Cargo Interests - The Right To Be Sued  

December 2005

On 29 February, 2004, the bulk carrier "Ythan" exploded off the coast of Colombia with the loss of six of her crew. The vessel and her cargo were a total loss. The explosion occurred in the cargo of 3,760 tonnes of Metallic HBI Fines and the shipowner commenced arbitration in London against Primetrade alleging that the carrier was negligent and claiming for losses in the region of USD 15 million.

Primetrade had purchased the cargo from the shippers and had contracted to sell the cargo on to another buyer. The bill of lading was consigned "to order". Primetrade was not named in, nor a party to the bill of lading, nor - they argued - were they bound by the arbitration clause in the bill of lading that incorporated English law and London arbitration.

In commencing arbitration proceedings against Primetrade, the shipowners relied upon sections 2(1) and 3(1) of the Carriage of Goods by Sea Act 1992 ("COGSA"), which state that "a person shall ... become subject to the same liabilities under ... a bill of lading if that person (i) is the lawful holder of the bill of lading, and (ii) falls within one of the three criteria set out at section 3(1) of COGSA. In Primetrade the relevant criteria was that the lawful holder of the bill of lading "makes a claim under the contract of carriage against the carrier ...".

At the outset of the arbitral proceedings, Primetrade disputed the substantive jurisdiction of the Tribunal8. It contended that it could not be sued for damages for shipping dangerous cargo because Primetrade (i) was not the lawful holder of the bill of lading and (ii) had not made a claim under the bill of lading, and as a consequence there could be no valid arbitration agreement between Owners and Primetrade. The Tribunal held unanimously that Primetrade had been the lawful holder of the bill of lading at the relevant time and, on a majority, that Primetrade had made a "claim" against Owners. Therefore, the Tribunal had substantive jurisdiction to hear and determine the Owners claim against Primetrade.

Primetrade appealed, and the case came before Mr Justice Aikens in the High Court. The two main issues arising out of his decision on this appeal are discussed below.

Issue 1: Was Primetrade the lawful holder of the bill of lading?

S 2(1) of COGSA provides that

"... a person who becomes

(a) the lawful holder of a bill of lading...

shall (by virtue of becoming the holder of the bill ...) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract."

A holder of a bill of lading is defined in s.5(2) as essentially a person with possession of the bill of lading, either by being entitled in the bill as the consignee or by indorsement8. In circumstances where the goods had been totally lost/destroyed during the course of the carriage and consequently the contractual right to possession of the goods no longer exists, Mr Justice Aikens decided that the relevant definition for determining the "holder" would be under s.5(2)(c)

"a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder ... had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates."

In this case, Primetrade had opened a credit letter with UBS in favour of the shipper. The bill of lading had been indorsed in blank by the shipper but paying demand of the sale price were held by UBS to the order of the shipper. After the explosion Primetrade instructed UBS to pay the shipper and to send the bill of lading to Primetrades insurers, via their insurance broker, who subsequently remitted the insurance proceeds to UBS.

These facts raised a number of issues:

Did Primetrade become the holder of the bill of lading when UBS paid the shipper?

No. Mr Justice Aikens reasoned that although Primetrade were the owner of the bill of lading at that point in time, they were not that the holder of the bill under the COGSA. When UBS paid the shipper the bill of lading was "transferred" to the bank who then became the actual holder of the bill. This was because if the payment by UBS to the shipper had taken place before the cargo had been lost UBS would have become the holder of the bill of lading by the operation of section 5(2)(b) of COGSA:

"a person with possession of the bill as a result of delivery of the bill, or any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill"

Therefore, when UBS paid the shipper section s.5(2)(c) was satisfied. The bank had possession of the bill of lading and would have become the holder under section 5(2)(c) because of the transfer to UBS of ownership of the bill when the sale price was paid to the shipper but for the loss of the cargo.

Did Primetrade become the holder when the bill was subsequently sent by UBS to Primetrades insurance broker?

