

International Ship and Port Facility Security (ISPS) Code:

Potential Commercial Disputes

Introduction

The International Maritime Organization, by way of a Conference of Contracting Governments to the International Convention for the Safety of Life At Sea, 1974 (SOLAS)¹ known as the Diplomatic Conference on Maritime Security, held in London December 9-13, 2002, adopted by way of amendment² new provisions of SOLAS and the International Ship and Port Facility Security Code (the "ISPS Code"). The objectives of the ISPS Code include establishing an international framework involving co-operation between Contracting Governments, government agencies, local administrations and the shipping and port industries to detect and take preventative measures against security incidents affecting ships and port facilities used in international trade. The subject amendments came into force in Canada on July 1, 2004, by way of the Marine Transportation Security Regulations³ made pursuant to section 5 of the Marine Transportation Security Act.⁴

Each Contracting Government must ensure that a Port Facility Security Assessment (PFSA) is completed for each port in its jurisdiction which serves ships that conduct international voyages. This assessment is a risk analysis designed to determine vulnerable parts of the facility's

¹ *International Convention for the Safety of Life at Sea, 1974*, 1 November 1974, Can. T.S. 1980, No. 4. Canada ratified SOLAS, 1974 on May 8, 1978.

² Amendments to the Annex to the International Convention for the Safety of Life at Sea (SOLAS), 1974 [contained in Resolutions 1,2,6 and 7 and including International Ship and Port Facility Security (ISPS) Code] (London, 12 December 2002). The ISPS Code was incorporated in the new Chapter XI-2 of the Annex to SOLAS.

³ *Marine Transportation Security Regulations*, SOR/2004-144.

⁴ *Marine Transportation Security Act*, S.C. 1994, c. 40.

operations which may be susceptible to security incidents. The PFSA will also determine what security measures are appropriate and should be included in that facility's Port Facility Security Plan (PFSP). The PFSP is developed, implemented, revised and maintained by a Port Facility Security Officer (PFSO), who must also liaise with Ship Security Officers (SSO) and Company Security Officers (CSO).

SSO's and CSO's are the responsibility of the company (ship owner, bareboat charterer or other person responsible for the operation of the ship). As with the port facility, a Ship Security Assessment (SSA) must be carried out on each vessel, the results of which are employed by the CSO to develop a Ship Security Plan (SSP). Each vessel involved in international trade must carry on board an International Ship Security Certificate (ISSC) which can only be obtained once the Contracting Government has verified that the ship's security system, security equipment and SSP fully comply with the ISPS Code.

The amendments to SOLAS⁵ require, amongst other things, the affixing of a permanent, plainly visible ship identification number⁶ and that each vessel involved in international trade be issued by its flag state a Continuous Synopsis Record (CSR) which is intended to provide an on-board record of the history of the ship with respect to the information recorded therein.⁷ The CSR shall include the name of the flag state, the date when the ship was registered with that state, the ship's IMO number, its name and port of registry, the name and historical details of the registered owners, bareboat charterers, the identity of the operating company as defined in SOLAS, the

⁵ These amendments renumbered existing Chapter XI as Chapter XI-1 and added a new chapter XI-2 immediately after the renumbered chapter XI-1.

⁶ Chapter XI-1, Regulation 3.

⁷ Chapter XI-1, Regulation 5.

ship's classification society and the organization which issued the documents required by the ISM Code, issued the ISSC, etc. The CSR must be kept onboard, continuously updated and kept current with the history of changes retained. It travels with the ship should the ship be transferred to another owner, bareboat charterer, company or flag and the information it contains is also held by flag state administration who will transmit same to any Contracting Government on change of flag. A ship must also carry a record of its ten previous ports of call.⁸ It has been suggested that this information provides "identity" and "transparency" and makes it clearer with whom business is being conducted and who is responsible for what as, prior to the ISPS Code's implementation, it was often uncertain as to who was the beneficial owner of a vessel and who was responsible for its conduct.⁹

For purposes of this discussion significant amongst the subject amendments to SOLAS is Chapter XI-2, Regulation 9, control and compliance measures.¹⁰ This deals with the control of ships in port and with ships intending to enter a port of another Contracting Government.

With respect to ships in a port of another Contracting Government, ships are subject to the control of officers duly authorized by that government. However, this control is limited to verifying that there is a valid ISSC on board which, if valid, shall be accepted unless there are "clear grounds" for believing that the ship not in compliance with Chapter XI-2 or Part A of the ISPS Code.¹¹ When there are such clear grounds, or where no valid ISSC is produced on

⁸ Chapter XI-2, Regulation 9-2.3.

⁹ 25 Things You Should Know About the ISPS Code, http://fleet.inmarsat.com/F77_security.htm, last visited October 21, 2004.

¹⁰ Chapter XI-2, Regulation 9.

¹¹ Chapter XI-2, Regulation 9-1-1.1.

demand, then one or more control measures in relation to the ship shall be imposed by those officers.¹² The control measures are identified as inspection, delaying or detention of the ship, restricting of operations including movement within the port or expulsion from the port.¹³ However, any such measures must be proportionate, taking into account the guidance given in Part B of the ISPS Code.¹⁴

With respect to ships intending to enter a port of another Contracting Government, that government may require such ships to provide the information listed therein to its duly authorized officers to ensure compliance prior to entry. This includes confirmation that the ship holds a valid ISSC and the name of the issuing authority, the security level at which the ship is currently operating and at which it operated in the ten previous ports where it conducted a ship/port interface, any special or additional security measures taken by the ship during that time, etc.¹⁵ As noted above, the ship is required to keep records of this information for the last ten ports of call.¹⁶ If this information is received and the duly authorized officers have clear grounds for believing that the ship is non-compliant with Chapter XI-2 or Part A of the ISPS Code then they are to try to establish communications with the ship to rectify the non-compliance. If this fails, or if they have "clear grounds otherwise for believing that the ship is in non-compliance" they may take the steps set out¹⁷: require the rectification of the non-compliance; require the ship to proceed to a specified location in the territorial sea or internal waters of that state; inspect the

¹² Chapter XI-2, Regulation 9-1-1.2.

¹³ Chapter XI-2, Regulation 9-1-1.3.

¹⁴ Chapter XI-2, Regulation 9-1-1.2.

¹⁵ Chapter XI-2, Regulation 9-2-2.1.

¹⁶ Chapter XI-2, Regulation 9-2-2.3.

¹⁷ Chapter XI-2, Regulation 9-2-2.4.

ship if it is in the territorial waters of that state or deny entry into port.¹⁸ Again, any such steps must be proportionate¹⁹, and prior to initiating them the ship is to be informed of the Contracting Government's intentions. Upon receiving that information the master may withdraw the intention to enter that port and in such event the regulation no longer has application.²⁰

Additionally, if such control measures or steps are imposed then the flag state Administration must be immediately notified as must the security organization which issued the ISSC.²¹ If port entry has been denied or the ship has been expelled then the port state authorities are to advise the authorities of the next ports of call and any appropriate coastal states of the factual circumstances surrounding the incident. Confidentiality and security of such notice are to be ensured.²²

The effect of this provision is that, regardless of the requirement of confidentiality of the notice, a denial of entry or expulsion from a port once communicated to the next ports of call and coastal states of concern will serve to blacklist the vessel. This, in turn, will inevitably give rise to potentially serious commercial consequences, including damages arising from delay, breaches of charter party and other contractual obligations not to mention economic loss. Moreover, such blacklisting could give rise to a claim against the Contracting State if the allegations proved to be ungrounded.

¹⁸ Chapter XI-2, Regulation 9-2-2.5.

¹⁹ Chapter XI-2, Regulation 9-2-2.4.

²⁰ Chapter XI-2, Regulation 9-2-2.5.

²¹ Chapter XI-2, Regulation 9-3-3.1.

²² Chapter XI-2, Regulation 9-3-3.2.

