Swept Overboard: Federal Court Finds Undeclared On-Deck Carriage Did Not Prevent Carrier From Limiting Liability Under Hague-Visby Rules

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In *De Wolf Maritime Safety BV v. Traffic-Tech International Inc., 2017 FC 23*, the shipper, De Wolf, entered into a contract with the carrier, Traffic-Tech, for the transport of its cargo from Vancouver, Canada to Rotterdam, Netherlands. Although the shipper alleged the true value of the cargo was almost CAD $100,000, no value was declared and the carrier issued a clean bill of lading. The cargo was loaded aboard the M/V Cap Jackson in Vancouver, but never made it to Rotterdam. At some point during transit, the cargo was swept overboard and lost.

The shipper brought an action in Federal Court against the carrier for the full value of the cargo. The carrier moved for a preliminary determination of a question of law under rule 220(1) of the *Federal Court Rules*. The Court considered the following two questions:

1. Does the undeclared on-deck carriage of the cargo under the bill of lading prevent the carrier from relying on the *Hague-Visby Rules*?
2. In the negative what are the limitations applicable to the contract of carriage pursuant to the *Hague-Visby Rules*?

On the first issue, the Court considered whether the cargo fell within the definition of "goods" under Article I(c) of the *Rules*, which provides:

"goods" includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

The Court found that the exception under Article I(c) for on-deck cargo requires both parts to be satisfied, namely that the cargo must be declared to be carried on deck and the cargo is in fact carried on deck. Accordingly, as the cargo in this case was not declared to be carried on-deck, the exception did not apply and the contract of carriage was subject to the *Rules.*

On the second issue, the Court considered whether the carrier could rely on the limitation of liability provided for in Article IV(5)(a). Where there is no declared value of the goods on the bill of lading, Article IV(5)(a) limits the liability of the carrier and ship "in any event" to an amount not exceeding the greater of 666.7 units of account per package or two units of account per kilogram of gross weight.

The Court found that, on their ordinary meaning and applied literally, the words "in any event" must be understood to mean "in every case". There was nothing within the wording or the context of the Article that limited this interpretation other than the exception within Article IV(5)(e), discussed further below. Accordingly, the Court found that the contract of carriage was subject to the *Rules* and the carrier was entitled to rely on the limitation of liability provided by Article IV(5)(a).

It must be noted Article IV(5)(e) bars Article IV(5)(a)'s limitation of liability where damage results from an intentional or reckless act or omission by the carrier with the knowledge that damage would probably result. Although the Court recognized that this was the only exception to Article IV(5)(a)'s applicability, it was not considered in this case as such a determination would require an assessment of facts, not just a question of law.

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