International Recent Developments: United Kingdom

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The purpose of this article is to provide an overview of two of the most important cases relating to charterparties and carriage of goods by sea decided in the United Kingdom during 2018. Given the nature of this article, the selected cases are discussed only briefly, while some additional cases decided in 2018 are referred to in the footnotes.[1]

I. Charterparties: *Limitation of Liability*

Charterparties are traditionally left outside the mandatory application of sea carriage conventions, although it is very common for the Hague–Visby Rules and/or the Hague Rules to be incorporated – *as a matter of contract* – into charterparties.[2] The correct construction of these sets of rules in the context of charterparties has been discussed in a number of English cases.[3] Recently, the English Court of Appeal in *Vinnlustodin Hf and Another v Sea Tank Shipping AS (The Aqasia)*[4] addressed whether the limitation of liability provision, which is found in Article IV Rule 5 of the Hague Rules, was capable of applying to bulk or liquid cargo under a charterparty. The decision has great significance to bulk trade and the wider shipping industry, particularly since the Hague Rules are commonly incorporated into standard form charterparties.

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[1] Other important shipping cases decided by the English courts in 2018 include *Deep Sea Maritime Ltd v Monjasa (The Alhani)* [2018] 2 Lloyd's Rep 563 (Application of Hague Rules time bar to misdelivery claims); *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd (The Priveocean)* [2018] 2 Lloyd's Rep 551(Whether negligence in relation to stowage plan was negligence in management of ship or in management of cargo); *Fehn Schiffahrts Gmbh & Co Kg v Romani Spa (The Fehn Heaven)* [2018] 2 Lloyd's Rep 385 (Consignee's assignment of interest in cargo under straight bill of lading); *Seatrade Group NV v Hakan Agro DMCC (The Aconcagua Bay)* [2018] 2 Lloyd's Rep 381 (Whether an 'always accessible' warranty under a charterparty included departure as well as arrival); *Navig8 Chemicals Pool Inc v Glencore Agriculture BV (The Songa Winds)* [2018] 2 Lloyd's Rep 374 (CA) (Whether disponent owners could recover its losses from sub-charterers under a letter of indemnity) ; *Glencore Energy UK Ltd v OMV Supply & Trading Ltd* [2018] 2 Lloyd's Rep 223 (CFR seller's right to claim detention/demurrage); *Sevylor Shipping and Trading Corporating v Altfadul Company for Foods, Fruits & Livestock and Another (The Baltic Strait)* [2018] 2 Lloyd's Rep 33 (Whether bill of lading holder required to give credit for monies received by way of settlement from intermediate seller of cargo);

[2] See Article V of the Hague Rules and the Hague-Visby Rules, Article 2(3) of the Hamburg Rules and Article 6 of the Rotterdam Rules.

[3] Some of the key cases on the construction of the Rules in the context of charterparties include *The Stolt Sydness* [1997]1 Lloyd's Rep 185; *Adamastos Shipping v Anglo-Saxon Petroleum* [1959] AC 133 (HL); *The Marinor* [1996] 1 Lloyd's Rep 301

[4] [2018] EWCA Civ 276 (CA)

The facts can be summarised as follows. The dispute arose out of a damaged cargo of fish oil in bulk carried aboard *The Aqasia* under a charterparty entered into between the disponent owner and the charterer. The charterparty provided for the carriage of 2,000 tonnes of fish oil in bulk (5 per cent more or less in charterer's option) from Iceland to Norway. The charterparty was on the "London Form", an old tanker form, commonly replaced by the Intertankvoy 76 form. Section 26 of the London Form provided that the owners would be entitled to "*the like privileges and rights and immunities as are contained in Sections 2 and 5 of the Carriage of Goods by Sea Act 1924 and in Article IV of the Schedule thereto . . .*"

On 6 September 2013, the vessel loaded a cargo of 2,056,926 kg of the charterer's fish oil in bulk at two Icelandic ports. Following the shipment, a bill of lading in Congenbill form was issued, acknowledging the shipment of the cargo in apparent good order and condition. In the bill of lading, the cargo was described as "Icelandic Fishoil in bulk – 2,056,926 kgs." On arrival at the discharge port, the cargo was found to have suffered damage. The charterer claimed damages from the disponent owner for the damage, as owner of the cargo, in the sum of US$367,836. The disponent owner admitted liability in principle, but sought to limit its liability to £54,730.90, having accepted to pay £100 per metric tonne of the cargo damaged with reference to Article IV Rule 5 of the Hague Rules. Although the bill of lading referred to kilograms, the unit of measurement for the cargo expressed in the charterparty was the metric tonne. The disponent owner sought to rely on the metric tonne as the applicable unit because the limitation by reference to kilograms would lead to a figure higher than the charterer's claim.

