Neutral Citation Number: [2018] EWHC 1055 (Comm)

Claim No: CL-2017-000413

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Date: 11 May 2018

B e f o r e :

HIS HONOUR JUDGE WAKSMAN QC
(sitting as a Judge of the High Court)

AGILE HOLDINGS CORPORATION

Claimant

- and -

ESSAR SHIPPING LTD

Defendant

Simon Rainey QC and Peter Stevenson (instructed by Bentleys, Stokes and Lowless, Solicitors) for the Claimant
Charles Priday and Sushma Ananda (instructed by Fishers, Solicitors) for the Defendant

APPROVED JUDGMENT

Hearing date: 12 and 13 March 2018

INTRODUCTION

1. This is an appeal on a question of law under s69 of the Arbitration Act 1996 ("the Act"), brought with the permission of Popplewell J given on 4 October 2017. It is in respect of an arbitration award made on 24 April 2017 ("the Award"). The arbitrators were Mr Alan Oakley, Mr Michael Baker-Harber and Mr Robert Thomas QC.

2. The arbitration arose as follows. In early 2004, the Claimant Owner and Appellant here, Agile Holdings Corporation ("Agile"), let the vessel "Maria" to the Defendant Charterer and Respondent here, Essar Shipping Ltd ("Essar") on a time charter for a single trip from Tunisia to India via Trinidad. The cargo was a consignment of direct reduced iron ("DRI") and the charter was on the NYPE 46 form. As is well known, DRI is highly reactive and combustible in the presence of heat or water. In the course of loading the cargo onto the vessel by means of a conveyor belt at Port Lisas, Trinidad, the belt was seen to have caught fire. However the appointed supercargo inspected the holds and advised that loading could continue. In fact the DRI was still on fire through the voyage and upon discharge, the cargo interests, Essar Steel Limited ("Essar Steel" - an associated company of Essar) brought a claim against Agile. Despite the lengthy passage of time, no actual claim has yet been brought by Essar Steel.

3. Nonetheless, Agile commenced an arbitration seeking from Essar a declaration that it was obliged as charterer to indemnify it against any liability it might be found to have to the cargo interests.

RELEVANT CONTRACTUAL PROVISIONS

4. By clause 8 of the charterparty ("Clause 8"):

> "… Charterers are to load, stow, and trim, tally and discharge the cargo at their expense under the supervision of the Captain…"

5. It is common ground that as a result of the decision in *Court Line v Canadian Transport* [1940] AC 934, this clause is effective to transfer responsibility for all cargo handling from owner to charterer.

6. By clause 89 of the charterparty:

> "Cargo claims as between the Owners and Charterers shall be settled in accordance with the Inter-Club New York Produce Exchange Agreement of February 1970 as amended September 1996 as attached, or any subsequent amendments."

I shall refer to that agreement as "the ICA".

7. Clause (8) of the ICA provides as follows:

"Cargo claims shall be apportioned as follows:…

> (a) Claims in fact arising out of unseaworthiness and/or error or fault in navigation or management of the vessel: 100% Owners…
>
> (b) Claims in fact arising out of the loading, stowage, lashing, discharge, storage or other handling of cargo: 100% Charterers unless **[1]** the words "and responsibility" are added in clause 8 [of the NYPE form] or there is a similar amendment making the Master responsible for cargo handling in which case: 50% Charterers 50% Owners save **[2]** where the Charterer proves that the failure properly to load, stow, lash, discharge or handle the cargo was caused by the unseaworthiness of the vessel in which case: 100% Owners [*my addition of the numbered square brackets to indicate the two provisos*]
>
> (c) Subject to (a) and (b) above, claims for shortage or overcarriage: 50% Charterers 50% Owners…
>
> (d) All of the cargo claims whatsoever (including claims for delay to cargo): 50% Charterers/50% Owners…"

8. Finally, by Clause 49 of the charterparty ("Clause 49"),

> "**Stevedore Damage**

> The Stevedores although appointed and paid by Charterers/Shippers/Receivers and or their Agents, to remain under the direction of the Master who will be responsible for proper stowage and seaworthiness and safety of the vessel…"

THE QUESTION FOR THE APPEAL

Introduction

9. Agile's primary case was that Clause (8) (b) applied without qualification so that Essar was 100% liable. In the alternative it contended that Clause (8) (d) applied but in circumstances where there was clear and irrefutable evidence that the claim arose out of the act or neglect of Essar so that again, Essar was 100% liable.

10. Essar's primary case was that Clause (8) (a) applied without qualification so that Agile was 100% liable. In the alternative it relied upon Clause (8) (b) but in one of two qualified ways:

    (1) the failure to load or stow the cargo was caused by the unseaworthiness of the vessel so that Agile was 100% liable under the second proviso, or

    (2) at the very least, the first proviso to Clause (8) (b) applied. This was because Clause 49 was a "similar amendment making the Master responsible for cargo handling" in which case liability was 50/50.

