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PIRACY & General Average

In a new case Herculito Maritime Limited (Owners' interests) v. GUNVOR (Cargo Interests), "THE POLAR" [2020] EWHC 3318 (Comm), where the issue was a claim by the owner of the MV POLAR to recover cargo's proportion of general average expenditure. The expenditure in question comprises of a ransom payment to pirates, who had detained the vessel in the Gulf of Aden. The cargo owners defended that premium was paid by the voyage charterers and ship owner's only remedy is to claim pursuant to their insurance policies.

Facts

a) By a charterparty dated 20th September 2010 the shipowner chartered the vessel to Clearlake Shipping Pte Ltd for a voyage from one or two safe port(s) Tallin/St Petersburg range to one safe port Fujairah or, in charterer's option, one or two safe port(s) or STS transfers in the Singapore area.

b) An additional Gulf of Aden Clause provided as follows:

> Any additional insurance premia (including, but not limited to, those in respect of H&M, crew, P&I kidnap risks and ransoms), crew bonuses (which to be in accordance with the international standard) shall be for chrtrs account. Max USD 40,000 for charterer's account for any additional insurance premium except for crew bonus which to be max USD 20,000 for charterers account.

c) Six bills of lading were issued. Bills of lading 1 to 5 contained these words of incorporation on their face: "… pursuant and subject to all terms and conditions as per TANKER VOYAGE CHARTER PARTY indicated hereunder, including provisions overleaf." Bill of lading 6 provided, on its reverse side: "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herein incorporated."

d) While transiting the Gulf of Aden on 30th October 2010, the vessel was seized by Somali pirates. She was held captive for ten months before being released on 26th August 2011. In order to obtain this release, a ransom payment of US D7.7 million was paid. This payment was reimbursed by the K&R and hull & machinery war risks underwriters, who sought a contribution in general average from cargo interests' underwriters.

Two legal issues arose:

1. Whether the phrase "bill of lading holders" was to be substituted for "charterers' on incorporation of the Gulf of Aden Clause from the charterparty into the bills of lading.

2. Whether Owners had agreed, by the Gulf of Aden Clause to constitute their own insurance fund as a complete code for recovery in the event of general average expenditure by payment of ransom on piratical seizure, with the consequence that Owners could not seek a general average contribution from bill of lading holders (Cargo Interests).

Judgment

On Issue 1, the Court of Appeal held that no manipulation was appropriate, because there was nothing in the bills (or the charterparty) to say how liability for the premium would be apportioned between different bill of lading holders.

On Issue 2, the Court of Appeal held that the bills of lading did not exclude Cargo Interests' liability. The risk of piracy and the potential need to pay a ransom were not only foreseeable but were foreseen by the parties to the bill of lading contracts and dealt with expressly by them. Cargo Owners' liability in such a scenario was not expressly excluded by any terms

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

a) All foreseeable risks must be taken into account for insurance purposes and ALCO's underwriters are available to guide the clients. Mr. Elvis Wang located in Shanghai office is particularly expert in this area to guide the client on piracy risks and insurances such as K & R, Additional War risks, War risks and so forth.

b) FDD department regularly advise on charterparties' wordings, legal risk assessment or provide advice. FDD department is a resource available to the clients and can be used 24 x 7 hours.

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