APPLICATION OF THE HAGUE-VISBY RULES IN SINGAPORE

"The Epar"[1]

THE interpretation of domestic legislation giving effect to an international convention is never a simple task. If the underlying purpose of most conventions, i.e., the unification of domestic laws of contracting States, is to be achieved, judges must consider interpretations adopted by foreign courts, in relation to the same convention, wherever possible. The extent to which they should be influenced, however, depends not only on the particular convention but on the domestic legislation itself. This question came up for consideration in Singapore in the case of *The Epar.*

The relevant convention concerned in *The Epar* was the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25th August 1924, as amended by the protocol signed at Brussels on 23rd February 1968 known as the Hague-Visby Rules which lay down principles regarding the rights and liabilities of the shipper and the carrier. The particular provisions of the Hague-Visby Rules[2] that had to be interpreted by the learned judge were Article III Rule 8 which states:

> 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 provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

and Article IV Rule 5(a) which states:

> Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

The facts of *The Epar* were simple enough. 349 pallets of oil drilling muds were shipped from Singapore to Indonesia on the vessel *Epar.* The bill of lading had *inter alia* four important clauses, namely:

> *Clause 9:* ... if the value has not been declared in the Bill of Lading the Carrier is not bound to refund an amount exceeding £100/- per package.
>
> *Clause 16:* Law applicable to this B/L. The B/L shall be governed by Indonesian Law, observant of the stipulations, laid down herein. The contents of this B/L must be considered as cancelled in so far as these contents are contrary to the stipulations of section 470 of the Commercial Code of Indonesia.

[1] [1985] 2 M.L.J. 3.

[2] The Hague-Visby Rules were given effect to in Singapore by the Carriage of Goods by Sea Act 1972. The Rules are contained in the Schedule to the Act.

> *Clause 17:* CLAIMS. ... Any claim for loss, damage or short delivery or otherwise, arising out of this B/L, shall be dealt with, at the option of Pelayaran Nasional Indonesia in the court (Pengnadilan Negeri) of Djakarta, to the exclusion of proceedings in any other court.
>
> *Clause 18:* BILLS OF LADING ISSUED IN THE STATES OF MALAYA AND THE REPUBLIC OF SINGAPORE. The following clause will apply to Bills of Lading issued in the States of Malaya and the Republic of Singapore.
>
> This Bill of Lading is to have effect subject to the provisions of the rules contained in the Schedule of the Carriage of Goods by Sea Ordinance 1927,

A claim was made in the High Court of Singapore by the owners of the cargo for loss/damage to 53 pellets and a writ was served on the carriers who entered an unconditional appearance. By a motion the carriers applied primarily for an order that all proceedings be stayed on the grounds that Indonesia was the more convenient forum and that the plaintiffs had agreed to refer and submit all disputes arising out of or in connection with the agreement for determination to the court of Djakarta.

It was in the carriers' interest to have the case dealt with in the court of Djakarta for that court would have applied Indonesian law where the liability of a carrier could be fixed by contract at 600 Dutch Guilders (about S$400) per package or more. On the other hand, if the case proceeded in Singapore and Singapore law was applied, the B/L would have taken effect subject to the Carriage of Goods by Sea Act 1972[3] giving effect to the Hague-Visby Rules and the maximum limit would have been increased to an amount not exceeding the equivalent of 10,000 francs (S$ 1,563.65) per package or unit, or 30 francs (S$4.69) per kilo of gross weight of the goods lost or damaged whichever was the higher.[4]

The Singapore court was faced with the task of examining the validity of the choice of forum and choice of law clauses in the B/L, and it had little doubt that the exclusive jurisdiction clause could not be sustained in the light of the provisions of the Singapore Carriage of Goods by Sea Act 1972. This conclusion was arrived at primarily by relying on the recent decision of the House of Lords in *The Hollandia (The Morvikeri)*.[5] Kulasekaram J. stated:

> Lord Diplock in delivering the judgment of the House of Lords in *The Morviken* considered a similar exclusive jurisdiction clause in a bill of lading — contract of carriage — and held that it was "of no effect" as it violated the provisions of the UK Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules contained therein."[6]

[3] The Carriage of Goods by Sea Act 1972 giving effect to the Hague Visby rules came into force on 16th January 1978 repealing the carriage of goods by Sea Act (1927) which gave effect to the Hague Rules. The maximum limit of liability under the Hague Rules is £100, an amount substantially less than that stipulated under the Hague Visby Rules.

[4] S. 5(a), Carriage of Goods By Sea Act 1972.

[5] [1983] 1 A.C. 565; [1983] 1 Lloyd's Rep. 1.

[6] See n. 1 at p. 5.