11. Agile disagreed with those contentions and in particular that Clause 49 was a "similar amendment".

12. The question of law with which this appeal is concerned is that final point which involves a consideration of the proper interpretation of Clause (8) (b) along with Clause 49.

The salient parts of the Award

13. The parts of the Award dealing with this question are as follows:

> "101…. The Charterers accepted (quite correctly in our view) that loading a cargo of hot DRI would constitute improper loading… As we have also explained above, the failure to halt the belt promptly (which might have led to burning cargo entering the hold) constitutes a further failure properly to load which must, in our view, be for the account of the Charterers.
>
> 102. In our view, the claim therefore falls within Clause (8) (b). Liability is 100% for the Charterers unless one or other of the provisos apply.
>
> 103. In this regard, the Charterers argued first of all that Clause 49 constituted a *"similar amendment"* to the addition of *"and responsibility"* and therefore, that at worst there should be a 50/50 split …"
>
> 104. The relevant part of clause 49 provides that '*...the Master...will be responsible for proper stowage and seaworthiness and safety of the vessel*.'. Having given careful consideration to this clause, we cannot see that its purpose is anything other than to make it clear that the Master is responsible for (part at least of) the loading process. We accept Ms Master's point [for Agile] that the first part of the clause refers only to *'stowage'* (as opposed to loading etc) but a similar argument seems to have found little favour with the Court in *The Sea Miror* [2015] 2 LI Rep 395. Moreover, it ignores the remainder of clause 49 which expressly refers to the Master being responsible for the seaworthiness and safety of the ship. Whilst it might be argued that this does no more than reinforce the Master's existing rights, it is, in our view, impossible to ignore the use of the word *'responsible'*. In the context of clause 8, the importance of the addition of the words '*and responsibility*' is well-known and we can attribute no less significance to it in clause 49.
>
> 105. Accordingly we find that the first proviso to Clause (8) (b) is engaged with the result that liability should be split 50/50.
>
> 106. For the sake of clarity, our findings in relation to unseaworthiness [where the tribunal rejected Essar's clause (8) (a) claim] mean that the second proviso to Clause (8) (b) does not come into play.

14. On this appeal, Agile contends that the tribunal was wrong because in order for there to be a "similar amendment", the relevant provision must transfer all cargo responsibilities (i.e. loading, stowing, discharge, trimming etc) to the Master/Owner, and a partial transfer is insufficient, (b) on any view Clause 49 effects a partial transfer only. Hence the tribunal was wrong to conclude that liability here should be 50/50 as opposed to 100% on Essar.

A PRELIMINARY POINT

15. Essar contends (and contended when leave was sought) that the question for the appeal as identified above had not in fact been raised at the arbitration and was therefore not determined by the tribunal. That is why it was not specifically addressed in paragraph 104 of the Award, and why the tribunal appeared to accept expressly that it was dealing only with a partial transfer. Accordingly, this appeal fails at the first hurdle because it does not involve a question of law arising out of the Award or one which the tribunal was asked to determine. See s69 (1) and (3) (b) of the Act.

16. However, Agile claims to have a complete answer to this argument which is that Popplewell J. granted leave of the basis of very full written arguments including on this point. Having granted leave, that particular point cannot now be re-argued and this Court must move straight to a substantive consideration of the question of law posed.

17. In order to deal with this point it is first necessary to recite the reasons given by Popplewell J for granting leave:

> "The question is of one of law as to the construction and application of clause 8(b) of the Inter-Club Agreement and clause 49 of the charterparty. That question will substantially affect the rights of the parties because, as the tribunal found, the prospect of the cargo claim being pursued to a judgment is not fanciful, and the question will determine the Claimant's rights of recovery of 50% of such liability from the Defendant in that eventuality. Accordingly the question affects the rights of the Claimant, and the effect is substantial because the potential liability is a real and substantial one. That question is one which the tribunal was asked to determine: it was articulated at paragraphs 65 and 103 of the award, and recognised by the tribunal as being in issue by being addressed in the immediately following paragraph, paragraph 104, whose reasoning is challenged in the appeal and the argument sought to be advanced on the appeal was raised by Ms Masters QC in this context, as set out in the Claimant's reply skeleton. The question is one of general public importance as is conceded. The decision of the tribunal on that question is open to serious doubt for the reasons set out in the Claimant's skeletons. Section 70(2) has no application: the Claimant is not obliged to have sought further reasons. It is just and proper in all the circumstances for the Court to determine the question."

18. There are, of course, a number of threshold questions for the judge at the permission stage to decide. Some are obviously final, in the sense that they will not arise again. I would put into that category the issue as to whether the determination of the question would substantially affect the rights of one or more of the parties, whether the question is one of general public importance and whether it is just and proper for the court to determine the question, all of which arise under s69 (3).

