Callidus News

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CHARTERER'S LIABILITY TOWARDS SHIPPER'S AFFIRMATION ON "APPARENT GOOD ORDER AND CONDITION"

One of the main challenges (or as might say "*An Issue*") faced by any Shipping Line is when they have to carry the perishable goods from one Port to another. Their main responsibility is to keep the Goods safe from damages due to temperature variance, moist, ingress of sea water into the containers etc. which shall mean a series of claims against the Carrier/Shipping Line by the Consignee/Shipper/Insurance Companies etc. In order to protect themselves from any such cargo claims, the Carrier/Shipping Line rely mostly on the reservations that they have included in the Bill of Lading to state, "*Shipper's Load, Stow and Count*". By including these types of reservations in the Bill of Lading, lifts the burden of proof from the Carrier to the Shipper wherein the Shipper has to prove that the Cargo was well packed and was safe for the voyage when it was handed over to the Carrier/ Shipping Line for loading. If the Bill of Lading does not have these types of reservation statements, usually the Shipping Lines are held liable for the damaged cargoes. However, a recent case of 2020 took a slightly different view from the usual practice of holding the Shipping Line or the Carrier liable for the damaged goods especially when there was no reservation, made in the Bill of Lading, by the Carrier/Shipping Line.

In the case, *PRIMINDS SHIPPING (HK)*

THOUGHT for the MONTH

Pizza always confuses me. It comes in a square box, yet when you open it, it is round and when you start eating it, it is a triangle! Life and people are like pizza; look different, appear different and of course behave absolutely different.

- A. P. J. ABDUL KALAM

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CO. LTD Vs. NOBLE CHARTERING INC. TAI PRIZE [2020] EWHC 127 (Comm), the Vessel, "MV TAI PRIZE" was time chartered to M/s Noble Chartering Inc. (hereinafter the "Disponent Owners"), who then sub-voyage chartered the Vessel to M/s Priminds Shipping (HK) Co. Ltd (hereinafter the "Voyage Charterer") for the carriage of the cargo "Soya Beans" from Brazil to China. The cargo was loaded by the Shipper and the Bill of Lading was prepared by the Shipper's Agent who described the cargo as "*..... Clean on Board... and Shipped in Apparent Good Order and Condition...*" and the said Bill of Lading was executed by the Master's Agent without any reservations. At the port of discharge, the Consignee discovered that the portions of the cargo suffered heat and mould damage. When the Consignee filed a case for the loss and damages incurred by them, the actual vessel Owner secured their claim by paying off their claim amount of around US$ 1 million, mainly in order to avoid the arrest of their vessel. The actual vessel owners in turn brought the claim against the Disponent Owners, under the terms of the Time Charter Party seeking contribution of half of the sum paid by them to the Consignee and the Disponent Owners settled the claim with the Actual Vessel Owners, by paying them the money. The present appeal was filed by the Voyage Charterer to challenge the impugned arbitral award pronounced in the London Arbitration Proceedings commenced by the Disponent Owners against the Voyage Charterer in order to recover the amount paid to the actual vessel owners and the costs of defending that claim since the Shipper was the Voyage Charterer's agent and therefore the Voyage Charterer had impliedly warranted the accuracy of any statement as to the condition contained in the Bill of Lading or had impliedly agreed to indemnify the Disponent owner against the consequences of the inaccuracy of any such statement.

Now before going to the Court's interpretation of the wordings and issues, involved in the case and the wordings used in the Bill of Lading, let us first see what is considered to be an "*Apparent Order and Condition of the Cargo*". According to the Interpreters, the term refers to the condition of the Goods as would be apparent on reasonable examination, and not the internal condition of the cargo on shipment or their quality. Further, when a shipment is said to be in "*apparent good order and condition*" it also mean that the cargo is properly packed so as to withstand the ordinary incidents of the voyage. In case if a cargo is not sufficiently packed or if the Carrier or the Master thinks that the Cargo will not withstand the incidents of the voyage, then they must not issue a Bill of Lading, without any reservations. Usually the reservations are like "*Cargo has been shipped at the Port of Loading in apparent good order and condition on board the Vessel for the Carriage to the Port of Discharge... Weight, Measure, Quality, Contents and Value Unknown*" OR "*All Particulars as furnished by the Shipper but unknown to the Carrier*". This reservations are mentioned so as to given the Shipper, Consignee or any party concerned a reasonable notice that there might be some defect or shortage in the goods which is not known to the Carrier. It is also to be noted that these reservations must be made on the front of the Bill of Lading and not elsewhere.

