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Winnetka Trading Corporation v Julius Baer International Ltd [2008] EWHC 3146 (Ch), **referred to**: [2010] 1 Lloyd's Rep 265
Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70, **considered**: [2010] 1 Lloyd's Rep 631
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LLOYD'S LAW REPORTS

Editors: Michael Daiches, Barrister, and Professor Robert Merkin

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

4, 11–12, 16–19, 23–24, 31 March, 1 April; 24 July 2009

COMPANIA SUD AMERICANA DE VAPORES SA
v
SINOCHEM TIANJIN IMPORT AND EXPORT CORPORATION
(THE "ACONCAGUA")

[2009] EWHC 1880 (Comm)

Before Mr Justice CHRISTOPHER CLARKE

Carriage by sea — Dangerous cargo — Explosion of cargo of calcium hypochlorite in container — Cargo stowed near bunker tank — Crew heating bunker tank during voyage — Charterers settling claim brought by shipowners — Whether charterers entitled to indemnity from shippers — Whether charterers ought to have known that cargo was dangerous — Whether heating of bunker tank causative of explosion — Meaning of requirement to stow dangerous cargo "away from" source of heat — Whether charterers in breach of seaworthiness obligation — Whether loss arose from excepted peril — Hague Rules article IV, rule 6 and article IV, rule 2(a).

On 28 November 1998 a cargo of 334 kegs of calcium hypochlorite stowed in a container was loaded on board the vessel *Aconcagua* at Busan, South Korea, for carriage to San Antonio, Chile. The bill of lading acknowledged the shipment of one container said to contain "Calcium Hypochlorite 65 per cent" and also stated: "IMO: 5.1. UN: 1748 PG: 5137". The reference was to para 5.1 of the UN International Maritime Dangerous Goods (IMDG) Code. One of the proper shipping names prescribed by the code was "Calcium Hypochlorite Dry", which had UN No 1748, which was at page 5137. The bill of lading incorporated the Hague Rules.

The container was stowed in No 3 hold in a position where it was surrounded on all three sides by a bunker tank. The vessel subsequently carried out cargo operations at Keelung, Hong Kong and Los Angeles. On 30 December 1998, while in the course of the voyage from Los Angeles to San Antonio, the calcium hypochlorite self-ignited and exploded. The bunker tank in No 3 hold had been heated during the voyage in order to allow a transfer of bunkers for fuel oil.

At the time of the incident the vessel was on time charter to the claimants (the charterers). The shipowners brought a claim against the charterers which was subsequently compromised by the payment of US$27,750,000.

The charterers claimed an indemnity from the shippers under article IV, rule 6 of the Hague Rules. The charterers submitted that the calcium hypochlorite had, unknown to them, an abnormally high thermal instability, being prone to self-heat at ordinary carriage temperatures. They admitted that the stowage of the container next to the bunker tank was negligent, and that the IMDG Code required the cargo to be stowed "away from" sources of heat. However, the charterers denied that the heating of the bunker tank was causative of the explosion. In any event, the vessel was not unseaworthy, and the negligent decision of the chief officer to heat a bunker tank adjacent to a cargo of calcium hypochlorite was "an act, neglect or default in the management of the vessel" for which the charterers were not responsible by virtue of article IV, rule 2(a) of the Hague Rules.

The shippers contended that the calcium hypochlorite was not abnormal or, at least, had not been shown to be so; that the heating of the bunker tank was a cause of the explosion; and that the bad stowage of the container and its contents amounted to unseaworthiness.

———*Held* by QBD (Comm Ct) (CHRISTOPHER CLARKE J) that the charterers were entitled to an indemnity:

(1) In seeking to determine the nature and character of goods declared as UN 1748 as ought to have been known to the charterers in 1998 it was necessary to take into account: (a) the hazard history of UN 1748; (b) the significance of the description of UN 1748 in the IMDG Code; and (c) any other information of which a prudent carrier ought to have been aware. A prudent carrier was not required to have the knowledge of an expert chemist or to resort to investigation inconsistent with the usual course of business. He was likely to have

less knowledge about a product than a specialist manufacturer or distributor, although the owners of vessels specially constructed for the purpose of carrying particular cargoes, eg LPG, might have particular specialist knowledge (*see* paras 60 to 62)

(2) The normal characteristics of UN 1748 of which a prudent carrier should have been aware in 1998 were that the material was safe for carriage in containers on or under deck; but that it had a tendency to decompose if the temperature was as low as 60°C, in which case it might explode; and that it should be kept away from sources of heat. The charterers did not know, nor should they have known, that UN 1748 could explode at critical ambient temperatures of 40°C or below (*see* para 322).

