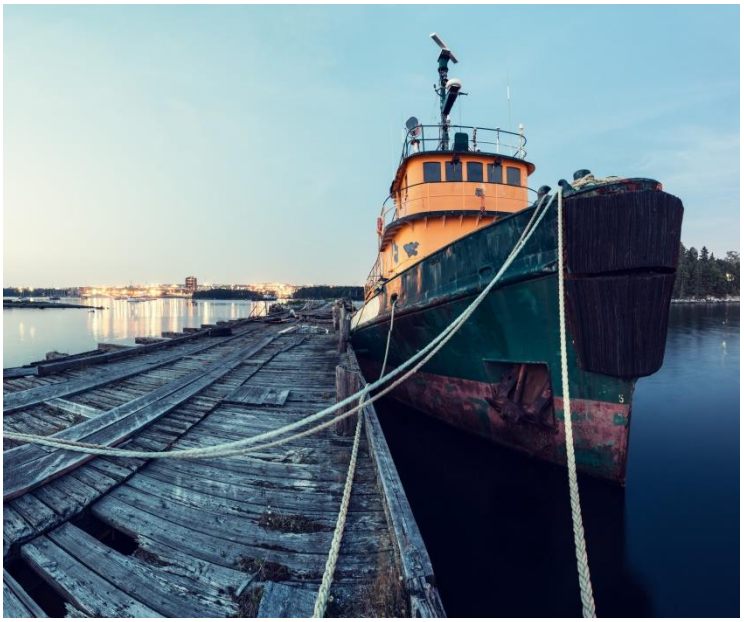
Campbell Johnston Clark



Quarterly Case Update

April 2017

59 Mansell Street, London, E1 8AN, Tel: +44 (0) 207 855 9669, Fax: +44 (0) 207 855 9666

London • Newcastle • Singapore

www.cjclaw.com

Campbell Johnston Clark

CONTENTS

Sino Channel Asia Ltd v Dana Shipping & Trading (Singapore) Pte Ltd & another [2016] EWHC 1118 (Comm)

Question of law

Is service of a notice of arbitration on a third party (i.e. an agent or otherwise), valid service on the intended recipient?

Background

Sino Channel Asia (the "**Charterers**") entered into an agreement with Beijing XCty Trading Ltd (the "**Third Party**"), under which the Third Party would arrange contracts to be concluded in Charterers' name but would be performed by the Third Party.

Under the agreement, the Third Party arranged a contract of affreightment (the "**COA**") with Dana Shipping (the "**Owners**"). At all points, the principal contact point between the parties was a junior employee at the Third Party.

A dispute arose as a result non-performance under the COA and, in February 2014, Owners sent a notice of arbitration to the junior employee at the Third Party, calling upon Charterers to appoint the second arbitrator.

The notice went unanswered and, in exercising rights under the COA, Owners appointed their nominated arbitrator as the sole arbitrator in the reference.

Charterers and the Third Party remained silent throughout the proceedings. Owners were awarded damages of US$1,680,404.15 (plus interest and costs).

In June 2015 the final award was published and was posted to Charterers' registered address in Hong Kong.

It is understood that Charterers first became aware of the award upon receiving it at their offices on 30 June 2015. It also transpired that, during subsequent discussions, the Third Party gave Charterers assurances that they would deal with the award and, therefore, Charterers should *"ignore"* it.

The Third Party failed to deal with the matter and, therefore, in light of Charterers' inaction; Owners commenced enforcement proceedings in Hong Kong in October 2015.

Shortly thereafter, Charterers made their first contact with the sole arbitrator, informing him that they had not received the notice of arbitration.

The Hong Kong court granted an order to enforce the award in November 2015.

The appeal to the English High Court

In January 2016, Charterers applied for a declaration and order pursuant to *section 72(1) (b)* or *(c)* of the *Arbitration Act 1996* (i.e. on the basis that they had not taken part in the proceedings) that the award was made without jurisdiction and should, therefore, be set aside.

Owners' argument that an application under *section 72(1)* is intended to deal with the position at an interlocutory stage was dismissed (citing Walker J in *The Prestige* [2014] 1 All ER (Comm) 300).

In response to Owners' time-bar, the Court held that a claim under *section 72(1)* is not subject to the same 28-day deadline applicable to an application under *section 72 (2)*.

Accordingly, Charterers were given leave to appeal.

Issues and Decision

In the circumstances, the Court was faced with the following issues:

(i) *Did the Third Party have implied actual authority to receive the notice of arbitration?*

No.

Whilst the Court accepted that the Third Party had a 'general authority' to act on Charterers' behalf (in respect of their obligations under the COA), this did not translate into an authority to accept service of *originating process* (in fact, neither a P&I club nor a solicitor will have such authority (unless expressly provided for): *The Lake Michigan* [2010] 2 All ET (Comm) 1170 *para 44*).

Furthermore, where a notice of arbitration gives rise to significant legal consequences (above and beyond those arising under ordinary contractual obligations):

> *"…it would be both extraordinary and unprecedented if service could validly be effected on* [Charterers] *by sending an email to a junior employee of* [the Third Party]*"* (Sir Bernard Eder *para 42*).

(ii) *Did the Third Party have ostensible authority to receive the notice of arbitration?*

No.

