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To: Transport Industry Operators

Hague Visby Rules vis-a vis transhipment

In this issue, we would like to discuss an important English Court case authority establishing the principle that the Hague Visby Rules ("the Rules") apply from the port of loading to the port of discharge, covering the transhipment port's operations ashore. The judgment was issued by the Queen's Bench Division of the Commercial Court in England on 27 October 1983. [1984] Vol. 1 Lloyd's law reports 317

This was a claim by Mayhew Foods Ltd. ("Mayhew") as shipper against Overseas Containers Ltd. ("OCL") as carrier in respect of a carriage of a cargo of food which was found on arrival at its destination to be unfit to eat. OCL accepted that the food became unfit and that it was liable for the deterioration of the food, but sought to limit its liability in reliance on the terms in its bill of lading. Mayhew claimed that the carriage was subject to the Carriage of Goods by Sea Act, 1971 ("the 1971 Act"), and the Rules scheduled thereto and that, accordingly, the contractual limitation of liability clause was of no effect.

On about 27 November 1981, Mayhew and OCL made a contract for the carriage of a refrigerated container of Mayhew's products from Uckfield in Sussex to Jeddah in Saudi Arabia. The products consisted of 1,100 cartons (weighing 8,685 kilogrammes) of chicken and turkey portions, some cooked, some uncooked, and a few breaded drumsticks which were uncooked. It was necessary that they should be deep frozen at minus 18 deg. C. It was envisaged that the goods would be carried in a refrigerated container on the vessel *Benalder*. The cartons were stuffed into a refrigerated container at Uckfield on 3 December. They were then taken to Shoreham and were, on 5 December, carried from Shoreham to Le Havre on a vessel named *Voline*, arriving in Le Havre on the 6th. The container was discharged and remained in Le Havre until it was loaded on *Benalder* on 11 or 12 December. *Benalder* arrived in Jeddah on 21 December, but permission to discharge this container was refused because the cargo had decayed and offensive juices were dripping from it. The temperature control on the container, instead of being set at minus 18 deg. C., had been set at plus 2 deg. C. to plus 4 deg. C. OCL accepted that, as a result of this failure to refrigerate the goods in the container, it was in breach of its contract and of its duty as a bailee, and at law, in failing to take reasonable care of the goods and to carry, keep, and care for the same properly and carefully.

After the damage state of the cargo was discovered at Jeddah, the contents of the container were deep frozen to the required temperature and the container remained aboard the vessel as it continued its journey to the Far East. The container was returned to Mayhew on 25 February 1982. The food was then found to be unfit for human consumption and was sold at 2p per pound for animal food.

OCL's bill of lading showed Mayhew as the shipper. The consignee was to order. The notify party was United Foods Ltd., Jeddah. The place of receipt of the goods was shown as Mayhew's Uckfield premises; the place of delivery as a numbered berth in Jeddah. The intended vessel and voyage number were shown as "*Benalder* 0418". The "intended port of loading" was Southampton; the "intended port of discharge" Jeddah. The place and date of issue were entered as "London 08 12 81". The bill of lading bore a signature on behalf of OCL and a stamp which read—

> Shipped on board per ocean vessel *Benalder* on 12 December 1981 for Overseas Containers Ltd. …

followed by a further signature.

Clause 7 specified how any compensation recoverable should be calculated and specified an upper limit of—

> … US $2 per kilo of gross weight of the Goods lost or damaged.

It was this provision, on which OCL relied to limit its liability to US$17,370.

Clause 21 provided:

> Methods and Routes of Transportation 1/ The Carrier may at any time and without notice to the merchant:—a/ use any means of transport or storage whatsoever. b/ transfer the Goods from one conveyance to another including transhipping or carrying the same on another vessel then the vessel named overleaf or on any other means of transport whatsoever…d/load and unload the Goods at any place or port (whether or not any such port is named overleaf as the Port of Loading or Port of Discharge) and store the Goods at any such place or port. 2/ The liberties set out in sub-clause 1/ may be invoked by the Carrier for any purpose whatsoever…and anything done in accordance with sub-clause 1 or any delay arising therefrom shall be deemed to be within the contractual carriage and shall not be a deviation.

In seeking to limit its liability to US$2 per kilo prescribed by cl. 7 of the bill of lading, OCL submitted: (1) that the Rules did not apply to this carriage until the goods were shipped aboard *Benalder* at Le Havre on 11 or 12 December 1981 : (2) that even if the 1971 Act and the Rules did apply during the carriage by sea from Shoreham to Le Havre, they did not apply when the goods were lying ashore at Le Havre before shipment aboard *Benalder* : (3) that during any period when the 1971 Act and the Rules did not apply, OCL were entitled to limit its liability in accordance with cl. 7 of the bill of lading : (4) that by the time the goods were loaded aboard *Benalder* at Le Havre on 11 or 12 December, from which time the 1971 Act and the Rules did apply, the goods had already deteriorated to such an extent that Mayhew thereafter suffered no loss and damage as a consequence of OCL's failure to refrigerate.

