

“All That Glisters”: The Gold Clause, the Hague Rules and Carriage of Goods by Sea

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All that glisters is not gold;
Often have you heard that told: ...
Fare you well; your suit is cold.¹

The quest for an internationally recognised, uniform liability regime which allocates the risk of loss or damage to cargo carried by sea has been a dominant theme of maritime law for over a century. After a number of false starts, the International Law Association and the Comité Maritime International held a series of diplomatic conferences in the Hague, London and Brussels from 1921 to 1924 which culminated in the signing of an International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in Brussels in 1924. The Convention is usually referred to by the slightly snappier sobriquet of the Hague Rules. The Hague Rules were generally well-received, particularly in the Anglo-Common Law world,² and have been adopted by an overwhelming majority of maritime nations. The Rules are, however, not free of substantive and drafting problems.

Package Limit

The first major difficulty with the Hague Rules is that Article IV rule 5 limits the carrier’s liability in the English text to “£100 per package or unit, or the equivalent of that sum in other currency” (unless the shipper has made a declaration of value, in which case the carrier’s liability is limited to the (higher) declared value). The authoritative French text refers to “100 livres sterling³ par colis ou unité, ou l’équivalent de cette somme en une autre

¹ William Shakespeare: *Merchant of Venice*, Act ii, scene vii. The saying probably derives from the *Parabolae* of Alanus de Insulis, a thirteenth century amateur economist: “Non teneas aurum totum quod splendet ut aurum/Nec pulchrum pomum quodlibet esse bonum”.

² English lawyers, we are told, regarded the Hague Rules “with a mixture of pride, affection, and even slight awe as a largely English innovation and one that had achieved a remarkable success”: see A Diamond “The Hague-Visby Rules” [1978] LMCLQ 225, 226. However, this view was not universally shared. For example, the Norwegian Ministry of Justice recommended that the Hague Rules be implemented by general reference only, to avoid putting on the Norwegian statute books provisions “that do not meet the most elementary standards of technique, readability and good statutory language”: see JO Honnold “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) JML&C 75, 101 n 98.

³ From the travaux préparatoires it seems that “sterling” was included in the English draft at one point, but was later dropped: see F Berlingieri (ed) *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI, Antwerp, 1997) 486; C Boyle and MF Sturley (ed) *The Legislative History of the Carriage of Goods by Sea Act and the*

monnaie". The travaux préparatoires of the Hague Rules reveal considerable debate and confusion over whether "£100" or "100 livres sterling" referred to the nominal or face value of the paper currency, or to its gold value. The drafters attempted to resolve this issue in a separate Article IX, which provides that "monetary units mentioned in this Convention are to be taken to be gold value". Article IX allows contracting States which do not use pounds sterling to pass domestic legislation converting the package limit into their own national currencies "in round figures".

Expressing the carrier's package limitation in terms of the gold value of £100 was feasible, after a fashion,⁴ whilst the United Kingdom and other major shipping nations adhered to the gold standard. With the departure of the United Kingdom from the gold standard in 1931, however, the formula became increasingly unworkable. In particular, those countries that had converted the £100 package limit into their own currencies in domestic legislation almost invariably failed to update the amounts to take account of inflation and changing currency relativities.

In 1968, the Visby Protocol to the Hague Rules substituted a new standard package limit of 10,000 Poincaré francs per package or unit. The Poincaré franc, which had been used in other international Conventions,⁵ was defined as a unit consisting of 65.5 milligrams of gold of millesimal fineness 900. It also proved problematic. Finally, the 1979 SDR⁶ Protocol to the Hague-Visby Rules introduced a package limitation of 666.67 Special Drawing Rights or SDRs.⁷ The Hamburg Rules⁸ and the recent CMI Draft Instrument on Transport Law⁹ similarly express the carrier's limited liability in SDRs.

Travaux Préparatoires of the Hague Rules (Fred B Rothman & Co, Littleton, 1990) vol 1, 375. On the etymology of "sterling" see D Sinclair *The Pound: A Biography* (Arrow Books, London, 2000) 77-82. See also the Hallmarking Act 1973 (UK), Sch 1, Pt III: "A description of an article, or of the metal in an article, as 'sterling' ... is to be presumed to be an indication that the article, or the metal, is of silver ... of a standard of fineness of 925."

