NORTON ROSE FULBRIGHT

The Big Read Book Series Volume 16
Marine insurance case law update

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Dearest Reader

Welcome to Volume 16 of Norton Rose Fulbright's The Big Read Book Series on ***marine insurance cases of 2023***.

The selected cases deal not only with direct decisions relating to marine insurance policies and principles, but also to bill of lading and charterparty cases where the outcome has an effect on the insurers and owners of cargo.

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Introduction

The court decisions discussed below were, with one exception, handed down by English courts. The exception is a decision of the Singapore court. All of the cases deal with principles of English law. They are accordingly of interest to people in all of the common law countries including South Africa.

In addition to being of general interest to South African companies involved in marine insurance, the decisions provide guidance on the interpretation of any marine insurance policy issued in South Africa (or elsewhere) which is subject to English law. As readers of this Big Read Book will be aware, the vast majority of marine insurance contracts in South Africa, even those dealing solely with domestic South Africa storage or transit issues, are made subject to English law.

South African courts recognise the parties' rights to select any legal system to will govern their contract. A proviso to this is that South African courts will apply any applicable South African legislation to the interpretation of marine insurance contracts, even if they are subject to English or other law.

Insurable interest clarified

Quadra Commodities S.A v XL Insurance Co SE and Others [2023] EWCH Civ 432

In April 2023, the UK Court of Appeal handed down its judgment which deals with the question whether, under a marine cargo open policy, the insured had an insurable interest in cargoes of grain purchased by them. The grain went missing from the Ukrainian grain silos in which the grain had been stored prior to delivery at ports for their export on an FOB basis. The court found that the insured buyer had an insurable interest in the cargoes both as a result of having paid or partly paid for the cargo and as a result of having an immediate right of possession to the grain as a matter of the law in the Ukraine. This case has obvious important implications for underwriters and those involved in commodity trades.

The facts

The insured was a trader in agricultural commodities and purchased goods from a Ukrainian entity under a series of purchase contracts concluded between September 2018 and January 2019. The contracts required the insured to effect payment of 80 per cent of the purchase price in relation to a number of grain cargoes stored at various grain silos inland in the Ukraine. The contracts provided for the grain cargoes to be delivered to a port for loading aboard vessels on an FOB basis, which meant that risk in and to the cargoes would pass to the insured on loading.

It transpired that the seller had sold some of the cargoes to several purchasers. The precise details of the fraud were unclear, but eventually, the quantities of grain in the silos became insufficient to cover the claims for delivery made by the insured and other traders.

The insured lodged claims under a marine open cargo policy seeking an indemnity in respect of the goods lost and damaged, for sue and labour charges, and for breaches by the insurers of their obligations under the Insurance Act of 2015 to effect payment within "a reasonable time". Insurers rejected liability for the claim under the policy.

The lower court

In the Commercial Court, Butcher J held that:

1. On a balance of probabilities, the insured had shown that goods corresponding to the warehouse receipts in fact existed;
2. The insured had an insurable interest in the unascertained goods of the relevant description by virtue of having paid the purchase price or a portion thereof;
3. The insured had an immediate right to possession of the cargoes under the warehouse receipts in accordance with Ukrainian law and this gave the insured an additional ground for claiming an insurable interest in the goods insured under the policy;
4. The insured's loss fell to be considered under the misappropriation clause rather than the fraudulent documents clause; and
5. Insurers had not breached the Insurance Act in respect of their handling of the claim.

Insurers obtained leave to appeal on the following grounds:

1. Whether the cargoes were physically present in the silos at the time the warehouse receipts were issued;
2. Whether the insured had an insurable interest in the cargoes in the circumstances where they did not form part of a bulk cargo which was sufficiently identified; and
3. Whether the insured had an immediate right to possession and accordingly an insurable interest in the cargoes.

The appeal court

The Court of Appeal approved the principle established by the Supreme Judicial Court of Maine in Cumberland Bone Company vs Andes Insurance Company 64 Me 466 [1874] and cited with approval the following passage in the current edition of MacGillivray on Insurance Law:

> *"If neither property nor risk has passed, payment or part-payment of the price will give the buyer an insurable interest because, if the goods were lost or damaged and the seller was insolvent, the buyer might not be able to recover the money which he paid for them."*

The Court of Appeal held further that the trial court was correct in finding that the insured had an insurable interest in all of the cargoes both as a result of its payment or part-payment and by virtue of having an immediate right to possession of the cargoes as a matter of Ukrainian law. This rendered the following two questions moot.

In commenting on the insurers' argument, that the goods have to be ascertained, the court held that this was an attempt to impose on the relationship between the insured and insurers an additional requirement beyond anything in the authorities concerning insurable interest. The court said that this confused the concept of an insurable interest as between the insured and insurers with that of a proprietary interest as between a buyer and a seller. The authorities on an insurable interest establish that an insured can have an insurable interest in goods even though it has no proprietary interest.

