



# Newsletter

Edition 2013 - 1  
March

Editors: Niels van der Noll, Monique Lardot, Frank Mathiesen

Email: [pr@dupi.nl](mailto:pr@dupi.nl)

Website: [www.dupi.com](http://www.dupi.com)

Contributors to this newsletter: Dennis de Bruin, Ernst Bulthuis, Arthur Dolk,  
Martijn Steenkamp

- **Introduction**
- **A legal view on stowaway cases**
- **Evidence in case of damage to reefer cargo**
- **Product-based use of Inert Gas Systems (IGS) on board tankers**



## Introduction

Dutch P&I Services are celebrating their 25th anniversary this year. We have been successful as brokers, claims handlers and P&I correspondents since 1988 and have always tried to share our P&I knowledge and experience with our clients and relations. As a new initiative and in order to further improve our services to all our good relations, we are now launching a Newsletter.

The Newsletter will be published every three months and I trust it will contribute to the professional development of the businesses of our clients. All the contributions to the Newsletter will be made available on our new website [www.dupi.com](http://www.dupi.com) and if you wish, you can download and save each separate article as a PDF file.

I would also like to mention that our broking department has started a blog, which can be found on the website as well. In our Newsletter we will focus on issues concerning claims, legal aspects and other shipping items, whereas relevant and up to date market information will be dealt with in our blog.

Martijn Steenkamp,  
Managing Director Dutch P&I Services

## A legal view on stowaway cases

Although not immediately expected, the stowaway case covers many different aspects of the main areas of both national and international law. The illegal entrance of a stowaway faces one with aspects of criminal law, administrative law, civil law, European law and international human rights law simultaneously, and since this legal area still needs to be cultivated in some respects, stowaway cases – from a legal point of view – are considered quite interesting.



Let's give a concrete example. An alleged citizen of Ghana illegally boards a ship in Cape Town and sails to Rotterdam. When the ship is halfway between Cape Town and Rotterdam, the stowaway shows up and reports himself to the crew. Once in Rotterdam he applies for asylum. What legal aspects does he "trigger"?

From the perspective of human rights law, the whole process starts when the stowaway shows up and reports himself to the crew. From that moment on, Owners have to abide by all humanitarian principles, such as the provision of medical attention, sanitary facilities, accommodation and food; principles that are also recognized in the IMO guidelines on Stowaway cases. In addition, stowaways shall not be required to work on board the ship.

Upon arrival in Rotterdam, according to Dutch law, Owners will receive a removal order from the local authorities, because an alien without permission to stay has been transported to the Netherlands. At the same time, the stowaway will apply for asylum, making the Netherlands the first European and thereby the responsible country for the stowaway and his asylum procedure: Dir. EC 343/2003 "Dublin II". During the application procedure, the first European country is obliged to detain the stowaway in case he should run away to and stay in another country without a residence permit.

Dutch administrative law covers the asylum procedure, whereas Owners are faced with the obligation to remove the stowaway from Dutch territory. Questions arise as to whether or not Owners could oppose such an order. First of all, the obligation does not exist during the asylum application procedure. Apart from that, and based on principles of human rights law, it could be argued that in cases when a refoulement prohibition applies, or when there is no vessel available that will call at a port in the stowaway's country of origin, or when the country of origin is unknown, the Owner should be excused from fulfilling this order. As a consequence, this could lead to a situation where the stowaway is forced to stay on the vessel indefinitely, and this is contrary to the right of liberty and will possibly result in inhuman or degrading treatment.

The moment the asylum application is rejected, the removal order will be reactivated and from that moment on, Owners will not only be responsible for the execution of the order as soon as possible, but can also be held liable for the costs of detention of the stowaway in the Netherlands, until he is actually deported from the country. If no direct means of transport to the stowaway's home country can be found, these costs can increase considerably.

Furthermore, a stowaway could be violent, and there is therefore a chance the Master might refuse to execute the order because he cannot risk endangering his ship or the crew when allowing the stowaway access on board. In these situations, the question arises as to which legal instruments will be available for Owners to prevent the authorities from executing the order, or even worse, from arresting the ship if Owners do not cooperate. This also depends on the available defences in the jurisdiction.

To conclude, in all situations it is advisable to have a standard letter of protest available on board, objecting to the order. Depending on the situation at hand, the Owners' legal advisers must take into account the possible grounds for defence available in law. One might not easily run into a situation as described above. Once in it, however, Owners are not easily released from it and seen from this perspective, some preparation can do no harm at all.

*No rights or remedies can be derived from this publication. For more information please contact Niels van der Noll via [niels.van.der.noll@dupi.nl](mailto:niels.van.der.noll@dupi.nl) or tel +31.20.6814692.*



### Evidence in case of damage to reefer cargo

According to contracts of carriage, the carrier has the duty to deliver the cargo in the same condition as he received it (art. 8:378 Dutch Civil Law). If mandatory law applies – for example, Hague Visby Rules – any exclusion of liability for damage sustained during the period between loading and discharging will be null and void. In case of any damage to the cargo, ascertained during discharge or afterwards, the question can be raised whether this damage is transport-related and if so, whether the carrier is liable for the damage.