⁴ Even when the Hague Rules were being drafted in 1923, there was disquiet about the discrepancy between the nominal value of the pound, and its gold value which was 5% higher. One of the delegates perceptively expressed fears about "the problems inherent in the case where the pound underwent a greater depreciation": see F Berlingieri (ed) *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI, Antwerp, 1997) 490-492, 678-679.

⁵ For example, the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929. On the problems generated by Article 22 of the Warsaw Convention, see WK Hastings "Living with an Archaic Treaty: Solving the Problem of the Warsaw Convention's Gold Clause" (1996) 26 VUWLR 143.

⁶ The SDR was created by the International Monetary Fund (IMF) in 1969. It is a unit of account valued on the basis of a basket of key national currencies (presently the euro, Japanese yen, pound sterling, and US dollar).

⁷ New Zealand became a party to the Hague Rules, as amended by the 1968 Visby Protocol and 1979 SDR Protocol, in 1995: see the Maritime Transport Act 1994, s 209 and Schedule 5. At the time of writing, 666.67 SDRs amounts to a package limit of NZ\$1,814.08 per or unit.

⁸ See the United Nations Convention on the Carriage of Goods by sea 1978, Art 6, which provides for a package limit of 835 SDRs, or NZ\$2,272.13.

⁹ For the full text of the CMI Draft Instrument (10 December 2001), see <http://www.comitemaritime.org/singapore2/singafter/issues/cmিদraft.pdf>. Article 6.7 of the Draft Instrument expresses the carrier's limited liability in terms of SDRs, but the number of units of account has deliberately been left blank at this stage, indicating the sensitivity of this issue.

Mandatory Application of the Rules

The second major difficulty with the Hague Rules relates to the scope of the Rules' mandatory application. It is crucial to know when the Hague Rules are mandatorily applicable, because Article III rule 8 of the Rules nullifies any clauses in carriage contracts which purport to lessen the carrier's liability below the package limit discussed above. Article X of the Hague Rules baldly states that the "provisions of this Convention shall apply to all bills of lading issued in any of the contracting States". As Clarke notes,¹⁰ the wording of Article X is as simple as interpretations of the effect of Article X and the obligations that arise from it are complex. It has been variously interpreted as giving rise to an international obligation to enact domestic legislation giving effect to the Rules, as creating or requiring a general conflict of laws rule in favour of the *lex fori* or perhaps the proper law of the bill of lading, or as having nothing to do with the scope of application of the Rules.

This confusion over the effect of Article X was compounded by the manner in which the United Kingdom chose to give domestic effect to the Hague Rules in the Carriage of Goods by Sea Act 1924 (UK). Rather than reproducing all the Rules in the Schedule and giving them the force of law, the drafters of the Act statutorily incorporated only Articles I-IX of the Rules into outward bills of lading.¹¹ The Act required bills of lading issued in the United Kingdom to include an express statement, commonly known as a Clause Paramount, that the bill of lading took effect "subject to the provisions of the [Hague] Rules as applied by this Act". The legislation of most Common Law jurisdictions followed the English model.¹² The problem with this model is that it created a loophole which allowed parties to contract out of the Hague Rules by choosing any law other than the law where the bill of lading was issued as the proper law of their contract.¹³ If they did so, the Clause Paramount probably had no effect - the "Rules *as applied by this Act*" would not govern their contract, as the contract was governed by foreign law. Even if the parties selected the law of another Hague Rules country as the proper law of their contract, the Rules would still not have mandatory application if that country had also followed the English model and had only statutorily incorporated the Rules into bills of lading issued in *its* jurisdiction. This gave rise to the ludicrous prospect that carriage of goods between two countries that had adopted the Hague Rules might not be governed by the Rules.

¹⁰ See MA Clarke *Aspects of the Hague Rules: A Comparative Study in English and French Law* (Martinus Nijhoff, The Hague, 1976) 11-17.

¹¹ The Protocol of Signature of the Hague Rules permits the High Contracting Parties to "give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention".

¹² See, eg, section 9 of the repealed Sea Carriage of Goods Act 1940 (NZ) which required in the same terms the inclusion of a Clause Paramount in all outward bills of lading issued in New Zealand. Section 9 provided that non-inclusion of a Clause Paramount was punishable by a \$200 fine.