Perhaps in an effort to mitigate this concern the ISPS Code states that denial of entry or expulsion from port shall only be imposed where the officers duly authorized by the Contracting Government have "clear grounds to believe that the ship poses an immediate threat to the security or safety of persons, or of ships or other property and there are no other appropriate means for removing the threat".²³

The non-mandatory Part B of the ISPS Code, Guidance Regarding the Provisions of Chapter XI-2, provides some insight into the concept of "clear grounds". It states that this means "evidence or reliable information" that the ship does not correspond with the requirements of Chapter XI-2 or Part A of the ISPS Code. Such evidence or reliable information may arise from the duly authorized officer's "professional judgment" or observations gained while verifying the ship's ISSC or "from other sources". It notes that even if a valid certificate is on board, the duly authorized officers may still have clear grounds for believing that the ship is not in compliance based on their professional judgment.²⁴ Examples of possible clear grounds include the straight forward, such as evidence from a review of the ISSC that it has expired or is invalid, to the less tangible and subjective such as evidence or reliable information that serious deficiencies exist in the required security equipment, documentation or arrangements; receipt of a report or a complaint which, in the professional judgment of the duly authorized officer, contains information clearly indicating that the ship is non-compliant; evidence or reliable information that the ship has embarked persons or loaded stores or goods at a port facility or from another ship where either the port facility or the other ship is in violation of Chapter XI-2 or Part A, and

²³ Chapter XI-2, Regulation 9-3-3.3.

²⁴ ISPS Code, Part B, Guidance Regarding the Provisions of Chapter XI-2 of the Annex to the International Convention for the Safety of Life at Sea, 1974, as amended and Part A of this Code, Section 4.32.

the ship has not completed a Declaration of Security nor taken appropriate, special or additional security measures or has not maintained appropriate ship security procedures, etc.²⁵

That is, establishing that there are “clear grounds” for the imposition of control and/or compliance measures may not be determined by looking to the ship alone, but also by looking at the ship’s interactions with other port facilities and other ships. And a ship that is ISPS Code compliant may still be subject to control measures if it previously interacted with a non-compliant port facility. In such cases, it has been suggested that the inspector should consider any special or additional security measures taken by the ship and maintained during the interaction with the non-compliant port.²⁶

The term “clear grounds” has yet to be considered by the courts in the context of ISPS Code non-compliance. Similarly, the professional judgment or proper exercise thereof by a duly authorized officer has not been scrutinized nor has what may comprise acceptable sources of other reliable information upon which that officer could rely in detaining the ship or taking other measures.

In this age of heightened and, in some instances possibly overly sensitized, security awareness this raises the issue of whether questionable intelligence or sources could lead to an unwarranted control or compliance measure being imposed upon a ship to its commercial detriment. Part B does note that in exercising control and compliance measures the duly authorized officers should ensure that any measures or steps imposed are proportionate and should be reasonable and of the

²⁵ ISPS Code, Part B, s. 4.33.

²⁶ “Guidance Relating to the Implementation of SOLAS Chapter XI-2 and the ISPS Code”, IMO MSC/Circ. 1111 (June 7, 2004), Annex 2 at p. 3.

minimum severity and duration necessary to rectify or mitigate the non-compliance.²⁷ Given the high costs/losses that may be incurred as a result of vessel delays it can be expected that these may be issues that will be challenged by shipping interests in the courts in the days ahead.

In that regard, Chapter XI-2, Regulation 9 states that when any of the described control measures or steps are effected by a Contracting Government all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is thereby unduly detained or delayed it shall be entitled to compensation for any loss or damage suffered. Part B goes further and suggests that the word "delay" in Chapter XI-2, Regulation 9-3.5-1 also refers to situations where, pursuant to actions taken under same, the ship is unduly denied entry into port or is unduly expelled from port.²⁸ Accordingly, it is probable that claims will also arise under these provisions whereby claims for compensation will be made against the Contracting State in the event of undue delay or detention or even, perhaps, against a party making spurious allegations which led to the control measure or steps being effected.

Potential Commercial Disputes

The requirements of the ISPS Code and SOLAS will in all probability lead to disputes between ship owners, charterers, ports and Contracting Governments. In the shipping industry 'time is money.'²⁹ Vessel owners calculate freight rates for charters based on their operating expenses, vessel utilization and turnaround time; charterers want their cargoes loaded and discharged as quickly as possible. When a vessel is delayed, in addition to time loss (lay time and demurrage),

²⁷ ISPS Code, Part B, s. 4.43.

²⁸ ISPS Code, Part B, s. 4.44.

²⁹ Lucienne Casasso Bulow, "Consequences of New Security Initiatives", ICMA XV (February 16, 2004), at p. 5.

other expenses can be incurred, including launch expenses, tug escorts, pilotage, port dues, inspection expenses, wharfage, transshipment and additional handling.³⁰ The question will be, who is responsible for the additional costs and/or losses incurred?

It has been suggested that, generally speaking, matters pertaining to cargo will be for the account of the charterers and matters pertaining to the ship are for the account of the owner.³¹ Nonetheless, without specific clauses designed to regulate the allocation of risk, reliance will have to be placed on the specific facts as they exist in each case, including, without limitation, the overall allocation of risk as agreed between the parties and the timing or reason for the delay.³² The following is a brief outline of various types of disputes that might arise in this context.

A. Charter Party Issues

In the absence of specific wording in a charter party, vessel owners are likely to be required to bear the financial consequences of vessel non-compliance with ISPS Code requirements, however, compliance may in fact require the cooperation of both owner and charterer or subcharterer.³³

³⁰ Lucienne Casasso Bulow, "Consequences of New Security Initiatives", ICMA XV (February 16, 2004), at p. 5.

³¹ Robert G. Clyne, Esq., "Muddled Waters: Maritime Security, Delays and Charter Party Implications", *The Arbitrator*, Vol. 35. No.4 (July, 2004), at p. 3.

³² Lucienne Casasso Bulow, "Consequences of New Security Initiatives", ICMA XV (February 16, 2004), at p. 5.

³³ Chris Moore, "Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at pp. 11 and 12.

A Contracting Government may require ships intending to enter its ports to provide, prior to entry, certain specified information to ensure compliance with the ISPS Code and SOLAS amendments. This would include the security level at which the ship is then operating and at which it operated at its previous ten ports of call as well as any special or additional security measures taken by the ship at such ports or during any ship to ship activity during that time frame. However, because it is the charterer who may direct the ship to an elected port, in practical terms it may be the charterers who must provide the ship with information such as the chosen port's security level and any changes to same and ensure that it does not direct the ship to a non-compliant port. This information would serve not only to avoid potential delays at the intended port but at the ports of call to follow because if the security history of the ship is tainted then the consequences of that tainting could be incurred long after the occurrence of the suspect port visit or ship to ship interface.

Given this it has been suggested that owners may wish to effect charter party terms which require the charterer to give clear and timely voyage instructions so that owners can comply in good time with the necessary security level and minimize any delay or detention of the vessel. Further, to have charterers expressly agree to the trading limits of the vessel, in advance, by reference to the ISPS Code. For example, by warranting that charterers will not order the vessel to proceed to ports which are not ISPS Code compliant (or have been blacklisted) or have standards of security which will meet level 1 as a minimum.³⁴

³⁴ Chris Moore, "Maritime Security Issues – Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 12.

(i) Voyage Charters

(a) Under voyage charter parties' ISPS Code related disputes will likely relate to liability for delay of the vessel arising either due to inspection or non-compliance. Where the charter party terms provide that the owner is only liable for delay where it results from the owner's personal lack of due diligence to make the vessel seaworthy then it will be open to the owner to argue that it is not liable as the delay was caused by the negligence of the master or crew, especially where the non-compliance which led to the delay was a simple breach of the ISPS Code on the part of the crew on an otherwise compliant vessel. On the other hand, where the charter party terms provide that the owner has an ongoing and indelegable duty to exercise due diligence to make the vessel seaworthy, it is not as clear where liability will lie.³⁵ There is case law which may be utilized to suggest that in such an instance, even where the crew acted negligently but the vessel is otherwise compliant, the owner can be held liable.³⁶

(b) A vessel might not be considered to have tendered its Notice of Readiness (NOR) until it has been inspected and obtained security clearance and is thus at the disposal of the charterer and ready to load or discharge, that is, it is an "arrived ship".

A delay of this kind may be the responsibility of the ship owner or operator rather

³⁵ Chris Moore, "Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 13.

