Hague or Hague-Visby ?

How will the limitation of the carrier's liability will be considered

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The Hague Rules of 1924 for the carriage of goods by sea and the Hague – Visby Rules of 1968 amending them, determine the extent of the sea carriers' exposure for damage caused to the cargo. Although more than 40 years have elapsed, a substantial number of shipowners refer to the "Hague Rules in the Bills of Lading or the Charter-Parties". As, in certain circumstances there are differences between these and the Hague - Visby Rules, the resulting disputes find their way to the courts.

A shipowner who elected to sail using a longer route, under difficult weather conditions – causing cargo damage; a chief engineer who caused a fire in an oil tanker; cargo carried on deck which was irreparably damage – what is the shipowner's measure of responsibility, if at all to cargo damage occurring during the voyage and what are the exemptions from liability. An English court has "Drawn the borders" and those using carriage by sea are advised to take these into account.

A sea voyage in itself has and remains in the eyes of the court systems, an "Adventure". All the interests involved, the ship, the cargo and the freight paid or payable, bear the risks which may eventuate "Where they fall" unless the exception of "General Average" applies.

A further principle applying to carriage by sea is that "Time is money". A ship consumes fuel and is generally obliged to effect mortgage payment, to pay port dues and fees, is subject to time schedules and sails from one voyage to another.

Accordingly, in 1924 ship owners and cargo owners arrived at an agreement known as: "The Hague Rules" which were modified in 1968 and are now known as "The Hague-Visby Rules".

The Rules, in the allocation of responsibility between the parties, provide generally that the owners responsibility is primarily before the commencement of the voyage, in that the ship must be sea-worthy, sufficiently "well-manned", to load and care for the cargo, and at the end of the voyage to safely discharge the cargo, all as provided in the Rules, namely, "to properly and

carefully load, handle, stow, carry, keep, care for and discharge the goods carried." (Article III, Rule 2).

The expression "properly" has been interpreted under English decisions to mean "In accordance with a sound system". A "Sound system" does not mean a perfect system, the maritime carriers' actions will be judged on what is expected from it – having regard to the information available or which should have been known for the purposes of caring for the cargo in accordance with the practice of careful carriers.

The word "Carefully" means that not only does the "Carrier" have to know what are acceptable practices but he has to "carefully" ensure that they are applied. It will not suffice to excuse the carrier from liability if he knew or was aware of suitable systems or practices but that these were not sufficiently observed and put into effect.

If the ships' crew did not act in accordance with the suitable systems or practices put

in place by the operator this would not exonerate the carrier from liability.
With that, events which are not under the control of the operator, such as "Perils of the sea", "Arrest or restraint of princes or rulers", "Quarantine restrictions" or, "Any other cause arising without the fault or privity of the carrier". (Article IV, Rules 2(a)-(q)), would excuse liability.

The division of responsibility between the carrier and the cargo interests– ensure certainty also insofar as the insurers of the cargo are concerned, enabling them to determine the premiums for providing insurance for loss or damage to the cargo.
Insofar as the relationship between the ship owner and a ship charterer is concerned, the shipowner is obliged to provide the charterer with a sea-worthy ship, including suitable cargo holds and

other storage spaces if applicable. Accordingly, when the ship presents itself at the loading or discharge ports and presents its "Notice of Readiness" the charterer has a determined period of time to discharge or receive the cargo (usually 36 hours) and any time in excess of the agreed loading or discharging time will attract demurrage at the rate agreed per day or part thereof.
Accordingly, "On paper" all is in order. However, in practice, as appears from a number of recent cases, the "Boundaries" and financial consequences resulting from the "Division" of responsibility are not completely clear.

If one examines the example of the ship, the "Santa Isabella" which was chartered to carry and deliver 44 tons of "White Corn" from Topolobampo in West Mexico to Durban and Richards Bay, in South Africa – the sea carrier chose to sail a route circumventing South America to Cape Horn and from there to South Africa instead of the shorter voyage through the Panama Canal. The resultant journey extended for 39 days and as a result of bad weather it was not possible to ventilate the cargo by opening the hatch covers for the most part of the voyage.

As a result of the aforegoing, the cargo was damaged and the discharge of the cargo was delayed, resulting in the ship entering into demurrage – the legal issue being whether the charterers were obliged to pay demurrage in view of the fact that the ship owners had chosen to use the "long" route and whether there was a legal obligation upon them under the charter party, to use the shorter Panama Canal route and/or whether the ship owners were in breach of their obligations under the Hague – Visby Rules to "Carry, keep and care for" the cargo during the voyage, having regard that the route chosen by the owners is characterized by low temperatures and weather conditions which did not allow the cargo to be ventilated.

The charterers relied on the case "The Washington" of 1976, decided by a Canadian Federal Court where it considered a shipment of glass panels from Taiwan to Vancouver. During the voyage weather forecasts spoke of bad weather conditions and the master elected to sail on a route south of the route recommended by the weather routing service. The cargo was damaged and was a total loss.

The ship owners relied on "Perils of The Sea". This argument was rejected as the cargo damage resulted from inadequate stowage. More than was necessary, the Court held that the ships' master had navigated the ship in stormy weather as required, but that he had been negligent in that he did not alter the ships' route so as to avoid the center of the storm. In this manner it was possible to determine that the master did not use the ships equipment and the ships capability to change the route in order to care for the cargo as required by the Rules.

In the "Santa Isabella" matter it was decided that the "Cape Horn Route" was an acceptable and reasonable route and generally the usual route. The usual route differs from the direct route because of navigation and also commercial reasons. Accordingly, if the parties do not determine the route in the contract, the owners are entitled to use the regular and accepted route between the loading and discharge ports. The court held, that on the evidence that in preceding years, there a few tens of voyages between Mexico and South Africa and in most instances, the preferred route had been via Cape Horn, as did the ships' owners in the present case.

