Supreme Court Rules on Piracy in Gulf of Aden

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On 17 January, 2024 the Supreme Court handed down judgment in ***Herculito Maritime Ltd v. Gunvor International BV*** [2024] UKSC 2, which considered the ramifications of a piratical seizure in the Gulf of Aden on insurers, owners, charterers and cargo interests holding the bills of lading. The court considered whether the charter contained an implied insurance code, incorporation from the charter into bills of lading and manipulation of wording.

Guy Blackwood KC led Oliver Caplin for the successful shipowners, their H&M and their K&R underwriters instructed by Richard Neylon and Jenny Salmon of HFW (London).

Implications:

1. For the first time, the Court identified the juridical basis on which an implied insurance code arises as a matter of construction in a contract, by which parties agree to look solely to insurers as the avenue of recourse and not to their contractual counterparty. An insurance code was *"akin to a necessarily implied term and involves a similarly high threshold"*. That high threshold was not met. This has implications for contracts which provide that one contractual party is obliged to pay insurance premium, including charterparties, construction/ finance contracts and commercial leases.

2. The Supreme Court approved the decision of the Court of Appeal in ***The Product Star*** and dicta contained in ***The Paiwan Wisdom***. As a consequence, in charterparties containing an agreement to proceed via Suez and necessarily the Gulf of Aden/ Red Sea, the shipowner cannot exercise general liberties to deviate and proceed around the Cape of Good Hope in order to avoid war risks unless there has been a qualitative change in circumstances. This might be of immediate significance in the context of attacks by the Houthi movement on commercial vessels in the Red Sea.

3. For the first time, the Court gave detailed consideration to whether a clause other than an arbitration or jurisdiction clause was incorporated from a charterparty into a bill of lading by general words of incorporation. The question to be addressed was whether the clause *"directly relate[s] to shipment, carriage and delivery"*. Whilst not changing the law on incorporation or manipulation, the judgment contains a concise but wide-ranging analysis of the principles, which ought to limit the need to refer to older authority.

Issues on appeal and their resolution:

On 30 October 2010, the MV POLAR was seized by Somali Pirates whilst transiting the Gulf of Aden. A ransom was paid for the vessel's release and the shipowner declared general average, which was subsequently adjusted.

Cargo interests argued that they had no liability to contribute in general average because the voyage charter contained an 'insurance code', by which the parties had agreed to look only to shipowners' insurers as the avenue of recourse in the event of the occurrence of a war risk in the Gulf of Aden and not to charterers. This insurance code was, cargo interests submitted, incorporated into the bills of lading.

The appeal raised four principal issues, (1) whether the charter contained an insurance code in its war risks clauses and the Gulf of Aden clause which precluded owners from claiming from charterers in respect of war risks arising in the Gulf of Aden, (2) if so, whether those clauses were incorporated into the bills of lading, (3) whether on a proper interpretation of the bills or by implication, the shipowner was precluded from claiming against the bill of lading holders and (4), whether the wording of those clauses should be manipulated so as to substitute the words *"the charterers"* with *"the holders of the bills of lading"*.

The tanker voyage charter provided that the voyage was to be "via Suez" and included an additional Gulf of Aden clause and a War Risks clause.

The Gulf of Aden clause provided, in its first paragraph that half of any time awaiting an escort or other protective measures would count against laytime or, if applicable, as time on demurrage. The second paragraph provided that any additional costs would be shared 50/50 between the shipowner and the charterer. The third paragraph required that any additional insurance premia would be for charterers' account, subject to a cap of US$40,000. The War Risks clause provided that any additional premia

payable in respect of war risks incurred by reason of the vessel trading to excluded areas was to be for charterers' account.

The charter incorporated the BPVOY 4 standard form, with the extensive liberties provided for by clause 39, which included within war risks *"acts of piracy"*.

The bills of lading were on the INTERTANK 78 form, which included broad general words of incorporation of the clauses in the charter.

Issue (1), did the charter contain an implied insurance code?

The Supreme Court held that the charter did not contain an implied insurance code, with the consequence that cargo interests' appeal failed *in limine*.

Whether or not the parties had agreed an insurance code or fund was a matter of construction of the charter. An implied insurance code was *"akin to a necessarily implied term and involves a similarly high threshold"*.