A general rule says that unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading (Art. III par.6 HVR). This general rule does not exclude the right to provide evidence of the damage if related to the carriage of the cargo. Usually the cargo receiver will hold the carrier liable and will invite him to carry out a joint survey. If, however, these surveyors come to different conclusions, one has to decide which party will have the burden of proof and to what extent.

Cargo interests must prove that the goods – let's say fruit – were delivered to the carrier in a sound condition and that the carrier delivered the cargo in a damaged condition. If the cargo was not checked by the carrier during the loading – for example, cargo stuffed and sealed by the shipper – the claimants have the possibility to provide reliable export certificates which could provide prima facie evidence of receipt by the carrier of the goods in sound condition. Statements from packing stations or warehouse employees, inland road carriers, etc. could be helpful as well.

The damage noted at discharge can vary. Ripening, soft or rotten fruit, too high temperatures, damage due to freezing, etc. If clear and convincing evidence fails, other means of providing evidence exist. The claimant – relying upon certain facts – could provide statements or documents supporting his claim. The defendant who denies the reliability of this evidence must support this with convincing arguments. This will be the case when the defendant is in a position to provide relevant information. If he fails to do so, the supplied evidence by the claimant must be accepted.

Another general rule is the balance of probabilities. In the opinion of some legal specialists this also means that if damage can be attributed to certain circumstances and these circumstances have occurred or can be proven, it will be likely that these are the cause, unless the other party provides counter evidence. Experts' opinions can be used to ascertain the causality. There are many circumstances that affect credibility. The following facts and circumstances could lead to prejudice against the carrier:

1. The carrier does not satisfy the court/tribunal that the refrigeration equipment was in good working order during the entire voyage;
2. The same in respect of the temperature registration;
3. The temperature information is (partly) handwritten and it is not explained why or how this information deviates from the Ryan recorders (recorders in or on top of the stow);
4. A similar cargo was shipped with another container or vessel – same period and same origin – but was discharged without



any problem;

5. The opinion of the carrier's surveyor is not consistent or deviates from his former opinions or publications (!);
6. In respect of the damage figures, the carrier's surveyor was invited to monitor the cargo from the moment of discharge to its final destination, or to give input regarding allowances, but he has refrained from doing so. The court/tribunal could then conclude that there is no credible evidence and substantiate that the conclusions of the cargo surveyor are not justified. In other words, the depreciation allowances could be adequate to show the actual damage;
7. Failure of credible evidence about the actual cause of the damage relieves the carrier from liability. The burden of proof is on the person claiming the benefit of an exception;
8. Carelessness or obstruction by his own surveyor;

Summarizing, it may be said that the balance of evidence will be in favour of the party who is cooperative and provides basic evidence.

*No rights or remedies can be derived from this publication. For more information please contact Nils Heijboer or Jaco van Eikeren via [info@dupi.nl](mailto:info@dupi.nl) or tel +31.10.4405513.*

### **Product-based use of Inert Gas Systems (IGS) on board tankers**

While carrying flammable cargoes, quite a number of tankers were caught in explosion incidents in the recent past, often with many casualties. Investigations into a number of these cases have led, among other things, to recommendations on the use of Inert Gas in cargo tanks when carrying these types of cargoes.

Unfortunately, international regulations on the product-based use of IG systems are not yet in force and this is one of the reasons why these accidents are still happening today. This article aims to explain the current situation and the risks related with shipping low flashpoint cargoes against the background of applicable regulations and forces in the industry that help drive change towards increased safety.

By the fundamental laws of nature, three elements are required for an explosion to occur: fuel (here a hydrocarbon mixture), oxygen and an ignition source must be present. The fuel and the oxygen must be in the right volumetric mixture. When one or more of these three elements is eliminated, the risk of an explosion occurring is practically eliminated as well. On board tankers, the fuel element is the flammable cargo itself and therefore cannot be isolated. For a number of different reasons, a potential ignition source cannot be excluded either, leaving the oxygen element as the one to deal with.

Inert gas, from a ship's Inert Gas Systems – i.e. from boilers or independent generators – predominantly comprises carbon dioxide. When purging the cargo tanks of a tanker with inert gas, the oxygen in the tank atmosphere will be replaced by the carbon dioxide, thus creating an oxygen/hydrocarbon gas mixture in the tank that will be too lean to ignite. From that perspective, Inert Gas has proven to be the most effective measure to eliminate the risk of vessels being exposed to explosive atmospheres when carrying flammable cargoes. One would therefore expect that the simplest way to prevent tanker explosions would be to require that all tankers carrying certain types of

flammable cargoes (listed in SOLAS/ IBC) must purge their cargo tanks with Inert Gas and that international Rules would make this mandatory, but strangely enough this is not the case.

