
Case Notes

Jindal Iron and Steel Co Limited and others v Islamic Solidarity Shipping Co Jordan Inc [2004] UKHL 49

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This case concerns the application and interpretation of Article III rules 2 and 8 of the Hague Visby Rules (“Rules”). It is interesting not because it has changed the law or because it sets out any novel interpretation of the law. In fact, the Honourable Law Lords chose not to depart from long established precedent. However, it is the Lords’ reasoning and discussion which is instructive to those of us involved in the day to day business of modern shipping.

Facts

The Islamic Solidarity Shipping Co Jordan Inc (“Islamic”) owned the vessel “*Jordan II*”. Islamic chartered the vessel to TCI Trans Commodities AG for a voyage from Mumbai, India to Motril, Spain. Jindal Iron and Steel Co Limited (“Jindal”) sold and Hiasana SA purchased 435 steel coils. The coils were shipped from Mumbai to Motril per bills of lading dated 2 January 1998.

Among other things, the bill of lading provided that:

1. Freight was payable as per the charterparty;
2. All terms and condition of the charterparty were incorporated into the bill of lading;
3. Where the Hague Visby Rules apply compulsorily, they were incorporated into the bill of lading;
4. It was to be governed by English Law.

It was common ground that the Hague Visby Rules applied compulsorily by virtue of Indian legislation. Clauses 3 and 17 of the charterparty provided:

1. Freight should be paid “Free in and Out Stowed and Trimmed” and “Lashed/Secured Dunnaged”;
2. Shippers/Charterers/Receivers were to put the cargo on board, trim and discharge cargo free of expense to the vessel.

When the cargo was discharged at Motril, it was found to have been damaged, allegedly by rough handling during loading, discharging or stowing. The ship owners relied on the above clauses to say that any handling damage was a matter for the charterers, who had agreed to load, stow and discharge at their own risk. The central issue was whether the agreement in the charterparty which purported to transfer responsibility for loading, stowage and discharge from the ship owners to shippers, charterers and consignees was overridden by Article III rule 2 and/or invalidated by Article III rule 8.

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Submissions

The cargo interests argued that Article III rule 2 of the Rules imposed upon the ship owners a duty to “properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried”. Therefore, they argued that the agreement as set out in the charterparty clauses 3 and 17 transferring responsibility for those functions was invalidated by Article III rule 8, which provides:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with goods arising from negligence, fault or failure in the duties and obligations set out in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

Cargo interests requested that the House of Lords depart from the rule in *G H Renton & Co Limited v Palmyra Trading Corporation of Panama* [1957] AC 149 and in *Pyrene Co Limited v Scindia Navigation Co Limited* [1954] 2 QB 402 that the extent to which loading, stowage and discharging are brought within the carrier’s obligations is a matter for agreement between the parties and can therefore be mutually agreed irrespective of the words in the Rules. Cargo interests were of the view that *Renton* and *Pyrene* should no longer apply because strict adherence to that precedent would lead to injustice, in accordance with the Practice Statement (Judicial Precedent) [1996] 1 WLR 1234.

The ship owners argued that *Renton* and *Pyrene* should continue to apply. They stated that, properly construed, the Rules do not invalidate an agreement transferring the responsibility of the ship owners to carefully load, stow and discharge to the shipper, charterer or consignee.

Pyrene

Pyrene concerned the application of Article III rule 2. Six fire tenders were to be shipped FOB from London to India. The tenders were delivered to the dock at London, but one of the tenders was dropped and damaged during loading prior to crossing the ship’s rail and before property had passed. The cargo owners claimed against the ship owners, who agreed that they were responsible for loading and that they had done so negligently. However, the ship owners argued that they were entitled to limit their liability by virtue of the Hague Visby Rules. Cargo owners argued that the Rules did not apply because the cargo had not passed the ship’s rail.

Lord Devlin held that the Rules applied and that the ship owners were entitled to limit their liability. Lord Devlin was asked to consider the meaning of Article III rule 2 to determine whether it applied to any loading that took place prior to the goods passing the ship’s rail. He observed that Article III rule 2 should not override the freedom of a contracting party to reallocate responsibility for the functions described in that rule. He was of the view that the proper interpretation of the rule was that the carrier should do whatever loading and stowing it did properly and carefully.

As the carrier contracted to load the cargo, the loading was within Article III rule 2. Lord Devlin stated that the parties should be free to contract as to the terms upon which they would take responsibility for the obligations set out in article III rule 2. Therefore, he concluded that the carrier could limit its liability under the Rules.

