

Bulk Cargo Limitation of Liability: The Aftermath of ‘The Aqasia’

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Abstract: This paper provides a critique of the law on limitation of liability for the carriage of goods by sea of bulk cargo. The 'unit' for determining the limit of liability for bulk cargo has been the subject of controversy under cargo regimes such as the Hague Rules. Famous texts such as *Scrutton on Charterparties and Bills of Lading* have adopted a legal position. This was followed by the obiter views of Evans J in *The Aramis* more than three decades ago. The matter arose once again before the High Court (QBD, Commercial Division) in *The AQAsia* in 2016. The appeal was considered by the Court of Appeal in 2018 and published recently. The outcome has not been helpful to the shipping industry as the Court of Appeal confirmed the decision of Sir Jeremy Cooke by concluding that the 'unit' in the cargo regime, did not apply to bulk cargo. This paper examines the basis of the Court of Appeal's decision and attempts to make useful suggestions that can be implemented in contracts of carriage in the aftermath of the appellate decision.

1 INTRODUCTION

There are two competing interests in the business of shipping goods around the world. The shipper (i.e. the consignor, who may be the cargo owner, or its agent) wants regular and reliable shipping services to transport goods from one port to another. By contrast, in order to provide this level of service, a sea carrier (i.e. a ship-owner, or a charterer of the vessel) will have to incur heavy capital expenditure. Hence shipping law balances these two interests by allowing the shipper to have a right of suit against the carrier for loss or damage to goods, thus providing a mechanism for recovering compensation. However, in order not to simply punish the carrier, for what is essentially a risky service, which is at the constant mercy of perils of the sea, the law provides some protection even when liability could be established against the sea carrier. This protection is known as limitation of liability.

For goods shipped from Malaysia, the legal mechanism which balances the competing interests of shippers and sea carriers is the Carriage of Goods by Sea Act 1950. The 1950 Act applies The Hague Rules into the municipal legal system of Malaysia. For containerised cargo the limit of liability has been set at £100 Gold Value (see *The Rosa S* [1988] 2 Lloyd's Rep 574) for each package or unit (see *The River Gurara* [1997] WLR 1128). There is some degree of

clarity as to what this means. *The Rosa S* has held that £100 Gold Value is the gold content of a Sterling coin. At today's value, 732.238 grammes of 916 gold under the Coinage Act 1971 (replacing the Coinage Act 1870), is estimated to be RM107,455.93 (Note: RM146.75 as at 24 July 2018). Further, *The River Gurara* has established that the package or unit for limitation of liability is the package or unit as agreed by the parties to the contract of carriage evidenced by the bill of lading.

This relative certainty with respect to containerised cargo, for many years, was thought to also extend to bulk cargo. In *The Aramis* [1987] 2 Lloyd's Rep.58 at p 67, Mr Justice Evans acknowledged that the 'freight unit' in the contract of carriage, or 'customary freight unit', could fall within the definition of the 'unit' referred to in The Hague Rules, although on the facts of that case, there was no evidence that this was adopted by the bill of lading. In *The Aramis*, the 'freight unit' in the bill of lading was 'kilogrammes' (i.e. in weight). There was no evidence that the 'customary freight unit' was 'metric tonnes' as was more commonly used in bulk shipping. For bulk cargo, there could not be a 'package' as bulk goods were stored in bulk (i.e. therefore unascertained) in the cargo hold, as this was the more cost effective way to ship such unpackaged goods. However, the calm waters of legal certainty came to an end with *The AQAsia*; *Sea Tank Shipping AS*

(formerly known as *Tank Invest AS*) v *Vinnlustodin HF and Vatryggingafelag Islands FH* [2016] EWHC2514; [2018] EWCA Civ 276. After the shock inducing decision of Sir Jeremy Cooke, sitting as a judge in the High Court, the Court of Appeal has confirmed that uncertainty.

