

## Chapter 5

### Hague-Visby gross weight limitation.

In *The Limnos*, [2008] EWHC 1036 (Comm), [2008] 2 Lloyd's Rep. 166] Burton J held that the gross weight alternative in art. IV r 5 (a) must be calculated solely by reference to the weight of cargo that is physically lost or damaged and excludes the weight of cargo that has suffered a purely economic loss, even though such a claim is subject to limitation. Therefore, only the package limitation would apply to a claim for delay where the cargo arrives late, but in sound condition. With bulk cargo no limitation figure could be set for such a claim.

## Chapter 6

### Conclusion of UNCITRAL's 'Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'

On 3 July 2008 the United Nations Commission on International Trade Law (UNCITRAL) approved the draft 'Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' which was adopted by the Legal Committee of the General Assembly on 14 November 2008. On 11 December 2008 the Convention was adopted by the General Assembly of the UN who authorised the ceremony for the opening for signature in Rotterdam to be held on 23 September 2009. The Convention will be known as 'The Rotterdam Rules'. It will come into effect on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession. Whether the new Convention avoids the fate of the Hamburg Rules remains to be seen.

The project is ambitious in that it is not confined to the familiar territory of the sea carrier's liability for cargo. It also tackles important associated issues that have, hitherto, been left exclusively to national law, such as: the cargo owner's title to sue and its liability under negotiable transport documents, as bills of lading are referred to in the convention; the obligations of the consignee in respect of delivery of the cargo; and the cargo owner's right of control over the cargo during the voyage, particularly its right to vary the discharge port. The Convention has been drafted so as to allow electronic documentation to be covered in the same way as conventional paper documentation. It also covers multi-modal carriage involving sea carriage which raises difficult issues of how the new Convention will interact with existing carriage conventions such as CMR. The Convention also contains optional chapters on jurisdiction and arbitration. A full analysis of the new Convention will appear in the forthcoming fourth edition of 'Shipping Law'.

## Chapter 9

### Legal fitness to carry cargo under time charters

The terms of a time charter as to fitness to carry a cargo or as to seaworthiness are capable of embracing legal fitness to carry the cargo. In *The Elli and the Frixos*, [2008] EWCA Civ 584, [2008] 2 Lloyd's Rep. 119, the shipowners were held to be in breach of charter after the coming into force of new regulations for double-hulled vessels, with which G's vessels did not comply, under the Convention for the Prevention of Pollution from Ships 1973 (MARPOL). Clause 1(g) of Shelltime 4 required the vessels to have on board the documents required "from time to time" by any applicable law to enable her to perform the charter service, even though cl.1 began as follows 'At the date of delivery of the vessel under this charter.' However, this is not the case as regards 'Rightship' approval which is a private vetting system set up by three major companies in the coal and iron markets. In *The Silver Constellation*, [2008] EWHC 1904 (Comm).[2008] 2 Lloyd's Rep. 440] such approval was held not to be required under clause 1 of the NYPE form nor under cl.31 which required the vessel to have the necessary certificates to be 'eligible' for trading

to permitted ports. However, the charterers were entitled to require the shipowners to have a Rightship inspection, as this would be an order as regards employment under cl.8.

Safe port and safe berth warranties in voyage charters

In *The Archimidis*, [2008] EWCA Civ 175, [2008] 1 Lloyd's Rep. 597, the Court of Appeal held that effect should be given to an express warranty of safety in a voyage charter in relation to a port that was specified in the charter itself. In *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [fn [2008] EWHC 1875 (Comm).] Aikens J held that a warranty as to the safety of a berth nominated by the charterer was not to be implied in the following circumstances. The charter was on GENCON form and was for loading at a named port and contained no express warranty as to the safety of the port. Clause 1 had been amended to delete 'safely' from the reference to the vessel proceeding to the loading port. Under cl.20 the shipowner agreed to investigate the named port or take the risk of any damage in getting into and out of it or in using it. The charterer's only obligation was not to nominate a berth which it was impossible to reach.

## **Chapter 10**

### **Liability for deadfreight**

In *The Archimidis*, [2008] EWCA Civ 175, [2008] 1 Lloyd's Rep. 597, the Court of Appeal held that a tender of the full amount of cargo by the charterers did not prevent their incurring a liability for deadfreight, as it was in fact not possible to load that quantity of cargo given draft restrictions at the port of loading. The charterers could have loaded the full quantity by taking up an option of loading by ship to ship transfer at anchorage, but they chose not to do so.

### **Lien on sub-freights**

In *Tagart Beaton & Co v James Fisher & Sons* [1903] 1 KB 391, the Court of Appeal held that there was no right to trace the payment of freight into the hands of the charterer or its agent. It still remains an open question whether this is also the case where the freight is paid to a third party. This issue came before Gross J in *Samsun Logix Corporation v Oceantrade Corporation* [2007] EWHC 2372 (Comm) [2008] 1 Lloyd's Rep. 450, but the point did not need to be decided, once it was found that payment to the charterer's solicitor, pursuant to a variation of a freezing order, constituted a payment to the charterer's agent.