The court held further that a finding of insurable interest is not in any sense dependent upon the goods being ascertained or part of a sufficiently identified bulk consignment. On the authorities, there was no case which suggests that there cannot be an insurable interest unless the goods in question are sufficiently identified.

In endorsing the principles, the court held that:

> *"In my judgment, the principle established by Cumberland Bone, as stated in the principles set out in MacGillivray, should now be recognised as a principle of English law, which is not in any sense dependent upon the goods being ascertained or part of a sufficiently identified bulk for there to be an insurable interest. Furthermore, Cumberland Bone is not an isolated or outlying case ... There is nothing in the judgments in that case to suggest that there cannot be an insurable interest unless the goods in question are sufficiently identified."*

Comment

Further possible appeal

In August 2023, insurers obtained permission for leave to appeal against this judgment to the UK Supreme Court of Appeal which will have the final say in this matter.

Subject to the outcome of the appeal, this decision may provide clarity to insurers and commodity traders on the question of whether an insurable interest can arise in unascertained goods regardless of whether they form part of an unascertained bulk; and where title and/or a proprietary interest has not yet passed to the insured. Insurable interest arises as long as payment or part-payment has been made.

Burden of proof examined

Sizer Metals Pte Ltd v Chubb Insurance Singapore Ltd [2023] Lloyd's Rep Plus 95

In May 2023 the Singapore High Court Appeals division, in a split judgment, upheld a Singapore High Court decision that the insurers should pay a claim under a marine open cargo policy because it had not proved that the theft took place at the premises of the seller rather than during transit. The court held that once the insured has discharged its onus to prove a loss on a balance of probabilities, the insurer should be liable for payment of the claim in the absence of any other evidence. An insurer who rejects the insured's theory carries a burden of leading evidence to show that its theory is more probable. This case provides some clarity on the difficult question of the burden of proof.

The onus

As can be seen in the *Popi M* [1985] 2 Lloyds Rep 1, a court will examine the evidence provided by the insured and the insurers and then decide either that the insured has discharged its onus or that, having regard to all of the circumstances, the onus has not been discharged. This does not mean that an insured has to persuade a court that its theory of loss is 51 per cent likely or that the insurers need to do the opposite. The court will have regard to all of the evidence lead and decide whether, having regard to common sense and conclusions that can naturally be drawn from the circumstances, the loss has been proved on a balance of probabilities.

Facts

The insured purchased 86 tonnes of tin concentrate from a company in Rwanda. When the drums were offloaded at their destination in Malaysia, they were found to be filled with iron oxide which was described by an expert witness as being worthless.

The trial court held that on the available evidence which included contemporaneous inspection reports and post-loss investigation reports along with a probe by the Rwandan authorities, it was likely that the cargoes had been tampered with at some point between leaving a bonded warehouse in Rwanda and arriving at Dar es Salaam for the sea voyage.

The drums had been welded shut and further secured with tamper-proof clips at the seller's compound in Rwanda and after inspection, three more security seals were added to each drum.

On discharge, the seals were intact and marks where the drums had been cut open and welded shut again had been painted over. The Judge concluded that:

> *"The swops were not done by amateur thieves, but by a professional and well organised gang of thieves."*

The trial court

At the trial, the insurers argued that there was some evidence to suggest that the switch of metals took place at the seller's property and before attachment of the risk because the iron oxide contained traces of metal which were found in Rwanda, but not in Tanzania and the paint covering the weld marks on the drums was the same as that paint found on the seller's premises.

The court rejected this argument on the basis that it would have been logistically impossible to swop the metals at the seller's premises because they were patrolled by security guards, were monitored by cameras, located in a heavily populated area and the company's director lived in a house on the same premises. Although there was no direct evidence of when the theft occurred, the court concluded that it was more likely to have taken place during the 1 400km multi-day trip to Dar es Salaam during which the security levels were at their lowest rather than at the seller's premises.

The appeal

On appeal, insurers argued that the lower court had reversed the burden of proof by requiring the insurers to prove on a balance of probabilities that the loss had not taken place during transit. In rejecting this argument, the majority of the appeal court judges found that:

> *"The trial Judge did not err in applying a method of elimination which entailed eliminating the possible locations of the thefts to determine the true state of affairs."*

The majority held that the House of Lords in the Popi M had rejected the notion that the test, in the absence of clear evidence, was that the least unlikely cause was to be treated as the proximate cause. The House of Lords had not rejected a process of elimination, but merely held that if the evidence is considered in its entirety and there is no indication as to what had happened then the insured had failed to discharge its onus.

Comment

The trial and appeal courts' approach was to try and work out the most probable time of the loss and, if they were satisfied that the insured had discharged its burden of proving where the loss occurred even if that was by way of a process of elimination, that was sufficient for liability under the policy to be established.