Such authority can only arise by way of representations made by the principal. An employee/agent cannot purport to create their own ostensible authority.

On the facts, the Court held that there was no express representation from Charterers that the Third Party had any authority to accept notice of arbitration.

Furthermore, irrespective as to whether the Third Party's junior employee was referred to, in correspondence between Owners and the Third Party, as *"CHRTRS' GUY",* this representation could only have come from the Third Party and not Charterers, as they had no direct dealing with Owners.

The Court went on to find that any representation could only arise by implication which, on the facts, could not be done.

(iii) *Did Charterers ratify the arbitral award?*

No.

Whilst Owners argued that Charterers ratified the award by subsequent inaction and acquiescence between: (i) receiving the award; (ii) learning of Owners' enforcement proceedings in Hong Kong; and (iii) making the application to the English court (i.e. between June 2015 and January 2016), the Court held that, ultimately, this was inconsequential as the Tribunal had not been properly constituted in the first instance.

Additionally, Charterers could not be taken to have ratified the award by their silence/inaction because they neither knew of, nor participated in, the arbitration.

Held, it was clear that, on receipt of the final award in June 2015, Charterers had not received notice of, nor participated in, the arbitration (rather it was the Third Party who had received the notice of, and 'participated' in, the arbitration *without authority*); accordingly, Charterers were entitled to the declaration and appropriate relief under *section 72(1)*.

Comment

This case highlights the importance of ensuring notices pertaining to the commencement of legal proceedings are served directly on the contractual counterpart.

Caution should always be exercised where serving a notice through the brokering channel; in particular, where the broker does not confirm the intended party has safely received the notice, as this may not be tantamount to good service.

If in doubt, it is recommended to exhaust all options to ensure direct service is effected, including (but not limited to): (i) sending the notice to a general company e-mail address (see *Bernuth Lines Ltd v High Seas Shipping Ltd* (*[2005] EWHC 3020 (Comm)*); and (ii) instructing a local agent to serve the notice at the intended recipient's registered address.

Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Ltd (The "Yangtze Xing Hua") [2016] EWHC 3132

Question of law

Does the word "act" in the words "act or neglect of one party or another" in clause 8(d) of the Inter Club Agreement mean 'culpable act' or simply any act at all?

Facts

The Owners of the mv YANGTZE XING HUA (the "**Vessel**") entered a time charter with Charterers for the carriage of soya bean meal (the "**Cargo**") from South America to Iran.

Upon arrival at the disport, Charterers had not received payment for the Cargo and therefore ordered the Vessel to not discharge the cargo for what became a period of more than 4 months. As a result of remaining on board for that extended period, the Cargo overheated and was damaged.

The receivers brought a claim against Owners in respect of the damage. Owners settled in the amount of €2,654,238, who in turn sought to recover this amount, plus hire, from Charterers.

Under the relevant charter, liability for cargo claims was to be assessed under the Inter Club Agreement ("**ICA**") and it was agreed that the relevant subsection was 8(d) which states that cargo claims are to be apportioned 50 / 50 between Owners and Charterers "unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim."

Dispute

Charterers contended that the cause of the damage was Owners' failure in not properly monitoring the temperature of the Cargo. Owners contended that the cause was Charterers' decision to delay discharging the Cargo for 4 months.

Tribunal's Decision

The Tribunal (Sheppard, Rookes and Baker-Harber) held that Owners were not at fault and the true cause of the damage was the physical properties of the Cargo combined with the extended period at anchorage at the discharge port. The Tribunal held that "act" for the purposes of clause 8(d) did not require any culpability to take effect. Accordingly, Charterers' decision to not discharge the Cargo, whilst taken logically to protect their position against the receivers, was still sufficient to make the subsequent claim fall to be 100% for Charterers' account.

Appeal Decision

On appeal to the Commercial Court, Charterers submitted that this interpretation of "act" was wrong, and the phrase "act" must be read together as "act or neglect" meaning 'culpable act' and required an element of fault of either party. The Tribunal was accordingly incorrect to hold that any act was sufficient to trigger 8(d) of the ICA. In support, Charterers relied on a finding in *Anglian Water Service v Crawshaw Robbins* [2001] Building Law Reports 173 (a building dispute) which found

that “act” ‘must take its colour from its context’ and required a failure by a party to do its duty.

This argument was rejected by the Commercial Court (Teare J) and the Tribunal’s finding was upheld. The ICA was drafted to be a rough and ready contractual apportionment of liability and therefore the interpretation of the word “act” would be a simple and ordinary interpretation without analysis of fault or investigations into culpability. The Court referred to *The Strathnewton* which emphasised the ICA’s character as a knock-for-knock agreement, unconcerned with fault or culpability.

Comment

This case again emphasises the strict and non-legal interpretation and application of the ICA, reflecting its original purpose to avoid lengthy legal arguments and technical debate. Charterers have been given leave to appeal so we will have to await further confirmation before drawing an ultimate conclusion on the wording of “act” but for now, the broader approach applies. This should enable similar cases to be dealt with simply and without the need for expensive litigation and perhaps will lend itself to a more direct interpretation of other aspects of the ICA also.

