CaseNote — Trade and Transport

February 2010

Shippers Beware: The "Aconcagua" (2010) 1 Lloyds Rep.1

Mr Justice Clarke, in the High Court in England, has held that a charterer was entitled to claim an indemnity from the shippers under Article IV rule 6 of the *Hague Rules* in circumstances in which a cargo of 334 kegs of calcium hypochlorite stowed in a container self ignited and exploded on board the vessel.

It had been argued by the cargo owner, in defence of the claim, that the cause of the damage was the fact that the container had been stowed in a position where it was surrounded on all three sides by a bunker tank which had been heated during the voyage in order to allow a transfer of bunkers for fuel oil. The time charterers paid the ship owners US$27,750,000 by way of a compromised settlement of the ship owner's claim against it and now sought an indemnity from the shippers.

Article IV rule 6 of the Hague Rules provides as follows:

> "Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation **and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.** If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any." (emphasis added)

The cargo had been identified in the bill of lading in the following manner:

> "Calcium hypochlorite 65%. IMO: 5.1 UN:1748 PG: 5137"

that being a reference to the UN *International Maritime Dangerous Goods* (IMDG) Code in paragraph 5.1.

The charterers argued that the cargo had, unknown to it, had an abnormally high thermal instability, being prone to self-heat at ordinary carriage temperatures.

It was admitted on behalf of the charterers that the stowage of the container where it was surrounded by a bunker tank was negligent. The IMDG Code required it to be stowed "away from" sources of heat.

A critical issue in the case was whether the heating of the bunker tank was the cause or a cause of the explosion. It was asserted that the bad stowage of the container and its contents amounted to unseaworthiness and that the charterer had failed to take due care to make the vessel seaworthy. The charterers denied any causative relationship, asserted that any unseaworthiness only arose during the course of the voyage when the heating took place and that the decision to heat was "an act, neglect or default in the management of the vessel" under Article IV rule 2(a) of the *Hague Rules* and thus the charterers were not liable in any event.

The court heard a considerable amount of expert evidence and there was a detailed discussion in the judgment of that evidence which resulted in conclusions by Clarke J as to what were the normal characteristics of UN1748 of which a prudent carrier should have had knowledge at the time.

In reaching the opinion which he reached on that issue, Clarke J did not regard the degree of knowledge which a prudent carrier should have as being equivalent to what was available in technical scientific papers and the like. Having identified the level of knowledge to be, essentially, that the material was safe for the carriage in containers on or under a deck, but that it had a tendency to decompose if the temperature was as low as 60°C, in which case it might explode, and that it should be kept away from sources of heat, His Lordship then had to consider whether the heating which was applied to the tanks was such as to have caused the explosion.

In his view it was not which implied that the material actually shipped was rogue material; that is, it had characteristics which were markedly different from those described as UN1748.

Clarke J found also that the cargo owner had failed to establish that the heating of the bunkers was a cause of the explosion. If he was wrong about that he further held that the stowage of the container in the vicinity of the bunker tank was not in breach of the carrier's obligations to exercise due diligence to make the vessel seaworthy. He based his decision in that regard on the fact that the operative fault lay not in the stowage of the container but in the decision to use and heat the bunkers.

His Lordship also accepted that the act of heating of the cargo was an act, neglect or default in the management of the ship. Heating the bunker oil for the transfer to the engine room was "patently" something done as part of the running of the ship. Accordingly, even if the heating had been causative the charterers would still be entitled to an indemnity under Article IV rule 6.

The lesson to be learned from this case is the importance of shippers ensuring that not only is the cargo which is tendered for shipment appropriately described in the carriage documents but also that it complies with that description. If the shipper is aware of any particular propensity in the cargo it should also draw that to the attention of the carrier.

Rotterdam Rules

The result is unlikely to be any different if the *Rotterdam Rules* (the new cargo liability regime finalised at UNCITRAL in 2008) had been in force. Article 32 of the Rotterdam Rules spells out the responsibilities of a shipper of dangerous goods, essentially requiring the shipper to inform the carrier of the dangerous nature or character of the goods before they are delivered to the carrier and if it fails to do so the shipper is liable to the carrier for loss or damage resulting from such failure to inform.

Significantly, the carrier would not under the *Rotterdam Rules* be able to rely upon the nautical fault defence but would still be able to avoid liability on the facts of this case because it would be able to prove *"that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in Article 18"* (Article 17 rule 2).

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