Swansea University
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Legal Aspects of Incorporation of Clause Paramount in Time Charters, Voyage Charters and Bills of Lading

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Summary

The main purpose of this thesis is to examine the effect of a clause paramount in bills of lading and charterparties and to clarify how this clause is interpreted by English courts.
The primary complexity that arises in the bill of lading context comes from the scope of the incorporated Hague or Hague-Visby Rules, which depends on the different variants of clause paramount, applicable statute and the country of shipment.
In the charter party context, a clause paramount has created a great deal of difficulty with the construction of contracts, especially in regard to the significance of the word "paramount" and the extent to which the incorporated articles override other provisions in a charterparty.

The thesis is divided into two parts:
Part One is focused on the structure and interpretation of the Hague Rules as an international treaty.
It examines the purpose of a clause paramount, based on its wording and different scenarios, and deals with contractual interpretation when the Rules are given effect by "force of law" or incorporated purely by contract.
Part Two investigates the way how a Clause Paramount, when incorporated in the contract, affects the parties' rights and obligations. It specifically deals with the fundamental obligation of seaworthiness and the secondary functions of the carrier. It examines the protection of third parties and investigates the interplay of Clause Paramount with the terms of the Inter-Club Agreement.

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This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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Abbreviations

BIMCO	The Baltic and International Maritime Council
CMI	Comite Maritime International
CMR	Convention Relative au Contrat de Transport International de Marchandises par Route
COA	Contract of Affreightment
COGSA	Carriage of Goods by Sea Act
FDD	Freight, Defence and Demurrage
FIO	Free In Out
FIOS	Free In Out Stowed
FIOS LSD	Free In Out Stowed Lashed, Secured and Dunnaged
ICA	Inter-Club Agreement
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
ILA	International Law Association
IMO	International Maritime Organization
ISM Code	International Safety Management Code
LOI	Letter of Indemnity
NOR	Notice of Readiness
NYPE	New York Produce Exchange
OUP	Oxford University Press
P&I	Protection and Indemnity
SDR	Special Drawing Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Commission on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
WCCON	Whether Customs Cleared or Not
WIBON	Whether in Berth or Not
WIFPON	Whether in Free Pratique or Not
WIPON	Whether in Port or Not

Introduction

Abstract

On 06th October, 2015, the general cargo vessel 'Flinterstar' sailed from the port of Antwerp, Belgium, and sometime later, after leaving the River Scheldt, collided with the gas carrier 'Al Oraiq' off the Belgian coast. To prevent m/v 'Flinterstar' from sinking in the confined waters, the gas carrier pushed the general cargo vessel onto a sand bank. The gas carrier sustained damages to its bow and ultimately the general cargo vessel sank, causing an extensive oil spill in Flemish waters. Luckily, all crew members and pilots on board the vessel were rescued.

On 16th October, 2015, by order of the Chairman of the Commercial Court in Antwerp, a wreck removal limitation fund was established in compliance with the local law '*Wrakkenwet*'.[1] However, on 08th December, 2015, following urgent procedural measures in Bruges at the request of the Belgian Federal Government, the President of the Commercial Court ordered the removal of the wrecked vessel to proceed. The charterers and the owners appealed this decision. The government for its part cross-appealed.

On 22nd February, 2016, the Court of Appeal of Ghent, upholding the decision of the lower court in Bruges, ordered four entities (including the head owner, managing owners and time charterers, who were "owners" within the definition of Belgian law) to enter into a contract with a competent salvage company for the removal of the wreck of the sunk vessel. As a matter of local law, these companies were held jointly and severally liable for the full cost of wreck removal and costs incurred with respect to the prevention of oil pollution and the detrimental consequences of the accident.

The decision was quite curious, because the time charterers had no influence on navigational matters and exercised only commercial management of the ship. Thus the question arose that if the time charterers were forced to pay for the wreck removal costs, was there any mechanism by which they might be able to recover any sums paid from the "true" contractual disponent owners of the vessel?

The usual indemnity implied into a time charter on the NYPE 1993 form is one whereby the charterers indemnify the owners for the consequences of complying with their orders.[2] But the indemnity under consideration was the other way around, whereby the owners should have been obliged to indemnify the

[1] *Wrakkenwet*, Article 18; this is similar to the Convention on Limitation of Liability for Maritime Claims, 1976.
[2] See, for example, *Triad Shipping Co v Stellar Chartering & Brokerage Inc, The Island Archon* [1994] 2 Lloyd's Rep 227. And see also Sir Nicholas Hamblen, 'Under Charterers' Orders – To Indemnify or Not to Indemnify' [2019] LMCLQ 200.

charterers. Moreover, there was no previous case where a term such as this had been implied in the context of wreck removal.

The time charterparty between the owners of m/v 'Flinterstar' and the charterers provided, *inter alia*, a clause paramount that incorporated the Hague-Visby Rules and thus, pursuant to the defence in Article IV Rule 2(a), made the Owners, and the ship, not "responsible for loss or damage arising or resulting from" negligent navigation. As the exceptions of liability of the carrier were not limited to cargo claims, the time charterers got a kind of shock as to the effect of the Hague Rules operating in the time charterparty, since they could not recover the wreck removal costs from the head owners, who had the actual control over the vessel.

Practically, this case shows that what is the most interesting about putting the clause paramount and charterparty general terms together is that one never knows what kind of controversy or conflict to expect in this marriage. The situation with the application of the Rules in the bills of lading context has proven to be no better.

The influence of the incorporation of a clause paramount on the transfer of risks and responsibilities in a bill of lading and charterparty context may be devastating and may have a considerable impact on the performance of the contract. This effect cannot be easily clarified, as it needs to be derived from terms of the contract of carriage (or the contract for provision of service) and articles of the International Convention,[3] which has not been designed as a single solution for all shipping disputes and situations.

This study examines the legal aspects of the incorporation of a clause paramount in charterparties and bills of lading.

[3] The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25th August 1924.

Background of the study

The majority of bills of lading governed by English law are in one way or another subject to the Hague-Visby Rules. Incorporation of the same Rules in charterparties has become a widely accepted practice, with the main result being that the Rules may apply only in part and may be required to be interpreted against the background of the general structure of the other terms of the charterparty.

Some academic commentators argue that a "clause paramount" device was created to ensure that the articles of the Brussels Convention,[4] when incorporated in a bill of lading and/or in a charterparty, are applicable to carriage of goods by sea and that the obligations under the chain of contracts (charterparties and bills of lading) are therefore put "back-to-back".

Thus, in order to understand the nature of clause paramount and to properly consider the legal aspects of its incorporation, one needs to go into the history of the drafting of the Hague Rules. As submitted by Mustill QC, the formulation of these Rules was the "next" step 'in a process of standardisation which had begun with the US Harter Act in 1893'.[5]

The main purpose of the Hague Rules was to produce provisions of liability as between a carrier and a shipper and to secure the pattern terms for bills of lading, which are often passed from hand to hand like negotiable instruments. This action was necessary in order to eliminate the escalating practice of inserting clauses that excluded the carrier's liability with respect to negligence as to the care of cargo through manipulation of fine-print reservations. It was said, therefore, that in most cases, the paramount clause operates to the benefit of the cargo owner.[6]

Although the main task of the Brussels Convention was unification of the domestic law of the contracting states and elimination of the legal uncertainties arising out in the different jurisdictions, like any other international treaty it is subject to the application of the generally accepted principles of international law relating to treaty interpretation. Unsurprisingly, these principles have not always been in line with the canons of interpretation used in the domestic courts of the Contracting States.

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[4] ibid.

[5] Michael J. Mustill QC, 'Carriage of Goods by Sea Act 1971'. This paper was based upon a lecture given before Norwegian Maritime Law Association in Oslo on 18th October, 1971.

[6] However, if the bill of lading is governed by American law, in this case The Harter Act (The Carriage of Goods by Sea Act 1936), such clauses are probably intended to protect the interests of carriers. See Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, 209 with reference to Knauth, *op cit*, note 1, 167-77.

The initial approach of the English courts to the interpretation of the Hague Rules was not the best example of adherence to the generally accepted principles of international law.[7] As the language was not chosen by English draftsmen, in seeking the true construction of the treaty the Brussels Convention should be considered and interpreted not in a narrow or English law-based manner, but in a broader approach to its language, without imposing pre-existing domestic common law rules of construction.

However, this philosophy and potential need for reference to the conflicting trends of foreign jurisdictions can easily devalue a country's own jurisprudence and could have a strong influence on future precedents. The difficulty is to determine how far the courts should be prepared to go in seeking a purposive interpretation of a treaty that has become part of the domestic law of this country. Courts in different jurisdictions traditionally filled these lacunas by having recourse to national systems.

Although in view of non-retroactivity, neither the Hague nor the Hague-Visby Rules are subject to the application of The Vienna Convention,[8] as the provisions contained in Articles 31 and 32 of the Vienna Convention represent pre-existing customary international law and provide fundamental principles of treaty interpretation. Thus, the courts should have no difficulty in using these articles when interpreting the Brussels Convention.

A remaining complexity, however, is that uniformity of law generally, and of maritime law in particular, cannot be achieved by simple adoption and ratification of an international convention wherein rules on a given area of the law are set out. Accordingly, there are still a few obstacles to uniform interpretation.

A further recourse to supplementary aids may be required. However, the reach of these aids is ambiguous, and it may be questioned if such a recourse is necessary. For example, on one hand, it may be argued that consideration of preparatory works in negotiations preceding the conclusion of the treaty should potentially influence the decisions of the Courts, on the other hand, the threshold for consideration of the *travaux preparatoires* is still high and there may be no need for these legal gymnastics.[9] As a number of

[7] As Lord Dilhorne stated, "the language in which the Treaties were expressed was different from that to which English and Scottish lawyers were accustomed, that it was not often as precise as the language of British statutes and that it did not always fit British institutions and legal concepts". *House of Lords Official Report (Hansard)*, vol 243, no 115, cols 416–426. Quoted in Ian McTaggart Sinclair, 'The Principles of Treaty Interpretation and Their Application by the English Courts' (1963) 12 Intl & Comp LQ 508, 508.

[8] The Vienna Convention on the Law of Treaties 1969, Article 4.

[9] For example, with reference to the recent decision in *Glencore Energy UK Ltd and Another v Freeport Holding Ltd, The Lady M* [2019] EWCA Civ 388 (CA).

authorities note, it will only be determinative 'in a case in which [preparatory works] clearly and indisputably lead to a definite legal intention'.[10]

The problem with the incorporation of the Rules is complicated by the method of their adoption by different (including non-contracting) states. This fact has created great uncertainty as to which Rules shall be applied to the transport documents (waybills, non-negotiable bills of lading, negotiable bills of lading).

The Hague-Visby Rules are effective in the UK by virtue of The UK Carriage of Goods by Sea Act 1971, which appended the Rules. The previous version of the Act (dated back in 1924) provided that the Hague Rules were 'to have effect in relation to and in connection with the carriage of goods by sea'.[11] Although the "original" Brussels Convention of 1924 provided that 'the provisions of this convention shall apply to all bills of lading issued in any of the Contracting States',[12] this wording was not adopted in the UK 1924 Act, as it gave rise to considerable difficulties internationally, finally termed the *Vita Food* gap.[13]

After so many years it had appeared that there was no settled form for the incorporation purposes. Section 3 of the 1924 Act provided for a method of ensuring the application of the Hague Rules by express reference to it into all outward bills of lading. Such a mechanism had initially been developed in The US Harter Act 1893, in order to ensure the application of the Rules as a matter of contract where the dispute was decided outside the country of shipment.

When enacting the Visby amendments,[14] Parliament adopted a different technique, and the previous requirement of an express contractual statement to the effect that the Rules 'are to have effect' was dropped. Thus The UK 1971 Act provided that the amended Rules 'shall have the force of law'.[15] This change in wording demonstrated that the Rules should take effect not merely as part of the proper law, where that law was English, but as part of the statute law of England, to which the English court should give effect, irrespective of the proper law, in all cases falling within Section 1 of The UK 1971 Act and Article 10 of The HV Rules.

However, it is still arguable if the phrase 'shall have force of law' is strong enough to apply the Rules (except when the contract is governed by English law), especially in the cases where a jurisdiction clause

[10] *Glencore Energy UK Ltd and Another v Freeport Holding Ltd, The Lady M* [2017] EWHC 3348, per Popplewell J at para [27] considering a number of authorities on the correct approach to the construction of the Hague Rules.
[11] The Carriage of Goods by Sea Act 1924, Section 1.
[12] The Hague Rules, Article X.
[13] See *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 227; (1939) 63 Ll L Rep 21.
[14] The Protocol signed at Brussels on 23rd February, 1968.
[15] With reference to The Carriage of Goods by Sea Act 1971, Sections 1(2), 1(3), 1(6) & 1(7).

may be considered as a clause that is not reducing liability. Meanwhile, Section 1(6)[16] and Article X(c)[17] do envisage a possibility for a voluntary application of the Rules, and this method of incorporation will attract the same level of application as application by statute.

However, it may still be open for discussion to which documents and types of carriage the Rules compulsorily apply. Thus, in situations where the Rules are not compulsorily applicable to bills of lading and sea waybills, or where there is a reasonable doubt to believe that the Rules are in force, voluntary incorporation by way of a 'clause paramount' became a widely used practice.

When only the Hague Rules dominated the shipping market, application of the clause paramount was relatively straightforward and simple. However, the situation became more complex as the number of potential rules and foreign statutes grew, which led to a lack of international harmony. Sometimes it may not matter which set of Rules is applied (to the charterparties or bills of lading). However, in other cases, there may be significant differences on outcome attributable as to which are applied, such as package limitations.

The Hague Rules are officially termed the 'International Convention for the Unification of Certain Rules of Law relating to Bills of Lading', so it covers limited aspects of freight movement. By describing the rules of the instruments as merely 'certain rules' regarding a certain issue and not as 'all rules' the denomination of the regimes clarify that they are not meant to be comprehensive.[18]

The application of the Hague Rules was never envisaged by the drafting commission to apply to charterparties. The question of whether they do in practice has never been addressed. There was simply no necessity to turn the views in that respect because the international carriage conventions are meant to regulate only certain aspects of carriage contracts, most specifically the liability of the carrier. The Rules are not compulsorily applicable to charterparties,[19] on a simple basis that this type of contract is not passed from hand to hand, and parties do not need any special protection, they are left free to negotiate the contract on terms they wish to choose. However, nowadays, the voluntary incorporation of the Rules in contracts of carriage has become widely accepted practice by 'shipping men'.

[16] The Carriage of Goods by Sea Act 1971, Section 1(6)
[17] The Hague-Visby Rules 1968, Article X(c).
[18] Marian Hoeks, *Multimodal Transport Law / The Law Applicable to the Multimodal Contract for the Carriage of Goods*, (Kluwer Law International 2010), 328.
[19] The Hague or The Hague-Visby Rules, Article V.

The important decision in *The Saxonstar* established unified rules of interpretation and laid standards on the construction of the clause paramount in charterparties. However, the application of the clause paramount may, in some cases, give rise to uncertainty in the terms of the contract.

Aims and objectives

The main purpose of this study is to investigate the effect of a clause paramount in bills of lading and charterparties. This investigation cannot be properly done without scrutinising the relevant provisions of the Rules.

In considering the particularities of incorporation it is necessary to put a clear distinction between the cases "which have addressed the question of what is meant by general expressions such as 'clause paramount' without spelling out what the terms of such a clause paramount are intended to be" (usually in the context of charterparty disputes) and the cases which have specifically addressed the terms of the particular clause (usually in the context of bills of lading disputes).[20] The precise formulation of the clause paramount shall always be carefully considered.

The underlying legal purpose for the incorporation of a clause paramount was to make sure that the articles under one of the Brussels Conventions apply to both contracts (the charterparty and the bill of lading issued under that charterparty), and that the obligations under both contracts are reciprocal. The practical reason for such a position is that existing insurance practices are based on the assumptions that cargo claims are mostly challenged through mandatory conventions (like the Hague Rules) as well as through one of two international tonnage limitation conventions and the risks that are inherent to maritime transportation are equally distributed between the cargo and P&I underwriters.

Most likely, the initial idea of having a straight line of obligations and limitation of liability under the charterparties and bills of lading seemed quite attractive. However, the ultimate result of incorporation has led to the fact that very special considerations of interpretation must be deployed: the Rules may apply only in part and may be required to be interpreted against the background of the general structure of the other terms of the contract.

[20] *Yemgas FZCO and Others v Superior Pescadores SA Panama, The Superior Pescadores* [2014] EWHC 971 Comm, para [16] (Males J).

This study examines the impact of the incorporation of a clause paramount to the contract terms, as this clause has created a great deal of difficulty with the construction of charterparties, especially in regards to the significance of the word "paramount" and the extent to which the incorporated articles override other provisions in a contract.

In the author's opinion, this difficulty is wholly artificial because the parties have carelessly chosen to use a particular form of standard wording that is unsuitable for purposes of the particular transaction or contract. What Lord Reid said already in 1958, unfortunately, is still applicable today: '[the parties] may have chosen this ill-designed clause simply because it had been used before. But they have been very vague in what they intended or what they said'.[21] Such a method of incorporation was said to be a very "slapdash" way of doing things.

And the problem here is that unlike the set of substantive law principles – for instance, the law of tort, or the law of property – interpretation of contracts is an exercise that is ultimately intuitive. There are no strict rules, only general principles that sometimes pull in different directions. The problem here is that it is for the courts to decide what is the proper interpretation of the contract, and not for the parties, who occasionally embed a clause that has already been incorporated in the previous contracts, but why and how is known by only a few (mostly by the lawyers, and not commercial people).

In seeking to interpret charterparties and transport documents with voluntary incorporation of the Rules, courts have given weight to a number of aspects of incorporation, the intention of the parties being one of them. However, as some legal commentators say,[22] the process of imputing an intention is extremely artificial, one which may be influenced by the court's view of the "desirability" of this term that is called upon to be interpreted.

In *The Saxonstar,* the House of Lords strived to apply three 'well-known' principles of construction that had been based on the principles of "old" case law. It was found that the incorporation of a clause paramount does not mean that the parties wish to incorporate the *ipsissima verba* of the Rules, rather they wish to incorporate into their contractual relations between owners and charterers the same standard of obligation, liability, right and immunity as subsists under the Rules between carrier and shipper.[23]

[21] *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd, Saxonstar* [1958] 1 Lloyd's Rep 73, 92.
[22] As, for example, Ewan McKendrick.
[23] *Anglo-Saxon Petroleum Co v Adamastos Shipping Co, The Saxonstar* [1958] 1 Lloyd's Rep 73, 81 (Viscount Simonds).

While there are no particular rules that apply to badly drafted contracts, the decision in *The Saxonstar* was mostly based on the implication of Latin maxims and application of the old case law which concerned incorporation of the charterparty terms in the bills of lading. These led their Lordships too far in applying a special remedy – "correction of mistake by construction" – notably disregarding the articles of the incorporated Rules and rectifying the contract's wording. In following this route, the whole concept of the Hague Rules and the reason of their birth was mostly neglected.

While it may be argued that some old principles and rules of law have survived, in the last decades a fundamental change has taken place in the law of contract interpretation. Based on these developments, the remedy of rectification has only recently been worked out. The most recent cases have confirmed that rectification operates as a separate doctrine, i.e., a safety net, or a fall-back position, in situations where modern principles of construction do not resolve the dispute.

Another objective of this study is to investigate whether the well-established interpretation of clauses paramount is still appropriate in a wake of these legal changes. The author of this thesis would like to examine if the reasoning (which was based on three principles of construction) pronounced by their Lordships in *The Saxonstar* sustains the latest developments in the modern approach to the contract interpretation, especially in the light of the remarks about discarding the old principles of construction expressed by Lord Hoffmann in *ICS*.[24]

What if *The Saxonstar* was decided differently? What if The House of Lords found that the clause paramount had not been sufficient to 'import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the Rules subsists between carrier and shipper'? The problem with the decision in *The Saxonstar* is that although it relied on the business common sense and purposive approaches, it curiously generated too much uncertainty. This precedent made it more difficult to predict the outcome of the interpretative process in relation to the clause paramount. It is still not clear how far this purposive approach to the incorporation of clause paramount may be stretched.[25] Would some of the subsequent cases have ever arisen if the House of Lords found in *The Saxonstar* that had the parties wished to incorporate 'the same standard of obligation, liability, right and immunity as under the Rules' they should have done it in clear words?

[24] *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28.
[25] See, for example, the decisions in cases like *The Leonidas* [2001] 1 Lloyd's Rep 533 (speed/consumption claim); and *The Lady M* [2018] 1 Lloyd's Rep 22 (barratry case); and *The Privocean* [2018] 1 Lloyd's Rep 99 (negligent stowage case).

Linguistic mistakes do happen. The danger is that these linguistic mistakes may encourage judges 'to stray from the task of interpreting the contract and instead to assume the role of creating a contract for parties'.[26] Thus, the line between "purposive interpretation" (which is legitimate) and "creative interpretation" (which is not legitimate) is very thin. The author of this thesis believes that (in relation to the application of the clause paramount) this line was crossed, or even blurred, and *The Saxonstar* case was a starting point in a long chain of arguable cases. All subsequent interpretative gymnastics have led to very irrational commercial results (or even absurd) and have led to consequences to which contracting parties "were unlikely to have agreed".

On the other hand, such contracts are made by businessmen. This paper questions, in a similar way, why should any special techniques be required for interpretation of a clause paramount? In practice, most contractual disputes are concerned with establishing the precise scope of promises. The truth is that a clause paramount has a well-known scope; it has stood the test of time and has not been scrapped as repugnant to the commercial common sense. For example, Lord Somervell found it 'natural' that 'parties concerned in the carriage of goods by sea should wish to embody this code of obligations, the product of much thought and experience, in contracts to which it would not be applicable by legislation'.[27]

As submitted by Mocatta J, the use of the term "paramount" could merely be shorthand for incorporation of the Hague Rules without the connotation that the Rules also take precedence over inconsistent terms, in which case ordinary principles of construction shall apply.[28]

What Lord Mansfield proclaimed in the 18th century is still valid today: 'In all mercantile transactions the great object shall be certainty: and therefore, it is one of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon'.[29] If any event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The certainty of rights and duties and predictability of dispute resolution is the first imperative of a system of commercial law.

The most interesting about putting clause paramount and the other contractual terms together is that one would never know what kind of controversy or conflict is to expect in this marriage. It may suddenly appear that the "slapdash" incorporation of clause paramount change promises under the contract of carriage. The parties may easily get an unexpected surprise as to the effect of the Rules operating in

[26] See, for example, the speech of Lord Lloyd in *ICS v West Bromwich Building Society* [1998] 1 WLR 896.
[27] *The Saxonstar* [1958] 1 Lloyd's Rep 73, 97–99 (Lord Somervell).
[28] *The Mariasmi* [1970] 1 Lloyd's Rep 247, 255.
[29] *Vallejo v Wheeler* (1774) 1 Cowp 143, 153; 98 ER 1012.

charterparty or bill of lading. For example, the exceptions of liability under Article IV Rule 2 may not be limited to cargo claims but may cover a wide range of the other activities undertaken by the Carrier (under the voyage charterparty) or by the Owners (under the time charterparty). On the other hand, where a special clause in the contract and the exceptions in The Hague Rules can be sensibly reconciled, the special clause will take effect, however subject to exceptions. The bright example of this effect is the interplay between Article III Rule 8 of the Rules and 'repugnant' clauses in charterparties and bills of lading.

The most fundamental, absolute and overriding obligation of the carrier is to furnish a suitable ship for (and throughout the whole) adventure. This study scrutinises how this duty is converted into an undertaking to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage. Sometimes this position cannot be easily reconciled with the implied or express obligations under the contract of carriage.

Cargo claims form the biggest share within the claims' portfolio of P&I Clubs. These claims generally result from loss, damage, shortage or misdelivery of goods; it also may be increasingly difficult to define the sphere of obligations and responsibilities of parties to the contract. The thesis considers the position when the charterers undertake to load and to stow the cargo, and bad stowage makes the ship unseaworthy. Who shall take the final responsibility for loss of or damage to cargo and/or for damage to the ship? Is there any residual seaworthiness obligation that the shipowner still owes to the charterer? If the secondary, and the most fundamental obligation, to care of cargo may be terminated by a simple transfer of liabilities to the Charterers, how does Clause Paramount work in this situation?

It could be argued that a carrier is unable to exclude his liability for the negligent exercise of warehousing functions, but in return, can exclude the liability for negligence in nautical functions. The *contra proferentem* approach was reconsidered in English law. According to the latest development a more common-sense or forgiving or mercantile approach has been advocated for exemption clauses in commercial contracts. This paper considers to what extent this forgiving approach may exclude liability for negligence and may possibly overcome provisions of the Rules.

This research critically analyses the allocation of liabilities for cargo claims as between shipowners and charterers, where the incorporated Rules represent particular problems. As legal practice has shown, liability for stowage is not always clearly allocated by the express terms of the charter. Thus in 1970, the Inter-Club Agreement was formulated in response to problems in the interpretation of the wording of Clause 8 of the NYPE charter, in order to establish financial as opposed to moral responsibility by means of a more or less 'mechanical apportionment' for cargo claims. Initially, these were agreements between

the clubs themselves and not between owners and charterers. The cargo claims advanced should be claims under the bill of lading and not claims based upon some other liability. This clause had neither been designed nor drafted to be incorporated into charters and thereby to govern contractual relationships between shipowners and time charterers. Thus, the conflicts with the charterparty provisions and, most importantly, with Articles of the incorporated Rules, arose. After a series of cases, it was found that the ICA provided its own code that was independent of the incorporation of the Hague Rules into the charterparty.

A similar situation (of uncertainty) concerns the total exemption of liability of sub-contractors with *Himalaya* and circular indemnity clauses. Initially, nothing was said in the Hague Rules with respect to the liability regime applicable in case of actions in tort against the carriers. This fact had resulted in attempts of claimants, in order to circumvent the exonerations from and limitation of liability granted by the Rules, either to sue the carrier in tort or to bring proceedings against his servants or agents, with varying results in different jurisdictions: while the first alternative had created problems in certain civil law jurisdictions, the second alternative of actions against servants or agents had created problems in common law jurisdictions inasmuch as a person who is not a party to a contract can derive no benefit from it.

This study analyses how this position correlates with the other contractual terms, for instance whether the protection of The Rules only extends to servants or whether there is a category of people in an intermediate class between servants and independent contractors, who are neither the servants nor independent contractors under the contract.

Apart from specific clauses, this study investigates some well-understood types of obligations arising under charterparties, which appear not to be touched by general words of the incorporated Rules, but all these obligations are left to "casually" interact with the Articles of the Brussels Convention.

The conclusion from all said above is that clauses paramount create more contradictions and uncertainties (which have been escalating, like a snowball, throughout the years of arbitration and litigation) rather than representing a "customary solution" for allocation of rights and liabilities in charterparties and bills of lading.

In the author's opinion, an attempt to reach such a 'customary solution' is something illusory on a simple basis of the difference between the basic nature of a time charterparty,[30] a voyage charterparty and a transport paper, which embrace different functions (e.g., waybills, non-negotiable bills of lading, negotiable bills of lading).

Research questions

Some argue that the 1924 Brussels Convention was based on the evolution of commercial interests throughout the world and conferred a degree of broad consensus between the carriers and cargo interests, even where the details of its application differed from jurisdiction to jurisdiction. Some on the contrary argue that these Rules have never brought a complete uniformity of law and have become outdated quite soon. The reality is that the Rules were not aimed to deal with all shipping problems but only with a few aspects that had as a condition issuance of paper bills of lading.

But the question is why it is necessary to bring all of these discussions into a situation that should have never existed. This study seeks to provide an answer to the following questions:

- What is a clause paramount?
- Why does this tool exist?
- What is the purpose of a clause paramount in a bill of lading?
- What is the purpose of a clause paramount in a charterparty?
- How does this clause affect the position of the parties to the bill of lading and the charterparties? What are the main issues with Clause Paramount in these contracts?
- How does the Hague and Hague-Visby Rules operate in contracts?
- Is it appropriate to incorporate an international treaty in the charterparties?

The ultimate task of the author is to abolish the existing technique of interpreting clauses paramount. The majority of bills of lading are in one way or another subject to the Rules: either by force of law or by voluntary incorporation. In the charterparty context, it is suggested that no considerable modifications are necessary to introduce in the existing forms of voyage and time charterparties, perhaps only in cases where the parties wish to consciously incorporate the certain provisions of The Rules, for example, in regard to

[30] According to definition given by Lord Diplock in *The Scaptrade* [1983] 2 Lloyd's Rep 253, 256–257: 'a time charter is … a contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting with accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charter-party the charterer is entitled to give to them'.

the ‘reduced’ level of seaworthiness obligation, or to grant the minimum level of defences to the carrier. But all these modifications should be properly worked out and to be reconciled with the other terms of the contract, depending on the form.

Further, the ICA mechanism shall be a viable solution for both types of contracts: the time charterparty and voyage charterparty. However, in the voyage charterparty context, a large part of the work should be done by the cargo underwriters and the P&I Clubs to develop the same mechanism as under time charterparties. Moreover, the terms of this “viable solution” of the ICA should be further modified in the context of the existing forms of the voyage charterparties.

However, having said the above, it is most unlikely that an average “shipping man” will deviate from the widely used tradition of incorporation. The research is aimed to touch all these points and to find a common solution in substitutions for clauses paramount.

Methodology

> Research activity at postgraduate level always includes a conceptual framework, a component of which is the theory underlying the law itself, and the philosophy that best encapsulates the researcher’s view of the law. In the post-modern world, legal researchers understand that nothing is objective.[31]

This research analyses the law in terms of internal consistency. The study is built on doctrinal (or ‘black letter’)[32] methodology, which is essentially focused on the analysis of case law, statutes and other legal sources, examining a number of technical and coordinated legal rules found in primary sources.[33]
A doctrinal approach differs from other methodologies in that it looks at the law within itself, examining the law as a written body of principles that can be discerned and analysed using only legal resources. The arguments are derived from existing rules, principles, precedents and scholarly publications.[34]

[31] Terry Hutchinson, ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) 3 EraLaw 130, 132.
[31] The tendency of legalistic approaches to concentrate solely on the ‘letter of the law’.
[33] The essential feature of doctrinal scholarship involves “a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation”, see T. Hutchinson, ‘Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era’ (2014) 106(4) *Law Library Journal* 579, 584.
[34] R. Van Gestel and H-.W. Micklitz, ‘Revitalizing Doctrinal Legal Research in Europe: What About Methodology?’ *European University Institute Working Papers Law* (2011)/05, at 26.

However, 'inhabiting only own legal system can be insulating and distorting'.[35] So the author of this thesis looked to other foreign legal systems 'for illumination and insight in the hope that wisdom and understanding are to be gained'[36] from both English law and foreign jurisdictions.
Although comparing domestic law with the way the same area has been regulated in one or more countries has become almost compulsory practice in doctrinal legal research, this paper does not focuse on a methodology for comparative legal study. Likewise, the research questions does not imply any form of comparative law.

The primary aim of the paper is to collate, organise and describe legal rules that are concerned with the interpretation of clauses paramount, and to offer commentary on the emergence and significance of the authoritative legal sources in which such rules are considered, in particular, English case law, with the aim of identifying underlying problems.

This study is a literature-based study with an argumentative approach applied to support the solutions, texts and documents to gain a broader perspective, to answer the legal questions and to solve the research issues.[37]

In accordance with the chosen methodology, a number of linear steps were followed within a problem framework: assembling the facts, identifying the legal issues, analysing the issues with a view to searching for the law, undertaking background reading and then locating primary material, synthesising all the issues in context, and coming to a tentative conclusion.[38] The study aims to answer questions instead of examining a hypothesis.[39]

This study employs a qualitative approach with a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social context and interpretation.[40] For clarification on the attitude of the law, the study also used secondary sources such as textbooks, journal articles, research and other scholarly publications that have commented on the primary sources which address the same matters.

[35] Edward J Eberle, 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 451, 456.
[36] Edward J Eberle, 'The Method and Role of Comparative Law' (2009) 8 Wash U Global Stud L Rev 451, 457.
[37] See, for example, Mark van Hoecke, *Methodologies of Legal Research: What kind of method for What Kind of Discipline* (Hart Publishing 2011).
[38] See, for example, Terry Hutchinson, *Researching and Writing in Law* (2010) 41, 42.
[39] Susan Bibler, 'Qualitative Research in Law and Social Sciences' (2012) 37 Mod L Rev 1;
Lisa M. Given, *The SAGE Encyclopaedia of Qualitative Research Methods*, vols 1 & 2 (SAGE Publications Inc 2008);
Workshop on Interdisciplinary Standards for Systematic Qualitative Research by National Science Foundation.
[40] Mike McConville and Wng Hong Chui, *Research Methods for Law* (EUP 2007), 21–22.

Moreover, the thesis looks beyond pure doctrinal analysis and based on 'reform-oriented' research which evaluates the adequacy of existing rules and recommends changes to any rules found wanting, as a separate category.[41]

Structure of the Study

The dissertation consists of the Introduction, Parts 1 and 2, divided into several chapters, and the Conclusion.

Part One is mostly focused on the structure and interpretation of the Hague Rules as an international treaty and the main principles of incorporation of clauses paramount in contracts. It consists of five chapters:

- Chapter 1 provides a brief description and general structure of the Hague Rules. It further considers the accepted approach to the interpretation of the Rules as to an international treaty; application of The Vienna Convention; and possible recourse to *travaux preparatoires* and to the 'broad principles of general acceptation'.

- Chapter 2 deals with contractual interpretation when the Rules are given effect or applied to the contract by "force of law".

- Chapter 3 clarifies the main purpose of a clause paramount and the underlying basis of its wording.

- Chapter 4 examines different scenarios when and which set of Rules applies in a charterparty or in a bill of lading.

- Chapter 5 examines the general principles of incorporation of clauses paramount in charterparties and embraces critical consideration of three principles of construction applied in *The Saxonstar* case. Further, this chapter investigates the contractual interpretation when the Rules are incorporated purely by contact. It considers the repugnancy clauses and specifically emphasises how the "killer provisions" of the Rules interact with the terms of chartetrparties.

[41] D. Pearce, E. Campbell & D. Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987), pages 2 and 310, para [9.12].

Part Two investigates the way how a Clause Paramount, when incorporated in the contract, affects the parties' rights and obligations. It consists of five chapters as well.

- Chapter 6 deals with the seaworthiness obligation: absolute versus exercising due diligence. It considers the overriding nature of Article III Rule 1; how does the express seaworthiness clause correlates with Clause Paramount. When shall the duty to provide a seaworthy vessel be exercised? Is there a possible dilution of seaworthiness obligation when the charterers are to stow the cargo?

- Chapter 7 clarifies the way of drafting a proper clause to exclude the carrier's liability in negligence and unseaworthiness. How does such a clause interact with a Clause Paramount?

- Chapter 8 specifically deals with the effect of Article III Rule 2 of the Rules and the way how this article is affected by the other terms.

- Chapter 9 deals with the protection of third parties, especially liability in tort and the Himalaya clause. How does this position change with the incorporation of the Rules?

- Chapter 10 investigates the interplay of Clause Paramount with the terms of the InterClub Agreement. Is there any interplay at all?

Part 1

Chapter 1: The Hague Rules and their *primary* object and purpose: harmonisation of international law versus lack of clarity on the meaning of individual provisions

In order to understand the nature of the clause paramount and to properly consider the legal aspects of its incorporation, one needs to go into the legislative history of drafting the Brussels Convention 1924.[42] However, few sources are readily available in this field of law, which represents a big "loss" that modern lawyers feel when handling these cases.[43]

In *The Leni*[44] Judge Diamond QC described the position in general terms:

> Before 1924 there had been no statutory control in England of bill of lading clauses with the result that shipowners had been able to introduce into the small print on the reverse of their bills of lading exception clauses relieving them from an ever increasing range of liabilities. In some other countries the legislature had already intervened. Notably in the United States the Harter Act had been passed in 1893 and in Canada the Water Carriage of Goods Act had been enacted in 1910 …[45]

In *Lady M*[46] Simon LJ gave the following overview of drafting the Rules:

> The history of the Hague Rules begins with the International Law Association conference in Gray's Inn between 17 and 20 May 1921, which produced an early draft. A few months later the International Law Association Conference took place at The Hague between 30 August and 3 September 1921 ("the Hague Conference"). This involved negotiations between representatives of different commercial interests (primarily cargo interests and carriers); and redrafting by the Maritime Law Committee; and formed the *travaux préparatoires*, whose admissibility was in dispute on the appeal. The negotiations culminated in an agreed text which became known as the 1921 Hague Rules.
>
> In October 1922 there was a further conference of the Comité Maritime International in London, at which further amendments were negotiated and agreed, in what became known as the 1922

[42] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25th August 1924.
[43] See preface to Michael F. Sturley, *The Legislative History of the Carriage of Goods by Sea and the Travaux Preparatoires of the Hague Rules* (Fred B Rothman & Co 1990).
[44] *Transworld Oil (USA) Inc v Minos Compania Naviera SA, The Leni* [1992] 2 Lloyd's Rep 48.
[45] ibid, 52–53.
[46] *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd, The Lady M* [2019] EWCA Civ 388.

> Hague Rules or London Rules. Shortly thereafter, a diplomatic conference in Brussels appointed a *sous-commission* to consider the Rules further. It was after meetings of the *sous-commission* in Brussels in 1922 and 1923[47] that the final version of the Hague Rules was adopted at the Brussels Conference on 25 August 1924 as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading.[48]

In *The Muncaster Castle,*[49] Viscount Simonds summarised the aim of the Rules in the following terms:

> …Their aim was broadly to standardise within certain limits the rights of every holder of a bill of lading against the shipowner, prescribing an irreducible minimum for the responsibilities and liabilities to be undertaken by the latter. …[50]

According to Article I(b), the Hague Rules were principally drafted to govern the carriage of goods by sea under bills of lading or similar documents of title. The whole object of the treaty was to produce standard provisions of liability between a carrier and a shipper and to secure standard terms for bills of lading, which are often passed from hand to hand like negotiable instruments, in order to eliminate the possibility that a carrier could shield itself from liability through manipulation of fine print clauses. Thus, in the interests of protecting the shipper (or an innocent consignee or endorsee of the transport document, who could easily find himself holding no rights against the shipowner for damage to or loss of cargo because of the harsh exclusion clauses), it is not lawful for a sea carrier to exclude or limit his liability with respect to negligence as to the care of cargo. Clauses purporting to do so are to be null and void, and a sea carrier cannot lawfully exclude or limit his liability to exercise due diligence in respect of seaworthiness.[51]

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[47] The Carriage of Goods by Sea Act 1924 provided for the application of the Hague Rules, as approved in Brussels in October 1923 and scheduled to the Act, in the circumstances set out in ss 1, 3 and 4 of the 1924 Act.
[48] *The Lady M* [2019] EWCA Civ 388, paras [22] and [23] (Simon LJ).
[49] *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807; [1961] 1 Lloyd's Rep 57.
[50] *The Muncaster Castle* [1961] AC 807, 836, [1961] 1 Lloyd's Rep 57, 67.
[51] See, for example, elaborative speech of Lord Somervell in *Adamastos Shipping Co Ltd* v *Anglo-Saxon Petroleum Ltd, The Saxonstar* [1959] AC 133; [1958] 1 Lloyds' Rep 73, 97; and *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605, 621 (Steyn LJ); [1998] 1 Lloyd's Rep 337, 346–347, with reference to Lord Roskill, Review of *Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules, 3 volumes* (1992) 108 LQR 501, 502; and the elaborative speech of Judge Thomas A. Clark in *Calmaquip Engineering West Hemisphere Corp v West Coast Carriers*, Ltd. (5th Cir. 1981) 650 F.2d 633, 639-640 with reference to *Encyclopaedia Britannica, Inc v SS Hong Kong Producer*, 422 F.2d 7 (2nd Cir 1969) with further appeal in the Second Circuit.

As Selvig argues The Hague Conference of 1921 consequently attempted to extend the coverage of the mandatory liability system set up in the Hague Rules,[52] so they have dominated the legal scene since their signature in 1924, conferring a measure of broad uniformity and consensus of approach throughout the world, even though the details of their application differ from jurisdiction to jurisdiction. Some say that these Rules are close to representing an international *lex mercatoria,* with the effect of distributing the maritime risks between the cargo-owner and the shipowner, and, in practice, distributing the risk between the cargo underwriter and the P&I underwriter.[53]

The objectives of the 1924 Brussels Convention[54] lay not only in the general advantages offered by uniformity of the law but particularly in the removal of certain defects in the previous situation.
As Anthony Diamond QC characterised in his paper:

> the main object was to secure the bill of lading as a commercial document, and this could only be achieved by: (1) redressing the imbalance of bargaining power between shipper and carrier, by placing the weight of legislation behind the shipper where necessary; … (2) clarifying the nature and scope of the minimum obligations imposed: buyers and banks need to know their rights without painful scrutiny of each bill of lading. Thus producing standardisation of the most important terms of bills of lading.
>
> The lessons of the past were that, to achieve these objects, the Convention must have binding force and must regulate both domestic and international contracts. It must be binding (1) because experience had shown that a voluntary system would not work in so controversial a matter; (2) lest carriers of states with parallel domestic legislation be at a disadvantage vis-a-vis carriers of states without such legislation; (3) to provide sufficient momentum for the abrogation of binding domestic rules in conflict with the Convention.[55]

However, the problem with such broad objectives that aim to provide a balance between competing interests is that they often do not clarify or explain the meaning of individual provisions or offer much practical assistance in interpreting the Rules as an international treaty – the underlined general aims tell

[52] Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, 208, esp see ft 11: "influenced by the success of the York-Antwerp Rules, the Hague Conference of 1921 agreed that the Hague Rules should be enforced by their contractual incorporation into bills of lading".
[53] The so-called "overlapping system of insurance": 'the system whereby the shipper or consignee effects insurance of the cargo; the ship effects liability insurance; and in the event of loss and damage it is discussed between the two sets of insurers which of them is to bear the loss and in what proportions'. See the historical background in Anthony Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 226.
[54] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25th August 1924.
[55] Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 263–264.

us nothing about the true meaning and construction of the particular articles. One is therefore directed to the language of the relevant part of the Hague Rules as the authoritative guide to the intention of the framers.[56]

In 1954, Raoul Colinvaux expressed an opinion that the Hague Rules were badly drafted and that they had thrown English shipping law into a state of confusion and uncertainty.[57] He said:

> no document gives more scope for ingenuity in its interpretation than a statute which attempts to incorporate into English law the terms of International Convention. A well-drafted enactment like the Sale of Goods Act, 1893, has the effect of crystallising the law within a few decades; one such as the Carriage of Goods by Sea Act, 1924 puts it into confusion indefinitely. Now, nearly thirty years later, every month sees some new and insoluble problem arising under it.[58]

The general structure of the Hague Rules

Brandon J provided a helpful summary of the scheme of the Hague Rules in *The Arawa*:[59]

- (i) The rules apply only to contracts for the carriage of goods contained in or evidenced by bills of lading, and only to so much of such contracts as relate to the carriage of goods by sea ("the sea carriage");[60]
- (ii) The sea carriage is defined as beginning with the loading of the goods on, and ending with their discharge from the ship used for such carriage ("the carrying ship");[61]
- (iii) The parties are free to decide by their contract what parts of the operations of loading the goods on, and discharging them from the carrying ship are to be performed by the carrier, and what parts by the shipper or receiver, and the rules will then apply only to such parts of those two operations as it has been agreed that the carrier shall perform and he does perform;[62]

[56] For example, *Effort Shipping Co Ltd v Linden Management SA and Another, The Giannis NK* [1998] AC 605, 621 (Steyn LJ): 'But these general aims tell us nothing about the meaning of art IV r 3 or art IV r 6. One is therefore remitted to the language of the relevant part of the Hague Rules as the authoritative guide to the intention of the framers of the Hague Rules'.
[57] Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 227–228.
[58] R.P. Colinvaux, *The Carriage of Goods by Sea Act, 1924* (London 1954). See also S. Dor, *Bill of Lading Clauses and the Brussels International Convention of 1924*, (2nd edn, London 1960).
[59] *The Arawa* [1977] 2 Lloyd's Rep 416, 424–425.
[60] Article I(b).
[61] Article I(e).
[62] *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 1 Lloyd's Rep 321; and *Jindal Iron & Steel Co v Islamic Solidarity Shipping Co, The Jordan II* [2005] 1 WLR 1363, [2005] 1 Lloyd's Rep 57.

- (iv) The liability of the carrier for loss of or damage to the goods during the sea carriage is governed by arts. III and IV of the rules. Further, while the parties may agree to liability terms less favourable to the carrier than those contained in those articles, any purported agreement providing for terms more favourable to the carrier is null and void;[63]
- (v) The liability of the carrier for loss of or damage to the goods before the beginning, or after the end, of the sea carriage is not governed by the rules at all, the parties being free to agree to whatever liability terms as they may choose.[64]

The background of the Hague-Visby Rules

As stated by Tomlinson LJ, '… strictly speaking there are no such Rules [i.e. the Hague-Visby Rules]. There was signed at Brussels on 23 February 1968 a "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ('Visby Rules')". Those "Certain Rules" are of course the Hague Rules.'[65]

Article 6 of the Protocol stipulates: 'As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument. A Party to this Protocol shall have no duty to apply the provisions of this Protocol to bills of lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.' Thus, the Protocol of 1968 should not be considered as a separate convention.

As Professor Tetley said, the result of ratification of or accession to the Protocol by a nation is that the nation consents to be bound by the Hague-Visby Rules. But it is perhaps inevitable that the Convention and the Protocol should have become together known compendiously as the Hague-Visby Rules.[66]

[63] Articles II, V and Article III Rule 8.
[64] Article VII.
[65] *Yemgas FZCO and Others v Superior Pescadores SA Panama, The Superior Pescadores* [2016] EWCA Civ 101; [2016] 1 Lloyd's Rep 561, para [48] (Tomlinson LJ).
[66] See explanations of Tomlinson LJ in *The Superior Pescadores* (2016) para [48] with reference to Professor W. Tetley, QC, *Marine Cargo Claims*, (4th edn, Yvon Blais 2008), vol 1, 11–12.

The approach to the interpretation of the Hague Rules

Uniformity of law in general and of maritime law in particular cannot be achieved by the simple adoption and ratification of an international Convention wherein rules on a given area of the law are set out. In order that uniformity is actually achieved, two further steps are required: (1) the provisions of the Convention must be properly enacted by the states; (2) the provisions must be interpreted in a uniform manner by the courts of the States parties.[67] As per the latter, as noted by Sturley, 'how can the courts of the world interpret an international uniform law consistently if they do not have access to essential evidence of the law's intended meaning?'.[68]

English law was long highly restrictive in its approach to the use of aids to the construction of statutes outside the language of the statute itself. Thus, it resolutely refused to look at what was said in Parliament during the passage of the relevant legislation and at least at present, this is still clear and binding precedent. Where that legislation was based on a treaty, the English courts would not until recently even look at the treaty whatever the language of its text as an aid to the construction of the statute. However, that rigid attitude has recently been modified.[69]

As Sinclair argues, there has been so much academic and doctrinal discussion on the subject of treaty interpretation that 'it is a task of some difficulty to state with precision what are the generally accepted principles of international law relating to treaty interpretation'.[70] However, some attempts were made to formulate a series of principles, see, for example, Sir Gerald Fitzmaurice's six principles as analysed by Sinclair: 'actuality; natural and ordinary meaning; integration; subsequent effectiveness; subsequent practice; and contemporaneity'.[71]

In the context of the Hague Rules, the English courts have followed one principal approach: that of seeking to give the language of the convention its ordinary and natural meaning, viewed neutrally and without bringing upon it any assumptions or presumptions as to what the words mean implied from domestic precedent or English legal methodology or practice. The courts have repeatedly stressed that the Hague Rules should be considered and interpreted, not in a narrow or English law–based manner, but in a broader

[67] Francesco Berlingieri, 'Uniform Interpretation of Foreign Conventions' [2004] LMCLQ 153, 154.
[68] See, for example, preface to Michael F. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules* (Fred B. Rothman & Co 1990).
[69] As shown by the decision of the House of Lords in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 Lloyd's Rep 295.
[70] Ian McTaggart Sinclair, 'The Principles of Treaty Interpretation and Their Application by the English Courts' (1963) 12 ICLQ 508, 509.
[71] ibid, 510–511. See also Lord McNair, *The Law of Treaties* (2nd edn, Oxford University Press 1961).

approach to the language, conscious of their having been adopted as the text of an international convention. It is important to avoid imposing pre-1923 English domestic common law rules in seeking the true construction of the Rules.[72]

In *Lady M,*[73] Popplewell J revised and summarised the material principles derived from a number of authorities[74] on the correct approach to the interpretation of the Hague Rules by the English Courts:

> (1) The Hague Rules as convention treaty obligations are subject to articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. As such the primary duty of the Court under article 31 is to ascertain the ordinary meaning of the words used, not only in their context but also in the light of the evident object and purpose of the convention. The language of the text is to be taken as a whole against this background;
>
> (2) Because the Hague Rules are the outcome of international conferences and have an international currency, being applied by foreign courts, it is in the interests of uniformity that they should be construed on broad principles of interpretation which are generally accepted rather than rules of construction particular to English law. For the same reasons, their interpretation is not to be controlled by the English law cases which preceded the Rules, and the court should not pay excessive regard to earlier decisions of English Courts in construing the international code. Where there are words or expressions which have received judicial interpretation as terms of art, the words may be presumed to have been used in the sense already judicially imputed to them; but the words have to be given their plain meaning, which should be given effect to without concern as to whether that involves altering the previous law;
>
> (3) Recourse may be had to the *travaux préparatoires*, in accordance with article 32 of the Vienna Convention, but only in the circumstances there identified, namely to confirm the ordinary meaning, or where without them the meaning would be ambiguous, obscure or lead to a result which is manifestly absurd or unreasonable. The travaux will only be determinative in a case in

[72] See, for example, *Daewoo Heavy Industries v Klipriver Shipping, The Kapitan Petko Voivoda* [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep 1, 12–13. But see *The Tasman Pioneer* [2010] 2 Lloyd's Rep 13, paras [23]– [25].
[73] *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd, The Lady M* [2017] EWHC 3348; [2018] 1 Lloyd's Rep Plus 22.
[74] *Stag Line v Foscolo, Mango & Co Ltd* [1932] AC 328, 342–343 (Lord Atkin), 350 (Lord MacMillan); *Aktieelskabet de Danske Sukkerfabriker v Bajamar Compania Naviera S.A.,The Torenia* [1983] 2 Lloyd's Rep 210, 219 (Hobhouse J); *CMA CGM S.A. v Classica Shipping Co Ltd* [2004] 1 Lloyd's Rep 460, 463–464 (Longmore LJ); *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2005] 1 Lloyd's Rep 57, 63– 64 (Lord Steyn); *Effort Shipping Co Ltd v Linden Management S.A., The Giannis N.K* [1998] AC 605, 615 (Lord Lloyd), 623 (Lord Steyn); and *Serena Navigation Ltd v Dera Commercial Establishment, The Limnos* [2008] 2 Lloyd's Rep 166, para [9] (Burton J).

which they clearly and indisputably lead to a definite legal intention. In the words of Lord Steyn in *The Giannis NK* 'Only a bull's-eye counts. Nothing less will do'.[75]

Application of The Vienna Convention to interpretation of the Hague and the Hague-Visby Rules: Their Object and Context

Although the Vienna Convention[76] does not cover the whole ground of the law of treaties, it embraces the most important areas and is the essential starting point for any discussion in this branch of law. The relevant principles of treaty interpretation are set out in this Convention,[77] which, for good reason, has been called the treaty on treaties.[78] The UK adopted the Vienna Convention with effect from 1981. Thus, the courts are obliged to interpret treaties and substantive law taken from treaties in accordance with articles 31 to 33 of the 1969 Convention.

As Gardiner argues, 'it is now well established that the provisions on interpretation of treaties contained in articles 31 and 32 of the Convention reflect pre-existing customary international law, and thus may be (unless there are particular indications to the contrary) applied to treaties concluded before the entering into force of the Vienna Convention in 1980.[79] … *There is no case after the adoption of the Vienna Convention in 1969 in which the International Court of Justice or any other leading tribunal has failed so to act*'.[80] For example, in *The Ocean Victory,*[81] Clarke LJ emphasised the importance of not interpreting international conventions by reference to domestic principles, but rather by reference to "broad and acceptable principles". Although it may be difficult to identify these principles, Articles 31 and 32 of the Vienna Convention may be of assistance.[82]

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[75] *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd, The Lady M* [2017] EWHC 3348 para [27] (Popplewell J). These principles were further reaffirmed in the second instance court [2019] EWCA Civ 388 paras [24] – [25].
[76] The Vienna Convention on the Law of Treaties, dated 23rd May 1969.
[77] For a considerable body of commentary and analysis see for example: M K Yasseen, *L'Interprétation des Traités d'aprés la Convention de Vienne sur le Droit des Traités*, 151 Hague Recueil (1976-III), 1; Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, OUP 2013); Fatima Shaheed, *Using International Law in Domestic Courts* (Bloomsbury Publishing plc 2005); F. A. Mann, *Foreign Affairs in English Courts* (OUP 1986); Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015).
[78] Anthony Aust, 'Vienna Convention on the Law of Treaties' (2006).
Source: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498.
[79] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015), 13.
[80] ibid, 13, with reference to *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands)*, Award of 24 May 2005, XXVII RIAA 35, 62, para [45].
[81] *Gard Marine & Energy Ltd v China National Chartering Company Ltd, The Ocean Victory* [2017] UKSC 35; [2017] 1 WLR 1793; [2017] 1 Lloyd's Rep 538.
[82] *The Ocean Victory* [2017] UKSC 35, [2017] 1 WLR 1793; [2017] 1 Lloyd's Rep 538, paras [72] and [73] (Longmore LJ). See also *Glencore Energy UK Ltd and Another v Freeport Holding Ltd, The Lady M* [2019] EWCA Civ 388, para [34] (Simon LJ).

However, after the broadly declared guidelines by the Vienna Convention, Lord Denning MR urged about an incoming tide of law flowing into the rivers and estuaries of waters of new judicial operation in the area of the common market.[83]

Gardiner with some justice states, the elision of 'broad principles of general acceptation' with Articles 31 and 32 of the Vienna Convention has perhaps led to the Convention being viewed slightly through the prism of how the House of Lords has chosen to summarise the general principles rather than applying the Convention provisions *tel quell (as such)*. Courts in the UK have followed a trail of progressive acceptance of the applicability of the Vienna rules to issues of treaty interpretation. The first sign of this was mention of the rules by four of the five judges in the House of Lords in *Fothergill v Monarch Airlines*[84]. However, only Lord Diplock referred to the rules at any length, and it was the possible use of preparatory work that mainly excited the judges. This left a rather incomplete impression of the Vienna Rules. Though later cases have referred to the rules much more extensively, sometimes looking at particular elements in some detail, the strong influence of precedent has meant that *Fothergill v Monarch* has acted as something of a counterweight to their systematic use.[85]

The Hague Rules and the Hague-Visby Rules would not be subject to the application of the Vienna Convention, because, pursuant to Article 4, 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'. In a strict sense this position is contrary to the statement of Popplewell J in *The Lady M*.[86]

Historically, the approach of the English courts to the interpretation of the existing Hague and Hague-Visby Rules has not been 'the best example of systematic adherence to the general principles of treaty interpretation'. The comparison can be made, for example, with the courts' approach to other conventions and treaties where a more rigorous 'Vienna Convention' approach has been adopted, a tendency which has increased in recent times.[87]

From the other side it was admitted that 'the need to focus on the ordinary meaning of the words used in their context and in the light of their object and purpose is consistent with the approach to interpretation

[83] *HP Bulmer Ltd & Anor v J Bollinger SA & Ors* [1974] 1 Ch 401, pages 418F and 425C–H.
[84] *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251; [1980] 2 Lloyd's Rep 295.
[85] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2017), 19-20.
[86] *The Lady M* [2017] EWHC 3348, para [27] (Popplewell J).
[87] Professor D Rhidian Thomas, *Carriage of Goods under the Rotterdam Rules*, edn 2010, *Interpreting the international sea-carriage conventions: old and new*, by Simon Rainey, QC, para 3.3. See also Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2017) 41–56, fn 49, especially five examples of treaty interpretations which are included in order to give an idea of how the Vienna rules should guide the treaty interpretation.

established before the Vienna Convention took the domestic effect; and it is therefore unnecessary to consider whether the earlier approach was inconsistent and, if so, how any such inconsistency might need to be resolved'.[88]

Similarly, respect should be paid to decisions of other jurisdictions in relation to the meaning of the Rules, as the stated object of the Convention was the unification of the domestic laws of the Contracting States relating to bills of lading.[89] Thus, the construction of the Rules should be based on broad principles of general acceptation, which are undoubtedly enshrined in Articles 31 and 32 of the 1969 Vienna Convention.[90]

Obstacles to Uniform Interpretation

There are three important obstacles to uniform interpretation of the Hague and Hague-Visby Rules.[91]

(1) The *first* obstacle may be the difference between the text of the Convention and the unique rules enacted in a state party to implement the Convention. English courts have made considerable efforts to overcome this obstacle by laying down the rule that when the terms of the legislation are capable of more than one meaning the Convention itself becomes relevant, because 'there is a *prima facie* presumption that Parliament does not intend to act in breach of international law'.[92] However, as Berlingieri argues, this rule is blurred where there are different bodies of international jurisprudence on the same point of law and especially where one of them seems to have developed without reference to the other.[93]

(2) The *second* obstacle may be the possible variants between the meaning in two different "official" languages of the treaty. Though the preliminary work in drafting the Hague Rules was done in English, the Convention was finally drafted in French, and the parties signed the French text, the English version merely being a translation. As it was assumed by Sir Leslie Scott, 'this mishmash of French and English

[88] *The Lady M* [2019] EWCA Civ 388, para [37] (Simon LJ).
[89] See *The River Gurara* [1998] 1 Lloyd's Rep 225, 228 (Phillips LJ) with reference to *Stag Line Ltd* v *Foscolo Mango Co Ltd* (1931) 41 Ll L Rep 165, 171; [1932] AC 328, 342 (Lord Atkin) and 174; 350 (Lord Macmillan); *The Hollandia* [1983] 1 Lloyd's Rep 1, 5; [1983] 1 AC 565, 572 (Lord Diplock);
and also in relation to other international Conventions, see *Morris* v *KLM Dutch Airlines* [2002] 2 AC 628, 656 and *Algrete Shipping Co* v *International Oil Pollution Compensation Fund* [2003] 1 Lloyd's Rep 327, paras [16]– [21].
[90] See *CMA CGM SA v Classica Shipping Co Ltd, The CMA Djakarta* [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460, para [10].
[91] As defined by Francesco Berlingieri in 'Uniform Interpretation of Foreign Conventions' [2004] LMCLQ 153.
[92] For clarification see, for example, *Salomon* v *Commissioners of Customs and Excise* [1967] 2 QB 116, 144;
[1966] 2 Lloyd's Rep 460, 468; *Post Office* v *Estuary Radio Ltd* [1968] 2 QB 740, 757; [1967] 2 Lloyd's Rep 299, 305;
The Banco [1971] P 137, 157; [1971] 1 Lloyd's Rep 49, 56.
Francesco Berlingieri, 'Uniform Interpretation of Foreign Conventions' [2004] LMCLQ 153, 154.
[93] See Julian Cooke, *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [85.9].

would, nonetheless, be perfectly understood by shipowners and shippers who grasped the meaning of the text precisely'.[94] However, historically in the English courts the French text of the Hague Rules had received less preference than perhaps it should when one considered that the Convention and the Rules were drawn in only one authentic text and that in French.[95]

The text of the Visby Protocol of the Hague Rules is in French and English – of equal validity,[96] although as the collected *travaux préparatoires* show, the negotiations were conducted principally in English.[97] Section 1(2) of The 1971 Act states that 'the provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law'. This phrase does not mean that recourse to the French text is forbidden. It arguably indicates that 'the English text is to be considered as authoritative except in cases of ambiguity'.[98]

Thus, in the early cases, the French text received attention and was consulted by the English court if there was any ambiguity or for confirmation. For example, in *Pyrene v Scindia,* Devlin J specifically relied upon the French text of the Hague Rules to assist him in the task of interpretation saying that 'having regard to the preamble to the Act and the fact that the French text is the only authoritative version of the Convention, …, that it is permissible to look at it'.[99] However, there was no universally adopted method that provided for the French language to prevail over the English in the event of inconsistency.

The modern approach of Parliament giving effect to the Hague and the Hague-Visby Rules has been consistent with that adopted with other carriage and maritime conventions passed since the Second World War. In *Buchanan v Babco*[100] the court had to consider the Convention on the Contract for the International Carriage of Goods by Road (CMR) which was signed in two authentic texts: English and French. The Convention was enacted by the Carriage of Goods by Road Act 1965 by appending only the English text as a schedule to the Act.

Wilberforce LJ rejected any exclusion of the French text or its narrow use in the following words:

> I think that the correct approach is to interpret the English text which after all is likely to be used by many others than British business men, in a normal manner, appropriate for the interpretation

[94] Meeting of the Sous-Commission, First Plenary Session on 06th October 1923, para [36].
[95] Professor D Rhidian Thomas, *Carriage of Goods under the Rotterdam Rules*, *Interpreting the international sea-carriage conventions: old and new*, by Simon Rainey, QC, (Informa Law from Routledge 2010), para [3.28].
[96] Sir G. Treitel, Professor F. Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-066].
[97] See Francesco Berlingieri, The *Travaux Preparatoires* of the Hague Rules and of the Hague-Visby Rules, CMI, 1997.
[98] Michael J. Mustill, QC, 'Carriage of Goods by Sea Act 1971', a lecture given before Den Norske Sjorettsforening (Norwegian Maritime Law Association) in Oslo on 18th October, 1971.
[99] *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402, [1954] 1 Lloyd's Rep 321, 330.
[100] *Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141; [1978] 1 Lloyd's Rep 119.

> of an international convention, unconstrained by technical rules of English law, or by English legal precedent but on broad principles of general acceptation.[101] Moreover, it is perfectly legitimate … to look for assistance, …, to the French text. This is often put in the form that resort may be had to the foreign text if (and only if) the English text is ambiguous, but I think this states the rule too technically. As Lord Diplock recently said in this House the inherent flexibility of the English (and, one may add, any) language may make it necessary for the interpreter to have recourse to a variety of aids.[102] There is no need to impose a preliminary test of ambiguity.[103]

His Lordship similarly gave a broad guidance as to how the alternative text, given that it was in a foreign language, was to be received by the Court:

> … I would not lay down rules as to the manner in which reference to the French text is to be made. It was complained … that there was no evidence as to the meaning of the French text, and that the Lords Justices were not entitled to use their own knowledge of the language. There may certainly be cases when evidence is required to find the exact meaning of a word or a phrase; there may be other cases when even an untutored eye can see the crucial point.[104] There may be cases again where a simple reference to a good dictionary will supply the key.[105] In such a case, …, when one is dealing with a nuanced expression, a dictionary will not assist and reference to an expert might also be unhelpful, for the expert would have to direct his evidence to a two-text situation rather than simply to the meaning of words in his own language, so that he would be in the same difficulty as the court. But I can see nothing illegitimate in the court looking at the two texts and reaching the conclusion that both are expressed in general or perhaps imprecise terms, so as to justify rejection of a narrow meaning.[106]

The French text has further proved to be of importance in the two House of Lords cases on the Hague-Visby Rules.

In *The Jordan II*,[107] the issue concerned the meaning of Article III Rule 2 of the Hague-Visby Rules and whether the words 'subject to the provisions of Article IV, the carrier shall properly and carefully load,

[101] With reference to *Stag Line Ltd v Foscolo Mango and Co Ltd* (1931) 41 Ll L Rep 165, 174; [1932] AC 328, 350 (Lord Macmillan).
[102] With reference to *Carter v Bradbeer* [1975] 3 All ER 158, 161.
[103] *Buchanan v Babco* [1978] 1 Lloyd's Rep 119, 122 (Lord Wilberforce).
[104] cf *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616 (insertion of 'and' in the English text)
[105] *Fothergill v Monarch Airlines Ltd* [1977] 2 Lloyd's Rep 184, 188 (Kerr J).
[106] *Buchanan v Babco* [1978] 1 Lloyd's Rep 119, 122 (Lord Wilberforce).
[107] *Jindal Iron & Steel Co v Islamic Solidarity Shipping Co, The Jordan II* [2005] 1 WLR 1363; [2004] UKHL 49; [2005] 1 Lloyd's Rep 57.

handle, stow, carry, keep, care for and discharge the cargo' meant that the carrier shall both perform the enumerated functions *and* shall do so properly and carefully.

The prevailing view in English law then was that Article III Rule 2 did not *per se* impose an obligation on the carrier to carry out or to be responsible for the proper performance of the operations listed in the rule (as the cargo-owners contended that it did) but only imposed an obligation and a responsibility upon him in respect of those operations which he is otherwise contractually obliged to perform that those operations be done properly and carefully.[108] In support of their argument, the cargo-owners relied upon the French text,[109] and argued that the relevant verb in Article III Rule 2, was 'procédera' which meant *to carry out* or *to conduct*. No alternative meaning was advanced by the carrier. It was also pointed out that the verb is used in the future tense, i.e. shall carry out.

Although the House of Lords rejected the cargo-owners' arguments on other grounds,[110] the French text was accepted as pointing more clearly to the cargo-owners' construction of Article III Rule 2 than the approach previously adopted in *Pyrene v Scindia*.[111]

Lord Steyn's approach derived little support from the purposes of the Rules, other than those which the court assumed must have been the purpose of the Rules. He stated as his reason for departing from the linguistic result as follows:

> Devlin J [in *Pyrene v Scindia*] did not base his interpretation on linguistic matters. He relied on the broad object of the Rules. It has often been explained that the Hague Rules and Hague-Visby Rules represented a pragmatic compromise between the interests of owners, shippers and consignees. The Hague Rules were designed to achieve a part harmonisation of the diverse laws of trading nations. It achieved this by regulating freedom to contract on certain topics […]. In interpreting article III, r. 2, its purpose and context is all important. For example, it is obvious that the obligation to make the ship seaworthy under article III, r. 1, is a fundamental obligation which

[108] See decision in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402; and as endorsed by the House of Lords in *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149.
[109] The French text provides: 'Le transporteur sous réserve des dispositions de l'article 4, procédera de façon appropriée et soigneuse au chargement, à la manutention, à l'arrimage, au transport, à la garde, aux soins et au déchargement des marchandises transportées.'
[110] Based on the ratio decidendi of *GH Renton & Co v Palmyra Trading Corporation* and call for certainty in international trade law.
[111] *The Jordan II* [2005] 1 WLR 1363, para [18] (Lord Steyn): 'In interpreting art III, r. 2, the starting point is the language of the text. Counsel for cargo owners was assisted by the fact that in *Pyrene* Devlin J accepted that the phrase 'shall properly and carefully load' fits more closely the interpretation which he rejected. Moreover, first instance the judge similarly accepted that this is so: […]. For my part, the concession of Devlin J was realistic. It follows that the common thread and ratio decidendi of the majority judgments in *Renton* is a purposive rather than literal reading of article III, r. 2'.
See 'Interpreting the international sea-carriage conventions: old and new', by Simon Rainey, QC, fn para [3.42].

> the owner cannot transfer to another. The Rules impose an inescapable personal obligation […]. On the other hand, article III, r. 2, provides for functions some of which (although very important) are of a less fundamental order e.g. loading, stowage and discharge of the cargo. Those who are not attracted to literal interpretations of an international Convention, reliant principally on linguistic matters, may find it entirely possible to conclude that the context and purpose of article III, r. 2, would not be undermined by permitting owners to transfer responsibility for loading, stowage and discharge to shippers and others. Devlin J thought that it was difficult to believe that the Rules were intended to impose a universal rigidity about such essentially practical secondary functions.[112]

Similarly, in *The Rafaela S,*[113] the French text was relied upon by the House of Lords in order to establish whether the Hague-Visby Rules applied to straight bills of lading or only to negotiable bills of lading. The appellant carrier argued that the Rules did not apply to straight bills and that Article I(b) was apt only to refer to a negotiable document that operates as a document of title to the holder of the bill.

There had been little or no reliance placed by the cargo-owners on the French text. So, the appellants submitted in their written case that 'although there is a slight linguistic difference between the French and English text of this Article, it is not suggested by either party that it is material to the issue on this appeal. It is therefore appropriate to proceed using the English text'. The House of Lords however considered the French text to be highly significant.[114]

Rodger LJ analysed the position in the following way:

> …even though their meaning would then be unclear, the words 'document of title' could stand on their own in the English text. Indeed, that is how they are usually read. By contrast, it is plain that the words 'tout document similaire formant titre' in the French text are intended to be read along with the following words 'pour le transport des marchandises par mer'. That is to say, the alternative to a 'connaissement … formant titre pour le transport des marchandises par mer' is 'tout document similaire formant titre pour le transport des marchandises par mer'. So the alternative document which the French text describes is simply one that entitles the holder to have the goods carried by sea – and, obviously, to have them delivered to the appropriate person at the end of the voyage. Nothing is said about the document having any effect in relation to the title to

[112] *The Jordan II* [2004] UKHL 49, para [19].
[113] *JI McWilliam Ltd v Mediterranean Shipping Co, The Rafaela S* [2005] 2 AC 605; [2005] UKHL 11; [2005] 1 Lloyd's Rep 347.
[114] ibid, para [44].

> the goods, in a property sense. The French text would therefore suggest that the words 'document of title' in the English version should be read along with the qualifying words 'in so far as such document relates to the carriage of goods by sea' and should be understood as applying to any document that entitles the holder to have the goods carried by sea …[115]

(3) However, even if a Convention has been given the force of law and there is no linguistic problem, there is a *third* and final obstacle: the possible different interpretations of the provisions of a Convention by the courts of Contracting States. Sometimes this problem exists even *within* a particular jurisdiction, especially in states where the binding character of precedents does not hold. However, the situation may be more serious when different jurisdictions are involved. As Berlingieri suggests, this additional danger may be for the following reasons: (a) the existence of differing rules of interpretation; (b) the temptation of interpreting the provisions of the Convention with the aid of domestic provisions of a general or special nature, overlooking the international origin of the uniform rules; and (c) the frequent consideration of domestic precedents only.[116]

The English courts have stressed, both in the context of the sea-carriage and other conventions, the need to promote uniformity in the interpretation of international conventions. The position was summarised by Hope LJ in *Morris v KLM*[117] as follows:

> In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them.[118]

In *The Rafaela S*,[119] a significant factor for the House of Lords in rejecting the argument that straight bills were not intended to be within the scope of the Rules was that such bills, while not as common as negotiable bills, were in many jurisdictions a well-known feature. Having reviewed the pre-1924 English case law on such bills, Lord Bingham considered the treatment of straight bills in the US under the

[115] ibid, para [75].
[116] Francesco Berlingieri, *Uniform Interpretation of Foreign Convention*s [2004] LMCLQ 153, 154.
[117] *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628; [2002] UKHL 7; [2002] 1 Lloyd's Rep 745.
[118] ibid, para [81].
[119] *The Rafaela S* [2005] UKHL 11.

