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Shipping Bulletin

Issue 2

"Kapitan Petko Voivoda"

***Question:** Should a carrier by sea who carries cargo on deck in breach of a contract of carriage that is governed by the Hague Rules be entitled to take advantage of Article IV rule 5 to limit his liability for loss or damage to that cargo, by reference to number of packages and/or weight of the cargo?*

This was the issue before the Court of Appeal in the recent case of *Kapitan Petko Voivoda* [2003] EWCA Civ, the answer being that owners and charterers are entitled to rely upon Hague Rules limitation, notwithstanding the unauthorised deck carriage.

Facts

A consignment of 34 new excavators was shipped on board the *Kapitan Petko Voivoda* for carriage from Inchon, Korea to Istanbul, Turkey. The cargo was carried pursuant to contracts of carriage containing general paramount clauses on usual conline terms. The Hague Rules as enacted in Turkey were thereby incorporated.

The cargo was loaded at Inchon in apparent good order and condition and was stowed under deck for carriage to Istanbul. However, due to unforeseen circumstances (a miscalculation of cargo to be loaded at an intermediate port) it was necessary for 26 of the excavators to be re-stowed on deck at Xingang without the knowledge or agreement of the shippers.

During its passage from Xingang to Istanbul the vessel encountered heavy weather, as a result of which eight of the excavators on deck broke free from their lashings and were lost overboard. Some of the other excavators suffered minor damage by wetting.

The total claim by cargo interests amounted to approximately $785,000 plus interest.

Commercial Court Decision

As soon as the claim was presented by cargo interests to shipowners and charterers, package limitation became the central issue. The eight totally lost excavators were valued at almost US$100,000 a piece and they probably represented only eight separate packets for limitation purposes (possibly 16 packets at most if each excavator's bag of spare parts was found to be a separate packet). Further, the Hague Rules package limit in Turkey has not been updated since the Hague Rules were initially framed in the 1920s and the current limit is equivalent to less than one US dollar (actually around 15 cents) per packet. There are some issues under Turkish law about the precise scope and meaning of the Hague Rules and the enactments surrounding the Hague Rules in Turkey, but on these figures the package limitation issue essentially became an "all or nothing" issue separating the parties.

It was therefore agreed to present the case to the Commercial Court in England by way of preliminary issue, asking the Court to determine whether owners and charterers were precluded by reason of the unauthorised deck carriage from relying upon package limitation provisions in the Hague Rules on the assumptions that deck carriage was the effective cause of the loss and/or on the alternative assumption that loss and/or damage was caused by deck carriage and one or more of:-

(1) inadequate lashing;
(2) perils of the sea; or
(3) insufficiency of packing.

Mr Justice Langley held in July 2002 that nothing prevented shipowners and charterers from relying upon the scheme of limitation set out in article IV rule

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5 of the Hague Rules in relation to package limitation. Cargo interests appealed.

Issues Before the Court of Appeal

Two main arguments were relied upon by cargo interests before the Court of Appeal as follows:-
whether on deck stowage was a 'special category' of breach, similar to deviation cases or 'warehouse' and/or bailment cases where goods were stored elsewhere than originally agreed, or were handled by a bailee in a manner different to that which was contemplated or agreed; and

the meaning and construction of Article IV rule 5 and in particular whether the words 'in any event' were wide enough to cover all breaches of contract, no matter how serious.

Cargo interests sought to argue that the serious nature of the breach should in itself determine whether or not exception or limitation clauses applied. They pointed to a number of deviation and 'warehouse' cases mostly from the 19th century or early 20th century where limitation and exclusion clauses had been held not to apply in the case of a breach of important contractual conditions.

Charterers and owners sought to distinguish the decisions in the deviation and warehouse cases in two ways. First that there was no English authority for treating on deck stowage in breach of contract as a deviation. Secondly, that although the obligation not to stow on deck was important, it could not be said to be more important than other obligations of the carrier, such as providing a seaworthy ship and exercising due diligence.
In finding in favour of the charterers and owners, the Court of Appeal agreed with the proposition that stowage on deck was not a 'special' category of breach of contract; the matter was one of pure construction of the wording of the particular exclusion clause as set out in the Hague Rules.

In reaching the conclusion in favour of the charterers and owners Longmore LJ cited and applied the reasoning in the *Happy Ranger [2002] 2 Lloyd's Rep 357*, a case in which there had been a breach of the seaworthiness obligation in Article III rule 1. He said of the words 'in any event':-

"Their most natural meaning to my mind is 'in every case' (whether or not the breach of contract is particularly serious; whether or not the cargo was stowed on deck)… Although … the obligation to carry under deck was an extremely important obligation, it could not be said that it was 'overriding' in the same sense as the seaworthiness obligation. The Happy Ranger is thus a stronger case than the present and I would respectfully adopt its reasoning."

The Court of Appeal overruled the decision of Hurst J in the *Chanda* [1989] 2 Lloyd's Rep 494, a case on similar facts to the "KAPITAN PETKO VOIVODA" case where owners lost on package limitation, which up to now has been considered to be the leading case in this area.

Alternative Options for Cargo Interests

The Court of Appeal commented that the outcome in this case will not always lead to a harsh result and it is always open to cargo interests to avoid application of the Hague Rules or low Hague Rules limits as follows:-
The use of Ad Valorem bills of lading;

Agreement between the parties of a different but increased maximum exceeding the sums prescribed in Article IV rule 5;

Article VI of the Hague Rules which provides for parties to enter in to any agreement in relation to the carriage of goods; and/or

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Judge LJ went on to the make the point that:

"When considering the argument that this clause (limitation) is so wide that it effectively protects the carrier from non-performance of the contract, it is not irrelevant to notice that, if that submission were right, it is precisely what the shipper agreed, notwithstanding the opportunity expressly provided by the contract for him to escape from the consequences of the limitation clause".

Comment

A successful result for shipowners and charterers and a setback for subrogated cargo underwriters in this particular case but does it represent a licence for owners or charterers to breach their contractual obligations towards cargo with impunity? In addition to the protections mentioned by the Court of Appeal, perhaps also important to remember article IV rule 5 (e) of the Hague Visby Rules which states:-

"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph [viz package limitation] if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result".

This extra paragraph was inserted into the Hague Visby Rules but is not present in the Hague Rules. In Hague Visby cases it would represent additional "comfort" for cargo interests and an additional argument which they could raise in a claim situation, if appropriate evidence were available to them.

***Graeme Baird** of Hill Taylor Dickinson represented the successful time charterers and their liability underwriters in the above case.*

This bulletin has been provided for information only and does not constitute legal advice. For more information on this topic and other areas of Shipowners' or charters' liability, please contact:

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