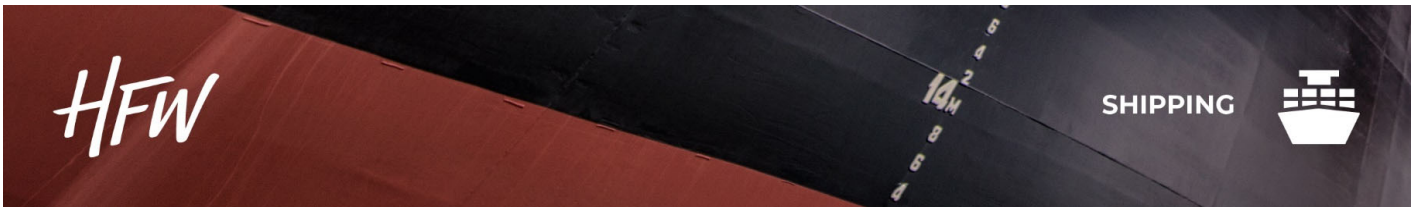

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COURT GRANTS OWNERS' S.69 APPEAL ON POINT OF LAW WITH IMPLICATIONS RELATING TO WAR RISKS AND GENERAL AVERAGE

Herculito Maritime Ltd and Others v Gunvor International BV and Others (the "POLAR") [2020] EWHC 3318 (Comm)

In this recent arbitration appeal with implications for owners, charterers and bill of lading holders, the High Court considered whether owners were prevented from recovering from cargo interests in General Average (**GA**) due to provisions in the charterparty allocating liability for additional insurance premiums. Cargo interests argued that those provisions were incorporated into the bills of lading and, therefore, that in an extension to the principles in *The Evia (No 2)* and *The Ocean Victory*, they formed a "complete code" or "insurance-based solution" as between owners and bill of lading holders which prevented owners from recovering from cargo interests in GA in the event of loss caused by covered risks. The Court disagreed and upheld the owners' right to recover.

The Facts

The MT POLAR was captured by pirates in the Gulf of Aden on 30 October 2010 and released on 26 August 2011 following payment of a ransom of US$7.7 million. At the time of the pirate seizure, the vessel was on charter and carrying a cargo of approximately 70,000mt of fuel oil pursuant to the terms of six bills of lading. After the vessel's release, to obtain delivery of the cargo, cargo owners provided a GA bond and their insurers provided a GA guarantee. A GA adjustment was subsequently issued which determined that a sum of over US$4.3m was due from cargo interests to owners.

The charterparty contained a Gulf of Aden Clause intended to address the high risk of piracy in the Gulf of Aden at that time, a War Risks Clause (at clause 39) and an Additional War Risks Clause.

The Gulf of Aden Clause provided that time awaiting an escort or protection team shall count (half time) against used laytime or demurrage if on demurrage. It also provided that additional costs incurred by reason of entering a convoy or picking up a protection team were to be shared 50/50 between owners and charterers. Finally, any additional insurance for matters such as P&I kidnap risks and ransoms were to be for charterers' account subject to a maximum of US$40,000. The War Risks Clause conferred on the owners liberties not to continue on the voyage or to deviate and it also imposed on the charterers an obligation to bear additional expenses caused by the exercise of such liberties. The Additional War Risks Clause provided that any additional premiums payable by the owners in respect of war risks were for the charterers' account.

The owners took out kidnap and ransom (**K&R**) insurance and extended their war risks cover for the Gulf of Aden transit, both of which responded to differing degrees to the losses which resulted from the pirate hijack.

The Dispute

Owners and their subrogated insurers commenced arbitration against the bill of lading holders under the GA bond, and against cargo underwriters under the GA guarantee, for payment of cargo's share of GA. As part of their defence to owners' claim, cargo interests argued that the Gulf of Aden Clause, the War Risks Clause and the Additional War Risks Clause were incorporated into the bill of lading and, in an extension to the principles laid down in *The Evia (No*

2) and *The Ocean Victory*, amounted to a "complete code" or "insurance-based solution" as between owners and bill of lading holders.