Vinnlustodin HF and Another v Sea Tank Shipping AS (The “Aqasia”) [2016] EWHC 2514 (Comm)

Question of law

Do the package limitation provisions in Article IV Rule 5 of the Hague Rules apply to bulk cargoes?

The Court was asked to consider whether the word “unit” in Article IV r.5 of the Hague Rules, could be read to mean a unit of measurement (e.g. a metric ton or kilogramme), so as to extend the application of the limit to cargoes carried in bulk.

Whilst the Hague Rules no longer have the force of law in England (having been succeeded by the Hague-Visby Rules), they are still regularly applied as a result of their incorporation into bills of lading etc. issued in in non-Hague-Visby contracting states.

Facts

The "AQASIA" was fixed, between Sea Tank Shipping AS (the "**Defendant**") to Vinnulstodin HF (the "**Claimant**"), to carry a cargo of fish oil (in the amount of 2,056,926kg).

On arrival at the discharge port approximately 26% of the cargo was found to be damaged and, on this basis, the Claimant issued a claim for the loss and/or damage to the cargo in the sum of US$367,836.

The Defendant accepted, in principle, that it was liable for the damage to the cargo under the terms of the charterparty; however, claimed a right to limit liability to £54,730.90 (i.e. £100 per metric tonne of cargo damaged) pursuant to Article IV r. 5 of the Hague Rules:

> “*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 pounds sterling 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."*

Submissions

The Defendant argued, Article IV r.5 can be applied to bulk or liquid cargo by reading the word 'unit' as a reference to the unit used by the parties to quantify the cargo in the contract of carriage.

Accordingly, the Defendant sought to rely on the description of the cargo in the charterparty which stated *"2,000 tons cargo of fish oil in bulk".*

The Claimant argued that there was no right to limit liability because Article IV r. 5 of the Hague Rules did not apply to shipments of bulk cargoes, on the basis that there is no relevant "package or unit"; therefore, the rule cannot apply.

The Hague Rules

The Defendant highlighted a number of other provisions in the Hague Rules that pointed to the inclusion of bulk cargoes and which envisaged the application of Article IV r.5 to bulk cargoes.

However, the Judge obtained little assistance from these other provisions as he needed to determine the true meaning of the word "unit" in Article IV r.5, which was the focus of the claim.

That said, the Judge did acknowledge that the word "package" related to a physical item. Furthermore, that the words "unit" and "package" together in the same context suggested that both terms were concerned with a physical item rather than to a unit of measurement.

The Defendant's argument was that "unit" was suitable to cover unpackaged physical items or a unit of measurement in the case of bulk cargoes. However, this analysis would create a problem in the case of a packaged or an unpackaged item where a weight or volume also appeared in the Bill of Lading.

The Hague Visby Rules

Article IV r.5(a) of the Hague-Visby Rules sets out the weight limitation multiplier, that is (***emphasis***):

> *"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 loss or damaged****, whichever is the higher."*

The Claimants asserted that, if the weight limitation had been introduced in order to include bulk goods within the limitation regime, the last sentence above would have stopped at the words "lost or damaged".

The Judge held that the terms of the Hague-Visby Rules cannot affect the construction of the Hague Rules.

The Decision and commentary

In his judgment, Sir Jeremy Cooke held that the word "unit" in the Hague Rules meant a physical unit for shipment and not a unit of measurement. In other words that "unit" referred to an item of cargo not suitable for packaging e.g. a motor car. Accordingly, there was no basis upon which this bulk cargo claim could be subject to limitation.

This case has set a precedent and has clarified a very old debate as to whether the Hague Rules unit element of 'package or unit' limitation can apply to bulk cargoes.

While it is already established that the word "package" in the phrase "per package or unit" in the Hague Rules could not apply to bulk

cargoes: "*A package is undoubtedly a physical item*", and so is the word "*unit*".

It is now settled under English law that the package limitation of the Hague Rules does not apply to bulk cargoes.

Oldendorff GmbH & Co KG v Sea Powerful II Special Maritime Enterprises (The "Zagora") [2016] EWHC 3212 (Comm)

Background

SCIT Trading Limited ("**SCIT Trading**") contracted to sell a cargo of iron ore to Xiamen C&D Minerals Co. Ltd. ("**Xiamen**").

Xiamen agreed to sell the cargo to an associated company, who in turn agreed to sell to Shanxi Haixin International Iron and Steel Co. Ltd ("**Shanxi**").

The final sales contract provided that the discharge port agent was to be appointed by the buyer, Shanxi.

SCIT Trading, who were responsible for arranging a vessel to transport the cargo, had a contract of affreightment with SCIT Services, who had entered into a voyage charterparty with Oldendorff Carriers for the carriage of the cargo.

The charterparty stipulated that, in the event an original bill of lading (for the cargo) was unavailable, the cargo was to be discharged and released against a letter of indemnity ("**LOI**").

Oldendorff Carriers had in place a long term agreement with the Oldendorff GmbH & Co KG (the "**Claimant**"), whereby the latter would provide tonnage to the former.

The Claimant entered into a time charter trip (on an NYPE form) with owners (Sea Powerful II Special Maritime Enterprises – "**Owners**") of the "ZAGORA" (the "**Vessel**") to carry the cargo and this was largely on back to back terms with the voyage charterparty.

