GA GUARANTEES AND GA BONDS – SPOT THE DIFFERENCE

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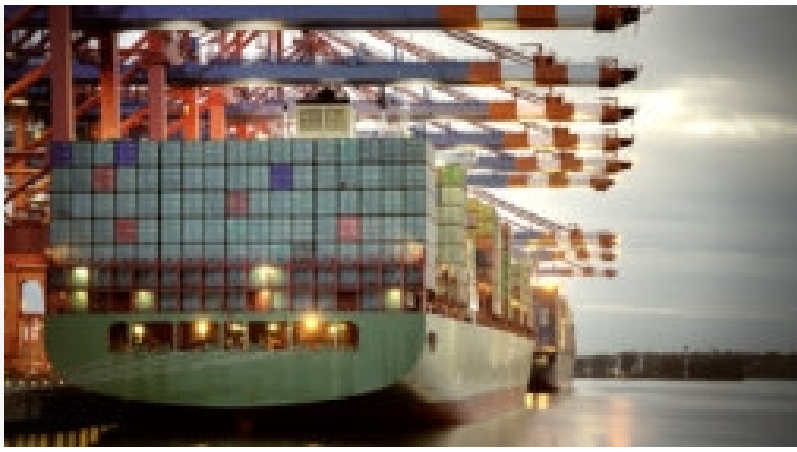

The English High Court recently handed down a helpful judgment that confirms the longstanding market view on the use of bonds and guarantees issued following a declaration of General Average (GA).

> "The question the court had to resolve was whether the guarantee could be drawn down upon the publication of the adjustment without regard to any defences which the cargo interests themselves may have had."

THE ISSUE

When GA is declared, the owners of the vessel have a possessory lien on the cargo which they are entitled to maintain until the owners are secured for any potential demand under a GA adjustment. Such security is usually issued by the cargo owners in the form of a bond which is then counter-secured, usually by a first-class insurer, with the provision of a guarantee.

In the *BSLE Sunrise*[1], the bond and guarantee were on amended standard wordings. The question the court had to resolve was whether the guarantee could be drawn down upon the publication of the adjustment without regard to any defences which the cargo interests themselves may have had.

This was a preliminary issue and thus, the court was asked to assume certain facts. The most salient in this case was that the cargo interests could argue a defence of unseaworthiness provided for in Rule D of the York-Antwerp Rules.

THE DECISION

The court found that GA guarantees are meant to operate hand-in-hand with GA bonds and that, at least in this case, the GA guarantee could be assumed to have been provided to secure the cargo interests' GA bond.

GA is adjusted without the determination of fault, with such arguments being retained for the enforcement stage. If at that stage the cargo interests are able to establish a Rule D defence and the owners are at fault for the incident, then no contribution is due (and no claim can be made under the bond). The publication of an adjustment thus settles nothing between the contributing parties.

Nevertheless, in this case the owners contended for a construction of the GA guarantee that allowed them to draw down on the funds of the guarantee before the enforcement stage, and require the cargo interests or their insurers to issue a claim to recover the funds in light of the Rule D defence. They argued that they were entitled to make a full and unqualified recovery, notwithstanding the cargo interests had a defence under the GA bond and in spite of the fact the GA guarantee had been provided to secure the obligations under the bond.

The court accepted that the owners were entitled to reasonable security, but had conceptual difficulty with why they would be entitled to a security under the GA guarantee that would provide a greater benefit to them than they would have had in circumstances where they were secured via a cash deposit subject to the York-Antwerp Rules, or indeed the GA bond. Indeed, if the owners' construction was correct, the court found it difficult to see why a GA bond was either sought or provided.

Applying the usual rules on contractual interpretation, the court concluded that whilst the language in the bond differed to that of the guarantee, that in itself did not lead to a primary obligation under the guarantee which was greater than the obligation provided under the bond. It was not appropriate to consider the language in the bond without considering it in the context of the guarantee.

Having taken that approach, it was clear from its wording that the guarantee was replacing the cash deposit envisaged by the York-Antwerp rules and that the sums under the guarantee only became due once they were due under the bond, and thus following determination of the issue of seaworthiness under Rule D. There was no good commercial reason that the insurers would adopt a more owner-friendly position by essentially abandoning their own security (i.e. the determination of the issue of seaworthiness before any sums became due under the guarantee).

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The court was also asked to examine what the word "due" meant in this context. This question previously arose in the *Maersk Neuchâtel*[2], which involved a form of bridging security. However, the court found that the circumstances of that case were quite different from this. In the context of the *BSLE Sunrise*, "due" meant legally owing or payable and there was no good reason to distinguish between the GA bond and guarantee. If a Rule D defence was available under one, it would be available under both. In addition, as the payment under the guarantee was made on behalf of the cargo owners, it would make no sense if the insurers providing the bond did not allow themselves the use of those very defences. In addition to this, the inclusion of the word "properly" in the GA guarantee seemed to put the matter beyond doubt.

The preliminary issue was therefore resolved in favour of the cargo insurers, which confirms the view set out in the 15th Edition of Lowndes and Rudolf.

[1] *Navalmar UK Limited v Ergo Versicherung AG & Anr (The BSLE Sunrise)* [2019] EWHC 2860 (Comm)

[2] *St.Maximus Shipping Co Ltd v AP Moller-Maersk A/S (The Maersk Neuchatel)* [2014] EWHC 1643 (Comm)