Nick Margetson[*]

CASE NOTE

Glencore Energy UK Ltd and Glencore Ltd versus Freeport Holdings Ltd (*Lady M*), Court of Appeal (Civil Division)[1]

1. Introduction

This judgment of 14 March 2019 concerns the appeal by Glencore Energy UK Ltd and Glencore Ltd (appellants, hereinafter jointly referred to as 'Glencore') against the judgment of Mr Justice Popplewell (hereinafter referred to as 'the Judge') of the High Court of Justice, Queen's Bench Division, Commercial Court of 21 December 2017.[2]

The members of the court of appeal were Sir Geoffrey Vos (chancellor of the High Court), Lord Justice Simon and Lord Justice Coulson. The main part of the judgment was written by Lord Justice Simon (hereinafter referred to as 'LJ Simon').

In this case note I mainly discuss the primary issue of the judgment, namely the question whether the shipowners ('the Owners') can rely on the fire exception of the Hague Visby Rules, even if the fire was caused barratrously. I have not discussed the side issues.

2. The judgment in first instance

The case concerned damages caused by fire on board the motor vessel *Lady M* which had been deliberately started by the Chief Engineer. Glencore had argued that the Chief Engineer's actions constituted barratry and therefore the Owners could not rely on the fire exception contained in art. IV.2(b) of the Hague Visby Rules or the defence contained in art. IV.2.(q) of the Hague Visby Rules[3] to avoid liability for the resulting damages of the fire.

The Judge concluded that further facts were needed regarding the Chief Engineer's state of mind to establish whether his conduct constituted barratry. He held that the issue was, however, not determinative for the question whether the Owners were exempt from liability for the fire under article IV.2(b) or q. He found that article IV.2(b) could exempt the Owners from liability if the fire were caused deliberately or barratrously and that the Owners were not exempt from liability for the fire under article IV.2(q).

3. The grounds for appeal

Glencore appealed against the Judge's decision on the basis that: (1) on the agreed and assumed facts, the conduct of the Chief Engineer in starting the fire constituted barratry and that this conclusion did not depend on a close analysis of his state of mind at the time; and (2) the article IV.2(b) defence was not available where the fire was caused by the barratrous act of the Master or crew.

The court of appeal (hereinafter referred to as 'the court') first dealt with the second issue: whether the Owners can rely on the defence provided by article IV.2(b) of the Hague Visby Rules even if the fire was caused by the barratrous act of the Master or crew. The answer to that question is discussed in this case note.

4. Can the Owners rely on the fire exception even though the fire was deliberately caused by the Chief Engineer?

The issue involves the interpretation of art. IV.2(b) of the Hague Visby Rules ('the fire exception') which provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

'Fire, unless caused by the actual fault or privity of the carrier'

Before the question of interpretation is dealt with, the court discusses the correct approach to the interpretation of the Hague Visby Rules.

Glencore argued that the defences contained in art. IV.2 were based on standard forms of exclusion clauses which had been used in contracts of carriage prior to the establishment of the Hague Rules. Therefore, English law should be applied to establish the meaning and effect of words used in such standard clauses. According to Glencore, at common law a term which excluded liability for 'fire' would not have provided a defence if it were caused by the negligence or barratry of the crew. Consequently, the exception in article IV.2(b) did not have

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1. [2019] EWCA Civ. 388.
2. [2017] EWHC 3348 (Comm). See my discussion of the judgment in *EJCCL* 2018, issue 2/3, p. 5-6.
3. Art. IV.2 of the Hague Visby Rules provides:
'2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in navigation or management of the ship. (b) Fire, unless caused by the actual fault or privity of the carrier. … (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier; but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents of the carrier contributed to the loss or damage.'

the effect of excluding liability for fires which were caused either negligently or deliberately.

The Owners argued that the words of art. IV.2(b) are clear. They provide an exception for all loss or damage arising or resulting from fire, subject to the proviso: where the fire is caused with the actual fault or privity of the carrier. The Owners contended that Glencore's interpretation would require a further implied proviso to be added, 'or the barratry of master or crew'. According to the Owners there is no proper basis for implying such words, not least because 'barratry' is not a relevant concept in the Hague Rules. The Owners further argued that the relevant interpretative rules require that it is only if the words of the Hague Rules are unclear, that it is permissible to look at their background. According to the Owners Glencore's wide-ranging search for a prior meaning of words which are clear was plainly impermissible.

