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No Hague Rule Limitation for Loss or Damage to Bulk Cargo – The Aqasia.

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The post First World War economy and that of the Great Depression in the 1920s was very different to the one in existence today. In particular, commodity prices during that period suffered a prolonged period of stagnation and were worth far less in value than their equivalent today.

Against this backdrop it is perhaps unsurprising that when the Hague Rules were being drafted those involved did not necessarily consider that the limitation provisions in Article IV r5 would be relevant to the carriage of bulk cargoes. Article IV r5 provides that:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit,…"

In a recent case Sir Jeremy Cooke in the English Commercial Court was asked to determine whether the Hague Rules limitation regime applied to bulk cargoes.

The defendants had agreed to carry 2,000 tons of fishoil in bulk 5% more or less in Charterers option from Westmans Islands and Faskrudsfjordur in Iceland to Stokmarknes, Averoy and Stavanger in Norway.

On 6th September 2013 the defendants loaded 2,056,926 kgs of cargo at Faskrudsfjordur and Vestmannaeyjar of which 550,000 kgs was loaded into tanks 1P, 2P AND 5S of the tanker "Aqasia".

While en route to discharge in Norway, a further cargo of fishoil was loaded at Lovund, Norway. Part of this parcel of cargo was loaded into tanks 1P, 2P and 5S and the resulting commingled cargo was then subject to a claim from cargo interests at discharge.

The claim was based on 547,309 kg of cargo amounting to US$ 367,836 plus interest and costs having been damaged. That the cargo had been damaged was not in dispute but what was contested was the righto limitation under the Hague Rules. The Owners were prepared to offer £ 54,730.90 applying the Hague Rule limit of £100 to each metric tonne of cargo damaged arguing the word "unit" could apply to the measurement used to quantify the cargo in the contract of carriage.

Looking at the language of Article IV r 5, the Judge was persuaded by the Claimants that the phrase "package or unit" referred to a physical item rather than a unit of measurement. Applying the *noscitur a sociis* principle, the Judge was satisfied the use of the term package and unit in the same context indicated that they were referring to physical items. The position was supported by the use of the word "package" in Article III r3 (b) where it was accompanied with the word "pieces", and where the references to "quantity and weight" were distinct and specified separately.

The Judge went on to point out that if the intention had been for the word unit to cover both unpackaged items as a units of shipment and also units of measurements for bulk cargo it would create a practical problem. Where both a package and its weight or volume appeared on the bill of lading it was probable this would give rise to different limitation amounts and it would then be a question of which would have been the appropriate one to use as, unlike the Hague Visby Rules, there was no mechanism contained within the Hague Rules to determine which would apply.

Article 5 (a) of the Hague Visby Rules provides:

"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 the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher."

Although the case was based on the construction of the Hague Rules, the defendants argued that the Hague-Visby Rules limitation provisions showed that bulk cargoes were within the scope of the phrase "per package or unit" as the limitation calculation included a weight limitation.

The Judge did not consider the purpose of the Hague-Visby Rules was to introduce a limit of liability for bulk goods that had been excluded under the Hague Rules. Conversely, as was evidenced by the inclusion of the phrase "whichever is higher" the intention was to provide cargo interests with two alternative types of limitation irrespective of the nature of the goods shipped. While the Judge agreed that the Hague-Visby Rules limitation provisions do apply to bulk cargoes he considered that the construction of the Hague Rules could not be influenced by the terms of the Hague Visby Rules.

In support of his approach the Judge cited:-

Other than the Australian Federal Court case El Greco v Mediterranean Shipping [2004] 2 Lloyd's Rep 537 there was no direct English authority for Sir Jeremy Cooke to rely on. However, in the El Greco Allsop J said (at paragraph 278):

"…The terms of art. IV, r. 5 of the Hague Rules were negotiated and agreed upon as a package limitation […] The addition of the words "or unit" can be seen to have been intended to clarify the rule by making unnecessary any debate in individual cases about the extent and nature of wrapping and the like, so that individual articles capable of being carried without packaging - boilers, cars and the like, and which could be seen as units of cargo as shipped - would be covered. This approach involves a rejection of the notion that "or unit" was inserted to cover bulk cargo by reference to freight unit, as in U.S. COGSA. The weight of judicial and other views that I have earlier referred to makes this a safe conclusion…"

The closest English decision was Studebaker Distributors Ltd v Charlton Steam Shipping Co Ltd [1938] 1 KB 459, in which Goddard J decided a bill of lading clause limiting liability to US$ 250 per package could not apply to an unboxed car. In his judgement Goddard J stated that if the shipowners wanted the clause to refer to any individual piece of cargo they could have used *"appropriate words, as, for instance, "package or unit," to use the language of the Hague Rules …"* An indication, therefore, that Goddard J thought the phrase "unit" only covered an individual piece of cargo and not a unit of measurement.

In addition to the distinction between the Hague and Hague Rules limitation provisions Sir Jeremy Cooke's decision has also highlighted the difference between the the word "unit" in the Hague Rules, and "customary freight unit" in the United States Carriage of Good by Sea Act (US COGSA). Indeed the reference to customary freight unit in US COSA was acknowledged in the US Department of State Memorandum of June 5th

1937 as being intended to "*clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States*" for purposes of interpretation" thereby allowing USCOGSA to apply to bulk cargoes.

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