith of the parties (uberrimae fidei), described in the paragraph 5 of Article 10 of the Civil Code of the Russian Federation (good faith of members of civil relations and the reasonableness of their actions are assumed).
The actions of the insurance company, which first issued policies recording the ship owner and manager as co-insurers, then received insurance premiums from the manager (and did not return them), got involved into the investigation of the insured event, and later refused to pay the insurance claims on the grounds that the manager does not have a proprietary interest in the insured vessel may violate the principle of " prevention of the breach of law" under part 1 of article 10 of the Civil Code of the Russian Federation.

There is no one solution to that kind of situation.
As such ship owners and managers should take into account different options when signing insurance agreements and filing claims for insurance reimbursement.

The above cases were actually considered by the Maritime Arbitration Commission and the awards were made.
These cases were considered by different arbitrators: experienced deep sea captains, experts in marine insurance, authoritative professors of Russian universities who took part in the formation of Russian maritime legislation and practicing lawyers.
This professional diversity in my opinion is one of the advantages of MAC - knowing practical and often unwritten aspects of maritime business, "good maritime practice" and having the opportunity to assess the circumstances of each dispute not only with the formal and legal, but also practical position, the arbitrators of MAC are able to make objective and correct decisions.
Another advantage of dealing with disputes before MAC is that the cases are considered faster and at lower total cost than in foreign courts and arbitrations referred to in this article.