

Limitation sum — gold value — Hague Rules, Article IV Rule 5

*BROWN BOVERI (AUSTRALIA) PTY LIMITED v BALTIC
SHIPPING COMPANY*

Court of Appeal New South Wales, 7 February 1989

This case was an appeal from the decision of Mr Justice Yeldham in which it was held that the limitation sum in Article IV Rule 5 of the Hague Rules of £100 is, in accordance with the reference to "gold value" in Article IX of the Hague Rules, £100 gold value at present prices.

In upholding Mr Justice Yeldham's decision the Court of Appeal approved the English High Court decision in *The Rosa S*.¹

In effect what their Honours have held is that the limitation sum referred to in the Hague Rules is a reference to *the quantity of gold which was the equivalent of £100 sterling in 1924*. This was the sole question before the Court of Appeal. It should be noted that the case involved an interpretation of the Convention itself and not the Rules as enacted by the legislature of any particular country. The original hearing had determined that one of the defences relied upon, such as insufficiency of packing, were available to the carrier.

Before summarising the argument in the Court of Appeal it is worth recalling the terms of the two provisions under discussion in the Hague Rules —

Article IV Rule 5

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pound sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.

Article IX

The monetary units mentioned in this Convention are to be taken to be gold value.

¹ [1988] 2 Lloyd's Rep 574.

Those contracting states in which the pounds sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pounds sterling into terms of their own monetary system in round figures.

The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned.

It should be noted that the final two paragraphs of Article IX are not to be found in the Rules as contained in the Schedule to the Sea-Carriage of Goods Act 1924 (Cth). The carrier argued that Article IX was not intended to be used to give meaning to the monetary value referred to in Article IV Rule 5. It was argued that it was a provision addressed to the contracting states to enable them to ascertain the amount recoverable in a sum other than sterling and therefore should be treated as being distinct from Article IV Rule 5.

Alternatively, the carrier argued that, if Article IX was to be used to interpret the meaning of the expression 100 pounds in Article IV Rule 5, it should be interpreted as requiring that sum to be calculated with reference to the value of gold that could be purchased now for 100 pounds. This would then enable the amount of that gold to be converted to the monetary system of the relevant country concerned. In that way the Rules would be interpreted as having been designed to ensure against the artificial exchange rates between different currencies.

Their Honours rejected the argument that Article IX should be regarded as distinct from Article IV Rule 5 by reason of the opening words which preceded the reference to "contracting states."

The Court of Appeal also rejected the alternative argument raised by the carrier since it considered that countries could just as easily artificially fix an "official" price of gold as they could an "official" exchange rate. As Kirby P pointed out, the interpretation contended for by the carrier could also "effectively deny the utility of a reference to a 'gold value' at all. It would tie the fate of a recovery under the limitation exclusively to the international value of the Pound Sterling." The weakness of the pound sterling was itself recognised at the time of the adoption of the Hague Rules.

The President concluded his judgment by a call for reform. The Federal Government has of course announced its intention of legislating to give effect to the Hague-Visby Rules which would eliminate the problems created by Article IX in the Hague Rules. It seems unlikely that the necessary legislation will be presented to the Australian Parliament this year.

In a very much shorter judgment with which McHugh J A agreed, Hope J A also upheld the judgment of Yeldham J and rejected the argument by which the carrier had sought to suggest that Articles IX

to XVI were not intended to have contractual operation between shippers and carriers. Hope J A also expressed the view that the first sentence of Article IX was "undoubtedly directed to preventing inflation making nonsense of the amount limiting maximum liability". He inferred that the contracting states were not content "to rely on the stability of the Pound Sterling to meet inflation; they wanted and intended to have a value which they concluded would be more stable, namely, the value of gold."

The practical result of this decision is that the package limitation amount under the Hague Rules Convention where applicable in Australia was approximately \$11,100 in late February 1989 (after the release of the poor trade deficit figures). Its value will fluctuate according to the value of gold and the US dollar exchange rate. By comparison, the Hague-Visby limitation amounts at the same time were approximately \$8940 per package and \$26.80 per kilogram or, if the SDR Protocol is applicable, \$1085 per package and \$3.25 per kilogram.