Neutral Citation Number: [2020] EWHC 3318 (Comm)

Case No: CL-2020-000061

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2020

Before :

SIR NIGEL TEARE
sitting as a Judge of the High Court

- -

Between :

HERCULITO MARITIME LIMITED AND OTHERS	**Claimants**
- and -	
GUNVOR INTERNATIONAL BV AND OTHERS	**Defendants**

- -
- -

Guy Blackwood QC and Oliver Caplin (instructed by **HFW LLP**) for the **Claimant**
Stephen Hofmeyr QC and Mark Jones (instructed by **Tatham & Co**) for the **Defendant**

Hearing date: 23 November 2020

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Approved Judgment

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Sir Nigel Teare

"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:00 AM on 04 December 2020."

Sir Nigel Teare :

1. This is an appeal pursuant to section 69 of the Arbitration Act 1996, brought with permission granted by Andrew Baker J. The underlying claim is a claim by shipowners against cargo owners for general average under the relevant bills of lading. The general average expenditure was the payment of a ransom to pirates to enable the release of the vessel so that she could complete her voyage. The claim has been defended by the cargo owners on the grounds that on the true construction of the bills of lading, which incorporated the terms of the relevant charterparty, the shipowners' only remedy in the event of having to pay a ransom to pirates was to recover the same under the terms of a Kidnap and Ransom insurance policy and a War Risks policy taken out by the shipowners, the premium for which was, pursuant to the charterparty, payable by the charterers. The experienced Tribunal (Mr. Timothy Young QC, Mr. Dominic Kendrick QC and Mr. Simon Gault), who considered this defence at length and with conspicuous care, learning and understanding of the market, concluded that the cargo owners were not liable to pay general average in respect of the ransom payment. It followed that the underwriters who had indemnified the shipowners were unable, by means of a subrogated claim, to recover what would, in the absence of this defence, have been cargo's contribution in general average.

2. The facts, as found by the Tribunal, can be shortly stated.

3. In 2010 the mv POLAR ("the Vessel") was engaged on a voyage from St. Petersburg to Singapore with a cargo of 69,493.28 mt of fuel oil. Whilst transiting the Gulf of Aden, an area where there was a known high risk of piracy, the Vessel was seized on 30 October 2010 by Somali pirates and held for ransom. She was released on 26 August 2011 following payment of a ransom of US$7,700,000. Some cargo was extracted during the period of seizure but ultimately the balance of the cargo was delivered in Singapore. General average was declared, the cargo underwriters provided a general average guarantee and the cargo owners provided a general average bond. A general average adjustment was issued pursuant to which US$4,829,393.22 was due from the cargo owners to the shipowners. In due course a claim was made by the shipowners (and the underwriters) under the GA bond and GA guarantee, which claim was referred to arbitration.

4. It is next necessary to set out the most material terms of the voyage charterparty and bills of lading.

5. The shipowners, Herculito Maritime Ltd. of Liberia, ("the Owners") chartered the Vessel to Clearlake Shipping Ltd. of the BVI ("the Charterers"), by a fixture recap dated 20 September 2010 on the terms of an amended BPVOY4 form and certain additional clauses.

6. The voyage was to be from 1/2 safe port(s) Tallin/St. Petersburg range to 1 safe port Fujairah or, in Charterers' option, 1/2 safe port/safe STS location in the Singapore area. The freight rate was US$17.5 per mt for carriage to Singapore and UDS$14.5 per mt for carriage to Fujairah. Laydays were to commence on 28 September 2010 and the demurrage rate was $16,000 per day. The fixture recap added:

> "All above via Suez with the Suez costs to be for Owners' account. All expenses at load port to be for Charterers' account. If STS all expenses are for Charterers' account and to be settled directly by them."

7. Clause 30.1 provided that bills of lading shall be signed as the Charterers direct, without prejudice to this Charter. Clause 30.2 provided:

> "All bills of lading issued under this Charter shall be deemed to contain War Risks, Both to Blame and New Jason clauses."

8. Clause 31.4 provided that freight shall be payable immediately after completion of discharge, on the gross quantity of cargo loaded.

9. Clause 39 was a long War Risks clause. It is attached to this judgment in an appendix. It may be summarised as follows:

> (i) Pursuant to Clause 39.2 the Owners were entitled to cancel the Charter if, at any time before the Vessel commences loading, it is considered that performance of the contract of carriage may expose the Vessel to War Risks.
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> (ii) Pursuant to Clause 39.3, the Owners were not required to continue to load or to sign bills of lading or to proceed or continue on a voyage where it appeared that the Vessel may be exposed to War Risks. If it should so appear the Owners were entitled to request the Charterers to nominate a safe port for the discharge of the cargo. If within 48 hours the Charterers failed to nominate such a port, Owners were entitled to discharge the cargo at any safe port of their choice in complete fulfilment of their obligations under the Charter. The extra expenses of such discharge were payable by the Charterers.
>
> (iii) Pursuant to Clause 39.4, if, at any stage of the voyage, it appeared that the Vessel may be exposed to War Risks on any part of the route and there is another longer route to the discharge port, Owners were entitled to give notice to Charterers that this route should be taken. The extra expenses of such route, if the extra distance exceeded 100 miles, were payable by the Charterers.
>
> (iv) Pursuant to Clause 39.5, the Owners were at liberty to comply with the orders of identified third parties.
>
> (iv) Pursuant to Clause 39.6, anything done or not done in compliance with the clause shall not be a deviation.

10. Clause 41 provided that general average shall be adjusted and settled in London in accordance with the York-Antwerp Rules 1994.

11. Clause 46 provided that the Owners shall have a lien upon the cargo for all freight, deadfreight, demurrage and the cost of recovery thereof.

12. There were several additional clauses including a Gulf of Aden Clause "for this CP only dated 20.09.10" and a War Risk clause. They are also set out in the appendix to this judgment and may be summarised as follows:

(1) The additional "Gulf of Aden Clause" provided that time awaiting an escort or protection team shall count (half time) against used laytime or demurrage if on demurrage. It also provided that additional costs incurred by reason of entering a convoy or picking up a protection team were to be shared 50/50 between Owners and Charterers. Finally, any additional insurance for matters such as P&I Kidnap Risks and Ransoms were to be for Charterers' account subject to a maximum of $40,000.

(2) The additional "War Risk Clause" provided that any additional premiums payable by the Owners in respect of war risks were for the Charterer's account.

13. Six bills of lading were issued, dated variously 29 and 30 September 2010 and 2 October 2010. They contained or evidenced contracts for the carriage of the cargo of oil from St. Petersburg to Singapore. The shippers were Warly International Ltd. "from resources of JSC Oil Company Rosneft Manufacturer Kuibyshev Refinery" and the consignee was "To the order of BNF Paribas (Suisse) SA". The bills were signed by the master.

14. Freight was payable "as per Charter Party". However, the bills also provided that "by taking delivery of the cargo the Consignee shall make himself liable for unpaid freight, deadfreight, demurrage and other charges".

15. It was common ground that the holders of all six bills and the receivers of the cargo in Singapore were Gunvor International BV though, as noted by the Tribunal, that need not have been so, given that there were six bills issued which were separately negotiable. Bills 1-5 provided on their face as follows:

> "pursuant and subject to all terms and conditions, liberties and exceptions as per TANKER VOYAGE CHARTERPARTY indicated hereunder, including provisions overleaf."

16. No charter was "indicated hereunder" but it is common ground that the charter incorporated was that to which I have referred above.

17. The sixth bill of lading was in a different form and provided on its reverse as follows:

> "All terms and conditions, liberties and exceptions of the Charter party, dated as overleaf, including the Law and Arbitration Clause are herein incorporated."

18. Again, it is common ground that the incorporated charter was the one to which I have referred above.

19. All the bills provided for general average to be adjusted, stated and settled in accordance with the York-Antwerp Rules (bills 1-5 providing for the 1974 Rules, the sixth bill providing for the 1994 Rules.)

20. Finally, bills 1-5 contained a marginal note on the reverse which provided:

> "For the purposes of the bill of lading : ……..CHARTERER means the person entering a Charter Party contract with the carrier ……."

