

The Thorco Lineage: limitation under the Hague-Visby Rules where there is physical damage and economic loss JFR and BXC

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Part of a cargo suffers some minor physical damage. But, an economic loss is suffered in respect of the whole of the cargo – perhaps a diminution in market value due to delay, a liability to pay salvors, or transshipment costs.

Under the Hague Visby Rules (“the HVR”) is the economic loss limited by reference to the weight of the whole cargo, just the physically damaged cargo, or is it unlimited?

In the controversial decision, *The Limnos* [2008] 2 Lloyd’s Rep 166, Burton J held that the economic loss fell to be limited by reference to the weight of the physically damaged cargo (at least where the economic loss is consequent on the physical damage), and that if there was no physical damage, the claim would be unlimited. This led to many anomalies, most notably that if there was very minor physical damage the entire claim might be limited to a few dollars, but if there was no physical damage at all, the economic loss claim would be unlimited.

In an important judgment handed down on Friday 13th January (*Trafigura PTE Ltd v TTK Shipping Ltd* (“*The Thorco Lineage*”) [2023] EWHC 26 (Comm)), Sir Nigel Teare declined to follow *The Limnos* and rejected the argument that Article IV(5)(a) of the HVR limits claims for economic loss by reference only to the weight of cargo which suffers physical damage.

Rather, he held that the limit is to be calculated by reference to the weight of cargo physically or economically damaged.

John Russell KC and **Benjamin Coffey** appeared for the Claimant cargo interests, instructed by Stephenson Harwood. **Nevil Phillips** and **Peter Stevenson** appeared for the Defendant carriers, instructed by MFB.

Article IV(5)(a) of the Hague-Visby Rules limit’s the carrier’s liability for “*loss or damage to or in connection with the goods*” by reference to the higher of two alternative figures: 666.67 SDR per package or unit or 2 SDR per kilogram of gross weight of “*the goods lost or damaged*”.

In *The Limnos*, Burton J held that the words “*the goods lost or damaged*” only encompass goods which are physically lost or damaged, so that where an incident causes limited physical damage but substantial consequential economic losses, the carrier can limit its liability by reference to the weight of cargo physically damaged. Further, he held that in the phrase, “*loss or damage to or in connection with the goods*”, “*the goods*” were only those which were physically lost or damaged.

Sir Nigel, sitting as a Judge of the Commercial Court, declined to follow the analysis of Burton J, preferring the view that goods which suffer a diminution in value are “*lost or damaged*” for the purpose of the rule. That includes a diminution in market value, a liability to a third party such as salvors, or a requirement to tranship or incur other costs.

The claim arose out of the grounding of the Vessel “THORCO LINEAGE” following a loss of main engine power. The Claimant was the owner of a cargo of zinc calcine which was on board the vessel at the time of the engine failure. Salvors re-floated the vessel, but had a lien on the cargo in respect of the cargo interests’ liability for salvage remuneration (subsequently settled for US\$7.355 million). In addition, a small part of the cargo was physically damaged in the re-floating efforts, causing losses of about US\$300,000.

The cargo interests argued that the grounding had been caused by a breach of the HVR (unseaworthiness), and claimed damages in respect of their payments to salvors and the damage to the cargo, as well as on-shipment costs. Relying on *The Limnos*, the carrier argued that its liability for all of the losses was limited by reference to the weight of the small quantity of cargo which had suffered physical damage.

The parties agreed that the limitation issue should be determined by the Court on an application under section 45 of the Arbitration Act 1996.

Sir Nigel rejected the attempt to limit.

He held that given that the delegates to the conventions leading to the Rules clearly intended Article IV(5)(a) to limit “*economic losses which arise in connection with the goods but without physical damage*” they cannot have intended to prevent there being any such a limit by requiring the presence of physical damage to the goods [53].

He thus held that to construe the words “*goods lost or damaged*” as requiring the presence of physical damage to define or quantify the limit would not properly reflect the intention of the delegates to confer a right to limit in respect of liability for loss or damage or in connection with the goods [56].

He thus rejected the reasoning underpinning *The Limnos* that, absent physical damage, economic losses are unlimited.

This analysis was the key to his finding that all losses must be limited by reference to the weight of the goods in connection with which the loss has been suffered.

