Shipping & International Trade

Maritime Piracy and the Entitlement to Contributions for Ransoms Paid

Introduction

Are shipowners entitled to recover part of the ransom paid to pirates as general average contribution from the holders of the bill of lading? That was the principal question before the English Court of Appeal in *Herculito Maritime Limited v Gunvor International* [2021] EWCA Civ 1828. The Court of Appeal answered the question in the affirmative, arriving at its conclusion by interpreting the terms of the bills of lading and the terms of the voyage charter to the extent they were germane to the contract of carriage evidenced by the bills.

Background

The vessel 'Polar' was fixed to carry fuel oil from St Petersburg to Singapore pursuant to an amended BPVOY4 voyage charterparty form. Clause 30.2 of the voyage charterparty stipulated that all bills of lading issued would be deemed to contain the War Risks clauses as well as Clause 39 which defined "War Risks" as including "acts of piracy". The voyage charterparty also contained several additional clauses, including a Gulf of Aden clause and a further war risks clause, the cumulative effect of which was that the charterers were to pay the premium for the additional war risks as well as kidnap and ransom cover up to US$40,000, with the shipowner being liable for premium above that sum.

In the event, a cargo of fuel oil covered by six bills of lading was shipped from St Petersburg and all the bills of lading contained words incorporating the terms of the voyage charterparty.

Whilst transiting the Gulf of Aden in October 2010, the Polar was seized by pirates. The Polar was released by the pirates in August 2011, after some US$7.7 million in ransom was paid to the pirates. The shipowner then declared general average and sought contributions from the holder of the bills of lading for the ransom.

The bills of lading holder resisted the claim, arguing that the shipowner's sole remedy was to recover the ransom under the insurance policies, the premium for which had been paid by the voyage charterers. The position taken by the bills of lading holder was as follows:

(a) The terms of the voyage charter - specifically, the war risk and Gulf of Aden clauses - were incorporated into the bills of lading.

(b) The charterer agreed to, and had in fact paid, the premium in respect of these clauses. The shipowner therefore had to look solely to the cover under the war risks and/or the kidnap and ransom insurance.

(c) Reference to the charterer should be read as referring to the bills of lading holder such that the latter (like the charterer) should not be liable for any general average for the ransom.

(d) In short, by the terms of the voyage charterparty, the shipowner had implicitly excluded the liability of the charterer, and the bills of lading holder (by incorporation of the charterparty terms in the bills) to contribute in general average towards any ransom paid.

An arbitral tribunal heard the dispute and decided that the holder of the bills of lading was not liable to contribute in general average. The English High Court, on an appeal against the tribunal's decision on a point of law, came to the opposite conclusion and held that the holder was liable to contribute in general average for the ransom. The Court of Appeal had to determine whether the arbitral tribunal or the High Court judge was right.

Decision of the Court of Appeal

The Court of Appeal considered whether the shipowner had agreed not to seek a general average contribution from the charterer in the event of a ransom payment to pirates seizing the vessel in the Gulf of Aden in the voyage charterparty; the Court explained that unless this question was answered affirmatively, the issue of incorporation into the bills of lading did not arise.

The Court of Appeal doubted (without deciding the point) that the mere agreement by the charterer to pay insurance premium meant that the shipowner had agreed to look solely to the insurer for compensation in the event of an insured peril. It also observed that such an argument was not convincing given that the charterer was not required to pay the full premium if it exceeded US$40,000 and there was no provision for the charterer to be named as a joint insured with the shipowner.

Be that as it may, the Court of Appeal was prepared to proceed on the basis that the charterparty included an (implicit) agreement by the shipowner not to seek a general average contribution from the charterer in the event of a ransom payment to pirates seizing the vessel in the Gulf of Aden. The question then turned to whether this agreement was incorporated into the bills of lading such that the shipowner had also agreed not to seek contribution from the bills of lading holder.

While the Court of Appeal accepted that the incorporating words in the bills of lading were wide enough to encompass the war risks and Gulf of Aden clauses in the charterparty, it was not prepared to hold that they were sufficiently wide to find an agreement in the bills of lading that the shipowners would not seek general average contribution from the holder thereof because:

(a) Not all the charterparty terms dealing with war risks were intended to be incorporated into the bills of lading. Matters pertaining to payment of additional war risk as well as kidnap and ransom insurance, and the ship owner's agreement to proceed through the Gulf of Aden, were directly relevant to the carriage and discharge of the cargo and hence, incorporated into the bills of lading.

(b) However, other matters within the ambit of the additional war risk clause which governed the position before the completion of loading would not be incorporated into the bills of lading. In other words, it did not follow that all matters pertaining to the war risk clause were incorporated.

(c) Even in the context of the charterparty, the agreement contended for by the bills of lading holder (i.e. to look solely to the insurance for compensation) was "merely implicit". This was not a case of an express term of the charterparty being incorporated into the bills of lading.

(d) Whereas the charterparty expressly stipulated that the charterer was to pay the premium for additional war risks as aforesaid, it would be inappropriate to read that stipulation as requiring the bills of lading holder to do so by manipulating the terms to substitute 'charterer' with 'bill of lading holder'. There was nothing in the bills or the charterparty to say how liability for the premium would be apportioned between different holders of the bills, how much premium each holder would be liable for, whether each holder should be jointly and severally liable for the full or proportionate amount of the premium and whether premium ought to be calculated by reference to value or volume of the cargo etc. The fact that neither the bills nor the charterparty addressed these questions militated against the bills of lading holder being liable for the premium.

(e) In essence, the bills of lading holder was arguing that the bills excluded liability on its part to pay contribution in general average. The risk of piracy and potential need to pay ransom however was plain from the terms. In these circumstances, if the bills of lading holder was exempted from that liability, this could have been explicitly stated, but was not. The bills of lading holder therefore failed to rebut the presumption that in construing a contract, neither party intends to abandon any remedies arising by operation of law and clear words must be used to rebut such a presumption.

(f) Conversely, the bills of lading holder's arguments was premised on an alleged implicit understanding under the voyage charterparty that somehow got incorporated into the bills of lading. This appeared unnecessarily convoluted and called into question whether this arrangement was actually what parties intended.

Conclusion

Maritime piracy still remains a very real threat for commercial vessels. As such, the responsibility for ransoms and other associated costs and losses should be duly considered in contractual arrangements between shipowners, charterers and other interested parties (including, as demonstrated in this case, bill of lading holders). Specific provisions addressing issues such as the right to contribution would avoid uncertainty and disputes such as the one in this case.

On a more general level, the decision highlights issues which may arise in the incorporation of terms – in particular from a charterparty – into a bill of lading. The decision demonstrates the value of explicitly incorporating terms and provisions which are intended to be applicable between the parties, particularly provisions which are intended to effect the abandonment of any remedies. Parties may otherwise have difficulty proving the alleged intention of the parties or rebutting legal presumptions on the wording of the contract.

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