Seaworthiness principle, negligence and deck cargo clauses – "The Elin" – 18 April 2019

A. TÉRMINOS Y BASES DE LA COBERTURA

In a High Court judgement dated 18 April 2019, English Judge Stephen Hofmeyr QC has provided some further guidance on the extent of the words "howsoever caused" in a deck cargo clause exclusion.

THE FACTS

During the voyage, between around 2 and 6 July 2016, the M/V "Elin" encountered heavy seas and some of the cargo loaded on deck was lost and/or damaged.

The B/L was claused with the frequently used deck cargo clause exclusion: (...) of which 70 pckgs as per attached list *loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising.*

THE LEGAL ARGUMENT

The question raised to the judge was:

Whether, on a true construction of [the Bill of Lading], the Defendant is not liable for any loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or the Defendant's negligence.

The cargo interests sued the carrier under the B/L and claimed that even if there is a general exclusion clause in the B/L for cargo carried on deck, the carrier (being the Owners of the vessel) cannot escape from its responsibility to have the vessel seaworthy. They also said that the Owners are to be found liable in case the damages are caused due to Owners negligence.
To escape from the duty of seaworthiness or avoid liability even if negligent, the clause should be spelling the words "seaworthiness" and "negligence" out clearly. A general wording such as "howsoever arising" is not sufficient.

The Owners said that the words "howsoever arising" were wide enough to include damage to the cargo caused by a breach of vessel's seaworthiness and that it did also exclude negligence.

The judge agreed with the Owners and said the following in his conclusion:

It will therefore be apparent that, for the reasons stated above, I see nothing in the authorities to justify departing from what in my view is a point of construction on which both as a matter of *plain language and good commercial sense* the Owner is right. As I have shown, the same or similar words of exclusion have been held to be effective to exclude both liability for negligence causing the loss of cargo (Travers v Cooper [1915] 1 K. B. 73 and The Danah [1993] 1 Lloyd's Rep. 351) and liability for unseaworthiness causing the loss of cargo (The Imvros) and the logic of the reasoning in those cases is compelling.
Words of exemption which are wider in effect than "howsoever caused" are difficult to imagine and, over the last 100 years, they have become "the classic phrase" whereby to exclude liability for negligence and unseaworthiness.

WHAT DOES THAT MEAN?

The duty of having the vessel seaworthy is a very strong principle and usually cannot be set aside. It is also very difficult to escape liability for a damage caused by your own negligence. In most cargo claims, where the Hague Visby rules or similar rules apply, it is not permitted to exclude liability in case of breach of seaworthiness or negligence.

However, in the specific case of cargo carried on deck of a vessel, you can exclude liability due to breach of seaworthiness obligation and / or negligence.

To do so you have to use very wide exclusion words, but you do not need to list all the exclusions one by one.

If you use the specific words "howsoever caused" in the deck cargo clause exclusion, it is accepted by the Courts that it is wide enough to include damages caused by breach of seaworthiness and negligence.

Such a wide exclusion clause is accepted by the industry in case of deck cargo carriage considering the increased risk of carrying cargo on deck.

It also works out legally because the Hague Visby Rules are not applicable to the carriage of cargo on deck.

The above comments are therefore only valid for the specific situation of carrying cargo on deck of the vessel and in case the applicable law is English Law.

OUR VIEWS

Carrying cargo on deck should remain an exception to the rule and agreeing to load cargo on deck should always be considered with much caution.

In the Elin, the Judge comments as follows on the very nature of deck cargo: The carriage of goods on the deck of a ship is inherently risky because the cargo is exposed to the elements and is subject to sea, spray and wind, as well as the additional risk of being washed or falling overboard. For this reason, as stated above, deck cargo has always been treated as being in a category of its own. (...) As a general rule, the deck of a ship is not a proper place for the stowage of cargo and a shipowner is therefore not entitled to stow goods on deck.

When such carriage on deck is agreed between the parties and is common practice for this particular type of goods, it is very important to be extremely clear on all documents that the cargo is carried on deck.

Not disclosing the carriage on deck will put the Shipowner / carrier under the B/L in a very difficult position: no defence will be available towards the cargo interests and most certainly the P&I cover will be compromised.

It is therefore of the utmost importance to clause the B/L with clear, unequivocal statement that this specific parcel of cargo has been shipped on deck, that the carriage of this cargo on deck will be for the cargo interests (shippers / receivers / charterers) risk and that the carrier will not be responsible for damages howsoever caused.

When drafting a B/L deck cargo clause, we recommend using the precise words "howsoever caused" as any other wording might not be wide enough to include a breach of seaworthiness or damages cause by negligence.

In case you have further questions (either legal or technical) on the carriage of a specific cargo on deck of the vessel, if you need guidance on what your insurance covers in case of trouble with deck cargo or need further guidance in drafting an efficient deck cargo clause, please do not hesitate to contact us.