The court's approach to the interpretation of the Hague Rules

The court first discusses the negotiations held in the 1920's which led to the text of the Hague Rules. Those negotiations are recorded in the so called *travaux préparatoires*. The admissibility of the *travaux préparatoires* was also an issue between Glencore and the Owners.
The court referred to the Judge's reference to, and discussion of, authorities[4] on the correct approach to the interpretation of the Hague Rules and concluded that it was a summary of what is clear and binding authority. The court focused on the four specific aspects of the Judge's analysis which are summarised below.

First specific aspect[5]

In approaching the construction of the rules it is important to bear in mind that one has to give the words as used their plain meaning, and not colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law.

Second specific aspect[6]

It may be permissible to look at earlier uses of a phrase to see whether it had a different meaning to that previously understood and regularly construed by the courts.

Third specific aspect

In the following passage in his speech in *Effort Shipping Co. Ltd v. Linden Management SA (The Giannis NK)* [1998] AC 605 at 621H Lord Steyn emphasised the importance of ascertaining meaning from the words:

'This much we know about the broad objective of the Hague Rules: it was intended to reign in the unbridled freedom of contract of owners to impose terms which were 'so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility' (1992) 108 L.Q.R, 5015, at p. 502; it aimed to achieve this by a pragmatic compromise between interests of owners and shippers; and the Hague Rules were designed to achieve a part harmonization of the diverse laws of trading nations at least in the areas which the convention covered. *But these general aims tell us nothing about the meaning of Article IV, r. 3 or Article IV, r. 6. One is therefore remitted to the language of the relevant parts of the Hague Rules as the authoritative guide to the intention of the framers of the Hague Rules*.' (emphasis added)

I am not completely sure what Lord Steyn means with the emphasised words, but I suspect that he is saying that if the purpose of the rules does not add anything to the meaning of the words their meaning should be established objectively. This does however raise the question if the *travaux préparatoires* may be consulted in order to establish the meaning. This issue is discussed further on in the judgment.

Fourth specific aspect

The importance of not interpreting international conventions by reference to domestic principles, but rather by reference to 'broad and acceptable principles' was repeated in *Gard Marine & Energy Ltd v. China National Chartering Company Ltd (The Ocean Victory)* [2017] UKSC 35, [2017] 1 WLR 1793. In that judgment Lord Clarke of Stone-cum-Ebony JSC recognised that it may be difficult to identify broad and acceptable principles, but identified some such principles in articles 31 and 32 of the Vienna Convention on the Law of Treaties.[7]

Article 31(1) of the Vienna Convention provides:

'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

Article 32 provides the following with regard to 'Supplementary means of interpretation':

'Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty

4. *Stag Line v. Foscolo, Mango & Co Ltd* [1932] AC 328, Lord Atkin at 342-3 and Lord MacMillan at 350; *Aktieelskabet de Danske Sukkerfabriker v. Bajamar Compania Naviera S.A.(The Torenia)* [1983] 2 Lloyd's Rep 210, Hobhouse J at 219; *CMA CGM S.A. v. Classica Shipping Co Ltd* [2004] 1 Lloyd's Rep 460, Longmore LJ at 463-4; *Jindal Iron & Steel Co Ltd v. Islamic Solidarity Shipping Co Jordan Inc* (The Jordan II) [2005] 1 Lloyd's Rep 57, Lord Steyn at 63-4; Effort Shipping Co Ltd v. Linden Management S.A. (The Giannis N.K.) [1998] AC 605, Lord Lloyd at 615 and Lord Steyn at 623; and Serena Navigation Ltd v. Dera Commercial Establishment (The Limnos) [2008] 2 Lloyd's Rep 166, Burton J at [9].
5. The court cites the following cases: *Stag Line Ltd v. Foscolo, Mango & Co* [1932] AC 428; *Volcafe Ltd and others v. Compania Sud America de Vapores SA* [2018] UKSC 61, Lord Sumption at [16].
6. *Gosse Millerd Ltd v. Canadian Government Merchant Marine* [1929] AC 223.
7. That convention came into force in the United Kingdom in 1980.

and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable.'