Incorporation of insurance policy into bill of lading

Herculito Maritime Ltd and others v Guvnor International BV and others [2024] UKSC 2

In October 2010, the mt Polar was attacked by pirates and the vessel, cargo and crew were held to ransom. Ransom was paid by the owners who declared General Average and sought to recover contributions to the ransom payment by way of General Average.

The UK Supreme Court held that cargo owners could not avoid paying their contribution on the basis that the charterers had separately contracted with the shipowners for war risks insurance which covered the payment of ransom by the shipowners.

The Supreme Court confirmed the decisions of the Commercial Court and Court of Appeal which had overturned the original decision of an arbitrator and, in doing so, brought an end to a decade of litigation. The case has important consequences for shipowners, charterers, bill of lading holders, and all their insurers. It turns on a dry but very important point that parties who wish to agree to the incorporation of an insurance code into a contract, should do so expressly rather than trying to rely on the language of the bill of lading contract to imply incorporation.

The Facts

At the time of the attack, the mv Polar was transiting the Gulf of Aden carrying a cargo of 70 000 metric tonnes of fuel oil from Saint Petersburg to Singapore. Shipowners paid a ransom of USD7.7 million for the vessel's release, declared general average and that general average was subsequently adjusted. Cargo interest's contribution was USD4 829 000. The General Average contributions due by cargo where covered under a cargo policy.

The vessel had been chartered from the owners on an amended BPVOY4 form for a single voyage. The charterparty provided that any additional insurance premium payable by shipowners in respect of war risks, including piracy, was to be paid by the charterers. This was if an additional premium was payable if the vessel traded to excluded areas not covered by the shipowners' basic war risk insurance.

The shipowners' basic war risk insurance excluded the Gulf of Aden and accordingly the charterers, who were not the owners of the cargo when the ship was captured, paid shipowners for the additional war risks insurance. The shipowners had issued bills of lading which incorporated the terms of the voyage charterparty.

No dispute was raised with regard to whether or not payment of a ransom was contrary to public policy because that issue had been resolved by the English courts in the *Bunga Melati Dua (Masefield AG vs Amlin Corporate Member Limited* [2011] EWCA Civ 24) where the UK Court of Appeal held that hull underwriters could not avoid paying a claim for ransom paid by the shipowners to secure the release of a vessel from pirates on the basis that payment of ransom is contrary to public policy.

Cargo interests however rejected the claim for a Gulf of Aden contribution on the basis that the shipowner's only remedy was to recover the entire ransom under the insurance policies taken out by the shipowner and paid in part by the voyage charterer.

The decision

The Supreme Court had to deal with four principal issues. The first was whether the charterparty contained an insurance code in its war risks clause which precluded owners from claiming from charterers in respect of war risks arising in the Gulf of Aden. Secondly, if that was the case, whether those clauses were incorporated into the bills of lading. The third question was whether on a proper interpretation of the bills or by implication, the shipowners were precluded from claiming against the bill of lading holders. The final question, whether the wording of those clauses should be manipulated so as to substitute the term "the charterers" with "the holders of the bills of lading".

The case was effectively disposed of on the first issue where the court held that the charterparty did not contain an implied insurance code. Whether or not the parties had agreed an insurance code was a matter of construction of the charterparty. An implied insurance code would be "akin to a necessarily implied term and involves a similarly high threshold." Rejecting an earlier decision in the *Ocean Victory* where the court had held that "the prima facie position where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other." In passing, the *Ocean Victory* decision amounted to a fundamental attack on the principle of subrogation.

Fortunately, the Supreme Court rejected that view and held that *"there is no prima facie position in these cases. It always depends upon the construction of the contract terms as a whole and the necessary consequences of what has been agreed in relation to insurance."*

Cargo interests received some brief hope when the court held on the second issue that it was clear from the contract of carriage evidenced by the bills of lading that all of the clauses of the charterparty, including the war risks clauses, were incorporated into the bills of lading.

This aspect of the judgment is the high water mark of the case for cargo interests because on issues three and four, the Supreme Court held that the wording of the charterparty was clear.

On whether or not the owners were precluded from claiming against the cargo interests, the court held that the contract was between the owners and the voyage charterers. Those two parties had agreed that they would not look to each other for an insured loss. It would require clear language to extend those rights beyond the contract to any third party.

This left only the argument that the term "charterers" should be replaced with "the holders of the bill of lading". It is often necessary to manipulate the wording of the charterparty to fit into a bill of lading because the parties are different. The court held however that manipulation of charterparty clauses may be permissible "if it is necessary to do so in order to make the wording fit the bill of lading." In this case, there was no need to do so because the Gulf of Aden exclusion and the war risk clauses "make perfectly good sense in the context of the bills of lading as a record of the terms upon which the shipowner has agreed to transit the Gulf of Aden exclusion." The court held further that there were positive reasons why there should be no manipulation because it seemed unlikely that the bill of lading holders and their insurers would accept the potential liability to pay an unknown and unpredictable amount.

