SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Hague Rules v Hague Visby Rules (II)

Remember our Chans advice/163 about the English High Court's Judgment holding the Hague Visby Rules instead of the Hague Rules to apply to the cargo damage claim case in excess of US$3.6 million? The English Court of Appeal issued a Judgment on 24/2/2016 upholding the High Court's conclusion but with different reasons. [Case No: A3/2014/1285, 2016 EWCA Civ 101, 2016 WL 00692394]

Introduction

Article IV Rule 5 of the (old) Hague Rules (1924) contains a provision entitling a shipowner to limit its liability to £100 gold per package or unit. Article IV Rule 5(a) of the (new) Hague-Visby Rules (1968) contains a provision entitling a shipowner to limit its liability by special drawing rights as defined by the International Monetary Fund. Article IV Rule 5(g) however provides that the parties to a bill of lading contract may agree other maximum limits provided that no maximum amount so fixed is less than the limit provided for in Article IV Rule 5(a). The main question in the appeal was whether in a case which was otherwise governed by the new (1968) rules, a common form of Paramount Clause incorporated the (old) Hague Rules which in fact gave rise to a higher limit than that provided for in the (new) Hague-Visby Rules and whether, in that event, the old (and higher) limit was available to the cargo-owner if the cargo was lost or damaged.

The Paramount Clause, set out on the reverse side of the bills of lading in the case in question, provided as follows:—

> " 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."

Although the bills of lading were not issued on the standard Congenbill form, this wording is (with one immaterial change) identical to the wording of the clause paramount which that widely used bill of lading form contains.

The Facts

Machinery and equipment, intended for use in the construction of a liquid natural gas facility in Yemen, were loaded on the vessel "SUPERIOR PESCADORES" at the port of Antwerp in Belgium in early January 2008. The shipowners issued six bills of lading in the Conline form acknowledging shipment of the cargo in apparent good order and condition for carriage from Antwerp to Balhaf in Yemen. 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 claimants' total losses resulting from this incident were said to be in excess of US $3.6 million.

On 12/10/2012 the Britannia Steamship Insurance Association Ltd gave a letter of undertaking to the cargo-owners to pay such sum as might be agreed or adjudged in respect of the claim and further agreed on the shipowners' behalf 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 (referred to formally as the Brussels Protocol (1968)) applicable as a matter of statute law when the carriage is from a port in a contracting state. Belgium is such a state.

Proceedings had been started in January 2012. The Particulars of Claim served in April 2012 relied on the clause paramount as a contractual incorporation of the Hague (not Hague-Visby) Rules and pleaded that to the extent that the Hague Rules provide for higher limits than the Hague-Visby Rules , the claimants were entitled to those higher sums. In the case of some of the bills of lading the Hague Rules limit was always higher than the Hague-Visby limit, and 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 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.

The claimants would be entitled to recover additional damages up to a further sum of about US$ 200,000 if they were entitled to rely on the Hague Rules limit.

The Issues

The first issue was whether, on the true construction of the Paramount Clause, it operated as an agreement between the cargo owner and the shipowner, that the (old) Hague Rules applied or that the Hague-Visby Rules applied. If it was an agreement that the Hague-Visby Rules applied, then there was no agreement between the parties that a different regime in the form of the (old) Hague Rules was to apply. But if it was an agreement that the (old) Hague Rules applied, a second issue arose namely whether the Paramount Clause constituted an agreement to fix maximum amounts other than those contained in Article IV Rule 5(a) of the Hague-Visby Rules for the purposes of Article IV Rule 5(g) of those rules. There was then a third issue namely whether the date of conversion into relevant currency of the limit of £100 gold per package or unit was the date when the cargo was delivered in its damaged condition or the date of the judgment.

The Rules

Article IV Rule 5 of the (old) Hague Rules provided:—

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.
>
> By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named."

Article IX provided that the limit of £100 per package or unit is to be taken to be "gold value".

The relevant provisions of the Hague-Visby Rules are:—

> **"Article III – Responsibilities and Liabilities**
>
> …
>
> **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 – Rights and Immunities**
>
> …
>
> **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.

Article V – 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. The High Court identified five. First, the previous limit of £100 in gold is replaced by a limit calculated by 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 High Court's Judgment

The High Court decided (1) the Paramount Clause on its true construction incorporated the (old) Hague Rules not the Hague-Visby Rules but (2) it did not operate as an agreement for a higher limit pursuant to Article IV rule 5(g) of the Hague-Visby Rules. The cargo-owners were therefore confined to recover damages limited by reference to Article IV rule 5(a) of the Hague-Visby Rules. That limit was calculated at the date of judgment as required by the Merchant Shipping Acts, so the third issue did not arise. If it had, he would have held that the limit was to be calculated as at the date of delivery of the cargo.

Hague or Hague-Visby?