¹³ *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC); *Ocean Steamship Co Ltd v Queensland State Wheat Board* [1941] 1 KB 402 (CA). For criticism of this approach, see *The Torni* [1932] P 78 (CA); *The Hollandia* [1982] QB 872 (CA); JHC Morris "The Choice of Law Clause in Statutes" (1946) 62 LQR 170; JHC Morris "The Scope of the Carriage of Goods by Sea Act 1971" (1979) 95 LQR 59.

In order to plug this loophole and restore uniformity, Article X of the Hague Rules was amended in 1968. Article X of the Hague-Visby Rules provides that the Rules apply to every bill of lading relating to the carriage of goods between ports of different States if: (a) the bill of lading is issued in a contracting State; (b) the carriage is from a port in a contracting State; or (c) the contract contained in or evidenced by the bill of lading provides that it is governed by the Rules or the legislation of any State giving effect to the Rules. A new method of giving domestic effect to the Hague-Visby Rules was also adopted. Rather than statutorily incorporating the Rules into bills of lading by means of a Clause Paramount, most jurisdictions giving domestic effect to the Hague-Visby Rules simply provide that the Rules have the force of law in that jurisdiction.¹⁴ This makes it plain that, where a connecting factor in Article X is satisfied, the Hague-Visby Rules are mandatorily applicable and cannot be avoided by including a choice of law or exclusive foreign jurisdiction clause pointing to a non-Hague-Visby Rules country.

The Tasman Discoverer

These two problems with the Hague Rules came together nicely in the recent case of *The Tasman Discoverer*, which concerned the carriage of 70 coils of electrolytic tin plates from Busan in Korea to Tauranga. During the voyage 55 of the coils were damaged by sea water. The shipowner, Tasman Orient Line, admitted liability. The plaintiff, Dairy Containers, claimed a loss of \$613,667.25. The only issue was whether the plaintiff was entitled to the full amount of its loss. Clause 6(B) of the bill of lading read as follows:

... [T]he liability of the Carrier in respect of ... loss or damage shall be determined:

(a) by the provisions contained in any international convention or national law,

...

(b) Where no international convention or national law would apply by virtue of (a) above:

(i) By the Hague Rules contained in the International Convention for the Unification of Certain Rules relating to the Bills of Lading dated 25 August 1924 (hereinafter called the Hague Rules), if the loss or damage is proved to have occurred at sea or in inland waterways; for the purpose of this sub-paragraph the limitation of liability under the Hague Rules shall be deemed to be £100 Sterling, lawful money of the United Kingdom per package or unit and references in the Hague Rules, to carriage by sea, shall be deemed to include reference to carriage by inland waterways and the Hague Rules shall be construed accordingly...

It was agreed that Korean law did not apply a mandatory liability regime to the carriage contract,¹⁵ and that the bill of lading was governed by New

¹⁴ See, eg, Carriage of Goods by Sea Act 1971 (UK), s 1(2); Maritime Transport Act 1994, s 209.

¹⁵ Korea is not a party to any of the relevant maritime Conventions. Article 789-2 of the Korean Commercial Code 1993 apparently provides for a limit of 500 SDRs per package if Korean law applies: see RS Yu and J Peck "The Revised Maritime Section of the Korean

Zealand law. Clause 6(B)(a) was therefore irrelevant and the carrier's liability fell to be determined by clause 6(B)(b)(i). The crisp question was whether the carrier was liable for the nominal value of £100 in paper currency per packet, or for the gold value of £100 sterling per packet as specified in the Hague Rules. On the former interpretation, the carrier's total liability would be limited to £5,500 (£100 x 55 coils) or NZ\$17,259.79. On the latter interpretation, the carrier's liability per package or unit would be limited to the current market value¹⁶ of the standard weight of gold which made up £100 sterling when the Hague Rules were adopted in 1924:¹⁷ which would amount to a package limit of NZ\$18,799.51, or a total limit of NZ\$1,033,973.37! Dairy Containers would therefore be entitled to recover its total actual loss.

