

The Hague-Visby rules back on course?

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reviews the *Tasman Orient* decision in the Supreme Court

In a succinct single judgment, the Supreme Court has held that the charterer and operator of a vessel called the *Tasman Pioneer* was entitled to rely on the exclusion in art 4.2(a) of the Hague-Visby Rules (HVR). The Court held that the immunity from liability applied, on its natural, ordinary meaning, where containerised deck cargo was lost and damaged as a result of the reprehensible conduct of the master of the ship after it had grounded off the coast of Japan.

Article 4.2(a) is often described as the carrier's main exemption under the HVR. Article 4.2 provides as follows:

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

The long running litigation arose from the unusual circumstances in which the cargo was lost and damaged. On a regular liner voyage from Auckland to Busan, the master of the *Tasman Pioneer* decided to leave the customary route between Yokohama and Busan and take the vessel through a narrow passage between the island of Biro Shima and the southwest end of the island of Shikokou. He wanted to make up time.

Not long after the *Tasman Pioneer* entered the passage, radar was lost. While the radar was being reconfigured, the master ordered "hard port" (apparently to abort the passage). When the radar came on again Biro Shima was 800 yards away on the port side of the ship. Although orders to go "hard starboard" were given, the vessel grounded. The crew heard two grinding impacts and the vessel slowed from 15 knots to seven knots. It began to list and take water into her cargo holds. Instead of alerting the Japanese Coastguard and proceeding to a nearby sheltered bay, Sukumo Wan, to anchor and await assistance, the master decided to continue through the passage at 15 knots with water entering the cargo holds. He eventually anchored the *Tasman Pioneer* about two and a half hours later, some 22 nautical miles from the grounding. At anchor, the *Tasman Pioneer* was down by the bow and taking water into the holds. Salvors were called. However, their actions could not prevent the deck cargo from being further immersed in seawater. Over the next few days, operations continued to remove the containers from the ship. The vessel was beached and temporarily repaired in situ, then towed to a dockyard for repairs.

The cargo owners claimed for the loss and damage to their cargo by immersion in seawater, with the exception of one which claimed for the loss of dairy products in refrigerated containers. This cargo had heated up when power to the refrigeration systems in the containers had been lost. The claims

totalled over US\$3 million dollars with a significant sum of interest added by the time the case came to trial in 2007.

It was common ground between the parties that the contract of carriage, evidenced by the Tasman Orient Line (TOL) bill of lading, was subject to the HVR.

HAGUE-VISBY RULES

The HVR contain the amendments to the original Hague Rules which were adopted in the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. Both the Hague Rules and the Hague-Visby Rules were signed after international conferences at which the various interest groups debated the provisions of the Rules. New Zealand, like some 80 or so other countries, has adopted the HVR (s 209(1) Maritime Transport Act 1994 under which the HVR (as set out in the Fifth Schedule to the Act) have "force of law" in New Zealand). The HVR provide for the obligations of carriers of goods by sea under contracts of carriage governed by bills of lading. The principal obligations of the carrier are to exercise due diligence to provide a seaworthy ship (art III r 1) and to care for the cargo (art III r 2). The obligations relating to the care of cargo are expressly subject to the list of exclusions for liability for loss and damage to cargo arising in various circumstances contained in art 4.2. A carrier also has to show that it has fulfilled its primary responsibility as to the seaworthiness of the ship under art III Rule 1, before it can rely on any of the exclusions in art 4.2. By and large, the provisions of art 4.2 reflect the exclusions which were found in shipping contracts and other existing liability regimes at the time when the Hague Rules were adopted. The exclusion in art 4.2(a) was in the original Hague Rules and remained unchanged in the HVR.

HIGH COURT

In the High Court, Hugh Williams J held that the post-grounding conduct of the master had caused the loss and damage to the deck cargo. If the master had acted properly after the grounding, the cargo would have been saved. He rejected the cargo-owners' claim that the carrier had not fulfilled its obligations to provide a seaworthy ship in breach of art III, r 1 of the HVR. This meant that TOL could, potentially, rely on the exclusion. After reviewing the various authorities on the question whether conduct factually fell within the exclusion as being "in the navigation or management" of the ship, as opposed to being conduct in relation to the care of cargo, the judge held that, prima facie, the conduct of the master in continuing on through the passage after the grounding fell within the exclusion.

The statements provided by the crew in the investigation by the Japanese Coastguard revealed that the master had asked them to lie about the course taken and to say that the damage to the *Tasman Pioneer* was caused by collision with a submerged object. He had also had the second officer erase the course from the chart. The conduct after the grounding, the High Court found, relying on the statements from the Japanese Coastguard investigation and the admitted facts, was part of a plan designed by the master to absolve himself from blame and cover up the decision to take the "short-cut".