Article IV Rule 5 of the Hague Rules does not provide for a clear limit that is applicable to bulk cargoes based on their gross weight. It only speaks of limitation of liability "per package or unit". However, its counterpart in the Hague–Visby Rules clearly refers to the "*units of account per kilo of gross weight of the goods lost or damaged"*. Despite the wide application of the Hague Rules under charterparties, it is only recently that the decision in *The Aqasia* has finally clarified whether the word "unit" could be interpreted as a unit of measurement, such as kilogram or metric tonne, as opposed to a physical item of cargo, in the case of bulk cargoes carried under a charterparty.

With the House of Lords decision in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum*,[5] it is well established that the incorporated provisions of the Hague Rules can be manipulated to adapt the wording in the charterparty, provided that doing so is in line with the overall context of the charterparty. Since the Hague Rules are an international convention, regard must also be had to the cases where English courts have established *inter alia* the following rules as aids to construction:

- *"The duty of a court is to ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the Convention. The court may then, in order to confirm that ordinary meaning, have recourse to the travaux préparatoires and the circumstances of the conclusion of the Convention."*[6]
- If the Hague Rules are considered to have an international currency, even when incorporated into a charterparty, *"it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."*[7]
- Where there are truly feasible alternative interpretations of a convention, the evidence contained in the *travaux préparatoires* can be determinative of the question of construction. However, that is only possible where the court is satisfied that *"the travaux préparatoires clearly and indisputably point to a definite legal intention"*.[8]

The *travaux préparatoires* of the Hague Rules reveal that the intention behind the drafting committee's addition of the words "or unit" was not to introduce limits of liability based on weight.[9] The words were intended to cover unpackaged items shipped as individual units. The price of bulk cargoes at the time the Hague Rules were adopted was so low that the

[5] [1959] AC 133 (HL).
[6] See Longmore LJ in *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] 1 Lloyd's Rep 460 cited in *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] 1 Lloyd's Rep 521.
[7] Per Lord Macmillan in *Stag Line v Foscolo, Mango & Co (The Ixia)* (1931) 41 Ll L Rep 165 at page 174.
[8] Per Lord Steyn in *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] 1 Lloyd's Rep 337 at page 347.
[9] As can been seen in para 169 of Allsop J's judgment in *El Greco (Australia) Lty Ltd v Mediterranean Shipping Co Sa* [2004] 2 Lloyd's Rep 537 the original draft of Article IV rule 5 contained a weight/volume limitation in the following terms: "neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods for an amount greater than *£ per package or £ per cubic foot or £ per cwt (as declared by the shipper and inserted in the contract of carriage, whichever shall be the least*) of the goods carried, unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading . . . "

limitation provisions were not considered to be relevant in the context of bulk cargoes. The increase in commodity prices led the disponent owners to contend that Article IV Rule 5 should equally apply to bulk cargoes.

In light of this factual and legal background, the main question was whether the word "unit" could be stretched to cover a unit of measurement, such as kilogram or metric tonne, in the case of bulk or liquid cargoes. In order to find an answer, the court had to address a number of preliminary issues: Can the word "unit" be given different meanings depending on (i) the particular type of cargo shipped and (ii) the descriptions in the charterparty and the relevant bill of lading? If so, what will be the "unit" for limitation purposes where, for instance, the cargo is shipped in packages but a weight or volume also appears on the bill of lading? Should the *travaux préparatoires* still be taken into account where there have been significant changes in the economic circumstances since the rules were drafted?

As has already been written in the previous issue,[10] Sir Jeremy Cooke, sitting as a Judge of the High Court, decided that (i) the disponent owner was not entitled to limit its liability to £54,730.90 and that (ii) the word "unit" in Article IV Rule 5 of the Hague Rules did not connote a unit of measurement. Following the disponent owner's appeal, the Court of Appeal affirmed the trial judge's decision regarding the meaning of the word "unit". Despite the fact that the charterparty expressly provided for the carriage of a bulk cargo of fish oil, the court refused to hold that the meaning should change because of the nature of the particular contract of carriage.