In the High Court¹⁸ Williams J held that the latter interpretation was correct. His Honour adopted the approach taken by the English High Court in *The Rosa S*¹⁹ and the New South Wales Court of Appeal in *The Nadezhda Krupskaya*²⁰ of linking Article IV rule 5 and Article IX of the Hague Rules and construing the reference to £100 in the Hague Rules as a gold value figure. Even though no international Convention or domestic law was mandatorily applicable in this case, Williams J decided that the parties had contractually incorporated all the Hague Rules into their bill of lading, and had thereby fallen into the "Gold Clause trap". On this analysis, the limitation of "£100 Sterling, lawful money of the United Kingdom" under clause 6(B)(b)(i) was nullified by Article III rule 8 of the Rules, and the higher gold value figure in the Rules prevailed. Williams J agreed with Kirby P's dicta in *The Nadezhda Krupskaya* that it was unlikely that the contracting parties would agree to their recovery being limited by such an archaic yardstick, and expressed skepticism that an importer like Dairy Containers would have agreed to run

Commercial Code" [1993] LMCLQ 403, 408. Cf *The Thomaseverett* [1992] 2 SLR 1068, 1992 SLR LEXIS 391 (HC) where the parties agreed that the Hague Rules applied to carriage of goods from Busan in Korea to Singapore.

¹⁶ The current market value of gold and the current nominal value of the paper currency are not the only possible interpretations. Given that the Hague Rules were drafted in the context of adherence to the gold standard, there is an argument that the gold value of £100 sterling should be pegged at the official price of gold when the United Kingdom abandoned the Gold Standard in 1931: cf W Tetley "Package & Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold" (1995) 26 JML&C 133; and in respect of Poincaré francs and the Warsaw Convention, *Trans World Airlines Inc v Franklin Mint Corp* 466 US 243, 104 SCt 1776, 1984 AMC 1817 (US SCt 1984); WK Hastings "Living with an Archaic Treaty: Solving the Problem of the Warsaw Convention's Gold Clause" (1996) 26 VUWLR 143, 151-153. In *The Rosa* [1988] 2 Lloyd's Rep 574, 578-579, however, Hobhouse J held that sterling still retains a gold value at English law: see the Coinage Act 1971 (UK), Sch 1, which specifies the standard weight of a gold sovereign as 7.98805 grams of gold of millesimal fineness 916.66.

¹⁷ See the Coinage Act 1870 (Imp), Sch 1, which specified the same formula as the 1971 Coinage Act cited above.

¹⁸ *Dairy Containers Ltd v The Ship "Tasman Discoverer"* [2002] 1 NZLR 265; [2001] 2 Lloyd's Rep 665.

¹⁹ [1988] 2 Lloyd's Rep 574. See FA Mann *The Legal Aspect of Money* (5 ed, Clarendon Press, Oxford, 1992) 160-161; J Gold *Legal Effects of Fluctuating Exchange Rates* (IMF, Washington, 1990) 102-104.

²⁰ *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co (The Nadezhda Krupskaya)* [1989] 1 Lloyd's Rep 518; (1989) 93 ALR 171; 94 FLR 425; discussed in M Davies "What Price a Gold Sovereign? Limitation of Liability under the Hague Rules" (1990) 6 Australian Bar Review 49.

the risk of being able to recover only a small percentage of its loss.²¹ His Honour was reinforced in his decision by the fact that, in following *The Rosa S* and *The Nadezhda Krupskaya*, “the law of a maritime nation such as New Zealand as to the construction of an international maritime instrument is effectively the same as the law in many other jurisdictions, both common and civil law, around the world”.

However, as Gaskell has warned,²² it is “not enough to assume that a Clause Paramount will have the same effect, i.e. of incorporating the Hague Rules, in every case”. There are, in fact, three different categories of cases, which require careful analysis. The first category is where the bill of lading is issued in a Hague Rules jurisdiction and is governed by the law of the port of shipment. The Hague Rules are then mandatorily applicable, by virtue of a combination of the Clause Paramount and enactment of the Hague Rules in national legislation.²³ A clause in the bill of lading which purports to contract out of the Rules in such cases is null and void. *The Rosa S* and *The Nadezhda Krupskaya* clearly fell into this category: both cases concerned shipments from Italy, which was, at the relevant times, a Hague Rules jurisdiction. By contrast, *The Tasman Discoverer* did not – a point made succinctly by the Court of Appeal²⁴ at para 24: “[T]hat is not our case. We are not concerned with overriding national legislation.”

The second category concerns bills of lading issued in a Hague Rules jurisdiction but governed by a law other than the port of shipment. Here the Hague Rules may not have mandatory application, by virtue of the conflicts loophole discussed above. The Rules may, however, be incorporated into the bill of lading as contractual terms in an unmodified or modified form.