In the *Ocean Victory* Lord Clarke concluded:

'The duty of the court is to ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the Convention. The court may then, in order to confirm that ordinary meaning, have recourse to the *travaux préparatoires* and the circumstances of the conclusion of the Convention.'[8]

The essential characteristic of the Hague Rules was a pragmatic compromise between cargo interests and shipowners. The right of shipowners to exclude their liability to an unreasonable extent was restricted and their obligation to provide a seaworthy vessel was reduced to an obligation to exercise due diligence for the seaworthiness before and at the beginning of the voyage.[9]

After an analysis of published cases and literature regarding the ordinary meaning of the words in article IV.2(b) LJ Simon reached the conclusion that there is no sound reason for reading the word 'fire', both in isolation and in context, in a way that excludes fire where deliberately caused by the crew, from the carrier's defence under Article IV.2(b).[10]

Regarding Glencore's arguments based on the pre-existing law, LJ Simon agreed with the Judge that the Hague Rules were not an exercise in codification. He also agreed with the Judge's finding that fire is a simple word, not naturally to be treated as a term of art.[11] He concluded:

'..., there was no pre-Hague Rules judicial interpretation of 'fire' as a term which had a clearly assigned meaning that excluded fire caused by the crew, so that it must be presumed that it was used in article IV.2(b) in the same way.'[12]

5. The allowability and relevance of the *travaux préparatoires*

LJ Simon considered the following two questions regarding the *travaux préparatoires*:

i. what is the test for recourse to them as a means of interpretation; and
ii. second, how do they assist in the interpretation of article IV.2(b) in the present case?

Regarding the answer to the first question LJ Simon quoted, *inter alia*, the following from *Fothergill v. Monarch Airlines Lid* [1981] AC 251:

'... the use of travaux préparatoires in the interpretation of treaties should be cautious, I think that it would be proper for us (...) to recognise that there may be cases where such travaux préparatoires can profitably be used. *These cases should be rare, and only where two conditions are fulfilled: first, that the material involved is public and accessible,*[13] *and, secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention*.' (emphasis added)

It was said in *Fothergill v. Monarch Airlines Lid* [1981] AC 251 that if the *travaux préparatoires* are used in this way, that would largely overcome the two objections which may properly be made: first, that relating to later acceding states and secondly, the general objection that individuals ought not to be bound by discussions and negotiations of which they may never have heard. LJ Simon added a third potential objection, namely that it is possible that parties to an international convention may choose (or at least acquiesce in) imprecise language.[14]
Regarding the answer to the question how the *travaux préparatoires* assist in the interpretation of article IV.2(b) in the present case, LJ Simon held that the Judge had concluded that they supported the plain meaning of the text of article IV.2(b).[15] He also held that, although the Judge was right in his analysis of the material he was invited to consider, he doubted whether the threshold for consideration of the *travaux préparatoires* came close to being met. He said:

'This was not a provision in respect of which there were 'truly feasible alternative interpretations' of the words, see Lord Steyn in the *Giannis NK*, ... Nor was it one of those 'rare' cases where the travaux 'clearly and indisputably' pointed to a definite legal intention, see Lord Wil-

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8. *Gard Marine & Energy Ltd v. China National Chartering Company Ltd (The Ocean Victory)* [2017] UKSC 35, [2017] 1 WLR 1793.
9. See for example N.J. Margetson, *The system of liabiliy of articles III and IV of the Hague (Visby) Rules*, Zutphen: Uitgeverij Paris 2008, chapter 3.5.
10. See par. 51. Cases and literature referred to are Arnould, Law of Marine Insurance and Average (18th edition) at 23-29), *Busk v. Royal Exchange Assurance Company* (1818) 2 B & Ald 73 at 82-83, *Trinder v. Thames and Mersey Insurance Company* [1898] 2 QB 114 at 124, and the cases at footnote 195 of Arnould, to which the Judge referred at [34] of his judgment: *Slattery v. Mance* [1962] 1 QB 676 at 680-681; *Continental Illinois National Bank & Trust Co of Chicago and Xenofon Maritime S.A. v. Alliance Assurance Co. Ltd (The Captain Panagos D.P.)* [1986] 2 Lloyd's Rep 470 at 510-511; [1988] 1 Lloyd's Rep and *Schiffshypothekenbank Zu Luebeck A.G. v. Compton (The Alexion Hope)* 311 at 316-317; Aikens, Lord & Bools on Bills of Lading (2nd edition) §10.231; Scrutton on Charterparties and Bills of Lading (23rd edition) at §14-074; Carver on Bills of Lading (4th edition) at §9-215; Voyage Charters (4th edition) at 85.261.
11. See par. 70.
12. See par. 79.
13. The *travaux préparatoires* of the Hague Rules have been published and are accessible for the public. See e.g. *The Travaux Préparatoires of the Hgaue Rules and of the Hague Visby Rules*, Comité Martime International 1997.
14. Par. 90.
15. Par. 96.

berforce in *Fothergill v. Monarch Airlines Ltd* (quoted by Lord Steyn). The introduction of the material was wholly disconsonant with the proper approach to interpretation: to ascertain the ordinary meaning of the words in article IV.2(b) in their context.'

