LIABILITY OF CARRIERS FOR POST-DISCHARGE MISDELIVERY

Trafigura Beheer BV and Another v Mediterranean Shipping Co (SA) (The MSC Amsterdam)
English Court of Appeal [2007] EWCA 794

The decision at first instance was noted in (2007) 13 JIML 148 (Digest). The Court of Appeal confirmed that decision subject to a few amendments.

Facts

On 30 September 2005 Trafigura, who were FOB buyers, shipped 18 containers containing 360 tonnes of copper cathodes on board the *MSC Amsterdam* from Durban, South Africa, to Shanghai. A genuine set of bills of lading was issued.

A second set of fraudulent bills of lading was produced by fraudsters, using employees of the ship's agents at Durban, which falsely named a company in Shanghai as consignee. The ship's manifest was also altered. This was done without creating suspicion because the bills and manifest were produced electronically. The fraudulent bills were sent to fraudsters located in Shanghai who obtained a delivery order for the containers from the ship's agents located at Shanghai.

On arrival at Shanghai the containers were discharged to a container terminal. In due course the fraudsters obtained the authority of customs to remove the containers from the terminal, having previously utilised the delivery order to pay customs duty and VAT on the cargo. This was an essential precondition to obtaining the release of the containers.

Subsequently Trafigura, using the genuine bills of lading, attempted to take delivery, only to be told that a delivery order had already been issued. Investigations then revealed evidence of the fraud and

the owners were fortunately able to instruct the container terminal not to release the containers without further instructions. At this time the cargo was worth over US$2 million.

Litigation was then commenced in the Maritime Court of Shanghai between the fraudsters, the shipowners and their agents over the ownership of the cargo, which remained pending. Trafigura were obliged to become involved in these legal proceedings.

Trafigura commenced proceedings in the English Commercial Court for the delivery up of the cargo or damages for the conversion of the cargo. The damages they sought to be assessed by reference to the value of the goods at the date of trial. They also sought damages for hedging losses suffered in the attempt to mitigate the risk caused by fluctuations in the value of copper.

The containers remained in the container terminal in Shanghai pending the outcome of the disputes in both sets of litigation.

The genuine bills of lading named the FOB seller as shipper, though the real shipper was Trafigura, who was party to the contract of carriage. The bill of lading was made out 'to Order' and the 'notify party' was a Chinese subsidiary of a leading London Metal Exchange warehousing company located in Shanghai. The bill also named Shanghai as the port of discharge.

Trafigura had sold the copper cathodes on 'CIF Liner Terms' Shanghai to HMC, a Chinese incorporated company wholly owned by affiliates to Trafigura. When Trafigura paid their FOB sellers for the copper cathodes, the bills of lading which had initially been issued to the FOB sellers, and which named them as shippers, were endorsed to Trafigura.

The fraudulent bills of lading carried the same number as the genuine bills, but in other regards there were several differences. In particular NINGBO, an existing company incorporated in China, was named as consignee and notify party. This company was not party to the fraudulent conspiracy. The conspirators in Durban altered the ship's cargo manifest to show NINGBO as consignee and notify party, and these false details were then transmitted to the ship's computer. The fraudulent bills and cargo manifest record were then sent electronically to the ship's agents in Shanghai. A fraudster purporting to represent NINGBO presented himself at the ship's agent's office with the fraudulent bills of lading and received a delivery order in exchange. The issue of the delivery order indicated an authorisation to release the containers.

The genuine bills of lading contained the following material clauses–

Clause 1. PARAMOUNT CLAUSE. This B/L shall have effect as follows:

(a) For all trades, except for goods shipped to or from the United States of America, this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX, 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 . . .

(b) For goods shipped to or from the United States of America, this B/L shall be subject to the US Carriage of Goods by Sea Act, 1936, and the US Bill of Lading Act 1916 (Pomerene) which shall also apply by contract at all times before loading and after discharge as long as the goods remain in the custody and control of the carrier.

Clause 2. LAW AND JURISDICTION

(a) Any claim or dispute arising from the Contract of Carriage evidenced by this B/L shall be subject to the exclusive jurisdiction of the High Court of Justice in London, and English law shall be applied,

(b) . . .

(c) . . .

