ALL DECKED OUT – ENGLISH HIGH COURT CLARIFIES DECK EXCLUSION CLAUSES

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IN AN IMPORTANT RECENT JUDGMENT [1], THE ENGLISH HIGH COURT HAS CONFIRMED THAT AN EXCLUSION CLAUSE WHICH STATES THAT A CARRIER IS NOT RESPONSIBLE FOR LOSS OR DAMAGE TO CARGO "HOWSOEVER ARISING" IS SUFFICIENT TO EXCLUDE THE CARRIER'S LIABILITY FOR NEGLIGENCE AND UNSEAWORTHINESS IN RESPECT OF LOSS OR DAMAGE TO CARGO CARRIED ON DECK. THE DECISION WILL BE WELCOMED FOR THE CLARITY IT PROVIDES.

BASIC FACTS

During a voyage, cargo on board the defendant Owner's vessel was lost and/or damaged in heavy seas. The Owner alleged that some of the cargo was carried on deck and that it was therefore excluded from liability for the loss of/damage to said cargo accept that the cargo had been carried on deck; and argued that even if it was carried on deck the Owner was *not* excluded from liability as was being argued. The construction of the Bill of Lading's exclusion clause was put to the Court as a preliminary issue, on the assumption that (1) the lost cargo was in fact carried on deck; and (2) the Hague and Hague-Visby Rules did not apply to deck cargo such that the Court was only concerned with the exclusion clause in the Bill of Lading.

THE ARGUMENTS

The Bill of Lading provided that:

1. The Owner shall "*in no case be responsible for loss of or damage to the cargo, howsoever arising … in respect of deck cargo*"; and
2. The described cargo was "*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 Owner argued that the court should interpret these words in the same way as any other contractual provision by taking their ordinary meaning, i.e. to exclude the carrier (Owners) for liability for carriage of deck cargo irrespective of the cause of loss or damage. The Owner argued that this included negligent loading/stowing/securing (even if this was so negligent as to make the vessel unseaworthy) – the parties' intention was for deck cargo to be carried at the sole risk of the Cargo Interests.

The Cargo Interests argued that the exclusion clause was not sufficiently clear to exclude liability for unseaworthiness or negligence. They contended that the implied obligation of seaworthiness is a fundamental and overriding obligation in a contract of carriage by sea; that exclusion clauses do not ordinarily affect that obligation unless very precise words are used; subject to the possible operation of the exclusion responsibility for loading, stowing, lashing and securing the cargo was on the Owner; the exclusion did not specifically refer to liability for unseaworthiness or negligence; and the words used could be given real and substantial meaning even if they did not exclude liability for unseaworthiness or negligence.

THE DECISION

The judge, Stephen Hofmeyr QC, held that the Owner was right.

He held that the words used were clear, concluding that the phrase "howsoever caused" has a very wide effect and was sufficient to exclude the Owner's liability for negligence and unseaworthiness in respect of any loss of, or damage to, the deck cargo.

He also considered that this was consistent with the authorities relied upon by the Owner as a "matter of plain language and good commercial sense" (*The Danah, The Imvros and The Socol 3*). As for the authorities relied upon by the Cargo Interests, he held that these did not assist them; in particular he disagreed with academic criticism of *The Imvros* [2] (where it was suggested that words of exclusion were effective to exclude liability for unseaworthiness causing loss of cargo) and that the propositions set out in *R v Canada Steamship Lines Limited* [3] on the interpretation of exclusion clauses should not be "applied mechanistically as if they were a codifying statute" – his overriding duty was to determine what the plain and ordinary meaning of the clause is to any ordinarily literate and sensible person, having regard to the 'factual matrix' background circumstances which would reasonably have been available to the parties when the Bill of Lading contract was concluded.

CONCLUSION

The carriage of cargo on deck is a risky enterprise given exposure to the elements and the danger of loss overboard. As a consequence, deck cargo is treated differently to cargo carried in hold. Generally speaking an owner will not be entitled to stow goods on deck, and will be liable for damage to goods in cases of unauthorised deck stowage. However, as this judgment makes clear, the fact that deck stowage will not normally be permitted does not mean that exceptions in the Bill of Lading will not apply in cases where there is consent to stow the goods on deck.

The Elin provides useful guidance as to what is needed in order to formulate an effective exclusion clause in a bill of lading. Carriers should ensure that their exclusion provisions are drafted widely and clearly to indicate the intentions of the parties and, in doing so, they should (always bearing in mind the remaining wording of the clause(s) in question) ensure the wording "howsoever caused" is included in order to exclude liability for negligence and unseaworthiness.

[1] *Aprile SPA v Elin Maritime Ltd (The "Elin")* [2019] EWHC [1001]

[2] [1915] 1 KB 73

[3] [1952] AC 192