

**International Maritime Congress
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**A carrier's liability for loss
of or damage to cargo**

**Eurof Lloyd-Lewis - Partner
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Overview

- **The Superior Pescadores [2016] EWCA Civ 101**
 - Construction of the Clause Paramount – meaning of reference to Hague Rules
- **The Sea Mirror [2015] EWHC 1747 (Comm)**
 - Risk and responsibility for loading and discharge
- **Volcafe Ltd v CSAV [2015] EWHC 516 (Comm)**
 - Scope and application of the Hague Rules

The “Superior Pescadores” [2016] EWCA Civ 101



- **Overview**

- Considers the meaning of the words “*the Hague Rules*” where they appear in a clause paramount
- the “*pick and mix*” case
- Previously the phrase “*the Hague Rules*” had been widely understood as referring to the un-amended 1924 Hague Rules
- The Court of Appeal decision in *The ‘Superior Pescadores’* suggests that that understanding was wrong, and that the words “*the Hague Rules*” will in fact refer to the Hague-Visby Rules (at least in some circumstances)

Background

- History of the Hague-Visby Rules:
 - Hague Rules
 - Hague-Visby Rules
 - Hague-Visby SDR Protocol

Facts

- Defendant shipowners contracted to carry machinery and equipment from Antwerp to Balhaf in the Yemen
- During the voyage the cargo shifted and suffered significant damage, resulting in losses in excess of US\$3.6 million.
- The parties agreed to English law and jurisdiction.
- Each of the six bills of lading included a Paramount Clause based on the standard Congenbill wording:

"Hague Rules....as enacted in the country of shipment shall apply to this contract... but in respect of shipments to which no such enactments are compulsorily applicable the terms of the said Convention shall apply."

Facts

- The Claimant cargo interests relied on the Clause Paramount as a contractual incorporation of the Hague Rules. Such an agreement would be permitted by the Hague-Visby Rules, which allows a carrier to agree to increase the applicable package limitation (but not to decrease it).
- The defendant shipowners argued that the Clause Paramount incorporated the Hague-Visby Rules, because “*the Hague Rules [...] as enacted in the country of shipment*” were the Hague-Visby Rules.

Court of Appeal

- The Court of Appeal accepted the Defendant's argument that the Hague Rules "*as enacted*" in England are the Hague-Visby Rules.
- Held that the Hague-Visby Rules are not a discrete set of rules at all; rather, the words '*the Hague-Visby Rules*' refer to the Hague Rules as amended by the Brussels Protocol of 1968.
- The words "*the Hague Rules [...] as enacted in the country of shipment*" could therefore properly be understood as a reference to the Hague Rules as amended by the Brussels Protocol, i.e. the Hague-Visby Rules.

Court of Appeal

- The Court of Appeal declined to follow the decision in *The Happy Ranger* which had concerned a Clause Paramount which incorporated “*the Hague Rules as enacted in the country of shipment*” but, crucially, also made separate provision for the position where the Hague-Visby Rules applied compulsorily.
- Tomlinson LJ (who was the High Court Judge in *The ‘Happy Ranger’*) said that he still thought his decision in *The Happy Ranger* was correct on the wording of the particular clause in that case, but that the clause in this case was different because it did not draw a distinction between the Hague Rules and the Hague-Visby Rules.
- However one of the other Court of Appeal Judges, Longmore LJ, thought that *The Happy Ranger* was altogether wrongly decided.

Court of Appeal

- This is a potentially significant point: many common forms of bill of lading contain clauses paramount in the form considered in *The Happy Ranger*. It is now at least arguable that *The Happy Ranger* first instance judgment is wrong on this point, and that references to the Hague Rules in those clauses paramount should now be understood as references to the Hague-Visby Rules.
- The principal consequence of the Court of Appeal decision is therefore that the words “*the Hague Rules as enacted in the country of shipment*” will be taken to mean the Hague-Visby Rules where the country of shipment is a Hague-Visby Rules state.
- The judgment leaves open an argument that the words “*the Hague Rules*” should now always be understood as a reference to the Hague Rules as amended by the Brussels Protocol.

