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Apparent Condition of Cargo & Indemnity

In a new case, *Priminds Shipping (HK) Co Ltd v. Noble Chartering Inc [2020] EWHC 127 (Comm)*, where Claimant (voyage charterer) appealed in respect of questions of law arising out of a final arbitration award. Pursuant to the award, the claimant had to pay the defendant (disponent owner's) claim in the sum of US$500,000 and costs. Disponent owner was the time charterer of the vessel.

FACTS OF THE CASE

- By a voyage charterparty dated 29 June 2012, the defendant agreed to let the vessel to the claimant for the carriage of a cargo of heavy grains, soya and sorghum in bulk from Brazil to China.
- Pursuant to the charterparty, the vessel arrived at Santos for loading. A Congenbill 1994 Bill of Lading (B/L) was drafted by the shipper and offered for signature by or on behalf of the master of the vessel. Under the heading 'Shipper's description of Goods' the cargo was described as '63,366.150 metric tons Brazilian Soyabeans Clean on Board'.
- The B/L was executed by agents on behalf of the master without any reservations stating that the cargo had been 'SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge …Weight, measure, quality, quantity, condition, contents and value unknown …
- The B/L incorporated the Hague Rules (HR) by operation of clause 2 on its reverse side. The contract of affreightment evidenced by the B/L was with the shipowner.
- The vessel arrived at Guangzhou and discharge commenced on 15 September 2012. On 17 September, discharge from two of the vessel's holds was suspended 'Due to charred Cargo Found'. That cargo was discharged but the receiver maintained that the cargo in those holds had suffered heat and mould damage.
- In order to prevent the arrest of the vessel, the Shipowners secured the Receivers' cargo claim and agreed that it would be subject to Chinese law and the jurisdiction of the Chinese courts. The shipowner contested the receiver's claim for damages in China but lost at first instance and on appeal and was ordered to pay a sum equivalent to US$1,086,564.70. Subsequently, the shipowner commenced arbitration in London against the defendant pursuant to the time charterparty, and the disponent owner agreed to pay US$500,000 to the shipowner in full and final settlement.
- Further, the defendant (disponent owner) claimed from the claimant the right to be indemnified for the amount paid to the shipowner and the associated costs. There was no express provision under the voyage charterparty under which the defendant was entitled to an indemnity on behalf of the shipper as the agent of the Claimant (voyage charterer).

DECISION AT ARBITRATION

- The Tribunal made findings of fact that:
    i. the cargo had been damaged by heating caking and by mould;
    ii. both types of damage were pre-existing at the time of loading but were not reasonably visible to the Master during loading, so the Master could not have verified the condition of the cargo and therefore he wrote in the bill what he saw; and
    iii. the damage would have been reasonably visible to the Shippers at the time of loading.

- Arbitrators held that claimant (voyage charterer) was liable to the defendant (disponent owner) because:
    i. the shipper was the claimant's agent and therefore the claimant had impliedly warranted the accuracy of any statement as to condition contained in the B/L;
    ii. voyage charterer had impliedly agreed to indemnify the defendant (disponent owner) against the consequences of the inaccuracy of any such statement.

The High Court Judgment following appeal:

- The Court rejected this argument of the disponent owners that agent has warranted the statements in the bill of lading and the bill of lading was presented to them to sign.

- It stated that although the Hague Rules provide an indemnity in respect of information provided by the charterer/shipper which is included in the bills of lading (for example, the marks on bales of cargo or the cargo weights). Such warranty does not extend to quality assessment that has to be done by the carrier in any event.

- In any event indemnity did not extend to statements concerning the apparent order and condition of the cargo and since there was no express provision in the charterparty, the judge was not going to imply any term so easily.

FDD department of ALCO's advice to Andrew Liu's client is that:

a) Any representation in the bill of lading should be checked thoroughly by both Owners and operators.
b) FDD department has assisted regularly the clients to resolve such disputes or guide ALCO's clients.
c) FDD department is regularly involved in matters where the Club cover is prejudiced. Clients are never without assistance even for a day.

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