The Supreme Court approved of the comments by Lord Justice Males in the Court of Appeal who stated:

> *"In reality, this is a case where both parties were insured against the risk of piracy and where allowing the shipowner to claim will mean that each set of insurers will bear their proper share of the risk which it has agreed to cover. In contract, the effect of construing the bills of lading to exclude a claim by the shipowner will mean that the loss is borne entirely by the shipowner's insurers and that the cargo owner's insurers escape liability for a risk which they agreed to cover."*

Comment

The importance of setting out in clear and plain language the express intention of the parties to a contract cannot be overemphasised. Legal systems generally have mechanisms by which they will attempt to give effect to parties' contracts by trying to interpret their intention or by implying terms if a certain threshold is met. This debate can be avoided by the use of clear, plain language to express your intentions.

From an insurance perspective, we doubt that the cargo insurers were all that surprised by the outcome. They had undertaken to insure the cargo for a particular voyage and included general average cover in that policy. They were accordingly alive to the possibility that they might have to pay, in general average, a contribution towards ransom.

Inherent vice and onus in bailment claim

JB Cocoa SDN BHD & Ors v Maersk Line AS [2023] EWHC 2203 (Comm)

A September 2023 judgment of the English High Court dealt with moisture and mould damage to consignments of containerised cocoa beans. The court confirmed the approach to be taken with regard to inherent vice, the carrier's period of responsibility, liability for damage after discharge, and the question of onus in claims of bailment. In doing so, the court endorsed previous decisions on these issues and has not introduced any new principle. The judgment is however a timely reminder to cargo claimants on the liability of a carrier, particularly where there is a delay in taking delivery of the cargo.

The facts

The claimants purchased a cargo of bagged cocoa beans stuffed in 12 x 40ft containers and carried from Nigeria to Malaysia. The sales contract provided for the cargo to have a maximum moisture content of 7.5 per cent and a maximum number of defective beans of 7 per cent. It was accepted that the cargo was in good order and condition when stuffed into the containers and that the unventilated containers had been properly prepared by being lined with corrugated cardboard and packed with bags of desiccant to attract moisture. The vessel proceeded around the South African coast to Malaysia during the southern hemisphere spring and the cargo was discharged.

As a result of a dispute between buyers and the sellers, payment of demurrage charges and problems with original documents, the containers spent six weeks at the container terminal before being released to the buyer. On opening the containers, it was discovered there was extensive moisture and mould damage to the contents of all of the containers. The buyers were indemnified by insurers who proceeded with a subrogated recovery against the contractual carrier under the bill of lading.

The carrier denied liability for the claim on the basis either that the loss arose as a result of inherent vice of the cargo and/or that the damage was occasioned during the lengthy storage at the container terminal in Malaysia. The former was a defence available to the carrier under the Hague Rules incorporated into the bill of lading and the latter arose as the carrier contended that their obligation to take care of the cargo ceased on discharge. In passing, we assume that the period of insurance was extended beyond that contained in the usual cargo policy.

The decision

The court had to deal with numerous issues which included: the cause of the loss; the onus on proving a defence under the Hague Rules; the date on which the carrier's liability terminated under a bill of lading; and liability for care of the cargo by a bailee.

Expert evidence was advanced by both parties with the carrier contending that the moisture content of the beans on loading, although within the sales contract specifications, ultimately resulted in the mould and accordingly entitled them to rely on the inherent vice defence. The claimants contended that the carrier had failed to properly care for the cargo in that container sweat would have been occasioned whilst the vessel was in warmer waters and that, after discharge, the terminal acting as an agent for the carrier, should have opened the containers to ventilate them. The court rejected the carrier's contention that the loss arose as a result of inherent vice and also rejected the claimant's contention that the carrier had failed to properly care for the cargo during the ocean voyage.

This left the claimant with the contention that delivery under the bill of lading did not take place until the cargo was released because a proper arrival notification had not been served on the buyer and holder of the bill of lading and/or that it had a claim in bailment if the cargo was damaged after discharge.

Having considered the appeal court decision in V*olcafe Limited vs Cia Sud Americana de Vapores SA* [2019] AC 358 and the terms of the bill of lading contract and incorporated the carrier's tariff, the court held that the carrier's obligation under the bill of lading was limited to the period between the time of loading and the time of discharge. The fact that the cargo was only delivered to the buyer when they took delivery several weeks after discharge did not extend that period of liability under the bill of lading beyond the period set out in the Hague Rules (which is identical to the Hague-Visby Rules) even though an arrival notification had not been properly served on the buyer.

The court held that reasonable notice had been given to the parties of the incorporation of the carrier's tariff into the bill of lading and accordingly the terms of the tariff would apply. The seven day period during which no storage or demurrage charges would apply after discharge contained in the tariff was displaced by a 15 day period in the bill of lading. The court however was of the view that even if this did extend the carrier's liability to the end of the free storage period, it was not material in this case as the delay was five weeks. There was no evidence that the loss occurred during the first 15 days after discharge.

