So – what did we do…quite a lot, in fact!

The Aliakmon… this discussion relates to the handout I sent round which looks at the matrix of contracts in trade…

- *The Aliakmon* [1986] AC 785 (which, as I said in class, to my mind was scuppered by *Junior Books v Veitchi* [1983] AC 520) – the tort of negligence, sale of goods and the Sale of Goods Act 1979, international sale of goods and shipment terms, bills of lading and rights (or lack thereof!) of suit in carriage, and limitation of liability.

- The way that English law recognises that the consignee has a contract with the carrier…essential if cif contracts are to continue on the risk passes on shipment basis: initially under an implied contract basis, then came the Bills of Lading Act 1855 (which required that the consignee had both the b/la and the property in the goods… not possible in bulk sales, and not in fact in this case), and now the Carriage of Goods by Sea Act 1992. So – we see the contractual role of the bill of lading in this case.

- What then are the qs that we should ask in international (any!) sale contracts?
  - When does the seller at law deliver the goods to the buyer?
  - When does the risk of loss or damage pass to the buyer?
  - When does the property in the goods pass to the buyer?

- We should keep in mind that the element which makes our international sale contract “international” is the shipment terms aspect: e.g. the c.i.f./f.o.b. terms.

- We looked at Incoterms, which are the International Chamber of Commerce’s standard codified shipment terms.

- Incoterms are regarded by English law as part of trade practice and will NOT be automatically incorporated into international sale contracts governed by English law. So, if you want Incoterms in your English law international sale contract, you must expressly include them!

- We also talked a little about standard form contracts – both this and last weekend. Try to think why standard form contracts are important in shipping and trade.

- We can see from our consideration of *The Aliakmon*, and cif type contracts, that the cif buyer will take the bill of lading as a contract (COGSA 92) against the carrier, and, since the 92 Act, irrespective of whether or not he also takes the property in the goods.

- I also flagged up that in addition to “divorcing the marriage” between right of suit on the bill as a contract and having the property in the goods, the 92 Act also has extended the range of documents which give right of suit, to: seaway type bills (which includes straight bills) and also ships’ delivery orders (SDOs).

- Our discussion about formation of contracts, and the need in cif sales for the buyer to be “given” a carriage contract under (today) COGSA 92 should help us to see that in respect of fob contracts, the buyer is the shipper and so he has a negotiated contract of carriage and, thus, does not require a COGSA 92 one!

- As I think I said in class, this came to the Commercial Court in July 1992, which in fact was the same month that the decision came out in *Junior Books*! It was in the Court of Appeal in 1994 – where their Lordships, by careful and subtle argument, made it clear, albeit by subtle and low-key analysis, that they were not going to
take *Junior Books* as having opened the door in general terms to pure economic loss, and certainly not in this case! The HL agreed… as I said, almost a case of wrong judge wrong time for our cargo interest… Lord Brandon had given a strong dissenting speech in *Junior Books*, and *The Aliakmon* was his golden opportunity to restate his approach and bring negligence nicely back into its previous boundaries! His Lordship also said that to allow the carrier to be sued outside of contract would be to deprive him of the “intricate blend” of liabilities and limitations provided by the H/HV Rules.

*Pyrene v Scindia (1954)*

This was the case in which Devlin J (as he was then) came to the conclusion that the fob seller was in a bill of lading contract with the carrier (fixed by the buyer, of course!), so as to justify coming to the conclusion that the carrier could then limit under the Hague Rules. This was a real “policy consideration” judgment - if the consignee sues in negligence because he has no contract, then it is difficult to apply the H/HV Rules, and, again, as in the subsequent case of *The Aliakmon*, this balance of rights and limitations will be disturbed. This was the problem with allowing the tort of negligence to succeed in *Pyrene v Scindia* … the problem for a general law lawyer, of course, is that negligence seems to fit the situation nicely… and, really, from a general legal point of view, is most sensible. But – allowing that fob seller to sue the carrier in negligence (because he has no contract) means that the H Rules (in force in the UK at the time, under the now repealed COGSA 1924, today it would be the HV Rules under COGSA 1971) could not be applied to allow the carrier to limit. So – we have to find some way of not allowing the claim, and this is achieved by the use of arguments which satisfy the current demands – we say policy arguments. Such arguments are often used by the courts to conclude that the defendant does not owe the claimant a duty of care: *The Nicholas H* and *The Aliakmon*.

The other issue for which this case is authority is that the carrier and cargo interest can decide for themselves the point at which mandatory application of the Rules starts… Devlin being wedded to the idea of a general base starting point of freedom of contract (what English law commercial contract law is about). As I said, this was a lucky break for him in his career, as this point was expressly approved in the slightly later HL case of *Renton v Palmyra* (1957). This freedom does not apply in all jurisdictions, and it can cause tensions… and so it was in *The Jordan II* (2005), when the HL was asked to overrule Renton and hold that the parties do not in this day and age have this freedom. As I said in class, the HL rejected this approach, saying that as there was not one universal approach across all jurisdictions, then they would not overrule Renton. We are still, after all these years, in commercial law, somewhat wedded to freedom of contract!