Clause 22. CLAIMS VALUATION, PACKAGE LIMITATION TIME-BAR

. . . 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 the limitation allowed under the Hague Rules or the Hague-Visby Rules/SDR limitation or the COGSA limitation, depending on which of these is contractually or compulsorily applicable, per package or unit, unless the nature and the value of such goods have been declared by the Merchant before shipment and inserted in the Bill of Lading . . . This limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes . . .

Issues and decision

Trafigura's principal claim was for delivery up of the cargo or payment of the value of the cargo and consequential damages.

The owners admitted that they converted the cargo when their agents issued a delivery order in exchange for the fraudulent bills of lading. Nonetheless they argued that they were entitled to limit liability in accordance with the provisions of Clause 22 in the genuine bills of lading. The owners further argued that the bills of lading were governed by the Hague Rules, excluding Article IX, in other words the default position under Clause 1(a), and they could limit liability in accordance with these Rules. If they were not entitled to limit, the owners argued that damages were to be measured by reference to the value of the cargo at the date of the conversion.

Trafigura argued that the Hague-Visby Rules governed and, further, that the owners could not rely on the limitation provisions in the Hague or Hague-Visby Rules, or in clause 22 of the genuine bills of lading because the conversion was a post-discharge breach of duty.

(i) The court at first instance held as follows

As a matter of contractual construction the Hague-Visby Rules applied to the bill of lading contract. The shipment was from a port in South Africa and the South African Carriage of Goods by Sea Act 1986 applied compulsorily to all shipments out from South African ports. As such the Hague-Visby Rules were compulsorily applicable within the meaning of clause 1(a). The Hague-Visby Rules applied as a matter of contractual construction and not by force of law under the English Carriage of Goods by Sea Act 1971.

The Hague-Visby Rules did not apply to the post-discharge period but they could be extended to apply to this period by the contract of the parties. None the less, on a proper construction of the provisions of the bill of lading the parties had not expressed an intention so to extend the application of the Hague-Visby Rules. Had they done so, the court would have held that the owners were entitled to limit liability according to the terms of Article IV Rule 5.

Clause 22 of the bill of lading did not extend to the post-discharge period. The clause was restricted to the period the owner accepted responsibility for the goods. Only if it were made unambiguously clear by the parties through the language of the clause would it be extended to apply also to post-discharge operations, such as delivery. On the facts of the case such a clear intent had not been expressed.

Trafigura were consequently entitled to damages for conversion with damages to be assessed by reference to the value of the cargo at the time of judgment. The judge rejected any right to consequential damages, save for the costs incurred in connection with the Chinese litigation; but awarded interest for the period from the date of the conversion to the date of judgment.

(ii) The Court of Appeal affirmed the decision subject to the following amendments

The bill of lading contract was governed by the Hague Rules and not the Hague-Visby Rules. This was the consequence of the proper construction of clause 1(a) of the bill of lading. But the judge was right to conclude that the application of the Rules was by contract and not by force of law.

The court agreed that the Hague and Hague-Visby Rules did not apply post-discharge, but had they done so the court refused to express an opinion as to whether under Article IV(5) the owners would have been entitled to limit liability for post-discharge conversion of the cargo.

In assessing the measure of damages for conversion of the cargo the judge had adopted the correct principle and was also right to deny the claimants compensation for their hedging losses as

consequential damages, but right to allow the costs of the Chinese litigation the claimants were obliged to become involved in as recoverable as consequential damages. However, the judge had been wrong to award interest in view of the approach he had adopted to the measure of damages for conversion.

Commentary

Introduction

The case concerns an international conspiracy and provides further proof of how the documentary character of maritime transport and international trade, and its increasing conversion to electronic format, can facilitate the designs of the criminal community. The case is also witness to the legal difficulties that may arise from the multiplicity of international conventions governing the international carriage of goods by sea. Currently three international conventions exist and are potentially applicable to contracts for the carriage of goods by sea, the Hague, Hague-Visby and Hamburg Rules, and the world may soon be blighted by a fourth if the new UNCTAD Transport Convention finds acceptance. The result is nothing short of being a legal mess and would surely dismay those who framed the original Hague Rules. It is unimaginable that the present state of affairs acts in the interest of international trade and it is doubtful if the UNCTAD initiative will produce a solution.

The case addressed a number of important legal issues.

Which international convention applied?