The court accepted that, if the carrier remained responsible for the cargo between discharge and devanning, it would have been held liable on the grounds that it failed to take reasonable care of the cocoa beans by opening the container doors to provide ventilation. It rejected the carrier's arguments that it was impractical to open the doors or that doing so would risk rodent infestation. This point however was moot as the court held that the carrier was only liable up until the point of discharge.

Insofar as bailment was concerned, the court confirmed the approach taken in the *Volcafe* decision namely that:

- Where there is cargo loss or damage on outturn, the legal burden is on the carrier to prove that it used reasonable and proper skill and care for the goods or that, even if it had not used reasonable skill and care, there still would have been loss or damage;
- The legal burden is also on the carrier to show that the loss or damage was caused by an excepted peril under the bill of lading; and
- The cargo owner has no legal burden at all beyond proving the existence of damage on outturn, but may wish to discharge an evidential burden to rebut the carrier's case.

As the carrier was no longer in possession of the containers after discharge, the question of bailment did not arise as against the carrier after discharge. This implies that a claim in bailment might have succeeded against the container terminal which was not a party to these proceedings.

Finally, although it was not relevant to the decision, the court rejected the carrier's defence that the claimant had failed to mitigate its loss because they had failed to carry out a manual sorting operation immediately on delivery whereafter they could have dried the beans and analysed them for mould. This was on the basis that the carrier had failed to discharge the onus of proving a failure to mitigate, and secondly that because the carrier was the wrongdoer, the court would not impose a high standard on the claimant with regard to mitigation. The claimant is only required to act in accordance with the practices in the ordinary course of business.

The claim against the carrier accordingly failed. The decision is a timely reminder of the need for cargo interests to ensure that cargo is properly prepared for the anticipated voyage. With regard to such sensitive cargo, this includes ensuring that the various anticipated weather conditions including the temperature and moisture content of the atmosphere, are taken into account for the voyage. This is particularly the case when the vessel passes through both hemispheres and the weather conditions may vary considerably. The decision also confirms that the carrier's obligation under a bill of lading ceases on discharge and the onus is on the consignee/receiver of the cargo to take delivery as soon as possible. The risk of delays arising out of a demurrage/storage dispute, a delay in receipt of the original documents, and a dispute between the seller and the buyer, falls on the consignee/receiver of the cargo.

Comment

The extensive delays being experienced in releasing containers from storage after discharge as a result of numerous causes must be borne in mind by the buyer/receiver. If that delay is being occasioned by a demand for demurrage or storage charges, the buyer should pay them under protest or secure them and take delivery as soon as possible.

Extent of duty to mitigate explained

AMS Ameropa Marketing Sales AG & Another vs Ocean Unity Navigation Inc [2023] EWHC 3264 (Comm)

In this decision, a court was called upon to decide whether or not the insured cargo owners had taken reasonable steps to mitigate their loss following damage to a cargo. The court held on the facts that the shipowners, who were the carriers under the bills of lading, had failed to prove the requisite high standard of an unreasonable failure by the cargo owners to mitigate their loss. The decision is important both for claims under bills of lading and under insurance policies where the insured cargo owner bears an obligation, either contractually or at common law, to mitigate its loss following the discovery of loss or damage to its cargo.

The facts
A cargo of 50 000 MT of yellow soyabeans in bulk were carried from Louisiana, United States, to Egypt on board the mv Doric Valour and was loaded in apparent good order and condition. On discharge, some of it was found to be damaged and cargo owners pursued a claim under bills of lading issued by the owners of the vessel. The owners admitted breach of their contractual duty under the bills of lading to take reasonable care of the cargo because the crew on board the vessel had excessively heated fuel in a tank adjacent to one of the holds in which the cargo had been loaded. The owners accepted that this heating caused damage to a small part of the cargo in that hold, but disputed most of the claim on the grounds that cargo owners lacked title to sue and that the alleged cause and amount of recoverable losses were incorrect.

The principal dispute arose because cargo owners were seeking damages for a loss of value of about 3 600 tonnes of the cargo which contained both sound and damaged cargo. It had been separated from the rest of the cargo, taken to a different warehouse and sold to a salvage buyer. The shipowners maintained that only about 15 to 88 tonnes of the cargo had been damaged by reason of their breach. They said that the balance of the loss was caused by the cargo owners failing to mitigate their loss by properly segregating sound and damaged cargo before concluding a salvage sale.

It was accepted that on arrival at the discharge port, it was noted that the top portion of the cargo had suffered heat damage and was lumpy, caked, rotten, discoloured and had a bad smell. The crew began removing the caked cargo on the surface manually. A few weeks later, cargo owners objected to the crew continuing manual segregation on grounds that it would cause delay and more costs and increase risk of further deterioration. The balance of the damaged cargo from hold no. 4 was discharged into a separate warehouse where it was rejected by the final purchaser. No further efforts were made at segregating the cargo and it was ultimately sold some months later to a salvage buyer.