Court of Appeal

- The wording that the Court of Appeal was asked to consider in *The Superior Pescadores* appeared in a clause entitled “*Clause Paramount*”. Those words have long been understood in English law to refer to a clause which incorporates the Hague Rules; not the Hague-Visby Rules.
- This was based primarily on the decision of the Court of Appeal in *The Agios Lazaros* [1976], a case decided before the widespread adoption of the Hague-Visby Rules.
- However, the Court of Appeal doubted whether *The Agios Lazaros* could be relied on as authority for the meaning of the words “*Clause Paramount*”, after the passing of COGSA 1971. As Longmore LJ put it:
"This decision is helpful as showing what this court thought shipping men meant by the phrase “clause paramount” in 1972 but is, perhaps of little assistance in determining what the phrase “the Hague Rules ... as enacted in the country of shipment” meant to shipping men in 2008."

Comment

- The Court of Appeal decision opens the door to an argument that the words “Clause Paramount” where they appear in a charterparty should now be understood as a reference to the Hague-Visby Rules.
- The decision in *The Superior Pescadores* is a significant one which will have a substantial effect on the way in which clauses incorporating the Hague Rules are understood.
- What remains to be seen is whether the judgment applies only to certain forms of Clause Paramount, or whether it requires the industry to rethink completely how the words “*the Hague Rules*” should be understood, wherever those words appear.

“The Sea Mirror” [2015] EWHC 1747 (Comm)

- **Overview**

- Background
- Facts
- Submissions
- Decision
- Comment

“The Sea Mirror” - Background

- At common law the shipowner is obliged to load, stow and discharge the cargo and is liable for any failure to perform those obligations properly and carefully
- It is open to the parties to agree that responsibility for cargo operations is transferred to cargo interests:
 - *'The Jordan II'* [2005]
 - This can be agreed even where the Hague Rules are incorporated into the contract of carriage:
 - *'Pyrene Co Ltd v Scindia Steam Navigation Co Ltd'* [1954]
 - *'G H Renton & Co Ltd v Palmyra Trading Corporation'* [1957]

“The Sea Mirror” - Background

- Lord Steyn in 'The Jordan II' :

“[...] The extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide. Thus, if the carrier has agreed to load, stow or discharge the cargo, he must do so properly and carefully, subject to any protection which he may enjoy under Article IV. But the Rules do not invalidate an agreement transferring the responsibility for these operations to the shipper, charterer or consignee.”

“*The Sea Mirror*” - Background

- For an agreement to have the effect of shifting responsibility away from owners it must be in clear terms
- Important to note that there are three ‘facets’ to cargo operations:
 - “*Who is to pay for it;*
 - *who is to carry it out;*
 - *and who is liable for it not being done properly and carefully?*”
[Tuckey LJ in the Court of Appeal in '*The Jordan II*']
- This three-way division is important because there is no assumption that a clause which transfers one of these facets to the cargo interests will also transfer the other facets

“The Sea Mirror” - Background

- Sir John Donaldson MR in *'The Filikos'* [1983]:

“At common law the task of loading from ship's rail, stowing and discharging overside is the sole responsibility of the shipowner. However either or both of the duties of (a) arranging for these processes to be carried out and (b) paying for them to be carried out may be transferred by contract to the charterers. So too can liability for breach of the duty of care in carrying out these processes, whether or not either or both the duties of arranging and paying for their performance have been so transferred.”

“The Sea Mirror” - Background

- Summary:
 - There are certain forms of loading and stowage clause which transfer to the cargo interests the right to nominate, and the duty to pay, stevedores to load, stow and discharge the cargo, but which do not transfer to the charterer the responsibility for the proper performance of those operations.
 - On the other hand, there are forms of clause which impose upon the cargo interests (and thus remove from the owner) the obligation to perform as well as to pay for specific cargo operations. Such forms will transfer responsibility for proper performance to the cargo interests.