21. It is also necessary to refer to the Vessel's insurance policies. The Owners had an annual H&M and War Risk insurance from 15 July 2010 which, it is common ground, covered piracy but excluded certain areas, in particular the Gulf of Aden. However, Kidnap and Ransom Insurance was taken out for a single voyage from 25 October 2010 not exceeding 14 days from Suez to Singapore through the Gulf of Aden. Coverage in respect of ransom was limited to $5 million. In addition, by an endorsement dated 26 October 2010 the Owners purchased additional cover in respect of the proposed transit through the Gulf of Aden, between 26 and 30 October 2010.

22. A manuscript note on the endorsement to the annual H&M and War Risk insurance recorded that the Kidnap and Ransom underwriters had no recourse to the H&M and War Risks underwriters. Similarly, the Kidnap and Ransom policy recorded that the underwriters of that policy waived all rights of subrogation against other marine or marine war risks policies. Thus the first $5 million of the ransom paid was funded by the Kidnap and Ransom Insurance policy and the balance of $2.7 million was funded by the H&M and War Risks policy.

23. Prior to delivery in Singapore Gunvor provided a GA bond in consideration of the delivery to it of the cargo. Gunvor undertook to pay the proportion of "any general average legally due from cargo interests". Cargo underwriters also provided a GA guarantee in consideration of the delivery of the cargo. They undertook to pay "any contribution which may be hereafter to be ascertained to be legally due in respect of the said goods."

24. I was told that the GA Bond and GA Guarantee provided for arbitration in London. The Tribunal stated in paragraph 23 of the Award that the arbitration had been brought pursuant to the terms of those documents.

The questions of law

25. The two questions of law on which permission to appeal was granted are as follows:

> (i) Are agreements between a shipowner and a charterer in a charter party which delineate the responsibility for the payment of additional war risk or K&R premia between the shipowner and charterer, germane to the carriage of the vessel's cargo in the context of a bill of lading?
>
> (ii) Does an agreement between a shipowner and bill of lading holder concerning the allocation of responsibility for the payment of War Risks Hull & Machinery and K&R insurance premia give rise to an exclusive insurance fund precluding the shipowner from recovering in GA a contribution from cargo interests in respect of any losses suffered as a result of perils falling within the insurances?

26. These two questions of law reflect in an abstract manner (that is, without referring to the particular terms of the bills and charter in this case) the two preliminary issues determined by the Tribunal. They were as follows:

    i) Were the terms of the voyage charter (dated 20 September 2010) made between the Owners (qua owners) and Clearlake Shipping Ltd. (qua charterers), including in particular Clause 39 "War Risks" of the BPVOY4 form (as amended by the Recap), the Additional "War Risk" Clause , and/or the

Additional "Gulf of Aden" Clause, incorporated into the Bills of Lading 9 as pleaded in paragraphs 9, 10 and 11 of the Respondent's Amended Defence?

ii) Did the Owners on a true and proper construction of the Bills of Lading, including in particular Clause 39 "War Risks" of the BPVOY4 form (as amended by the Recap), the Additional "War Risk" Cause , and/or the Additional "Gulf of Aden" Clause and/or by implication, agree to look solely to their insurance cover under the "war risks" insurance and/or K&R insurance identified in those clauses, and not to their counterparties under the Bills of Lading in, for example, general average (or by any other means on any other basis), in the event they suffered a loss covered by that insurance cover?

27. When granting permission to appeal Andrew Baker J observed that the two questions articulated in the Arbitration Claim Form, which reflected the two preliminary issues determined by the Tribunal, arose out of a single, ultimate question, namely whether, properly construed, the Bills of Lading excluded liability on the part of Bill of Lading holders in respect of cargo's contribution in general average in the event the Vessel encountered a peril insured under any of the insurances referred to in clause 39, the Additional War Risks clause or the Additional Gulf of Aden clause of the voyage charter.

28. The two questions of law, like the preliminary issues determined by the Tribunal, give rise to two familiar issues in commercial law. First, what terms of a charter are incorporated by general words of incorporation in a bill of lading? Second, does an agreement by one party to pay another party's insurance effectively exclude what would otherwise be the first party's liability to the other for loss caused by an insured peril?

The first question, incorporation

29. The Tribunal answered the first question "Yes", that is, the Tribunal determined that Clause 39 of the BPVOY4 form (as amended by the Recap), the Additional "War Risk" Clause, and/or the Additional "Gulf of Aden" Clause were incorporated into the Bills of Lading with the exception (see paragraph 56 of the Award) of "the demurrage (or demurrage-type) obligation" in the Gulf of Aden clause which, the Tribunal concluded, "cannot be imposed upon bill of lading holders". My understanding of the Tribunal's conclusion is that the obligation in the Gulf of Aden clause that the owners and charterers were to share 50/50 certain additional costs, time and bunkers did not apply to the bill of lading holders. The Tribunal considered that the obligation to pay the extra insurance premium did apply to the bill of lading holders (see paragraphs 106-108 of the Award) but the Tribunal did not consider this essential to their overall conclusion as to the true construction of the bills of lading (see paragraphs 103-105 of the Award).

30. It was submitted on behalf of the Owners that the correct answer to the first question was "No", although it was accepted that the liberties to deviate granted by the clause 39 to the Owners were "perhaps" incorporated.

31. It was submitted on behalf of the Cargo Interests that the Tribunal's decision was correct.

32. It is to be noted that whereas it is usually the shipowner who contends that the relevant provisions of a charterparty, to which the shipowner was party, have been incorporated

in the bills and whereas it is usually the bill of lading holders who contend that the provisions of the charterparty, to which the holders were a stranger, have not been incorporated in the bills of lading, in this case, by contrast, it is the shipowner who contends that the relevant terms were not incorporated and it is the holders of the bills who contend that they were. Whether the relevant provisions were incorporated depends upon an objective process of construction of the bills of lading.

33. The manner in which the court decides the effect of a clause in a bill of lading which purports to incorporate the provisions of a charterparty in general terms has been the subject of several court decisions dating from the latter half of the nineteenth century to the latter half of the twentieth century. The learned editors of *Scrutton on Charterparties* 24th.ed have summarised the effect of those decisions in three stages; see paragraph 6-016. The learned editors of *Voyage Charters* 4th.ed. have summarised the effect of the authorities by reference to five propositions; see paragraphs 18.48–18.59.

34. The Tribunal described the process to be adopted in paragraphs 35-41 of the Award. It was not suggested that the Tribunal's summary was in error. It is therefore appropriate to adopt that summary. The Tribunal's starting point was to identify the breadth and scope of the words of incorporation in the bills of lading. In the present case the words used were described as "very wide-encompassing words". Assuming the words of incorporation were wide enough to incorporate the terms in question, the next stage was, notionally, to write those terms into the bills of lading. Terms which were inconsistent with the terms of the bills of lading were to be deleted (that is, not incorporated). Terms which were inappropriate in the context of the bills of lading were also to be deleted. If the relevant provision of a charterparty were germane to the loading, carriage and/or discharge of the cargo, it would usually be incorporated and in such a case there might be good reason to manipulate the language of the charterparty so that, for example, "Charterer" might be read as "bill of lading holder". If the relevant provision of the charterparty were not germane to the loading, carriage or discharge of the cargo, it would not be incorporated unless the language of the charterparty, when written into the bill of lading, justified the incorporation of the provision in question.

35. In applying those principles it is helpful to note a few additional observations found in the authorities. First, the court is seeking to identify those clauses which are "directly" germane to the shipment, carriage or delivery of the goods; see *The Annefield* [1971] PD 168 at p.184 E-F and p.186 F per Lord Denning MR and Cairns LJ and *The Miramar* [1984] 1 AC 676 at p.683 C and p.688 D-E per Lord Diplock. Thus it is not enough that a clause is germane, or relevant, to the loading, carriage or discharge of the goods; it must be "directly" germane or relevant to the loading, carriage or discharge of the goods. The learned editors of *Voyage Charters* 4th.ed. drew attention in this context to the statement of principle in *Thomas v Portsea Steamship Company* [1912] AC 1 at p.6 per Lord Loreburn LC that the court was seeking to identify a clause which "governs shipment or carriage or delivery or the terms upon which delivery is to be made or taken." That phraseology perhaps indicates the nature of the direct relevance to loading, carriage or delivery which is required. Second, there is no rule of construction that clauses in a charterparty which are directly germane to the shipment, carriage or delivery of goods and impose obligations upon the "charterer" under that designation, are presumed to be incorporated in the bill of lading with the substitution of "charterer" with "consignee of the cargo" or "bill of lading holder"; see *The Miramar* at p.688 D-

E per Lord Diplock. Rather, as is apparent from that passage, the particular terms of the contract must be studied with care to see whether manipulation or substitution is appropriate. Third, in considering whether a term of a charterparty is inconsistent with the bill of lading the court must do so intelligently and not mechanically. It must be "clear" that a particular term, when read into the bill of lading, is intended to apply to the bill of lading contract; see *The Annefield* at p.187 A-B per Cairns LJ.