³⁶ See for example *Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.*, [1959] A.C. 589 (P.C.), wherein the court noted that an owner's obligation to make the vessel seaworthy is personal, and if any experts, servants or agents hired by the owner fail to exercise due diligence to make the vessel seaworthy, the owner is still liable. And also see *Canadian National Steamships v. Bayliss*, [1937] S.C.R. 271, where the court held that a carrier cannot acquit himself merely by showing that he has employed competent persons.

than the charterer.³⁷ In some cases the provisions of a voyage charter party will provide that a vessel can tender a NOR upon arrival at port so long as the master warrants that the vessel is in fact ready in all respects. If inspection subsequently reveals the vessel is not compliant with the ISPS Code then any time lost as a result of the defect would not count as lay time. Where this type of provision is found it may be that a vessel could tender its NOR and lay time will continue during the inspection and would only stop running if the vessel were found to be non-compliant.³⁸ However, if the charter party provides that the vessel may tender its NOR upon arrival at the customary anchorage, any delay for any reason over which the charterer has no control and which occurs after the NOR has been tendered may not count as lay time. In that case, even if the delay is due to non-compliance, time lost for inspection may not count as lay time.³⁹

(ii) Time Charters

(a) Under a time charter, liability for delays resulting from ISPS Code non-compliance would likely fall to the owner if it is accepted that non-compliance is a breach of the owner's duty to provide seaworthy vessel. However, until non-compliance is discovered, the vessel is arguably not in breach of the ISPS Code and therefore is capable of performing what is required of it pursuant to the charter party terms. In that situation, charterers will probably not be able to put the vessel off hire

³⁷ Lucienne Casasso Bulow, "Consequences of New Security Initiatives", ICMA XV (February 16, 2004), at p. 7.

³⁸ Chris Moore, "Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 14.

³⁹ Chris Moore, "Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 14.

unless the off hire clause specifically states “any other causes whatsoever”. Of course, if “clear grounds” for non-compliance are subsequently found, the charterers may consider this a breach by the owners of their obligation to provide a seaworthy ship and may make a claim for damages for the hire paid on the lost time.⁴⁰

(b) It has also been suggested that the charterer’s obligation to nominate a safe port may be redefined by the ISPS Code to include not just physical safety but also political safety. This obligation, however, may only apply at the time the vessel is ordered to proceed to the port in question. Where it has done so but the port is subsequently deemed to be a non-compliant port or a port that is subject to a higher security level, the charterer may argue the port was politically safe or at a lower security level at the time the order was made and, therefore, it was not in breach of its obligation to nominate a safe port. Further, to avoid this situation owners may demand warranties from charterers that they will not trade to non-compliant or high security ports.⁴¹ While this is not out of keeping with existing safe port warranties charterer resistance may arise on the basis that such contingencies could arise without notice for reasons beyond charterers’ control.

(c) Increased costs will be incurred when a vessel has to increase its security measures to a higher level and disputes may arise as to who should pay these costs.

For example, a ship docked at Security Level 1 may be forced to increase to Security

⁴⁰ Chris Moore, “Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities”, ICMA XV (February 14, 2004), at p. 15.

⁴¹ Chris Moore, “Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities”, ICMA XV (February 14, 2004), at p. 15.

Level 2 when a passenger liner docks alongside. In such cases it may be that with timely communication between the owner and the charterer, a dispute could be avoided altogether. However, where information in respect of changes in security level cannot be or has not been obtained, who pays will likely cause much debate and dispute.⁴²

(d) If a Contracting Government decides that one of the previous ten ports visited did not take appropriate security measures when handling cargo and therefore detains the vessel, then it is the owner who would likely bear the responsibility for the non-compliance. But, if the detention was conducted without any evidence of non-compliance by the owner, then it could be argued by owners that the charterers should bear any resultant costs because the charterers were responsible for loading the cargo, or, have an implied indemnity to the owners for any losses incurred as a result of the owners' compliance with the charterer's orders. But as has been pointed out, this is by no means a clear cut issue.⁴³

To address these potential issues owners and charterers alike will, no doubt, develop contractual terms intended to allocate liability in the context of ISPS Code issues. Organizations such as BIMCO have already developed standard clauses for insertion in

⁴² "Maritime Security and the ISPS Code", Hill Taylor Dickinson (April 2004).

⁴³ Chris Moore, "Maritime Security Issues – Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004) at p. 16.

charter parties.⁴⁴ However, like all new clauses, their interpretation and effectiveness in the face of actual disputes will be eventually addressed by the courts.

B. Cargo Issues

The detention of a vessel can lead to cargo claims for delay, lost profits and even loss of cargo. Where the detention and inspection does not lead to a finding of non-compliance against the vessel, it is arguable that the owners should not be responsible for the losses as they have not breached the contract of carriage. Conversely, where a finding of ISPS Code non-compliance has been made with respect to the vessel then the argument advanced by charterers would, no doubt, be that the owner breached its duty to provide a seaworthy vessel.⁴⁵

By way of example, pursuant to Article III of the Hague-Visby Rules, a carrier must, before and at the beginning of the voyage, exercise due diligence to make the vessel seaworthy. Article IV states that neither the owner nor the ship will be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence will be on the party claiming due diligence.⁴⁶

In applying the Hague-Visby Rules to a cargo claim, the cargo interest would need to establish only that the cargo was not delivered in the same good order and condition as received onboard and also

⁴⁴ See Lucienne Casasso Bulow, "Consequences of New Security Initiatives", ICMA XV (February 16, 2004), at pp. 16-18.

⁴⁵ Chris Moore, "Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 19.

⁴⁶ Hague-Visby Rules, Art. IV, s.1.

the value of the loss. Once established, the burden of proof shifts to the carrier to establish the loss or damage is attributable to an excepted peril set out in Article IV. The excepted perils most relevant to disputes of this type would be where the damage arose from an act, neglect or default of the master, mariner, pilot or the servants of the owner in the navigation or management of the ship⁴⁷; arrest or restraint of princes, rulers or people or seizure under legal process⁴⁸; act or omission of the shipper or owner of the goods, its agent or representative⁴⁹; or, possibly, where the loss arose as the result of any other cause without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.⁵⁰ It would then be up to the cargo interest to establish the carrier's negligence or both that the ship was unseaworthy at the commencement of the voyage and that the loss was caused by that unseaworthiness. If these points, in the context of unseaworthiness, are established, the carrier can avoid liability by establishing that due diligence was exercised to make the ship seaworthy.⁵¹

With respect to whether the loss is an excepted peril relating to any loss or damage arising from an act, neglect or default in the navigation or management of the ship, if the owner can establish that an act or omission was done, or omitted to be done, in the handling of the vessel, i.e. for the safety of the ship as a ship and not primarily done in connection with the cargo, then this is a matter which falls within the management of the ship.⁵² With respect to whether the loss is an excepted peril

⁴⁷ Hague-Visby Rules, Article IV, s. 2(a).

⁴⁸ Hague-Visby Rules, Article IV, s. 2(g).

⁴⁹ Hague-Visby Rules, Article IV, s. 2(i).

⁵⁰ Hague-Visby Rules, Article IV, s. 2(q).

⁵¹ *Nova Steel Ltd. v. "Kapitonas Gudin" (The)* (2002) CarswellNat 219 (FC); *Kruger Inc. v. Baltic Shipping Co.* (1989) 11 F.T.R. 80 Affirmed (1989) 57 D.L.R. (4th) 4985 (FCA); *Papera Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd.*, [2002] 1 Lloyd's Rep 719 (QBD-Com. Ct.); also see *Voest-Alpine Stahl Linz GmbH v. Federal Pacific Ltd.* (1999) 174 F.T.R. 69; CarswellNat 1588 (FC); *Francosteel Corp. v. Fednav Ltd.* (1990), 37 F.T.R. 184 (FC).