Importantly, the Supreme Court disagreed with the dictum of Longmore LJ in ***The Ocean Victory*** that *"the prima facie position where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other."* The Court held that *"there is no prima facie position in these cases. It always depends upon the construction of the contract terms as a whole and the necessary consequences of what has been agreed in relation to insurance."*

Having considered ***The Evia (No. 2)***, ***The Concordia Fjord*** and ***The Chemical Venture*** the Court identified four general considerations which were of relevance to the appeal:

1. For a shipowner to have given up a valuable common law right such as general average in relation to well-known kidnap and ransom risks requires a clear agreement to that effect.
2. To establish that the parties have agreed an insurance code it has to be shown that this is a necessary consequence of what has been agreed, which is a high threshold.
3. The case was not one of joint names insurance.
4. There is no principle exempting charterers from liability for their breaches of contract or in general average merely because they have provided the funds whereby owners insured themselves against the relevant loss or damage.

Cargo interests submitted that the charter was materially indistinguishable from that in ***The Evia (No. 2)***. The Supreme Court disagreed, distinguishing each of the five features stressed by Lord Roskill in ***The Evia (No. 2)***:

1. Cargo interests' case was that clause 39 of the BPVOY standard form conferred *"an unqualified right"* and an *"absolute veto"* on shipowners comparable to clause 21 of the Baltime form considered in ***The Evia (No. 2).*** The Supreme Court disagreed:
    a. Whilst clause 39 was expressed in broad and unqualified terms, it had to be viewed in its context.
    b. That context included the parties' agreement that the contractual voyage would be "via Suez" which would necessarily take the vessel through the Gulf of Aden, the well known risk of piratical attack and seizure for ransom and the detailed agreement between the parties as to the terms on which the vessel was to transit the Gulf of Aden.
    c. Against that background, it would not have been open to the shipowner to assert that the known piracy risks were "war risks" within the meaning of clause 39 so as to enable the shipowner to refuse to transit the Gulf of Aden and proceed round the Cape of Good Hope instead. The position might have been different if there had been a qualitative change in the risk of proceeding through the Gulf of Aden after the charter had been concluded, but in the appeal no change in risk was suggested. If needed, support for this construction was derived from the decision of the Court of Appeal in ***The Product Star*** and in dicta contained in ***The Paiwan Wisdom***.
    d. Cargo interests' submission that The Product Star was wrongly decided was dismissed.
    e. The "unqualified right" or "absolute veto" stressed by Lord Roskill was not present in relation to transit of the Gulf of Aden.

2. The obligation on charterers to pay premium was by no means determinative and there was a cap on that obligation, so there could have been a sharing of costs.

3. The additional obligations which might have fallen on charterers under clause 39 of the BPVOY form did not arise, because it was not open to cargo interests to submit that the known piracy risks were "war risks" within the meaning of clause 39. Even if there had been such additional obligations, they were not comparable those assumed by charterers under clause 21 of the Baltime form considered by the House of Lords in ***The Evia (No. 2)***. The shipowner's right to claim additional freight or divert the vessel under clause 39 did not address delay in the war risk zone, nor did they disapply an otherwise contrary position. They merely echoed similar rights to be paid for additional services by the shipowner outside the war risks context.

4. The rubric of the clauses was not a factor of much weight.

5. There would be no "remarkable result" (to use Lord Roskill's moniker) absent an implied insurance code, because charterers did obtain the significant benefit of being able to transit an otherwise prohibited zone, the Gulf of Aden, in consideration for the payment of additional war risks premium.

The Supreme Court emphasized that ***The Evia (No. 2)*** did not establish any general principle, turning as it did on the particular terms of the charter in that case. Arbitrators ought to be *"cautious before concluding that the reasoning and decision in* ***The Evia (No 2)*** *should be followed in relation to differently termed charters"* for four reasons:

1. English commercial law and shipping law in particular recognizes the importance of certainty and predictability and fosters it.

2. Leaving aside cases of joint insurance, the search for an insurance code in a charterparty necessarily introduces uncertainty.

3. If parties wish to provide that there is to be no right to recovery or rights of subrogation for insurers, this can be easily stated (as with clause 13 of Barecon 89).

4. The existence of an implied insurance code may lead to difficulties with material disclosure to insurers, when the existence of such a code is uncertain. Disclosure of the charterparty without more might not amount to full and fair disclosure to insurers. Difficult questions of coverage under insurance contracts might also arise where an implied insurance code is found to exist.

Issue (2) – whether all material parts of these war risks clauses were incorporated into the bills of lading

The Supreme Court recorded that there is a large body of case law relating to the incorporation of charterparty terms into bills of lading and abundant citation of authority should be discouraged.

The Supreme Court approached incorporation by reference to the following considerations:

1. Bills of lading are negotiable instruments and the contractual rights and obligations thereunder may be transferred down a chain of contracts to the ultimate receiver.

2. Bills of lading on a single voyage may be for different cargoes and may be negotiated to a variety of receivers at different times. When a bill of lading is concluded, the identity of the receivers and the proposed discharge port may not be known, and may change by the time the vessel arrives at her destination.

