STAUNCH SHIPS – DUE DILIGENCE EQUALS ABSOLUTE OBLIGATION?

A shipper's rights against the carrier of his goods will normally be contained in the contract evidenced by the bill of lading issued by the carrier upon accepting the shipper's goods for carriage. Where the Hague Rules[1] (hereinafter referred to as 'the Rules') come into the picture[2], the rights of the shipper for a minimum care regime is guaranteed if the following elements are fulfilled:

1. That the shipper ships his goods under a contract of carriage evidenced by a bill of lading or any similar document of title.[3]
2. That the carriage of his goods is in a ship carrying goods from any port in Malaysia.[4]
3. That the shipper is shipping any article of every kind whatsoever except live animals.
4. That the shipper's goods is not carried on deck and is so stated.[5]

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[1]Rules made by the International Conference on Maritime Law held at Brussels in October 1922 (amended 1923). These rules were incorporated in an international convention signed in Brussels on 25th August 1924 by major maritime nations. Before being applied throughout the Federation, the Rules were applied exclusively in the former Federated Malay States, Johore and the Straits Settlements.

[2]As they will in Peninsular Malaysia, by virtue of section 2 of the Carriage of Goods by Sea Act 1950; in Sabah, by virtue of the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961, and in Sarawak, by virtue of the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960.

[3]However, in the case of Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd [2000] 5 MLJ, Ian Chin held that the Hague Rules also applied to a shipping order as it could also amount to a document of title.

[4]Section 2 of the Carriage of Goods by Sea Act 1950.

[5]Article 1(c) of the Hague Rules.

One of the things a shipper will be concerned with when choosing a particular liner vessel or a vessel sailing directly to the port of destination is whether the vessel will be able to carry his cargo safely to its destination without sinking into the bottom of the sea at any time during the voyage. In other words, whether the vessel is seaworthy. Seaworthiness of the vessel is a basic obligation of the shipowner towards persons utilizing his ship and is implied by the law even without expressly being incorporated into the contract. At common law, the duty to provide a seaworthy ship is absolute, subject only to the defences of Act of God, Act of the Queen's enemies and inherent vice.[6] Even these defences will not avail the shipowner if he was found to be negligent. Nevertheless, parties to a charterparty frequently include clauses relating to seaworthiness of the vessel in the charterparty itself[7] and this is allowed by the law, even to the extent of excluding or limiting their liability regarding that duty.[8]

However, for a shipper to find clauses relating to seaworthiness in his bill of lading may be rare.[9] This is because, the Hague Rules would have sealed the obligations of the carrier regarding his duty to provide a seaworthy ship for the shipper, leaving no room for modifications, except for a voluntarily higher degree of responsibility on the part of the carrier[10] which a carrier is unlikely to 'voluntarily' offer. Thus, the need to include terms relating to seaworthiness in the bill of lading may be redundant.

The duty regarding seaworthiness of the vessel imposed on the carrier is found in Article III rule 1 of the Hague Rules, which states:

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[6]Wilson, Carriage of Goods by Sea, 1998, p. 186.

[7]See Shellvoy Charter, Gencon Charter and Baltime Charter.

[8]Unless the Rules are incorporated into the charterparty, where Article III rule 8 renders any clause relieving the carrier or the ship from liability as provided under the Rules null and void and of no effect.

[9]See Conline Bill, P & O Nedlloyd Bill, Combicon Bill and GCBS Short Form Bill.

[10]Article V of the Hague Rules.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to-

(a) make the ship seaworthy;
(b) properly man, equip, and supply the ship;
(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.

Therefore the duty provided under the Hague Rules is similar to the undertaking provided by the common law, i.e. that the duty encompasses not merely the vessel's seaworthiness in the sense of it being physically fit and suitably manned and equipped to face ordinary perils of the seas, but also cargoworthy, meaning the vessel must be in a state fit to receive the particular cargo contracted to be carried.