Renton

In *Renton*, the shipper contracted with the carrier to carry a consignment of timber from Canada to London/Hull. The bill of lading provided that in the event of strike, the master could discharge the cargo at any safe and convenient port. There were dock strikes at United Kingdom ports and the cargo was delivered to Hamburg. The cargo owners paid for the cargo to be stored in Hamburg and later shipped to London. The cargo owners then claimed against the carrier, who relied upon the clause in the bill of lading, allowing it to deviate. The cargo owners argued that the clause was repugnant to the Article III rule 2 because it allowed the carrier to fail in its obligation to “properly discharge” the cargo and, therefore, should be invalidated by Article III rule 8.

The House of Lords was asked to apply the *obiter* comments from *Pyrene* about Article III rule 2. It held that the clause allowing deviation should not be regarded as giving liberty to deviate but rather as providing an agreed substituted method of performance. As such, the contract was performed in accordance with Article III rule 2 and was not invalidated by Article III rule 8. Lord Somerville stated at 174:

It is in my opinion, directed and only directed to the manner in which the obligations undertaken are to be carried out. Subject to the latter provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes to do properly and with care.

The Text of the Rules

In considering the Rules, Lord Steyn stated that their broad object was to achieve harmonisation of the diverse laws of trading nations by regulating freedom of contract to certain topics only. He stated that the purpose and context of Article III rule 2 would not be undermined by permitting owners to transfer responsibility for loading, stowage and discharge to shippers or others. However, the obligation to make the vessel seaworthy in Article III rule 1 is more in the nature of a fundamental obligation which the owner cannot transfer.

Lord Steyn referred to the practice of using shore based stevedores rather than crew to unload vessels, citing Greer J in *Brys & Gylsen v J and J Drysdale* (1920) 4 Lloyd's Rep 24, at 25:

It would be an odd state of things if one were to hold that a shipowner who has no contract whatever with the stevedore, and who cannot say to the stevedore: You have broken your contract with me.... And who has no control over what is to be paid to the stevedore, should be responsible for the failure of the stevedore to do his duty

Lord Steyn was in favour of a purposive approach rather than a strictly literal approach to interpreting the Rules. However, in referring to the *travaux préparatoires*, the French text to the Rules, Lord Steyn acknowledged that they closely matched the interpretation put forward by cargo interests. But the *travaux* did not expressly state that merchants could not reallocate responsibility for loading, stowage and discharge. Therefore, Lord Steyn was of the view that the draftsmen did not consider the possibility of alternative arrangements and that as a result, the *travaux* could not assist cargo interests' arguments.

Other Views

Lord Steyn noted that no English text book writers have questioned the correctness of *Renton*.

Nevertheless, he was invited by cargo interests to adopt the approach of the United States, South Africa and France, which variously support the argument that ship owners cannot contract out of the obligation to properly and carefully load and stow. However, Lord Steyn noted that none of the decisions referred to *Renton*. Therefore, he stated that he was not convinced that he should adopt the law of the United States when it had never even considered the English approach. He also noted that *Renton* has been followed in Australia, New Zealand, Pakistan and India.

Lord Steyn did see some attraction in the argument that it was manifestly unfair to allow owners to incorporate charterparties that cargo interests have not seen. However, he noted that “it is an inevitable risk of international trade and cannot affect the correct interpretation of article III rule 2”.

Is Departure from *Renton* Justified?

Lord Steyn recognised that the law as set out in *Renton* has stood for fifty years and that many transactions would have been concluded on the basis that *Renton* was the law. In his view, certainty was an important consideration and he was aware of the problem that could be caused by a decision having retrospective effect.

Lord Steyn noted that the Rules had been reviewed in 1968. There was an opportunity for any unsatisfactory provisions in the Rules to be altered, but only limited changes were made. Similarly, when Parliament enacted the *Carriage of Goods by Sea Act 1971* incorporating the Rules into law in the United Kingdom, no dissatisfaction in respect of the above matters was raised by cargo interests.

The Rules are currently under review by the United Nations Commission on International Trade Law (UNCITRAL). Therefore, Lord Steyn held that it was inappropriate to review *Renton*.

Conclusion

The House of Lords expressed no view on the interpretation of Article III rule 2. However it refused to depart from the rule in *Renton* and dismissed the appeal.

Filippo Lorenzon and Jocelyn Graham-Wilson in their article “The Jordan II: a forgone conclusion or missed opportunity?” noted that this is a matter that polarises practitioners and operators into two groups: “pro-owner” and “pro-cargo”. For the owners, it must be said that the House of Lords purposive approach is a victory for certainty in contractual relations.

But for cargo interests, the matter is less rosy. Lorenzon and Graham-Wilson note that this decision may cause merchants to re-evaluate the risks of buying under CIF sale contracts and banks to consider their position in holding bills as security in letters of credit transactions, notwithstanding that this case does not represent a change in the law. However, as Lord Steyn points out – if we do not like it, we can choose to participate in the UNCITRAL revision of the Rules currently under development.