Deck Cargo - Can Liability Be Excluded?

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Introduction

In the Commercial Court decision of Sidendrafric Systems SpA and Anor v BBC Chartering and Logistec GmbH & Co KG ("BBC Greenland") [2011] EWHC 3106 (Comm), it was necessary to consider whether cargo carried on deck fell within the definition of "Goods" contained within the Hague Visby Rules ("the Rules"). If not, the carriage of that deck cargo was excluded from the scope of the Rules.

Background theory and principles

If cargo is carried on deck, and if the contract of carriage in respect of that cargo states the cargo "as being carried on deck", then the carriage of that cargo does not fall within the definition of Goods as set out under Article 1 (c) of the Rules:

Art 1 (c) "Goods" includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

As such, the Rules do not apply to that carriage so that Article III r 8, which states:

"Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect."

has no affect and the carrier is free to avail himself of wider defences than those contained within the Rules.

However, even where the cargo docs fall within the definition of deck cargo contained within Article 1 (c) of the Rules, sections 1(6) and 1(7) of UK Carriage of Goods by Sea Act (COGSA) 1971 provide:

"(6) Without prejudice to Article 10 of the rules, the Rules shall have the force of law in relation to:
(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, ...
(7) If so far as the contract contained in or evidenced by a bill of lading ... within paragraph (a) of subsection (6) above applies to deck cargo ... the Rules as given the force of law by that subsection shall have effect as if Article 1(c) did not exclude deck cargo ...

in this subsection 'deck cargo' means cargo when by the contract of carriage is stated as being carried on deck and is so carried."

The bill of lading issued for the carriage of the cargo on the "BBC Greenland" contained a clause:

"3. Liability under the contract
(a) Unless otherwise provided herein, ........ in trades where [the Hague Visby Rules] apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this bill of lading. .... Unless otherwise provided herein, the carrier shall in no case be responsible for loss of or damage to deck cargo and for live animals."

And was clause on its face:

"All cargo carried on deck at shippers / charterers / receivers risk as to any peril inherent in such carriage, any warranty of seaworthiness of the vessel expressly waived by the shipper / charterer / receiver.

in all other respects subject to the provisions of the US Carriage of Goods by Sea Act 1936"

How the theory and principles were considered

The court had to decide whether:

(i) The clause on the bill of lading amounted to a liberty to the carriers to carry the cargo on deck or a statement that the cargo was "carried on deck" and an exclusion of liability,
(ii) The Rules nonetheless applied to the carriage as a result of section 1(6) and 1(7) of COGSA 1971.

Facts of the Case

The case involved the carriage of sand filter tanks on deck from Italy to Mobile (USA) on the "BBC Greenland". During the voyage one of the tanks was lost and another damaged culminating in a claim being brought against the contractual carriers under the bill of lading ("defendants") by the Cargo Interests ("claimants").

As mentioned above clause 3(a) of the bill of lading provided for liability, but the bill also provided that the United States Carriage of Goods by Sea Act 1936 ("US COGSA") applied where the contract was subject to US COGSA (and, in which case, at the carriers' election the US courts shall have exclusive jurisdiction). Furthermore, there was a law and jurisdiction clause which allowed for Arbitration in London and for English Law...
The defendants sought to protect their position by starting proceedings in the US seeking a declaration of non-liability or, alternatively, if US COGSA applied to the contract of carriage that they were entitled to US COGSA package limitation of US$ 500 per package (US$ 1,000 in total in respect of the two affected packages).

For the claimants’ part, they rejected that US COGSA applied to the contract of carriage and sought an anti-suit injunction from the English Commercial Court contending that the defendants were in breach of the arbitration agreement in the Bill of Lading.

The Defendants applied to the English Commercial Court to set aside the order granting claimants permission to serve the application for the anti-suit injunction and to seek a ruling that the courts of England were not the correct forum to decide the matter.

The Decision

The court first sought to consider whether the fillers should be considered as deck cargo within the definition provided in The Rules. While the cargo had actually been carried on deck the question was whether the Contract of Carriage stated the cargo had been carried on deck or was a mere liberty to carry the cargo on deck.

Claimants asserted that the master’s remarks on the face of the bill of lading - “All cargo carried on deck at the Shipper’s/Charterer’s/Receiver’s risk” - were intended to be a general term interpreted as “any cargo which is carried on deck is at the Shipper’s/Charterer’s/Receiver’s risk”, as opposed to being a statement of fact that the cargo had actually been carried on deck.

The court held that the natural meaning of remark on the face of the bill of lading was one of fact and that a remark on the face of the bill of lading was not an obvious or usual place to set out a contractual provision. Further support of this position could also have been taken from previous conduct between the parties. (See Hoolier Brother & Co Ltd v Public Works Commissioner [1908] AC 276, page 285). It was therefore held that the cargo was deck cargo according to the definition of Goods provided in the Rules and did not fall within the scope of the the Rules. Therefore the Rules did not apply.

The claimants had contended that even if the cargo was not “deck cargo” within the ambit of the definition in the Rules, the Rules applied to the contract by virtue of section 1(6) and 1(7) of COGSA 1971. The claimants’ argument was rejected as, although the parties could have agreed that the Rules should apply to the carriage of deck cargo (The “Happy Ranger” [2002] Lloyd’s Rep 357), by clause 3(a) they had failed to do so.

Unless otherwise provided herein, the Carrier shall in no case be responsible for loss of or damage to deck cargo and/or live animals…”

As it had been decided that the Rules did not compulsorily apply and that the parties had not incorporated the Rules into the contract of carriage, it followed that the contract of carriage was subject to US COGSA and that US Courts should have sole jurisdiction.

Conclusion

This case illustrates the importance of clear language in the clauing of contractual terms and serves as a reminder to the unwary that, as a matter of English law, clauses seeking to exclude liability for deck carriage can be struck down by UK COGSA.

Article by Alex Towell (alex.towell@simsl.com)