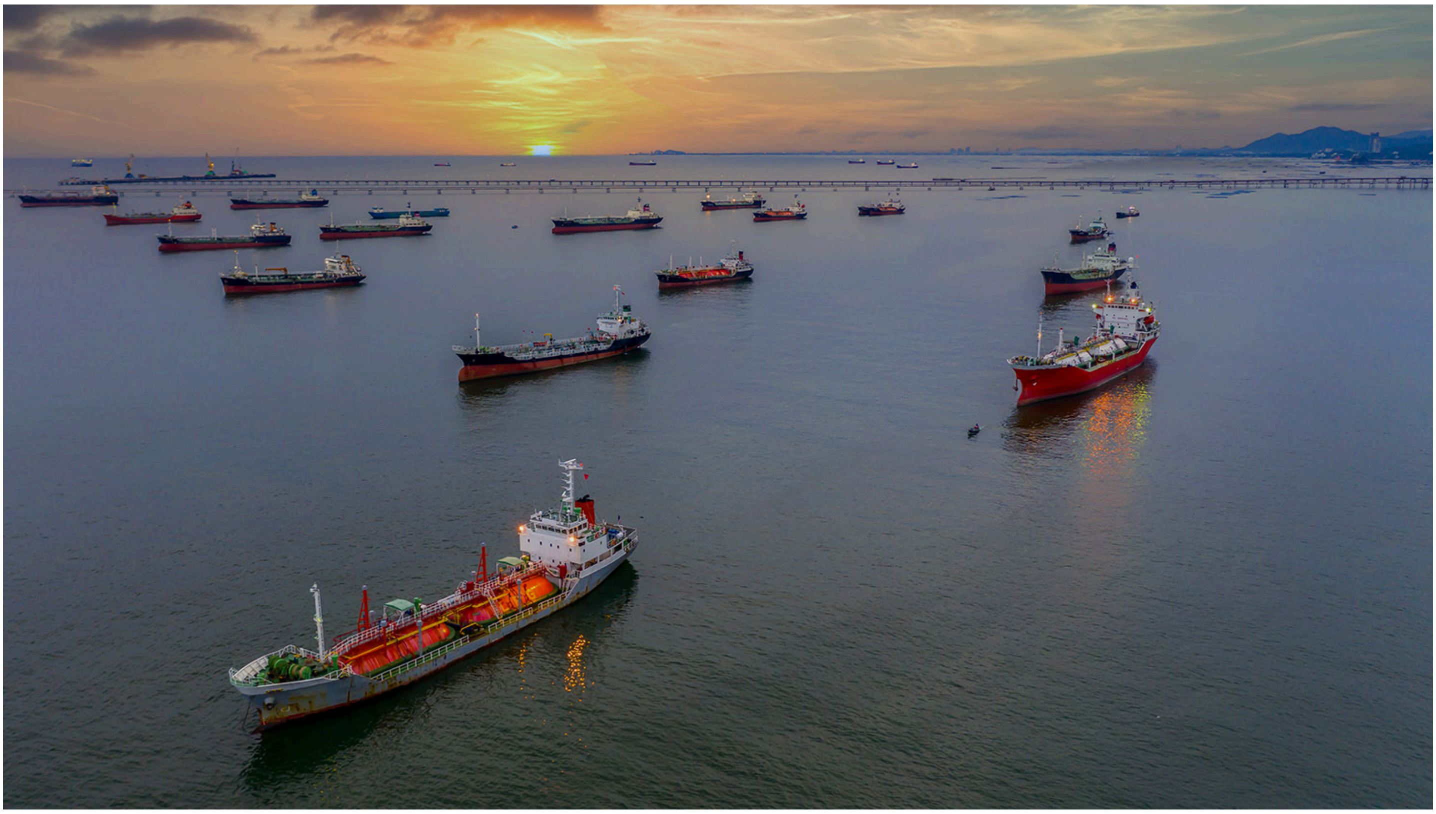

The Polar - you don’t always get what you pay for

In this article we discuss one of the issues decided by UK Supreme Court in The Polar case – the practical and legal effect of charterers’ payment of additional premium to an owner’s insurer and whether this shields the charterer from subrogated claims arising from the risks insured.

