The "Thorco Lineage" [2023] EWHC 26 (Comm): Hague-Visby Rules liability limitation extends to economic loss; The "Limnos" [2008] 2 Lloys'd Rep. 186 not followed

Dr. Arun Kasi & Kishore Sharma

4-5 Gray's Inn Square

Art IV r 5(a) of the Hague-Visby Rules limits the liability of the carrier "for any loss or damage to or in connection with the goods" to the higher of 666.67 Special Drawing Rights (currently about USD899) per package (or unit) or 2 Special Drawing Rights (currently about USD2.70) per kilogramme of gross weight "of the goods lost or damaged".

Art IV r 5(a) reads as follows:

(a) 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 lost or damaged, whichever is the higher. (Emphasis added)

In Serena Navigation v Dera Commercial Establishment (The "Limnos") [2008] 2 Lloyd's Rep. 166, Burton J held that the words "of the goods lost or damaged" meant physical loss or damage. Hence, the limitation operated by reference to the goods physically, and not economically, lost or damaged. The "Limnos" appears to be the first case in which this issue was decided.

In that case, the vessel carried about 44,000 mt of corn from Louisiana (USA) to Aqaba (Jordan) under a bill of lading that incorporated the Hague-Visby Rules. A

small portion (7 or 12 mt) of the cargo was damaged by wetting through hatch cover leakages. A further small portion (up to 250 mt) was damaged by kernels broken in the course of being discharged by bulldozers. As a result of the wet damage to, albeit a relatively small quantity of, cargo, the authorities at the discharge port required fumigation of the entire cargo and its chemical treatment and transfer to pre-fumigated and disinfected silos. The fumigation process involved movement of the cargo within the silos, which resulted in a further breakage of kernels in some of it. Consequently, the value of the cargo depreciated by about USD362,142. As a result of these events, the entire cargo acquired the reputation of a distressed cargo in the market, resulting in its market value dropping by about USD571,842. In addition to that, the cargo owner (the lawful holder of the bill of lading) incurred the cost of fumigation, segregation and storage in silos of the cargo. The cargo owner claimed about USD1.55 million in damages.

The carrier contended that its liability was limited by reference to the damaged cargo (before discharge), which was not more than 262 mt. To the contrary, the cargo owner contended that the liability was limited by reference to the entire approximately 44,000 mt, as it had suffered an economic loss as a whole. The question was listed before Burton J for determination as a preliminary issue. Burton J agreed with the carrier and held that the liability was limited by reference to the physically damaged goods, being not more than 262 mt. Accordingly, the carrier's liability was limited to a relatively small amount. Burton J decided that the words near the end of Art IV r 5(a) ("goods lost or damaged") were only capable of applying to goods lost or damaged physically, and not economically.

The decision raised a number of practical difficulties and difficult legal questions in the context of cargo claims. In particular, what if there was only an economic loss without any physical loss or damage, such as in the case of delayed delivery? In such a case, would there no liability limitation at all (which would be bad for the carrier) OR no liability at all (which would be bad for the cargo interests)?

Fifteen years after the "Limnos" was decided, the issue came before the court again in Trafigura Pte Ltd v TKK Shipping Pte Ltd (The "Thorco Lineage") [2023] EWHC

26 (Comm). The context was similar in that the carriage was of bulk cargo carried under a bill of lading that was subject to Hague-Visby Rules (in the "Thorco Lineage", these Rules were statutorily applicable). Teare J disagreed with the "Limnos" and held, in favour of the cargo owner, that the liability limitation was by reference to the cargo that suffered a loss or damage physically or economically. That would entail quantification of the limit, at the rate of 2 SDR per kg, on the basis of the entire cargo, which would on the facts allow the cargo owner to recover the entire economic loss.

In the "Thorco Lineage", the vessel carried 10,287 WMT of zinc calcine from Baltimore (USA) to Hobart (Australia). The vessel grounded in French Polynesia and was severely damaged. This resulted in salvage and towage to three places for temporary/permanent repairs, namely Papeete (French Polynesia), Gwangyang (South Korea) and Yesou shipyard (South Korea). Some cargo was discharged at Gwangyang, and the balance discharged at Yesou shipyard.

As a result, the cargo owner essentially suffered four types of loss: (1) physical damage to a small quantity of the cargo (764 WMT out of 10,287 WMT); (2) costs incurred in disposing of the damaged cargo; (3) costs of on-shipment of the cargo from South Korea to the destination port in Australia; and (4) liability incurred to salvors.