The cargo-owners had expressly pleaded that the exclusion was not applicable because the conduct of the master had not been in good faith. The essentials of the master's actions after the grounding were admitted by TOL (although it was denied that he had been reckless). He was not called to give evidence. On the basis of the material before the Court, the Judge held that the master's conduct had been in bad faith and for an improper purpose and that the exclusion did not apply because it was subject to an implied requirement that the conduct of the servant or agent in question be in good faith. The High Court rejected the claim in relation to the refrigerated cargo on the (erroneous) ground that the cargo-owners had not discharged the burden on them of showing how the loss had been caused.

COURT OF APPEAL

In the Court of Appeal, the majority (Baragwanath and Chambers JJ) reached the same conclusion as the High Court, but "by a different route". Rather than implying a requirement that the conduct of the servant or agent had to be in good faith for the exclusion to operate, the majority held that the exclusion should be read as only excluding liability for acts where they were akin to negligent acts. This approach, which involved limiting the general meaning of the wording in art 4.2(a), was based on various factors: the HVR were a "radical" departure from the laissez-faire approach of the common law and had been adopted to cut down "exorbitant" exclusion clauses; modern statutory interpretation was contextual in approach; and the interpretation of the exception should not defeat the overall purpose of the HVR. Accordingly, the majority held that the clause could not apply to loss caused by the conduct of the master which was wholly at odds with the carrier's obligations in relation to the care of the cargo under art 3.2 of the HVR. Characterising the HVR as a radical departure from the laissez-faire position at common law meant that the older common law cases, which had interpreted and applied the exclusion broadly when it was found in contracts of carriage, were not relevant.

Chambers J also expressed the view that it was not necessary or desirable to examine the travaux préparatoires to the Rules because many of the States which had adopted the Rules since 1921 had not been present at the diplomatic conference at which the provisions had been debated. Chambers J found that the evidence established, on balance of probabilities, that the loss of the refrigerated containers had been caused after the grounding when the salvors cut off the power to the containers in their efforts to save the ship and

cargo. Article 4.2(a) did not apply to the loss and damage of the refrigerated containers because the loss had been caused by the post-grounding conduct of the master and the exclusion could not apply on the interpretation of art 4.2(a) adopted by the majority.

Fogarty J dissented and found that art 4.2(a) applied to the conduct of the master. His decision was primarily based on the words of the provision, in particular the unqualified use of the word "act". The Judge found support for this conclusion in the nature of the regime in the HVR overall, which was to impose obligations on the carrier in relation to the matters under its control and provide immunities from liability in a range of circumstances where loss or damage was caused by matters beyond

the control of the carrier. The intention of those who debated and adopted the Rules as revealed by the travaux préparatoires to the Hague Rules made it clear that art 4.2(a) reflected clauses found in contracts of carriage at the time (and in the US Harter Act 1893) which gave protection to the carrier for acts of the master or crew which caused loss and damage, provided the acts were in the navigation of the ship. The older common law cases also supported the conclusion reached on the broad interpretation of the exclusion (eg. *Marriott v Yeoward Bros* [1909] 2 KB 987; *Bulgaris v Bunge* (1933) 45 Ll L Rep 74). His Honour rejected the approach based on the implication of an obligation of good faith which had found favour in the High Court. None of the cases relied on supported such an approach in this context. The authorities concerned the general duty of a master either as an employee or as a person acting on behalf of the owner under the provisions of a charterparty. They were not concerned with the question of the interpretation of the exclusion which was before the court.

Fogarty J also rejected the (related) alternative argument that the master's conduct amounted to using the vessel for his own purpose and not for the purpose of the voyage under the contract of carriage so that the conduct could not be said to be "in the navigation of the ship". This argument had the same failing as the argument for an implied obligation of good faith in that it meant that the application of the exclusion depended on the master's subjective purpose. While acknowledging that the actions of the master in this case were a clear case of wilful misconduct, he could see no basis for refining the meaning of the exception by limiting its application to particular kinds of acts done with particular motives or purpose — this approach would create commercial uncertainty.

SUPREME COURT

On appeal to the Supreme Court, the parties agreed (it seems for the first time) that the clause did not apply where the servants or agents of the carrier had committed barratry. Barratry involves wilful acts of wrongdoing by the master or crew against the ship and goods without the privity of the shipowner. The position taken on barratry reflected the debates between the various interests at the international conference which preceded the adoption of the Hague Rules. In those discussions, the draft of art 4.2(a) (an exclusion

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which, as noted, was commonly found in contracts at the time) was agreed to by those representing cargo interests on the basis that there would be no exclusion for barratry in the Hague Rules. Barratry would appear to be an exclusion which is void under art III r 8 of the HVR.