Published 09 December 2024

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In the recent case, *Herculito Maritime Ltd and others v. Gunvor International BV and others (the Polar),* the UK Supreme Court ruled that cargo underwriters are not excused from contributing in General Average (GA) towards a ransom payment, notwithstanding the fact that

- the voyage charterers contributed under the terms of the charter towards the additional war risk premium payable to owners' war and K&R insurances, and
- the charter was incorporated into the bills of lading.

The Court decided that GA was such a well-known concept that clear and express words would be required if a shipowner was to be held to waive contributions towards a ransom payment from other property interests. Such a waiver could not be implied in this case.

The test for implying terms into a contract is high, and a court is reluctant to 'second guess' the presumed intentions of the parties. The judgment clarifies the scope and limitations of an implied "insurance code", shorthand for when parties to a contract agree one of them must look to its own insurance for compensation, in lieu of claiming against the counterparty.

Several articles have discussed the impact of the judgment on deviation and its implications for current Red Sea transits. The charter in the *Polar* itself provided for trading via Suez, so that the owners no longer had the liberty to decline to proceed via a war risk zone affected by piracy, unless the nature of the risk had altered. These considerations are both fact and charter specific, and accordingly this aspect is not addressed in this article.

An analysis of all points in the decision by Guy Blackwood KC of Quadrant Chambers who acted for owners and their insurers can be found here.

Background of the litigation

Somali Pirates seized the M/V Polar in 2010 in the Gulf of Aden holding the vessel and crew hostage for ten months. After a ransom of USD 7.7 million was paid the crew and vessel were released. Tragically, one crew member was lost. The ransom payment was funded by the owner's kidnap and ransom (K&R) policy up to their limit of USD 5 million, and then by their war risk underwriters. The ransom payment formed a substantial element of the total GA expenditure falling to be apportioned between ship and cargo. Following an average adjustment, cargo's portion of GA was determined to be in the region of USD 5.9 million. The subject litigation was a claim by the owner of the M/V POLAR and its subrogated K&R and war risk underwriters to recover cargo's proportion of general average.

The vessel had been voyage chartered by Clearlake Shipping Pte. for carriage of a fuel oil cargo. The voyage charterparty was on an amended BPVOY4 form. Its additional clauses contained a detailed series of War Risks clauses (with additional premiums for charterers' account). The additional premium for K&R cover was to be for charterers' account up to a maximum of USD 40,000. Gunvor International BV, a related company to Clearlake, was the holder of the bills of lading at the time the vessel was detained by pirates. Gunvor, and their cargo insurers, (cargo interests) issued GA security but refused to pay the cargo portion of GA resulting in an arbitration.

The arbitration tribunal accepted cargo interests' argument that Clearlake as charterer had paid the additional premium for Gunvor's benefit and because the voyage charter terms were incorporated in the bills of lading, the payment of the additional premium for war risks and K&R cover constituted an implied insurance code or insurance fund meaning that owners could only look to the K&R and war risk insurance. Consequently, the owners' insurers had no subrogation rights and cargo insurers did not have to pay the cargo portion of general average.

Although cargo interests were successful in arbitration the award was reversed in the Commercial Court and the Court of Appeal upheld the Commercial Court in December 2021.

The UK Supreme Court also ruled for owners and their subrogated underwriters but on different grounds than the Court of Appeal. Essentially, the Court of Appeal presumed but did not decide that an insurance code existed in the charter party but that the holder of the bills of lading did not benefit from it. The Supreme Court faced the insurance code issue head on and determined that no such code existed.

The rise (and fall) of the implied insurance code

In our Insight article following the Court of Appeal decision in 2021, we both agreed with the result – Gunvor's cargo insurers could not shirk responsibility for a multi-million-dollar contribution in GA due to the charterer's payment of additional K&R and war risk premia. As stated in the Court of Appeal decision:

In reality this is a case where both parties were insured against the risk of piracy and where allowing the shipowner to claim will mean that each set of insurers will bear its proper share of the risk which it has agreed to cover. In contrast, the effect of construing the bills of lading to exclude a claim by the shipowner will mean that the loss is borne entirely by the shipowner's insurers and that the cargo owners' insurers escape liability for a risk which they agreed to cover.