The question was whether the Hague or Hague-Visby Rules applied to the contract. The limitation of liability provisions of the former were advantageous to the owners, and those of the latter were advantageous to the claimants, and unsurprisingly the parties argued accordingly. As matters turned out the issue was not of any consequence in resolving the question of liability. It is nonetheless an interesting legal question.

Two points are relevant to this question. The parties had agreed English law as the governing law of the contract of carriage and clause 1(a), the Paramount Clause, in the bills of lading. The English Carriage of Goods by Sea Act 1971 gives the force of law to the Hague-Visby Rules in circumstances which are set out in the Schedule to the Act. Article X provides:

> The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:
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> (a) the bill of lading is issued in a contracting State, or
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> (b) the carriage is from a port in a contracting State, or
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> (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,
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> whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Clause 1(a) in the bill has already been reproduced in full above. It is capable of being broken down into three elements:

(i) it establishes a general default position, applying the Hague Rules to all trades (except voyages to and from the USA) with the exclusion of Article IX; nonetheless,

(ii) the Hague-Visby Rules are to apply if the Hague-Visby Rules are compulsorily applicable to the bill of lading contract;

(iii) the Hague-Visby Rules are to apply if compulsory legislation based on the Hague-Visby Rules is applicable to the bill of lading contract.

In paragraph (ii) the direct application of the Hague-Visby Rules *ipsissima verba* appears to be contemplated, whether by legislation or otherwise; whereas paragraph (iii) contemplates legislation or other legislative instruments which give effect to the Hague-Visby Rules, without reproducing the precise language of the Rules.

At the core of the legal problems in the case was the surprising revelation that although South Africa had given the force of law to the Hague-Visby Rules in the Carriage of Goods by Sea Act 1986, it had never signed or otherwise acceded to the Rules. It, therefore, was not a Contracting State and accordingly paragraphs (a) and (b) of Article X of the Hague-Visby Rules did not apply.

That left only paragraph (c), and the question was whether clause 1(a) in the bills of lading satisfied the requirements of paragraph (c) – did it indicate that the Hague Rules or legislation of any state giving effect to them were to govern the bill of lading contract? Again there were difficulties. Clause 1(a) did not clearly indicate that the Hague-Visby Rules were to apply, only that they were to apply if they were compulsorily applicable. That left open the question whether they were compulsorily applicable. Nor did clause 1(a) identify the legislation of any state giving effect to the Hague-Visby Rules as applicable. Both the judge at first instance and the Court of Appeal interpreted this part of Article X(c) as requiring the legislation of a particular state to be identified. It was not sufficient to refer to the legislation of any state, for it was necessary to know which legislation applied in any particular situation. But in this context it was not necessary to name a state, it could be identified indirectly as where the bill of lading provided that the Hague-Visby Rules 'as enacted in the country of shipment' were to apply.

In the opinion of the Court of Appeal the question whether the Hague-Visby Rules were compulsorily applicable was to be determined by the proper law of the contract and, when relevant, the lex fori, as where the Hague-Visby Rules applied as a matter of mandatory law. On this question the Court of Appeal differed from the trial judge who had concluded, on a proper construction of clause 1(a) that the words 'compulsorily applicable' included the concept of compulsory application at the port of shipment. The trial judge consequently held that the Hague-Visby Rules applied as a matter of contract, though not by the application of the English COGSA 1971.

In principle there is nothing to preclude the application of the Hague-Visby Rules being extended beyond the boundaries established by the English COGSA by the contract of the parties, if that is the consequence of the proper construction of the contract applying the proper law, but in the opinion of the Court of Appeal that consequence did not arise on the present facts. In the opinion of the Court of Appeal the Hague-Visby Rules were only compulsorily applicable in circumstances when they were recognised to be applicable compulsorily by the proper law of the bill of lading contract, namely English law. There is no precedent directly supporting this conclusion, but the Court of Appeal identified a number of supporting judicial assumptions (*Holland Colombo Trading Society Ltd v Alawdeen & Others* [1954] 2 Lloyd's Rep 45, 53; *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] QB 933, 968 D-H per Goff LJ; *The Komninos S* [1991] 1 Lloyd's Rep 370; *The Happy Ranger* [2001] 2 Lloyd's Rep 530, 540, para 34, [2002] 2 Lloyd's Rep 357, 361–2).