The charterers, the cargo owners who argued that a voyage via the Panama Canal was shorter and offered more opportunities to ventilate the cargo did not "condition" the charter by a special route and the owners choice of the route did not constitute a breach of the charter party.

In relation to the charterers contention, which is supported by the "obiter" findings in the "Washington", the court held that it is not possible to apply what was decided in the "Washington" as a generally applicable principle in that manner which would "render nugatory", the principle which is stated above, namely the absence of a clear agreement in the charter party.

In the absence of a contractual route, the owners are entitled to elect the regular or reasonable route. Additionally, the charterers approach would result, in "unending" disputes. How would a charterers approach, to the effect that the owners should choose a route which would limit cargo damage or eliminate it completely, be reconciled with considerations relating to the length and expenses of the voyage. How would the owners decision be examined in the light of "being wise after the event"? Accordingly, it was not possible to determine, that an owners decision to sail a route chosen by the owner, as the breach of an obligation to "keep" and "care for" the cargo under the Rules.

In another matter, which dealt with the division of responsibility between the shipowner and the cargo owner, dealt with the total loss of a shipment of deck cargo after the ship experienced heavy weather. The cargo owners argued, that the shipowners were in breach of their obligation to "carry", "keep" and "care for" the cargo. The shipowners relied on a clause in the bill of lading stating that "In no case will they be liable for any damage or loss to cargo "on deck" however arisen".
The Hague-Visby Rules state that in article 1(c) that cargo carried on deck and which is stated in the contract of carriage as being carried "on deck" and is so carried are not "goods" for the purposes of the Hague-Visby Rules and the rules do not apply to such deck cargoes. The effect of the foregoing is that owners are at liberty to determine in the contract of carriage, the bill of lading, those conditions which free them from any liability which would not be the case if the Hague-Visby Rules (or any domestic enactment thereof) are applicable.

Notwithstanding the fact that the Hague-Visby Rules are not applicable, would the common law apply, under which in the absence of a clause in the contract stating the contrary, is there an implied term imposing a duty on the owners to provide a sea-worthy ship and to deliver the cargo in the same good condition as when received, unless there was an event of "vis majeure", or an act of the "Queens enemies", or "inherent vice" of the cargo. The cargo owners contended that if the shipowner intended to be excused from the obligation to provide a seaworthy ship and to care for the cargo, as such exemptions were not stated, the owners were not excused from what the cargo owners contended were the shipowners' basic obligations.

The court held the exemption contended for by the shipowner, namely that it is not responsible for deck cargo carried on deck whatever the cause and it was not possible to find a more encompassing wording than that stated in the bill of lading. The exemption applies to any circumstance and does not exclude events of unsuitable practices or negligence. The court interprets exemption clauses so as to understand the intention, as these would be understood by a literate and reasonable person, having the background which those who were parties to the bill of lading have when the bill of loading was concluded or signed and that there was no need to depart, when interpreting the exemption clause from the intention of parties which is clearly stated and the clear underlying logic thereof.

The expression "howsoever caused" used by the shipowner is a classic expression in use for 100 years to exempt liability relating to the seaworthiness of the ship or negligence. Accordingly, the court held that the owners were not responsible for the damage or loss-even if resulting from lack of seaworthiness or negligence.

During the course of a voyage of the tanker "Lady M" from Russia to Houston a fire broke out in the engine room. The owners ordered towage assistance and the ship was towed to Las Palmas where the owners declared "General Average" (A claim for the participation in the value of property, cargo and equipment "sacrificed" during the "threat" to the ship.) "Glencore", the owner of the rights in the ship's cargo, 62,250 tons of oil, filed a claim against the ship owners claiming the expenses paid by it for "saving" the ship and also for arbitration expenses relating to the "saving".

Glencore argued that the ship owners were in breach of their obligations to provide a seaworthy ship, properly manned and equipped and to safely carry the cargo.

Glencore also alleged that the fire was as a result of a deliberate act on the part of the crew and constituted (Barratry), an unlawful act of the ships master or crew directed at the ship owners and that the Barratry prevented the shipowners from relying on the exemption clauses under the rules.

The shipowners reply was that it was entitled to the "Fire" exemption under article IV, Rule 2(6) and that the fire was caused by the deliberate act of the chief engineer and not as a result of neglect of the owners as a carrier of goods by sea and that the chief engineer acted as a result of emotional pressure or mental illness and that he did not have the unlawful intention required to constitute an act of Barratry and that in any event Barratry does not displace the defenses available to a carrier by sea.

The claim reached the English Court of Appeal which held that one has to attribute the expression "Fire" in the rules has to have its normal meaning and includes fire emanating from a deliberate act having regard also to the fact that the rules are the result of a "Trade Off" between carriers and users and that it was not possible to relate to the legal situation in any country, in this matter England, in relation to exceptions or their scope in order to negate the clear meaning of the words.

In the present matter, the Court held that there was no dispute that the fire was caused by the chief engineer and not as a result of fault or knowledge of the sea carrier. In this manner the exemption is available to the ship owners for damage resulting from fire, save for that caused by the sea carrier itself or with its knowledge or consent, otherwise under Glencore's construction one would have to add another condition to the exemption, (which does not exist) namely "Except if caused by the fault or negligence of the crew" and that such an interpretation cannot be accepted.

In the above manner there is a clear expression of English law, which is circumspect in enforcing exemption clauses available to ship owners, whether under the Rules or in the provisions of the bills of lading. The terms of the exemption and the effect thereof are not "Dead Letters" and cannot be interpreted in such a manner so as to modify their accepted meaning. Users of sea carriage and their insurers are obliged to take this into account in assessing their commercial and legal risks.

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