19. On the other hand, there are some threshold issues which will obviously fall for consideration again. These are the ones dealing with the merits of the underlying question for appeal i.e. was the decision of the tribunal "obviously wrong" or "at least open to serious doubt".

20. The proper characterisation of the requirements that first there is a question of law ("the Law Question") and second that the Law Question was one which the tribunal had been "asked to determine" ("the Determination Question") is rather more nuanced. It is only the second which arises here. But as to that, Agile contends that it is a threshold question which does not and need not arise again. It takes support for that view from paragraph 12.5 of PD 62 which deals with the permission stage. It provides that "Unless there is a dispute whether the question raised by the appeal is one which the tribunal was asked to determine" the only documents to go before the court will be the award and any other document which the court would need to read to determine the question of law. Agile points to the fact that as far as the appeal itself is concerned

paragraph 12.15 provides that the bundle should contain only the claim form, the respondent notice, the arbitration documents referred to in paragraph 12.5, the order granting permission to appeal and the skeleton arguments." That is somewhat ambiguous because on one view if there were further documents submitted at the permission stage because of the Determination Question it would seem by implication that they could be included at the appeal stage. I am not sure in truth, that anything can be read out of these particular paragraphs to assist me.

21. For its part, Essar relies on two cases in support of the proposition that both the Law Question and the Determination Question can be freely re-argued at the appeal.

22. In *The Ocean Crown* [2010] 1 Lloyd's Rep. 468, there were three separate questions of law for appeal for which permission had been granted. The third question involved the allegation by the appellant that the tribunal had sought to restrict the ambit of a well-known legal principle concerning salvage remuneration and had thereby committed an error of law. The respondent argued that the tribunal had done no such thing but was merely dealing with how that principle was to be applied on the particular facts of the case. On that analysis there was no error of law at all.

23. The appellant took a preliminary point which was dealt with by Gross J. (as he then was) as follows in paragraph 53 of his judgment:

> "At the outset, I should dispose of one preliminary matter. Mr Brenton, if I understood his submission correctly, suggested that because leave to appeal had been given under section 69 of the Arbitration Act 1996, the court hearing the appeal was bound to accept that question of law had arisen for decision. With great respect, that is not right. The court hearing the appeal cannot of course reopen the grant of leave and leave cannot properly have been granted unless the judge seised of that issue has concluded (amongst other things) that a question of law did arise out of the award under consideration. But the court hearing the appeal is in no other way bound by the decision of the judge granting leave. On hearing the appeal, the court is not restricted as to its conclusions; so, it may conclude that in reality there is no question or error of law at all. Nor does any such conclusion involve implicit criticism of the judge who granted leave; the task of the judge considering the grant of leave is different from the task of the judge hearing the appeal."

24. It is not clear from the report to what extent the point about the characterisation of the tribunal's decision had been taken at the leave stage or whether leave was granted following an oral hearing. I suspect not. On any view, Gross J. was dealing with the Law Question not the Determination Question. And he certainly was not dealing with all the threshold requirements under s69. Moreover, it could be argued that the Law Question is more intimately involved with the actual decision of the tribunal than the Determination Question which would more readily require additional materials.

25. The other case relied upon by Agile is a decision of the Court of Appeal of Singapore in *Motor Image v SCDA Architects* [2011] SGCA 58, which considered identical appeal provisions in s49 of the Singapore Arbitration Act 2002. In that case the judge granting permission held that there was a question of law arising out of the award which concerned the construction of a particular document. When the same judge heard the appeal she decided that the question of construction did not so arise: the factual premise underlying the question for appeal was not actually the factual premise on which the arbitrator had made the award. She took the view that as a result the appeal should be dismissed. The Court of Appeal agreed. It took the view that this sort of point could be reargued on appeal because it went to the very jurisdiction of the court to hear the appeal in the first place. In other words, the grant of leave was a finding that the court had the relevant jurisdiction. So if on further analysis, one of the threshold conditions was not made out, the court was actually deprived of jurisdiction and could not hear the appeal. It was also said that to require the court at the permission stage to make full and conclusive determinations would undermine the utility of the leave stage as a filter.

26. With respect, I do not think that this is necessarily the right approach at least so far as appeals in this Court are concerned. While the threshold conditions must be satisfied, once a judge

decides that they are, surely the court then has jurisdiction to determine the appeal. If it were otherwise, then, presumably all of the threshold conditions could be re-argued on the basis that if a different view was taken the court would in truth have no jurisdiction to deal with the appeal at all, even if they were the conditions regarding public importance or affecting the rights of the parties. In my view, that cannot be right.

27. Further, and certainly with regard to the Determination Question, it is quite difficult to see why that should necessarily arise when dealing with the merits of the appeal i.e. the answer to the question of law. As indicated above, it might be less difficult where the Law Question itself is concerned.

