The "Tai Prize" – The Court of Appeal reaffirms the Master's duty to independently record the order and condition of cargo

The Tai Prize decision is unsurprising in result in that it reaffirms the Master's obligations under the Hague-Visby regime. It is, however, a demonstration of a failed attempt by a time charterer to pass liability to the voyage charterer for damage to soya beans due to pre-shipment conditions. Following their breakdown of the case, our authors discussed the options in such cases for Owners, Time Charterers and their P&I Clubs with Solicitor Darryl Kennard of Penningtons Manches Cooper LLC.

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The Court of Appeal in PRIMINDS SHIPPING (HK) CO LTD V NOBLE CHARTERING INC ("The Tai Prize") confirmed the commercial court's decision which held that the shipper's statement in a *draft* Bill of Lading presented to the Master does not amount to a warranty by the Shipper/Charterers of the cargo's apparent order and condition. This is because the carrier has the free-standing and independent obligation under the Hague Rules to accurately record the apparent order and condition of the cargo on the Bill of Lading when shipped on board.

Background

The *Tai Prize* loaded a cargo of 63,366.150MT soyabeans in Brazil bound for China. Shippers presented Shipowners a Bill of Lading which contained the statements "clean on board" under "Shipper's description of Goods" and "shipped … in apparent good order and condition." At discharge, receivers raised a claim for burnt, discolored and mouldy cargo. Receivers succeeded in their claim in Chinese court against the Head Owners as carriers under the Bills of Lading. Shipowners recovered a 50% contribution from Disponent Owners under the Inter-Club Agreement as incorporated in the Head Time Charterparty. In turn, Disponent Owners claimed 100% recovery from Charterers under an amended North American Grain Charterparty 1973. They succeeded in arbitration on the basis (as held by the Tribunal) that (i) it would, on a reasonable pre-shipment inspection, have been apparent to the shippers/charterers that the cargo was not in apparent good order and condition, (ii) in consequence of this, the *draft* bill of lading presented for signature was inaccurate because it stated that the cargo was shipped in apparent good order and condition and (iii) Owners were entitled to be indemnified for any liability they incurred by reason of signing inaccurate draft bills because the defective condition of the cargo was not apparent to the Master on a reasonable inspection during loading.

The Commercial Court

The Charterers appealed the arbitrator's decision to the High Court, which considered the following questions:

1. Did the pre-filled statements, "clean on board" and "apparent good order and condition" on thedraftBills of Lading, constitute a representation or warranty by shippers as to their knowledge of the apparent condition of the cargo as presented, or were the draft Bills of Lading merely an invitation to the Master to make his own assessment of the apparent order and condition of the cargo after reasonable inspection?
2. Were the Bills of Lading, as issued, inaccurate as a matter of law?
3. Would Charterers be liable to Owners either by way of warranty or implied indemnity if the Bills were inaccurate?

The High Court reversed the arbitrator's decision, finding that a pre-filled statement on a draft Bill of Lading is neither a warranty nor a representation as it is the Master's obligation independently to assess and record the apparent order and condition of the cargo. Furthermore, the Bills of Lading were not inaccurate as a matter of law, given that as far as the Master or crew could see during a reasonable inspection during loading, there was no damage to the cargo and thus no reason to remark the Bills of Lading. The last question then was moot as the Bills of Lading were not inaccurate.

The Court of Appeal Decision

The Court of Appeal considered the same three questions and confirmed the Commercial Court judgment.

First, they considered what the term "apparent good order and condition" means on a Bill of Lading. The arbitrator had accepted that the Master was unable to see any damage to the cargo at loading, but held that the damage would have been discoverable by shippers before loading, and thus the cargo was not in apparent good order and condition. The Court, citing *The Nogar Marin* , found that the arbitrator applied the wrong test; the words on a Bill of Lading are understood to be a representation by the Master, not the shippers. The authority of the *David Agmashenebeli [2003]* case was reconfirmed where it was held that the remark " *in apparent good order and condition* " is a statement made by the Master regarding the cargo's external condition at the time of shipment arising from a reasonable examination by a competent Master based on the prevailing circumstances during loading. A reasonable examination does not entail that the Master is an expert in the cargo and cannot perform a granular inspection nor interrupt regular cargo operations for inspection.