2 A CRITIQUE OF THE COURT OF APPEAL'S JUDGMENT IN THE AQASIA

The three appellate judges (with the leading judgment delivered by Lord Justice Flaux) decided that the 'unit' in The Hague Rules referred to 'pieces' of cargo. It could not therefore apply to bulk cargo, which was usually measured either in 'weight' or 'volume'. Hence, the Hague Rules could only cover bulk cargo if the limitation was described as 'freight unit', not solely as 'unit'. The 'unit' is therefore a reference to a physical object, not a unit of measurement (see para 23-36).

It is submitted that this is a very restrictive way to interpret the Hague Rules. Lord Justice Flaux (see para 28) took the view that the definition of 'goods', although defined widely, was not helpful. It could not help to provide for a wide definition of the word 'unit'. His Lordship pointed to Article IV, Rule 2(n) that could only apply to physical items of goods when the 'insufficient packaging' exclusion was invoked. It is further submitted that this approach ignores a very important principle in the interpretation of the Hague Rules that 'International Law' has to be given its natural and ordinary meaning. This requirement is laid down by the Vienna Convention on the Law of Treaties (VCLT), in particular, Article 31(1). The practice of not adopting a narrow interpretation for international conventions such as the Hague Rules is not something new or unusual in shipping law. As long ago *Stagline v Foscolo Mango* 1932] AC 328 at p 350, Lord Macmillan reminded judges interpreting international conventions that a narrow approach should be abhorred in order to achieve uniformity in the construction of the Rules, which had to be applied worldwide across multiple jurisdictions. This advice was acknowledged by Lord Justice Flaux (see para 36) but then summarily dismissed, as the term 'unit' in the Hague Rules had not been interpreted in any other jurisdictions, thus there was no evidence of any difficulty faced in interpreting that word in other parts of the world.

Lord Justice Flaux should have not been so dismissive of giving the word 'unit' its wider natural

and ordinary meaning, so as to also include the concept of a 'freight unit' measurement. This approach to construction of international conventions is nothing new, and would not be inconsistent with English Law. For example, even in the context of a charterparty, Lord Justice Hirst in *The Trade Nomad; Poseidon Schiffahrt GmbH v Nomadic Navigation Co. Ltd.* [1999] 1 Lloyd's Rep.723 (CA), approving the judgment of Colman J at first instance, said that a charterparty must be construed to cover events that are within the "natural and ordinary meaning" of the words used in the charter. Unless there is a need for a technical meaning, for example as in some areas of marine insurance (such as the definition of 'theft'), a judge should adopt the language of the reasonable businessman as this is probably what was indeed intended when the contract of carriage was negotiated.

Lord Justice Flaux (see para 34-54) also examined the *travauxpreparatoires* of the Hague Rules and concluded that initial intentions to extend the word 'unit' to also include 'weight' and 'volume' were not followed though in the Final Draft. It is submitted that this ignores one very important rule of interpretation. The *travauxpreparatoires* is merely a secondary means to interpretation. The VCLT make it clear that if a word in an international convention is clear, it should be given its 'ordinary meaning'. Hence the primary means of interpretation in Article 31 should be applied first. Therefore, the *travauxpreparatoires* should not be resorted to in this case when the word 'unit', was sufficiently wide to refer to both a 'physical unit' and a 'unit of measurement', such as a 'freight unit'. This is clearly stipulated in Article 32, which classified the *travauxpreparatoires* as a secondary means of interpretation. Whenever Article 31 is applicable, such as in this case in *The AQAsia*, the alleged ambiguity could be solved simply with the application of 'ordinary meaning' of the word 'unit'. Thus, there is no need to resort to Article 32.

Another problem with the approach of Lord Justice Flaux, was identified by his Lordship himself in his leading judgment in *The AQAsia* (see para 59). The Hague-Visby Rules, were widely believed to be a clarification of the existing rules, which were first drafted around 45 years earlier in the Hague Rules. This later amended form of the Hague Rules contains a specific reference to a freight unit. Article IV, Rule 5(a) of The Hague-Visby Rules provides for 2 units of account per kilogramme for goods lost or damaged. It was not clear why this particular ground was not pursued in great depth in the appeal, but Lord Justice Flaux grudgingly acknowledged (see para 59) that this issues 'remains live'. This provides good ground

that the drafters of the Visby amendments believed that the earlier version of the Hague Rules could be interpreted widely and thus the word 'unit' could also encompass a 'freight unit'.