The first of these submissions rested on the contention that the bill of lading related to the shipment on *Benalder* as shown by the reference to the intended vessel and to the stamp. That shipment occurred at Le Havre. No bill of lading was issued in respect of the sea leg from Shoreham to Le Havre and the bill of lading did not cover it. Mayhew could not rely on the 1971 Act and the Rules before loading aboard the vessel nominated in the bill of lading to undertake the sea carriage.

The Judge could not accept this submission. The contract was for carriage of the goods from Uckfield to Jeddah. The Rules did not apply to inland transport prior to shipment on board a vessel, because under s. 1 (3) of the 1971 Act, they are to have the force of law only in relation to and in connection with the carriage of goods by sea in ships. But the contract clearly provided for shipment at a United Kingdom port, intended to be Southampton but in the event Shoreham, and from the time of that shipment, the 1971 Act and the Rules plainly applied. It did not matter that the vessel on which the container left the United Kingdom was not *Benalder*, because OCL had liberty to substitute vessels or tranship and *Benalder* was only the intended vessel. Nor did it matter that the bill of lading was issued some days after the goods had arrived in Le Havre showing *Benalder* and Southampton as the intended vessel and port of shipment. The parties clearly expected and intended a bill of lading to be issued and when issued it evidenced the parties' earlier contract. Since the bill of lading was issued in a contracting state and provided for carriage from a port in a contracting state, the Judge thought it plain that the Rules applied once the goods were loaded on board the vessel at Shoreham.

OCL's second submission was that the 1971 Act and the Rules only applied—

> …in relation to and in connection with the carriage of goods by sea in ships…

It was argued that even if the statutory provisions governed carriage from Shoreham to Le Havre, they did not apply while the goods were lying ashore at Le Havre. In short, it was said that the interval of storage at Le Havre was not carriage by sea and so not covered by the Rules.

The Rules do not apply to carriage or storage before the port of shipment or after the port of discharge, because that would be inland and not sea carriage. But between those ports the contract was, despite the wide language of cl. 21, for carriage by sea. If, during that carriage, OCL chose to avail itself of its contractual rights to discharge, store and tranship, those were, in the Judge's judgment, operations "in relation to and in connection with the carriage of goods by sea in ships", to use the language of the 1971 Act, or were "within the contractual carriage", to use the language of cl. 21 (2) of the bill of lading. It would, the Judge thought, be surprising if OCL could, by carrying the goods to Le Havre and there storing the goods before transhipment, rid itself of liability to which it would have been subject had it, as contemplated, shipped the goods at Southampton and carried them direct to Jeddah, the more so since Mayhew had no knowledge of any voyage to Le Havre. The Judge's conclusion was that the Rules, having applied on shipment at Shoreham, remained continuously in force until discharge at Jeddah. It did not matter whether the damage to the cargo occurred before or after the container was loaded on board *Benalder*, provided only that it occurred only after shipment at Shoreham.

The Judge accepted the OCL expert's evidence that heat was applied to the cargo for most of the time from 4 to 11 December. The Judge accepted the expert's evidence that between 8 and 10 December the cargo was absorbing heat during its final thawing-out phase, with the result that the great bulk of the cargo was completely thawed out by early on the 11th. By 11 December these conditions would have prevailed for some uncooked products for a number of days, and for a day or two in almost all cases.

On the measure of damages recoverable by Mayhew, its claim was originally based on its c.i.f. invoice price to United Foods Ltd. at Jeddah, making the appropriate allowance for the animal food sale price. It amended to increase this price by 25 per cent. Under art IV, r. 5 (b) of the Rules—

> The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of the goods of the same kind and quality.

To prove the value of the goods or the market price or the normal value, Mayhew relied on a letter from United Foods Ltd. outlining the margins upon which it normally worked to achieve its desired return. If evidence at all, this letter did not prove the value or market price of the goods and it was quite unclear whether this company was describing wholesale or retail sales. There was no other evidence. In this unsatisfactory situation, Mayhew should, in the Judge's judgment, recover no more than the c.i.f. invoice price, less the animal food sale price, which came to £27,985.02. There would be judgment for Mayhew for that sum.

Please feel free to contact us if you have any questions on the case or if you would like to have a copy of the judgment.

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