CLIENT BRIEFING

SEAWORTHINESS AND THE CARRIAGE OF STEEL FEDERAL COURT OF AUSTRALIA AFFIRMS AN INCREASED BURDEN ON STEEL CARRIERS

Introduction

In September 2006 we advised that the Federal Court of Australia in the matter of Stemcor (A/sia) Pty Ltd ("cargo interests") and CV Sheepvaartonderneming Ankergracht ("Carrier"), concerning the carriage of steel coils from Japan to Australia, held that the Carrier was liable for corrosion damage to the cargo caused by condensation within the cargo holds.

In holding the Carrier liable, the Court found that, as it was practicable to install dehumidifiers in the vessels, the Carrier had failed to exercise due diligence to make the ships seaworthy and to make the holds fit and safe for the carriage and preservation of the coils.

This decision was appealed by the Carrier in C V Sheepvaartonderneming Ankergracht and Stemcor (A/sia) Pty Limited. On appeal, the Full Court of the Federal Court upheld the decision at first instance with the majority judges finding that, whilst they took a different view to the primary judge as to seaworthiness, cargo interests nonetheless established a cause of action against the Carrier pursuant to Article 3 Rule 2 of the Australian *Carriage of Goods by Sea Act 1991* ("COGSA"), being a statutory modification of the Hague-Visby Rules. That is, the Carrier failed to properly and carefully load, handle, stow carry, keep, care for, and discharge the steel coils.

Seaworthiness and Due Diligence

Article 3 Rule 1 requires that the Carrier exercise due diligence to:

1. Make its vessel seaworthy;

2. Properly man, equip and supply the vessel; and

3. Make the "cargo spaces" fit and safe for the reception, carriage and preservation of "goods".

In the eyes of the Court, the essential question was whether each vessel was fit to carry its cargo to its destination? There was no suggestion that either vessel operated by the Carrier was unfit to arrive safely at its destination. The alleged unfitness concerned the absence of dehumidifiers in the cargo holds, leading to an inability to

avoid condensation forming on the steel coils and, as a consequence, corrosion of the coils.

The Court reasoned that if the conditions that the vessel may encounter would have been likely to have led to condensation forming on the steel coils then, given the susceptibility of the coils, the Carrier was obliged to supply a ship, crew and equipment capable of dealing with that risk. This in turn involved answering two questions. First, whether such conditions might have arisen; and second, whether the Carrier was capable of dealing with the problem?

The Court considered that the chance that moisture might enter the hold during loading, by itself, could hardly make the vessel unseaworthy. The Court also found it relevant to consider whether further moisture might have entered the hold during the voyage and likely climatic changes and held that it was possible and probable that additional water did, in fact, enter the holds during the relevant voyages.

However, as the Carrier had a mechanism for removing water from the holds, namely by wiping and mopping, and the absence of any evidence of any practice of installing and using dehumidifiers, the Court reasoned that there was insufficient evidence to justify a finding of unseaworthiness pursuant to Article 3 Rule 1 as cargo interests had failed to establish that the Carrier was not equipped to deal with the peril which might be encountered during the voyage.

Properly and Carefully Handle the Steel Coils

Article 3 Rule 2 requires a Carrier to properly and carefully load, handle, stow, carry, keep, care for and discharge their respective cargoes. In examination of the system of properly handling and caring for the steel coils the Court considered that the word "properly" added to the requirement of care in that the Carrier's function be performed in accordance with a sound system.

As the Court found that the relevant causal event was condensation, and not the mere presence of water in the holds, Article 3 Rule 2 required that the Carrier act in accordance with a sound system to prevent condensation, given it was well known that steel cargoes were susceptible to damage as a result of condensation.

On all occasions but one the Carrier ventilated the cargo space when the air dew point temperature outside the hold was lower than inside the hold in an attempt to avoid the admission of moist and/or warm air which may tend to cause condensation. According to the Court, this system might suggest that the Carrier adopted a proper ventilation system and so were not in breach of their duty under Article 3 Rule 2.

The Court, however, reasoned that as it was not possible to accurately determine the relative moisture content of the ambient air, by ventilating the cargo spaces this resulted in the ingress of air containing water vapour rather than the extraction of water vapour. The Court then determined that the Carrier should not have ventilated the cargo holds as the ventilation was capable of causing condensation on the steel coils.

In the eyes of the Court it followed that the Carrier therefore did not have a proper system for handling and caring for the steel coils, and that the corrosion was caused by the Carrier's breach of Article 3 Rule 2.

Carrier's Defences – Article 4 Rule 2

(a) **Article 4 Rule 2 (m)**

As some of the steel coils had been loaded whilst wet, the Carrier sought to rely on the defence of inherent defect, quality or vice of the goods. However, as the primary judge found that the coils had not been damaged by water, as opposed to water vapour, the Carrier had failed to establish this ground of exemption.

(b) **Article 4 Rule 2(o) - Insufficiency of Packing**

In submissions on appeal the Carrier asserted that the steel coils should have been wrapped so as to provide a waterproof vapour barrier. However, as it was accepted that the corrosion had been caused by condensation and not by liquid water in the cargo holds, this assertion was later abandoned. The Carrier also failed to show that there was any such wrapping which would have prevented the ingress of water vapour on the steel coils. As a consequence, the Court found that there was no basis for attributing the corrosion to insufficient packing.

(c) **Article 4 Rule 2 (q)**

The Carrier also sought to establish that they were not responsible for the corrosion damage because it arose or resulted without any actual fault or privity of the carrier within the meaning of Article 4 Rule 2(q).

However, as the Court found that the Carrier had breached Article 3 Rule 2, the Carrier could not sensibly rely on the defence available in Article 4 Rule 2(q).

Conclusion

As the Court had previously recognised that cargo interests were responsible for selection of the Carrier to carry the steel coils, and were also familiar with the nature of the holds, including the absence of fixed or portable dehumidifiers, the decision by the Court not to overturn the Carrier's liability for the steel coil corrosion is now considered to represent an extension of the degree of due diligence a carrier must exercise when considering the cargoworthiness of its vessels for the carriage of particular cargoes.

We therefore repeat our earlier comments that carriers, in order to protect their interests where carriage is performed subject to COGSA legislation, should:

(i) make specific inquiries with a shipper as to the nature of the packaging of steel cargo;

(ii) make specific inquiries with the shipper as to the precise carriage requirements of the steel cargo; and

(iii) if not fitted, install equipment necessary to accommodate the specific carriage requirements of steel cargo, such as dehumidifiers, even in the absence of specific requests by shippers.

At the time of writing it is not known if the decision of the Federal Court will be subject to an appeal to the High Court of Australia. It follows that, in the absence of any further appeal, carriers who do not take proper measures to carefully load, handle, stow, carry, keep, care for, and discharge the goods received by them will more likely to be found liable by an Australian court for damage to their goods whilst in the care of the carrier.

Should the Carrier appeal this decision we shall provide a further HFW update on this matter.

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JUNE, 2007

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