Liability for general average and incorporation of charterparty war risks terms in bills of lading (Herculito Maritime Ltd v Gunvor—The 'M/V POLAR')

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Insurance & Reinsurance analysis: Following the detention of the M/V 'POLAR' by pirates in the Gulf of Aden and declaration of general average (GA) by her owners, Cargo Interests resisted the owners' claim for them to contribute in GA. The arbitrators held that Cargo Interests were not liable to contribute in GA. This was on the grounds that the voyage charter terms in respect of war risks/Gulf of Aden were incorporated into the bills of lading. As a result, the owners agreed to look solely to their insurance cover for losses covered thereby, rather than to the holders of the bills of lading in GA. On appeal, the Commercial Court concluded that Cargo Interests were liable, but gave permission to Cargo Interests to appeal. That appeal was dismissed by the Court of Appeal, upholding the first instance judgment, finding in favor of the owners and holding that the bills of lading did not exclude liability on the part of Cargo Interests to pay their share of the GA. Written by Richard Hugg, partner and Nikki Chu, senior associate at Stephenson Harwood LLP.

Herculito Maritime Ltd and others v Gunvor International BV and others [2021] EWCA Civ 1828

What are the practical implications of this case?

This case considered questions of incorporation of charterparty terms into bills of lading; in the context of a GA claim against Cargo Interests this was novel. Paras [33]–[36] of the judgment provide an overview of the principles and approach (in cases more usually addressing incorporation of arbitration provisions). The Court of Appeal emphasised that any question about incorporation is a question of construction of the bill of lading contract, highlighting the iterative nature of the exercise (ie although the steps, in this case described in Scrutton on Charterparties, provide a convenient approach to the issue, they must not be applied rigidly and at each subsequent stage of the analysis one must be prepared to revisit a conclusion reached at an earlier stage).

The Court of Appeal held that it would have been straightforward for the parties to include express terms in the contract to say that Cargo Interests would not contribute in GA. However, the parties did not do so, and this left Cargo Interests to pursue complex arguments regarding the incorporation of charterparty terms into a bill of lading contract which seemed an unnecessarily convoluted way to express a simple concept and called into question whether this is what the parties intended (see para [57] of the judgment).

The case also considered the relevance/interplay of the various sets of insurers, concluding that the owners' case would lead to each insurer (respectively on behalf of Owners and Cargo Interests) bearing its proper share of the risk which it had agreed to cover (see Para [60] of the judgment). Accordingly, it was held that the first instance decision (as upheld) was consistent both with the legal analysis and commercial sense.

What was the background?

The voyage charterparty contained a Gulf of Aden Clause which provided that any additional insurance premia (including kidnap risks and ransoms) were to be for Charterers' account up to maximum of US$40,000.

When sailing through the Gulf of Aden with a cargo of fuel oil, the vessel was seized by pirates. The vessel was released after a ransom of US$7.7m was paid by the owners and their underwriters.

Owners declared GA and in the usual way GA securities were provided. A GA Adjustment concluded that approximately US$4.8m was due from Cargo Interests, and the owners claimed this sum from them and their underwriters in arbitration.

The arbitral tribunal held that Cargo Interests were not liable to contribute in GA. The Commercial Court reached the opposite conclusion, and the matter was then appealed to the Court of Appeal which considered:

- whether the charterparty included an agreement by the owners not to seek GA contribution from charterers in the event of a ransom payment to pirates seizing the vessel in the Gulf of Aden
- on the assumption the answer to (1) was positive, whether that agreement was incorporated into the bills of lading in such a way that the owners agreed also not to seek contribution from the bill of lading holder. That involved consideration of:
    - the width of the incorporating language in the bills of lading
    - assuming prima facie the relevant terms of the charterparty were incorporated into the bill of lading contract, whether the words 'bill of lading holders' were to be substituted for 'charterer' so as to impose an obligation on Cargo Interests to pay the premium
    - what the purpose of the incorporation of the terms was and whether, fundamentally, the bills of lading accordingly excluded liability on the part of Cargo Interests (as the holder of the bills of lading) to pay cargo's contribution in GA

What did the court decide?

The appeal was dismissed by the Court of Appeal.

The first issue was not determined by the Court of Appeal which proceeded on the basis that the charterparty included an agreement by the owners not to seek a GA contribution from charterers in the event of a ransom payment to pirates seizing the vessel in the Gulf of Aden. There is interesting comparison/discussion of similar issues which arose in *The Evia (No 2)* [1983] AC 736) and *The Ocean Victory* [2017] UKSC 35, [2017] 1 WLR 1793 (see para [43] of the judgment).

In relation to the second issue, as to item (a) the Court of Appeal agreed with the Tribunal and Commercial Court that the incorporating language in the bills of lading were sufficiently wide to encompass the war risks and Gulf of Aden clauses in the charterparty (see para [46] of the judgment). While not all of the charterparty terms dealing with war risks were intended to be incorporated into the bills of lading, it was held that the relevant provisions dealing with the charterers' obligation to pay for the premium was relevant to the carriage and discharge of the cargo and that part of the additional war risk and Gulf of Aden clauses were prima facie incorporated into the bills of lading (see paras [47] and [48] of the judgment).

As to item (b), it was not appropriate to manipulate the relevant wording to impose the obligation to pay the premium on Cargo Interests, as there was nothing in the bills of lading to say how such liability would be apportioned between different bill of lading holders (see para [49] of the judgment).

As to item (c), the purpose of the incorporation of the terms was to make clear (even if it is only a record of the terms agreed between the owners and charterers), the basis on which the owners had agreed that the voyage would be via Suez and the Gulf of Aden in the bill of lading contract ie, owners would have insurance against piracy risks (although paid for by charterers and not Cargo Interests) (see paras [53] and [54] of the judgment). If these terms

were not incorporated, then the crucial issue of the Vessel's route under the bill of lading contract would be highly uncertain at best.

Ultimately, the Court of Appeal held that the bills of lading did not exclude Cargo Interests' liability to pay their contribution in GA (see para [57] of the judgment). The piracy risk and potential requirement to pay ransom were not only foreseeable but were foreseen by the parties to the bill of lading contracts and dealt with expressly by them. It would have been straightforward for the parties (if that is what they intended) to state in the contracts that Cargo Interests were not to contribute in GA in these circumstances. However, the parties did not do so, and it was held that there were no express words to rebut the presumption that the owners did not intend to abandon its rights to a contribution from Cargo Interests in GA (see paras [57] and [58] of the judgment).

Case details

- Court: Court of Appeal (Civil Division)
- Judges: Lord Justice Peter Jackson, Lord Justice Males and Sir Patrick Elias
- Date of judgment: 1 December 2021

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