Pomerene Act 1916, German law distinguishing between order bills (*order-konnossement*) and straight bills (*namenskonnossement*), the French Commercial Code position from 1808 in relation to bills to a person named therein ("à personne dénommée"), and "recta" bills in Scandinavia. He concluded:

> This brief survey shows that straight bills (however described) were a familiar mercantile phenomenon in the early 1920s and, as already observed, they were not ignored in the Hague Rules negotiations. Thus one would incline to infer that the Rules were intended to apply to straight as well as order bills unless either (a) there was any persuasive reason why they should be excluded or (b) the text of the Rules, broadly interpreted, suggests an intention to exclude them.[120]

In the context of the Hague and Hague-Visby Rules, a special affinity is usually stated to exist with the case law of the United States, given both it being a dominant source of maritime law at the time of the adoption of the 1924 Convention and its participation both in the drafting of the Rules and in the methodology of the Harter Act and cases interpreting it, which shaped the Canadian Water Carriage of Goods Act 1910, the Ur-template for the first draft of the Rules.[121]

In *The Giannis NK*,[122] Lord Steyn stated that 'in the construction of an international convention an English Court does not easily differ from a crystallised body of judicial opinion in the United States',[123] although, as Lord Lloyd stated, there needs to be 'prevailing harmony on the other side of the Atlantic'[124] before such a view carries weight.[125]

Overcoming the above obstacles may still be unhelpful in interpreting individual provisions of the Rules. The next option for the Courts is to use the supplementary aids to interpretation, which include *travaux preparatoires*, the preparatory work that lie behind the final text, provided (a) it clearly points to a definite legislative intention; and (b) that it is public and accessible.

[120] ibid, para [16].
[121] See, for example, *The Muncaster Castle* [1961] AC 807, 840, citing *Hourani v Harrison*, the House of Lords stressed the importance of US law where the concepts in the Rules were taken from the Harter Act.
[122] *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605, [1998] 1 Lloyd's Rep 337.
[123] ibid [1998] AC 605, 623 (Lord Steyn); [1998] 1 Lloyd's Rep 337, 347 (Lord Steyn).
[124] ibid [1998] AC 605, 615 (Lord Lloyd); [1998] 1 Lloyd's Rep 337, 342, with reference to Viscount Simonds.
[125] See D. Rhidian Thomas, *Carriage of Goods under the Rotterdam Rules* (Informa Law from Routledge 2010), Chapter 3 by Simon Rainey, 'Interpreting the international sea-carriage conventions: old and new', para [3.109].

Recourse to Travax Preparatoires: legitimate but not necessary

The *travaux preparatoires* (literally, the preparatory works) represent the important "legislative history" of international conventions. In the case of the Hague and Hague-Visby Rules, the relevant materials were mostly unavailable until the relatively recent publications, first, by Professor Michael Sturley,[126] and second, by Professor Francesco Berlingieri,[127] that similarly unearthed long-buried Visby materials.[128]

It is argued that consideration of preparatory works might potentially influence court decisions. Sturley suggests that had the United States Supreme Court in *Herd v Krawill Machinery*[129] and the House of Lords in *Scruttons* v *Midland Silicones*[130] been aware of and paid regard to the *travaux préparatoires*, those two cases might have been differently decided instead of being decided based on the applicable domestic law of the two countries. The implication is that the Himalaya clause need never have been born. From the other side, when reviewing the publication of Sturley's work in 1992, Roskill LJ expressed the view that it was now too late to revisit decisions in the light of the newly unearthed materials:

> The texts to which the author refers in support of the submission that recourse should be had to them in order to overturn the two decisions mentioned have been interred for some 70 years. They can hardly be said to be easily available to the public or even to specialist lawyers. It is permissible to regret the *Midland Silicones* decision for many reasons. But it is difficult to see the House of Lords departing from it on the basis of these *travaux preparatoires* …[131]

In *Fothergill v Monarch Airlines*,[132] Wilberforce LJ said

> … the use of *travaux préparatoires* in the interpretation of treaties should be cautious, I think it would be proper for us … to recognise that there may be cases where such *travaux préparatoires* can be profitably used. These cases should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that *travaux préparatoires*

[126] Michael F. Sturley, *The Legislative History of The Carriage of Goods by Sea Act and the Travaux Preparatoires*, Volume I, II and III (edn by Fred B. Rothman & Co, 1990).
[127] Francesco Berlingieri, *The* Travaux Preparatoires *of the Hague Rules and of the Hague-Visby Rules* (CMI 1997).
[128] Also, there were some references in textbooks written by those who had participated in or attended the negotiations: e.g. Sandford Cole: *the Hague Rules Explained being the Carriage of Goods by Sea Act 1924*, 1924; and R. Temperley, T. Stevens, R. Stevens, *The Carriage of Goods by Sea Act 1924* (1st edn 1925).
[129] *Herd & Co v Krawill Machinery Corp* 359 US 297 (1959).
[130] *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446; [1961] 2 Lloyd's Rep 365.
[131] Lord Roskill, 'Review of *Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules*, 3 volumes', (1992) 108 LQR 501, 506.
[132] *Fothergill v Monarch Airlines Ltd* [1981] AC 251; [1980] 2 All ER 696; [1980] 3 WLR 209; [1980] UKHL 6

> clearly and indisputably point to a definite legislative intention … If the use of *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 … secondly, the general objection that individuals ought not to be bound by discussions and negotiations of which they may never have heard.[133]

Plainly, there will be many cases where the absence of clear discussion does not permit one to draw any conclusion. For example, in *The Giannis NK,*[134] the House of Lords expressly rejected the utility of the materials revealed by Professor Sturley in construing Article IV Rule 6. Steyn LJ expressed the following test:

> That brings me to the argument for the shippers based on the *travaux préparatoires* of the Hague Rules. Those materials are now readily accessible: see [Sturley]. Although the text of a convention must be accorded primacy in matters of interpretation, it is well settled that the *travaux préparatoires* of an international convention may be used as 'supplementary means of interpretation:' compare article 31 of the Vienna Convention […]. Following *Fothergill v Monarch Airlines* […], I would be quite prepared, in an appropriate case involving truly feasible alternative interpretations of a convention, to allow the evidence contained in the *travaux préparatoires* to be determinative of the question of construction. But that is only possible where the court is satisfied that the *travaux préparatoires* clearly and indisputably point to a definite legal intention: …. Only a bull's-eye counts. Nothing less will do.[135]

Thus, the *travaux preparatoires* should reveal both that there was express consideration of the particular question and that they give a clear answer.[136]

In *The Rafaela S,*[137] both parties relied on the *travaux preparatoires* as pointing in their favour.[138] Bingham LJ emphasised that

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[133] Also quoted in *The Lady M* [2019] EWCA Civ 388, para [89].
[134] *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605; [1980] 2 All ER 696.
[135] *The Giannis NK* [1998] AC 605, 623.
[136] ibid, 623 (Lord Steyn). A similar point was made in *The Rafaela S* [2003] 2 Lloyd's Rep., 127ff (CA), and the important cautionary words of Lord Bingham in the House of Lords [2005] 2 AC 423, para [19]. See also *The Jordan II* [2005] 1 Lloyd's Rep 57 and F.M.B. Reynolds 'The Package or Unit Limitation and The Visby Rules' [2005] LMCLQ 1, noting *El Greco (Australia)* v *Mediterranean Shipping Co* [2004] 2 Lloyd's Rep 537: 'The *travaux preparatoires*, as usual, reveal interesting but inconclusive information'. See *Tasman Orient Line* v *New Zealand China Clays, The Tasman Pioneer* [2010] 2 Lloyd's Rep 13, para [23], on the role of barratry; and see also *Serena Navigation Ltd v Dera Commercial Establishment , The Limnos* (QBD (Comm Ct)) [2008] EWHC 1036 (Comm); [2008] 2 Lloyd's Rep 166, para [20] of Burton J's judgment; and the most recent case *The Lady M* [2019] EWCA Civ 388 paras [87] through [99], again on the role of barratry.
[137] *The Rafaela S* [2005] UKHL 11; [2005] 2 AC 605.
[138] ibid, para [56].

> [i]t must be remembered that in a protracted negotiation such as culminated in adoption of the Hague Rules there are many participants, with differing and often competing objects, interests and concerns. It is potentially misleading to attach weight to points made in the course of discussion, even if they appear at the time to be accepted. In the present case, I do not think that either party can point to such a clear, pertinent and consensual resolution of the issue before the House as would provide a sure ground of decision.[139]

The House of Lords expressed no reservation in that case whatsoever in terms of taking into consideration the full range of materials gathered by Professors Sturley and Berlingieri, albeit with no positive result in either case.

In *The Jordan II,*[140] the cargo-owners submitted that the *travaux* pointed clearly to a common understanding on the part of the delegates that the carrier was to carry out and be solely responsible for all of the operations in Article III Rule 2, whether loading, stowing, carrying or discharging. Since the carrier could not divest itself of the obligation and responsibility to carry and care for in Article III Rule 2, it could not divest itself of its obligation and responsibility in respect of the other operations either.[141]

On 09th October, 1923 during the seventh Plenary Session of the Brussels Conference, Mr. Louis Frank (Chairman) made a report on the Convention on the Rules of the Carriage of Goods by Sea. He opened his speech by mentioning the importance attached to this convention. Further, he ran through the various articles and took account of the comments made. In regards to Article III Rule 2 he said:

> Article 3(2) contained an essential clause highlighting that the carrier, except as provided for in article 4, was responsible for seeing that everything required for loading, handling, stowage, carriage, custody, and unloading was provided for the goods to be carried. And the inclusion of every clause permitting the shipowner, without incurring responsibility, to fail in this essential duty of overseeing the preservation of the goods from the point of view of successful stowage, loading and unloading was null and void. That was the main element of the convention because it was in this way that, in the past, the use of immunity clauses had given cause for the greatest

[139] ibid, para [19].
[140] *The Jordan II* [2005] 1 WLR 1363; [2004] UKHL 49; [2005] 1 Lloyd's Rep 57.
[141] *The Jordan II* [2003] 2 Lloyd's Rep 87, para [60].

> criticism. The result had been the creation of different sorts of bills of lading that still bore the form, but whose content was completely destroyed by the force of the immunity clauses.[142]

Thus, the preparatory works showed that the history of the relevant wording of Article III Rule 2 was as follows: 'The carrier shall be bound to provide for the proper and careful handling [etc.]' was used in the Rules up to the 1923 Sub-Commission; this was translated into the official text by the French "procédera à" (i.e. shall perform/carry out); subsequently, the official text was re-translated back into English to read 'shall properly and carefully load [etc.]'.[143] At first instance in *Jordan II*,[144] the judge recognised the considerable force of these and other passages:

> There are certain statements in the *travaux préparatoires* which strongly suggest that the art. III r. 2 was not intended to permit a shipowner to contract out of his duty to load, stow and discharge. […] [T]his passage does not sit happily with the possibility that shipowners could avoid their obligations under art. III, r. 2 by entering into an agreement which removed from their sphere of activity the duty to load, stow and discharge.[145]

Nevertheless, while the judge at first instance held that the cargo-owners had 'come very near' to scoring a 'bull's eye', Teare J concluded that they had failed to do so because the *travaux préparatoires* failed to deal expressly with the very question raised in this case.[146]

In the House of Lords, that approach was upheld, Steyn LJ remarking:

> The general thrust of the *travaux* closely match the interpretation put forward by cargo owners. The Judge recognised this. But he also pointed out that nowhere in the *travaux* is there any statement that art. III, r. 2, prevents an owner and merchants from reallocating responsibility for loading, stowage and discharge of the cargo to the merchants. It is not enough to show that the draftsmen proceeded on the basis of the normal common law rule that loading stowage and discharging is the duty of the shipowner, without considering the effect of different contractual

[142] Michael F. Sturley, *Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires* (Fred B Rothman & Co 1990), volume I, 506.
[143] *Interpreting the international sea-carriage conventions: old and new*, by Simon Rainey, QC, para [3.93], fn 61.
[144] Nigel Teare QC of Quadrant Chambers, now Teare J; [2003] 2 Lloyd's Rep 87 (CA), 98–99.
[145] Similarly, positive views founded on the travaux were also expressed in the first edition of Carver:
Sir G. Treitel and F.M.B Reynolds, *Carver on Bills of Lading* (1st edn, Sweet & Maxwell), 470, para [9-115],
[146] Especially see *The Jordan II* [2003] 2 Lloyd's Rep 87, 98-99, para [70]: 'The Court can only be influenced by these *travaux preparatoires* if they clearly and indisputably point to a definite legal intention. The degree of clarity is graphically illustrated by Lord Steyn's remark that only "a bull's eye" counts. Since the travaux preparatoires do not deal expressly with the question raised in this case I find it difficult to say that Mr. Rainey has scored a bull's eye although he has come very near to doing so (particularly in the case of Sir Norman Hill's address to the shipowners the World Shipping Conference in November, 1921)'.

> arrangements. If the issue had been directly confronted by draftsmen, it is far from obvious that they would have concluded that a shipowner should be liable to cargo owners for damage caused by cargo owners themselves when they undertook the relevant duty and did it badly. In these circumstances the Judge held that the requirements enunciated in *Fothergill* were not satisfied. In my view he was entirely right to do so. The *travaux* cannot therefore assist the argument of the cargo owners.[147]

Therefore, the present position appears to be unfriendly to any attempt to support interpretation by referring to the *travaux* unless they are virtually explicit, at least in the context of the Hague and Hague-Visby Rules.

In *The Limnos,*[148] the carrier relied on the texts relating to the discussions surrounding the drafting of Article IV Rule 5(a) of the Hague-Visby Rules as evidence that the emphasis was upon *physical* loss and damage. Thus, the initial text of the Convention was modified by the German delegation to refer to 'per kilogram of the goods *actually* lost or damaged' (emphasis added) based on their concern expressed as follows:

> the calculation of the amount of liability should differ from the calculation applicable under the other system. Whereas the lump sum per package or unit limits the liability, according to the present practice, even in case of damage caused only to part of the contents of the package, the liability calculated per kilogram should be limited by the weight of the goods actually damaged that is to say, not necessarily of the whole package. This ruling is to avoid that in case of large packages e.g. containers, the often considerable weight of the whole package practically will abolish the limitation of liability at all.[149]

While this wording did not survive into later drafts, no one disputed the correctness of what was being said. The same concept was adopted by the UK Delegation (see its memorandum in favour of the weight limit):

> It is the value of the actual cargo lost or damaged which is in the majority of cases the true measure of the cargo owner's loss … Accordingly it is suggested that the fairest and most practical solution of the problem is to adopt as the measure of the carrier's upper or maximum limitation of liability,

[147] *The Jordan II* [2005] 1 WLR 1363; [2005] 1 Lloyd's Rep 57 para [20].
[148] *Serena Navigation Ltd v Dera Commercial Establishment, The Limnos* [2008] EWHC 1036 (Comm); [2008] 2 Lloyd's Rep 166.
[149] *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules*, (1997) CMI, 541–542.

> the value of the cargo actually lost or damaged at the place and time at which such cargo is discharged. …[150]

The judge concluded that 'there was something for everyone' in the *travaux* which, it might be argued, is difficult to reconcile with the concentration of the delegates on "actual" loss and damage to the goods carried and the obvious connotations that lay behind that term. Unlike some *travaux* considered that were such as to 'leave one altogether unclear what was to be intended to be the rule on the point at issue',[151] this was a case where it could be said that the *travaux* indicated a definite legal intention of the draftsmen, namely to fix the limit by reference to the physically lost and damaged goods found on outturn from the ship. Importantly, the whole basis of the discussion as to how to calculate the limitation amount was predicated upon arriving at a figure that was meant to be a fair compromise in assessing the value of the lost and damaged goods.[152]

Consideration of the *travaux* recently came up in *The Lady M*,[153] where the primary issue raised on appeal was whether Article IV Rule 2(b) of the Hague-Visby Rules was capable of exempting the carrier from liability to the cargo owner for damage caused by fire, if that fire had been caused deliberately or barratrously. The appellants' counsel argued, *inter alia*, that the fact that the delegates to the Hague Conference considered that the carrier would have no liability for a barratrously started fire did not show that the word "fire" in the draft was understood to mean fire even where caused by barratry. On a proper reading, the *travaux préparatoires* show that the draftsmen made a deliberate decision not to exclude losses caused by barratry. It would have been strange if the defence had been reintroduced for certain forms of barratry through the fire defence.[154]

The history of drafting the fire exception was closely considered by Simon LJ. It was discovered that 'the wording of the draft of the Rules which first came before the 1921 Hague Conference included "fire" as an excepted peril. At some stage before the second day, the draft was amended so that Rule 2(b) exempted "barratry" and Rule 2(c) exempted "fire". Both these changes were discussed and negotiated, and the wording of both exceptions was retained.'[155] Simon LJ continued:

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[150] ibid, 545–546.
[151] As Bingham J put it in *Data Card Corp and Others v Air Express International Corp and Others* [1983] 3 All ER 639; [1983] 2 Lloyd's Rep 81, in relation to a similar package limitation in the Warsaw Convention 1929, Article 22(2), as amended – [1983] 3 All ER 639, 644.
[152] D. Rhidian Thomas, *Carriage of Goods under the Rotterdam Rules* (Informa Law from Routledge 2010), Chapter 3 by Simon Rainey, 'Interpreting the international sea-carriage conventions: old and new', para [3.105].
[153] *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd, The Lady M* [2019] EWCA Civ 388; [2019] 2 Lloyd's Rep 109.
[154] ibid, para [97].
[155] ibid, para [92].

> The discussions during the second day appear to have concluded that "fire" in what was then draft rule 2(c) was understood to mean fire however caused including, in particular, fires started by servants or agents of the carrier either deliberately or negligently. There was a discussion about whether to add wording which excluded fires caused with the fault of servants or agents in the specific context of a proposed amendment covering fires wilfully started. However, that amendment was rejected. The understanding was that fire caused with the privity of the owners could not be exempted even if the language were left simply as "fire".[156]

At some stage before the end of the Conference, the barratry exception was removed and the Rule 2(b) exception in the 1921 Hague Rules became "fire".[157]

A year later, at the Brussels conference in October 1922, the words 'unless caused by the actual fault or privity of the carrier' were added, following a proposal by the US delegation, such wording already being the basis of shipowners' exception under Section 502 Merchant Shipping Act 1894. Thus, in *The Diamond,*[158] it was held that Section 502(i) protected the owner unless it was 'in fault or privy to [the] misconduct or carelessness on the part of the crew', in starting the fire.[159]

In *The Lady M*, Simon LJ agreed with the reasoning of the Judge in the first instance court and doubted whether the threshold for consideration of the *travaux preparatoires* came close to being met. He found that that was not a provision in respect of which there were 'truly feasible alternative interpretations' of the words,[160] nor was it one of those 'rare' cases where the preparatory works 'clearly and indisputably' pointed to a definite legal intention.[161] Thus 'Glencore's argument not only failed to hit the bullseye, it should not have been aimed at the target'.[162]

Carver similarly came to the inference that the extensive records of the various committees whose work led up to the Hague and Hague-Visby Rules are rarely conclusive for the solution of matters of interpretation, stating 'as often occurs, the *travaux preparatoires* are rich in ambiguity'.[163] The preparatory works are often worth considering as 'throwing light on the general objectives and trend of

[156] ibid, para [93].
[157] ibid, para [94].
[158] *The Diamond* [1906] P 282.
[159] *The Lady M* [2019] EWCA Civ 388, para [95].
[160] With reference to Lord Steyn in *The Giannis NK.*
[161] With reference to Lord Wilberforce in *Fothergill v Monarch Airlines Ltd.*
[162] *The Lady M* [2019] EWCA Civ 388, para [99].
[163] *The Rafaela S* [2002] EWCA Civ 556; [2003] 2 Lloyd's Rep 113, para [59] (Rix LJ).

the discussions of the time'. But it has been said that 'only a bull's eye counts',[164] and judgments so far suggest that it is unlikely that a bull's eye will often be scored.[165] Certainly, 'the bull's eye has in terms of surface area been reduced to that of a dartboard rather than that of an archery target'.[166]

Finally, the role of preparatory work in treaty interpretation is probably best expressed by Waldock in ILC's Special Rapporteur[167] as 'simply evidence to be weighed against any other relevant evidence of the intentions of the parties', and pointing out that its force depends on the extent to which it furnishes 'proof of common understanding of the parties as to the meaning attached to the terms of the treaty'.[168]

"Broad principles of general acceptation": Where do these come from? What does English law say?

In the early cases, the Courts applied a rigid approach to the construction of the Hague Rules, effectively treating them as part of an English statute,[169] and showing a willingness 'to have regard to earlier decisions, to a greater or lesser extent so as to confirm a particular meaning in the Hague Rules or to note a particular variation of language'.[170]

In *Gosse Millerd,*[171] the House of Lords had to interpret the words 'management of the ship' in Article IV Rule 2(a) of the Hague Rules. Hailsham LC referred to the long judicial history of these words in England and was not able 'to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning from that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and … that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion'.[172]

Viscount Sumner expressed himself in similar terms:

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[164] *The Giannis NK* [1998] AC 605, 623 (Lord Steyn). However, this approach criticised in Richard Gardiner, *Treaty Interpretation* (2nd edn, 2016), 382–385.
[165] Sir G. Treitel and F.M.B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, 2017), 632, para [9-098].
[166] D. Rhidian Thomas, *Carriage of Goods under the Rotterdam Rules* (Informa Law from Routledge 2010), Chapter 3 by Simon Rainey, 'Interpreting the international sea-carriage conventions: old and new', para [3.106].
[167] International Law Commission, Special Rapporteurs, Sir Humphrey Waldock, Law of Treaties, 1962–1966
[168] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2016), 384.
[169] That is as if analogous to the legislative technique of incorporating the convention into the statute itself, see I. M. Sinclair, 'The Principles of Treaty Interpretation and their application by the English Courts' (1963) 12 ICLQ, 508.
[170] *The Lady M* [2019] EWCA Civ 388, para [31] (Simon LJ).
[171] *Gosse, Millerd, Ltd v Canadian Government Merchant Marine, Ltd, The Canadian Highlander* [1929] AC 223; [1928] 32 Ll L Rep 91.
[172] ibid, [1929] AC 223, 230; [1928] 32 Ll L Rep 91, 93 col 2 (Hailsham LC).

> … of foreign decisions, of course, the Legislature is not deemed to take notice and although the Conference was doubtless well acquainted with the United States cases, it has not yet been held that the Legislature of this country is deemed to know what those whose reports or conventions it affirms have been familiar with. *Prima facie*, therefore, the interpretation of the words in question which had been laid down in the English decisions before 1924, had the approval of the Legislature and is not to be doubted.[173]

Later, however, the interpretation of the provisions of a Convention based on national rules and national precedents was condemned. The first statement to the effect that the Hague Rules, as with any other international convention, should be considered and interpreted not in a narrow or English law–based manner but in a broader approach to the language, conscious of their having been adopted as the text of an international convention, was expressed in *Stag v Foscolo, Mango,*[174] where the court was considering the meaning of the words 'reasonable deviation' in Article IV Rule 4 of the Hague Rules. Lord Macmillan propounded:

> It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules set out in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on *broad principles of general acceptation*.[175]

In *The Hollandia,* Diplock LJ quoted this passage and continued:

> They [the Rules] should be given a purposive rather than a narrow literalistic construction, particularly wherever the adoption of a literalistic construction would enable the stated purpose of the international convention, viz., the unification of domestic laws of the contracting states relating to bills of lading, to be evaded by the use of colourable devices that, not being expressly referred to in the Rules, are not specifically prohibited.[176]

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[173] ibid, [1929] AC 223, 237; [1928] 32 Ll L Rep 91, 96.
[174] *Stag Line Ltd v Foscolo, Mango & Co* [1932] AC 328; or *Foscolo, Mango & Co, Ltd and H.C. Vivian & Co, Ltd v Stag Line* [1931] 41 Ll L Rep 165.
[175] ibid, [1932] AC 328, 350 (Lord Macmillan). See *Algrete Shipping Co Inc and Another v International Oil Pollution Compensation Fund and Others, The Sea Empress* [2003] EWCA Civ 65; [2003] 1 Lloyd's Rep 327, especially paras [16] and [21] (Lord Justice Mance).
[176] *The Hollandia (sub nom The Morviken)* [1983] 1 Lloyd's Rep 1, 5. See also *Riverstone Meat Co, Pty, Ltd v Lancashire Shipping Co, Ltd, The Muncaster Castle* [1961] AC 807, 855 & 874.

The use of the adverb "rigidly" (controlled) diminishes the force of Lord's Macmillan statement,[177] as several subsequent decisions indicate. For example, in *The Edinburgh Castle*,[178] the Admiralty Court ignored the international origin of the Supreme Court Act 1981 Section 20(2)(m), and based its decision only on English precedents, one of which was from a date (1921) preceding that of the Arrest Convention (1952).[179]

Similarly in *Stag v Foscolo, Mango*,[180] Lord Atkin took a narrower approach with a presumption in favour of any relevant English-law meaning. He emphasised that for the sake of uniformity 'the Courts should apply themselves to the consideration only of the words used without any predilection for the former law', although he expressed a caveat that 'words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them'.[181]

However, as noted by Rainey, neither the 'English lexicon' approach applied in *Gosse Millerd* nor the presumption referred to by Lord Atkin in *Stag Line* survived. Lord Macmillan's approach subsequently became endorsed in the series of post-war cases on the Hague Rules,[182] for example in *Renton v Palmyra*[183] and *Maxine Footwear*.[184]

In *Pyrene v Scindia*,[185] Devlin J adopted the wider general principle:

> … It is no doubt necessary for an English court or law to apply the rules as part of English law, but that is a different thing from assuming them to be drafted in the light of English law. If one is inquiring whether 'loaded on' in article 1(e) has a different meaning from 'loaded' or 'loading' in other parts of the rules, it would be mistaken to look for the significant distinction in the light of a conception which may be peculiar to English law … It is more reasonable to read the Rules as contemplating loading and discharging as single operations. It is no doubt possible to read art. I(e)

[177] As stated by Lord Roskill in *Fothergill* v *Monarch Airlines* [1981] AC 251, 298; [1980] 2 Lloyd's Rep 295, 314, described it as a 'slightly more liberal approach'.
[178] *The Edinburgh Castle* [1999] 2 Lloyd's Rep 362.
[179] ibid, [1999] 2 Lloyd's Rep 362, 363 (Mr. P. Gross, QC sitting as a Deputy Judge of the High Court) with reference to *William Fleming v Equator, The Equator* (1921) 9 Ll L Rep 1.
[180] *Stag Line Ltd v Foscolo, Mango & Co* [1932] AC 328.
[181] ibid, 343 (Lord Atkin).
[182] D. Rhidian Thomas, *Carriage of Goods under the Rotterdam Rules* (Informa Law from Routledge 2010), Chapter 3 by Simon Rainey, 'Interpreting the international sea-carriage conventions: old and new', para [3.11].
[183] *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149; [1956] 2 Lloyd's Rep 379 (HL).
[184] *Maxine Footwear Co Ltd v Canadian Government Merchant Marine* [1959] AC 589; [1959] 2 Lloyd's Rep 105.
[185] *Pyrene & Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402; [1954] 1 Lloyd's Rep 321.

> literally as defining the period as being from the completion of loading until the completion of discharging. But the literal interpretation would be absurd.[186]

This wider principle was taken up and applied further (usually paraphrased or restated in some other way, and in other treaty or convention contexts). In a CMR[187] case, *Buchanan v Babco,*[188] Lord Wilberforce described the interpretative technique as one 'unconstrained by technical rules of English law, or by English legal precedent, but on *broad principles of general acceptation*'.[189] He continued in the following terms:

> We should of course try to harmonise interpretation but, …, courts in six member countries have produced 12 different interpretations of particular provisions – so uniformity is not to be reached by that road. To base our interpretation of this Convention on some assumed, and unproved, interpretation which other courts are to be supposed likely to adopt, is speculative as well as masochist.[190]

Viscount Dilhorne stated that he did not know of any authority 'for the proposition that one consequence of this country joining the European Economic Community is that the Courts of this country should now abandon principles as to construction long established in our law'.[191]

The technique to be used in the interpretation of an international Convention was considered later in *Fothergill* v *Monarch Airlines*.[192] In that case, the House of Lords was concerned with the construction of the 1929 Warsaw Convention relating to carriage by air,[193] as amended by the Hague Protocol of 1955. Lord Diplock stated:

> As Lord Wilberforce has already pointed out, international courts and tribunals do refer to *travaux préparatoires* as an aid to interpretation of treaties and this practice as respects national courts has now been confirmed by the Vienna Convention on the Law of Treaties of 1969, to which Her

[186] ibid, [1954] 1 Lloyd's Rep 321, 328.
[187] Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 19th May, 1956.
[188] *Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141; [1978] 1 Lloyd's Rep 119.
[189] ibid [1978] AC 141, 153; [1978] 1 Lloyd's Rep 119, 122 (Lord Wilberforce); with reference to *Stag Line Ltd v Foscolo, Mango & Co* [1932] AC 328.
[190] ibid [1978] AC 141, 153; [1978] 1 Lloyd's Rep 119, 123 (Lord Wilberforce).
[191] ibid [1978] AC 141, 156; [1978] 1 Lloyd's Rep 119, 125. In *Monte Ulia (Owners) v The Banco and Other Vessels (Owners), The Banco* [1971] 1 Lloyd's Rep 49, 56, Megaw LJ stated, however, that the provisions of the 1952 Arrest Convention could be considered, for the purpose of the interpretation of the Administration of Justice Act 1956 only if the wording of Section 3(4) was ambiguous.
[192] *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251; [1980] 2 Lloyd's Rep 295.
[193] Convention for the Unification of Certain Rules for International Carriage by Air, signed at Warsaw on 12th October 1929 and amended by the Hague Protocol of 1955

> Majesty's Government is a party and which entered into force a few months ago. It applies only to treaties concluded after it came into force and thus does not apply to the Warsaw Convention and Protocol of 1955; but what it says in articles 31 and 32 about interpretation of treaties, in my view, does no more than codify already-existing public international law.[194]

Lord Scarman, citing the *Stag Line* case, after having reminded that uniformity is the purpose to be served by most international conventions, stated: 'It follows that our Judges should be able to have recourse to the same aids to interpretation as their brother Judges in the other contracting States'.[195]

A similar attitude towards foreign jurisprudence was shown by Lord Diplock, otherwise a strong supporter of uniform interpretation of international conventions. So stated in his speech:

> As respects decision of foreign courts, the persuasive value of a particular court's decision must depend upon its reputation and its status, the extent to which its decisions are binding upon courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system. For instance, your Lordships would not be fostering uniformity of interpretation of the Convention if you were to depart from the *prima facie* view which you had yourselves formed as to its meaning, in order to avoid conflict with a decision of a French court of appeal that would not be binding upon other courts in France, that might be inconsistent with an unreported decision of some other French court of appeal and would be liable to be superseded by a subsequent decision of the Court of Cassation that *would* have binding effect upon lower courts in France. It is no criticism of the contents of the judgments in those foreign cases to which your Lordships have been referred if I say that the courts by which they were delivered do not appear to me to satisfy the criteria which would justify your Lordships in being influenced to follow their decisions in the interests of uniformity of interpretation.[196]

Surprisingly enough, there seems to have been more cases where foreign writings were considered.[197]

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[194] *Fothergill* v *Monarch Airlines Ltd* [1981] AC 251, 282C-D; [1980] 2 Lloyd's Rep 295, 304 (Lord Diplock).
[195] ibid [1981] AC 251, 294; [1980] 2 Lloyd's Rep 295, 312 (Lord Scarman). A similar view has been expressed, perhaps more firmly, in Italy by the Court of Cassation in *American Export Lines* v *FIAT* 1968 Il Diritto Marittimo 110, 112, where the court said: 'A norm of international origin is made part of the Italian legal system pursuant to the law which authorises the ratification of the convention, but cannot be interpreted by means of an internal rule which regulates carriage by sea even if of an objective international character, but with a different scope of application from the convention. In such a case, the norm of international origin maintains its autonomy, and as a consequence, it is necessary to effect its construction on the basis of its meaning according to the original character'.
[196] ibid [1981] AC 251, 284; [1980] 2 Lloyd's Rep 295, 306 (Lord Diplock).
[197] See the analysis made by Lord Wilberforce in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 274–275.

In *Morris v KLM,*[198] it was stated in relation to the Warsaw Convention that

> As the language was not chosen by English draftsmen and was not designed to be construed exclusively by English judges, it should not be interpreted according to the idiom of English law. What one is looking for is a meaning which can be taken to be consistent with the common intention of the states which were represented at the international conference. The exercise is not to be controlled by technical rules of English law or domestic precedent. It would not be right to search for the legal meaning of the words used, as the Convention was not based on the legal system of any of the contracting states. It was intended to be applicable in a uniform way across legal boundaries. In situations of this kind the language used should be construed on broad principles leading to a result that is generally acceptable …[199]

In *The CMA Djakarta,*[200] Longmore LJ, commenting upon what is meant by construction on "broad principles of general acceptation" or "broad and generally acceptable principles" propounded:

> It may be difficult to know in any given case what are broad and generally acceptable principles, but some such principles are undoubtedly enshrined in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which was ratified by the United Kingdom on June 25, 1971 and came into force on January 27, 1980 on ratification by the required number of signatories … As I read these provisions, the duty of a 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 what may be called the *travaux préparatoires* and the circumstances of the conclusion of the convention. I would, for my part, regard the existence and terms of a previous international convention (even if not made between all the same parties) as one of the circumstances which are part of a conclusion of a new convention but recourse to such earlier convention can only be made once the ordinary meaning has been ascertained. Such recourse may confirm that ordinary meaning. It may also sometimes determine that meaning but only when the ordinary meaning makes the convention ambiguous or obscure or when such ordinary meaning leads to a manifestly absurd or unreasonable result.[201]

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[198] *King v Bristow Helicopters Ltd; Morris v KLM Royal Dutch Airlines Ltd* [2002] 2 AC 628; [2002] UKHL 7; [2002] 1 Lloyd's Rep 745.
[199] With reference to: *Stag Line Ltd v Foscolo, Mango & Co Ltd* (1931) 41 Ll L Rep 165, 174; [1932] AC 328, 350 (Lord Macmillan); and *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] 1 Lloyd's Rep 119, 122; [1978] AC 141, 152 (Lord Wilberforce).
[200] *CMA CGM SA v Classica Shipping Co, The CMA Djakarta* [2004] 1 Lloyd's Rep 460.
[201] ibid, 463-464, para [10] (Longmore LJ).

Similarly, in *In re Deep Vein Thrombosis and Air Travel Group Litigation*,[202] also a case concerning the interpretation of the Warsaw Convention 1929 as amended in 1955, Lord Mance summarised the position as follows:

> The primary consideration is the natural meaning of the language used, taking into account the text as a whole, and such conclusions as can be drawn regarding its object and purpose: *Fothergill v Monarch Airlines Ltd* […]. The text should be interpreted 'in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation' …[203] The concepts deployed in the convention are thus autonomous international concepts. The legislative history and *travaux préparatoires* may be considered to resolve ambiguities or obscurities, when the material is publicly available and points to a definite consensus among delegates. It is also legitimate to have regard to any subsequent practice among the parties which is capable of establishing their agreement regarding interpretation. All these points are, for conventions concluded after 27 January 1980, covered in articles 31(3) and 32 of the Vienna Convention on the Law of Treaties; and in *Fothergill* […], Lord Diplock and Lord Scarman treated these articles as codifying previous international legal principles.[204]

The value of international jurisprudence (in the sense of jurisprudence developed in other Contracting States), as well as the writings (in civil law countries called 'doctrine') of jurists, must be broadly taken into consideration. But access to these sources is clearly much more difficult than access to domestic jurisprudence and writings, both because they are not easy to find and because of language problems. Thus there seems to have been (not only in England) a certain reluctance to use foreign precedents.

Moreover, the existence of different and even conflicting views in the philosophy of law of other jurisdictions devalues that jurisprudence. Nobody, *per absurdum*, should pay any attention to that jurisprudence at all. But this is clearly not the intended case. In fact, amongst different judicial trends, a prevailing view in many cases develops because some reasons given in support of a certain interpretation of the law are more persuasive than others.

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[202] *In re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495; [2006] 1 Lloyd's Rep 231; [2005] UKHL 72.
[203] With reference to *Stag Line Ltd v Foscolo, Mango & Co* [1932] AC 328 and *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141.
[204] *In re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, para [54].

No court in Italy, or France, or in a great many other countries, would ever say that all precedents are valueless because they are conflicting. Any such court would analyse them and state why some are persuasive and others are not. Thus, there are difficulties that exist in this respect, and it is clear that reasonable efforts should be made to widen the research of precedents as much as possible.[205]

Mann already urged this in 1946 when he wrote

> It may be worthwhile considering whether future statutes incorporating a treaty into the law of England should not contain a section to the effect that the Courts should construe them according to the principles which an international tribunal would apply. For these are the 'broad principles of general acceptation', the application of which was urged by Lord Macmillan.[206]

However, Professors Treitel and Reynolds noted that the general suppositions by which the Hague Rules are interpreted by the English courts, especially the overriding nature of the seaworthiness duty, clearly derive however from the historical development of the law in this area in England,[207] and some of these approaches are so well entrenched as to have almost instinctive force, even for those who conceive themselves to be applying international standards.[208]

An example of this proposition is given by the approach of the House of Lords to the proper interpretation of Article IV Rule 6 of the Hague Rules as to the scope of 'goods of … [a] dangerous nature', and whether it created a free-standing strict liability for the shipment of dangerous goods in *The Giannis NK*.[209] It was argued that the law in the United States was clear that the obligation in Article IV Rule 6 was qualified by Article IV Rule 3.[210] While it was accepted that this was clearly the US position, the House of Lords declined to follow it as a correct interpretation of the provision on the basis that the framers of the Hague Rules must have intended the position to be that as recognised as the law of England in 1924, given the

[205] Amongst the various statements made by their Lordships in the *Fothergill* case, sometimes not fully consistent with one another, there is one of Lord Scarman that is encouraging. He in fact said in *Fothergill* [1981] AC 251, 293; [1980] 2 Lloyd's Rep 295, 311: 'Our courts will have to develop their jurisprudence in company with the courts of other countries from case to case – a course of action by no means unfamiliar to common law judges'. See Francesco Berlingieri, *Uniform Interpretation of Foreign Conventions* [2004] LMCLQ 153, 155–156.
[206] Francis Mann, 'The Interpretation of Uniform Statutes' (1946) 62 LQR 278, 291.
[207] With reference to M.A. Clarke, *Aspects of the Hague Rules, A Comparative Study in English and French Law* (Springer, Dordrecht 1976).
[208] Sir G. Treitel, QC; Prof F. M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-097].
[209] *Effort Shipping Co Ltd v Linden Management SA and Another, The Giannis NK* [1998] AC 605 (HL); [1998] 1 Lloyd's Rep 337.
[210] Especially with reference to Wilford, Coghlin and Kimball, *Time Charters* (4th edn, 1995) 169, 173–176, the Courts in the United States have taken the view that Article IV Rule 3 qualifies Article IV Rule 6.

preponderance of British shipping and the fact that the dominant legal theory was strict liability for shipping dangerous goods, following the decision in *Brass v Maitland.*[211]

On the other hand, in *The Kapitan Petko Voivoda*[212] the cargo-owners (the plaintiff) could not derive benefit from the supposed principle stated in the deviation cases or warehouses cases that could be treated "as a body of authority *sui generis* with special rules derived from historical and commercial reasons"[213]. The dispute arose out of the partial loss of and damage to a consignment of new excavators carried from Korea to Turkey. The cargo was carried pursuant to a charterparty, between the plaintiff and the defendant (the charterer of m/v *Kapitan Petko Voivoda*), which incorporated CONLINE terms and contained a general paramount clause. The bill of lading also incorporated CONLINE terms. It was agreed between the parties to a contract that the carriage would be under deck only.

The question in the Court of Appeal was whether a carrier by sea, who carried cargo on deck in breach of a contract of carriage which was governed by the old Hague Rules, could take advantage of Article IV Rule 5 to limit his liability for loss or damage to that cargo.

The plaintiff submitted that the obligation to carry cargo under deck had the same importance as the obligation not to deviate,[214] and the obligation to store in a contractual warehouse.[215] Therefore, as a matter of well-established principles of English law, it could not have been the intention of the parties to apply the Hague Rules limitation to such a serious breach.
Contrary, the defendant argued that there was no English authority for treating stowage on deck as being equivalent to deviation. Neither the plaintiff's submissions nor *The Chanda*[216] gave any force to critical phrase "in any event" in Article IV Rule 5 of the Hague Rules. The "no deck" stowage obligation was not more important than other obligations of the carrier such as to provide a seaworthy ship or to exercise due diligence to make the vessel seaworthy under Article III Rule 1. The defendant referred to *The Happy*

[211] In *Brass v Maitland* (1856) 6 E&B 470, the majority held that under a contract of carriage there is a term implied by law that a ship will not ship dangerous goods without notice to the carrier; the obligation is absolute. The same view prevailed in the Court of Appeal in *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 KB 94 and in *Great Northern Railway Co v LEP Transport and Depository Ltd* [1922] 2 KB 742.
[212] *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another, The Kapitan Petko Voivoda* [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep 1.
[213] In the words of Lord Wilberforce in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 845.
[214] *The Kapitan Petko Voivoda* [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep 1, para [11], specifically referring to *J Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078; [1976] 2 Lloyd's Rep 165 and *Wibau Maschinenfabric Hartman SA and Another v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494.
[215] *The Kapitan Petko Voivoda* [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep 1, para [11], specifically referring to *Gibaud v Great Eastern Railway Co* [1921] 2 KB 426, 435 (Scrutton LJ) and *Lilley v Doubleday* (1881) 7 QBD 510.
[216] *Wibau Maschinenfabric Hartman SA and Another v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494.

Ranger[217] and *The Antares*[218], arguing that the package limit in Article IV Rules 5 was not inherently different.[219]

Longmore LJ, in his leading judgment, upholding the defendant's argument, emphasized that the Hague Rules were an international convention that must be construed as incorporated into a contract governed by English law, and must not be rigidly controlled by "domestic principles of antecedent date …".[220] Although the deviation cases were found to be a "peculiar creature of the common law" and found support, for example, in the United States,[221] it could not be described as a "broad principle of general acceptation", 'as the deviation principle [did] not apply in Holland, France or Italy where courts [had] decided that the carrier [could] rely on the Article IV Rule 5 limit in deck cargo cases'.[222]

Similarly, it was not possible to conclude that the historical development of the law in different jurisdictions could constitute precedents to show that the deviation principle was "of general acceptation". It was a question of some controversy whether they could exemplify even a principle of English law.[223] The same point was stated in the earlier case *The Antares*: Lloyd LJ saw 'no reason for regarding the unauthorised loading of deck cargo as a special case' and said that '[the deviation cases] should now be assimilated into the general law of contract'.[224]
Moreover, the rule foregoing Article IV Rule 5, disapplied the strict common law rule about deviation.

Thus the problem was treated by the Court of Appeal purely as a question of construction. The words "in any event" in Article IV Rule 5 became very important and were assigned their natural meaning "in every case". The French wording "en aucun cas" supported that view. A previous decision in *The Chanda*[225]

[217] In *Parsons Co and Others v CV Scheepvaartonderneming 'Happy Ranger' and Others, The Happy Ranger* [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep 357 it was held that the words "in any event" in Article IV Rule 5 of the Hague Rules meant what they said. They were unlimited in scope and there was no reason for giving them anything other than their natural meaning. The shipowner was able to limit his liability for a breach of the seaworthiness obligation contained in Article III Rule 1.
[218] In *Kenya Railways v Antares Co Pte Ltd, The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424 (CA) it was held that the time limit of one year contained in Article III Rule 6 of the Hague Rules applied to a claim for failure to carry under deck.
[219] *The Kapitan Petko Voivoda* [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep 1, para [12].
[220] With further reference to *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350 (Lord Macmillan) and *R J Tilbury & Sons (Devon) Ltd v International Oil Pollution Compensation Fund and Others, The Sea Empress* [2003] EWCA Civ 65; [2003] 1 Lloyd's Rep 327, paras [16] and [21] (Mance LJ).
[221] In *St Johns NF Shipping Corp v SA Companhia Geral Commercial Do Rio De Janeiro* 263 US 119 (1923) the Supreme Court held that a carrier who stowed goods on deck became liable "as for a deviation". In *Jones v The Flying Clipper* 116 F Supp 386 (1953) Weinfeld DJ followed the former authority to hold in New York that the carrier could not rely on Article IV Rule 5 to limit his liability for loss or damage to cargo stowed on deck.
[222] *The Kapitan Petko Voivoda* [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep 1, para [14].
[223] ibid.
[224] *The Antares (Nos 1 and 2)* [1987] 1 Lloyd's Rep 424, 430. See also a comment in Sir G. Treitel, Professor F. Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-058].
[225] *Wibau Maschinenfabric Hartman SA and Another v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494.

that the package or unit limitation did not apply as a matter of interpretation was disapproved. The supposed repugnancy of Article IV Rule 5 could not be justified as a matter of construction.[226]

Judge LJ agreed with reasoning of Longmore LJ and, by way of footnote added that, 'notwithstanding we are considering an international convention, I can see no advantage in commenting on decisions reached in different jurisdictions'.[227] His Lordship did not clarify his opinion. In reality, when the drafting history of the Hague (and also of the Hague-Visby Rules) is considered, the Rules were essentially a creature of the common law mind, based on English law statutes implementing the US Harter Act. While delegates from other countries participated and the French and Belgian delegates played a notable part, unlike the Rotterdam Rules where a much wider international participation has been the feature of the extensive drafting work, the earlier sea-carriage rules remain as the reflection of an English law approach.[228]

The decision in *The Chanda*[229] was based upon the discredited English law of fundamental breach of contract and ran contrary to the underlying purposes and scheme of the Hague Rules. However, it was followed by the New Zealand High Court in *The Pembroke*.[230] Ellis J held that the defendants could not rely on the package limitation clauses in either the Hague Rules or Hague-Visby Rules since the carriers were in breach of its obligation to stow below deck,[231] however, without providing any independent reasoning.

In *The Cap Jackson*[232] the Federal Court of Canada reached a different conclusion. The key issue in that case was whether the undeclared on-deck carriage of cargo prevented the carrier from relying on the limitations applicable under the Hague-Visby Rules.[233] The crux of the argument centered around the meaning of the words "in any event" in Article IV Rule 5(a).
The consignee of cargo sued the contractual carrier alleging that it failed to carry the cargo under deck and that failure to disclose the on-deck carriage, after a clean bill of lading was issued (implying under

[226] *The Kapitan Petko Voivoda* [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep 1, para [22].
[227] ibid, para [44].
[228] D. Rhidian Thomas, *Carriage of Goods under the Rotterdam Rules* (Informa Law from Routledge 2010), Chapter 3 by Simon Rainey, 'Interpreting the international sea-carriage conventions: old and new', paras [3.11], [3.62]; and Francesco Berlingieri, 'Uniform Interpretation of International Conventions' [2004] LMCLQ 153, 154.
See also *The Giannis NK* [1998] AC 605 (HL); [1998] 1 Lloyd's Rep 337, 348–349 (Lord Steyn).
[229] *Wibau Maschinenfabric Hartman SA and Another v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494.
[230] *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd, The Pembroke* [1995] 2 Lloyd's Rep 290, New Zealand High Court, Wellington Registry.
[231] ibid, 296.
[232] *De Wolf Maritime Safety BV v Traffic-Tech International Inc, The Cap Jackson* Federal Ct (St Louis J) 2017 FC 23; [2017] 1 Lloyd's Rep Plus 40.
[233] Being Schedule 3 of the Marine Liability Act, Statutes of Canada 2006, c 6.

deck carriage), was an act of bad faith and constituted gross negligence.[234] Thus, the carrier was not entitled to invoke any of the immunities or limitations provided for in the Hague-Visby Rules.

The defendant argued that Article IV Rule 5(e) was 'not at play in these proceedings', and this Rule required a higher threshold than gross negligence. The carrier relied on a decision of the English Court of Appeal in *The Kapitan Petko Voivoda* and submitted that the limitations of Article IV Rule 5(a) applied to undeclared on-deck carriage.[235]

The plaintiffs relied on the argument set out in the late professor William Tetley's famous text *Marine Cargo Claims* that the words "in any event" of Article IV Rule 5(a) 'should not be construed to mean that the package limitation applies where the carrier fails to prove its right to total exoneration from liability under any of the exceptions of Article 4(2)(a) to (q)' of the Hague-Visby Rules.[236] Tetley's argument was based on older Canadian,[237] US[238] and French authorities but was in essence that undeclared deck carriage amounted to a deviation and a fundamental breach of contract.[239]
On the other hand, the claimants pointed out that 'Canadian Courts are not bound by decisions of English courts, that Professor Tetley called the decision [in *The Kapitan Petko Voivoda*] "unfortunate and flawed", and that it was rendered under the old Hague Rules'.[240]

The Federal Court found that, as the bill of lading did not mention on-deck carriage, the cargo fell within the definition of "goods" subject to the Hague-Visby Rules. With respect to the carrier's right to limitation of liability, Madam Justice St-Louis agreed that the Court should stick to the ordinary meaning to be given to the terms of the treaty and followed the decision in *The Kaptain Petko Voivoda*. 'Interpreting the words "in any event" as "in every case" [was] compatible with the exclusion of the doctrine of fundamental breach in Canadian law'.[241]

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[234] With reference to Article IV Rule 5(e).
[235] *The Cap Jackson* [2017] 1 Lloyd's Rep Plus 40, paras [14] – [17].
[236] Professor William Tetley, *Marine Cargo Claims* (4th edn, Cowansville: Les Editions Yvon Blais 2008), 1587.
[237] *St-Siméon Navigation Inc v A Couturier & Fils Limitée* (SCC) [1974] SCR 1176.
[238] *Searoad Shipping Co v EI DuPont de Nemours*, 361 F.2d 833 (5th Cir 1966); *Encyclopaedia Britannica v Hong Kong Producer*, 422 F.2d 7 (2d Cir 1969), where the fact that a container was carried on deck without indication on the bill of lading was considered as a deviation depriving the carrier of the USD 500 per package limitation of the Carriage of Goods by Sea Act of the United States.
[239] *The Cap Jackson* [2017] 1 Lloyd's Rep Plus 40, paras [24], [48] and [49].
See also a discussion in the article 'Deck Carriage and the Hague-Visby Rules' published by Steamship Mutual P&I Club on September 2017: https://www.steamshipmutual.com/publications/Articles/deckcarriagehvrules.htm
[240] *The Cap Jackson* [2017] 1 Lloyd's Rep Plus 40, para [25].
[241] ibid, para [55], with reference to the decision of the Supreme Court of Canada in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)* 2010 SCC 4, para [62].

Chapter 2: Contractual interpretation when the Rules are given effect or applied to the contract by 'force of law'

Giving effect to the Rules in domestic legislation

The Hague Rules, as the product of an international convention, have been customarily incorporated into the domestic legislation of a large number of seagoing nations. Some countries have a national local law for internal shipments that is similar but not identical to the Hague or the Hague-Visby Rules. Some nations, such as the United States, have a local law that is unique only to them.[242]

The problem with incorporation is complicated by the method of adoption of the Rules.
For example, some nations such as Canada[243] and Australia[244] have enacted a local statute to which the Hague Rules are attached as a schedule, but those countries have neither acceded to nor ratified the 1924 Convention and therefore cannot be considered as "contracting states".

Some countries such as France ratify conventions and such ratification makes the convention law:[245] as Mr Ripert said on the First Plenary Session, 'in order to produce [the] uniformity, it would be desirable for the national law to be as close as possible to the text of the international convention', and 'a national law woud be necessary to incorporate [the Rules] into French legislation because it was not conceived that different rules should be applied in France depending on whether it was a matter of Frenchmen or foreigners'.[246] Once the 1924 Convention had been signed and ratified by the French legislature, it became binding on the French courts even when dealing with French nationals.

Some countries, particularly in South America, have never ratified or acceded to the 1924 or the 1968 Conventions nor have they adopted equivalent national legislation. Nevertheless, it is a common practice in those countries to incorporate the Hague Rules or the Hague-Visby Rules by reference into the bill of lading.[247]

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[242] Overview see, for example, in William Tetley, *Marine Cargo Claims* (3rd edn, International Shipping Publications by BLAIS 1988), 4.
[243] The Marine Liability Act, SC 2001, c. 6, Part 5 and Schedule 3, in force August 8, 2001, replacing the Carriage of Goods by Water Act, SC 1993, c. 21, which in turn replaced the Carriage of Goods by Water Act, RSC 1985, c. C-27.
[244] The Sea-Carriage of Goods Act 1924 was repealed by the Carriage of Goods by Sea Act 1991.
[245] Article 55 of the Constitution of France of October 3, 1958 (Journal Officiel, October 5, 1958) is to the effect that treaties duly ratified or acceded have precedence over municipal laws.
[246] Meeting of the Sous-Commission, First Plenary Session on 06th October 1923, para [36].
[247] Professor William Tetley, *Marine Cargo Claims* (3rd edn, International Shipping Publications by Yvon Blias 1988), 4.

Giving effect to the Rules in the law of the UK

No international treaty has effect in English law until and unless it is given effect by statute. It may take one of three broad forms: '(a) legislation, the effect of which is to translate into terms of English law the substantive provisions of the treaty, or so to amend English law as to enable effect to be given to the treaty; (b) legislation (or subordinate legislation), the effect of which is to apply the treaty within the framework of a general law designed to form the basis for the conclusion of the treaty in question; (c) legislation (or subordinate legislation), the effect of which is to enact directly as part of English law the substantive provisions of a treaty.'[248]

The majority of bills of lading governed by English law are in one way or another subject to the Hague-Visby Rules, which are effective in the UK by virtue of the Carriage of Goods by Sea Act (COGSA),[249] which *appended* the Rules and conferred upon them the force of law.[250] As Mann said, this 'appending' legislative technique was fairly revolutionary. It was believed that this technique would represent 'a fresh chapter in the evolution of English law' bringing with it a wholly new approach to treaty interpretation.[251] While in cases involving the older style legislative techniques of direct incorporation within a statute, the court pronounced itself constrained to construe the statute and not to fall back to the international convention which underpinned it,[252] the English Courts have not hesitated to embark upon the task of treaty interpretation when faced with legislation or subordinate legislation the effect of which is to enact directly as part of English law the substantive terms of a treaty.[253] The early cases on the Hague Rules are all leading examples of this approach.[254]

The Convention of 1924 provided that 'the provisions of this convention shall apply to all bills of lading issued in any of the Contracting States'. [255] This wording gave rise to considerable difficulties internationally, and was not therefore adopted in the UK COGSA 1924 which actually was passed before

[248] I. M. Sinclair, 'The Principles of Treaty Interpretation and their application by the English Courts' (1963) 12 ICLQ 508, 528.
[249] The Carriage of Goods by Sea Act 1924 was repealed by the Carriage of Goods by Sea Act 1971.
[250] See explanation, for example in *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), paras [9-065], [9-067] and [9-069].
[251] F. A. Mann, 'The Interpretation of Uniform Statutes', (1946) 62(3) LQR 278, 282.
[252] See, for example, *Ellerman Lines v Murray* [1931] AC 126 and *Barras v Aberdeen Steam Trawling & Fishing Co* [1933] AC 402.
[253] I. M. Sinclair, 'The Principles of Treaty Interpretation and their application by the English Courts' (1963) 12 ICLQ 508, 532
[254] Such as *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328; *Pyrene & Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402; *Riverstone Meat Co v Lancashire Shipping Co, The Muncaster Castle* [1961] AC 807;
but cf *Gosse Millerd v Canadian Government Merchant Marine* [1929] AC 223.
[255] The Hague Rules 1924, Article X.

the final draft of the Convention in Brussels. Thus the first "version" of COGSA[256] provided that the Hague Rules were 'to have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Island'.[257] The operation was secured solely by the enacting words, which used a formula, weaker than that subsequently adopted in 1971.
As Mustill said, 'when Parliament enacted the 1924 Act, it omitted from the scheduled text of the Convention that part of the Convention which prescribed the voyages to which it was to apply. The task of defining these voyages was performed by Section 1 of the Statute itself'.[258]

On a broad reading of this Section, the Rules before an English court should be applied to all outward shipments under bills of lading that are governed not only by English law but even where they are governed by foreign law.[259] However, this approach was doubted by Mann,[260] who argued that English statutes should be presumed to apply only to contracts governed by English law;[261] otherwise, as according to the conflict of laws rules, there should be very clear words of application of the law of that other country. The underlying basis of this argument is that no country applies statutes of another.

Section 3 of the 1924 Act provides for: 'every bill of lading, …, issued in Great Britain … to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act'. This express method of ensuring the application of the Hague Rules was called 'the Clause Paramount technique'.[262] Such a method had initially been developed in the Harter Act and was intended to have a result that where the dispute was decided outside the country of shipment, the Rules would be held to be incorporated as a matter of contract.[263] Thus, the effect of Section 3 of The 1924 Act was to incorporate the Hague Rules by express reference into all outward bills of lading from the United Kingdom.

However, there are two practical questions with respect to the application of such a technique:

[256] The Carriage of Goods by Sea Act, 1924, see especially Sections 1, 3 and 4.
[257] The Carriage of Goods by Sea Act, 1924, Section 1, 'Application of Rules in Schedule'.
[258] Michael J. Mustill, QC, 'Carriage of Goods by Sea Act 1971', a lecture given before Den Norske Sjorettsforening (Norwegian Maritime Law Association) in Oslo on 18th October, 1971.
[259] Such a view was adopted in Singapore in *The Epar* [1985] 2 MLJ 3; [1984] SGHC 16, however without a complete consideration of the issues involved. The matter has since been clarified by amendment of the enacting statute; though this was doubted, on the grounds that there were very clear words (which those used were argued not to constitute).
[260] F.A. Mann, 'Statutes and the Conflict of Laws', (1972–1973) 46 Brit YBIL 117, 125–126.
[261] See discussion in *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.074].
[262] *The Hollandia* [1983] 1 AC 565, 577 (Lord Diplock); *The Morviken* [1983] 1 Lloyd's Rep 1, 8 col 2.
[263] Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 257; Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, 206 – 207.

(a) if the foreign courts, especially in non-Contracting States, would be prepared to adopt the effect of Section 3 in a potential dispute litigated in their jurisdiction, especially where the bill is not governed by English law; and
(b) if this technique is still effective in cases where a clause paramount was not inserted in the bill of lading.

The answer to the first question depends on the State's own public policies.

The answer to the second question is negative. However, breach of Section 3 may give rise to an action for damages if a contractual duty to insert could be attributed to the carrier,[264] but this is still uncertain.

In *The Torni,*[265] Slesser LJ expressed in *dictum* that breach of Section 3 was a 'misdemeanour'.[266] However, in *Vita Food,*[267] when considering the issue if the bill released for the shipment ex Newfoundland was illegal or not, it was held that such a clause [paramount] had a 'directory', and not 'obligatory' character,[268] thus overruling *The Torni*.[269]

Lord Wright explained the position in the following terms:

> The Act, however, does not in terms provide that the bill of lading is to be deemed illegal and void merely because it contravenes Sect. 3, nor does it impose penalties for failure to comply with Sect. 3, nor does it in terms expressly prohibit the failure …
> The inconveniences that would follow from holding bills of lading illegal in such cases as that in question are very serious … The bill of lading fulfils other functions that merely that of setting out the conditions of carriage.[270]

The same reluctance to extend the coverage of the Hague Rules appeared in the US courts.[271] Provisions of the Hague Rules referred to in the paramount clause have in exceptional cases been held invalid as

[264] Sir G. Treitel and F.M.B. Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.074].
[265] *The Torni* (1932) P 78; (1932) 41 Lloyd's Rep 174.
[266] ibid, 90–91.
[267] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277; (1939) 63 Ll L Rep 21.
[268] ibid, (1939) AC 277, 295.
[269] *The Torni* (1931) 41 Ll L Rep 174, aff (1932) 43 Ll L Rep 78 CA.
[270] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) 63 Ll L Rep 21, 29–30 (Lord Wright).
[271] *Esso Standard Oil Co v The Kaposia* 1957 AMC 565 SDNY, aff 1958 AMC 2349 2CCA. For a further discussion when the paramount clause may be held invalid see Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, 211 – 213. Thus 'the paramount clause may sometimes be held invalid because it contravenes specific national legislation'.

against "public policy".[272] On the other hand, some countries have made it a criminal offense not to include a clause paramount in outward bills of lading.

When enacting the amended Rules, Parliament adopted a different technique, as Mustill noted, 'for the reasons which are not clear to the outsider'.[273] The COGSA 1971 provides, in Sections 1(2), (3), (6) and (7), that the Amended Rules 'shall have the force of law'. Arguably, this technique was used to close the *Vita Food* gap. Thus the previous requirement for a clause paramount was dropped, and there is no express need in the 1971 Act corresponding to Section 3 of the 1924 Act.[274]

However, Article X(c) and Section 1(6) do envisage such a possibility. Article X(c) sets out the principle that a voluntary paramount clause will attract the statutory application of the Rules. The historical reason was that the 1968 Conference hoped thereby to obtain as wide a statutory coverage as would have been achieved if the Rules had compulsorily applied to the inward cargoes of all contracting States.

As Diamond notes,[275] there are three reasons why it may be relevant that the Rules apply by statutory law and not just as a matter of contract. First, it is vital to the 'Himalaya' provision, Article IV bis Rule 2 that the Rules should apply by statute in the country where the servant or agent is sued. Second, the apparent policy of giving some protection (e.g. limit of liability and time-bar) after a contract has been terminated, e.g. through a deviation,[276] may require the statutory application of the Rules. Third, if the Rules applied by statute, the paramount clause may have a more radical effect in overruling inconsistent provisions in the bill of lading; for, if the paramount clause applies only as a matter of contract, then in the absence of a 'paramountcy' provision,[277] an attempt may have to be made to reconcile the different provisions of the bill of lading or to decide between competing clauses.[278]

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[272] See Georges Ripert, *Droit Maritime* (4th edn, Paris 1952), Volume 2, 350 – 351.
For the US cases see, for example, *The Aurania* 1929 AMC 1741 NYAD and *The Edmund Fanning* 1953 AMC 86 2CCA.

[273] Michael J. Mustill, QC, 'Carriage of Goods by Sea Act 1971', a lecture given before Den Norske Sjorettsforening (Norwegian Maritime Law Association) in Oslo on 18th October 1971, 693.

[274] See Professor William Tetley, *Marine Cargo Claims* (3rd edn, International Shipping Publications by BLAIS 1988), 8: 'It is interesting to note that a paramount clause is no longer necessary under the Visby Rules because the Rules apply by force of law. Thus sect. 3 of the U.K.'s Carriage of Goods by Sea Act of 1924 calling for a paramount clause in each bill of lading is no longer to be found in the U.K. Act of 1971'.

[275] Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LMCLQ 225.

[276] See, for example, the recent decision in *Dera Commercial Estate v Derya Inc, The Sur* [2018] EWHC 1673 (Comm); [2019] 1 Lloyd's Rep 57.

[277] For example, of a 'paramountcy provision' see *Golodetz v Kersten, Hunik & Co* (1926) 24 Ll L Rep 374
('If, or to the extent that, any terms of this bill of lading is repugnant to or inconsistent with anything in such Act or Schedule, it shall be void'). For a case where a special stamped clause was held to prevail over a printed paramount clause, see *Varnish, WR & Co Ltd v Kheti (Owners)* [1948/49] 82 Ll L Rep 525.

[278] Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 259; See also Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, esp 213 – 216 concerning the principal approach where the Hague Rules referred to are not regarded as applicable *ex proprio vigore*.

Both Article X(c) and Section 1(6)(a) set out the principle that even a voluntary paramount clause will attract the statutory application of the Rules. But Section 1(6)(a) is slightly wider than Article X(c), since the former applies to all voyages while the latter applies only to international carriage. It is to be noted that Section 1(6)(a) applies to a coastal voyage within the foreign State, whereas Article X(c) does not. It is also to be noted that there is no reference in Section 1(6)(a) to legislation giving effect to the Rules, but it is submitted that a reference to appropriate legislation is equivalent to a reference to the Rules.

The compulsory application of the Rules is still limited to outward voyages from contracting States, with the single new addition that the Rules are compulsory if the bill is issued in a contracting State. But there are differences as regards to: (i) legislative techniques, (ii) the UK coastal trade, (iii) the effect of voluntary paramount clauses, and (iv) the effect of Section 1(7) as regards deck cargo carried under bills of lading which fall under Section 1(6)(a).

The change in wording demonstrates that the Rules take effect, not merely as part of the proper law, where that law is English, but as part of the statutory law of England.[279] Thus under the 1971 Act, an English court will disregard the legislation of the foreign contracting State and apply the Act as a matter of English statutory law.[280] This will be the case even when a shipment is not only out of the UK but also out of any other Contracting State, or issued in any of the other circumstances (wider than those of the original Article X of 1924) detailed in Article X of the Hague-Visby Rules.

The broad result of the wording of Article X was that the Hague-Visby Rules overrode the policy of the forum and the mandatory rules under Article 7(2) of The Rome Convention,[281] which said that 'nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract'. This position was further reinforced by Article X's wording: 'whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person'.

[279] See *The Morviken* [1983] 1 Lloyd's Rep 1; [1983] 1 AC 565 (*The Hollandia*). It is no longer necessary to consider the true effect of the *dicta* in *Vita Food Products v Unus Shipping Co* [1939] AC 277; and *The Torni* (1932) 43 Ll L Rep 78, which is related to the different legislative techniques employed by the 1924 Act and the kindred Commonwealth legislation. See also *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286.

[280] Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 257 and 258.

[281] See Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980, which was enacted by The Contract (Applicable Law) Act 1990. See also Lord Collins and Professor Jonathan Harris, *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2018), paras 33-111 and 33-112. This point may have been lost sight of in The Court of Appeal in *Parsons Corp and Others v CV Scheepvaartonderneming "The Happy Ranger" and Others, The Happy Ranger* [2002] 2 Lloyd's Rep 357; [2002] EWCA Civ 694.

The Rome Convention is now replaced by Rome I[282] as regards litigation. Thus, 'any contract concluded on or after 17th December 2009 which involves "a conflict of laws" will be subject to Rome I, unless it is specifically excluded'. Rome I apply to a contractual obligation within its scope which comes before the court of an EU Member State provided it involves a conflict of law, i.e. between any jurisdiction and not simply those of EU Member States. Pursuant to Article 1(2)(e), the Rules of Rome I do not apply to arbitration agreements and agreements on the choice of court.

Article 25 deals with the relationship between Rome I and international conventions, and shall not prejudice the application of such a convention as the EU Member States are obliged to honour their international commitments. Article 25 of Rome I is more restrictive than the equivalent provision, Article 21 Rome Convention. Similarly, Article 25 of Rome I specifically requires the international convention 'to lay down conflict-of-law rules relating to contractual obligations'. No such requirement is found in Article 21 of the Rome Convention.[283]

The conflict of law problems may still arise in relation to shipments from a country, like Finland, which has enacted legislation based on the 1968 Protocol, but which is not a contracting state. However, as Diamond argues, it is not relevant for the purposes of litigation in England whether a contracting State has complied with its obligation to enact legislation based on the amended Rules.[284]

In order to ascertain whether a voyage is subject to the Rules or not, it is necessary to construe Section 1 and Article X together. Section 1(2) of the 1971 Act states that the Rules will 'have the force of law' in the UK, and this means that Article X itself has the force of law as well. Further, it is clear from the wording of Section 1(3) that it is not intended to limit the effect of Section 1(2), but rather to extend the application of the Rules to all shipments from the UK regardless of whether the carriage is between two different states. Thus, in *The Benarty*[285] it was common ground that the Hague-Visby Rules applied by force of law to shipments from western European ports.

Pursuant to Article X, 'the provisions of [the] Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States', that is where the bill of lading is 'connected' to a contracting state or where the bill contains or evidences a contract that imports the Rules or legislation

[282] Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations (Rome I).
[283] Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations (Rome I) will survive Brexit as part of UK domestic law under the European Union (Withdrawal) Act 2018.
[284] Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 258.
[285] *The Benarty* [1985] QB 325; [1984] 2 Lloyd's Rep 244 (CA).

giving effect to them. This connection can be expressed in two ways: by issuing the bill in the contracting State and by the relation of the bill to carriage from a contracting State.

In *The Morviken*[286], in which the Hague-Visby Rules were applied to a bill of lading covering a voyage from Scotland to Bonaire in the Dutch Antilles, the bill stated that it was governed by Dutch law and provided for litigation in the Netherlands.[287] Dutch law would at that time have applied the Hague Rules, under which the package or unit limitation was lower than that provided by the Hague-Visby Rules for the shipment ex Scotland. It was argued that whether Condition 2, 'Law of application and jurisdiction' of the bill of lading, which made the Dutch law and the Court of Amsterdam jurisdiction 'to apply to [this] contract', be given a wider or the narrower meaning, in so far as it purported to lessen, as it expressly did, the liability of the carriers for which Article IV Rule 5 of the Hague-Visby Rules provided. In doing so, it unquestionably contravened Article III Rule 8 and by that rule was deprived of any effect in English or Scots law.

A narrow literalistic interpretation of Article III Rule 8 of the Rules was advanced by one of the parties, who contended that a choice of forum clause is to be classified as a clause which only prescribes the procedure by which disputes arising under the contract of carriage are to be resolved. It does not *ex facie* deal with liability at all and so does not fall within the description of '... any clause, covenant, or agreement in a contract of carriage … lessening … liability …' so as to bring it within Article III Rule 8. Even though the consequence of giving effect to the clause will be to lessen the liability of the carrier for loss or damage to or in connection with the goods arising from negligence, fault or failure in the duties and obligations, unlike the provisions of Hague-Visby Rules.[288]

This approach was rejected by all three members of the Court of Appeal and thereafter by the House of Lords, as they looked solely to the form of the clause in the contract of carriage and wholly ignored its substance. It was held that the Rules were to be given 'a purposive rather than a narrow literalistic construction, particularly wherever the adoption of a literalistic construction would enable the stated purpose of the international convention, viz. the unification of domestic laws of the contracting States relating to bills of lading, to be evaded by the use of colourable devices that, not being expressly referred to in the rules, are not specifically prohibited'.[289]

[286] *The Morviken* [1983] 1 Lloyd's Rep 1; [1983] 1 AC 565 (*The Hollandia*).
[287] The last paragraph of Law and Jurisdiction Clause was unquestionably a choice of forum clause, weighted no doubt in favour of the carriers, providing for the exclusive jurisdiction of the Court of Amsterdam unless the carriers elect otherwise.
[288] According to the Counsel for the Carriers in the Court of Appeal [1982] 1 Lloyd's Rep 325.
[289] *The Morviken* [1983] 1 Lloyd's Rep 1, 5 (Lord Diplock).

