Package or Unit Limitation under the Hague-Visby Rules

In a recent landmark judgment, the Commercial Court has decided what constitutes a 'unit' for the purposes of limitation under Article IV Rule 5 of the Hague Rules and the Hague-Visby Rules. The Court also gave important guidance on whether the Hague-Visby Rules can be compulsorily applicable even though the carrier issued a sea waybill rather than a bill of lading. Last but not least, the Court declined to follow what until now has been the only relevant authority on what constitutes a package or unit for containerised cargo under the Hague-Visby Rules, namely the Australian High Court decision in *El Greco v MSC*, from 2004.

Facts
The Defendant agreed to carry the Claimant's cargo of deep frozen tuna, comprising 6,448 unpackaged pieces of tuna loin weighing between about 20kg and 75kg each, stuffed into 3 of the Defendant's 'super freezer' containers. One of the containers also contained 460 bags of other types of tuna meat.

The Defendant prepared a draft bill of lading covering 12 containers of cargo including the subject 3 containers.

As a result of errors in transhipment, delivery of the 3 containers was delayed and although it was initially envisaged that the bill of lading would be issued, instead, in order to avoid any further delay the parties subsequently agreed to the issue of 3 sea waybills, one for each of the 3 containers and each of which identified the Claimant as consignee. The cargo was described in the same way in each sea waybill, for example, as follows:
1 Container Said to Contain 206 PCS FROZEN BLUEFIN TUNA LOINS – 18740.000KGS

The reference to the 460 bags of tuna which had appeared in the draft bill of lading, was mistakenly omitted from the cargo description in the sea waybill.

Upon delivery, the cargo in all 3 subject containers was found to have suffered damage allegedly due to reefer machinery failure. The Defendant carrier did not admit liability for the cargo damage but it was recognised that if a number of questions relating to the limitation applicable to the claim could be answered, this would likely encourage the parties to settle their dispute. In early March 2017 a hearing took place before the Commercial Court to determine agreed preliminary issues as follows:
Were the Hague-Visby Rules compulsorily applicable to the contract of carriage?

The Claimant argued that the Hague-Visby Rules applied by force of law pursuant to the Carriage of Goods by Sea Act 1971 ('the Act') because shipment was from Spain, a contracting state. Although no bill of lading was ever issued, the Claimant said that the contract of carriage was nevertheless 'covered by a bill of lading' for the purposes of the Act and the Hague-Visby Rules Article 1(b) because when the contract was made the parties contemplated that a bill of lading would be issued and the Claimant was entitled to demand the issue of a bill of lading (see *Pyrene v Scindia* [1954] 2 QB 402 as approved by the Court of Appeal in The *'Happy Ranger'* [2002] 2 Lloyd's rep 357, both cases in which cargo was damaged during the loading operation and no bill of lading was issued).

The Defendant sought to distinguish the case from Pyrene because sea waybills were issued and they argued that any right to demand the issue of a bill of lading was spent once waybills were

issued. The Defendant said that because a sea waybill is not a bill of lading under Article 1(b) (see The 'Rafaela S' [2005] 2AC 423), the Hague-Visby Rules could not apply compulsorily.

The judge followed Pyrene and found that so long as the terms of a contract require a bill of lading to be issued or the Claimant is entitled to demand one, it is immaterial whether a bill of lading was ever issued, or even whether a waybill was issued instead, and decided that the Hague-Visby Rules applied by force of law.

If the Hague Rules apply is the container or each individual piece of tuna the relevant package or unit for the purpose of Article IV rule 5

Given that the judge had decided that the Hague-Visby Rules applied compulsorily, the question (what is a unit under the Hague Rules?) did not apply. However, the judge chose to deal with it because in his view there is no difference in meaning of the words 'package or unit' under the Hague Rules and under the Hague-Visby Rules (see below).

The Claimant argued that the individual unwrapped and unpackaged pieces of tuna were the relevant 'units' and the 460 bags of tuna parts the relevant 'packages' for Hague Rules purposes. The Claimant relied on The *'River Gurara'* [1998] 1 Lloyd's Rep 225 (CA) which held that the carrier's liability under the Hague Rules is to be calculated on the number of packages or units that are proven to have been loaded in the container, not upon the number of containers.

