SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Hague Rules v Hague Visby Rules

The English High Court issued a Judgment on 2/4/2014 holding the Hague Visby Rules instead of the Hague Rules (as incorporated by a Paramount Clause) to apply to a shipment ex Belgium. [Case No: 2012 Folio 102, 2014 EWHC 971 Comm, 2014 WL 1219313]

The claim arose out of damage to machinery and equipment intended for use in the construction of a liquid natural gas facility in Yemen. This cargo was loaded on the vessel "Superior Pescadores" at the port of Antwerp, Belgium in early January 2008. On 11/1/2008, the owners of the vessel issued six bills of lading numbered ABA01 to ABA06 acknowledging shipment of the cargo on board the vessel in apparent good order and condition for carriage from Antwerp to Balhaf in Yemen. Each of the bills was for a number of packages and contained on its reverse side a "Paramount Clause" in the following familiar terms:

> "2. **Paramount Clause**
> The Hague Rules contained in the International Convention for the Unification & of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply."

The vessel sailed from Antwerp on 12/1/2008. On about 17/1/2008, while the vessel was crossing the Bay of Biscay, the cargo in hold no.1 shifted, causing significant damage to part of the cargo. The claimant cargo interests' total losses resulting from this incident were said to be in excess of US $3.6 million. Agreement was subsequently reached that the claim would be subject to English law and jurisdiction. That law includes the Carriage of Goods by Sea Act 1971 which renders the Hague-Visby Rules applicable as a matter of statute law when the carriage is from a port in a contracting state. Belgium is such a state.

Examination of the claim revealed that in the case of some of the bills of lading the Hague Rules limit was always higher than the Hague-Visby limit, and that the claimants had claimed this higher limit. In the case of bill of lading no. 4, however, application of the Hague Rules yielded a higher limitation figure for four of the six packages, while for the remaining two packages the Hague-Visby limit was higher. In the case of each package the claimants had claimed whichever limitation figure was the higher. The effect of the different limitation formulae for which the two regimes provide was that the Hague Rules limit was higher for packages weighing up to about 10 tonnes, while for packages weighing more than this the Hague-Visby limit was higher.

The shipowners' Defence served on 18/5/2012 admitted liability to pay the amount of the Hague-Visby package limit, equivalent to just over US $400,000, and contended that "it is not open to the Claimants to pick and choose between the Hague Visby package limit and the Hague package limit, depending on which gives them more". The undisputed Hague-Visby amount (plus interest) had since been paid.

If the claimants were entitled to recover the Hague Rules limit where this would give them a higher recovery than the Hague-Visby limit, the claimants would be entitled to recover additional damages up to a further sum of about US$ 200,000.

The premise for the claimants' argument that they were entitled to rely on the Hague Rules limit where this was higher was that it was the Hague Rules and not the Hague-Visby Rules which were incorporated into the bill of lading by virtue of the clause paramount. The claimants recognised that where the carriage was from a port in a contracting state, the Hague-Visby Rules applied compulsorily by reason of section 1(2) of the 1971 Act and Article X of the Hague-Visby Rules themselves, but they relied on the permission given by those Rules to agree contractually on a higher package limitation figure than that for which the Rules provided.

They said that the parties had so agreed (to the extent that it produced a higher limit) by incorporating the limit provided for by the Hague Rules.

The first question was therefore whether the parties had indeed incorporated the Hague Rules and not the Hague-Visby Rules by virtue of the clause paramount. That depended on what was meant by the phrase "the Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment …" It was common ground that if this did not refer (or was not capable of referring) to the Hague-Visby Rules which have been enacted in Belgium, the Hague and not the Hague-Visby Rules were incorporated by virtue of the second sentence of the clause.

The claimant cargo interests submitted that the clause was clear in incorporating the original Hague Rules and not the Hague Rules "as amended", as the words "the Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924" were only capable of referring to the original Hague Rules.

The defendant shipowners submitted that the Hague-Visby Rules were capable of falling within the expression "the Hague Rules … as enacted in the country of shipment" and should be construed as doing so if there was no contrary indication in the clause (such as a distinction drawn elsewhere in the clause between the Hague and Hague-Visby Rules).

