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Incorporation of terms of charterparty into bills of lading

Gunvor International BV and others v Herculito Maritime Limited and others ("The Polar") [2024] UKSC 2
17 January 2024

Lord Hamblen (delivering the unanimous judgement of the Court) held:

- *A charterer's agreement to pay the insurance premia for war risk and kidnap and ransom risks does not create an insurance fund or code that absolves the charterer from liability to contribute in general average following piracy, except where the charterer and owner are joint insureds.*

- *Incorporation of terms of a charterparty into a bill of lading is determined by the three-stage test, that is:*

  1) *Examine the scope of the incorporation clause in the bill of lading to see if it is wide enough to incorporate the relevant terms of the charterparty. A general incorporation clause will import only the terms as to shipment, carriage, delivery and payment of freight.*

  2) *Examine the relevant terms of the charterparty to see if it makes sense in the context of the bill of lading. Some degree of manipulation is permissible in the case of terms as to (i) shipment, (ii) carriage and (iii) delivery, but not as to other matters (including arbitration) in the absence of clear intention.*

  3) *Check if the prima facie incorporated terms of the charterparty are consistent with the terms of the bill of lading.*

Background facts

The respondent-owners of the vessel "POLAR" let her on a voyage charter to the charterers for a voyage from Tallin/St Petersburg range to one safe port Fujairah or to one or two safe port(s)/STS transfers in the Singapore area. The agreed route was "via Suez" that would necessarily take the vessel through the Gulf of Aden (a designated area of high risk of piracy). The charterparty had a war risks clause which allowed the owners to refuse to proceed to areas of war and piracy risks. The charterparty also had a Gulf of Aden clause, which provided for the sharing of various costs related to transit through the Gulf of Aden between the owners and the charterers, and also required the charterers to pay the additional insurance premia incurred in respect of such transit, to a limit of US$40,000. Charterers paid the additional premia, which did not exceed the cap of US$40,000. A cargo of fuel was loaded in St Petersburg for which six bills of lading were issued, of all of which the appellant was the lawful holder.

All the bills of lading generally incorporated the charterparty. The incorporation clause provided that the "liberties and exceptions as per TANKER VOYAGE CHARTER PARTY indicated hereunder, including provisions overleaf" and in one of the bills of lading, an additional wording was found on terms that "*(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herein incorporated.*"

The vessel proceeded on the voyage, and whilst transiting through the Gulf of Aden, the vessel was seized by Somali pirates and released after about 10 months upon a payment of a ransom of US$7.7 million. Thereupon, after diverting for repairs, etc, the vessel proceeded for and arrived at Singapore, she declared general average. The cargo was released upon general average bond by the and cargo insurer's guarantee. Subsequently, the general average

adjustment was issued, pursuant to which the shipowners were entitled to a general average contribution of about US$4.9 million from the cargo interests, that is from the appellant, who denied liability.

The shipowners commenced an arbitration, in which the tribunal found in favour of the appellant. On appeal to the High Court, Teare J reversed the decision of the arbitral tribunal and found the appellant liable. On appeal by the appellant to the Court of Appeal, the decision of Teare J was upheld, albeit on somewhat different grounds. The appellant further appealed to the Supreme Court.

It was the appellant's contention that the bills of lading incorporated the terms of the charterparty, and that the charterparty, as to the piracy risk, created an insurance fund or code to which the owners agreed exclusively to look for in the event of a loss so the charterers (and through them the appellant) were relieved from the liability to contribute in general average.

The two key issues for the Supreme Court to decide were (i) whether the charterparty created an insurance fund or code in respect of piracy risk such that the charterers were relieved from liability for general average contribution and (ii) if so, whether that was so incorporated into the bills of lading such that the appellant was relieved from their liability to contribute in general average.