“The Sea Mirror” - Facts

- Cargo claim by various claimants in respect of two consignments of bagged rice carried on the vessel '*Sea Mirror*' from Karachi in Pakistan to Abidjan in the Ivory Coast under two bills of lading.
- The bills of lading incorporated the terms of a voyage charter on the Synacomex 90 form
- The vessel arrived at Abidjan on 15 May 2012 and completed discharge on 26 May 2012.
- On discharge loss and damage to the cargo was discovered consisting of wet and mouldy bags, loss of cargo from torn bags and short delivery of bags.

“The Sea Mirror” - Facts

- Preliminary issue:

“Whether on the proper construction of the contract of carriage contained in or evidenced by the bill of lading dated 7 April 2012 the First Defendant is liable for loss or damage to the cargo caused by improper loading, stowage or discharging of the cargo.”

“The Sea Mirror” - Facts

- Clause 5 of Synacomex 90:

*“Cargo shall be loaded, ... **trimmed and/or stowed at the expenses and risk of Shippers/Charterers** at the average rate of 1,500 metric tons per weather working day [...] Cargo shall be **discharged at the expenses and risk of Receivers/Charterers** at the average rate of 1,500 metric tons per weather working day [...] **Stowage shall be under Master's direction and responsibility** [...]*”

[Emphasis added]

“The Sea Mirror” - Submissions

- Cargo claimants submitted that clause 5 did *not* transfer responsibility for loading or discharge from the carrier to the charterers. They argued:
 - The words in clause 5: “*At the expense and risk of Shippers/Charterers*” were not sufficiently clear to impose responsibility for the operations of loading and discharge on the charterers
 - The clause drew a clear distinction between risk and responsibility given that when it was intended to make a party responsible for an operation, the clause said as much: “*Stowage shall be under Master’s direction and responsibility*”
 - “Risk” should bear its ordinary meaning of the occurrence of a fortuity and only the risk of fortuitous loss (without fault) was on the cargo interests rather than the carrier

“The Sea Mirror” - Submissions

- The carrier argued that “*at the expense and risk of*” were words which passed responsibility for the relevant cargo operations to the charterers/cargo interests. They argued:
 - Taking the charterparty as a whole, loading, stowage and discharge were to be undertaken by the charterers who, as such, had responsibility for those operations. The phrase “*Stowage shall be under Master’s direction and responsibility*” only transferred responsibility for *stowage* back to the carrier.
 - In the context of the charterparty, risk should be equated with responsibility.
 - The ordinary meaning of the words “at [a party’s] risk” outside an insurance context, was that any loss would be borne by that party, not just a fortuitous loss.

“The Sea Mirror” - Decision

- Held that the provision for cargo to be loaded and discharged “*at the [...] risk of*” the cargo interests was sufficient to transfer to them the responsibility for proper performance of loading and discharge.
- Although the clause did not require the cargo interests to actually carry out those operations, the Judge held that “risk” meant the same as “responsibility”.
- The clause was therefore sufficient to make cargo interests responsible for any negligence in loading or discharging the cargo.
- In reaching this finding the Judge accepted that the wording of the clause was not entirely clear

“The Sea Mirror” - Comment

- The decision is surprising given the Judge's acknowledgment that the wording of the clause in question was not entirely clear.
- The decision has gone further than the finding in *'The EEMS Solar'* [2013] where the charterparty provided:

*“The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured by the Charterers, **free of any risk, liability and expense whatsoever to the Owners**”*

- In *"The Sea Mirror"* the Judge felt able to reach the same conclusion based on a clause which purported to transfer only *"risk"* to the charterers and made no reference to *"liability"*.
- The decision is a warning to cargo interests when considering bills of lading that incorporate charterparties on the Synacomex 90 wording

Volcafe Ltd v CSAV [2015] EWHC 516 (Comm)

- How do you like your coffee? With or without mould?