It is interesting to note that Lord Diplock, who gave the only substantive speech in the House of Lords, had been the leader of the British delegation to the 1968 Conference and clearly understood the Parliamentary intention behind COGSA. According to Lord Diplock, the provisions in Section 1 of the 1971 Act appeared to be free from any possible ambiguity. The Hague-Visby Rules, which were included in the Schedule of the 1971 Act, are to have the force of law in the United Kingdom: they are to be treated as if they were part of directly enacted statutory law.[290] In the words of Lord Diplock, 'an English Court is commanded by the 1971 Act to treat the choice of forum clause as of no effect'.[291]

> The only sensible meaning to be given to the description of provisions in contracts of carriage which are rendered 'null and void and of no effect' is one which would embrace *every provision in a contract of carriage* which, if it were applied, would have the effect of lessening the carrier's liability otherwise than as provided in the Rules. To ascribe to it the narrow and most basic sense would leave it open to any shipowner to evade the provisions of article III Rule 8 by the simple device of inserting in his bills of lading issued in, or for carriage from a port in, any contracting state a clause in standard form providing as the exclusive forum for resolution of disputes what might aptly be described as a Court of convenience, viz. one situated in a country which did not apply the Hague-Visby Rules or, for that matter, a country whose law recognised an unfettered right in a shipowner by the terms of the bill of lading to relieve himself from all liability for loss or damage to the goods caused by his own negligence, fault or breach of contract.[292]

Moreover, it was found that a choice of law clause did not offend against Article III Rule 8 by itself, as

> it comes into operation only upon the occurrence of a future event that may or may not occur, viz: the coming into existence of a dispute between the parties as to their respective legal rights and duties under the contract which they are unable to settle by agreement. There may be some disputes that would bring the choice of forum clause into operation but which would not be concerned at all with negligence fault or failure by the carrier or the ship in the duties and obligations provided by Article III. So a choice of forum clause which selects as the exclusive forum for the resolution of dispute a Court which will not apply the Hague-Visby Rules, even after such clause has come into operation, does not necessarily always have the effect of lessening the liability of the carrier in a way that attracts the application of Article III Rule 8.[293]

[290] ibid, 5.
[291] ibid, 7.
[292] ibid, 6–7.
[293] ibid, 7.

Statutes and Conflict of Laws[294] supported the view that a choice of substantive law, which excludes the application of the Hague-Visby Rules, had not been prohibited by the 1971 Act notwithstanding that the bill of lading was issued in and was for carriage from a port in the United Kingdom.

However, the decision in *The Morviken* was criticised as 'lacking principled explanation and analysis'. *Carver* argues that the whole litigation concerned the issue of jurisdiction, and it is still not clear whether or not the choice of law clause, which was closely connected with the jurisdiction clause, was itself also invalidated, or whether on matters not affected by the rules of Dutch law would have applied.[295]

The speech of Lord Diplock drew no distinction between jurisdiction and arbitration clauses. The effect of Article III Rule 8 in this context was left open, and he suggested that the English court might consider that an arbitration agreement that had the effect of circumventing the mandatory provisions of the 1971 Act might be null and void. This is apparently on the basis that the arbitrator should refuse to give effect to the express choice of substantive law on grounds of public policy if it avoided the application of the law of the place where the contract was made or of the law that would have been the applicable law in the absence of the choice of law clause.[296]

It is further questioned if the decision in *The Morviken* falls within Article 25 of Rome I. This does not appear to be the case.[297] *The Morviken* will not apply in respect of an exclusive jurisdiction clause for the Courts of another EU Member State.

As to how far the common law will be relevant in the future on the subject of the enforceability of choice of forum clauses in bills of lading is likely to depend upon the extent (if any) to which the UK continues to particpate in the European regime on jurisdiction clauses.[298] In some cases, a jurisdiction clause may be considered as a clause that is not reducing liability.[299]

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[294] 'Statutes and Conflict of Laws,' *British Year Book of International Law* (1972–73) volume 46, 117.

[295] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para [9-077], fn 295.

The same reasoning would apply if the applicable law was that of a state which was a party to the Visby Protocol, but with the Poincare Franc for the package or limitation rather than the SDR limitation which applies in the UK, and the former yielded on the facts a lower value limit. The UK court would be bound to apply the limit as enacted in the UK.

[296] Lord Justice Aikens, Richard Lord QC, Michael Bools, *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.60].

[297] See Y. Baatz, *Maritime Law* (4th edn, Informa Law from Routledge 2017), chapter 1, pages 42, 63, 66.

[298] For the effect of a jurisdiction clause see *Bills of Lading* (3rd edn, Informa Law from Routledge 2015), para [15.48].

[299] See, for example, *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

Such a jurisdiction clause should however normally require to be accepted by virtue of Article 17 of Council Regulation 44/2001 on Civil Jurisdiction and Judgments which was replaced by Regulation (EU) No 1215/2012, Brussels I (recast). Article 24 of Regulation (EU) 1215/2012, Brussels I (recast) give the courts of an EU Member State exclusive jurisdiction in relation to specific types of claims, this is irrespective of the defendant's domicile or any contrary party agreement. Jurisdiction (or choice of court agreements) are subject to provisions in Article 25.

Unless there is a deal on Brexit, the Brussels Regulation will cease to apply as domestic UK law after 01 January 2021, although the UK will then become a party in its own right to the Hague Convention on Conflict of Laws 2005 which applies the Brussels Regime to exclusive jurisdiction clauses in certain civil disputes in the EU and certain Third States of which the UK is soon to

Mann argues that the phrase 'shall have force of law' is still not strong enough to apply the Rules except when the contract was governed by English law.[300] This phrase may have other effects as well, particularly in respect of provisions that would otherwise cross the boundary of privity of contract.[301] The inconsistency must be assessed at the time at which the contract is relied on and the dispute crystallises: hence the operation of Article III Rule 8 can be avoided, for example, if there is an undertaking not to rely on a lower package or unit limitation or a shorter time bar.[302]

It is interesting to note that on the matter of resolving the difficulty caused by the conflict of international conventions some States hesitate to take an absolute position. For example, on the matter of the applicability of the Rules, French law is ambiguous: two decisions[303] of the Paris Court of Appeal show that the judges hesitating to side with either the direct application of the Hague-Visby Rules or their application according to the applicable foreign law.[304] Curiously enough, the Supreme Court has not interfered in this conflict of methods and has left the lower courts free to decide.

To which documents do the Rules compulsorily apply?

According to Article I(b), the Rules apply to a 'contract of carriage covered by a bill of lading or any similar document of title'. As contemplated by Article VI, all 'ordinary commercial shipments made in the ordinary course of trade' shall fall into this category.

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be one. Certain matters are excluded such as contracts of the carriage of goods, so exclusive jurisdiction clauses in time and bareboat charters will remain within the Brussels Regime.

[300] See F.A. Mann, *Uniform Statutes in English Law* (1983) 99 LQR 376, 392–399. The sort of wording which may be regarded as acceptable was that in the Australian Sea Carriage of Goods Act 1924 Section 24, which imposed an actual obligation of choice of law on outward shipments; the technique is repeated in Section 11 of the Australian Sea Carriage of Goods Act of 1991 as amended.

[301] An example is Article IV*bis* of the Hague-Visby Rules. The point is of less significance since the enactment of the Contracts (Rights of Third Parties) Act 1999. It was held that the power of the court to extend time under the Arbitration Act did not apply to a time-bar which has statutory force: *Kenya Railways v Antares Co Pte Ltd, The Antares (No 1 and No 2)* [1987] 1 Lloyd's Rep 424; the Arbitration Act 1996, Sections 12(5) and 13.

[302] See, for example, *The Benarty* [1985] 1 QB 325 (CA); and *Baghlaf al Zafer Factory Co v Pakistan National Shipping Co, The Sibi* [1998] 2 Lloyd's Rep 229.

[303] *Vessel Lucy,* Paris CA, December 2, 1998, DMF 1999.732, the case where in order to determine the applicable law, the French judge applied the conflict of laws method and decided that the law applicable to the contract of carriage was the law of the country in the territory of which the contract was located; and *Vessel Aton,* Paris CA, May 5, 1999, DMF 2000.346, the case where the French judge made no reference to the conflict of laws method and decided that the Hague Rules were applicable because of their content.

[304] Antapassis A, Athanassiou LI, Rosaeg E, *Competition and Regulation in Shipping and Shipping Related Industries* (Martinus Nijhoff Publishers 2009), page 378.

A mere reference to English law, or indeed to any other system of law, is not sufficient to bring Article X(c) into effect.

According to Section 1(6) of the 1971 Act there are two classes of documents to which the Rules have the force of law: if the carrier issues a either *bill of lading* or a *receipt which is a non-negotiable document marked as such*, in connection with a shipment on a voyage to which the Rules apply. The wording in sub-Section 1(6)(b) 'non-negotiable documents marked as such' is a plain link to Article VI, however, which provides that in such documents the Rules can be excluded. It is not exactly clear what was intended by this wording.

On one view, it simply envisages a clause paramount in a waybill or similar document on the same terms as those used in the bills of lading: on that basis, such a clause paramount (when inserted into such a document) brings in the whole Hague-Visby Rules as a matter of law and partial incorporation is not possible.

On the other hand, it only applies where the actual words 'as if [this] receipt is a bill of lading', or something similar are used. If they are not – the subsection is inapplicable, and the Rules operate by incorporation only and can be incorporated in part if the court so reads the contract.

In *The Vechscroon,*[305] Lloyd J favoured the first view. The goods were carried from Ireland under a document described as a 'commercial vehicle movement order', in a refrigerated vehicle which overturned in the course of the voyage. The refrigeration had to be turned off in order to minimise the risk of fire. When the goods reached Cherbourg, they were condemned and the plaintiffs, the owners of the goods, claimed against the defendants under a through contract of carriage. The defendants settled the plaintiffs' claim and sought to recover the paid-out sum from a third party.

The third party, however, argued that the Rules could have only a contractual force and a non-negotiable receipt without clear words 'as if receipt were a bill of lading' cannot be considered within the 'force of law' ambit of the Rules. Thus the claim against them was time-barred.[306]It was further argued that if they were liable at all then they were entitled to limit their liability under Article IV Rule 5 of the Hague Rules. The defendants countered that the rules applicable were the Hague-Visby Rules,[307] thus, Article III Rule

[305] *McCarren & Co Ltd v Humber International Transport Ltd and Truckline Ferries (Poole) Ltd, The Vechscroon* [1982] 1 Lloyd's Rep 301.
[306] Since the claim had not been brought within the one allowed by the Hague Rules, Article III Rule 6, in that the writ had not been issued until January 25, 1979 and the third party notice was not issued until April 19, 1979.
[307] Which provided, *inter alia*, Article III, Rule 6 bis and Article IV Rule 5.

6 provided for an extended period of an action for indemnity and Article IV Rule 5 provided the higher limitation of carrier's liability.

In response to the third-party statement, Lloyd J held that the submission that the Rules could have no more than contractual force[308] would be rejected, in that there was no sensible reason why Parliament should have intended to draw any distinction between a document that said 'this non-negotiable receipt shall be governed by the Hague-Visby Rules' and a document that said 'this non-negotiable receipt shall be governed by the Hague-Visby Rules as if it were a bill of lading'.[309] The purpose of the words was said 'to equate non-negotiable receipts, which are expressly governed by the Rules, with bills of lading which are expressly governed by the Rules'.[310]

It was further held that the language of Section 1(6)(b) of the 1971 Act is perfectly general. It does not provide that the contract must be exclusively governed by the Rules for the Rules to have the force of law. Nor does it provide that the contract is to be governed by the Rules without condition or qualification. The conditions of carriage expressly provided that the Rules were to govern this contract and the Rules had the force of law by virtue of Section 1(6)(b) of the Act.[311]

Herewith to mention that Lloyd J expressly disagreed with the statement of Diamond QC,[312] who actually had already foreseen such a kind of controversy in the past.[313] The judge said that the purpose of the words of the statute was simply to equate non-negotiable receipts with bills of lading. Since non-negotiable receipts were never mentioned as such in the amended Rules, it was natural to include the words mentioned in Section 1(6)(b). And allegedly there was no need to include these words in Section 1(6)(a).

Moreover, whether the Hague-Visby Rules had statutory force or not, the argument that the defendants' claim was time-barred against third parties should have failed. Even if the Hague-Visby Rules were only incorporated by contract and had no statutory force, there was nothing to prevent to giving effect to Article III Rule 6bis in accordance with the terms of the conditions of carriage. There was no doubt of which set of Rules to be applied.[314]

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[308] Such a submission was based on the fact that there was no mentioning in Clause 1 of the conditions of carriage that the Hague-Visby Rules were to govern the contract 'as if the receipt were a bill of lading'.
[309] *The Vechscroon* [1982] 1 Lloyd's Rep 301, 304, col 2.
[310] ibid, 305, col 1.
[311] ibid, 305.
[312] Anthony Diamond, 'The Hague Visby Rules' (1978) LMCLQ 225.
[313] ibid, 261: 'It is moreover curious to note as another limiting factor; the paramount clause must by Section 1(6)(b) state that the Rules are to govern "as if the receipt were a bill of lading". If those words are missing from the paramount clause, is the application of the Rules to be statutory or only contractual? The answer would seem to be the latter'.
[314] *The Vechscroon* [1982] 1 Lloyd's Rep 301, 303.

However, in *The European Enterprise*[315] the court did not follow the above decision and took a different view in regard to the interpretation of Section 1(6)(b).[316] The facts of the case were as follows. While entering the port during heavy weather, m/v *European Enterprise* heavily listed; goods on board overturned and were damaged. The Carrier claimed to be entitled to limit his liability under the conditions of carriage evidenced by the consignment note (or waybill) to a sum that was less than the amount stated in Article IV Rule 5.[317] The plaintiffs contended that the defendants could not so limit their liability because the Rules had the statutory force of law in relation to this contract, and para 3 in so far as it lessened the defendant's liability was void under Article III Rule 8. Thus the whole issue turned on whether the Hague-Visby Rules were incorporated as a matter of the contract (as the defendants contended) or have the force of law (as the plaintiffs contended).[318]

The consignment note was described as a non-negotiable receipt note, which was not a document of title. Thus the only gateway to the statutory application of the Rules was Section 1(6)(b) of the 1971 Act. It was held that the purpose of Section 1(6)(b) was 'to confer on a voluntary contractual tie a statutory binding character'. The shipowners could escape the application of the Rules by issuing a notice to shippers that no bills of lading would be issued by them in a particular trade, and Section 1(6)(b) could only be activated by contracting into the statutory regime in the appropriate contractual form.[319]

Moreover, Section 1(6)(b) could only apply if the receipt expressly provided that 'the Rules are to govern the contract as if the receipt were a bill of lading' or contained similar wording; the 1971 Act required that the receipt which was a non-negotiable document had to be marked as such and the contract had to provide expressly that the rules were to govern as if the receipt were a bill of lading. Only if those formal requirements were complied with would Section 1(6)(b) confer statutory force onto a voluntary contractual tie.[320]

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[315] *Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise* [1989] 2 Lloyd's Rep 185.
[316] *The European Enterprise* [1989] 2 Lloyd's Rep 185, 190, col 1 (Steyn J).
[317] para [3] of the consignment note provided *inter alia* that the goods were carried subject to the Hague-Visby Rules set out in the schedule to the Carriage of Goods by Sea Act, 1971 except that the goods and their respective contents (i.e. the tractor trailer and its consignment) were to be regarded as one package or unit for the purpose of Article IV Rule 5(a); the carrier was to be entitled to limit its liability to 10,000 frs. package or unit.
[318] *The European Enterprise* [1989] 2 Lloyd's Rep 185, 187 col 2 (Steyn J).
[319] ibid, 188 col 2 and 189 col 1 (Steyn J).
[320] ibid, 189 (Steyn J).
Further reference was made to the following articles and pages: M.J. Mustill, QC, *The Carriage of Goods by Sea Act 1971*, art iv for Sjorett, vol II, issue 4-5, 1972, 697; Anthony Diamond, QC, 'The Hague-Visby Rules' (1978) LMCLQ 225.

It was said that in enacting Section 1(6)(b), the legislature did not intend to override the agreement of the parties when they had freedom of choice of whether or not to incorporate the Rules into the contract, and the partial incorporation of the Hague-Visby Rules did not comply with Section 1(6)(b).[321]

It may be questioned if there is any test with a statutory foundation, for deciding what degree of incorporation will be sufficient? In the words of Steyn J, 'leaving aside *de minimis* arguments, it seems to me that any test designed to decide which partial incorporations of the rules will or will not be sufficient will in practice be unworkable ...' The judge agreed that 'it would be curious if a voluntary paramount clause, which effected only a partial incorporation of the rules, had the result that a statutory binding character was given to *all* the rules, even when there was no primary contractual bond'.[322]

The European Enterprise[323] remains the leading case on this subject matter.

Scrutton states that where a receipt or other document is not marked as non-negotiable and is not incorporating a clause paramount, it is arguable that in some circumstances at least such documents might be subject to the Rules.[324]

Carver also agrees that the overall assumption is that though parties specifically refer in a waybill to the Rules, they are assumed not to have intended to adopt them in full (including their compulsory element) unless they have used a set of formulas. It is difficult to see why carriers ever should bind themselves by such a formula (though it appears they do), and why it should have been thought worthwhile to insert the subsection in question to provide such a facility. A possible explanation is that standard forms of clauses paramount refer to legislation bringing the Rules into effect, and such legislation only refers to bills of lading, with the result that clear wording was needed to indicate that they were nevertheless to apply to waybills. In that case one would have expected the drafter to make the formula to be used clearer: for example, is the word 'receipt' required if the document is headed 'waybill' or simply 'non-negotiable'? As against the second interpretation, it can be said more generally that the aim of uniformity of maritime regimes indicates that parties who are willing to adopt the Rules should accept them in full as regards waybills, as they apply to bills of lading, and that if they wish to undertake a lesser liability, they should simply avoid reference to the Rules.[325]

[321] ibid, 190 col 2 and 191 col 1.
[322] ibid, 191, col 1.
[323] *The European Enterprise* [1989] 2 Lloyd's Rep 185.
[324] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), paras [14-011] and [14-012].
[325] *Carver on Bills of Lading and Charterparties* (4th edn, Sweet & Maxwell 2017), para [9-087].

Chapter 3: The Clause Paramount

As *Voyage Charters* states, the relevance of the Rules to charterparties cannot simply be defined by reference to the relations between shipowners and charterers. They are also relevant to the relations between shipowners (or charterers if they are principal carriers) and cargo owners under bills of lading issued under the charterparty, and they are further relevant to the allocation of liability as between shipowners and charterers for liabilities to cargo owners.[326]

The purpose and underlying basis of clauses paramount

It may well be the case that the Rules are not compulsorily applicable to bills of lading and sea waybills. Similarly, pursuant to Article V, the Rules are not compulsorily applicable to charterparties on the simple basis that these documents 'do not pass from hand to hand and parties [are] therefore left free to contract on what terms they chose'.[327]

However, voluntary incorporation has become widely accepted practice by way of a simple 'integration' of either Hague or Hague-Visby Rules in contracts of carriage, as if it is intended that they should apply as between shipowners and charterers.[328] For example, the standard ASBATANKVOY form does incorporate the Rules,[329] but the standard GENCON form does not.

A commonly used clause for voluntarily contractual incorporation remains the "clause paramount", arguably, so called because the intention was that the Rules as incorporated by it were to be "paramount" and to take precedence over any inconsistent clauses to the contrary. However, there may easily be uncertainties, especially in connection with charterparties, as to the significance of the word 'paramount' and the extent to which the Rules override other contract provisions – it may be simply wrong to put too much weight on the word 'paramount'. As noted by Tetley, a carelessly worded clause can be a dangerous way of applying the Hague Rules to a charterparty.[330]

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[326] Julian Cooke, Timothy Young QC, John Kimball, LeRoy Lambert, Andrew Taylor, David Martowski, *Voyage Charters* (4th edn, Lloyd's Shipping Law Library 2014), para [85.19].
[327] *The Saxonstar* [1959] AC 133, [1958] 1 Lloyds' Rep 73, 97 col 2 (Somervell LJ).
[328] In this connection, see the Baltic Conference Addendum 1946: 'A charterparty or a bill of lading issued today is hardly complete if it does not contain a Paramount Clause, a Both-to-Blame Collision Clause and an Amended Jason Clause'.
[329] See ASBATANKVOY, Clause 20(b)(i) Clause Paramount.
[330] Professor William Tetley QC, *Marine Cargo Claims* (3rd edn, Yvon Blais 1988), 13.
See also *Overseas Tankship (UK) Ltd v BP Tanker Co Ltd* [1966] 2 Lloyd's Rep 386.

In *The Mariasmi*[331] Mocatta J stated:

> this word is used in relation to the Hague Rules in two rather different senses. It is sometimes used as a form of shorthand to describe a clause in a bill of lading or in a charter-party making the whole or part of the Hague Rules applicable to those documents, but without any addition. On other occasions it has a wider meaning, in that it refers not only to a clause incorporating the Hague Rules in a bill of lading or charter-party, but to one going further and expressly providing that the provisions of the Hague Rules, where there is any conflict with the provisions of the bill of lading or charter-party, are to prevail, or in other words be paramount.[332]

The ultimate result of incorporation may lead to special considerations of interpretation being deployed in a way that the Rules may apply only in part and be required to be interpreted against the background of the general structure of the other terms of the contract.

More sophisticated recent standard form contracts do not seek to incorporate a clause paramount into the charterparty but only into any bill of lading issued under that charterparty.[333] There is an express clause stating that the Rules that apply to the bill of lading are also to apply to cargo-carrying voyages under the charterparty.[334] In *The Seki Rolette,*[335] the wording 'the following Paramount Clause to apply and to be inserted in all Bills of Lading issued under the Charter Party' was held to mean 'the following Paramount Clause to apply under the charter' and not 'the following Paramount Clause to apply … in all Bills of Lading issued under this Charter Party', but not to the charterparty itself.[336]

It will be a question of construction of both the words of incorporation and the clause paramount itself as to whether the same Rules that apply to each bill of lading issued under the charterparty are to apply to the voyages covered by such bill of lading under the charterparty, which could have the result that, for example, different voyages under a time charterparty are governed by different Rules.

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[331] *Marifortuna Naviera SA v Government of Ceylon, The Mariasmi* [1970] 1 Lloyd's Rep 247.
[332] ibid, 255, col 2.
See also as illustrated in *The Kheti* (1948) 82 Ll L Rep 525; and *Golodetz v Kersten, Hunik & Co* (1926) 24 Ll L Rep 374 and, in a charterparty context: *Seven Seas Transportation Ltd v Pacifico Union Marina Corporation, The Satya Kailash and Oceanic Amity* [1984] 1 Lloyd's Rep 588; see also *Sabah Flour and Feedmills* v *Comfez* [1988] 2 Lloyd's Rep 18; *Trafigura Beheer BV* v *Golden Stavraetos Maritime, The Sonia* [2003] EWCA Civ 664; [2003] 2 Lloyd's Rep 201 and *Borgship Tankers* v *Product Transport, The Casco* [2005] 1 Lloyd's Rep 565.
[333] e.g. Clause 38 of the SHELLTIME 4 charterparty.
[334] e.g. Clause 27(c)(ii) of the SHELLTIME 4 charterparty as amended in December 2003.
[335] *Grimaldi Cia di Navigazione SPA* v *Sekihyo Lines, The Seki Rolette* [1998] 2 Lloyd's Rep 638.
[336] ibid, 647 (Mance J), in reply to the question 'Are the Hague Rules incorporated in the charter?'
See discussion in *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [85.2].

In *London Arbitration 2/97* LMLN 450, the Hague-Visby Rules applied compulsorily to the bills of lading for the cargo in question under the law of the country where the cargo was loaded. It was held that the wording of the clause incorporated the Hague-Visby Rules into the voyage charterparty, although the clause did not refer to trades where the rules 'apply compulsorily to bills of lading' or to the Rules as enacted in the country of shipment.

Although strictly it could be said that there was no "trade" where the rules were compulsorily applicable, the clear intention of the clause paramount was to apply the Rules to bills of lading, incorporating it where the Rules were compulsorily applicable by a relevant law to those bills. Similarly, the intention where a clause paramount had been incorporated into a charter was to incorporate the Rules into the charter where they would, by relevant law, apply compulsorily to bills of lading issued under it. An alternative construction would be that the default position under the clause paramount is to apply to all the voyages under the charterparty, with the result that the charterparty and the bill of lading may not be back-to-back.

Initially, interpretation of a clause paramount was relatively straightforward, especially when the only international convention was the Hague Rules. However, many major states have now incorporated the Hague-Visby Rules into their law and some have even incorporated in whole or part the Hamburg Rules,[337] so that there are differences between the various national statutes and differences between the sets of Rules thus incorporated and the Rules as originally drafted. For example, some forms of clauses paramount purport to incorporate the entire Carriage of Goods by Sea Act of some countries,[338] but some forms incorporate the certain provisions of the Act only. [339] The main result is that the Rules may then apply only in part.

In *The Tasman Discoverer*,[340] the bill of lading expressly incorporated only Articles I-VIII of the Hague Rules and did not incorporate Article IX with its 'gold value' provision;[341] accordingly, the Article IV Rule 5 package limitation was determined by reference to GBP 100 sterling and not the gold value of that sum, which was considerably greater. In the other case, *The Sonia*,[342] the charterparty provided that the

[337] See, for example, The Carriage of Goods by Sea Act 1991 (Australia), the Carriage of Goods by Water Act 1993 (Canada) and The Maritime Transport Act 1994 (New Zealand).
See B. Soyer and A. Tettenborn, *Charterparties: Law, Practice and Emerging Legal Issues*, Chapter 13, *Clauses Paramount* by Professor Y. Baatz, 249, para [13.1]. However, it is not intended here to discuss the Hamburg Rules.
[338] As in *The Saxonstar* [1959] AC 133 – consecutive voyage charter incorporated the US COGSA 1936; or *The Satya Kailash and Oceanic Amity* [1984] 1 Lloyd's Rep 586, 588 – time charter aspect.
[339] *Leeds Shipping Co v Duncan, Fox & Co Ltd* (1932) 37 ComCas 213; (1932) 42 Lloyd's Rep 123 KB; *Joseph Constantine v Imperial Smelting Corp* (1940) 66 Ll L R 146, 148; *Chandris v Isbrandtsen-Moller* [1951] 1 KB 240; *Minister of Food v Reardon Smith Line* [1951] 2 Lloyd's Rep 265.
[340] *Dairy Containers Ltd v Tasman Orient Line C.V., The Tasman Discoverer* [2002] 2 Lloyd's Rep 528 (NZCA).
[341] The first New Zealand statute to take account of the Hague Rules was the Sea Carriage of Goods Act, 1940. While it set out arts I–VIII in full, the Act did not include the gold clause.
[342] *Trafigura Beheer BV v Golden Stravraetos Maritime Inc, The Sonia* [2003] EWCA Civ 664; [2003] 2 Lloyd's Rep 201.

provisions of Article III (other than Rule 8) of the Hague-Visby Rules should apply.[343] It was held that the omission of Rule 8 excluded the paramountcy of the Rules.

The possible question that may arise is whether, in case of incorporation of the foreign Act, it is English law or foreign law on a provision in question that applies.[344] In *Dobell v Rossmore*[345] it was held that the US Harter Act, as incorporated in a bill of lading, must be construed not as an Act but 'simply as words occurring in the bill of lading'.[346]

In a like manner, Selvig noted in his article[347] that courts of most countries had held that the application of "a certain Hague Rules Act" 'should not then be regarded as of statutory character, but merely as ordinary, contractual provisions, incorporated in the contract by the paramount clause. They must consequently be interpreted and construed in accordance with general principles of the law of contract, like any other provisions of bills of lading and charterparties'.[348] For example, in earlier German[349] and Scandinavian[350] law the same principle was firmly established.

In French law the same conception was expressed by Ripert,[351] and applied in at least two earlier decisions.[352] On the other hand, the French judge considered that the paramount clause did not apply if the Hague-Visby Rules were applicable because of their content.[353] If it is not so, the paramount clause applies and the Hague-Visby Rules apply because of freedom of contract.[354] And, even when the Rules apply due to the effect of the paramount clause, the law incorporated in the contract is mandatory regulatory law,[355] unlike the position in the UK.[356]

[343] Clause 46 provided, *inter alia*, for 'the provisions of arts. III (other than r. 8), IV, IV bis and VIII of the Schedule to the Carriage of Goods by Sea Act, 1971 should apply to the charter-party'.
[344] The reference to a foreign statute may not, however, be a significant pointer to the applicable law: see *Mineracoas Brasilieras Reunidas v EF Marine SA, The Freights Queen* [1977] 2 Lloyd's Rep 140.
[345] *GE Dobell & Co v Steamship Rossmore Co* [1895] 2 QB 408 (CA 1895).
[346] ibid, 413.
[347] Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205.
[348] ibid, 213 – 214.
[349] See, for example, Franz Schlegelberger & Rudolf Liesecke, *Seehandelsrecht* (Berlin; Frankfurt am Main 1959), 236.
[350] Several Scandinavian decisions contemplate that the "contract approach" is correct: see Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, page 215, fn 47.
[351] Georges Ripert, *Droit Maritime* (4th edn, Paris 1952), Volume 2, 348.
[352] *The Reims* (1929) 20 RevDMC 398 Cour de Cassation (regarding the application of the Harter Act); *The Highland Brigade* 1950 DMF 38 DC Le Havre (regarding the application of the UK Carriage of Goods by Sea Act 1924).
[353] *Vessel Ville de Sahara*, Cass. Com. June 20, 1995, DMF 1996.382, obs. Remery.
[354] *Vessel World Apollo*, Cass. Com. May 28, 2002, DMF 2002.613, rep. De Monteynard.
[355] *Vessel Hilaire Maurel*, Cass. Com. February 4, 1992, DMF 1992.289 obs. Lemaitre, Rev. Crit. DIP 1992.495 n. Lagarde. See a discussion in Antapassis A, Athanassiou LI, Rosaeg E, *Competition and Regulation in Shipping and Shipping Related Industries* (Martinus Nijhoff Publishers 2009), at pages 380 and 381.
[356] With reference to the decision in *Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise* [1989] 2 Lloyd's Rep 185.

Selvig further argued that 'American courts should consequently be expected to adhere to the "contract approach"', in accordance with the law of European countries.[357] 'However, if the parties have contracted that US COGSA shall supersede the Harter Act in US coastwise trade, the position is different. In accordance with express statutory warrant, such agreements merely substitute one compulsory Act with another'.[358]

Thus, it remains the basic principle that words of a foreign statute, incorporated into a contract governed by English law, must be construed as a matter of English law, and not necessarily by the law of the state in which the statute was passed. However, as *Bills of Lading* emphasized, a more subtle analysis may be required.[359] For example, the commencement of 'suit' in Article III Rule 6 has an apparently different meaning in English and US law. But where the US Act is incorporated into an English charterparty, it will be given its English law meaning.[360]

[357] *The Framlington Court* 1934 AMC 272 5CCA and *The Westmoreland* 1936 AMC 1680 2CCA (cases dealing with paramount clauses and incorporating the Harter Act); *Federal Ins Co v American Export Lines* 1953 AMC 1330 SDNY (the case dealt with paramount clause and the bill of lading incorporated The US Carriage of Goods by Sea Act 1936).
[358] With reference to the decision of Palmieri DJ at first instance court in *Pannell v United States Lines Co* 1958 AMC 1428 SDNY. Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, 215–216.
[359] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [10.18].
[360] See, for example, *The Merak* [1965] P 223; [1964] 2 Lloyd's Rep 283; *The Marinor* [1996] 1 Lloyd's Rep 301; *Mauritius Oil Refineries Ltd* v *Stolt Nielsen Nederlands BV, The Stolt Sydness* [1997] 1 Lloyd's Rep 273.

Before proceeding to the discussion about the general principles of incorporation of a clause paramount it is necessary to make a clear severance between

> cases (usually charterparty cases) which have addressed the question of what is meant by general expressions such as "clause paramount" without spelling out what the terms of such a clause paramount are intended to be and other cases (usually bill of lading cases) which have addressed the terms of particular clauses. …
>
> In a charterparty case, there is freedom of contract, so that the parties are entitled to agree whatever they wish. That will not necessarily be so in a bill of lading case, where (under English law) the application of the Hague-Visby Rules is compulsory in the cases falling within section 1 of the 1971 Act and article X of the Rules, although not in other cases.[361]

The first part of the below discussion relates to the charterparty cases and the cases where the Rules are voluntarily incorporated in bills of lading or sea waybills. The second part of discussion relates solely to bill of lading cases that are mostly focused on the scope of the clause paramount *per se*, which may seem somewhat irrelevant when we have bills issued in, or contracts of carriage made in, the Hague or Hague-Visby Rules contracting states.[362] A carrier will have a standard form of bill based on whatever mandatory convention is in force in the place of loading – it will be directly applicable to the bill. Thus there is no need to bring any reference to the law of destination.

[361] As stated by Males J in the first instance of *Yemgas FZCO and Others v Superior Pescadores SA Panama, The Superior Pescadores* [2014] 1 Lloyd's Rep 660, para [16].
[362] The cases like *The Happy Ranger* [2002] 2 Lloyd's Rep 357 (CA) and *The Superior Pescadores* [2016] 1 Lloyd's Rep 561.

Chapter 4: Which Rules are incorporated by virtue of the Clause Paramount?

Incorporation of international carriage conventions

Clauses Paramount come in various shapes and sizes, for example: 'clause paramount'; 'general clause paramount'; 'The Chamber of Shipping Voyage Charter Clause Paramount 1958'; 'Canadian clause paramount'; 'US clause paramount'; 'BIMCO Paramount Clause General 1997'; etc.[363]

Sometimes it may not matter whether the Hague or the Hague-Visby Rules are applicable because, for example, in both cases, the extent of a seaworthiness obligation (to exercise due diligence before and upon the beginning of the voyage) is the same,[364] plus both have the same list of the carriers' defences.[365] However, in other cases, there may be significant differences depending on which set of rules apply. For example, the liability regime is different under the Hamburg Rules;[366] limits of liability may also be different.[367] The defences and limits of liability of the carrier are extended to claims in tort under the Hague-Visby[368] and Hamburg Rules[369] but not under the Hague Rules; the defences and limits of liability of the carrier are extended to the servant or agent of the carrier by the Hague-Visby[370] and Hamburg Rules,[371] but not by the Hague Rules. The Hague-Visby Rules and The Hamburg Rules provide for breaking the limits,[372] whereas the Hague Rules do not; and the time bar differs.[373]

As noted by Longmore LJ in *The MSC Amsterdam*, incorporation of the Hague Rules is more common, because they are more generally applicable world-wide, unless the application of the Hague-Visby Rules

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[363] See discussion, for example, in *Seabridge Shipping AB v AC Orssleff's Eftf's A/S, The Fjellvang* [1999] 2 Lloyd's Rep 685, 689 col 1.
[364] However, if the owner is in breach of this obligation, the owner can limit its liability accordingly – *The Happy Ranger* [2002] 2 Lloyd's Rep 357. The limits differ under the Hague and the Hague-Visby Rules.
[365] See Article IV Rule 2. Thus, is *Whistler International v Kawasaki Kisen Kaisha Ltd, The Hill Harmony* [2001] 1 Lloyd's Rep 147, where the charterparty incorporated three clauses paramount but no point arose on their application or on which one was relevant, as their effect was to incorporate the exception in Article IV Rule 2(a).
[366] Article 5.
[367] Article IV Rule 5 of the Hague and the Hague-Visby Rules and Article 6 of The Hamburg Rules.
[368] Article IVbis Rule 1.
[369] Article 7 Rule 1.
[370] Article IV bis Rule 2 and Rule 3.
[371] Article 7 Rule 1.
[372] Article IV Rule 5(e) and Article IVbis Rule 4 of the Hague-Visby Rules and Article 8 of the Hamburg Rules.
[373] The time bar under the Hague and the Hague-Visby Rules is one year, whereas it is two years under The Hamburg Rules, Article 20. Article III Rule 6bis of the Hague-Visby Rules specifically provides for indemnity claims, whereas the Hague Rules do not – see London Arbitration 2/97 LMLN 450; *Lauritzen Reefers v Ocean Reef Transport Ltd SA, The Bukhta Russkaya* [1997] 2 Lloyd's Rep 744 and *The Fjellvang* [1999] 2 Lloyd's Rep 685.
Article 20 Rule 5 of the Hamburg Rules also provides for indemnity claims.

as a matter of law is anticipated or compulsory,[374] but this is not an inflexible rule and evidence will be permitted as to what precisely is the form and content of the incorporated clause.

The Clause Paramount and the terms of Charterparties: Which set of Rules is to apply?

As stated in *Marine Cargo Claims*, 'a carelessly worded paramount clause can be a dangerous way of incorporating the Hague Rules into a charterparty'.[375]

Initially, the English courts considered that the wording 'Paramount Clause' meant incorporation of the Hague Rules. *The Agios Lazaros*[376] was decided after the Carriage of Goods by Sea Act 1971 had been passed but before it had come into force in respect of a contract made in 1972.[377] The charterparty provided, *inter alia*, for: '… and also Paramount Clause … deemed to be incorporated in this Charter Party'. Neither set of Rules was compulsorily applicable.[378]

At first instance, Donaldson J held that part of Clause 31, especially the phrase 'and also Paramount Clause' was void for uncertainty / ineffective, because he could not say what clause was to be incorporated. So none of the Rules applied. Nor did the time bar in them. The judge disregarded the purported incorporation with the result that the one-year time limit for claims imposed by Article III Rule 6 of the Hague Rules did not apply. The contract was found good but the words 'and also Paramount clause' should be struck out as meaningless.[379]

However, the Court of Appeal reversed the decision and held that the intention of the parties was to incorporate all the Hague Rules including the one-year time limit for claims. It was submitted that the Court shall always struggle to give a meaning to what the parties have said if it can. This is a principle of general application that is not confined to commercial contracts.[380]

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[374] *Trafigura Beheer BV and Another v Mediterranean Shipping Co, The MSC Amsterdam* [2007] 2 Lloyd's Rep 622, this case will be further considered below.
[375] William Tetley, *Marine Cargo Claims* (4th edn, Cowansville, Québec, Les Editions Yvon Blais 2008), 13.
See also *Overseas Tankship (UK) Ltd v BP Tanker Co Ltd* [1966] 2 Lloyd's Rep 386.
[376] *Nea Agrex SA v Baltic Shipping Co Ltd, The Agios Lazaros* [1976] QB 933, [1976] 2 Lloyd's Rep 47.
[377] At the date of the charterparty, the Hague-Visby Rules had not been adopted in any country yet.
[378] Especially see *The Agios Lazaros* [1976] 2 Lloyd's Rep 47, 50 (Lord Denning MR).
[379] Based on the decision in *Nicolene Ltd v Simmonds* [1953] 1 Lloyd's Rep 189, [1953] 1 QB 543.
[380] *Hillas & Co Ltd v Arcos* (1932) 43 Ll L Rep 359, (1932) 147 LT 503, 517 (Wright LJ): 'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defect; but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*'.

The first step was to ask what does 'paramount clause' or 'clause paramount' mean to shipping men. Lord Denning MR propounded:

> … Primarily it applies to bills of lading. In that context its meaning is, I think, clear beyond question. It means a clause by which the Hague Rules are incorporated into the contract evidenced by the bill of lading and which overrides any express exemption or condition that is inconsistent with it. As I said [in *The Saxonstar*[381]]: '… when a paramount clause is incorporated into a contract, the purpose is to give the Hague Rules contractual force: so that, although the bill of lading may contain very wide exceptions, the rules are paramount and make the shipowners liable for want of due diligence to make the ship seaworthy, and so forth …'[382]

Such being the clear meaning of 'paramount clause' in a bill of lading.

The second step was to identify what was the meaning of such wording in this particular charter-party. The answer had similarly been given by the decision of the House of Lords in *The Saxonstar*.[383] It brings 'the Hague Rules into the charter-party so as to render the voyage, or voyages, subject to the Hague Rules, so far as applicable thereto; and it makes those rules prevail over any of the exceptions in the charter-party'.[384]

Lord Denning MR propounded:

> It seems to me that when the "paramount clause" is incorporated, without any words of qualification, it means that all the Hague Rules are incorporated. If the parties intend only to incorporate part of the rules (…), or only so far as compulsorily applicable, they say so. In the absence of any such qualification, it seems to me that a "clause paramount" is a clause which incorporates all the Hague Rules. I mean, of course, the accepted Hague Rules and not the Hague-Visby Rules which are of later date.[385]

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[381] *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd, The Saxonstar* [1957] 1 Lloyd's Rep 271, 277; [1957] 2 QB 233, 266.
[382] *Nea Agrex SA v Baltic Shipping Co Ltd and International Charter Co, The Agios Lazaros* [1976] 2 Lloyd's Rep 47, 50 col 2 (Lord Denning).
[383] *The Saxonstar* [1959] AC 133; [1958] 1 Lloyds' Rep 73.
[384] *The Agios Lazaros* [1976] 2 Lloyd's Rep 47, 50 col 2 (Lord Denning).
[385] ibid, 50 col 2 – 51 col 1 (Lord Denning).
As Longmore LJ noted in *The Superior Pescadores* [2016] 1 Lloyd's Rep 561 para [23]: 'it is not clear why Lord Denning referred to the Hague-Visby Rules all, since they also included a one-year time limit but since England had already enacted the Hague-Visby Rules but they were not yet in force, his expression of opinion is not, perhaps, surprising'.

Goff LJ concluded that the phrase "paramount clause" was a term of art which referred to (and was therefore intended to incorporate) the Hague Rules as a whole. He accepted that a possible area of uncertainty was whether it was intended to incorporate the (old) Hague Rules or the (new) Hague-Visby Rules but he had no difficulty in saying that the intention was to refer to the Hague Rules in their original form: 'At the date of the charterparty the Visby rules had not been adopted in any country, nor indeed I think have they even now, but that does not matter. The form taken from a bill of lading and entitled "Hague-Visby Paramount Clause" had not been published and the Visby variant was not in any kind of general use.'[386]

Shaw LJ agreed by saying:

> A more productive approach in the circumstances of this case is to ask what the shipowner would have supposed the charterer had in mind when the words 'paramount clause' were inserted; and then to ask the same question with the parties reversed. In the absence of any express words of variation or abbreviation or extension, each party must have assumed that the other party had the Hague Rules in mind in their original form without modification or qualification. This approach *does* provide a clue as to what the respective parties had in contemplation, namely that by the phrase 'paramount clause' they meant simply the Hague Rules …[387]

This decision represents what the Court of Appeal thought shipping men meant by the phrase 'Paramount clause' in 1972. However, since that time the Visby Protocol has been adopted, and there are now various more explicit and more complex forms of clauses paramount.

As *Carver* argues, it is obviously now less certain what is intended in a reference to a paramount clause, though the countries adopting the Visby Protocol are smaller in number, making it certainly possible in some contexts that it was still the Hague Rules which were intended. Sometimes the paramount clause itself solves the problem by referring to the Hague Rules with subsequent amendments or the like.[388] But even without this aid, it is possible to say that where a country has adopted the Visby Protocol and thus amended its original adoption of the Hague Rules, a reference to the Hague-Visby Rules is taken to be covered by a reference to the Hague Rules 'as enacted in the country of shipment'.[389] This will be easiest

[386] ibid, 54 col 2 (Goff LJ).
[387] ibid, 57–58 (Shaw LJ).
[388] See, for example, *The Veschstroon* [1982] 1 Lloyd's Rep 301 (Brussels Convention 'and any subsequent amendment thereto'); *The Marinor* [1996] 1 Lloyd's Rep 301 (Canadian Carriage of Goods Act "as amended").
[389] It was so held in *The Superior Pescadores* [2016] EWCA Civ 101; [2016] 1 Lloyd's Rep 561, the case with a complicated background. *Carver* further argues in ftn 349 that the significance of Article X(a) of the Hague-Visby Rules, which have the force of law, deserved more attention.

where the clause does not continue, as many do, to make reference to the application of the Hague-Visby Rules in special circumstances.[390]

In *The Marinor*[391] the paramount clause provided for the provisions of the Canadian Carriage of Goods by Water Act 'as amended'.[392] The position when the charter was entered into in 1991 was that the Canadian Carriage of Goods by Water Act, then in operation and identified in the charter, incorporated the Hague Rules. In 1993 the Canadian Act was repealed and a new Act enacted the Hague-Visby Rules.

Colman J had no difficulty in holding that the words 'as amended' did incorporate the (new) Hague-Visby Rules:

> The words 'as amended' in Rider A are, …, intended to provide for legislative changes which may subsequently be made in respect of the subject-matter of the existing Act identified in the clause paramount. Whether those changes were effected by a subsequent Act which introduced amendments into the Act specified or by a subsequent Act which repealed the specified Act and replaced it with an Act containing amended provisions in respect of the same subject-matter would be wholly irrelevant to the owners and charterers of *Marinor*. The obvious purpose of incorporating the rider is to make sure that throughout the period of the time charter the current Canadian Carriage of Goods by Sea legislation is contractually incorporated.[393]

It was not the Hague Rules 'as amended' but 'as enacted'.

The Marinor is not directly relevant save to show that there is a form of words which will lead to the definitive conclusion that the new Rules are intended to apply.

Sometimes the incorporation is sought to be effected merely by general phrases such as 'paramount clause to apply'. Where the phrase is qualified by "US" – it is the US version of the Rules which apply. Where there is no indication, or the word "general" is used (especially "General Paramount Clause to apply") the

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See also *JCB Sales Ltd v Wallerius Lines (The Seijin)* 124 F.3d 132 (1997), referred to in *The Superior Pescadores.*

[390] See Guenter Treitel, Francis Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-090].

[391] *Noranda Inc and Others v Barton (Time Charter) Ltd and Another, The Marinor* [1996] 1 Lloyd's Rep 301.

[392] Rider A 'Canadian Clause Paramount' provided for 'This Bill of Lading so far as it relates to the carriage of goods by water, shall have effect subject to the provisions of the Carriage of Goods by Water Act … as amended, enacted by the Parliament of Canada, which shall be deemed to be incorporated herein'.

[393] *The Marinor* [1996] 1 Lloyd's Rep 301, 304 col 2 (Colman J).

court may ask 'what the words meant to persons involved in shipping at the time the contract was entered into'.[394]

In *The Bukhta Russkaya,*[395] a 'general paramount clause' was to apply in a time charterparty on the BALTIME form, and that was the clause in standard form that promulgated by BIMCO in 1994. The charter was governed by English law, provided for arbitration in London and for: '… trades involving neither US nor Canadian ports, the general paramount clause to apply in lieu of the USA clause paramount'. The claim was made by the charterer who had settled with the cargo interests who claimed against the charterers for damage to cargo. Thus, the Charterers claimed an indemnity from the shipowner in respect of the payments they had made to cargo interests and issued an application under Section 27 of the Arbitration Act for an extension of time and a declaration that the claim was not time-barred.

The charterers argued that the Hague-Visby Rules were incorporated into the charter by the words 'general paramount clause' and the claim was not time-barred, since Article III Rule 6*bis* stated that an action for indemnity against a third person might be brought even after the expiry of the one-year limitation period, if it was brought within the time allowed by the law of the Court seized of the case. This time must be at least three months from the date on which the claim was settled. For the charterers, the counsel relied on a passage from *Time Charterers* that, after referring to *The Agios Lazaros*, stated: 'However, if a paramount clause is incorporated into a BALTIME charterparty governed by English law it is likely, following the coming into force in 1977 of the Carriage of Goods By Sea Act 1971, the Hague-Visby Rules would be regarded as incorporated'.[396] Contrarily, the owners argued that the Hague Rules (which contained no such provision for claims for indemnity) were incorporated; the one year limit applied and the claim was time-barred.

Thomas J came to the conclusion, on the evidence before him, that the words 'general paramount clause' in a time charterparty referred to a particular clause or more accurately any of a number of clauses that had the following essential terms: '(1) if the Hague Rules are enacted in the country of shipment, then they apply as enacted; (2) if the Hague Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination applies or, if there is no such legislation, the terms of the Convention containing the Hague Rules apply; (3) if the Hague-Visby Rules are compulsorily applicable to the trade in question, then the legislation enacting those rules applies.'[397]

[394] *The Bukhta Russkaya* [1997] 2 Lloyd's Rep 744, 746–747 (Thomas J). See *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-090].
[395] *Lauritzen Reefers v Ocean Reef Transport Ltd SA, The Bukhta Russkaya* [1997] 2 Lloyd's Rep 744.
[396] ibid, 746, with reference to the of Wilford, Coghlin and Kimball on *Time Charters* (4th edn), 561.
[397] ibid, 746 col 2.

In the light of this observation, the judge on the evidence before him was satisfied that 'shipping men would have understood the "general paramount clause" to have referred to a clause with the essential features which … spelt out. Applying the terms of that clause to the circumstances of this case, it is clear on what is common ground as to the applicable legislation at the ports of shipment and destination, that the Hague Rules apply'.[398]

Since the Hague-Visby Rules were specifically referred to in the 'general paramount clause' as being applicable (by contract) if compulsorily applicable (presumably by the proper law), which they were not in the case before the judge, it was the older Hague Rules that applied to the case – the voyage being one from Mauritania to Japan, neither of which countries had enacted the Hague-Visby Rules by the date of the charter. This is perhaps not a surprising decision in a case where the incorporating clause itself expressly referred to both the Hague Rules and the Hague-Visby Rules and made clear that the latter were only to apply in certain defined circumstances. Therefore, it was not necessary to consider the plaintiff's arguments or the application of the Hague-Visby Rules.[399]

However, it may be questioned if the charterers' reliance on *Time Charters* was correct. For example, Longmore LJ in *The Superior Pescadores* was of the opinion that the late edition of Mr. Wilford's book was indeed correct to say that since 1977 a typical clause paramount, which did not make difference in terms between the two sets of rules, would be taken by shipping men to incorporate the Hague-Visby Rules in a BALTIME charter governed by English law and, by extension, to other charters and bills of lading subject to such a clause (such as the CONLINE bills).[400]

As a further note, the BIMCO paramount clause which was taken to be the one referred by 'General Paramount Clause' has subsequently been revised with the latest edition called "BIMCO Paramount Clause General 1997".

In the next case, *The Fjellvang*,[401] a charterparty was based on the GENCON form and expressly governed by English law. Disputes were to be referred to arbitration in London. The same charter party provided, *inter alia*, for '… Paramount Clause [is] deemed to be incorporated into this Charter Party'.[402] By the date

[398] ibid, 747 col 1.
[399] ibid, 747 col 1.
[400] *The Superior Pescadores* [2016] EWCA Civ 101, [2016] 1 Lloyd's Rep 561, 566 para [30] (Longmore LJ).
[401] *Seabridge Shipping AB v AC Orsleff's EFTF'S AS, The Fjellvang* [1999] 2 Lloyd's Rep 685.
[402] Clause 27 of the governing charter-party provided as follows: 'P&I Bunkering Clause, Both to Blame Collision Clause, New Jason Clause and Paramount Clause are deemed to be incorporated into this Charter Party'.

of the charterparty, the Hague-Visby Rules were in force in about 25 states including Sweden and Denmark, the states in which the owners and charterers were residents of; and the country of shipment, Poland, gave effect to the Hague-Visby Rules as did the governing law of the charterparty. The cargo interests under a bill of lading issued by the charterers brought a claim against the charterers in respect of the cargo carried. That bill of lading incorporated the Hague Rules as enacted in the country of shipment.[403]

The decision of the arbitrator was that the Hague Rules were incorporated and not the Hague-Visby Rules, and that the arbitration had not been brought within the one-year time limit applicable under the Hague Rules. Mr. Oakley decided that the document sent by the charterers was not a valid notice to commence the arbitration. The arbitrator took the view that the Hague Rules applied because the cargo had been discharged in the United States.[404]

On appeal from the arbitration award, Thomas J thought that the correct approach was to ask what shipping men would have had in mind when referring to a clause paramount. In accepting the submissions of Owners' counsel, there was nothing before the court which justified 'that shipping men in general, or these owners and charterers in particular, had intended a different view to that current at the time of *The Agios Lazaros*'.[405]

The judge expressed the following view:

> The shipping trade commonly uses terms – "clause paramount", "general clause paramount", "Canadian Clause paramount", "US clause paramount". For over 20 years the meaning of "clause paramount" has been certain. Persons in the shipping trade have been free to use the phrase "general clause paramount" if they wished to incorporate the Hague-Visby Rules into trades where those rules are compulsorily applicable. Thus, on the evidence before me I see no warrant for departing from the views of shipping men which the court ascertained and gave effect to in *The Agios Lazaros*.[406]

The very important note was advanced by the judge that the meaning of the term "clause paramount" shall not vary depending on factors such as where the port of loading was or who the charterer or owners were, as 'it would cause great uncertainty, …, if the term "clause paramount" referred to the Hague Rules in

[403] *The Fjellvang* [1999] 2 Lloyd's Rep 685, 687.
[404] ibid, revision of the case at 687.
[405] ibid, 688–689.
[406] ibid, 689.

one charter-party, but meant the Hague-Visby Rules in another charter-party. I cannot readily envisage particular owners or charterers intending the meaning of the term to vary as between different charter-parties depending on the parties or the port of loading.'[407] The fact that the law of England and Wales subjected bills of lading on voyages within its scope to the Hague-Visby Rules did not, of itself, bring about the incorporation of those rules by the use of the term "clause paramount". Thus the decision of the arbitrator on this issue was upheld.

However, this note is contrary to the view advanced by Hamblen J in *The Socol 3*.[408] In that case, the time charterparty was based on the NYPE 1993 form with additions and amendments, and provided for one trip from Finland/Sweden to Egypt/Mediterranean with timber products. En route to Egypt deck cargo was partly lost and the vessel had to take refuge at the port of Halmstad where the rest of deck cargo was discharged and re-stowed. In the opinion of Hamblen J, it was common ground that the Hague-Visby Rules had been contractually incorporated into the charterparty, 'Finland being a Contracting State to the Hague-Visby Rules'.[409] The learned judge did not explain the basis of his view, which was contrary to the statement of Thomas J in *The Fjellvang*, just expressed above.

However, on a literal reading of protective clauses, which were incorporated in the voyage charterparty in *The Fjellvang* and in the time charterparty in *The Socol 3*, there was a difference in wording. In the first case a simple reference to 'Paramount Clause' was included. In the second case the standard NYPE 1993 Clause Paramount provided for:

> This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, the Hague Rules, or the Hague-Visby Rules, as applicable, or such other similar national legislation *as may mandatorily apply by virtue of origin or destination of the bills of lading* [emphasis added], which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said applicable Act. If any term of this bill of lading be repugnant to said applicable Act to any extent, such term shall be void to that extent, but no further.

Thus, in the last case, the wording expressly referred to the application of The Rules as mandatorily applicable by virtue of origin of the bill of lading.

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[407] ibid, 689 col 1.
[408] *Onego Shipping and Chartering BV v JSC Arcadia Shipping, The Socol 3* [2010] EWHC 777 (Comm), [2010] 2 Lloyd's Rep 221.
[409] *The Socol 3* [2010] EWHC 777 (Comm), [2010] 2 Lloyd's Rep 221, para [17].

On one hand it may be argued, in line with the decision in *The Fjellvang*, that application of the Rules in the charterparties should not depend on the type of the contract and the port of loading on the simple basis that such a dependency will create uncertainty in the application of the Rules on every separate voyage. On the other hand, following the reasoning in *The Socol 3*, a definition of 'contract of carriage' in Article I(c) can only sensibly apply to bills of lading, as it is only the bill of lading which contain the information about the cargo, for example, as an on-deck statement. On every separate voyage, the bill of lading is different. Thus the application of the Rules in the charterparty depends on the country of shipment. Moreover, in reaching the point of uniformity and certainty, it is submitted that a dislocation between the contractual regime applicable under the bill of lading and that under the charterparty should be avoided by applying the same set of Rules.

Although *Carver* has suggested that a mere reference to a 'clause paramount' might incorporate the Hague-Visby Rules,[410] uncertainty may arise in cases where the parties purpose to incorporate the Rules with additional qualification of where the Rules "apply" or "apply mandatorily" or "as applicable". As questioned by the authors of *Bills of Lading*: by which law is it to be decided whether the Rules "apply" or "apply compulsorily"?[411] This problem is exacerbated where "multiple choice" standard form clauses seek to apply different versions of the Rules to different situations.

If the question of applicability of the Rules is to be judged by the applicable law of the contract, then the fact that, for example, United States or Canadian law might compulsorily apply the Hague Rules to shipments from the United States or Canada is likely to be irrelevant if the applicable law of the contract is English, although as discussed below, the appropriate form of wording can incorporate the Rules in circumstances where foreign law would have otherwise applied to them.[412] For example, in the "bill of lading" case, Longmore LJ said that 'the words "compulsorily applicable" have consistently, as a matter of English law, been given the meaning of "applicable to the proper law of the contract"', however adding that 'it may be said that this is a matter of assumption rather than direct decision at the level of this court'.[413]

As considered by the leading academic commentators, it is most common for a clause paramount to provide that the Hague Rules apply, but if the Hague-Visby Rules 'apply compulsorily' they will apply

[410] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-083].
[411] Aikens R, Richard Lord, Michael Bools, *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.37].
[412] As to when the Hague-Visby Rules apply compulsorily and contractually, see elsewhere in this thesis.
See also *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), paras [9-075]– [9-096]; J. Wilson, *Carriage of Goods by Sea* (6th edn, Pearson Longman 2007) 173–186; *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), paras [11.21] – et seq.
[413] *The MSC Amsterdam* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622, para [13].

to the bill of lading. This wording simply serves to put the parties on notice that the Hague-Visby Rules may apply mandatorily. It does not, however, of itself make the Hague-Visby Rules apply compulsorily to charterparties. So, if the Hague-Visby Rules would not apply mandatorily, for example, because those Rules would not apply to the document or to deck cargo, this wording has no effect.[414]

If the parties wish the Hague-Visby Rules regime to apply to the charterparty, it would be better to insert a detailed clause paramount stating so, rather than just to refer to a vague wording of 'clause paramount'.

Clause Paramount and Bills of Lading: Which set of Rules is to apply?

In *The Happy Ranger,*[415] based on a contract concluded between the first defendants, the owners of a heavy lift tween decker *Happy Ranger*, and the third claimant Parsons, the owners agreed to carry three reactors by sea onboard *Happy Ranger* from Italy to Saudi Arabia. The second paragraph of the clause paramount provided for the following terms: '… in trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on 23 February 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading …'[416] The bill of lading, which was not actually issued, provided for English law to apply.

The main point of contention was whether the Hague-Visby Rules applied if the contract was contained not in 'a bill of lading or any similar document of title' but in what might be called an ordinary contract for goods to be carried that merely provided that the carrier's regular form of a bill of lading[417] was to form part of the contract. The second question was whether Deck Clause (Clause 7) of the contract excluded/precluded liability on the part of the owners.

At first instance the cargo interests contended that the version of the Hague Rules enacted in Italy was the Hague-Visby Rules, so that it was those Rules that applied pursuant to the first sentence of the clause; the shipowners argued that the Hague-Visby Rules were not the Hague Rules as "enacted" in Italy: 'not simply

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[414] Bariş Soyer and Andrew Tettenborn, *Charterparties: Law, Practice and Emerging Legal Issues*, Informa Press, 2018, chapter 13, Clause Paramount by Yvonne Batz, 13.4.5.2.; and *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), paras [11.42A] – [11.48].

[415] *Parsons Corp and Others v CV Scheepvaartonderneming "The Happy Ranger" and Others, The Happy Ranger* [2002] 1 All ER (Comm) 176; [2001] 2 Lloyd's Rep 530.

[416] '3. GENERAL PARAMOUNT CLAUSE:
the Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels 25 August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, arts I to VIII of the Hague Rules shall apply. In such case the liability of the Carrier shall be limited to £100.-sterling package'.

[417] MAMMOET bill of lading

because of the various important differences between the two codes but also because … the wording of clause 3 itself draws a clear distinction between enactment of the Hague Rules and enactment of [the] Hague-Visby Rules'.

Tomlinson J accepted this submission saying:

> I also reject the argument that the Hague-Visby Rules are to be regarded as the Hague Rules "as enacted" in Italy so as to be incorporated by reason of the first limb of cl. 3 of the specimen bill of lading. Quite apart from the important differences between the two codes, in the first two sub-clauses of cl. 3 a clear distinction is drawn between the Hague and the Hague-Visby Rules and their enactment. Italy has repealed its enactment of the Hague Rules and has enacted the Hague-Visby Rules. That is not the situation to which the first sub-clause of cl. 3 refers.[418]

Thus, Tomlinson J held that no bill of lading or document of title was in fact issued and, therefore, that the Hague-Visby Rules were not "compulsorily applicable" because the contract was not covered by a bill of lading or any similar document of title as required by Articles I(b) and X, but that the Hague Rules did apply.

However, in the Court of Appeal[419] Tuckey LJ disagreed with this statement by saying that 'the Hague Rules are not enacted in Italy so the first sentence of the first paragraph of Clause 3 of the bill is not applicable.'[420]

However, on appeal, the cargo claimants no longer suggested that the first sentence of the clause ('the Hague Rules … as enacted in the country of shipment') referred to the Hague-Visby Rules. Instead, they contended that the Hague-Visby Rules applied by virtue of the second part of the clause in that case, referring to trades where the Hague-Visby Rules applied, and because this was a shipment from Italy, it was a trade to which the Hague-Visby Rules applied. It was not necessary to consider whether Article 1(b) was satisfied as the parties had made their intention clear in Clause 3, and, if necessary, the contract should be manipulated to reflect this intention as in *The Saxonstar*.

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[418] *The Happy Ranger* [2001] 2 Lloyd's Rep 530, para [31] (Tomlinson J)
[419] *The Happy Ranger* [2002] 2 Lloyd's Rep 357.
[420] ibid, para [11].
As Longmore LJ further explained in *The Superior Pescadores* [2016] 1 Lloyd's Rep 561, 567 para [36]: 'The judge regarded this as an endorsement of what he (Males J) thought Tomlinson J was saying. But I respectfully doubt that. Tomlinson J had expressly held (para 35) that the (old) Hague Rules did apply with their limitation of £100 sterling package. As I read Tuckey LJ's sentence as cited above, he is saying (obiter) that the (old) Hague Rules were not (any longer) enacted in Italy with the result that if the Hague-Visby Rules were not compulsorily applicable pursuant to the second part of the clause, there would be no limitation all. That, however, was not the position because there had been a bill of lading and the Hague-Visby Rules were therefore compulsorily applicable and the claim was limited to about US$2 million by reason of article IV, r 5 of the Hague-Visby Rule (see para 32)'.

Lastly, it was argued by the appellants that the parties could not have intended the wholly uncommercial result that only the default provisions of Clause 3 applied to the contract where the country of shipment (Italy); the country whose law was the proper law of the contract (England) and the country whose law would apply in the absence of another choice (the Netherlands) are all parties to the Hague-Visby Rules.[421]

In response to these submissions Tuckey LJ propounded:

> To see what the parties intended one must look at the words they used. The heading of the second paragraph of cl. 3 must be read with the body of the paragraph and that refers to 'Trades where the … Hague-Visby Rules … apply compulsorily'. The rules do not define or even refer to trades but I am prepared to accept that they include voyages or carriage of cargoes within the scope of art. X. This article applies 'to every bill of lading relating to the carriage of goods' so to this extent it is compulsory but while the issue of a bill of lading is a necessary condition of the application of the rules, it is not in itself sufficient. The scope of art. X must be subject to art. I(b) so if this contract is not one which is covered by a bill of lading or similar document of title the rules, including art. X, do not apply. If they do not apply they are obviously not compulsory. I do not think it is permissible to manipulate the wording of cl. 3 to delete the words 'apply compulsorily'. It cannot be said that to do so would reflect the intention of the parties because those are the words which they used. If that is what they have agreed the fact that it is arguably uncommercial is of little consequence. This conclusion does of course mean that the second paragraph of cl. 3 is surplusage because the rules would apply compulsorily with or without it, but no real significance can be attached to this in a document of this kind.[422]

Rix LJ dissented on this point and rejected 'a narrow or over-literal view'.[423] He suggested that if the owners were correct in their submission that the Hague-Visby Rules applied compulsorily only if the document satisfied the definition of Article 1(b), that would mean that no regime applied to the document as Article 1(b) was a requirement of both the Hague and the Hague-Visby Rules. This cannot be correct. The parties have expressly agreed that if the Hague-Visby Rules do not apply compulsorily and the Hague Rules are not enacted in the country of shipment – 'articles I to VIII of the Hague Rules shall apply.'[424]

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[421] *The Happy Ranger* [2002] 2 Lloyd's Rep 357 (CA), para [18].
[422] ibid, para [19].
[423] ibid, paras [40] – [48].
[424] See discussion in Nicholas Gaskel, Regina Asariotis R, Yvonne Baatz, *Bills of Lading: Law and Contracts* (1st edn, Informa Law from Routledge 2000), para 2.49, fn 154, and ss 12B, 16B.1 for the reason for excluding Article IX.
See also *The Tasman Discoverer* [2004] UKPC 22; [2004] 2 Lloyd's Rep 647.

Those articles would apply even if the bill of lading does not satisfy Article 1(b), as the parties have agreed contractually that they shall, whether they would apply by their own terms or not, and they do not have to apply compulsorily.

The Court of Appeal held that the second part of the clause only operated when the Hague-Visby Rules applied compulsorily, which would only be the case when there was a bill of lading or similar document of title. Reversing Tomlinson J's decision, all three members of the court came to the conclusion that the bill of lading was a document of title within Article 1(b) of the Rules as, although only a named consignee appeared in the consignee box, the printed words on the front of the bill referred to delivery of the goods to the 'consignee or to his or their assigns.' Read together this made the bill of lading transferable and not a straight bill of lading. Had it been a straight bill of lading and thus not a document of title,[425] the Hague-Visby Rules were not applicable.

Therefore, the Hague-Visby Rules did apply compulsorily. It did not matter whether the clause purported to apply the Hague or Hague-Visby Rules. It is interesting to note that Tuckey LJ said: 'the Hague Rules are not enacted in Italy so the first sentence of the first paragraph of clause 3 of the bill is not applicable'.[426]

Mostly the same view was expressed in the US by the Second Circuit of the US Court of Appeals, where the US had not enacted the Hague-Visby Rules. In *The Seijin,*[427] a contract stated that it was to be governed by 'the Hague Rules contained in the international convention for the unification of certain rules relating to bills of lading … as enacted in the country of shipment'.
It was held that the carriage to be governed by the Hague-Visby Rules, as the country of shipment (England) had enacted them, the enactment describing the new rules as being 'the Hague Rules as amended by the Brussels 1968 Protocol'.[428]

In *The MSC Amsterdam*[429], a cargo of copper cathodes was shipped from South Africa to China. The bill of lading was expressly governed by English law and Clause 1(a) 'Paramount Clause' provided, *inter alia*, '… for all trades, …, this B/L shall be subject to the 1924 Hague Rules with the express exclusion of article IX, or, if compulsorily applicable, subject to the 1968 Protocol (Hague-Visby) or any compulsory legislation based on the Hague Rules and/or said Protocols …'

[425] This decision precedes the decision of the House of Lords in *The Rafaela S* which decides that a straight bill of lading is a document of title.
[426] *The Happy Ranger* [2002] 2 Lloyd's Rep 357, 360, para [11].
[427] *JCB Sales Ltd v Wallerius Lines, The Seijin* 124 F.3d 132 (1997).
[428] ibid, paras [27]–[34] (Van Graafeiland CJ).
[429] *The MSC Amsterdam* [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep 622 and *Trafigura Beheer BV v Mediterranean Shipping Co SA, The MSC Amsterdam* [2007] EWHC 944 (Comm).

Thus the facts differed from *The Happy Ranger* where the port of shipment in Italy was a Contracting State. The Hague-Visby Rules were part of directly enacted statutory law in the United Kingdom with respect to carriage from any contracting State,[430] and were also part of directly enacted statute law of the Republic of South Africa in respect of carriage from South Africa.[431] However, although South Africa had enacted the Hague-Visby Rules, it had never signed the 1968 Protocol and was therefore not a 'contracting State' within the meaning of Article X(a) and the Schedule to the 1971 Act.

The shipowners contended that it was the Hague Rules, rather than the Hague-Visby Rules, that governed the carriage. The default position was that the 1924 Hague Rules applied, and the Hague-Visby Rules could only apply if it were compulsory to apply them. In the present case, it was not compulsory to apply the Hague-Visby Rules because the bill of lading was not issued in a 'contracting State', the carriage was not from a 'contracting State', and the bill of lading contract did not provide that the Hague-Visby Rules were to govern the contract – only that they were to govern the contract if compulsorily applicable which, as a matter of English law, they were not.

The cargo interests accepted that South Africa was not a 'contracting State' and that neither Article X(a) nor X(b) could apply. They submitted however that the words 'compulsorily applicable' indicated that the Hague-Visby Rules were intended to apply if they were applicable by *the law in force* at the port of shipment.

At first instance, Aikens J gave judgment in favour of the cargo interests, and he ordered the shipowners to deliver the cargo or pay the full value of the cargo. The judge held, *inter alia*, that as a matter of construction of Clause 1(a) of the bill of lading, the Hague-Visby Rules applied as a matter of contract rather than by 'force of law'.

The shipowners appealed. In the Court of Appeal, the cargo interests argued to the effect that the bill of lading should, as a matter of contract, be construed to apply to the Hague-Visby Rules if *compulsorily applied by the law of the country of shipment*, 'because that was the only way in which the shipowners could preserve their (*ex hypothesi* desirable) exclusive choice of English law and jurisdiction'. They pointed out that 'a particular feature of the Hague-Visby Rules (at any rate enacted in England) was their mandatory effect. If a claim was brought in England but the proper law of the contract applied a less favourable limit than the HVR (eg the Hague Rules limit) any choice of jurisdiction for the courts which

[430] The Carriage of Goods by Sea Act 1971 of the UK.
[431] The Carriage of Goods by Sea Act 1986 of South Africa.

applied the proper law would be defeated by the requirement of the *lex fori* that the rules be mandatorily applied … So argued, any bill of lading subject to English law should be construed, if possible, to provide for the application of the Hague-Visby Rules'.[432] However, such reasoning would put 'the contractual cart before the legal horse'.

