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# SHIPOWNER'S RIGHT TO A GENERAL AVERAGE RANSOM RECOVERY CONFIRMED BY THE COURT OF APPEAL

## Herculito Maritime Ltd and Others v Gunvor International BV and Others (The Polar) [2021] EWCA Civ 1828

## Court of Appeal reviews the principles to apply when considering whether charterparty terms are incorporated into bills of lading, and confirms that GA recovery from cargo interests for piracy losses is not blocked by bill of lading terms.

The Court of Appeal has this week upheld the judgment of former Admiralty Judge Sir Nigel Teare, confirming that various war risks provisions in the charterparty did not create an agreement whereby shipowners would not claim against bill of lading holders in the event of a loss covered by the additional war risks insurances referred to in those clauses.

### The Background

The context was a claim by the owners of "POLAR" to recover cargo's proportion of General Average (GA) from cargo interests, which comprised the US$ 7.7 million ransom and associated expenses incurred in securing the release of the vessel, its cargo and crew during the height of the Somali piracy crisis in 2010/11. The Court of Appeal confirmed shipowners' right of recovery, thus reinforcing the commercial practice of shipowners making a GA recovery from cargo interests in a piracy/ransom context, which has been occurring since the outset of Somali piracy in about 2008.

This issue was first argued before an arbitration tribunal in late 2019. The tribunal held, based on The Evia (No. 2) and The Ocean Victory, that the charterparty war risks clauses, which provided that charterers should pay for additional insurance cover for Gulf of Aden transits, amounted to an agreement or "complete insurance code" between owners and charterers that owners would look to those insurances rather than to charterers in the event that a covered loss arose. However, the tribunal went further, and said that the relevant parts of the war risks clauses were incorporated into the bills of lading and that a complete insurance code also existed between shipowners and bill of lading holders. As a result, shipowners were not entitled to claim against cargo interests for cargo's contribution in GA towards the ransom.

A year later, the High Court overturned this decision. Sir Nigel Teare held that the relevant parts of the war risks clauses in the charterparty were indeed incorporated into the bills of lading. However, as there was no provision in the bills of lading dealing with how any additional war risks premium should be apportioned between bill of lading holders, clearly bill of lading holders were not intended to pay the premium and there was no complete code or agreement by shipowners not to claim for cargo's contribution in GA.

### The Court of Appeal's judgment

In its judgment this week, the Court of Appeal agreed with Sir Nigel. The leading judgment of Lord Justice Males provided a useful summary of the correct approach to adopt when considering whether charterparty terms are incorporated into a bill of lading.

Having cited a passage from *Scrutton*, one of the leading textbooks on charterparties, setting out the three stages of enquiry to determine if a charterparty provision is incorporated into a bill of lading, Males LJ then stated that these three stages should not be applied too rigidly. Males LJ went on:

> *"Moreover, it is important at each subsequent stage to be prepared to revisit a conclusion reached at an earlier stage, and to stand back at the end of the process to test the conclusion reached against the terms of the contract and business common sense."*

This is the so-called "iterative" approach referenced by the English Courts in previous cases. Therefore, until the end of the process, any conclusion could be no more than provisional or prima facie.

The Court therefore first considered whether the charterparty contained an agreement by the shipowner not to seek a general average contribution from the charterer in the event of a ransom payment to pirates seizing the vessel in the Gulf of Aden. If no such agreement existed, there would be nothing of relevance to be incorporated into the bills. Males LJ made no finding on this, instead adopting a prima facie conclusion that such a code did exist on the basis that it was implicit in what the parties to the charterparty had agreed.

Males LJ then went on to consider whether that agreement was incorporated into the bills of lading in such a way that the shipowner also agreed not to seek a contribution from the bill of lading holders, approaching the question in stages.

First, the incorporating words in the bills of lading ("all terms and conditions, liberties and exceptions") were wide enough to include the war risks and Gulf of Aden clauses in the charterparty. However, it was doubtful whether they were wide enough to cover any agreement which is implicit from the charterparty's express terms considered as a whole. Therefore, if the Court was to find that the bills of lading contained an agreement as between shipowners and bills of lading holders, that must be because the express terms of the charterparty which are incorporated into the bills demonstrate that the same (or an equivalent) agreement was intended to apply also under the bills of lading.