The Hollandia which has turned out to be a controversial decision had similar facts to that of *The Epar.* The cargo, a road finishing machine, sustained damage to the value of £22,000 whilst being carried from Scotland to the Dutch West Indies. The bill of lading specified that the law of Netherlands applied and that the carriers' maximum liability per package was DFL 1,250 (about £250). It also stipulated that all actions under the contract of carriage were to be brought before the court of Amsterdam and that no other court was to have jurisdiction in any such action unless the carrier elected otherwise. The shippers brought an action against the carriers in the UK. If the claim was determined in the Netherlands where the Hague Rules were applicable, the carriers' liability could have been limited to about £250 whereas in the UK the Hague-Visby Rules being applicable, the maximum liability would have been about £11,000. The carriers naturally argued that the High Court of England ought to give effect to the choice of forum clause by granting a stay. Sheen J. ordered that all further proceedings in the action be stayed, but the Court of Appeal allowed an appeal by the shippers and the House of Lords dismissed the carriers' appeal.

The reasoning was seemingly simple, if one could ignore the conflict of law issues involved. The House of Lords first looked at the choice of law provision in the bill of lading and held that "in so far as it purports to lessen, as it expressly does, the liability of the carriers for which Article IV, paragraph 5 of the Hague-Visby Rules provides, it unquestionably contravenes Article III, paragraph 8[7] and by that rule is deprived of any effect in English or Scots law."[8]

The House held further that although the choice of forum clause does not *ex facie* offend against Article III, paragraph 8, since the court chosen (the Amsterdam court) would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if Article IV, paragraph 5 of the Hague-Visby Rules applied, then an English court is commanded by the Act of 1971 to treat the choice of forum clause as of no effect.[9]

The argument is undoubtedly attractive but the Carriage of Goods by Sea Act and thus the Hague-Visby Rules would apply only if English law were to apply and the reasoning of Lord Diplock goes against the general principle that applicability of English law in the first place depends on the proper law of the contract. In this case the proper law agreed by the parties was the law of the Netherlands and this was done expressly by inserting an exclusive forum clause. To assume or impose the application of English law would mean that the Carriage of Goods by Sea Act is a statute of such mandatory nature that it defeats the intention and expectations of the parties inconsistent with it.[10]

The reasoning in *The Hollandia* casts doubts on some of the accepted principles of conflict of laws and must await the test of time. By following it without query in *The Epar,* however, the learned Judge missed an opportunity of reviewing the reasoning in *The Hollandia*

7 See *supra,* p. 204.
8 [1983] 1 A.C. 565, 573 *(per* Lord Diplock).
9 *Ibid*., at 575.
10 See Jaffey "Statutes of Law & Choice of Law" [1984]. 100 LQR 198, p. 199.

and resolving what appears to be a contradiction in the provisions of the Singapore Carriage of Goods by Sea Act 1972. The contradiction lies in Section 3 which limits the scope of application of the Rules in the Schedule (Hague-Visby Rules) to outward shipments from Singapore and Article X of the Rules in the Schedule which envisages a wider scope of application. The Learned Judge further assumed that there was no significant difference in the wording of the UK and Singapore Carriage of Goods by Sea Act 1971 and 1972 respectively.

The defendants in *The Epar* did not contest the validity of the reasoning in *The Hollandia.* However, they submitted that the Singapore Carriage of Goods by Sea Act 1972 was not in the same terms as the UK Carriage of Goods by Sea Act 1971 in that the UK Act provides[11] that the Hague-Visby Rules in the Schedule to the Act "shall have the force of law" whereas the Singapore Act provides that, "subject to the provisions of this Act, the Rules have effect.. ,"[12]. The defendants argued that this was because the Singapore Parliament wanted to preserve the freedom of the parties to contract outside the Act and the exclusive jurisdiction clause was not affected by the Hague-Visby Rules.

An examination of the two Acts shows that the words "force of law" are absent from the Singapore Act. The rationale for this departure can only be speculated upon. It is interesting to note however that the preamble to the Singapore Carriage of Goods by Sea Act 1927 incorporating the Hague Rules contained the phrase "force of law"[13] so that the drafters appear to have deliberately omitted the phrase in the 1972 Singapore Act. It could very well be that they thought the words to be redundant. After all, when domestic legislation is enacted giving effect to a convention that a country has ratified, there does not seem to be any reason why it should not have "the force of law" unless specifically stated.[14] If this be correct the absence of the phrase would not have made any material difference, but in *The Hollandia* their Lordships relied on this phrase to support the contention that the Hague-Visby Rules were mandatorily applicable irrespective of any choice of law clause. Lord Diplock referring to an argument which supported the view that even a choice of substantive law which excludes the application of Hague-Visby Rules is not prohibited by the Act of 1971,[15] stated:

11 Section 2.

12 Section 3.

13 "… And whereas provision has been made by the Carriage of Goods by Sea Act, 1924, that the said rules as so amended and as set out with modifications in the schedule thereto shall, subject to the provisions of that Act, have the force of law…"
"And whereas it is expedient that like provision should be made in the colony."