Longmore LJ propounded:

> If a set of rules is applicable only if compulsorily applicable one has to look to the proper law of the contract to determine if they are applicable. One cannot say that the proper law of the contract would apply the rules compulsorily if a claim were brought in England and then say that the rules must therefore apply contractually if the fact of the matter is that the rules are not compulsorily applicable. The only reason why the rules are not compulsorily applicable is that, although South Africa has enacted the rules, it is for some reason not a "contracting State". The reason for this is puzzling but irrelevant. The fact is that the HVR are not compulsorily applicable and that is the end of the matter. Of course, if the claim had been brought in South Africa and if South African law were the same as that declared by the House of Lords in *The Hollandia*,[433] then the South African courts might not have stayed any action brought by the claimants on the ground that English law would not apply the HVR and that would be contrary to the mandatory provisions of South African law. But that would be a different case, not this case.[434]

The Court of Appeal held that on the true construction of the bill of lading the shipowners accepted Hague Rules obligations, but only accepted the Hague-Visby Rules obligations if they were forced to do so. They could only be forced to do so if the proper law of the contract compelled it, or if the place where the cargo owners chose to sue them compelled it. On the facts of the present case, neither law compelled it. Accordingly, it was the Hague Rules, rather than the Hague-Visby Rules, that were applicable.[435]

The words 'compulsorily applicable' have consistently, as a matter of English law, been given the meaning of 'applicable according to the proper law of the contract',[436] and therefore neither the proper

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[432] *The MSC Amsterdam* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622, para [17].
[433] *The Hollandia* [1983] 1 Lloyd's Rep 1; [1983] 1 AC 565 where the English courts refused to stay an action brought in England even though the parties had agreed Dutch law and jurisdiction because a claim brought in Holland would have been subject to the Hague Rules 1924 limit and not the HVR limit. See description of the case above.
[434] *The MSC Amsterdam* [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep 622, para [18].
[435] ibid, para [16].
[436] With reference to *Holland Colombo Trading Society Ltd v Alawdeen* [1954] 2 Lloyd's Rep 45, 53; *The Agios Lazaros* [1976] 2 Lloyd's Rep 47; [1976] QB 933, 968D-H (Goff LJ); *The Komninos S* [1991] 1 Lloyd's Rep 370 (where, although there was no reference to compulsory applicability, a reference to English law was held to be insufficient to incorporate the HVR) and *The Happy Ranger* [2001] 2 Lloyd's Rep 530, 540 para [34] (Tomlinson J) and [2002] 2 Lloyd's Rep 357, 361–362, para [20] (Tuckey LJ).

law nor the law of the forum made the Hague-Visby Rules compulsorily applicable to the bill of lading.[437] In the case of the Hague-Visby Rules or some legislation based on those rules, they both had to apply compulsorily and in this case they did not.

The problem which arose in *The MSC Amsterdam* would not arise in those clauses paramount that refer to the legislation in force in the country of shipment. In *The BBC Greenland,*[438] the bill of lading contained a Clause 3 'Liability Under the Contract' that provided, *inter alia*, for the Hague Rules to apply but continued that '… in trades where [the Hague-Visby Rules] apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading … Unless otherwise provided herein, the Carrier shall in no case be responsible for loss of or damage to deck cargo …'[439] The Law and Jurisdiction Clause provided for 'any dispute arising under or in connection with this Bill of lading shall be referred to arbitration in London'. However, the bill of lading further provided in Special Clause B 'US Trade. Period of Responsibility', *inter alia*, that '… in the event that US COGSA applies, then the Carrier may at the Carrier's election, commence suit in a court of proper jurisdiction in the United States in which case this court shall have exclusive jurisdiction'. The recap included a provision giving the defendants (the carrier) liberty to carry the tanks as deck cargo.

The tanks were carried on deck from Italy to the USA and sustained damages. According to Smith J 'a central issue between the parties, … was whether the carriage had been subject to the Hague-Visby Rules. The claimants contend that it was. The defendants contend that it was not because the tanks were deck cargo, that is to say, "cargo which by the contract of carriage is stated as being carried on deck and is so carried", as per Article I(c). If they were deck cargo, they were not "goods" within the definition of the Rules, and therefore the bill of lading did not relate to the "carriage of goods" and, as the defendants contend, therefore the Rules do not apply to it, as per Article X of the Rules.'[440]

It was held that 'The Hague-Visby Rules did not apply to the carriage because the tanks were deck cargo within the exception in Article I(c). The master's remark on the front of the bill was to be interpreted as a

[437] See also discussion in Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LCMLQ 225, 259.
[438] *Sideridraulic Systems SpA and Another v BBC Chartering & Logistic GmbH & Co KG, The BBC Greenland* [2011] EWHC 3106 (Comm); [2012] 1 Lloyd's Rep 230.
[439] Clause 3 Liability under the contract.
(a) Unless otherwise provided herein, the Hague Rules … dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply. In respect of shipments to which there are no such enactments compulsorily applicable, the terms of arts I–VIII inclusive of said Convention shall apply. In trades where the International Brussels Convention 1924 as amended by the Protocol signed Brussels on 23 February 1968 ('the Hague-Visby Rules') apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading … Unless otherwise provided herein, the Carrier shall in no case be responsible for loss of or damage to deck cargo …
[440] *The BBC Greenland* [2011] EWHC 3106 (Comm); [2012] 1 Lloyd's Rep 230, para [2].

statement that the tanks were to be carried on deck. The defendants could also rely on a previous course of conduct whereby the master's remarks on the bills for the shipment of tanks on other vessels could only be understood as stating which tanks were carried on deck.'[441]

It was similarly found that the parties had not agreed that the Hague-Visby Rules should apply to deck cargo. Pursuant to Clause 3(a) the provisions of the relevant legislation should be considered incorporated in the bill in trades where the Hague-Visby Rules applied compulsorily, but if the tanks were deck cargo the Hague-Visby Rules did not apply compulsorily.[442]

In regards to a proper forum, if the tanks had not been deck cargo the American courts would not have had jurisdiction. It was found by the judge that the parties agreed that a proper forum in the US should have exclusive jurisdiction only in the event that the COGSA 1936 applied to the carriage. The parties could not have intended that COGSA 1936 should apply, so as to import American jurisdiction, notwithstanding that the HVR also applied to the carriage. The COGSA 1936 and the HVR provided for different and inconsistent regimes.[443]

In *The Golden Endurance*,[444] a cargo of wheat bran pellets was shipped to Morocco from three ports in Gabon, Togo and Ghana. They were the subject of three separate bills of lading[445] all of which provided for 'freight payable as per Charter-Party dated 11 June 2013', and for General Clause Paramount on a reverse side.[446] On the vessel's arrival in Morocco, it became apparent that the cargo was damaged by the presence of live insects and wet and black mould.

One of the issues before Burton J was whether the dispute between the parties should be resolved by reference to the Hague Rules (which would be the case if the proceedings were tried in The High Court or arbitration in London), or by reference to the Hamburg Rules, as would be the case in the Moroccan

[441] ibid, paras [22] and [23].
[442] ibid, para [27]. Andrew Smith J similarly referred to 'the very point' made in the third edn of *Voyage Charters* para [85.66], fn 92: '… the common form of words in bills of lading that the Hague-Visby Rules apply to a bill of lading in trades where those Rules compulsorily apply will not achieve the effect of incorporating the Rules unless they would otherwise so apply'
[443] ibid, para [30].
[444] *Golden Endurance Shipping SA v RMA Watanya SA, The Golden Endurance* [2014] EWHC 3917 (Comm); [2015] 1 Lloyd's Rep 266.
[445] The Owendo Bill, the Lomé Bill and the Takoradi Bill.
[446] (2) General Paramount Clause provided for:
(a) the Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.
(b) Trades where Hague-Visby Rules apply …'

courts, where by legislation, any such dispute must be decided according to Hamburg Rules and the ambit of the Hague Rules is ousted.

Burton J considered, *inter alia*, the construction of a General Clause Paramount providing that when the Hague Rules are not enacted in the country of shipment, 'the corresponding legislation of the country of destination shall apply'. The cargo interests argued that where the country of destination was Morocco, which had imposed by legislation the Hamburg Rules, that is, "corresponding legislation", so that the Hamburg Rules would apply to the shipment from Gabon, where there is no enactment of the Hague Rules. At a later stage, it was not necessary for the judge to decide this point and therefore he did not do so. He only expressed a provisional view that the contrary view was 'more likely to be correct'.[447]

In *The Superior Pescadores,*[448] the bills of lading were for a shipment of equipment from Belgium to Yemen. The contracts contained in or evidenced by the bills of lading were governed by the law of the country where the carrier had his principal place of business. That was a Panamanian company; however, the parties agreed that the claim would be subject to English law and jurisdiction. The UK COGSA 1971 rendered The HVR applicable as a matter of statute law when the carriage was from a port in a contracting state, which Belgium was. However, the application of the Hague Rules would have resulted in a higher limit of liability.

The bills of lading contained a clause paramount that stated: 'The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.'

The cargo interests made claims against the shipowners in respect of damage to the cargo of machinery and equipment while the vessel *Superior Pescadores* was crossing the Bay of Biscay. 'The shipowners paid the cargo interests the amount of the Hague-Visby package limit, equivalent to just over USD 400,000. However, the cargo interests said that the clause paramount constituted a contractual incorporation of the 1924 Hague Rules, and argued that, to the extent that the 1924 Hague Rules provided for higher limits than the 1968 Hague-Visby Rules, the cargo interests were entitled to those higher

[447] *The Golden Endurance* [2014] EWHC 3917 (Comm), [2015] 1 Lloyd's Rep 266, para [52].
[448] *The Superior Pescadores* [2016] EWCA Civ 101, [2016] 1 Lloyd's Rep 561 and, the High Court case – *The Superior Pescadores* [2014] EWHC 971 (Comm), [2014] 1 Lloyd's Rep 660.

sums.'[449] However, the shipowners contended that 'it is not open to the Claimants to pick and choose between the Hague-Visby package limit and the Hague package limit, depending on which gives them more'.

The first issue was whether, on the true construction of the paramount clause, it operated as an agreement between the cargo owner and the shipowner that the (old) Hague Rules applied or that the Hague-Visby Rules applied. If it was an agreement that the Hague-Visby Rules applied, then there was no agreement between the parties that a different regime in the form of the (old) Hague Rules was to apply. But if it was an agreement that the (old) Hague Rules applied, a second issue arose, namely whether the paramount clause constituted an agreement to fix maximum amounts other than those contained in Article IV, Rule 5(a) of the Hague-Visby Rules for the purposes of Article IV, Rule 5(g) of those Rules. There was then a third issue, namely whether the date of conversion into relevant currency of the limit of GBP 100 gold per package or unit was the date when the cargo had been delivered in its damaged condition or the date of the judgment.[450]

At first instance, Males J held that (1) The clause paramount was to be construed as providing for the application of the Hague Rules, not the Hague-Visby Rules;[451] (2) It was possible for the parties to a bill of lading contract to which the Hague-Visby Rules applied to agree on the original Hague Rules limitation figure of £100 gold value. Effect would be given to such an agreement to the extent that it resulted in a higher limit of liability than the amount provided for by Article IV, Rule 5(a) of the Hague-Visby Rules. However, the parties had not made any such agreement in the present case. They would have known that the original Hague Rules would not apply because Belgium was a Hague-Visby state. It was most unlikely that the parties intended a single contract of carriage to be covered simultaneously by two differing limitation of liability regimes. The clause paramount purporting to incorporate the original Hague Rules was to be regarded as surplusage which could be ignored. The applicable package limitation amount was the Article IV Rule 5(a) amount under the Hague-Visby Rules;[452] (3) If, contrary to the court's conclusion, the relevant package limitation figure was the original Hague Rules limit, the time at which the gold value was to be converted into national currency was not the date of judgment but the date of delivery of the goods in their damaged condition.[453]

[449] *The Superior Pescadores* [2016] 1 Lloyd's Rep 561, 561.
[450] ibid, para [10].
[451] *The Superior Pescadores* [2014] 1 Lloyd's Rep 660, paras [36], [37], [39].
[452] ibid, paras [39], [51], [55].
[453] ibid, para [59].

The cargo owners were therefore confined to recover damages limited by reference to Article IV Rule 5(a) of the Hague-Visby Rules. That limit was calculated at the date of judgment as required by the Merchant Shipping Act 1995.

The main question in the appeal was whether in a case which was otherwise governed by the new (1968) Rules, a common form of paramount clause incorporated the (old) Hague Rules which in fact gave rise to a higher limit than that provided for in the (new) Hague-Visby Rules and whether, in that event, the old (and higher) limit was available to the cargo owner if the cargo was lost or damaged.[454]

The Court of Appeal questioned if it can really be the case that a paramount clause in a contract made over 30 years earlier is still to be taken as incorporating the 1924 Rules rather than the 1968 Rules in 2008?[455] The Court of Appeal proceeded to look at existing authorities.[456] Longmore LJ considered that any case, in which a bill of lading was issued in 2008 incorporating the Hague Rules as enacted in the country of shipment and in which the country of shipment had (as here) enacted the Hague-Visby Rules, should be regarded as a case which was subject to the Hague-Visby Rules rather than the (old) Hague Rules.[457] The same view was confirmed in the foreign jurisdictions by, for example, the second circuit of the United States Court of Appeals in an appeal from the District Court for the Southern District of New York where the Hague-Visby Rules have not been enacted.[458]

The Court of Appeal held that the Hague-Visby limits applied as any case in which a bill of lading was issued in 2008 incorporating the Hague Rules as enacted in the country of shipment and in which the country of shipment had enacted the Hague-Visby Rules should be regarded as a case that was subject to the Hague-Visby Rules rather than the Hague Rules.

So, the conclusion of Males J that the Hague-Visby limits applied was upheld, but based on the other reasons. Longmore LJ noted that the judge in the first instance felt constrained by authority to hold that on true construction of the clause paramount the 1924 Hague Rules rather than the 1968 Hague-Visby Rules should apply. The judge had no evidence as to the method by which Belgium in fact enacted the Hague-Visby Rules and had, therefore, to proceed on the assumption that Belgian law was the same as

[454] *The Superior Pescadores* [2016] 1 Lloyd's Rep 561, para [1], Introduction.
[455] ibid, para [16].
[456] Especially *The Agios Lazaros* [1976] QB 933, [1976] 2 Lloyd's Rep 47; *The Marinor* [1996] 1 Lloyd's Rep 301; *The Bukhta Russkaya* [1997] 2 Lloyd's Rep 744; *The Fjellvang* [1999] 2 Lloyd's Rep 685; *The Happy Ranger* [2002] 2 Lloyd's Rep 357.
[457] *The Superior Pescadores* [2016] EWCA Civ 101; [2016] 1 Lloyd's Rep 561, para [37].
[458] See *JCB Sales Ltd v Wallerius Lines, The Seijin* 124 F 3d 132 (1997).

English law, an assumption that was perhaps likelier in the present case than in some other cases where the assumption had been made.

The rest of the Court agreed with this approach (including Tomlinson LJ, who conceded that his previous judgement in *The Happy Ranger* rested on a 'mistaken approach'), holding that the Hague-Visby Rules were incorporated both compulsorily and contractually, there was no need for the Court to consider whether contractually incorporating the Hague Rules would allow the cargo interests to pick and chose their preferred limitation regime.

Given the prevalence of bills of lading incorporating a clause paramount with the "Hague Rules … as enacted" formula, the judgment in *The Superior Pescadores* may be of considerable importance to all those involved in the trade. If there is neither a specific clause paramount stating that the Hague-Visby Rules are to apply nor a reference to the 'general clause paramount', but a reference to a 'clause paramount', in the light of the decision in *The Superior Pescadores* it is likely that this would mean the Hague-Visby Rules.[459]

However, not all the maritime scholars agree with this point of view. For example, Bundock argues that 'the clause paramount in *The Superior Pescadores* was in an unusual form, and accordingly the significance of the judgment may be limited. Bundock submits that the Court 'gave insufficient weight to the actual wording used by the parties', and that 'it was unduly influenced in its construction by what is considered was the prevalence of the Hague-Visby Rules'.[460] With reference to the first edition of Gaskell,[461] such an assumption shall be unsound as 'almost 50 years after the Visby Protocol it remains an everyday occurrence to encounter contracts in which the parties choose to apply the Hague Rules … in preference to the Hague-Visby Rules'.[462]

A clause that specifically incorporates UK COGSA 1924 'and subsequent amendments' will not incorporate the Hague-Visby Rules,[463] however.

[459] However, not for the shipments out of the Hague Rules' countries.
[460] Michael Bundock, 'The Clause Paramount: Hague or Hague-Visby Rules? (*The Superior Pescadores*: Analysis and Comment)' (2018) 24 JIML 100, 104.
[461] Nicholas Gaskell, Regina Asariotis, Yvonne Batz, *Bills of Lading: Law and Contracts* (1st edn, Informa Law from Routledge 2000), 55, fn 153: 'Carriers seem determined to retain the Hague Rules in preference to the Hague-Visby Rules wherever they can'.
[462] Michael Bundock, 'The Clause Paramount: Hague or Hague-Visby Rules? (*The Superior Pescadores*: Analysis and Comment)' (2018) 24 JIML 100, 103.
[463] See, for example, *Homburg Houtimport BV v Agrosin Private Ltd and Others, The Starsin* [2003] UKHL 12; [2003] 1 Lloyd's Rep 571, esp paras [119] and [137] (Lord Hobhouse).

Chapter 5.1: The general principles of incorporation of a clause paramount in charterparties

The incorporation of the Rules may have an effect by way of consent, merely giving them the status of contractual terms, which have to be construed together with the other provisions of the contract. The difficulty of construction often arises because the parties have chosen to use a particular form of standard wording that is unsuitable for the particular transaction.[464] Thus quite frequently a clause paramount is simply incorporated blindly into the existing form of the charterparty,[465] without any attempt to reconcile its articles with those of the mass of fine print text that is often found in standard contracts.[466] In the earlier cases it was said that the Hague Rules 'cannot be considered to be part of the contract … unless the parties to it have clearly agreed that they shall apply; … that intention should be expressed in clear terms'.[467]

In 1958 Lord Reid identified a clause paramount as 'ill-designed' that was chosen by the parties to the case on the simple basis that it had been used before, 'who may have been very vague in what they intended or what they said'.[468] However, the courts are not concerned with what the parties may have intended, but the courts are concerned with interpreting the words which the parties have chosen to use in their contracts.[469] As Richard Calnan said in the preface to his book,[470] unlike the substantive law – for instance, the law of tort, or the law of property – interpretation is an ultimately intuitive process. There are no rules in this respect. There are only basic principles to guide the interpreter. But sometimes these principles pull in different directions.

In seeking to interpret charterparties and transport documents with voluntary incorporation of the Hague Rules, the courts have given weight to the following aspects:

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[464] A good example is *The Alexion Hope*. This case concerned a claim by the claimant bank under a mortgagees' interest policy. One gets a flavour of the difficulties of construction in that case by the opening words of the Judgment of Lloyd LJ in *Schiffshypothekenbank Zu Luebeck AG* v *Norman Philip Compton, The Alexion Hope* [1988] 1 Lloyd's Rep 311 (CA) 312: 'In this case we are concerned with a new type of insurance. It seems a pity, therefore, that the parties should have incorporated their contract in a form which was described as long ago as 1791 by Buller J as absurd and incoherent: *Brough* v *Whitmore* (1791) 4 TR 206, 210'.
See Sir Bernard Eder, 'The Construction of Shipping and Marine Insurance Contracts: Why Is It So Difficult?' (2016) LMCLQ 220, 222.

[465] As Selvig wrote: 'Together with other clauses customarily attached to charterparties, it might have been inserted therein – more or less as a matter of routine – by the shipbroker drafting the charterparty'. See Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, 209.

[466] See, for example, Michael J. Mustill, QC, 'Carriage of Goods by Sea Act 1971', a lecture given before Den Norske Sjorettsforening (Norwegian Maritime Law Association) in Oslo on 18th October, 1971.

[467] *The St Joseph* (1933) 45 Lloyd's Rep 180, 187 (Bateson J).

[468] *The Saxonstar* [1958] 1 Lloyds' Rep 73, 92.

[469] ibid, 93.

[470] Richard Calnan, *Principles of Contractual Interpretation* (2nd edn, Oxford University Press 2017), preface.

The First Aspect of Incorporation

The Incorporation of a clause paramount does not mean that the parties wish to incorporate the *ipsissima verba* of the Rules, rather they wish to incorporate into their contractual relations between owners and charterers the same standard of obligation, liability, right and immunity as under the Rules subsists between carrier and shipper.[471]

The subject principle is derived from *Hamilton & Co v Mackie & Sons*,[472] the case where the question related to the incorporation of charter-party terms in a bill of lading, and Lord Esher, MR said that the procedure to be followed was as follows: 'The conditions of the charter-party must be read verbatim into the bill of lading as though they were there printed *in extenso*. Then if it was found that any of the conditions of the charter-party on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded.'[473] In *The Socol 3* case it was further added by Hamblen J that the process of verbal manipulation should 'be carried out intelligently [] rather than mechanically and only in so far as it is necessary to avoid insensible results',[474] as it is quite obvious that there is much in the Rules which in relation to the charterparties may be insensible or inapplicable, and must be disregarded.

In *The Saxonstar,*[475] Lord Morton strived to apply three 'well-known' principles of construction, which appeared to be relevant at the time.

(1) The first principle was stated by Lord Wright in *Hillas v Arcos*:

> Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the Court should seek to apply the old maxim of English law *verba ita sunt intelligenda ut res magis valeat quam pereat*.[476]

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[471] *The Saxonstar* [1958] 1 Lloyd's Rep 73, 81 col 2 (Viscount Simonds) with reference to the first instance decision of Devlin J: *The Saxonstar* [1958] 1 Lloyd's Rep 73 and with citation of *Scrutton on Charterparties*, (16th edn), 456n.
[472] *Hamilton & Co v Mackie & Sons* (1889) 5 TLR 677.
The same principle was approved in *TW Thomas & Co, Ltd v Portsea Steamship Company, Ltd* [1912] AC 1.
[473] *The Saxonstar* [1957] 1 Lloyd's Rep 79, 85–86 (Devlin J).
[474] *The Socol 3* [2010] 2 Lloyd's Rep 221, 227.
[475] *The Saxonstar* [1958] 1 Lloyd's Rep 73.
[476] *Hillas & Co, Ltd v Arcos, Ltd* (1932) 43 Ll L Rep 359, 367, (1932) 38 Com Cas 23, 36.

Thus, following this passage, if 'the parties have expressly stated that "Paramount clause" is deemed to be incorporated into the charterparty, [one] should strive to give effect to this incorporation, rather than render this wording meaningless. [All] reasonable implications should be made to this end …'[477]

In the first instance of *The Saxonstar,*[478] Devlin J came to the same conclusion by applying the *Hamilton v Mackie*[479] principle that the plain object of Clause 52[480] was to incorporate the paramount clause, and that adopting the principle '*Falsa demonstratio non nocet*' the paramount clause should be corrected to read: 'This *charter-party* shall have effect subject to' the US Act of 1936, notwithstanding Section 5 of the Act; and that accordingly the provisions of the US Act should affect the rights and liabilities of the parties under the charter-party.[481]

(2) The second principle was stated by Lord Wright in the same case:

> That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.[482]

In the first instance of *The Saxonstar,* Devlin J further added: '… this Court does not exist for the purpose of correcting the exercises of commercial men but for the purpose of giving effect to their intentions, where it can penetrate to them through the very often dubious forms of words which they use…'[483]

(3) The third principle was stated by Loreburn LC in *Nelson Line v James Nelson & Sons*[484]:

> The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties

[477] Just as the House of Lords did in *Hillas (WN) & Co Ltd v Arcos Ltd* (1932) 38 Com Cas 23, 36–38.
See *The Saxonstar* [1958] 1 Lloyd's Rep 73, 85 (Lord Morton).
[478] *The Saxonstar* [1957] 1 Lloyd's Rep 79.
[479] *Hamilton & Co v Mackie & Sons* (1889) 5 TLR 677.
[480] Clause 52 provided for the following statement: 'It is agreed that the … Paramount Clause … as attached, [is] to be incorporated in this charter-party'.
[481] *The Saxonstar* [1957] 1 Lloyd's Rep 79, 85.
[482] *Hillas & Co, Ltd v Arcos, Ltd* (1932) 43 Ll L Rep 359, 367; (1932) 38 Com Cas 23, 36–37.
[483] *The Saxonstar* [1957] 1 Lloyd's Rep 79, 85–86.
[484] *Nelson Line (Liverpool), Ltd v James Nelson & Sons, Ltd* [1908] AC 16.

remain; and such a contract is not proved by producing language which may mean that and may mean something different.[485]

In the same case, Lord Loreburn further assumed that … 'it is useless to draw the attention of commercial men to the risks they run by using confused and perplexing language in their business documents. Courts of Law have no duty except to construe them when a question arises'.[486]

Critical consideration of three principles of construction applied in The Saxonstar

In 1997 in *Investors Compensation Scheme v West Bromwich Building Society*[487] it was submitted that a "fundamental change" has overtaken the law of contract interpretation:[488] in the words of Lord Hoffmann, 'almost all the old intellectual baggage of "legal" interpretation had been discarded'. The way in which contracts are interpreted has been assimilated 'to the common sense principles by which any serious utterance would be interpreted in ordinary life'.[489]

However, many commentators have been critical of this view.[490] As noted by Evans LJ, 'the old intellectual baggage has been discarded but the courts are not travelling light. The cabin trunks have been replaced by airline suitcases; the contents are much the same though they are expressed in more modern language'.[491] Thus, for example, in *The Tychy (No 2)* the Court of Appeal found a need for a 'little intellectual hand luggage'.[492] And the *Canada Steamship*[493] guidelines of Lord Morton were dusted down and revisited in *HIH Casualty and General Insurance v Chase Manhattan Bank.*[494]

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[485] ibid, 19.
[486] ibid, 20.
[487] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896; [1998] 1 All ER 98;
[488] Said to be as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, pages 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989.
[489] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913, (Hoffmann LJ)
[490] See, for example, Gerard McMeel, 'Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation' (2003) 119 LQR 272; Ewan McKendrick, 'Interpretation of Contracts: Lord Hoffmann's Restatement', in Worthington (ed), *Commercial Law and Commercial Practice* (2003) 139, 154–157; Lord Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 LQR 577; Andrew Burrows, 'Construction and Rectification', in Burrows & Peel (eds), *Contract Terms* (2007) 77; David McLauchlan, 'Contract Interpretation: What Is It About?' (2009) 31 Sydney L Rev 5. See reference in David McLauchlan, 'Interpretation and Rectification: Lord Hoffmann's Last Stand', 2009 NZ L Rev 431.
[491] *BOC Group Plc v Centeon LLC* [1999] 1 All ER (Comm) 970, cited in Gerard McMeel, *The Construction of Contracts* (2nd edn, OUP 2011), 60–61, para [1.115].
[492] *The Tychy (No 2)* [2001] EWCA Civ 1198; [2001] 2 Lloyd's Rep 403, para [29] (Lord Phillips MR): 'With respect to Lord Hoffmann, we are inclined to think that a little intellectual hand luggage is no bad thing when approaching the task of construing a contract'. However, this joke can be traced back to least Christopher Clarke QC, 'Interpretation and Rectification of Contracts' (Unpublished Commercial Bar Association (COMBAR) Lecture, 1998).
[493] *Canada Steamship Lines Ltd v The King* [1952] AC 192 PC.
[494] *HIH Casualty and General Insurance v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349.

While it may be validly argued that some old principles and 'rules of law' have survived, the general approach of the modern courts may be formulated as follows:

> the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.[495]

The author of this thesis would like to investigate if the reasoning pronounced by their Lordships in *The Saxonstar* case can be sustained given the latest developments in the modern approach to the contract interpretation.

The first principle of construction applied in *The Saxonstar* applied two Latin maxims: 'the contract should be interpreted so that it is valid rather than ineffective',[496] and 'a false description does not vitiate when there is no doubt which person is meant' (or, most accurately, 'mere false description does not make a law or an instrument inoperative once the content of the law or of the document can be ascertained unequivocally')[497].

Fundamentally, the Latin maxims constituted a significant part of the 'intellectual baggage': the law of deeds and contracts were notoriously replete with these dictums embodying supposed rules of construction.[498] But in modern accounts of the principles of contractual interpretation, these 'wise saws' have been conspicuous by their absence. In the twenty-first century, when the judiciary made it quite clear that the courts are no longer hospitable to legal Latin, it is unsurprising that such maxims are fading from the scene.[499]

The problem was identified by Karl Llewellyn already writing over half a century ago. In the context of statutory interpretation, he argued that, until the court whole-heartedly embraced pragmatic or purposive

[495] See, for example, *Rainy Sky v Kookmin Bank* [2012] 1 Lloyd's Rep 34, para [21] (Lord Clarke) with reference to the principles laid down by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 and Lord Neuberger in *Pink Floyd Music Ltd v EMI Records Ltd* [2011] 1 WLR 770.
[496] See translation of the Latin maxim *verba ita sunt intelligenda ut res magis valeat quam pereat*, for example, in *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 All ER 545, 557 (Lord Staughton LJ).
[497] '*Falsa demonstatio non nocet cum de corpore (persona) constat*'.
[498] For a 'traditional account' see Gerald Dworking, *Odgers' Construction of Deeds and Statutes* (5th edn, London 1967) and Sir Robert Goff, 'Commercial Contract and the Commercial Court' [1984] LMCLQ 382, especially 385–386.
[499] See Professor G. McMeel, *McMeel on The Construction of Contracts* (3rd edn, OUP 2017), para [8.01].

approaches to construction, 'there must be a set of mutually contradictory correct rules on how to construe Statutes'.[500]

However, some of these 'wise saws' still have a contribution to make to construction:[501] Firstly, a maxim may simply reflect a rule of public policy which may still need to be weighed by the court in carrying out an exercise in construction; and secondly, a maxim may represent a presumptive rule of language that may assist in determining the result where the contract is vague and ambiguous.[502] But, by the end of the day, as Professor Patterson remarked: 'the maxims of interpretation sometimes quoted in opinions are usually less reliable as predictors than as rationalisers of decisions'.[503] It is submitted that some of these saws may constitute a part of the intellectual hand luggage of the twenty-first century.

How the Latin maxims were applied in *The Saxonstar* case 'whittled away' the whole principle of construction and made it ridiculous. It was a 'misapprehension'.[504] In order for the maxim to be properly applied, there must be an adequate and sufficient description of the subject in the absence of the rejected words. If the words sought to be rejected are themselves part of the essential description of the subject, the court cannot apply the maxim. In a similar way, if the description, taken as a whole, does fit some subject without inaccuracy, the court cannot reject part of the description by the application of this principle.[505] Thus, where the subject exists that is precisely described by the written description, the maxim can have no application.

The weakness of the first principle of construction applied in *The Saxonstar* is that the set of Hague Rules were embodied in an International Convention in order to transfer them into legal rules binding upon all shipowners, with or without their consent. Article 1(b) contains a qualifying phrase that refers to the specific types of contracts 'covered by a bill of lading or any similar document of title'. Even so, the bill of lading may well be not the primary document in shipping, especially in tramp shipping that is done on a basis of free contract: 'the primary document is the charter party, and the charter party is gone through by both parties and signed by both parties. It is generally signed by the merchants and signed over by a representative of the shipowner, at any rate he acts for the owner and the owner must abide by what he

[500] Karl N. Llewellyn, 'Remarks on The Theory of Appellate decision and the Rules or Canons about How Statutes are to be Construed' (1949–50) 3 Vand L Rev 395, 399

[501] See Scottish Law Commission, *Report on Interpretation in Private Law* (ScotLawCom No 160, October 1977).
See also Lawrence M. Solan, *The Language of Judges* (The University of Chicago Press 1993), 37–38, and Lorna Marie, *The Judges and Lawyer's Companion*, Lulu.com, 2017.

[502] See discussion, for example, in *McMeel on The Construction of Contracts* (3rd edn, OUP 2017), para 8.02, fns 518 with reference to the works of K. Llewellyn.

[503] See Professor E. Patterson, 'The Interpretation and Construction of Contracts' (1964) 64 Colum L Rev 833.

[504] In the words of Lindley MR in *Cowen v Truefitt Ltd* [1899] 2 Ch 309.

[505] Sir Kim Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2015), para [9.05].

does. Therefore, the cargo interests are as regards tramp shipping in a much better position to protect their interests, and as there are so many trades in the world it is natural that there will be different charter parties, and it is possible for both parties, and convenient for both parties to be able to do so, to put such special conditions into any given charter party that any given special trade may demand'.[506]

The point is that the call for reform in the early 1920th and the reason that the Rules were brought into being at all, had been owing to the position as regards liner bills of lading.
In the context of charterparties the parties shall retain absolute freedom to conclude on the terms they wish and that they shall insert whatever clauses they like. By accepting incorporation of the Hague Rules in a way of blind application of Latin maxims one simply neglects the subject of the law reform and the purpose of the charterparty.

The second principle proclaimed by Lord Morton in *The Saxonstar* was based on the assumption that the Courts should attempt to find a solution in the interests of the contract, having regard to its overall nature and purpose by implication of terms what are just and reasonable, as the contract is a governing instrument and made to yield a solution. The parties' intention must be ascertained from the document in which they have elected to enshrine their agreement.[507]

However, it may suddenly appear that, in the light of the admissible background, the contract does not apply to the events that have arisen in reality. Or oppositely, it might lead to the application of the contract's provisions to the unexpected event: some clauses may be embedded in a contract on a simple basis that 'it-has-always-been-like-this in the previous agreements'[508], but the way "how to interpret" is only known by a few (mostly by the lawyers, and not commercial people).

The point is that construction is 'a composite exercise, neither uncompromisingly literal nor unswervingly purposive'.[509] "A commercially sensible construction" may be reached, firstly, by interpretation of the express terms that are chosen by the parties, and secondly, by development of the related technique of implication.

In 1997, writing extra-judicially, Lord Steyn advanced the following principle:

[506] See the explanation provided by Mr. A. P. Möller (Denmark*):* Francesco Berlingieri, *The Travaux Preparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI), 94-95.
[507] The principle which was expressed in the past, for example, in *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85.
[508] As an investigation has shown this is the common explanation provided by an average commercial man in regards to incorporation of a clause paramount in charterparty.
[509] *Arbuthnott v Fagan* (30 July 1993) [1996] LRLR 143 (Sir Thomas Bingham MR). The same opinion has recently been expressed in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] 2 WLR 1095; [2017] 4 All ER 615.

> Often there is no obvious or ordinary meaning of the language under consideration. There are competing interpretations to be considered. In choosing between alternatives a court should primarily be guided by the contextual scene in which the stipulation in question appears. And speaking generally, commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties.[510]

And he repeated much the same judicially:

> Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.[511]

The appropriate solution may come from establishing the 'presumed common intention' *of* the parties.[512] However, the problem here is that in some cases the process of imputing an intention *to* the parties is an extremely artificial exercise, which is sharply influenced by a court's view of the "desirability" of the contract term which is called upon to interpret.[513] Thus the courts may simply cross 'a critical breakpoint … beyond which no language can be forced'.[514] And this is something that is called a legal fiction and not contractual interpretation – as was questioned by Lord Reid, 'how far a Court is entitled to go in disregarding words in a contract in order to discover the intention of the parties'.

Modern pronouncements attempt to circumvent the apparent artificiality of this exercise. The methodology of common law has recently said to be 'not to probe the real intentions of the parties but to

[510] Lord Steyn, 'Contract Law: Fulfilling the reasonable expectations of honest men' (1997) 113 LQR 433, 441.
[511] *Society of Lloyd's v Robinson and Another* [1999] 1 All ER (Comm) 545, 551.
[512] As it was suggested half a century ago in *British Movietonews v London and District Cinemas* [1952] AC 166, HL.
[513] Admitted criticism: see, for example, in *Bromarin v IMD Investments* [1999] STC 301 (CA) (Chadwick LJ).
[514] With reference to the words of Mr L. Hand J in *Eustis Mining Co v Beer* 239 Fed 976, 982 (1917).

ascertain the contextual meaning of the relevant contractual language',[515] and therefore speak directly of the meaning which the document would convey to a reasonable person. 'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear'.[516]

And here we come to a shift from a literal approach of the courts to the interpretation of contracts towards a purposive approach, with particular emphasis being laid upon the adoption of an interpretation which has regard to the commercial purpose of the document.[517] Purposive construction said to be '…instinctive appreciation of commercial likelihood'.[518] However, as Lloyd LJ cautioned, in his descending speech in *ICS*: 'purposive interpretation of a contract is a useful tool where the purpose can be identified with reasonable certainty. But creative interpretation is another thing altogether. The one must not be allowed to shade into the other.'[519]

The purposive approach has been applied to incorporation of clauses paramount through the decades. But what if the courts have gone too far in application of a purposive approach to the interpretation of clauses paramount? What if this purposive approach has finally led to very unreasonable results, like the application of defences mentioned in Article IV Rule 2 in the charterparty (esp in time charterparty) cases. On the other hand, it may be argued that there is no general principle of construction in English law that judges are equipped with a general power or discretion to override the clearly expressed intentions of the parties on the basis that the result contended for is unfair, unreasonable, or contrary to good faith.

The third principle expressed in *The Saxonstar* was based on certainty of contract terms. While businessmen and lawyers are often loud in their stress on the need for certainty in commercial law,[520] the exact definition of the word 'certainty' in the context of a commercial agreement may be vague and indefinite.

Through the whole history and development of contract law, there has been a desire to ensure the respective rights and duties under a contract, as the parties should know where they stand. What, for

[515] *Deutsche Genossenschaftsbank v Burnhope and Others* [1995] 1 WLR 1580, 1587 (Lord Steyn).
[516] *L Schuler AG v Wickman Machine Tools Sales Ltd* [1973] UKHL 2; [1974] AC 235, 251 (Lord Reid).
[517] *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, especially 770 (Lord Steyn).
See also Lord Bingham, 'A New Thing Under the Sun? The Interpretation of Contracts and *The ICS* Decision' (2008) 12 Edinburg LR 374.
[518] *Sinochem International Oil (London) Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep 339, para [24] (Mance LJ).
[519] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 904 (Lord Lloyd).
[520] *Masport Ltd v Morrison Industries Ltd* (31 August 1993) unreported, Court of Appeal, NZCA 362/92; quoted in David McLauchlan, 'A Contract Contradiction' (1999) 30 VUWLR 175, 189.

example, Lord Mansfield proclaimed in 18th century is still valid today: 'in all mercantile transactions the great object should be certainty: and therefore, it is one of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon'.[521]

The same idea was repeated in the 20th century. In *The Scaptrade*[522] Goff LJ proclaimed:

> It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The Court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer: because it may be commercially desirable for action to be taken without delay, action which may be irrecoverable and which may have far-reaching consequences. It is for this reason, of course, that the English Courts have time and again asserted the need for certainty in commercial transactions – for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly.[523]

Certainty assists businessmen and their advisers in the drafting and negotiating the contracts. It enables proper consideration of the risks, 'to make suitable arrangements by way of contractual stipulations and the procuring of insurance cover'.[524]

On the one hand, with a clear desire to ensure predictable decision-making on commercial disputes, certainty may be a clear factor against overturning a long-established precedent on the construction of a commercial instrument. On the other hand, in appropriate cases, the need for certainty may be overridden as a factor in a context where it can be shown that a precedent, relied on for many decades, nevertheless approached a question of construction, or more properly characterisation, on the wrong basis. Thus according to Lord Walker in *Re Spectrum Plus*:[525] 'The wish to achieve legal certainty by use of a standard precedent cannot override the need to construe any document in its commercial context.' Similarly, in *Chartbrook v Persimmon Homes*,[526] the first and the most prominent reason given by Lord Hoffmann for refusing to admit prior negotiations as a background for the purposes of construction was that to do so

[521] *Vallejo v Wheeler* (1774) 1 Cowp 143, 153, 98 ER 1012.
[522] *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 1 Lloyd's Rep 146 (CA)
[523] ibid, 153 (Goff LJ).
[524] *Novorossisk Shipping Co v Neopetro Co Ltd, The Ulyanovsk* [1990] 1 Lloyd's Rep 425, 430 (Steyn J).
[525] *National Westminster Bank Plc v Spectrum Plus Ltd and Others* [2005] UKHL 41, [2005] 2 AC 680, para [159].
[526] *Chartbrook Ltd v Persimmon Homes Ltd and Others* [2009] UKHL 38, [2009] 1 AC 1101.

'would create greater uncertainty of outcome in disputes over interpretation and add to the cost of advice, litigation or arbitration'.[527]

It is important not to fixate on one particular word or phrase and thereby neglect the overall purpose of the document or to give disproportionate importance to one phrase or clause. It is trite law that 'a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible'.[528] Any term in the charterparty must be read in light of the general nature of the contract, of the fact that the contracting parties were businessmen, and all relevant facts were available to them when the contract was made. The words that the parties have used must be taken and interpreted. Where unambiguous language is faced – the court must apply and construe it.[529]

Having said above the author of this thesis submits that incorporation of a clause paramount in charterparties has created more uncertainty in the interplay between clauses and provisions in contracts.

The Saxonstar*: Was rectification necessary?*

Following the principles of incorporation expressed in *The Saxonstar*, especially in regards to the application of the clause paramount to the charterparties, it was found that as the parties had chosen to incorporate the provisions that were designed to apply to bills of lading – one must infer that they intended these provisions to be incorporated *mutatis mutandis*: 'those parts of the Act which enact the rights and liabilities of carrier and shipper and which are capable of being applied to a charter-party if one reads owner and charterer for carrier and shipper',[530] rejecting 'words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.'[531]

[527] ibid, para [35].
[528] *Chamber Colliery Co Ltd v Twyerould (Note)* (1893) 1 Ch 268 (HL), 272 (Lord Watson); quoted with approval in *North Eastern Railway Co v Lord Hastings* [1900] AC 260 (HL), 267 (Lord Davey).
[529] This can be seen, for example, from the decision of the Court of Appeal in *Cooperative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97.
[530] *The Saxonstar* [1958] 1 Lloyds' Rep 73, 91 col 1 (Lord Reid).
[531] *Glynn and Others v Margetson & Co and Others* [1893] AC 351, 357 (Lord Halsbury).
(Lord Herschell, LC): '… Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking the main object and intent of the contract and in limiting the general words used, having in view that object and intent'.

So the wording 'the provisions of this Act shall not be applicable to charter-parties'[532] must be rejected as being meaningless. The words 'this bill of lading' must be held to be as a misnomer for 'this charter-party'.[533]

Nevertheless, in the opinion of the author of this thesis, *The Saxonstar* was decided wrongly. While there are no particular rules applicable to badly drafted contracts,[534] technically, the decision of the House in *The Saxonstar* was mostly based on two grounds: (a) the implication of Latin maxims; and (b) the application of the old case law which concerned incorporation of the charterparty terms in bills of lading. These two ways led their Lordships too far in applying a special remedy – 'correction of mistake by construction' – notably, disregarding the articles of the incorporated Rules and rectifying its wording. In following this route, the whole concept of the Hague Rules and the basis of their birth were completely eliminated from consideration.[535]

It is important to emphasise that the remedy of rectification has only recently been worked out,[536] following the controversial decision of the House of Lords in *Chartbrook v Persimmon Homes,*[537] and the difficult decision of the Court of Appeal in *Daventry District Counsel v Daventry Housing*.[538] These cases confirmed that rectification operates as a separate doctrine, or as a 'safety net',[539] or a fall-back position in situations where modern principles of construction do not resolve the dispute. Thus rectification is only a secondary or subsidiary doctrine, for which there was no special need in *The Saxonstar* case.

As Lord Denning said, in order to make rectification work 'it is necessary to show that the parties were in complete agreement on the terms of the contract, but by an error wrote them down wrongly … If you can predicate with certainty what their contract was, and that it is by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice'.[540]

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[532] Article V of the Hague or Hague-Visby Rules.
[533] *The Saxonstar* [1958] 1 Lloyds' Rep 73, 90 col 1 (Lord Reid).
[534] As expressed by Lord Bridge in *Mitsui Construction Co Ltd v Attorney General of Hong-Kong* (1986) 33 Build LR 1, 14.
[535] See some critics on application of the first principle of construction.
[536] For discussion see post-*Chartbrook* articles: D.W. McLauchlan, 'Commonsense Principles for Interpretation and Rectification' (2010) 126 LQR 8; D.W. McLauchlan, 'Interpretation and Rectification: Lord Hoffmann's Last Stand' [2009] NZLRev 431; C. Mitchel, 'Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule' (2010) 26 JCL 134; and Sir Richard Buxton, 'Construction and Rectification after *Chartbrook*' [2010] CJL 253; J. Ruddell, 'Common Intention and Rectification for Common Mistake' [2014] LMCLQ 48; D.W. McLauchlan, 'Refining Rectification (2014) 130 LQR 83; and D.W. McLauchlan, 'The Many Versions of Rectification for Common Mistake' in S. Degeling (ed), Contracts in Commercial Law (2017), chapter 10; Lord Neuberger, 'Rectifications on the ICLR Top Fifteen Cases: A Talk to Commemorate the ICLR's 150th Anniversary' (2016) 32 Const LJ 149, 157–8.
[537] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101.
[538] *Daventry District Counsel v Daventry Housing Ltd* [2011] EWCA 1153, [2012] 1 WLR 1333.
[539] 'Safety net' is the phrase used by Lord Hoffmann in *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] 1 AC 1101, para [41]. For clarification see also G. McMeel, *McMeel on the Construction of Contracts* (3rd edn, Oxford University Press 2017), para [17.37].
[540] *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450, 461 (CA) (Lord Denning).

Moreover, 'it should be clear that something has gone wrong and that it should be clear what a reasonable person would have understood the parties to have meant'.[541] As Lord Bingham emphasised in *The Starsin*, '… the Court should not interpolate words in a written instrument, of whatever nature, unless it is clear both that the words have been omitted and what those omitted words were.'[542]

In *The Saxonstar* there was a clear disagreement between the parties in regard to the application of the clause paramount. As followed from the submissions of both parties the owners argued that 'by Clause 52 of the charter-party the Paramount Clause was deliberately incorporated, and that it was thereby intended that the Act should apply, so far as it could be made to apply, to the charter-party. Accordingly, they said, their obligation as to providing a seaworthy vessel was limited to exercising due diligence with regard thereto'. The charterers, however, contended that 'it was not permissible to apply to the charter-party the provisions of the Act (or at least that such provisions should be read as applying only to loss of, or damage to, goods carried in pursuance of the charter-party)'.[543]

Interestingly, in arbitration, the umpire held that the owners were not entitled to rely upon any of the provisions of the Act in relation to the charter-party or their obligations thereunder. He also found that the owners, by the terms of the charter-party, undertook that, apart from any damage or inefficiency caused by perils of the sea, the vessel would remain tight, staunch and strong and in every way fitted for the voyage, throughout the course of each voyage undertaken under the charter-party, and he held that the owners were in breach of that provision and had failed in their duty of maintenance. Subject to the opinion of the Court, the umpire awarded that the owners were in breach of charter-party and liable to the charterers and that the owners should pay the costs of the interim award.

After arguments had been led by Counsel, it was agreed by both parties that before damages could be finally assessed by the umpire, one of three main questions would have to be answered by the first instance court: 'Whether the United States Carriage of Goods by Sea Act (hereinafter called the Act) affects the rights and liabilities of the parties under the charter-party'.

I do not think that the remedy of rectification served any useful purpose in *The Saxonstar* case. Some leading academic commentators would probably argue that rectification can do things that construction

[541] In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 2 WLR 267 Lord Hoffmann approved the judgment of Carnwath LJ in *KPMG LLP v Network Rail Insurance Ltd* [2007] Bus LR 1336.
[542] *The Starsin* [2004] 1 AC 715, [2003] 1 Lloyd's Rep 571, para [23].
[543] *The Saxonstar* [1958] 1 Lloyd's Rep 73, 77 col 1.

cannot do, such as, for example, to reintroduce a whole clause which has been omitted by mistake,[544] or to easily swap the words.

From the other side, there is another example, *The Miramar*[545] case, where the House of Lords found no business reason for verbal manipulation as to substitute for the words 'the charterer' in the bill of lading context. Interestingly, Lord Roskill considered the application of Latin maxims in that case and admitted that *The Saxonstar* 'provided as good an elementary text-book example of the application of [the] Latin maxim as the classic one in which the intended corpus which is "Blackacre" is, by an obvious mistake described as "Whiteacre"'.[546]

The decision of the Court might run counter to a widely held belief or widely accepted commercial practice, but, as said by London arbitrators, 'if the market did not like the result, then the answer [is] to change the wording of the standard form'.[547] So if the market is prepared to eliminate the application of the Hague Rules to the charterparties – they should stop 'unconscious' incorporation of a clause paramount in their contracts.

The problem here is that the modern Courts are bound by the decision in *The Saxonstar*. It is well established that the use of precedent is 'an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules'. [548]

From the other side, too rigid adherence to precedent may lead to injustice in a particular case and to unduly restrict the proper development of the law. Thus, it might be permitted in certain cases to depart from the previous decision in *The Saxonstar,* especially in charterparty cases. However, such a selective approach may be inconsistent with the more-or-less settled practice of application of The Rules 'by force of law' in bills of lading cases.

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[544] The principal defenders of rectification are: Sir Kim Lewison, 'If it in't broke don't fix it – Rectification and the Boundaries of Interpretation' (The Jonathan Brock Memorial Lecture, 21 May 2008), in Sir Kim Lewison, *The Interpretation of Contracts* (4th edn 1st supplement, 2010), Appendix; and David Hodge QC, *Rectification – The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd edn, Sweet & Maxwell 2015), paras [2-95] to [2-101].

[545] *The Miramar* [1984] AC 676; [1984] 2 Lloyd's Rep 129, see 133–134 (Lord Diplock), who saw no business reason for verbal manipulation. There was no justification for the maxim of construction *falsa demonstratio non nocet cum de corpore constat*, such as was induced by The House in *The Saxonstar* [1958] 1 Lloyd's Rep 73.

[546] *The Miramar* [1984] 2 Lloyd's Rep 129, 134.

[547] In the words of London Arbitrators (summarised in Lloyd's Maritime Newsletter 481), as quoted in *Cero Navigation Corp v Jean Lion & Cie, The Solon* [2000] 1 Lloyd's Rep 292, 294 (Mr. Thomas J).

[548] *The Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

The Second Aspect of Incorporation

The second aspect of incorporation is that the obligations assumed by the owners and charterers under a charterparty are frequently more extensive than those assumed under bills of lading. Thus, the provisions of the Rules become applicable to a wide range of activities that may go further, sometimes in respect of operations for which the Rules do not apply and outside the ambit of Article II and Article III Rule 2.

Time and extent of application of The Rules in Charterparties

In *The Saxonstar* case, provisions of the incorporated US COGSA 1936 applied to any voyages, rather than just those to or from the US ports, and to non-cargo-carrying voyages as well.

Viscount Simonds propounded:

> … The contract between the parties is of world-wide scope: the area of state jurisdiction is necessarily limited, and, because it is limited, the Act is given a restricted operation. No reason has been suggested, nor, as far as I am aware, could be suggested, why a similar restriction should be imported into the contract. On the contrary, to do so would, from the commercial point of view, make nonsense of it. I find it easy therefore, as did the learned Judge, to construe this contract as making the substituted standard of obligation coterminous with the enterprise.[549]

Lord Keith stated: '… Very good reasons can be seen for the United States legislature limiting its Act to goods carried under a bill of lading to or from United States ports. They seem quite inapposite when the Act is introduced contractually into a charterparty covering a very wide range of ports outside the United States …'.[550]

Lord Somervell stated: '… once one has come to the conclusion that the 'Act' is being incorporated in a contract to which it does not as an Act apply, one *prima facie* rejects the limitations which are imposed in these various Acts necessitated by the limits of the legislative jurisdiction of the country concerned. One takes the geographical limits from the contract'.[551]

[549] *The Saxonstar* [1958] 1 Lloyds' Rep 73, 82 (Viscount Simonds).
[550] ibid, 96 (Lord Keith).
[551] ibid, 99 (Lord Somervell).

Some would possibly argue that non-cargo-carrying voyages cannot be brought within the reduced scope of obligations under the Rules, as strictly saying, the US COGSA 1936 is the Act which deals with the carriage of goods by sea under bills of lading. Thus all sections of the Act refer to obligations, rights, liabilities and immunities in respect of goods carried. If no goods on board are carried – there shall be no application of the Rules to a non-cargo-carrying voyage.

However, such a narrow interpretation should be rejected. The majority of the House of Lords in *The Saxonstar* went on to hold that the application of the Act should not be confined to cargo-carrying voyages. In reaching this conclusion, the House was much influenced by the consideration that no sensible distinction could be drawn for this purpose between cargo-carrying and ballast voyages.

Viscount Simonds noted:

> … it is, I think, permissible in a consideration of this commercial transaction to ask what possible difference it makes to the charterers whether the delay, to which their loss is due, occurs when the ship is in ballast or is loaded with a cargo of oil or of water. It matters not for this purpose whether the charterparty was for a single voyage, as the original document seemed to contemplate, or for a number of consecutive voyages. The contractual subject-matter was the whole period during which the vessel was under charter, and it is, in my opinion, to this whole period that the parties agreed that the statutory standard of obligation and immunity should relate.[552]

Such reasoning imposes upon the carrier/owner an obligation under Section 3(1)(c) of the incorporated US COGSA[553] to exercise due diligence to 'make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation' even at a time when the vessel was leaving in ballast for her port of loading. It was said that in the commercial view it was unlikely that owner and charterer would adopt a shifting standard of obligation between cargo-carrying and non-cargo-carrying voyages.[554]

Thus, the primary emphasis should be made to a *qualified standard of obligation* that is incorporated in a commercial agreement. Since the narrow interpretation, as expressed above, excludes this qualified standard, such a position cannot be right. [555]

[552] ibid, 82 (Viscount Simonds).
[553] Analogue to Article III Rule 1(c)
[554] *The Saxonstar* [1958] 1 Lloyds' Rep 73, 82 (Viscount Simonds). However, Viscount Simonds doubted whether the obligation under Section 3(1)(c) arises until the vessel arrives the port of loading.
[555] ibid, 83 (Viscount Simonds).

> A charter-party is a contract for the purpose of the carriage of goods by sea and [there is] no difficulty in saying that a voyage in ballast is all part and parcel of and incidental to that purpose. If a chartered ship proceeds to her port of loading she is, … engaged in a voyage relating to the carriage of goods though she is not actually carrying goods at the time. To exclude the carrier in such a case from the obligations and immunities of sections 3 and 4 is merely to assert that the Act applies to contracts for the carriage of goods by sea under bills of lading which are confined to the actual carriage of goods.[556]

Range of obligations to which The Rules apply in Charterparties

Compared to the bill of lading a charter party imposes the more extended range of obligations on the shipowner. Thus, where the Rules are incorporated in the contract the question arises of whether the Articles thus incorporated prevail over the remaining terms of the charter. Mostly it depends on the construction of the whole document and the precise wording of the clause paramount.

In *The Socol 3*[557] the time charterparty was subject to the terms of Clause Paramount which also should "be included in all bills of lading or waybills issued" thereunder.[558]

The first question before the judge was where a charterparty incorporates the Hague-Visby Rules and envisages deck cargo carriage, do the Rules apply to the carriage of deck cargo or is their application excluded by virtue of Article 1(c) Hague-Visby Rules?[559]

The charterers sought to argue that when the Rules were contractually incorporated into the charterparty the rules of construction meant references to 'bill of lading' in the Rules should be read as 'charterparty' and, where the charterparty (being for all purposes 'the contract of carriage'), did not bear an on-deck statement, as required for Article 1(c), the Rules applied to the carriage. The owners contended that the intention of a paramount clause was simply that the liability regime that applied to the bills of lading (that

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[556] ibid, 96 col 1 (Lord Keith).
[557] *Onego Shipping and Chartering BV v JSC Arcadia Shipping, The Socol 3* [2010] EWHC 777 (Comm); [2010] 2 Lloyd's Rep 221.
[558] Clause 31 'Protective Clauses' (a) Clause Paramount provided for: "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, the Hague Rules, or the Hague-Visby Rules, as applicable, or such other similar national legislation as may mandatorily apply by virtue of origin or destination of the bills of lading, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said applicable Act. If any term of this bill of lading be repugnant to said applicable Act to any extent, such term shall be void to that extent, but no further".
[559] *The Socol 3* [2010] EWHC 777 (Comm); [2010] 2 Lloyd's Rep 221, para [5] (Hamblen J).

were claused to reflect the on-deck carriage) also applied to the charterparty. Thus, the logical conclusion was that by virtue of Article 1(c) the Rules did not apply under the charter so far as the deck carriage.[560]

Both parties accepted that the House of Lords made it clear in *The Saxonstar* that an important purpose of incorporating the Rules into a charterparty was 'to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the rules subsists between carrier and shipper'. However, the House of Lords was not considering the specific issue of construction that arose in the present case.

The judge agreed with the tribunal's conclusion that the Rules did not apply to the carriage of the deck cargo as between owners and charterers. The rules of construction in respect of incorporation, he said, were not for rigid and mechanical application but, instead, logic should be exercised to find which words of the incorporated text should be altered to result in a sound meaning.[561] Clearly, the time charter (which was concluded before it was even known what cargo would be carried on deck) could never include an on-deck statement. The judge considered that in the context of Article 1(c) the words 'contract of carriage' therefore meant the 'bill of lading' and not the 'charterparty', as it is only the bill of lading which is ever likely to contain an on-deck statement.

The practical effect of the charterers' construction would be that the carriage of deck cargo would almost invariably be subject to the Hague/Hague-Visby Rules and to render the Article I(c) liberty to contract out of the Rules illusory. It would also mean that the liability for deck cargo under the bill of lading and the charterparty would differ. In contrast to the position under the bill of lading, owners would not be free to carry deck cargo on their own conditions under the charterparty. The terms of the bill(s) of lading issued under a time charter party would generally be within the control of the charterers as the Master was obliged to sign bills "as presented".[562]

The further consequence of the charterers' construction was a dislocation between the contractual regime applicable to the carriage of deck cargo under the bill of lading and that under the charterparty. Under the bill of lading, an on-deck statement means that the Rules are inapplicable and that a different regime of responsibility applies, whilst under the charterparty, the Rules will invariably govern the carriage. When written out in the charterparty, Article I(c) requires the bill(s) of lading rather than the charterparty to

[560] ibid, para [21] (Hamblen J).
[561] ibid, para [26] (Hamblen J): 'Verbal manipulation is a process which should be carried out intelligently rather than mechanically and only in so far as it is necessary to avoid insensible results'.
[562] *The Socol 3* [2010] 2 Lloyd's Rep 221, see discussion on pages 227–228.

contain the on-deck statement and that this is the relevant 'contract of carriage'. Therefore, the tribunal's conclusion that the Hague-Visby Rules did not apply to the carriage of deck cargo was confirmed.

However, it was also found that the Owners were contractually responsible for the improper loading/stowage of the cargo insofar as it resulted in the instability and consequent unseaworthiness of the vessel. Thus, the next issue was whether the owners could rely on the indemnity clause.[563] Hamblen J held that the clause provided the owners with an indemnity in respect of loss and/or damage and/or liability effectively caused by the carriage of deck cargo but not for loss and/or damage and/or liability caused by negligence and/or breach of the obligation of seaworthiness on the part of owners, their servants or agents.[564]

In *The Tasman Pioneer*[565] the shippers claimed damages from the liner operator Tasman Orient when the deck cargo was damaged following vessel's grounding. The master decided that instead of taking the usual route, he would take the vessel through a narrow passage, which was expected to shorten the journey. The master's initial explanation of the casualty was that the ship hit an identified floating object, and he instructed the crew to lie and to adopt this explanation in the enquiry conducted by the Japanese coastguard. The Supreme Court of New Zealand found that Article IV Rule 2(a) of the incorporated Hague-Visby Rules did not import any requirement of good faith and held that the Carrier was exempted from liability for the acts or omissions of master and crew in the navigation and management of the ship unless their actions amounted to barratry.[566] However, in that case the shippers did not argue that the actions of the master amounted to barratry.

In *The Privocean*[567] the dispute arose under a time charterparty on the NYPE_1946 form which incorporated the US COGSA, including sub-Section 4(2)(a). Clause 2 of the contract further obliged the charterers to provide "necessary dunnage and shifting broads, also any extra fittings requisite for a special trade or unusual cargo". Clause 8 was unamended.

[563] Clause 13 'Space Available' part (b) provided for the following terms: 'In the event of deck cargo being carried, the Owners are to be and are hereby indemnified by the Charterers for any loss and/or damage and/or liability of whatsoever nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded'.
[564] *The Socol 3* [2010] 2 Lloyd's Rep 221, paras [82] and [88].
[565] *Tasman Orient Line CV v New Zealand China Clays Ltd and Others, The Tasman Pioneer* [2010] NZSC 37; [2010] 2 Lloyd's Rep 13.
[566] *The Tasman Pioneer* [2010] 2 Lloyd's Rep 13; [2010] NZSC 37, paras [21] & [30].
[567] *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd, The Privocean* [2018] EWHC 2460 (Comm); [2018] 2 Lloyd's Rep 551.

The dispute resulted from the master's insistence on a particular stowage plan and because of the master's negligent decision to require additional cargo strapping in Hold 2 – "the master's view in relation to the plans was that if two holds were slack, one had to be strapped". It was the money and time incurred by the additional strapping which was subject to arbitration. The owners argued that this had been done in order to ensure the stability of the ship in accordance with SOLAS Convention, and claimed a balance of retained hire about USD 400,000. The charterers counter-claimed the losses at an amount of USD 410,000 which they sustained in view of the master's decision.

In London arbitration proceedings the Tribunal found that the master provided the charterers with incorrect information as to the vessel's capabilities. It was clear that the master was negligent not to work out a stowage plan from the software available to him. The requested strapping was excessive. However, the owners were able to avail themselves of the protection under sub-Section 4(2)(a). On appeal in the High Court the charterers argued that 'having found that the master's stowage plan was in breach of the charterparty and negligent, the Tribunal was wrong to find that his negligence was in the management of the ship, not in the management of cargo'. Thus protection of the carrier under Section 4(2)(a) shall not be applicable in this case. In their submissions the charterers relied on *The Germanic*,[568] a decision of the US Supreme Court; and also on *The Iron Gippsland* [569], although both authorities were about damage to cargo. The charterers also relied on *The Eternity*,[570] and emphasized that a stowage plan was produced by the master and the cargo was loaded in accordance with this plan.

Mrs Cockerill J found that there was indeed a failure of the master 'to identify and hence accept that the converse arrangement [in regards to a stowage plan] was safe'. From the other side, 'there was no separate obligation to produce a plan or to hand one over' because the allocation of liability in regards to stowage was clearly set in Clause 8 of the NYPE_1946 form. The only reason which 'drove the master to act as he did was a consideration of the stability of the vessel and was, hence, a care of the ship issue'.[571] Thus the Tribunal's award was upheld.

[568] *The Germanic* 196 US 589 (1905).
[569] *Caltex Refining Co Pty Ltd v BHP Transport Ltd, The Iron Gippsland* [1994] 1 Lloyd's Rep 335.
[570] *The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd v Fr8 Singapore Pte Ltd, The Eternity* [2009] 1 Lloyd's Rep 107.
[571] *The Privocean* [2018] EWHC 2460 (Comm); [2018] 2 Lloyd's Rep 551, para [72].

The wider effect of the Rules in non-cargo areas

In the voyage charter case *The Mariasmi,*[572] it was held that the exceptions in the Rules did not exclude the shipowner's liability for breach of a particular term concerning notice of readiness. It was found that Clause 29[573] contained a limited provision of paramountcy, and thus did not necessarily prevail over the wording of the other clause in the GENCON-based charterparty. In the words of Mocatta J, 'it was wrong to place too much weight on the word Paramount'.[574]

However, in some cases, the paramount clause has the effect of exempting the carrier from liability to a greater degree than do the exoneration clauses of the charterparty. As Lord Denning stated 'it is strange thing to find a shipowner relying on the Paramount Clause to exempt himself from liability. Historically, its purpose was to make him liable'.[575]

In *The Leonidas*[576] owners of the vessel succeeded to avoid liability where a speed performance warranty had been breached due to the engine breakdown. The Hague Rules exceptions, incorporated by clause paramount into the voyage charterparty, were capable of constituting a defence to a claim for damages for breach of an express warranty.[577]

Especially, in the time charter cases, the Articles of the Rules found a 'flexible' approach.

In *The Aliakmon Progress*,[578] the charter contained *inter alia* an off-hire clause and a clause incorporating the provisions of the US COGSA, 1936 (i.e., the Hague Rules).
The Court of Appeal held that if the damage to the vessel due to striking the quayside was caused by the negligence of the Master, the Owners were not liable as they were not responsible for the act, neglect or default of the Master in the navigation of the vessel. The alleged negligence of the master was excluded by Article IV Rule 2(a).

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[572] *Marifortuna Naviera SA v Government of Ceylon, The Mariasmi* [1970] 1 Lloyd's Rep 247.
[573] Voyage Charter Party Clause Paramount (Carrier's Rights and Immunities).
[574] *The Mariasmi* [1970] 1 Lloyd's Rep 247, 253–254 (Mocatta J). See also *Leeds Shipping Co v Duncan, Fox & Co Ltd* (1932) 37 ComCas 213; (1932) 42 Lloyd's Rep 123 KB, the case where it was held not to modify the "fixed time" doctrine according to which the charterer had an absolute obligation to pay demurrage at the expiry of the laytime.
[575] *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd* [1957] 1 Lloyd's Rep 257 CA, 277.
[576] *Bayoil SA v Seawind Tankers Corporation, The Leonidas* [2001] 1 Lloyd's Rep 533.
[577] *Cf* London Arbitration 1/96 LMLN 422, where it was held that speed and consumption claims under a time charterparty were not time barred under the US Carriage of Goods by Sea Act, as a claim in relation to the performance of a vessel had nothing to do with any particular goods carried.
[578] *Aliakmon Maritime Corporation v Trans Ocean Continental Shipping Ltd, The Aliakmon Progress* [1978] 2 Lloyd's Rep 499.

In *The Aquacharm*[579] the owners let their vessel under a time charter to the charterers for a period of one-time charter trip from the USA to Japan to carry a cargo of coal. The contract was based on the NYPE_1946 form incorporating, *inter alia*, the US COGSA 1936 in full. When the ship arrived at the entrance of the Panama Canal, she was refused to enter on the ground that she exceeded the permitted draft. After considerable delay about 600 mts of coal were transhipped to another vessel which then followed *Aquacharm* through the canal and reloaded this part of the shipment from the other side. The charterers refused to pay hire for this period of time arguing that the vessel was off-hire which resulted from her draft restrictions and inability to perform service immediately required from her. The owners contended that the vessel was on hire and they were entitled to recover the transhipment expenses under an express or implied term of the charter, and that pursuant to Article IV Rule 2(a) the owners were exempted from liability for the act, or default of the master in the management of the vessel.

The dispute was referred to arbitration and the umpire found in favour of the owners dismissing the off-hire claim and upholding the owner's indemnity claim. On appeal at the High Court it was found by Lloyd J that (1) the vessel was in a fully efficient state and fully capable of performing the service immediately required from her; (2) the vessel was not unseaworthy; (3) the master had failed to use reasonable care to comply with the charter's orders under Clause 8 of the NYPE_1946; (4) as no question of 'due diligence' arose, the owners were entitled to rely on Article IV Rule 2(a); (5) Clause 8 of the NYPE_1946, on its true construction, did not oblige the charterers to pay for loading and discharging more than once. Thus, there was no ground on which the owners could recover the transhipment expenses from the charterers.

Both parties appealed.

The Court of Appeal upheld the first instance decision. It was found that the Owners failed to show that the transhipment expenses were incurred as a direct consequence of complying with the charterer's orders, thus the owners were not entitled to be indemnified against these costs. It was held that the vessel was delayed by bad stowage and not by unseaworthiness thus the owners were exempted from liability by reason of Article IV Rule 2(a). Lord Denning MR stated in his leading judgement that the words in The Hague Rules shall be given 'its ordinary meaning, and not in any extended or unnatural meaning', so that the vessel, with her master and crew, was herself fit to encounter the perils of the voyage and fit to carry the cargo safely.[580]

[579] *Actis Co Ltd v The Sanko Steamship Co Ltd, The Aquacharm* [1982] 1 Lloyd's Rep 7 (CA).
[580] *The Aquacharm* [1982] 1 Lloyd's Rep 7, 9.

In *The Satya Kailash*,[581] the owners of m/v *Satya Kailash* chartered m/v *Oceanic Amity* to lighten their vessel. The charterparty incorporated the US COGSA 1936. During lightening operations, m/v *Satya Kailash* was damaged through the negligent navigation of the master of m/v *Oceanic Amity*. The owners of the *Satya Kailash* brought a claim against the owners of the *Oceanic Amity* and the latter relied upon the exception of an act, neglect or default in the navigation of the ship (namely the *Oceanic Amity* as the chartered ship) under Section 4(2) of the 1936 Act.[582]

The Court of Appeal upheld the judgment of Staughton J in the first instance[583] that the owners of the *Oceanic Amity* were entitled to rely upon the exceptions in Section 4(2), which formed part of the contract between the two for the use of the vessel.[584]

In his leading speech, Goff LJ considered two main authorities on the subject matter: the decision of the House of Lords in *The Saxonstar* and the decision of the High Court of Australia in *Australian Oil Refining v RW Miller,*[585] and confirmed that where the subject matter of the contract is not merely the carriage of goods by sea but voyages, the immunities provided to the Owners are to be read as relating to the contractual voyages.[586] His Lordship concluded:

> by contracting in terms of the […] charterparty, the appellants [owners of the *Satya Kailash*] were expressly conferring on the respondents [owners of the *Oceanic Amity*] the benefit of the relevant immunities in respect of their contractual activities and appellants must be taken to have recognised that, if any of their property involved in the adventure was at risk from such activities, and the respondents should be entitled to the benefit of such immunities in respect of loss or damage suffered by the appellants in consequence …[587]

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[581] *Seven Seas Transportation Ltd v Pacifico Union Marina Corporation, The Satya Kailash and Oceanic Amity* [1984] 1 Lloyd's Rep 588 (CA).
[582] The same as Article IV Rule 2(a) of the Hague Rules. See discussion, for example in *Voyage Charters*, para [85.13].
[583] *The Satya Kailash and Oceanic Amity* [1982] 2 Lloyd's Rep 465.
[584] *The Satya Kailash and Oceanic Amity* [1984] 1 Lloyd's Rep 588 (CA), 596 (R. Goff LJ): '… on the approach of the majority of the House of Lords in the *Adamastos* case, even such general words of incorporation can be effective to give an owner the protection of the statutory immunities in respect not merely of those matters specified in s. 2, but also of other contractual activities performed by him under the charter' and '… we can see no reason why, in principle, the benefit of the immunities contained in s. 4 of the United States Act should not be available to the respondents in respect of damage caused to the appellants in performance of this activity, even though such damage did not fall within any of the range of activities specified in s. 2'.
[585] *Australian Oil Refining Pty Ltd v RW Miller & Co Pty Ltd* [1968] 1 Lloyd's Rep 448.
[586] *The Satya Kailash and Oceanic Amity* [1984] 1 Lloyd's Rep 588, 595 (Goff LJ), with reference to the reasoning given by Viscount Simonds and Lord Keith in *The Saxonstar*.
[587] ibid, 597 (Goff LJ). See also *Australian Oil Refining Pty* v *RW Miller & Co Pty* [1968] 1 Lloyd's Rep 448; *The Marinor* [1996] 1 Lloyd's Rep 301 and *The Seki Rolette* [1998] 2 Lloyd's Rep 638.

