

Circular From SKULD**Date: 19 July 2023****Securing Evidence – Charterers' Tools**

Charterers are often at a considerable disadvantage in securing contemporaneous evidence to support or defend claims arising out of the charterparty. By governing the vessel, master, and crew, owners control access to the flow of critical information. Depending on the type of claim, charterers can be at owners' mercy when it comes to disclosure of documents and access to the vessel, master, and crew. What are charterers' options when access to critical information is cut-off?

One option for charterers is to force owners' disclosure with a court order. Depending on the jurisdiction where the vessel is located, charterers can obtain a court order which requires owners to disclose the relevant and requested information and documents. With this approach, charterers' representative or surveyor can board the vessel and obtain the relevant information themselves. The downside here is that obtaining the order can be expensive, there is no guarantee a local court would find in charterers' favor, and unless there is breach of an affirmative obligation to provide the requested information, the costs of obtaining such an order may not be recoverable. An example of a possible affirmative obligation can be found under clause 11 of the NYPE form. So, if owners failed to disclose deck or engine logs as per their obligations under clause 11, then charterers may be able to claim the costs of obtaining a local court order as their damages flowing from owners' breach.

If a court order is not available or desirable, and owners continue to be obstructionist [1], charterers can start to build a record of owners' prejudicial behavior and ask for an adverse inference in their favor. In arbitration, tribunals do not have the same coercive powers as local courts. Instead, tribunals will need to rely on an adverse inference to incentivize disclosure and prevent concealment or spoliation [2]. If a party continuously fails to disclose pertinent and requested evidence, without sufficient justification, a tribunal may then infer that the evidence is unfavorable to the withholding party.

To successfully obtain an adverse inference there usually needs to be a bad faith element in the parties' conduct [3]. Moreover, tribunals will generally have broad discretion in drawing an adverse inference, and owners will be allowed to justify as to why documents were not disclosed contemporaneously or why access was denied. If the justification is not sufficient, then a tribunal is within its right to draw an adverse inference. Requests for adverse inference will be made during arbitration by the parties' appointed lawyers. What then

can charterers do before arbitration is underway? The best tactic is to build prejudice, to continuously request the withheld information, question owners' motives for nondisclosure, and to put owners on notice that a failure to disclose or allow access prejudices charterers' position and ability to investigate the claim. This helps to create a narrative that owners are noncompliant, concealing information, and obstructing charterers' investigation.

While charterers may not see the fruits of their efforts immediately, if disclosure or access is not forthcoming, building a narrative of obstructionism and noncompliance can assist further down the line. Such a narrative will not always be determinative in and of itself, but in matters where the merits are uncertain, increasing the suspicion of wrongdoing and documenting prejudicial behavior can tip a tribunal to ultimately find in charterers' favor.

Finally, it is important to be aware of the evidence required to support or defend a claim. Skuld is here to assist charterers with our knowledge and experience of the evidence and information required to support or defend a claim, and we will mobilize our global network of correspondents, experts, lawyers, and surveyors to secure the evidence you need.

[1] If there is a risk of spoliation of evidence, charterers can also obtain an order from a tribunal to preserve evidence - Arbitration Act 1996, C. 44 s 2(b),

[2] E.g., LMAA Rules, Disclosure of Documents 8(a) – allows for the tribunal to draw adverse inference in its award should a party be in default of its disclosure obligations.

[3] Under English law, a commonsense approach, using context and particular circumstances, not a strict set of legal rules, should guide courts in drawing an adverse inference. See *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863 at para 41.

Source of Information: The Skuld P&I Club