In the hypothetical context of a charterparty provision that required the charterer to pay additional premium and where the claim is made against that charterer, one of the authors found attractive the idea that a charterer's payment of additional premium ought to preclude claims from the owner and its subrogated insurers when such claims arise from the very risk insured against. This is at the nub of the implied insurance code concept as articulated in *The Ocean Victory* and *The Evia (No 2)*.

The Evia (No 2) was ordered by time charterers under a Baltime charter to load cargo at Basrah and was then stuck when the Iran/Iraq war broke out some months later.

The case decided that when instructions were given to proceed the port was prospectively safe, and the later outbreak of war was an abnormal occurrence. The vessel remained on hire until the charter was frustrated some months later. Lord Roskill made the comment it would be a 'remarkable result' if time charterers had paid additional war premium, yet received no benefit if they faced claims from war risk insurers, subrogated to owners' claims. He explained his conclusion by applying a 4-stage test in the charter wording.

Subsequent war risk cases *Concordia Fjord* and *Chemical Venture* distinguished the insurance code approach, finding no such code existed under different charter wordings. Payment of premium was viewed as no more than an agreement to pay a hire supplement for trading in high-risk areas. These decisions also endorsed the holding in the *Helen Miller.* Reimbursement by charterers of additional premium charged to owners for proceeding outside IWL/INL warranty limits did not provide protection to charterers from subrogated claims for ice damage.

Then came the *Ocean Victory*. In that case, Gard insured the vessel for Hull and Machinery risks when she grounded in a storm while attempting to leave Kashima Port in Japan. Following attempts to salvage the vessel, the vessel broke in two and became a total loss. Owners and demise charterers were co-assureds. Gard, as assignee of both owners and demise charterers, brought a claim against the time charterer for breach of a safe port warranty. The claim failed in both the Court of Appeal and the Supreme Court primarily on the basis the weather conditions experienced were an abnormal occurrence, which provided a defence to the unsafe port claim. The claim also failed on the grounds that the co-assurance arrangement constituted an implied insurance code. Therefore, the owner and demise charterer could look only to the insurance which was held to discharge both liability and loss such that demise charterers could not assert they had suffered substantial loss, nor claim down the line against the time charterer.

In discussing the insurance arrangements, a comment by Longmore LJ's in the Appeal Court breathed new life into the implied insurance code concept:

"*...the prima facie position where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other.*"

The concern felt in the marine insurance market after that decision was that parties in the charter chain who were not co-assured or had made no premium payments were given a 'free ride'. The market reacted by amending P&I Club Rules, Nordic Plan and BARECON 2017 to make it clear that a third party outside the insurance policy did not benefit. The proposed draft CONWARTIME 2024 under discussion at BIMCO also repeats this stance.

The *Polar* decision limits the implied insurance code concept

The Supreme Court judgment in *The Polar* makes it clear that a charterparty clause requiring charterers to pay additional premium does not in itself create an implied insurance code. The Court found that there is no prima facie position arising from insurance arrangements. *The Ocean Victory* decision was explicable by the co-assurance arrangements, but even then, courts may struggle to identify precisely what term necessarily should be implied.

The Evia (No 2) was not expressly overturned, although its impact is limited to its facts and the wording of the now defunct Baltime 1939 charter form. The Supreme Court cautioned future arbitration tribunals to be wary of following the authority of *Evia (No 2)* on this aspect.

It is now clear that, apart from some limited co-insurance arrangements, charterers should have no expectation that payment of premium to owner's insurers will provide protection from claims.

Greater certainty for owners and charterers

The uncertainties of an implied insurance code carry the risk of an unintended waiver of subrogation rights.Insurance arrangements generally require notice to the insurer and approval of a contract term that impacts subrogation rights. Lack of notice risks voiding insurances, which in turn would breach loan covenants. Alteration of risk usually can be preserved by alterations in price by an insurer. As the court noted:

'*Whether or not they are to have rights of subrogation is likely to be material to their rating of the risk as it increases the risk of loss borne by them… If no effective insurance cover were provided then issues would arise as to whether in such a case there is any code, and difficult questions might also arise if the insurance did not fully cover the losses suffered by the shipowner*.'

If parties intend to look only to insurance arrangements to make good losses such intent can be made expressly, and the parties can then seek prior approval from the insurer.

The authors thank Sarah Hamon-Mathiopoulou, Senior Lawyer, Defence, Piraeus and Marie Kelly, Vice President, Defence Global, for their kind assistance with this article.