To achieve this, again rejecting the analysis in *The Limnos*, he held that in HVR IV(5)(a) the phrase “*goods lost or damaged*” means “*goods lost or damaged physically or economically*” [57], [104].

On the facts of the case, the salvage liability and the on-shipment costs were incurred in respect of the cargo as a whole. The whole cargo was therefore “*damaged*” for the purposes Article IV(5)(a), and the limit should be calculated by reference to the weight of the full cargo. The entire cargo, though largely in sound condition, had from the claimant’s perspective “*a diminished value at the port of discharge to the extent of the additional expense [it] had incurred*” [54].

Sir Nigel also went on to hold that, even if the decision in *The Limnos* was correct, the entire cargo, in this case, would nevertheless have been considered physically “*damaged*” because the salvor’s maritime lien had the effect of damaging the Claimant’s proprietary or possessory title to the cargo, following dicta of Sheen J in *The Breydon Merchant* [1992] 1 Lloyd’s Rep 373 and Derrington J in an Australian case, *The Ikan Jahan* [2019] 2 Lloyd’s Rep 235.

Finally, Sir Nigel considered what connection is required between the damage to the goods relied on for the calculation of limitation and the losses which are the subject of the claim. Although this issue had no effect on the outcome on the facts of this case, it could conceivably be relevant in other cases where there are multiple instances of physical damage to different parts of a cargo during a voyage. The Judge considered that a single limit would apply to all losses arising out of the same breach of the contract of carriage, calculated by reference to the weight of cargo (physically or economically) damaged as a result of that breach.

The consequence is that claims for pure economic losses, such as diminution in market value, and quasi-physical losses, such as those arising out of the imposition of a lien for salvage or general average, are limited under Article IV(5) (a), whether or not there is conventional physical damage arising out of the same incident. However, the limit will be calculated by reference to the full weight of the cargo to which the losses relate.

On the facts of the *Thorco Lineage* itself, this was a significant win for the Claimant, because the weight of the entire cargo was such that the limitation figure exceeded the total sum claimed.

However, the decision is not all bad news for carriers, as it rejects the *Burton J* analysis that if there is no physical loss at all, any claim for economic loss is unlimited. There will be cases, where the losses are higher, or the weight of economically damaged cargo is lower which will now be subject to limitation whereas under *The Limnos* they would not have been.

Importantly, the decision eliminates many of the undesirable anomalies inherent in *The Limnos* analysis and to a considerable extent brings the English law approach to Article IV(5)(a) into line with commercial common sense.

The judge refused the Defendant carriers’ application for leave to appeal. Pursuant to section 45, the application cannot be renewed to the Court of Appeal. Therefore, the matter rests with Sir Nigel’s decision. On one view, therefore, there are two inconsistent first instance decisions. However, Sir Nigel’s judgment contains a very detailed and cogent analysis of (a) the ordinary and natural meaning of the words used in the Rules; (b) the *travaux préparatoires*; (c) the authorities (including a detailed deconstruction of *The Limnos* itself); and (d) the textbooks and commentaries. This is, with respect, in marked contrast to the conclusionary reasoning of *Burton J*. It can be safely said that *The Thorco Lineage* now represents the law, and *The Limnos* will slide into history.

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"A highly gifted advocate with a superlative depth of knowledge in complex areas of law." (Chambers UK, 2023)

John is an experienced and determined commercial advocate and has acted as lead Counsel in numerous Commercial Court trials, international and marine arbitrations and appellate cases, including two successful appearances in the Supreme Court, including the landmark shipping decisions in *Volcafe v CSAV* and the *CMA CGM Libra*. He has also appeared as counsel in inquests and public enquiries.

John has been named Shipping Silk of the Year for both the Legal 500 UK Awards 2020 and the Chambers & Partners Bar Awards 2020, having also been nominated in 2019. He was named the top maritime lawyer of 2020 by Lloyd's List. He is ranked in the Legal 500 and Chambers & Partners in Shipping and Commodities.

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"It is as though he missed the junior stage and immediately possessed the knowledge and gravitas of a senior barrister." (Chambers UK, 2023)

Ben was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards. He was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2020 and shortlisted for Shipping Junior of the Year for Chambers & Partners UK Bar Awards in 2022.

He is described by the directories as "a rising star", "a standout shipping and commodities junior" and "a star of the future". He is also recognised as a leading junior in the Legal 500 Asia Pacific Guide.

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