Thus, in the context of a bill of lading, the words 'loss or damage' in Article IV Rules 1 and 2 are limited to 'loss of or damage to in connection with the goods' or in connection with activities enumerated in Article II. However, following the decision of The Court of Appeal in *The Satya Kailash*, no such restrictions should be assumed to apply where the Rules are incorporated into a charterparty.[588]

In *The Stena Pacifica*,[589] Evans J considered the incorporation of Clause 27[590] in the SHELLTIME_4 charter form, which was materially identical to that in the SHELLVOY_5 form, and concluded that the terms of incorporation were limited to the extent that the effect of Article III Rule 6 did not apply to claims that fell outside the ambit of the Hague Rules obligations.[591] It was noted that the claim must be one that, for the purposes of the rules, was for 'loss of or damage to or in connection with the goods', including a claim for financial loss arising in relation to the goods. The claim for damages measured by reference to the fall in the value of the goods was found to be of this kind.

It follows from the decision that the claim for damages is subject to articles of the Rules in so far as it depends upon breaches of the charter-party that correspond with the Owners' obligations under the Rules, but in so far as it alleges breaches of any independent term of the charter-party, it is not.[592] For example, the exception did not avail the Owners in *The Hill Harmony*[593]. The case concerned a time charterparty in the NYPE form. The House of Lords held that the Master was in breach of the obligation to prosecute two voyages with the utmost despatch as he had not taken the shortest and quickest route, the Great Circle route, but had taken the rhumb line route instead. In addition, it was held that the Master had failed to comply with the Charterers' instructions concerning the employment of the vessel to follow the Great Circle Route. The Owners could not rely on the exception in Article IV Rule 2(a) as the choice of route related to the employment of the vessel and not to her navigation.

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[588] See *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [85.13].
[589] *Navigazione Alta Italia SpA v Concordia Maritime Chartering AB, The Stena Pacifica* [1990] 2 Lloyd's Rep 234 and see also *Borgship Tankers* v *Product Transport Corp, The Casco* [2005] 1 Lloyd's Rep 565.
[590] Clause 27(a): The … Owners shall not … be liable for any … delay … arising or resulting from any act, neglect or default of the master … Further neither the … Owners nor Charterers shall … be liable for any … delay … in performance … arising or resulting from act of God, act of war …;
Clause 27(c): Clause 27(a) shall not apply to or affect any liability of Owners … in respect of … (ii) any claim … arising out of any loss of or damage to or in connection with cargo. All such claims shall be subject to the Hague-Visby Rules or the Hague Rules.
[591] *The Stena Pacifica* [1990] 2 Lloyd's Rep 234, 237 (Evans J): 'A related issue is whether the phrase "in connection with cargo" qualifies "any claim" or whether, possibly different, the clause means "any claim arising out of any loss … in connection with cargo"' See also *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [85.7].
[592] *The Stena Pacifica* [1990] 2 Lloyd's Rep 234, 237-238 (Evans J).
[593] *Whistler International v Kawasaki Kisen Kaisha Ltd, The Hill Harmony* [2001] 1 AC 638, [2001] 1 Lloyd's Rep 147 (HL); [2000] QB 241, [1999] 2 Lloyd's Rep 209 (CA).

The effect of the time-bar in Article III Rule 6 may be somewhat more limited.[594] It is not all claims under a charterparty that will be caught by the time bar, as there must be a real connection between the loss or damage claimed *vis-à-vis* the goods being carried, and not just a very tenuous link.[595] Thus in *The Standard Ardour*[596] Saville J held that the Charterers' claim for an indemnity for claims due to delays in the release of bills of lading which the Charterers alleged were caused by the failure of Owners to provide a vessel properly equipped to measure the quantities loaded, was not time barred. The loss was connected with the shipping documents and not the goods.

In *The Marinor*,[597] one of the issues which particularly arose was the extent to which owners can rely on the protection of the time bar contained in Article III Rule 6 as a defence to time charterers' claims for damages for breach of the time charter. The plaintiff charterers contended that because their claims relate not to the carriage of any specific sulphuric acid but to on-going breaches of the express terms of the charter-party and to the losses by reason of the provision of substitute tonnage and a substitute sale contract. Thus, regardless of whether that cargo was damaged or not, the Hague or Hague-Visby time bars are inapplicable. Arguably this was not the type of claim that a cargo-owner could bring against a carrier, and it was therefore not the kind of claim to which the time bar was designed to apply. The very nature of the claim made the mechanics of application almost impossible.[598]

In their defence, the owners argued that the basis of the claim was the allegation of breaches of the owners' duties as to cargo-worthiness and manning or careful cargo handling, which were said to have caused the contamination of the sulphuric acid on the four voyages. The losses represented by the charterers, as reduced price and other expenses and the cost of substitute tonnage were losses sufficiently connected with cargo that was shipped under the specific voyage or was intended to be shipped.[599]

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[594] See, for example, *Sabah Flour and Feedmills* v *Comfez* [1988] 2 Lloyd's Rep 18 and *Interbulk* v *Ponte dei Sospiri Shipping Co, The Standard Ardour* [1988] 2 Lloyd's Rep 159; *The Marinor* [1996] 1 Lloyd's Rep 301; *Mauritius Oil Refineries Ltd* v *Stolt Nielsen Nederlands BV, The Stolt Sydness* [1997] 1 Lloyd's Rep 273; *The Seki Rolette* [1998] 2 Lloyd's Rep 638.

[595] See a number of cases enumerated in Bariş Soyer and Andrew Tettenborn, *Charterparties: Law, Practice and Emerging Legal Issues* (1st edn, Informa Law from Routledge 2018), chapter 13 'Clauses Paramount', para [13.5.3.3].

[596] *Interbulk Ltd v Ponte Dei Sospiri Shipping Co, The Standard Ardour* [1988] 2 Lloyd's Rep 159.

[597] *Noranda Inc and Others v Barton (Time Charter) Ltd and Another, The Marinor* [1996] 1 Lloyd's Rep 301.

[598] ibid, 307.

In support of their argument the plaintiffs relied heavily on the decision of Saville J in *The Standard Ardour* [1988] 2 Lloyd's Rep 159 and the decision of Evans J in *The Stena Pacifica* [1990] 2 Lloyd's Rep 234.

[599] ibid, 308. In support of their argument the defendants referred to the decision of the Court of Appeal in *Cargill International SA v CPN Tankers (Bermuda) Ltd, The Ot Sonja* [1993] 2 Lloyd's Rep 435, is that under a charter-party incorporation clause the time bar could apply where the claim was in respect of cargo intended to be shipped which had never been loaded in the first place.

While there was no reason why the protection provided to the shipowner by Article III Rule 6 should not apply to an equally broad spectrum of claims as covered by Article IV (to the extent provided in *The Saxonstar* and *The Satya Kailash*), Colman J held that the liability 'in respect of goods'

> was not to be construed in the context of a periodic time charter as meaning a liability arising from the facts which would found a claim by a cargo-owner under the Hague or Hague-Visby Rules in the context of a bill of lading contract, but rather as meaning liability based on facts involving a particular cargo or intended cargo and, in the absence of physical loss or damage, sufficiently closely involving that cargo for it to be said that the financial loss sustained was referable to what was done with that cargo or was directly associated with it.[600]

Thus, the following general conclusion was made by Colman J:

> where there is incorporation by general words into a time charter of legislation enacting the Hague Rules or Hague-Visby Rules, the shipowners will be entitled to rely on the protection of the time bar against claims for breach of any of the terms of the charter, even if not co-extensive with obligations under the rules, provided that (i) those claims assert (a) a liability involving physical loss of or damage to goods or (b) a liability for financial loss sustained in relation to goods and (ii) the goods in question were either shipped or were intended to be shipped pursuant to the charter. In order to operate the time bar provision in the case of goods intended to be shipped it is clearly necessary for a particular voyage or voyages to have been in the contemplation of both parties at the time when the breach preventing shipment on that voyage occurred.[601]

In *The Voc Gallant*[602] dispute arose, with the Owners claiming outstanding hire for a period deducted by the Charterers whilst reloading and discharging cargo at two ports. A time charterparty contained a London arbitration clause and a clause paramount. Owners argued that the Charterers were time barred as the commencement of arbitration by the Owners for their claim for hire did not constitute the bringing of suit by the Charterers in respect of their claims for breach of Article III rule 2. While the reference to arbitration of Owners' claim for hire necessarily included valid defences, the bringing of suit on a cross-claim was a different matter.

On the charterers' appeal from the tribunal's decision Judge Mackie QC held that the initial message of the owners satisfied the requirements of the Arbitration Act 1996 and of commercial life, and that the arbitration

[600] ibid, 310.
[601] ibid, 311.
[602] *Bulk & Metal Transport (UK) LLP v Voc Bulk Handymax Pool LLC, The Voc Gallant* [2009] EWHC 288 (Comm), [2009] 1 Lloyd's Rep 418.

agreement was being invoked and that a party was required to take steps accordingly. The judge also found that the charterers despite having not served a notice themselves, would not be barred from relying upon in their defence of the owners' claims, cargo claims which would otherwise have been time barred but for the commencement of arbitration by the owners.

The Third Aspect of Incorporation

The third aspect of incorporation is that the terms of charterparties shall be construed so as not to contradict the articles of the Rules. As a matter of general approach, the Rules shall have an overriding effect over other inconsistent provisions in the contract as a result of the terms of Article III Rule 8, which may be called as a 'killer provision'.[603] Thus, the default position, as incorporated the Rules shall take precedence over other terms even in the absence of an express wording 'paramount clause' and incorporation of Article III Rule 8.[604]

Courts of the most countries held that if the clause is entitled "Paramount Clause", the parties actually intended that the Rules should be unconditionally overriding in character.[605] For example, the Supreme Court of Sweden[606] pointed out that a reference to the Hague Rules Convention[607] 'can very reasonably be understood to mean that it [the Convention] shall be of fundamental importance for the contract of carriage, giving to the bill of lading its character'. Admitting that the parties were legally entitled to contract as they pleased, the Court held that the carrier was not protected by the negligence clauses of the printed part of the bill of lading, because 'if despite the existing inconsistency, the … exemption from liability should be considered as prevailing, the bill of lading would appear inadmissibly deceptive as to the actual meaning' of the Hague Rules.[608]

Earlier American decisions are probably also in accordance therewith. In *The Framlington Court*[609] the Court of Appeal, Fifth Circuit, found that "having incorporated the Harter Act by reference in the charter, the parties are bound to take it with its burdens as well as its benefits and it is controlling".[610] Thus a 'liberty-to-deviate' clause of a charterparty, into which the Harter Act had been incorporated, was declared invalid. However, in *The Westmoreland*[611] the Court of Appeal, Second Circuit, held that a typed

[603] As defined by Professor Simon Baughen in his article 'Article III Rule 8, A Killer Provision? Repugnancy and the Clause Paramount' (2002) Shipping and Transport Lawyer 3(3), 14.
[604] See, for example, *The Petroleum Oil and Gas Corporation of South Africa Pty Ltd v FR8 Singapore Pte Ltd, The Eternity* [2009] 1 Lloyd's Rep 107, where Clause 38 'Exceptions' provided, inter alia, for: 'The provisions of arts III (other than r 8) IV, IV bis and VIII of the Schedule to the Carriage of Goods by Sea Act, 1971 of the United Kingdom shall apply to this Charter and shall be deemed to be inserted *in extenso* herein …'.
[605] For a list of cases see Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, page 218 fn 60 (with regard to incorporation of the Harter Act 1893); page 219 fn 72 (with regard to incorporation of the Hague Rules' Acts); and page 224 fn 99.
[606] *Cie Beurriere et Fromagere et al v Rederei A/B Svea* ND 1951, 589.
[607] Printed Clause 1 of the Bill of Lading.
[608] *Cie Beurriere et Fromagere et al v Rederei A/B Svea* ND 1951, 589, 603–604.
[609] *The Framlington Court* 69 F2d 300 (5th Cir 1934); 1934 AMC 272.
[610] ibid, 276. Specific emphasis was placed on the fact that the Harter Act, Sections 1 and 2 expressly prohibited certain exceptions which offended the Act. In accord with *The Nordhvalen* 1925 AMC 973 DMd; *The Agwimoon* 1929 AMC 570 4CCA; *The Vale Royal* 1943 AMC 1099 DMd. See also *The Yoro* 1949 AMC 187 SDNY (see esp pages 192–193), affirmed 1952 AMC 1094 2CCA.
[611] *The Westmoreland* 86 F2d 96 (2nd Cir 1936); 1936 AMC 1680 2CCA.

negligence clause relating to the particular mode of shipping the cargo was inconsistent with and prevailed over the printed sections of the Harter Act. The Court in that case believed that the parties specifically intended that the typed clause should apply unconditionally.[612] This conclusion was reached as a matter of contractual interpretation and construction.

Moreover, in *The Moremackite*[613] it was held that the incorporation of US GOGSA para 1308 excluded the application of the American "personal doctrine", which ordinarily prevents global limitation of shipowner's liability according to 46 US Code para 181 (Liability of Masters as Carriers).

Thus the general approach is subject to certain qualifications, as 'no rule is of such importance that it should be regarded as of paramount importance'.[614] Like with all general rules of construction, the principal object is to seek to construe the parties' intentions in the context of the agreement which they made.[615] Incorporation of the applicable parts of the Rules into a charterparty does not necessarily mean that the parties always intend them to be paramount in the case of inconsistency with other terms of their contract. For example, if a specific clause begins with the words: '*Notwithstanding anything else to the contrary herein …*' it would normally be expected to take precedence over the Rules, but this application is a little inconsistent because the Rules are incorporated only as a matter of contract and the issue is always one of trying to interpret the contract as a whole.[616]

Article III Rule 8 plainly gives a certain edge over the clauses of any contract,[617] and contains a key 'anti-avoidance' provision that prevents the carrier from circumventing the effects of the Rules by other contract provisions protecting the certain minimum liabilities laid down on the carrier. It shall be given broad construction embracing every stipulation in a contract which, if it were applied, would have had the effect of lessening the carrier's liability otherwise than as provided in the Rules.[618] This result might be said to

[612] ibid, 1682. To the same effect was the decision in *The Tregenna* 1941 AMC 1282 2CCA where a stranding clause was held applicable, although under the Harter Act para 3 the validity of such clauses is conditioned on the ship being seaworthy.
[613] *The Moremackite* 1960 AMC 185 2CCA; cf Grant Gilmore and Charles L. Black, *The Law of Admiralty* (Brooklyn: The Foundation Press, Inc 1957), 708–710.
[614] *Sabah Flour and Feedmills SDN BHD* v *Comfez* [1988] 2 Lloyd's Rep 18, 20 col 1 (Parker LJ).
[615] See, for example, *Freedom General Shipping* v *Tokai Shipping, The Khian Zephyr* [1982] 1 Lloyd's Rep 73; *The Marinor* [1996] 1 Lloyd's Rep 301 and *Borgship Tankers* v *Product Transport Corp, The Casco* [2005] 1 Lloyd's Rep 565.
[616] See *The Kheti* (1949) 82 Ll L Rep 525.
[617] *Sabah Flour and Feedmills SDN BHD v Comfez Ltd* [1988] 2 Lloyd's Rep 18, 19 (Parker LJ).
[618] See, for example, *The Morviken* [1983] 1 Lloyd's Rep 1, 6&7 (Lord Diplock): 'My Lords, like all three members of the Court of Appeal, I have no hesitation in rejecting this narrow construction of art. III, r. 8, which looks solely to the form of the clause in the contract of carriage and wholly ignores its substance. The only sensible meaning to be given to the description of provisions in contracts of carriage which are rendered "null and void and of no effect" by this rule is one which would embrace every provision in a contract of carriage which, if it were applied, would have the effect of lessening the carrier's liability otherwise than as provided in the rules. To ascribe to it the narrow meaning for which Counsel contended would leave it open to any shipowner to evade the provisions of art. III, r. 8 by the simple device of inserting in his bills of lading issued in, or for carriage from a port in, any contracting state a clause in standard form providing as the exclusive forum for resolution of

already flow from the wording of Articles II and III Rule 1 and Rule 2, but Article III Rule 8 removes any doubt.[619]

Voyage Charters submit that the only general limitation on the effect of Rule 8 is that the liability should arise from negligence, fault or failure in the duties or obligations provided in Article III. Whilst negligence and fault are not clearly connected with failure in the duties, it is further submitted that the rule should be read so as to make the relevant negligence and fault as 'negligence in the performance of' and 'fault in the performance of' the duties respectively. So read, it would mean that negligence or fault relating to duties not themselves provided for in Article III would not be subject to Rule 8. Given that the purpose of the Rules is to ensure certain minimum standards for the performance of the tasks specified in Articles I and II, there is little reason why the performance of other contractual duties, otherwise unaffected by the Rules, should be affected by this ambiguity in Rule 8.[620]

Article III Rule 8 should not nullify clauses or agreements in contracts of carriage which deal, say, with responsibility for things occurring before loading or after discharge.[621] On the other hand, referring to Article VII, nothing shall prevent a carrier or a shipper from entering into any agreement for responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from the ship on which the goods are carried by sea. If the Rules are extended to cover the whole loading and discharging operation by agreement, it is proper to examine the intention of the parties in the light of the custom and practice of the port, as well as the nature of the cargo itself, to determine at what point the operation of loading begins and at what point the operation of discharge ends.[622]

disputes what might aptly be described as a Court of convenience, viz. one situated in a country which did not apply the Hague-Visby Rules or, for that matter, a country whose law recognised an unfettered right in a shipowner by the terms of the bill of lading to relieve himself from all liability for loss or damage to the goods caused by his own negligence, fault or breach of contract'.

[619] *Bills of Lading* (3rd edn, Informa Law from Routledge 2015), para [11.212].

[620] *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [85.246].

[621] In the first instance it may appear that the time which the goods are loaded should coincide with the time which the loading operations are completed, whereas the time which they are discharged should coincide with the time which the discharge operations are completed, but situation is different: see *American Can Company Ltd and Gosse Millerd Ltd v Canadian Government Merchant Marine, Ltd* [1927] 28 Ll L Rep 88, 103 (Wright J) and *Pyrene Company, Ltd v Scindia Steam Navigation Company Ltd* [1954] 1 Lloyd's Rep 321, 327–329 (Devlin J).

[622] In *Pyrene Company Ltd v Scindia Steam Navigation Company Ltd* [1954] 1 Lloyd's Rep 321, Devlin J specifically referred to 'custom and practice of the port and the nature of the cargo'.

One-way effect of Article III Rule 8, compared to Article V

Article III Rule 8 mostly works only one way in that it prevents the carrier from contracting out of the scheme of his compulsory or paramount obligations under the Rules and in tort or bailment. But there is still the certain possibility to agree to a modification of the Rules' obligations in the exercise of the parties' legitimate freedom to choose on what best suits them. Further, it is still open to the shipper/charterer to contract out of his obligations under, for example, Article IV Rule 3 or Rule 6, to enable them to get better terms than would be obtained by relying on the Rules.[623]

In *Studebaker Distributors v Charlton Steam Shipping*,[624] although the certificate issued by the shipper's surveyor did not comply with the terms of the bill of lading clause and could not, therefore, be relied upon by the defendants as conclusive evidence that the goods had been properly stowed, the question was argued whether the same clause offended against the Harter Act 1893. It was held that the Act, which in accord with English decisions should be regarded as written out in the bill of lading, prohibited any clause relieving the shipowner 'from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage…'[625]

The learned judge revisited the previous authorities on the subject matter and found quite contradictory records, in the only previous case, *Walters v Joseph Rank,* from 1923, before Bailhache J.[626] As that was an *obiter dictum,* Goddard J finally expressed his own opinion that the clause in the bill of lading was inconsistent with the Harter Act. The certificate could not be pleaded as an answer to the allegation of unseaworthiness.[627]

As a general note, one must use care in applying decisions on the Harter Act and in construing Article III Rule 8 of the Hague Rules, because of the existence of different rules as to the carrier's seaworthiness obligations and as to the use of the criterion of reasonableness in approaching exemption clauses in the United States.[628]

[623] It would seem however, that the ship cannot surrender the rights given to him by the Rules.
[624] *Studebaker Distributors v Charlton Steam Shipping Co* (1937) 59 Ll L Rep 23.
[625] The Harter Act 1893, Section 190 'Stipulations relieving from liability for negligence', analogues to Article III Rule 8.
[626] The case is reported both in 30 TLR 255 and in 14 Ll L Rep 421. Unfortunately, the two reports flatly contradict one another. In Lloyd's List Law Reports the Judge is reported as saying that he thought the clause was not inconsistent with the Act, and in the Times Law Reports that it was.
[627] *Studebaker Distributors v Charlton Steam Shipping Co* (1937) 59 Ll L Rep 23, 26 (Goddard J).
[628] However, it should be noted that the leading Harter Act case, *Dobell v Rossmore* [1895] 2 QB 408 CA evidently influenced both the European and American attitude towards paramount clauses.

However, the position may be different when the Rules apply only as a matter of contract.[629] In this respect, it is important to distinguish between contractual provisions that legitimately describe and limit the scope of the carrier's obligations, most obviously in relation to loading, stowage, discharge and care of the cargo, and those that seek to lessen his liability.[630] For example, depending on the facts a clause purporting to provide for no liability for failing to ventilate a cargo might be a legitimate clause effectively agreeing that proper care of the cargo might be effected without ventilation or, if objectively the cargo required ventilation, an ineffective attempt to lessen the carrier's liability.

Thus, in the first instance of *The Gudermes*,[631] Hirst J thought that a suggested term, implied by business efficacy, that the vessel was not obliged to heat cargo would come into conflict with Article III Rule 8 and declined to imply it.[632] The charter-party in that case was more like a long-term contract of affreightment which had no express reference to the Hague-Visby Rules or to any overriding provision such as they contain in Article III Rule 8 by itself. However, the bill issued under the charter-party did incorporate a clause paramount, but the port of shipment[633] was not in a Contracting State for the purpose of the COGSA 1971.

The one-way mandatory character in Article III Rule 8 is further reinforced by Article V, which permits the parties to increase the liabilities of the carrier and acts as a sort of counterweight to Article III Rule 8. In the words of Sir Guenter Treitel QC, there was obviously no harm in adding it *ex abundanti cautela*. But, since the COGSA 1971 gave to the Hague-Visby Rules the 'force of law', it would seem that the same term increasing the carrier's liability is therefore to be effective as a matter of law. The difficulty is caused by the specific requirement of Article V that the increase shall be 'embodied' in the bill of lading 'issued to the shipper'. By English law a transferee of the bill of lading only takes a contract on the basis of what appears on the face and reverse. Hence if the term does not appear on the bill of lading, the transferee would not be able to enforce it.[634]

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[629] As, for example, *The Tasman Discoverer* [2004] 2 Lloyd's Rep 647.

[630] Thus, clauses providing for liberty to transship or for delivery from ship's tackles did not offend Article III Rule 8: *The Tapti* [1936] 1 KB 565, neither does a clause giving liberty to carry on deck: *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) Ltd* [1953] 2 QB 295; [1953] 2 Lloyd's Rep 124.
However, a provision permitting transhipment and disclaiming any liability after transhipment would probably fall afoul of Article III Rule 2: See *Holland Colombo Trading Society v Alawdeen* [1954] 2 Lloyd's Rep 45, 53–54.
The distinction may not be easy to draw in practice, particularly as the court will look to the substance and not the form of the clause *The Hollandia* [1983] 1 AC 565, 574.

[631] *Mitsui & Co Ltd v Novorossiysk Shipping Co, The Gudermes* [1991] 1 Lloyd's Rep 456, however decision reversed on other grounds [1993] 1 Lloyd's Rep 311.

[632] The claimants submitted that the implication of business efficacy was ruled out by the terms of sub-Section 1(6)(a) of the Carriage of Goods by Sea Act 1971, and by Article III Rule 8 of the Hague-Visby Rules.
See *The Gudermes* [1991] 1 Lloyd's Rep 456, 472.

[633] The port of shipment was Aden, Yemen.

[634] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.309].

According to Sir Leslie Scott,[635] the words in regard to embodiment had been specifically inserted in the Rules in order 'to indicate quite clearly that the surrender must be contractual, that is, agreed at the time when the contract of carriage was made and not simply a surrender agreed to after the contract had been fulfilled'.[636]

As regards the original shipper, the bill of lading technically only acknowledges the shipment of goods as a form of receipt,[637] and acts as an evidence of a contract possibly made earlier;[638] thus, subject to the *parol evidence* rule or arguments concerning changes in the contract terms, a separate undertaking, not embodied in the bill of lading, by the carrier to undertake greater liability should usually be effective.[639]

A contract of carriage is often made between the shipper of the goods and the carrier before loading commences and, in the absence of an express agreement, a contract may be implied from the acts of the shipper in presenting the goods for loading and of the carrier in receiving them on board. It follows from this that the bill of lading, which is not issued until after receipt of the goods by the carrier, is not itself a contract of carriage, since that has, in the usual case, already been made.[640] Where the bill of lading issued to a FOB seller who can be called 'shipper' but not the charterer, and then indorsed to the charterer, it would seem that there is initially a bill of lading contract with the shipper, which is subject to the Rules in the normal way. Thus, the shipper can make the requisite demand under Article III Rule 3.[641] The endorsement to the charterer, however, creates the same position as regards the bill as that in which it was issued to the charterer direct, and it would seem from the general way in which the second paragraph of Article V is expressed that the charterer can make the demand if the bill first issued does not contain the requisite particulars.[642]

The shipper may be liable to the carrier under Article III Rule 5 on a guarantee that the particulars are supplied by him correctly, this does not make the charterer/indorsee, not being the shipper, liable. From the other side, the transferee of the bill of lading actually takes the contract on the basis of what appears

[635] Solicitor-General, later Scott LJ.
[636] See Francesco Berlingieri, The *Travaux Preparatoires* of the Hague Rules and of the Hague-Visby Rules (CMI, 1997), 636–637.
[637] *Rodoconachi, Sons & Co v Milburn Bros* (1886) 18 QBD 67.
[638] *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] 2 Lloyd's Rep 388, 402 para [45] (Eder J).
[639] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.309].
[640] *Pyrene v Scindia Navigation* [1954] 2 QB 402, [1954] 1 Lloyd's Rep 321.
[641] See *The President of India v Metcalfe Shipping Co Ltd, The Dunelmia* [1970] 1 QB 289, 295.
[642] See Charles Debattista, 'The Bill of Lading as a Receipt – Missing Oil in Unknown Quantities' [1986] LMCLQ 468, 479–480; and *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.311].

on its face and reverse.[643] If such a declared term does not appear on the bill of lading – the transferee will be unable to enforce it, unless the carrier had been in a separate communication with him in advance.

Another possibility is that the bill may contain the 'qualifying' clause, which negatives the other statements, and it may easily appear that there is no representation by the carrier upon which the transferee can be said to have relied. And it is irrelevant whether or not the qualification is true.[644] Even where the representation is of quantity and, therefore, covered by Section 4 of the COGSA 1992,[645] negativing qualifications will be effective as they will prevent the bill from being one that 'represents goods to have been shipped'.

In *The Mata K,*[646] the carriage was subject to the Hague Rules.[647] A shortfall of cargo was discovered on final discharge. The cargo interests' assignees advanced the claim against the carrier. The defendants denied the alleged shortage and submitted that all the cargo was unloaded and that if less than the total bill of lading quantity was discharged the explanation was that the total bill of lading quantity was not shipped.

The plaintiffs argued that the defendants were bound by the declared bill of lading quantity and based on Article III Rule 8, it was not open to them to say that the whole quantity was not shipped. The issues were whether the defendants were bound by the quantity of goods stated in the bill of lading by reason of the terms of the bill of lading and/or by reason of the incorporation of the binding clause[648] of the charter.

It was held, *inter alia*, that a bill of lading in which the weight, measure, quantity of goods shipped was 'said to be unknown' did not represent that the goods stated had been shipped so as to be *conclusive* evidence against the carriers under Section 4.[649] There was no basis on which the 'weight … unknown' provision could be treated as 'null and void and of no effect' under Article III Rule 8; Article III Rule 4 had no application because the bill of lading was not 'such a bill of lading' as referred to in Article III Rule 3 so that the bill was not *prima facie* evidence of receipt of the stated quantity of cargo under Article

[643] *Leduc & Co v Ward* (1888) 20 QBD 475, especially Lord Esher in the Court of Appeal.
[644] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [4.32] – [4.35].
[645] The Carriage of Goods by Sea Act, 1992, Section 4.
[646] *Agrosin Pte Ltd v Highway Shipping Co Ltd, The Mata K* [1998] 2 Lloyd's Rep 614.
[647] Under the voyage charter FERTIVOY_88 the vessel after loading Ventspils, Latvia proceeded to discharge South Korean and Japanese ports with the final port of Sodeguara, Japan.
[648] Clause 46: '…Quantity/quality of cargo as determined by an International Independent Surveyor (SGS or another neutral international organisation) together with Master to be final and binding for both parties. Owners to be responsible for quantities of cargo taken on board'.
[649] *The Mata K* [1998] 2 Lloyd's Rep 614, 619 (Clarke J): '… it is likely that Section 4 of the Carriage of Goods by Sea Act, 1992 was intended to lead to the same result as art III r 4 of the Hague-Visby Rules'.
Further see 616, col 2 and 620, col 2.

III Rule 4, and the bill of lading did not represent that the stated quantity of cargo was shipped so as to be *conclusive* evidence against the defendants under Section 4.[650]

In coming to such a conclusion, Clarke J referred to the decision of Longmore J in *The Atlas,*[651] who said that one has to construe the bill of lading as a whole. If the document provides that the weight is unknown it cannot be an assertion or representation of the weight in fact shipped. The statements like 'weight unknown' must be held to mean that the shipowners are not committing themselves, one way or the other, as to the weight of the cargo shipped.

In giving the decision Clarke J stated:

> If the bills provide 'Weight … number … quantity unknown' it cannot be said that the bills "show" that number or weight. They "show" nothing at all because the shipowner is not prepared to say what the number or weight is. He can, of course, be required to show it under article III Rule 3 but, unless and until he does so, the provisions of article III Rule 4 as to *prima facie* evidence cannot come into effect.[652] Thus, in order to succeed the plaintiffs would, as a first step, have to prove that 'they demanded a bill of lading showing the weight of the goods as furnished in writing by them'.[653]

Thus, it was found that based on the form of the bill by itself, there was no demand such as would satisfy Article III Rule 3. There was no basis on which the 'weight … unknown' provision could be treated as null and void and of no effect under Article III Rule 8. The 'liability' referred to must in this context be liability arising for breach of the obligations in Article III Rule 1 and 2.[654]

It should be mentioned that the terms of Article III Rules 3 and 4 are confined to cases where the goods are entrusted to a 'carrier' or are received under a 'contract of carriage', as defined in the meanings set out in Article I. Where, therefore, there is no carrier and no contract of carriage, the terms of the Rules do not apply, or at any rate do not apply until the bill of lading becomes the document which regulates the relations of the parties. The Rules have, therefore, no application to a shipper who is also charterer, and it

[650] *The Mata K* [1998] 2 Lloyd's Rep 614, 619 col 1, 620 col 1, 621 col 2 (Clarke J).
[651] *Noble Resources Ltd v Cavalier Shipping Corp, The Atlas* [1996] 1 Lloyd's Rep 642.
[652] ibid, 646 (Longmore J). In coming to such a conclusion Longmore J referred to *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamship Ltd* (1946) 80 Ll L Rep 13; [1947] AC 46 and *Attorney General of Ceylon v Scindia Steam Navigation Co Ltd* [1961] 2 Lloyd's Rep 173; [1962] AC 60.
[653] *The Mata K* [1998] 2 Lloyd's Rep 614, 618 col 2 (Clarke J) with reference to *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* (1946) 80 Ll L Rep 13, 18; [1947] AC 46, 57 (Lord Wright).
[654] See *The Mata K* [1998] 2 Lloyd's Rep 614, 620 (Clarke J) and *The Atlas* [1996] 1 Lloyd's Rep 642, 646 (Longmore J).

seems that such a shipper cannot demand a bill of lading in the form prescribed, because until the contract between the parties is regulated by a bill of lading there is no carrier within the meaning of the Rules.[655]

Severance and Article III Rule 8

Problems may arise in connection with the following words in Article III Rule 8 *'... otherwise than as provided in these Rules, shall be null and void and of no effect'*.[656] It may be asked whether a whole clause is void because part of it is caught by Article III Rule 8, or whether it is severable and/or only effective in certain respects. It would seem that the better view is that a clause should only be void in so far as it involves reduction of the carriers' liabilities and not, where it may have this effect, *in toto*. Any other conclusion might nullify provisions in themselves generally unobjectionable, or unobjectionable in many respects, such as choice of law and arbitration clauses, and clauses delimiting the carrier's area of responsibility (e.g. as to loading).[657]

The literal wording of the rule makes no provision for severance. However, providing specific wording included in the clause,[658] the court will be prepared to sever an offending part of a clause from a non-offending part.

In *Svenska Traktor v Maritime Agencies (Southampton)*[659] a clause permitting carriage on deck and providing that there should be no liability for goods so carried was held valid as regards the first part [in regards to the liberty to carry on deck], but void as regards the second, with the result that deck carriage was authorised but subject to the Rules. Some of the tractors covered by the bill of lading were stowed on the deck of the vessel *Glory* on her voyage from Southampton to Stockholm. One tractor came adrift and was lost overboard. The consignees named in a bill of lading sued the time charterers, claiming damages (the admitted value of a unit and its equipment) for alleged breach of contract or duty in connection with the ocean carriage. Defendants denied liability. The charter-party in question was on the printed form of BALTIME_1939 and incorporated the UK COGSA 1924.[660]

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[655] *Scrutton On Charterparties & Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [14-014], when considering bills of lading issued under charterparties.
[656] Such problems arise also under The Unfair Contract Terms Act 1977.
[657] See discussion in *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-198] describing which types of clauses are covered; para [9-199] referring to choice of court clauses; para [9-200] referring to arbitration clauses.
[658] For example, 'If or to the extent that, any terms of this bill of lading [are] repugnant to or inconsistent with anything of such [Hague Rules] it shall be void'.
[659] *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) Ltd* [1953] 2 QB 295; [1953] 2 Lloyd's Rep 124.
[660] The clause in the bill of lading which incorporated the Carriage of Goods by Sea Act 1924 provided for:
'All the terms, provisions and conditions of the Carriage of Goods by Sea Act 1924 and the Schedule thereto, are to apply to the contract contained in this bill of lading and the carriers are to be entitled to the benefit of all privileges, rights and immunities contained in such Act, and the Schedule thereto, as if the same were herein specifically set out

Two points of law arose.

The first point flowed from the fact that the bill of lading did not state that the goods were being carried on deck and therefore not taken out of the ambit of the Carriage of Goods by Sea Act. The carriage covered by the Act was normal carriage, and the bill of lading holder was entitled to have his cargo carried below deck unless the bill of lading stated that carriage was to be on deck. Thus, deck carriage was abnormal and was a deviation in the absence of custom or express agreement, and the shipowner could not rely on any exceptions clause. The consignees should have been reasonably warned, in a case where the shipowners were entitled to carry on deck, and did carry on deck, that they were doing so.

Alternatively, it was submitted that line 76 of the bill of lading,[661] which in that sense was an exclusion clause, had to be read with reference to Article III Rule 8, which made null and void clauses relieving shipowners from liability, or lessening their liability. In certain circumstances, line 76 contained a clause that was aimed at lessening the shipowners' liability, and the shipowners could not rely on it. If it was void, there was nothing in the bill of lading to entitle defendants to carry the tractor on deck and therefore they could not rely on perils of the sea.

The third point of law would arise if the judge concluded that defendants were, for some reason, entitled to carry the tractor on deck. It would then have had to be decided whether the tractor was properly and carefully stowed, as required by Article III, Rule 2.[662] The fact that the tractor went overboard in normal weather suggested bad stowage.

In reply to the Plaintiff's submission, the Defendants responded that under line 76 they were not liable. Alternatively, they said that it was a loss by perils of the sea.

Thus the general question was whether 'liberty' was the equivalent of 'statement' within the meaning of the Act.[663] In the light of line 76, the judge questioned if the shipowner had (in those circumstances) ever been entitled to carry the tractors or any of them on deck, as the second part of the sentence offended against Article III Rule 8 and could not be relied upon the shipowner.[664]

If, or to the extent that, any terms of this bill of lading is repugnant to or inconsistent with anything of such Act or Schedule, it shall be void. There the matter is expressed, and even if it had not been expressed it would have been implied by law'.

[661] Line 76 of Bill of Lading: 'Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage, or claim arising therefrom'.

[662] *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) Ltd* [1953] 2 Lloyd's Rep 124, 126 col 2.

[663] ibid, 126.

[664] ibid, 130 (Pilcher J).

The Defendants extensively relied on *Varnish v Kheti*[665] to say that it was possible the second part of the clause did not offend against the Act. However, the judge found that case depended upon its own facts,[666] and there was no authority at all for the proposition that the second part of that particular clause did not offend against the Act. He was clear that it did.[667]

As the bill of lading contained no statement that any particular goods were being shipped on deck, this fact led Pilcher J to consider the section of the Act and the articles of the Schedule:

> A mere general liberty to carry goods on deck is not in my view a statement in the contract of carriage that the goods are in fact being carried on deck. To hold otherwise would in my view do violence to the ordinary meaning of the words of article I (c) of the Act.[668]

Thus, the judge proceeded upon the assumption that the shipowners had had such a liberty as to ship cargo on deck subject always to their obligations under Article III Rule 2, properly and carefully to load, handle, stow, carry, keep and care for the goods in question.

The judge was inclined to think that the Defendants were right that the clause should be read disjunctively and that inasmuch as the first portion did not offend against the Act it should be allowed to remain, and that it could not consequently be said that in shipping some tractors on deck the owners had committed such a fundamental breach of their obligation under the contract of carriage, so as to disentitle them from relying upon any of the statutory exceptions, and in particular upon the exception of perils of the sea.[669]

Quite the opposite, at first instance, was held in *Renton v Palmyra*[670] (although reversed on other grounds), where severance was a process which McNair J considered not to be legitimate, and *dictum* of Pilcher J was not followed. The submission of Plaintiffs in that case was, *inter alia*, that inasmuch as the bills of lading state the contract voyage to be from Vancouver or Nanaimo to London or Hull, the provision in Article III Rule 2, that 'the carrier shall properly and carefully … carry … and discharge the goods'

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[665] *Varnish, WR & Co Ltd v Kheti (Owners), The Kheti* [1948/49] 82 Ll L Rep 525.
[666] *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) Ltd* [1953] 2 Lloyd's Rep 124, 130 (Pilcher J): 'it was a case in which the Carriage of Goods by Sea Act was only incorporated by contract, and a case in which a rubber stamp clause was superimposed upon the bill of lading'.
[667] ibid, 130 (Pilcher J).
[668] ibid, 126 (Pilcher J).
[669] ibid, 131 (Pilcher J): 'The two portions of the clause under consideration are connected by the conjunction 'and' without any stop. The second part offends against the Act and the first part does not. While, in the view which I take of the facts, the point in this case has not any practical importance, I am inclined to think that Mr. Brandon is right, and I proceed upon the assumption that the shipowners had liberty to ship cargo on deck subject always to their obligations under Art. III, r 2, properly and carefully to load, handle, stow, carry, keep and care for the goods in question'.
[670] *GH Renton & Co* v *Palmyra Trading Corp of Panama* [1955] 2 Lloyd's Rep 301.

involved an obligation to discharge at London or Hull, and that any clause or stipulation in the bills of lading which purported to entitle the carrier in any circumstances to deliver elsewhere was avoided by Article III Rule 8, as being a clause which relieves the carrier from liability for failure to perform this obligation.[671]

The particular clauses relied upon [by the Owners], namely, Clause 14 (c) and (f),[672] if were given their literal meaning, would permit the shipowner to discharge the goods at Vancouver, the port of loading, and to claim full freight: such provision would clearly be avoided by the Rules and, if part of the clause was bad, the whole clause had to be avoided.

McNair J stated:

> The words of Article III, Rule 8, 'any clause, covenant or agreement' are quite precise and do not, as I think, permit of any such process of revision in a case where the Act and Rules apply as a matter of law; and where, as in this case, the Act and Rules apply as a matter of contract and the parties have not in the incorporation clause used language such as 'if and to the extent that any terms of this bill of lading are repugnant to or inconsistent with the Act or Rules such term is to be void', I see no method of construction by means of which such process of revision can take place.[673]

In expressing his view, the judge was conscious that he could be differing from the tentative view expressed in *Svenska Traktor v Maritime Agencies (Southampton)*. However, the incorporation clause was different here because the shipment in question was an outward shipment from the United Kingdom so that the Act and Rules applied as a matter of law, and the clause itself fell into two distinct parts and did not require substantial revision.[674] However, it is submitted that this literalistic approach of McNair J in *Renton v Palmyra*[675] is unattractive and ought not to be followed, even in the absence of a repugnancy clause.

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[671] ibid, 311 col 1.
[672] Clause 14(c): 'Should it appear that epidemics, quarantine, ice,-labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore-difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo port of loading or any other safe and convenient port';
Clause 14(f): 'The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods'.
[673] *GH Renton & Co* v *Palmyra Trading Corp of Panama* [1955] 2 Lloyd's Rep 301, 314 col 2.
[674] ibid, 314 col 2.
[675] *GH Renton & Co* v *Palmyra Trading Corp of Panama* [1955] 2 Lloyd's Rep 301.

It is also interesting to note a *dictum* of Salmon J in *British Imex Industries v Midland Bank*,[676] a case that did not involve a repugnancy clause, in which the judge said that 'in so far as' the offending clause went beyond Article IV Rule 2, it was null and void.[677] Whilst that reflected the way the case was argued, the use of the terms 'in so far as' may be significant. It further appears to have been the view of the Judicial Committee of the Privy Council in *Holland Colombo Trading Society v Alawdeen* that the effect of The Rules and Article III Rule 8 was 'to override and impliedly delete from the bill, the *peccant* … provisions'.[678]

On the other hand, in *The Zhi Jiang Kou*,[679] a court in New South Wales, Australia used some ingenious arguments to find that a clause in a bill of lading shortening the time for suit was valid and did not contravene the Hague Rules. In that judgment, *the freedom of contract* rule was relied upon as one of the arguments. The issue mostly related to the delivery of cargo to a person who was not the holder of the bill of lading. The court categorised this as a post-discharge situation to which Article III Rule 8 would not apply and at which stage the parties are allowed, by the Hague Rules themselves, to limit or exclude their liability under Article VIII.

[676] *British Imex Industries v Midland Bank* [1957] 1 Lloyd's Rep 591.
[677] ibid, 597 (Salmon J): 'It may be that the parties can agree what shall be deemed to be adequate marking. In my judgment, however, it is not open to the parties to agree that the goods shall be deemed in certain circumstances to be inadequately marked so as to relieve the vessel or the shippers from liability on that account if in fact and in truth the goods are adequately marked: see *Walters v Joseph Rank, Ltd* (1923) 14 Ll L Rep 421; (1923) 39 TLR 255; *Studebaker Distributors Ltd v Charlton Steam Shipping Company, Ltd* [1938] 1 KB 459; (1937) 59 Ll L Rep 23; *Holland Colombo Trading Society, Ltd v Segu Mohamed Khaja Alawdeen and Others* [1954] 2 Lloyd's Rep 45, 53. Accordingly, in so far as Additional Clause B goes beyond art IV, r 2, of the Hague Rules, it is null and void'.
[678] *Holland Colombo Trading Society Ltd v Segu Mohamed Khaja Alawdeen and Others* [1954] 2 Lloyd's Rep 45, 53; see also *PS Chellaram* v *China Ocean Shipping Co., The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493; (1990) 28 NSWLR 394.
[679] *PS Chellaram* v *China Ocean Shipping Co., The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493; (1990) 28 NSWLR 394.

Chapter 5.2: Principles of interpretation when the Rules are incorporated by contract

As submitted by Tetley, the process of reconciling the Rules with other terms often entails a delicate (and not always predictable) balancing exercise in interpreting the unexpressed intention of the contracting parties, taking account of the contract as a whole and related commercial consideration.[680]

The starting point is that where English law governs the contract, the English courts' interpretation of the Rules will be followed, but this does not mean that the Rules will be automatically applied.[681] This also does not mean that reference to foreign law and/or the country of shipment will be completely abandoned, as the same may be highly relevant to the ascertainment of the parties' intentions.[682] It is further assumed that other legal systems also normally permit this in some way when either set of Rules does not apply by its own force.

In *The Komninos S,*[683] the matter arose under the bill of lading contract with the term 'all dispute[s] to be referred to British Courts', and the question arose 'whether, assuming the choice of an English forum showed an intention that English law should govern the contracts, the bills of lading "provided" that the legislation of the United Kingdom giving effect to the Rules should govern the contracts'.[684]

At first instance[685] the court found that 'as the bills of lading contained no express choice of law but the facts, that the contract was made in Greece between Greek shippers and Greek managers to carry Greek steel from Greece to Italy for freight payable in Greek currency, indicated that Greek law was the proper law of the contract'.[686] Thus the application of foreign limitation law was governed by The Foreign Limitation Periods Act.[687] However, 'if English law had been the governing law, and the Hague-Visby Rules had applied the defendants by force of art. III, r. 8, could not have relied on any clauses relieving them from liability in negligence'.[688]

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[680] William Tetley, *Marine Cargo Claims* (3rd edn, Yvon Blais, 1988), Chapter 2, Application of the Rules to Charterparties.
[681] See a discussion in Chapter 1.
[682] See a discussion by Rix J in *The Stolt Sydness* [1997] 1 Lloyd's Rep 273, 278-279; referring to *Stafford Allen & Sons Ltd v Pacific SN Co* [1956] 1 Lloyd's Rep 495, where US law was applied to determine whether Cristobal, in the Panama Canal Zone, 'was a port in the US'. For further examples of interpretation by English law see *The Merak* [1965] P 223 (concerning a provision for arbitration) and *The Stolt Sydness* itself.
[683] *Hellenic Steel Co and Others v Svolamar Shipping Co Ltd and Others, The Komninos S* [1991] 1 Lloyd's Rep 370.
[684] ibid, 376 (Bingham LJ).
[685] *Hellenic Steel Co and Others v Svolamar Shipping Co Ltd and Others, The Komninos S* [1990] 1 Lloyd's Rep 541.
[686] ibid, 544 (Leggatt J).
[687] ibid, 545–547.
[688] ibid, 546 (Leggatt J).

In considering the Owners' appeal, the Court of Appeal did not find any English or any other foreign authority that could assist them to answer the question or would have been of obvious importance in interpreting an international convention. The French text of the incorporated Rules gave no assistance in that regard either.[689] It was important to bear in mind that in many civil law systems, much stricter rules governed incorporation by reference than were accepted in the subject case. It was further important to bear in mind that the bills were negotiable instruments that could bind parties remote from the original contracts.

Interpreting Article X(c), the Court of Appeal found it impossible to conclude that 'All dispute[s] to be referred to British Courts' amounted to a provision that the legislation of the United Kingdom giving effect to the Rules should govern the contract. It was held that where English law[690] was the proper law of contract, the Hague-Visby Rules were not incorporated, and, therefore, the exception clauses in the bills protected the shipowners against the undoubted negligence of the shipowner's servants or agents. The fact was that the cargo-owners contracted on terms which expressly relieved 'the shipowners, their master and crew, of responsibility for any act, error, neglect or default in the management, stowage, navigation or preparation of the vessel or otherwise'.

The judgment gave effect to what the parties expressly agreed.[691] As the Hague-Visby Rules did not find the proper application in the bill of lading contract, Article III Rule 8 had not been triggered at all.

Bingham LJ stated:

> since the shipment was from Greece, section 1(3) plainly had no application. It was not suggested that these bills expressly provided that the Rules should govern the contract so as to trigger the application of section 1(6). Greece was not a contracting state, so the bills of lading were not issued in a contracting state and the carriage was not from a port in a contracting state, and article X (a) and (b) accordingly had no application. There was thus no question of the United Kingdom legislation applying automatically. It had to be incorporated. So, the argument centred on article X (c).[692]

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[689] *The Komninos S* [1991] 1 Lloyd's Rep 370, 376–377.
[690] Which incorporates the Hague-Visby Rules by force of the Carriage of Goods by Sea Act 1971.
[691] *The Komninos S* [1991] 1 Lloyd's Rep 370, 377 (Bingham LJ).
[692] ibid, 376 (Bingham LJ).
See also the earlier American case *The Berengaria* 1931 AMC 690 2CCA, where the bill of lading, covering a carriage from Italy to the US, did not contain a paramount clause, but only a general choice of law provision referring to English law.
A GBP 20 per package limitation of liability clause was held to apply, although this clause generally was in derogation of the British COGSA 1924 para 4(5).

Where the Rules do not have the force of English law they may be incorporated by contract. In such a case the words [of the Rules] are to be treated as written out in the contract and construed as contractual terms rather than statutorily. In addition, this fact may easily affect the Rules' application by itself.

The following example shows the approach of English courts on interpretation of the Rules when incorporated voluntarily. In *The River Gurara*,[693] the bills of lading were on the UK West Africa Line form which made, by a clause paramount, the carriage of goods subject to the Hague Rules *if they formed part of the law of the place of shipment*. The law of the places of shipment of *River Gurara's* cargo incorporated the Hague Rules, in their unamended form, and thus the contract of carriage was rendered subject to those rules. Thus, the advanced basis of the contract was that the voluntary incorporation of the Rules equated with their mandatory application. Moreover, Clause 9(b) of the bill of lading provided for the following terms: notwithstanding any provision of law to the contrary, the Container shall be considered a package or unit even though it has been used to consolidate the Goods, the number of packages or units constituting which have been enumerated on the face hereof as having been packed therein by … the Merchant and the liability of the Carrier … shall be calculated accordingly.

In order to conclude that the express clause in a Hague Rules bill of lading, which defined a container as a package, would be struck down by Article III Rule 8, their Lordships, with reference to the decision of Colman J at first instance,[694] revisited the approach to the construction of the Hague Rules as a whole. Phillips LJ emphasised[695] that the Hague Rules were the product of an international Convention. They were incorporated into the domestic legislation of a large number of seagoing nations and became widely used as the terms that governed the international carriage of goods by sea; thus, two considerations would follow from this fact. First, it is legitimate when construing the Rules to have regard to their objects, as disclosed by the *travaux préparatoires* of the Convention. Second, particular respect should be paid to decisions of other jurisdictions in respect of the meaning of the Rules, for the stated object of the Convention was the unification of the domestic laws of the Contracting States relating to bills of lading.[696]

[693] *The River Gurara* [1998] 1 Lloyd's Rep 225 (CA).
[694] *The River Gurara* [1996] 2 Lloyd's Rep 53 (HC).
[695] *The River Gurara* [1998] 1 Lloyd's Rep 225 (CA), 228 col 2 and 229 col 1.
[696] With reference to *Foscolo, Mango v Stag Line* [1931] 41 Ll L Rep 165, 171; [1932] AC 328, 342 (Lord Atkin) and 174, 350 (Lord Macmillan); *The Hollandia* [1983] 1 Lloyd's Rep 1, 5; [1983] 1 AC 565, 572 (Lord Diplock).

Following these two considerations, it was argued that one of the main purposes of limitation in the Rules was to benefit cargo owners in order to give them a liberal limit of liability to preclude shipowners from inserting clauses in their bills of lading purporting to limit liability to ridiculously low figures.[697]

From the carrier's perspective, it may be simply unfair to put an excessive liability when the carrier has no means to verify its initial extent, especially where packages are put in the container and a number is not apparent to the carrier and he has no means to attest the extent of his liability. However, the carriers' point of view was to be rejected, as the verification of package principle was not apparent from consideration of *travaux preparatories* of the Convention.[698] Furthermore, Article III Rules 3 and 5 by itself envisaged circumstances in which the shipowner would not be able to verify the number of packages shipped.[699]

Phillips LJ was persuaded by the cargo interests' argument to conclude that 'where the Hague Rules limit falls to be computed in relation to parcels of cargo which are loaded in containers, it is the parcels, and not the containers, which constitute the relevant packages'.[700] When the Convention was concluded in 1924, a figure of GBP 100 represented a fair figure for the average value of a package shipped. To apply the same figure to a huge container stuffed with many packages would defeat the object of preventing shipowners from limiting their liability to sums that were absurdly low by reference to the average values of cargoes shipped. Further, to describe a container as a package was to strain the natural meaning of that word. Thus, in *Bekol v Terracina Shipping*,[701] which seemed to be the only recorded case in which the English Court had considered the meaning of 'package' in the Hague Rules, Leggatt J referred to the definition of that word in the Oxford English Dictionary: '… a bundle of things packed up, whether in a box or receptacle, or merely compactly tied up'.

The preference for basing damages on the packages, rather than the containers in which they are stuffed, at least where the bill of lading states the number of each, were shown by the Courts of Canada, Australia,

[697] See, for example, Anthony Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 228–229.
[698] See, Francesco Berlingieri, 'The *Travaux Preparatoires* of the Hague Rules and of the Hague-Visby Rules' (CMI, 1997), 445–494.
[699] *The River Gurara* [1998] 1 Lloyd's Rep 225, 229 col 1 (Phillips LJ).
[700] ibid, see Claimant's Submissions quoted at 229 col 1.
[701] *Bekol BV v Terracina Shipping Corporation* (July 13, 1988, unreported).

France, Holland, Italy and Sweden.[702] Similarly, having reviewed a set of US authorities,[703] Phillips LJ concluded that it was impossible to derive the functional economics test[704] from the legislation. This would make the intent of the parties, as revealed by the available evidence, the touchstone in applying the US COGSA liability to a containerised cargo. Evidence of intent would serve to rebut the initial presumption and identify conclusively the US COGSA package. The better approach was to conscientiously construe the legislation in the factual context seeking to effectuate the legislature's, not the parties', intent and purpose.[705]

Thus Phillips LJ concluded that 'the Courts have calculated the Hague Rules limit on the basis of the packages and not the containers'.[706] A huge metal container stuffed with goods which will normally themselves be made up in individual packages cannot naturally be described as a package. A test for determining whether a container is a package must reflect the realities of the maritime industry of today.[707]

As Reynolds pointed out, the main problem is caused by the use of the same two words, and especially "unit", in the limitation provision of Article IV Rule 5(a), and in the container provision of Article IV Rule 5(c).[708] *The Travaux Preparatoires* reveals that the word "unit" in para (a) was included as an alternative to "package" 'at a very late stage without much explanation' and was taken to cover unpacked objects.[709] The US COGSA 1936 took a different interpretation and specified that what was meant was "in the case of goods not shipped in packages, per customary freight unit", which provided a limit for bulk

[702] A similar approach to that of the American decisions was adopted by the Canadian Courts: see *The Tindefjell* [1973] 2 Lloyd's Rep 253 and *Haverkate v Toronto Harbour Commissioners* (1986) 30 DLR (4th) 125;
and by the New South Wales Supreme Court in *PS Chelleram & Co Ltd v China Ocean Shipping Co* [1989] 1 Lloyd's Rep 413. The Courts of Holland and France and Sweden appear to have adopted the same approach.
Italy seems to strike a discordant note: in *Compagnia Mediterranea Servizi Marittimi SpA v Carniti*, a decision of the Court of Cassation of Apr. 27, 1984, No. 2643.
[703] *The River Gurara* [1998] 1 Lloyd's Rep 225, 230–231; *Standard Electrica SA v Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft* [1967] 2 Lloyd's Rep 193; *The Mormaclynx* [1971] 2 Lloyd's Rep 476;
The Pioneer Moon [1975] 1 Lloyd's Rep 199; *The Kulmerland* [1973] 2 Lloyd's Rep 428; *Nichimen Co v MV Farland*, 462 F 2d 319 (1972) and *The Container Forwarder* [1974] 1 Lloyd's Rep 119; *The Aegis Spirit* [1977] 1 Lloyd's Rep 93; *Yeramex International v SS Tendo* [1977] AMC 1807; *Mitsui & Co Ltd v American Export Lines Inc* 636 F 2d 807 (1981); *Binladen B.S.B. Landscaping v MV Nedloyd Rotterdam* 759 F 2d 1006 (1985); *Hayes-Leger Associates Inc v MV Oriental Knight* 765 F 2d 1076 (1985).
[704] Advanced in *The Kulmerland* [1973] 2 Lloyd's Rep 428, 431–432 (Oakes J).
[705] *The River Gurara* [1998] 1 Lloyd's Rep 225, 229 (Phillips LJ).
The principle derived from the US case *The Aegis Spirit* [1977] 1 Lloyd's Rep 93, 100 (Beeks DJ).
[706] *The River Gurara* [1998] 1 Lloyd's Rep 225, 233.
[707] *Matsushita Electric Corp of America v SS Aegis Spirit, The Aegis Spirit* [1977] 1 Lloyd's Rep 93, 99 (Beeks DJ).
[708] Professor Francis Martin Baillie Reynolds, 'The Package or Unit Limitation and the Visby Rules' [2005] LMCLQ 1, 2.
[709] See Professor Michael F Sturley, *The Legislative History of the Carriage of Goods by Sea and the Travaux Preparatoires of the Hague Rules* (Fred B. Rothman & Co 1990), Volume 1, 322 (The Chairman Sir Henry Duke): "Now there is a slight alternation made to which I call your attention – 'GBP 100 paer package or unit' – As you know, there are goods to which the Code will apply which are not described as per package, and the matter was raised yesterday, and upon consideration the committee thought that by adding the words 'or unit' the intent would be clear" (dated 02nd September 1921).

cargo. This means that the body of American cases on the limitation are of indirect relevance in England, because in the context they concern packages and have no fall-back concept of unit in a related sense.[710]

But what has happened with 'freedom of contract' and 'mutual consent to a bargain'? Why is it not possible to contractually agree on the definition of the package where the parties' intentions are paramount?

As said, the legislative objective for the Rules was to establish the minimum floor below which the carriers subject to the act could not reduce their liability for cargo damage. If carriers alone, or even carriers and shippers together, are allowed to christen something a 'package' which distorts or belies the plain meaning of this word as used in the statute, then the liability floor becomes illusory and negotiable. The package limitation provision serves no purpose whatsoever if the Courts' function in applying it is to merely identify and uphold the parties' private definition of COGSA package. In the words of Beeks DJ 'it is not the parties' characterisation of the shipment, but the Court's interpretation of the statute, that controls'.[711]

A further undesirable side effect of a rule based upon the parties' intentions is its obvious potential for impairing the value and negotiability of ocean bills of lading, due to uncertainty in the allocation of risks with respect to the cargo. The holder of the bill can never be sure what the shipper and carrier 'intended' to treat as a package, except to the extent that said intent can be taken from the four corners of the bill itself. Bills of lading, though, are hardly appropriate vehicles for such expressions of mutual intent, because their contractual terms are commonly the product of unilateral draftsmanship by the carrier incorporating largely self-serving provisions.[712]

The earlier American Court of Appeal decision may appear to have a conflicting view. In *Pannell v United States Lines*[713] the damaged cargo was a yacht shipped from London to New York on deck of the respondent's vessel *American Flyer* in May 1953. In unloading the yacht it sustained damage through fault of the carrier. The bill of lading referred to the US COGSA 1936 and the question for decision was what the legal effect of such reference was. The District Court held that the Act had the effect of making

[710] Professor Francis Martin Baillie Reynolds, 'The Package or Unit Limitation and the Visby Rules' [2005] LMCLQ 1, 2. The decision of the Court of Appeal in *Sea Tank Shipping AS v Vinnlustodin HF, The Aqasia* [2018] 1 Lloyd's Rep 530 has made clear that the Hague Rules limit had no application in the case of bulk cargo, as a "unit" meant a physical item of cargo and not a unit of measurement of freight unit, even in the context of a contract of carriage which specified a bulk cargo.
[711] ibid, 100 (Beeks DJ).
[712] ibid, 100 (Beeks DJ).
[713] *Peter Pannell v United States Lines Co* 1958 AMC 1428 SDNY (the District Court); 1959 AMC 935 (the Court of Appeal).

it applicable in the same way as where it applied *ex proprio vigore*,[714] and granted recovery on the basis of USD 500 per customary freight unit,[715] and referred to a commissioner the computation of damages. However, the Court of Appeal, Second Circuit[716] flatly rejected this point of view argued by the District Court.

Swan CJ stated:

> Where a statute is incorporated by reference its provisions are merely terms of the contract evidenced by the bill of lading…[717]
>
> The parties have defined what "package" means in the bill of lading. We see no reason why this specific definition should not prevail over the general term "package" contained in the Act. It is true that if the Act applied *ex proprio vigore* the yacht … could not be deemed a "package", and the parties by so describing it could not reduce the carrier's liability. But we cannot agree with the District Court's view that because the definition would be void when applied to shipments covered by the Act, it should likewise be ineffective to reduce liability where the Act is not operative as a matter of law.[718]

Thus the *Pannell* case falls within the "except otherwise provided" group of cases. Although Clause 2 of the bill of lading contained a customary US paramount clause, the goods were carried on deck, and the case was not one to which that Act applied.[719] Contrary, a bill of lading clause provided that the risks of on-deck carriage should be borne by the cargo-owner, and continued: '… but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the carrier shall have the benefit of all and the same rights, immunities, exceptions and limitations contained in said Carriage of Goods by Sea Act …'.

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[714] *Peter Pannell v United States Lines Co* 157 F S1958 AMC 1428 SDNY, 1439 (Palmieri DJ): the learned Judge did not believe that 'the effect of the incorporation should differ according to whether the incorporation is by permission of the Act itself or by permission of courts'.

[715] Pursuant to para 4(5) of the United States Carriage of Goods by Sea Act, 46 USCA para 1304(5), which provided that the carrier should not be liable 'in an amount exceeding USD per package …, or in case of goods not shipped in packages, per customary freight unit, …'.

[716] *Peter Pannell v United States Lines Co* 263 F2d 497 (1959); 1959 AMC 935.

[717] *The Westmoreland* 2 Cir 86 Fd 96, 97; *The Tregenna* 2 Cir 121 F2d 940, 945 (both cases related to incorporation by reference of the Harter Act); *Petition of Petterson Lighterage & Towing Corp* DCSDNY 154 F Supp 461, 467 (relating to incorporation of the US Carriage of Goods by Sea Act 1936).

[718] *Peter Pannell v United States Lines Co* 263 F2d 497 (1959); 1959 AMC 935, 936 – 937. See also *Aron & Co v The Askvin* 1960 AMC 314 2CCA; *Petterson Ltge & T Corp v Belgian Line* 1958 AMC 1261 2CCA, affirming 1958 AMC 567 SDNY, and *The Berengaria* 1931 AMC 690 2CCA.

[719] Pursuant to the US Carriage of Goods by Sea Act, Title 46 US Code para 1301(c).

From a close analysis of this case it is possible to make the conclusion that the US COGSA should only apply partially to the extent it might entitle the carrier to additional immunities and limitations; and the liability of the carrier for on-deck cargo primarily should be determined according to the terms of the bill of lading. Moreover, the same terms did not expressly provide that the carriage should be subject to the statutory responsibilities and liabilities.

Thus the *Pannell* decision is reconcilable with the other authorities.[720]

Herewith to mention that for the first time in English law, the Court of Appeal has recently confirmed the meaning of 'unit' in the context of The Hague and the Hague-Visby Rules. In *The Maersk Tangier*[721] it was held that any description of the cargo which states the number of items which are in fact 'units' or 'packages' inside the container will be sufficient enumeration for the purposes of Article IV Rule 5(c).[722] A 'unit' is any physical item which is not packaged up; and there is no additional requirement that the item must have capable of shipment breakbulk.[723] The bill of lading shall accurately describe the number of packages or units inside the container, but does not need to use specific words or describe the cargo item or "as packed".[724]

In this respect the English Court of Appeal found support for its approach in the French text of Article IV Rules 5(c) 'which simply refers to enumeration of the number of packages or units "being included" in the container',[725] and did not follow the decision of the Full Court of the Federal Court of Australia.[726] In *El Greco v MSC*[727] a consignment of posters and prints were loaded in 20 foot container and shipped from Australia to Greece with transhipment in Antwerp, Belgium. The container was carried under a non-negotiable received for shipment through bill of lading and said to contain "200,495 pieces posters and prints", "shippers load stow and count". The column entitled "No of Pkgs" contained the number "1", and Clause 21 (on the back of the bill) provided for: "Where the goods have been packed into containers by or on behalf of the merchant, it is expressly agreed, that each container shall constitute one package for

[720] *Watermill Export Inc v Mv Ponce* 1981 AMC 2457; 506 F Supp 612 (SDNY 1981), 614 (Sofaer DJ).
[721] *Kyokuyo Co Ltd v AP Moller-Maersk A/S, The Maersk Tangier* [2018] EWCA Civ 778; [2018] 2 Lloyd's Rep 59.
[722] ibid, para [92] (Flaux LJ).
[723] See a discussion, for example, https://www.quadrantchambers.com/news/maersk-tangier-court-appeal-dismisses-carriers-appeal-robert-thomas-qc-benjamin-coffer
[724] See a discussion in the following articles: Liz Booth, 'A Landmark Judgment Provides Clarity on the Hague-Visby Rules' (06th June 2018) Maritime Risk International; Edward Yang Lui, 'Packages, Units, Containers and The Maersk Tangier' (2018) 18 STL 4.
[725] *Kyokuyo Co Ltd v AP Moller-Maersk A/S, The Maersk Tangier* [2018] EWCA Civ 778; [2018] 2 Lloyd's Rep 59, at para [84] (Flaux LJ).
[726] ibid, para [92].
[727] *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyd's Rep 537; [2004] FCAFC 202.

the purpose of application of limitation of the carrier's liability". The word "merchant" was defined as the shipper and consignee.

The goods arrived damaged by seawater. It was agreed that the total figure of posters and prints was in fact overstated by about 70,000 pieces; and that the posters were in fact made up in about 2,000 packages. One of the questions was whether the single posters and prints were the "units" for the purposes of Article IV Rules 5(a), or whether the container was.

The primary judge rejected the carrier's argument that the package limitation in Article IV Rule 5 should be assessed reference to one container and found Clause 21 null and void by reason of Article III Rule 8. The primary judge similarly rejected the plaintiff's evidence as to the value of the goods at the port of discharge and calculated by reference to the value of the goods in Australia.

However, the Full Court found that the container was described as one package. Allsop J stated that 'if it is not clear from the face of the bill what numbers of packages or units were packed as such, there would only be one package or unit – the container or other article of transport'.[728] The words "packages or units … as packed" in the container referred to the manifestation of how the cargo was made up for transport and how it was packed in the container.[729] Hence in the case itself, 'the nature of the cargo was such as to be obvious that the bill did not disclose how and in what number the goods have been made up for transport as packed in the container'.[730] Article III Rule 8 should only apply where the bill of lading enumerated packages or units and included a clause that said that the enumeration was not agreed to be part of the bill of lading.

El Greco v MSC[731] illustrates the problems that arise when a "package" is contained within a larger receptacle. Beaumont J, although dissenting, relied on the fact that the container actually contained a smaller number of packages (2,000), which had not been referred to in the bill of lading,[732] with the result that the enumeration went beyond what was actually shipped and was only valid for the number of packages that was shipped. The majority approach gave a restrictive meaning to a key wording in Article IV Rule 5(c): "enumerated in the bill of lading as packed". It means that fine differences in meaning in

[728] ibid, at para [284].
[729] ibid, at para [286].
[730] ibid, at para [308].
[731] *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyd's Rep 537; [2004] FCAFC 202.
[732] ibid, esp at paras [99] and [100] (Beaumont J).

wording such as "packed", "separately packed", "consolidated", "packaged", "stowed" and "stuffed" may give rise to very different results.[733]

Reynolds argues that it is difficult to see that the words "as packed" were actually intended to bear such an imprecise significance attributed to them. 'On the basis of the judgment, it seems difficult to say more than that what is needed is some indication in the bill of lading that the item concerned is intended to rank as a unit for limitation purposes: in the absence of this the default provision will apply and the container will be the package'. Thus there is a need for a working definition of "unit" which excludes items too small or of too low value, and yet not apt to be part of a bulk cargo, from ranking to the limitation sum.[734]

Purely Constructional Approach

In contrast to the decision in *The River Gurara*, the court may take a purely constructional approach in which Article III Rule 8 plays no role if the same is clearly excluded from the ambit of a clause paramount. The bright example is *Sabah Flour and Feedmills v Comfez,*[735] where the Court faced a conflict between a contractual time bar and the time bar in Article III Rule 6, which had been incorporated by a clause paramount in The Australian Wheat Charter 1983 form. This was clearly not a case where it might be said that the parties had overlooked their provisions. The clause paramount was quite specific and selective.[736] It did not incorporate the Rules in their entirety.[737]

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[733] See a discussion in *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), paras [11.343] and [11.344]: 'For example, a statement in a bill of lading that the one container contains "100 car engine parts packed inside" would mean there are 100 units for limitation purposes. On the other hand, a statement in the bill of lading that the container contains "100 car engine parts" would mean that the one container is to be considered as the package or unit'. The same "anomaly" was reiterated at first instance court in *Kyokuyo Co Ltd v AP Moller-Maersk A/S, The Maersk Tangier* [2017] EWHC 654 (Comm); [2017] 1 Lloyd's Rep 580, at para [100] (Baker J).
See also a discussion in *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-269].

[734] See Professor Francis Martin Baillie Reynolds, 'The Package or Unit Limitation and The Visby Rules' [2005] LMCLQ 1, 3. There is more "trenchant criticism" expressed by Pierre-Jean Bordahandy in his article 'Package and Unit Limitation of Liability under the Hague-Visby Rules' [2004] 10(6) JIML 477, who similarly refers to the French text of Article IV Rule 5(c) and who argues that, in failing to refer to the French text, the Full Court of the Federal Court of Australia erred in its interpretation of the Hague-Visby Rules.