36. The Tribunal noted that in applying these principles problems arise from "the fact that charters may have single indivisible obligations" and that it be may "very complex and far from obvious how to incorporate provisions into bills of lading which may be numerous and in relation to parcels within a full cargo"; see paragraph 42 of the Award.

37. Since the amount of the ransom paid by the Owners engaged both the K&R policy and the H&M War Risks policy (as amended by the endorsement) it is necessary to consider whether clause 39 and the additional Gulf of Aden and War Risk clauses were incorporated into the bills of lading.

38. Previous cases in this area of commercial law have tended to concern the incorporation of arbitration or exclusive jurisdiction clauses or the incorporation of demurrage clauses. No previous case has been found which concerned the incorporation of war risks clauses or their equivalent. In that sense this case has thrown up a novel and interesting problem (at least to those of us familiar with bills of lading).

39. The words of incorporation in the bills of lading are wide enough to incorporate clause 39, the additional War Risk clause and the Gulf of Aden clause. That was not disputed.

40. It is necessary, at least as an aid to analysis, to deal with the component parts of the clauses separately. I say "at least as an aid to analysis" because it was the submission of counsel for the Cargo Interests that the provisions of the War Risks clause, the additional War Risk Clause and the Gulf of Aden clause were so interlinked and interwoven that either they were all incorporated or none of them were. They formed a "package" which must be construed as a whole. However, there were limits to that submission because it was accepted that parts of the Gulf of Aden clause, that making provision for time against laytime or on demurrage and that providing for certain expenses to be shared 50/50 by the Owners and Cargo interests, were not incorporated. That being so, it seems inevitable that the court must deal with the component parts of the clauses separately whilst bearing in mind the links which exist between the component parts of the "package".

41. Clause 39, the War Risks Clause, was long and detailed but in outline it did two things; first, it conferred on the Owners liberties not to continue on the voyage or to deviate and, second, it imposed on the Charterers an obligation to bear additional expenses caused by the exercise of such liberties. The Additional War Risk clause and the Gulf of Aden clause imposed on the Charterers the obligation to pay for the extra costs of insurance if the Owners decided to transit the Gulf of Aden, but subject to a maximum figure. In addition the Gulf of Aden clause made provision for waiting time in connection with transiting the Gulf of Aden to count as laytime or time on demurrage and for certain costs to be shared between Owners and Charterers.

42. I deal first with the Owners' liberty not to continue with the voyage or to deviate from the usual route. Was this liberty germane (or directly germane, as it is put in the

authorities) to the loading, carriage and discharge of the cargo ? I consider that it was. The liberty directly impinged on the question whether the cargo would be carried to the intended destination, and permitted certain deviations from the normal or expected route.

43. The Tribunal said, at paragraphs 57 of the Award:

> "57……The route taken by the Vessel was, in our view, of central importance to the adventure and to the legal relations between carriers and cargo. This is not just because of commercial considerations, the cost to the Owners and the marketing of cargo afloat, but also for discretely legal reasons, the possibility and consequences of deviation."

44. I agree. The Owners' liberties not to continue with the voyage or to deviate were therefore incorporated into the bills of lading. No manipulation or substitution was required. This conclusion was not in terms opposed by the Owners.

45. I next turn to the Charterers' obligation to bear the expense caused by the exercise of such liberties. This is not so easy to decide. There was little discussion in counsel's submissions about this clause but it is an important part of the War Risks clause and raises issues of a similar nature to the question whether the holders of the bills of lading should be regarded as having agreed to pay the additional insurance premium. The question is whether it is appropriate to manipulate the wording of clause 39 when it is written into the bills of lading by substituting "bill of lading holders" for "Charterers". There are arguments either way.

46. On the one hand, the obligation to bear the expense caused by the exercise of the Owners' liberties is self-evidently directly connected with the Owners' liberties, which liberties are directly germane to the carriage of the goods. Clause 39.3 contemplates that the Charterers may nominate an alternative discharge port and, as the Tribunal noted (in paragraph 109 of the Award) the bill of lading holder would probably be more acutely concerned with where his cargo was discharged than the Charterer. It is therefore arguable that it would be appropriate to substitute "bill of lading holders" for "Charterers" so that the obligation to bear the resultant expense is not divorced from the Owners' liberties.

47. But on the other hand the bill of lading holders have agreed to pay freight "as per Charter Party" as the price for performance of the contract of carriage by the Owners. The bill of lading holders have not agreed to pay sums in addition to the freight rate as part of the price for performance of the contract of carriage. It is therefore arguable that an obligation on the part of the holders of the bills to pay these expenses is inconsistent with the terms of the bills. Counsel for the Cargo Interests referred to the provision on the face of the bills that by taking delivery of the cargo the consignee "shall make himself liable for unpaid freight, deadfreight, demurrage and other charges". It is difficult to see how this provision might make the bill of lading holder who has paid the agreed freight, and in consequence had the cargo delivered to him, liable for sums which he had not agreed to pay such as "other charges". Indeed, the argument proves too much. It would suggest that the consignee was liable for demurrage; yet counsel for the Cargo Interests did not suggest that it could have that effect. Counsel accepted, as did the Tribunal, that the bill of lading holder was not liable for demurrage.

48. I have to consider this matter intelligently, not mechanically. I have sought to do so. In my judgment, to substitute "bill of lading holders" for "Charterers" when reading clause 39 into the bills would be inconsistent with the obligation of the bill of lading holders to pay freight as per the charterparty as the price for the performance by the Owners of the contract of carriage. It would mean that the holders of the bills of lading, in the event that certain liberties were exercised by the Owners, had to pay may more than the agreed freight for the performance of the contract of carriage. Moreover, such additional sums would be unknown and unlimited. It is unlikely that a bill of lading owner would agree to such a liability (cf the approach of Lord Diplock in *The Miramar* to the question whether a liability to pay demurrage was incorporated into the bills in that case). The obligation may be linked to the Owners' liberties, which are directly germane to the carriage of the cargo, and on that account may itself be germane to the carriage of the cargo, but there is no rule, as explained by Lord Diplock in *The Miramar*, that a clause which is so germane is presumed to be incorporated in the bill of lading with the substitution of "bill of lading holder" for "charterer". I have concluded (noting the language of Cairns LJ in *The Annefield*) that clause 39, when read into the bills, does not *clearly* oblige the bill of lading holders to pay the expenses caused by the exercise of the Owners' liberties. Rather, the obligation of the Charterer to pay such expenses should be regarded as an accounting matter between the Owners and the Charterer.

49. I now turn to the Gulf of Aden clause. It is in three parts.

50. The first part concerns time used awaiting an escort, daylight or a protection team or the implementation of protective measures. Such time shall count ("at half time") against laytime or demurrage if the vessel is already on demurrage. It was not suggested that this was incorporated into the bill of lading. It concerns demurrage which was a liability of the Charterer.

51. The second part concerns additional costs, time or bunkers incurred following a fixed route, entering a convoy, deviating to pick up or drop off a protection team or implementing protective measures or deviating from the usual route. Such additional costs, time and bunkers are to be shared 50/50 between the Owners and Charterers. Counsel for the Cargo Interests did not suggest that this was incorporated into the bill of lading so as to make the bill of lading holders liable to share the additional costs with the Owners. The Tribunal also considered (at paragraph 56 of the Award) that this "specific demurrage (or demurrage-type) obligation" could not be imposed on the bill of lading holders "in the light of *The Miramar*". Counsel for the Cargo Interests suggested that this part of the clause was a "self-standing clause" which was not part of the War Risks clause. It is true that it is not found in clause 39 or in the additional War Risk clause but it concerns the war risk of piracy as does the third part of the clause which imposes an obligation upon the Charterers to pay for additional insurance premium in respect of, in particular, Kidnap and Ransom risks. I am unable to accept that it is a "self-standing clause". Rather it is one part of the agreements reached by Owners and Charterers regarding the war risk of piracy in the Gulf of Aden. When written out in the bills of lading it is not appropriate to manipulate it by substituting "bill of lading holders" for "Charterers" for the same reasons that it is not appropriate to do so with regard to the additional costs obligations of the Charterers in clause 39. It is, as counsel for the Cargo Interests suggested in his oral submissions, a matter of "costs allocation" between Owners and Charterers.