⁵² See for example *Kalamazoo Paper Co. v. Canadian Pacific Railway*, [1950] S.C.R. 356.

arising from any other cause without the actual fault or privity of the owner or the servants and agents of the owner, the owner would have to prove that neither the actual fault or privity of the owner nor the fault or neglect of its servants or agents contributed to the loss. The burden on the owner is heavy and it is not enough for the owner to show that he has employed competent persons to carry out the owner's duties.⁵³ In either case, even where the loss is due to an excepted peril, the owner must still meet the overriding obligation to provide a seaworthy ship.⁵⁴

A vessel is seaworthy if it has a degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to all the probable circumstances to it.⁵⁵ Arguably then, if the vessel is ISPS Code non-compliant at the commencement of the voyage, it does not have a degree of fitness an ordinary careful and prudent owner would require and therefore is not seaworthy. The questions then become when did the non-compliance occur and whether the unseaworthiness arising from it caused the loss.⁵⁶ In the case of ISPS Code non-compliance if the breach occurred prior to loading then the vessel may be deemed to have been unseaworthy from the commencement of the voyage. However, if it occurred subsequently then the carrier may not be liable. In a case of delay for non-compliance it may not be difficult to establish that the non-compliance caused the loss in which case, if the non-compliance preceded the commencement of the voyage, then the carrier would then only escape liability if it

⁵³ *Canadian National Steamships v. Bayliss*, [1937] S.C.R. 261.

⁵⁴ *Smith, Hogg & Co. Ltd., v. Black Sea & Baltic General Insurance Company Ltd.* (1940), 67 Ll. L. Rep. 253 (H.L.).

⁵⁵ See, for example, *Papera Traders Co. Ltd.*, *supra*, note 50.

⁵⁶ *Smith, Hogg & Co. Ltd., v. Black Sea & Baltic General Insurance Company Ltd.* (1940), 67 Ll. L. Rep. 253 (H.L.).

could prove that it, and all of those for whom it was responsible, exercised due diligence to make the ship seaworthy.⁵⁷

Due diligence is equivalent to reasonable diligence, having regard to the circumstances known or to be expected, the nature of the voyage and the cargo carried.⁵⁸ It has been suggested that, practically speaking, given the circumstances surrounding the implementation of the ISPS Code and the mandatory nature of the requirements placed on ships the non-compliance itself may be equivalent to a failure to exercise due diligence.⁵⁹ Conversely it has also been suggested that a comparison can be made to the watchkeeping and crew resting requirements of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW). Under those provisions if the owner can show that the correct procedures were in place on board the vessel and were adequately monitored to ensure compliance then the vessel owners may satisfy the due diligence obligations. On that analysis, under the ISPS Code scrutiny, owners would only be found liable where the non-compliance was fundamental such as relating to the security plan itself or can be traced back to shore based staff.⁶⁰

The "24 Hour Rule"/Trade to U.S.

Pursuant to section 222(1) of the Marine Transportation Security Regulations, the master of a ship must ensure the ship does not enter Canadian waters unless he first reports certain pre-arrival

⁵⁷ See, for example, *Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.*, [1959] A.C. 589 (F.C.) at p. 54 or *Eridania SPA and Others v. Rudolph A. Oetker and Others (The "Fjord Wind")*, [2000] 2 Lloyd's Rep. 191 (C.A.).

⁵⁸ Hague-Visby Rules, Article III, r. 1.

⁵⁹ Lucienne Casasso Bulow, "Consequences of New Security Initiatives", ICMA XV (February 16, 2004), at p. 9.

⁶⁰ Chris Moore, "Maritime Security Issues – Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 19.

information to the authorities.⁶¹ This pre-arrival information must be reported at least 96 hours before entering Canadian waters and must include, among other things, the vessel's name and country of registry, name of the registered owner and operator, the vessel's IMO number, a general description of the cargo, including cargo amount and the presence and description of any dangerous substances or devices on board.⁶²

The US Customs Regulations⁶³ require advance cargo information to be provided 24 hours before the loading of cargoes bound for the United States. The information provided should fully describe the cargo, the shipper, consignees, notify parties, etc. Cargo manifests must also be sent to US Customs electronically directly from the carrier, or, through other approved channels. In the case of bulk cargoes, the information need not be provided until 24 hours before arrival in an American port facility. Thus, if a tanker was to go from a transshipment facility in Newfoundland and Labrador to a port in the United States and not give sufficient notice the tanker could be denied entry into the US port.⁶⁴ Would the tanker be required to wait until the 24 hours has expired before entering the US port, or would the vessel be forced to return to its port of loading to provide the required notice? And who would be responsible for the costs of such a delay? Arguably, the vessel owner should not be responsible for any losses resulting from a failure to provide adequate notice as the onus should be on the cargo interests to provide the notice and cargo manifests.⁶⁵

⁶¹ Marine Transportation Security Regulations, SOR/2004-144, s. 221(1)©. This is the case unless the duration of the segment of the voyage before entering Canadian waters is less than 24 hours, in which case, the information must be provided no later than time of departure from the last port of call (s. 221(1)(a)); or, if the duration of the segment of the voyage before entering Canadian waters is less than 96 hours but more than 24 hours, at least 24 hours before entering Canadian waters (s. 221(1)(b)).

⁶² Marine Transportation Security Regulations, SOR/2004-144, s. 221(2).

⁶³ 19 C.F.R., s. 4.7 (2003).

⁶⁴ Robert G. Clyne, "Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries", 77 Tulane Law Review 1182 (2003) at 1201.

⁶⁵ Further analysis of security issues arising from trade into the U.S. is beyond the scope of this paper.

D. Undue Delay or Detention¹

As noted above it can be argued that a vessel is not seaworthy if it does not have the documentation necessary to perform the voyage.⁶⁶ Furthermore, that as ship owners should be well aware that a vessel is required to carry such documents as an ISSC, an SSP, and a CSR if these documents are not on board the ship, or they are somehow deficient, it is unlikely that damages resulting from such a deficiency could be deemed unforeseeable.⁶⁷

However, even with all the proper documentation a vessel may still be delayed for reasons known only to the authorities.⁶⁸ In other cases, an inspection may be motivated by the nationality of crew or the flag of the vessel.⁶⁹ Further, a detention may have been caused by a false alarm.⁷⁰ Chapter XI-2, Regulation 9 of SOLAS states that all possible efforts must be made to avoid a ship being unduly detained or delayed and that if a ship is unduly detained, or delayed, it will be entitled to compensation for any loss or damage suffered.⁷¹ It does not specify who is responsible for paying this compensation but one probable party is the Contracting State by way of its Port State Control activities.

⁶⁶ Robert G. Clyne, Esq., "Muddled Waters: Maritime Security, Delays and Charter Party Implications", *The Arbitrator*, Vol. 35. No.4 (July, 2004), at p. 3.

⁶⁷ Lucienne Casasso Bulow, "Consequences of New Security Initiatives", *ICMA XV* (February 16, 2004), at p. 7.

⁶⁸ Lucienne Casasso Bulow, "Consequences of New Security Initiatives", *ICMA XV* (February 16, 2004), at p. 7.

⁶⁹ Lucienne Casasso Bulow, "Consequences of New Security Initiatives", *ICMA XV* (February 16, 2004), at p. 7.

⁷⁰ Lucienne Casasso Bulow, "Consequences of New Security Initiatives", *ICMA XV* (February 16, 2004), at p. 10. Specifically noted is the case of the MV "Palermo Senator", which was detained at port in New York for several days while a search was made to determine the source of radioactive emissions. The ship docked before the problem was found and she was then escorted to another site for a closer examination. It was subsequently determined the radiation was the natural radiation emitted from a container of clay tiles. The vessel operator incurred demurrage costs exceeding \$50,000.00.

⁷¹ Chapter XI-2, Regulation 9-3-3.5.

E. Port State Control

Given the important and intertwined role that Port State Control will play in respect of ISPS Code control and compliance measures, a brief overview of the existing general principles of Port State Control may be warranted.

Flag state supremacy has long been a dominant theme in the law of the sea. Flag states have held almost exclusive jurisdiction and control over the ships flying their flag and the events which take place on board those ships. Nonetheless, concerns over such things as safety of navigation, conservation of the living resources of the sea, preservation of the environment and national security have caused coastal states to extend their sovereign rights to protect their shores and their citizens. Port State Control is one measure employed by coastal states to exert some control over foreign ships visiting their ports. Port State Control is, in essence, a system of ship inspection whereby foreign vessels entering a sovereign state's ports are boarded and inspected to ensure compliance with various major international maritime conventions, including SOLAS, the International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978 (MARPOL73/78), the International Convention on Load Lines, the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG), amongst others.