The principle that remarks about cargo condition are from the Master's point of view is consistent with the Hague Rules incorporated in the Bills of Lading. Article III Rule 3 obliges the carrier to issue, upon the shipper's demand, a bill of lading setting out certain information such as number of packages, leading marks, quantity, weight, and apparent order and condition of the goods. Further, Article III Rule 5 contains a guarantee (and associated indemnity) by the shipper to the carrier for accuracy of all this information save, importantly, for the apparent good order and condition of the goods.

If the above establishes that it is the Master who is obliged to record the apparent order and condition of the cargo, what is the effect of the wording on the draft Bills of Lading, "s *hipped in apparent good order and condition* " and " *clean on board* ," as presented by the shippers? Owners argued that this was a statement of shippers' knowledge of the cargo condition, which gave rise to a right of indemnity where it was inaccurate. The court found that this was not the case, as it was contrary to the obligation of the Master to issue a Bill of Lading based on his own assessment of the apparent order and condition of the cargo. The presentation of the *draft* Bill of Lading by the Shippers is merely an invitation to the Master who must examine the external condition of the shipment at the time of loading and under normal loading procedures to confirm the cargo's apparent good order and condition. If the shipper's "clean" draft cannot be confirmed, the Master has a right, and a duty, to refer to cargo's apparent condition at the time of shipment with a suitable remark. This principle leads back to the basic functions of a Bill of Lading, as a receipt from the Carrier for the goods as shipped on board, and as a contract of carriage (or evidence of a contract) between the holder of the Bill of Lading and the Carrier.

In summary, on the questions of law, the Court found:

1. The statements on thedraftBill of Lading provided by shippers do not amount to a representation or a warranty. They are an invitation to the Master to make an independent representation of the condition of the cargo as it is apparent to the Master.
2. The Bills of Lading as issued were not inaccurate.

On the question of implied indemnity, there could be no implied indemnity for shippers tendering a draft Bill of Lading; it would be contrary to the Carrier's Hague Rules obligation to issue a Bill of Lading stating the apparent condition of cargo when shipped on board.

We took the opportunity to discuss the Tai Prize decision in the wider context of soya bean claims in China arising from inherent vice of the cargo with Darryl Kennard, Solicitor and Partner with Penningtons Manches Cooper LLC.

The Court of Appeal expressed some sympathy with the Owners in a theoretical case where the Shippers have actual knowledge of poor cargo condition, which the Master could have no reasonable means of discovering, suggesting in such a case there could be implied representation. What would be the applicable test to prove knowledge? And moreover, would gross negligence also pass the test?

The applicable test would be one of actual knowledge of the cargo being defective at the time of shipment. In any case, the question is only theoretical since there is neither an implied nor an express representation made by the Shippers who only provide a draft Bill of Lading to the Master. The Master has no obligation to follow what the pre-printed words mention if, according to his judgment, the cargo is not in apparent good order and condition. Another issue would be whether the party having suffered the loss (be the Head Owner or the Disponent Owner) would pursue its claim under the charterparty chain or under the bill of lading. The latter may present better prospects of success. The party having suffered a loss, might possibly find an economic tort if it could be established that the Shippers knowingly and deliberately provided damaged cargo and tendered a draft "clean" bill of lading in order to obtain payment for defective cargo, and thereby benefited to the detriment of the Owners.

Is there any danger that Shippers/Voyage Charterer are "encouraged" to be careless or negligent as argued by Owners?

A clean Bill of Lading is simply a Bill of Lading without clausing, (Sea Success) - it is the Master who provides any information about the apparent order and condition. This case just makes clear that the Bill of Lading in draft form does not constitute a representation of the apparent order and condtion of the cargo. How can the shippers be encouraged to do something they are not doing in the first place? If the defective condition is not apparent, then the Owners are not deprived of defences, although they have to be careful to keep good records and overcome the burden of proof to show they have cared for the cargo and any defect was either not apparent at loading or not caused by the ship. It does not assist to conflate the cause of the claim with the remark on the bill of lading. The Owners did not succeed in China to convince the court that they had no liability for the damaged cargo condition. The cause of the liability was not the statements as to the apparent condition of the cargo as contained in Bills of Lading, which were accurate as far as the Master could determine.