In fact, quite a large number of small newly built tankers that are allowed to carry flammable cargoes is still not even fitted with IGS facilities and therefore present a serious danger when handling low flashpoint cargoes such as naphtha, gasoline, etc. When considering the current international regulations – still linked to sizes and types of tankers, rather than to the nature of the product – the situation is not likely to undergo rapid change in the near future. Without amending international regulations there is, apart from the safety aspect itself, little or no pressure on ship owners and charterers to install costly Inert Gas Systems on small newly built vessels.

The use of IG systems on tankers carrying flammable liquids is regulated by the IMO under the provisions of SOLAS (reg. 1.6 and reg. 4.5.5.). SOLAS requires all tankers of 20,000 dwt and over, carrying crude oil or petroleum products with flashpoints not exceeding 60°C (e.g. gasoline), to be fitted with IG systems. Essentially, chemical tankers are not required to have IG systems unless they carry crude oil or petroleum products with flashpoints not exceeding 60°C or flammable cargoes as listed in chapters 17 and 18 of the IBC Code in tank compartments exceeding 3,000m<sup>3</sup>.

When considering the current international regulations, it is evident that potential explosion risks are related to the size of a vessel rather than to the product carried on board. The question is, however, whether the risk of an explosion on a 15,000 dwt vessel – without an IGS – carrying gasoline is significantly lower than when the same product is carried in a 20,000 dwt vessel bound to regulations regarding IGS systems. In addition, one could ask oneself whether the danger of flammable products carried on chemical tankers (as per Marpol Annex II) are not as dangerous in terms of potential explosion risks as many petroleum products.

When examining a number of explosion incidents in the recent past one could argue – and perhaps even rightly – that it is time to amend the current international regulations. A study on explosion incidents on tankers was already initiated by the Maritime Safety Committee (MSC) of the IMO in 2006. To do this, the MSC appointed an industry working group incorporating Industry bodies including Intertanko, OCIMF, IACS and others to investigate a number of explosion incidents and to return with recommendations on operational practices.

This working group investigated 35 cases in which it was noted – among other things – that the majority of explosions occurred on vessels below 20,000 dwt (27 out of 35). None of the explosions occurred on ships using IG systems and both petroleum cargoes (with low flashpoints) as well as flammable chemical cargoes (listed in the IBC code chapter 17 and 18) were involved. In more than half of the cases the ignition source was located inside a cargo tank.



The results of these studies seem to indicate that in many cases the use of inert gas could possibly have prevented an explosion. It is perhaps for that reason that one of the working group's recommendations was related to atmosphere control whereby further attention should be given to effective methods and procedures to establish and control tank atmospheres.

Although the working group adopted a pro-active approach, little or no changes have been noted in international regulations since the investigation 6 years ago. Ironically enough, a number of vessels was caught in explosions long after publication of the working group's study and therefore the value and contribution of the study to the industry does not seem to have had the required effect.

In the meantime, INTERTANKO has strengthened and clarified its own position, thereby indicating to support the logic that the use of inert gas on new tankers should be on a product- based approach, whereby the inert gas requirement should apply to all cargoes (Marpol Annex I and II) with flash points below 60°C. In this respect, they also support the idea of installing IG Systems on all tankers irrespective of ship's size, ship's type or size of cargo tanks.

The vision adopted by INTERTANKO does make sense and in fact is deemed the only correct approach in the aim to make tanker shipping safer and to avoid recurrence of major accidents. By now, too many seafarers have lost their lives and too many tankers have had to be written off completely.

Perhaps we may even take the statement of INTERTANKO a little further and consider cargo operations on board inland tanker barges. If tanker size does not matter, this part of the tanker industry, which is of considerable importance in industrialised areas in NW Europe (The Netherlands, Belgium, France and Germany) and North America (for instance the Mississippi and Houston areas), deserves some consideration as well. With a few exceptions, IG systems are not used on inland shipping, which presents an actual risk, since they are carrying the same flammable products as ocean- going tankers and often up to amounts of 8,000 and even 12,000 m.t. per voyage. These cargoes are not only discharged at the premises of large refineries in industrial areas but also at smaller facilities close to urban areas.

One could even take a wider perspective on the subject by considering that an inland barge without IGS could be loading or discharging gasoline almost in one's own backyard and then this discussion would be everyone's concern, making the

demands for a product- based approach on the use of IGS seem quite understandable.

An interesting report in respect of the subject, issued by the Brazilian Navy Directorate of ports and coast can be found here:

[www.dpc.mar.mil.br/cipanave/rel\\_acidentes/vicunha/VICUNA.pdf](http://www.dpc.mar.mil.br/cipanave/rel_acidentes/vicunha/VICUNA.pdf)

*No rights or remedies can be derived from this publication. For more information please contact Frans van Dalen via [frans.van.dalen@dupi.nl](mailto:frans.van.dalen@dupi.nl) or tel +31.10.4405591.*