Port State Control is not the subject of international convention. Rather, it is reflective of agreements reached between the maritime authorities of participating states in specific geographical regions which share common waters and which have grouped together and entered

into Memorandums of Understanding (MOU) to ensure that vessels trading in their regions are not sub-standard. Canada is signatory to two such MOU's, the Paris Memorandum of Understanding on Port State Control (the "Paris MOU"), which is comprised of 20 participating maritime administrations and covers the waters of the coastal European states and the North Atlantic basin from North America to Europe, and the Tokyo Memorandum of Understanding on Port State Control, which is comprised of 18 Asia-Pacific countries.

In Canada, Transport Canada, Safety and Security, is responsible for all Port State Control activities, and foreign ship inspections are carried out at all major ports by ship inspectors of the Marine Safety Branch.⁷² These inspectors ensure that foreign flagged vessels entering Canadian waters are in compliance with safety and pollution prevention standards and standards respecting seafarers' living and working conditions. The objective is to detect sub-standard shipping and minimize threats to life, property and the marine environment and, to that end, to annually inspect 25% of the average number of individual foreign merchant ships which have entered Canadian ports during the last three years. Although it is well understood that the ultimate responsibility for implementing the international maritime conventions is left to the flag states, participant port states are, to the extent set out in the MOU's, entitled to inspect and detain foreign ships visiting their own ports to ensure that any deficiencies found are rectified prior to departure. In cases where the delay is undue or unjustified, there are certain remedies available.

⁷² Ships and Operations Standards – Inspection and Navigation Standards – Port State Control, Transport Canada website at http://3www.tc.gc.ca/Marine_Safety/Ships-and-operations-standards/Inspection/Port-State-Control, last visited on October 21, 2004.

By way of example, in fulfilling the commitments under the Paris MOU the Authorities apply the “relevant instruments” which are in force and to which its State is a party. These are listed⁷³ in the MOU and include SOLAS 74 with 1978 and 1988 Protocols. The Authorities will carry out inspections consisting of a visit on board a ship in order to check the certificates and documents as listed in section 2 of Annex 1 of the MOU⁷⁴ which includes the SOLAS Document of Compliance. The 26th Amendment to the Paris MOU was adopted in view of the security requirements for ships stemming from the ISPS Code and SOLAS amendments. It entered into force on July 1, 2004 and, accordingly, section 2 of Annex 1 also permits that at the initial inspection the port state control officer will examine the ISSC. In the absence of valid certificates or documents or if there are clear grounds for believing that the condition of the ship or of its equipment, or its crew does not substantially meet the requirements of the relevant instrument a more detailed inspection will be carried out as referred to in section 5 of Annex 1. Examples of clear grounds are given in section 4 of Annex 1. In exceptional circumstances where as a result of the initial control and a more detailed inspection, the overall condition of the ship and its equipment is found to be sub-standard, the ship can be detained until the deficiencies have been remedied.⁷⁵ Like the ISPS Code, in the Paris MOU there is a non-compliance notification process which, in effect, blacklists the ship.⁷⁶

The recent case *Budisukma Puncak Sendirian Berhad v. Canada* 2004⁷⁷ (“*Berhad*”), is perhaps a good example of the authority of Port State Control and the question of undue delay in the

⁷³ Paris MOU, Section 2-2.1.

⁷⁴ Paris MOU, Section 3-3.1.

⁷⁵ Paris MOU, Section 3.9.2 and 3.10.1.

⁷⁶ Paris MOU, Section 3.12.1 and 3.12.2.

⁷⁷ *Budisukma Puncak Sendirian Berhad v. Canada* 2004 FC 501. A Notice of Appeal was filed on behalf of the Defendants on May 3, 2004.

exercise thereof *Berhad* did not deal with non-compliance in respect of the ISPS Code. However, as Port State Control will be the mechanism employed to effect the control and compliance measures under the ISPS Code the issues which arose could be equally applicable to the latter circumstance.

There the bulk carrier "Lantau Peak" entered the port of Vancouver on April 5, 1997 to repair hull frames found to be detached during the voyage from Japan and then to load coal for the return voyage. Immediately after being berthed for repairs the "Lantau Peak" was inspected by Marine Safety Branch, Transport Canada, inspectors and was ordered detained as a measure of Port State Control for safety at sea. The ship remained in detention until August 13, 1997 at which time it sailed in ballast to China for extensive hull repairs required by the terms of its release from detention. The detention was primarily imposed on the basis that the ship's hull frames were wasted by corrosion beyond what the Port State Control inspectors considered an acceptable limit. The inspectors maintained that acceptable wastage of the hull was 17 percent of original thickness on construction, while the vessel's classification society stated that the acceptable wastage for such a vessel was 25 percent. The classification society declared the ship to be seaworthy to travel to China where the majority of the repairs could much more economically be effected. The vessel's flag state also requested the release of the vessel. The inspectors gave notice that the detention would remain in effect until the hull frames were repaired to the 17% standard.

After an unsuccessful appeal to the Chairman of Steamship Inspectors, the owners agreed under protest to the terms of a release requiring all panels corroded beyond 33 percent to be restored to

25 percent, and for the vessel to travel to China to repair the remainder of its hull panels corroded beyond 25 percent. A draft of the Chairman's decision was prepared in part by one of the inspectors.

The owners subsequently brought a successful action against the Crown in negligence arising from the detention and delay in releasing the ship and were awarded damages totaling \$4,344,859.47. It was held that the vessel could not be detained pursuant to s. 310 of the *Canada Shipping Act*, rather that the authority for detaining the vessel was the Tokyo Memorandum of Understanding and SOLAS, 1974. Campbell, J. held at page 57:

"Given the finding that the MOU, with reliance on SOLAS, was the authority for the detention in the present case, the MOU provides the authority to take the action stated in Regulations 19(b) and (c) of SOLAS. The standard of care in taking this action is stated in Regulation 19(f) of SOLAs as follows:

19(f) When exercising control under this regulation all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is thereby unduly detained or delayed it shall be entitled to compensation for any loss or damage suffered.

In my opinion, by becoming an Authority to the MOU, Canada has agreed to respect this standard of care. However, the MOU is careful to state that the MOU "is not a legally binding document and is not intended to impose any legal obligations on any of the Authorities"; this means that an Authority cannot be sued directly under the MOU for breach of an agreement to respect a standard of care. Indeed, as stated, the Plaintiffs make it clear that they are not attempting to do so in bringing their action. Essentially, by bringing this action the point being made is that the proviso in the MOU does not mean that the Authority is unaccountable for its actions in detaining a ship under the MOU; the Authority and its servants are still liable for negligent conduct as a matter of maritime common law".

The Federal Court held that the owners' loss of income was reasonably foreseeable and that sufficient proximity existed between the owners and the inspectors based on the MOU upon which to ground liability (p. 61):

"I find that the MOU is the principle feature which establishes proximity. The agreement to establish a Port State Control process creates a close causal connection between an inspector and any harm that results from an inspection. Under the MOU, with particular reference to Regulation 19(f) of SOLAS, the parties have an expectation that inspections will be conducted in such a way so as not to cause undue detention or delay. In addition, by Regulation 19(b), "clear grounds" are required to go beyond

valid certificates to initiate detailed inspections. These expectations impose an obligation on inspectors to take specific care in carrying out inspections.

In my opinion, there is nothing unjust or unfair in the imposition of a duty of care on the Defendants give that Canada has agreed to be an authority under the MOU."

The Court held that the inspectors failed in their duty to take specific care when carrying out the inspection and acted improperly by detaining the vessel after only a cursory inspection of certain portions of the hull. No expert analysis was conducted on the vessel before the ship was detained and the determination that the hull had to be restored to 17 percent wastage was arbitrary and unsupported by any official standards or documentation. Further, that the briefing note prepared by the inspectors for the Chairman of Steamship Inspectors overstated the amount of corrosion present on the vessel, misstated corrosion limits for the type of vessel, did not mention the standard that inspectors had applied and ignored reports that the vessel met class requirements was negligently prepared. The three month delay in deciding the appeal was also negligent.

Damages were awarded as follows:

- (i) \$1,462,200.00 was awarded for the cost of repairs in Canada and there was no reduction to account for repair of hull wastage above class limit performed in Canada;
- (ii) \$892,556.38 was awarded for the cost of repairs in China, being the cost of repairs to 624/671 of the panels (only 47 of the hull's panels did not meet class requirements for thickness and corrosion);
- (iii) a proportion (624/671) of the expense incurred in the voyage to China;
- (iv) port disbursements and owner's expenses incurred from the date the vessel was declared seaworthy to sail to China until the date the vessel was ultimately released totaling \$71,623.96 and \$38,184.86, respectively;
- (v) \$1,706,066.68 for 624/671 of off-hire costs incurred from the date the vessel was declared seaworthy to sail to China to the date of her release; and
- (vi) \$174,227.59 for bunkers.