(3) The heating of the relevant bunker tank would have produced temperatures in Hold No 3 in the high 30s. Normal UN 1748 should not have exploded if subjected to such temperatures, which implied that the material actually shipped was rogue material in that it had characteristics markedly different from those of calcium hypochlorite correctly described as UN 1748. The material shipped on *Aconcagua* had an abnormally low critical ambient temperature — somewhere in or around the mid to high 20s, or early 30s, far less than that which a prudent carrier would expect from UN 1748. The evidence as a whole established that the calcium hypochlorite shipped on *Aconcagua* was a cargo of a dangerous nature of which the charterers neither had, nor ought to have had knowledge, and the charterers had not knowingly consented to the shipment of calcium hypochlorite of such a nature (*see* paras 323, 324 and 326)

(4) The heating of the bunker tank was not a cause of the explosion. The temperature in Hold No 3, even without heating of the bunker tank, would have been in excess of 30°C. The effect of heating the bunker tank would have meant that the temperature reached the high 30s. The difference between the temperatures which the container would have experienced without heat being applied to the bunker tank and the temperature which it did in fact experience was unlikely to have been sufficient to make the difference between safety and explosion (*see* para 339).

(5) Even if the heating of the bunker tank had been causative, the charterers would still have been entitled to an indemnity:

(a) If the charterers had acted competently in the stowage of the container they would have been required by the IMDG Code to stow the calcium hypochlorite "away from" sources of heat. That requirement would be complied with if there was at least one container space between the container and the source of heat. On the evidence, had the charterers acted competently, they would have stowed the container in the same hold, but higher up, in which event the calcium hypochlorite would still have exploded (*see* paras 350, 351 and 358).

(b) The heating of the bunker tank did not constitute or result from unseaworthiness. The vessel could not be treated as unseaworthy at the commencement of the voyage unless the heating of the bunker tank was bound to occur which, on the facts of the present case, it was not. Whether or not that particular bunker tank was used would depend on an operational decision made during the voyage. The operative fault lay not in the stowage of the container in the position it was stowed, but in the negligence of the crew in using and heating the relevant bunker tank. To heat the bunker tank around Hold No 3 was negligence but not unseaworthiness. The obligation to take care to make the vessel seaworthy did not mean that the ship had to be immune from the negligence of her crew (*see* para 366).

(c) Subject to the provisions of article IV, the charterers were bound under article III, rule 2 "properly and carefully to keep, care for and carry" the cargo. Heating the relevant bunker tank when a container of calcium hypochlorite was stowed on top of it was a failure properly to care for and carry that cargo. The heating of the cargo was, however an "act, neglect or default in the . . . management of the ship". The risk of loss arising therefrom was, therefore, an excepted peril and the charterers were under no liability in respect of it. The indemnity under article IV, rule 6 could not be relied on where the casualty was caused by a combination of a dangerous cargo and a non-excepted peril such as a want of due diligence to make the ship seaworthy "or negligence in the loading handling or carriage of the cargo". However, article IV, rule 6 could be relied upon if the second cause was an excepted peril. If the casualty was caused by the shipment of dangerous goods and by a cause for which the charterers were not liable, there was no reason why the charterers should be disentitled to the article IV, rule 6 indemnity (*see* paras 372 and 373);

———*Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1993] 1 Lloyd's Rep 257 considered.

The following cases were referred to in the judgment:

Athanasia Comninos, The [1990] 1 Lloyd's Rep 277;

Atlantic Oil Carriers Ltd v British Petroleum Ltd (The Atlantic Duchess) [1957] 2 Lloyd's Rep 55;

Brass v Maitland (1856) 6 E & B 470;

Canadian Transport Co Ltd v Court Line Ltd (HL) (1940) 67 Ll L Rep 161; [1940] AC 934;

CHZ Rolimplex v Eftavrysses Compania Naviera (The Panaghia Tinnou) [1986] 2 Lloyd's Rep 586;

F C Bradley & Sons Ltd v Federal Steam Navigation Co Ltd (CA) (1926) 24 Ll L Rep 446;

Fyffes Group Ltd v Reefer Express Lines Pty Ltd (The Kriti Rex) [1996] 2 Lloyd's Rep 171;

Glenochil, The [1896] P 10;

Gosse Millard v Canadian Government Merchant Marine Ltd (The Canadian Highlander) (HL) [1929] AC 223;