The Claimant requested the Owner to provide a copy of its standard LOI wording, leaving the name of the receiving party blank.

The LOI form was passed down the chain by the Claimant to SCIT Services, SCIT Trading, Xiamen and Shanxi. Xiamen identified to Shanxi that the receiving party would be Sea-Road Shipping Agency Co. Ltd. ("**Sea-Road**"), who were Shanxi's contractually nominated agent at the disport.

That said, Xiamen identified itself as the receiving party when it provided the LOI to SCIT Trading and this was passed up the line to Owners.

In December 2013, the cargo was discharged to Sea-Road against a LOI.

A few months later, the Vessel was arrested at the suit of the Bank of China, who asserted that, where it held the original bill of lading, the cargo had been mis-delivered.

Issues

Owners requested the Claimant to procure the release of the Vessel pursuant to the terms of the LOI issued.

Whilst this was passed down the chain to Xiamen, no action was taken. In the event, the Claimant provided security for the release of the Vessel; however, maintained that the terms of the LOI were not engaged.

The Claimant eventually brought proceedings against Owners.

The main issue as to whether the LOI was engaged was whether Sea-Road took delivery as agent of Xiamen or as agent of the Claimant.

Judgment

A distinction was made between discharge and delivery of a cargo.

Discharge involves movement of cargo onto shore; whereas delivery involves transferring possession of cargo to a person ashore.

Held, on balance it was more likely that Sea-Road had acted as agent for Xiamen rather than Owners.

The following facts supported this conclusion, including:

(i) Sea-Road was nominated by the ultimate buyers, Shanxi; and
(ii) Xiamen had identified Sea-Road as the receiving party in the LOI.

Furthermore, Owners had no interest in discharging the cargo to Sea-Road as their agent. Doing so would not give Owners protection under the LOI, as Xiamen were named as the receiving party and, therefore, delivery to Sea-Road would have been mis-delivery.

Comment

This case raised issues which may arise when a series of LOIs has been given. It also showed that in determining the issue of agency, the court may be prepared to take into consideration the commercial position of the parties.

London Arbitration 30/16

Question of law

Are Owners entitled to an indemnity from Charterers, under the NYPE Inter-Club Agreement (the "**ICA 1996**"), for defending proceedings brought by cargo receivers in a foreign court?

Background

Pursuant to an amended NYPE 1993 form of charter, incorporating the terms of the ICA 1996, owners carried a cargo of soya beans from South America to the Middle East.

Prior to loading, an inspection company issued a certificate confirming the cargo's quality.

On arrival at the disport, charterers instructed the vessel to wait at anchorage. In the event, the vessel remained at anchorage for 35 days before discharging.

On discharge, part of the cargo was found to be damaged and cargo receivers brought a claim in the country of discharge, in the amount of US$1 million, against:

(i) the registered owners (an associated company of owners of the vessel);
(ii) the master;
(iii) the charterers; and
(iv) the inspection company.

Foreign proceedings

Owners' experts judged that the most likely cause was the self-heating of the cargo and subsequent ship's sweat.

Held; charterers were liable by reason of selling inferior soya beans to cargo receivers and that the other defendants were not liable.

London Arbitration

In the premises, owners, commenced arbitration proceedings against charterers, in London, claiming US$ 372,148.36, under clause 8(d) of the ICA 1996 in respect of all legal, club correspondents' and experts' costs

incurred in defence of the foreign court proceedings.

Owners' claim

Owners claimed:

(i) the foreign court judgment (absolving them of blame) constituted an *issue estoppel* based on *res judicata*; and/or

(ii) the root cause of the damage was, as a matter of fact, the inferior quality of the soya beans, which was compounded by an "act" or "neglect" of charterers (i.e. by shipping cargo with excessive moisture content and ordering the vessel to wait for 35 days at the disport); therefore, liability was clear as per clause 8(d) of the ICA 1996; and/or

(iii) an implied indemnity under the charterparty as a consequence of following charterers' orders as regards employment of the vessel.

Charterers' claim

Charterers denied the ICA 1996 applied. They argued that cargo receivers' claim was not brought under a contract of carriage but under a foreign law concept akin to bailment.

Moreover, a claim for legal costs and correspondents' costs did not constitute a cargo claim; as such, a claim could only be made as costs incurred in defending a claim and/or as part of losses paid in respect of a claim for damage to cargo. The costs and expenses claimed by the owners did not fall within the wording of clause 3 of the ICA 1996.

Accordingly, owners could only recover defence costs where a payment had been made in respect of the original cargo claim (*London Arbitration 10/15 (2015) 929 LMLN 4*); and this was not the case. As such, owners' claim did not fall within clause 3 of the ICA 1996.

Tribunal's decision

Held, owners plea re. *issue estoppel and res judicata* failed; the foreign court was not the jurisdiction of choice in the bills of lading issued for the cargo and therefore it was not a jurisdiction that either party may have expected and/or consented to determine any claims arising thereunder.

As such, it was inappropriate to hold the parties to the findings of that judgment (which, in any event, was not final and was subject of an appeal by charterers).

The ICA 1996 did apply as cargo receivers specifically referred to the bills of lading in their action. Therefore, action was brought under a contract of carriage.