52. There remains to be considered the third part of the Gulf of Aden clause, the additional premium liability. This falls to be considered along with the additional premium liability in the additional War Risk Clause. The important question is whether, when reading these clauses into the bills of lading, it is appropriate to substitute "bills of lading holders" for "Charterers".

53. The obligation to pay for additional war risk and K&R insurance to transit the Gulf of Aden appears to me to be directly germane to the carriage and delivery of the cargo. The bill of lading holders would expect the vessel to proceed from St. Petersburg to Singapore via the Suez Canal and the Gulf of Aden. This clause contemplated that the Owners might have to take out such insurance to transit the Gulf of Aden in order to perform the anticipated voyage. This would not have been a surprise to the bill of lading holders. The Tribunal made this observation at paragraph 60 of the Award:

> "The passage through Suez and into the Indian Ocean was well-known at the time to involve piracy perils and the growth of kidnap and ransom insurance was equally well-known."

54. I agree, based upon my own knowledge of piracy incidents in the Gulf of Aden and the consequent growth of K&R insurance which I have derived from cases in this court and in the Admiralty Court.

55. Moreover, unlike demurrage or the costs consequential upon the exercise of the liberties granted by clause 39 the liability to pay the additional premium is limited to $40,000. That is a modest sum compared with the freight (60,000 mt at $17.5 per mt). To make the holders of the bills liable for the additional premium would not expose them to an unknown and unlimited sum.

56. But, as I have already noted, the bills of lading provided for the holders of the bills to pay freight as per Charter Party in return for the carriage and delivery of their cargo to Singapore. It is arguable that it would be inconsistent with that provision to make the holders of the bills of lading also liable for the additional insurance premium required to transit the Gulf of Aden. Moreover, certain matters are not explained. Would each bill of lading holder be liable for the additional insurance premium or only for a share of the additional premium? If each bill of lading holder were liable for the additional premium on a joint and several basis (as counsel for the Cargo Interests suggested they would be) how would liability be apportioned amongst them? Would a bill of lading holder who had purchased his cargo after the vessel had been released by pirates pay the same as a bill of lading holder who had purchased his cargo before the vessel entered the Gulf of Aden? The fact that these questions are unanswered by the terms of the bills suggests that it would not be appropriate to manipulate the clauses by substituting "bills of lading holders" in place of "Charterers" with regard to the liability to pay the additional insurance premium.

57. The Tribunal said that it was not necessary to answer this question but that if it were necessary the Tribunal said that it *was* permissible to read "Charterers" as "bills of lading holders" when reading the material clauses into the bills of lading; see paragraphs 106-108 of the Award. Counsel for the Cargo Interests also said that it was not necessary to answer this question but that if it was necessary he adopted the views of the Tribunal.

58. As a matter of analysis it is, at the least, helpful to answer the question, for the answer to the second question of law or preliminary issue may depend upon whether the bills of lading, properly construed, impose upon the bills of lading holders an obligation to pay the additional premium. I therefore think that I should answer the question.

59. The bills of lading provided that the holders' obligation was to pay freight as per the charterparty. That was the price to be paid by the bill of lading holder for the carriage of his cargo to Singapore. In those circumstances I consider that clear words would be required to impose upon the bill of lading holder a liability not only to pay freight but also to pay the additional insurance premium as the price for the carriage for his cargo. The words in the charterparty were obviously clear enough to impose that obligation upon the Charterers because both obligations, the obligation to pay freight and the obligation to pay the insurance premium, were expressly set out in the charter party. But the terms of the charter party would not have that effect when read into the bills *unless* it were appropriate to substitute "holder of the bill of lading" for "Charterers". That is the crucial question.

60. The Tribunal, in paragraph 106 of the Award, thought it probable ("the probability grows") that the obligation to pay the premium was imported by general words of incorporation because it was "an essential element of the performance of the carriage itself. It was, after all, only a premium which had to be paid for the lawful holder to get his cargo at the destination." This reasoning enables one to say that the obligation is germane to the carriage and delivery of the goods. But, as Lord Diplock observed in the *Miramar*, there is no rule of construction that clauses which are germane to the carriage and delivery of the goods are presumed to be incorporated in the bill of lading with the substitution of "charterer" for "bill of lading holder". It is necessary to consider the words of the contract in each case. In this case the bills include the words "Freight as per Charter Party". They show that the price to be paid by the holder of the bill to for the carriage of his cargo to destination was the freight. In those circumstances I do not consider that it is appropriate to substitute "charterer" for "holder of bill of lading" because the bill of lading, properly construed, does not *clearly* show that that was intended.

61. If that had been intended one would expect there to be some clarity as to what each bill of lading holder was to pay. The total sum payable was limited. But was each liable to pay the whole premium on a joint and several basis? If so, how would that liability be shared between each bill of lading holder? Would a holder who had bought his cargo after the vessel had been released by the pirates pay the same as a holder who had bought his cargo before the vessel had been seized by the pirates? None of these matters is addressed by the terms of the bills. That is a further indication that the parties to the bills of lading did not intend that "charterer" should be substituted by "bill of lading holder".

62. The Tribunal observed that as a matter of practical reality it was most unlikely that the Owners would look to the bills of lading holders rather than to the Charterers for payment of the additional premium (or an undertaking to pay) before entering the Gulf of Aden. However, the Tribunal accepted that the possibility could not be excluded; see paragraph 107 of the Award. It is therefore a matter which must be addressed. The Tribunal did so in paragraph 108 of the Award.

> "In the event however that the Owners did have to look to bill of lading holders for the premium, we think that each bill of lading holder would be liable to pay the unpaid premium but (a) the total payment by all bill of lading holders could be no more than the premium, not the premium times six, and (b) there would most probably be restitutionary rights as between the bill of lading holders, even though the formula for effecting that restitution might be complex. We do not think that complexity should alter the position as between the parties to each single bill of lading. As between those parties there would be no need to consider such things as apportionment or the basis for apportionment."

63. To impose upon a single bill of lading holder liability for the whole insurance premium is a striking conclusion in the absence of clear words. This approach was adopted in a case where liability in demurrage *was* incorporated into the bills of lading; see *Porteus v Watney* (1878) 3 QBD 534 as noted by the editors of *Voyage Charters* 4th.ed. at paragraph 16.20. However, in the *Miramar* Lord Diplock suggested that that case and other old cases adopted a literalist construction of the words in the charterparty and bill of lading and that, by reason of the commercial considerations to which he had alluded, those cases would have been decided differently if they had been decided in the two or three decades before the *Miramar.* Assuming that liability was joint and several that leaves the question of apportionment between holders and on that topic the Tribunal was unable to assist but suggested that there was no need to consider the matter as between the parties to each bill of lading. But the approach of Lord Diplock in the *Miramar* shows that it is a relevant commercial consideration which bears upon the question whether manipulation or substitution is appropriate.

64. It is not known how any such liability was to be apportioned as between the holders. The terms of the bills do not suggest an answer. The Tribunal accepted that the formula for such restitutionary rights "might be complex". An individual bill of lading holder would surely want to know what his rights were as between him and the other holders. The fact that the bills do not suggest an answer to that question is a further reason why manipulation or substitution is unlikely to have been intended (on an objective basis). The Tribunal had earlier noted (in paragraph 42 of the Award) that whilst on occasion it may be possible to apportion responsibilities to particular parcels of cargo it was not the task of the court to re-write or improve the parties' contracts.

65. Having sought to consider the question intelligently and not mechanically (as I have no doubt the Tribunal also sought to do) I have reached a different conclusion from the Tribunal. In my judgment, having regard to (a) the express obligation of the bill of lading holder to pay freight as the price of the carriage of goods to destination and (b) the absence of any indication in the bills of lading as to how much of the premium each holder was to pay or how apportionment of the premium between the holders was to be assessed, it is not appropriate, when reading into these bills of lading the terms of the additional Gulf of Aden and War Risk clause, to substitute "the holders of the bills of lading" for "the Charterers". Such manipulation or substitution would, I think, be inconsistent with the express obligation to pay freight as the price of the carriage of the goods to destination. In any event, the bills do not, on their true construction, *clearly* impose upon the holders a liability to pay the additional insurance premium. Rather, as submitted by counsel for the Owners, the relevant provisions were no more than an accounting mechanism as between Owners and Charterers.