Berhad suggests that compensation for undue detention and delay arising in connection with the ISPS Code and as set out in Chapter XI-2, Regulation 9 of SOLAS, may be the responsibility of the Contracting Government and remedy may be available by way of a claim in negligence against it.

E. Insurance Coverage

The requirements of the ISPS Code and the amendments to SOLAS have become mandatory for all vessels involved in international trade to which SOLAS applies. Compliance with the ISPS Code is required by a vessel's flag state and therefore, it is quite likely that, as with the ISM Code, non-compliance by an owner can be seen as a breach of the terms of its insurance contract.⁷⁸ Likewise, where a vessel is not in compliance with the ISPS Code and this non-compliance leads to or causes a loss, an insurer may raise section 37 of the *Marine Insurance Act*⁷⁹ and take the position that the non-compliance was a breach of the implied warranty of seaworthiness, thus allowing the insurer to deny cover for any resulting losses.⁸⁰ These arguments will undoubtedly be made by and on behalf of insurers responding to claims in respect of non-compliant ships.

Even when a ship is fully compliant there may be a security breach which leads to a claim against the vessel and its owners and operators. In such a case, would an insurer be successful in denying the claim on the basis that the vessel was unseaworthy? What if the security issue was the existence of a questionable party in the chain of charterers?⁸¹

⁷⁸ Chris Moore, "Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 18.

⁷⁹ S.C. 1993, c. 22.

⁸⁰ Chris Moore, "Maritime Security Issues - Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 18.

⁸¹ "Maritime Security and the ISPS Code", Hill Taylor Dickinson (April 2004).

Conclusions

As the above discussion suggests, the potential for disputes arising from the implementation and enforcement of the ISPS Code is broad. It may be the case that owners and charterers can plan for and prevent many of the potential commercial disputes which could arise by ensuring compliance with the ISPS Code, maintaining timely, open and adequate communication, and amending or adding various clauses in charter party agreements to reflect and account for new security measures. Ultimately, however, the decision as to whether a vessel is in breach of the ISPS Code rests with the Contracting Government's Port State Control inspectors. Thus, an owner may do everything required of him to comply with the ISPS Code and maintain a perfect security record, but the vessel may still be found to be non-compliant.⁸²

On a more positive note, compliance will result in a reduced risk of marine terrorism, greater transparency in respect of vessel ownership and operation, the potential decrease in stowaways, piracy and robbery incidents at sea, and eventually, increased efficiency of the shipping industry.

⁸² Chris Moore, "Maritime Security Issues – Compliance, Cost of Compliance & Allocation of Liabilities", ICMA XV (February 14, 2004), at p. 11.

International Ship and Port Facility Security (ISPS) Code: Potential Commercial Disputes

By: Cecily Y. Strickland



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Outline of Presentation

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Introduction to ISPS Code

- IMO, by amendment of SOLAS, 1974, adopted new security related provisions, including the ISPS Code
- The ISPS Code Came into force on July 1, 2004
- Provides international framework of security-related requirements for Contracting Governments, port facilities and shipping companies
- Objective to DETECT and PREVENT security incidents affecting ships and port facilities used in international trade



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ISPS Code Requirements

- Contracting Governments must ensure that a Port Facility Security Assessment (PFSA) is completed for each port that serves ships that conduct international voyages
- This is a risk analysis designed to determine vulnerable parts of the facility's operations
- PFSA will determine what security measures should be included in Port Facility Security Plan (PFSP)
- The PFSP is developed, implemented, revised and maintained by a Port Facility Security Officer (PFSO), who must also liaise with Ship Security Officers (SSO) and Company Security Officers (CSO).

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ISPS Code Requirements

- SSO's and CSO's are the responsibility of the company (ship owner, bareboat charterer or other person responsible for the operation of the ship)
- A Ship Security Assessment (SSA) must be carried out on each vessel and results are employed by the CSO to develop a Ship Security Plan (SSP)
- Every ship involved in international trade to which SOLAS applies must carry on board an International Ship Security Certificate (ISSC) which will only be issued by the flag state Administration once it has verified that the ship's security system, security equipment and SSP fully comply with the ISPS Code.

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ISPS Code Requirements

- The amendments to SOLAS, Chapter XI -2, Special Measures to Enhance Maritime Security, include requirements that each vessel involved in international trade affix a permanent visible ship identification number, carry a Continuous Synopsis Record (CSR) and addresses compliance and control measures
 - Continuous Synopsis Record
 - issued by the flag state Administration
 - must be kept on board and continually updated
 - is intended to provide a history of the ship with respect to the information it contains
 - travels with the ship if ownership or flag changes
 - flag state administration will transmit the information it contains to any Contracting Government on change of flag
 - each ship must also carry a record of security information pertaining to its 10 previous ports of call
 - provides "identity" and "transparency"

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Control and Compliance Measures

- Control of Ships in Port

- Ships are subject to control when in the port of another Contracting Government by duly authorized officers of that government
- In Canada, Transport Canada, Safety and Security, is responsible for all Port State Control which will include ISPS Code control and compliance
- Control is normally limited to verifying that a valid ISSC is on board which shall be accepted unless there are "clear grounds" for believing the ship is not in compliance with SOLAS Chapter XI-2 or Part A of the ISPS Code

CHAPTER 11 – PORT STATE CONTROL



Control and Compliance Measures

- Control of Ships in Port (continued)

- If "clear grounds" exist or the ISSC is not produced on demand then specified control measures may be imposed
 - inspection of ship
 - delay of ship
 - detention of ship
 - expulsion of ship from port
 - lesser administrative or corrective measures
- Such measures must be proportionate

CHAPTER 11 – PORT STATE CONTROL



Control and Compliance Measures

- Control of ships intending to enter port

- Ships intending to enter a port of another Contracting Government may be required to provide specific information to ensure compliance with Chapter XI-2, including:
 - Confirmation that the ship possesses valid ISSC and name of issuing authority
 - Security level at which ship is operating
 - Security level of ship at past 10 ports of call
 - Any special or additional security measures taken by ship within the last 10 ports of call, etc

CHAPTER 11 – PORT STATE CONTROL



Control and Compliance Measures

- Control of ships intending to enter port (continued)
 - If, when this information is received, officers have "clear grounds" for believing that the ship is non-compliant with Chapter XI-2 or Part A of the ISPS Code they must try to establish communications with the ship to rectify the non-compliance
 - If this is not successful they may take the following steps:
 - require rectification of the non-compliance
 - require ship to proceed to a specified location in the territorial sea or internal waters
 - inspect the ship (if it is in the territorial sea or internal waters)
 - deny entry into port

LEGISLATION COLLECTION INDEX MONITORING STANDARDS BY CODE



Control and Compliance Measures

- Control of ships intending to enter port (continued)
 - Any such steps must be proportionate
 - The ship must be informed of the contracting Government's intentions prior to any steps being taken
 - Upon receiving this information the master may withdraw the intention to enter that port, at which time the regulation no longer has application
 - Additionally, if control measures or steps are imposed, the flag state Administration and the security organization which issued the ISSC must be notified immediately

LEGISLATION COLLECTION INDEX MONITORING STANDARDS BY CODE



Control and Compliance Measures

- Ships denied entry or expelled from port
 - the port state authorities are to advise the authorities of the next ports of call and any appropriate coastal states of the circumstances surrounding the incident
 - confidentiality and security of this notice are to be ensured
 - however, the effect of this provision will serve to blacklist the ship, giving rise to potentially serious commercial consequences
 - blacklisting could also give rise to a claim against the Contracting Government if the allegation proved to be ungrounded
 - the ISPS Code states that denial of entry or expulsion from port shall only be imposed where officers have "clear grounds to believe that the ship poses an immediate threat to the security or safety of persons, or of ships or other property and there are no other appropriate means for removing the threat"