The cargo owner claimed against the carrier for these four items of loss in arbitration. A question of law was referred to the court under s 45 Arbitration Act 1996 as to the liability limit pursuant to Art IV r 5(a) of the Hague-Visby Rules in respect of salvage and on-shipment costs. For the purpose of this question, it was to be assumed that the losses were caused by a breach of contract committed by the carrier.

The cargo owner argued that the liability was limited based on the weight of the entire salved cargo because the words "goods lost or damaged" near the end of Art IV r 5(a) meant goods lost or damaged physically or economically, and in this case the entire salved cargo (which was 9,523 WMT) suffered diminished value by being subjected to salvor's maritime lien. Alternatively, the cargo owner argued, no liability

limitation was applicable on a claim for recovery of economic loss. The "Limnos" was relied upon as holding that the Art IV r 5(a) liability limit did not apply economic losses.

The carrier's argument was that the liability was limited based on the weight of the goods physically damaged. The carrier too relied on the "Limnos" as holding that the Art IV r 5(a) limited the liability of the carrier by reference to the physically damaged or lost cargo, which was 764 WMT only.

Teare J held that the words "in connection with", earlier in the Article, were wide enough to cover economic loss in addition to physical loss or damage. The words "goods lost or damaged", appearing near the end of the Article, had a "close linkage" to the words "any loss or damage to or in connection with the goods" appearing earlier in the Article. Hence, the words "goods lost or damaged" had essentially the same wide meaning as the words "any loss or damage to or in connection with the goods" and covered economic loss.

Accordingly, the Judge's decision was for the cargo owner, entailing that the liability limit was to be calculated by reference to the entire cargo, which would on the facts allow the cargo owner to recover the entire loss.

In coming to this conclusion, Teare J found support in G.H. Renton & Co. Ltd. v Palmyra Trading Corporation of Panama [1957] AC 149, where Lord Morton deconstructed the words "any loss or damage to or in connection with the goods", appearing in Art III r 8, as applying to four scenarios as follows:

(a) loss to goods (whatever that may mean);
(b) damage to goods;
(c) loss in connection with goods;
(d) damage in connection with goods ...

Lord Morton observed “the words ‘or in connection with’ were inserted in order to give a wider scope to the clause, and, ... they are wide enough to cover, for example, the loss or damage sustained by the appellants in having to bear the cost of transhipping the goods from Hamburg and of storage at that port”.

Teare J held that a cargo owner’s proprietary interest in the goods is (economically) damaged for the purpose of Art IV r 5(a) of the Hague-Visby Rules when the cargo is salved and thus encumbered with a maritime lien, which requires the cargo owner to put up security for, or settle, the salvor’s claim before the cargo would be released.

Teare J extended the same reason to on-shipment cost thus: “the value of the goods was diminished on arrival at the discharge port as a result of the Claimant having to incur salvage charges and on-shipment costs”. This would amount to economic damage to the cargo because, being specified in the bill of lading as destined for a particular port or ports, the cost of on-shipment would have to be incurred for it to reach its specified destination.

Comments

Art IV r 5 of the original Hague Rules contained only a package (or unit) liability, generally referred to as the “package limitation”. There was no limit in the case of carriage of bulk cargo: Vinnlustodin HF v Sea Tank Shipping (“The Aqasia”) [2018] 1 Lloyd’s Rep. 530. In those Rules, the words “goods lost or damaged” were absent. In relevant part, Art IV r 5 of the Hague Rules provided as follows:

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

The words “goods lost or damage” were inserted only when the gross weight limitation was introduced by the Visby amendments (Brussels Protocol of 1968).

Thus, Art IV r 5(a) of the Hague-Visby Rules concludes with the added words “or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher” (emphasis added).

It would seem that, in the Hague-Visby Rules, the added words “goods lost or damaged” apply to the weight limitation only and not to the package (or unit) limitation. Both the “Limnos” and the “Thorco Lineage” are cases of “weight limitation”.

Under the Hague-Visby Rules, in the case of non-bulk cargo, where the limit applicable is “whichever is the higher” of the package or gross weight limitation, if the applicable limit is the package limitation, then the words “goods damaged or lost” near the conclusion of the provision would seem not to be relevant; the limitation being applied would seem to be governed only by the wide words “loss or damage to or in connection with the goods”. Accordingly, in such a case, all the goods physically or economically damaged will be admitted for the purposes of calculating the package limitation.

Dr. Arun Kasi & Kishore Sharma

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