First Issue

As to the first issue, the court decided that the Gulf of Aden clause in the charterparty did not create any insurance fund or code. The court recognised that parties to a contract may agree that, in the event of a loss, they would exclusively seek to be compensated by an insurance fund, but considered that only the clearest wording would achieve this result. The court positively referred to *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 HL, in which the House of Lords said "*one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption*". The court pointed out that in all cases where an argument was advanced, in the context of time charters and demise charters, that the agreement by the charterer to pay for the insurance premia in respect of a risk impliedly created an insurance fund or code, the argument was rejected (save in cases where the owners and charterers were joint insureds) with the exception of *The Evia (No. 2)* [1983] 1 AC 736 HL – a time charter case. The court referred to *The Helen Miller* [1980] 2 Lloyd's Rep 95; *The Concordia Fjord* [1984] 1 Lloyd's Rep 385 and *The Chemical Venture* [1993] 1 Lloyd's Rep 508.

The court, although did not overrule *The Evia (No. 2)*, confined it to its very own facts and held that it was not an authority of general application nor an authority to say that an agreement by the charterer to pay insurance premia created such a fund or code.

The court observed that the only type of cases that are treated differently were landlord-tenancy cases, in which an agreement by a landlord to insure in respect of a particular type of risk might, as a matter of construction, relieves the tenant from liability in respect of that loss *(Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211 and *Frasca-Judd v Golovina* [2016] EWHC 497).

The court distinguished the demise charter case of *The Ocean Victory* [2017] UKSC 3, in which it was held that an agreement by the charterer to pay the insurance premia created an insurance fund or code, because both the owners and the demise charterers were joint insureds in that case. The court acknowledged that in joint insurance cases, it is accepted that one joint-insured would not look to another for compensation in respect of losses covered by the insurance (*Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] 1 WLR 1419 HL and *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127).

Accordingly, the court held that the charterers were not exempted from their liability to contribute in general average. This rendered it unnecessary for the court to consider the second issue, that is whether the Gulf of Aden clause was incorporated into the charterparty. However, the court went on to answer the second issue, hypothetically.

Second Issue

The court observed the general principles concerning incorporation of a charterparty into a bill of lading and approved the three-stage test stated in *Scrutton on Charterparties*, 24th ed (2020) at paras 6-016 to 6-018.

At the first stage, it must be asked if the incorporation words are prima facie wide enough to bring about a prima facie incorporation of the relevant terms of charterparty. A general incorporation clause would only incorporate those terms germane (directly relating) to (i) shipment, (ii) carriage, (iii) discharge and (iv) payment of freight. If there is a doubt, the court will lean towards not incorporating the term. Examples of terms that will not be incorporated with a general incorporation clause include the terms as to the approach voyage and hire. Only the incorporation words of the bill of lading (and not the terms of the charterparty) must be considered to decide if it is wide enough to incorporate a term of the charterparty. On the last point, the court agreed with *The Varenna* [1984] QB 599 and *The Federal Bulker* [1989] 1 Lloyd's Rep 103), and disagreed with *The Merak* [1965] P 223 and *The Annefield* [1971] P 168.

At the second stage the relevant terms of the charterparty must be examined to see if they make sense in the context of the bill of lading. Some degree of manipulation is permissible in the case of terms as to (i) shipment, (ii) carriage and (iii) delivery, but not as to other matters in the absence of clear intention (The Miramar [1984] AC 676 HL). When an arbitration clause is specifically incorporated, it will be manipulated to refer to the carrier and the bill of lading holder (The Oinoussin Pride [1991] 1 Lloyd's Rep 126). If the term does not make sense in the context of the bill of lading, it is not incorporated.

