SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Navigational errors

The Supreme Court of New Zealand on 16/4/2010 issued a Judgment holding a shipping company not liable for the cargo damage of more than 20 million New Zealand dollars caused by the Master's navigational errors pursuant to the Hague Visby Rules.

On 3/5/2001 the *Tasman Pioneer*, a Cypriot-registered vessel of 16,748 gross tonnes under sub-charter to the shipping company, was on a voyage from Yokohama in Japan to Busan in South Korea. Because he was behind schedule, the Master decided to pass through a narrow channel between Biro Shima Island and the mainland of southern Japan, rather than going around the island. In poor weather, the *Tasman Pioneer* struck rocks on the island side of the channel while steaming at about 15 knots. The Master should have immediately ascertained what, if any, damage had resulted. Had he done so, he would have discovered that the hull had been holed and sea water was entering. He should then have notified the nearby Japanese coastguard and the owners of the vessel. In all probability, the ready availability of salvage services would in that event have ensured that there was no damage to the cargo on the *Tasman Pioneer*, said to have a total value of in excess of 20 million New Zealand dollars. What the Master actually did, apparently motivated by a concern for his own position if the truth emerged, was to attempt to conceal what had occurred from the authorities and the owners. To that end, he steamed for some hours towards a point where he would have rejoined the course he would have taken had he gone outside Biro Shima Island. Meanwhile, the flooding of the vessel by sea water continued and was increased by the ship's passage through the water. The Master also falsified the course plot on the relevant chart and, when he did report to the coastguard and the owners, downplayed the extent of the damage and incorrectly stated that it had been caused by collision with a semi-submerged object, probably a container. The Master also attempted, necessarily but unsuccessfully, to involve deck officers and crew in a conspiracy to conceal what had actually occurred. By the time salvage assistance was finally sought the cargo was a total loss. In the proceedings in question, the cargo interests sought to recover that loss from the shipping company.

The cargo was being carried under contracts of carriage between the shipping company and the cargo interests governed by New Zealand law. Section 209(1) of the Maritime Transport Act 1994 confers the "force of law" in New Zealand on the Hague-Visby Rules, as set out in the Fifth Schedule to the Act. Whether the cargo interests could recover from the shipping company turned on the interpretation and application of those Rules, which resulted from significant amendments in 1968 and 1979 to rules previously known as the Hague Rules.

Hague-Visby Rules

Article 1 of the Rules defines the "carrier" as including "the owner or the charterer who enters into a contract of carriage with a shipper". The shipping company was therefore a "carrier" for the purposes of the Rules. Article 3.1 and 3.2 then impose the following, among other, obligations on the carrier:

(1) The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
  (a) Make the ship seaworthy;
  (b) Properly man, equip and supply the ship;
  (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(2) Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

In return, art 4 confers certain exemptions on the carrier, including those set out as follows in art 4.2:

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from–
  (a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
  (b) Fire, unless caused by the actual fault or privity of the carrier;
  ...
  (i) Act or omission of the shipper or owner of the goods, his agent or representative;
  ...
  (p) Latent defects not discoverable by due diligence;
  (q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of

> this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Paragraph (q) is a general provision which applies to "other" causes not addressed specifically in the preceding paragraphs. The scheme of the Rules is clear. Carriers are responsible for loss or damage caused by matters within their direct control (sometimes called "commercial fault"), such as the seaworthiness and manning of the ship at the commencement of the voyage. They are not however responsible for loss or damage due to other causes, including the acts or omissions of the master and crew during the voyage ("nautical fault"). This allocation of risk is confirmed by art 3.2 being made subject to art 4 and by the inapplicability of the art 4.2(b) and (q) exemptions in the event of "actual fault or privity" of the carrier. The allocation of responsibility between the carrier and the ship on the one hand and the cargo interests on the other promotes certainty and provides a clear basis on which the parties can make their insurance arrangements and their insurers can set premiums.

