English Court Says Hague Rules "Unit" Does Not Include Bulk Cargo

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On October 14, 2016, Judge Sir Jeremy Cooke (sitting as a Judge of the High Court) rendered his decision on the issue of whether the term "unit," as contained in The Hague Rules of 1924, included bulk cargo. The Honorable Sir Jeremy Cooke held that it did not. *Vinnlustodin HF v. Sea Tank Shipping AS (The Aqasia)* [2016] EWHC 2514 (Comm); [2016] Lloyd's Rep. Plus 75).

The case involved a claim for damage to a cargo of fish oil carried onboard a tanker vessel pursuant to a charter party on the "London Form" (an older tanker voyage charter form which has been replaced in common usage by Intertankvoy 76). The "London Form" provided, in Clause 26, "The Owners in all matters arising under this Contract shall also be entitled to the like privileges and rights and immunities as are contained in Sections 2 and 5 of the Carriage of Goods by Sea Act 1924 and in Article IV of the Schedule thereto…"

Article IV, R.5 of the Hague Rules provides "...Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 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 and inserted in the bill of lading…."

The Charter Party provided for the carriage of some 2,000 tons of fish oil in bulk (5% more or less in charterer's option) from Iceland to Norway. The vessel sailed to Norway and loaded a further cargo of fish oil, part of which was loaded into three tanks with fish oil loaded at Iceland. On arrival at the discharge port, some 547.309 metric tons of the cargo loaded into the same tanks were found damaged.

Claim was made by the owner of the cargo as well as its underwriter ("out of an abundance of caution"). Although the matter was subject to arbitration, the parties agreed that the Commercial Court should have jurisdiction to determine a preliminary "Limitation Issue."

The disponent-owner/defendant claimed it was entitled to limit liability to the sum of £54,730.90 (i.e., to £100 per metric ton of cargo damage pursuant to Article IV Rule 5 of the Hague Rules). Cargo claimants took the position that no limitation applied and the value of the goods lost was $367,836.

Some 92 years earlier, the Hague Rules were instituted in 1924. They were the result of efforts to attain international uniformity with respect to bills of lading issued in maritime commerce.

Charter parties were specifically excluded; however, provision was made that the Rules would apply to any bill of lading issued… "under or pursuant to a

charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same" (Hague Rules, Article I(b)).

Article V of the Hague Rules also provides (in pertinent part):

> The provisions of this Convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Convention….

The Hague Rules also provide for a limitation of £100 to any "package or unit."

Some 12 years after the Hague Rules were instituted, the United States Carriage of Goods by Sea Act (COGSA) was passed; however, it passed with some modifications. £100 became $500 and "package or unit" became "…for goods not shipped in packages, per customary freight unit." This latter modification was stated by the US State Department to represent merely a "clarification" with respect to the Hague Rules, and did not constitute any change in substance; in other words, essentially the same as "per package or unit."

So much for that.

In the United States, under decisional law, the term "customary freight unit" ultimately came to be the unit used with respect to calculating the freight charged.

The term "customary" went by the wayside, particularly in the Second Circuit Court of Appeals which considered "customary freight unit" to mean the "unit used to describe the freight, looking at the bill of lading and tariff, regardless of how the ultimate freight may have been calculated." As an example, this led to a lump sum freight (although calculated on metric tons) becoming the unit, limiting recovery on a bulk shipment of peanut oil to $500 based upon the lump-sum charged. *E.g.*, *Vigilant Ins. Co. v. M/T Clipper Legacy*, 656 F.Supp.2d 352 (S.D.N.Y. 2009).

Decisions in Canada, Australia, and New Zealand took the term "unit" to apply to a "shipping unit" which they understood to be a "physical unit of goods" (as opposed to a unit of measurement). *See*, *e.g.*, *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*, 1974 S.C.R. 933; 2 Lloyd's Rep. 469, 475 (Can. 1973).)