The shipowners' argued that the claim had been exaggerated because the cargo owners had failed to show that about 3 600 MT of cargo had been physically damaged as a result of the shipowners' breach of the contracts evidenced by the bills of lading.

The decision
The court accepted the expert evidence that the damage to the cargo on the surface of the hold was as a result of ship's sweat and that the heat damage was as a result of the neighbouring heated fuel tank. They then considered the conflicting experts' views on the extent to which the wet damage and heat damage would have affected the balance of the cargo and whether the physically damaged cargo was limited to between 15 and 90 tonnes.

The court held that, in all the circumstances, it was not unreasonable for the cargo owner to insist on the balance of the cargo in no. 4 hold to be discharged by grab and that the damaged portion was limited to the cargo where there was visible sign of discoloured beans. This may have been a "basic method of segregation, but it was safe and avoided the risk of substantial delay and significant admixture throughout the whole stow."

The court considered a number of factors relating to the salvage sale and concluded that the cargo interests, in the circumstances, had acted reasonably. The relatively prompt sale at an 18 per cent discount protected cargo owners and shipowners against further deterioration and storage costs.

Comment
The decision emphasises the fact that insureds and cargo owners need to take steps that are commercially reasonably in all of the prevailing circumstances in order to discharge their obligation to mitigate their loss.

Which version of York-Antwerp Rules apply to claim in general average

Star Axe I LLC vs Royal & Sun Alliance Luxembourg SA and Others [2023] EWHC 2784 (Comm)

General Average, simply put, is the contribution by the parties to a maritime adventure to extraordinary costs incurred by a carrier to get the cargo to its intended port of discharge. It is one of those maritime minefields that helps set marine insurance apart. General average are often born out of spectacular casualties (MSC Napoli, Hanjin Pennsylvania), acts of piracy (can a ransom payment to release the ship and cargo be recovered as part of a GA?) or common or garden engine breakdowns. As and when the vessel arrives at its intended port or place of refuge, cargo interests, charterers and their insurers are then faced with further drama as shipowners refuse to release cargo unless they are secured by way of general average bonds and guarantees. The wait for the various adjustments to determine what contributions are required from the various parties could take years.

The rules

Fortunately, the dark arts often associated with General Average (GA) have been regulated by a series of rules dating back to the 1880's – the York-Antwerp Rules (YAR). Various iterations of the YAR each attempted to reflect changes in shipping practice, or developments elsewhere in other areas of shipping law, such as salvage.

Like any set of rules that never remains static, care needs to be taken when parties conclude their agreements to make sure that there is no ambiguity as to which version of the YAR applies to the particular contract of carriage.

The issue has now been addressed in the English courts in the *Star Antares*.

The facts

The court had to decide which version of the YAR was applicable to a 2021 event pursuant to clause (3) of the standard Congenbill 1994 form – a very common form of charterparty for the carriage of bulk products - that provided:

> *"General average shall be adjusted, stated and settled according to York-Antwerp Rules 1994, or any subsequent modification thereof, in London unless another place is agreed in the Charter Party".*

The Claimant (the contractual carrier) contended that it is the York-Antwerp Rules 1994 ('the YAR 1994').

The Defendants (insurers of the cargo) contended that it is the York-Antwerp Rules 2016 ('the YAR 2016').

The facts

The Claimant carrier issued seven bills of lading on the Congenbill 1994 form, acknowledging shipment on its vessel, the mv *Star Antares*, of cargoes of ferro chrome loaded in Maputo and Richards Bay.

As the vessel was proceeding to her second discharge port, Luoyan in China, on November 3, 2021, she allegedly struck an unknown submerged object, sustaining damage. General Average was declared on November 19, 2021 by Independent Average Adjusters Ltd.

The cargo insurers issued Average Guarantees dated November 26, 2021 to the Claimant, undertaking to pay the Claimant or the Claimant's average adjusters any contribution to general average and/or salvage and/or special charges which might be legally and properly due and payable in respect of the goods covered by the bills of lading.

The parties' submissions

The carrier referred to numerous textbook authorities and industry advices on the YAR. These authorities and advices all gave an opinion that the YAR 2016 was not a modification of YAR 1994, but an entirely new set of rules. They submitted that clause (3) of the Congenbill 1994 form would have been understood in the relevant trade at the time of the agreement as applying YAR 1994. If the parties had intended to incorporate YAR 2016, rather than YAR 1994, they would either have used the Congenbill 2016 form, or would have amended clause (3) of the Congenbill 1994 form to incorporate YAR 2016 instead.