The basic difference between the duty imposed by the Hague Rules and that implied under common law is that the duty to provide a seaworthy ship in both aspects of seaworthiness (i.e. seaworthiness pure and simple and cargoworthiness) is one of due diligence under the Rules, whereas under the common law the duty is absolute. In the latter, should a breach of the duty occur, the shipowner will be liable even though he was not at fault. In the former, he is only required to exercise due diligence to fulfill his duty. Hence, theoretically there is a reduction in degree of the duty where the Rules apply though the due diligence requirement is a personal obligation on the part of the carrier.[11]

Would this mean that the duty cannot be delegated? Surely the shipowner cannot be expected to carry out the repairs himself; just because he owns ships does not mean he knows anything about fixing it (though some may have the technical skills to do so). Tetley's view on this is, "the carrier may employ some other person to exercise due diligence, but, if the delegate is not diligent, then the carrier is responsible."[12] Essentially, under the Rules the duty is personal to the carrier. Even if he had exercised due diligence in selecting a competent

[11]Wilson, Carriage of Goods by Sea 1998, p. 187.

[12]Tetley, W., Marine Cargo Claims, 1988, p. 391.

independent engineer to ensure the ship's seaworthiness, he would still be liable for breach of that duty if the latter has failed in his duty to render the ship seaworthy. Delegation of duty is no defence.[13]

Now if the carrier has no expertise to do the repairs himself and he engages reputable and competent experts to perform the task, why should he not be entitled to rely on their professional workmanship? Why should he still be held liable if the independent contractor to whom he has delegated the task was the one negligent. The carrier would have no way of checking the work of the independent contractor because he lacks the expertise. If he did, he might as well do the job himself, and save his money. If he is still liable after having to fork out a fortune to get someone reputable to make sure that his ship is seaworthy, does this mean that his supposedly reduced liability under the Hague Rules is no different from his absolute liability under the common law? In this respect, the carriers' complaint that their liability is still absolute, with or without the Rules, is understandable.

In the case of *The Muncaster Castle*[14], the carrier had called in a reputable firm of ship repairers to undertake a loadline survey of the vessel. This process involved an inspection of the storm valves which was actually undertaken under the supervision of a Lloyd's surveyor. After the inspection, the task of screwing back the inspection covers of the storm valves was delegated to a fitter employed by the ship repairers. The fitter was negligent in tightening the nuts and this caused them to loosen during the subsequent voyage. The loosened inspection cover thus allowed water to enter the hold and damage the cargo inside. Even though the carrier was not negligent himself in the sense he had chosen the best people to do the repairs, the House of Lords held that the carrier was still liable for breach of the obligation to exercise due diligence to ensure the seaworthiness of the ship.

According to Lord Radcliffe, his reasoning was that,

> "I should regard it is as unsatisfactory, where a cargo owner has found his goods damaged through a defect in the seaworthiness of

[13]The Muncaster Castle [1961] AC 807, [1961] 1 Lloyd's Rep. 57.

[14][1961] 1 Lloyd's Rep. 57.

> the vessel that his rights of recovering from the carrier should depend upon particular circumstances in the carrier's situation and arrangements with which the cargo owner has nothing to do; as, for instance, that liability should depend on the measure of control that the carrier had exercised over persons engaged on surveying or repairing the ship, or on such questions as whether the carrier had or could have done whatever was needed by the hands of his own servants or had been sensible or prudent in getting done by other hands. Carriers would find themselves liable or not liable according to circumstances quite extraneous to the sea carriage itself."[15]

Viscount Simonds advanced his reasoning as,

> ".....no other solution is possible than to say that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done."[16]

What exactly is meant by due diligence? The draftsmen of the Hague Rules adopted a term taken from the Harter Act 1893 (USA). The courts have interpreted the term to mean something along the line of the duty of care under common law. This means that the carrier has the same duty as that of a reasonable carrier in the same circumstances. Again here there would be a similar objective test approach as used under the common law absolute obligation to provide a seaworthy ship. For example, in *McFadden v. Blue Star Line*[17], Channell J said that the "the vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the possible circumstances of it."[18] In the case of *President of India v. West Coast Steamship Co.*[19], District Judge Kilkenny said, "....the obligation, although absolute, means nothing more or less than the duty to furnish a ship and equipment reasonably suitable for the intended use or service."[20]

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[15]*Ibid.* at p. 82.

[16]*Ibid.* at p. 71.

[17][1905] 1 K.B. 697.

[18]*Ibid.* at p. 706.

[19][1963] 2 Lloyd's Rep. 278.

[20]*Ibid.* at p. 281.