The principal case relied on by the claimants was The Happy Ranger [2001] 2 Lloyd's Rep 530 at first instance. The contract of carriage contained a general paramount clause which provided as follows:

> " General Paramount Clause
> The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels 25 August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, Articles I to VIII of the Hague Rules shall apply. In such case the liability of the Carrier shall be limited to £100.- sterling per package.
> Trades where Hague-Visby Rules apply
> In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on 23 February 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading…"

The contract was for carriage from Italy, which had enacted the Hague-Visby Rules. Accordingly it might have been expected that the effect of the 1971 Act would be that the Hague-Visby Rules would apply compulsorily. However, Tomlinson J held that this was not so because the contract of carriage was not a bill of lading or similar document of title within the meaning of the 1971 Act. Accordingly the Rules would only apply if incorporated by contract. The claimant cargo interests contended that "the version of the Hague Rules enacted in Italy is the Hague-Visby Rules so that those rules are applicable pursuant to the first sentence of clause 3", while the defendant shipowners' argued that the Hague-Visby Rules were not the Hague Rules as enacted in Italy. That was said to be so "not only because of the various important differences between the two codes but also because, as they contend, the wording of clause 3 itself draws a clear distinction between enactment of the Hague Rules and enactment of [the] Hague-Visby Rules". Tomlinson J held that the Hague and not the Hague-Visby Rules were applicable, saying:

> "I also reject the argument that the Hague-Visby Rules are to be regarded as the Hague Rules "as enacted" in Italy so as to be incorporated by reason of the first limb of clause 3 of the specimen bill of lading. Quite apart from the important differences between the two codes, in the first two sub-clauses of clause 3 a clear distinction is drawn between the Hague and the Hague-Visby Rules and their enactment. Italy has repealed its enactment of the Hague Rules and has enacted the Hague-Visby Rules. That is not the situation to which the first sub-clause of clause 3 refers."

When the case reached the Court of Appeal ([2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357), the arguments appeared to have been different. The cargo claimants no longer suggested that the first sentence of the clause ("The Hague Rules … as enacted in the country of shipment") referred to the Hague-Visby Rules. Instead they contended that the Hague-Visby Rules applied by virtue of the second part of the clause in that case, referring to trades where the Hague-Visby Rules applied. That argument was rejected as a matter of construction: the majority (Tuckey and Aldous LJJ, Rix LJ dissenting) held that the second part of the clause only operated when the Hague-Visby Rules applied compulsorily, which would only be the case when there was a bill of lading or similar document of title. However, reversing Tomlinson J, all three members of the Court held that there was such a bill in this case and therefore the Hague-Visby Rules did apply compulsorily. It did not matter, therefore, whether the clause purported to apply the Hague or Hague-Visby Rules. It was nevertheless of interest that Tuckey LJ said:

"The Hague Rules are not enacted in Italy so the first sentence of the first paragraph of clause 3 of the bill is not applicable."

The decision of Tomlinson J in The Happy Ranger was a decision that the language of the clause in question was not apt to refer to the Hague-Visby Rules, while Tuckey LJ's statement in the Court of Appeal was to the same effect. Even if not strictly binding, these were highly persuasive statements and the Judge should follow them. The Judge concluded, therefore, that the clause paramount at clause 2 of the bill of lading constituted a contractual agreement that the Hague Rules should apply.

On the basis that the Hague-Visby Rules applied compulsorily by virtue of the 1971 Act but (as the Judge had held) the clause paramount was to be read as providing for the application of the Hague Rules, the question arose whether the claimant cargo interests were entitled to take advantage of the Hague Rules package limitation figure when that would yield a greater recovery than the Hague-Visby limit.

The provisions of the Hague-Visby Rules which are relevant to this issue are as follows.

Article III Rule 8

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods … or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. …"

…

Article IV Rule 5

(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. …

…

(d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.

(e) 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.

…

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph."

Surrender of Rights and Immunities, and increase of Responsibilities and Liabilities

A carrier shall be at liberty to surrender in whole or in part all or any part of his rights and immunities or to increase any of his responsibilities and liabilities under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. …"

Paragraphs (a) and (d) of Article IV Rule 5 in their current form set out above were inserted into the Schedule to the 1971 Act by section 2 of the Merchant Shipping Act 1981. The same section provided that the date for conversion of the special drawing rights into national currency under English law was the date of judgment. These provisions are now contained in Schedule 13 to the Merchant Shipping Act 1995.