In 1968, the Visby Amendments were passed which made certain modifications to the Hague Rules, resulting in the "Hague-Visby Rules." Of particular significance, the limitation set forth in Hague for "package or unit" was modified to read (in relevant part):

> Unless the nature and value of such goods had 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 two units

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

In *The Aqasia*, the Honorable Sir Jeremy Cooke stated this to mean (emphasis added): "The…latter Convention (the Hague-Visby Rules) provided for limitation 'per package or unit or per kilogram of gross weight of the goods lost or damaged,' which undoubtedly means that bulk cargoes can be subject to limitation (by reference to the weight of the lost or damaged goods) as well as individual packages or objects."

The United States chose not to adopt the Hague-Visby Rules.

It is submitted that the term "freight" can mean either the goods themselves which are being transported, or the amount charged or paid for such transportation. *See*, *e.g.*, definition of "freight" in English/Oxford Dictionaries; definition of "freight" by Merriam-Webster Dictionary; definition of "freight" in the Cambridge English Dictionary (extracted from Google).

If the Department of State was correct in 1936, the term "customary freight unit" should actually be taken as the shipping unit of the goods themselves, as opposed to emanating from the calculation or statement of freight charged. Be that as it may, it is most unlikely (indeed, remote) that at this point in time, there will be any change of significance to the meaning of the term "customary freight unit" in COGSA as now rendered in the decisional law of the United States.

The Rotterdam Rules contain a provision somewhat similar to the Hague-Visby Rules concerning limitation on cargo or goods; however, while the Rotterdam Rules have been signed by the United States, they have only been ratified by three nations thus far, and the United States is not one of them. As stated before, the United States did not take up the Hague-Visby Amendments.

Thus, a bulk cargo, depending upon the voyage and ports involved, could face the issue of a limitation being based upon weight (Hague-Visby); or the unit as stated to be the amount of freight "charged" (U.S. COGSA: lump sum, metric ton, etc.), or none at all (given the *Aqasia* holding that the Hague Rules unit limitation is not applicable to bulk cargo).

So much for uniformity!

As indicated previously, it is submitted the issue of what should constitute a "unit" has a basis for question. However, it would be most unlikely for the right case with the right facts to arise whereby a party would now take the issue up for clarification. Likewise, proper treatment of the issue would involve more than the space for the present article allows.

Statistically, vessels dedicated to the carriage of bulk cargo (to include grain, ore, coal, oil, chemicals, etc.) represent the majority of the total tonnage carrying commodities by water. It would seem to be safe to say that the international

carriage of goods by water involves bulk shipments more than any other type of commodity.

In the *Aqasia*, the disponent-owner (carrier) sought some protection by reference and incorporation of certain Hague Rules ("Sections 2 and 5"). The successor form (Intertankvoy 76) contains a similar provision that is somewhat more expansive to include the Hague Rules in toto. It also includes the United States Carriage of Goods by Sea Act, where applicable, but essentially the application of COGSA would likely mean application of the current interpretation of "customary freight unit" as relating to freight charges, which, could favor the carrier (considering a lump sum freight). Under the Hague Rules, per the *Aqasia* decision, there would be no limitation for bulk cargo.

It is submitted the purpose of the Hague Rules initially was to reach uniformity so far as possible and they were the result of negotiated efforts on the part of all sides to come up with a set of rules which were acceptable to all.

What to do?

The Hague Rules, COGSA, and the Hague-Visby Rules (even the Rotterdam Rules) make exception with respect to charter parties. Obviously, if the charter includes a boiler plate form as now contained in most charter party forms by way of Clauses Paramount (where the particular regimes are also made part of the

charter party), it is submitted that nothing will have changed the treatment of customary freight unit or unit. Indeed, in the instance of bills of lading being issued, particularly where a negotiable bill of lading is involved, application of the applicable regime would be mandatory.

If nothing else, the owner and the charterer should at least be aware of the bumps and depressions (perhaps mountains and valleys?) which face either.

Ponderments:

- Where no bills of lading are issued, as opposed to blanket incorporation of particular regimes (as now found in current forms), could a contractual provision be fashioned in a charter party to cover the inclusion of bulk cargoes?

- Where no bills of lading are issued, would inclusion of most of the Hague-Visby Rules as contractual provisions accomplish the same?