LEGISLATION COLLECTION INDEX MONITORING STANDARDS BY CODE



Control and Compliance Measures

- "Clear Grounds"
 - Part B of the ISPS Code, Guidance Regarding the Provisions of Chapter XI-2, provides insight into the concept of "clear grounds"
 - This means "evidence or reliable information" that the ship does not correspond with the requirements of Chapter XI-2 or Part A of the ISPS Code
 - Such evidence or reliable information may arise from the duly authorized officer's "professional judgment" or observations gained while verifying the ship's ISSC or "from other sources"
 - Even if a valid certificate is on board, the duly authorized officers may still have clear grounds for believing that the ship is not in compliance based on their professional judgment

Control and Compliance Measures

- "Clear Grounds" (continued)
 - Examples of possible "clear grounds" include:
 - evidence that the ISSC has expired or is invalid
 - evidence or reliable information that serious deficiencies exist in the required security equipment, documentation or arrangements
 - receipt of a report or a complaint which, in the professional judgment of the duly authorized officer, contains information clearly indicating that the ship is non-compliant
 - evidence or reliable information that the ship has embarked persons or loaded stores or goods at a port facility or from another ship where either the port facility or the other ship is in violation of Chapter XI-2 or Part A

Control and Compliance Measures

- "Clear Grounds" (continued)
 - Establishing that there are "clear grounds" for the imposition of control and/or compliance measures may not be determined by looking to the ship alone, but also by looking at the ship's interactions with other port facilities and other ships
 - A ship that is ISPS Code compliant may still be subject to control measures if it previously interacted with a non-compliant port facility
 - In such cases, it has been suggested that the inspector should consider any special or additional security measures taken by the ship and maintained during the interaction with the non-compliant port

Control and Compliance Measures

- "Clear Grounds" (continued)
 - The term "clear grounds" has yet to be considered by the courts in the context of ISPS Code non-compliance
 - The professional judgment or proper exercise thereof by a duly authorized officer also has not yet been scrutinized
 - Nor has what may comprise acceptable sources of other reliable information upon which that officer could rely in detaining the ship or taking other measures
 - Questionable intelligence or sources could lead to an unwarranted control or compliance measure being imposed upon a ship to its commercial detriment
 - Given the high costs/losses that may be incurred as a result of vessel delays it can be expected that these may be issues that will be challenged by shipping interests in the courts

Control and Compliance Measures

- Part B states that in exercising control and compliance measures the duly authorized officers should ensure that any measures or steps imposed are proportionate and should be reasonable and of the minimum severity and duration necessary to rectify or mitigate the non-compliance
- Chapter XI-2, Regulation 9 states that when any of the described control measures or steps are effected by a Contracting Government all possible efforts shall be made to avoid a ship being unduly detained or delayed

Control and Compliance Measures

- If a ship is unduly detained or delayed it shall be entitled to compensation for any loss or damage suffered
- Part B states that the word "delay" in Chapter XI-2, Regulation 9-3.5-1 also refers to situations where the ship is unduly denied entry into port or is unduly expelled from port
- Accordingly, claims for compensation may be made against the Contracting State in the event of undue delay or detention or even, perhaps, against a party making spurious allegations which led to the control measure or steps being effected

Potential Commercial Disputes

- The requirements of the ISPS Code and SOLAS will lead to disputes between ship owners, charterers, cargo interests, port facilities and Contracting Governments
- When a vessel is delayed, in addition to time loss (lay time and demurrage), other expenses can be incurred
- Who is responsible for the additional costs and/or losses incurred?
 - Without specific clauses designed to regulate the allocation of risk each situation will be fact specific and may include the overall allocation of risk as agreed between the parties and the timing or reason for the delay

OVERSIGHTS PREVENTION REMEDY RESOLUTION SETTLEMENT ENFORCEMENT ENFORCEMENT



Potential Commercial Disputes

- Commercial disputes related to ISPS Code implementation and application could pertain to:
 - Charter Party Issues
 - Voyage Charters
 - Time Charters
 - Cargo Issues
 - 24 Hour Rule/Trade With U.S.
 - Undue Delay or Detention
 - Port State Control
 - Insurance Coverage

OVERSIGHTS PREVENTION REMEDY RESOLUTION SETTLEMENT ENFORCEMENT ENFORCEMENT



Charter Party Issues

- Absent specific wording in a charter party, vessel owners may bear the financial consequences of vessel non-compliance
- Yet compliance may require the cooperation of both owner and charterer or subcharterer
- To address this owners could effect charter party terms
 - requiring the charterer to give clear and timely voyage instructions so that owners can comply in good time with the necessary security level and minimize any delay or detention of the vessel
 - requiring charterers to agree to the trading limits of the vessel, in advance, by reference to the ISPS Code

OVERSIGHTS PREVENTION REMEDY RESOLUTION SETTLEMENT ENFORCEMENT ENFORCEMENT



Charter Party Issues

Voyage Charters

- ISPS Code disputes will likely relate to liability for delay of ships due to inspection and or non-compliance
- Whether the charter party states the owner is only liable for delay resulting from the owner's personal lack of due diligence to make vessel seaworthy or the owner has an ongoing and indelegable duty to exercise due diligence to make the vessel seaworthy will affect the owner's liability for a delay
- If the vessel is subsequently delayed for non-compliance then from that point forward the delay may not be lay time
- A voyage charter party may provide that a vessel can tender a NOR upon arrival at port so long as the master warrants the vessel is ready in all respects. If the vessel is delayed for non-compliance lay time will be affected
- If the charter party provides that the vessel may tender its NOR upon arrival at the customary anchorage, even if the delay is due to non-compliance time lost for inspection may not count as lay time

Charter Party Issues | Voyage Charters | Time Charters | Time Charters (continued) | BIMCO



Charter Party Issues

Time Charters

- If "clear grounds" for non-compliance are found this may be a breach by the owners of their responsibility to provide a seaworthy ship
- If the charterer's nominated port is, or is subsequently deemed non-compliant or subject to a higher security level, the owner may allege that the charterer breached its obligation to nominate a safe port and is liable for costs of delays.
- Disputes may arise as to who should pay the increased costs incurred when a vessel has to increase its security measures and owners may demand warranties from charterers to protect themselves in this event

Charter Party Issues | Voyage Charters | Time Charters | Time Charters (continued) | BIMCO



Time Charters

Time Charters (continued)

- If a Contracting Government decides one of the previous 10 ports visited did not take appropriate security measures and detains vessel the owner may bear responsibility for non-compliance. But if the detention is without evidence of non-compliance by the owner then perhaps charterers should bear the resulting costs as:
 - charterers were responsible for loading cargo
 - charterers' implied indemnity to owners for any losses incurred as a result of the owners' compliance with charterer's orders
- To address these potential issues owners and charterers alike will develop contractual terms intended to allocate liability
- Organizations such as BIMCO have developed standard clauses for insertion in charter parties

Charter Party Issues | Voyage Charters | Time Charters | Time Charters (continued) | BIMCO



Cargo Issues

- The detention of a vessel can lead to cargo claims for delay, lost profits and even loss of cargo
- If delay/detention does not lead to a finding that the ship was ISPS Code non-compliant owners will argue that they have not breached the K of carriage and are not liable for losses
- If the ship is found to be non-compliant charterers will assert that owners breached the duty to provide a seaworthy ship



CHAPTER 10: CARGO | INCIDENTS | CARGO | INCIDENTS | CARGO | INCIDENTS | CARGO | INCIDENTS

Cargo Issues

- Hague-Visby Rules:
 - before and at the beginning of the voyage a carrier must exercise due diligence to make the vessel seaworthy
 - neither the carrier nor the ship will be liable for loss or damage arising from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy
 - the burden of proving the exercise of due diligence will be on the party asserting due diligence was exercised

CHAPTER 10: CARGO | INCIDENTS | CARGO | INCIDENTS | CARGO | INCIDENTS | CARGO | INCIDENTS

Cargo Issues

- Burden of Proof
 - a cargo interest need only establish that the cargo was not delivered in the same good order and condition as received onboard
 - the burden of proof then shifts to the carrier to establish the loss or damage is attributable to an excepted peril
 - the burden shifts to the cargo interest to establish the carrier's negligence or both that the ship was unseaworthy at the commencement of the voyage and that the loss was caused by that unseaworthiness
 - even where the loss is due to an excepted peril the carrier can avoid liability by establishing that due diligence was exercised to make the ship seaworthy

CHAPTER 10: CARGO | INCIDENTS | CARGO | INCIDENTS | CARGO | INCIDENTS | CARGO | INCIDENTS

Cargo Issues

- Excepted Perils/Seaworthiness/Due Diligence
 - ISPS Code non-compliance may fall into one of the excepted perils (eg. negligence of master in navigation of ship, "restraint of princes", act or omission of shipper, other causes without fault of carrier)
 - If so, cargo interests must address seaworthiness
 - If the vessel was ISPS Code non-compliant at the commencement of the voyage then it can be argued that it was not seaworthy
 - The carrier would then only escape liability if it could prove that it, and all of those for whom it was responsible, exercised due diligence to make the ship seaworthy
 - If the non-compliance occurred subsequently the carrier may not be liable
 - Can non-compliance itself be considered a failure to exercise due diligence?

