FIRE ON BOARD! WHEN CAN AN OWNER RELY ON THE "FIRE" DEFENCE UNDER THE HAGUE-VISBY RULES?

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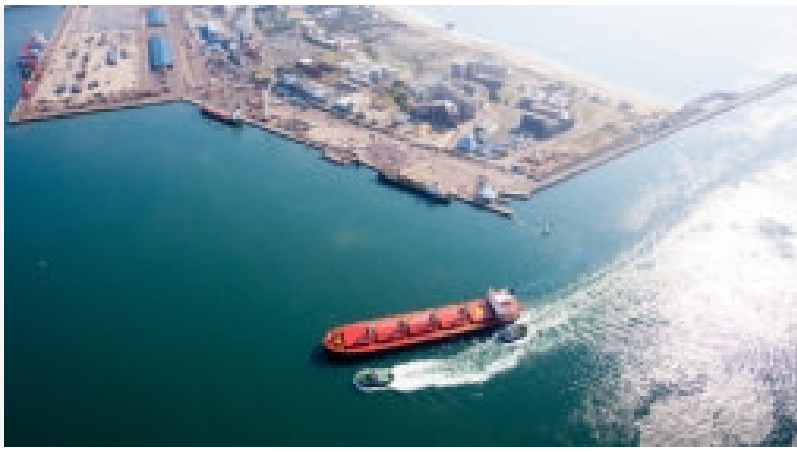

In a significant recent decision the English Court of Appeal has provided useful guidance on the scope of the 'fire' defence that may be available to a vessel's owner/carrier under the Hague-Visby Rules ("HVR"), in particular where a fire on board a vessel is started deliberately[1]. The decision also sheds more light on the construction of the HVR defences more generally, and will be welcomed by the maritime community for the clarity it provides.

FACTS

As a result of a fire that started in her engine room, the vessel Lady M became immobilised in the course of a voyage from Russia to the USA. She was carrying about 62,250 mt of fuel oil and salvors had to be engaged by her owners to tow her to Las Palmas, where general average was declared.

HIGH COURT DECISION

The cargo interests claimed from the owners in High Court proceedings the sums they had to pay the salvors and the costs they had incurred in defending salvage arbitration proceedings. They argued that the owners had breached HVR Article III Rules 1 and 2, which were incorporated into the bill of lading contracts.

Article III Rule 1 provides:

1. The carrier [the owners] shall be bound before and at the beginning of the voyage to exercise due diligence to:
    1. make the vessel seaworthy; and
    2. properly man, equip, and supply the ship.

Article III Rule 2 provides:

Subject to the provisions of Article IV, the carrier [the owners] shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried…

The owners contended that the fire had been caused by the deliberate act of the chief engineer (due to extreme emotional stress/anxiety or an undiagnosed mental illness/personality disorder or neither of these two possibilities) but argued that they were nevertheless entitled to rely upon the defences in HVR Article IV Rules 2(b) and/or 2(q) so as to defeat the cargo interests' claim. These provide:

2. Neither the carrier [the owners] nor the ship shall be responsible for loss or damage arising or resulting from:

    1. Fire, unless ceased by the actual fault or privity of the carrier; and
    2. Any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier.

The High Court heard two preliminary issues: (1) whether the conduct of the chief engineer constituted barratry on the basis of the agreed/assumed facts; and, if so, (2) whether the owners were precluded from relying upon HVR Article IV Rules 2(b) and/or 2(q).

The judge (Popplewell J) held that the owners were entitled to rely on the fire defence under HVR Article IV Rule 2(b) even if the fire had been caused deliberately or barratrously; though they were not entitled to the alternative defence under HVR Article IV Rule 2(q). As to whether the chief engineer's conduct constituted barratry, the judge held that there could be no barratry if the Chief Engineer had been insane (he had to know, or intend, that what he was doing was a crime in order for his act to constitute barratry). However, that question could not be answered without clarification of further facts as to the state of the chief engineer's mind.

The cargo interests appealed.

COURT OF APPEAL DECISION

The Court of Appeal decided two issues.

1. Could Article IV Rule 2(b) give the owners a defence to the cargo interests' claim in circumstances where the fire had been caused deliberately by the Chief Engineer?

The Court of Appeal dismissed the cargo interests' appeal and held that Article IV Rule 2(b) did give the owners a defence in these circumstances, for the following reasons:

1. The words "fire, unless caused by the actual fault or privity of the carrier" have a clear natural and ordinary meaning: they exclude the owner/carrier from liability for fire, however that has been caused, provided that (i) it was not caused with their actual fault or privity; and/or (ii) they did not breach their seaworthiness obligations under Article III (which override the Article IV defences).

2. The word "fire" contains no implicit qualification as to how the fire is started (i.e. accidentally or deliberately, negligently or otherwise), nor is there an implicit qualification depending on who may be responsible for the fire. There is also no proper basis for implying such words as a matter of ordinary meaning – certainly not where Article IV Rule 2(b) contains an express qualification ("unless caused by the actual fault or privity of the carrier") which makes clear that the fire gives the owner/carrier a defence to a claim unless it was caused by the owner's/carrier's actual fault or privity (which was not the case here).
3. There was therefore no basis for the cargo interests' argument that the Article IV Rule 2(b) fire defence had a decided meaning under English law, or that the HVR drafting intentions (evident from the *travaux préparatoires*) were such that the owners would be precluded from relying on the fire defence if the fire had been caused deliberately or negligently by a crew member. Where the words used had a plain meaning excessive regard should not be given to HVR drafting intentions or to previous HVR case-law (even if words used have been held to constitute terms of art).
4. And, for these reasons, and in view of the assumed facts for the purposes of the agreed preliminary issues, the cargo interests were not assisted by their additional argument that the recent Supreme Court decision in *Volcafe v CSAV* [2] required owners to show, in terms of the burden of proof, both that the fire was an excluded peril and that it was also the effective cause of the loss.

2. Did the Chief Engineer's act constitute barratry?

The Court of Appeal considered this briefly, given that it was not necessary in view of its decision on the first issue (on which the owners won).

The owners argued that the chief engineer's act could not constitute barratry without the requisite criminal intention – which could not have been the case here if the chief engineer had been insane. The cargo interests disagreed that a criminal intention was required for an act to constitute 'barratry'.

Without deciding that point, however, the Court of Appeal held that the judge had been wrong to hold that this question could be considered without being advised of further facts – it was not for the courts to answer hypothetical questions and, in this case, the pleading of insanity had not been made by the owners (indeed they remained unable to say if the chief engineer was insane and, if so, on what basis).

CONCLUSION

The judgment clarifies the scope of the fire defence under Article IV Rule 2(b) and its availability to a carrier. It makes clear that the defence is available so long as there is no actual fault or privity on the part of the carrier, even where the fire was deliberately caused by a crew member. It also makes clear that drafting intentions and previous case-law must not be given excessive regard if the words used have a clear, plain meaning.

A copy of the judgment can be found here.

[1] *Glencore Energy UK Ltd & Anr v Freeport Holdings Ltd (The 'Lady M')* [2019] EWCA Civ 388

[2] [2018] UKSC 61. A link to our Briefing on this can be found here: http://www.wfw.com/wp-content/uploads/2018/12/WFW-Briefing-Burden-of-Proof-Under-the-Hague-Rules.pdf)

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