Above being the usual practice in the Industry, in the case of *PRIMINDS SHIPPING (HK) CO. LTD Vs. NOBLE CHARTERING INC. TAI PRIZE [2020] EWHC 127 (Comm)*, the Court took a slightly variant view while interpreting the wording by Shipper in the Bill of Lading, "Clean on Board" and "Shipped in apparent good condition" or the Issue as to whether the Shipper's presentation of the Bill of Lading with the aforementioned terms, leads to a representation or warranty by the Shipper as to the apparent good condition of the cargo observable prior to the loading OR if it is only an invitation to the Master to make a representation of fact, in accordance with his own assessment of the apparent condition of the cargo. The Court opined that as per Article III Rule 3 of the Hague Rules (incorporated in both the Charter Party as well as the Bill of Lading of the subject case), the information regarding "*leading marks necessary for the identification of the Goods*" and "*the number of packages or pieces or the quantity or weight*" of the Goods constituting the Cargo, to which the relevant Bill of Lading is concerned, is the information furnished in writing by the Shipper and as far as this case is concerned this aforementioned provision of the Hague Rules applies to the information "*63,366.150 metric tons Brazilian Soya Bean*". Further the Hague Rules also provide the "*apparent order and condition of the Goods*" but as per the Court, this information is not to be furnished by the Shipper, instead this part should be an exclusive assessment by the Carrier (or The Master) of the Goods at the point of shipment. Therefore while answering the aforementioned issue, the Court said that by presenting the draft Bill of Lading for signature by or on behalf of the Master, in relation to the statement concerning apparent good order and condition, the shipper was doing no more than inviting the Master to make a representation of fact in accordance with his own assessment of the apparent condition of the cargo. The Court also noted that The Hague Rules Article III Rule 5 impose an express indemnity obligation on the Charterer in respect of the information that he "*furnishes in writing*". A Charterer has no such obligation however in relation to statements regarding the "*apparent order and condition*" of the Cargo. The Court also held that the Disponent Owner was not entitled to an Indemnity from the Voyage Charterers, because the Hague Rules, incorporated into the Voyage Charter Party between the Parties, do not impose on the Shipper in relation to the statement concerning apparent order and condition of cargo.

Even though this decision is a boon to the Charterers as they will be relieved that a general implied indemnity was not owed to the Disponent Owners in respect of the statement concerning the apparent order and condition of cargo, made by the Shipper, we are yet to see the final outcome of the case, as the Disponent Owners are granted leave to file an appeal.

STRIKING A BALANCE BETWEEN ADMIRALTY AND INSOLVENCY LAWS

The conflict between Admiralty laws and Insolvency has been a matter of much debate in the recent times. The Bombay High Court in the matter of Raj Shipping Agencies v. Barge Madhwa & Anr, delivered its judgement on 19th May 2020 discussing this aspect. The Hon'ble Court delivered its judgement with assistance from various senior advocates of Bombay high court. We discuss the key takeaways from the judgement.

The court condensed the crux of its discussion under two heads by framing the below 2 questions of law:

1. Is there a conflict between actions in rem filed under the Admiralty Act, 2017 and the provisions of IBC and is so, how is the conflict to be resolved.

2. Whether leave under Section 446(1) of the Companies Act, 1956 is required for the commencement or continuation of an Admiralty action in rem where a winding up order has been made or the Official liquidator has been appointed as Proisional Liquidator of the company that owned the ship?

After detailed discussion of landmark judgements under Admiralty law and IBC, the court came to the conclusion the action under Admiralty Act, is an action in rem whereas under IBC, the action undertaken is an action in personem. In an attempt to harmonize the two, it was ruled that an action in rem (arrest of ship) could be commenced independent of an action in personem (under IBC), but not continued to its full length, as this would overlook the purpose of a moratorium formed under IBC. Those claimants who arrested the vessel under Admiralty Act would automatically be characterized as secured creditors for insolvency purposes.

According to the court, maritime claimants are to be independently dealt with under Admiralty Act and that their priorities are to be decided as under the Admiralty Act, which is to be adopted by the moratorium under its resolution plan. Similarly, release of an arrested vessel, is again a matter of discussion before the Admiralty court alone, on sufficient satisfaction of security. Further the court reasoned that the provision in IBC, barring commencement and continuation of proceedings in liquidation, would not apply to admiralty action as it is an action in rem, against the res and not against the corporate debtor himself. Thus the independent legal personality of a ship was confirmed and upheld by the court.

As regards the second question coined by the court, it was decided that as a logical conclusion to the discussion under the first question, no leave of the company court was required as the Admiralty Act, 2017 being a special enactment would prevail over the general enactment Companies Act, 1956.

The detailed judgement of the court may be considered commendable in its attempt to draw out various combinations and circumstances that may arise under the two enactments. However, on the applicability side of the judgement, there could possibly be roadblocks when dealing with intricacies of the two important enactments. Nevertheless, the judgement might be considered a welcome contribution in the field and a relief for maritime claimants in their rights recognition.

HOT TIPS

TIPS TO BEAT INSOMINA AND SLEEP BETTER

1. Put all devices away from your bed and Back off from the Blue Light.
2. Nap If You Are Sleep-Deprived.
3. Clock-Watching Increases Anxiety.
4. Use Pillows to Ease Low Back Pain.
5. Keep Your Neck in a Neutral Position.
6. Allergy-Proof Your Mattress and Blankets.
7. Mind Your Circadian Rhythm, Sleep and Wake up at the same time.
8. Good Hot water Oil Bath.
9. Avoid Tobacco for Better Sleep.
10. Watch Out for Hidden Caffeine.
11. Exercise Improves Sleep Quality.
12. Smart Night time Snacks; Do not eat any rich, spicy, fried food.
13. Prevent Night-time Washroom Interruptions.
14. Turn Down the Lights to Get Better Sleep.
15. Keep Noise to a Minimum, as unwanted sounds can be distracting.
16. Keep Pets Off the Bed.
17. Establish a Relaxing Night-time Routine.
18. Use Sleeping Pills with Caution.
19. See Your Doctor for Chronic Sleep Problems.
20. Read a Good Book or Magazine

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