Although this author is not completely happy with the approach adopted by Lord Justice Flaux in *The AQAsia*, it is at the very least, consistent with previous English cases. These cases, when interpreting the word 'package', also proceeded on the assumption that the word 'unit' within that same phrase, only applied to physical objects. There a number of cases proceeding on this assumption, for example, *Studebaker Distributors Ltd v Charlton Steam Shipping Co Ltd* [1938] 1 KB 459, and also the unreported cases of *The Jamie*; *Bekol BV v Terracina Shipping Corporation et al.* (unreported, 13 July 1988) and *The Troll Maple* (unreported, 1990, quoted in *The Jaime* at para 42). This long line of authority was further strengthened by Mr Justice Andrew Baker in *The Maersk Tangier*; *Kyokuyo Co Ltd v AP Moeller-Maersk A/S* [2017] EWHC 654 (Comm), at para 83 who said that 'under English Law, when considering 'units' under The Hague Rules, the search is for identifiably separate items of cargo, as in fact shipped'. This therefore, leaves no 'wriggle room' for the argument that 'unit' could be sufficiently wide to encompass 'freight unit', a unit of measurement, rather than physical cargo.

Before the Court of Appeal's decision in *The AQAsia*, there was only one academic reference, where the authors were sufficiently brave to stick their heads above the parapets and champion the view that the word 'unit' was sufficiently wide to even encompass the concept of a 'freight unit'. That book was *Scrutton on Charterparties and Bills of Lading* (Scrutton). Using its 18th Edition, Mr Justice Evans in the earlier mentioned case of *The Aramis*, proposed that 'unit' in The Hague Rules, could be read to encompass a 'freight unit' of measurement where bulk cargo is involved. Scrutton is a much celebrated reference work, which not too long ago, reached the 125 years publication milestone. This long-lived academic work was commemorated with a special edition, i.e. the 22nd Edition. Scrutton is currently in its 23rd Edition (2017, with 1st Supplement).

However, Scrutton's *cause celebre*, with respect to the freight unit interpretation, came to an abrupt end in *The AQAsia*. Lord Justice Flaux politely described the view espoused by Scrutton as a 'minority' view. His Lordship also pointed out that if Mr Justice Evans (in *The Aramis*) wanted to say that the analysis in Scrutton was correct, he would have expressly said so, but he did not (see para 62). Lord Justice Flaux also emphasised that other writers such as

Temperley & Vaughan: The Carriage of Goods by Sea Act 1924, 4th Edition, 1932, at pp 81-82 state that 'the word unit connotes one of a number of things rather than a thing standing by itself ... it does not seem appropriate to describe the whole of a cargo or parcel of cargo in bulk'. Hence after the Court of Appeal's pronouncement in *The AQAsia*, it is a case of 'Rest in Peace Scrutton'.

3 WHAT IS THE LEGAL POSITION FOR THE SHIPPING INDUSTRY IN THE AFTERMATH OF THE 'AQASIA'?

3.1 Bulk Cargo Transported under Charterparties Incorporating the Hague Rules and Specifically Drafted Limitation of Liability Clauses

Even where contracting parties to a contract of carriage opt for a charterparty (as opposed to a bill of lading) as their contractual document of choice for the carriage of goods by sea, that charterparty could provide for the incorporation of a bill of lading regime such as the Hague Rules. Although charterparties are generally left unregulated by the law (i.e. due to the *laissez faire* attitude to charterparties as opposed to bills of lading) some shipowners and charterers actively choose to incorporate a bill of lading regime contractually (as opposed to incorporation by force of law) into the charterparty. An example of this can be seen in *Seabridge Shipping AB v AC Orsleff's Eftf's A/S* [1999] 2 Lloyd's Rep.685. There are also examples of charterparties incorporating the Hague-Visby Rules, as illustrated in *The Mariner* [1996] 1 Lloyd's Rep.301. Some parties even choose to incorporate the statutory version of the Hague Rules as enacted in the United States. This is demonstrated in *The O.T. Sonja* [1993] 2 Lloyd's Rep.435 where the charterparty incorporated the *US Carriage of Goods by Sea Act 1936*.