## **Chapter 11**

### **Waiver of defective NOR by charterer's agents**

For there to have been a waiver of a defect in an NOR, the agents must have known of the facts rendering the notice invalid. There is no further requirement that the agents must also have known of the terms of the charter regarding the giving of NOR. In *The Northgate* [2007] EWHC 2796 (Comm) [2008] 1 Lloyd's Rep. 511 the charter provided that NOR could be given to the terminal at the load port who had the implied authority of the charterers to waive a defect in it. Waiver occurred through the terminal accepting the NOR with knowledge of the facts that rendered it defective. There was no additional requirement that the terminal should also have been aware of the terms of the charter regarding the giving of NOR.

### **Right to renominate loading/discharge ports**

In *The Antiparos* [2008] EWHC 1139 (Comm), [2008] 2 Lloyd's Rep. 237, which involved cl.4(c) of the Asbatankvoy form, it was held that the right to renominate must be expressly provided for in the charter and is not to be implied from a clause requiring the charterer to pay extra expenses incurred pursuant to a change in the loading or discharge port.

## **Chapter 12**

## Damages for late redelivery

The issue of what damages should be awarded in respect of a late redelivery has recently been considered by the House of Lords in *The Achilles*, [2008] UKHL 48, [2008] 2 Lloyd's Rep. 275. The shipowner suffered an unusual loss in that market rates had risen substantially by the time the vessel should have been redelivered but had then fallen back somewhat by the time the vessel was actually redelivered. The shipowner had to renegotiate the follow-on charter at a lower hire rate to avoid cancellation. At first instance, and before the Court of Appeal, damages were awarded on the basis of the difference between the agreed rate and the lower rate for the whole period of charter, and not just the difference between the market rate and the hire rate under the old charter for the period of the overshoot. The type of loss was within the contemplation of the parties and was recoverable in full, notwithstanding that the quantum of the loss was not such that could have been expected at the time of the contract. The decision, however, was reversed by the House of Lords. The decision was unanimous but their Lordships adopted a variety of approaches to reach this conclusion.

Lords Hoffmann and Hope based their decision on the ground that *Hadley v Baxendale* required account to be taken of the type of liability which the parties could be said to have undertaken. Here, it was commonly assumed in shipping industry that late redelivery would sound only in damages for the difference between hire and the market rate for the period of overshoot. Lord Hoffmann made the analogy with the assumption of risk in tort cases such as *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd (sub nom South Australia Asset Management Corp v York Montague Ltd)*. [fn [1997] AC 191.] Lord Hope stressed the need for the parties to have information about potential liabilities before them so as to enable them to provide for that in the contract. The loss here was due to how the shipowner had dealt with the follow on charterer and this was completely unpredictable and went beyond mere market fluctuations. This approach adds a completely new element into the process of calculating what damages may be awarded for breach of contract – the type of liability the parties could be taken to have undertaken under their contract.

Lord Rodger of Earlsferry based his decision on the more orthodox ground that this type of loss was not within the contemplation of the parties. The parties would contemplate that although the shipowners might lose a fixture due to late redelivery, market availability of substitute fixtures would protect them. There might however be some scope for awarding a general sum for loss of business where the late redelivery of a particular vessel in a particular area at a particular time might mean that there was a poor market for its services. However, even this approach is at odds with the existing law in that the *type* of loss in issue, loss of a follow-on fixture, clearly was within the contemplation of the parties. What was not within their contemplation was the extent of such loss, due to unforeseeable market fluctuations at the end of the charter. However, previous authority is clearly to the effect that a loss which is within the parties' contemplation is recoverable in full, notwithstanding that the *extent* of the loss is unusually large. [fn *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 2 Lloyd's Rep 425; *Brown v KMR Services* [1995] 2 Lloyd's Rep 513.]

Lord Walker held that the charterer had not contracted on the basis that they would be liable for any loss, however large, caused by late redelivery where the charterer had no knowledge or control over the shipowner's forward fixture. Baroness Hale, along with Lord Hope, had initially been inclined to uphold the judgment of the lower courts. She preferred Lord Rodger's solution. The parties had not contemplated this particular type of loss. The loss was caused by extreme market volatility. This type of loss could not be said to be 'not unlikely', in contrast to that caused by missing a fixture. She did not take the approach adopted by Lords Hoffmann and Lord Hope of determining whether the contemplation of the parties had encompassed the particular type of liability for which the claim was being made. This would introduce a new element into the *Hadley v Baxendale* analysis, by importing into contract law the principles seen in tort law in the context of liability for professional negligence. Baroness Hale's views mean that the majority ratio of the decision is that the loss was not recoverable because it was not of the type that was within the contemplation of the parties at the date of the conclusion of the contract.