66. Counsel for the Owners also relied upon the side note in the bills 1-5 which stated that:

> "For the purposes of the bill of lading : ……..CHARTERER means the person entering a Charter Party contract with the carrier ……"

67. I have not found it necessary to rely upon that note. One perhaps has to be wary of applying that note in a mechanical, rather than in an intelligent, fashion. But the note is consistent with the conclusion which I have reached and does not detract from it.

The second question, the insurance solution

68. It is now necessary to consider whether the bills of lading, properly construed, give rise to an exclusive insurance fund precluding the shipowner from recovering a General Average contribution from cargo interests in respect of any losses suffered as a result of perils falling within the insurances.

69. As indicated by the preliminary issue considered by the Tribunal the question is whether, on a true construction of the Bills of Lading and/or by implication, the Owners agreed to look solely to their insurance cover under the "war risks" insurance and/or K&R insurance identified in those clauses, and not to their counterparties under the Bills of Lading in, for example, general average (or by any other means on any other basis), in the event they suffered a loss covered by that insurance cover.

70. Whilst questions as to the effect of insurance provisions in a charter party have been addressed by the courts this appears to be the first occasion on which the effect of such provisions on claims in general average against the holders of the bills of lading has been considered. In that sense this issue too is novel and, again, of interest.

71. The Tribunal held that the answer to the question was "Yes", even assuming (as I have held to be the case), that the bills of lading did not impose an obligation upon the holders of the bills to pay for the additional insurance premium. The Tribunal first considered the position under the charterparty and concluded that the charter contained a "code" for the losses resulting from the operation of on-voyage piracy risks in the Gulf of Aden area and that, on the true construction of the charter, the Owners did agree not to claim a general average contribution from the Charterers in respect of such losses; see paragraphs 85-101 of the Award. The Tribunal then considered whether that "code" was incorporated into the bills of lading at paragraphs 102-105 of the Award. The Tribunal held that it was:

> "We do not think the issue here is whether the cargo interests, as such, acquired an obligation to pay the relevant premiums nor whether the word "Charterers" in the pertinent clause can/need be manipulated to read "lawful holders of the bill of lading", since we think all that matters is that the Charter code involved an agreement by the Owners not to seek contribution for piracy losses. It is not a case of incorporating a positive obligation on cargo but of an agreement by the Owners excusing cargo from liability. It is thus not infected by the same onerous uncommerciality that drove Lord Diplock's thinking in *The Miramar*; quite the reverse since an exclusion of liability is not in the least onerous on the beneficiary bill of lading holder. A bill of lading holder would, in our view, have to have taken leave of his senses not to accept the exclusion of his liability for the effects of piracy risks by reason of the relevant "code"….."

72. It was submitted by counsel on behalf of the Owners that the Tribunal was wrong to look first at the Charter when what was at issue was the true construction of War Risk clauses when set out in the bill of lading. Of course that was the ultimate issue and that was the issue to which the Tribunal turned at paragraph 102 of the Award after considering the true construction of the Charter. It seems to me that it must be right to start, at least as a matter of analysis, with the Charter. There is no harm in doing so, so long as one eventually turns to the true construction of the bills of lading.

The position as between the Owners and the Charterers

73. Thus the first question is whether on the true construction of the Charter the Owners were disabled from recovering a contribution from the Charterers in general average in respect of the ransom paid by the Owners to the pirates and were restricted to recovering an indemnity under their policies of insurance.

74. Questions of this nature, though not involving general average, have been considered in the *Evia No.2* [1983] AC 736 and the *Ocean Victory* [2017] 1 WLR 1793. Both cases concerned the safe port warranty in a charter party. In the *Evia No.2* the time charterparty provided by clause 21 that if the vessel was to be exposed to war risks the owners could insure the vessel against such risks and the charterers would be liable to refund the premium on demand. The House of Lords held, first, that there was no breach of the safe port warranty by the charterer and, second, that in any event clause 21 freed the charterers from any liability. Clause 21 was a complete code so that if there had been a breach of the safe port warranty clause 21 provided the owners' only remedy, namely, an indemnity pursuant to the policy of insurance, the premium for which had been paid by the charterers. In the *Ocean Victory* the demise charterparty provided by clause 12 for joint insurance of the vessel in the name of the owners and charterers and for the distribution of the insurance proceeds. The Supreme Court held, first, that there was no breach of the safe port warranty and, second, by a majority, that clause 12 precluded the right of the owners to recover in respect of losses against the demise charterers for breach of the safe port warranty.

75. Whether an insurance provision creates an insurance fund as the sole avenue for making good the relevant loss or damage is in each case a matter of construction; see the *Evia No.2* at p.766D per Lord Roskill and the *Ocean Victory* at paragraph 139 per Lord Toulson.

76. The present case is not one where the Owners and Charterers are joint assureds as was the case in the *Ocean Victory*. That point was regarded as a matter of particular importance by the majority of the Supreme Court. However, the *Evia No.2* did not involve joint assureds and in that sense it is comparable to the present case. Lord Roskill said (at p.766D-F) that if at the time of the charterer's breach, the safe port warranty remained in full force and effect the "remarkable result" followed that if a risk covered by the insurance materialised "the charterers would have paid the premiums not only for no benefit for themselves but without shedding any of the liabilities which clause 2 [the safe port warranty] would, apart from clause 21, impose on them." It appears, because there was little further explanation by Lord Roskill that, as it was put by the Tribunal, "his use of the term "remarkable result" was plainly intended to convey the impression that he thought it was wrong in law and should not be adopted without very strong countervailing reasons" (see paragraph 93 of the Award.)

77. This approach reflects that articulated by Longmore LJ in the Court of Appeal in the *Ocean Victory*, with whose judgment the majority in the Supreme Court agreed. Longmore LJ said, at [2015] 1 Lloyd's Rep.381 at paragraph 74:

> "Similar problems can also arise, in the absence of joint insurance, if one party to a commercial relationship is required to pay premiums for an insurance against loss or damage to the property insured. If a loss occurs as a result of a breach of contract or negligent conduct on the part of the party who pays the premium , can the insurer use the name of the "innocent" party to sue the "guilty" party once the insurer has paid for the loss ? Since insurance is usually intended to cover an insured for any breach of contract or duty on his part, it is generally thought that the answer to this question must be "No"; otherwise the party paying the premium has not secured the insurance cover he was entitled to expect."

78. After considering the *Evia No.2* and *Mark Rowland Ltd.v Berni Inns Ltd.* [1986] QB 211 Longmore LJ said, at the end of paragraph 77:

> "Thus even in a case where there was no provision for joint insurance but the insurance was paid for by the "guilty" party, the insurance was held to cover the liability of that party and no rights of subrogation existed. Clear words to exclude that possibility were not required, once it was evident that the insurance was intended to be for the joint benefit of the parties."

79. Longmore LJ considered at paragraph 83 that:

> "……the prima facie position where a contract requires a party to that contract to insure should be that the parties have agreed to look to the insurers for indemnification rather than to each other."

80. This was not how matters appeared to me at first instance in the *Ocean Victory*. I had thought, based on cases to which I referred, that something more than an agreement by the charterer to pay the insurance premium was required to exempt the charterer from liability for breach of the safe port warranty. But that approach, although supported by a minority of the Supreme Court (see the *Ocean Victory* at paragraphs 48-57 per Lord Clarke and paragraph 105(6) per Lord Sumption) cannot now be pursued. Nevertheless, counsel for the Owners submitted that I should do so and that in any event what Lord Roskill said in the *Evia No.2* on this subject was obiter and should not be followed. That would be a bold route for a first instance judge to take, particularly by me after the discussion of the subject on appeal from my judgment at first instance by the Court of Appeal and the Supreme Court in the *Ocean Victory*. Moreover, in circumstances where Lord Roskill gave two reasons for dismissing the appeal in the *Evia No.2* both reasons must be regarded as the ratio of the case; see *Jacobs v LCC* [1950] AC 361 at pp.369-370 per Lord Simonds. It must also be noted that Longmore LJ's analysis of this area of the law in cases where the parties are not joint assureds is one that, although obiter (because the *Ocean Victory* was a case of joint assureds) is most persuasive having regard to his particular knowledge of insurance law.