14 See Mann "Uniform Statutes in English law" 99 LQR 377 at p. 396.

15 See Mann, "Statutes and the Conflict of Laws", [1972-73] 46 B.Y.I.L. 117, 125; Mann states: "Moreover the Carriage of Goods by Sea Act 1924, or the Carriage of Goods by Sea Act 1971 (…), cannot be invoked except where the bill of lading is governed by English law … the critics ought to attack the terms of the Hague Rules or of the statute incorporating them rather than the effects of a valid choice of law, for it is its very essence that the chosen legal system applies and that another country's law, whether it be mandatory, imperative, directory or optional, whether it be common law or statute law, is irrelevant.... The result would be different if the Carriage of Goods by Sea Act contained, not a self-limiting provision, but a choice-of-law clause to the effect that all matters covered by the Hague Rules shall be subject to the law of the place of shipment."

> They draw no distinction between the Act of 1924 and the Act of 1971 despite the contrast between the legislative techniques adopted in the two Acts, and the express inclusion in the Hague-Visby Rules of Article X (absent from the Hague Rules) expressly applying the Hague-Visby Rules to every bill of lading falling within the description contained in the article, which article is given the force of law in the United Kingdom by Section 1(2) of the Act of 1971.[16]

Kulasekaram J. dismissed the defendants' contention that the Singapore Act preserved the freedom of the parties to contract outside the Act on two grounds:

(a) that such construction would ignore the provisions of Article X Rule 1(a) and (b) that they apply to all bills of lading issued in Singapore; and

(b) such a construction would also be contrary to the stated purpose of the international convention viz. the uniformity of the domestic laws of the contracting states.

With respect, both grounds are questionable. The first ground overlooks what appears to be a contradiction within the Singapore Carriage of Goods by Sea Act 1972 affecting its scope of application, for the Act is drafted in such a way that it almost ignores the provisions of Article X of the Hague-Visby Rules. It also brings out another departure from the wording of the UK Act. To appreciate the contradiction, it is necessary to examine the Hague Rules and the Hague-Visby Rules which were given effect to by the Singapore Carriage of Goods by Sea Acts 1927 and 1972 respectively.

The Hague Rules which were the result of the first constructive attempt at unifying rules relating to bills of lading and more generally to contracts of carriage, contained no provision regarding the scope of their application. This was regulated by the national enactments giving effect to the Rules. Most countries which adopted the Hague Rules limited the scope of application to outward shipments. The UK Carriage of Goods by Sea Act 1924 and the Singapore Carriage of Goods by Sea Act of 1927 had similar provisions. Section 2 of the Singapore 1927 Act reads "Subject to the provisions of this Act, the Rules set out in the Schedule hereto (hereinafter referred to as "the Rules") have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Singapore to any port whether in or outside Singapore."

Thus, where the contract was in respect of carriage from a port outside Singapore to a port in Singapore (inward shipment) the Hague Rules were not applicable. It also meant that even where the shipment was from another contracting state, e.g. UK to Singapore, the Hague Rules were still not applicable.

[16] [1983] 1 A.C. 565, 577. However, see Mann *ibid*., pp. 125 & 126 where he states "The argument is that the New Article X of the Rules is 'an attempt to close the gap' and 'an express enactment in force in the forum... which makes the Rules apply irrespective of the intention of the parties'.... If and in so far as it rests on the alleged existence of a choice-of-law clause it is not sustainable ... Article X is a self-limiting internal provision. It does not express a choice of law."

The Hague-Visby Rules rectified this problem to some extent by making provision for the scope of application of the Rules. Article X states "The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

(a) the bill of lading is issued in a contracting State, or

(b) the carriage is from a port in a contracting States, or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,

whichever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person."

This would mean that an inward shipment from a contracting state (e.g. from UK to Singapore) should be subject to the Hague-Visby Rules. It would also mean that an inward shipment from a non-contracting state (e.g. Netherlands to Singapore) should be subject to the Rules if the bill of lading was for some reason issued in Singapore. In fact it could also be that where the carriage is between two non contracting states but the carrier stipulates in the bill of lading that the Singapore Carriage of Goods by Sea Act 1972 applies (e.g. carriage from Indonesia to Netherlands in a Singapore registered ship engaged in cross trading) then too the Hague-Visby Rules would apply. But all this presupposes that the Rules would apply by virtue of the enabling Act.

However, Section 3 of the Singapore Carriage of Goods by Sea Act 1972 retains the original provision in the 1927 Act limiting the application of the Rules to outward cargo. Section 3 of the 1972 Act reads:

> Subject to the provisions of this Act, the Rules have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Singapore to any other port whether in or outside Singapore.