In the light of the Court of Appeal's decision in *The AQAsia*, this practice of incorporating a bill of lading regime into a charterparty for the transportation of bulk cargo by sea has to be performed with added caution. As the limitation of liability provisions in the Hague Rules no longer apply to bulk cargo, a specifically drafted limitation of liability clause that deals with loss or damage to

bulk cargo loaded under the charterparty has to be drafted. This clause must clearly spell out the freight unit for weight (e.g. ‘metric tonnes’ or ‘kilograms’) or volume (e.g. ‘cubic metre’, commonly described by the acronym ‘CBM’) depending on the type of bulk cargo carried, for the purposes of limitation of liability. Only with the addition of a purposefully drafted clause, it is submitted that any loss or damage to bulk cargo carried under a charterparty, could be subjected to limitation of liability.

Post-*AQAsia*, anyone negotiating a charterparty, cannot have the luxury of forgetting to include this specifically drafted limitation of liability clause for loss or damage to bulk cargo, in the final draft of the charterparty. As charterparties are now regarded as fairly complex legal documents, a court is unlikely to interfere with the contractual arrangements by implying such a clause into the charterparty. Ever since the Court of Appeal’s decision in *The Reborn; Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce* [2009] EWCA Civ 531 about a decade ago, a court would rarely imply a term into a contract, on the basis that it was necessary for business efficacy between the contracting parties. The Court of Appeal in *The Reborn* refused to correct an oversight that resulted in a safe ports clause being left out of a charterparty.

After *The Reborn*, a shadow was effectively cast over the long established case of *The Moorcock* (1889) 14 PD 64. For a long time before *The Reborn*, it was thought that a court would, as a matter of course, imply a term to give business efficacy to a business arrangement. For example, in *The Moorcock*, the implied term was that the jetty was safe to use. However, in the light of *The Reborn*, a contracting party that fails to include a specifically drafted limitation of liability clause for loss or damage to bulk cargo in the charterparty will not enjoy the protection of limitation of liability, as it is highly unlikely that such a clause would be implied into the charterparty. In modern shipping law, there appears to be a general reluctance by the courts to interfere with contracts negotiated by signatory parties who are assumed to have equal bargaining power, such as a shipowner and charterer. For example, in *The Clipper Sao Luis* [2000] 1 Lloyd’s Rep.645, Mr Justice David Steel went to the extent of refusing to imply a term that stevedores appointed by the charterers would take reasonable care not to endanger the ship or cargo, as that would be inconsistent with the express term imposing liability on the shipowner for bad stowage.

3.2 Bills of Lading Issued under Charterparties and/or Charterparty Bills of Lading for Bulk Cargo and the Importance of a Properly Drafted Incorporation Clause

Where the charterer operates the vessel in order to earn freight, after contracting with the shipowner, the charterer will receive cargo from a person who is a third party to the charterparty. When a bill of lading is issued for this third party, it will usually have an incorporation clause that purports to import all charterparty clauses into the bill of lading. Similarly, charterparty bill of lading, which in a short form bill of lading (i.e. without the famous fine print on the reverse), purports to import all charterparty clauses into the bill of lading. As the bill of lading regime no longer has an effective limitation of liability provision for bulk cargo after the Court of Appeal’s decision in *The AQAsia*, care must be taken to ensure that any specifically drafted limitation of liability clause for bulk cargo in the charterparty, is properly described by any incorporation clause contained in bill of lading. Otherwise, a lack of proper drafting of the incorporation clause, may result in the failure of that incorporation clause, to successfully import that specifically drafted charterparty bulk cargo limitation of liability clause into the contract of carriage evidenced by the bill of lading.