81. Applying Longmore LJ's analysis the position appears to be as follows. In circumstances where the Owners and Charterers have agreed that if the Owners insure against war risks in the Gulf of Aden the Charterers will pay the insurance premium then, prima facie, the parties have agreed to look to the insurers for indemnification in

respect of losses caused by such risks rather than to each other. The question therefore is whether there is any reason why that prima facie position is displaced in the present case.

82. This was the approach followed by the Tribunal. The Tribunal considered whether there was a "sufficient countervailing reason to think that the Charterers should not only pay the premium but also contribute to the liability of the insurers they have paid"; see paragraph 99 of the Award.

83. Counsel for the Owners submitted that there was such a reason, namely, that the claim sought to be made in the name of the Owners was not a claim for damages for breach of contract but was a claim for cargo's contribution in general average. Counsel for the Owners submitted that general average is different from breach. That is obviously the case. General average is "the system of maritime law by which sacrifices of property made, and loss and expenditure incurred, as a direct result of actions taken for the purpose of preserving a common maritime adventure from peril are rateably shared between all those whose property is at risk in the adventure"; see the *"Longchamp"* [2018] 1 Lloyd's Reports 1 at paragraph 2 per Lord Neuberger. It is an ancient and venerable principle by which losses are shared. Depending upon what sacrifices are made or expenditure incurred the Owners may be liable to contribute in general average to the Cargo Interests or the Cargo Interests may be liable to contribute to the Owners. In the present case the Owners incurred an expenditure to preserve the common maritime adventure by paying a ransom to the pirates; hence (subject to the suggested defence) the Cargo Interests were liable to contribute in general average to the Owners. If the Owners had secured the release of the Vessel by sacrificing half of the cargo of fuel oil by delivering it to the pirates then the Owners would have been liable to contribute in general average to the Cargo Interests.

84. The additional war risks cover taken out by the Owners covered, amongst other losses, the Vessel's proportion of general average, that is, such contribution as the Owners were liable to pay to the Cargo Interests. That cover did not, of course, cover the cargo's proportion of general average, that is, such contribution as the Cargo Interests were liable to pay in general average to the Owners. That would be covered by the cargo insurance purchased by the Cargo Interests. As the Tribunal noted cargo underwriters in the present case wrote the insurance of cargo on familiar terms.

85. Counsel for the Owners advanced several submissions with regard to this point at paragraphs 33-38 of their Skeleton Argument.

86. First, it was said that because the present case involved a claim by the Owners in general average the insurance solution explained in the *Evia No.2* and in the *Ocean Victory* is simply not on point; see paragraph 33 of Counsels' Skeleton Argument. The Tribunal's answer to this argument was that if a case of breach could fail because of the presence of an insurance "code" then it is *a fortiori* where there is no suggestion of a breach; see paragraphs 95 and 96 of the Award. I cannot discern an error of law in that answer, notwithstanding the ancient and venerable origins of general average and its different juridical character from that of breach of contract. Were the Charterers as Cargo interests to be liable in general average the "remarkable result" would follow, namely, that Charterers would have paid the premium as agreed and yet would still be liable in respect of losses caused by the peril insured against.

87. Second, it was said that the additional war risks cover taken out to enable the vessel to transit the Gulf of Aden had nothing to do with cargo; that the Owners did not take out a policy which extended to cargo and that it cannot be correct that where the insurance only covers insurance for the Vessel the Owners are precluded from making a recovery from Cargo Interests attributable not to the vessel but to the cargo; see paragraph 34 of Counsels' Skeleton Argument. I had difficulty in following this argument. It is right that the additional insurance had nothing to do with cargo. It insured the Vessel and the Owners. It is also right that the Owners did not take out a policy which extended to cargo. The Cargo Interests would take out insurance which extended to cargo. Lastly, I do not follow why it is said that the Owners are seeking to make a recovery from Cargo Interests attributable to the cargo. The Owners are seeking to make a recovery from Cargo Interests attributable to expense incurred by the Owners, which expense was covered by the additional war risk cover.

88. It was also said that it is tolerably clear that, had the shipowner in the *Evia No.2* made a claim in general average against cargo interests in relation to loss which fell outside of their insurance cover over "their interests in the Vessel" (ie cargo), the House of Lords would not have decided the case as they did; see paragraph 36 of Counsels' Skeleton Argument. I also had difficulty following this argument. Of course, if the Owners' claim in general average were in relation to a loss which fell outside their insurance cover there would be no question of the claim being debarred by the agreement relating to the funding of additional insurance cover. But if there were a claim in general average against Cargo Interests caused by a general average expenditure made by the Owners as a result of the war risk of piracy materialising such a claim would not have fallen outside of the Owners' insurance cover because the Owners would have been entitled to have been indemnified by the additional war risk underwriters in respect of it.

89. It was also said that the Cargo Interests (in this context the Charterers) have <u>never</u> paid or become liable to pay to owners <u>a premium for cargo insurance</u>; see paragraph 37 of Counsels' Skeleton Argument. That is true. The Cargo Interests have paid or become liable to pay to the Owners the premium for the Owners' additional war risks insurance. The payment of ransom by the Owners was covered by that insurance.

90. Third, it was said that very clear, express language is required to result in a party to a maritime adventure giving up its right to claim a general average contribution, *a fortiori* when the contract of carriage positively provides for general average (as does clause 41 of the charter party) and one is seeking to excise out of that agreement one class of event in relation to which general average would ordinarily require a contribution from cargo: see paragraph 38 of Counsels' Skeleton Argument. This argument, however apparently orthodox, runs up against the position which has been reached in this area of the law of subrogation, as explained by Longmore LJ in the *Ocean Victory*, namely, that the prima facie position is that where a contract requires a party to that contract to insure the parties have agreed to look to the insurers for indemnification rather than to each other. I do not see why that approach is inapplicable when the Owners' claim is for a contribution in general average rather than a claim for damages for breach.

91. In this context it is to be noted that the Tribunal said as follows, at paragraph 93:

> As we read his speech, Lord Roskill was saying that the "code" interpretation which he adopted was a sufficiently clear expression of the shipowner giving up the right to sue for a breach of warranty of safety.

92. In the light of Longmore LJ's explanation of the law I must agree with that observation. Whilst a claim in general average is different in character from a claim for breach of the warranty of safety I am not persuaded that that difference has the effect that the "code" interpretation is not a sufficiently clear expression of the shipowner giving up the right to sue for a claim in general average. The indemnification to which the shipowner is entitled from his insurance covers or encompasses the loss which gives rise to the general average contribution.

93. Clause 41 of the Charter made express provision for general average. But that clause must be read together with the war risk clauses. They form part of the same charter. Reading the insurance "code" provided by those clauses together with clause 41 does not deprive clause 41 of effect. Clause 41 can still apply to all general average events which occur otherwise than as a result of war risks in the Gulf of Aden.

94. There is however one aspect of this matter which troubles me. The effect of the Cargo Interests' case as to the effect of the agreement to fund the additional war risks cover is that the implied carve out from clause 41 is one way only. The Cargo Interests would remain free to make a claim in general average against the Owners in the event that cargo was sacrificed by being delivered to the pirates in order to preserve the common maritime adventure. Thus clause 41 of the Charter would be subject to an implied, one way, restriction on claims for general average by the Owners against the Cargo Interests where the Owners' sacrifice or expenditure was necessitated by a peril insured by the additional war risks cover. This might well cause problems where as a result of piracy in the Gulf of Aden there was both a general average expenditure by the Owners and a general average sacrifice of cargo. However, the answer is probably that there is justification for preventing the Owners from recovering in general average, because the Charterers, if they were the Cargo interests, had agreed to pay the premium, whilst there is *no* justification for preventing the Charterers, if they were the Cargo interests, from recovering in general average because the Owners had not agreed to pay the premium for cargo insurance. In the event, although troubled by the one way carve out, I am not persuaded that the principle described by Longmore LJ should not apply to a claim for a general contribution by Cargo Interests.

95. Counsel for the Owners submitted that where a party takes out its own insurance, as the holders of the bills of lading did, that is a strong indication that an exclusive insurance fund did not exist. Reliance was placed on *Haberdasher's Aske's Federation Trust Ltd.v Lakehouse Contracts Ltd.* [2018] Lloyd's IR 382 at paragraph 70. However, the court in that case emphasised that there was an express agreement that the party in question would take out its own insurance. To be comparable there would have to have been in the present case an express obligation that the Cargo Interests would take out their own insurance to cover their own liability in general average. There was no such agreement although it would have been known that such insurance would typically be taken out by the Cargo Interests. I do not consider that such knowledge is a good reason for not applying the principle in the *Evia No.2* to the present case.