28. Moreover, there are strong policy reasons in my judgment for making the decision to grant leave as efficacious and immune from further consideration as possible.

29. First, the exercise undertaken by the Judge considering permission is not, and is not meant to be, a simple and sometimes brief overview of the case to answer a broad question-"is there an arguable case?" Or "is there a real prospect of a successful appeal?" It involves a more detailed consideration of a number of separate threshold questions. It can, at least in my experience, take a significant amount of time.

30. Second, the route to appeal under s69 is a very narrow one, deliberately so in deference to the interest in the finality of arbitral awards. But once a case has successfully navigated that route then it seems to me that there is every reason to move onto the merits of the question of law posed without the distraction of tangential points which have already been decided.

31. For my part, I would make the following observations:

    (1) It is impossible to see how the issues about public importance, affecting the rights of the parties and justice and convenience can ever be raised on the appeal once leave has been granted;

    (2) The Law Question and the Determination Question are in a different category but in my view the appeal court should at the very least give considerable weight to the decision by the Judge granting permission on those points;

    (3) That weight increases where (a) the decision was made not merely on paper but after an oral hearing and/or (b) the materials before the Judge granting permission were the same or substantially the same as those before the appeal court so that the appeal court is in effect being asked simply to second-guess the original decision. If both of those factors are present, then very considerable weight should be given to the original decision;

    (4) Because, analytically, the Law Question might more genuinely arise out of a consideration on appeal of the tribunal's reasoning and decision, there might be somewhat more leeway to reconsider it on appeal than with the Determination Question.

32. In this case, Popplewell J. granted leave after reading four separate sets of written submissions including on the very point as to whether the question had arisen for determination at all. In its reply submissions, Agile specifically referred to oral closing arguments made by its counsel before the tribunal, to make good its case that it had arisen. Popplewell J adopted and referred specifically to that contention. It is right to say that at paragraph 9 (g) of Mr Fisher's second witness statement dated 14 September 2017, as a final alternative in Essar's arguments against the grant of permission, the Court was invited to adjourn the application to an oral hearing. Popplewell J. declined that invitation, unsurprisingly in my view since the point clearly emerged on the papers. In those circumstances, and especially where the materials before me

on this issue were not significantly different from those before Popplewell J I consider that I should be very slow to reach a different conclusion. Indeed, I cannot see any basis for doing so.

33. Since I have not suggested that there is an absolute bar against the Determination Question being reargued on appeal, and lest my approach as set out above is wrong, I shall deal with the preliminary point here *ab initio* as it were.

34. In my judgment, it can be dealt with shortly. The principal issue is whether the tribunal was asked to determine the relevant question of law. At one level it obviously was and it clearly did. That is because the underlying question of law was whether Clause 49 did amount to a "similar amendment". Agile's position was that Clause 49 failed to qualify because it actually failed to transfer any responsibilities at all or because it was concerned with stowage whereas this was a case about loading. But the point that, in any event a "similar amendment" had to transfer all cargo handling responsibilities, is simply a further argument which is relevant to the underlying question.

35. But in addition, I consider that the particular argument as to whether a partial transfer of responsibility could be sufficient to engage Clause (8) (b) was itself sufficiently put by Ms Masters QC in closing, where there was this exchange (and I provide the full context):

> "MS MASTERS: But in my submission it's not — in any view it's not what the word is saying. On any view, if transfers anything at all it can only transfer responsibility for proper stowage and we are not talking about stowage here, we are talking about loading
>
> THE CHAIRMAN: That's something I was going to ask because that was one of the - clause 8 refers to a number of operations: loading, stowing, trimming, all rest of it. 49 refers simply to stowage…
>
> THE CHAIRMAN: But in terms of the operations, does that tell us something about the scope of that clause in your submission.
>
> MS MASTERS: In my submission, yes, it does. Because ordinarily — the problem — if and to the extent- standing back, my primary submission is that it's not clear enough to transfer anything at all.
>
> THE CHAIRMAN: Okay.
>
> MS MASTERS: And it's to do with stevedore damage. If it does transfer anything, what it's transferring is responsibility in the sort of cases where the stevedores are likely to be involved and that's when what's stowage rather than the physical act of loading of the cargo. This is not a stowage case and therefore we would say that if it transfers anything at all, it makes sense just to transfer responsibility for proper stowage and not for-
>
> THE CHAIRMAN: But on that analysis if we were to find for Mr Priday that the - he said in opening I think it was akin to an amendment clause 8. Now, if that's right, I'm not saying it is or it isn't, we would then fall into the proviso to 8(b):
>
> "Unless the words 'and responsibility' are added to clause 8 or similar amendment [in which case it's 50/50] save where charterers proved failure to load and was caused by the unseaworthiness of the vessel."
>
> MS MASTERS: Well it depends then, in my submission what the meaning of "cargo handling" is. And cargo handling must be an amendment - it has to be - the words "responsibility" or [are] added or there's a similar amendment making the Master responsible for cargo handling.
>
> Now cargo handling is a whole series of different events. So unless the words - the material amendment affects all of them, a fortiori, the proviso can't apply. So putting matters another way, even if is 49 is a material amendment for the purposes of stowage, it doesn't follow that it's a material amendment for loading –
>
> THE CHAIRMAN: All purposes.
>
> MS MASTERS: All purposes under clause 8."