The package limitation regime contained in Article IV Rule 5 of the Hague-Visby Rules differs from the equivalent Hague Rules regime in several respects. It is sufficient to mention five. First, the previous limit of £100 in gold is replaced by a limit calculated by reference to IMF special drawing rights, the value of which is based upon a basket of currencies. Second, paragraph (a) spells out that it is the higher of two figures, calculated by reference to the number of packages or the weight of the goods respectively, which constitutes the relevant limit. Third, paragraph (b) is new, providing for the method by which damages are to be calculated. Fourth, paragraph (c), dealing with containerisation, is new. Fifth, paragraph (e) provides for the circumstances in which the carrier may lose the benefit of limitation. The Hague Rules contained no equivalent provision, although resort would sometimes be had to the common law principles of deviation. Paragraph (g), however, permitting agreement on a higher maximum amount, existed in materially the same terms in the Hague Rules.

The claimant cargo interests submitted as follows:

a. The effect of the clause paramount was to incorporate the Hague Rules as a matter of contract, so that the parties had agreed that the owners' liability would be limited in accordance with the relevant provisions of the Hague Rules.
b. To the extent that this express contractual agreement led to greater liability for the owners, it was expressly permitted under the relevant provisions of the Hague-Visby Rules, but to the extent (and only to the extent) that it had the effect of reducing their liability it was of no effect.
c. There was nothing to prevent the parties from agreeing on a limit which might sometimes be higher than the limit provided for by Article IV Rule 5(a) and sometimes lower. When that occurred, effect could be given to that agreement in the former case while in the latter case the agreement would be of no effect.
d. The question whether the parties' agreement resulted in such a higher limitation figure must be considered separately in relation to each bill of lading and (where a bill was for more than one package) each package.

The defendant owners submitted:

a. There was in principle no difficulty about the parties agreeing a higher limit (eg that the Article IV Rule 5(a) limit should be 4 SDR per kg rather than 2 SDR per kg), but an agreement which could result in a limit which might turn out to be either higher or lower than the Hague-Visby limit was not permitted by paragraph (g) and was struck down by Article III Rule 8 at the outset.
b. That was the effect of the clause paramount in the bill of lading because, depending upon the weight of the particular package that was subsequently damaged or lost and depending upon the respective values of gold and SDRs at the date of loss/judgment, the package limit applied by clause 2 (ie the Hague Rules limit) could be more or less than the Hague-Visby limit.
c. Accordingly clause 2 of the bill of lading was rendered null and void by Article III Rule 8 in all cases where the Hague-Visby Rules were compulsorily applicable.
d. Clause 2 had to be either valid or invalid in each bill of lading contract. An approach which resulted in it being valid in relation to some packages and null and void in relation to others was unworkable.

In the Judge's judgment, however, Article III Rule 8 had little to do with the issue in question. Article III Rule 8 renders null and void a clause which purports to lessen the carrier's liability, but the issue here was whether clause 2 of the bill of lading was an agreement which increased that liability. Article V permits such an agreement generally, but it is Article IV Rule 5(g) which deals specifically with the issue in question and on which attention had to focus. There was no doubt that an agreement which increases the carrier's liability is permitted. The issue was whether paragraph (g) imposed any limits on the parties' freedom of contract in making such an agreement.

It was one thing for the parties to agree in terms that instead of the Article 4 Rule 5(a) limit, the carrier's maximum liability should be £100 gold value. They would then know that, to the extent that this agreement produced a higher figure for liability, effect would be given to it, and that to the extent that it did not, it would be of no effect as not falling within the permission granted by Article 4 Rule 5(g). But it seemed quite another thing for the figure of £100 gold value to come in by a side wind as the result of a clause paramount purporting to incorporate the Hague and not the Hague-Visby Rules when the parties must have realised that it would be the Hague-Visby and not the Hague Rules which would apply to their contract as a result of the compulsory application of the 1971 Act.