The ultimate decision of the Court of Appeal that the Hague Rules applied will surprise many. Most commercial shipping people viewing the facts of the case generally would immediately identify it as a situation where the Hague-Visby Rules applied. It was a shipment out of a Hague-Visby country and had the litigation been commenced in South Africa it is probable, if not certain, that that country's COGSA would have applied. That is what commercial sense would also have suggested for it was a case of container transport, in respect of which the Hague Rules, unlike the Hague-Visby Rules, are woefully inadequate. The commercial appeal is with the decision at first instance, whereas the Court of Appeal appears to have largely ignored the commercial matrix when construing the Paramount Clause in the bills of lading and adopted throughout a strictly legalistic approach. Considerations of policy could also have been mustered to support the identification of the Hague-Visby Rules as the governing legal code.

All the problems emerged from the surprising fact that South Africa, although it had legislated for the application of the Hague-Visby Rules, had never signed, ratified or acceded to the Protocol and, therefore, was not a 'Contracting State'. Consequently the focus turned to the proper construction of the words in the Paramount Clause indicating compulsory application. In construing these words as meaning compulsory under the proper law of the contract or lex fori, namely English law in each

case, the court succeeded in both rendering the Paramount Clause effectively meaningless and in acting inconsistently with the premise it accepted that by contract the application of the Hague-Visby Rules could be given a wider application than that prescribed by COGSA 1971. It is also a remarkably UK-centric approach. The Hague-Visby Rules are a global legal regime governing the carriage of goods by sea primarily in circumstances where shipment is from a country which has adopted the Rules. It is the nature of much of shipping that contractual ports of loading may be many and various, with the itinerary not necessarily known in advance. In the context of the commercial realities of shipping it would have been both legally justifiable and commercially sensible to have construed the Paramount Clause as revealing an intention that the Hague-Visby Rules were to apply to shipments from ports in countries where the Hague-Visby Rules applied by application of law, that is compulsorily. That is how the judge at first instance viewed matters.

Did the Rules apply post-discharge of the cargo?

This was a more straightforward question, with no distinction to be made whether it was the Hague or Hague-Visby Rules (hereafter the Rules) that were applicable. The relevance of the issue related to the question whether the carrier, if liable, might have a right of limitation of liability, and if so the nature of the right.

Adopting the colloquial language of the shipping industry the Rules apply 'tackle to tackle'. In more formal terms Article 1(e) of the Rules prescribes that ' "Carriage of Goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship'. The same principle is implicit in Articles II and III rule 2. It is quite clear that the period of responsibility of the carrier begins with the loading and ends with the discharge of the cargo. It is to be noted that the Rules speak of the discharge, and not the delivery, of the cargo (see *Gosse Millard v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432, 434, Wright J). The Rules do not apply preloading and post-discharge, during which periods freedom of contract applies subject to any restrictions imposed by the applicable law (see Article VII).

Although the Rules do not apply post-discharge, it is always open to the parties as a matter of contract, expressly or impliedly, to extend their application to this period. Where, in the absence of an express contract, the carrier continues to provide services in relation to the cargo it might readily be implied that the parties intend the obligations and immunities embodied in the Rules to continue to apply. But such an implication cannot be made if the express terms of the bill of lading indicate the contrary. This was precisely the case on the facts. The submission by the owners that the Rules extended by the operation of implied contract was rejected because several of the bill of lading clauses indicated a party intention to the contrary. Thus clause 4(ii) provided – '. . . the Carrier shall not be liable for loss of or damage to the goods during the period before loading onto and the period after discharging from the vessel . . .' Clause 4(iii) provided: 'When the goods are in the custody of the Carrier and/or his subcontractors before loading and after discharge . . . they are in such custody for the risk and account of the Merchant without any liability of the Carrier'. And clause 7 provided '. . . any loss of, or damage to the goods . . . shall, after the end of the Hague period, be at the sole risk of the consignee in every respect whatsoever . . .'.

The court also rejected argument that the words 'in any event' in Article IV rule 5 operated to extend the right to limit liability to the post-discharge period.

Had the court come to a contrary conclusion, it would have raised the interesting question of interpretation whether the right to limit under the Rules applied to the misdelivery of cargo. The trial judge expressed the opinion that it would have applied, but the Court of Appeal left the question open.