36. The last part of the exchange between counsel and the Chairman shows clearly that the point was being taken that in any event (i.e. irrespective of what if any particular aspect of cargo handling was being transferred by Clause 49), <u>all</u> aspects of cargo handling had to be transferred under the alleged "similar amendment" for it to have effect under Clause (8) (b). This appears not to have been Agile's central argument and it may even be that the tribunal did not address

it head on, as would appear to be the case. But none of that means that it was not a question that fell for consideration or more strictly, that "the tribunal was asked to determine". The emphasis placed on particular points which were advanced may well shift as between an arbitration and an appeal, as with other appeals. Further, I take the view that paragraph 23 (2) of Agile's written Closing Submissions in the arbitration does prefigure the point because it says that "Clause 49 did not make the Master responsible for cargo handling…" Thus the fact that the argument was not more extensively raised in those submissions (where there were many others which had to be made) is not determinative.

37. It is correct that Agile did not go back to the tribunal to seek further reasons. But that does not make any difference here, and Popplewell J found (as he had to do before granting leave) that s70 (2) of the Act did not apply.

38. In my view, the question did arise for determination in this case, and accordingly I turn to the substantive merits of the appeal.

ANALYSIS

The Meaning of "similar amendment making the Master responsible for cargo handling"

39. The regime created by the ICA was designed to achieve, and has achieved, a clear and certain system for allocating responsibilities as between owner and charterer in the cases to which it applies. Since the only options within Clause (8) (b) are 100% charterer, 100% owner or 50/50, it is obviously a very mechanistic and no doubt sometimes arbitrary regime. Which is why it is sometimes criticised. But it has the merit of simplicity, as with motor insurers' "knock for knock" agreements to which it has been compared. See the observations of Goff J. in *The Strathnewton* [1982] 2 Lloyd's Rep. 296 at p298 and of Kerr LJ in the same case on appeal, [1983] 1 Lloyd's Rep. 2019, at p223 and those of Hobhouse J in *The Benlawers* [1989] 2 Lloyd's Rep. 51 at p60.

40. Prior to its amendment in 1996, the ICA only specified 50/50 in the instant context where the words "and responsibility" were added to Clause 8. It is important to note that even here, where the effect of adding those words (absent the ICA) would have been to place all the responsibility on the master/owner, the charterer still has to bear 50%. It was in the 1996 revision that the 50/50 proviso was extended where there was the "similar amendment" as cited above.

41. Somewhat surprisingly, I have not been shown any material (whether strictly admissible on this issue of interpretation or not) which explains why the additional words to cater for the "similar amendment" were added. Certainly the academic literature does not suggest that a major change was intended or effected. And the BIMCO circular dated 1 September 1996 which accompanied publication of the 1996 revision, and which might at least be regarded as an authoritative statement of intent rather like a statute's explanatory note, did not suggest that there were any significant changes either, as opposed to arranging the agreement in a more logically structured way. Indeed the "similar amendment" receives no specific attention at all.

42. Essar suggests at paragraph 36.3 of its skeleton argument that the addition of the reference to "similar amendment" was "no doubt" to include cases where the parties chose to transfer responsibility of just parts of cargo handling. I can see no basis for that assertion at all.

43. The parties are at odds as to what "similar" means in this context. I do not see any undue difficulty here. Surely (as Agile submits) it is intended to connote a provision in the charter party which is of the same kind or is to the same effect as the addition of the words "and responsibility", which is what the amendment must be "similar to". That distinguishes it from a provision which is the same as "and responsibility" which would just be a repetition. On that basis, the amendment must be to the effect of transferring all cargo handling responsibilities back to the owner not just some of them, because this is the effect of adding the words "and responsibility" to Clause 8.

44. Essar's view of "similar" is that it just means where two things are alike but not identical. I see that, but it is not clear from this argument in what respect it is said that the "similar amendment" must be "like" the addition of the words "and responsibility". If the answer is that sufficient similarity is provided where both provisions deal with cargo handling even though one transfers all cargo handling back while the other one can transfer just part, I disagree. Moreover, the comparison is not as simple as that for Essar because of its gloss by reference to questions of causation - see below. In truth, on Essar's view one might as well dispense with the word "similar" altogether. The word is not needed to indicate that the subject matter is cargo handling because if the word is removed the requirement becomes "a[n] amendment making the Master responsible for cargo handling" and even here, the general words "for cargo handling" remain.

