Relevance of Insurance Provisions to Cargo Interests' Liability to Contribute in General Average - *Herculito Maritime Limited v Gunvor International BV*

Paul Toms

14 December 2020

On Friday 4 December 2020, Sir Nigel Teare handed down judgment in Herculito Maritime Limited ("Herculito") v Gunvor International BV ("Gunvor"), a s. 69 appeal from an arbitration award of Timothy Young QC, Dominic Kendrick QC and Simon Gault ("the Tribunal"). Guy Blackwood QC of Quadrant Chambers appeared on behalf of Herculito, the successful appellant.

The case concerned two novels points of law:

1. Whether a War Risks clause (or equivalent) in a charterparty was incorporated into a Bill of Lading by general words of incorporation.

2. Whether provisions concerning responsibility for the payment of insurance premiums in a charterparty could affect the obligation of a Bill of Lading holder to contribute to general average.

Facts

The dispute arose out of the hijacking of the mv Polar ("the Vessel") in the Gulf of Aden by Somali pirates in October 2010 whilst it was performing a voyage from St Petersburg to Singapore pursuant to a voyage charter ("the Charterparty") between Herculito and Clearlake Shipping Ltd ("Clearlake"). Gunvor were the lawful holder of six Bills of Lading issued in respect of the cargo carried on board. The Bills provided that freight was payable as per the Charterparty. The Bills also contained general words of incorporation which purported to incorporate "terms and conditions, liberties and exceptions" of the Charterparty.

The Charterparty had the following relevant clauses:

1. A clause which permitted Herculito not to continue the voyage or to deviate

2. A clause which obliged Clearlake to bear the expenses caused by the exercise of the liberties in 1. above by Herculito.

3. Clauses which required Clearlake to pay for additional War Risks and Kidnap and Ransom ("K&R") insurance to transit the Gulf of Aden.

The Vessel was released in August 2011 following the payment of a ransom of US$7,700,000 by Herculito. General average was declared and, in the usual way, cargo underwriters provided a general average guarantee and Gunvor a general average bond. An adjustment was issued pursuant to which US$4,829,393.22 was held to be the amount of Gunvor's contribution to general average.

Under the terms of the Charterparty referred to above, Herculito had procured War Risks and K&R cover which indemnified them for the entirety of the ransom paid.

The underwriters, pursuant to their rights of subrogation, sought to recover payment of Gunvor's contribution in general average in the amount of US$4,829,393.22 under the general average bond and against the underwriters under the guarantee.

That claim was met with the defence that the Charterparty provisions which required Clearlake to pay the insurance premiums for the War Risks and K&R cover disentitled Herculito from claiming a contribution to general average from cargo interests under the Charterparty because the insurance provisions were, in effect, a complete code i.e. an agreement that Herculito would only look to the underwriters (and not Clearlake) for any losses falling within the scope of the cover which had been paid for by Clearlake.

It was further argued that those provisions were incorporated into the Bills of Lading such that a claim could not be brought against Gunvor under the Bills either.

The Award

The Tribunal held that Gunvor's defence succeeded. It held that the Charterparty did set out a "code" for the losses resulting from the operation of on-voyage piracy risks in the Gulf of Aden area, namely that Clearlake agreed to pay the premiums for the relevant insurance policies and Herculito agreed not to advance claims against Clearlake in respect of losses which fell within those insurance policies. The Tribunal further held that the obligation to pay extra insurance premiums was incorporated into the Bill of Lading contracts and, therefore, the same "code" applied as between Herculito and Gunvor. However, the Tribunal also held that even if the obligation to pay the extra insurance premium was not incorporated into the Bill of Lading contracts, that did not matter, "since we think all that matters is that the Charter code involved an agreement by the Owners not to seek contribution for piracy losses. It is not a case of incorporating a positive obligation on cargo but of an agreement by the Owners excusing cargo from liability".

The Judgment of the Commercial Court

Sir Nigel Teare identified three principal issues which fell to be determined:

1. Were the Charterparty provisions concerning the payment of insurance premiums incorporated into the Bills of Lading?

2. Was the effect of the insurance provisions in the Charterparty such as to prevent a claim being made by Herculito against Clearlake under the Charterparty?

3. Was the effect of the insurance provisions in the Charterparty such as to prevent a claim being made by Herculito against Gunvor under the Bills of Lading?

Issue 1: Incorporation

Sir Nigel Teare set out at paragraph 34 the well-establish principles of incorporation of charter terms into a bill of lading contract supplemented, at paragraph 35, with some additional observations found in the authorities.

In applying those principles, he held:

1. The words of incorporation in the Bills of Lading were wide enough to incorporate the relevant clauses from the Charterparty (see paragraph 39).

2. The obligation to pay for additional War Risks and K&R cover to transit the Gulf of Aden was directly germane to the carriage and delivery of the cargo under the Bills of Lading in that the Bill of Lading holders would expect the Vessel to proceed on its voyage via the Gulf of Aden and would have understood that Herculito might have to take out such insurance (see paragraph 53).

3. That the key question on incorporation was whether it was appropriate to substitute the words "holder of the bill of lading" for "Charterers" so as to make the Bill of Lading holders liable under the Bill of Lading contracts to pay the insurance premium (see paragraph 59).