The mandatory application of the H/HV Rules, and the overriding obligations under the H/HV Rules… we looked at the application of the H/HV Rules, and their provisions, and the judiciary’s approach to applying them to a wide range of bill-type contracts.

- *The Rafaela S* [2005] 1 Lloyd’s Rep 347… the CA and the HL agreed that the straight bill was subject to the mandatory application of the HV Rules, following the shipment of the goods (after transshipment) from the UK. That the bill had to be
presented formed the basis of Rix LJ taking this approach, but their Lordships in the HL seemed to think that this was not the most important issue. So – all in all on this case we have a sort of a “fudge” here… although the Law Commission, in its report towards COGSA 92, was firmly of the view that a straight bill was not a document of title, Rix LJ was of the view that this view was confined to the ambit of COGSA 92, and that for the purposes of the H/HV Rules, a straight (any?!) bill was to be regarded as a document of title.

- The vessel was arrested within the jurisdiction of the English Admiralty Court: an in rem action, for a statutory lien in rem action (not a maritime lien in rem).
- Statutory in rem actions were formally recognized by the Arrest Convention 1952, which forms part of English procedural law, the starting point for which in modern law is the Civil Procedural Rules 1999 (CPR).
- Maritime liens… ah – we didn’t discuss these, and I will… they arise in respect of unpaid salvage, collision damage and crew/masters’ wages (and in the US, for unpaid bunkers). Like statutory in rem actions, they are effect through the in rem action. Maritime liens “attach” to the vessel, and are NOT defeated by sale of the vessel to an innocent third party. Maritime liens only attach to the “wrong-doing” vessel.
- Statutory liens can be brought against any vessel which is owned at the time the claim is brought by the person who would be liable in personam.
- All in rem arrest actions are brought within the jurisdiction of the Admiralty Court.
- Art III – seaworthiness and cargo care.
- Art IV 2 (a) the defence of negligent navigation or management of the vessel. This defence is not in the Hamburg Rules or the Rotterdam Rules.
- I told you about *The Eurasian Dream* (2002), in which the defendant carriers attempted to rely on the defence under Art IV r 2(b): fire, which is not the fault or privity of the carrier. The Court agreed with the claimants that the inability of the crew to extinguish the one fire (which led to the total loss of the vessel and her cargo) meant that the carrier was in breach of Art III, in that the incompetent crew meant that the carrier had not exercised due diligence “before and at the beginning of the voyage” to provide a seaworthy vessel. The carriers’ attempts to argue that this was a one-off act of negligence by the crew which was not a breach of Art III was rejected. Cresswell J said that “Seaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable.” As I said in class on Saturday, these defences are getting harder and harder to plead successfully, because of the standards and practices of today’s industry (think ISM expectations!). So – the chances of the carrier being able to plead Art IV r 2 (a) successfully are, as I also said, in my mind remote to non-existent!
- International regulation of carriage relationships… started in the US with the Harter Act 1893, to combat English law’s “freedom of contract” which allowed British shipowners/carriers to exclude more or less all liabilities for breach of carrying contract. The Harter Act provided a minimum benchmark of liability which the carrier could not avoid, and it applied on all cargos discharged in and shipped from the US. Even where the carrier’s contract was governed by English law, which allowed the exclusions, the cargo interest could arrest the vessel in rem, and so had his defendant within the jurisdiction! This is still the reason for using the in rem action today.
- The international community then came to think this approach was the way to go,
and the Hague Rules were agreed, with minimum level of liability and some breaches for which liability could not be excluded: Art III, to exercise due diligence before and at the beginning of the voyage to provide a seaworthy ship, and to load, stow, carry and discharge the goods “properly and carefully”. If there is a breach of Art III, this over-rides any of the exclusions in Art IV 2 and the carrier is liable – although he can, of course, still limit his liability.