45. Agile's interpretation is reinforced of course by the fact that it is to be a similar amendment "making the Master responsible for cargo handling"; on a natural reading that means cargo handling generally as opposed to some aspect of cargo handling. And the general reference to "cargo handling" reflects the descriptive heading to Clause (8) (b) which refers to claims arising out of the loading, stowage… or other handling of cargo." As to this, Essar says that for there to be a requirement that amendment transfers back all aspects of cargo handling the word "all" would need to be inserted before "cargo handling". I disagree. That result is sufficiently procured by the language used and the similarity requirement.

46. This interpretation is not merely true to the language but in addition has the merit of simplicity and certainty which underpin the ICA regime.

47. Of course, it is the case that Owner and Charterer can agree a different way to allocate responsibility between them by using clear enough words. Clause (8) (b) does not prevent that, it merely dictates a particular result where particular wording is used.

48. Essar also contends that something less than a full transfer can satisfy the "similar amendment" requirement because if some other provision has the same effect as adding "and responsibility" it would simply be counted as adding those words to Clause 8. I disagree. This is a very lightly worded regime and absent the "similar amendment" provision, I cannot see how anything less than the literal addition of those words would do. No case has been cited to me showing otherwise.

49. A variant of this is to say that since there is a high burden on the charterer even to get to 50/50 (leaving aside the second proviso) the addition of "similar amendment" is surely to make life easier by allowing for partial transfers back. But that just does not follow.

50. Further, it would be commercially odd (and inconsistent with the effect of adding "and responsibility") if the transfer of any part of cargo handling, would be enough to engage Clause (8) (b) without more. Essar's answer to this point is to put a gloss on <u>what aspect</u> of cargo handling, which is transferred back to the Owner, would qualify. It could only be that aspect of cargo handling which was in fact in issue in the particular case. So, for example, if the case was about negligent loading of cargo, but the "similar amendment" was concerned only with discharge or trimming, then the proviso would not apply because there was no causal connection between the "similar amendment" and the issue in the dispute. It seems to me, however, that there are a number of difficulties with this:

    (1) it reads a great deal into Clause (8) (b) itself when on Agile's interpretation, it can operate perfectly well; it is not as if a solution is needed because "something has gone wrong with the drafting";

    (2) it will require a detailed analysis of which particular cargo handling functions are in issue so as to compare them with the handling functions the subject of the "similar amendment"; while this can be done, although the parties may be in serious dispute

about it on the facts of the case, it does not seem to me to be consistent with the simple approach of the ICA;

(3) it is true that there has to be a causal enquiry (emphasised by the use of the words "in fact") before deciding whether Clause (8) (b) is engaged at all but (a) this is in very broad terms and effectively just requires a finding that the claim arises out of cargo mishandling as opposed to, for example, unseaworthiness, navigation error, delay or short delivery and (b) the mere fact that there is a causal enquiry at this stage does not dictate that a further such enquiry is necessary when deciding whether there has been a "similar amendment";

(4) equally the fact that the second proviso requires an evidential assessment before it operates says nothing about the interpretation of the first proviso, which on its face is about terms not facts.

51. Essar retorts that it makes no commercial sense if the Owner can escape a 50/50 apportionment simply because some (irrelevant) aspect of cargo handling is not transferred back. But that is just another way of expressing the causation argument and also uses that alleged purpose to disregard or at least distort the clear language of Clause (8) (b). It also begs the question of what the commercial purpose is because if it is to establish under the ICA, a clear apportionment regime albeit by a somewhat blunt instrument, then that purpose is achieved on Agile's interpretation. It is also why, in truth, that interpretation does not produce the "anomalies" referred to in paragraph 39 of Essar's Skeleton argument. Of course, extreme cases can be imagined, such as the notion that only some miniscule aspect of cargo handling is not transferred and yet that would deny the operation of the proviso. But (a) having regard to the usual forms of cargo handling, that example seems highly unlikely and (b) if there could be such an extreme case a *de minimis exception* might apply. But all of that is a very long way from this case.

52. Nor does it follow that the requirement of a total transfer of cargo handling responsibilities does not work because if there was such a transfer one would expect the Owner to be 100% liable and not a 50/50 apportionment. That is because such an argument ignores the parameters of the Clause (8) (b) apportionment; after all even though it is common ground that the addition of the words "and responsibility" will cast all cargo handling responsibilities back to the Owner, the Owner is still not 100% liable.

53. There is a further argument raised by Agile, and a counter-argument raised by Essar, which deal with the interrelationship between Clause (8) (b) and Clause (4) (b) of the ICA. Clause (4) sets out when apportionment under the ICA will apply. One of the requirements is that

> "(b) the cargo responsibility clauses in the charterparty have not been materially amended. A material amendment is one which makes the liability, as between owners and charterers, for cargo claims clear. In particular, it is agreed solely for the purposes of this Agreement
>
> > (i) that the addition of the words "and responsibility" in Clause 8… or any similar amendment of the charterparty making the Master responsible for cargo handling, is not a material amendment.."