## Chapter 14

### Alternatives to 'ballast/laden' method of calculating damages

The aim of damages in a collision case is to effect restitutio in integrum. The usual method of doing this is the 'ballast/laden' method adopted in *The Argentino* (1889) 14 App Cas 519. The lost charter would have involved a ballast voyage to the new load port and a laden voyage under the fixture. A time charter equivalent rate is calculated for this period and then a similar calculation is made for the substitute fixture for the period in which it coincides with what would have been the period of the cancelled fixture. Damages are awarded on the difference between the two rates for the duration of the ballast and laden voyages on the cancelled fixture. However, this method is not invariably used. In *The Vicky 1*, [2008] EWCA Civ 101, [2008] 2 Lloyd's Rep. 45, the Court of Appeal held that the Registrar had correctly adopted an alternative method based on 'time equalisation'. This involved a calculation of the earnings the vessel would have made between the time the lost fixture would have ended and the time at which the longer substitute fixture actually ended. This method was more suitable for vessels which had one major loading area, the Arabian Gulf, which meant it was commercially important to discharge cargo as close as possible to that area. The method was also able to take account of the difference in voyage lengths between the cancelled and the substitute fixtures.

## Chapter 15

### Article 6(2) of the 1989 Salvage Convention

In *The Altair*, [2008] EWHC 612 (Comm), [2008] 2 Lloyd's Rep. 90, Gross J held that art. 6.2 of the 1989 Salvage Convention was not limited to a salvage contract made by the master, or shipowner personally, or by an employee of the shipowner. It also applied to a salvage contract made by other agents, such as an employee of the shipowner's managers, provided they had the necessary authority from the shipowners. Accordingly, the salvors were able to enforce an arbitration award, as a judgment, against the Iranian cargo owners, who had not participated in the arbitration. It was irrelevant that Iran was not a party to the 1989 Salvage Convention. What mattered was that the LOF provided for arbitration in London and the Convention had the force of law in the UK.

### Application of the 'disparity principle'.

The 'disparity principle' states that in salvage cases where there is only immobilisation, and there exists no great urgency and only straightforward towage is required to effect a cure, it is important that the sum awarded should not be wholly out of line with commercial towage rates. The principle was regarded as fundamentally flawed by the arbitrator in *The Voutakos*. However, David Steel J, [2008] EWHC 1581 (Comm) 10 at para 45, held that commercial rates were admissible and relevant but their significance would depend on the facts of each case. 'In the simplest of towage cases they may be particularly influential and provide, subject to values, a floor to any award that could begin to be regarded as encouraging.' The award was remitted to the Appeal Arbitrator for reconsideration.

## Chapter 17

### Public law liability and the CLC

A public law liability may arise under EC legislation that exceeds the amount of compensation payable under the CLC and the Fund. In *Commune de Mesquer v Total France SA and Total International Ltd*, (C-188/07) [2008] 3 C.M.L.R. 16, the Grand Chamber of the European Court of Justice held that an oil spill was capable of involving the provisions of Directive 75/442 on waste. Heavy fuel oil was not waste while it was being carried, but was waste once it had been spilled. For the purposes of the Directive the shipowner could be regarded as the 'holder' of the waste. A national court could also find that the seller of the fuel or the charterer of the ship were producers of the waste. If the costs of disposing of the waste exceeded what

was recoverable under the CLC and from the Fund, the producer of the product could be held liable if their conduct contributed to the risk of pollution due to shipwreck.

### **The Protocol to the HNS Fund**

The 1996 HNS Convention has received only a few ratifications and a working group was set up in October 2007 to suggest amendments in three particularly problematic areas. First, the definition of the receiver of general cargo. It has been proposed that general cargo should not longer be regarded as contributing cargo under the HNS Convention, although it would still be possible to receive compensation from the HNS Funds in incidents involving general cargo if the compensation amount exceeded the shipowner's financial liability limit. It has been proposed to raise the shipowner's financial liability limit for damage to general cargo. Secondly, there is a problem of how to ensure payments for the Convention's LNG (Liquified Natural Gas) accounts. The 1996 HNS Convention places contributing responsibility on the party that is the owner of the LNG immediately before it is loaded, which causes problems when such owner is in a Member State that has not not ratified the Convention. The current proposal is that the receiver of LNG should be the contributing party. Thirdly, a mechanism is needed to ensure compliance by Member States on their obligation to submit information as to the quantity of contributing cargo they have received. It has been proposed that sanctions should be imposed on the Member States for failure to submit such information. Ratification of the Convention and entitlement of Member States to compensation will be conditional on compliance with this obligation.