In the Supreme Court, the respondent cargo owners were granted leave to seek to support the judgment of the Court of Appeal on two further grounds, namely that the exclusion did not apply where the conduct was in bad faith (their central argument throughout) or where conduct amounted to barratry.

Wilson J gave the single judgment of the Supreme Court. In interpreting the exclusion, the Court rejected the various grounds advanced by the High Court and Court of Appeal for not applying art 4.2(a). It could see no basis on the wording of the exclusion or on the cases referred to in the High Court to imply a requirement of good faith into art 4.2(a).

The Court expressed difficulty in understanding the interpretative starting point adopted by the majority in the Court of Appeal that the Hague Rules were designed to change the common law in a radical way.

The Court referred to the travaux préparatoires which showed how the representatives of the ship owners had insisted on retaining the exclusion as drafted in art 4.2(a) because such exclusions were common in contracts of carriage at the time. This position had been accepted, the travaux showed, by those representing cargo interests provided there was no exclusion for conduct which amounted to barratry. Accordingly the Hague Rules could be seen as adopting the position at common law. Article 4.2(a) reflected the retention of a broad exclusion of the kind found in contracts of carriage at the time and considered in earlier common law cases.

The Court summarised the scheme of the HVR as a regime which allocated responsibility and risk between carrier and cargo owners and aimed to provide a clear basis on which parties and their insurers could make their commercial arrangements. The Court saw the purpose of the HVR regime, with its inter-related obligations and exclusions, as being to make carriers liable for breaches of their obligations which relate to matters within their control but not otherwise, rather than bringing about the radical reform of the common law or the striking down of "exorbitant" exclusion clauses.

Clearing away the erroneous interpretative starting point adopted by the Court of Appeal meant that the words used in art 4.2(a) should be given their natural ordinary meaning. The words covered acts or omissions of master and crew. The motive and purpose of the conduct and the degree of culpability were irrelevant (subject to proof of intentional or reckless acts amounting to barratry). Unlike the majority in the Court of Appeal, the Court could see no reason to depart from the eminent authors of *Scrutton on Charterparties* and *Carver on Bills of Lading* who considered that the exclusion applied broadly on its wording to acts which were intentional or reckless.

The court reached a clear conclusion:

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[30] In summary, the text of art 4.2(a), the scheme of the Rules, the common law authorities, the travaux, cases on the Hague Rules, cognate definitions and the views of eminent textbook writers all support the exemption of owners from liability for the acts or omissions of masters and crew in the navigation and management of the ship unless their actions amount to barratry.

The barratry ground could not be relied on by the cargo owners in the Supreme Court because the point had not been pleaded and advanced at trial. The cargo owners had only ever pleaded their case in terms of the master having a personal motive and acting in bad faith to protect himself and conceal what he had done. There

was no pleading of intentional conduct amounting to barratry and, as a result, it was not possible to argue before the Supreme Court that art 4.2 (a) did not apply on this basis. TOL had conducted its case on the basis of the case pleaded and the master had not been called to give evidence at trial to address any allegation of intentional (or reckless) conduct. There would be clear prejudice to TOL if the cargo owners could raise the argument that the master's conduct amounted to barratry on appeal.

COMMENT

Two and a half hours of "reprehensible misconduct" over ten years ago by a master who, no doubt, feared for his career, has led to a marathon battle in the New Zealand courts. At the end of that process, a review of the judgments leads to the suggestion that the cargo-owners may not have mounted possible viable alternative arguments against the application of the exclusion clause. Throughout the case, the cargo-owners focussed their argument on the implication of a requirement of good faith conduct by the servant or agent of the carrier before the exclusion could apply, or an interpretation which meant that navigation of the ship for a "selfish" purpose could not fall within the phrase "in the navigation or management". Both arguments proceed on the same basis and have the same difficulties. Most important, they have no support in the words of the exclusion itself, the overall scheme of the HVR or in the textbooks. As the Supreme Court noted, the HVR provide in art 4.5(e) and 4.4(b) is for specific situations in which intentional or reckless conduct by the carrier itself or a servant or agent sued in its personal capacity will prevent the carrier or servant or agent relying on the exclusions in the HVR. Similarly the exception of barratry concerns wilful or intentional conduct. The HVR look not to the motive of the individual or bad faith but to the proof of intent or recklessness as regards the loss and damage caused, if the benefit of the exclusions is to be lost.

Given the difficulties with the argument, it is surprising that the cargo-owners chose to focus their case solely on it. The master's conduct, analysed objectively, involved a deliberate decision to take the *Tasman Pioneer* on particular courses, both before and after the grounding. While the conduct after the grounding was reprehensible, and wrongly motivated, it may have been more relevant for the argument against the application of the exclusion that the master must have known

that in steaming on through the passage and not proceeding to the nearby bay and calling for help, he would cause damage to the deck cargo.

