Commercial Court decision on important and controversial Hague-Visby Rules limitation issue: *Trafigura v TKK Shipping* [2023] EWHC 26 (Comm)

In a judgment handed down on Friday, 13 January, Sir Nigel Teare declined to follow the controversial decision in *The Limnos* [2008] 2 Lloyd's Rep 166 and rejected the Carrier's argument that Article IV(5)(a) of the Hague-Visby Rules limits claims for economic loss by reference only to the weight of physically damaged cargo. Stephenson Harwood LLP acted for the successful Claimant.

In a decision that will no doubt attract widespread interest from P&I clubs and carriers, the English High Court has determined an important question of law on the interpretation of Article IV(5)(a) of the Hague-Visby Rules. The relevant section of the Article 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 the goods in an amount exceeding the equivalent of 667.67 units of account per package or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher."*

The question of limitation arose following the 2018 grounding of the m.v. *THORCO LINEAGE* in French Polynesia, which gave rise to costly liabilities for salvage and on-shipment expenses. In an application under s.45 of the Arbitration Act on a preliminary issue of law, the Court was asked to consider whether the Defendant carrier was entitled to limit its liability to cargo interests, and if so, in what amount in respect of such losses.

The point arose in the following way: in consequence of the grounding and salvage, a very small part of the cargo suffered *physical* damage. However, by reason of the salvage contract, *all* of the cargo was rendered subject to salvors' maritime lien. Cargo interests could not obtain possession of their cargo without putting up salvage security. They ultimately paid more than US$ 7 million to settle salvors' claim. They commenced arbitration proceedings to recover from the Carrier an indemnity in respect of that sum, and damages in respect of the damaged portion of the cargo and transhipment expenses incurred to forward the cargo to destination.

The Carrier argued that the claim was subject to limitation under Article IV(5)(a), and the relevant limitation figure was to be calculated by reference only to the part of the cargo that had suffered physical damage. If correct, that would have given rise to a limitation sum representing only a small fraction of the actual loss.

The Carrier's argument was based on the proposition that the words "*the goods lost or damaged*", by reference to which the weight limit was to be calculated, meant only goods that had been *physically* lost or damaged.

Specifically, the Carrier contended that the words could not include goods which were only *economically* damaged. This argument was based on the controversial decision of the High Court in *The Limnos* [2008] 2 Lloyd's Rep. 166.

The Carrier also maintained that goods which were subject to a maritime lien were not *physically* damaged goods within the meaning of the Article.

In a careful and detailed judgment, the Court rejected both of these arguments. The judge, Sir Nigel Teare, noted that the object of Article IV(5)(a) was to create a limit in respect of all claims for loss

of or damage to, or in connection with, goods. It was a recognised feature of the carriage of goods by sea that goods could be damaged either physically or economically. In those circumstances, there was no basis for the existence of an anomalous distinction between the limitation treatment of goods which had been *physically* damaged on the one hand and goods that were *economically* damaged on the other.

The judge therefore concluded that the words "*the goods lost or damaged*", construed in the context of the carriage of goods by sea, and in light of the object of the Hague-Visby Rules, included goods which were economically damaged. In reaching this conclusion, Sir Nigel Teare declined to follow Burton J's contrary decision in *The Limnos*, respectfully expressing the view that the case had been wrongly decided.

The judge went on to decide that even if he was wrong to determine that the words "*the goods lost or damaged*" include goods that are economically damaged, *all* of the goods were *physically* damaged within the meaning of Article IV(5)(a) by reason of the imposition of a maritime lien on cargo interests' proprietary or possessory interest in them.

Thus, on both the primary and alternative bases, the Court concluded that the limitation figure was to be calculated by reference to the entire cargo, with the result that there was no effective limit for the claim since the limitation figure calculated on that basis greatly exceeded the amount of the claim.

Looking forward

The judge refused the Carrier's application for leave to appeal. As this was an arbitration claim, there is no scope for the Carrier to petition the Court of Appeal for permission to appeal. The judgment is therefore now unappealable.

Although there are now two inconsistent decisions at first instance in connection with Article IV(5)(a), it is submitted that the detailed and careful reasoning, and decision, in *The Thorco Lineage* will be followed in the future, and that the decision in *The Limnos* will not be followed.

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