
Trafigura, as cargo owners sued MSC, as ship owners, for conversion and breach of contract in relation to a cargo of copper stowed in 18 containers and shipped from Durban to Shanghai on board “MSC Amsterdam.”

The containers were discharged at Shanghai into a container terminal. Fraudsters, using employees of MSC’s agents at Durban, procured a second set of bills of lading, which were used to obtain a delivery order from the ship’s agents in Shanghai. Using this, the fraudsters paid duty and vat, thus obtaining customs authority at Shanghai. When Trafigura sought a delivery order they were advised this had already been issued and immediate investigations revealed the fraud. MSC were in fact able to prevent delivery to the fraudsters and there is ongoing litigation in Shanghai over ownership of the copper. At that time the cargo was worth just in excess of US$1.3 million.

Pursuant to an English High Court jurisdiction clause in the bill of lading, Trafigura pursued MSC for delivery up of the cargo or damages for conversion. The case concerned to what extent MSC could exclude or limit liability and what losses Trafigura were entitled to recover. Trafigura were in the main successful at first instance and again before the Court of Appeal.

Misdelivery

The Court had to consider 4 issues:

1. Did the Hague or Hague-Visby Rules apply to the bill of lading? If the latter, was this by contract or by force of law?
2. Did the Rules apply to the period after the cargo had been discharged from the ship but remained in the container terminal?
3. If yes to 2 above, could MSC limit their monetary liability and if so, to how much?
4. If no to 2 above, did a clause in the bill of lading limit or exclude MSC’s monetary liability?

The first question was important as it would affect the quantum of MSC’s liability to Trafigura. If the Hague Rules applied, MSC could limit in the sum of £1,800 per container. The Paramount clause in the bill of lading provided:

“For all trades, this B/L shall be subject to the 1924 Hague Rules or, if compulsorily applicable, subject to the 1968 Protocol (Hague-Visby) or any compulsory legislation based on the Hague Rules and/or said Protocols. Where Hague-Visby or similar legislation is compulsorily applicable, the Hague-Visby 1979 Protocol (SDR Protocol) shall also apply whether or not mandatory.”

Both MSC and Trafigura agreed that if the Hague-Visby Rules (“HVR”) did not apply, then the Hague Rules did. Whether or not the HVR did apply was a taxing question of construction that occupies much of the judgment of first instance and was in fact overturned by the Court of Appeal.

The issue was whether the HVR only applied if compulsorily applicable under English law or whether also as a matter of contractual incorporation. Trafigura’s argument was that the HVR themselves provide at Article X (c) that the HVR will apply if the contract provides that the legislation of any State giving effect to them is to govern the contract. South Africa, the country of shipment, although not a Contracting State, had compulsory legislation giving effect to the HVR. In the alternative Trafigura submitted that the HVR could be applicable by contractual incorporation because the parties had not intended they would apply only if compulsorily applicable under English law. At first instance, Aikens J preferred the latter submission.

The Court of Appeal disagreed. The words “compulsorily applicable” meant applicable according to the proper law of the contract, English law. As South Africa was not a Contracting State, the HVR were not compulsorily applicable. Thus the Hague Rules applied in default.

Having thus decided the lower financial limit would apply the second question of whether the Rules applied to the period after discharge whilst the containers remained in the terminal was considered. On this, both Courts came to the same conclusion. The Rules concern the carriage of goods by sea and cease to apply on discharge of the cargo (Geuss Millard v Canadian Government Merchant Marine Ltd [1927] 2 KB 432) but parties are free to extend and define the temporal limit themselves and agree to apply the Rules after the end of the carriage.

Certain clauses of the bill of lading in question sought to limit MSC’s responsibility to the time commencing with loading and ending with discharge and in one instance referred to “after the end of the Hague rules period.” So the Rules did not apply to the period after discharge whilst the containers were still in MSC’s custody at the terminal.

The third issue was therefore redundant, leaving for consideration Clause 22 of the bill of lading and whether it excluded or limited MSC’s liability. The clause is long and rambling. Although earlier clauses of the bill of lading, as referred to in the paragraph above, sought to exclude MSC’s liability after discharge, MSC accepted such exclusion could not apply to misdelivery claims. Very clear words are needed to exclude such a serious breach of duty and MSC contended Clause 22 did just that.

We need not consider the whole clause, only the following:

“Neither the Carrier nor the ship shall in any event become liable for any loss or damage in connection with the goods in an amount exceeding the limitation allowed under the Hague Rules or the Hague-Visby Rules SDR limitation or the COGSA limitation, depending on which of these is compulsorily or compulsorily applicable. This limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes.”

Both Courts again agreed that the Clause did not exclude or limit MSC’s monetary limitation although for different reasons. Aikens J found that the parties could not have intended the contractual limitation of liability provisions to apply to a period after which the Carrier did not accept responsibility for the cargo. As earlier clauses in the B/L limited MSC’s liability to the end of the Hague Rules period so Clause 22 must be read in that context.

The Court of Appeal however felt it was unlikely to have been the parties’ intention that liability for failure to perform obligations of such importance

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as delivering the goods against presentation of a properly indorsed original bill of lading should be limited by sentences buried within this clause. It was in fact so unlikely as not to be the case and the clause was not "apt to limit liability for the essential obligation to deliver against original bills of lading. Any exemption or limitation of liability for such a breach has to be clearly expressed and clause 22 does not clearly do so"

Having thus decided MSC were unable to limit or exclude any liability for misdelivery what losses were Trafigura actually able to recover? This focussed primarily on whether "hedging" losses Trafigura had suffered could be recoverable against MSC. An essay on hedging is beyond the scope of this article but Aikens J accepted that it is common practice these days for commodity traders to hedge their sale and purchase deals but felt that most Carriers would have insufficient knowledge to have foreseen such hedging losses. Trafigura did not appeal that finding.

The Torts Interference with Goods Act (1977) allows the Court to make a variety of orders, including an order for delivery of the goods and consequential damages or an order for delivery with an option to pay damages by reference to the value of the goods or finally damages for the innocent party’s interest in the goods.

In respect of this last type of order, the Court may either award damages calculated by reference to the value of the goods at the date of conversion or at the date of judgment. Depending on market movements, the difference in the two could, and in this case was, substantial.

Having dismissed Trafigura’s hedging losses as not sufficiently foreseeable Aikens J instead awarded the value of the copper at the date of the judgment, the market having moved significantly upwards (the copper was worth close to US$2.8 million at the time of the Court of Appeal judgment), this had the effect of extinguishing most of the hedging losses anyway.

The Court of Appeal, despite MSC’s submissions to the contrary for the very reason that it did in effect compensate them for losses that were irrecoverable, agreed that this was the fairest way to compensate Trafigura.

"Once the judgment is satisfied, the shipowners will have title to the goods and can sell them to the fraudsters or any one else and they will no doubt obtain the value at the time of that sale. In these circumstances I agree with the judge that the fairest way to compensate the claimants is to award them the value of the cargo at the time when he made his judgment."

However Aikens J had also awarded Trafigura interest on the invoice value of the copper between the date of conversion and the date of judgment. The Court of Appeal overturned this as being a double benefit. Trafigura had already been compensated for being out of their money by the increase in the value of the copper between those dates.