

SHIPPING BULLETIN



“Tasman Pioneer” - The Hague-Visby Rules nautical fault defence

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Article IV, rule 2(a) of the Hague-Visby Rules provides that neither contracting carrier nor ship shall be responsible for loss and damage to cargo resulting from “*act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship*”.

In *Tasman Orient Line CV v New Zealand China Clays Ltd* [2010] NZSC 37 (16 April 2010), the New Zealand Supreme Court held that this “nautical fault” defence for contracting carriers applies to all acts - apart from barratry - of the master and crew in the navigation or management of the ship. The decision displays a common sense approach, making clear which acts are covered by the exemption and which are not.

On 3 May 2001, “Tasman Pioneer” grounded in Japanese waters, causing significant damage to ship and cargo. It was common

ground that the nautical fault defence covered the master’s conduct up until the time of the grounding. However, he then delayed reporting the casualty to the Japanese Coastguard and his owners and continued sailing. During this time, the vessel suffered further ingress of water into the cargo holds. The carrier admitted that this conduct of the master, described by the Supreme Court as “*reprehensible*”, was in order to absolve himself from blame.

Proceedings against the contracting carrier, Tasman Orient Line, were commenced in the New Zealand High Court by a group of cargo interests who owned deck cargoes on the vessel. The High Court held that damage to the deck cargoes was caused by the master’s post-casualty misconduct. But for that, salvors would have arrived at the casualty five hours earlier and the deck cargo would have been saved.

The question for the New Zealand courts was whether the master’s post-grounding conduct fell within the nautical fault defence in Article IV, rule 2(a).



The High Court held that the nautical fault defence is only available where the actions of those in charge of the ship are “*bona fide*” in its navigation or management. The master’s conduct did not satisfy this test.

The Court of Appeal came to the same conclusion by a different method, finding that the master’s “*selfish*” and “*outrageous*” behaviour could not be conduct in the navigation or management of the ship.

However, the Supreme Court of New Zealand unanimously allowed the carrier’s appeal.

Justice Wilson, who delivered the judgment, analysed the Hague-Visby Rules as follows:

“The scheme of the Rules is clear. Carriers are responsible for loss or damage caused by matters within their direct control (sometimes called “commercial fault”), such as the seaworthiness and manning of the ship at the commencement of the voyage. They are not however responsible for loss or damage due to other causes, including the acts or omissions of the master and crew during the voyage (“nautical fault”)... The allocation of responsibility between the carrier and the ship on the one hand and the cargo interests on the other promotes certainty and provides a clear basis on which the parties can make their insurance arrangements and their insurers can set premiums.”

The contracting carrier was not liable to compensate the cargo interests for their loss because the conduct of the master, although reprehensible, was in the navigation or in the

management of the vessel. The Supreme Court specifically noted that neither the owners nor the carrier had any knowledge of the master’s conduct and could not be said to have authorised his actions. Unless cargo interests were able to establish barratry, which they could not, the carrier was entitled to rely on the defence.

Barratry includes wrongful acts wilfully committed by the master or crew to the prejudice of the vessel or cargo, without the involvement of the shipowner. Examples include wrongful desertion, illegal scuttling of the vessel and theft of the ship or cargo. The test for establishing barratry is whether damage has resulted from an act or omission of the master or crew done with intent to cause damage to the ship or cargo, or recklessly and with subjective knowledge that damage would probably result. No allegation of barratry had been made in the pleadings.

Should they take effect, the Rotterdam Rules will eliminate the nautical fault defence. However the Hague-Visby Rules remain in force in common law jurisdictions, including the United Kingdom, New Zealand, Australia and Hong Kong. It is encouraging that the courts continue

to interpret them in a commercial manner, providing for clear allocation of risk between contracting carriers and cargo interests.

Holman Fenwick Willan acted for the owners of “Tasman Pioneer” in relation to the grounding and the subsequent claims by cargo interests.

For more information, please contact [George Lamplough](#) (pictured below), Partner on +852 3983 7776 or george.lamplough@hfw.com, or [Nick Luxton](#), Associate on +852 3983 7774 or nick.luxton@hfw.com, or your usual contact at HFW.



“The contracting carrier was not liable to compensate the cargo interests for their loss because the conduct of the master, although reprehensible, was in the navigation or in the management of the vessel.”



HNS Convention moves closer to implementation

Following a Diplomatic Conference held at the IMO in April 2010, a protocol ("the 2010 Protocol") to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the "HNS Convention") has been adopted. The aim of the Protocol is to resolve problems which have prevented many States from ratifying the HNS Convention, and to facilitate its rapid entry into force.

The intention is that, once in force, the HNS Convention will compensate victims of spills from vessels carrying hazardous and noxious substances ("HNS") - such as solid chemicals, liquids including oils, and liquefied gases - in a similar way to the regime which exists for compensating victims of spills from oil tankers under the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of a Fund for Compensation for Oil Pollution Damage, 1992.

The HNS Convention covers claims for both pollution damage (including property damage, economic loss and personal injury) as well as damage caused by fire and explosion. The HNS Convention would impose strict liability and a compulsory insurance obligation on the shipowner, who would usually be able to limit his liability by reference to gross tonnage up to a maximum of 100 million SDRs (approximately US\$150m). The owner of a ship entering the port of any state which is party to the HNS Convention must provide evidence of insurance by production

of a certificate. Claims above the shipowner's limit would be paid by the HNS Fund, financed by receivers of HNS contributing cargo after sea transport, up to a maximum of 250 million SDRs (approximately US\$375m). The HNS Fund will have separate accounts for oil, LNG, LPG and a general account for bulk solids and other HNS. To avoid cross-subsidy, each account will meet the cost of compensation payments arising from damage caused only by substances contributing to that account.

The 2010 Protocol addresses three main issues which have so far prevented ratification:

1. To overcome concerns about the difficulty of monitoring packaged cargo imports, packaged HNS no longer counts towards contributing cargo for which levies must be paid to the HNS Fund. Shipowner compensation limits, for packaged HNS only, have been increased to 115 million SDRs (around US\$172.5m).
2. No compensation shall be paid by the HNS Fund for damage in the territory of a state which has not fulfilled its obligations to report contributing cargo.
3. States were worried that the existing provisions relating to payment of contributions for LNG cargoes were unworkable and these have therefore been amended.

The 2010 Protocol calls for early entry into force of the updated HNS Convention 2010, which will be open for signature from 1 November 2010.

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Bribery Act 2010

HFW will be hosting a seminar on the Bribery Act 2010 in our London office on the afternoon of Thursday 8 July 2010. This will include a legal overview and practical steps for clients presented by HFW partners, as well as presentations by Richard Horwell QC, a senior commercial fraud silk and John Drysdale, the Chairman of Transparency International UK. Delegates will also have the opportunity to ask questions to the panel. The seminar will begin at 4.00pm and will be followed by a drinks reception. Those interested in attending should contact events@hfw.com.

Conferences & Events

[AJFB Colloque Maritime](#)

Paris
(3-5 June 2010)
Xavier McDonald and Guillaume Brajeux

[Lloyd's Maritime Academy Bunker Schools 2010](#)

Bonhill House, London
(14-16 June 2010)
James Mackay and Russell Harling

[Cambridge Academy of Transport, Disputes on Charterparties](#)

Millenium Gloucester Hotel, London
(21-23 June 2010)
Julian Pierce

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