54. Agile says that the treatment of both the addition of the words "and responsibility" and the "similar amendment" as being provisions which would make the liability between owners and charterers "clear", and the consequent need to save them from having the effect of ousting the ICA apportionment regime, show that they are both the same kind of creature. If only some aspect of cargo handling was transferred by an amendment, then that would not make the liability "clear" and would not require saving. While by no means conclusive, I see the force of this argument.

55. As against this, Essar contends that the wording of clause 4 (b) supports its case because (a) the ICA regime covers all sorts of cargo claims not just those arising from mishandling, (b) it will ousted by material amendments which make the cargo claim liability clear, (c) if they had not been saved, the addition of the words "any responsibility" or a similar amendment would have that effect even though they deal only with cargo mishandling claims not all cargo claims, therefore (d) one should construe the phrase "make clear" as being a reference to the particular aspect of cargo claim in question, but (e) if so, one should take a similar "partial" approach to "similar amendment" in Clause (8) (b). I do not accept this argument, ingenious though it may be. The conclusion simply does not follow from the premise and moreover in Clause (4) (b) the suggested qualification is about a whole category of cargo claims (eg mishandling as opposed to delay) whereas in Clause (8) (b) it is about one aspect of mishandling.

56. A second and related contentious issue between the parties concerns the import of the commentary on clause 4 (b) in section 20.68 of the Seventh Edition of *Time Charters*. While it is hardly appropriate to treat such a commentary as if it were a statute, it is necessary to address the rival contentions about it if only briefly. It says this:

> "20.68 Clause 4(b) is similar to Clauses 1 (ii) (a) and (b) of the 1984 Agreement. It makes it a requirement for the applicability of the Agreement that the cargo responsibility clauses in the time charter have not been materially amended. A material amendment is defined as "one which makes the liability, as between Owners and Charterers, for Cargo Claims clear", although by Clause 4(b)(i) the common amendment of adding "and responsibility" to Clause 8….. is not for these purposes a material amendment. Clause 4(b)(i) goes on to provide that "any similar amendment of the charterparty" that is, similar to adding 'and responsibility making the Master responsible for cargo handling" is **not** a material amendment dis-applying the Agreement. That provision did not appear in the 1984 Agreement. ;There was a marked reluctance to regard amendments other than adding "and responsibility" as having equivalent effect, because the[ir] effect was to preclude any apportionment under the 1984 Agreement, rather than to apply the special apportionment regime for "and responsibility" charters. For example, all of these were held not to have made liability for cargo claims clear **[1]** "... charterers are to load, stow, trim and discharge at their risk and expense but always understood these operations remain under the supervision and direction and responsibility of the Captain" **(London Arbitration 17/84** (LMLN 128)); **[2]** "... charterers are to load, stow, trim and discharge the cargo at their expense but such stowage shall be directed by and under the control of the Master..." **(The Trade Yonder,** SMA No. 2435); **[3]** "... charterers are to load, stow and trim the cargo at their expense under the supervision and direction of the captain" **(The Labrador** [1998] 2 Lloyd's Rep. 387). In that last example, the same result might be reached now, under the 1996 Agreement. But it is suggested that the first two examples would be regarded as amendments similar to adding "and responsibility", so that under Clause 4(b)(i) of the 1996 Agreement, the Agreement would still apply, but apportionment would be under the "and responsibility" regime of Clause (8) (b)."

57. Essar says that example 2 (my numbering) shows that the learned editors would regard that wording as constituting a "similar amendment" for the purposes of Clause (8) (b) even though only stowage was being transferred back. I do not think this follows because it all depends on what the words "such stowage" mean and whether they are intended to encompass all the preceding cargo handling functions, as I think they do. If so, that would be consistent with Agile's case and not Essar's. At the very least the position with regard to that decision is not clear.

58. What is worth noting from this passage is that there had been a reluctance on the part of tribunals to hold that provisions other than the addition of "any responsibility" (which were saved from disengaging the ICA) were material amendments, so that their presence did not disapply the ICA regime. Hence provisions which might look to have an effect equivalent to the addition of those words were not so treated. However the 1996 version with the additional references to "similar amendments" dealt with the problem by making such amendments not "material" for the purpose of clause 4 (b). But if anything, that suggests that "similar amendments" should be viewed as equivalent to adding "and responsibility".

59. For all those reasons I am of the clear view that the required "similar amendment" is one which would have the same effect as the addition of the words "any responsibility" and therefore, connotes the transfer of all aspects of cargo handling generally back to the Owner.