[735] *Sabah Flour and Feedmills SDN BHD v Comfez Ltd* [1988] 2 Lloyd's Rep 18.

[736] Clause 23 read as follows: 'The provisions of Section 5 and 8 of the Australian Sea Carriage of Goods Act 1924, and of arts III (except clause 8 thereof), IV, VII, and IX of the Schedule thereto shall apply to this charter-party and shall be deemed to be inserted in extenso herein. This charter-party shall be deemed to be a contract for the carriage of goods by sea to which the said Sections and the said arts apply, and no regard shall be had to art I of the said Schedule. Nothing in this clause shall be deemed to prejudice or limit clauses 7, 11, 18, 24, 25, 28, 30, 31 and 32 hereof'

[737] *Sabah Flour and Feedmills SDN BHD v Comfez Ltd* [1988] 2 Lloyd's Rep 18, 19 (Parker LJ): 'this case was somewhat unusual one as compared with others which have featured in the authorities in that the conflict which clearly exists in this case is not a conflict which arises between the written document clauses and the incorporated document clauses, but it is a conflict which arises between the clauses in the incorporated document and therefore it is one remove'.

Since clear words are generally required for the imposition of a time bar,[738] the conflict was resolved in favour of the longer time limit, as the provision that plainly gave the clauses in the Rules a certain edge over the clauses in a contract, was excluded, and it might be said that the method of express exclusion of that clause was specifically developed to ensure that the other clauses of the contract, if in conflict, would prevail.

The Court of Appeal[739] decided that:

(1) 'the proposition, that if an incorporated document contained provisions which conflicted with provisions of the written document then the terms of the written document, in the ordinary way, would prevail, was a rule of construction but it was not the only rule of construction which could be applied and no rule was of such importance that it could have been regarded as paramount; this was not a conflict between what the parties had written and the incorporated documents but a conflict between the incorporated documents themselves'.[740]

(2) An arbitration clause in the Charterparty AUSTWHEAT_1983 form[741] was general in its application; the six months' time limit applied to claims of all sorts and kinds. The clause paramount with exceptions prevailed because it was a specific clause dealing with certain types of claims and the one-year time limit in Article III Rule 6 applied to cargo claims against the carrier.[742]

Staughton LJ stated:

> general things do not derogate from special things. Arbitration Clause 34 is general in its application. It applies to claims by the owner against the charterer and to claims by the charterer against the owner. It applies to claims of all sorts and kinds. By contrast, art. III r. 6 applies only to claims against the carrier. Furthermore, it is, …, limited to claims which have some connection with the goods carried, or at any rate that was the case under the rules as scheduled to the 1924 Act, although it may have been modified somewhat since the rules became the Hague-Visby Rules. We in this case are concerned with the rules in the 1924 Act.
>
> … an additional reason for dismissing this appeal that the Clause Paramount [23] and the Rules time bar prevail because it is a specific clause dealing with certain types of claim only and with

[738] According to the decision in *Bunge SA v Deutsche Conti-HandelsGesellschaft mbH (No 2)* [1980] 1 Lloyd's Rep 352.
[739] *Sabah Flour and Feedmills SDN BHD v Comfez* [1988] 2 Lloyd's Rep 18 (Parker LJ and Staughton LJ).
[740] ibid, 20 col 1 with further reference to *The Saxonstar* [1958] 1 Lloyd's Rep 73.
[741] Clause 34 last sentence read as follows: '… Any claim must be made in writing and claimant's Arbitrator appointed within six months of the Vessel's arrival final port of discharge, otherwise all claims shall be deemed to be waived'.
[742] *Sabah Flour and Feedmills SDN BHD v Comfez* [1988] 2 Lloyd's Rep 18, 20 cols 1 and 2.

claims against the carrier only. The general provisions in Arbitration Clause [34] do not derogate from that.[743]

Repugnancy Clause and Deeming Provisions

Sometimes the incorporation of the Rules is reinforced by an express 'repugnancy clause' which states that in case of inconsistency the provisions of the Rules shall prevail,[744] or contract terms repugnant to or inconsistent with the Rules shall be void. In *Ocean Steam Ship v Queensland State Wheat Board*,[745] the bill of lading jurisdiction clause,[746] which specified that English law had to govern the contract, was held to be null and void in view of the incorporation of the Australian Sea Carriage of Goods Act 1924,[747] especially Section 9(1)[748] with its specific provision that made anything contrary to the Act of no effect.

MacKinnon LJ concluded that the goods were shipped and were carried on the terms of the mass of small print supplemented by the terms of the Australian Act and its schedule which were to be read into that contract as additional stipulations. Because of one of those additional stipulations, the parties were deemed to contract according to the law in force in the port of shipment, Brisbane. This led him to the conclusion that a jurisdiction clause was by another part of the contract to be null and void and of no effect.[749]

Equally, Luxmoore LJ suggested giving effect to the incorporation of the Act 1924 as it was not an Act of the Australian legislature, but as if all the words and the schedule to it were written out at length in the

[743] ibid, 20, col 2 (Staughton LJ).
[744] However, see *The Tasman Discoverer* [2004] UKPC 22 especially the robust statement at para [16] (Lord Bingham): '… a term in a bill cannot be repugnant to any provision of the Hague Rules if the terms in question represents a modification of the Hague Rules provision agreed by the parties in exercise of their freedom to agree what they will'.
As to repugnancy clauses see also *The Ion* [1971] 1 Lloyd's Rep 541: it is unlikely that such a clause can have a different effect from that of Article III Rule 8 if that applies.
[745] *Ocean Steam Ship Company Ltd v Queensland State Wheat Board* [1940] 68 Ll L Rep 136.
[746] Clause 16 read as follows: 'The contract evidenced by this bill of lading shall be governed by the law of England – Australian Sea Carriage of Goods Act, 1924, Section 9 (1): "All parties to any bill of lading . . . relating to the carriage of goods from any place in Australia . . . shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary . . . shall be illegal, null and void, and of no effect"'.
[747] Clause 1 read as follows: 'All the terms, provisions and conditions of the Australian Sea Carriage of Goods Act, 1924, and the schedule thereto are to apply to the contract contained in this bill of lading, and the carrier is to be entitled to the benefit of all privileges, rights and immunities, contained in such Act and the schedule thereto as if the same were herein specifically set out. If anything, herein contained be inconsistent with the said Act and schedule it shall, to the extent of such inconsistency and no further, be null and void'.
[748] The Australian Sea Carriage of Goods Act 1924, Section 9(1): 'All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect'.
[749] *Ocean Steam Ship Company Ltd v Queensland State Wheat Board* [1940] 68 Ll L Rep 136, 138–139.

bill of lading as constituting part of the contract therein contained.[750] Thus the only meaning which the words of Section 9(1) of the Act could give to a reasonable reader was that 'all parties shall be deemed to have intended to contract according to the laws in force at the place of shipment'. The further words 'any stipulation or agreement to the contrary shall be illegal, null and void, and of no effect' were part of that section and the words of a jurisdiction clause [16] to be contrary of that contained in the first part of Section 9(1) and must, therefore, as a matter of construction of the contracts, be ignored, with the result that the contracts were to be governed, according to the true meaning of the parties as expressed in the contracts, per Australian law.

Luxmoore LJ extensively referred to Lord Atkin in *Rex v International Trustee*[751]:

> The legal principles which are to guide an English Court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the Court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion the Court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law: e.g., the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried. But all those rules but serve to give *prima facie* indications of intention: they are all capable of being overcome by counter-indications, however difficult it may be in some cases to find such. The principle of law so stated applies equally to contracts to which a Sovereign State is a party as to other contracts. [752]

In accordance with these decisions American courts held that if, on the other hand, the paramount clause contained the reservation "except as otherwise specifically provided", the Harter Act or the COGSA 1936

[750] ibid, 140–141 (Luxmoore LJ) with further reference to *Dobell & Co v Steamship Rossmore Company Ltd* [1895] 2 QB 408, 412 (Lord Esher, MR): 'What we have to do is to construe the bill of lading, reading into it as if they (*sic*) were written into it the words of the Act of Congress' and at 413: 'They then introduce into their bill of lading the words of the Harter Act, which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading'.
[751] *Rex v International Trustee for the Protection of Bondholders AG* [1937] AC 500.
[752] *Ocean Steam Ship Company Ltd v Queensland State Wheat Board* [1940] 68 Ll L Rep 136, 140 (Luxmoore LJ) with reference to *Rex v International Trustee for the Protection of Bondholders AG* [1937] AC 500, 529 (Lord Atkin).

referred to were not controlling. Special clauses normally invalid under the Acts should not be disregarded.[753] Courts of other countries have adhered to similar points of view.[754]

In *Holland Colombo Trading Society v Alawdeen*,[755] the Hague Rules were incorporated into a bill of lading contract 'unless otherwise provided in the bill of lading'. In considering the appeal from a judgment of the Supreme Court of Ceylon, the Judicial Committee of the Privy Council held that the provisions of the bill of lading prevailed over the Hague Rules in the case of conflict.

Asquith LJ propounded:

> … But the Hague Rules are only incorporated 'unless otherwise provided in the bill of lading'; hence the provisions of the bill of lading prevail in case of conflict. It is true that Clause 2 (*b*) makes all "compulsory provisions" of the law to which the carriage might be subject prevail over contrary stipulations in the bill of lading. The only relevant "compulsory provisions" in this case are the Hague Rules themselves, and these are not in the present case "compulsory." For although by 1948 they had been incorporated in the English Carriage of Goods by Sea Act, 1924, that Act only applies to transit from United Kingdom ports, not to a transit from, e.g., Rotterdam; and (if Netherlands law be relevant) at the time in question the "Hague Rules" would appear not to have been incorporated into the statute law of the Netherlands.[756] Hence their Lordships are of opinion that the bill of lading is not so affected by the Hague Rules as to become part of a good documentary tender under a c.i.f. contract.[757]

The matter in *The Ion*[758] arose out of an arbitration and was related to the shipowners' liability to the cargo-owners for short delivery of cargo carried on m/v *Ion*. The claimant shipped on board of the respondent's vessel fishmeal at Peruvian ports for delivery at a number of Japanese ports under bills of lading which stated, inter alia, that 'all the terms, conditions, liberties and exceptions of the Charter-Party including the Centrocon arbitration clause are herewith incorporated'. The shipowners admitted the short delivery alleged, but disputed liability for it on the ground that the claim was time-barred by the terms of

[753] *Aron & Co v The Askvin* 1960 AMC 314 2CCA; *Petterson Ltge & T Corp v Belgian Line* 1958 AMC 1261 2CCA, affirming 1958 AMC 567 SDNY; *St Paul F&M Ins Co v Alcoa SS Co* 1957 AMC 574 NYAD and *Federal Ins Co v American Export Lines* 1953 AMC 1330 SDNY.
[754] See Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, page 220 fn 76: *The Lago* 1958 Schip en Schade 58 DC Rotterdam; *The Cap Blanc-Alger* 1958 DMF 227 DC Seine; *The Hestia* (1958) 102 JPA 244 CA Brussels and *The Hilde* (1936) 35 RevDMC 77 CA Hamburg.
[755] *Holland Colombo Trading Society v Segu Mohamed Khaja Alawdeen* [1954] 2 Lloyd's Rep 45.
[756] With reference to *Scrutton on Charter-parties* (15th edn, Sweet & Maxwell 1948), 440–441.
[757] *Holland Colombo Trading Society v Segu Mohamed Khaja Alawdeen* [1954] 2 Lloyd's Rep 45, 53–54.
[758] *Unicoopjapan and Marubeni-Iida Company Ltd v Ion Shipping Co, The Ion* [1971] 1 Lloyd's Rep 541.

the relevant contracts of carriage. The Centrocon arbitration clause[759] stated that an arbitrator had to be appointed by a claimant within three months of the final discharge of the goods. This term was in conflict with Article III Rule 6 of the Rules, which provided a year for a suit to be brought against the carrier or the ship. The question so raised being one of law, the arbitrator, at the request of the parties, stated his award in the form of a special case for the decision of the High Court.

It was argued for both sides that the resolution of any conflict depended on the application of the bill of lading repugnancy clause,[760] rather than Article III Rule 8. It was said that the effect of the latter was wider than the effect of the former in that, where there is a conflict, the bill of lading repugnancy clause allowed partial avoidance, whereas Article III Rule 8, required, or might require, total avoidance.[761] Brandon J expressed his doubt on this point and underlined that the effect of the bill of lading repugnancy clause was that, to the extent that the Centrocon arbitration clause was in conflict with the Hague Rules, but no more, it was void,[762] and suggested that in a contractual context, Article III Rule 8 had a similar effect to a standard bill of lading 'repugnancy' clause. Actually, a requirement for arbitration was not of itself in conflict,[763] but the true extent of repugnancy was limited to the second sentence of the arbitration clause and the right approach was to ask to what extent that part of the Centrocon arbitration clause was in conflict with Article III Rule 6, and then to hold that the provision was void to that extent and no further.[764]

Adopting that approach, the judge took the view that the second sentence of the arbitration clause[765] was in conflict with Article III Rule 6, to the extent that, after the first sentence had prescribed arbitration of all disputes, it provided that claims by cargo-owners should be barred if not made in writing and not made

[759] Read as follows: 'All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. Any claim must be made in writing and Claimant's Arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred'.
[760] Read as follows: '… If any term of this Bill of Lading be repugnant to any extent to the legislation by this clause incorporated, such term shall be void to that extent but no further …'.
[761] *The Ion* [1971] 1 Lloyd's Rep 541, 544. Reference to be made to the observations by Mr Justice McNair in *Renton v Palmyra* [1956] 1 QB 462, pages 477 and 478; [1955] 2 Lloyd's Rep 301, 314–315.
[762] *The Ion* [1971] 1 Lloyd's Rep 541, 544 (Brandon J): 'For my part I am doubtful whether the avoiding effect of art. III, r. 8, is any different from that of the bill of lading repugnancy clause …' and '… The effect of the bill of lading repugnancy clause is that, to the extent that the Centrocon arbitration clause is in conflict with the Hague Rules, but no more, it is void'.
[763] *The Merak* [1965] P 223; [1964] 2 Lloyd's Rep 527.
[764] *The Ion* [1971] 1 Lloyd's Rep 541, 545.
[765] The meaning and effect of the second sentence of the Centrocon arbitration clause were considered in *A/S Det Dansk-Franske Dampskibsselskab v Compagnie Financière d'Investissements Transatlantiques S.A. (Compafina), The Himmerland* [1965] 2 Lloyd's Rep 353, 360 (Mocatta J): 'In my judgment on the true construction of the clause, the provisions of the second sentence apply to bar a claim, whether it is sought to pursue it by action or in arbitration, if the claim is not made in writing and the claimant's arbitrator appointed within three months of final discharge, even though the cause of action giving rise to the claim has not arisen or come to the knowledge of the claimant until too late to enable him to comply with the clause. The matter is largely one of first impression and does not bear much elaboration. The words of the sentence, to my mind, convey that meaning'.

by appointing an arbitrator within three months rather than 12 months. The bill of lading should have been read as 'containing: (a) the Centrocon arbitration clause; (b) Article III Rule 6, of the Hague Rules; and (c) either Article III Rule 8 of the Hague Rules or, if it be different, the bill of lading repugnancy clause. The Court had to construe all the three provisions taken together and on that basis the Court had to consider whether there was a conflict between (a) and (b) and, if there was, resolve the conflict by the application of (c)'.[766]

Thus, Brandon J held that the Centrocon arbitration clause, in so far as it stated that an arbitrator had to be appointed by a claimant within three months of the final discharge of the goods, was void if incorporated into a bill of lading to which the Hague Rules applied, because it was in conflict with Article III Rule 6 of the Rules which provides a year for a suit to be brought against the carrier or the ship. The conclusion was reached based on an express repugnancy clause.

Voyage Charters argue that two results would emerge if Brandon J's view in *The Ion* were not to be followed in a case without a repugnancy clause or where the Hague or Hague-Visby Rules apply as a matter of law. The first is that the agreement to arbitrate contained in the standard Centrocon arbitration clause (which has a three-month limitation period) would be rendered null and void and of no effect.[767] If that were so, then the commencement of arbitration in time would be the bringing of suit before an incompetent forum and would not preserve the limitation period in Article III Rule 6. Furthermore, if the arbitration clause is null and void, so also would be any implicit choice of law, with a corresponding effect upon charterparties and bills of lading.[768] The second result is that if part of a clause offends Rule 8, but another part of the same clause extends the carrier's liability, as might well be the true construction of Clause 2 of the GENCON form, that extension of liability would likewise be null and void and of no effect, notwithstanding the express provisions of Article V of the Rules.[769]

However, there are a number of cases where repugnancy provision has been overridden by the specific modification duly incorporated in the contract, and the effect of Article III Rule 8 was held to be different. In *The Tasman Discoverer,*[770] there was an appeal by the bill of lading holders from the decision of the

[766] *The Ion* [1971] 1 Lloyd's Rep 541, 545 (Brandon J).
See also *Australasian United Steam Navigation Company v Hunt Linn Hunt* [1921] 2 AC 351, (1921) 8 Ll L Rep 142; and *Coventry Sheppard & Co v Larrinaga Steamship Company Ltd* (1942) 73 Ll L Rep 256.
[767] But see the decision of the Maltese court in *The City of Athens*: 'Malta: Nine-Month Time Bar Clause Not Invalid Under Hague Rules' [1995] LMCLQ 23 (CA of Malta), where the Court of Appeal held that Article III Rule 8 of the Hague Rules does not prohibit variations of the Hague Rules insofar as time for actions is concerned. It therefore concluded that the principle of freedom of contract implies that the parties are free to establish a different, even shorter, time for suit.
[768] See *Pacific Molasses Co and United Molasses Trading Co Ltd v Entre Rios Compania Naviera SA, The San Nicholas* [1976] 1 Lloyd's Rep 8 and *cf The Hollandia* [1983] 1 AC 565.
[769] *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [85.244].
[770] *Dairy Containers Ltd v Tasman Orient Line CV, The Tasman Discoverer* [2004] UKPC 22; [2004] 2 Lloyd's Rep 647.

New Zealand Court of Appeal,[771] which had allowed the appeal of the carrier from the decision of Williams J.[772] The judge held that the bill of lading holders were entitled to recover their full loss in respect of 55 coils of electrolytic tin plate found damaged after being carried on board m/v *Tasman Discoverer*. The carriage and bill of lading were not governed by any international convention nor by the law of either the country of shipment Korea or the country of destination New Zealand, and incorporated the Hague Rules as a matter of contract with a certain provision in regards to the sterling limit.[773]

The Privy Council held that the incorporation of the Hague Rules was a matter of contract and the Rules together with the amended limit of 'GBP 100 Sterling' were thus incorporated and the carriers were entitled so to limit their liability. The term was not repugnant to the Rules but rather a modification of the same.[774] In coming to such a decision, the Privy Council emphasised that if a party, otherwise liable, was actually to exclude or limit his liability or to rely on an exemption, he had to do so in clear words; any ambiguity or lack of clarity had to be resolved against that party.[775]

As to the alleged repugnancy clause found in the bill,[776] Lord Bingham stated:

> In any event, a term could not be repugnant to any provision of the Hague Rules if the term in question represented a modification of the Hague Rules provision agreed by the parties in exercise of their freedom to agree what they will. It would similarly be absurd to hold that a clear contractual limitation agreed by the parties was invalidated by Article III Rule 8 of the Hague Rules.[777]

However, this statement is contrary to a view expressed in *The River Gurara*[778].

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[771] *The Tasman Discoverer* [2002] 2 Lloyd's Rep 528 (The Court of Appeal of New Zealand).
[772] *The Tasman Discoverer* [2001] 2 Lloyd's Rep 665 (The High Court of New Zealnd, Auckland Registry in Admiralty).
[773] Sub-Clause 6(B)(b)(i) of the bill provided: 'By the Hague Rules contained in the International Convention for the Unification of Certain Rules relating to the Bills of Lading dated Aug. 25, 1924 (hereinafter called the Hague Rules), if the loss or damage is proved to have occurred sea or on inland waterways; for the purpose of this sub-paragraph the limitation of liability under the Hague Rules shall be deemed to be £100 Sterling, lawful money of the United Kingdom package or unit and references in the Hague Rules, to carriage by sea, shall be deemed to include references to carriage by inland waterways and the Hague Rules shall be construed accordingly'.
[774] *The Tasman Discoverer* [2004] UKPC 22, para [11] (Lord Bingham): 'where the Hague Rules (including both art IV r 5 and art IX) have compulsory effect by the operation of domestic law, any limitation of the carrier's liability to a figure lower than that yielded on application of both those provisions will fall foul of art III r 8 and will be null and void. That result may, or may not, follow where (as here) the application of the rules is the result of contractual incorporation and not compulsory application by operation of law'.
[775] The reference was made to *The Starsin* [2003] UKHL 12, para [12] (Hobhouse LJ).
[776] Clause 8(2): 'If any provision of this Bill of Lading is held to be repugnant to any extent to any international convention or national law which is applicable to this Bill of Lading by virtue of cll. 6 and 7 and sub-cl. (1) above or otherwise, such provision shall be null and void to that extent but no further'.
[777] *The Tasman Discoverer* [2004] UKPC 22, para [16] (Bingham LJ).
[778] *The River Guarara* [1998] 1 Lloyd's Rep 225 (CA).

Absence of Repugnancy Clause

In the absence of an express repugnancy clause, specific provisions in the contract will prevail over general provisions including those of the Rules. And the terms in a written document will generally prevail over those in an incorporated one. Thus, in *Metalfer Corporation v Pan Ocean Shipping,*[779] Clause 30 of the charter-party provided *inter alia* for the clause paramount to be fully incorporated in the charterparty and the amended Clause 41 provided *inter alia* for 'any dispute arising out of [this] charterparty to be referred to the London Arbitrators within 30 days of completion of the voyage and English law to apply...'

The claimant's counsel submitted that the clause does not say expressly that any claim made after 30 days is barred, nor does it say that arbitration is a condition precedent to making a claim or that it is the only way of making a claim. He emphasised that the parties' rights to proceed for damages for breach of contract are not to be taken away without clear words,[780] and drew a parallel with notice clauses in insurance and other contracts, where Courts have been reluctant to dismiss a claim made outside a notice period unless the contract says expressly that notice of a claim within a particular time is a condition precedent to recovery.[781] Thus it was argued that, in the absence of an express barring provision, the plaintiff charterers were at least free to institute proceedings and that such proceedings would not be time-barred.[782] Alternatively, it was argued that the plaintiff charterers could still arbitrate and the arbitrators could not hold that the claim was time-barred, although, if asked, they might be able to award damages to the owners for late referral of the dispute.

In the words of Longmore J, there was a contract in writing with an arbitration clause and a clause incorporating other terms of the previous charter-party. It is a well-accepted principle that when one has a written contract that incorporates other terms by reference and the incorporated document contains provisions that conflict with the provisions of written documents, then the terms of the written document will, in the ordinary way, prevail.[783] The reason for that principle is that in the ordinary way the parties

[779] *Metalfer Corporation v Pan Ocean Shipping Co Ltd* [1998] 2 Lloyd's Rep 632.
[780] The statement was based on the decision in *Szymonowski v Beck & Co Ltd* [1923] 1 KB 457.
[781] *Metalfer Corporation v Pan Ocean Shipping Co Ltd* [1998] 2 Lloyd's Rep 632, 634.
The claimant's counsel Mr M. Coburn also relied on the case of *Pinnock v Lewis & Peat* [1923] 2 KB 690, where there was a provision that notice of arbitration should be given and the arbitrator nominated not later than 14 days after discharge of the vessel. The claimant's counsel further referred to the following cases: *Ayscough v Sheed Thomson & Co* (1923) 14 Ll L Rep 209, (1923) 39 TLR 206; *Atlantic Shipping and Trading Co v Louis Dreyfus & Co* [1922] 2 AC 250; *Pompe v Fuchs* (1876) 34 LT 800.
[782] In *Smeaton Hanscombe v Sassoon I Setty & Co* [1953] 2 Lloyd's Rep 580, 585; [1953] 1 WLR 1468, 1472, Devlin J, without criticising *Pinnock's* case, indicated that the preferable interpretation of a clause requiring notice to be given within a certain number of days is that if it is not given, the claim is barred. McNair J came to a similar conclusion in *Metalimex Foreign Trade Corporation v Eugenie Maritime Ltd* [1962] 1 Lloyd's Rep 378.
[783] With reference to *Sabah Flour and Feedmills SDN BHD v Comfez Ltd* [1988] 2 Lloyd's Rep 18.

will have given express consideration to the written terms and much less, if any, consideration to the application of the incorporated terms. It is much the same principle whereby typed clauses will ordinarily prevail over printed clauses and handwritten clauses will ordinarily prevail over typed clauses.[784]

For these reasons, it seemed to the Judge that 'if there was a conflict between the arbitration clause and the paramount clause incorporating the Hague Rules, the arbitration clause should prevail'. And he did not therefore need to consider how much of the arbitration clause conflicted with Article III Rule 6 of the Rules.[785]

This case was expressly distinguished from *The Ion* (which actually dealt with a bill of lading rather than a charter-party) on the following basis: (1) the paramountcy of the Hague Rules was set out on the face of the bill of lading, whereas it was the arbitration clause that was incorporated by reference; and (2) both relevant clauses were printed in the bill of lading and there was no evidence of any special agreement made between the parties as to arbitration.

Are there any unified principles that allow resolving the conflicts between the provisions of the incorporated Rules and the terms of the charter party or bills of lading which are repugnant to Article III Rule 8?

In *Finagra v Africa Line,*[786] Rix J applied the approach derived from that of Lord Esher MR in *Hamilton v Mackie & Sons.*[787] The judge followed the principle confirmed by Longmore J in *Metalfer Corporation v Pan Ocean Shipping*[788] that 'when one has a written contract which incorporates other terms by reference and the incorporated document contains provisions which conflict with provisions of written documents, then the terms of the written document will, in the ordinary way prevail',[789] and held that 'where Hague Rules were incorporated by contract the essential rule was to treat the rules as set out in the body of the contract *in extenso* but rejecting provisions which were inconsistent with the incorporating document'.[790]

[784] *Metalfer Corporation v Pan Ocean Shipping Co Ltd* [1998] 2 Lloyd's Rep 632, 637 (Longmore J).
[785] ibid, 637.
[786] *Finagra v OT Africa Line* [1998] 2 Lloyd's Rep 622.
[787] *Finagra v OT Africa Line* [1998] 2 Lloyd's Rep 622, 627 (Rix J) with reference to *Hamilton & Co v Mackie & Sons* (1899) 5 TLR 677, approved in *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1 and applied in *The Saxonstar* [1957] 1 Lloyd's Rep 79, 86; [1958] 1 Lloyd's Rep 73, 81; [1958] AC 133, 154-155: see discussion above.
[788] *Metalfer Corp v Pan Ocean Shipping* [1998] 2 Lloyd's Rep 632.
[789] ibid, 637, col 1. See also *Sabah Flour and Feedmills SDN BHD v Comfez* [1988] 2 Lloyd's Rep 18.
[790] *Finagra v OT Africa Line* [1998] 2 Lloyd's Rep 622, 627 col 1 (Rix J).

Having reviewed a set of authorities,[791] Rix J summarised the following unified principles of interpretation:[792]

> (1) The presence of a repugnancy clause, whether the clause inherent in the rules in the form of Article III Rule 8, *a fortiori* a separate repugnancy clause in the contract itself, will always be relevant.[793] But neither its presence,[794] nor its absence[795] is necessarily decisive;
>
> (2) A specifically negotiated clause is likely to take precedence over the merely incorporated.[796] This is an aspect of the maxim that the general does not derogate from the special. How does one recognise the special? An example is where the parties have indicated that they have paid special regard to the matter in their negotiations.[797] Another example is that where the specific clause was stamped on the bill and reference was made to the principle that in the case of irreconcilability, precedence will be given to what is written or stamped (or it may be said typed) over what is merely printed;[798]
>
> (3) In the case of insensibility or inconsistency, the clause in the incorporating document takes precedence over the merely incorporated;[799]
>
> (4) As in the case of a repugnancy clause, the bill of lading or charter-party may contain special language designed to indicate where the precedence is to be found;[800]
>
> (5) One set of incorporated rules may, in certain circumstances, oust another set of incorporated rules, even the Hague Rules, entirely, where they cannot live together.[801] That, however, may be thought to be a comparatively rare event;
>
> (6) More commonly, if the conflicting clauses can live together, then the Courts should seek to give effect to both of them;[802]
>
> (7) 'Claims are not to be barred except by clear words', so that in a case of doubt or ambiguity the conflict must be resolved in favour of the longer time limit.[803]

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[791] *Hamilton & Co v Mackie & Sons* (1899) 5 TLR 677; *TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1; *The Saxonstar* [1957] 1 Lloyd's Rep 79, 86; [1958] 1 Lloyd's Rep 73, 81; *Unicoopjapan and Marubeni-Iida Company Ltd v Ion Shipping Co, The Ion* [1971] 1 Lloyd's Rep 541; *D/S A/S Idaho v Peninsular and Oriental Steam Navigation Co, The Strathnewton* [1983] 1 Lloyd's Rep 219; *Sabah Flour v Comfez* [1988] 2 Lloyd's Rep 18; *Metalfer Corporation v Pan Ocean Shipping Co Ltd* [1998] 2 Lloyd's Rep 632 and the US case *J. Aron & Co Inc v The Askin*, 267 F 2d. 276 (1959) (U.S.C.A.).
[792] *Finagra v OT Africa Line* [1998] 2 Lloyd's Rep 622, 629 (Rix J).
[793] *The Ion* [1971] 1 Lloyd's Rep 541.
[794] *Metalfer Corporation v Pan Ocean Shipping* [1998] 2 Lloyd's Rep 632.
[795] *Sabah Flour and Feedmills SDN BHD v Comfez* [1988] 2 Lloyd's Rep 18.
[796] *Metalfer Corporation v Pan Ocean Shipping* [1998] 2 Lloyd's Rep 632.
[797] ibid.
[798] *The Kheti* (1949) 82 Ll L Rep 525.
[799] *Hamilton v Mackie* (1899) 5 TLR 677 (Lord Esher MR).
[800] An example was the clause in *Sabah Flour v Comfez* [1988] 2 Lloyd's Rep 18, which said that the paramount clause was not to prejudice specified other clauses.
[801] *The Strathnewton* [1983] 1 Lloyd's Rep 219.
[802] *Sabah Flour v Comfez* [1988] 2 Lloyd's Rep 18.
[803] *Bunge SA v Deutsche Conti-Handelsgesellschaft MbH (No 2)* [1980] 1 Lloyd's Rep 352, 358 (Donaldson J).

In applying the principles laid down in *Finagra v OT Africa Line,* a court will try to construe the document as a whole to reconcile the possible inconsistencies between the provisions of the Rules and the clauses in the incorporating document. In *The Leonidas,*[804] Langley J in coming to such a conclusion considered two authorities[805] that had been submitted by both parties to the arbitration and court proceedings. He accepted that tailor-made clauses will normally prevail over typed clauses if there is indeed a 'conflict' between the two. The judge underlined that the Courts will seek to construe a contract as a whole and if a reasonable commercial construction of the whole can reconcile two provisions (whether typed or printed) then such a construction can and should be adopted.[806] Thus it was found legitimate and commercially appropriate to read the speed warranty as qualified by the provisions brought by the clause paramount.

[804] *Bayoil SA v Seawind Tankers Corp, The Leonidas* [2001] 1 Lloyd's Rep 533.
[805] *The Mariasmi* [1970] 1 Lloyd's Rep 247; and *The Satya Kailash* [1984] 1 Lloyd's Rep 588.
[806] *The Leonidas* [2001] 1 Lloyd's Rep 533, 536 (Langley J).

Part 2

Chapter 6: Undertaking of Seaworthiness and Care of Cargo

A ship is a complex instrument with potentially hidden defects, some of which are undiscoverable by reasonable care. The maintenance, repair and inspection of a ship are delegated to experts and registered surveyors and are largely carried out while the ship is in the port or drydock. Yet in the modern world, the ship-owner is blamed if his ship is found to be unseaworthy, whether in fact or in law. Since bills of lading, charterparties and marine insurance policies refer to seaworthiness and do not particularise further, this constantly creates a tug-of-war between the shipowner and the shipper. All of this leads to the question of what constitutes seaworthiness in the present day and how both the shipper and the ship-owner can be protected in a complex commercial world. This obligation is not a condition in the technical sense of the word, and is often referred to, especially in the insurance context, as a *warranty* of seaworthiness,[807] which has been categorised as of "overriding importance".[808]

What is Seaworthiness? A brief description

The basic definition. As stated by Diplock LJ in *Hongkong Fir*,[809] the shipowners' undertaking to tender a seaworthy ship has, as a result of numerous decisions as to what can amount to "unseaworthiness", become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment, and the crew itself. It can be broken by the presence of trivial defects that are readily remediable as well as by defects that must inevitably result in a total loss of the vessel.[810]

Carver submits that 'a vessel must have that degree of fitness which an ordinarily careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it'.[811] If the defect existed, the question to be put is, 'would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking'.[812] Thus, it amounts to an undertaking

[807] *Steel v State Line SS Co* [1877] 3 App Cas 72, 86.
[808] See for example, *Maxine Footwear v Canadian Government Merchant Marine* [1959] AC 589, 602–603.
In *Canadian Co-operative Wheat Producers Ltd v Paterson Steamships Ltd* [1934] AC 538, 545, the obligations as to seaworthiness and as to care of cargo were both described as 'overriding'.
[809] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA); [1961] 2 Lloyd's Rep 478.
[810] ibid, [1962] 2 QB 26, 71 (Diplock LJ).
See also *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd* [1940] AC 997, 1005 (Wright LJ).
[811] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-014].
[812] Thomas Gilbert Carver, *Carver on Carriage of Goods by Sea* (9th edn, Stevens & Sons 1952), 706 (i.e. the previous edition of *Carver*); *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [7-025].
See also *FC Bradley & Sons Ltd v Federal Steam Navigation Co* (1926) 24 Ll L Rep 446, 454 (Scrutton LJ).

'not merely that they [the carriers] should do their best to make the ship fit, but that the ship should really be fit'.[813]

Cargoworthiness. Another uncompromising obligation is cargoworthiness, which some commentators preferred to treat in the past as a distinct obligation, while others regarded it as an example of the wider duty to ensure seaworthiness. Nowadays it is clear that the general term 'seaworthiness' is to be taken as covering both,[814] as the difference is, in practice, one of presentation rather than substance.[815] This obligation extends in respect of any cargo that the shipper is entitled to load,[816] and includes providing a vessel that can not only receive and carry but deliver the cargo at the specified destination on the voyage contemplated.[817] Thus, a ship that can navigate safely may still be unseaworthy in law if it is not fit to carry the shipment.

In the pre-Hague Rules cases, it was established that where the contract had provided for liberty to stow in a particular place, such as on deck, the obligation as to cargoworthiness did not extend to ensure that the cargo had to be in a waterproof compartment.[818] However, in the post-Hague Rules cases, it may be argued that Article III Rule 1(c) of the Rules requires the carrier to make any "part of the ship" where the goods are carried fit and safe for their carriage, and any attempt to derogate this shall be ineffective in the light of Article III Rule 8. This proposition raises the interplay between the obligations imposed on the carrier under Article III Rules 1 and 2 and the immunities given under Article IV rule 2, especially in relation to goods whose inherent vice or defective packing is assessed by reference to the contemplated means of carriage.[819]

If the contract is for carriage aboard a vessel that is named and/or described in the contract, there may be a conflict between the principle outlined in the previous paragraph and the principle that a cargo that is not fit to withstand the rigours of carriage by the contemplated means suffers from inherent vice.[820] Thus, if, for example, cargo requires forced ventilation for proper carriage, a vessel without forced ventilation is *prima facie* unseaworthy. If, however, the contract is for carriage aboard a vessel stated to have only

[813] *Steel v State Line Steamship Co* (1877) LR 3 AppCas 72, 86 (Lord Blackburn).
[814] See discussion, for example, in *Ben Line Steamers Ltd v Pacific Steam Navigation Co, The Benlawers* [1989] 2 Lloyd's Rep 51, 56–60 (Hobhouse J), with reference to the previous cases including *Empresa Cubana Importada de Alimentos 'Alimport' v Iasmos Shipping Co SA, The Good Friend* [1984] 2 Lloyd's Rep 586.
[815] *Tattersall v National Steamship Co* [1884] 12 QBD 297 (DC). Anthony Rogers, Jason Chuah, Martin Dockray, *Cases and Materials on the Carriage of Goods by Sea* (4th edn, Routledge 2016), chapter 2.21, 69.
[816] *Stanton v Richardson* [1872] LR 7 CP 421; *Ben Line Steamers Ltd v Pacific Steam Navigation Co, The Benlawers* [1989] 2 Lloyd's Rep 51, 60. See also *Elder Dempster & Co v Paterson Zochonis* [1924] AC 522, pages 549, 552, 555.
[817] See *Rathbone Bros & Co v D MacIver, Sons & Co* [1903] 2 KB 378, 386, 389.
[818] *Rennacid Casein Ltd v Nelson Steam Navigation Company Ltd, The Highland Laddie* [1925] 21 Ll L Rep 162.
[819] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.116].
[820] See elaborative discussion in *Volcafe Ltd and others v CSAV SA* [2018] UKSC 61; [2019] 1 Lloyd's Rep 21, especially paras [8], [9], [16], [21], [27].

natural ventilation, a carrier might argue that the vessel was not unseaworthy, and that any damage to the cargo due to lack of forced ventilation was attributable to inherent vice because the 'contemplated means' of carriage is a vessel without forced ventilation.[821]

However, in *The Benlawers*, the court took the view that the vessel had to be seaworthy and fit to carry any permissible cargo, at least if it was not an exceptional or unusual cargo.[822] Finally, as past case law has shown, the position varies with the particular cargo contracted to be carried.[823]

Moreover, a common instance of unseaworthiness is where the vessel has been considered unstable,[824] often due to being overloaded, improperly stowed, or incorrectly ballasted.[825] There can be an argument as to whether loss or damage is caused by non-cargoworthiness of the vessel or by negligent stowage, for the latter may be the responsibility of the shipper and not the carrier.[826] This topic is discussed later.

Seaworthiness is absolute and relative

In common law system the duty to provide a seaworthy ship is described as absolute, but relative.[827] It must be judged by the standards and practices of the industry at the relevant time,[828] at least so long as those standards and practices are reasonable.[829]

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[821] See, for example, *Albacora SLR v Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep 53 (HL), 58-59 (Reid LJ), an argument under Article III Rule 2 where cargo requiring refrigeration was carried in an unrefrigerated vessel: 'It follows that whether there is an inherent defect or vice must depend on the kind of transit required by the contract. If this contract had required refrigeration there would have been no inherent vice. But as it did not there was inherent vice because the goods could not stand the treatment which the contract authorised or required'.

[822] *Ben Line Steamers Ltd v Pacific Steam Navigation Co, The Benlawers* [1989] 2 Lloyd's Rep 51, 59–61. There was in that case an express requirement that the vessel be ready to receive any permissible cargo, but the reasoning applies even in the absence of such a clause. See discussion in *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.117].

[823] *Stanton v Richardson* [1874] LR 9 CP 390; affirmed 45 LJQB 78 HL; *Tattersall v National Steamship Co* [1884] 12 QBD 297; *The Marathon* [1879] 40 LT 163; *Maori King v Hughes* [1895] 2 QB 550 CA (refrigerating machinery); *Queensland Bank v P&O Co* [1898] 1 QB 567 CA (bullion in bullion room); *The Waikato* [1899] 1 QB 56 CA (wool in an insulated hold).

[824] See *Smith Hogg v Black Sea and Baltic General Insurance* [1940] AC 997; [1940] 67 Ll L Rep 253; *Reed v Page* [1927] 1 KB 473; and *Standard Oil Co of New York v Clan Line Steamers Ltd* [1924] AC 100; [1923] 17 Ll L Rep 120, where the judgments were less than illuminating on this point. The principle to be derived from the case is that where a vessel is on sailing stable but will probably only remain so if the master complies with builders' instructions that have not been communicated to him, the vessel is unseaworthy.

[825] See *Diestelkamp and Sibaei v Baynes (Reading) Ltd, The Aga* [1968] 1 Lloyd's Rep 431.

[826] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.016].

[827] *Burges v Wickham* (1863) 3 B&S 669, 696; 122 ER 251, 261 (Blackburn J). Lord Esher MR stated that the vessel must be '… in a condition to bear all the ordinary vicissitudes of the voyage …'.

[828] *FC Bradley & Sons Ltd v Federal Steam Navigation Ltd* (1927) 27 Ll L Rep 395, 396 (Viscount Sumner).

[829] *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd, The Eurasian Dream* [2002] 1 Lloyd's Rep 719, 736, paras [126] and [127] (Cresswell J).

Once the standard has been defined, however, the shipowners' obligation to meet this criterion is absolute.[830] There is no excuse that the owner did not know of a defect or that best endeavours were used to make the ship fit.[831] Similarly, there is no defence that all care was taken.[832] It makes this obligation an unconditional one where the shipowner is absolutely liable, irrespective of fault, for any breach of the undertaking. The court may make a finding of unseaworthiness without even being able to identify the precise defect.[833] If there are several competing candidates as causes of the loss, some of which involve unseaworthiness and others that do not, the court may find loss due to unseaworthiness, even without being able to be satisfied which of the possible causes actually gave rise to the loss.

Whilst it is wrong to use the language of a 'presumption' of unseaworthiness arising in certain factual circumstances, the court will draw inferences of fact and conclusions based on those inferences where appropriate.[834] Thus, if a vessel leaves port and shortly thereafter suffers water ingress or sinks without any apparent reason, that fact might give rise to a *prima facie* inference of unseaworthiness, unless explained, and, if it is not, then it may be that the court will be satisfied that unseaworthiness can, indeed, be inferred in those circumstances.[835]

Unseaworthiness may itself be caused by the operation of events that would, in isolation, constitute an excepted peril.[836] A prime example is when cargo is damaged by fire, where the fire itself is caused by the unseaworthiness of the vessel.[837]

The obligation of seaworthiness relates to the particular voyage contracted for[838] and the particular stages of the voyage upon which the ship is engaged,[839] being different for summer or winter voyages, for river,

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[830] *Steel v State Line Steamship Co* [1877] 3 App Cas 72.
[831] *McFadden v Blue Star Line* [1905] 1 KB 697.
[832] *Steel and Another v State Line Steamship Co* [1877] 3 AppCas 72, 86; *The Glenfruin* [1885] 10 PD 103; *The Caledonia* 157 US 124 [1895] US Sup Ct, referring to the words of Fuller CJ.
[833] As was the case, for example, in *The Fjord Wind* [2000] 2 Lloyd's Rep 191.
[834] See *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc, The Kriti Rex* [1996] 2 Lloyd's Rep 171; *CHS Inc Iberca SL and CHS Europe SA v Far East Marine SA, The Devon* [2012] EWHC 3747 (Comm).
[835] See *Lindsay v Klein* [1911] AC 194, where the misleading nature of the headnote illustrates the difficulty in separating question of onus of proof from those of evidential inference; *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 339; *Aktieselskabet De Danske Sukkerfabrikker v Bajamar Compania Naviera SA, The Torenia* [1983] 2 Lloyd's Rep 210, 214–215. In *The Aga* [1968] 1 Lloyd's Rep 431, the court had no difficulty in inferring unseaworthiness and lack of due diligence. Contrast *The Toledo Carrier* [2006] EWHC 2054 (Comm). See *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), paras [11.102] – [11.108], with regard to 'Seaworthiness – Basic Tests'.
[836] In *Empresa Cubana Importada de Alimentos 'Alimport' v Iasmos Shipping Co SA, The Good Friend* [1984] 2 Lloyd's Rep 586, 588–589, Staughton J held that the presence of a residue of cargo, infested with insects from a previous voyage, rendered the vessel unseaworthy. He also opined that inherent vice was unique among the Article IV Rule 2 exceptions in that damage by inherent vice and unseaworthiness were mutually exclusive.
[837] In *Maxine Footwear v Canadian Government Merchant Marine* [1959] AC 589, the Privy Council ruled that the carrier was liable for damage to a cargo caused by fire at the load port in the ship's structure, because the vessel was unseaworthy at the relevant time and due diligence has not been shown.
[838] *The Good Friend* [1984] 2 Lloyd's Rep 586.
[839] *The Fjord Wind* [1999] 1 Lloyd's Rep 307, 315 (Moore-Bick J), with the further approval in the Court of Appeal [2000] 2 Lloyd's Rep 191, 197–198 (Clarke LJ).

lake, or sea navigation,[840] whilst loading in harbour and when sailing.[841] A vessel may be fit to carry a given cargo across the English Channel in summer but not fit to carry the same cargo across the Atlantic in winter.[842] In short, a ship should be in a condition to encounter whatever perils of the sea a ship of that kind, laden in that way, may be fairly expected to encounter.[843]

However, the standard required is not an accident-free ship, nor an obligation to provide ship or gear which might withstand all conceivable hazards. The obligation, although named as 'absolute', means nothing more or less than the duty to furnish a ship and equipment reasonably suitable for the intended use or service: 'the standard is not perfection but reasonable fitness'.[844] Thus, if the ship goes to sea with a defect which such an owner would not have tolerated and first corrected, the ship is unseaworthy.[845]

Innominate term. Though sometimes described as an absolute 'warranty', this definition is somewhat misleading[846] in the modern context, because the obligation to provide a seaworthy vessel is neither a warranty nor a condition. It is an innominate term. The right of the charterer to treat the contract as discharged in consequence of a breach of the undertaking depends on whether the breach goes to the root of the contract. If the initial seaworthiness is sufficiently serious, the charterer may treat the contract as discharged even after the contract has been partially performed.

Due Diligence to make the ship seaworthy under the Rules. The effect of Article III Rules 1(a)-1(c)

Where a clause paramount is incorporated in the charterparty or bill of lading, the Hague/Hague-Visby Rules regime is applied and the common-law absolute undertaking of seaworthiness is replaced by a 'lesser' obligation: an undertaking that the shipowner will (before and at the beginning of the voyage) exercise due diligence to make the ship seaworthy, an undertaking which shall be satisfied to enjoy the protection of the Rules in Article IV Rule 2.

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[840] *Thin v Richards* [1892] 2 QB 141; *Daniels v Harris* [1874] LR 10 CP; *Annen v Woodman* (1810) 3 Taunt 299.
[841] *McFadden v Blue Star Line* [1905] 1 KB 697.
[842] See e.g. *Mitsui Co Ltd v Novorossiysk Shipping Co, The Gudermes* [1991] 1 Lloyd's Rep 456, 472–474; [1993] 1 Lloyd's Rep 311, 324 where the vessel was unseaworthy due to lack of capacity to heat the relevant oil cargo for the relevant voyage.
[843] *Steel v State Lines SS Co* (1877) 3 App Cas 72, 77 (Lord Cairns), echoing similar language in *Dixon v Sadler* (1839) 5 M&W 405, 414.
[844] Summarising the points put forward by District Judge Kilkenny in *President of India v West Coast Steamship Co, The Portland Trader* [1963] 2 Lloyd's Rep 278, 281.
[845] *FC Bradley & Sons v Federal Steam Navigation Co* [1926] 24 Ll L Rep 446.
For example, a slight defect (ventilation) that was irrelevant, see *MDC Ltd v NV Zeevaart Maatschappij 'Beursstraat', The Westerdok* [1962] 1 Lloyd's Rep 180.
[846] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26 (CA), [1961] 2 Lloyd's Rep 478.

In English law, the usage of the Rules is further reinforced by COGSA 1971, Section 3,[847] which is limited to situations where the Rules 'apply by virtue of this Act'. This may mean that the absolute warranty is not abolished for situations where the Rules are incorporated by contract only, in circumstances where they do not have the "force of law" by virtue of sub-Sections 1(1) and 1(6) of the Act.

To paraphrase McHugh J, Article III Rule 1 effectively imposes an obligation on the carrier to carry the goods in a ship that is adequate in terms of her structure, manning, equipment and facilities having regard to the voyage and the nature of the cargo.[848] Whilst Article III Rules 1(b) and 1(c) set out obligations that are included within the common law obligation as to seaworthiness, the question arises as to whether they add to the common law obligation in this respect, as opposed to merely reflecting it, given that they appear in addition to Rule 1(a), which expressly refers to "seaworthy". One suggestion, advanced in *The Bunga Seroja*, was that the burden of proof on lack of due diligence is on the cargo owner under sub-rules (b) and (c), but on the carrier under sub-rule (a).[849]

However, it is very difficult to see the justification for this suggested distinction. In *The Good Friend*,[850] Staughton J considered that Article III Rule 1(c) obligations were subsumed within the seaworthiness obligations, in the course of rejecting a submission that holds were fit if the only consequence of insect infestation was that it prevented the cargo carried being discharged at the port of discharge because Rule 1(c) made no mention of discharge. Whatever the relationship between Rules 1(a) and (c), it appears that the carrier's obligations as to the fitness of the vessel are limited to matters that are attributes of the vessel and are not enlarged by sub-Rule 1(c).[851]

What is "due diligence"?

The concept of "due diligence" had initially been introduced by the Harter Act in 1893, and similar British Commonwealth statutes. The Hague/Hague-Visby Rules adopted it, and it became an inseparable part of the obligation to provide a seaworthy vessel. Thus, it was held that those words should be given the meaning attributed to them prior to the Hague Rules.[852] At that time, the exercise of the duty was not a

[847] Which, like its predecessor, Section 2 of COGSA 1924, provides that 'there shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship'.
[848] *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhard, The Bunga Seroja* (1998) 158 ALR 1, 25; [1999] AMC 427, 459; [1999] 1 Lloyd's Rep 512, 527 (High Court of Australia).
[849] ibid 527, [87] (McHugh J).
[850] *The Good Friend* [1984] 2 Lloyd's Rep 586, 591.
[851] See discussion in *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.150].
[852] For example, see an elaborative speech of Viscount Simonds in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807; [1961] 1 Lloyd's Rep 57, 67–70.

positive obligation but was a way for the carriers to defend themselves should the cargo owners incur damage or loss. Thus, the absolute duty to provide a seaworthy vessel was replaced by a duty to exercise due diligence and at that point was the extent of the obligation.

Professor Tetley defined "due diligence" as a 'genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of article III rule 1 of the Hague or Hague-Visby Rules'.[853] The French version of the Hague Rules (which is the official version) uses the words '*une diligence raisonnable*'. This illustrates that the diligence required is not absolute, but only reasonable. It has been submitted that 'lack of due diligence is negligence'.[854] The reference to negligence suggests looking to its traditional criterion of foresight of possible dangers. The mere fact that with hindsight it is possible to see that extra precautions could have been taken does not necessarily mean that due diligence was not exercised.[855]

In *The Kapitan Sakharov,*[856] Auld LJ, upholding the view of the lower court, set a test to examine whether the carrier exercised due diligence:

> The Judge correctly took as the test whether it had shown that it, its servants, agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage. He also correctly stated the test to be objective, namely to be measured by the standards of a reasonable shipowner, taking into account international standards and the particular circumstances of the problem in hand.[857]

Bills of Lading suggested that 'as "due" diligence must mean all effort necessary to make the vessel seaworthy, 'there is in reality little or no reduction in the absolute duty to make the vessel seaworthy'.[858]

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[853] Professor William Tetley, *Marine Cargo Claims* (4th edn, Cowansville, Québec, Les Editions Yvon Blais 2008), 'Chapter 15, Due Diligence to Make the Ship Seaworthy'.
[854] *Union of India v NV Reedereij Amsterdam, The Amstelslot* [1963] 2 Lloyd's Rep 223, 235 (HL) (Lord Devlin); and 231 (Lord Evershed).
[855] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-137], with reference to *The Amstelslot* [1963] 2 Lloyd's Rep 223, 230 (HL) (Lord Reid).
[856] *Northern Shipping Co v Deutsche Seereederei GmbH and Others, The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255.
[857] ibid, 266 (Auld LJ). See also *The Eurasian Dream* [2002] 1 Lloyd's Rep 719, 737, 744 (Cresswell J), esp 'The exercise of due diligence is equivalent to the exercise of reasonable care and skill. Lack of due diligence is negligence …'.
[858] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.139], fn 266.

What is "reasonable skill and care"?

The question of reasonableness is one of fact depending on numerous factors, such as the nature of the vessel, the state of knowledge at the time,[859] the provisions of regulatory codes such as P&I Club rules or the ISM codes,[860] class requirements, systems and practices,[861] and so on. Thus, a recent trend has been to consider what procedures might reasonably have been followed, even though no specific danger was foreseen.

A carrier is obliged to make proper checks on master and crew to ensure their competence,[862] as a vessel that does not have a sufficient, efficient and competent crew is simply unseaworthy.[863] However, negligence by the master will not of itself justify a finding of incompetence.[864] The line between incompetence and negligence is as difficult to draw, as it is significant, potentially making the difference between a breach by the carrier of Article III Rule 1 (in the first case) and a defence under Article IV Rule 2(a) in the second. The issue is highly fact sensitive.[865]

As an example, reported cases deal with the care that should be employed in fumigation,[866] maintaining steering gear,[867] electrical equipment,[868] and engines,[869] maintaining and inspecting the internal

[859] As to 'state of knowledge' arguments see *FC Brandley & Sons v Federal SN Co* (1927) 27 Ll L Rep 395 (ventilation of apples); *The Australia Star* (1940) 67 Ll L Rep 110 (structure of fuel tanks); *Blackwood Hodge Ltd v Ellerman & Bucknall SS Co Ltd* [1963] 1 Lloyd's Rep 454 (stowage). As with other types of negligence the wisdom of hindsight is not relevant: *The Amstelslot* [1963] 2 Lloyd's Rep 223, especially at 230.

[860] *The Eurasian Dream* [2002] 1 Lloyd's Rep 719, para [143] (Cresswell J), that the ISM Code (which did not in fact apply at the relevant time) is a 'framework upon which good practices should be hung'. See also Phil Anderson, *The ISM Code: A Practical Guide to the Legal and Insurance Implications* (3rd edn, Informa Law 2015), 117–132;
and *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.137].

[861] *Cosco Bulk Carrier Co Ltd v Tianjin General Nice Coke and Chemicals Co Ltd, The Jia Li Hai* [2018] 1 Lloyd's Rep 396 and *The Maersk Karachi* [2019] EWHC 1099 (Comm); [2020] 2 Lloyd's Rep 98.

[862] As illustrated in *The Roberta* (1938) 60 Ll L Rep 84 (CA); *The Makedonia* [1962] 1 Lloyd's Rep 316.

[863] *Hong Kong Fir* [1962] 2 QB 26, [1961] 2 Lloyd's Rep 478; *The Eurasian Dream* [2002] 1 Lloyd's Rep 719;
The Makedonia [1962] 1 Lloyd's Rep 316.

[864] For example, see explanations of Langley J in *Rey Banano Del Pacifico SA and Others v Transporters Navieros Ecuatorianos and Another, The Isla Fernandina* [2000] 2 Lloyd's Rep 15, especially p 33.
In *Hong Kong Fir* [1962] 2 QB 26, 34 it was suggested that ordinary care and skill may not suffice in that if the state of the vessel warrants it may be necessary to engage an engine room staff of 'exceptional ability, experience and dependability'.

[865] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.130].

[866] *The Good Friend* [1984] 2 Lloyd's Rep 586.

[867] *Phillips Petroleum Co and Others v Cabaneli Naviera SA, The Theodegmon* [1990] 1 Lloyd's Rep 52.

[868] *The Subro Valour* [1995] 1 Lloyd's Rep 509.

[869] *The Antigoni* [1991] 1 Lloyd's Rep 209; cf *Kuo International Oil Ltd and Others v Daisy Shipping Co Ltd and Another, The Yamatogawa* [1990] 2 Lloyd's Rep 39, where failure to follow good practice by visual inspection was not causative of the loss, which would have occurred anyway.

structure,[870] analysing lubricating oil,[871] and providing documentation[872] – all of which are matters that may also arise outside the context of the Rules. However, the presence of other undeclared dangerous cargo in a container is not necessarily something that could be detected by the exercise of due diligence.[873]

Exercise of Due Diligence: A Non-Delegable Duty

The test of the exercise of due diligence takes into account the conduct of a reasonable prudent carrier. Thus, for the purposes of English interpretation of the Rules, this duty is a personal and a non-delegable one.[874] In other words, it must be exercised *personally* by the carrier. This obligation is not discharged by using due diligence to simply appoint a competent independent contractor, or, a *fortiori*, employee. It is non-delegable in the sense that the carrier is liable for the shortcomings of independent contractors as well as his servants or agents.[875] In each case, one shall consider the conduct of all parties involved in the operation of the ship: starting from the person doing (or omitting to do) the relevant act to those who are in the management chain.[876] Thus, in case of crew incompetence, the relevant "diligence" that will be in issue is usually that of the owners or managers responsible for appointing and training the crew. But where there is a failure on board of supervision or implementation of systems and procedures that might have been perfectly formulated and documented by owners, the master or officers may be guilty of a lack of due diligence.[877]

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[870] In *The Toledo* [1995] 1 Lloyd's Rep 40, it was found that the cause of crack in the shell plating was a fatigue fracture resulted from damage and deformation of the brackets and frames. The vessel was found unseaworthy.

[871] *The Kriti Rex* [1996] 2 Lloyd's Rep 171.

[872] A deficiency in documentation including: *The Isla Fernandina* [2000] 2 Lloyd's Rep 15 (in regards to navigational charts); *Cheikh Boutros Selim El-Khoury and Others v Ceylon Shipping Lines Ltd, The Madeleine* [1967] 2 Lloyd's Rep 224 (in regards to deratisation certificate); *Chellew Navigation Co Ltd v AR Appelquist Kolinport AG* [1933] 45 Ll L Rep 190; *Alfred C Toepfer Schiffahrtsgessellschaft GmbH v Tossa Marine Co Ltd, The Derby* [1985] 2 Lloyd's Rep 325 (in regards to the certificates bearing on seaworthiness).

[873] *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 225. From the other side, the carriage of other unknown inflammable material elsewhere in the ship involved a breach of the duty of due diligence. See *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.137].

[874] *Paterson Steamships Ltd v Robin Hood Mills Ltd, The Thordoc* (1937) 58 Ll L Rep 33, 40 (Lord Roche). 'The condition' – that is, of the exercise of due diligence to make a vessel seaworthy – 'is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose'.

[875] See discussion in *The Muncaster Castle* [1961] 1 Lloyd's Rep 57; [1961] AC 807. For example, a shipowner may not be responsible for the omissions of the shipbuilder as his contractor, but may be responsible for the omission of an inspector supervising the building: see *W Angliss & Co (Australia) Pty Ltd v P&O SN Co* (1927) 28 Ll L Rep 202; [1927] 2 KB 456. See the submission in *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255, 271–272 that the carrier was liable in respect of the failings of a shipper in causing dangerous cargo to be shipped on board, rendering the vessel unseaworthy, was not surprisingly rejected.

[876] This will include consideration of systems and procedures required by the ISM code and/or by due diligence as well as failing specific to individuals: see *The ISM Code: 'A practical Guide to the Legal and Insurance Implications*', 3rd Edition.

[877] *Bills of Lading*, (2nd edn, Informa Law from Routledge 2015), para [10.135].

In *The Muncaster Castle*,[878] which is often cited as a leading case on liability for independent contractors, it was said that one must ask the question 'whether [the] unseaworthiness is due to any lack of diligence in those who have been implicated by the carriers in the work of keeping or making the vessel seaworthy. Such persons are then agents whose diligence or lack of it is attributable to the carriers'.[879] The House of Lords rejected the argument that professional ship repairers were to be equated with original builders on the basis that the owner had assumed control and responsibility for the ship at the time he engaged the repairers.

However, some of the practical rigour of *The Muncaster Castle* case was mitigated by the later decision in *The Amstelslot*,[880] where the House of Lords, reversing the decision of the Court of Appeal,[881] found that the Owners (defendants) properly established that they had exercised due diligence to make the vessel seaworthy. It was held that if a competent professional makes a survey with reasonable skill, there is due diligence, although later experience indicated that tests that were for valid reasons not employed would have revealed defects. In the case itself, the surveyors were not negligent by normal professional standards of the time.

With reference to the earlier case *Angliss v P&O SN*,[882] the carrier is not responsible for defects in the ship as a result of the building of the vessel or before the carrier acquired the ship in his 'orbit' that were not discoverable by reasonable inspection, and where the third parties were 'not the agents of the carrier for the purposes of discharging the duty imposed by Article III Rule 1'.[883] Although the carrier does have an obligation to exercise due diligence to choose a reputable shipbuilding company that employs diligent naval engineers and workers, to survey, repair or construct his vessel.[884] Similarly, where the carrier purchases the ship from a former owner, he is not liable for their lack of due diligence,[885] but is liable for defects which it ought to have discovered by the exercise of due diligence, either personally or through competent experts, on or after the transfer of possession.[886]

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[878] *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd, The Muncaster Castle* [1961] AC 807, [1961] 1 Lloyd's Rep 57, a decision that was disliked by many shipping interests, and one the effect of which the early work on what became the Visby Protocol was intended to abolish.
[879] *The Muncaster Castle* [1961] AC 807, 862 (Lord Radcliffe); see also Lord Merriman at 850: 'what was required is due diligence in the work itself'; and Lord Keith of Avonholm at 871: 'their failure to use due diligence … is his failure'.
[880] *Union of India v NV Reederij Amsterdam, The Amstelslot* [1963] 2 Lloyd's Rep 223; see also *Charles Brown & Co v Nitrate Producers SS Co Ltd* (1937) 58 Ll L Rep 188; *The Australia Star* (1940) 67 Ll L Rep 110.
[881] *Union of India v NV Reederij Amsterdam, The Amstelslot* [1962] 2 Lloyd's Rep 336.
[882] *W Angliss & Co (Australia) Pty Ltd v P&O Steamship Navigation Co* (1927) 28 Ll L Rep 202, [1927] 2 KB 456.
[883] *The Muncaster Castle* [1961] AC 807, 867 (Lord Radcliffe). Lord Radcliffe also said that 'the carrier's responsibility for the work itself does not begin until the ship comes into his orbit' (see pp 841, 872 & 877).
[884] *W Angliss & Co (Australia) Pty Ltd v P&O Steamship Navigation Co* [1927] 2 KB 456, 461–462, affirmed in *The Muncaster Castle* [1961] 1 Lloyd's Rep 57.
[885] *W Angliss & Co (Australia) Pty Ltd v P&O SN Co* (1927) 28 Ll L Rep 202, 214.
[886] *The Muncaster Castle* [1961] AC 807, 872.

However, such an approach is problematic where the contractual carrier is a time charterer, as he can be regarded as discharging his duties by means of another; and, therefore, the carrier may be liable for lack of due diligence by the owner occurring even before the commencement of the charter. At the same time, there shall be a front limit before which the acts and omissions should not be attributed to the carrier.[887] In any event, the presence of a time charterer between shipowner and cargo owner may substantially weaken the latter's remedies under Article III Rule 1.[888]

When chartering the vessel, the carrier shall seek to rely on the advice of, or certificate or report from a third party, such as a surveyor, regulatory body or classification society to the effect that a vessel is seaworthy. On the other hand, the non-delegable nature of the carrier's duty means that he cannot do so, subject to the points made on the issue of "orbit".

It was suggested that a carrier should not (in any event) be liable for the defaults of a body such as a classification society which holds a 'public and quasi-judicial position'.[889] However, this suggestion should be rejected: regardless of the effect of any special status of such bodies for the purposes of their liability in tort, it is difficult to see the justification for reducing the obligation of a carrier under the Hague Rules: the law of vicarious liability in tort is not a reliable guide to the effect of Article III Rule 1. As pointed out in *The Nicholas H*,[890] it would be unfair, unjust and unreasonable to place a duty of care on a classification society as against a shipowner.

[887] *Voyage Charters* (4th edn, Informa Law from Routledge 2014) para [85.105]: 'There is, however, a difficulty in applying this approach too literally to the position of a charterer as "carrier". He may charter a vessel which is unseaworthy as a result of the failure of the owner to exercise due diligence. In one sense, the vessel comes into the charterer's orbit when she enters the chartered service and he is not responsible for any concealed pre-existing unseaworthiness. This result is unattractive and it is submitted that it is avoidable because the charterer uses the shipowner effectively as his independent contractor in order to perform his obligations as carrier and the vessel is, therefore, within his orbit as long as it is in the orbit of the owner as his agent.'

[888] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.148].

[889] *Waddle v Wallsend Shipping Co* [1952] 2 Lloyd's Rep 105, 129, referring to *Angliss & Co*.

[890] *Marc Rich & Co AG & Others v Bishop Rock Marine Co Ltd and Nippon Kaiji Kyokai, The Nicholas H* [1995] 2 Lloyd's Rep 299, [1996] 2 AC 211 However, the case involved claims in tort, and not claims for breach of the Hague-Visby Rules.

The overriding nature of Article III Rule 1 and Rule 2 and reliance on Article IV immunities

At common law, the breach of an obligation as to seaworthiness generally prevents the carrier from reliance on a list of exceptions included in the bill of lading, unless clearly worded to that effect.[891] Particularly if the obligation is implied by law, in contrast to being express, the exception might be more readily construed as applying to the obligation.[892]

The Rules impose two duties on the carrier as regards the care of the cargo under the contract. The first contained, in Article III Rule 1, is as a "modified" duty of seaworthiness. The second, contained in Article III Rule 2, is a duty to "properly and carefully" load, handle, stow, carry, keep, care for, and discharge the goods carried. The "seaworthiness" and "proper and careful" duties each contains its own corresponding exceptions in Article IV Rule 1 and Rule 2, respectively. If the goods are lost or damaged, it is of utmost importance to ascertain which of these two duties were breached. This is because exceptions provided in Article IV Rule 2 can only be relied on for breaches of Article III Rule 2 and not of Article III Rule 1.[893] The consequences of breaches of Article III Rule 1 are reflected in Article IV Rule 1, which makes it clear that the carrier is not liable for the consequences of unseaworthiness unless caused by want of due diligence to make the ship seaworthy.[894] If the shipowner did not exercise due diligence to provide a seaworthy vessel and the cargo interests can prove it, he will not be able to use the protection provided by Article IV rule 2, as this duty is an *overriding* one.[895]

In *Maxine Footwear*,[896] the loss was held to be due to the shipowners' breach of their obligations under Article III Rule 1 which meant that they could not rely on the exception in Article IV Rule 2(a).

Somervell LJ propounded:

> Article III Rule 1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Article IV cannot be relied on. This is the natural construction apart

[891] For example, in *Aprile SpA v Elin Maritime Ltd, The Elin* [2019] EWHC 1001 (Comm) the provision that "the Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising … in respect of deck cargo" was held to be effective to exclude loss or damage due to negligence or unseaworthiness.
[892] With reference to *Kish v Taylor* [1912] AC 604; *The Torenia* [1983] 2 Lloyd's Rep 210, esp page 217.
Bills of Lading (3rd edn, Informa Law from Routledge 2020), para [11.137].
[893] Simon Baughen, *Shipping Law* (7th edn, Routledge Press 2018), 'The Content of the Rules', 109 – 110.
[894] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.139].
[895] In *Canadian Co-operative Wheat Producers Ltd v Paterson Steamships Ltd* [1934] 51 TLR 5; [1934] 49 Ll L Rep 421 [1934] AC 538, esp 545. The obligations as to seaworthiness and as to care of cargo were both described as 'overriding'.
[896] *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589; [1959] 2 Lloyd's Rep 105.

> from the opening words of Article IV Rule 2. The fact that that Rule is made subject to the provision of Article IV and Rule 1 is not so conditioned makes the point clear beyond argument.[897]

The origin of this principle lies clearly in the special features of English law in respect of this duty, as they existed before the Rules were even born: '… a kind of collateral contract to which the bill of lading contract did not apply'.[898] In that sense, it forms the basis of a rather specific English interpretation of the Rules, a fact which has ramifications into reasoning elsewhere.[899]

The same position was supported in some foreign jurisdictions and, for example, reiterated by McHugh J in The High Court of Australia:

> Article III imposes a positive obligation on the carrier to exercise due diligence to make the ship seaworthy. This obligation is an overriding obligation which is not subject to the exceptions to liability listed in Article IV Rule 2. This interpretation is consistent with the omission to make Article III Rule 1 subject to Article IV Rule 2, in contrast with Article III Rule 2, which deals with the proper care of goods carried and is specifically expressed to be '[s]ubject to the provisions of Article IV'.[900]

The overriding nature of the carrier's due diligence obligation was further reaffirmed in the UK in *The Fiona*,[901] where a shipowner sought to recover from a shipper the indemnity contemplated by Article IV Rule 6 of the Rules, in respect of expenses and damages arising from the shipment of dangerous cargo which had caused an explosion on the vessel just prior to discharge.
In the first instance, Judge Diamond QC held that 'the exceptions in Article IV Rule 6 are clearly … subject to the performance by the carrier of his overriding obligation set out in Article III Rule 1. So … is

[897] ibid, [1959] AC 589, 602–603.
[898] *The Torenia* [1983] 2 Lloyd's Rep 210, 217 col 2 (Hobhouse J).
[899] Clarke, M, 'The Carrier's Duty of Seaworthiness under The Hague Rules', *Lex Mercatoria, Essays in Honour of Francis Reynolds* (Lloyd's of London Press 2000), 105–108; and C.W. O'Hare, 'The Hague Rules Revised: Operational Aspects' (1976) 10(4) Melbourne University Law Review 527.
[900] *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad, The Bunga Seroja* [1998] 158 ALR 1, 24; [1999] 1 Lloyd's Rep 512, 526; [1999] AMC 427, 458 (High Court of Australia; McHugh J), citing both *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd*, supra, and *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538, 548; [1934] 49 Ll L Rep 421, 428 (PC).
See also *The Bunga Seroja* [1998] 158 ALR 1, 43; [1999] 1 Lloyd's Rep 512, 537; [1999] AMC 427, 484 (Kirby J), citing *Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* [1980] 147 CLR 142,152 (The High Court of Australia).
[901] *Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona* [1993] 1 Lloyd's Rep 257.

the right to an indemnity conferred by the first paragraph of the rule'.[902] On appeal, Hirst LJ upheld the trial judge, stating that he had rightly relied on *Maxine Footwear*.[903]

In *The CMA CGM Libra*,[904] it was held that a vessel may be rendered unseaworthy by negligence in the navigation or management of the vessel, and the obligation to exercise due diligence to make the vessel seaworthy was an overriding obligation, to which none of the exceptions in Article IV Rule 2 was a defence. The Court of Appeal confirmed that defects in passage planning, as well charts that had not been fully updated, would render a vessel unseaworthy. There was a clear policy reason in upholding the Admiralty Court's decision in that:

> article III rule 1 of the Hague Rules draws a clear temporal line … This reflects the balance struck at the inception of the Hague Rules in 1924. The signatories to the Convention agreed to divide the allocation of risk for maritime cargo adventures into two separate regimes. The first regime imposes a non-delegable duty on carriers to exercise due diligence to make the ship seaworthy "before and at the beginning of the voyage" (article III rule 1). The second regime excuses carriers from liability for loss or damage caused by errors of the crew or servants "in the navigation or in the management of the ship' thereafter, i.e. during the voyage (article IV rule 2(a))".

