

Case Comment: *Jindal Iron & Steel Co. Ltd. and others v. Islamic Solidarity Shipping Co. Jordan Inc. (the “Jordan II”)* [2005] 1 Lloyd’s Law Report 57 (H.L.)

By H. Peter Swanson

Canada, like many nations, incorporates into its domestic law the Hague-Visby Rules for the carriage of goods by sea. The Hague-Visby Rules are found attached as Schedule 3 to Canada’s *Marine Liability Act*. The Hague-Visby Rules limit a carrier’s freedom to contract, but, in turn, provide for specific defences, including a one year limitation period, and a package limitation based on the greater of 666.67 special drawing rights per package or 2 special drawing rights per kilogram of gross weight of the goods.

The limitation on freedom of contract found in the Hague-Visby Rules has given rise to questions relating to the responsibility of the carrier when others (apart from those hired by the carrier) have performed the loading, stowing or discharging of cargo. Cargo claimants have, from time to time, tried to assert that the carrier is responsible for damage to cargo during loading, stowing or discharging, even when those operations have been undertaken by or on behalf of the cargo claimant. This issue often arises in the context of cargo carried on FIO terms (i.e. Free-in, Free-out).

The English House of Lords in the recent case of *Jindal Iron & Steel Co. Ltd. and others v. Islamic Solidarity Shipping Co. Jordan Inc. (the “Jordan II”)* [2005] 1 Lloyd’s Law Report 57 grapples with who has legal responsibility for damage to cargo during loading or discharging where the cargo is carried on F.I.O.S.T. terms (free in and out, stowed and trimmed).

The material facts of the case are fairly simple. A suit was commenced for damage to steel coils carried from Bombay, India to Barcelona and Motril. The cargo was carried, in part, pursuant to a voyage charterparty which contained the following terms:

- “3. freight to be paid at the rate of US \$... per metric ton F.I.O.S.T. – lashed/secured/dunnage ...
7. Charterer is to have full use of all vessel’s gear to assist in loading and discharging cargo. Vessel’s gear should only be considered as supplementary to the shore gear. Shore winch/cranemen to be used at all times.
17. Shippers/charterers/receivers to put cargo onboard, trim and discharge cargo free of expense to the vessel. Trimming is understood to mean levelling off the top of the pile and any additional trimming required by the master is to be for owner’s account ...”

Two bills of lading were issued for the cargo which provided that freight was payable “as per charterparty” and the bills of lading further incorporated “all terms and conditions liberties and exceptions of that contract”. In addition the Hague-Visby Rules were said to apply.

The issue before the first level of court was the proper construction of the charterparty and the contracts contained in the bills of lading, and whether the shipowner was under any liability for damage to the cargo caused during loading, stowage, laying of dunnage, securing and discharging. The hearing judge concluded the shipowner was not responsible under either the charterparty or the bills of lading so long as the damage was not caused by their acts or omissions. The cargo claimant appealed to the English Court of Appeal. On appeal the cargo claimant argued that Article 3, rule 2 of the Hague-Visby Rules imposed an obligation on the shipowner to properly and carefully load, stow and discharge the cargo, and that any contractual provisions to the contrary was void by reason of Article 3, rule 8. In essence, the cargo claimant argued the shipowner could not contract out of responsibility for loading, stowing and discharging cargo, and remained responsible whether the shipper's agent or servant loaded, stowed or discharged the cargo. Article 3, rule 8, on which the cargo claimant relied, provides as follows:

“Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.”

The English Court of Appeal rejected the cargo claimant's arguments and dismissed the appeal. The Court of Appeal confirmed that F.I.O.S.T. clauses do not automatically transfer responsibility for loading, stowing and discharging on to the charterer, shipper or receiver. The Court of Appeal held that “Free” simply means at no cost, it does not necessarily transfer the risk of the operation. To transfer the risk of the operation under Free in/out terms, the Court of Appeal said more was required. In this case the Court of Appeal concluded the words “...charterers to put cargo on board ... and discharge cargo free of expense to the vessel” not only imposed the cost of operation on the charterers, but also the duty to perform the function. Once the charterer or shipper performs the function, then the shipowner is not responsible for associated damage.

The cargo claimant, again not being satisfied with the decision, sought leave to appeal to the House of Lords which was granted. Five Law Lords heard the appeal. Lord Steyn wrote the judgment adopted by the other Law Lords. The decisions of the Court of Appeal and the hearing judge were affirmed. The House of Lords defined the central issue as being whether Article 3, rule 2 of the Hague-Visby Rules defines the “irreducible scope of the contract of service to be provided by the carrier by sea or whether Article 3, rule 2 merely stipulates the manner of performance of the functions which the carrier has undertaken by the contract of service.” The cargo claimant advanced the same arguments put before the Court of Appeal. They relied heavily on Article 3, rule 8 set out above.

The House of Lords summarized what it considered to be the existing law, as follows:

“Under the common law the duty to load, stow and discharge the cargo prima facie rested on shipowners but it could be transferred by agreement to cargo interests. In Pyrene ... Mr. Justice Devlin observed that the effect of Art. III, r. 2 of the Hague-Visby Rules was not to override freedom of contract to reallocate responsibility for the functions described in that rule. He said:

‘The phrase ‘shall properly and carefully load’ may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be

more consistent with the object of the Rules. Their object, as it is put, I think, correctly in Carver's Carriage of Goods by Sea, 9th ed. (1952), p. 186, is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in that respect, or to deny freedom of contract to the carrier. The carrier is practically bound to place some part in the loading and discharge, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their contract the part which each has to play. On this view the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide."

Despite the urging of the cargo claimants, the House of Lords was not prepared to deviate from its prior decisions. Importantly the House of Lords recognized that the Hague-Visby Rules were an international convention and not UK legislation and had to be interpreted somewhat differently. Lord Steyn recognized the interpretation previously given to the rules was not based on any technical rules of English law but rather was founded on a perspective relevant to the interests of maritime nations generally. He went on to note that it was far from obvious that the drafters of the Hague-Visby Rules would have necessarily concluded that a carrier should be liable to cargo owners for damage caused by cargo owners themselves when they undertook the relevant duty to load and discharge cargo badly. The House of Lords noted that English academics have accepted the law as expressed by Mr. Justice Devlin, and the House of Lords was not persuaded by contrary views or cases from other countries. In particular the House of Lords commented on various US decisions which have held that loading, stowing and discharging under US COGSA are "non-delegable" duties of the carrier. The House of Lords, however, noted the courts of Australia, New Zealand and other countries have followed the reasoning adopted by English courts.

Ultimately, the House of Lords adopted what appears to be a fair and just approach to the interpretation of the Hague-Visby Rules: charterers/shippers who contractually agree to load, stow or discharge cargo, will be responsible for damage caused during those processes by their servants. To impose liability on a shipowner for the acts of others hired by a charterer or shipper would seem unfair, and unwarranted. This decision, while useful, is not binding in Canada, and future Canadian cases will determine whether our courts adhere to this approach.

Peter Swanson is a partner and maritime lawyer with Bernard & Partners and can be reached at swanson@bernardpartners.com