Males LJ held that the provision for the charterer to pay for the additional war risks and K&R insurance was directly relevant to the carriage and discharge of the cargo. He then reached a *prima facie* finding that that part of the additional war risks and Gulf of Aden clauses was incorporated into the bill of lading contracts.

As a next step, Males LJ considered whether the word "charterer" in those clauses as incorporated into the bills should be manipulated to read "bill of lading holder". For many of the same reasons as had been relied on in the High Court, he rejected this approach.

Males LJ then observed that, on the basis of his prima facie conclusions about incorporation and manipulation, since the clauses as prima facie incorporated impose no liability on the bill of lading holders, it was necessary to consider whether their incorporation in the bills of lading serves any useful purpose. If not, then applying the iterative approach, the issue of incorporation would need to be revisited as there may be no point in incorporating a term which has no effect. Males LJ found that the clauses record the basis on which the shipowner has agreed in the bill of lading contract that the voyage will be via Suez and the Gulf of Aden (i.e. the insurances). This is a useful purpose.

With the terms of the bills of lading now identified, Males LJ moved on to consider what he described as "the ultimate question in this appeal", namely whether the bills excluded liability on the part of the bill of lading holders to pay cargo's contribution in GA in the event the vessel encountered a peril insured under any of the insurances.

At this stage, the judge noted that if the parties had intended that the bill of lading holders should not be liable in GA in the event of a pirate attack in the Gulf of Aden, they could have said so. Instead, cargo interests had to argue that there was an *"implicit understanding to this effect to be inferred (on the cargo owners' case) by reference to complex arguments concerning the incorporation of charterparty terms into a bill of lading contract"*. Males LJ referred to the presumption arising from previous cases that no party to a contract intends to abandon its remedies arising by operation of law unless clear express words are used. There were no such clear express words in this case. Any implicit agreement was not so clear that the Court could be confident that it existed. At this point, the judge noted that the charterparty clauses in question only imposed a liability on charterers to pay additional premiums up to US$40,000, which in some cases could leave a balance to be picked up by shipowners.

Finally, Males LJ found that there was no *"commercial imperative"* requiring the Court to find in favour of cargo interests. It had been argued by cargo interests that this was a subrogated claim such that insurers, not shipowners, had suffered the loss, and that this was a loss that those insurers had agreed to bear when accepting the risk. However, Males LJ observed that cargo's contribution in GA was also insured by cargo interests under their cargo policy. Therefore, Sir Nigel Teare's decision was in line with both legal principle and commercial sense, and the appeal would fail.

### Analysis and comment

From a legal point of view, this case is of undoubted importance to anyone considering the knotty issue of whether certain charterparty terms are incorporated into bills of lading. Males LJ's judgment is a masterclass in the subject. However, ultimately, the case depended on one simple legal point: did the bills of lading contain clear express words to the effect that shipowners gave up their right to claim a contribution from cargo interests in the event of a pirate attack? Clearly, they did not.

The judgment also accords with commercial practice and common sense. It is pleasing that the convention of shipowners making a GA recovery from cargo interests in a piracy/ransom context, which has been occurring since the outset of Somali piracy in about 2008, has been comprehensively endorsed by the Court of Appeal. Moreover, that cargo interests' attempt to avoid their contribution in GA – despite being fully insured for it has been thwarted.

It remains to be seen whether cargo interests will be granted permission to appeal by the Supreme Court.

**HFW Partner Richard Neylon and Senior Associate Jenny Salmon acted for the successful shipowners/insurers with Guy Blackwood QC and Oliver Caplin as Counsel. HFW were also involved in securing the release of "POLAR", its crew and cargo in 2010/2011 – which was among the 150 or so vessels and 1,800 hostages that the HFW Admiralty & Crisis Management Team has helped to secure the release of in the last 15 years.**

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