The shipping company, and the cargo interests, agreed that the exemption conferred by art 4.2(a) should be read down to some extent, but differed as to that extent. The shipping company submitted that the exemption should apply in the absence of barratry, which is, in general terms, conduct of the master or crew of a vessel intended to prejudice the owners of the vessel or its cargo. The cargo interests however sought to extend the qualification to include not only barratry but also acts of gross negligence and actions which, because they were not undertaken in good faith, could not be said to be "in the navigation or in the management of the ship".

Accordingly it was common ground between the parties that the art 4.2(a) exemption did not apply in the event of barratry. It was therefore necessary to ascertain what was barratry for the purposes of the Rules. Fortunately, the Rules themselves provided a ready answer to that question. Paragraph 4.5(e), as inserted into the Rules in 1968, limits the availability of the limitation of quantum otherwise conferred by art 4.5 by stating that:

> Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

To like effect, art 4bis.4, which was also inserted in 1968, limits the protection which art 4bis confers on the employees or agents of a carrier by providing that:

> Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Although neither art 4.5(e) nor art 4bis.4 uses the term "barratry", both are directed to damage with actual or imputed intent, which is the essence of barratry. The words of these paragraphs should therefore be adopted as the definition of barratry for the purposes of another provision in the same Rules, art 4.2(a). It followed that the test for establishing barratry as an implicit qualification to the exemption conferred by that paragraph was whether damage had resulted from an act or omission of the master or crew done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

High Court and Court of Appeal

The shipping company pleaded, and the cargo interests admitted, that the shipping company had provided a competent master and crew. In the High Court, Hugh Williams J rejected the allegations of the cargo interests that the *Tasman Pioneer* was unseaworthy at the commencement of the voyage and that the actions of the Master, before and after the grounding, were not in the navigation or management of the ship. However the Judge upheld the cargo interests' claim in breach of contract and breach of bailment because he found that the art 4.2(a) exemption was only available where the actions of those in charge of the ship were "bona fide" (in the navigation or management of the ship) and those of the Master after the grounding were not.

The shipping company appealed to the Court of Appeal. The Court divided. By a majority (Chambers and Baragwanath JJ), the appeal was dismissed. Fogarty J would have allowed the appeal. The reasons of the majority for dismissing the appeal were given by Baragwanath J. He 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 purposes of art 4.2(a) because such "selfish" and "outrageous" behaviour could not be conduct in the navigation or management of the ship. Fogarty J, dissenting, thought that the phrase "act, neglect or default of the master" in art 4.2(a) included intentional conduct, "be it laudable or culpable", and that the application of the clause did not depend on the motive of the master.

Article 4.2(a)

In light of the judgments of the High Court and the Court of Appeal and the submissions of the shipping company and cargo interests, and given that, as was common ground, art 4.2(a) did not apply in the event of barratry, four possible interpretations of that paragraph were before the Supreme Court. First full effect was to be given to the ordinary meaning of the words of that paragraph (the position of Fogarty J, supported by the shipping company). Next, the paragraph had no application where a master or crew had acted in bad faith, as Hugh Williams J thought. Thirdly, the protection conferred by the paragraph did not apply in the event of "outrageous" behaviour, as the majority of the Court

of Appeal found, because such behaviour could not be said to be in the navigation or management of the ship. Fourthly the paragraph did not apply where either good faith was lacking or the conduct of the master or crew had been grossly negligent (as the cargo interests submitted).

The Supreme Court had difficulty in understanding the basis on which Hugh Williams J implied a requirement of good faith into art 4.2(a). His approach required the reading into the paragraph of words which did not appear in it. The authorities on which he relied provided no support for the introduction into the article of a general requirement of good faith.