The Nature of clause 49

60. It is common ground that clause 49 affects only a partial transfer of cargo handling responsibilities back to the owner. It is concerned specifically with one aspect of cargo handling namely stowage. Agile's primary contention is that it does not even cover all aspects of stowage but only those which could affect the seaworthiness or safety of the vessel. As such, it could be seen as designed to reverse the effect of the well-known decision of Langley J in *The Imvros* [1999] 1 Lloyd's Rep. 848. This was to the effect that on the clauses in question the charterer was liable for all the effects of bad stowage, whether that led to damage to the cargo or to the vessel by making it unseaworthy. Under clause 49 here, bad stowage leading to unseaworthiness would now be the responsibility of the owner. I suspect that this was the intended ambit of the clause although it refers to bad stowage and unseaworthiness, not bad stowage leading to unseaworthiness.

61. But if that is wrong, the owner has responsibility for stowage generally, it is still stowage, as opposed to any other form of handling.

62. The fact that stowage is not the same as all aspects of cargo handling was emphasised by Flaux J. (as he then was) in *The Sea Miror* [2015] 2 Lloyd's Rep. 395. The issue there was whether in a claim brought by cargo interests, the carrier was responsible for the cargo damage which had occurred due to inadequate cargo handling. Clause 5 of the charterparty stated that:

> "Cargo shall be loaded, spout trimmed and/or to stowed at the expenses and risk of Shippers/Charterers… Stowage shall be under Masters direction and responsibility."

63. In paragraph 38 of his judgment, Flaux J (held, against the cargo interests) that the first part of the clause placed general handling responsibilities upon them. That was made clear by the second clause which then transferred back to the Master stowage (and only stowage) responsibility. If the cargo interests' argument, that the first clause was ineffective to transfer cargo handling responsibilities generally to the Master was correct, then there would have been no need for the second clause. The relevance for this appeal is simply that a transfer back of stowage only does not connote any transfer back of other cargo handling responsibilities. In this case, of course, the handling responsibility transferred back was that of stowage.

64. On that basis, Clause 49 is ineffective to engage the proviso to Clause (8) (b) so as to make liability 50/50 and not 100% on Essar.

The Arbitrators' Decision

65. There is not much by way of reasoning to analyse here and that is because the arbitrators did not in fact deal with this particular argument head on. It is clear that on any view, the Arbitrators did not reach the conclusion that Clause 49 transferred all responsibilities back to Agile. Even if they thought that it transferred back stowage and some aspect of loading, that would be insufficient. The Arbitrators referred to *The Sea Miror* to the effect that the argument that stowage is different from other cargo handling functions there found little favour with the Court. But that is not an accurate portrayal of that decision, having regard to the extract referred to above. Even if, as the Arbitrators thought, the responsibilities for safety and seaworthiness were placed upon the Master by Clause 49, that would still not amount to a complete transfer. And the tribunal did not suggest that it did.

66. In this context I do not agree that the tribunal fixed upon the word "responsibility" as being enough in itself to trigger the first proviso, as Agile suggested, as some kind of "mantra". I think the tribunal referred to it simply to indicate that responsibility for stowage was indeed transferred back to the owner. But none of this helps on the error made by treating a partial transfer as sufficient.

67. Accordingly, the Arbitrators decision on this point of law was wrong.

68. In the light of that conclusion it is not necessary to deal with Agile's fallback position. This was that on Essar's interpretation, it would still be necessary to show that Clause 49 transferred back a causally relevant aspect of cargo handling. But (as paragraph 101-102 of the Award shows) there was improper loading which was the fault of the charterers. And since Clause 49 only transferred back stowage it would not qualify for the loading anyway. On the other hand the tribunal found that Clause 49 imported some element of loading. So the point may not have been straightforward. But as I have indicated it does not now arise.

A FURTHER POINT

69. Essar served a respondent's notice in respect of this appeal. Only one part of that notice is now pursued. It is to rely not only upon Clause 49 but also Clause 93. This states, among other things, that the cargo must be loaded in accordance with IMO and local regulations. In this context, it is common ground that the regulations would be the BC Code 2001 DRI Entry which deals with the loading and carriage of DRI. On that basis, Clause 93 would have the effect of making Agile as well as Essar responsible for the proper loading the DRI. In fact there are considerable obligations still on the shipper – see Appendix B p77. And in any event, it is still not a general transfer back of all cargo handling responsibilities and Essar does not even suggest that it is.

CONCLUSION

70. Accordingly, for the reasons given above, the Arbitrators' finding that the 50/50 apportionment under Clause (8) (b) was applicable, was wrong in law, and the appeal must be allowed.

71. In this particular case, there is no point in remitting the case back to the Arbitrators because the question which turned on the issue of law just decided is a binary one. If the 50/50 apportionment cannot be applied (as I have found) then the inevitable result is that Essar is 100% responsible (the tribunal having rejected the alternative case that the second proviso was engaged). Accordingly, Agile is now entitled to a complete indemnity in respect of any claim hereafter made against it by the cargo interests.

72. I am grateful to Counsel for their most helpful oral and written submissions.