The tribunal declined to follow *London Arbitration 10/15 (2015) 929 LMLN 4* and owners were entitled to recover legal costs claimed.

Clause 3 was clear that cargo claims included, *inter alia*, *"all legal, Club correspondents' and experts' costs reasonably incurred in the defence of or settlement of the claim made by the original person"*.

The tribunal agreed with owners that the reference to *"cargo claims"* in clause 4 includes costs incurred in the defence of the original claim and, in particular where that claim is properly settled / compromised / paid, extended to cover costs incurred in defence of the claim as long as those costs had been paid.

As to causation, the tribunal found that the root cause of the damage to the cargo was the shipment of cargo that was inherently unstable.

Given charterers (i) loaded the cargo; and (ii) gave instruction for its carriage, the tribunal found that this was sufficient as an "act" or "neglect" of charterers and therefore, pursuant to clause 8 (d) of the ICA, charterers were 100% liable for owners' costs.

In the alternative, shipping a cargo with a propensity to self-heat took the cargo outside the limits of the charter and outside the kind of risk owners agreed to bear under the charter.

In any event, the tribunal held that owners would be entitled to recover sums under an implied indemnity as owner had merely followed charterers' instructions as regards the employment of the vessel (i.e. the 35 day waiting period at the disport prior to discharge, which, it was found, exacerbated the damage).

Kairos Shipping Ltd and Another v Enka & Co LLC and Others (The "Atlantik Confidence") [2016] EWHC 2412 (Admlty)

Background

Following the outbreak of a fire in an unmanned engine room, the ATLANTIK CONFIDENCE (the "**Vessel**") sank off the coast of Oman, together with all of her cargo on board.

Owners of the Vessel, Kairos Shipping ("**Kairos**"), issued proceedings in the Admiralty Court seeking a declaration that their liability for losses should be limited under the *Convention on Limitation of Liability for Maritime Claims 1976* (the "**Limitation Convention**").

Part of the cargo was insured by Axa, who had been subrogated to the cargo owner's claim against Kairos.

Axa's claim (€10.2m excluding interest) exceeded Kairos' limit of liability under the Limitation Convention (£7.3m plus interest); however, pursuant to Article 4 of the Limitation Convention, Axa sought to break those limits, arguing that the fire was started deliberately and the sinking was carried out on Kairos' instructions.

Article 4 of the Limitation Convention entitles a shipowner to limit his liability unless it is *"proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."*

The burden of proof, however, rests with the party challenging the right to limit (i.e. Axa) (see *The Bowbelle* [1990] 1 WLR 1330 and *The Leerort* [2001] 2 Lloyd's Rep 291).

The burden and standard of proof

The standard of proof required was on the balance of probabilities and the approach taken by the court in deciding whether the burden has been discharged, ought to be the same adopted in hull insurance policies where the insurer alleges that the ship was scuttled (*The Milasan* [2000] 2 Lloyd's Rep 458).

In *The Milasan*, Aikens J held that the defendant insurer not only had to prove that the vessel was deliberately cast away, but also that this was done at the owner's behest.

Although both aspects have to be proved on a balance of probabilities, the standard of proof has to be higher (almost as high as the criminal standard) as it involves allegations of fraud and criminal conduct. The Court also has to look at all the relevant facts, including indirect or circumstantial evidence (albeit it is not necessary to prove motive).

Decision

Whilst it was not possible to inspect the wreck of the Vessel (to determine the cause of the fire or sinking), this was not necessarily fatal to Axa's claim. If Axa successfully proved its case on a balance of probabilities, the court could

draw inferences from the evidence that the Vessel was scuttled on Kairos' instructions.

Teare J was not convinced by the witness evidence given by some of the crew members and based on the expert evidence concluded that there was a "real and substantial possibility" that the fire was started deliberately.

Teare J's conclusion, based on the totality of the evidence, was that the chief engineer and master deliberately set a fire in the store room and deliberately caused the Vessel to sink.

He noted, for instance, that the master's order to abandon ship came less than two hours after the fire alarm, furthermore noting the oddity that the master and chief engineer returned to the Vessel twice, nothwithstanding her being abandoned because it was unsafe to remain onboard.

While the evidence did not point to any motive on the master's/chief engineer's part, it did point to the inference that the sinking was at the request of Kairos, which included the instruction to change the Vessel's route, so that she sailed into deep water.

Teare J concluded that:

"In those circumstances the loss of the cargo resulted from [Kairos'] *personal act committed with the intent to cause such loss. The loss of the cargo was the natural consequence of his act as he must have appreciated. There can be no doubt that he intended the cargo to be lost just as much as he intended the vessel to be lost."*

Consequently, Kairos' claim for a limitation decree was dismissed.

Comment

This is a landmark case, as it is the first time the limits of liability under the Limitation Convention, which have previously been described as 'unbreakable', have been broken in the UK.

That said, it is unlikely that this decision will lead to the opening of the floodgates, as this decision was reached due to the peculiar nature of the facts and the overwhelming evidence in favour of Axa.

It is clear however that the Court will be willing to break the limits under the right circumstances; that is, where the party seeking to break the limits has discharged its higher standard of proof and the available evidence leads to that conclusion or allows such an inference to be drawn by the Court.