Moreover, this interpretation can be justified from the wording of the Rules themselves, in that whereas Article III Rule 2, on the care of cargo, is expressly made subject to the exceptions in Article IV (and this is not so in the US COGSA 1936, Section 3(2)), Article III Rule 1 is subject to no such limitation. It can also be said that whereas Article III Rule 1 says 'The carrier shall be bound … to …', Article III Rule 2 merely says 'shall properly and carefully …'. But it is difficult to see that this is more than a choice of different words in drafting.[905]

[902] ibid, 286, col 1.
[903] *The Fiona* [1994] 2 Lloyd's Rep 506, 513–514.
[904] *Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others, The CMA CGM Libra* [2020] EWCA Civ 293, upholding the first instance judgement [2019] 1 Lloyd's Rep 595 (Teare J).
[905] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell, 2017), para [9.141], fns 611 & 612.

The burden of proof under Article III Rule 1

The concluding words of Article IV Rule 1[906] make it plain that the burden is on the carrier to demonstrate the exercise of due diligence. However, it could be argued that in line with the general principle that the burden of proof lies upon the party asserting a state of affairs, the initial burden of proof on unseaworthiness (and causation) shall stay with the cargo owner, [907] and that it is only after unseaworthiness has been established that the burden on due diligence shifts to the carrier. According to *Scrutton*, this is the orthodox view.[908]

However, *Tetley* argues that this position is not correct,[909] that it is only after the cargo owner proves damage and the carrier proves the (exculpatory) cause of the loss and, *prima facie*, due diligence to make the vessel seaworthy that the burden reverts to the cargo owner to disprove due diligence or seaworthiness.[910] The latest edition of *Carver* supports the orthodox view stating that 'the burden of proof of unseaworthiness rests upon the cargo claimant'.[911]

At first instance, in *The CMA CGM Libra*, Teare J considered the issue of the burden of proof in relation to unseaworthiness, noting that 'the conventional view that the burden was on the cargo interests to establish that the vessel was unseaworthy'. And if those matters were causative to damages, 'the burden was on the Owners to establish that due diligence was exercised to make the vessel seaworthy'.[912] This statement is in line with the decision of the House of Lords in *The Muncaster Castle*.[913]

In order to establish due diligence, the carrier must indicate the true cause of the loss or damage. Thus where a latent defect in the ship causing the loss or damage can be proved, it may be fairly easy to establish

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[906] '… whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article'.
[907] What is actually the position at common law, see *Lindsay v Klein* [1911] AC 194, 203, although inferences may be drawn from the primary facts.
[908] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), especially para [7-030] and Chapter 20 with reference to *Minister of Food v Reardon Line* [1951] 2 Lloyd's Rep 265, especially 272; *Walker v Dover Navigation* (1949) 83 Ll L Rep 84. See also the Canadian case of *Robin Hood Flour Mills Ltd v NM Paterson & Sons Ltd, The Farrandoc* [1967] 2 Lloyd's Rep 276, and *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, especially 339, applied in *Phillips Petroleum Co and Others v Cabaneli Naviera SA, The Theodegmon* [1990] 1 Lloyd's Rep 52, 54.
The issue is also discussed in *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), paras [9-242] and [9-243].
[909] Professor William Tetley, *Marine Cargo Claims* (4th edn, Cowansville, Québec, Les Editions Yvon Blais 2008), Chapter 15, 880–885, relying in particular on *Paterson Steamships v Canadian Co-operative Wheat Producers* [1934] AC 538, 545 and *Bradley & Sons v Federal Steam Navigation Co* (1927) 27 Ll L Rep 395, 396.
[910] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020) para [11.156].
[911] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-143].
[912] *Alize 1954 and Another v Allianz Elementar Versicherungs AG and Others, The CMA CGM Libra* [2019] EWHC 481 (Admity); [2019] 1 Lloyd's Rep 595, para [56]. Confirmed by the Court of Appeal in *The CMA CGM Libra* [2020] EWCA Civ 293.
[913] *The Muncaster Castle* [1961] AC 807; [1961] 1 Lloyd's Rep 57 (HL).

due diligence, although it might in such a case be easier to proceed directly to the defence in Article IV Rule 2(p). However, if it is found that there is no possibility of a latent defect that could be overlooked in the exercise of due diligence, it will be difficult to find that due diligence was in fact exercised.

The nature of the defect concerned may be relevant not only to whether the vessel is unseaworthy but also to whether the exercise of due diligence would have made the vessel seaworthy. If the evidence on due diligence justifies it, the court may be able to infer the existence of some unidentified latent defect.[914]

In *The Antigoni,*[915] Staughton LJ stated:

> If the evidence points to no more than "purely scientific hypotheses"[916] as to the existence of some explanation which is consistent with the exercise of due diligence, the Judge is entitled and bound to take into account the plausibility of that explanation. There is not imposed on the shipowner in law any burden to establish a latent defect if he seeks to rely on article IV Rule 1. But he will find it much easier to establish due diligence if he can point to the likelihood of a latent defect, and much more difficult if he can suggest none, or only one which is wholly implausible.[917]

In some cases, it may be necessary to establish that a proper investigation of failures was carried out.[918] As expressed by Hobhouse J in *The Torenia*:[919] '… where a structural defect in the ship has contributed to the loss, the carrier has in effect to prove that he had exercised due diligence to make the ship seaworthy, I find nothing surprising about that conclusion. Indeed, it suggests that common sense and the law are proceeding in step'.[920]

[914] *The Antigoni* [1991] 1 Lloyd's Rep 209. See also *Charles Brown & Co v Nitrate Producers Steamship Co*. (1937) 58 Ll L Rep 188. It is unnecessary for present purposes to engage in the debate as to whether a latent defect is by definition one not discoverable by due diligence: see the discussion under Article IV Rule 2(p).
[915] *The Antigoni* [1991] 1 Lloyd's Rep 209 (CA).
[916] cf *Moore v R Fox & Sons* [1956] 1 QB 596, 607.
[917] *The Antigoni* [1991] 1 Lloyd's Rep 209, 213 (Staughton LJ).
[918] As, for example, was demonstrated in *The Fjord Wind* [2000] 2 Lloyd's Rep 191.
[919] *The Torenia* [1983] 2 Lloyd's Rep 210.
[920] ibid, 219 (Hobhouse J).

Express Seaworthiness Clause and Clause Paramount

The carrier's duty to provide a vessel that is 'tight, staunch and properly manned and equipped for the voyage' was a feature of customary maritime law. It was incorporated into modern English law by being treated as an *implied promise*.[921] However, this promise is now a rarity, as charterparties frequently contain the express stipulation as to seaworthiness, which may raise difficulties in connection with its meaning, the time of its application (which may make it necessary to fall back on the implied obligation) and its exclusion.[922]

A particular problem might arise when there is a provision in the charterparty for an express obligation of seaworthiness, and at the same time, a clause paramount which incorporates the Hague/Hague-Visby Rules into the same contract. In *The Fjord Wind*,[923] the NYPE-based time charterparty included two express clauses: Clause 1[924] provided for an absolute obligation to provide a seaworthy ship and the other, Clause 35,[925] provided for a duty to exercise due diligence only. The primary task of the Court was to reconcile the apparent conflict between two provisions and to answer the question of whether the carrier's duty was an absolute one or a mere duty to exercise due diligence.

In answering this question, the general rule is that the court should consider the intention of the parties. Usually, where there is an express seaworthiness clause followed by a clause paramount, the court has to look at the contract as a whole and try to construe it in light of the parties' intentions and commercial considerations, in order to maintain the stability of the commercial transactions.
At first instance,[926] Moore-Bick J found that

> Clause 1 governed 'the obligation of the shipowner in relation to seaworthiness of the vessel in respect of events occurring during the period prior to the commencement of loading, that being the point at which the cargo-carrying stage of the adventure began';
>
> and Clause 35 'imported into [the] charter the fundamental scheme of obligations and exemptions in relation to the carriage of cargo contained in the Hague Rules' and 'it was clear that the parties

[921] *Paterson SS Ltd v Canadian Co-operative Wheat Producers* Ltd [1934] AC 538, 544-545 (Lord Wright); *Canadian Co-operative Wheat Producers Ltd v Paterson SS Ltd* [1934] 49 Ll L Rep 421, 426–427 (Lord Wright).
[922] See, for example, explanations given by Clarke LJ in *The Fjord Wind* [2000] 2 Lloyd's Rep 191, 195–197.
[923] *Eridania SpA and Others v Rudolf A Oetker and Others, The Fjord Wind* [2000] 2 Lloyd's Rep 191 (CA).
[924] Clause 1 provided *inter alia* for: 'It is this day mutually agreed … 1. That the said vessel being tight, staunch and strong and in every way fit for the voyage, shall with all convenient speed proceed to [the river Plate] … and there load …'
[925] Clause 35 provided *inter alia* for: 'Owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy …'.
[926] *The Fjord Wind* [1999] 1 Lloyd's Rep 307.

> intended that the owners' liability for loss of, damage or delay to the cargo was intended to be governed by those terms'.[927]

Doubt was expressed if such a position would be commercially attractive because it would mean that the owners' obligation in relation to seaworthiness varied at different stages of the adventure. However, as the judge stated, to construe the charter in this way would give effect to all its terms and would not produce an unworkable result.[928] Thus it was held that 'the obligations of the disponent owners in relation to the seaworthiness of the vessel during the cargo carrying voyage were limited to an obligation to exercise due diligence before and at the beginning of that voyage to make the vessel seaworthy'.[929]

However, after due consideration, the Court of Appeal took a view that 'the expression "before and at the beginning of the voyage" was apt to include the whole period before the beginning of the voyage'.[930] This view was based on the decision of the House of Lords in *The Saxonstar*.[931] Clarke LJ referred to the principles laid down in *ICS* that 'interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.[932] On this basis, he concluded that if Clause 1 stood alone it would be likely to be held to have the meaning of an absolute warranty of seaworthiness, but it did not stand alone.[933]

Clarke LJ stated:

> If there were no Clause 35 it is likely that it would be held that there was an absolute warranty that the vessel should be seaworthy for both the approach voyage and loading. Yet on any view Clause 35 expressly applies 'before and at the beginning of the voyage', which must include the loading process. Thus under Clause 35 the owners must exercise due diligence to make her seaworthy for the loading process and thereafter they must exercise due diligence to make her seaworthy for the cargo-carrying voyage itself. It follows that Clause 35 directly affects the true construction of Clause 1 and the question arises whether it was intended to affect the whole operation of the clause.[934]

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[927] ibid, 314.
[928] ibid, 315.
[929] ibid, 315.
[930] *The Fjord Wind* [2000] 2 Lloyd's Rep 191, para [11].
[931] *The Saxonstar* [1959] AC 133; [1958] 1 Lloyd's Rep 73 (HL).
[932] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896, 912 (Lord Hoffmann).
[933] *The Fjord Wind* [2000] 2 Lloyd's Rep 191, para [10].
[934] ibid, para [11] (Clarke LJ).

Thus, considering the background knowledge, 'the parties would be expected to apply a Hague or the Hague-Visby Rules regime and not to have agreed to an absolute warranty of seaworthiness'.[935] Moreover, it was unlikely that the parties would have agreed to a different regime for different voyages for cargo damage under a bill of lading and the charter-party.

Bills of lading need not contain such an express stipulation as the Rules usually create a similar effect; however, the requirement may appear as a term on the reverse side of the bill. Thus, the qualified duty under Article III Rule 1 has had a widespread application. Reduction of the implied duty to liability only where the carrier has not been negligent is common and is what the Rules provide for.

When the duty to provide a seaworthy vessel shall be exercised? The position at common law

At common law, the carrier's duty to provide a seaworthy ship is not a continuing obligation that extends throughout the period covered by the carriage contract. This duty attaches to the time of loading as regards the cargo,[936] and to the time of sailing as regards the seaworthiness of the ship in general.[937] On completion of each stage, the vessel must have the degree of fitness that is required for the next stage.[938] The stages of a voyage for this purpose are usually marked by different physical conditions or perils which may be encountered.[939] Thus, the vessel needs only to be seaworthy in the sense of being fit to encounter the perils to be expected during that particular stage.[940] It is submitted that there is no English authority defining the moment of commencement of the voyage but *Tetley* suggests that it is when 'all hatches are battened down, visitors ashore and orders from the bridge given so that the ship actually moves under its own power or by tugs or both'.[941]

[935] ibid, para [15] (Clarke LJ).
[936] *McFadden v Blue Star Line* [1905] 1 KB 697, especially 703–705 (Channell J).
[937] *Cohn v Davidson* (1877) 2 QBD 455 (voyage charter case).
[938] *Reed v Page* [1927] 1 KB 743.
[939] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [7-021].
[940] See *Bouillon v Lupton* 33 LJ (CP) 37; *E Timm & Son Ltd v Northumbrian Shipping Corporate Ltd* [1939] AC 397; [1939] 64 Lloyd's Rep 33.
[941] *Marine Cargo Claims* (4th edn, Cowansville, Québec, Les Editions Yvon Blais 2008), Chapter 15, 'Due Diligence to Make the Vessel Seaworthy, Before and at the Beginning of the Voyage, The Basic Principle', 15–16.
See *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.144] fn 281.

There is no ordinary implied warranty of seaworthiness applying to the approach voyages.[942] There is no implied warranty of actual fitness for loading cargo as well.[943] At the commencement of loading the ship must be fit to receive her cargo and fit to sustain the ordinary perils of lying afloat in harbour (while receiving her cargo) but need not be fit for sailing.[944] Similarly, if she becomes uncargoworthy after loading but before sailing, at common law the basic duty is complied with, and responsibility for consequent events will (unless they are attributable to initial unseaworthiness) turn on the allocation of responsibility under the rest of the contract of carriage.[945]

There is said, however, to be a duty that after the cargo is loaded the ship must be seaworthy enough to lie in part without damaging the cargo.[946] As *Carver* argues, this can be regarded as an aspect of cargoworthiness, or as a special stage of the voyage, the "lying stage", with limited requirements rather like those of the doctrine of stages.[947]

In case of a charter for consecutive voyages or a "round trip", the shipowner is obliged to provide a seaworthy ship at the commencement of each voyage[948] or each stage of the trip.[949] However, *Scrutton* further argues that a time charter not by way of demise includes an undertaking of seaworthiness at the beginning of the time charter only, referring to the Scots decision in *Giertsen v Turnbull*,[950] but *not* at the beginning of each voyage.[951] Probably the same is true in English law.[952]

A standard time charter almost always includes terms requiring the ship to be in a particular condition at the time of delivery. Thus, for example, the undertakings enumerated in lines 21 to 24 of the NYPE form, and in Clause 1 of the BALTIME form (without incorporation of a clause paramount) contain a series of

[942] Following the decision of The Court of Appeal in *Compagnie Algerienne de Meunerie v Katana, Societa di Navigazione Maritima, Spa, The Nizeti* [1960] 1 Lloyd's Rep 132, dismissing the appeal from the first instance Court: [1958] 2 Lloyd's Rep 502, it was held that the implied warranty of seaworthiness does not attach until the commencement of loading. However, the decision is questioned by *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [11.46].
[943] See *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [11.46].
[944] *Reed v Page* [1927] 1 KB 743; *Svenssons v Cliffe SS Co* [1932] 1 KB 490, where the stage of loading was held not to be completed when the last sling of pit-props was on board, but not stowed. Although unseaworthy at the time of the accident there was no breach of warranty, the ship having been unseaworthy at the commencement of the stage of loading.
cf *The Stranna* [1938] P 69, 77, 84. See, also, as to when loading is completed: *Argonaut Navigation Co v Ministry of Food* [1949] 1 KB 572.
[945] *McFadden v Blue Star Line* [1905] 1 KB 697.
[946] *Reed v Page* [1927] 1 KB 743 (where cracks in barge admitted water).
[947] *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.020].
[948] As considered, for example, *The Saxonstar* [1958] 1 Lloyd's Rep 73 (HL).
[949] *McIver v Tate* [1903] 1 KB 362 ('round trip').
[950] *Giertsen v Turnbull* [1908] SC 1101.
[951] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [17-031].
[952] ibid, at para [17-031] fn 127, *Scrutton* refers to a time policy of insurance where there is no implied warranty of initial seaworthiness 'owing to the hardship of requiring the shipowner to undertake that his vessel is seaworthy at a time when she is at sea beyond his control, at a time at which such policies frequently begin to run', with further reference to *Gibson v Small* (1853) 4 HLC 353 and The Marine Insurance Act 1906, Section 39(5).

requirements as to the condition and quality of the ship at delivery. After delivery, the owners come under separate obligations with respect to the ship's maintenance.[953]

Sometimes, despite the categorical language of these additional clauses in a contract, it does not impose an absolute duty of seaworthiness. For example, the wording that requires the owners to 'maintain her class and keep the vessel in a thoroughly efficient state in terms of the hull, machinery and equipment for and during the service'[954] represents a mere duty 'to exercise reasonable diligence'.[955] Therefore, 'the nature of obligation to maintain must depend on the exact words used'.[956] Thus some forms of maintenance clause may be so worded that the obligation is absolute.[957]

'Before and at the beginning of each voyage'. The position with incorporation of the Rules

The incorporation of a clause paramount creates an obligation to exercise due diligence [to make the ship seaworthy] before and at the beginning of each voyage. This wording supersedes the common law obligation under the "doctrine of stages" to ensure that the vessel was seaworthy for each separate stage of the voyage at the commencement of that stage,[958] and supplements the owner's undertaking as to the maintenance of the ship during the charter period.

'Before … the voyage' appeared to be a vague phrase, as the Rules do not provide expressly how far back in time this period stretches. There may be cases where the breach of duty is treated as eventually giving rise to the loss or damage occurred very considerably before loading: for example, in respect of the carrier's system of inspections and surveys, repairs and apportionment and supervision of master and crew.[959] As *Bills of Lading* argues, however, 'the wording of the rule makes it clear that the carrier's obligation ceases at the beginning of the voyage'.[960]

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[953] See, for example, Clause 6 of the NYPE 1993 or Clause 3 of the BALTIME form.
For reference see *Time Charters* (7th edn, Informa Law from Routledge 2014), para [8.5].
[954] The NYPE 1993 form, Clause 6, lines 37 and 38.
[955] See *Tynedale Steam Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd* (1936) 54 Ll L Rep 341, 344 (CA) (Lord Roche)
[956] *The Saxonstar* [1957] 1 Lloyd's Rep 271, 280 (CA) (Parker LJ).
[957] For example, in *The Saxonstar* [1957] 1 Lloyd's Rep 271 (CA), it was held that an absolute obligation was created by the following wording: '… the said vessel being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted …'
See a discussion in *Time Charters* (7th edn, Informa Law from Routledge 2014), paras [11.5] – [11.11].
[958] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), paras [11.144] & [11.145].
[959] For example, *The Assunzione* [1956] 2 Lloyd's Rep 468, 487.
[960] *Bills of Lading*, (2nd edn, Informa Law from Routledge 2015), para [10.139].
It is further submitted that there is no English authority defining the moment of commencement of the voyage.

In *Maxine Footwear*,[961] a ship caught fire while in port (and already after loading operations had begun) by reason of negligent handling of an acetylene torch. In its decision, the Privy Council clearly stated that the obligation was not merely to exercise due diligence at the beginning of the loading and at the beginning of the voyage, but that the operative wording meant 'the period from at least the beginning of the loading until the vessel starts on her voyage'. The word "before" could not be read as meaning 'at the commencement of the loading'.[962]

Lord Somervell propounded:

> … When the warranty was absolute it seems at any rate intelligible to restrict it to certain points of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began only to reappear later shortly before the beginning of the voyage.[963]

The loss, in that case, was therefore attributable to the failure to comply with Article III Rule 1 and not covered by the exception of fire.[964]

Pursuant to Article I(e) of the Rules, the cargo-carrying voyage is defined from load port to discharge port. In *The Makedonia,*[965] the word "voyage" was held to mean the contractual voyage from the port of loading to the port of discharge, as declared in the appropriate bill of lading.[966] When some action to make a vessel seaworthy, which can be done at sea or before she sails, is planned to be done at sea, the vessel is not unseaworthy when she sails.[967] However, the terms of charterparties, may make the "additional" obligations applicable to an approach voyage too.[968]

Generally, the scope of the duty is limited to the adventure undertaken: a ship does not need to be seaworthy for all voyages, nor cargoworthy for all cargo on all voyages. However, in the words of Mustill J in *The Hermosa*, the difficulties created by the inclusion of the Hague Rules into a time charter have not been worked out by the Courts yet. The analogy with a consecutive voyage charter is not exact. For

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[961] *Maxine Footwear v Canadian Government Merchant Marine* [1959] AC 589; [1959] 2 Lloyd's Rep 105.
See also *The Fjord Wind* [2000] 2 Lloyd's Rep 191; cf *A Meredith Johns & Co Ltd v Vagemar Shipping Co Ltd, The Apostolis* [1997] 2 Lloyd's Rep 241.
[962] *Maxine Footwear v Canadian Government Merchant Marine* [1959] AC 589, 604 (Lord Somervell).
[963] ibid, 604.
[964] See a discussion in *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.134].
[965] *The Makedonia* [1962] 1 Lloyd's Rep 316.
See also *The Anders Maersk* [1986] 1 Lloyd's Rep 483, 486 (Hong Kong High Ct).
[966] *The Makedonia* [1962] 1 Lloyd's Rep 316, 329–330 (explanations of Hewson J).
[967] See, for example, *Orient Ins Co v United SS Co*, 1961 AMC 1228 (SD NY 1961): a vessel may be seaworthy although ballasting is not complete by the time of sailing, if ballasting is planned to be done at sea.
[968] See *The Kriti Rex* [1996] 2 Lloyd's Rep 171; *The Fjord Wind* [1999] 1 Lloyd's Rep 307, affd [2000] 2 Lloyd's Rep 191.

example, the charterer pays directly for the whole of the time while the ship is on hire, including ballast voyages; and there are in most time charters express terms as regards initial seaworthiness and subsequent maintenance that are not easily reconciled with the scheme of the Hague Rules, one which creates an obligation as to due diligence attaching voyage by voyage.[969]

Moreover, it may well be the case that if the vessel becomes unseaworthy for the first time between two different ports where she calls to collect the cargo, a failure to exercise due diligence may constitute a breach in relation to some cargo but not to other cargo (loaded earlier), and the rights of cargo interests, having shipments from two different ports, may differ. The circumstances on the voyages are usually not similar, but it is most likely that the courts will have no hesitation in inferring unseaworthiness at the beginning of the voyage on the basis of a breakdown or other incident occurring subsequently.[970] The words 'before and at the beginning of the voyage' qualify the obligation to exercise due diligence rather than designate the time at which the vessel must be seaworthy.

If, however, a vessel is unseaworthy but not required to perform any service, such as loading cargo, for a month, the carrier will not be in breach of the obligation if he waits until just before the month is up before effecting the necessary repair. In this sense, the first relevant date for considering seaworthiness is that of commencement of loading. Contrast the case where the vessel is unseaworthy a month before the voyage, and the delay in making her seaworthy means that a perishable cargo is loaded late and suffers damage in consequence. In such a case the carrier may, depending on the terms of the contract and questions of due diligence, be in breach of the obligation.[971]

With regards to the bunkers, as with the doctrine of stages at common law, a ship should have sufficient fuel onboard at the loading port for the whole voyage, unless proper arrangements have been diligently made at the loading port for bunkers at various ports along the planned and advertised route.[972]

[969] *The Hermosa* [1980] 1 Lloyd's Rep 638, 647–648 (Mustill J).
[970] *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.144].
[971] With reference to *Fyffes Group Ltd and Caribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc, The Kriti Rex* [1996] 2 Lloyd's Rep 171. See *Bills of Lading* (3rd edn, Informa Law from Routledge 2020), para [11.145].
[972] *The Makedonia* [1962] 1 Lloyd's Rep 316. See also *E Timm & Son, Ltd v Northumbrian Shipping Co, Ltd* [1939] AC 397, where the carrier's failure, before the voyage began, to provide sufficient bunkers to get the ship to its first bunkering port was held to be a failure to exercise due diligence resulting in liability and depriving the carrier of the exceptions provided by the Canadian Hague Rules.

Seaworthiness and Stowage. Possible Dilution of Seaworthiness Obligations when the Charterers Are to Stow the Cargo

An important qualification to the obligation as to cargoworthiness is the general principle that poor stowage endangering the cargo will not generally render the vessel unseaworthy, as for example in *The Thorsa*,[973] where chocolate was damaged due to stowage in close proximity to gorgonzola cheese, unless poor stowage endangers the vessel or its integrity as, for example, in *Kopitoff v Wilson*[974] where armour plates that had not been securely stowed broke loose in heavy weather and pierced through the side of the vessel, leading to the loss of both the ship and cargo.[975]

Viscount Cave noted in this respect:

> there are cases, such as *Kopitoff v Wilson*,[976] where, a ship having been injured in consequence of bad stowage, the warrant of seaworthiness of the ship has been held to be broken, but in such cases it is the unseaworthiness caused by bad stowage and not the bad stowage itself which constitutes the breach of warranty.[977]

A distinction, therefore, exists between stowage that renders the vessel uncargoworthy, and that which imperils the safety of the vessel itself. Only the former can be classified as bad stowage and only the latter as an instance of unseaworthiness.[978]

This principle was applied in *Elder Dempster v Paterson, Zochonis*,[979] a case in which their Lordships had to consider whether a bill of lading exception that covered bad stowage protected the shipowners when they had stowed the vessel so badly as to imperil the cargo, but not the vessel. Palm oil barrels had been loaded at the bottom of the vessel's holds in two West African ports. The master then allowed another

[973] *The Thorsa* [1916] P 257, see also *Werner and Others v Det Bergenske Dampskibsselskab* (1926) 24 Ll L Rep 75.
[974] *Kopitoff v Wilson* (1876) 1 QBD 377.
[975] See also *Ingram & Royle Ltd v Services Maritimes du Tréport* [1913] 1 KB 538, where insufficiently packed sodium exploded on contact with water. However, note the observation of Admiralty Registrar Jervis Kay QC in *Yuzhny Zavod Metall Profil LLC v EEMS Beheerder BV, The EEMS Solar* [2013] 2 Lloyd's Rep 487 para [82], that poor stowage of steel coils, 'during the course of the voyage given that it was being undertaken during the monsoon season', rendered the vessel unseaworthy may at first sight seem contrary to this general principle. However, if the stowage of something as heavy and possibly moveable as steel coils is really poor, it could result in unseaworthiness if, for example, the coils could move around thus affecting the stability of the ship.
[976] *Kopitoff v Wilson* (1876) 1 QBD 377, the shipowner lost the right to rely on a defence of "perils of the sea" in respect of loss of ship and cargo caused by collapse of the defective stow during heavy weather.
[977] *Elder Dempster & Co v Paterson, Zochonis & Co* [1924] AC 522; (1924) 18 Ll L Rep 319, 324 (Viscount Cave).
[978] Professor Simon Baughen, 'Bad Stowage or Unseaworthiness?' [2007] LMCLQ 1, 4–5.
[979] *Elder Dempster & Co v Paterson, Zochonis & Co* [1924] AC 522; (1924) 18 Ll L Rep 319.

layer of barrels to be loaded on top of these barrels. The weight of the upper layer was too much and caused the lower layers of barrels to break.

In giving the judgment Lord Sumner propounded:

> … Unseaworthiness is a quality of the ship, however arising … Bad stowage which endangers the safety of the ship, may amount to unseaworthiness, of course: but bad stowage which affects nothing but the cargo damaged by it is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo.[980]

However, in *The Starsin,*[981] Lord Hobhouse considered that stowage of wet cargo might make the vessel unseaworthy for the carriage of timber to be loaded at a later port. Thus the situation may become even more complex where the hazard is not tied to the vessel itself.[982]

In *The Panaghia Tinnou,*[983] the voyage charter-party case, the cargo of bagged oil cakes was loaded by stevedores appointed by or on behalf of the charterers. During the course of the voyage, the cargo suffered from condensation, heating and spontaneous combustion, and the owners failed to prosecute the voyage with reasonable despatch so that the voyage was prolonged. The charterers sought to recover their loss in respect of the damaged cargo and argued, *inter alia*, that the master had both a right and a duty to intervene in stowage.[984]

Rejecting the charterers' argument, Steyn J reiterated the common law position that fundamentally the responsibility for stowing the goods rests on the owners. However, both under the Hague Rules and the Hague-Visby Rules, the owners and charterers were free to determine what part (if any) either shall play in the stowage of the cargo.[985] There were no findings of fact which could give rise to a duty, owed by the master to the charterers, to intervene.[986]

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[980] ibid, [1924] AC 522, 561–562 (Lord Sumner).
[981] *Homburg Houtimport BV v Agrosin Private Ltd and Others, The Starsin* [2004] 1 AC 715, [2003] UKHL 12, [2003] 1 Lloyd's Rep 571, para [120] with reference to Article III Rule 1 and Rule 2 of the Hague Rules.
[982] See also *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255.
[983] *CHZ Rolimpex v Eftavrysses Compania Naviera SA, the Panaghia Tinnou* [1986] 2 Lloyd's Rep 586.
[984] As per the charterparty, cl 18: 'Cost … (c) Free in and stowed - The charterers shall load and stow the cargo free of any expense whatsoever to the owners …'.
[985] *The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586, 589 (Steyn J).
[986] With reference to *the Panaghia Tinnou* [1986] 2 Lloyd's Rep 586, 591 (Steyn J).

In *The Apostolis (No 1),*[987] the cargo of raw cotton in bales was damaged by fire or the water used to extinguish it. The cargo interests argued that the fire, which was allegedly caused by welding carried out on deck, rendered the vessel unseaworthy and put owners in breach of the Hague-Visby Rules Article III Rule 1. Therefore, the owners were liable for their losses. The owners responded that the most probable cause of the fire was a discarded cigarette for which the cargo interests' employees were liable and counterclaimed their losses. In the course of the investigation, it was found that if welding was being carried out on deck above Hold 5 than a spark from this activity was the most probable cause of the fire. If no such work was being carried out, then a discarded cigarette was the most probable cause.

At first instance there was not sufficient evidence before Tuckey J to justify the conclusion that the fire was caused by the welding,[988] thus the cargo interests failed to establish that welding was a more probable cause of the fire than a discarded cigarette.

The Court of Appeal rejected the plaintiff's argument and held that in order 'to show breach of Article III Rule 1 the cargo interests had to show that the owners failed to make the ship seaworthy and that their loss or damage was caused by the breach i.e. the fire cause by unseaworthiness'. The fact that hot works were carried out on deck did not, by itself, rendered the vessel unseaworthy – the owners were not in breach of Article III Rule 1 merely because 'welding exposed the cargo to an ephemeral risk of ignition'.[989]

Phillips LJ distinguished the current case with the *Maxine Footwear* and concluded:

> For a ship to be unseaworthy, or more strictly uncargoworthy, there must be some attribute of the ship itself which threatens the safety of the cargo. If a hold is dirty, that is properly considered as an attribute of the ship. But the fact that a hold contains cargo which threatens damage to other cargo stowed in proximity is not an attribute of the ship and does not render the ship unseaworthy.[990]

His Lordship continued:

> A ship will be unseaworthy if she is not in such a state as will preserve the cargo from the risk of damage from the necessary incidents of a ship's existence, whether at sea or in harbour. But a

[987] *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd, The Apostolis (No. 1)* [1997] 2 Lloyd's Rep 241 (CA).
[988] *The Apostolis (No. 1)* [1996] 1 Lloyd's Rep 475.
[989] *The Apostolis (No. 1)* [1997] 2 Lloyd's Rep 241, 244, 245, 257, 258.
[990] *The Apostolis (No. 1)* [1997] 2 Lloyd's Rep 241, 257, col 1, with further reference to *The Thorsa* [1916] P 267.

> ship will not be unseaworthy simply because she or her cargo will be endangered if an act or activity occurs on board her which it is not necessary to perform while she is in that condition and which reasonable care requires shall not be performed while she is in that condition.[991]

The "attribute of the ship" test is not always straightforward to apply in practice.

Possible Dilution of Seaworthiness Obligations in the Time Charter cases

The modern form of time charter is a type of contract where the charterer and the owner are effectively dividing up between them the obligation assumed by the carrier under the contract of carriage.[992] The shipowner agrees with the time-charterer that during a certain named period the shipowner will render services as a carrier by his servants and crew to carry the goods which are put on board his ship by the time-charterer.[993] At the heart of the performance of any time charter will be the loading, stowing, trimming and discharging of cargoes, the obligations which, in the absence of express provisions in the contract, are the responsibility of the owners.[994]

Clause 8 of the NYPE_1993, however, addresses explicitly the question by whom those operations are to be undertaken or arranged and at whose cost, representing a continuing cause of confusion. It does not in its terms address which party, as between owners and charterers, bears legal responsibility for how those operations are performed. As a matter of language, there is room to contend that the charterers' commitment to, for example, load 'under the supervision of the Captain' left that responsibility with the master and therefore the owners.[995] Similarly, Clause 7 'Charterers to Provide' contains the wording 'provide and pay for … all other usual expenses … necessary dunnage and fittings …', which is indefinite.

The division of responsibility for cargo operations by Clause 8, is not, under English law, affected by the incorporation of the US COGSA into the time charter by a clause paramount and (as opposed to a provision seeking to exclude the owners' liability for negligent performance of cargo operations for which they have accepted contractual responsibility) will not be struck down by Article III Rule 8 of the Hague Rules.[996] Section 3(2) of the US COGSA does not import into the time charter an obligation on the owners,

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[991] ibid, 257, col 2 (Phillips LJ).
[992] As classified by Mackinnon, LJ, and quoted in John Weale, 'Cargo Liabilities Under the NYPE Time Charter and The Inter-Club Agreement' (2016) at 12th Annual International Colloquium in Swansea, session 2, page 1.
[993] *Sea & Land Securities v William Dickinson & Co* (1942) 72 Ll L Rep 159, 162, col 2 (Mackinnon LJ).
[994] See, for example, *CHZ Rolimpex v Eftavrysses Compania Naviera SA, The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586, 589 (Steyn J): 'It is trite law that, at common law, the responsibility for stowing the goods rests on the owners'.
[995] *Time Charters* (7th edn, Informa Law from Routledge 2014), para [20.13].
[996] In regard to the effect of Article III Rule 8 see the previous chapter, especially the discussion on *Freedom General Shipping SA v Tokai Shipping Co Ltd, The Khian Zephyr* [1982] 1 Lloyd's Rep 73.

as carriers, to carry out or be responsible for the loading, stowing, or discharging of the cargo, especially when under other provisions of the charter, the responsibility for undertaking these operations is put on the charterers.[997] The underlying basis for such a position is that the parties are free to divide the various cargo operations between themselves as they think fit under the contract. The Act provides only for the manner in which the operations are to be carried out.[998] This interpretation of the Rules was approved by the House of Lords in *Renton v Palmyra*,[999] from which their Lordships declined to depart in *The Jordan II*.[1000]

The general understanding has always been that the effect of the unamended Clause 8, subject only to the two qualifications,[1001] is to transfer the risk and the responsibility to the charterer. Accordingly, where there is damage to the cargo, to other cargo or to the ship, or personal injury, or financial loss or expense, resulting from negligent performance of cargo operations, the charterers are liable to indemnify the owners.[1002]

The frequently seen addition of the words "risk and" before "expense" in line 78 of the NYPE 1993 is said to be an unnecessary amendment. In practice, cargo operations will ordinarily be carried out by stevedores or terminal employees who are independent contractors, and for whose conduct neither the owners nor the charterers are vicariously liable. But they are the hands by which tasks that the charterers have undertaken to perform are in fact performed, such that the stevedores are in that sense and to that extent the charterers' "agents". References in the charter to the charterers "or their agents" may therefore encompass stevedores or terminal owners carrying out the tasks for which the charterers have responsibility under Clause 8, or its equivalent in other forms of time charters.[1003]

However, it has been suggested that if negligent stowage causes the ship to become unseaworthy, responsibility for consequent damages will revert to the owners, who cannot transfer their *primary*

[997] *Time Charters*, (7th edn, Informa Law from Routledge 2014), para [20.9].
[998] With reference to *Pyrene v Scindia* [1954] 1 Lloyd's Rep 321, 328 (Devlin J).
[999] *Renton v Palmyra* [1956] 2 Lloyd's Rep 379.
[1000] *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49; [2005] 1 WLR 1363 (HL); [2005] 1 Lloyd's Rep 57.
[1001] Identified by the House of Lords in *Court Line Ltd v Canadian Transport Co Ltd* (1940) 67 Ll L Rep 161, [1940] AC 934; see discussion below.
[1002] *Time Charters*, (7th edn, Informa Law from Routledge 2014), para [20.14].
[1003] See *Merit Shipping Co Inc v TK Boesen A/S, The Goodpal* [2000] 1 Lloyd's Rep 638, 642–643 (Colman J);
Nippon Yusen Kaisha Ltd v Scindia Steam Navigation Co Ltd, The Jalagouri [2000] 1 Lloyd's Rep 515, 519–520 (Tuckey LJ); *Great Elephant Corp v Trafigura Beheer bv, The Crudesky* [2014] 1 Lloyd's Rep 1, paras [29]–[30] (Longmore LJ), and *NYK Bulkship (Atlantic) NV v Cargill International SA, The Global Santosh* [2013] 1 Lloyd's Rep 455 (Field J), [2014] 2 Lloyd's Rep 103 (Court of Appeal). This should not be taken too far, however. In *The Global Santosh*, the Court of Appeal disapproved Field J's decision that receivers' failure to discharge within the laytime stipulated in their sale contract, and their failure to pay or secure their resulting demurrage liability to their sellers, were acts of the charterers' 'agents' in this sense. But held that the off-hire proviso under consideration in that case used 'agents' in a broader sense, so as to apply nonetheless.

obligation to maintain the seaworthiness of the ship. This view appeared from the *obiter* comment of Lord Steyn in *The Jordan II*, who said that 'it is obvious that the obligation to make the ship seaworthy under article III, rule 1 is a fundamental obligation which the owner cannot transfer to another. The Rules impose an inescapable personal obligation'.[1004]

The crucial question being asked is: where the stowage is so bad that it not only imperils the cargo but also puts the ship itself at risk – i.e. renders it unseaworthy – does the owner/master have a duty to intervene and forbid the vessel's departure in that condition, i.e. whether, as against the charterers, the owners retain any residual responsibility as regards to cargo operations?

In *Court Line v Canadian Transport*[1005] damage to the cargo was caused by bad stowage that caused no damage to the vessel herself. The time charterparty provided for an unamended Clause 8,[1006] and express incorporation of the Hague Rules. In considering the case, the House of Lords rejected the argument that the phrase 'under the supervision of the Captain' meant that responsibility for proper stowage rests with the owners and held that Clause 8 imposed a *primary* duty on the charterers to load and to stow the cargo safely. Their Lordships supported the proposition that the master always had the right to supervise the cargo operations if he so wished.[1007]

Lord Atkin propounded:

> The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage, no doubt they might escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely; any more than the stipulation that a builder in a building contract should build under the supervision of the architect relieves the builder from duly performing the terms of his contract.[1008]

[1004] *The Jordan II* [2005] 1 Lloyd's Rep 57, 63, col 2 (Steyn J).
[1005] *Court Line Ltd v Canadian Transport Co Ltd* (1940) 67 Ll L Rep 161; [1940] AC 934.
[1006] Clause 8 read as follows: 'charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain, who is to sign bills of lading for cargo as presented, in conformity with mates' or tally clerks' receipts'.
[1007] *Court Line Ltd v Canadian Transport Co Ltd* (1940) 67 Ll L Rep 161, 166 (HL) (Lord Atkin) and 168 (Lord Wright).
[1008] ibid, 166 col 1 (Lord Atkin).

In taking such a view Lord Atkin relied on *Brys & Gylsen v Drysdale*,[1009] the case relating to responsibility for stowage under a voyage charter,[1010] where Greer J stated:

> … where a Charter-party uses the words "provide and pay" or "employ and pay" [stevedores], I think the effect of such a clause is to transfer the duty and obligation, which would otherwise rest on the shipowner, to the Charterer, of stowing the cargo in the way it ought to be stowed. It would be an odd state of things if one were to hold that a shipowner who has no contract whatever with the stevedore, and who cannot say to the stevedore: You have broken your contract with me, and therefore I will not have you any longer in my vessel; and who has no control over what is to be paid to the stevedore, should be responsible for the failure of the stevedore to do his duty.[1011]

Lord Wright qualified the wording 'under the supervision of the captain' as the master's power of supervision, which shall not be only limited to matters affecting seaworthiness.[1012] He propounded:

> … under clause 8 … the charterers are to load, stow and trim the cargo at their expense. I think these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners relieve them of liability for bad stowage….[1013]

Thus, supervision of the cargo operations was classified as a right but not as a duty on the part of the Owner:[1014] a clear distinction was drawn between an entitlement to supervise on the one hand and a duty to do so (owed to the charterers) on the other.

[1009] *Brys & Gylsen Ltd v J&J Drysdale & Co* (1920) 4 Ll L Rep 24.

[1010] In that particular case, the Judge did not refer to the words 'under the supervision of the master' which were in the relevant clause in *Court Line v Canadian Transport*. But, in the words of Lord Atkin it was obvious that that very experienced Judge attached no importance to the words as affecting the liability of the charterers arising from their contract 'to provide and pay a stevedore to do the stowing of the cargo under the supervision of the master'.

[1011] *Brys & Gylsen Ltd v J&J Drysdale & Co* (1920) 4 Ll L Rep 24, 25 col 2 (Greer J) with further reference to Lord Esher in *Harris v Best, Ryley & Co* (1892) 68 LT 76.

[1012] *Court Line Ltd v Canadian Transport Co Ltd* (1940) 67 Ll L Rep 161, 169 col 2 (Lord Wright).

[1013] ibid 168, col 2. Viscount Maugham and Lord Romer expressed their agreement with the judgments of Lord Atkin and Lord Wright.

[1014] See also *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 Lloyd's Rep 848, 851 col 2 (LangleyJ): 'A right to intervene does not normally carry with it a liability for failure to do so let alone relieve the actor from his liability'.

However, two exceptions were identified: where the master intervenes in the stowage and that intervention causes cargo loss and damage,[1015] and where such loss or damage results from some aspect of the ship that is, or should be known to the master, but not by the charterer.[1016] Lord Porter postulated a responsibility on the master to act to preserve the seaworthiness of his ship where it is threatened by a method of stowage that he knows or ought to know, but the charterers' stevedore did not possess 'any such knowledge':

> In my opinion, by their contract the charterers have undertaken to load, stow, and trim the cargo, and that expression necessarily means that they will stow with due care. *Prima facie* such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores. It may indeed be that in certain cases as, e.g., where the stability of the ship is concerned, the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge. It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers'. The primary duty of stowage, however, is imposed upon the charterers and if they desire to escape from this obligation they must, I think, obtain a finding which imposes the liability upon the captain and not upon them.[1017]

Thus, an owner might be liable under a bill of lading to cargo interests if the stowage was such as to render the vessel unseaworthy and the owners were guilty of a lack of due diligence in "looking after" the vessel and the goods, but, as Lord Wright explained, the effect of Clause 8 was to transfer that responsibility to the charterers from whom the owners would be entitled to an indemnity.[1018]

[1015] *Court Line Ltd v Canadian Transport Co Ltd* (1940) 67 Ll L Rep 161, 169 (Lord Wright) and 172 (Lord Porter).
[1016] ibid, 172 (Lord Porter).
[1017] ibid, 172–173 (Lord Porter).
[1018] See *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255 as an example of a case where bad stowage caused the vessel to be unseaworthy, but it says nothing about the issue which arises in this case.

In *The Imvros,*[1019] the time charter was based on NYPE 1946 with a materially unamended Clause 8.[1020] The contract excluded the Hague Rules from its application with a deleted clause paramount,[1021] and included the specific Clause 48 with regards to employment of the crew,[1022] and Clause 87 which specifically allocated the burden to leave the vessel in a seaworthy condition,[1023] and Clause 91, in regards to deck cargo.[1024] On her voyage to the river Para, the deck cargo of sawn timber was lost, and the vessel was damaged. It was found by the arbitrators, *inter alia*, that the vessel was unseaworthy due to the insufficiency of her lashings.

The charterers contended that bad stowage that endangers the safety of the ship and crew constituted unseaworthiness and that in law, the responsibility for the seaworthiness of the vessel remains 'the overriding responsibility' of the owners in the absence of a clear exclusion clause or a clause that clearly transfers the responsibility to the charterers.

However, Langley J did not agree with the charterers' submission and concluded that:

> It would be a remarkable construction which produced the effect that so long as the loading was carried out by the charterers badly enough to put this or other cargo but not the vessel at risk the charterers would be liable and the owners would not but the moment the loading was so badly carried out that it made the vessel itself unseaworthy the entire responsibility fell upon the owners and the charterers were relieved of it. That would mean the worse the loading the better for the charterers and it is often not an easy question (as the arbitrators noted) to determine the moment when the line between bad stowage and unseaworthiness is crossed.[1025]

[1019] *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 Lloyd's Rep 848.
[1020] Clause 8: '… charterers are to load, stow … lash … the cargo at their expense under the supervision of the Captain …'
[1021] Clause 24: clause paramount.
[1022] Additional Clause 48: 'Lashing … although done by crew, crew to be considered as Charterers' servants'.
[1023] Additional Clause 87: 'Safe Stowage and Trimming: Charterers are to leave the vessel in safe and seaworthy trim and with cargo on board safely stowed, dunnaged and secured to the Master's satisfaction for all shiftings between berths and all passages between ports under this Charter in their time and at their expense'.
[1024] Additional cl 91: 'Deck Cargo: Charterers are permitted to load cargo on the vessel's deck and hatch covers provided always that the permissible loads on the deck/hatch covers are not exceeded, that the stability of the vessel permits, and that such cargo does not impair the seaworthiness or safe navigability of the vessel in any manner. Any extra fittings required for deck or hatch cover cargo are to be provided and paid for by the Charterers who are to load, stow, dunnage, lash and secure such cargo in their time and at their expense always to the entire satisfaction of the Master. The vessel is not to be held responsible for any loss of or damage to the cargo carried on deck whatsoever and howsoever caused'.
[1025] *The Imvros* [1999] 1 Lloyd's Rep 848, 851 (Langley J). However, Langley J's approach was questioned by Professor Simon Baughen in his article 'Problems with Deck Cargo' [2000] LMCLQ 295 and by *Sunlight Mercantile Pte Ltd and Another v Ever Lucky Shipping Company Ltd* [2004] 2 Lloyd's Rep 174 (Singapore CA).
In *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, Morison J followed the decision in *The Imvros* (as regards Clause 8) but the issue deserves appellate attention (see also Simon Baughen, 'Seaworthiness or Bad Stowage?' [2007] LMCLQ 1).

The judge similarly found no basis for the charterer's reference to the decision in *The Panaghia Tinnou*,[1026] and the passage of Steyn J was found entirely consistent with the *Court Line* decision:[1027] 'there were no findings of fact which could give rise to a duty owed by the master to the charterers to intervene, nor, I would add, would it necessarily follow even if there were that the effect would be to relieve the charterers of liability to the owners'.[1028] The "overall responsibility" of the master for the seaworthiness of the vessel and a causation argument were said to be not in issue. What was in issue is its relevance to the particular provisions of the charter-party and the obligations and responsibilities under it as between the owners and charterers in respect of bad stowage.[1029]

Such a position accords with US law, where in *The Farland*,[1030] Judge Friendly rejected a similar argument on behalf of time charterers, saying that it 'would drain too much meaning from Clause 8's delegation of responsibility for the cargo to the charterer'. Thus it would be appropriate for the English courts to construe the same form of the contract (which is widely used internationally) in the same way as the US courts – the decisions in the three cases to which the attention was drawn as compelling.[1031]

However, it has recently been questioned again if negligent stowage causes the ship to become unseaworthy, responsibility for consequent damages will revert to the owners, who arguably shall not transfer their obligation to maintain the seaworthiness of the ship under the Rules.

CSAV v *MS ER Hamburg*[1032] deserves an in-depth consideration in this respect.
The dispute arose out of a charter-party on an amended NYPE form with unamended Clause 8, which provided, *inter alia*, that the charterers were to load and to stow the cargo under the supervision of the master, and with Clause 24, which expressly referred to the USA clause paramount.

Following an explosion on board the vessel, the owners referred their claim to arbitration against the charterers for loss of hire and loss and damage, which they said was caused by the loading of a container of calcium hypochlorite. The charterers counterclaimed, asserting that the owners were under a duty to intervene in the stowage of the cargo "to avoid unseaworthiness" of the vessel. They said that even where

[1026] *The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586.
[1027] ibid, 591.
[1028] *The Imvros* [1999] 1 Lloyd's Rep 848, 852 (Langley J).
[1029] ibid, 852 col 1 (Langley J).
[1030] *Nichimen Company v The Farland*, 462 F2d 319 (US 2d Cir 1972). The court found that Clause 8 of the New York Produce form shifts responsibility for stowage to the charterer: '… Under Clause 8, the safety of the stowage, insofar as cargo damage is concerned, generally is the primary responsibility of the charterer', (332).
[1031] *Nichimen Company Inc v MV Farland* 462 F 2d 319 [US 2d Cir 1972]; *Fernandez v Chios Shipping Co Ltd* 458 F Supp 821 [1976] District Court; *Duferco SA v Ocean Wilde Shipping Corp* [2000] 210 F Supp 2d 256, [2001] District Court.
[1032] *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft MbH & Co KG* [2006] 2 Lloyd's Rep 66; [2006] EWHC 483 (Comm).

a charterer was in breach of his duty not to ship dangerous goods under Article IV Rule 6, the owner should still establish that he had exercised due diligence to avoid unseaworthiness through bad stowage and, if he could not and the failure to exercise due diligence was an effective cause of the loss, the owner should not recover.

The arbitrators found that the container should not have been stowed next to a bunker tank and that had the chief officer understood the computer programme he was using, he would have realised that the location of the container was close to a source of heat and not "away from" "sources of heat" as the IMDG Code required. Therefore, the Chief Officer was found negligent in this respect.[1033]

The Tribunal further concluded that following the decision in *Court Line,* the effect of the unamended Clause 8 was to transfer responsibility for stowage from the owners ("who would otherwise be responsible for stowage at common law") to the charterers, but with two known exceptions. In this instance, the charterers' argument was considered as 'an attempt to introduce an unpleaded case on unseaworthiness by the back door', and an attempt to introduce the third exception to *Canada Transport*. Thus, the arbitrators, relying on the decision in *The Imvros*,[1034] rejected this assertion.

On appeal in the High Court, there were two rival contentions as to why the container exploded,[1035] and two issues arose as a matter of law:

> (1) What is the proper interpretation of Clause 8 in the light of Clause 24 and express incorporation of the Rules? In other words, if the stowage were done in such a way as to render the vessel unseaworthy, would the owners or charterers be responsible under the contract for the losses sustained?
> (2) Assuming as a fact that the bunkers on the vessel were heated to a temperature above what was required to keep the fuel oil reasonably thin and that this was causative of the explosion, did the owners have a defence to a claim for breach of Article III, Rule 2 by reason of Article IV, Rule 2(a)…?[1036]

The charterers submitted that voluntary incorporation of the Hague Rules requires the contract into which they have been incorporated to be read as though the Rules formed an integral part of the express terms.

[1033] ibid, para [6].
[1034] *The Imvros* [1999] 1 Lloyd's Rep 848.
[1035] One is that the cargo was inherently unstable and volatile; the other is that it exploded due to the fact that it was stowed adjacent to a bunker tank which was heated during the voyage causing the cargo to become unstable and explode.
[1036] *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, para [2].

Article III Rule 1 places a duty on a shipowner which is not delegable,[1037] and not one of vicarious responsibility – it is a question of statutory obligation and thus the performance shall be the carriers' performance. Whilst an owner may divest himself of the task of making his vessel seaworthy, he cannot divest himself of the consequences of operating an unseaworthy vessel.[1038] The charterers asserted that Clause 8 (and Clause 30),[1039] being silent about unseaworthiness, should be read harmoniously together with Article III Rule 1. In case of any conflict, Article III Rule 1 should prevail because an attempt to shift responsibility for unseaworthiness arising from stowage onto the charterers was prohibited by Article III Rule 8. And it would need very clear terms to exclude or qualify responsibility for seaworthiness.

The charterers further stressed that contrary to the views of the arbitrators, the result contended for was neither "bizarre" nor un-commercial. That in fact, the majority of the House of Lords in *Court Line* "arguably contemplated" that the transfer of responsibility for stowage to charterers would not extend to absolve the owner of his responsibility for the vessel being seaworthy.[1040] The arbitrators wrongly applied *The Imvros* case in the construction of the present charter-party. Thus the owner was under a general duty to intervene in the stowage of the cargo so as to avoid unseaworthiness: where the charterparty incorporated the Hague Rules, the owners were obliged to exercise due diligence to make the ship seaworthy at the beginning of the voyage, regardless of any breach by the charterer.[1041]

The Owners contended that the relevant relationship with which the court was now concerned was the contractual allocation of responsibility for stowage as between owners and charterers. The fact that the owners may have responsibilities to their crew or holders of bills of lading arising from unseaworthiness due to bad stowage is irrelevant to the contractual allocation of responsibility under the time charter.[1042] 'The owners are relieved of the liability not just in a dispute between themselves but also because they would be entitled to an indemnity from the charterers if sued by a third party because of the way the cargo had been loaded'.[1043]

[1037] With reference to *The Muncaster Castle* [1961] 1 Lloyd's Rep 57, especially 87; [1961] AC 807, especially 871.
[1038] *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, para [18].
[1039] Clause 30 read as follows: 'Provided Master will be informed soonest possible and gets all necessary papers/dangerous cargo manifests etc in good time Charterers have the option to load up to a maximum permitted by regulations in accordance with certificate of compliance of containerised dangerous IMO cargo on and under deck provided packed / labelled/ loaded/ stowed / lashed / secured / discharge according to board of trade/IMO regulations and or local regulations, and time lost and expenses for complying with port and said regulations, additional safety equipments or other necessary deliveries, etc, if any, to be for Charterers account. Any extra insurance, if any, to be for Charterers account'.
[1040] *Court Line Ltd v Canadian Transport Co, Ltd* (1940) 67 Ll L Rep 161; [1940] AC 934, especially per Lord Atkin at page 937; Lord Wright at 943–944; Lord Poreter at 951–952.
[1041] *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, skeleton argument of the claimant at para [52].
[1042] ibid, para [32], with reference to Lord Wright in *Court Line Ltd v Canadian Transport* [1940] AC 934: 'It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners relieve them of liability for bad stowage, except as qualified by the words "under the supervision of the captain"'.
[1043] *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, para [32].

If the charterers' arguments were right, effectively owners would have to take on responsibility for the loading of their vessel, which would have the effect that their contractually agreed allocation of responsibility would be meaningless. There is a simple way in which the charterers could have the result for which they contend – the addition of the words 'and responsibility' after the word 'supervision', as this is a well-recognised formula and construction, which covers the entire operation, both planning and execution, of loading, stowing, trimming and discharging cargo.[1044] On a proper interpretation of the contract, the responsibility for unseaworthiness due to bad stowage was transferred to the charterers and does not fall within the scope of Article III Rule 1,[1045] which applies a non-delegable duty only to those functions or obligations in respect of loading and stowing which the shipowner has contracted to perform. To that extent Article III Rule 8 represents no impediment. If the Charterers were right in their contention that Clause 8 would be inconsistent with Article III Rule 8, the argument would lead to the same conclusion as in relation to the clause that incorporated the Inter-Club Agreement.[1046]

The Owners further submitted that in the international context, the approach of the US courts on this question should be followed as well.[1047]

Morison J considered what the parties intended by incorporating both the terms of Clause 8 and the paramount clause in the contract.[1048] The question was not whether the owners were under a duty to intervene in the loading process, but rather whether they owed that duty to the charterers.[1049] The judge found no authority which assisted the charterers' case. It was apparent that in *Court Line* Lord Atkin robustly rejected the defence that the words "under the supervision of the captain" placed responsibility

[1044] *Alexandros Shipping Co of Piraeus v MSC Mediterranean Shipping Co SA of Geneva, The Alexandros P* [1986] 1 Lloyd's Rep 421, 424 (Steyn J): 'The effect of the addition of the words 'and responsibility' in cl. 8 is therefore to effect a prima facie transfer of liability for damage caused to the vessel or cargo by stevedore negligence in the discharge of the cargo. Of course, if the charterers' intervention in such discharging operations caused the loss, the charterers will be liable. However, on the arbitrators' findings that did not happen. The arbitrators held the charterers liable merely because the damage was caused by the negligence of the stevedores. That was a risk which was contractually assumed by the owners under cl. 8 of the charter-party.'

[1045] As stated by Devlin J in *Pyrene v Scindia Navigation* [1954] 2 QB 402, 416 (as subsequently approved in *Renton v Palmyra*): 'The operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time'. See also p 418.

[1046] *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, para [38]. The ICA clearly has the effect of relieving the carrier from liability for loss of or damage to cargo; yet to the question 'What connection can the parties have intended between a settlement under the Inter-Club Agreement and The Hague Rules in relation to such settlement' the answer is 'None': see *The Strathnewton* [1983] 1 Lloyd's Rep 219, 225. It is a matter of interpretation and the clear intention of both clauses 8 and 55 (clause 54 in the present case) is that they stand on their own and are unaffected by the provisions of The Hague Rules.'

[1047] See *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, para [39]: *Nichimen Company Inc v MV Farland* 462 F 2d 319 [2nd Cir 1972]; *Fernandez v Chios Shipping Co Ltd* 458 F supp 821 [1976] District Court; *Duferco SA v Ocean Wilde Shipping Corp* [2000] 210 F Supp 2d 256, [2001] District Court.

[1048] As questioned by Morison J in *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, 78–79. Actually the same question was raised by Langley J in *The Imvros* [1999] 1 Lloyd's Rep 848.

[1049] *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, para [41].

for stowage or to exercise due supervision over stowage upon the owners.[1050] A master is entitled to seek to protect his vessel from stowage that renders the vessel unsafe and that he would have that right whether or not the contract expressly conferred it on him.[1051] The only potential support for the charterers' case could be derived from a judgment of Steyn J in *The Panaghia Tinnou*.[1052] However, Steyn J did not assert in that case that as between charterer and owner, having regard to the terms of that charter-party, the charterers could escape their responsibility for the consequences of their bad stowage,[1053] thus the point made by the judge in regards to a "remarkable construction" is to apply with equal effect.[1054]

In reality, no owner could safely and properly leave the stowage to the charterers.[1055] In this instance, the decision in *Court Line* was a complete answer to the charterers' main submission. Morison J stated:

> The unseaworthiness argument is something of a red herring because it was entirely the fault of the charterers if their improper stowage caused the vessel to become unseaworthy and founder. Making the vessel unseaworthy through improper stowage does not, contractually, make the owners liable; on the contrary, all damage caused directly by improper stowage will be for the charterers' account.[1056]

This position accords with US law.

Finalising the case, the judge referred to the article of Simon Baughen[1057] who questioned Langley J's approach in *The Imvros* and asserted that 'even where clause 8 is unamended the master still remains responsible to ensure that the stowage of his vessel will not imperil its safety'. Morison J stated in this respect:

> He [Professor (*sic*) Baughen] has, with respect, fallen into the same trap as Mr. Rainey QC [charterers' counsel]. The question is whether as between owner and charterer under a contract such as this one, the owner has any responsibility in law to the charterer for damages consequent on improper stowage, even if it renders the vessel unseaworthy. The bare assertion, that the 'master still remains responsible', begs the questions: 'responsible to whom? And why?' And, to be convincing, he needed to deal with the remarkable and absurd consequence of distinguishing

[1050] *Court Line v Canadian Transport* [1940] AC 934, 937.
[1051] ibid, 937.
[1052] *The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586, 591.
[1053] *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, para [46].
[1054] ibid, para [48].
[1055] ibid, para [49].
[1056] ibid, para [52].
[1057] Simon Baughen, 'Problems with Deck Cargo' [2000] LMCLQ 295.

> between improper stowage which does and improper stowage which does not render the vessel unseaworthy. Finally, I am not sure how he arrives at his conclusion in the light of the *Court Line* decision. In my judgment, Langley J was plainly right and I should follow his decision and the arbitrators' reasoning and conclusions cannot be faulted.[1058]

Thus, there was no authority for the full transfer of responsibility to the charterers by Clause 8 being interrupted, as between owners and time charterers, merely because the stowage was bad enough to cause unseaworthiness. In such circumstances, the principle established in *Pyrene v Scindia* continued to apply. If the owners are sued by the cargo interests based on this unseaworthiness, they should thus be entitled to an indemnity from the charterers. However, the owners should keep in mind the natural aversion and hostility of courts and arbitrators to unseaworthiness generally.

It is important to note that the decision of Morison J focused entirely on the correct interpretation of the contract, especially Clause 8 of the NYPE_1993 and said nothing about its relationship with the obligations imposed on the shipowner by The Hague Rules Article III Rule 1.[1059] The shipowners argued that the *Pyrene v Scindia* principle[1060] also applied to obligations arising under Article III Rule 1, and Morison J appears implicitly to have accepted this, at least as it applied to claims under charterparties rather than under bills of lading.

However, Devlin J's *dicta* were limited to the obligations arising under Article III Rule 2 and did not extend to obligations under Article III Rule 1, a position that was clearly reiterated by Lord Steyn in *The Jordan II*.[1061] It follows therefore that, if the shipowner wishes to dilute the obligations imposed on it by Article III Rule 1, it must do so by way of a clearly worded exceptions clause, rather than by reliance on Devlin J's *dicta* in *Pyrene v Scindia*.[1062]

[1058] *CSAV v MS ER Hamburg* [2006] 2 Lloyd's Rep 66, para [53] (Morison J).

[1059] By contrast, in neither *Court Line Ltd* [1940] AC 934 case nor *The Imvros* [1999] 1 Lloyd's Rep 848 was unseaworthiness at issue.

[1060] Concerning the freedom of the parties to a bill of lading contract to allocate the responsibility amongst themselves for loading, stowage and discharge.

[1061] *The Jordan II* [2004] UKHL, 49 para [19]: 'Mr. Justice Devlin did not base his interpretation on linguistic matters. He relied on the broad object of the Rules. It has often been explained that the Hague Rules and Hague-Visby Rules represented a pragmatic compromise between the interests of owners, shippers and consignees. The Hague Rules were designed to achieve a part harmonisation of the diverse laws of trading nations. It achieved this by regulating freedom to contract on certain topics only: *Chandris v Isbrandtsen-Moller Co Inc.* (1950) 84 Ll L Rep 347, [1951] 1 KB 240, 247. In interpreting article III, r 2, its purpose and context is all important. For example, it is obvious that the obligation to make the ship seaworthy under article III, r 1, is a fundamental obligation which the owner cannot transfer to another. The Rules impose an inescapable personal obligation: *The Muncaster Castle* [1961] AC 807. On the other hand, article III, r 2, provides for functions some of which (although very important) are of a less fundamental order, eg, loading, stowage and discharge of the cargo'.

[1062] Simon Baughen, 'Bad Stowage or Unseaworthiness?' [2007] LMCLQ 1, 6.

Professor Baughen refers to a clear severance between two breaches: the charterer's failure to stow properly and the shipowner's failure to take due diligence to ensure the seaworthiness of the vessel before and at the start of the voyage, in setting sail with the unsafe stow. It is difficult to see how the former breach can be regarded as the effective cause of the loss when the latter breach is later in time.

The arbitrators' observations in *CSAV* v *MS ER Hamburg*[1063] can only be explained in the light of their finding that the shipowner owed no duty to require that the dangerous stow be rectified prior to the vessel's sailing. If, however, such a duty is imposed by Article III Rule 1 and is not transferred to the charterer by the operation of Clause 8, that then leaves the issue as to whether it would be possible to apportion the loss under the Law Reform (Contributory Negligence) Act 1945. Apportionment under the Act would be possible only if the shipowner's contractual duty to provide a seaworthy vessel would also exist in tort, independently of the contract. This will almost never be the case as regards the time charterer, who is highly unlikely either to own the goods on board the vessel or to have an immediate possessory interest in them at the time the vessel sails with a stow that renders her unseaworthy.[1064]

[1063] *CSAV* v *MS ER Hamburg* [2006] 2 Lloyd's Rep 66.
[1064] Simon Baughen, 'Bad Stowage or Unseaworthiness?' [2007] LMCLQ 1, 7.

Chapter 7: Drafting the Proper Clause to Exclude the Carrier's Liability in Negligence and Unseaworthiness. Interplay with the Clause Paramount

The General Approach to Exclusion Clauses

As submitted by Sir Kim Lewison, exclusion clauses were given a hard time in the twentieth century.[1065] In the past, for reasons of consumer protection the courts have applied different techniques to the interpretation of clauses excluding and limiting liability than to the interpretation of other clauses in contracts. The courts were reluctant to allow a party to rely on an exemption clause, especially where the breach was a particularly serious one, and did their best to strike such clauses down either as offending against a rule of law or interpreting them out of existence.[1066]

The necessity to do this in a consumer context was removed by the Unfair Contract Terms Act 1977. Further, the House of Lords gave judgments in two *Securicor*[1067] cases rejecting the substantive doctrine of fundamental breach and holding that although exclusion clauses must be construed against the person relying on them, but subject to that, they were to be construed in the same way as any other clause in the contract.[1068] An ambiguously drafted exclusion clause was held ineffective to exclude liability, at least in the case where it was not clear whether the clause covers the loss that has been suffered.[1069] If one wanted to exclude or limit his liability, one should do it in "clear words".[1070] The reason for this approach was very simple – the exclusion clause either contracted out of an existing liability or, more usually, excluded or limited a liability that would have otherwise been the subject of the contract.[1071]

However, as argued by Professor B. Coote, this approach is understandable where the party is contracting out of a pre-existing legal liability, but more difficult to understand where the clause excludes or limits a

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[1065] Sir Kim Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2015), Chapter 12.
See also Richard Calnan, *Principles of Contractual Interpretation* (2nd edn, OUP 2017), para [7.67].
[1066] Ewan McKendrick, *Contract Law: Text, Cases and Materials* (8th edn, OUP 2018), 409: 'in essence what the courts did was to apply the *contra proferentem* principle with particular venom to exclusion clauses'. The story of the rise of unfair exemption clauses and their subsequent control by legislation has never been better told than by Lord Denning MR in *George Mitchell* (*Chesterhall*) *Ltd* v *Finney Lock Seeds Ltd* [1983] 1 All ER 108; [1983] 1 QB 284, 269–299, CA.
[1067] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 Lloyd's Rep 545; and *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and Securicor (Scotland) Ltd, The Strathallan* [1983] 1 WLR 964, [1983] 1 Lloyd's Rep 183.
[1068] *Photo Production v Securicor Transport* [1980] AC 827, 851 (Lord Diplock).
[1069] In some cases this principle had been applied by the courts in the past in an unreasonable way in an attempt to create ambiguity in order to apply the rule: see, for example, *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394 and *Andrews Bros (Bournemouth) Ltd v Singer and Co Ltd* [1934] 1 KB 17.
[1070] See, for example, Lord Bingham's speech in *The Tasman Discoverer* [2004] 2 Lloyd's Rep 647, [2005] 1 WLR 215, para [12], when he said that a person wishing to limit his liability 'must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party'.
[1071] *Photo Production v Securicor Transport* [1980] AC 827, 850 (Lord Diplock).

liability that would otherwise have been assumed under the contract. In reality, what the exclusion clause is doing is establishing the extent of the parties' contractual liabilities. Thus, it is a very artificial construct to suggest that it excludes a liability that will only exist if the contract is entered into a different form from that agreed.[1072] As said, there is no justification for treating exclusion clause any differently from any other clause in the contract.[1073] Therefore the cases post-*ICS*[1074] provide some support for a more relaxed approach to the interpretation of exclusion clauses.

The modern approach taken by the courts may be formulated in the following terms:

> …The courts should not ordinarily infer that a contracting party has given up rights which the law confers on him to an extent greater than the contract terms indicate he has chosen to do; and if the contract terms can take legal and practical effect without denying him the rights he would ordinarily enjoy if the other party is negligent, they will be read as not denying him whose rights unless they are so expressed as to make clear that they do.[1075]

The *contra proferentem* rule has similarly "a very limited role" in commercial contracts negotiated between parties of equal bargaining power.[1076]

However, McKendrick argues that 'it may be too soon to write the obituary for the old rules applicable to the interpretation of exclusion clauses', and in some of the cases in which these rules were enunciated have been approved by appellate courts and cannot be so easily swept aside.[1077]

[1072] See a discussion in Professor Brian Coote, *Contract as Assumption: Essays on a Theme* (Hart Publishing, 2010 and 2018), Chapter 6 'The Function of Exception Clauses', 81–95.
[1073] Richard Calnan, *Principles of Contractual Interpretation* (2nd edn, OUP 2017), para [7.83].
[1074] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 836, [1997] UKHL 28.
[1075] *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349, [2003] 2 Lloyd's Rep 61, para [11] (Lord Bingham).
[1076] *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, [2017] BLR 417, para [52]; with reference to *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, para [68]; and *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372; [2016] 2 Lloyd's Rep 51, paras [20] & [21].
[1077] Ewan McKendrick, *Contract Law: Text, Cases and Materials*, (8th edn, OUP 2018), 412.

Excluding Liability in Negligence

The general principles of construction relating to whether an exemption clause excludes liability for negligence may be represented by the long line of cases starting from the most authoritative: *Canada Steamship Lines v The King*.[1078] In that case, the Privy Council considered the construction of two separate clauses in a lease: one being an exemption clause and the other being an indemnity clause and held that the former clause[1079] did not exempt the landlord from liability for the negligence of its employees because negligence was not specifically mentioned in that provision and the exemption covered matters other than negligence.

