SUN MOBILITY
Insurance and Claims Services Limited

30 April 2004
Ref : Chans advice / 40

To: Transport Industry Operators

General Average & Unseaworthiness

Does the cargo owner need to contribute to general average resulting from unseaworthiness of the vessel at the commencement of the voyage? The Singapore Court of Appeal said no in its Judgment dated 21 / 11 / 2003.

This concerned a shipment of 2,212 logs from three West African ports to Tuticorin, India in September and October 1999. The bulk of the cargo was stowed in the holds. However, some 430 logs were stowed on deck and this fact was noted in the bills of lading for the deck cargo. On 24 / 12 / 1999, there was an explosion in the vessel's main engine crankcase. The engine could not be operated and the vessel lay adrift in the ocean. The vessel was towed to Cape Town on 3 / 3 / 2000 for repairs to be effected. However, it was difficult to obtain a repair berth. A decision was then made to have the vessel towed all the way from Cape Town to Tuticorin, the port of discharge.

The vessel owner insisted that the cargo owner was obliged to contribute towards general average expenses because the vessel owner was attempting to save the vessel and the cargo from a common danger. After negotiations between the parties, a general average bond and a general average guarantee were provided by the cargo owner and the cargo insurer. The vessel arrived at Tuticorin on 14 / 5 / 2000 and the discharge of the cargo of logs was completed on 4 / 6 / 2000. On 29 / 6 / 2000, the vessel owner sold the vessel as the cost of complete repairs was too costly and would take a few months. The vessel was subsequently scrapped.

The general average expenses incurred by the vessel owner totalled US$910,288.78. Under the York Antwerp Rules 1974 and / or the York Antwerp Rules 1994, US$746,967.18 was attributable to the cargo and this sum was claimed from the cargo owner and the cargo insurer as general average contribution or, alternatively, as damages.

Rule D of the York Antwerp Rules 1974, which governs rights of contribution towards general average loss and expenses, provides as follows:

> Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

As for the meaning of the term "fault" in Rule D of the York Antwerp Rules, it refers to an actionable fault. For the purpose of determining whether or not there was an actionable fault in this case, much depended on whether or not the vessel was seaworthy at the commencement of the voyage and on the effect of exceptions in the bills of lading.

10/F., United Centre, Admiralty, Hong Kong. Tel: 2299 5566 Fax: :2866 7096
E-mail: gm@sun-mobility.com Website: www.sun-mobility.com
CIB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

The Court found that the vessel was unseaworthy when the vessel left the last load port for the contractual voyage because of defects in the main engine. The Court also found that the explosion in the main engine was not caused by a latent defect. The breach of the absolute undertaking of seaworthiness by the vessel owner amounted to an actionable fault that would deprive the vessel owner of a general average contribution from the cargo owner unless there was an exception in the contract of carriage that altered the position. After noting that the deck cargo was outside the scope of the Hague-Visby Rules, the Court added that the issue was one of construction of the exceptions in the bills of lading for the deck cargo. Two types of exceptions were found in the bills of lading in question.

One batch of bills of lading provided as follows:

> Pieces shipped on deck at Shipper's risk; the Carrier not being responsible for loss or damage howsoever arising.

On the other hand, another batch of bills of lading contained the following slightly different words:

> Logs loaded on deck at the shipper's risk, expense and responsibility without liability on the part of the vessel or her owners for any loss, damage, expense or delay howsoever caused.

As the contract for the carriage of the deck cargo is outside the ambit of the Hague-Visby Rules, it ought to be borne in mind that at common law, a vessel owner has an absolute obligation to send his ship out to sea in a seaworthy state at the commencement of the agreed voyage. Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability, namely, that the vessel owner shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the vessel owner's protection in such a case. It is well established that an exception that is intended to relieve a vessel owner from the consequences of the unseaworthiness of the vessel at the commencement of the voyage must be express, pertinent and apposite. Innumerable cases have shown how difficult it is to frame an exception that would be applicable in cases of unseaworthiness.

The Court held that the exceptions in the bills of lading for the deck cargo in the present case were inapplicable because the vessel was unseaworthy when the vessel commenced on the contractual voyage, it followed that there was an actionable fault on the part of the vessel owner. In view of this, the question of a contribution from the cargo owner and the cargo insurer for general average expenses did not arise.

Should you have any questions or want to have a copy of the Judgment, please feel free to contact us.

Simon Chan
Director
E-mail: simonchan@sun-mobility.com

Richard Chan
Director
E-mail: richardchan@sun-mobility.com