



Bills of Lading and the *Tai Prize*

Challenges and impacts

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General factual background

- Voyage c/p for a carriage of a cargo of soya beans from Brazil to PRC.
- The soya beans were loaded from a silo(s) via mechanical hoppers at the Terminal of the load port in Santos.
- Shippers drafted a b/l, with printed text stating 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.”
- Typed words “clean on board” were located in the box headed *“Shipper’s description”*.
- The master executed the b/l without reservation as required by Clause 6.
- The cargo was, however, damaged prior to loading.
- The damage was discovered at the discharge port on outturn and receivers brought a claim against Head Owners in China resulting in claims down the chain.



Specific findings by the Tribunal informing legal arguments on appeal and the Tribunal's decision

- The cargo was not in actual (cf apparent) good order and condition on loading.
- The damage to the cargo which occurred prior to loading was either reasonably observable or ought to have been reasonably observable by the shipper prior to loading. As a consequence, the shipper was deemed to have known of the actual apparent condition of the cargo upon shipment.
- The damage was not reasonably observable by the Master, crew, or any agent of Owners at and during loading.
- Shippers were charterers' agent for the purpose of drafting the b/l.



Decisions of the High Court and Court of Appeal

- High Court [2020] 2 Lloyd's Rep 333, HHJ Pelling QC
- Court of Appeal [2021] 2 Lloyd's Rep 36, Bean LJ, Males LJ, Rose LJ



The Court of Appeal held:

- (1) The words “apparent good order and condition” in the draft bill of lading were only an invitation to the master to make his own reasonable assessment of the cargo, and did not amount to a representation by the shippers of these matters (*The David Agmashenebeli* [2002] EWHC 104). See paras 43-44; 58-59; 66-67; & 69.
- (2) There was no necessity to imply an indemnity in the circumstances, applying *The Nogar Marin* [1988] 1 Lloyd’s Rep 412. See paras 60; 62; & 65.
- (3) As properly construed, the description in the draft bill of lading was not inaccurate (*The Peter der Gross* (1875) 1 PD 414; *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416). See paras 36-42; 48-52; & 54.
- (4) The question of what the result would have been had charterers/shippers actually known of the defective condition of the cargo was left open. The issue did not arise on the arbitrator’s findings, in which shippers were held only to have imputed (or constructive) knowledge. See paras 14; 57; & 76.



Application to Supreme Court

- Application made on 25.2.21
- Grounds:
 - the words “CLEAN ON BOARD” and / or “SHIPPED in apparent good order and condition” in the draft bill of lading are capable of amounting to a representation or warranty by the shippers and / or Charterers that they knew of no reason why the Master could not sign the bill in the terms presented
 - Constructive or imputed knowledge of defect is sufficient
 - Should be no difference in principle between implied indemnities in TC/VC
 - *Nogar Marin* rightly decided but should be analysed as a case turning on causation
- Permission to appeal refused 04.04.22 as “*application does not raise an arguable point of law*”



Problem (1) **draft** BoL

- Comm Ct and CofA focused on meaning of *COB* etc in issued BoL
- But Tai Prize is a claim on c/p where charterers permitted shippers to draft Bill
- In asking Master to issue BoL shippers/charterers represented they knew of no reason why those statements were inaccurate.
- If Master had been informed that the shippers did not think that the cargo was in good (apparent) order and condition the Master would not have certified the cargo as being in apparent good order and condition regardless of what his own inspection might have revealed.

Problem (2): constructive/imputed knowledge

- *The David Agmashenebeli* [2003] 1 Lloyd's Rep 92, 103 RHC:

“...it is relevant to take account of the fact that it is the shipper or his agent who is delivering the goods and that accordingly any such statement [in the bill] would be as to facts of which he must already have actual or imputed knowledge. Further, because the shipper already has that knowledge he cannot be said to rely on the accuracy of the statement.”

Problem (3): *Nogar Marin* [1988] 1 Lloyd's Rep 412

- Court of Appeal held in *NM* that an indemnity against the consequences of misdescriptions as to the order and condition of cargo by shippers / charterers will be unnecessary where the Master has an opportunity to check the cargo (paragraphs 64-65)
- Bring in line with *The Island Archon* [1994] 2 Lloyd's Rep 227:
 - owner is entitled to an indemnity from charterers against consequences of complying with an order as to the employment of the ship save that:
 - the loss, damage or liability must not result from a risk or cost which owners have expressly or impliedly agreed to bear;
 - the loss, damage or liability must be effectively caused by the charterers' order

Problem (4): *Nogar Marin* [1988] 1 Lloyd's Rep 412

- NM should be regarded as a case turning on causation: the claim failed because the Master had the opportunity to establish the true condition of the goods
- This would bring VC and TC into line, and difference is governed by concept of acceptance of risk:

“This does not mean that a rigid distinction between time and voyage charters must always be made. If the question is whether the shipowner has accepted the risk to which in the event the vessel has been exposed, there could be voyage charters giving the charterer a wide range of options to choose a cargo or port where it would be "reasonable" for the shipowner to expect the indemnity to apply, and conversely, time charters with a narrow range e.g. charters for the period of a specified voyage or "trip", where it would not.”

The Island Archon [1994] 2 Lloyd's Rep 227, 236 per Evans LJ

Problems with Court of Appeal decision

- Does a representation ever arise when tendering draft BoL? Unclear.
- Charterers/shippers may be encouraged to misdescribe the condition of the cargo in draft bills because the consequences of that misdescription will fall on owners
- Actual knowledge is unrealistic where as here relevant individuals are entirely beyond reach of parties in charterparty chain
- Achieves clarity at expense of justice

Unfair to owners/masters?

- Widespread problem of claims for defective cargoes at disports
- Necessity of a clean Bill for financing
- Delays arising out of disputes about quality/quantity at loadport are themselves problematic
- Master: liable for failing to clause Bill; liable for wrongly wishing to clause Bill
- Many cargoes difficult for Master meaningfully to inspect
- Different legal systems reach different decisions
- Owner (insurers) ending up wrongly bearing liabilities for defective goods

Solutions?

- Better pre-loading tests
- Better records of loading
- Express terms in charterparties:
 - Liability for defects not reasonably visible on loading
 - Indemnity against liabilities imposed on owners not in accordance with HV rules
 - Beef up cl.9 of the Inter Club Agreement (security for cargo claims)

Thank you!

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