Was liability for post-discharge misdelivery exempted by contract?

On the facts of the case the misdelivery was constituted by the wrongful giving of a delivery order to the fraudsters or by the refusal to hand over the goods on production of an original, genuine, bill of lading. An act of misdelivery is a particularly grave breach of a bill of lading contract and it is well

established that an exclusion clause will protect a carrier only if it is drafted in such clear and unambiguous words as to make it plain that it applies to liability arising from misdelivery of the cargo (*Glyn, Mills Currie & Co v East and West India Dock Co* (1882) 7 App Cas 591; *The Stettin* (1889) 14 PD 142; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959 AC 576); *Motis v Dampskibsselskabet af 1912* [2000] 1 Lloyd's Rep 211).

The owners conceded that Article 4(ii), (iii) and Article 7 in the bill of lading (considered above), were not protective of the owners' position, but did attempt to take the protection of Article 22. This was an extensive and cumbersome clause, from which the owners highlighted two sentences to the following effect:

> 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 the limitation allowed under the Hague Rules or the Hague-Visby Rules/SDR limitation or the COGSA limitation, depending on which of these is contractually or compulsorily applicable, per package or unit, unless the nature and the value of such goods have been declared by the Merchant before shipment and inserted in the Bill of Lading . . . This limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes.

The Court of Appeal accepted that the various provisions of clause 22 did apply to matters arising before and after the period of the Rules, except where individual provisions expressly provided otherwise. Nonetheless, it contained nothing that was clear enough to protect against liability arising from breach of the duty to deliver against original bills of lading. In the words of Longmore LJ (paragraph 37), 'Any exemption or limitation of liability for such a breach has to be clearly expressed and clause 22 does not clearly do so'. For an example of an exclusion clause expressly applying to 'misdelivery' see *The New York Star* [1981] 1 WLR 138, 146G.

Remedy for misdelivery

The owners, having failed by one legal route or another either to exclude or limit their liability for misdelivery, were obliged either to deliver up the cargo or pay damages to the value of the cargo to the claimants (the order of the court at first instance made under the Torts (Interference with Goods) Act 1977, section 3(2)(b)). If they elected to pay damages the claimant's title would be extinguished (section 5(1)). The question of damages raised a further question about the date of valuation. Was it to be the date of the act of conversion (24 or 25 October 2005) or the date of judgment (27 April 2007)? In the period between these dates the price of copper had risen steadily and therefore the answer to the question was of material significance. The question was to be answered by the court in the exercise of its judgment as to the true foreseeable loss suffered by the claimant. Normally the damages would be assessed by reference to the market value of the goods at the time of the conversion. But having regard to the circumstances of any case it was open to the court to adopt some other measure of damages which might yield a higher or lower amount (see *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, para 67, per Lord Nicholls).

The ultimate aim is to award just compensation for the loss suffered (see *IBL Ltd v Coussens* [1991] 2 All ER 133). The owners argued that the normal rule should apply as at the date of the first act of conversion and that the increase in the value of the copper represented a consequential loss that could be recovered only if it was foreseeable, which it was not. The Court of Appeal was of the same mind as the trial judge that damages were to be assessed at the date of judgment. On the facts it was reasonable for Trafigura not to get in further cargo and to keep open the hedge position on the existing cargo. Also, if the date of the conversion was chosen the owners would unjustly take the benefit of the increase in the value of the copper, subject to any liability for consequential damages.

With regard to consequential damages, Trafigura could not recover its hedging costs or losses because they were not reasonably foreseeable to the owners at the time of the conversion. However, the costs in relation to the Chinese litigation were foreseeable and therefore recoverable as consequential damages. The Court of Appeal expressed the opinion that even if the date of the

conversion had been adopted as the measure of damages, the subsequent increase in value could have been attributed to loss of use and recoverable as consequential damages, subject to the obligation to mitigate.

The trial judge awarded Trafigura interest on the invoice value of the copper from the date of conversion to the date of judgment, on the basis that that was the period Trafigura had been kept out of its money. The Court of Appeal set aside this award, because its effect was to confer upon Trafigura a double benefit. By fixing the date of judgment as the measure of damages Trafigura was being compensated for being kept out of its money by the increase in the value of the copper.

DRT