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WORKSHOP 6 – CHARTERPARTY

1.1 What options might be available to the Master with regard to the damaged bags?

The master is under an obligation to suitably clause the mates' receipts / bills of lading unless the cargo is loaded in "apparent good order and condition". However, the governing NYPE Charterparty provides that only "shipped clean onboard" bills of lading are to be issued. Accordingly, the Master has no alternative but to reject the torn and / or wet stained bags and insist that only sound cargo is presented for shipment.

The moment the problem became apparent, the master should advise owners and owners' P&I club so that a correspondent and local surveyor attend to protect owners' and the club's best interests.

Owners and the master should resist any request by charterers to issue clean bills of lading for unsound cargo against an LOI. Such an LOI is likely to be void and un-enforceable (as a matter of English law) because it will be seen to be facilitating a fraud against subsequent innocent third party holders of the bills of lading.

Furthermore, knowingly issuing bills of lading with an incorrect description of the condition of the cargo might well prejudice owners' P&I cover under Rule 10 (17) (D) (vi) subject to directors' discretion. In such circumstances, any subsequent request for the P&I club to put in place security in order to avoid arrest on discharge may also be prejudiced.

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1.2 Can the master insist that alternative suitable dunnage be supplied in adequate quantities to his satisfaction and/or insist that an alternative method of stowage is used?

Under NYPE un-amended Clause 8 states that charterers are to load, stow and trim the cargo under the "supervision" of the master. As a matter of English law, "under the supervision of the Captain", places no responsibility on owners/master to intervene unless either the vessel/crew and/or the cargo is put at risk by not doing so. Usually this is taken to mean ensuring the seaworthiness of the vessel as far as her stability is concerned.

Arguably, the right for charterers to require the master (or their agents) to sign bills of lading (under which owners assume responsibility and liability for the care of the cargo), necessarily implies that (a) charterers properly load cargo so that it is not put at risk and (b) they do so without exposing owners to a liability for failure to care for the cargo under the bills of lading issued in owners' name.

Dunnage is not, of course, a cargo. However, bamboo and timber dunnage are hygroscopic, and green timber dunnage can have high moisture content. Thus, particularly where large quantities are used, the dunnage may itself act as a reservoir of moisture in the same way as a hygroscopic cargo such as bagged wheat does. This may have an adverse impact on the safe carriage of the cargo particularly if there is no means of mechanical ventilation.

In these circumstances, the master should insist that an alternative method of stowage is used together with alternative dunnage (if available) and lodge an LOP reserving owners' position to make a full recovery in the event that charterers' failure to do so results in a claim against owners under the bills of lading.

If the Master considers that the safety of the vessel and/or cargo is being put at risk, he should stop loading until charterers employ a safe method of stowage. In those circumstances, it is essential that owners and owners' P&I club are advised and involved at the outset.

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2.0 Are owners entitled to counter-security from charterers pending settlement of the cargo claims?

Under Clause 9 of the ICA 2011, a party which has provided security to someone making a cargo is entitled to security in an equivalent amount from the other party to the charter. Until owners have put up security to the cargo claimant, or settle and pay the claim, it is unlikely that they will be able to obtain counter-security from charterers. This is because until owners have actually put up security or settled the cargo claims (whether amicably by negotiated settlement or following a final judgment), owners are unable to assert a valid claim against charterers under the ICA.

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3.1 Advise owners as to their likely prospects of successfully making a recovery against charterers for:

- wet damage
- torn bags
- shortage/pilferage
- costs and surveys fees/legal advice.

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Wet damage

- Under clause 8 (a) of the ICA the wet damage caused by seawater would remain 100% for owners' account. Owners may have a "perils of the sea" defence against cargo interests under the bills of lading, although they would have to prove that they exercised due diligence to make the ship seaworthy at the beginning of the voyage. If not, any liability would fall to be covered by P&I under Rule (19) (17) subject to the applicable cargo deductible. If Owners cannot defend the cargo claim, or they settle in light of the risk they might lose the claim, they will not be able to pursue an indemnity from Charterers under the ICA where the damage was in fact caused by unseaworthiness.