96. For these reasons I agree with the Tribunal that on the true construction of the Charter the parties had agreed to look to the additional policies for the recovery of relevant losses and so the Owners were precluded by that agreement from seeking to recover that loss by way of a contribution in general average.

The position as between the Owners and the holders of the bills of lading

97. That being the position under the charter the final (and ultimate) question is whether those parts of clause 39, the War Risks Clause, and the additional Gulf of Aden and War Risk clauses which are incorporated into the bills of lading so as to bind the holders of the bills of lading have the effect of precluding the Owners from recovering a general average contribution from the holders where the general average expenditure resulted from a peril insured by the additional policies.

98. For the reasons I have given earlier in this judgment the only parts of the clauses in question which have been incorporated into the bills so as to bind the holders of the bills are the liberties conferred on the Owners not to complete the voyage or to depart from the usual or expected route. The other provisions, in particular those which oblige the Charterers to pay the expenses caused by the exercise of those liberties and to pay for the additional insurance premium in the event that the Owners take out additional war risk cover, although incorporated into the bills, do not have the effect (by way of manipulation or substitution) of making the holders of the bills of lading liable for such expenses or the additional insurance premium.

99. That being so there is an important difference between the position under the Charter and the position under the bills of lading, namely, that it cannot be said of the bill of lading holders, as Lord Roskill said of the charterers in the *Evia No.2* (and paraphrasing his comments so as to apply in the general average context) that they have paid the premiums not only for no benefit for themselves but without shedding any of their liability to contribute in general average in respect of losses caused by the additional insured perils. The point was expressed in this way by counsel for the Owners in their Skeleton Argument at paragraph 39(b):

> This is a radical departure from and extension of both the *Evia No.2* and the *Ocean Victory*, where what was at stake was the equity between the two contracting parties where one had contributed to or paid insurance premiums for policies held by the other in relation to the relevant eventuating risks. If there is only a Fund Agreement between Owners and Clearlake, premised on the equity of Clearlake having paid or been liable to pay the premiums, it is wrong to extend the benefit of that equity to any bill of lading holder that Owners may in future contract with once bills are issued.

100. Counsel for the Owners put this point centre stage in his oral submissions and counsel for the Cargo Interests accepted that it was "superficially formidable". But, he added, it was flawed essentially because it missed the point, namely, that the insurance based solution was set up at no cost to the Owners so that they could perform the contract of carriage and recover any resultant loss from underwriters.

101. It is necessary to remember that the court is concerned with the true construction of the contract of carriage contained in or evidenced by the bills of lading. As Andrew Baker J. observed when giving permission to appeal the single, ultimate question is whether,

properly construed, the bills of lading excluded liability on the part of the bill of lading holders in respect of cargo's contribution in general average in the event the vessel encountered a peril insured under the relevant insurances.

102. On the true construction of the Charter the liability of the Charterers to contribute in general average in the event the vessel encountered a peril insured under the relevant insurances *was* excluded. The reason why that was the true construction of the Charter was the "remarkable result" which would otherwise follow, namely, that the Charterers would have paid the premium not only for no benefit for themselves but also without shedding any of their liability to contribute in general average in respect of losses caused by the additional insured perils. The fact that the Charterers had agreed to pay the premium was central to that analysis. When explaining this area of the law in the *Ocean Victory* Longmore LJ had clearly in mind that the other party to the contract had agreed to pay the insurance premium ("the insurance was paid for by the "guilty" party"). As the Tribunal noted at paragraph 99 of the Award what matters is "the agreement to pay the premium". There are no words which expressly designate a "code", nor do the words expressly state that the Owners are to look only to the underwriters, as the Tribunal noted at paragraph 87 of the Award. What gives rise to the "effective fund for the payment of ransom" is the insurance "for which the Charterers were to pay", as concluded by the Tribunal at paragraph 91 of the Award.

103. Thus, when one examines the true construction of the contracts contained in or evidenced by the bills of lading, one finds that a crucial component of Lord Roskill's reasoning in the *Evia No.2* is missing. The holders of the bills of lading have *not* agreed to pay the premium. It therefore cannot be said of them that the "remarkable result" would follow that the holders of the bills would have paid the premium not only for no benefit for themselves but without shedding any of their liability to contribute in general average in respect of losses caused by the additional insured perils.

104. In the absence of the "remarkable result" there is in my judgment no proper basis for concluding that, as between the Owners and the Cargo Interests (that is, the holders of the bills of lading), there is an agreement that where a general average expenditure has been incurred as a result of an insured peril the Owners may look only to the insurance policy and not to a contribution in general average from the Cargo Interests.

105. Counsel for the Cargo Interests suggested that counsel for the Owners had missed the point. I disagree. The point is not that the Owners had agreed to transit the Gulf of Aden at no cost to themselves. The crucial point, as correctly identified by counsel for the Owners, was that the Charterers had agreed to pay for the insurance.

106. The Tribunal concluded that the "code" *was* incorporated into the bills of lading; see paragraphs 102-105 of the Award. The Tribunal, having found that there was in the Charter a code which involved an agreement by the Owners not to seek contribution for piracy losses, reasoned as follows:

> "We do not think the issue here is whether the cargo interests, as such, acquired an obligation to pay the relevant premiums nor whether the word "Charterers" in the pertinent clause can/need be manipulated to read "lawful holders of the bill of lading", since we think all that matters is that the Charter code involved an agreement by the Owners not to seek contribution for piracy losses. It is not a case

> of incorporating a positive obligation on cargo but of an agreement by the Owners excusing cargo from liability. It is thus not infected by the same onerous uncommerciality that drove Lord Diplock's thinking in *The Miramar*; quite the reverse since an exclusion of liability is not in the least onerous on the beneficiary bill of lading holder. A bill of lading holder would, in our view, have to have taken leave of his senses not to accept the exclusion of his liability for the effects of piracy risks by reason of the relevant "code"…..".

107. The essential steps in this reasoning are:

i) The "code" in the charter party included an agreement by the Owners not to seek contribution for piracy losses.

ii) The bills of lading incorporated "all terms and conditions, liberties and exceptions" of the charter party.

iii) The agreement by the Owners not to seek contribution for piracy losses was a term of the charterparty and so was incorporated into the bills of lading.

108. However, the agreement by the Owners not to seek contribution for piracy losses was derived from the agreement by the Charterers to pay the insurance premium. The agreement by the Owners not to seek contribution was either the effect of the agreement by the Charterers to pay the insurance premium on its true construction or was implied from that agreement. It followed that the agreement by the Owners not to seek contribution for piracy losses was an agreement not to seek such contribution from the Charterers.

109. By contrast, the contract of carriage contained in or evidenced by the bill of lading did not contain an agreement by the holders of the bill of lading to pay the insurance premium. There was therefore no foundation in that contract for an agreement by the Owners not to seek a contribution for piracy losses from the holders of the bill of lading.

110. In my judgment, it is not appropriate in the context of the contract contained or evidenced by the bill of lading to incorporate into it the agreement by the Owners not to seek a contribution in respect of piracy losses because the holders of the bill of lading had not agreed to pay the insurance premium. To incorporate into the bills of lading the Owners' agreement in the charter party not to seek contribution for piracy losses would be a mechanical operation of the incorporation clause because it divorced the Owners' agreement not to seek a contribution from the Charterers' agreement to pay the premium which had given rise to the former agreement and because it failed to take into account that the holders of the bill had not agreed to pay the premium.

111. I have therefore found myself unable to agree with the reasoning and conclusion of the Tribunal. The Tribunal put to one side in this part of the Award the importance of there being no agreement by the holders of the bills to pay the insurance premium. I consider that that was an error.

112. The Tribunal said that the words of incorporation meant that the terms and conditions, liberties and exceptions should be given a similar meaning in both the bills of lading and in the Charter and that it would be remarkable if the same terms had materially different meanings in the two types of contract. In my judgment these observations lack

force in circumstances where the obligation to pay the premium cannot properly be manipulated to impose the obligation on the holders of the bills of lading. Thus the same terms are not found in both types of contracts.

