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THE POLAR
Herculito Maritime Ltd and others v Gunvor International BV and others

The Supreme Court handed down its judgment recently in Herculito Maritime Ltd v. Gunvor International BV [2024] UKSC 2[1], also known as "The Polar". The decision concerns insurance issues arising out of piracy attacks and will be of particular interest to owners, insurers and cargo interests with vessels trading in and around the Red Sea and Russia/Ukraine.

The Supreme Court found, against cargo interests, that (1) the charterparty did not contain an insurance code or fund; (2) the insurance provisions contained within the charterparty were incorporated into the bills of lading; (3) owners were not precluded by operation of the relevant clauses from claiming losses from the holders of the bills of lading; and (4) the wording of the clauses could not be manipulated such that payment of the additional insurance premia would be re-allocated.

Brief facts

In 2010, the MT POLAR was seized by Somali pirates in the Gulf of Aden. The vessel was held hostage for ten months before being released following a ransom payment of US$7.7 million. Following declaration of general average by the vessel's owners, cargo interests (who held the bills of lading) denied that they were under any liability to contribute nearly $6 million in respect of the ransom.

It was argued, by cargo interests, that on the true construction of the bills of lading the Owners' only remedy was to recover the ransom under additional insurance which had been taken out to cover war risks, and in particular the Gulf of Aden, pursuant to the terms of the voyage charterparty, the premium having been paid by the charterer.

The matter was referred to arbitration, with the Tribunal finding in cargo interests' favour. The matter was referred to the High Court, which agreed with the Tribunal on certain issues but not on others, with the result that cargo interests would have to contribute to general average, in respect of which an appeal was allowed. The Court of Appeal reached largely the same conclusion as the lower court[2], resulting in a further appeal by cargo interests to the Supreme Court.

Key issues

1. What was the correct interpretation of the voyage charter, specifically the 'War Risk' and the 'Gulf of Aden' clauses and whether the owners were able to claim against the charterer in respect of losses arising out of risks which the additional insurance covered. I.e., whether there was an implied insurance fund or 'code' in the charterparty.
2. Had the war risk clauses in the charterparty been materially incorporated into the bills of lading and, if so:
   - 2.1 were owners similarly precluded from making a claim against cargo interests; and
   - 2.2 could the charterparty be manipulated such that "charterer" would be replaced with "holders of the bill of lading".

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[1] https://www.supremecourt.uk/cases/docs/uksc-2022-0009-judgment.pdf

[2] The Court of Appeal decision was analysed for Lexis PSL by our colleagues previously, and is available here: Liability for general average and incorporation of charterparty war risks terms in bills of lading (Herculito Maritime Ltd v Gunvor—The 'M/V POLAR') (shlegal.com)

Supreme Court decision

The Supreme Court dismissed the appeal, upholding the Court of Appeal decision that there was no insurance fund in the charterparty and that the bills of lading did not exclude the cargo interests' liability to pay their share of general average.

Lord Hamblen determined that:

1. General average is a common law right, regulated by contract. For the shipowner to give up such a valuable right in relation to well-known kidnap and ransom risks, clear agreement was required. No such agreement was apparent.
2. Most cases in which an insurance code has been found have involved joint names insurance. This was not the case in *The Polar*, which was materially distinguishable from the time charter in *The Evia (No 2)*. Cargo interests were not the party that paid the premium for the additional insurance.
3. To establish that the parties had agreed an insurance code it must be shown that this was a necessary consequence of the agreement. This high threshold was not met. Therefore, the cargo interests' case fell at the first hurdle, which was a threshold issue, and there was no insurance code which could be incorporated into the bills of lading.
4. Further, even if the insurance code had been materially incorporated in the bills of lading, the wording could not be manipulated to give the 'bill of lading holder' (the cargo interests) the benefit of that code.

Comment

This is an important decision for clients dealing with issues arising out of Houthi attacks in the Red Sea, the Ukraine/Russia war or any other zone that may become dangerous in these increasingly unstable times. The following principles arise from this case and should be kept in mind when drafting or construing contracts where "war" issues might arise:

(a) Absent an express term to the contrary, a party is presumed not to have given up valuable remedies for breach of contract.

(b) Third parties to marine insurance contracts are limited in their ability to widen the scope of the insurance code for their own benefit.

(c) Contractual terms dealing with insurance and risk allocation should be clearly expressed in a manner that accurately reflects the intentions of the parties.

Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking here.

Authors

Rebecca Crookenden
Managing associate, Singapore

D: +44 20 7809 2112
E: rebecca.crookenden@shlegal.com

Phoebe Love
Trainee solicitor, London

D: +44 20 7809 2322
E: phoebe.love@shlegal.com