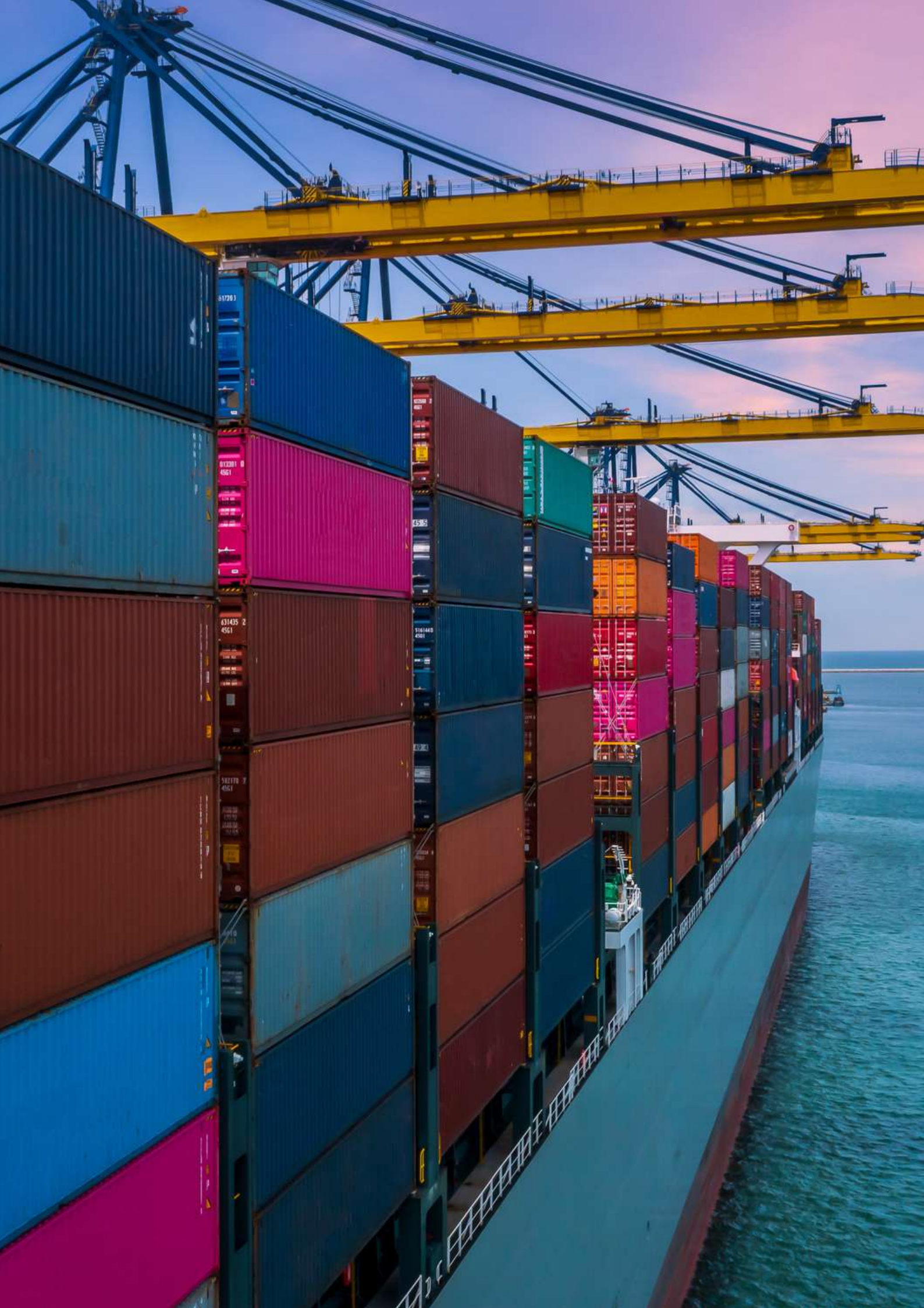
At the third stage, it must be examined to see if the prima facie incorporated term is consistent with the express terms of the bill. If not, the term is not incorporated.

At each stage, the court reaches a provisional conclusion only so the court may revisit a conclusion reached at an earlier stage and finally test the conclusion against business common sense. Ancillary agreements like arbitration and jurisdiction clauses will not be incorporated by a general incorporation clause into the bill of lading, unlike what would be case with other contracts.

Applying the principles to the case, the court held that the war risk and the Gulf of Aden clauses were incorporated in to the bills of lading because they relate directly to the carriage and they make sense in the context of the bills of lading as they tell the circumstances in which the carrier would be obliged (and when they would not be obliged) to transit the Gulf of Aden. More than this, the court did not find it possible to manipulate the terms to put the holder of the bills of lading in the place of the charterer because it would not make sense to make the holder of the bills of lading liable to pay the insurance premia, among other reasons.

Conclusion

Accordingly, the court upheld the liability of the holder of the bills of lading to contribute in general average and dismissed their appeal.



