

## P&I | Cargo Liability

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The Court's interpretation of Article 4 Rule 2 (a) came as a complete surprise to the maritime world, since none of the leading texts had identified any bona fide elements in the Rule. The decision was criticized, because it cannot be correct that the carrier has to depend on the subjective intentions of the master in order to be able to refer to the exemption.

### The Court of Appeal of New Zealand

The carrier appealed the lower court's decision, arguing that the defence was available for any navigational act, reckless or otherwise. The majority of the court concluded that the conduct of the master was not an "act, neglect or default..." in the navigation or in the management of the ship for the purpose of Article IV (2) (a), because such "selfish" and "outrageous" behaviour could not be conducted in the navigation or management of the ship. The actions of the master in his delay in notifying salvors and local authorities had not been motivated by his paramount duty to the safety of the ship, crew and cargo, but by his intention of avoiding blame. The majority of the court dismissed the appeal.

None of the judges however considered there to be any reason for implying an obligation of good faith into the Article IV(2) (a) exclusion, and the High Court judgement can, therefore, be treated as not being good law.

### The Supreme Court

The carrier's application for leave to appeal to the Supreme Court was granted, and the case was heard in October 2009. The Supreme Court rejected the approach of both the High Court and the Court of Appeal, and went on to say that the carrier is responsible for loss or damage caused by matters within their direct control i.e. commercial fault, such as the seaworthiness and manning of the ship at the commencement of the voyage. However, the carrier is exempted from liability for the acts or omissions of the master or crew in the navigation and management of the ship, unless their actions amount to barratry. Since barratry was never pleaded, it was not possible to argue that the master's actions constituted barratry.

The Supreme Court held that the carrier is protected by the exemption in Article IV (2)(a) and allowed the appeal.

### Comments

The decision of the Supreme Court of New Zealand was welcomed. Had the decision of the High Court and the Court of Appeal stood unchallenged, there would have been a great deal of uncertainty as to what error in navigation encompassed. It would not have been in the interest of a uniform interpretation of the Rule to read in requirements in addition than those already available in the leading texts.

This is even more important today, when we see many countries expressing heavy criticism of the Rotterdam Rules which might postpone a ratification of this convention and extend the further application of the Hague Visby Rules amongst the major trading nations.

## Cargo | Iron Ore Fines

# Iron Ore Fine



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**Iron Ore Fine is cargo sensitive to moisture content, and it endangers ship's stability if it loads with excessive water content. It creates a free surface effect, and the ship might lose her stability at sea and end up sinking.**

Most shipowners are aware of the risks when loading iron ore fine or the like, or concentrate in South East Asia, and in particular at Indian ports. When a few sinking incidents occurred immediately after loading of a similar cargo at Indian ports, evidence indicated that the cargo had greater moisture content than permissible. The most recent incident as reported was the sinking of the Hong Kong Flag ship Asian Forest on 18 July 2009.

It is important for shipowners to consider how to ensure that the ship can sail from the loading port with sufficient stability and at a safe mode throughout her voyage. In order to achieve this, shipowners in a majority of cases are to nominate their own surveyor whenever their ship is calling at these ports to load Iron Ore Fine or the like. The surveyor appointed is required to inspect the condition of the cargo before loading, and more importantly, its moisture content (by both can test and laboratory analysis) which must be within the TML (Transportable Moisture Limit). This is to reconfirm and ascertain that the information provided by the shipper is correct when, according to BC Code loading of bulk cargo, the shipper is obliged to provide a cargo quality certificate for their cargo to the shipowners prior to loading. This prevents the possibility that, the cargo might have been exposed to rainy weather while it is waiting for loading at quayside, although analysis of the cargo might have been completed by the shipper's surveyor days before.

The survey fee normally in this circumstance is for the safety of the ship, and is on account of the shipowners who ordered the survey.

On 28 May 2010, the Indian Ministry of Shipping issued a circular to all Port Trust of Indian ports in which it defined that various requirements have to be complied with by parties including the shipper, port, vessel agents, shipowners, master



# loading at Indian Ports



**Iron Ore Fine – cargo sensitive to moisture content.**

and charterers etc, these including but not limited to the following compliances:

## Compliances

- A.** A P&I surveyor has to be appointed by the owners' P&I club or the owners themselves (head owners themselves). The surveyor shall produce his job assignment letter from head owners/owners' P&I club to the authorities to confirm that he is really representing the interest of the owners (head owners)/their P&I Club. The P&I surveyor has to confirm/accept/certify the results obtained by the charterers' surveyor/shippers' surveyor before it is submitted to the Mercantile Marine Department to issue the clearance for the vessel to sail. This procedure is vital to have the confirmation/assurance on the cargo loading from a surveyor who is appointed by the vessel's interest (owners/owners' P&I). In most cases, the charterers'/shippers' surveyors are more inclined to make savings for the cargo interests by ignoring the safety of the vessel.
- B.** The authorities have also specified other compliances to ensure that the safety of the vessel is maintained throughout. Some of the compliances are as follows;
- TML certificate provided by the shippers together with the shipping bill to be issued by a Directorate General of Shipping-approved first class laboratory.
  - The moisture content certificate for cargo drawn from the vessel's holds during loading is to be issued by a Government-approved laboratory.

- On the completion of loading, the holdwise finding of the P&I surveyors on the moisture content and the cargo trimming is required to be submitted.
  - A shiftwise report of the P&I surveyor on CAN test and on the spot moisture test is required to be submitted.
  - The vessel's agents are to provide a declaration to the port that the vessel is strengthened to load high density cargo in all the cargo holds, and they are also required to submit the relevant page of the stability booklet.
  - There should be a continuous survey by the surveyors appointed by the charterers/shippers.
- C.** The surveyors representing the other interests will have to work along with the P&I surveyor, and their findings should meet with his satisfaction, and has to be accepted/approved by the owners' surveyor.
- D.** In addition to the above, all the other specifications required to be complied with have to be met in order to get MMD (Mercantile Marine Department) clearance.
- E.** Please note that without MMD clearance, an MDC (Marine Dues Clearance) will not be issued by the port and without an MDC the Customs will not issue the port clearance.

## Playing an important role

In the above circumstance, owners/P&I club's surveyor is playing a very important role in certifying that the cargo is within the requirement in particular as regards its moisture content, and moreover in accepting the findings of the shipper/charterer's surveyor. A ship cannot obtain a port clearance from the port authority without a P&I -approved surveyor attending the ship on her loading of Iron Ore Fine at Indian ports. This obviously becomes a statutory requirement/rule of the port.

## Recommendation

Owners are, however, recommended to arrange their surveyor's attendance via their P&I club or the club's local correspondent for their ship loading this cargo at Indian Ports. If they have their ship time-chartered out, it is suggested they ask the charterer to pay the survey fee, or at the time of fixing the cargo to have this survey requirement taken into their account, so that there is no doubt, and have the clause clearly stated in the Charterparty that the cost of this survey is on the account of the charterer.



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