In the third class of cases, the bill of lading is issued in a non-Hague Rules jurisdiction. Here, the Hague Rules will not have mandatory application, but the text of the Rules may nonetheless be contractually incorporated into the bill of lading, as was the case in *The Tasman Discoverer*. In such a scenario, as the Court of Appeal rightly notes at para 24, “we are concerned only with the interpretation of their agreement which, as it happens, incorporates a treaty text”.²⁵

²¹ With respect, it seems far more unlikely that the carrier would have expected or agreed to a Hague package limit roughly 8-10 times higher than the current Hague-Visby or Hamburg package limits, given that the last two regimes were designed to provide more favourable package limits for cargo interests. It might also be argued that limiting liability does tend to be the point of a limited liability regime, and that the cargo owner could easily have declared the value of its goods or taken other steps to protect its position.

²² N Gaskell, R Asariotis and Y Baatz *Bills of Lading: Law and Contracts* (LLP Professional Publishing, London, 2000) p 60, para 2.54.

²³ The matter may be further complicated where the relevant overriding national legislation departs from the literal text of the Hague Rules: see eg *The Ebn Al Waleed* [2000] 1 Lloyd's Rep 270, where the Trial Division of the Federal Court of Canada held that, because the Hague Rules as enacted in Turkish law were applicable, the package limitation was 100,000 Turkish lire rather than the gold value of £100.

²⁴ Unreported, CA205/01, 17 June 2002, Keith, Blanchard, Anderson JJ.

²⁵ See also *Atlantic Consolidated Foods Ltd v The Ship Doroty* [1979] 1 FC 283, 293: “It is quite clear that where a Bill of Lading is subjected by legislation to the Hague Rules, the Rules will prevail and any clause in the bill repugnant to any clause of the Rules is of no effect. But where the Rules are contractually incorporated in a bill, then such construction must be placed on both documents as will best effectuate the intention of the parties.”

The Court of Appeal examined clause 6(B)(b)(i) closely, and decided that the parties had contractually modified the Hague Rules, both by deeming their scope to be extended to carriage in inland waterways, and by deeming the package limitation to be “£100 Sterling, lawful money of the United Kingdom”, thereby fixing a specific, stand-alone limitation of liability written in terms of national currency, without any reference to gold value, or the essential linkage between Article IV rule 5 and Article IX of the Hague Rules. The statement in clause 6(B)(b)(i) that “the Hague Rules shall be construed accordingly” plainly showed that the parties intended to modify the Hague Rules in these respects, which in turn meant that the more general provisions in the rest of the bill of lading had to be read consistently with these specific modifications. Whilst acknowledging the importance of uniformity of interpretation of international Conventions, Keith J reiterated at para 32 that: “[w]e are concerned with the meaning of a contract in the making of which the parties were free to fix their own rights and obligations. We have held that they have not adopted the full Hague Rules.” As a consequence, the Court allowed the carrier’s appeal and held that its liability was limited to the nominal value of £5,500.

Conclusion

The Court of Appeal decision in *The Tasman Discoverer* successfully skirts the shoals surrounding the Hague Rules. Such nimble navigation would naturally not have been necessary, had the Hague Rules been more happily drafted and more appropriately incorporated into domestic legal systems. As more maritime nations adopt the Hague-Visby or Hamburg Rules, we can hope for plain sailing in this area. However, about 60 countries are still party to, or give domestic effect to the Hague Rules. And, even in respect of the Hague-Visby and Hamburg regimes, it remains important to distinguish carefully between instances where the relevant Convention applies by force of law and where it does not.²⁶

The Tasman Discoverer underscores the need for carriers to signal clearly their intentions to modify the Hague Rules when incorporating them into standard bills of lading – what seems a convenient shorthand at the time of drafting may later turn out to be very expensive indeed. At the same time, cargo interests need to be mindful that, where the Hague Rules do not have the force of law, incorporation of the Rules into a bill of lading does not license a court to adopt a “Convention reading” of the text, with all that that entails in terms of purposive treaty interpretation, applying Convention jurisprudence to promote international uniformity, and if necessary poring over the travaux préparatoires. Instead, as the Court of Appeal held in *The Tasman Discoverer*, the Convention text should be construed simply as a part of the carriage contract, in the light of ordinary contract interpretation principles.

²⁶ Contrast, eg, *The Hollandia* (sub nom *The Morviken*) [1983] AC 565 (HL); and *Hellenic Steel Co v Svolarar Shipping Co Ltd (The Komninos S)* [1991] 1 Lloyd’s Rep 370 (CA).