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"Apparent Order And Condition" –

Is It The Master's Eyes Or Shipper's Eyes That Is Relevant?

In a new case as decided recently on 28 January 2021, *Noble Chartering Inc v Priminds Shipping (HK) Co Ltd (The "Tai Prize")* – Court of Appeal ([2021] EWCA Civ 87), Noble Chartering ('the Owners') were the disponent owners of the vessel *Tai Prize*. They sub-chartered the vessel to Priminds Shipping ('the Charterers') for the carriage of a cargo of soya beans in bulk from Brazil to the PRC ('the sub charter'). This sub-charter was a voyage charter. The Head owners were a separate party from these two parties and the Owners had the separate charterparty agreement with the Head Owners.

Facts

- After loading, the bill of lading was drafted by the shipper and offered for signature and the goods were described "Shipper's description of Goods" "63,366.150 metric tons Brazilian Soyabeans Clean on Board".
- The Head Owner's bill of lading (Head Owners were the contractual carrier) was executed by the master without any reservations, stating that the cargo had been shipped at the port of loading "in apparent good order and condition". The bill of lading incorporated the Hague Rules.
- The vessel arrived at Guangzhou for discharge to the receivers. However, some of the cargo was found to have suffered heat and mould damage.
- The Chinese courts upheld a claim by the receivers against the head owner, and ordered the head owner to pay the receivers a sum equivalent to USD 1,086,564.70. Subsequently, head owner, via a settlement agreement, successfully claimed a contribution for USD 500,000 from the owners under the head charter.
- The owners brought arbitration proceedings against the Charterers claiming the right to be indemnified for the amount they paid to the head owner and the costs of defending that claim. There was no express provision under which the owners were entitled to the indemnity they sought.
- The Tribunal rejected the owner's claim for general indemnity but held that charterers via the shippers (as the shipper was deemed to be their agent) invited the Master to sign the bill of lading, when they

could have realised that there was pre-existing damage and Master do not possessed such ability about the cargo.

- The Charterer appealed to the High Court after arbitration ruling on the basis that the sub-charter incorporated Hague rules that only obligated the charterers an express indemnity obligation in respect of information furnished by them, but did not provide for such an obligation in relation to statements concerning apparent order and condition of cargo.

- The Owners appealed to the Court of Appeal.

Court of Appeal held:

a) The apparent order and condition in bills is actually the external condition of the cargo as can be apparent on reasonable examination, which can actually vary from port to port.
b) What matters ultimately as to what is reasonably apparent to the eyes of Master and his/her crew.
c) Whether the shipper could have come to different conclusion as to the reasonable condition of cargo is beside the point. Master's eyes is what matter in relation to the '*apparent order and condition*' in the bill of lading. There is distinction between the issue of quantity of cargo or leading marks provided by shipper and the issue of '*apparent order and condition*' under the Hague Rules.
d) Court also rejected the Owner's case that tender of draft bill of lading by the shippers was representation or warranty of condition of cargo. It was no more than a request to the master to satisfy himself that the bill in those terms could properly be signed, and did not give rise to any right of indemnity.

FDD department of ALCO has advised numerous clients of Andrew Liu in such types of cases. In the last year, even during the year of COVID with sever restrictions, FDD department managed to win many big and small cases without ceasing any work. A few of the cases to highlight the work of FDD are as follows:

a) A cargo claim started by subrogated insurers against our client (operator) in China for nearly USD 1.2 million, and we managed to settle it for less than USD 60,000 by finding unique high end legal point and even successfully pushed the client's P and I club (that has prejudiced the cover in the first place as they could not understand the fine legal and technical points) to indemnify our client.
b) A claim of our client (Owners) for nearly USD 1 million and through arbitration commenced during the peak of COVID and translating all documents in English from Chinese, managed to recover most of the money, even though the operator was registered in Marshal Island.
c) Won a couple of arbitration awards to recover demurrage from the sub-charterers for different Operators, those are based in China and India.
d) Assisted various clients with quick advice/opinion to pre-empt issues or negotiating with Port authorities or drafting settlement agreements to resolve cases, or assisting in liaising with local lawyers at various ports due to the network developed over the years.
e) Drafting very complicated submissions, when the lawyers from the law firms even refuse to draft on the pretext of the case is bad, when in fact they have not understood the complicated technical points. FDD department has drafted such complicated submission for the client at a short notice, a few times by working overnight to keep the deadline.
f) Drafting quick Escrow Agreements on a short notice to assist the clients.

g) In all of the above, the main intention has never been to stretch the case of the clients, as being a client of ALCO is paramount for us and handling of case is just additional service that FDD department provides ONLY to the clients of ALCO.

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