The Supreme Court also had difficulty in understanding the contention of Chambers and Baragwanath JJ that art 4.2(a) was designed to change the common law. The inclusion in bills of lading of a similar term was a long and well-settled practice when ship-owners and cargo interests came together at a conference of the International Law Association at the Hague in 1921 to settle the rules governing the international carriage of goods in a form which became known as the Hague Rules. The common law had given strict effect to the wide exclusion of owners' liability, provided that the act or omission had occurred during a voyage and was in relation to both the ship and the cargo or to the ship alone, and not just to the cargo. The Hague *travaux préparatoires* revealed that the owners' representatives, while prepared to concede on quantum issues where liability was imposed, were insistent on retaining the exclusion of liability in the circumstances specified in what became art 4.2(a). The cargo interests accepted this position, provided that it was understood that liability for barratry was not excluded. The owners' representatives accepted this qualification. Far from changing the position at common law, the Hague Rules therefore reaffirmed that (in the absence of barratry) the owners' exemption from liability at common law remained. The common law authorities therefore remain relevant. More specifically, the relevance to art 4.2(a) of common law authorities on the interpretation of the same provisions in bills of lading was demonstrated by the acceptance by other delegates at the Hague Conference of the words of Sir Norman Hill, representing British ship owners:

> This clause, Article IV, is the shipowners' clause. Now, Sir, I would venture to remind the Committee that we have dealt with the cargo interests clause in Article III, and we have agreed and accepted the actual words that the cargo interests have put forward imposing the obligations on the ship with regard to seaworthiness, and, what is more important, we have accepted Article III. (2), which says that "The carrier shall be bound to provide for the proper and careful handling, loading, stowage, carriage, custody, care, and unloading of the goods carried." We have not sought to weaken those or qualify those in any way. When we come to Article IV (2) our big point is the navigation point, and what we have asked is that we should have the words which from time immemorial have certainly appeared in all British bills of lading. "Faults or errors" have not appeared. They have been added. Our old words were: "Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship," and we would ask, Sir, in our clause to have our old words; leave out "faults or errors," and put in our old words instead.

Both parties sought to support their argument by reference to recent European decisions. The shipping company referred to the *MS Cita*, a decision of the Federal Court of Justice of Germany which held that the ship owner was not liable under the Hague Rules where an employee had turned off a watch alarm, fallen asleep and run the ship aground because that was "nautical" rather than "commercial" fault. The cargo interests sought to rely on the *Quo Vadis*, a judgment of the Court of Appeal of the Hague, the Netherlands, which held that the failure of the Master to ensure that the air inlet to the engine room was closed, despite a storm warning, was a "serious error" but could not be characterised as "reckless and with knowledge that damage will probably result". It appeared to the Supreme Court that both authorities were consistent with the proposition that art 4.2(a) exempted a ship owner from liability for the actions of master and crew unless the damage was intentional or the consequence of subjective recklessness. That formulation is also consistent with s 85(2) of the Maritime Transport Act, which provides that the limitation of liability otherwise conferred by Part 7 of the Act does not apply where loss, injury or damage is caused intentionally or "recklessly and with knowledge that such loss or injury or damage would probably result."

The other reasons of Chambers and Baragwanath JJ for departing from the ordinary meaning of the words of art 4.2(a) all came down to the proposition that a purposive approach should be adopted when interpreting that paragraph. But that begged the question of what its purpose was. The Supreme Court had said, that purpose was to make carriers responsible for loss or damage caused by matters within their direct control, but not otherwise. Giving full effect to the ordinary meaning of the words of art 4.2(a) was entirely consistent with that purpose of the Rules. The opening words of the paragraph ("act, neglect or default") were sufficiently wide to encompass all acts or omissions of master or crew. However culpable the conduct, and whether or not it was intentional, the owner or charterer was not, subject only to barratry, deprived of the benefit of the exemption conferred by the paragraph. This interpretation is supported by eminent writers. In *Scrutton on Charter Parties and Bills of Lading*, Stewart Boyd QC and his co-authors express the view that:

> Where an exception of negligence of the shipowner's servants is clearly expressed, full effect will be given to it, so that even the most culpable recklessness on their part will not render him liable.