This argument was determined in cargo interests' favour at a preliminary issues hearing before the arbitration tribunal in late 2019, where it was held that there was such a complete code in the charterparty which was incorporated into the bills of lading. As a result, it was held that owners had agreed to look to their insurers rather than to the bill of lading holders in the event of any losses falling within those insurances.

The High Court Appeal

Owners successfully appealed to the High Court pursuant to section 69 of the Arbitration Act 1996. The judge (Sir Nigel Teare) held:

1. Incorporation of the charterparty war risks and Gulf of Aden provisions into the bills of lading

Agreements between a shipowner and a charterer in a charterparty which delineate the responsibility for the payment of additional war risk or K&R premia between the shipowner and charterer were incorporated into the bills of lading.

They were germane to the carriage of the vessel's cargo. However, having regard to (a) the express obligation of the bill of lading holder to pay freight as the price of the carriage of goods to destination and (b) the absence of any indication in the bills of lading as to how much of the premium each holder was to pay or how apportionment of the premium between the holders was to be assessed, it was not appropriate, when reading into these bills of lading the terms of the Gulf of Aden Clause, and the war risks clauses, to substitute the words "the holders of the bills of lading" for "the charterers". The judge further held that the bills do not, on their true construction, *clearly* impose upon the holders a liability to pay the additional insurance premium.

The only parts of the clauses in question which have been incorporated into the bills so as to bind the holders of the bills are the liberties conferred on the owners not to complete the voyage or to depart from the usual or expected route.

2. The "insurance solution" - position as between the owners and the charterers

On the true construction of the charterparty the parties to the charterparty (i.e. owners and charterers, who were not a party to the POLAR claim and had no liability in GA in that case) had agreed to look to the war and K&R policies for the recovery of relevant losses and so the owners were precluded by that agreement from seeking to recover that loss by way of a contribution in general average from the charterers (if there had been any such liability, which there was not in this case).

Based on past legal authorities *The Evia (No. 2)* and *The Ocean Victory*, the judge held that if the above were not the case, there would be a "remarkable result" namely that the charterers would have paid the premiums not only for no benefit for themselves but without shedding any of the liabilities which the relevant charterparty clause imposed on them.

3. The "insurance solution" - position as between the owners and the holders of the bills of lading

The holders of the bills of lading have not agreed to pay the premium. It therefore cannot be said of them that the "remarkable result" would follow that the holders of the bills would have paid the premium not only for no benefit for themselves but without shedding any of their liability to contribute in GA in respect of losses caused by the additional insured perils.

In the absence of the "remarkable result" there is no proper basis for concluding that, as between the owners and the cargo interests (that is, the holders of the bills of lading), there is an agreement that where a general average expenditure has been incurred as a result of an insured peril the owners may look only to the insurance policy and not to a contribution in GA from the cargo interests.

Analysis and comment

The judgment confirmed that bill of lading holders are generally liable in GA and, consequently, that shipowners are generally able to recover a contribution from cargo interests in GA where they have incurred expense or made a sacrifice to further the common adventure. This is consistent with market practice and how practitioners administer GA claims in a war risks context.

So far as the position between shipowners and charterers is concerned, the judgment followed the "complete code" or "insurance based solution" approach from *The Evia (No 2)* and *The Ocean Victory*, which would prevent shipowners from recovering from the charterers. However, in most circumstances, that will have limited application to claims in GA.

Generally, it will be necessary to examine the terms of the charterparty and bills of lading in each individual case to confirm, using the already well-established principles regarding incorporation of charterparty terms, whether a "complete code" also arises between shipowners and the bill of lading holders where a loss arises (whether in GA or otherwise) which is covered by insurances.

This judgment is not an end to the matter. Cargo interests are appealing the judgment to the Court of Appeal. Owners are contesting the appeal.

In the meantime, to remove room for debate, owners, charterers and bill of lading holders could consider including an express term in the charterparty and/or bills of lading confirming whether or not they intend any term in either document relating to insurance to restrict any party's right to recover from the other in the event of a loss covered by the insurance.

Authored by Richard Neylon and Jenny Salmon of HFW, who represented the successful appellant owners and their insurers. Counsel were Guy Blackwood QC of Quadrant Chambers and Oliver Caplin of 20 Essex.

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