For example, there are a number of cases, which demonstrate that when incorporation clauses are not properly drafted, an arbitration clause cannot be exported from the charterparty into the contract of carriage evidenced by the bill of lading. What is clear from *The Varena* [1983] 3 All E.R.645, *T.W. Thomas v Portsea SS. Co. Ltd.* [1912] A.C.1, *The Federal Bulker* [1989] 1 Lloyd’s Rep.103 and *The Heidberg* [1994] 2 Lloyd’s Rep.287, is that an ‘arbitration clause’ is not a term, condition or exception of the charterparty. English Law requires very specific drafting such as that found in *The Merak* [1965] 1 All E.R.230 for the incorporation clause to be successful. In *The Merak*, the incorporation clause provided for “all the terms, conditions, clauses and exceptions ... “ of the charterparty to be incorporated into the bill of lading. This incorporation clause worked because the word ‘clauses’ in the incorporation clause was sufficiently wide to describe an arbitration clause, and could thus function to successfully import a charterparty arbitration clause into the bill of lading.

Hence, where the bill of lading contains a choice of law clause for 'English Law', it is submitted that a 'Merak type' incorporation clause will be necessary for the incorporation of a specifically drafted limitation of liability clause for bulk cargo from the charterparty into the bill of lading. The bulk cargo limitation of liability clause is neither a 'condition' of the contract, nor is it an 'exception'. Therefore, just like a provision for arbitration, the limitation of liability for bulk cargo will be a 'clause' as in *The Merak*, for the purposes of importation into the bill of lading. It appears that only English Law requires such degree of precision in the drafting of the incorporation clause. In this context, it would be advisable to even have the word 'limitation' in the incorporation clause, just to err on the side of safety. It is therefore arguably necessary to get professional legal advice before deciding on a formula for one's incorporation clause in a bill of lading issued under a charterparty, or one used in a charterparty bill of lading because of the degree of accuracy and clarity which English Law requires for its incorporation clause. The consequences of the incorporation clause not functioning as intended, could be dire as the 'carrier' under the bill of lading would be left unprotected by any exclusion clause for loss or damage to goods where the transportation involved bulk cargo. The carrier would therefore be potentially liable for the full amount of any such loss or damage to bulk cargo. Although in practice, this would probably be covered by 'Protection and Indemnity' insurance, this may affect the 'calls' of the club for the current financial year.

By contrast, where the bill of lading is subject to Malaysian Law, the position is rather different. At one time, it was thought that the same degree of precision required under English Law for an incorporation clause to function in a bill of lading. However, this assumption went out of the window in *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link SdnBhd* [2013] 5 MLJ 625. The Federal court held that a 'Palm Oil Refiners Association of Malaysia' (PORAM) arbitration clause could be incorporated into a contract for sale of palm oil using a 'general' incorporation clause. The Federal Court (see para 15-28) pointed out that the Section 9(5) of the Arbitration Act 2005 (which enacts Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 in its original form) merely stipulates that the arbitration 'agreement is in writing and the reference is such as to make that clause part of the agreement'. Hence '[o]n the issue of whether there is an incorporation of the STC and arbitration clause into the sales contracts

we noted the sales contracts prominently incorporate the STC with the caption 'ALL OTHER TERMS, CONDITIONS AND RULES NOT IN CONTRADICTION WITH THE ABOVE AS PER PIL'S TERMS AND CONDITIONS'. In our view as there is a specific mention in the sales contracts that all terms and conditions of the respondent's STC will be applicable, the intention of the parties is clear that arbitration clause would also be applicable'. Therefore, the Malaysian approach is that the word 'terms' and 'conditions' are sufficiently specific for the incorporation of an arbitration clause.

There are several points to note about the approach of the Federal Court in *Ajwa*. First, there is no requirement for the use of a very specific formula as is necessitated by English Law. If the Federal Court is correct, the arbitration clause is not a 'condition', and therefore their Lordships must have thought that an arbitration clause is caught by the word 'term' in the incorporation clause. Hence, the threshold for incorporation is very low as all provisions in the contract are 'terms' anyway. It is submitted that this is a word, which does not make a distinction between the various types of terms that are encompassed within a contract. Second, the *Ajwa* case does not deal with a bill of lading. Instead, the incorporation clause is in a contract for the sale of palm oil. If *Ajwa* is correctly decided, there is no reason why its principle cannot be extended to bills of lading, which have a choice of law clause for Malaysian Law, or which are caught by Section 2 of the Carriage of Goods by Sea Act 1950 where the shipment is made from a port in Malaysia. Third, *Ajwa* might be the catalyst for more industry stakeholders using Malaysian Law, and therefore also hopefully choosing Malaysia as a jurisdiction for dispute resolution.