The Defendant argued that the pieces of tuna were not 'units' in the accepted sense of 'shipping units' (as determined by The 'Aqasia' [2016] 2 Lloyd's Rep 10 (Commercial Court, Sir Jeremy Cooke)) because they required consolidation by stuffing them into a container in contrast to the examples of 'units' in the case law such as cars, large pieces of timber, tractors and generating sets. Accordingly, the Defendant said that only the containers themselves were the relevant 'units'.

The judge decided that the Hague Rules do not require any consideration of how the cargo could have been shipped if not containerised. He suggested that the container walls should be treated as 'transparent under the gaze of Article IV rule 5' and found that the only relevant question to ask is whether the individual physical items were in any way packaged together. He found that the cargo was a mixed cargo of ‘packages’ and ‘units’ with each bag being one package and each unpackaged tuna loin being one unit, since each was identifiable as a separate article for transportation within the container.

Assuming that the Hague-Visby Rules apply, is the container or the individual piece of tuna the relevant package or unit for the purposes of Article IV Rule 5 and in particular, are the individual pieces of tuna 'packages or units enumerated in the bill of lading as packed in such [container]' for the purposes of Article IV rule 5(c)

Having decided that each piece of fish constituted a unit for the purposes of the Hague Rules and the Hague-Visby Rules, the question then is whether or not such units were 'enumerated' in the bills of lading as packed in the container as required by Article IV, rule 5(c) of the Hague-Visby Rules. Until now there has been no English case law authority on this question and the only guidance has been from the High Court of Australia's majority judgment in *'El Greco'*. In that case the Australian Court held that the expression 'as packed' meant that individual items 'enumerated in the bill of lading' will only constitute the relevant 'units' under rule 5(a) if it is clear from the bill of lading description that those items have been packed into the container directly rather than packaged up separately e.g. into cartons or bundles. In *'El Greco'* the bill of

lading referred to a container *'said to contain 200,945 pieces'* when in fact the individual items (posters) had been bundled up together into 2,000 packages. In that case, the cargo was not correctly described *'as packed'.*

The judge disagreed with the finding in *'El Greco'* and decided that Article IV,5(c) merely requires that the number of units in a container is correctly stated on the bill of lading. As the sea waybills correctly stated that the containers contained a number of pieces of tuna, the waybills therefore 'enumerated' the number of units for the purposes of Article IV,5(c).

Whether the Hague Rules or the Hague-Visby Rules are applicable, is limitation to be calculated by reference to the cargo in all three of the containers collectively or individually per each container?

The judge dismissed the idea that a single liability limit should apply to the number of packages or units in all three containers, akin to a single contract price. He also rejected the idea that the Defendant's liability should be subject to an aggregate limit per container, calculated by reference to the number of tuna loins in that container. Instead, having first decided that each tuna loin was a 'unit' under both the Hague Rules and the Hague-Visby Rules, the judge decided that the limitation applied to each tuna loin separately, leaving no carry over of unused balances between units.

So, if the limitation amount is £100 per package or unit and two pieces of tuna (units) in a container suffered differing amounts of damage (one £200 and one £50) the recoverable claim will be limited to £150 not £200.

Summary

For the first time in English law we now have a clear judgment confirming the following:-

- The Hague-Visby Rules will compulsorily apply when the contract requires the issue of a bill of lading, even if a sea waybill is in fact issued
- The definition of 'unit' in the Hague Rules and the Hague-Visby Rules is the same and the large pieces of tuna in this case were "units" for the purpose of both.
- To qualify as a 'package or unit enumerated in the bill of lading as packed in [a container]' (Article IV, Rule 5(c) of the Hague-Visby Rules), it is sufficient that the physical items of cargo are accurately stated in the bill of lading and there is no additional requirement that the physical items must be described 'as packed'.
- The package or unit limitation in the Hague Rules and the Hague-Visby Rules should be calculated by reference to each individual package that has suffered damage.

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