An extension of this duty is that the obligation cannot be delegated. Therefore, it is not just the carrier who cannot afford to be negligent, the person to whom he delegates also cannot be, or else the carrier will be liable for the latter's negligence as well. This is so whether the third party is the servant of the carrier, an independent contractor, or even a Lloyd's surveyor.[21] Therefore, the meaning of the obligation to exercise due diligence is best seen not by itself but by comparing it with the obligation to provide a seaworthy ship at common law. In the former, where neither the carrier nor the person to whom he delegated the performance has been negligent, the obligation of due diligence is deemed to have been fulfilled. In the latter, the carrier is liable irrespective of fault unless he can invoke one of the common law exceptions as stated above, and these defences in turn will be defeated if the carrier was negligent. In one sense, there is a reduction in the level of the duty under the Rules, i.e. if the carrier was not at fault, he is no longer liable unlike under common law. However, since the carrier will also be liable for persons to whom he delegated the work to, in the belief that they are expert and skilled persons and that they can be relied upon in discharging his obligations to provide a seaworthy ship, and whose work he has no means of checking, the scales are seemingly being tipped back to its original position.

This means that the basic underlying duty of the carrier or shipowner in any contract for the carriage of goods by sea is not to be negligent, whether it is a charterparty contract or a contract evidenced by a bill of lading subject to the Rules. In fact, the position of shipowners under a charterparty where the Rules are not incorporated is better because there he can exclude his liability under common law by wording appropriate exception clauses in the charterparty. The law does not prevent him from doing this but, like any other exclusion clauses, it will be interpreted in a restrictive and qua *contra proferentem* manner.

Since the carrier almost always inevitably engages third parties to perform the task of repairing and inspecting the ship to ensure its seaworthiness, there is little comfort on the part of the shipowner or carrier as to his obligation to provide a seaworthy ship under the Rules. There is not much difference in the final outcome although under the Rules, he is shielded by a time bar of one year[22], the catalogue

[21]*The Amstelslot* [1963] 2 Lloyd's Rep. 223.

[22]Article III rule 6.

of defences available[23], and limitation of liability to the equivalent of 100 pounds per package.[24] However, even the catalogue of defences cannot be relied on if the unseaworthiness occurred before and at the beginning of the voyage.[25]

In any event, the carrier can always have a separate indemnity agreement with his independent contractor if nthe latter's negligence was the cause of the carrier's breach of the obligation to provide a seaworthy ship.

A strict application of the obligation to provide a seaworthy ship imposes a heavy responsibility on the shipowner or carrier. This is not only in line with the spirit of the Rules to protect cargo owners, but goes down well with the common law basic principle that it is the basic duty of the shipowner to take care of the cargo entrusted to him, since he is paid for that service. Furthermore, no one but the carrier knows what happens after your cargo is placed on board the carrying ship and the ship disappears into the horizon.

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[23]Article IV rule 2.

[24]Article IV rule 5.

[25]Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine [1959] A.C. 589.

RELEVANCE OF PARTNERSHIP PRINCIPLES IN COMPANY LAW - WINDING-UP ON THE 'JUST AND EQUITABLE' GROUND

Three interesting cases were reported in consecutive years in relation to applications by shareholders to wind-up the company based on the 'just and equitable' ground pursuant to s 218(1)(i) of the Companies Act 1965. They are *Fairview Schools Bhd v Indrani a/p Rajaratnam (No 2)*,[1] *Ngan Tuck Seng v Ngan Yin Hoi*[2] and *Loh Eng Leong v Lo Mu Sen & Sons Sdn Bhd*.[3]

In *Fairview Schools Bhd*, several shareholders of Fairview School Bhd applied to court for an order that the company be wound up based on, inter alia, the 'just and equitable' ground. They protested against the sale of several vital company assets. The trial judge found that the company was a quasi partnership and, relying on *Ebrahimi v Westbourne Galleries Ltd*[4] and *Re Yenidje Tobacco Co Ltd*,[5] ordered that the company be wound up. Among the factors which influenced the judge's decision were :

(1) the assets of the company belong to the shareholders; and
(2) the sole reason of the company's existence was that it should oversee and manage the assets.[6]

The Court of Appeal disagreed. The appellate court discussed who the actual owner of the assets in question was, whether it belonged to the shareholders or the company, and in the end concluded that the company alone was the beneficial owner of all its assets. This alone,

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[1][1998] 1 MLJ 110.

[2][1999] 5 MLJ 509.

[3][2000] 5 MLJ 529.

[4][1973] AC 360.

[5][1916] 2 Ch 426.

[6]*Supra*, note 1 at p 114.