The insurers, in turn, relied upon the following uncontested factual matrix:

- Shipowners and charterers are in the habit of using contract wordings for many years, even after newer wordings have been published. There could have been no assurance, when drafting a wording such as Congenbill 1994, that the market would only use it until such time as an updated wording became available.
- The YAR constitutes a code for regulating the adjustment of general average. The first version of the Rules appeared in 1877, their aim being to harmonize the treatment of general average by the principal seafaring nations.
- The YAR have been periodically revised, with further versions being published in 1890, 1924, 1950, 1974, 1994, 2004 and 2016. At least since 1950, the revisions have been overseen by Comite Maritime International (CMI). Following a consultation process, the new version will be approved at a CMI meeting and published in the CMI yearbook.
- In addition to these further versions, an amended version of the 1974 Rules was issued in 1990, in order to take account of the Salvage Convention 1989.

- Apart from that specific instance, the periodic updating of the YAR is, in general terms, to be explained by a desire for the adjustment of general average to march in step with developments in shipborne commerce and to suit the changing expectations of ship and cargo interests.

Insurers argued that, against that background, when the Congenbill 1994 was drafted, the parties would reasonably have anticipated that there would have been a further version of the YAR before the Congenbill was updated or fell out of use. The drafters would have considered it desirable for the wording to incorporate the latest version of the YAR, not one that was outdated, for otherwise developments in shipborne commerce would not be properly reflected.

The decision

The Court agreed that the insurer's submission that the word 'modification' ordinarily signifies a change which does not alter the essential nature or character of the thing modified. When used in the context of a written instrument or set of rules it has a wider connotation than 'amendment'. The clause contains the words 'any subsequent modification'. The use of 'any' emphasises that it is all 'modifications' to the YAR 1994 which are to be incorporated.

The words are reasonably to be understood as capable of applying to a new version of the rules. The court did not consider that a reasonable person possessed of that background knowledge, and without regard to the materials relied on by the carrier, would understand the parties to have meant only amendments to the 1994 version of the Rules which were identified as such, rather than a new version of the Rules that included some changed provisions. A reasonable person would not, in the court's view, have understood the parties to have been drawing that somewhat technical distinction, without its being expressly articulated. On the contrary, had the narrower effect been intended the parties would not have used the words 'any … modification'.

There is no difficulty, the court found, as a matter of the ordinary use of language, in describing YAR 2004 or YAR 2016 as 'modifications' of YAR 1994. Each was produced by the same body, was directed to the same end, and contained many of the same provisions, but introduced some changes.

With regard to the reliance on textbooks as authorities, the judge commented that *"even assuming that one should regard this text book material as being known to the parties at the time of contracting, it does not point to the conclusion that the relevant words would have been reasonably understood to have the meaning for which the [carrier] contends. The reasonable person considering what the parties meant, would have regarded these expressions of opinion as just that; and would rather have understood the parties to have meant what the words, taken in the context of what I have called the 'uncontroversial' factual matrix, conveyed."*

The Judge further commented that: *"In my judgment, that meaning is the one for which the defendants contend. The relevant words would have incorporated into a putative contract comparable to the contract(s) at issue here the YAR 2004 after their adoption and before the adoption of the YAR 2016. Those words are effective to have incorporated the YAR 2016 into the contract(s) with which the present case is concerned".*

So which clauses are incorporated as "modifications"? The Court said in this regard: *"…, I do not draw a distinction between the effect of the relevant words on the incorporation of the YAR 2004 and YAR 2016. But, as [insurers] submitted, the incorporation of the YAR 2016 is, if anything, the stronger case, as those Rules command a broader consensus, Baltic and International Maritime Council (BIMCO) has not made about them statements similar to those which it made about YAR 2004 which I have referred to above, and the arguments that they are not at least a 'modification' of the YAR 1994 are weaker."*

The Court therefore held that the relevant general average adjustment was to be conducted under YAR 2016.

Comment

The importance of this decision, apart from the clarity it brings, is that the 2016 YA Rules are a considerable improvement on the 1994 YA Rules and on the widely ignored 2004 YA Rules. Perceived as owner-friendly, expensive to adjust, and allowing adjustments to drag on for up to a decade, the 1994 Rules are out of step with commercial reality.

The 2016 Rules, while preserving the underlying principles of GA, do make adjustments more expeditious and certain.

On the timing issue, particulars of the value and particulars in support of a claim to GA contributions must be provided within 12 months failing which the adjuster is empowered to make an estimate. Parties pursuing recovery have two months from receipt of the recovery to notify the adjuster. The party claiming GA (usually the shipowner) has 12 months from the issue of the adjustment to commence proceedings against contributing parties who have not yet paid. These proceedings must be brought within six years of the termination of the voyage giving rise to the declaration of GA.

The 2016 Rules seek to settle the differing approaches to salvage taken by the 1994 and 2004 Rules. Shipowners and cargo interests who have paid a salvage award separately are entitled to seek a reduction in their GA contributory value. This used to require a lengthy and expensive re-apportionment of values. That rule has been ameliorated by providing that salvage awards are only applicable in GA if certain criteria are met, and those criteria are significant. This leaves considerable discretion in the hands of the adjuster, but does reduce the delay and cost of re-apportionment.