3. Cargo interests may have no knowledge of the charterparty terms and no ready means of finding out.

4. What matters are the incorporating words in the bill of lading, not provisions relating to incorporation in the charter.

5. Many cases state that general words of incorporation only incorporate provisions of the charter which are *"germane"* to the shipment, carriage and delivery of the goods. This was not archaic language and remained an apt term, but if any tribunal would prefer to use a synonym, the Court suggested *"referring to provisions which 'directly relate' to shipment, carriage and delivery"* provided that it was understood that no change in meaning is intended thereby.

6. The principal significance of the established rule that general words only incorporate provisions which directly relate to shipment, carriage and delivery is that it excludes ancillary agreements such as arbitration clauses. That is justified by the negotiable nature of a bill of lading.

7. Aside from ancillary agreements, the incorporation only of terms which are directly relevant to shipment, carriage and delivery excludes provisions which are inapplicable in the bill of lading context, such as provisions which relate to the approach voyage.

8. Where specific words of incorporation are used, a degree of manipulation of the relevant clause in the charterparty is appropriate, for example by substituting 'bill of lading holders' for 'charterers'.

9. Where by contrast general words of incorporation are used, some degree of manipulation may be permissible of terms which directly relate to shipment, carriage and delivery in order to make the wording fit the bill, but there is no rule of construction to that effect.

10. The case law on incorporation was not *"dated"* but *"involves an appropriately iterative approach"*. It was preferable that the law should be clear, certain and well understood than that it should be perfect.

The focus of the argument in the appeal was on those parts of the war clauses which addressed the obligations for payment of insurance premia. In order to give effect in the bills of lading to the agreed allocation of risk in relation to transiting the Gulf of Aden, the entirety of the Gulf of Aden clause and the War Risks clause should be regarded as incorporated in the bills of lading so as to be read alongside clause 39 of the BPVOY 4 standard form, as they would be in the charter.

Even if the Gulf of Aden Clause and the War Risk clause did not restrict the shipowner's liberties under clause 39, they would still be directly relevant to the carriage. For example, if the charterer did not pay the additional premium due for transiting the Gulf of Aden, the shipowner might refuse to proceed there.

Issue (3) – Whether on the proper interpretation of those clauses in the bill of lading and/or by implication the shipowner was similarly precluded from claiming for such losses against the bills of lading holders:

Issue (3) was premised on two assumptions. The first was that the charter did contain an insurance code. The second was that there was no manipulation of the wording.

On these premises:

1. The obligation to pay premium rested on the charterers alone and no such obligation was imposed on the bills of lading holder. If so, then an essential reason for holding that there is an insurance code was inapplicable and there could be no "remarkable result" absent a code, because the bill of lading holder would not have paid the insurance premium.

2. The obligation is that of the charterer and it has its own interest in ensuring proper performance of the charter. The bargain made is that the parties to the charter would not look to one another to make good an insured loss, which is a bilateral agreement only.

In the circumstances, the Supreme Court rejected cargo interests' case on Issue (3).

Issue (4) – If necessary, whether the wording of those clauses should be manipulated so as to substitute the words "the Charterer" with "the holder of the bill of lading" in the parts of those clauses allocating responsibility for the payment of additional insurance premia.

Manipulation of charter clauses incorporated by general words of incorporation may be permissible *"if it is necessary to do so in order to make the wording fit the bill of lading."*

There was no need to do so on the facts of the case, because the Gulf of Aden and the War Risk *"make perfectly good sense in the context of the bills of lading as a record of the terms upon which the shipowner has agreed to transit the Gulf of Aden."*

Further, there were *"positive reasons why there should be no manipulation"*. One of the factors emphasized in ***The Miramar*** was the implausibility of bill of lading holders accepting a potential liability to pay unknown and unpredictable amounts. Similar considerations arose on the appeal:

1. If the bills of lading holders are liable to pay the insurance premium, the basis of that liability vis a vis the shipowner was wholly unclear.
2. Was each bill of lading holder liable for the full premia? If not, was its liability proportionate and if proportionate, proportionate to what?
3. If a bill of lading holder pay the insurance premia what are its rights of recourse against other bills of lading holders and how are they to be enforced?

Result:

In order to succeed on the appeal, cargo interests needed to succeed on Issue (1), the insurance code which was a threshold issue, on Issue (2), incorporation and on either of Issues (3) or (4), implication of an insurance code in the bills and manipulation.

Cargo interests failed on Issues (1), (3) and (4), with the consequence that the appeal was dismissed and shipowners succeeded.

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Guy has a comprehensive commercial practice, which includes insurance & reinsurance, large contractual disputes, international and investment treaty arbitration, banking & finance, civil fraud, energy & utilities, commodities and shipping, shipbuilding and offshore construction.

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