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24 Hour Rule/Trade to U.S.

- Marine Transportation Security Regulations, s. 222(1)
 - the master of a ship must ensure the ship does not enter Canadian waters unless he first reports certain pre-arrival information to the authorities within specified time frames
 - pre-arrival information must include, among other things:
 - the vessel's name and country of registry
 - name of the registered owner and operator
 - the vessel's IMO number
 - a general description of the cargo, including cargo amount and the presence and description of any dangerous substances or devices on board

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24 Hour Rule/Trade to U.S.

- US Customs Regulations
 - require advance cargo information to be provided 24 hours before the loading of cargoes bound for the United States
 - the information provided should fully describe the cargo, the shipper, consignees, notify parties, etc.
 - cargo manifests must also be sent to US Customs electronically
 - in the case of bulk cargoes, the information need not be provided until 24 hours before arrival in an American port facility

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24 Hour Rule/Trade to U.S.

- Example:
 - If a tanker was to go from a transshipment facility in Newfoundland and Labrador to a port in the United States and not give sufficient notice:
 - Would the tanker be detained upon entry into port or would it be denied entry entirely?
 - Who would be responsible for the costs of such a delay?

Navigation Rules | Collision Rules | Vessel | Vessel | Vessel | Vessel | Vessel | Vessel



Undue Delay or Detention

- A vessel may not be seaworthy if it does not have the documentation necessary to perform the voyage
 - However, even with all the proper ISPS Code documentation a vessel may still be delayed for reasons known only to the authorities
 - An inspection may be motivated by the nationality of crew or the flag of the vessel
 - A detention may have been caused by a false alarm or unreasonable or arbitrary enforcement measures
- SOLAS Chapter XI-2, Regulation 9 states that all possible efforts must be made to avoid a ship being unduly detained or delayed
 - If a ship is unduly detained, or delayed, it will be entitled to compensation for any loss or damage suffered
- A contracting state may be responsible for paying that compensation if its representatives unduly delay or detain the ship

Navigation Rules | Collision Rules | Vessel | Vessel | Vessel | Vessel | Vessel | Vessel



Undue Delay or Detention

- Port State Control
 - One measure employed by coastal states to exert some control over foreign ships visiting their ports
 - Foreign vessels entering a sovereign state's ports are boarded and inspected to ensure compliance with various major international maritime conventions
 - Port state control is not the subject of international convention, rather, Memorandums of Understanding (MOU) have been reached between the maritime authorities of participating states in specific geographical regions
 - Canada is signatory to two such MOU's - the Paris Memorandum of Understanding on Port State Control and the Tokyo Memorandum of Understanding on Port State Control

Navigation Rules | Collision Rules | Vessel | Vessel | Vessel | Vessel | Vessel | Vessel



Undue Delay or Detention

- Port State Control (continued)
 - Transport Canada, Safety and Security, is responsible for all Port State Control activities
 - The objective is to detect sub-standard shipping and minimize threats to life, property and the marine environment
 - Participant port states are, to the extent set out in the MOU's, entitled to inspect and detain foreign ships visiting their own ports
 - The Authorities will carry out inspections consisting of a visit on board to check certificates and documents, including the ISSC

LEGISLATION PRESENTATION CANADA MARITIME REGULATION OF SHIPS AT PORTS



Undue Delay or Detention

- Port State Control (continued)
 - In the absence of valid certificates or documents or if there are clear grounds for believing that the condition of the ship or of its equipment, or its crew does not substantially meet the requirements of the relevant instrument a more detailed inspection will be carried out
 - In exceptional circumstances where the overall condition of the ship and its equipment is found to be sub-standard, the ship can be detained until the deficiencies have been remedied
 - In cases where due to port state control measures the delay is undue or unjustified, there are certain remedies available

LEGISLATION PRESENTATION CANADA MARITIME REGULATION OF SHIPS AT PORTS



Undue Delay or Detention

- Recent Case Law
 - The recent decision in *Budisukma Puncak Sendirian Berhad v. Canada* 2004 FC 501 considered the authority of Port State Control inspectors and the question of undue delay
 - *Berhad* did not deal with non-compliance in respect of the ISPS Code, however, the issues which arose could be equally applicable to a compliance or control measure effected in that regard
 - The "Lantau Peak" entered the port of Vancouver on April 5, 1997 to repair hull frames found to be detached during the voyage from Japan and then to load coal for the return voyage. Immediately after being berthed for repairs it was inspected by Marine Safety Branch, Transport Canada, inspectors and was ordered detained as a measure of Port State Control for safety at sea. The ship remained in detention until August 13, 1997 at which time it sailed in ballast to China for extensive hull repairs required by the terms of its release from detention
 - The owners brought a successful action against the Crown in negligence arising from the detention and delay in releasing the ship and were awarded damages totaling \$4,344,659.47.

LEGISLATION PRESENTATION CANADA MARITIME REGULATION OF SHIPS AT PORTS



Undue Delay or Detention

- Recent Case Law (continued)

- In finding for the plaintiff it was held that the MOU, with reliance on SOLAS, was the authority for the detention and that the standard of care in taking such action was that all possible efforts would be made to avoid a ship being unduly detained or delayed. While the MOU was held not to be a legally binding document, by becoming an Authority to the MOU Canada agreed to respect this standard of care and, further, that even though the MOU was not legally binding and accordingly that the Authority could not be sued directly there under for breach of an agreement to respect the standard of care, however, the Authority and its servants were still liable for negligent conduct as a matter of maritime common law
- *Berhad* suggests that compensation for undue detention and delay arising in connection with the ISPS Code and as set out in Chapter XI-2, Regulation 9 of SOLAS, may be the responsibility of the Contracting Government and that remedy may be available against it by way of a claim in negligence

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Insurance Coverage

- The requirements of the ISPS Code and amendments to SOLAS have become mandatory for all vessels involved in international trade to which SOLAS applies. From an insurance perspective this raises the questions of whether:
 - non-compliance may be a breach of the terms of the ship owners' contract of insurance?
 - in the case of voyage policies, non-compliance which leads to or causes a loss would lead an insurer to raise section 37 of the *Marine Insurance Act*: that is, assert that the non-compliance was a breach of the implied warranty of seaworthiness, allowing the insurer to deny coverage for any resulting losses?
- Even when a ship is fully compliant there may be a security breach which leads to a claim - would an insurer be successful in denying the claim on the basis that the vessel was unseaworthy? What if the security issue was the existence of a questionable party in the chain of charterers?

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Conclusions

- The potential for disputes arising from the requirements of the ISPS Code and SOLAS amendments is broad
- Ultimately however, owners and charterers may be able to plan for and prevent many of the potential commercial disputes which could arise by
 - ensuring compliance with the ISPS Code
 - maintaining timely, open and adequate communication
 - amending various clauses in current charter party agreements to reflect and account for new security measures
- Ultimately, the decision whether a vessel is in breach of the ISPS Code rests with the Contracting Government's Port State Control inspectors
- Therefore, although an owner may do everything required of it to comply with the ISPS Code and maintain a perfect security record the vessel may still be delayed, detained and/or found to be non-compliant

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Conclusions

- On the positive side, compliance with the ISPS Code will result in
 - a reduced risk of marine terrorism
 - greater transparency in respect of vessel ownership and operation
 - a decrease in stowaways, theft, smuggling of contraband and piracy
 - and, possibly, increased efficiency of the shipping industry


