

Cargo Damage from Fire

By Gavin Brown

Bowman Gilfillan Attorneys

The fire which broke out onboard the MV Charlotte Maersk near Port Klang in Malaysia in July of this year raises some interesting questions for shippers.

While one is hesitant to speculate as to the cause of the fire and the liability of any of the parties involved until thorough investigations are carried out, early press reports indicate that the fire may have been the result of mis-declared hazardous cargo. Whether this was the case or not time will tell, however the incident provides a good platform for discussing the liabilities which may arise from an incident of fire.

Before proceeding, it should be noted that determining the applicable rules and law for assessing liability in shipping can be a very complex enquiry depending on various factors including origin, destination, nationality of contracting parties, choice of law and incorporation of liability regime. This discussion will focus only on liability under the South African Carriage of Goods by Sea Act ("COGSA") which incorporates the terms of the Hague-Visby Rules.

At a basic level, two types of claim might arise in the instance of fire. Firstly, shippers may have a claim against the carrier for damage to their cargo or, secondly, the carrier may have a claim against cargo for damage to its ship.

Fire as a Defence

In terms of the Hague-Visby Rules fire can be raised as a defence, better known as an exception, by the carrier. The carrier can only raise the exception of fire if the fire was not a result of its actual fault or privity.

The onus of proving the fault or privity of the carrier is on the claimant, the shipper. To contest proof of fault or privity, a carrier can show, *inter alia*, that its safety procedures conform to the requirements of the ISM code and the Merchant Shipping Act, provide evidence of regular fire drills and maintenance checks of fire fighting equipment and show that it has up-to-date information on dangerous goods likely to self combust.

If it is successful in doing so, the carrier can escape liability for any damage caused as a

result of the fire, or as a result of efforts to put out the fire, such as water damage.

Mis-declaration of Cargo

The shipper is under a duty to properly declare cargo, particularly in circumstances where the cargo is hazardous or dangerous. Failure to do so would mean that it is liable, not only to the carrier for damage to the ship in cases of fire, but also to other cargo which may be damaged.

Scenarios

Two hypothetical scenarios are useful to examine the liability which may arise from a fire onboard a ship.

For the sake of demonstrating the scenarios we will be discussing a vessel called the mv "X" which is carrying cargo from two shippers: shipper "A" and shipper "B".

Scenario 1:

In scenario 1 both shipper A and B correctly declare their cargo; however, two days before reaching Cape Town, a fire breaks out onboard the X damaging both A and B's cargo.

A and B wish to claim against the carrier for the loss sustained as a result of the fire. However, the carrier is able to show that the vessel was in a seaworthy state and that proper due diligence was observed prior to and at the beginning of the voyage. The shipper therefore raises the exception of fire without its fault or privity.

If A and B are unable to prove that the fire or the resulting damage was Y's fault, Y would avoid all liability arising from the fire.

Scenario 2:

In this scenario A ships cargo which is properly declared; however, B's cargo is hazardous and is mis-declared. Two days before arriving at Cape Town, B's cargo spontaneously combusts.

The fire not only causes damage to A's cargo it also causes damage to the vessel.

A, whose cargo was properly declared, sues the carrier Y for the damage to its cargo. Again the carrier raises the fire exception. A is not able to prove that the fire or the damage resulted with the carrier's actual fault or privity and the carrier avoids liability.

There is, however, a further step in this scenario. The damage to A's cargo and the carrier's vessel was caused through the fault of B who failed to properly declare its hazardous cargo. Both A and the carrier, therefore, have claims against B. The question is whether B is in a financial position to meet such claims which could easily run into millions of rand.

What is significant in both scenarios is that an innocent shipper may find itself in a position where it has suffered damage as a result of fire but is not able to recover that loss from the parties involved or their insurers. This could be either because the carrier is able to raise the exception of fire or because the guilty party, whose insurance may have repudiated because of failure to properly declare cargo, is unable to pay for the damage.

It is accordingly advisable, even if your own processes are watertight, to always insure your cargo yourself. That way, come fire or water, there is somewhere to turn if and when disaster strikes.