The draft text to the Protocol was agreed at the 95th session of the IMO's Legal Committee on 9 April 2009. A Diplomatic Conference is likely to be held in 2010 with a view for final adoption.

### **Chapter 18**

The October 2008 amendments to the Civil Procedure Rules have resulted in various numbering changes. The most important are those relating to service of proceedings. Service without the leave of the court is now covered by CPR 6.33, while service without the leave of the court falls under CPR 6.36, 6.37, and para. 3.1 of Practice Direction B to Part 6.

### *The Rome I Regulation*

The Rome Convention is due to be replaced by Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) which must be implemented before 17 December 2009. The Rome I Regulation essentially replicates the Rome Convention as an EC Regulation. Although there has been some rewording to Article 3 on freedom of choice and a restructuring of Article 4 on applicable law in the absence of choice, it is likely that these provisions will operate in similar fashion to their equivalent provisions in the Rome Convention. It contains two important differences for the shipping lawyer. First, its provisions relating to the law applicable to contracts for the carriage of goods have been removed from Art 4 and now appear in Art 5(1) as follows;

To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

Unlike Art 4 of the Rome Convention, this article refers to the 'habitual residence' of the carrier and the consignor, rather than to their 'principal place of business', and to the place of 'receipt' and 'delivery' rather than to the place of 'loading' and 'discharge'. The second sentence of Art. 5(1) is new. Secondly, Art 7(1) of the Rome Convention on overriding mandatory provisions is replaced by a narrower provision in Art 9(3) of the Regulation, as follows:

Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

The reference to overriding mandatory provisions which 'render the performance of the contract unlawful' is considerably narrower than the previous reference in Art 7(1) of the Rome Convention to 'the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.' Without this amendment the UK would have been unable to opt in to the Regulation, as the required uniform application of Council Regulations would not have been subject to any reservation by a Member State.

### *The Rome II Regulation*

Tort proceedings commenced after 11 January 2009, where the events giving rise to damage occurred after 19 August 2007, now fall under Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). Article 3 provides for the universal application of any law specified by the Regulation, whether or not it is the law of a Member State. Article 25(2) provides that Member States are not obliged to apply the Regulation to cases that give rise to conflicts solely between separate territorial units located within them. The UK has, however, decided to apply the Regulation to such internal conflicts by SI no 2986, Private International Law – The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008; and SI no 404, Private International Law - The Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008).

The general rule is to be found in Art 4.1, as follows.

Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. [fn Where a claim is made in respect of environmental damage, Art. 7 provides for the application of Art 4.1 but gives the claimant the option of basing the claim on the law of the country in which the event giving rise to the damage occurred.]

Where the claimant and the defendant both have their habitual residence in the same country at the time the damage occurs, Art 4.2 then applies the law of that country. An 'escape route' from these rules is provided in Art 4.3 which provides:

Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 15(c) provides that questions of damages are covered by the applicable law under the Regulation. This reverses the previous position under English law where such issues were dealt with under the law of the forum. Article 16 preserves the application of the mandatory rules of the law of the forum. Article 26 preserves the application of the public policy of the forum.

## Chapter 19

(n.b. In the fourth edition anti-suit injunctions will appear in this chapter rather than in chapter 18).

Anti-suit injunctions, arbitration, and the Judgments Regulation.

Until recently there was uncertainty concerning the consistency with the Judgments Regulation of the practice of granting anti-suit injunctions which prevent parties from bringing proceedings in the courts of another Member State, on the ground that such proceedings were in breach of an arbitration agreement. In this regard, the House of Lords in *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)*, [2007] 1 Lloyd's Rep. 391, submitted its views that such orders are consistent with the Regulation, since arbitration is excluded from its material scope by virtue of Art.1(2)(d), and referred the issue to the European Court of Justice. The case involved a collision of a vessel with the jetty of the charterer's Italian oil refinery. The charterparty was subject to English law and contained a clause providing for arbitration in London. The charterer was paid by its insurers who initiated proceedings in Italy against the shipowner. The shipowners then sought an anti-suit injunction in England on the grounds that the insurers' claim arose out of the charterparty and they were bound by its arbitration clause.

The opinion of Advocate General Kokott was given on 4 September 2008 to the effect that a court of a Member State could not grant an injunction in such circumstances. The Italian court had jurisdiction under art. 5 of the Regulation and it was for that court, as the court first seised, to determine preliminary issues relating to the validity of the arbitration agreement. The New York Convention did not require such issues to be determined by a court in the state in which arbitration was to be held. Although the Regulation excluded arbitration, this exclusion related to arbitration of the substantive dispute. Disputes as to the validity of an arbitration agreement were not excluded under art. 1 and could be determined by the court first seised of the claim. On 10 February 2009 the European Court of Justice gave its decision in accordance with the reasoning adopted by the Advocate General.