Although, as a matter of ordinary language, the word "unit" is capable of meaning both a physical item of cargo and a unit of measurement, the court took the view that there was no such duality of meaning when the word unit is interpreted *particularly in the context of Article IV Rule 5 of the Hague Rules*. In this respect, the court was not convinced by the disponent owner's argument that the meaning of the word unit could not be interpreted in isolation from Article III Rule 3(b), which expressly refers to weight, and the definition of "goods" in Article I, which includes bulk cargoes. Hence, the court took the view that these articles would not be of any particular assistance in construing the word "unit". For the

[10] See T. Nikaki [2017] 41 Tulane Maritime Law Journal, 566

purposes of confirming the clear meaning of the word in the context of Article IV Rule 5,[11] the court relied on (i) the *travaux préparatoires* of the Hague Rules; (ii) the construction accepted by courts in commonwealth jurisdictions;[12] and (iii) the commentaries and textbooks on the point.

With clause 26 of the charterparty, the parties in *The Aqasia* intended to give effect to Article IV of the Hague Rules under the charterparty. However, the court was not persuaded that (i) every provision in Article IV was intended to be applicable nor that (ii) the limitation was intended to be calculated on the basis of the gross weight of the cargo in metric tonnes, particularly since the unit of measurement for the cargo expressed in the charterparty (i.e. metric tonne) was different from that stated in the bill of lading (kilogram). The decision is welcome mainly because it shows a preference for uniformity of interpretation in the interests of commercial certainty. It also makes it clear that a mere reference to Article IV is not sufficient to apply the limitation provision to bulk cargoes. What is still not clear is in what circumstances, if any, the intentions of the parties to the charterparty can shape the interpretation of Article IV Rule 5 in a particular case.

II. Carriage of Goods by Sea: *Scope of the Hague and Hague–Visby Rules and Limitation of Liability*

Last year saw another important Court of Appeal decision, *Kyokuyo Co Ltd v AP Moller-Maersk A/S,* on the meaning of "unit", this time in the context of containerised cargoes. The facts of the case were straightforward. Three container-loads of frozen tuna were shipped from Cartagena for carriage by the defendant carrier to Japan. The containers, which were packed by the shippers, contained 500 frozen loins in one, 520 frozen loins in another and 206 frozen loins and 460 bags in another. The loins were neither wrapped nor packaged.

The containers were delivered to the cargo receiver pursuant to the carrier's standard terms and conditions, which contained an implied term that a bill of lading would be issued for these shipments. Following the shipment, the carrier drew up and provided to the cargo

[11] As has been referred to in the previous issue, Article IV(5) of the Hague Rules do not speak of "unit of measurement or customary freight unit", as referred to under the US Carriage of Goods by Sea Act 1936.
[12] *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd* [1973] 2 Lloyd's Rep 469 (Supreme Court of Canada); *New Zealand Railways v Progressive Engineering Co Ltd* [1968] NZLR 1053 (New Zealand); *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyd's Rep 537 (Federal Court of Australia).

receiver a draft straight consigned bill of lading covering all the containers, but no bill of lading was ever issued. In order to avoid delay, non-negotiable seawaybills were instead issued by agreement. Each seawaybill stated "1 container said to contain [no] PCS FROZEN BLUEFIN TUNA LOINS". The number of pieces stated in each case was the number of individual frozen tuna loins. The seawaybill for the container that also contained bagged tuna parts made no mention of the number of bags. Following the delivery of the containers, the cargo receiver brought a cargo claim against the carrier, contending that the goods were damaged by raised temperatures and/or rough handling.

In the first instance, the commercial judge decided a number of preliminary issues. On appeal, only the following issues were considered by the Court of Appeal: (i) whether Article IV Rule 5 of the Hague Rules or its counterpart in the Hague–Visby Rules was applicable to the carrier for limitation purposes, (ii) if the Hague Rules were applicable, whether the container or each individual item of tuna was to be considered as a "package or unit" and (iii) if the Hague–Visby Rules were applicable, whether the phrase "package or unit" under Article IV Rule 5 referred to the container or the individual items of cargo contained in the containers.

Regarding these issues, the commercial judge held that: (i) the Hague–Visby Rules, as opposed to the Hague Rules, were applicable to the seawaybills issued in respect of the three containers; (ii) if, contrary to his finding, the cargo claim was governed by the Hague Rules, each of the individual tuna pieces amounted to a "unit" and each bag of tuna was to be treated as a separate "package" for limitation purposes pursuant to Article IV Rule 5 of the Hague Rules; (iii) the individual tuna loins constituted separate "units" in the context of the Hague–Visby Rules, as they were sufficiently identified and enumerated in the seawaybills pursuant to Article IV Rule 5(c). In this respect, the phrase "package or unit" was given the same meaning in Article IV Rule 5(a) and Rule 5(c).