The High Court would like to have held that the Paramount Clause incorporated the Hague-Visby rather than the Hague Rules but felt constrained by authority to hold that on its true construction (even in 2015 in respect of a contract made in 2008) the 1924 Hague Rules rather than the 1968 Hague-Visby Rules should apply. It would therefore be necessary to look at those authorities. The United Kingdom adopted the Hague-Visby Rules as early as 1971 in the Carriage of Goods by Sea Act of that date; it did not come into force until a certain number of other countries had signed up but that happened as long ago as

The actual terms of the Paramount Clause are, of course, important. It identifies the Hague Rules contained in the International Convention of 25th August 1924 but provides that it is those Rules

" as enacted in the country of shipment"

which are to apply to the contract. The country of shipment was Belgium which adhered to the Hague-Visby Rules on 6/12/1978.

In the United Kingdom, the (old) Hague Rules had been enacted by the Carriage of Goods by Sea Act 1924. The Carriage of Goods by Sea Act 1971 ("the 1971 Act") repealed that Act, see section 6(3) of the 1971 Act and provided by section 1:—

" 1 Application of Hague Rules as amended

(1) In this Act, "the Rules" means the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25th August 1924, as amended by the Protocol signed at Brussels on 23rd February 1968 [and by the Protocol signed at Brussels on 21st December 1979].

(2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.

…"

The schedule to the Act, referred to in section 1(2) is entitled

" THE HAGUE RULES AS AMENDED BY THE BRUSSELS PROTOCOL 1968."

The schedule then enacts that Brussels Protocol which is the formal designation of the 1968 Hague-Visby Rules. On any ordinary and sensible view of English law, therefore, the Hague Rules "as enacted" in England are the Hague Rules as enacted by the schedule to the 1971 Act, a schedule which in its title refers to the Hague Rules "as amended". The position in Belgium must be taken to be the same.

It was, therefore, necessary to consider the authorities by which the High Court felt constrained to come to a contrary conclusion.

The first such authority is Nea Agrex S.A. v Baltic Shipping Co. Ltd (The Agios Lazaros) [1976] QB 933; [1976] 2 Lloyd's Rep 47 a case decided after the 1971 Act had been passed but before it had come into force in respect of a contract made in 1972. It was a charterparty case and neither set of Rules was compulsorily applicable but the charter itself provided "Paramount Clause deemed to be incorporated in this Charter Party". This decision was helpful as showing what this court thought shipping men meant by the phrase "clause paramount" in 1972 but was, perhaps of little assistance in determining what the phrase "the Hague Rules … as enacted in the country of shipment" meant to shipping men in 2008.

The High Court referred to The Marinor [1996] 1 Lloyd's Rep 301 in which the paramount clause incorporated the provisions of the Canadian Carriage of Goods by Water Act "as amended". Colman J had no difficulty in holding that those words did incorporate the (new) Hague-Visby Rules. In the case in question, of course, it was not the Hague Rules "as amended" but "as enacted". The Marinor was not therefore directly relevant save to show that there was a form of words which would lead to the definitive conclusion that the new Rules were intended to apply.

In Lauritzen Reefers v Ocean Reef Transport Ltd S.A. (The Bukhta Russkaya) [1997] 2 Lloyd's Rep 744 a "general paramount clause" was to apply in a 1995 charterparty. The claim was made by a charterer who had settled with bill of lading holders and wanted to claim an indemnity from the shipowner. The Hague-Visby Rules permitted a claim for an indemnity to be brought if it was brought within 3 months of the settlement (Art III Rule 6bis) but the original Hague Rules required any claim to be brought within one year of delivery. It was therefore critical to determine which Rules applied. For the charterers, Mr Michael Coburn of counsel relied on a passage from the 4th edition of Wilford Coghlin & Kimball on Time Charters page 561 which, after referring to the Agios Lazaros stated:—

" However, if a paramount clause is incorporated into a Baltime charterparty governed by English law it is likely, following the coming into force in 1977 of the Carriage of Goods By Sea Act 1971 , the Hague-Visby Rules would be regarded as incorporated."

Thomas J did not deal with this argument of Mr Coburn because he held, on the evidence before him, that the words "general paramount clause" in a time charterparty referred to a particular clause or more accurately any of a number of clauses that had the following essential terms (page 746):—

" (1) if the Hague Rules are enacted in the country of shipment, then they apply as enacted; (2) if the

> Hague Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination applies or, if there is no such legislation, the terms of the Convention containing the Hague Rules apply; (3) if the Hague-Visby Rules are compulsorily applicable to the trade in question, then the legislation enacting those rules applies."

In the light of this conclusion Thomas J held that, since the Hague-Visby Rules were specifically referred to in the "general paramount clause" as being applicable (by contract) if compulsorily applicable (presumably by the proper law) which they were not in the case before him, it was the old Hague Rules which applied to the case. That was perhaps not a surprising decision in a case where the incorporating clause itself expressly referred to both the Hague Rules and the Hague-Visby Rules and made clear that the Hague-Visby Rules were only to apply in certain defined circumstances.