Eurobank SA v Momentum Maritime SA & others [2024] EWHC 210 (Comm)

29 January 2024

Equitable duties of a mortgagee arresting a ship

Eurobank SA v Momentum Maritime SA & others [2024] EWHC 210 (Comm)
29 January 2024

HHJ Pelling KC (sitting as a High Court Judge) held:

- *Arresting a ship is not an act of taking possession of a ship.*
- *A mortgage has no equitable duty to take reasonable care of the ship unless he takes possession of the ship.*
- *A mortgagee has no equitable duty to obtain the true market price for the ship unless he exercises the power of sale.*
- *The only general duty of an arresting party is to act in good faith in arresting the ship to obtain security.*

On costs:

- *Where the contract allows costs on an indemnity basis, costs will be awarded on that basis.*
- *Such costs may be assessed either summarily or by detailed assessment.*
- *On indemnity basis, costs may be claimed in excess of the guideline fee for fee earners and of the usual counsel's fee, but that is subject to reasonableness requirement and the court's usual discretion to reduce the rate and the hours.*

Claimant bank lent monies to three one-ship companies secured by mortgages respectively on the three ships. The companies defaulted payments under the loan agreement. The claimant arrested all three ships in Djibouti when all the ships were already subject to multiple prior arrests by other creditors including the Djibouti Port Authority.

The port authority obtained a first instance order to sell the vessel without the court supervision. The claimant appealed that order and the Djibouti Court of Appeal set aside the order but authorised a court-supervised process of sale. Despite that, the port authority sold the vessels by a private sale and, as per the claimant, the claimant got noting from the sale.

The claimant brought the present proceedings against the three one-ship borrow companies and the three guarantors of the borrowers' obligations for the outstanding monies. The defendants defend the claim by saying that the claimant breached their equitable duty (1) to act reasonably in the realisation of the mortgaged property and/or (2) to obtain the true market price for the mortgaged property.

The judge disagreed with both the defences and identified the two equitable duties, other than the general duty of an arresting party to act in good faith in arresting the ship to obtain security, of a mortgagee, namely:

1. A mortgage comes under a duty to take reasonable care of the mortgaged property only if the mortgage takes possession of the mortgaged property (*Silven Properties v RBS* [2004] 1 WLR 997 per Lightman J at [13]). Arresting a vessel, as did the claimant, is not an act of taking possession (*The Tropical Reefer* [2004] 1 All ER (Comm) 904 per Teare QC J (then sitting as deputy judge of the High Court) at [19]).
2. A mortgage comes under a duty to obtain the true market price at the time of the sale only if the mortgage exercises a power of sale, which the claimant did not (*The Tropical Reefer* [2004] 1 All ER (Comm) 904 per Teare QC (then sitting as deputy judge of the High Court) at [19]).

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The judge emphasised that a mortgagee has an unfettered discretion to exercise a power of sale or not and, if he decides to exercise it, when to sell (*Silven Properties v RBS* [2004] 1 WLR 997 per Lightman J at [13]: "*A mortgagee has no duty at any time to exercise his powers as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value or to realise his security. He is entitled to remain totally passive*").

The defendants argued that the claimant had a duty to attempt to collect the proceeds of sale apparently received by the port authority. The judge refused this argument too.

The defendants further argued that the claimant had a duty to obtain the highest price for the vessels and duty extended to settling all the creditors and to take possession of the vessels and move them to a jurisdiction where a higher price might be obtained. The judge rejected this argument as being plainly unarguable.

The judge accordingly granted the claimant's application for a summary judgment against the defendants.

As to the costs, the judge found that the loan agreement provided for costs on an indemnity basis. He made the following observations as to costs on indemnity basis:

1. It may be either summarily assessed or be awarded upon a detailed assessment.
2. It did not permit extreme or unjustified costs which would operate punitively against a party.
3. But it may permit a rate above the guideline rate for fee earners or what would ordinarily be allowed as the counsel fee.
4. The court retains the usual discretion to reduce the rate or hours claimed.

The judge refused the permission to appeal sought by the defendants.


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