The adjuster has been given far more discretion with the term "significant" appearing in several of the rules relating to values, GA expenses and allowances.

In addition, clarity has been provided on the *Bigham* clause which limits cargo owners' contribution to an amount equivalent to the costs which the cargo owners would have paid in order to forward the cargo to final destination at their own expense. This flows from the incorporation of a non-separation agreement in the GA bonds and guarantees which provide that even if the cargo is forwarded by the owner/carrier on another vessel, the contract of carriage is treated as having been completed by the original carrying vessel. The 2016 Rules have clarified that this cap on contributions applies only to expenses allowed under the non-separation agreement and not to all of the expenses. Although this increases the exposure of cargo interests by allowing detention and cargo handling costs to fall outside the Bigham limitation, it does create certainty.

The 2016 Rules have abolished the 2 per cent commission charged on the provision of cash deposits and has capped interest at SOFR plus 4 per cent.

The South African insurance market has dealt with numerous casualties giving rise to GA, some of which were significant including the mv *MSC Napoli*, the mv *APL Austria* and the mv Kota Kado. The last of these resulted in GA payments of 100 per cent of the value of the saved cargo. The first of these which took six years to finalise, was reopened two years after that. Fortunately, this was in order to make a partial refund of GA contributions as a result of a recovery by shipowners and charterers. We have been involved in every casualty affecting the South African marine insurance market over the last several decades and are well-positioned to provide guidance and assistance when dealing with the little understood rules that apply to an adjustment. Fortunately, as a result of this judgment that guidance, in most cases, will relate to a relatively commercially-minded set of YA Rules.

How to calculate package limitation

Trafigura Pty Ltd v TKK Shipping Pte Ltd [2023] EWHC 26 (Comm)

Prior to the decision in this decision which was handed down by the commercial Court in England in January 2023, the law on limitation and economic loss was clear. This case known as the *Thorco Lineage*, follows the heavily criticised decision in the *Limnos* [2008] where the court held that if a cargo owner suffered economic loss relating to the entire cargo together with physical loss, then limitation has to be calculated by reference only to the physically damaged cargo. Paradoxically, the court then held that if there was no physical damage the claim would be unlimited.

A typical example of this might be a shipment of cars, some of which suffer minor physical damage but all of which lost value due to a decline in market. In the *Limnos* test the shipowners would entitled to limit their liability by reference to the weight of the damaged cars, but if there was no physical damage, it would be calculated by reference to the weight of all the cars put together.

In the *Thorco Lineage* one of the most experienced maritime judges on the English bench declined to follow the *Limnos*. The vessel ran aground following failure of her main engine. The salvors refloated the vessel and exercised a lien over the cargo for a salvage claim which was subsequently settled by the cargo insurers for US$7.5 million. A small part of the cargo was physically damaged causing losses of about US$300 000.

The claimants instituted proceedings against the shipowners under the bills of lading stating that the grounding had been caused by a failure on the part of shipowners to exercise due diligence to make the ship seaworthy. They sued for the amount paid to salvors, for the damage to the cargo, and for onwards shipment costs when the voyage was abandoned before final destination. In response, the shipowners alleged amongst other things that they were entitled to limit their liability in accordance with the terms of the bills of lading. This should be calculated by reference to the weight only of the physically damaged cargo. The claimants alleged the limitation should be calculated by reference to the weight of the entire cargo because the salvage payment and onwards costs were paid on the entire cargo. The main dispute was heard by way of arbitration, but it was agreed the limitation issue should be determined separately by the Commercial Court.

The court rejected the owners' attempt to limit their liability. The claimants had raised the fact that delegates to the Conventions leading up to Hague and Hague-Visby Rules clearly intended the package limitation to apply to economic losses which arise in connection with the goods, but without physical damage. They accordingly could not have intended to prevent there being any such limit by requiring the presence of physical damage to the goods. In the circumstances, limitation for the economic loss paid to the salvors and for onwards shipment should be calculated by reference to the weight of the entire cargo.

Comment

This case has important implications in calculating limitation when financial losses are incurred in respect of cargo where not all the cargo is damaged. It does not however change the position on the more common problem of how to calculate limitation where there is only physical damage to the cargo where, for example, one motor vehicle in a shipment of ten is destroyed. On the *Limnos* test this would still be calculated only by reference to the weight of the damaged vehicle.

It is hoped that future decisions will extend the *Thorco Lineage* approach to claims where there is only physical damage to part of the cargo and not apply it only to claims where there is financial loss to the entire cargo. The claimant would then have the benefit of calculating the package limitation by reference to the weight of all ten vehicles. The owners would have certainty in that they know the limitation is calculated by reference to the weight of the entire shipment on the bill of lading as opposed to some unascertained amount which currently only becomes clear when the weight of damaged cargo is determined.

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