To like effect, Sir Guenter Treitel QC and Professor F M B Reynolds QC express the opinion in *Carver on Bills of Lading* that:

> It seems that the exception extends even to a wilful or reckless act of any person within the list, ie master, mariner, pilot or servants of the carrier (as opposed to the carrier himself) for the words of Art 4.2(a) do not in fact refer to negligence, but to "act, neglect or default".

In summary, the text of art 4.2(a), the scheme of the Rules, the common law authorities, the *travaux*, cases on the Hague Rules, cognate definitions and the views of eminent textbook writers all supported the exemption of owners from liability for the acts or omissions of masters and crew in the navigation and management of the ship unless their actions amounted to barratry.

When this test was applied to the facts in question, the outcome was clear. The actions of the Master following the grounding were reprehensible, but they were actions in the navigation or the management of the *Tasman Pioneer*. Captain Goodrick, a Master Mariner who gave expert evidence at trial for the cargo interests about the conduct of the Master, accepted that, putting aside questions of intention and motive, his actions were in the navigation or management of the ship. There was no evidence to the contrary. The owner and the charterers had no knowledge of the decision of the Master to pass through the channel between Biro Shima Island and the mainland and there was no evidence of a practice of taking that course. The Master attempted to conceal the grounding from the owner and charterers. They could not be said to have authorised the actions of the Master or to have acquiesced in them. It followed that, unless the cargo interests were able to establish barratry, their claims were defeated by art 4.2(a).

Was barratry pleaded?

In order to rely on the barratry qualification to art 4.2(a), the cargo interests must have pleaded that the actions of the Master amounted to barratry. They did not do so. To the contrary, they pleaded that his conduct following the grounding;

> ... was intended to allow him to misrepresent and lie about the true circumstances of the casualty so as to absolve himself from blame and in particular to hide his reckless decision to transit the inside channel of Biro Shima Island in order to take a short cut route ...

The shipping company admitted this allegation.

The failure of the cargo interests to use the word "barratry" in their pleading would not have been fatal to their ability to advance such a claim if they had pleaded the necessary elements. But, as the Supreme Court had said, those elements included an act or omission with intent to cause damage to the ship or to the cargo or recklessly and with knowledge that damage would probably result. The actual pleading of the Master's intention was of an intention to derive personal benefit, which could not possibly be construed as an intention to cause damage to the cargo, or as recklessness with knowledge that damage to it would probably result. An essential element of barratry not having been pleaded, the cargo interests could not now argue that the Master's actions constituted barratry. The pleading point was not an unmeritorious technical one. The shipping company did not call the Master to give evidence at trial. It was entitled to adopt that course in the knowledge that it was not being alleged by the cargo interests that the Master had, following the grounding, been actuated by any intent to damage the ship or the cargo. To the contrary, the cargo interests alleged a different motivation, which the shipping company admitted.

Result

The shipping company was protected by the art 4.2(a) exemption from all the claims by the cargo interests. The appeal was therefore allowed. Judgment was entered for the shipping company against all of the cargo interests. The cargo interests jointly were ordered to pay the shipping company costs of $30,000 in the Supreme Court together with their reasonable disbursements, to be fixed if necessary by the Registrar. The costs order in the Court of Appeal was reversed. Failing agreement, costs in the High Court were to be fixed by that Court in the light of this judgment.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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Thanks to the colossal injections by worldwide governments, the fourth quarter of 2009 imparted some hope as we saw both seafreight and airfreight cargo rush in the last quarter created temporary space shortage. Whether the robust trend will continue is uncertain as worldwide governments are not in unison in their fiscal policies. The "visible" hand will still haunt the economy in 2010.

During time of uncertainty, we believe the number of E&O, uncollected cargo and completion of carriage claims will be unabated. If you need a cost effective professional service to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.