If they thought about the clause paramount at all, the parties must be taken to have understood that the original Hague Rules would not apply because Belgium was a Hague-Visby state. They would therefore have viewed the clause paramount purporting to incorporate the Hague Rules as surplusage which would have no application in this case and could for all practical purposes be ignored. It seemed to the Judge most unlikely that the parties intended a clause paramount which they knew would be ineffective to result in some but not all cases to the application of the Hague Rules limit to the rather different Hague-Visby limitation regime. It seemed improbable that the parties could have intended a single contract of carriage to be covered simultaneously by two differing limitation of liability regimes with differing provisions. The claimants' "pick and mix" approach, taking the benefit of whichever bits of the two package limitation regimes were in their favour, seemed a surprising thing for rational business people to wish to agree.

The oddness of that approach was underlined by the result for which the claimants contended in the case of bill of lading no. 4. The Judge would readily accept that each bill of lading was a separate contract. However, it was hard to think that sensible parties could have intended a single bill of lading to be subject to two

different package limitation figures as a result of what would have been regarded by them if they thought about it as an ineffective clause paramount which would not apply to the voyage which was the subject of the bill of lading. The Judge saw no good reason to construe the bill of lading in a way which attributed this uncommercial intention to the parties.

Accordingly, while the Judge would accept that it would in theory be possible for the parties to a bill of lading contract to which the Hague-Visby Rules applied to agree on the original Hague Rules limitation figure of £100 gold value, and that effect would be given to that agreement to the extent that it resulted in a higher limit of liability than the amount provided for by Article IV Rule 5(a) of the Hague-Visby Rules, the Judge did not accept that the parties had in fact made any such agreement in the case in question. This meant that the applicable package limitation amount was the Article IV Rule 5(a) amount which the owners had paid.

The final issue arose only if, contrary to the conclusion reached above, the relevant package limitation figure was the Hague Rules limit. Article IX of the Hague Rules provides that the Article IV Rule 5 limit of £100 per package or unit is a gold value. In The Rosa S [1989] QB 419 Hobhouse J held that this refers to the gold value of £100 sterling as defined by the Coinage Acts, not its nominal or paper value, so that the applicable limitation figure is the value of the quantity of gold which was the equivalent of £100 sterling in 1924, that is to say 732.238 grams of fine gold. This decision was followed by the Privy Council in The Tasman Discoverer [2004] UKPC 22, [2005] 1 WLR 215.

The issue in question was whether the time at which this gold value was to be converted into national currency was the date of judgment (as the claimants submitted) or some earlier date.

The claimants submitted that there was no authority on this point, it having been assumed without argument in The Rosa S that the relevant date was the date when the damaged goods were delivered, and that the same logic which led the legislature to take the date of judgment for the purpose of converting special drawing rights to national currency under the Hague-Visby Rules ought to lead to the same conclusion in the case of the Hague Rules. The shipowners contended for the date of delivery of the goods in their damaged condition.

The Judge considered that the relevant date was the date of delivery (or, in the case of loss, the date when the goods ought to have been delivered). That was when a claimant's loss crystallised and the cause of action accrued. The Judge accepted that there appeared to have been no argument about this issue in The Rosa S and that Hobhouse J did not explain in any detail why this was the relevant date, but the Judge did not accept that Hobhouse J did not apply his mind to the point. The Judge considered that it was sufficiently clear from Hobhouse J's judgment not only that it was a conscious decision to take the date of delivery as the relevant date but also that this was because that was when the cause of action accrued. But even if that was not so, this was a field of law in which Hobhouse J's unarticulated assumptions were worth quite a lot and the Judge agreed with them. The Judge would add that *Cooke, Voyage Charters* , 3rd Edition (2007) at paragraph 85.367 also considers that this is the relevant date. The Judge did not accept that the legislative choice made by the United Kingdom for converting special drawing rights into national currency for the purpose of the Hague-Visby Rules had any bearing on this issue. Whatever the logic of that choice, it was not the only possible choice that could be made and, in any event, a single state's choice made in 1981 could not help to determine the meaning of an international convention concluded in 1924.

For the reasons given above, the Hague-Visby limit applied in the case in question. It was accepted that, in that event, as they had paid that limitation amount, there had to be judgment for the owners.

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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