

MAIB REPORTS – CAN THEY BE USED IN MARITIME ARBITRATION OR COURT DISPUTES?

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BACKGROUND

In *The Ocean Prefect*^[1], the English High Court recently clarified how UK Department of Transport Marine Accident Investigation Branch (MAIB) reports may be used in maritime disputes.

"In *The Ocean Prefect*, the English High Court has confirmed that MAIB reports may well be inadmissible in maritime disputes, and it will be necessary to seek the court's consent to use them, even in arbitration."

It was commonly considered that such documents were inadmissible, but this view had been cast into doubt by the Court of Appeal in a decision regarding the use of Air Accident Investigation Branch (AAIB) reports (*Rogers v Hoyle*^[2]). In *The Ocean Prefect*, the English High Court has confirmed that MAIB reports may well be inadmissible in maritime disputes, and it will be necessary to seek the court's consent to use them, even in arbitration.

MAIB REPORTS

When a ship is involved in a serious marine incident, both the coastal and flag state can investigate and issue a report. In an attempt to standardise reporting internationally, in 2008 the International Maritime Organization ("IMO") issued a code of conduct on accident investigation. In the UK, following Mr Justice Sheen's

report into the capsizing of the *Herald of Free Enterprise* with the loss of 193 lives, the MAIB was established. Its purpose is to freely investigate maritime incidents and establish the root cause, with a view to preventing similar incidents occurring again. This approach means that failings of the regulators can be highlighted where relevant. Indeed, the MAIB has been critical of the Maritime and Coastguard Agency where it has considered it appropriate.

The Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 set out how the MAIB should proceed with an investigation and how investigators are to use their powers, derived from the Merchant Shipping Act 1995. The Regulations also set out restrictions on the use of the report following its publication. Regulation 14(4) provides that, where information has been obtained by an investigator exercising the powers of an "inspector" under the Act, any part of a document or analysis it contains is inadmissible in "judicial proceedings" whose purpose is to attribute liability unless permission of a court is granted.

THE JUDGMENT

The *Ocean Prefect*, a British registered vessel, ran aground twice when entering the port of Umm Al Quwain in the UAE, and an unsafe port claim was brought by the owners of the vessel in a London LMAA arbitration. The MAIB issued a report to investigate the circumstances of the grounding and to see what lessons could be learnt with regard to improving the safety of shipping, which both parties' experts referred to in their expert reports.

The owners' expert considered the MAIB report to be favourable to the owners' unsafe port case, and the owners argued that the MAIB report's conclusions should be borne in mind by the tribunal. The charterers and the MAIB argued that it should not be borne in mind by the tribunal.

The owners applied urgently to the English High Court under the 2012 Regulations for permission to rely on the report in the London arbitration, for which the hearing was just a week away.

The two key questions for the Court were:

1. Did a private LMAA arbitration satisfy the definition of "judicial proceedings" for the purposes of the MAIB Regulations (owners argued that it did not); and if so
2. Should the Court allow the MAIB report to be used in those proceedings (owners argued that it should)?

Question 1 – does London arbitration qualify as "judicial proceedings"?

The Court found that London arbitration was within the definition of "judicial proceedings" for the purposes of the 2012 Regulations. The fact that arbitral proceedings were confidential made no difference to this issue.

Question 2 – should the Court grant to use the MAIB report in the London arbitration unsafe port claim?

The main objection for using MAIB reports in maritime disputes has always been the impact this may have on future investigations. The MAIB have wide-ranging powers, including the ability to compel witnesses to meet with them and exclude legal representation from those meetings. By preventing the use of MAIB reports in legal proceedings it is hoped that witnesses will talk more freely to them, without fear of self-incrimination, allowing for a more thorough investigation.

The 2012 Regulations set out the factors that the court must consider in making its decision. The court must consider, having had regard to the views of the Chief Inspector, whether the interests in justice outweigh any likely prejudice that will occur to:

1. the instant investigation into the accident;
2. any future safety investigation conducted by the MAIB; or
3. relations between the UK and another state or organisation.

In this case the Chief Inspector's view was that admitting the report in the arbitration would be likely to prejudice future investigations, diminishing the MAIB's ability to have candid conversations with witnesses and unqualified access to accident sites. Against this, although the Court recognised that refusing to admit the report may cause the owners prejudice in the arbitration, it would still be possible to cross-examine witnesses without reference to the report, and both parties would be assisted by their own experts. There was also no restriction on the witnesses explaining, under cross-examination, what evidence they had given to the MAIB and, if they were willing to do so, providing copies of the statements that they had made to the MAIB.

"In this case the Chief Inspector's view was that admitting the report in the arbitration would be likely to prejudice future investigations."

In those circumstances Mr Justice Teare considered that the detriment to incident investigation (having taken account of the Chief Inspector's views) of giving permission for the report to be admitted outweighed any benefit to a commercial arbitration between the parties and ordered that the MAIB report should **not** be used in the London arbitration unsafe port proceedings.

The Court appeared to be particularly swayed by the Chief Inspector's view that such use would have a damaging effect on future incident investigation. This was an argument that was rejected by the Court of Appeal in *Rogers v Hoyle* in respect of the AAIB (concerning air accident incidents). There the use of an AAIB report was permitted, contrary to representations made on behalf of the AAIB on the impact on future investigations and the potential burden on the AAIB itself. The Court of Appeal rejected those submissions on the basis that (1) the AAIB report was admissible evidence and had particular value; (2) any exercise in discretion is to be carried out with the overriding objective in mind; and (3) there is a distinction in the AAIB Regulations between the "report" and the "records", with legislators considering only "records" should be restricted. Whilst there is no similar distinction between "records" and the "report" in the MAIB Regulations (meaning that under the MAIB Regulations the restriction applies to the report itself), the Court of Appeal commented that the MAIB Regulations seemed to contemplate that MAIB reports may be *prima facie* admissible. However, that point was not subject to full argument in that case and it was not binding on the High Court in *The Ocean Prefect*.

COMMENT

This decision confirms what many involved in MAIB or Flag State investigations have considered to be the position for some time, namely that MAIB reports cannot be relied upon in maritime disputes. This will therefore need to be borne in mind by parties litigating their maritime disputes in London arbitrations or in the English High Court.

It also seems that because of subtle differences between the AAIB Regulations (concerning air accident incidents) and the MAIB Regulations (concerning maritime incidents), particularly as to the regard to be given to the Chief Inspector's views, a report may be admissible in air accident legal proceedings under the AAIB Regulations whereas an equivalent report will not be admissible in maritime dispute legal proceedings under the MAIB Regulations.

[1] [2019] EWHC 3368 (Comm)

[2] [2014] EWCA Civ 257

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