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Torn bags

- Under clause 8 (b) of the ICA any liability owners incur towards cargo interests under the bills of lading in relation to torn bags caused by stevedores' bad handling on discharge would be 100% for charterers' account. In those circumstances, stevedores are viewed as charterer's servants.

Shortage/pilferage

- Under Clause 8 (c) of the ICA the claim for shortage is to be split 50:50 unless there is clear evidence that the claim arose out of pilferage by the stevedores, or act of neglect in which case stevedores being charterers' servants, charterers bear 100%.

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Costs and surveys fees/legal advice.

- As far as the costs and survey fees incurred by owners in the defence of the claim are concerned, these are fully recoverable. However, the legal advice owners obtained as to their rights of recover from charterers under the ICA are not - see ICA Clause 3 (c).

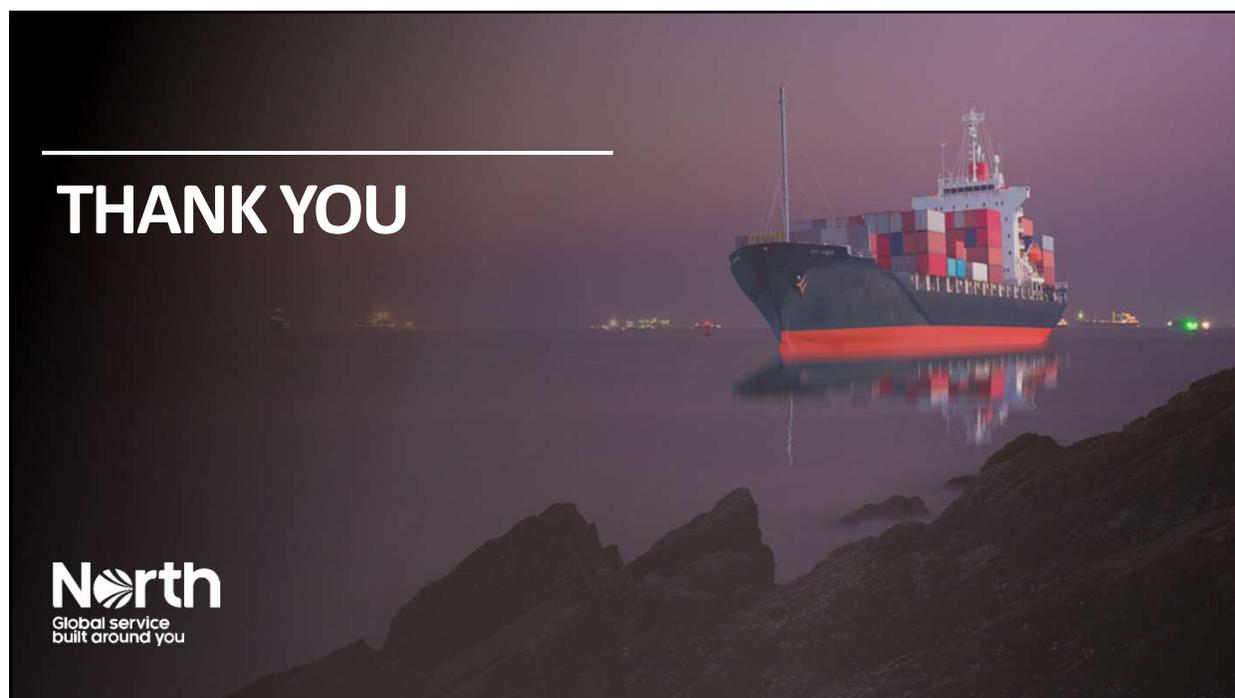
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3.2 Would your advice change if Clause 8 of the charterparty had been amended to include the words ".....under the supervision and responsibility of the Captain...?"

In general, if the words "and responsibility" have been added to NYPE Clause 8 (or there is a similar amendment making the Master responsible for cargo handling), the torn bags and any shortage relating to stevedores' bad handling would be split 50:50.

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