- Remember… if the carrier/owner can show, on a balance of probability, that he did exercise due diligence, then the cargo interest has no claim: Art IV r 1 excuses the carrier/owner from liability where he can show due diligence.
- The H Rules came into force in the UK under the COGSA 1924.
- The US introduced the H Rules (although it has not repealed the Harter Act) under the US COGSA 36. It applies those Rules on shipment from (as the UK does the HV Rules) and (like the Harter Act) on discharge in the jurisdiction (which most jurisdictions, including the UK do not). Hmm – do you think these different approaches effectively regulate carriage contracts?!
- The Rules were updated/moved on a little under the Visby Protocol, and the HV Rules came into force.
- The HV Rules came into force in the UK under the COGSA 1971 (not to be confused, of course, with COGSA 1992, which more appropriately might have been called “The Rights of Suit in Carriage Act”!), which repealed the 1924 Act.
- The HV Rules have a much higher level of limitation (in The Rafaela S, the carrier’s liability would have been about US$ 2,000, whilst under the HV Rules about US£150,000!), and also introduced the third party limitation clause. So – if goods are carried under the H Rules, the contract does need a third party limitation clause, i.e. the Himalaya clause as you know it. This huge difference in limitation amounts do lead to forum shopping (e.g. as in The Rafaela S, where the claimant arrested the vessel in rem so as to get the mandatory application of the HV Rules, the goods having been shipped from the UK, on transhipment). Hmm – do you think this forum shopping contributes towards effective regulation of carriage contracts?!
- The H/HV Rules apply on a mandatory basis to contracts evidenced by (The Ardenness) or contained in (e.g. in the hands of a consignee to whom the bill is endorsed) bills of lading or similar document of title contracts (e.g. in The Rafaela S, the HL held that a straight bill which had to be presented was a “document of title” type contract for the purposes of mandatory application).
- The H/HV Rules do not apply on a mandatory basis to charters – these still have freedom to contract on what terms they want. Hmm – do you think in this day and age that this is an effective regulation of carriage contracts? Charters will include a Hague clause (the clause paramount, as many of you know it), but this is because of the soft law concept, in that P & I Clubs will “make” their members contract on such terms in order to be covered. Do you think this an effective way of regulating carriage/charter contracts?
- Art IV r 2 (a) – the very contentious defence of “negligent navigation or management of the vessel”… although in reality today a very difficult defence to plead. The Hamburg Rules do not have this defence, and, if they come into force, neither will the Rotterdam Rules… do you think this defence leads to effective regulation of carriage contracts in today’s modern shipping?
- Where the contract is governed by the H/HV Rules, the cargo interest claimant has one year in which to bring his claim – if he does not, he is time-barred. This one year is much shorter, certainly than under English law (and, I suspect also than
under German law) than one normally gets to bring a claim (although time limitations on shipping and international sale contracts are not uncommon). Is this an effective way to regulate shipping relationships? Under the Hamburg Rules the cargo interest gets two years (Art 20 Hamburg Rules).

- Art III R 8... of both H/HV Rules: any attempt to lower/reduce the carrier’s liability to be less than under the mandatory applicable regime is “null and void”... if, e.g. goods are shipped out of a HV state (e.g. the UK) and the bill of lading contains a H Rules clause, the lower limitation amount under the H Rules cannot, in the eyes of the English courts, apply. So – the English courts will simply think of that Hague Clauses as “null and void” and ignore it, and apply the HV Rules! Hmm – again, forum shopping… does this impact on successful regulation of carriage contracts? A corresponding provision is in the Hamburg Rules (Art 23 Hamburg Rules). We touched on this right at the end of Saturday.

- Art IV r bis... this is the third party limitation clause, under which the servants and agents of the carrier, typically stevedores, can, if sued in negligence or bailment for loss and damage to the cargo by the cargo interest, limit their liability to the same level as the carrier could under the contract. This article is not in the H Rules, and so a third party limitation clause must be inserted into (a) bill of lading type contracts governed by the H Rules, and (b) to charterparties. An express third party limitation clause is, for historical case purposes called a Himalaya clause (from the case *Alder v Dickson* (1954)). There is a corresponding provision in the Hamburg Rules (Art 7 Hamburg Rules). We did mention this but I did not tell you the Article, and do not expect you to know the Hamburg Rules’ articles for the exam.

The contractual status of a bill of lading... this, of course, is important, as the H and HV and Hamburg Rules apply on a mandatory basis to contracts contained in or evidenced by a bill of lading or similar document of title (which has been an issue since *The Rafaela S*).

- The role of bills of lading: (i) as a receipt, as a receipt for the goods shipped; (ii) as a document of title (and we know what we mean by this, i.e. it stands in the shoes of the goods), and (iii) as a contractual document.

- Where the shipper charters the vessel, his contract is contained in the charter (parole evidence rule again), and the bill has no contractual role whatsoever. So - a chartering shipper does not have a “bill of lading contract” and so his contract is not governed on a mandatory basis by the H/HV Rules. Hence what is called “the paramount clause”, which is a clause expressly incorporating a Hague clause... the carrier's insurance (his P & I Club) will generally insist (for several reasons, which we will cover) that the charter does have a Hague clause in it (generally a Hague rather than a HV clause because, of course, the limitation level under the H Rules is much, much lower than under the HV.

- The bill of lading as a contractual document is the difficult one – it is critical, as the H/HV Rules apply on a mandatory basis to contracts “evidenced by or contained in a b/l):

  1. The b/l will be evidence of the shipper’s contract with the carrier where the shipper has not also chartered the vessel... So – the non-chartering shipper has a bill of lading contract. Under English common law, the bill cannot be the contract, as the contract is fixed by the shipper’s and carrier’s mutual exchange of promises, which occurs before the goods are put on board.