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Date: April 25, 2023

日期: 2023.4.25

Re: Soybeans Shortage Claim & Identification of Carrier

Key Words: Soybeans Shortage, who is the carrier, draft survey, Customs' certificate of weight

Our Tianjin Office recently handled a cargo shortage claim lodged by a cargo insurer against a shipowner, which involved the identity of carriers and the perspective of Tianjin courts on the discrepancy between the cargo weight as per the Customs' shore scales and the figures from draft surveys. Ultimately, both Tianjin Maritime Court and the Tianjin High Court ruled in favor of the shipowner. As this case offers insight on the aforementioned issues, we are pleased to provide an overview of the key points in the Tianjin High Court's judgment for your reference.

Facts

The case involving the MV SD pertained to the transportation of soybeans from Rosario and Necochea in Argentina to Chinese ports on the bulk carrier SD. The vessel was under a demise charter to S Company and was sub-time chartered to E Company. Clean bills of lading were issued by ISA Company, acting as an agent for and on behalf of the Master of MV SD.

Upon arrival, the holder of the bills of lading (the cargo receiver) contended that the weight of the discharged cargo did not correspond to that indicated on the bills of lading, alleging a shortage of 472.17 metric tons according to the Customs' shore scale. In contrast, based on CCIC's draft surveys appointed by S company, the shortage amounted to only 144.8 metric tons, falling within the 0.5% allowance provided for in the bills of lading.

The cargo insurer instituted legal proceedings against S Company in the Tianjin Maritime Court for breach of the carriage contract embodied or evidenced by the bills of lading, having acquired the right of subrogation through indemnifying the cargo receiver. Both Tianjin Maritime Court and Tianjin High Court unanimously ruled that S Company should not be held liable for the purported cargo shortage. For ease of reference, S Company and E Company will be referred to as "shipowner" and "charterer" respectively.

Issues:

Two specific issues were presented before Tianjin High Court by the cargo insurer:

1. Was the shipowner or the time charterer the contracting carrier?
2. Did the cargo shortage occur during the shipowner's period of responsibility?

The Court's judgement:

1. Identity of the Carrier

The determination of the contractual carrier can be significantly complicated due to intricate chartering arrangements. In the present case, Tianjin High Court offers guidance on identifying the appropriate carrier. The Court concluded that the charterer was the contractual carrier for the following reasons:

- 1) The identity of the carrier should be ascertained based on the content of the bills of lading, the party issuing the bills of lading, and the operational condition of the vessel, among other factors.
- 2) The bills were issued using the CONGENBILL 2007 form, which did not specify a particular carrier on the bills of lading. The Signature Box indicated that the agent, ISA Company, affixed its company stamp and signature under option "(ii) as agent for and on behalf of the Master," rather than option "(iii) as agent for the Owner". It is reasonable to infer that this action demonstrated the agent's reluctance to sign the bills of lading on behalf of the shipowner.
- 3) The charterer authorized the agent, ISA Company, to issue the bills of lading. The Time Charter Party utilized the NYPE 1946 form with necessary amendments. Clause 8 stipulates that "the Captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with the ship's crew, *equipment*, and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, ~~and spout~~ trim *and discharge* the cargo at their expense under the supervision of the Captain, who is to sign *or is to authorize Charterers or their agent to sign* Bills of Lading for cargo as presented, in *strict* conformity with Mate's ~~or Tally Clerk's~~ receipts."

Clause 8 indicates that the charterer is responsible for cargo booking, employment, and agency. The Master is obligated to follow the charterer's instructions and orders on employment and agency. The right of the master and agents to issue bills of lading originated from the charterer, not the shipowner. Consequently, Tianjin High Court held that the bills of lading contained a contract of carriage established with the charterer as the carrier. The shipowner should be considered as the actual carrier.

2. Whether cargo shortage incurred within the shipowner's responsibility period?

Having failed in their bid to sue the shipowner in contract, the cargo insurer argued in the alternative that the shipowner was liable as the actual carrier because cargoes weight reduced during the actual carrier's responsibility period according to Article 61 of the Chinese Maritime Code. This question involved a familiar conundrum of whether weight of cargoes discharged from the vessel should be decided as per shore scale results or ship's draft survey figures.

Tianjin High Court held that, in this case, the weight assessed via draft surveys was more accurate and objective than the number of shore scales with followings reasons:

- 1) Chinese Maritime Code in Article 46 provides that "... the responsibilities of the carrier with respect to non-containerization goods covers the period during which the carrier is in charge of the goods, starting from the time of loading of the goods on the ship until the time of goods are discharged therefrom. During the period the carrier is in charge of the goods, the carrier shall be liable for the loss of or damage to the goods...". In the case involved, judges found that shore scales by the Customs was conducted after the cargoes passing the ship's rail. Therefore, the Customs' Weight Certificate was not able to reflect the amount of cargoes discharged within the shipowner's responsibility period.

2) The draft surveys were conducted by CCIC within the shipowner's responsibility period and were confirmed by the Chief Officer. Figures of draft surveys can prove the actual amount of cargoes discharged more accurately and objectively than the the Customs' Weight Certificate. As the shortage was 144.8 mt within 0.5% allowance of the bills of lading quantity according to draft survey reports, the shipowner should not be liable for the alleged shortage claims raised by the cargo insurer.

Our comments:

Since 1 November 2019, China Customs has stopped weighing imported bulk cargo and issuing Weight Certificate ex officio, unless laws require otherwise. Assessment of weight would be conducted via relevant parties' application. In this regard, it becomes arguable if the Weight Certificate issued accordingly could be considered as a governmental document with natural power overriding independent surveyor's report. Furthermore, the Supreme People's Court has expressed its perspectives in recent judgments and publications that when ascertaining weight of bulk cargo discharged from the vessel, it is crucial to consider which weighing method could effectively reflect the cargo amount unloaded from the vessel within carriers' responsibility period. The variation on the Customs' functions and the views of the Supreme People's Court give courts more space to figure out which method is more reliable when ascertaining the shipowners' liability impartially.

Hope you may find the information above helpful.

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