The Hague Visby Rules, which are the benchmark of P&I cover, are clear with respect to Carrier's obligations when signing a Bill of Lading. Does the " Tai Prize " bring Owners in a more onerous position or does it reiterate what is already known? (The David Agmashenebeli [2003] / Nogar Marin [1988])

This case aligns the risks with the provisions of the Hague Visby Rules. It was always the Master's obligation to ensure the accuracy of the facts on the Bill of Lading insofar as concerns the apparent order and condition of the cargo, not of the Shippers. The obligation cannot be put on the Shippers who are only presenting the cargo for loading. The bill of lading is a receipt of goods being brought for loading, and it is the Master's obligation to report the apparent condition of the cargo at the time of shipment under normal loading procedures, it always has been. The Master was never entitled to rely at what Shippers presented as being the condition of the cargo.

Is it an even balance of risk that Owners, or the Charterers in the middle, are left with a loss which was not their fault? For example, soya bean "inherent vice" claims represent significant exposure to P&I Clubs and Shipowners and this case makes it difficult to pass liability to voyage charterers, who would presumably have more information about the cargo condition. How can Owners protect themselves? Are express indemnity clauses the only solution? Could there be recourse against shippers under the Bill of Lading?

It is important to remember that although Charterers may be the agents of the shippers in a charterparty context, it cannot necessarily be said that it is the Charterers who would have more information about the cargo. The Master's role in recording the condition of cargo at the time of shipment on a Bill of Lading has been the same for hundreds of years for a good reason, which is that the Master may be the only party that can give an independent assessment of the cargo. In FOB sales contracts the buyer may be entirely reliant on the Master's remarks that the cargo as provided by the seller is in good order and condition, and it is on this basis that they agree to pay for the cargo.

Express indemnity clauses may sound like a solution, but they are not getting to the root of the problem, and they will inevitably create more. For P&I insurance, any charterer agreeing to such an indemnity clause would likely have trouble with their Club. The market is unlikely to accept such clauses if they lead to uninsured losses. The trouble, really, is that by addressing these claims through the charterparty chain, there is going to be nothing but more narrow legal arguments until the liability rests with one or another party until the next case comes up. The cause meanwhile is going unaddressed, which is that the Owners have defences under the Bill of Lading when they can prove that any damage was pre-existing but not apparent to the Master. There was no inaccuracy in the Bills as issued, from the eye of the Master, and implying there is another test, that of the shipper's representation, changes the meaning of the representation on the Bill of Lading as it has been understood through hundreds of years in international trade.

Is there any market-based approach to rectifying this imbalance?

It is important for the P&I Market to stem the tide of soya bean cases in China, and this is perhaps best done by a coordinated and concerted effort to push back against the main protagonists, the Chinese receivers and insurers.

In this regard, the recent English court decision in The Frio Dolphin has (subject to appeal) given P&I insurers a powerful weapon in their fight against the injustice of being saddled wrongly with the cargo losses arising from inherent vice. In this case, the court held that a shipowner may bring arbitration proceedings against a subrogated cargo underwriter and claim "equitable compensation" (i.e. damages) in cases where the subrogated underwriters has obtained judgment in a foreign court in breach of the arbitration clause incorporated in the Bill of Lading contract. As the law currently stand, such damages would be equal to the amount the shipowner has had to pay pursuant to the foreign judgment, plus any associated costs. Of course, the challenges of enforcement remain but insurers are much more susceptible to enforcement proceedings than local receivers are.

Finally, anti-suit injunctions remain a potent weapon and it should not be assumed that they will simply be ignored by Chinese receivers. In a recent soya bean case in which damages of US$10 million were claimed, we obtained an anti-suit injunction against a government owned Chinese receiver, and this stopped the claim dead in its tracks; the ASI was complied with and the security posted in China returned.

We are still left to see whether the Court of Appeal's decision will be overturned by the Supreme Court. What is the deadline to submit the case at the Supreme Court?

An application to appeal at the Supreme Court has been made. Although it remains to be seen what the Supreme Court's decision will be, chances are that the law as we know it will be reiterated.

Thank you, Darryl, for taking the time to speak with us and for sharing your views.