

Lost or damaged?

Michael Volikas and **David Richards**, of Ince & Co, consider the recent UK Commercial Court judgment in *The Limnos*, on the meaning of the words 'goods lost or damaged' within art IV Rule 5(a) of the Hague-Visby Rules.

Article IV Rule 5(a) of the Hague-Visby Rules permits a carrier/ a ship to limit liability for 'any loss or damage to or in connection with the goods' carried to 2 SDR's per kilogram of gross weight of the 'goods lost or damaged'.

There has previously been no English legal authority as to what precisely 'lost or damaged goods' refers. The type of uncertainty that can be encountered when applying Hague-Visby weight limitation where only part of a cargo has been physically damaged is illustrated by *The Limnos*.

The judgment given by Mr Justice Burton was on a preliminary issue concerning a claim around a shipment of US corn from Louisiana to Aqaba. The relevant bill of lading incorporated the Hague-Visby Rules.

On arrival at Aqaba a small quantity of wetting damage was discovered in holds 2 and 3. The wet and damaged cargo was segregated and disposed of. It was alleged that a further 250 mt of the cargo in holds 2 and 3 suffered physical damage, when kernels within the cargo were damaged by bulldozers during discharge.

It was accepted by the owners that this quantity, which had been physically damaged before or at the time of discharge, fell within the definition of 'goods lost or damaged' under art IV Rule 5(a) of the Hague-Visby Rules (the 'conceded tonnage').

The preliminary issue concerned whether the weight of the remaining cargo in holds 2 and 3 also fell within the definition of 'goods lost or damaged'. As a condition of allowing discharge the Jordanian authorities required that the remaining cargo from those holds be transferred into silos for fumigation.

During fumigation the number of broken kernels increased resulting in depreciation in the cargo value. In addition, all the corn from the two holds acquired a reputation in the market as a distressed cargo, which depreciated its price.

Arguments

The cargo interests argued that the words 'lost or damaged' included goods that have been 'economically damaged'. The owners argued that 'lost or damaged' meant goods physically lost or physically damaged only. The

cargo interests' total claim was for US\$1.55m of which around \$38,000 comprised losses in respect of the physically damaged cargo.

If limitation was calculated by reference to all the cargo in holds 2 and 3 it would be calculated on the total weight of 44,000 mt, which would produce a limitation figure greater than the value of the total claim.

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by reference to the weight of only the physically damaged cargo (the conceded tonnage).

Comment

The judgment shows that where there is physical damage to cargo, any economic losses that flow from that are subject to a limitation amount determined solely by reference to the weight of the damaged cargo.



physically damaged cargo only (ie the conceded tonnage) limitation would be based on a maximum of 262 mt and limited to approximately \$85,000.

Judgment

The owners' argument and reasoning was preferred by Burton J. He held that the phrase 'lost or damaged' referred to two categories of good:

1. 'goods that are lost in the sense of vanished, gone, disappeared, destroyed ...'; and
2. '... goods that are damaged, in the sense of not being lost, but surviving in damaged form'.

He rejected cargo interests' arguments that the remainder of the cargo, beyond the conceded tonnage, could be described as 'economically damaged', holding that a claim for losses that was consequential upon physical damage could not be a claim for economically damaged goods.

Therefore, the entirety of the cargo interests' claim would be subject to limitation determined

The judgment leaves open a number of questions on the interpretation of the words 'goods lost or damaged'. The possibility that goods might be described as 'economically damaged' on different facts remains.

Burton J questioned whether it was appropriate to ask whether goods have been 'economically damaged' then this would have to be assessed at the time of delivery/discharge by reference to whether the goods had then depreciated and whether there was a likelihood that some monies might need to be spent in relation to them.

The judge gave no view as to the position in respect of a claim for a pure economic loss (where the claimant has suffered no physical loss, such as with a claim for delay) stating that such claims were not, in his view, frequent.

The effects of the judgment for all cargo claims are potentially significant as illustrated by the figures involved in this case. The vast majority of cargo interests' claimed total losses of \$1.55m consisted of economic losses (only \$38,000 related to physical damage), which the judge viewed as consequential on the physical damage.