On the facts, of the case in question, however, it was necessary to consider the argument which Mr Coburn made in that case and whether Mr Wilford's book on Time Charters was correct in the view it expressed. The Court of Appeal though the late Mr Wilford was indeed correct to say that since 1977 a typical clause paramount, which did not differentiate in terms between the two sets of rules, would be taken by shipping men to incorporate the Hague-Visby rules in a Baltime charter governed by English law and, by extension, to other charters and to bills of lading subject to such a clause (such as the Conline bills in the case in question).

The Court of Appeal were shown the updated form of the Conline bill which (in clause 3(a)) incorporates the Hague Rules "as amended" by the Protocol signed at Brussels on 23/2/1968 ("the Hague Visby Rules"). The cargo-owners argued that since it was possible to incorporate the Hague-Visby Rules by express words and it had been done in a later form than that used for the instant cargo carrying voyage, the court could safely assume that there was no intention to incorporate the Hague-Visby rules in the present case. Such an argument was not to the Court of Appeal's mind decisive. The court had to construe a contract made by shipping men in 2008; the fact that they could have used a clause which made the position clear did not absolve the court from deciding what the clause meant when the position was not clear. The Court of Appeal saw little argument against Mr Wilford's view as expressed in his book.

There remained, however, the authority on which the High Court chiefly relied to hold that in these bills of lading it was the 1924 rather than the 1968 rules which were incorporated. That was Parsons Corporation v C.V. Scheepvaartonderneming Happy Ranger (The Happy Ranger) [2001] 2 Lloyd's Rep 530 (Tomlinson J) and [2002] 2 Lloyd's Rep 356 (CA). The main point of contention was whether the Hague-Visby Rules applied if the contract was contained not "in a bill of lading or any similar document of title" but in what might be called an ordinary contract for goods to be carried (from Italy to Saudi Arabia) which merely provided that the carrier's regular form of bill of lading was to form part of the contract. It was held that there was in fact a bill of lading and the Hague-Visby Rules were "compulsorily applicable".

The relevant general paramount clause was:—

> *"General Paramount Clause*
>
> The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels 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, 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 apply
>
> In trades where the International Brussels Convention 1924 as amended by the protocol signed at Brussels on 23rd February 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of lading …."

At first instance the cargo-owners contended that the version of the Hague Rules enacted in Italy was the Hague-Visby Rules so that it was those rules which were applicable pursuant to the first sentence of the clause; the shipowners argued that the Hague-Visby Rules were not "the Hague Rules … as enacted" in Italy

> "not only because of the various important differences between the two codes but also because … 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 accepted this submission saying at para 31:—

> "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 cl. 3 of the specimen bill of lading. Quite apart from the important difference between the two codes, in the first two sub-clauses of cl. 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 cl. 3 refers."

The Court of Appeal did not regard this paragraph of the judgment as saying that the words "as enacted in the country of shipment" could not refer to the Hague-Visby Rules if, for example, the particular paramount clause made no specific reference to the Hague-Visby Rules in some other part of the same clause but those Rules had in fact been enacted in the country of shipment. The Court of Appeal considered that any case, in which a bill of lading was issued in 2008 incorporating the Hague Rules as enacted in the country of shipment and in which the country of shipment had enacted the Hague-Visby Rules , should be regarded as a case which was subject to the Hague-Visby Rules rather than the (old) Hague Rules.

The claimant sought to rely on an Additional Clause B at the foot of the bill of lading headed Scandinavian Trades providing for the Hague-Visby Rules to be incorporated

> "in trades where one of the Scandinavian Maritime Codes apply compulsorily."

The claimant submitted that this showed the parties to the bill of lading could refer to the Hague-Visby Rules when they wished to do so. The Court of Appeal could not accept that this Scandinavian tail could wag the general ocean-going dog. Nor did the High Court judge who said that if he had had to decide the point

> "I would have been cautious about construing a reasonably prominent and widely used clause paramount by reference to another clause buried in the small print of the bill which stated that it was "to be added" in a trade with Scandinavian and therefore, at least arguably, did not even form part of the contract in a case having nothing to do with Scandinavia."

The Court of Appeal would applaud the High Court judge's instincts in this respect.

Agreement "fixing" other maximum amounts within Art IV rule 5(g)

The Court of Appeal's conclusion that clause 2 of the bills of lading incorporated the (new) Hague-Visby Rules rather than the (old) Hague Rules made it unnecessary to consider whether clause 2 constituted an agreement fixing other amounts within Article IV rule 5(g).

Date for Conversion under the Hague Rules

Nor was it necessary to express any concluded view about the date of converting £100 gold per unit into the national currency.

Conclusion

As it was, the Court of Appeal would dismiss the appeal and uphold the High Court's conclusion that the Hague-Visby limit applied, even if the Court of Appeal's reasons for doing so were not the same as those in the High Court's judgment below.

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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