We thus have the anomalous situation of the Rules making provision for a wide application while the Act itself narrows it down. This conflict is not evident in the UK 1971 Act which has done away with the limiting provision of the 1924 Act. It is difficult to rationalise the retention of this limiting section[17] but the following possibilities cannot be overlooked.

It could very well have been that the Singapore legislature was mainly concerned with protecting the interests of the shippers and the drafters were glad to avoid possible problems regarding conflict of laws or questions regarding extraterritorial application of the Rules.[18]

[17] The scope of application of the Carriage of Goods by Sea Act 1972 was not referred to when the Bill was presented in Parliament by the then Minister for Finance, Mr. Hon Sui Sen, on 24th October 1972. Parliamentary Debates, Republic of Singapore (Vol. 32) p. 162.

[18] A similar contradiction appears in another statutes. The Sri Lanka Carnage of Goods by Sea Act No. 21 of 1982. Section 2(2) limits the application of the rules to outward shipments. This was done for policy reasons. However, had sufficient thought been given to the scope of application, it would have been apparent that Section 2(2) of the Act contradicts Article X of the Rules.

It is also possible that the drafters of the legislation were guided by the UK Act and misconstrued Section 3 which at first glance appears to limit the application of the Rules to outward shipments but in fact extends the application of the Rules to carriage between different ports in the UK itself.[19] This provision had been inserted in order to override Article X which limits the application of the Rules to carriage between two different states.[20]

Regarding the second ground referred to by Kulasekaram J., although it is undoubtedly important to ensure uniformity in the construction of the laws of the signatory states[21] and the provisions could be construed on broad principles of general acceptance,[22] it is not possible to overlook fundamental differences in the domestic legislation of individual states and apply a construction adopted by one country to the legislation of another.

The correctness of *The Epar* rests on two factors:

(a) The correctness of *The Hollandia* and

(b) The importance to be attached to the departure in the wording of the Singapore Act from the wording of the UK Act and whether this departure affects the applicability of *The Hollandia* in Singapore.

The first factor brings us into the area of pure conflict of laws which is beyond the scope of this case note. The court in *The Epar* however need not have assumed that the decision was correct. From the conflicts aspect, an important question could have been raised, namely, should the House of Lords have looked first at the choice of forum clause instead of first looking at the choice of law clause? This is the normal approach that a court adopts in a conflict situation because, if it finds that it has no jurisdiction, there is no need for it to look at the choice of law clause.

With regard to the difference in the wording of the UK and the Singapore Acts, it must be noted that the defendants in *The Epar* . brought out only one such instance, that is, the absence of the words "force of law" in the Singapore Act. They made no reference to the contradiction in Section 3 and Article X of the Schedule to the Act which also constituted a departure from the technique and wording of the UK Act. One may thus argue that it was not for the court to raise a factor which may have been in favour of the defence. Being

[19] Section 3, UK Carriage of Goods by Sea Act 1971 states: "Without prejudice to subsection (2) above, the said provisions shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different states within the meaning of Article X of the Rules."

[20] Article X states: "The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if: ..."

[21] This was referred to by the then Minister for Finance at the second reading of the Bill when he stated: "Most maritime nations of the world have acceded to this protocol and have incorporated it in their legislation. Singapore in keeping with other world maritime nations has also acceded to the protocol and is now therefore required to pass legislation to incorporate the protocol." 3rd November 1972, Parliamentary Debates, Republic of Singapore Vol. 32, p. 347.

[22] See *Stag Line Ltd.* v. *Foscolomango & Co. Ltd.,* [1932] A.C. 328 *(per* Lord Macmillan).

an outward shipment from Singapore it also fell within both Section 3 and Article X of the Singapore Act. Even so the particular technique and wording of the UK Act were clearly taken into account in arriving at the decision in *The Hollandia.* The departure of the Singapore Act from that technique and wording casts doubt on the validity of applying the same reasoning in *The Epar.* This does not mean, however, that the Singapore court could not have interpreted the Singapore Carriage of Goods by Sea Act 1972 in the same way as the House of Lords interpreted the corresponding UK Act in *The Hollandia* and thereupon independently concluded that it has the same mandatory nature as the UK Act. Further the learned judge should have given more consideration to the absence of the words "force of law" in the Singapore Act and resolved the conflict within the Act by deciding that Article X overrides Section 3 or that Article X is limited by Section 3. The learned judge might also have directed Parliament's attention to the need to resolve the contradiction between Article X and Section 3.

The significance of *The Epar,* however, lies in the fact that it highlights a common assumption that the law relating to the carriage of goods by sea in Singapore is identical to that in the UK. An examination of the two Acts, however, shows that this assumption is not justified and although English decisions are a useful guide to the interpretation of the Singapore law, they should be applied with caution when the issues involved raise questions regarding the application of the Hague-Visby Rules in the two countries.

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