3.3 The Effect of Supersession Clauses in Charterparty Bills of Lading

Generally, where a ship is chartered and a bill of lading issued under that charterparty to the charterer, the question arises as to which document (i.e. either charterparty, or the bill of lading), governs the relationship between the shipowner and charterer. In *Rodocanachi v Milburn Brothers* (1887) 18 Q.B.D.67, the Court of Appeal held that the charterparty remains the governing document, whilst the bill of lading is merely a receipt and document of title for the goods. The exclusion clause in *Rodocanachi*, which was found in the bill of lading (but not in the charterparty), could not protect the shipowner. Hence, in this relationship, where a clause

for limitation of liability is drafted to provide protection for the carriage of bulk cargo by sea, that clause would have to be specifically placed in the charterparty. There would be no need for an incorporation clause, as the bill of lading would not be relevant for the purpose of governing the relationship between the shipowner and charterer.

Exceptionally, the charterparty may contain a supersession clause. This clause provides that when a bill of lading is issued under the charterparty, that charterparty will be superseded by the bill of lading. The principle of supersession clauses were recognised in *The Jocelyne* [1977] 2 Lloyd's Rep.121 and if effective, the bill of lading will perform all of its three traditional functions, i.e. Firstly, a receipt for goods loaded on board the ship; Second, a document of title for the goods; and Third, evidence of the contract of carriage contained in the bill of lading. For the supersession clause to work effectively, the bill of lading must be in the form prescribed by the shipowner in the charterparty. On the facts of *The Jocelyn*, the bill of lading issued could not supersede the charterparty because it was issued with an arbitration clause as required by the agreement contained in the charterparty.

In the light of *The AQAsia*, charterparties that contain a supersession clause will have to specify that any bill of lading issued to replace that charterparty, must contain an expressly drafted clause for limitation of liability when bulk goods are carried by sea. Therefore, following *The Jocelyn*, only a bill of lading with such a specifically drafted clause for limitation of liability for bulk cargo would be in compliance with the specification laid down in the charterparty. Thus a bill of lading issued without such a clause would not be a document that is in compliance with charterparty instructions and thus, cannot successfully replace the charterparty as the contractual document, pursuant to a supersession clause.

4 CONCLUSIONS

Several observations can therefore be made after the decision of the Court of Appeal in *The AQAsia*, which flow from the fact that a carrier can no longer rely on the limitation of liability provisions in the Hague Rules for the carriage of bulk cargo by sea. First, specifically drafted limitation of liability clauses must be drafted for charterparties used for the transportation of bulk goods by sea, as incorporation of a bill of lading regime such as The Hague Rules, will not suffice. Second, where short form bills of

lading are used, a proper incorporation clause is needed to ensure that both the Hague Rules and the specifically drafted limitation of liability clause are successfully imported into the bill of lading. This appears to be the position under English Law, but not so for Malaysian Law, which allows a more general incorporation clause to be used. Third, usage of a supersession clause in the charterparty will have to be accompanied by an additional clause, which stipulates that only a bill of lading with a specifically drafted limitation of liability clause for bulk cargo will be in compliance with charterparty requirements and thus supersede the charterparty. In the light of the three obvious consequences that flow from the decision of the Court of Appeal in *The AQAsia*, drafters of both charterparties and bills of lading will have to pay more attention to the accuracy and precision needed for drafting of not only limitation of liability clauses, but also incorporation clauses, supersession clauses and choice of law clauses. It is therefore necessary to build into the checklist with respect to documentation for both charterparties and bills of lading, as the courts will not step in to imply such clauses. Therefore, the mantra for this area of the law, remains very much, 'help yourself'.

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