6. Conclusion regarding the question whether the article IV.2(b) defence was not available where the fire was caused by the barratrous act of the Master or crew ('Issue 1')

LJ Simon concluded:

'It was common ground that an act of barratry occurs without the actual fault or privity of the carrier. However, Glencore's argument necessarily implies an additional qualification to the words, 'Fire, unless caused by the actual fault or privity of the carrier, *or the fault or neglect of the crew*,' [emphasis added]. I can see no proper basis for implying such words either as a matter of ordinary meaning nor on any of the supplementary arguments advanced by Glencore, and I see principled reasons for not doing so. In my view the Judge was right in his conclusion on issue 2.'

7. The question whether the conduct of the Chief Engineer necessarily constituted barratry on the assumed facts? ('Issue 2')

LJ Simon started his discussion of this question with the following remark:

'Since I have concluded that the Judge correctly decided the issue 2, it is unnecessary to deal at the same length with this issue. If the fire were set by the deliberate act of the Chief Engineer, provided it was caused without their actual fault or privity, the Owners can rely on the article IV.2(b) defence. *It follows that it is unnecessary to decide whether or not the Chief Engineer's assumed conduct would properly fall within the definition of barratry*.' (emphasis added)

From an academic perspective it is unnecessary to deal with the question at all because it is not relevant for the application of the fire exception. LJ Simon did however consider the question and allowed Glencore's appeal on this issue.

8. Overall conclusion

LJ Simon's overall conclusion was:

'The issue of whether the conduct of the Chief Engineer in starting the fire constituted barratry is not determinative of whether the Owners are exempt from liability for the fire under article IV.2(b), because it was agreed that the fire was caused deliberately by him with intent to cause damage.
Article IV.2(b) exempts the Owners from liability if the fire were caused deliberately or barratrously, subject only to (i) a causative breach of article III.1, or (ii) the actual fault or privity of the Owners.'

9. Closing remarks

This judgment confirms that the Owners can avoid liability under the fire exception even if the fire was intentionally caused by a crew member.
This judgment is also relevant for the interpretation of the Hague Rules. It makes clear that cases where profitable use of the *travaux préparatoires* is possible are rare. As the *travaux préparatoires* of the Hague Rules and the Hague Visby Rules are available to the public they may be used if they clearly and indisputably point to a definite legislative intention.

A final closing mark on the court's application of the Vienna Convention; Article 4 of that convention provides, *inter alia*, that it only applies to treaties entered into by Member States after its coming into force for those Member States. As the Vienna Convention was framed in 1969 and it came into force in 1980, one's first thought may be that it is not relevant for the Hague Rules of 1924. However, the rules of construction contained in Articles 31, 32 and 33 are customary international law and apply regardless of the Vienna Convention. The fact that the Vienna Convention happened to codify them does not change that. This is expressed by Article 4 of the Vienna Convention itself which provides:

'*Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention*, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.' (emphasis added)

Because Articles 31, 32 and 33 of the Vienna Convention are a codification of existing public international law, the rules of construction contained in those articles can be applied to conventions on commercial law entered into by the Member State before the entering into force of the Vienna Convention.[16]
In that respect I disagree with the Judge where he said in par. 27:

'The Hague Rules as convention treaty obligations are subject to Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.'

In the light of art. 4 of the Vienna Convention that is incorrect because the Vienna Convention applies 'only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States'. Therefore the Hague Rules are not subject to Articles 31 and 32 of the Vienna Convention but the principles contained in those articles, which are a codification of existing public international law, can be applied when interpreting the Hague Rules.

16. See *Fothergill v Monarch Airlines Limited*, [1980] 2 Lloyd's Rep. 295, 304 per Lord Diplock. See also M.L. Hendrikse & N.J. Margetson, 'Uniform International Commercial Law: The Phenomena of Unification, Uniform Construction and Uniform Application', *EJCCL* 2009, issue 2, p. 72-90 on p. 75.