No. Although it might appear that the transfer by UBS to Marsh, as Primetrades' agents, of the bill of lading would make Primetrade the holder of the bill of lading, there was also the question whether there was "transaction" within the meaning of s.5(2)(c). Mr Justice Aikens held that the transfer of the bill of lading from UBS to the broker had nothing to do with the normal course of trading a bearer bill of lading, as it was made after the casualty and that this transaction was merely to allow, pursuant to an agreement with cargo insurers, Primetrade to collect the cargo insurance monies. Therefore, Primetrade would not have become a holder of the bill of lading "by virtue of" such a transaction had it occurred at a time when possession of the bills gave a right (as against the carrier) to possession of the goods. But for the casualty the bill of lading would never have been sent to the insurance broker and Primetrade would never have had possession of the bill of lading.

Without ever having had possession of the bill of lading Primetrade was not at any time the lawful holder of the bill of lading, and did not have "... rights of suit under the contract of carriage..." under section 2(1) of COGSA. As a consequence it was not necessary for Mr Justice Aikens to decide the second issue but, to guard against the possibility that he was wrong on the lawful holder of the bill of lading issue, he went on to decide whether a claim had been made under the contract of carriage.


Issue 2: Did the demand for security amount to a "claim"?

Whilst the Carriage of Goods by Sea Act 1992 gives rights of suit "to a person who becomes the lawful holder of a bill of lading"\textsuperscript{10}, the Law Commission - when drafting the legislation - decided that the liabilities should not attach to such a person merely because they had become the holder of the bill of lading\textsuperscript{10}. Accordingly, section 3(1) COGSA requires a person that has become the lawful holder to take action to enforce their rights before incurring liabilities, either by demanding delivery of the cargo (s. 3(1)(a)), or by making a "claim" against the carrier (s.3(1)(b))\textsuperscript{11} before the holder "shall ... become subject to the same liabilities under that contract as if they had been a party to the contract"\textsuperscript{12}.

Shortly after the casualty the recovery agent appointed by Primetades' cargo insurance underwriters contacted the shipowners' P&I club to request security for the claim. Did this action constitute the making of a claim by Primetade against Owners under the contract of carriage?<br>

In "The Berge Sisar"\textsuperscript{13}, Lord Hobhouse in the Court of Appeal held that the meaning of a "claim" in s.3(1) refers to:

"a formal claim against the carrier asserting a legal liability of the carrier under the contract of carriage to the holder of the bill of lading"

Mr Justice Aikens considered that whilst the arrest of a vessel - clearly constituting the intention of the arresting party to enforce their contractual rights against the carrier - would be considered a "claim", a request for security was quite different. A request for and the voluntary provision of security was a contractual arrangement, and in the case of the "Yihan" the security provided did not even identify the potential claimant or owner of the cargo, referring to "other persons entitled to sue in respect of the cargo". Mr Justice Aikens further observed that whether the actions of the recovery agent in seeking security constituted making a claim under the contract of carriage against the owner was a question of fact, and that as the process of seeking and providing a letter of undertaking did not commit any party to making a claim against the shipowners, the request for security did not of itself amount to a "claim" within s.3(1)(b) COGSA. As such, even if Primetade was the lawful holder of the bill of lading Primetade was not related to the same liabilities under that contract as if they had been a party to the contract\textsuperscript{14}.

Conclusion

As Primetade was not the holder of the bill and as the request for security did not amount to a claim under the bill, no rights or liabilities arose under COGSA. Accordingly, Primetade was not bound by the arbitration clause, and they would not be liable to face a USD 15 million claim from the shipowner. Mr Justice Aikens overturned the Tribunal's decision. It is not yet known whether the shipowner will apply for leave to appeal, or if indeed leave will be granted, but for now this case provides important clarification of the interpretation and application of the rights and liabilities that arise under COGSA.

*Primetade AG v Yihan Limited [2005] EWHC 2399 (Comm)*

\* See "Dangerous Goods - Is The Charterer Liabe When He Is Not The Shipper"

1. The bill of lading specifically incorporated the law and arbitration clause in the Charterparty
2. section 3(1)
3. In accordance with s.30(1) Arbitration Act 1996
4. See section 5(2) for the complete definition
5. not s.5(2)(b) as had previously been decided by the Tribunal
6. a holder - falling within s.5(2)(a) or (b)
7. s.5(2)(c) in accordance with s.5(2)(c)
8. Section 2(1)(a)
9. In accordance with section 5(2)
10. see also section 3(1)(c)
11 see concluding paragraph of section 3(1)
12. [2002] 2 AC 205
13. see concluding paragraph of section 3(1)