SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand

Young Lawyers Examine Application of Hague-Visby Rules

As is the tradition of the New Zealand Branch of MLAANZ, three of the profession's young lawyers were called upon to make presentations of case notes at this year's Branch conference in Wellington.

Clara Kwon of Hesketh Henry, Nana Jacobson of McElroys and Cate Hensen of Chapman Tripp presented on judicial decisions relating to the application of the Hague Visby Rules.

Young Lawyer Presentation 1

Ms Kwon examined the case of *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG & Anor* [2024] HCA 4.

This case in the High Court of Australia examined the interpretation of Article 3 Rule 8 of Hague-Visby Rules in relation to London arbitration. The clause states:

> *Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to goods or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.*

The dispute related to damage of steel rails shipped from South Australia to Queensland. The bill of lading provided for disputes to be referred to arbitration in London with English Law to apply.

Clara Kwon

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OneSteel Manufacturing Pty supplied the steel rails to Carmichael Rail Network Pty. BBC Chartering Carriers GMBH & Co KG shipped the steel as an agent of OneSteel. Upon arrival the rails were found unusable and were sold as scrap.

BBC commenced arbitration in London under the bill of lading. The Federal Court stayed the proceeding in favour of BBC, but Carmichael appealed, maintaining that the arbitration provision in the bill of lading was rendered inoperative by Article 3 Rule 8 of the Australian version of the Hague-Visby Rules.

Carmichael argued: there was a risk that BBC's liability would be relieved by arbitrators interpreting liability under English Law, not Australian Law; that the arbitrators may apply Rules 1 to 8 of the Hague Rules and not the Australian Hague-Visby Rules; and that there would be expense and practical difficulty in pursuing a claim through arbitration in London.

The appeal was dismissed. The High Court rejected Carmichael's arguments on the basis that:

- Article 3 Rule 8 operates on the ordinary civil standard of proof. Carmichael's arguments assumed a lesser standard might be applied
- Article 3(8) applied to the current circumstances
- expense and practicality was outside the scope of Article 3(8)

In summary, the High Court of Australia dismissed an appeal by cargo owners who had maintained that the referral of a dispute in relation to cargo damage to London arbitration amounted to a lessening of liability, such that the arbitration provision should be regarded as null and void and of no effect.

Article 3(8) applies to the choice of forum clauses if the issue may lead to relief of liability. Hague Rules may not apply if risk of relief cannot be established on civil standard of proof.

Young Lawyer Presentation 2

Ms Jacobson examined the case of *Trafigura Pte Ltd v TKK Shipping Pte Ltd (the Thorco Lineage)* [2023] EWHC 26 (Comm).

Nana Jacobson

The issue at hand was the extent to which the ship owners were entitled to rely on the limitation provisions of the Hague-Visby Rules in respect of the cargo owners' liability for salvage and on-shipment costs.

Article IV rule 5(a):states:

> *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 kilogram of gross weight of the goods lost or damaged, whichever is the higher.*

The claim concerned a bulk cargo of zinc calcine carried onboard the Thorco Lineage from Baltimore to Hobart in May 2018. The vessel broke down, then ran aground. It was eventually salved, towed for repairs and the cargo eventually on-shipped.

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Of the 10,287 tonnes of zinc calcine onboard only 764 tonnes suffered physical damage (7.34%). A total of 9523 tonnes of undamaged cargo eventually were on-shipped to Hobart. The cargo owners also incurred:

- a liability to pay the salvors US$7.3 million
- on-shipment costs of US$700,000
- costs of US$58,000 for disposal of the damaged cargo

The cargo owners claimed all of these costs from the shipowner for breach of the bill of lading terms. They argued the words “goods lost or damaged” referred to goods lost or “damaged physically and/or economically”. The whole cargo suffered economic damage by reason of the cargo owners’ liability to pay salvage and on-shipment. The limit calculated on that basis exceeded the value of the claim – ie, US$7.7million.