Volcafe Ltd and Others v Compania Sud Americana de Vapores SA [2016] EWCA Civ 1103

Background facts

The case involved 20 containers of Colombian bagged coffee beans shipped from Columbia to Germany. The unventilated containers had been stuffed by stevedores acting on behalf of the carrier, CSAV. During the process the stevedores had lined the containers with kraft paper to protect against condensation damage.

Upon arrival, the coffee bags in all but two containers were found to have suffered from condensation damage, although the extent was relatively minor. The experts agreed at trial that coffee beans are hygroscopic in nature, meaning that they both absorb and release moisture depending on atmospheric conditions. Because of this, condensation damage is likely when coffee beans are transported from warm climates to colder climates.

The primary allegation put forward by cargo claimants was that CSAV had failed to properly care for the goods, in that they should have lined the containers with stronger, thicker kraft paper in order to properly protect against condensation damage.

In reply, CSAV argued that in lining the containers with two layers of kraft paper, they had taken adequate steps to care for the cargo in accordance with standard industry practice. They also alleged that the effective cause of the damage was the inherent vice of the cargo, in that it was unable to withstand an ordinary voyage of this type from a warm to a cool climate without suffering condensation damage.

Finally, in addition, CSAV contended that the claim failed as a matter of causation because the damage was inevitable.

Relevant Hague (and Hague/Visby) Rules provisions

The key provisions of the Rules addressed in this case are as follows:
- Article III Rule 2- *"Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."*

- Article IV Rule 2(m) - *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from…inherent defect, quality or vice of the goods."*

High Court decision

The core conclusions of the judge at first instance were as follows:

(1) Once the cargo claimants had established that the cargo was delivered in a damaged condition, the onus was on CSAV both to establish inherent vice or inevitability of damage and disprove negligence.

(2) As to negligence, the essential question was whether CSAV had discharged its obligation properly and carefully to care for and carry the goods under Article III Rule 2 of the Rules.

(3) It was held that CSAV had failed to discharge this obligation, since it had failed to adopt a sound system for looking after the cargo. The judge reached this conclusion on the basis that the carrier had not carried out an empirical study of the type, weight, and amount of kraft paper required to prevent damage.

(4) The judge also rejected the argument that generally accepted industry practice in relation to the lining of unventilated containers when carrying coffee in bags could be relied on by CSAV as establishing a sound system of carriage.

(5) CSAV was unable to rely on the inherent vice exception in relation to the carriage of a "normal" cargo of coffee beans, because it could not prove that it had carried the goods in accordance with a sound system.

(6) The judge also rejected the carrier's argument that a small amount of condensation damage was inevitable for this type of cargo when carried in unventilated containers from a warm to cool climate, as he concluded that the evidence did not support this assertion.

(7) Finally, the judge also held that CSAV was not entitled to rely on the contractual defences in its bill of lading. Since the containers were stuffed by CSAV's stevedores, further to the parties' agreement, the judge concluded that this was an extension of the loading process, and the Rules evidently covered the whole loading process. This meant that CSAV's standard bill of lading terms were caught by Article III Rule 8 of the Rules, which prohibits contractual clauses whereby a carrier seeks to avoid or qualify obligations imposed by the Rules. It was further held that, in any case, the terms in the bill of lading relied upon would have been of no application on the facts.

Court of Appeal decision

The Court of Appeal unanimously overturned the first instance decision in relation to all but one of the above issues. Its core reasoning is set out below.

How does the burden of proof operate in cargo claims involving the Hague (or Hague/Visby) Rules?

This aspect of the decision was overturned on appeal. It was held that in fact the correct approach involves a three-stage test:

(a) firstly, if the cargo claimant is able to demonstrate that the goods were loaded in apparent good order and condition, but discharged in a damaged condition or lost, that leads to an inference that the carrier is in breach of its obligation properly and carefully to care for and carry the goods under Article III Rule 2 of the Rules;

(b) secondly, the burden of proof then passes to the carrier to exonerate itself by one or more of three ways: (1) to establish a defence based on an excepted peril under Article IV Rule 2, such as, on the facts, inherent vice; or (2) to prove that there was no breach of the "*carefully… carry"* duty under Article III Rule 2; or (3) to prove that the damage was inevitable in any event; then,

(c) finally, if the carrier succeeds in establishing a defence under Article IV Rule 2, the burden of proof once again shifts, this time back to the cargo claimant. The claimant is then obliged to prove negligence or a failure properly and carefully to care for and carry the goods.

Did CSAV have a sound system in place for care of the cargo?

The Court of Appeal considered that the judge erred in law by imposing upon CSAV a standard above what the law requires. There was absolutely no requirement for the carrier to carry out complex and detailed studies dealing with issues such as the moisture absorption rate of the kraft paper used to line the containers. The judge's requirement for such went beyond general practice in the container industry, and imposed a counsel of perfection on carriers way beyond what a sound system required.

After looking at the evidence as to the lining of the containers, the Appeal Court concluded that the cargo claimants had failed to establish that CSAV's system was not sound. As such, by application of the three-stage burden of proof test set above, the carrier's defence of inherent vice succeeded.

Was the damage inevitable?

