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Papers on Shipping Law & Maritime Economics

The Johanna Ostendorff test & Bill of Lading as a receipt under The Hague/Visby Rules

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1.1 Introduction

This assignment is divided in two parts:

A. a critical evaluation of the failure of the *Johanna Oldendorff* test to provide a fair solution for the carrier as it uses the strict port limits as against the normal waiting place for that port.
B. A critical examination of the bill of lading as a receipt under the Hague/Visby rules.

1.2 Purpose of the Assignment

The purpose of this paper is to assess case and/or statutory law with a view to answering the two questions presented by the assignment.

1.3 Structure of the Assignment

Next, we provide the examination and critical analysis of the two questions presented by the assignment in two parts.
Part 1.6 shall examine the implications of the *Johanna Oldendorff* test and
Part 1.7 shall examine the role of the bill of lading as a receipt.

1.4 Methodology & Data

The assignment is based on secondary data including case and/or statutory law as well as textbooks and articles published on the *Johanna Oldendorff* case and the role of the Bill of Lading as a receipt.

1.5 Literature Review & Analysis

1.6 *Johanna Oldendorff* test's implications for carriers

1.6.1 The Johanna Oldendorff test

The *Johanna Oldendorff* test was articulated as a response to port charters where (unlike with voyage charters specifying a berth or dock as a loading point) there is

ambiguity as to which area of the port should the vessel be in order to be an arrived ship.

The *Johanna Oldendorff*[1] had been chartered to carry dry bulk cargo from USA to Liverpool/Birkenhead (port charter). The vessel arrived on the 2nd of January 1968 and at the time of arrival there was no available berth and it was ordered by the port authority to anchor at the Mersey Bar. The ship was then ordered to proceed and anchor at the Bar Light vessel. The ship anchored until the 20th of January ready to discharge.

Owners claimed demurrage providing the reasoning that the vessel became an arrived ship when she anchored at the Bar anchorage which according to their claim was within the port of Liverpool.

On the other hand, the charterers replied that arriving at the anchorage was not arrival at the port and arrival only occurred when the vessel moved to her unloading berth in the docks of the port around 16 days later.

Lord Reid in the *Johanna Oldendorff* recognized the main idea in the *Aello*[2] case was that the vessel's location is "inseparably connected…with her status of immediate and effective availability for the services required"[3].

However, Lord Reid went even further (deriving from *Aello*) and pointed out that[4] "But for practical purposes it is so much easier to establish that, if the ship is at a usual waiting place within the port, it can generally be presumed that she is there fully at the charterer's disposal". Unlike with the *Aello* case where the ship should be within the commercial area of the port in order to be deemed as an arrived ship, their Lordships treated the matter differently in *The Johanna Oldendorff*.

Lord Reid articulated a test on whether a vessel will be treated as an arrived ship under a port charter by stating that[5] "Before a ship can be said to have arrived at a port she

[1] *The Johanna Oldendorff*, 1973, 3 All ER 148
[2] [1969] 2 All ER 578
[3] [1969] 2 All ER 578 at p. 587
[4] *The Johanna Oldendorff* 1973, 3 All ER 148 at p. 157
[5] *The Johanna Oldendorff* 1973, 3 All ER 148 at p. 157

must, if she cannot proceed immediately to a berth, (1) have reached a position within the port where she is at the immediate and effective disposition of the charterer. (2) If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the charterer".

Furthermore, (3) it was also a vital prerequisite per Lord Reid that the ship must be within the legal (administrative) area of the port. In the said case *The Johanna Ordendorff* was ruled to be an arrived ship as the Mersey Bar was within the administrative/legal limits of the Liverpool/Birkenhead port and the Bar was the normal anchorage for vessels waiting for a berth.

Although the first two points make perfect sense it is the latter that one may argue it has unnecessarily added complexity to defining an arrived ship. This is so because sometimes the administrative area of the port does not coincide with the place where waiting ships usually lie and/or areas where they are "at the immediate and effective disposition to the charterer"[6]. The following section is devoted to this problem and its implications for carriers.

1.6.2 Implications for carriers

The last point above, referring to the ship being within the administrative area of the port has created scope for arguments against the decision reached by the House of Lords.

As Wilson points out (2010, p. 53) in practical terms the decision implies that a ship will never be considered as having arrived in the event a port authority orders it to stay outside its administrative area.

The House of Lords was given several chances to review their position and clarify the ambivalence on this issue but emphatically denied doing so.

In the case of *Maratha Envoy*[7] the charterer had nominated (under a port charter) Brake, a river port in Weser, Germany as the port of loading. The vessel was ordered to wait at the Weser Light (located 25 miles downstream from Brake) which was the normal waiting place for vessels the size of the Maratha Envoy. Since there were no

[6] *ibid* 5

[7] *Federal Commerce & Navigation Co v Tradax Export* [1977] 2 All ER 849

suitable anchorages within the port's administrative area for ships her size, one would expect that the ship would be deemed as an arrived ship.

The Court of Appeal following the above reasoning ruled that the ship was an arrived ship. However, the House of Lords (on appeal) rejected the decision of the lower court because one prerequisite of *The Johanna Ordendorff* test was not met i.e. the Maratha Envoy was not anchored within the administrative (legal) limits of the port of Brake.

It appears that this test may present challenges to carriers and owners.

There are many ports that have no clearly defined legal/administrative limits (Davies, 2000-2017) or ports that - as mentioned above - their administrative areas do not coincide with the place where waiting ships usually lie and/or areas where they are at the immediate and effective disposition to the charterer.