4. He held that it was not appropriate to do so for two reasons. Firstly, the price to be paid by the Bill of Lading holder for the carriage of his cargo to Singapore was freight as per the Charterparty. As such, the Judge held that "clear words would be required to impose … a liability not only to pay freight but also to pay the additional insurance premium as the price for the carriage of his cargo" and there were no such clear words (see paragraphs 59 – 60). Secondly, the Bills of Lading gave no indication as to what each Bill of Lading holder was to pay given that the additional premium was for the entire voyage and not on a per bill of lading basis. Given the lack of any wording in the Bills addressing the precise liability of each of the holders or how the premiums were to be apportioned, that was "a further indication that the parties … did not intend that "charterer" should be substituted by "bill of lading holder" (see paragraph 61).

Issue 2: Did the insurance provisions prevent Herculito making a claim for cargo interests' contribution to general average under the Charterparty

The Judge held by reference to the dicta of Lord Roskill in The Evia No. 2 [1983] AC 736 and the analysis of Longmore LJ in The Ocean Victory [2015] 1 Lloyd's Rep 381 (with whose judgment the majority of the Supreme Court agreed) that if there was an agreement by a charterer to pay insurance premium, the usual construction would be that the charterer was exempt from liability to the shipowner under the charter for losses falling within the scope of the cover put in place at charterer's expense.

The primary argument advanced by Herculito as to why that prima facie position should be displaced was that the claim advanced was not one of damages for breach of contract (as in The Evia No. 2 and The Ocean Victory) but rather a claim for payment of cargo interests' contribution to general average. The Judge agreed with the Tribunal that this distinction was irrelevant. Indeed, the position of charterers might be thought to be stronger where the claim was not founded on a breach of contract by them. The rationale in the other cases applied equally here, namely it would be a "remarkable result" if Clearlake was liable to pay for the insurance premiums and yet was still liable in respect of losses caused by the peril insured against (see paragraphs 86 – 88).

The one particular factor of this case which gave the Judge cause for concern was that the implied carve out of responsibility to contribute to general average was one way. Had cargo interests incurred general average expenditure or made a general average sacrifice, there would have been nothing to stop Clearlake under the Charterparty from claiming Herculito's contribution to that general average expenditure or losses despite the fact that cargo interests would invariably (and on the facts of this case) have procured their own insurance. However, at paragraph 95 the Judge decided that it was significant that Clearlake had agreed to pay the premium for the insurance procured by Herculito and, by contrast, Herculito had not agreed to pay the premium for the insurance procured by cargo interests. In other words, there was a good reason for concluding that the parties had in fact agreed that there was a one way liability for general average contributions under the Charterparty.

Issue 3: Did the insurance provisions in the Charterparty prevent Herculito making a claim for general average under the Bills of Lading against Gunvor?

As set out above, the Judge held that it was not a term of the Bill of Lading contracts that Gunvor was obliged to make payment of the additional premiums for War Risks and K&R cover.

It follows, therefore, that the code set out in the Charterparty did not directly apply to the Bill of Lading contracts. As a result it could not be said of the Bill of Lading holders "that they have paid the premiums not only for no benefit for themselves but without shedding any of their liability to contribute in general average in respect of losses caused by the additional insured perils" (see paragraph 99).

Despite this, Gunvor argued that no claim could be brought against them because the scheme of the Charterparty was that the "insurance based solution was set up at no cost to the Owners so that they could perform the contract of carriage and recover any resultant loss from underwriters" (see paragraph 100). In other words, it was argued that the Charterparty constituted an agreement or arrangement by which Herculito had accepted that it would not be able to claim contributions to general average arising out of losses falling within the scope of the insurance cover which had been set up at no cost to it.

Sir Nigel Teare held that The Evia No. 2 and Longmore LJ's dicta in The Ocean Victory made clear that what mattered for a party to be taken to have agreed to look only to its underwriters to be compensated for a particular loss was an agreement that the contractual counterparty should pay for the relevant insurance premium. In the absence of such an agreement, there were no words in the Bill of Lading contracts which established an "insurance code" or expressly stated that Herculito had agreed to look only to the underwriters. Moreover, since Gunvor had not agreed to pay for the premium, it would not be a "remarkable result" if it was held liable – in the usual way – for its contribution to general average (see paragraphs 102 – 103).

In other words, Sir Nigel Teare held that the lack of incorporation of the obligation in the Charterparty to make payment of the insurance premiums into the Bill of Lading contracts was fatal to Gunvor's defence.

Conclusion

The judgment will be of interest to those in the shipping, insurance and commodities markets. Notwithstanding that there should be relatively few unresolved disputes arising out of the large number of vessels hijacked Somali pirates from the late 2000s until 2012/2013, the judgment is of wider application, concerning as it does whether the agreement by charterers to pay the insurance premium for any types of losses affects the liabilities of a bill of lading holder in respect of losses falling within the relevant insurance policy.

JOIN OUR MAILING LIST | FOLLOW QUADRANT | FOLLOW QUADRANT

Paul Toms

"Careful, considered and astute, he has an unparalleled eye for detail." (Chambers UK, 2021)

Paul is an experienced junior barrister specialising in commercial and international trade disputes. He has been recommended for many years in the Legal Directories, namely Who's Who Legal: UK Bar, the Legal 500 and Chambers UK. His depth of experience in working with clients in the Asia Pacific region is reflected by his inclusion in the Legal 500's Asia Pacific rankings.

> view Paul's full profile

paul.toms@quadrantchambers.com