AGAPI TERZI: IS ''CLEAN ON BOARD'', CLEAN ENOUGH?

SHIPOWNERS

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On 28 January 2021, the Court of Appeal issued the anticipated judgement on the *Tai Prize* [2021] EWCA Civ 87, dealing with the representations made in the bills of lading, with respect to the description of cargo.

The *Tai Prize* represents a significant decision, as it provides some answers to practical issues encountered by Masters at load ports when signing bills of lading. Masters may frequently find themselves under commercial pressure to sign the bill of lading "as presented", "CLEAN ON BOARD" and "shipped in apparent good order and condition". Sometimes such pressure exists on the basis that the charterparty requires the Master to sign bills of lading "as presented". However, the judgement in the *Tai Prize* case highlights that it is ultimately the Master who must make the decision, after carrying out their own assessment.

As Lord Justice Males stated "*what matters is what is reasonably apparent to the Master or other servants of the carrier. The bill of lading contains a representation by the Master and says nothing about what may be apparent to anyone else, such as the shipper, who may have other means of examining the cargo"*.

FACTS

Priminds chartered the *Tai Prize* under a voyage charterparty (Northern American Grain 1973 form dated 29 June 2012) for the carriage of a cargo of heavy grains from Brazil to China. Noble were disponent owners pursuant to a time charterparty (New York Produce Exchange form dated 8 September 2011). The head charterparty incorporated the Inter-Club Agreement.

Following completion of loading operations, a bill of lading (Congenbill form 1994) was issued. The bill of lading had been drafted by local shippers and presented to the Master for signature. It incorporated the Hague Rules. The representation "CLEAN ON BOARD" was at the front of the bill of lading which stated that the cargo was "SHIPPED" at the port of loading in apparent good order and condition on board the vessel… weight, measure, quality, quantity, condition, contents and value unknown."

The cargo receivers in China successfully brought a claim for heat, caking and mould damage to the cargo and recovered over US$ 1 million from the owners. Head owners brought a claim against Noble under the Inter-Club Agreement incorporated in the time charterparty, and the latter contributed the amount of US$ 500,000.

ARBITRATION

Noble commenced arbitration against Priminds under the voyage charterparty to recover their contribution of US$ 500,000 to the cargo claim. Noble argued that the shipper, who in their opinion should be considered Priminds' agent under the voyage charterparty, presented a clean bill of lading to the Master and therefore, were liable for the cargo damage. The arbitrator found for Noble on the following basis:

1) The damage was not visible to the Master, by reasonable means, during loading, whereas shippers were in a position to assess the condition of the cargo before loading;

2) shippers were acting as agents of voyage charterers (supplying the cargo and presenting the draft bill of lading to the Master, therefore;

3) shipper's knowledge of the damage would be deemed as knowledge of voyage charterers.

Following the above reasoning, the arbitrator held that, being in a position to ascertain the condition of the cargo (when the Master was not), shippers made an implied warranty that the statements in the draft bill of lading were true. The Charterers were thus in breach of this warranty as shippers were their agents and Noble was entitled to recover.

COMMERCIAL COURT

Priminds appealed to the Commercial Court where the Arbitration decision was overturned. The judge held that:

1) By presenting the draft bill of lading, shippers were merely inviting the Master to accept or reject the representations of facts, according to his own assessment of the condition of the cargo;
2) the bill of lading was not inaccurate as a matter of law;
3) there was no obligation (upon the shippers and therefore voyage charterers) to indemnify the owners.

The decision highlights the view that only the Master has the responsibility for assessing the apparent order and condition of the cargo shipped on board his vessel. Where he is not able to ascertain the cargo condition by reasonable means, the representation "in apparent good order and condition" is not inaccurate but the Master should refrain from accepting such qualification.

The Commercial Court gave permission to appeal to the Court of Appeal.

COURT OF APPEAL

The Court of Appeal upheld the Commercial Court's decision. The Court of Appeal recognised that both parties' submissions were made with "considerable skills" but concluded that:

- The references "CLEAN ON BOARD" and "shipped in apparent good order and condition" in the draft bill of lading should not be construed as a warranty by shippers and by subsequent charterers, of the condition of the cargo prior to loading. The statements are only an invitation to the Master to make a representation of fact in accordance with his own assessment of the apparent condition of the cargo upon shipment.

- The Court of Appeal held that statements in relation to the apparent condition of the cargo would only refer to the external condition of the cargo, as would be apparent after reasonable examination, and that reasonable examination would be dependent on the circumstances during loading operations. Therefore, the Master's responsibility is to assess the cargo via reasonable means, and he should not be required to disrupt normal loading procedures (if they are taking place at night, from silos etc.)

- On the basis that a statement on the apparent order and condition of the cargo refers only to the external condition, upon reasonable examination by the Master under the circumstances during loading, then the bill of lading as issued on behalf of the Master in the *Tai Prize* was accurate. Therefore, the arbitrator's argument that shippers were in the position to discover the condition of the cargo before loading, by reasonable means, is of no relevance. The Court of Appeal's decision highlighted that the question is whether the cargo was in good order and condition in the Master's eye.

- There was no implication of a warranty and therefore, an indemnity in the circumstances as the tender of a draft bill of lading is only a request by the shipper to the Master. In commercial reality, the shipper may wish the Master to sign the bill as presented to him, but in no event does such a request give rise to the implication of a warranty.

- The Court of Appeal leaves unanswered the question of whether their decision would have been any different, if it was in fact proven that the shippers were aware of the damaged condition of the cargo, showing some sympathy for the Owners' argument that it is unfair for a charterer to escape liability on that case. However, had the Court of Appeal provided an answer it may have given way for further

misrepresentations by shippers or charterers where they reasonably ascertained the cargo condition, when the Master could not.

If the Master finds themselves in such situation and they are concerned about the condition of the cargo at loading, they are encouraged to obtain assistance from their P&I Club or local P&I correspondent.