It is arguable that the House of Lords should have gone a few steps further and further clarify the issue and remove uncertainty by possibly removing the prerequisite of arriving at the administrative area of the port as a determining factor for establishing the *arrived ship* concept.

As M. Davies (2000-2017, p. 5) points out: "Does it really matter whether or not a vessel has got within certain limits (which can be difficult to delineate) so long as she has got to the customary or usual waiting place for vessels having to wait for a berth? It appears to many persons in the commercial world that the Courts have missed a golden opportunity to simplify even further, the arrived ship concept, so as to allow an owner compensation for his money making asset when his vessel has got as far as she can, and is waiting at a place where vessels normally wait for a berth."

1.7 The role of the Bill of Lading as a receipt under The Hague/Visby Rules

1.7.1 Functions of the bill of lading as a receipt

One of the functions of the bill of lading under common law and the Hague/Visby Rules is to act as a receipt of goods shipped.

As Dockray (2004, p. 89) points out the bill of lading is "like a cloakroom ticket because it must be produced in order to obtain delivery".

It is therefore quintessential for e.g. a shipper that a carrier should be able to make solid statements as to

1. Receipt as to the quantity
2. Receipt as to the condition
3. Receipt as to leading marks

of the goods shipped (Wilson, 2010).

In the absence of a statement contained in the bill of lading as to quantity, condition or leading marks it would be cumbersome for a shipper or consignee to recover for goods delivered that were short or damaged.

However, it has been commonplace that carriers may insert clauses containing phrases such as *weight & condition unknown*, *shipper's count* etc. before placing their signature on the bill. This creates further ambivalence in the event something goes wrong.

Article III Rule 3 of The Hague/Visby Rules gives entitlement to a shipper to demand a bill of lading containing certain information and sets out the following:

"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things –

a. The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or recovering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
b. Either the number of packages or pieces, or the quantity, or weight, as the case may be as furnished in writing by the shipper.
c. The apparent order and condition of the goods."

Under Article III Rule 5, the shipper is deemed to have guaranteed to the carrier the accuracy of all info supplied by himself in writing for inclusion in the bill of lading. Furthermore, he is liable for compensation to the carrier in the event of inaccuracies. The carrier is under no obligation issue a bill containing such information unless instructed so by the shipper.

According to the finding of the court in *The Esmeralda*[8], the shipper may refuse to issue any of the above if he/she has reasonable grounds for believing the information is inaccurate, or lacks the means to check it.

Furthermore, under Article III Rule 4 of the Hague/Visby Rules

"Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with § 3, a, b and c. However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

Also in the absence of a carrier's compliance with a request under Article III Rule 3 it has been argued that Article III Rule 8 may apply although there have been arguments to the contrary[9].

The following sections will examine each of the three main functions of the bill of lading as a receipt in the light of case law developed on the subject:

1.7.1.a Receipt as to the quantity of the goods shipped

As seen above Article III Rule 3 subsection b of The Hague/Visby Rules provides the shipper may request an acknowledgement of quantity which is defined by "either the number of packages or pieces, or the quantity, or weight, as the case may be as furnished in writing by the shipper".

In *Oricon* v *Intergraan*[10] receipt of 2,000 packages of copra cake was acknowledged on the bills of lading (which were Hague/Visby Rules bills) "said to weigh gross 105,000 kgs for the purposes of calculating freight only".

The court ruled that whereas the quantity as to the number of packages was clearly acknowledged neither bill was evidence of the actual weight of the goods shipped.

The proof was upon the consignee to establish the weight of cargo shipped before he could successfully make a claim (action for short delivery). It is further important to

[8] *The Esmeralda* [1988] 1 Lloyd's Rep 206
[9] *The Malta K* [1998] 2 Lloyd's Rep 614
[10] [1967] 2 Lloyd's Rep 82

recall Article III Rule 4 (discussed above) where a third party acting in good faith does not fall within the scope of the rule that "a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with § 3, a, b and c" but *conclusive evidence*.

1.7.1.b Receipt as to the condition of the goods shipped

The same applies as above in respect Article III Rule 3 subsection c. which refers to statements as to the order and condition of goods shipped. Again, Article III Rule 4 applies here.

Also, exception clauses by the carrier shall be rendered void as per Article III Rule 8.

Finally, such statements must be expressly requested by the shipper.

This was the issue in *Canada & Dominion Sugar Co Ltd* v *Canadian National Steamships Ltd*[11] (a relevant case although dated 1947) (also see *Tokio Marine & Fire Ins Co* v *Retla Steamship Co*[12]) where in the ship-owner signed the bill under guarantee to produce ship's clean receipt. In this case, Article III Rule 3 should have applied only if the shipper explicitly requested a bill of lading showing the apparent order and condition of the goods. In the absence of such demand the ship-owner's qualification could not be rendered void.

1.7.1.c Receipt as to the leading marks of the goods shipped

Article III Rule 3 subsection a of The Hague/Visby Rules provides that the shipper may request that identification or quality marks on the goods shipped are registered in the bill of lading and that such marks remain legible until the completion of the journey.

An important qualification to the above rule was presented under common law in *Parsons* v *New Zealand Shipping Co*[13] where a slightly different numeral mark on the

[11] [1947] AC 46
[12] [1970] 2 Lloyd's Rep 91
[13] [1901] 1 KB 548

carcasses of lamb exported from New Zealand (used for book-keeping purposes of the sellers) was not affecting the quality and value of the goods shipped and bore no market implications.

It would be a different case if e.g. it was about a shipment of *Scotch Whiskey* and instead Japanese labelled Whiskey was shipped.

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