The facts seem to give rise to the potential argument based on barratry, which the cargo owners sought to raise in the Supreme Court, and a possible alternative claim against the master personally in tort (in relation to which he could not rely on any exclusion under the HVR if his conduct fell within art 4.4(b) is because the damage resulted from his reckless act when he knew that damage would result from his act). These possible arguments seem to fit more readily with the objective facts and established legal principle.

Deviation

Similarly, no attempt was made to maintain that the carrier could not rely on the HVR exclusions because the ship had deviated from the contractual voyage. While the status of the maritime deviation cases is uncertain with the demise of fundamental breach as a rule of law, they remain authority for the proposition that, in the event of a geographic deviation, exclusions in the contract of carriage and the HVR are displaced as a matter of law. Whether this principle as a rule of law would survive reconsideration by a higher court is, perhaps, doubtful, but, at the very least, there remains a good argument on the construction of the HVR that the exclusions in art 4.2 do not apply in the event of geographic deviation. This is supported by the text books (see, eg, *Scrutton on Charterparties*, pp 405-406 commentary to art 4.4 HVR). The argument does not depend on uncertainties of motive or purpose or findings on such matters, but, rather, in determining the contractual effect of the master's conduct on the voyage required by the contract and applying established (although difficult) legal principle. Where the point was not advanced and there was no direct consideration of the factual issues, it is not really possible to assess the merits of the argument. However, one wonders whether the following argument might have offered a sounder foundation for the challenge to the exclusion or, at least, a worthwhile alternative plea.

Under the contract of carriage, whether by express or implied obligation, the carrier has to proceed by the agreed route or the usual, customary and/or reasonable route. A liberty clause of the kind in the TOL bill of lading allows for changes of route, but will be construed narrowly as only allowing reasonable deviations. What is the usual or proper route will depend on the circumstances of the voyage in question. The proper route can change in the course of the voyage.

As agent of the carrier, the master is under an obligation during the voyage to do all that is required to safeguard the ship and take care of the cargo as required by the contract/HVR and the terms of bailment. The actions required under this obligation will depend on the circumstances but could require the master to deviate from the course taken, if that is required to care for the ship or cargo. In this way a "deviation" from the original course might become the course which the carrier is obliged to take under the contract. Continuing on an original course

where that is not reasonable, may amount to a deviation (see Aitkens et al *Bills of Lading*, 1st 2006 [10.270] for this suggestion).

Where a deviation occurs which is not permitted by the HVR or the contract of carriage, as a matter of law, the exclusions in the contract of carriage are not applicable. Alternatively, more simply, as a matter of construction of the HVR, the exclusions in art 4.2 are not appli-

cable where a deviation in breach of contract has occurred (*Scrutton*, pp 405-406).

The first decision by the master to enter the passage and take the "short-cut" involved deviation from the customary route in the circumstances. There was no evidence that there was any established practice of tak-

ing this course. The established course was to take the other route. Although the channel was apparently noted as suitable for "large vessels", in the Pilot Book, the application of this statement to a vessel of the *Tasman Pioneer's* size was doubted (in passing) in the High Court judgment. It seems that this may not have been a usual, customary or reasonable route for the *Tasman Pioneer*. The liberty clause in the TOL bill should not be interpreted as allowing a departure from the route of the kind taken. Its application should be limited, on its true construction, to a reasonable change of route.

Whether as a matter of law, or on the construction of the HVR (the latter is more likely), the exclusion from liability under Article 4.2(a) was not applicable because there had been a deviation from the contractual route in taking the *Tasman Pioneer* into the passage, which had caused the loss and damage.

If the master's first decision and change of course to pass near Biro Shima did not amount to a deviation in breach of contract, and was covered by the exclusion in art 4.2(a), the decision to sail on through the passage without altering course to anchor in the sheltered bay was, in the circumstances which arose after the grounding, a deviation because the master had come under an obligation to take the course to Sukumo Wan after the grounding and had not done so. Again, whether as a matter of law or as a matter of construction, the exclusions in the HVR could not apply where such a deviation had occurred.

POST SCRIPT

Article 4.2(a) has been the subject of much criticism over the years because it goes too far in protecting the carrier for acts or neglect by its servants or agents where, in modern times, the carrier has more contact and control over the master and crew in navigation and management matters. The latest international convention dealing with the carriage of goods by sea, the Rotterdam Rules, has removed the exclusion. New Zealand is adopting a "wait and see" approach on the question whether it will adopt the Rotterdam Rules. Accordingly, for some time to come, art 4.2(a) will continue to represent the allocation of risk between carriers and cargo owners where the conduct of a servant or agent of the carrier causes loss and damage to the cargo. □

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