Volcafe Ltd v CSAV

Facts

- 9 consignments of bagged coffee beans shipped in containers from Colombia to Germany on LCL/FCL terms
- Before the cargo was loaded, the containers were lined by the carrier (CSAV) with Kraft paper
- On outturn, it was found that the cargo had suffered condensation damage (cargo losses of US\$62,500)
- Cargo claimants were the consignees under the bills of lading

Volcafe Ltd v CSAV

Facts

- Main issue was whether the carrier was liable for the cargo claim for failing to properly prepare the containers to meet the threat of condensation
- Under Condition 10 of the bills of lading the carrier undertook responsibility for the whole of the intermodal transport from the port of loading to the port of discharge.
- The bills of lading incorporated the Hague Rules into the contract of carriage
- Article I (e) of those Rules defines carriage by sea as *“the period from the time when the goods are loaded on to the time they are discharged from the ship”*.

Volcafe Ltd v CSAV

- Container before stuffing



- Container lined with Kraft paper



Volcafe Ltd v CSAV

- Container after stuffing



Volcafe Ltd v CSAV

- Container on arrival at destination - extensive wetting to bagged coffee beans and Kraft paper soaked with condensation



Scope of the Hague Rules

- The Carrier argued that the stuffing of the containers occurred before loading and was therefore outside the definition of '*carriage by sea*' in Article I (e) of the Hague Rules
- The Judge held that where the obligation to stuff the containers rests with the carrier, the contract of carriage includes this as part of the loading process
- This finding significantly extends the period during which a carrier's responsibility falls within the ambit of the Hague Rules

Duties under the Hague Rules

- The Carrier had two options to demonstrate that it had complied with its obligation under the Hague Rules:
 - first, by proving that it had discharged its duty by taking care of the goods “*properly and carefully*”; or
 - second, by proving that its liability was excluded by reference to one of the exceptions in Article IV(2) of the Hague Rules
- The Judge referred to the *Albacora* [1966] where “*properly*” had been interpreted as “*in accordance with a sound system*”

Duties under the Hague Rules cont'd

- The Judge held that a sound system requires a rational, adequate and reliable basis for concluding that it will prevent a threatened damage
- In the present case, the Judge found that the risk of condensation damage to coffee beans was well-known in the industry; by lining the containers, the Carrier demonstrated recognition of the risk of this type of damage
- On the evidence, the Carrier had failed to show that the Kraft paper used constituted a sound system to prevent condensation damage.

Defences – Inherent Vice and Inevitability

- Article IV(2)(m) of the Hague Rules provides:

“Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from... wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.”

- The Carrier argued that the loss had been inevitable, regardless of the measures taken for handling the goods
- The Judge held that the Carrier had failed to establish this point through expert evidence or by reference to any industry-wide experience.

Burden of Proof

- The Court relied on the doctrine of *res ipsa loquitur*, meaning "*the thing speaks for itself*":
 - if goods are acknowledged to have been received in apparent good order and condition, but are delivered in a damaged state the carrier will need to provide evidence to counter such inference of breach
- The goods in this case were in fact received by the carrier in apparent good order and condition and were delivered in a damaged state:
 - therefore, **burden of proof on the carrier** to establish that it adopted a sound system for the carriage of the cargo

Decision

- The undisputed damage on outturn created a prima facie case of breach of Article III(2).
- The Judge held that the **carrier had failed to establish that it had adopted a sound system**
- The Judge gave judgment for the Claimants against the Carrier.

Comment

- This pro cargo decision has significant implications for the carriage of containerised cargoes
- In particular, the judgment provides useful guidance on the standard of care required by a carrier under Article III(2) of the Hague Rules. In order to show that the cargo has been carried “properly and carefully”, the carrier must show that it had a “rational, adequate and reliable” basis for concluding that the method of carriage (such as lashing arrangements) would prevent damage to the cargo
- The burden on the carrier is a high one. In cargo claims in the future, the choice of carriage method/system used by the carrier may be subject to increasing scrutiny, in line with general practices and up to date research
- Leave to appeal has been granted by the Court of Appeal

Eurof Lloyd-Lewis

Partner

Eurof.lloyd-lewis@clydeco.com

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