The ship owners argued that “goods lost or damaged” referred “only to goods lost or damaged physically”. Since only a small amount was physically damaged, the ship owners’ limit calculated by reference to damaged cargo was US$300,000.

The significant difference between US$300,000 and US$7.7 million makes this point important for carriers and cargo interests.

In the *Limnos* case in 2008, the decision was that the words of Rule 5 should be read as applying the limitation only to the “goods [physically] lost or damaged”, and not to “economically” damaged goods.

In this *Thorco Lineage* case, the Judge’s decision differed from the approach earlier taken in *Limnos*. His approach was to consider the purpose of the Hague-Visby Rules, the plain meaning of words and *travaux prepartoires* (documentary evidence of the negotiation, discussions, and drafting of a final text), the case law and the academic authorities.

He then agreed with the cargo owners. He found that goods carried by sea may be damaged physically *and* economically. The value of the goods had diminished on arrival due to the salvage charge and on-shipment costs incurred as a result of the shipowners’ breach.

Therefore, the costs could be limited by reference to the weight of the whole cargo not just the cargo physical damaged.

Ms Jacobson said that the main outcome was that the rule is not limited to goods physically lost or damaged only.

Cargo owners are pleased with the decision but there was a silver lining for shipowners. In cases where there is no physical damage, the Rule 5 limitation provisions can be applied to their liability for economic losses too.

Young Lawyer Presentation 3

Ms Hensen reviewed the case of *Silver Fern Farms Ltd v AP Møller Maersk* [2022] NZHC 3120.

At issue here was Article 3(6) of the Hague-Visby Rules which states that any claim in respect of the goods carried will be time-barred unless proceedings have been commenced within one year of their delivery, or the date when they should have been delivered.

Silver Fern Farms arranged shipments of chilled meat by Maersk Line, which until early 2015 had been on bills of lading issued on a Maersk Line form describing the carrier as “AP Møller – Maersk A/S trading as Maersk Line”. In February 2015, the plaintiffs arranged cargo to be carried on the Maersk Alexandra. The bills of lading were signed by the carrier “Maersk Line A/S”. The Maersk Alexandra broke down en route from New Zealand, which affected delivery of the meat.

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Subsequently, Silver Fern Farms filed proceedings naming “AP Møller – Maersk (trading as Maersk Line)” as the defendant. In 2019, Maersk Line A/S changed its name, dropping the word “Line” from its title.

On 1 April 2022, Silver Fern Farms sought an order to correct what it argued was a “misnomer” by amending the name of the defendant under r 1.9 of the High Court Rules 2016 (amendment of defects and errors). The defendant did not consent to this. It argued the plaintiffs were seeking a different company to be substituted for the existing defendant and in these circumstances the action was not available under r 1.9.

Cate Hensen

The defendant also stated it would oppose any move by the plaintiff to pursue a joinder of Maersk A/S under r 4.56 of the High Court Rules (striking out and adding parties).

The issues for determination were, was the misdescription in the claim a misnomer? – and, if so, should the Court decline to correct the misnomer on the basis of the limitation in Article 3(6) of the Hague-Visby Rules?

The outcome was the Court allowed the amendment and expressly stated that a limitation defence was not determined. The description of the circumstances giving rise to the claim was sufficiently clear that a reasonable person receiving the document would understand it to be addressed to the carrier, that is Maersk Line A/S (now Maersk A/S), and not the named defendant AP Møller – Maersk. Because the limitation defence had not been determined, the proposed amendment did not give rise to substantial prejudice.

In support of its argument that this was not a misnomer, the defendant relied on matters including the fact that the statement of claim referred to the defendant as the “owner and/or charterer and/or responsible for operation of the vessel”, and AP Møller – Maersk was the charterer, and the reference to “the defendant’s vessel”. However, the Court accepted the plaintiffs’ submission that reference to the “defendant’s vessel” was explicable on the basis that the carrier is responsible even if it does not own the ship or employ the crew. The Court also accepted the plaintiffs’ submission that it was not plausible that the plaintiffs were seeking to sue the charterer.

June 2024

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