113. The Tribunal was right to say that a bill of lading holder would have happily accepted the exclusion of his liability in general average. Counsel for Cargo Interests also submitted that it would be odd if a charterer/seller were protected by the code under the charterparty, whilst the receiver/buyer in possession of the bill of lading was not protected by the code. But the question is whether the exclusion of liability had, on an objective basis, been agreed by the parties to the bill of lading contract. That is a question of the true construction of the words used by the parties to the bill of lading contract to express their bargain. In my judgment such an exclusion of liability had not been agreed by the parties to the bill of lading contract.

114. For these reasons the contract of carriage contained in or evidenced by the bills of lading does not contain an agreement by the Owners not to seek a contribution in general average from the holders of the bills from liability in respect of losses covered by the additional insurance taken out by the Owners.

115. It follows that this appeal succeeds.

Appendix

39. WAR RISKS

39.1 For the purpose of this Clause 39 the words:-

"Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charted with management and/or operation of the Vessel, and the Master; and

"War Risks" shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolutions, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, of the Government of any state whatsoever, which, in the reasonable judgment of the Master and/or Owners, may be dangerous or are likely to become dangerous to the Vessel, her cargo, crew of other persons on board the Vessel.

39.2 If at any time before the vessel commences loading, it appears, in the reasonable judgement of the Master and/or Owners, that performance of the contract of carriage, or any part of it, may expose, or is likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks, Owners may give notice to Charterers cancelling this Charter, or may refuse to perform such part of it as may expose, or may be likely to expose, the Vessel, her cargo, crew or other persons on board
the Vessel to War Risks provided always that if either Section E or F of PART 1 provides for a loading or discharging Range, as the case may be, and the Vessel, her crew, other persons on board, or cargo may be exposed, or may be likely to be exposed, to War Risks, at the port originally nominated by Charterers, then Owners shall first require Charterers to nominate a safe port which lies within the relevant Range, and may only cancel this Charter if Charterers shall not have nominated such safe port within forty-eight (48) hours of such request.

39.3 Owners shall not be required to continue to load cargo for any voyage, or to sign Bills of Lading for any port, or to proceed
or continue on any voyage, or on any part thereof, or to proposed through any canal or waterway, or to proceed to
remain at any port whatsoever, where it appears, either after the loading or the cargo commences, or at any stage of the
voyage thereafter before the discharge of the cargo is completed, that, in the reasonable judgement of the Master and/or Owners, the Vessel, her cargo (or any part thereof), crew or other persons on board the Vessel (or any one of them) maybe, or are likely to be, exposed to War Risks. If it should so appear, Owners may, by telex or email, request Charterers to nominate a safe port for the discharge of the cargo or any part thereof, and if within forty-eight (48) hours of the receipt of such telex or email, Charterers shall not have nominated such a port, Owners may discharge the cargo at any safe port of their choice (including

the loading port) in complete fulfilment of their obligations under this Charter. Owners shall be entitled to recover from Charterers the extra expenses of such discharge and, if the discharge takes place at any part other than the loading port, to receive a full fright as though the cargo had been carried to the discharge port originally nominated. Any additional period by which the steaming time taken to reach the port at which the cargo is discharged exceeds the time which would have been taken had the Vessel proceeded to the original discharge port directly, and bunkers consumed for steaming during such additional period, shall be calculated and compensated in accordance with the provisions of Clause 22.3.

39.4 If at any stage of the voyage after the loading of the cargo commences, it appears, in the reasonable judgement of the
Master and/or Owners, that the Vessel, her cargo, crew or other persons on board the Vessel may be, or are likely to be, exposed to War Risks on any part of the route (including any canal or waterway) which is normally and customarily used in a voyage of the nature contracted for, and there is another longer route to the discharge port, Owners may give notice to
Charterers that this route should be taken~~. In such case this Charter shall be read in respect of freight and all other conditions whatsoever as if the voyage performed were that originally designated~~. ***IN THIS EVENT THE OWNERS SHALL BE ENTITLED, IF THE TOTAL EXTRA DISTANCE EXCEEDS 100 NAUTICAL MILES TO THE***
EXTRA EXPENSES INCURRED (WHICH TO INLCUDE EXTRA TIME AND BUNKERS CONSUMED AS A RESULT OF HAVING TO PROCEED VIA AN ALTERNATIVE ROUTE LESS SAVINGS MADE) TO BE FOR CHARTERERS ACCOUNT. TIME SHALL COUNT AS LAYTIME OR IF THE VESSEL IS ON DEMURRAGE FOR DEMURRAGE.

However if the Vessel discharges the cargo at a port outside the Ranges stated in Section F of PART 1, freight shall be paid as for the voyage originally designated and any additional period by which the teaming time taken to reach the discharge port exceeds the time which would have been taken to reach the originally designated discharge port directly, and bunkers consumed for steaming during such additional period, shall be calculated and compensated in accordance with the provisions of Clause 22.3. Any additional port, canal or waterway expenses incurred by Owners as a result of the Vessel discharging outside the Ranges stated in Section F of PART 1 as aforesaid shall be for Charterers' account and Charterers shall reimburse to Owners any amounts due under this Clause 39.4 upon receipt of Owners' invoice together with full supporting documentation.

39.5 The Vessel shall have liberty:-

39.5.1 to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharging of cargo, delivery or in an way whatsoever which are given by the government of the state under whose flag the Vessel sails, or other government to whose law Owners are subject, or any other government which so requires or anybody or group acting with the power to compel compliance with their orders or directions;

39.5.2 to comply with the orders, direction or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance applicable to the Vessel;

39.5.3 to comply with the terms of any resolution of the Security Council of the United Nations, any directions of the European Community, the effective orders of any other supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which Owners are subject, and to obey the orders and directions who are charged with their enforcement;

39.5.4 to discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;

39.5.5 to call at any other port to change the crew or any part thereof or other persons on board the Vessel it there is good reason to believe that they may be subject to interment, imprisonment or other sanctions; and

39.5.6 If cargo has not been loaded or has been discharged by Owners under this Clause 39, to load other cargo for Owners' own benefit and carry it to any other port or ports whatsoever, whether backwards or forwards or in a contrary direction to the ordinary or custom any route.

39.6 If any compliance with Clauses 39.2 to 39.5 anything is done or not done, such shall not be deemed to be a deviation, but shall be considered as due fulfilment by the party concerned of its obligations under this Charter.

The Gulf of Aden Clause

" Gulf of Aden Clause – For this CP only dated 20.09.10

In case the vessel for safety reasons is escorted by naval vessel(s) and/or restricted by daylight, and/or if a protection team and or any other protective measures is employed, all time used while awaiting escort and/or awaiting daylight and/or awaiting the protection team and/or awaiting implementation of protective measures to count at half time against used laytime or demurrage if vessel already on demurrage.

Furthermore if it is necessary for the vessel to follow a fixed route (way points) and/or to enter a convoy and/or to deviate to pick up/drop off a protection team and/or implement any other protective reasonable measure, and/or to deviate from the usual route, additional costs (including the costs of protection team and protective measures), time and bunkers used to be shared 50/50 between owners and charterers.

Any additional insurance premia (including, but not limited to, those in respect of H&M, Crew, P&I kidnap risks and ransoms), crew bonuses (which to be in accordance with the international standard) shall be for chrtrs account. Max USD40,000 for charterers account for any additional insurance premium except for crew bonus which to be max USD 20,00 for charterers account"

The Additional War Risk Clause

> *"Any additional premiums payable by owner in respect of war risks under their policies of insurance that are incurred by reason of the vessel trading to excluded areas not covered by owner's basic war risk insurance shall be for charterer's account. Any bonuses or additional premiums payable by owners in respect of their crew which are due by reason of trading to such excluded areas shall also be for charterer's account.*
>
> *For the avoidance of doubt it is agreed that if the vessel is bound to enter an excluded area in order to arrive at the load port, or if the vessel will have to steam away from the discharge port in order to leave an excluded area then the additional premiums and bonuses payable by charterers shall include those payable from the time the vessel passes into the excluded area inward bound to the load port and until the time the vessel passes out of the excluded area outward bound from the discharge port calculated at normal speeds and prudent navigation. Such additional premiums and expenses that are for charterer's account are payable by charterers together with freight against owner's invoice supported by appropriate documents. If such documents not available then such additional premiums and expenses shall be settled not later than 2 weeks after receipt by charterer from owner's invoice and appropriate supporting documents.*
>
> *Any discount or rebate refunded to owner for whatsoever reason shall be passed on to charterer. Any premiums and increase thereto attributable to closure. Max USD 20,000 crew war bonus for charterers account"*