Both before the commercial judge and on appeal, one of the main contentions of the carriers was that the cargo claim was not governed by the Hague–Visby Rules because mere contemplation of issuance of a bill of lading was not sufficient to trigger the mandatory application of the rules. In support of this, they relied on Article I(b) of the rules, which provides that the carriage has to be *"covered"* by a bill of lading or any similar document of

title.[13] In essence, their contention was that the carriage was *"covered"* by a seawaybill and therefore this requirement, which is also replicated in the French version of the rules, was not satisfied. Like the commercial judge in the first instance, the Court of Appeal held that pursuant to section 1(4) of the English Carriage of Goods by Sea Act 1971, the Hague–Visby Rules could apply mandatorily where the contract of carriage provided for a bill of lading or any similar document of title, whether or not one was ever issued. It further held that a contrary approach would make section 1(4) redundant.

The conclusion reached by the judges is consistent with the weight of the authorities that have taken the view that the rules would apply mandatorily if the shipper was contractually entitled to demand a bill of lading.[14] Furthermore, the French text of the rules was not considered to be of any assistance in the absence of any decision of a court that had construed that phrase to mean that a bill of lading had to be in existence for the mandatory application of the rules.

The conclusion reached by the judges on this matter raises the question of whether the carriage would be considered as being *"covered"* by a bill of lading if the contract provided that the shipper was not entitled to a bill of lading but one was subsequently issued. It appears from the Court of Appeal judgment that there is a possibility that the rules may not mandatorily apply to a bill of lading in those circumstances if there is no express variation of the contract requiring the issue of a bill of lading.

Moving onto the issue of whether the carrier's liability could be limited by reference to Article IV Rule 5 of the Hague–Visby Rules, the owners argued that the container, not the individual items of cargo in the container, constituted "package or unit" for limitation purposes. Drawing support from the approach of the majority of the Federal Court of Australia in *El Greco v Mediterranean Shipping*,[15] they further contended that mere enumeration of the number of individual items was not enough to displace the default rule that the container would be the "unit". In this respect, their contention was that, due to the

[13] It should be noted that the same provision is also found in Article I(b) of the Hague Rules.
[14] See *Pyrene Co Ltd v Scindia Steam Nagivation Co Ltd* [1954] 1 Lloyd's Rep 321; *The Happy Ranger* [2002] 2 Lloyd's Rep 357 and *The Rafaela S* [2005]1 Lloyd's Rep 347 (HL). See also M.Özdel, *The Carriage of Goods by Sea under Private Law and EU Regulation*, in EU Transport Law (Hart-Nomos-Beck 2016) para 137 *et seq.*
[15] [2004] 2 Lloyd's Rep 537

words in Article IV Rule 5(c), which read "enumeration … as packed", how the packages and units had been packed in the container had to be clearly specified.

Rejecting the carrier's arguments, Flaux LJ held that there was sufficient enumeration for the purposes of Article IV Rule 5(c) of the rules. Each of the tuna loins was therefore considered to be a "unit" for limitation purposes. The main grounds[16] for his decision were that (i) in light of the clear wording of Article IV Rule 5(c), there was no need for the bill of lading or seawaybill to specify how the packages or units had actually been packed into the container;[17] (ii) it would be uncommercial and unrealistic to decide what amounted to a "unit" by reference to fine distinctions, dependent on the precise language used; and (iii) the phrase "in the bill of lading" found in Article IV Rule 5(c) should be interpreted in a way that covers any other document containing any enumeration that would have been in the bill of lading had such a bill of lading been issued.[18]

Flaux LJ's interpretation of Article IV Rule 5(c) is welcome not only because it is a victory for commercial sense but also because it brings certainty about the meaning of "unit" and how the default rule that a container constitutes a "unit" can be displaced by the parties. It is now possible for any individual items of cargo in a container that are not apt to be part of a bulk cargo to constitute units for limitation purposes whether or not they are packaged, provided that they are identified and enumerated in the bill of lading or any other relevant shipping document.

[16] In support of his interpretation, at para 85 of the judgment, Flaux LJ referred to what Diplock LJ (as he then was) had said at the International Maritime Conference, which formed part of the travaux preparatoires for the Hague-Visby Rules.
[17] For a contrary view see Allsop J in *El Greco* at para 284, where he concluded that, for the application of Article IV rule 5, the bill of lading should contain some additional statements as to how the packages or units were packed in the container.
[18] In this context, Flaux LJ added at para 78 that had he concluded that Article IV rule 5(c) could not apply to the enumeration in the seawaybills, he would have been prepared to conclude that it could apply to the draft bill of lading, which mentioned both the individual tuna loins and bagged tuna parts.