

Circular Ref: 2019/0008

Date: 27 May 2019

Deck Cargo - Legal minefield

In the recent case of *Aprile SpA and Others v Elin Maritime Ltd (The "Elin")* - QBD (Comm Ct) [2019] EWHC 1001 (Comm) - 18 April 2019 and it concerns various issues of law relating to deck cargo.

In this matter, the claimant cargo interests brought an action against the defendant ship owners following the loss of deck cargo in heavy seas by alleging the owners' breach of duty and/or the contract contained in or evidenced by the bill of lading. The allegations were as follows:

- owners failed to deliver the deck cargo in the same good order in which it had been on shipment; and
- failed properly and carefully to load, stow, carry, care for and discharge the deck cargo; and
- failed properly to lash and/or stow the deck cargo sufficiently for the voyage; and/or
- failed to exercise due diligence to make the ship seaworthy at the commencement of the voyage and, in particular, to make the ship and her holds fit for the reception, carriage and preservation of the deck cargo stowed in it.

The owners denied liability and relied on provisions in the bill of lading that read:

The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising ... in respect of deck cargo [emphasis added] ;and

[the packages identified on the attached list are] "loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising.

The Court ordered the determination of a preliminary issue of law as follows:

Whether, on a true construction of [the bill of lading], the defendant is not liable for any loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or the defendant's negligence.

The Hague-Visby Rules do not apply to deck cargo as long as the following two requirements are satisfied:

- (1) the cargo must be stowed on deck; and
- (2) the deck stowage must be clearly stated on the bill of lading.

Then, the carriage of goods on deck would be governed by clauses in the Bill of lading and any common law, express anything to the contrary. The cargo interests argued that at common law, the warranty of seaworthiness is absolute except a few exceptions and the wording “howsoever arising” would not cover the loss arising out of unseaworthiness and negligence of the ship owners. The exclusion clause should expressly exclude the liability for both unseaworthiness and negligence.

The Court decided in favour of the Owners on the basis that it was the court’s duty to construe the exclusion clause in order to see what they plainly meant to any ordinarily literate and sensible person having all the relevant background knowledge, which would reasonably have been available to the parties in the situation in which they were at the time the bill of lading contract was concluded.

FDD department’s advice to clients of Andrew Liu is as follows:

- a) Lots of project cargoes are being loaded on deck these days. The exclusion clauses in carriage contracts concerning deck cargo are different in England as compared to the US and other jurisdictions. It is important to check with the local lawyer of port of discharge about the relevant rules.
- b) Details of deck cargo should be clearly mentioned on the face of bill of lading and there would be a liberty clause allowing the Owners to load the cargo on deck.
- c) Owners and Charterers should check with P and I Clubs about the cover issue concerning deck cargo to avoid disappointment.
- d) In cases, where the cover is prejudiced, FDD department has assisted both the Owners and Charterers to fight the cases against their respective opponents.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk