

Dangerous cargo (1)

Neil Henderson takes a look at recent dangerous cargo cases

Compania Sud Americana de Vapores SA v Sinochem Tianjin Import and Export Company [2009] EWHC 1880 (Comm)
Bunge SA v ADM DO Brasil LTDA [2009] EWHC 845 (Comm)

Summary

Two cases decided by the Commercial Court this year have illustrated the issue of physically and legally dangerous cargoes. The physically dangerous cargo case involved an explosion and widespread damage to a container vessel, resulting from the self-heating of calcium hypochlorite. The case in respect of the allegedly legally dangerous cargo involved a cargo of soya bean meal found to contain rats.

Whether or not a cargo is physically dangerous is a question of fact for the relevant tribunal. A potentially dangerous situation will not make the vessel unseaworthy at the commencement of the voyage unless that situation is bound to arise. If the situation arises by the negligence of the crew, then the charterer will be entitled to rely upon the defence afforded by art IV r 2(a) of the Hague Rules as against the cargo interests if the negligence is in relation to the management of the ship rather than in respect of the care of the cargo.

In relation to legally dangerous cargoes, the Hague Rules' concept of dangerousness does not encompass cargoes that are not physically dangerous but might cause delay. The common law principle is not as widely drawn as is often thought: there is a requirement that there must be a legal obstacle in place which causes the delay (ie violation of or non-compliance with some municipal law or regulation). The common law principle does not apply where there is simply a risk of rejection of the cargo which results in cost and delay.

Physically dangerous cargoes

In the early morning on 30 December 1998, an explosion took place in the no. 3 hold of the MV ACONCAGUA while she was off the coast of Ecuador. The cause of the explosion was the self-ignition of 334 kegs of calcium hypochlorite stowed in a container. The owners of the vessel claimed against the

charterers, and reached a settlement of US\$27,750,000. The charterers claimed damages under art IV r 6 of the Hague Rules against the shippers under the bill of lading, alleging that the consignment of calcium hypochlorite was "rogue" in that it had an abnormally high thermal instability, being prone to self-heat at ordinary carriage temperatures.

The legal test of dangerousness

The Hague Rules provide as follows: "6. 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...."

The scope of the word "dangerous" here does not only require that the goods cause or become capable of causing direct physical damage to persons, the ship or even to other cargo. It also applies to cargo liable to give rise to physical loss of other cargo on the same vessel by creating a situation in which, for example, it might be required by public authorities that all the cargo be dumped at sea. At common law the shipper undertakes not to ship goods liable to cause damage to the vessel or other cargo shipped thereon without giving notice to the shipowner of the character of the goods: *Brass v Maitland* (1856) 6 El & Bl 470.

The charterers admitted that they had been negligent in the placement of the container containing the calcium hypochlorite. It was stowed in a position where it was surrounded on three sides by no. 3 bunker tank which was subject to heating. This was contrary to the relevant IMDG Code which required the cargo to be stowed "away from" sources of heat.

The shippers contended that the heated bunker tank was either "the" or "a" cause of the explosion. They alleged that the bad stowage of the cargo amounted to unseaworthiness and that the charterers had failed to exercise due diligence to make the vessel seaworthy.



The charterers denied that the placement of the container next to the bunker tanks had any causative significance since the ambient carriage temperature meant that the cargo would have exploded in any event. They further contended that the vessel was not unseaworthy upon loading of the cargo since it was only a subsequent negligent decision of the chief officer to heat the adjacent bunker tank that caused the explosion, relying upon the defence afforded by art IV r 2 (a).

Was the vessel unseaworthy?

A carrier is "bound before and at the beginning of the voyage to exercise due diligence to make the vessel seaworthy". Bad stowage which endangers the safety of the ship and cannot readily be cured on the voyage is unseaworthiness: *Ingram & Royle Ltd v Services Maritimes du Treport* [1913] 1 KB 538. However, a vessel is not necessarily unseaworthy because, at the commencement of the voyage, there is something which may need a correction. So long as the need for this correction is evident, and can readily be made, then the vessel will not be unseaworthy: *Steel v The State Line Steamship Company* [1877] 3 AC 72.

The court held that the vessel could only be said to be unseaworthy if: (i) the heating of no. 3 tank was bound to occur because the fuel in it had to be used on the voyage to San Antonio; or (ii) if such heating was pre-programmed to occur; or (iii) if alternatively the crew were incompetent. There was no allegation of incompetence against the vessel's crew.

"Act, neglect, or default"?

The charterers were bound under art III r 2 "properly and carefully to keep, care for and carry" the cargo. The court held that heating the no. 3 bunker tanks when the container was stowed on top was a failure properly to care for and carry that cargo.

However, the court held that the heating of the cargo was, an "act, neglect or default in the ... management of the ship". The risk resulting from this act was

an excepted peril and the charterers were under no liability in respect of that act. The relevant principle of law was that found in *Gosse Millard v Canadian Government Merchant Marine* [1929] AC 223, namely whether the act or default which caused loss or damage was done (or left undone) as part of the care of the cargo or as part of the running of the ship, not specifically related to the cargo. The court held that improper bunker heating was something done as part of the running of the ship and analogous to errors in ballast management, which fell within the art IV, r 2(a) exception for "management of the ship": see *The Glenochil* [1896] p 10 and *The Rodney* [1900] p 112.

On a purely *obiter* basis, Clarke J then referred to the *obiter* comments of Diamond J in *The Fiona* [1994] 2 Lloyd's Rep 506. He similarly recognised the principle that the indemnity under art IV, r 6 could only be relied upon if the secondary cause of the damage was an excepted peril (ie an act or omission for which the charterers would be excused). Article IV, r 6 could not be relied on where the casualty or damage was caused by a combination of a dangerous cargo and a non-accepted peril such as a want of due diligence to make the ship seaworthy "or negligence in the loading, handling or carriage of the cargo".

Legally dangerous cargoes

In *Bunge SA v ADM DO Brasil LTDA*, the Commercial Court was asked to reconsider the decision of a tribunal in relation to a series of arbitrations brought by the disponent owners of the vessel M/V DARYA RADHE against nine Brazilian shippers under various bills of lading. The cargo shipped on board was soya bean meal and it was alleged by the disponent owners that the cargo had contained a number of rats and that this had resulted in delays at the discharge port.

The basis of the claim was that because

of the presence of the rats, the cargoes were legally dangerous at common law, alternatively pursuant to art IV r 6 of the Hague Rules. The shippers denied this on the bases that: (i) the rats came on board the vessels other than in the cargoes; and (ii) that even if the rats had been so loaded this did not make them dangerous.

The defence resulted in submissions on such topics as the terminal velocity of a rat, the native wit of rats, the importance which rats attach to hiding and their likely willingness to accept the challenge of circumventing rat guards in order to gain access to foodstuff. The arbitrators found that at least 14, but no more than 20 rats, had been loaded on board the vessel with the cargo, but that this did not make the cargo dangerous.

On appeal, in relation to the question of dangerousness under the Hague Rules, the Commercial Court applied the principle recognised by the House of Lords in *The Giannis NK* [1998] AC 605. This limited the scope of danger to the ability to cause physical harm to the cargo or the vessel. Referring to *Scrutton on Charterparties and Bills of Lading* (21st ed), page 409, the Commercial Court held that goods that might only cause delay (rather than the risk of physical damage) were not dangerous within the meaning of art IV, r 6.

The owners sought to rely on the common law principle that a shipper undertakes not to ship goods which are liable to cause delay to the vessel. As Tomlinson J explained, this second principle has been treated by authors and editors of books on carriage by sea as part of the law concerning dangerous goods and both principles would seem to have had a common origin in a proposition set out in the fifth edition of *Abbott on Shipping* (1825) at p. 270: "The general duties of the merchant ... are comprised in a very narrow compass. The hirer of anything must use it in a lawful manner

and according to the principle for which it is let. The merchant must lade no prohibited or uncustomed goods by which the ship may be subjected to detention or forfeiture."

Referring to the approach taken in *Mitchell Cotts & Co v Steel Bros. & Co*, [1916] 2 KB 610, Tomlinson J recognised the principle that legal dangerousness was limited to the situation where delay or cost at a discharge port was caused by a local legal obstacle. The court refused to extend the principle to situations in which there was a general risk of delay. Since there was no finding by the tribunal of any legal obstacle applying to the discharge port, the Commercial Court held that the tribunal was correct in finding that the owners were not entitled to an indemnity from shippers.

Comment

When considered from a purely commercial perspective, the decision in *Bunge v ADM* is consistent with good sense. The proposition relied upon by owners, namely that they ought to be indemnified for any delay at the loadport resulting from a cargo being loaded, would have led to an unwelcome extension of the common law principle. Put at its most basic, it would have had the effect of making shippers or charterers of almost every cargo loaded liable for any delays arising in relation to that cargo.

The decision in *CSAV v Sinochem* makes clear how fine the distinction may be between the carrier's duty under art III r 2 to carry and care for the cargo and the exclusion from liability afforded to the carrier under art IV r 2. The extent of any duty or obligation of the carrier under art III r 2 is cut across by all aspects of the management of the vessel, even where those may directly impact on, or imperil the cargo.

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