The appeal also succeeded on the grounds that the weight of the evidence pointed to minor condensation damage to bagged coffee carried in unventilated containers being inevitable, regardless of the lining of the containers.

Did the Hague (or Hague/Visby) Rules apply to the stuffing of the containers?

Article III Rule 2 obliges the carrier to properly and carefully load the goods, but it is still necessary in any particular case to identify the loading period. The Court of Appeal upheld the decision of the first instance judge in this regard. It ruled that parties are free to determine what acts or services fall within the operation of "loading", and that on the facts, the stuffing of the containers formed part of the loading operations. It was therefore caught by the Rules.

Conclusion

The Court of Appeal judgment will be welcomed by carriers, in that it reinforces the fact that they should not be treated as insurers of the cargoes they carry, but are instead obliged to follow general industry practices in looking after those cargoes.

The key points to take away are as follows:

(1) It is now clear that, under the Rules, if a carrier is able to establish a *prima facie* defence based on an excepted peril, the burden of proof then shifts to the cargo claimant to establish negligence.

(2) Whilst carriers are obliged to have sound systems in place for looking after cargoes in line with industry practice, they are not obliged to take steps to guarantee delivery in an undamaged condition, or become experts in the carriage of particular cargoes.

(3) The Rules can apply to the stuffing of containers by carriers, subject to what is agreed with cargo interests as to the contractual duties of the carrier.

Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2016] EWCA Civ 982

Question of law

Is the prompt payment of hire, under a time charterparty, a contractual condition; breach of which would allow the innocent party to terminate the charter and claim damages for the loss of the remainder of the charterparty period?

Background facts

In *Spar Shipping*, shipowners Spar Shipping AS (Spar) time chartered three vessels to charterers Grand China Shipping (Hong Kong) Co. Ltd (GCS), under separate charterparties with materially identical terms. The withdrawal and anti-technicality clauses in all three charterparties gave Spar the right to withdraw the vessels following non-payment of hire by GCS.

Following a spate of missed or delayed payments, Spar withdrew all three vessels and terminated the charterparties. Following GCS's insolvency, High Court proceedings were brought against the appellant, Grand China Logistics Holding (Group) Co Ltd (GCL), under letter of guarantees issued pursuant to the charterparty.

First instance judgment

As already noted above, at first instance Popplewell J declined to follow the decision in the *Astra*, and instead found that the requirement promptly to pay hire was not a contractual condition. However, judgment was still given for Spar against GCL, on the basis of a finding that GCS had renounced the charterparties by failing to pay hire punctually for approximately five months and demonstrating that it was clearly unable to do so for the balance of the charterparty periods.

GCL appealed to the Court of Appeal on the finding of renunciation, with Spar cross-appealing on the question of whether timely payment of hire was a condition.

Court of Appeal judgment

In short, the Court of Appeal judgment upheld the first instance decision, finding that:

(a) prompt payment of time charterparty hire is not a contractual condition; and

(b) GCS had indeed renounced the charterparties.

Whilst the judgment is a useful summary of what an owner needs to show in order to demonstrate that the charterer has renounced a charterparty, this note concentrates solely on the decision in relation to the contractual classification of the obligation promptly to pay charterparty hire.

The reasoning of all three Court of Appeal justices (Sir Terence Etherton MR, Gross LJ and Hamblen LJ) provides valuable insight as to the arguments for and against prompt payment of time charterparty hire being a condition.

However, the key findings of the Court, per Gross LJ and Hamblen LJ, were as follows:

(1) Under English law the modern approach to the classification of contractual terms is that a term is innominate unless it is clear that it is intended to be a condition or warranty;

(2) It was not clear that the payment clause was a condition. Whilst the charterparties included an express option to terminate, this did not indicate that prompt payment was a condition. Indeed, per Hamblen LJ, it instead suggested that the payment provisions amounted to an innominate term, given that the inclusion of an express right of termination would not be necessary if payment of hire timeously was a condition;

(3) Whilst classifying the payment clause as a condition would achieve greater certainty than finding it to be innominate, this would come at the expense of proportionality. The example given was a single payment of hire a few

minutes late entitling a shipowner to throw up a five- or three-year charterparty and claim loss of bargain damages;

(4) Arguments put forward as to the anti-technicality clause and as to time being of the essence in mercantile contracts were not regarded as significant; and

(5) The finding that prompt payment was not a condition accorded with the general, albeit far from settled, market view.

Conclusion

Prior to the decision in *The Astra* ([2013] 2 Lloyd's Rep. 69), it had been the general understanding of the market that the failure to pay hire punctually and in advance under a time charterparty was **not** a breach of condition entitling a shipowner both to terminate the charter and claim damages for the loss of the remainder of the charterparty period.

This understanding reflected the decision of Brandon J in *The Brimnes* [1972] 2 Lloyd's Rep. 465 which, perhaps surprisingly, remained the only decision on this important point for about 40 years.

The decision in *The Astra* therefore generated significant market interest in holding, contrary to *The Brimnes*, that the punctual payment of hire was indeed a condition.

However, this long-awaited decision brings welcome clarity to the question of whether failure to pay hire on time amounts to a condition, and restores the status quo in this regard; that is, prompt payment of hire is not a condition.

Rather, and this maybe regarded as an innominate term, the innocent party's remedy (as regards termination) requires an assessment of the effect of the breach in order to ascertain whether or not the breach goes to the 'root of the contract'.

Owners wishing to preserve their rights to claim damages in the absence of renunciation/repudiation might wish to consider making express contractual provision for such by way of, for example, Clause 11 of the NYPE 2015 form.

De Wolf Maritime v Traffic Tech 2017 FC 23

This matter is a Canadian decision which considered the definition of "goods" within the meaning of the Hague Visby Rules and the extent to which a carrier is entitled rely on the limitations of liability within these Rules in respect of such goods.

Facts

De Wolf was the owner and consignee of a shipment stated as "One piece zodiac and Spare Parts" for a voyage on the vessel "Cap Jackson" from Vancouver to Rotterdam. The container was carried under a bill of lading issued by Defendants' Traffic-Tech, who did not declare the container was to be carried on deck carriage or contain details as to the value and nature of the goods. The container was however carried on deck without the knowledge of De Wolf and during the course of the voyage, was washed overboard and lost.

De Wolf commenced proceedings against Traffic- Tech for EUR 71,706.00 on the basis that as the cargo was not carried under deck, the carrier had failed to safely carry, care for, discharge, store and deliver its cargo in good order and condition. It further claimed Traffic-Tech was grossly negligent in handling the container and therefore due to this bad faith, was not entitled to invoke any of the immunities or limitations provided for in the Hague Visby Rules.

The Court had to consider two questions of law:

(1) Did the undeclared on-deck carriage of the cargo under the bill of lading

prevent the defendant from relying on the Hague Visby Rules? and;

(2) If it did not, what were the limitations applicable to the contract of carriage under the Hague Visby Rules?

Judgment

The definition of "goods" under the Hague Visby Rules is set out at Article I(c) as "goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried".

Traffic-Tech, on the basis of this definition, argued that the undeclared on-deck carriage of the cargo did not prevent it from relying on the Hague Visby Rules. In addition they argued that they were able to limit their liability for the loss of the container through application of the limitation of liability calculations set out in Article IV(5)(a) at an amount not exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods, whichever the higher. Despite De Wolf's allegations, Traffic-Tech argued the exception at Article IV(5)(e), in the event of a carriers' gross negligence, was inapplicable.

In respect of the first question, the Court determined under Canadian law, that the undeclared on-deck carriage of the cargo under the Traffic-Tech bill of lading did not prevent the Defendant from relying on the Hague Visby Rules. It was discussed, in accordance with Tetley's definition, that in order for goods to fall outside the scope of the Hague Visby Rules, the bill of lading must state the goods are carried on deck and the cargo must in fact be carried on deck. As one of the two conditions in this case was not met, the cargo was considered to fall within the Hague Visby definition of "goods" and therefore the Rules were held to apply.

As such the Court then turned to consider what limitations were applicable to the contract of carriage pursuant to the Hague Visby Rules. Article IV(5)(a) states that "Unless the nature and value of the 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 liable for any loss or damage to or in connection with the goods in an amount exceeding…..".

Did the undeclared on-deck

The Court held that Traffic-Tech was able to limit liability under this provision. On the basis of the decision set out in *The Kapitan Petok Voivoda* ([2003] 2 Lloyd's Rep 1), the Court determined that carriage of a container on deck could not be inferred as bad faith and did not amount to a fundamental breach. Whilst Traffic-Tech failed to state where the container would be stowed and stowed the container on –deck without authorisation, De Wolf had not requested a specific location or provided any indication as to the value of the container. Therefore, unaware of the value and nature of the cargo, the carrier was able to stow below or on deck as it saw fit. As to whether the carrier had been 'grossly negligent' and thus fell within the exception of Article IV (e) the Court considered that decision as to the carriers' intent was a question of fact, not a question of law, and was therefore not for the concern of the present Court.

Comment

This decision, whilst under Canadian Law, was considered in line with case law from the United Kingdom. It is interesting to note as, in addition to discussing the history of the Rules in general, it highlights the importance of containing all the relevant information to the carriage within the bill of lading. It also acts to provide guidance as to how a Court may interpret the definition of "goods" under the Hague Visby Rules and what may constitute bad faith, so as to restrict the ability of the carrier to rely on the limitations set out within the Rules.

CONTRIBUTORS

Allen Marks
allen@cjclaw.com
Director, Newcastle

Filippo Lorenzon
filippo@cjclaw.com
Consultant, London

Eric Eyo
eric@cjclaw.com
Senior Associate, Newcastle

Oli Goossens
oli@cjclaw.com
Associate, Singapore

Sandros Koutouroushis
sandros@cjclaw.com
Associate, London

Kaan Polat
kaan@cjclaw.com
Associate, London

Lisa Jenkins
lisa@cjclaw.com
Associate, London

Debo Awofeso
debo@cjclaw.com
Trainee Solicitor, London

Zoe Jackson
zoe@cjclaw.com
Trainee Solicitor, London

Greg Whillis
greg@cjclaw.com
Trainee Solicitor, Newcastle

Zhi-Yi (Romie) Yeo
romie@cjclaw.com
Paralegal, Newcastle / Singapore