The classic statement of principles of construction was propounded by Lord Morton:[1080]

> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the *proferens*") from the consequences of the negligence of his own servants, effect must be given to that provision …;[1081]
>
> (2) If there is no express reference to negligence, the Court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point, it must be resolved against the *proferens* …;[1082]
>
> (3) If the words used are wide enough for the above purpose, the Court must then consider whether 'the head of damage may be based on some ground other than that of negligence'.[1083] The "other ground" must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it; but, subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are *prima facie* wide enough to cover negligence on the part of his servants

[1078] *Canada Steamship Lines Ltd v The King* [1952] AC 192 PC, [1952] 1 Lloyd's Rep 1.
[1079] Clause 7 provided for: 'That the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed'.
[1080] *Canada Steamship Lines Ltd v The King* [1952] 1 Lloyd's Rep 1, 8.
[1081] With reference to the decision of the Supreme Court of Canada in the *Glengoil Steamship Co and Gray v Pilkington and Others* (1897) 28 SCR (Can) 146.
[1082] However, if a doubt arises at this point, it must be resolved against the *proferens* in accordance with Article 1019 of the Civil Code of Lower Canada: 'In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation'.
[1083] With reference to the words used by Lord Greene MR in *Alderslade v Hendon Laundry* [1945] KB 189, 192.

Following this passage, in order to satisfy the first test, there must be a "clear and unmistakable" reference to negligence or a synonym for it (such as carelessness).[1084] However, the main problem lies with the second and the third principles because they rest on the dubious assumption that parties do not intend to use general words.[1085]

The second test assumes that if the wording excludes a particular type of liability but negligence is not specifically mentioned, the terms will only exclude negligence if that is the only type of liability that could be covered by the words concerned.[1086] As *Scrutton* argues, general words will normally be construed as excluding liability for negligence where the defendant could realistically only have been liable for negligence but will normally not be construed as excluding liability for negligence, as opposed to strict liability, where the defendant's liability may be strict.[1087] The basic flow in the *Canada Steamship* rules was the assumption that contracting parties did not intend to use general words of exclusion to cover both negligently inflicted loss and non-negligently inflicted loss.[1088] However, this assumption does not represent a rule of law.[1089]

The third test in the *Canada Steamship* is the most uncertain. Lord Morton added the qualification to the statement of Lord Greene MR in *Alderslade v Hendon Laundry*[1090] that 'the "other ground" must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it'. Even with this important qualification, in *Lamport & Holt v Coubro & Scrutton*[1091] the Court of Appeal subsequently cautioned against a too literal or over-legalistic approach,[1092] as there is no artificial rule to compel the court either to construe a clause as covering negligence or not covering negligence.[1093]

A number of cases provided examples of the application of this third test: for instance, it was illustrated by reference to a common carrier whose liability for loss of or damage to the goods carried may be based on a ground, e.g. strict liability that is independent of negligence.[1094] And, where there were mutual

[1084] See, for example, *Shell Chemicals UK Ltd v P&O Roadtanks Ltd* [1995] 1 Lloyd's Rep 297.
[1085] See a discussion in Ewan McKendrick, *Contract Law: Text, Cases and Materials*, (8th edn, OUP 2018), 413.
[1086] Richard Calnan, *Principles of Contractual Interpretation*, (2nd edn, OUP 2017), para [7.86].
[1087] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [11-110].
[1088] Ewan McKendrick, *Contract Law: Text, Cases and Materials* (8th edn, OUP 2018), page 413.
[1089] As expressed by Salmon LJ in *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, 80: 'rules of construction are merely our guides and not our masters'.
[1090] *Alderslade v Hendon Laundry Ltd* [1945] 1 KB 189, 192 (Lord Greene MR): 'where … the head of damage [liability for which is sought to be excluded] may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss, occurring through that other cause, to the exclusion of loss arising through negligence.'
[1091] *Lamport & Holt Lines Ltd v Coubro & Scrutton (M&I) Ltd and Coubro & Scrutton (Riggers and Shipwrights) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42.
[1092] ibid, especially at 45 (Donaldson LJ); 48 and 49 (May LJ); 51 (Stephenson LJ).
[1093] ibid, 51 (Stephenson LJ).
[1094] *Rutter v Palmer* [1922] 2 KB 87, 90. Also see the recent decision in *Volcafe Ltd v CSAV SA* [2018] UKSC 61.

exceptions in a charterparty in certain specified events including "errors of navigation", one of the reasons advanced for holding that negligent errors of navigation were not covered was that the clause was based on the assumption that a shipowner would be liable without negligence.[1095]

Although *Canada Steamship* was an appeal from six judgments of the courts (including the Supreme Court) of Canada, the approach taken by Lord Morton was said to represent the position in English law.[1096] However, over the last decades, there has been a long-running debate about the effect of these guidelines and the extent to which this authoritative case is still good.[1097] Thus, in *The Raphael,*[1098] it was decided that a clause can be effective to exclude liability for negligence under the third limb even though it had been possible to envisage some other possible source of liability to which the clause might potentially apply.[1099] The more realistic the alternative source of liability, the less likely it is that the court will conclude that general words are effective to exclude liability for negligently inflicted loss.[1100] Eventually, the role of three principles advanced in *Canada Steamship* vanished but survived the decision in *ICS,*[1101] and was further rehabilitated and refined in *HIH Casualty v Chase Manhattan Bank*.[1102]

In *Mir Steel UK v Morris*[1103] the Court of Appeal observed that the *Canada Steamship* principles 'should not be applied mechanistically and ought to be regarded as no more than guidelines. They do not provide an automatic solution to any particular case. The court's function is always to interpret the particular contract in the context in which it was made'.[1104] Now the *Canada Steamship* guidelines are more relevant to indemnity clauses rather than to exclusion clauses.[1105]

[1095] *The Satya Kailash and The Ocean Amity* [1982] 2 Lloyd's Rep 465, 475 (Staughton J) (affirmed [1984] 1 Lloyd's Rep 588). cf *Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co SA* [1983] 1 Lloyd's Rep 310, 314.
[1096] *Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd* [1973] 1 QB 400 (CA).
[1097] *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373; [2017] BLR 417, para [52] (Jackson LJ).
[1098] *The Raphael* [1982] 2 Lloyd's Rep 42, where the Court of Appeal held *inter alia* that the second defendants were entitled to rely on the exclusion clause in their standard terms and conditions against the plaintiffs' claim for damage done to their vessel *Raphael* while the defendants were restowing a derrick on the vessel. The words "any act or omission" were wide enough to comprehend negligence.
In *K/S Victoria Street v House of Fraser Ltd* [2011] EWCA Civ 904 Lord Neuberger stated: "… rules of interpretation such as *contra proferentem* are rarely decisive as to the meaning of any provisions in a commercial contract".
[1099] See 'May LJ's gloss on Lord Morton's third test' in *The Raphael* [1982] 2 Lloyd's Rep 42, 48.
[1100] *EE Caledonia Ltd v Orbit Valve Plc* [1994] 1 WLR 1515.
[1101] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28.
[1102] *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6.
[1103] *Mir Steel UK v Morris & Others* [2012] EWCA Civ 1397; [2013] 2 All ER (Comm) 54; [2013] CP Rep 7.
[1104] ibid, para [35] (Rimer LJ).
[1105] *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA 373, [2017] BLR 417, para [56].

Excluding Liability in Unseaworthiness

In general, *the implied undertakings* in a contract of affreightment, that is to provide a seaworthy ship, to proceed without unreasonable delay, and without unjustifiable deviation, are not affected by exceptions in the bill of lading, unless these later clearly negative them.[1106] Thus, for example, the breakdown of a crankshaft, unseaworthy at starting, does not come within the exception "breakdown of machinery"; in other words, exceptions are to be construed 'as exceptions to the liability of a carrier, not as exceptions to the liability of a warrantor'.[1107]

In *Nelson Line v Nelson,*[1108] a clause exempting the shipowner from liability for any damage to goods 'which is capable of being covered by insurance' was held not to be effective in excluding liability for damage to cargo resulting from unseaworthiness.[1109] Lord Loreburn stated:

> … the law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different.[1110]

The implied requirement of seaworthiness is a fundamental obligation in a contract of carriage by sea, which is said to arise from "the nature of the contract".[1111] Thus to exclude this warranty 'the words used must be express, pertinent and apposite'.[1112] The underlying basis of this approach is arguably that 'seaworthiness is always supposed to be before the minds of the consignor and owner, and the agreement contained in the bill of lading is made upon the basis of that understanding. The implication only arises because it must necessarily be presumed that the contracting parties had the thing implied in their minds

[1106] *The Glenfruin* (1885) 10 PD 103; *Rathbone v McIver* [1903] 2 KB 378; *Elderslie v Borthwick* [1905] AC 93; *Nelson v Nelson* [1908] AC 16 as explained by Lord Macnaghen in *Chartered Bank v British Indian SN Co* [1909] AC 369, 375; *The Christel Vinnen* [1924] P 208; *Thompson & Norris Manufacturing Co v Ardlay* (1929) 34 Ll L R 248; *The Rossetti* [1972] 2 Lloyd's Rep 116; *Sunlight Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd* [2004] 2 Lloyd's Rep 174; [2004] 1 SLR 171. Contrast *The Cargo ex Laertes* (1887) 12 PD 187; *Bond v Federal SN* (1905) 21 TLR 438, 440 (Channell J), where the exceptions in terms qualified these obligations and *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 Lloyd's Rep 848. See also *Houston v Sansinena* (1893) 68 LT 567 HL; *Searle v Lund* (1903) 19 TLR 509.
[1107] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [11-028].
[1108] *Nelson Line (Liverpool) Ltd v James Nelson & Sons, Ltd* [1908] AC 16.
[1109] See also *Ingram & Royle Ltd v Services Maritimes du Tréport* [1914] 1 KB 541; [1914] 109 LT 733.
[1110] *Nelson v Nelson* [1908] AC 16, 19 (Lord Loreburn).
[1111] *Kopitoff v Wilson* (1876) 1 QBD 377, 380 (Field J).
[1112] *Sleigh v Tyser* [1900] 2 QB 333, 337-338 (Bigham J) (insurance matter); cited in *Petrofina SA v Cia Italiana Trasporto Olii Minerali* (1937) 42 ComCas 286 (Lord Wright) (voyage charter case); *Nelson Line (Liverpool) Ltd v Jams Nelson & Sons Ltd* [1908] AC 16 (freightage contract).

and contracted upon that basis, just as clearly and specifically as if it were set out in the written agreement.'[1113]

Thus, there are many cases where exclusions of liability have been held not to apply to the implied duty concerned with the furnishing the vessel and equipment for the voyage, but only to events on the voyage;[1114] the same principle has been applied not only to exclusions of liability, but also to financial limits of it,[1115] and even to arbitration clauses referring 'to all disputes arising under this contract'.[1116]

It is most unlikely that one will be able to avail himself of the general exemption clause. In *Atlantic Shipping*,[1117] the charterparty did not contain an express requirement for seaworthiness. A disagreement arose over the loss of cargo resulting from the vessel being unseaworthy, and the cargo-owner failed to appoint an arbitrator within the specified time limit. The shipowner argued that the charterers waived their right to claim damages. In giving the judgment, Lord Sumner expressed his opinion that since the shipowner's duty was an implied one, if he was able to prove that he had fulfilled his obligation to provide a vessel which was seaworthy in all aspects then he would be able to use the protection as provided in the clause, but if he had failed to discharge his duty then the exception would not apply.[1118]

However, the principle is of less effect where the seaworthiness duty is express. The possible explanation is that this obligation becomes an ordinary term of contract and is likely to be affected by other terms, even when these are exclusions. The ordinary principles of contract interpretation shall be applied.

[1113] As submitted by the appellants in *Union Steamship Co of British Columbia v Drysdale* (1902) 32 SCR 379 with reference to *Tattersall v National Steamship Co* (1884) 12 QBD 297 and *Cargo per Maori King v Hughes* [1895] 2 QB 550.

[1114] For example, *The Galileo* [1914] P 9 (goods 'at shipper's risk'); *Nelson Line (Liverpool) Ltd v Jams Nelson & Sons Ltd* [1908] AC 16 ("damage capable of insurance"); *Ingram & Royle Ltd v Services Maritimes du Treport Ltd* [1914] 1 KB 541 (overall fire immunity); *Tudor Accumulator Co Ltd v Oceanic Steam Navigation Co Lt* (1924) 41 TLR 81 ("defects in hull tackle or machinery"); *The Christel Vinnen* [1924] P 208 ("any latent defects in hull … even when occasioned by negligence"); *Sunlight Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd* [2004] 1 SLR 171; [2004] 2 Lloyd's Rep 174 (CA of Singapore) ("howsoever arising"); not following *The Imvros* [1999] 1 Lloyd's Rep 848.

[1115] *Tattersall v National SS Co* (1884) LR 12 QBD 297 ('under no circumstances shall they be held liable for more than GBP 5 for each of the animals': inapplicable for loss caused by failure to cleanse the ship after carrying cattle with foot and mouth disease).

[1116] *Atlantic Shipping & Trading Co v Louis Dreyfus & Co* [1922] 2 AC 250; (1922) 10 Ll L Rep 707, where such a clause was held inapplicable to a dispute about unseaworthiness. In this case Lord Sumner said at 260: 'there is no difference in principle between words which save them from having to pay at all and words which save them from paying as much as they would otherwise have had to pay'. The view expressed is different from a later statement by Lord Fraser of Tullybelton to which more attention has been paid: see *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 WLR 964, 970.

[1117] *Atlantic Shipping & Trading Co v Louis Dreyfus & Co* (1922) 10 Ll L Rep 707.

[1118] ibid, 709 (Lord Sumner): 'The shipowners' general liability in respect of damage due to the ship's unseaworthiness accordingly remains where the law places it. Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability, namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case'.

The modern approach of the courts was summarized by Lord Bingham in *BCCI v Ali*[1119] in the following terms:

> To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions, the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.[1120]

In *Steel v State Line Steamship*,[1121] it was found that the express exception of negligence did not cover loss due to unseaworthiness. The House of Lords held that 'a shipowner who accepts goods, which he is to deliver in good condition, impliedly contracts to perform the voyage in a ship which is seaworthy',[1122] and this ship should be 'in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter …'.[1123] In giving the judgment Lord Blackburn distinguished between (i) a porthole left open on the orlop deck with cargo piled up high against it, where no one could see whether the porthole had been left open or not, in circumstances where it would require a great deal to time to remove the cargo; and (ii) a porthole left open in a cabin which could be shut at a moment's notice as soon as the sea became rough. In the latter case, the vessel would not be unfit to encounter the perils of the voyage because the matter could be set right within a few minutes and 'if they did not put it right after such a warning, that would be negligence on the part of the crew, and not unseaworthiness of the ship'.[1124]

In *Tattersall v National Steamship*,[1125] the vessel was contracted to carry live animals. The contract of carriage provided *inter alia* for the terms purported to limit the owner's liability to a certain level: 'under no circumstances shall they be held liable for more than 5 l. for each of the animals'. Notwithstanding the general character of the clause and the fact that the owners admitted their liability, this wording was held inappropriate to fully protect the owners from liability for the full value of animals lost by the ship's unseaworthiness.

[1119] *Bank of Credit & Commercial International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251.
[1120] ibid, para [8] (Lord Bingham).
[1121] *Steel v State Line Steamship Co* (1877–78) 3 App Cas 72.
[1122] ibid, 84 (Lord O'Hagan).
[1123] ibid, 77 (Lord Chancellor Cairns).
[1124] ibid, 90 (Lord Blackburn).
[1125] *Tattersall v National Steamship Company* (1883–1884) 12 QBD 297.

However, each case shall be judged on its merits. In *Bank of Australasia v Clan Line Steamers,*[1126] the Court of Appeal held that since the bill of lading was subject to the express condition making the shipowners liable for damage resulting from unseaworthiness,[1127] the provisions of Clause 12,[1128] which established the certain time bar for submission of claims, applied.

In distinguishing this case from *Tattersall v National Steamship*[1129] Bukley LJ stated:

> It seems to me that in this case clause 14 has expressly introduced that which would otherwise be implied, and that therefore the obligation as regards seaworthiness in this case rests upon express contract and not upon implied contract. The relevance of that for the present purpose is this. The clause of limit of liability, according to *Tattersall's* case, would not extend to the implied contract if it were implied; but if it is expressed, then such stipulation of the contract is to be applied to that part of the contract as well as to any other part. The result is that *Tattersall's* case does not apply in this case. There is here an express contract as to unseaworthiness. Consequently clause 12 applies.[1130]

It is suggested that if the contract specifically provides for the express duty of seaworthiness[1131] and a general liability exclusion clause, most likely it shall extend to cover the breach of that duty.[1132]

In *Varnish v Kheti,*[1133] the bills of lading (for shipment of the parcels of onions from Alexandria to Liverpool) incorporated the "Onions Clause"[1134] and the provisions of the GOGSA, 1924. The cargo interests alleged that quantities of onions were found damaged on arrival at the discharging port and brought a claim against the owners. The defendants denied the plaintiffs' allegations and contended that they were protected by the provisions of the COGSA or, alternatively, by the terms of the "Onions Clause".

[1126] *Bank of Australasia v Clan Line Steamers Ltd* [1916] 1 KB 39.
[1127] Pursuant to Clause 14, which provided that 'the shipowners shall be responsible for loss or damage arising from any unseaworthiness of the vessel when she sails on the voyage'.
[1128] Clause 12 read as follows: 'No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of steamer's arrival there'.
[1129] *Tattersall v National Steamship Co* (1883–1884) 12 QBD 297.
[1130] *Bank of Australasia v Clan Line Steamers Ltd* [1916] 1 KB 39, 48-49 (CA) (Buckley LJ).
[1131] For example, SYNACOMEX 90 Clause 2 or NYPE 1993 Clause 2.
[1132] *Bank of Australasia and Others v Clan Line Steamers Ltd* [1916] 1 KB 39, 48-49 (Buckley J); 55-56 (Bankes LJ).
[1133] *WR Varnish & Co Ltd v Kheti (Owners), The Kheti* (1948/49) 82 Ll L R 525.
[1134] The 'Onion Clause' was drafted in purple ink and provided for: 'it is specially agreed that no liability for loss or damage to and/or deterioration in onions shall attach to the master and/or owners of the steamer, even if such loss, damage and/or deterioration result from a cause for which but for this special agreement to the contrary, the steamer would have been liable. The steamer shall not be responsible for obliteration of marks and numbers, delay in delivering or incorrect delivery involving loss whether in quality, condition, or other account, nor for protraction of voyage through any cause whatever'.

In construing the contract, Pilcher J stated:

> … where a document, such as a bill of lading, contains clauses which are printed and clauses which are written or stamped upon it, and those clauses are mutually irreconcilable, so that it is impossible to give effect to what is printed as well as to what is written or stamped, effect will be given, in the event of irreconcilability, to the written or stamped portion rather than to such portion of the printed clause as is irreconcilable with the written or stamped clause …[1135]

It was held that the words of the "Onions Clause" were apt to relieve the shipowners from liability, even assuming that plaintiffs were able to establish that the damage was due either to unseaworthiness or to negligent stowage and handling. In taking his decision, the judge referred to the previous authorities: *Price v Union Lighterage*[1136] and *Travers v Cooper*.[1137] Pilcher J was of the opinion that it was not necessary for the shipowner to say in terms: 'I will not be responsible for damage due to unseaworthiness or to a failure to exercise due diligence to make my ship seaworthy', provided that he had used language which conveyed that he did not intend so to be responsible.[1138]
It is a general rule of interpretation that clauses specifically added are paramount to clauses found in the printed part of a contract.

In *The Emmanuel C,*[1139] the vessel grounded in the St Lawrence River and became a constructive total loss. The dispute between the owners and charterers was referred to arbitration and the arbitrator found that the grounding was caused by the negligent navigation of those on the vessel and that the owners were not entitled to rely on the general exemption clause[1140] in the time charterparty, which additionally provided, *inter alia*, for a deleted USA Clause Paramount and the provision that 'all Bills of Lading are further subject to United States Clause Paramount'.

The arbitrator stated his award in the form of a special case, the question for decision being 'whether the exemption clause protected the owners against liability for negligent errors of navigation, [which was

[1135] *The Kheti* (1948/49) 82 Ll L R 525, 527.
[1136] *Price & Co v Union Lighterage Company* [1904] 1 KB 412.
[1137] *Travers & Sons Ltd v Cooper* [1915] 1 KB 73.
[1138] *The Kheti* (1948/49) 82 Ll L R 525, 529.
[1139] *Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co, SA The Emmanuel C* [1983] 1 Lloyd's Rep 310.
[1140] Clause 16 of the NYPE time charterparty provided for: 'should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation throughout this Charter Party, always mutually excepted'.

provided by a separate clause in the time charterparty],[1141] or only where the errors occurred without negligence on the part of the owners, their servants, or agents'.

Bingham J held that the wording 'error of navigation' did not protect against the negligence of the owners and their servants, as the general exemption Clause 16 contained no express reference to "negligence", and no synonym for negligence. It was wrong to approach the NYPE form on the assumption that 'it represents the work of a single all-seeing creator'.[1142] Even if it had been the law that a carrier's liability encompasses negligence only, the legal position was unclear and therefore protection against the possibility of strict liability could reasonably have been sought.[1143] On the true construction of the charter, the owners were held liable to the charterers in damages for breach of the charter and the arbitrator's award was upheld.

In *The Irbenskiy Proliv*,[1144] a bill of lading contained an extensive provision excluding liability for loss or damage of any kind, including the loss or damage resulting from unseaworthiness.[1145] The holder of the bills of lading alleged that some of the goods shipped were damaged as a result of the negligence of the owners, or the unseaworthiness or uncargoworthiness of their vessel, as the vessel's refrigeration system was not working properly. The cargo interests further asserted that the Carrier's Exemption Clause was repugnant to the object of the contract and should be rejected,[1146] as it purported to exclude liability 'for loss or damage to … the goods of any kind whatsoever … however caused …'.[1147] Arguably, on its ordinary and natural meaning, this clause gave the defendants complete freedom whether or not to render any performance under the contract of carriage and how to render any performance they chose to provide. It left the defendants 'virtually without enforceable obligations under the contracts'.[1148]

[1141] Clause 26 of the NYPE time charterparty provided for: 'nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, acts of pilots and tugboats, insurance, crew, and all other matters, same as when trading for their own account.'
[1142] *The Emmanuel C* [1983] 1 Lloyd's Rep 310, 314.
[1143] ibid, page 314. The same conclusion was reached in *The Satya Kailash and The Ocean Amity* [1984] 1 Lloyd's Rep 588.
[1144] *Mitsubishi Corp v Eastwind Transport Ltd and Others, The Irbenskiy Proliv* [2005] 1 Lloyd's Rep 383.
[1145] The reverse side of each bill contained the quite extensive Clause 4 'Carrier's Exemption Clause': 'Carrier's exemption clause. Subject to Clause 1 hereof the carrier shall not be responsible for loss or damage to or in connection with the goods of any kind whatsoever (including deterioration, delay or loss of market) however caused (whether by unseaworthiness or unfitness of the vessel or any other vessel, tender, lighter or craft or any other mode of conveyance whatsoever or by faults, errors or negligence, or otherwise howsoever). In particular, and without prejudice to the generality of the foregoing …'.
[1146] In accordance with the principle laid down by Lord Halsbury in *Glynn v Margetson & Co* [1893] AC 351, 357. See also *J Evans & Son (Portsmouth) Limited v Andrea Merzario Ltd* [1976] 2 Lloyd's Rep 165, [1976] 1 WLR 1078, 1082A-C (Lord Denning MR), 1084A-C (Lord Justice Roskill), 1084H-1085F (Lord Justice Geoffrey Lane); *Watling v Lewis* [1911] 1 Ch 414, 424 (Warrington J); *In re Tewkesbury Gas Company* [1911] 2 Ch 279, affirmed at [1912] 1 Ch 1; and *Prudential Assurance Co Limited v London Residuary Body* [1992] 2 AC 386.
[1147] *The Irbenskiy Proliv* [2005] 1 Lloyd's Rep 383, para [15].
[1148] ibid, para [18].

The trial judge Mr. Ian Glick QC rejected the claimant's argument that the exemption clause was repugnant to the main object of the time charterparty by reducing the contract to a mere declaration of intent and held that the clause was sufficiently drafted to exclude all liability for unseaworthiness. The wording was said to bear a restricted meaning and did not 'operate to relieve the carrier of liability for any and every breach of contract',[1149] especially from all secondary obligations under the contract.

In taking such a decision, the judge revisited the common law's approach to the construction of contracts, which appeared to be 'not a literalist one'.[1150] If giving the words in a contract their 'full and complete meaning' would produce a result at odds with the main object of the same contract, then the Court will put upon those words a restricted meaning.[1151] In some cases, the Court may have to reject words, or even whole provisions, if they are inconsistent with the main purpose of the contract.[1152]

Wherever possible, the Court will attribute to the words used a meaning consistent with that purpose.[1153] 'Moreover, the principle that, in cases of doubt a contractual provision will be construed against the person who produced it, and for whose benefit it operates, does not extend to construing a contractual provision as widely as possible so as to render it repugnant to the main object of the contract read as a whole when it can be given a meaning consistent with that object'.[1154]

Appropriate Wording Shall Be Employed

As *Scrutton* states, 'there is no rule of law which disentitles a party who has committed a "fundamental breach" from relying on a provision of the contract which excludes or limits his liability'.[1155] The question if such a provision shall be applied to a serious breach of contract is a matter of construction.[1156] Thus, in principle, it is possible to exclude the common law obligation of seaworthiness by an appropriate clause

[1149] ibid, para [31] (Ian Glick J): '… They do not cover, for example, loss or damage caused by dishonesty on the part of the carrier. Whether this is because of a rule of law, or a principle of construction does not matter: the result is that the carrier would be liable for a breach of contract caused by its dishonesty. Moreover the words would not be strong enough to relieve the carrier from liability for loss of or damage to the goods caused by it arbitrarily refusing to ship them to the port of discharge at all …'.
[1150] With reference to *Glynn v Margetson & Co* (HL) [1893] AC 351. See also the speech of Lord Steyn in *Sirius International Insurance Company (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, especially para [19]: 'There has been a shift from literal methods of interpretation towards a more commercial approach …'
[1151] *Glynn v Margetson & Co* (HL) [1893] AC 351, 354–355 (Lord Herschell LC).
[1152] *The Irbenskiy Proliv* [2005] 1 Lloyd's Rep 383, para [29] (Mr Ian Glick, Deputy Judge).
[1153] ibid, para [30].
[1154] ibid, para [33].
[1155] *Scrutton on Charterparties and Bills of Lading*, (24th edn, Sweet & Maxwell 2019), para [11-009].
[1156] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *Suisse Atlantique Societe d'Armement Maritime v Rotterdamsche Kolen Centrale NV* [1967] 1 AC 361; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.

in the contract. As emphasised in the earlier cases, the wording shall 'most clearly and unambiguously'[1157] provide that the clause applies to this duty, as there is 'a strong, though rebuttable, presumption' that the parties did not intend to cover such a breach in their agreement.[1158]

In *The Rossetti*,[1159] there was the preliminary point on trial: 'whether, upon a true construction of the bills of lading, clauses (2)[1160] and (3)[1161] thereof (in particular the exception of "any loss of or damage to any goods however caused which is capable of being covered by insurance") gave the defendants a defence to a claim for loss of or damage to goods "which was capable of being covered by insurance but was caused by unseaworthiness which the defendants had not taken all reasonable means to provide against"'.[1162]

Brandon J held that, as there was a conflict between the provisions of unseaworthiness, and the exception clause did not refer to causation,[1163] the owners undertook responsibility for loss or damage caused by unseaworthiness where they had not provided all reasonable means to make the ship seaworthy. No clear and plain exception relieving the owners of such liabilities was found.[1164]

However, the reasoning in *The Rossetti* is to be compared with the decision in *Travers v Cooper*,[1165] a case where the goods were loaded into a barge from a ship for delivery at the wharf in the Thames. The barge was left unattended and sunk with the goods on board. The contract of carriage contained a clause that exempted the barge owner from liability 'for any damage to goods however caused which can be covered by insurance'. The majority of The Court of Appeal found that the addition of the words "however caused" was important in this type of case, because they indicated that the parties must be taken then to be directing

[1157] *The Strathallan* [1983] 1 WLR 964, 966; [1983] 1 Lloyd's Rep 183, 184 (Lord Wilberforce).
[1158] As expressed in *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale NV* [1967] 1 AC 361; [1966] 1 Lloyd's Rep 529.
[1159] *The Rossetti* [1972] 2 Lloyd's Rep 116.
[1160] Clause (2) read as follows: 'All the liabilities conditions and exceptions of this Bill of Lading shall apply to any carrying vessel (any custom or rule of law notwithstanding) although the vessel may have deviated from the contract voyage . . . and although such deviation may amount to a change or abandonment of the voyage and notwithstanding unseaworthiness or unfitness of the vessel at the commencement of or at any period of the voyage'.
[1161] Clause (3) read as follows: 'The Carriers will not be responsible for loss damage injury or other consequences occasioned by or arising directly or indirectly from any of the following causes perils or things namely – … Any act, omission, error of judgment, mistake, neglect or default whatsoever of the Master, Officers, Mariners, Engineers or other servants or Agents of the Carriers or of Pilots, Stevedores or other persons employed by the Carriers or their Agents, or unseaworthiness of the vessel either at the commencement of or at any stage of the voyage provided all reasonable means have been taken by the Carriers to provide against such unseaworthiness; nor for any loss of or damage to any goods however caused which is capable of being covered by Insurance'.
[1162] *The Rossetti* [1972] 2 Lloyd's Rep 116, 116 col 2.
[1163] ibid, 118, col 2.
[1164] ibid, 118, cols 1–2.
[1165] *Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73 (CA).

their minds to the cause of the damage, and thus this term relieved the owner from liability caused by negligence and/or unseaworthiness.

Giving the words "however caused" their natural and plain meaning, Phillimore LJ propounded:

> If you say "any loss" you are directing attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean "any and every loss" irrespective of the cause, and therefore you have not brought home to the person who is entrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or possibly even for your own personal want of care. But if you direct attention to the causes of any loss, if you say "any loss," "however caused" or "under any circumstances," you give sufficient warning and it is not necessary to say in express terms "whether caused by my servants' negligence," or in the bill of lading phrase, "neglect or default or otherwise".[1166]

It was concluded that 'it is not necessary that a clause by which a shipowner seeks to exempt himself from the consequences of unseaworthiness should contain any direct reference to seaworthiness or unseaworthiness.'[1167]

In a number of cases, the wording "from whatever other cause arising",[1168] "howsoever caused",[1169] "howsoever arising",[1170] "arising from any cause whatsoever",[1171] "relieves from all responsibility for any injury, delay, loss or damage, however caused"[1172] have been held to be effective. Likewise, a clause that excluded liability for any damage "which may arise from or be in any way connected with any act or omission of any person … employed by [the defendant]" was held to be wide enough to cover negligence on the part of the defendant's servants.[1173]

[1166] ibid, 101.
[1167] With reference to the decision of the House of Lords in *Elderslie Steamship Company, Ltd v Borthwick* [1905] AC 93, especially 96 (Lord Halsbury).
[1168] *Ashenden v LB & SC Ry* (1880) 5 Ex D 190; *Manchester, Sheffield & Lines Ry v Brown* (1883) 8 App Cas 703.
[1169] *Austin v Manchester, Sheffield & Lines Ry* (1852) 10 CB 454; *The Stella* [1900] P 161*; Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73; *Ashby v Tolhurst* [1937] 2 KB 242; *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep 251*; White v Blackmore* [1972] 2 QB 651; *Stag Line Ltd v Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep 211;
see also *Hunt & Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 QB 617 ("however sustained").
[1170] *Pyman SS Co v Hull & Barnsley Ry* [1915] 2 KB 729; *Swiss Bank Corp v Brink's Mat Ltd* [1986] 2 Lloyd's Rep 79; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm); [2004] 2 Lloyd's Rep 251; cf *Bishop v Bonham* [1988] 1 WLR 742.
[1171] *AE Farr Ltd v Admiralty* [1953] 1 WLR 965.
[1172] *The Stella* [1900] P 161.
[1173] *Lamport & Holt Lines Ltd v Coubro & Scrutton (M&I) Ltd* [1982] 2 Lloyd's Rep 42. See also *Monarch Airlines Ltd Ltd v London Luton Airport Ltd* [1998] 1 Lloyd's Rep 403 ("act, omission, neglect or default").

However, as *Chitty* states,[1174] the meaning of the clause must be collected from the entire wording of the contractual provisions that may throw light on the meaning. The factual background should not be ignored.[1175] Thus in some cases even such comprehensive words as "any liability … whatsoever",[1176] "howsoever caused",[1177] "any loss howsoever arising"[1178] and "at charterers' risk"[1179] may be limited by their context and thus not extend to the negligence of the defendant which is sought to exclude. Where a clause in a charterparty expressly accepted liability for negligence only in certain specified respects, it was held that it necessarily followed that it excluded negligence in all other respects.[1180]

The operation of exclusion clauses has recently been tested by the English Court in a judgment in *The Elin.*[1181] The dispute involved the carriage of offshore project cargo that was lost overboard during heavy weather on the voyage from Thailand to Algeria. A non-negotiable bill of lading described the shipment of 201 packages of cargo in "apparent good order and condition" and page 1 provided, *inter alia*, for: 'The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising … in respect of deck cargo'. Page 2 of the same bill stated, *inter alia*, that 70 packages enumerated in the separate list were 'loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising'. Pursuant to the terms of Article I(c) and II, neither the Hague nor the Hague-Visby Rules applied to packages stated in the bill of lading.

The claimant cargo interests alleged that the loss of the deck cargo was caused by the owners' breach and brought an action in contract, tort and bailment against the defendant shipowners. The claimants sought to revoke the operation and effectiveness of the carrier's liability exclusion clause, arguing that the implied obligation of seaworthiness is fundamental and overriding in a contract of carriage by sea and should not exclude the carrier's liability for loss or damage caused by the carrier's negligence or the unseaworthiness of the ship.

[1174] Professor Hugh Beale, *Chitty on Contracts* (33rd Edition, Sweet & Maxwell 2020), Part IV, Article 15 'Exemption Clauses', paras [15-007] & [15-008].
[1175] See, for example, *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165, page 168; *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180; [2010] 2 Lloyd's Rep 467, para [15].
[1176] *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165.
[1177] *Raymond Burke Motors Ltd v Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155.
[1178] *Bishop v Bonham* [1988] 1 WLR 742. See also *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 2 Lloyd's Rep 145 ("any damage whatsoever").
[1179] *Svenssons Travaruaktiebolag v Cliffe SS Co* [1932] 1 KB 490, 496; *Exercise Shipping Co Ltd v Bay Marine Lines Ltd* [1991] 2 Lloyd's Rep 391.
[1180] *Mineralimportexport v Eastern Mediterranean Maritime Ltd, The Golden Leader* [1980] 2 Lloyd's Rep 573.
But contrast *Tor Line AB v Alltrans Group of Canada Ltd* [1984] 1 WLR 48; *Airline Engineering v Intercon Cattle Meat* Unreported, January 24, 1983 CA; *Caledonia Ltd v Orbit Valve Co Europe* [1994] 1 WLR 221, 229 (affirmed [1994] 1 WLR 1515). See Professor Hugh Beale, *Chitty on Contracts* (33rd Edition, Sweet & Maxwell), Part IV, Article 15 'Exemption Clauses', paras [15-014] & [15-015].
[1181] *Aprile SpA and Others v Elin Maritime Ltd, The Elin* [2019] EWHC 1001, [2020] 1 Lloyd's Rep 111.

The owners argued that the correct approach to the construction of exclusion clauses should be the same as the other contractual provisions. The defendants placed particular reliance on the judgment of Lord Toulson JSC in *Impact Funding Solutions v Barrington Support Services,*[1182] and the judgment of Jackson LJ in *Persimmon Homes v Ove Arup.*[1183] They argued that 'although clear words will be necessary to limit or exclude the liability of a party, there is no need to construe words of limitation or exclusion narrowly or artificially'.[1184] The particular clause on page 1 of the bill upon which the owners relied and the specific clause on page 2, especially wording "howsoever caused" which appeared in each of the clauses, should be interpreted as excluding all liability for the carriage of deck cargo.

In the light of the guidance set out in *Canada Steamship* Mr Hofmeyr QC, sitting as a judge of the High Court, considered the question 'whether the clause would have meaning if liability for negligence or unseaworthiness was not excluded; and that, if they would, they should be so construed'.[1185] Having revisited the judgments in the most relevant authorities: *Travers v Cooper*[1186]; *The Danah*[1187]; and *The Imvros*[1188],[1189] Mr Hofmeyr QC came to the following conclusion:

> words of exemption which are wider in effect than "howsoever caused" are difficult to imagine and, over the last 100 years, they have become the classic phrase whereby to exclude liability for negligence and unseaworthiness.[1190]

It was held that the words 'howsoever caused' were effective to exclude liability for both negligence and unseaworthiness.

[1182] *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 571; [2017] AC 73, especially para [35].
[1183] *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, especially paras [56] and [57].
[1184] *Aprile SpA and Others v Elin Maritime Ltd, The Elin* [2019] EWHC 1001, para [28].
[1185] The cargo interests argued that although the words of the exclusion clauses were sufficiently broad to cover negligence and unseaworthiness, the clauses do not specifically refer to liability for unseaworthiness or negligence. *The Elin* [2019] EWHC 1001, para [57].
[1186] Joseph *Travers v Cooper* [1915] 1 KB 73.
[1187] *Kuwait Maritime Transport Co v Rickmers Linie KG, The Danah* [1993] 1 Lloyd's Rep 351.
[1188] *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 Lloyd's Rep 848.
[1189] *The Elin* [2019] EWHC 1001, paras [39]–[44], including criticism of *The Imvros,* paras [45]–[56].
[1190] ibid, para [57].

Chapter 8: The Effect of Article III Rule 2: "properly and carefully" load, stow and discharge

By contrast to Article III Rule 1, the obligation to load, stow and discharge at Article III Rule 2 is not qualified by the words "due diligence" but by the words "properly and carefully", which is a more stringent obligation. In this instance, Professor William Tetley refers to a number of erroneous US judgments,[1191] relying for the most part on one another, that state that the carrier need exercise only due diligence to care for cargo. A study of these judgments indicates that the theory, besides being contrary to the wording of the Rules, does not appear to be based on any valid precedent.[1192] Thus, it may be questioned if a single standard shall be applied through a scope of the whole Rules.

The issues of due diligence under Article III Rule 1 and of proper care under Article III Rule 2 are often closely interrelated.[1193] In *The Chyebassa,*[1194] McNair J held that there was no difference in principle between the shipowners' obligation under Article III Rule 1 and that under Article III Rule 2. However, unlike Article III Rule 1, Rule 2 is expressly subject to the exceptions in Article IV. It demonstrates why Article III Rule 1 duties are overriding, and that the Article III Rule 2 duties are not. Duties in Article III Rule 2 provide for *secondary functions* which are less fundamental, e.g. loading, stowage and discharge of the cargo.[1195]

In *Albacora v Westcott & Laurance Line*[1196] Lord Pearson propounded:

> Art. III, r. 2, is expressly made subject to the provisions of Art. IV. The scheme is, therefore, that there is a *prima facie* obligation under Art. III, r. 2, which may be displaced or modified by some

[1191] *Calif, Packing Corp v Matson Navigation Co* 1962 AMC 2651 (Cal Mun Ct 1962) citing *Pettinos Inc v American Export Lines* 68 F Supp 759, 1946 AMC 1252 (ED Pa 1946) relying on *The Vermont* 47 F Supp 877, 1942 AMC 1407 (ED NY 1942); *General Foods Corp v SS Troubador* 98 F Supp 207 1951 AMC 662 (SD NY 1951); *American Tobacco Co v SS Katingo Hadjipatera* 81 F Supp 438, 1949 AMC 49 (SD NY 1948); *The Shickshinny* 45 F Supp 813, 1942 AMC 910 (SD Ga 1942).

[1192] See the remarks and decisions discussed in William Tetley, *Marine Cargo Claims* (4th edn, Cowansville, Québec, Les Editions Yvon Blais 2008), Chapter 26, 'Erroneous Decisions'. See also *Great China Metal Industries v Malaysian International Shipping Corporation Berhad, The Bunga Seroja* [1999] 1 Lloyd's Rep 512, 537 (High Court of Australia): '… the duties imposed by art. III, r.2 are not those of exercising due diligence to produce defined results'. The High Court also held that the carrier's duties under Article III Rule 2 were not those of an insurer.

[1193] See, for example, *The Apostolis (No 1)* [1997] 2 Lloyd's Rep 241 (CA), a case in which a fire of uncertain origin damaged a cargo in a hold while loading was in progress. The Court of Appeal, reversing the trial judge, found unconvincing the claimant's evidence that the fire had been caused by welding on deck. The Court's decision that improper care of the cargo by the carrier was insufficiently proven was closely related to its decision that the claimant had not adequately proved any lack of due diligence by the carrier in making the vessel and its holds safe for the reception of the cargo.

[1194] *Leesh River Tea Co v British India Steam Navigation Co, The Chyebassa* [1966] 1 Lloyd's Rep 450; see also *International Packers London v Ocean Steam Ship Co* [1955] 2 Lloyd's Rep 218, 236.

[1195] See, for example, *Voyage Charters* (4th edn, Informa Law from Routledge 2014), paras [85.94] and [85.113].

[1196] *Albacora SRL v Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep 53.

> provision of Art. IV. Art. IV contains many and various provisions, which may have different effects on the *prima facie* obligation arising under Art. III, r. 2. The convenient first step is to ascertain what is the *prima facie* obligation under Art. III, r. 2.[1197]

As described in Section 6 it is obvious that the obligation to make the ship seaworthy is of a fundamental nature which the owner cannot transfer to another, thus simply imposing an inescapable *personal* obligation towards the carrier.[1198]

According to Article IV Rule 1 and the earlier cases[1199] once the goods' owner proves loss or damage while the goods were in the custody of the carrier, the burden falls on the carrier to prove the operation of one or more of those exceptions, and if necessary, the extent of its operation, whereas the burden of proving causative[1200] unseaworthiness lies on the goods' owner.

On the other hand, the mere fact of the operation of one of the Article IV exceptions does not necessarily relieve the carrier from liability for damage resulting also from a breach of an Article III Rule 2 duty.[1201]

The duties under Article III Rule 2 are non-delegable

As with Article III Rule 1 obligations, the duties under Rule 2 are non-delegable in the sense that carriers are liable for the acts or omissions of independent contractors engaged to fulfil those obligations at least where those contractors are acting within the scope of their engagement.[1202]

Thus, for example, the carrier may be liable where a stevedore (engaged by him to effect discharge) steals or drops the cargo in question. Although the carrier is not liable for damage resulting from the theft by the stevedore of part of the ship, allowing ingress of water, as this act is not done in the course of the discharge

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[1197] ibid, 63.
[1198] See decision in *The Muncaster Castle* [1961] 1 Lloyd's Rep 57, [1961] AC 807.
[1199] *Gosse, Millerd Ltd v Canadian Government Merchant Marine Ltd, The Canadian Highlander* [1929] AC 223, [1928] 32 Ll L Rep 91.
[1200] *The Torepo* [2002] 2 Lloyd's Rep 535, but cf the position in Australia: *The Bunga Seroja* (1998) 196 CLR 161 and see further comments in Martine Davies, 'Australian Maritime Law Decisions 1998' [1999] LMCLQ 406;
Seafood Imports Pty Ltd v ANL Singapore Ltd (2010) 272 ALR 149, where FIOS was held not sufficient.
[1201] See generally *The Glendarroch* [1894] P 226 and more particularly *Shipping Corporation of India v Gamlen Chemical (Australasia)* (1980) 147 CLR 142.
[1202] *The City of Baroda* (1926) 25 Ll L Rep 437, 438-439 (Roche J); *International Packers London Ltd v Ocean Steam Ship Co Ltd* [1955] 2 Lloyd's Rep 218, 236 (McNair J); *The Arawa* [1977] 2 Lloyd's Rep 416, 426 (Brandon J): 'the duty to take proper care of the cargo under art. III (2) is in principle non-delegable'. The primary case and the main discussion on this point being the House of Lords decision in *The Muncaster Castle* [1961] 1 Lloyd's Rep 57. Actually, this position reflects the non-delegable nature of the duties of a common law bailee: *BRS v Arthur Crutchley* [1968] 1 All ER 811.

of the cargo.[1203] However, as shown above, the separate obligation to load, stow and to discharge cargo properly and carefully shall be regarded as one which may validly be transferred by the shipowner to the shipper *by way of contractual agreement*.

Burden of proof

In *Volcafe v CSAV,*[1204] the decision of the Supreme Court provided clarity on the burden of proof under Article III Rule 2 and Article IV Rule 2 in actions against a shipowner for loss of or damage to cargo. The claim was brought by the holders of bills of lading for nine separate consignments of bagged coffee beans which were stowed in 20-foot non-ventilated containers and shipped from Buenaventura to Bremen. These containers were transhipped at Balboa and discharged in Rotterdam, Hamburg or Bremerhaven for on-carriage to Bremen. The bills of lading were subject to English law and jurisdiction and incorporated The Hague Rules. Moreover, it was clear that 'the carriers were contractually responsible for preparing the containers for carriage and stuffing the bags of coffee into them'[1205] by employing the stevedore for this operation. Coffee was a hygroscopic cargo and absorbed and emitted moisture. "Kraft" paper was used as an absorbent material in order to protect the coffee from water damage. However, when the containers were opened at the port of destination, the bags were found to have suffered water damage from condensation.

The cargo owners pleaded their case in a conventional way. Their primary submission was that the carrier, as a bailee, failed to deliver the cargo in the same condition as received from the shipper and as described in the bill of lading. Alternatively, they pleaded the carrier's breach of Article III Rule 2 of The Hague Rules and the carrier's negligence in using dunnage / "kraft" paper for protection of cargo from condensation. The carrier argued that the Hague Rules did not apply to the stuffing of containers before loading the units onboard the vessel, and further relied on the protection of Article IV Rule 2(m) pleading "inherent vice" on the ground that coffee beans in bags were not able to withstand 'the ordinary levels of condensation forming in containers during passages from warm to cool climates'. In reply, the cargo interests alleged the carrier's negligent failure to take proper measures to protect the cargo.[1206]

[1203] *Leesh River Tea Co Ltd v British India SN Co Ltd*. [1966] 1 Lloyd's Rep 450, [1967] 2 QB 250, 271–272, 276;
A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd, The Apostolis (No 2) [1999] 2 Lloyd's Rep 292, 300, however, revised on other grounds [2000] 2 Lloyd's Rep 337 (CA).
[1204] *Volcafe Ltd and others v Compania Sud Americana De Vapores SA* [2018] UKSC 61; [2019] 1 Lloyd's Rep 21.
[1205] ibid, para [3].
[1206] ibid, para [4].

At first instance, it was found that the carrier undertook to stuff its own containers and this stuffing should be regarded as part of the loading operation, as the parties agreed on an extended scope of application of The Rules, especially Article I(e).[1207] Mr Donaldson QC, sitting as a Deputy High Court Judge, considered that there was "complete circularity" between Article III Rule 2 and Article IV Rule 2(m). He was left unpersuaded that the carrier followed industry practice in relation to preparation of containers for the carriage of coffee in bags. The carrier failed to demonstrate that this particular cargo was carried 'in accordance with a sound system',[1208] thus failed to comply with Article III Rule 2, and in those circumstances could not reply on the Article IV Rule 2(m) defence.

The Court of Appeal overturned the Judge's decision. While accepting the argument that the carrier, as a bailee, bears a legal burden of brining itself within one of the defences in Article IV Rule 2, Flaux J held that the carrier was able to establish a "prima facie" case of inherent vice merely by proving that the moisture which caused the damage originated from the nature of the goods, and 'had made out a sustainable defence within Article IV Rule 2(m)'.[1209] Thus, in accordance with the weight of the existing authorities,[1210] the burden shifted back to the cargo interests to show that the carrier failed to exercise reasonable care and the cause of damage was not due to inherent vice. Flaux J rejected the analysis of "complete circularity" between Article III Rule 2 and Article IV Rule 2(m), saying that that assertion was wrong "as a matter of law".[1211]

In the Supreme Court Lord Sumption JSC, who gave a leading judgment, summarised the common law position.

> The contract of carriage is a contract of bailment, and the carrier is a bailee who is liable for damage to goods in its possession unless he can prove that the damage was not caused by any breach of the required standard of care, or unless it can bring itself within a contractual exclusion clause.[1212]

[1207] *Volcafe v CSAV* [2015] EWHC 516 (Comm); [2015] 1 Lloyd's Rep 639, para [9], with reliance on *Pyrene v Scindia Navigation* [1954] 2 QB 402; [1954] 1 Lloyd's Rep 321, approved in *GH Renton v Palmyra Trading* [1957] AC 149.
[1208] *Volcafe v CSAV* [2015] EWHC 516 (Comm); [2015] 1 Lloyd's Rep 639, para [9].
[1209] *Volcafe v CSAV* [2016] EWCA Civ 1103; [2017] 1 Lloyd's Rep 32, at para [63].
[1210] *The Glendarroch* [1894] P 226; *The Canadian Highlander* [1927] 2 KB 432; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* (1941) 70 Ll L Rep 1; [1942] AC 154; *Shaw, Savill and Albion Co Ltd v R Powley & Co Ltd* [1949] NZLR 668; *Albacora Srl v Westcott & Laurence Line Ltd* [1966] 2 Lloyd's Rep 53; 1966 SC (HL) 19; *Shipping Corporation of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142; *The Torenia* [1983] 2 Lloyd's Rep 210; and *The Bunge Seroja* [1999] 1 Lloyd's Rep 512.
[1211] *Volcafe v CSAV* [2016] EWCA Civ 1103; [2017] 1 Lloyd's Rep 32, at para [63].
[1212] *Volcafe v CSAV* [2018] UKSC 61, para [9]: 'The obligation of the bailee is a qualified obligation to take a reasonable care, at common law he bears a legal burden of proving the absence of negligence. He need not show exactly how the injury occurred, but he must show either that he took reasonable care of the goods or that any want of reasonable care did not cause the loss or damage sustained.'

The bailee's burden of proof shall not be displaced by the application of the Hague Rules. The approach to the burden of proof must therefore be the same as in bailment, and *The Glendarroch* is therefore no longer good law. Where the Rules are silent – English common law rules are to apply. Therefore, the carrier must prove on the balance of probabilities that the loss or damage was not caused by any breach of Article III Rule 2, or that one of the defences in Article IV Rule 2 applies.

Lord Sumption JSC propounded:

> When one examines the scheme of the Hague Rules, it is apparent that they assume that the carrier does indeed have the burden of disproving negligence albeit without imposing that burden on him in terms. This is because of the relationship between articles III and IV. article III.2 is expressly subject to article IV. A number of the exceptions in article IV cover negligent acts or omissions of the carrier which would otherwise constitute breaches of article III.2: for example articles IV.1 and IV.2(a). It is common ground, and well established, that the carrier has the burden of proving facts which bring him within an exception in article IV, and in the case of articles IV.1 and IV.2(q) this is expressly provided. It would be incoherent for the law to impose the burden of proving the same fact on the carrier for the purposes of article IV but on the cargo owner for the purposes of article III.2.[1213]

The Supreme Court held that 'so far as [*The Albacora*[1214] and *The Bunga Seroja*[1215]] suggest that the cargo owner has the legal burden of proving a breach of article III.2, they are mistaken'.[1216]

[1213] ibid, para [18].
[1214] *Albacora Srl v Westcott & Laurence Line Ltd* [1966] 2 Lloyd's Rep 53.
[1215] *The Bunge Seroja* [1999] 1 Lloyd's Rep 512.
[1216] *Volcafe v CSAV* [2018] UKSC 61, para [27].

Article III Rule 2 versus Article III Rule 8

Before considering the effect of the Rules, the common law position shall be considered briefly.

The traditional common-law rule is that loading and discharging are joint operations:[1217] the shipper's duty being to lift the cargo to the rail of the ship and the carrier's to take it on board and to stow it.[1218] This rule applies equally to the cost and the risk of the cargo operations – as both are transferred simultaneously.

In *Ceval v Cefera*[1219] Evans LJ stated:

> The common law rule, however, that in the absence of express agreement the goods are at the risk of the shipowner whilst they are inboard of the ship's rail continues to apply. So during the first part of the loading operation, from the quay to the ship's rail, they remain at the risk of the shipper, and from the moment when they cross the ship's rail in the course of discharge, the risk passes to the receiver, but the question of risk has to be distinguished from expense, meaning the costs of and associated with the loading and discharging operations.[1220]

However, this idea is not a universal one, for example, where the contract provides that for the cargo to be loaded and discharged at the charterers' expense 'under the responsibility of the captain',[1221] or referring to the position in Scotland.[1222]

When the ship's tackle is used, it would seem that the loading starts at the moment when the tackle is attached to the cargo at the quayside. Where the loading is done by stevedores engaged by the carrier as part of his duties and using shore equipment, the loading would seem to start when they commence work on the cargo to load it.[1223] In some situations, (such as loading from a grain elevator or by pump) there may however be recourse to the ship's rail or a flange connection. Likewise, where the carrier undertakes unloading and the ship's tackle is used, discharge ceases where the goods are unhooked from the tackle

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[1217] For general background see, for example, *Carver of Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-123].
[1218] *Harris v Best, Ryley & Co* (1892) 68 LT 76, especially 77 (Lord Esher); *Argonaut Navigation Co v Ministry of Food* [1949] 1 KB 572; *Ceval Intl Ltd v Cefetra BV* [1996] 1 Lloyd's Rep 464, 467 (Evans LJ).
See also three regimes of responsibility in respect to loading in William Tetley, *Marine Cargo Claims* (4th edn, Cowansville, Québec, Les Editions Yvon Blais 2008), Chapter 24.
[1219] *Ceval International Ltd v Cefetra BV v Soules CAF* [1996] 1 Lloyd's Rep 464 (CA).
[1220] ibid, 467 (Evans LJ).
[1221] *Voyage Charterers* (4th edn, Informa Law from Routledge 2014), para [14.3].
[1222] *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 1 Lloyd's Rep 321 [1954], 2 QB 402, 417, referring to the position in Scotland: *Glengarnock Iron and Steel Co Ltd v Cooper & Co* (1855) 22 R 672, 676 (Lord Trayner).
[1223] cf *Raymond Burke Motors Ltd v The Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155.

on the quay. The overall result is often referred to as the "tackle to tackle" or "hook to hook" principle. However, this wording would be more appropriate to the interpretation that requires the carrier to perform the loading and unloading operations.[1224]

In regards to the Rules, the fundamental "bundle" of obligations placed on the carrier, specifically in relation to the care of the cargo, is set out in Article III Rule 2, under which the carrier must avoid "seven deadly sins" in relation to the cargo to 'load, handle, stow, carry, keep, care for, and discharge' it properly and carefully.[1225] The period during which the carrier is under these obligations is defined by the combined effects of Articles II and 1(e). As Devlin J stated 'the operation of the Rules is determined by the limits of the contract of carriage by sea and not by any limits of time'.[1226]

However, it is clear that this division does not provide a key to the application of the Rules. Thus stowage, as a part of loading, is the entire responsibility of the owner unless the terms of the carriage contract transfer such a responsibility to the charterer, as for example by way of Clause 8 of the NYPE_1993 form, or by use of FIO or FIOST terms,[1227] as in the GENCON charterparty Clause 5. The distribution of both the legal responsibilities for stowage and the roles assumed by each party may well determine whether there has been a breach of the carrier's obligation to stow properly and carefully under the Rules.

Although the carrier must familiarise himself with and comply with all the relevant regulations, codes and similar authorities which affect stowage of cargo, the shipper has greater knowledge of the characteristics of the cargo.[1228] The carrier may discharge his obligation to act properly and carefully if he follows the direction of a shipper as to the method of stowage even if the method is unsatisfactory.

[1224] A draft of year 1921 Hague Rules actually used the words 'from the time when the goods are received on the ship's tackle ['plan du navire'] to the time when they are unloaded from the ship's tackle'. The words were removed from the same year. See Berlingieri.
The Australian Carriage of Goods by Sea Rules 1998 seek to solve the problem by defining in considerable detail 'carriage of goods by sea' as to cover the period when the goods are "in charge of" the carrier. See Stuart Hetherington, 'Australian Hybrid Cargo Liability Regime' [1999] LMCLQ 12; see also Hamburg Rules, Article 4.

[1225] For a recent survey of the ambit of these duties, see Stephen Girvin, 'The Carriers Fundamental Duties to Cargo under the Hague and Hague-Visby Rules' (2019) 25 JIML 443'.

[1226] *Pyrene v Scindia* [1954] 2 QB 402, 417 and [1954] 1 Lloyd's Rep 321, 328.

[1227] Respectively, FREE IN / FREE OUT and FREE IN FREE OUT / STOWED / TRIMMED. However, the correct meaning of these phrases in terms of transfer of responsibility will depend on the context and particularly the other terms of the contract: see for example, *The Jordan II* [2004] UKHL 49; [2005] 1 Lloyd's Rep 57 (as considered further); *Subiaco (Singapore) Pte v Baker Hughes Singapore Pte* [2010] SGHC 265 concerning FIOS L/S/D terms; and *The Sea Miror* [2015] EWHC 1747 (Comm); [2015] 2 Lloyd's Rep 395 where Flaux J undertook a comprehensive review of the authorities in considering the effect of a charterparty clause providing for cargo to be 'loaded trimmed and/or stowed at the expense and risk of Shippers/Charterers … stowage to be under Master's direction and responsibility'.

[1228] *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255. But the facts may entitle or oblige a carrier, as part of his duty under Rule 2, not to comply with shipper's instructions: *Shaw Savill & Albion Company Ltd v Electric Reduction Sales Co Ltd and Others, The Mahia* [1955] 1 Lloyd's Rep 264.

Bills of lading may similarly be affected by clauses specifically referring to loading and unloading terms. These are usually incorporated charterparty clauses,[1229] or the terms which correspond to the booking note,[1230] and it usually appears in connection with the statement of freight and indicates who pays for these items, but not who undertakes responsibility. It is possible to have a situation in which the carrier engages and takes responsibility for stevedores but is reimbursed for the cost; or where the shipper employs stevedores and takes responsibility for them but is reimbursed by the carrier. However, there may be reinforcing wording (which may be in an incorporated charterparty only) indicating that the carrier not only does not pay for these operations but also does not undertake responsibility for loading and/or unloading.[1231]

It may still be argued that the wording of Article II is strong enough to suggest that the carrier must always take responsibility for loading, handling and stowage, and for discharge. Such a view is reinforced by the wording of Article III Rule 2, which requires the carrier to 'properly and carefully load, handle, stow, … and discharge' the goods carried. This argument flows from the assumption that any clause purporting to exempt the carrier from liability in respect of any of these functions (for example, by allocating risks and costs of loading and/or unloading to the shipper or receiver) shall be void under Article III Rule 8.

Scrutton argues that there could be three possible views advanced in this respect:[1232]

> (i) the carrier, whether he wants to or not, is obliged to undertake or perform responsibility for the whole of loading and discharging;
> (ii) the carrier is only responsible under the Rules for that part of loading and discharging which takes place on the ship's side of the ship's rail;
> (iii) the carrier is only responsible for that part, if any, of either operation which it is agreed shall be carried out by or under arrangements made by him.

[1229] For example: FREE IN FREE OUT / STOWING / TRIMMING / LASHING
[1230] *Ceval Intl Ltd v Cefetra BV* [1996] 1 Lloyd's Rep 464, 467 (Evans LJ).
[1231] For example, in *The Jordan II*, read 'Shippers/Charterers/Receivers to put the cargo on board, trim and discharge free of expense to the vessel'. See discussion in *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9.128].
[1232] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [14-042].

Pyrene v Scindia

The first view was supported until 1954 by the majority of English books, the age before the decision in *Pyrene v Scindia*.[1233] In that case, *the carrier* had undertaken loading and the goods were dropped while loaded by one of the ship's cranes before they crossed the rail. It was held that the Rules extended to the loading operation even outside the ship's rail, and thus covered the situation where the goods were dropped on the shore side of it.

The reasoning used by Devlin J was wider than was needed for the resolution of the point, and the conclusion from it is that the carrier is, despite the wording of Article II and Article III Rule 2, also free to transfer the responsibility for loading, stowage and discharge to shippers, charterers or consignees. The judge observed that the effect of Article III Rule 2 was not to override freedom of contract but to reallocate responsibility for the functions described in that rule and to define 'not the scope of the contract service but the terms on which that service is to be performed'.[1234] Devlin J propounded:

> The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.[1235]

The Rules only apply therefore to those parts of the loading and unloading which the carrier because of his contract undertakes, thus rejecting the second view advanced by *Scrutton* and preferred the third.

Some say that the statement of Devlin J was an *obiter dictum* only. However, in *The Jordan II* Lord Steyn opined that 'it was a carefully considered statement by one of the most distinguished commercial judges

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[1233] *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402; [1954] 1 Lloyd's Rep 321.
[1234] *Pyrene v Scindia* [1954] 2 QB 402, 418 (Devlin J): 'The phrase "shall properly and carefully load" may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the Rules. Their object, as it is put, I think, correctly in Carver's Carriage of Goods by Sea, 9th ed. (1952), p. 186, is to define not the scope of the contract service but the terms on which that service is to be performed'
[1235] ibid, 418.

of the 20th century, who believed firmly in the principle that it is the task of a judge to administer the law as it stands'.[1236]

However, the decision in *Pyrene v Scindia* involved rejecting the significance of the definition of "carriage of goods" in Article I(e), which provides for the period from 'the time when the goods are loaded on to the time they are discharged from the ship'.

Renton v Palmyra

In 1956 the very same point came before the House of Lords in *Renton v Palmyra*[1237] case, which concerned a strike clause in bills of lading. Strikes prevented the cargo of timber from being discharged at English ports so it was discharged at Hamburg. The cargo receivers argued that the strike clause was repugnant to the main object of the contract of carriage and was contrary to Article III Rule 2 which required shipowners to 'properly … carry … and discharge the goods …' so it should have been held null and void. The shipowners argued that the obligation properly to carry was concerned only with how the goods were to be carried. It had no geographical significance. They also relied on *Pyrene v Scindia,* saying that they had not agreed to discharge at strike-bound English ports and Article III Rule 2 did not prevent them from contracting in this way.[1238] The House decided unanimously in favour of the shipowners. The majority[1239] did so for different reasons, based on The Hague Rules point. The minority did so on the geographical point.[1240]

Lord Morton agreed with the judge in *Pyrene v Scindia*,[1241] and added that 'not only is the construction approved by Devlin J, more consistent with the object of the Rules, but it is also the more natural construction of the language used'.[1242] Lord Somervell referred to Article III Rule 2 and observed that the general ambit of The Rules was to be found there and it was only directed to how the obligations undertaken are to be carried out. Subject to the later provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes properly and with care.[1243]

[1236] *The Jordan II* [2004] UKHL 49; [2005] 1 Lloyd's Rep 57, para [11] (Lord Steyn) with further reference to the entry "Lord Devlin", Professor Tony Honoré, Oxford Dictionary of National Biography, 2004, vol 15, pp 985–988.
[1237] *GH Renton & Co Ltd v Palmyra Trading Corporation* [1956] 2 Lloyd's Rep 379 (HL).
[1238] As described by Tuckey LJ in *The Jordan II* [2003] 2 Lloyd's Rep 87, 104 para [31].
[1239] Consisting of Lord Morton, Lord Cohen and Lord Somervell.
[1240] As explained by Tuckey LJ in *The Jordan II* [2003] 2 Lloyd's Rep 87, 104 paras [31] & [32].
[1241] *Renton v Palmyra* [1956] 2 Lloyd's Rep 379, 390–391 (Lord Morton) with reference to [1954] 2 QB 402, 417–418.
[1242] ibid, 391 (Lord Morton).
[1243] ibid, 393 (Lord Somervell).

Thus it had become a clear *ratio decidendi* that an agreement transferring responsibility for loading, stowage and discharge of the cargo from the shipowners to shippers, charterers and consignees was not invalidated by Article III Rule 8, and 'the parties are free to determine by their own contract the part which each has to play'.

The latter point was subsequently reaffirmed by the Court of Appeal in *The Coral,*[1244] the case where a bill of lading subject to the compulsorily applicable Hague-Visby Rules statute of South Africa incorporated both The Rules (by a paramount clause) and a charterparty, one of the clauses of which made the charterers liable for loading, stowing and discharge. At first instance,[1245] Sheen J granted summary judgment to the plaintiff cargo owner, holding that the shipowning carrier, under Article III Rule 2, had assumed the obligation to load, stow and discharge properly and carefully and was therefore liable to the cargo owner, where the facts raised an inference that the damage had been caused by the carrier's breach of that obligation. However, the Court of Appeal reversed the decision of Sheen J, invoking the principles laid down in *Pyrene v Scindia* and *Renton v Palmyra* that the parties were free to decide for themselves what part the carrier would play in loading, stowing and discharge. This decision implied that the carrier may validly transfer to the shipper/charterer, not just the *responsibility* for loading, stowing and discharging the cargo, but also the *liability* for negligence in performing those tasks.

According to the latest edition of *Scrutton,*[1246] it was unclear whether the incorporation into the bill of lading of a charterparty under which loading and discharge are the responsibility of the charterer was sufficient to negate the shipowner's liability.[1247] However, this point is now clear from the decision in *EEMS Solar,*[1248] where the Admiralty Registrar Jervis Kay QC saw no sensible reason why the parties should not decide to apportion the responsibilities for the cargo stowage in the way that they chose. He noted: 'where the responsibility for the stowage has been contractually passed from the shipowner to the charterer (or the cargo owner) the shipowner will not be liable for damage arising from improper stowage even if it renders the vessel unseaworthy …'[1249] The Registrar made considerable reference to *The Jordan II* case.

[1244] *Balli Trading Ltd v Afalona Shipping Co Ltd, The Coral* [1993] 1 Lloyd's Rep 1.
[1245] *The Coral* [1992] 2 Lloyd's Rep 158 (QB).
[1246] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [14-051], fn 128.
[1247] Referring to Simon Baughen, 'Defining the Limits of the Carrier's Responsibilities' [2005] LMCLQ 153.
[1248] *Yuzhny Zavod Metall Profil LLC v EEMS Beheerder BV, The EEMS Solar* [2013] 2 Lloyd's Rep 487.
[1249] ibid, paras [98] – [100].

The Jordan II

In *The Jordan II,*[1250] the shipment of steel coils was shipped from India to Spain, and the claimants alleged that damage to the cargo was due to rough handling during loading and/or discharge and/or inadequate stowage. Two bills of lading incorporated a charterparty clause transferring responsibility for loading and unloading to cargo interests.

The shippers and consignees argued that Article III Rule 2 defined the irreducible scope of the contract of service to be provided by the carrier by sea. And the agreement in the charter-party,[1251] which purported to transfer responsibility for loading, stowage and discharge from the shipowners to shippers, charterers and consignees, was invalidated by Article III Rule 8.[1252] In their argument, the claimants referred to the other jurisdictions which had taken the view that the carrier could not transfer responsibility for the operations listed in Article III Rule 2. For example, the US Second Circuit and Fifth Court of Appeal had ruled that cargo loading, stowing and discharging constituted non-delegable duties of the carrier;[1253] a South African decision,[1254] as well as French jurisprudence, reached the same conclusion. The cargo owners similarly invoked consideration of *travaux preparatoire* to assist their argument.

The carrier argued that Article III Rule 2 merely stipulated the manner of performance of the functions which the carrier had undertaken by the contract of service.

On the trial of preliminary issues, Mr Teare QC (sitting as a deputy judge) applied Devlin J's dicta and confirmed that the *ratio decidendi* of the House in *Renton v Palmyra* was to the effect that an agreement transferring responsibility for loading, stowage and discharge of the cargo from the shipowners to shippers, charterers and consignees was not invalidated by Article III Rule 8, and two incorporated clauses were intended to relieve the defendants of all responsibility for the cargo operations.

The plaintiffs appealed and invited the Court of Appeal and consequently the House of Lords to depart from its decision in *Renton v Palmyra* under the *Practice Statement (Judicial Precedent).*[1255] The Court of Appeal upheld the decision of a first instance deputy judge.[1256]

[1250] *Jindal Iron and Steel Co Ltd and Others v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49; [2005] 1 WLR 363, [2005] 1 Lloyd's Rep 57.

[1251] Evidenced by Cause 3: 'Freight to be paid at a rate of USD … per metric tonne FIOST – lashed/secured/dunnaged …' and Clause 17: 'Shippers/charterers/ receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel …'.

[1252] *The Jordan II* [2004] UKHL 49, para [9] (Lord Steyn).

[1253] *Associated Metals and Minerals Corp v m/v Arktis Sky* 978 F2d 47 (2nd Cir 1992); and *Tubacex Inc v m/v Risan* 45 F3d 951 (5th Cir 1995).

[1254] *Owners of the Cargo lately Laden on Board the MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487(C), esp at 504.

[1255] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

[1256] *The Jordan II* [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep 87.

In those circumstances, it was not necessary for the House of Lords to analyse the facts of the case, and the long-standing precedent was given the effect that such a reallocation of risks by agreement had been permissible and that the carrier was not liable. In giving the leading judgment Lord Steyn proceeded on his own contrsuction of Article III Rule 2 by employing four interpretation techniques: the interpretation of the text of the provision by itself, the *travaux preparatoires*, commentaries by learned authors and foreign caselaw. Lord Steyn propounded:

> *Renton* had stood for nearly half a century; if the decision in *Renton* had worked unsatisfactorily in practice one would have expected the matter to have been raised at the 1968 Brussels Protocol which led to the adoption of the Hague-Visby Rules; nor had British cargo interests raised the matter when Parliament was considering enacting the Carriage of Goods by Sea Act, 1971;[1257] there had been no criticisms of the *Renton* decision in United Kingdom trade journals and publications; and no academic writers had argued that *Renton* should be reversed; shipowners, charterers, shippers, consignees, insurers and P&I Clubs had acted on the basis that it correctly stated the law; moreover, there had to be many outstanding disputes which would now be affected by a departure from *Renton*; FIOST clauses were in wide use; cargo damage caused by loading, stowage and discharging was an everyday occurrence in maritime transport, and many such transactions might still be open.[1258]

In response to the cargo interests pleading Lord Steyn stated that:

> nowhere in the *travaux* is there any statement that Article III Rule 2 prevents an owner and merchants from reallocating responsibility for loading, stowage and discharge of the cargo to the merchants. It is not enough to show that the draftsmen proceeded on the basis of the normal common law rule that loading stowage and discharging is the duty of the shipowner, without considering the effect of different contractual arrangements. If the issue had been directly confronted by draftsmen, it is far from obvious that they would have concluded that a shipowner should be liable to cargo owners for damage caused by cargo owners themselves when they undertook the relevant duty and did it badly.[1259]

[1257] See the position placed before Parliament the speech of Lord Diplock, Hansard (HL Debates), 25th March 1971, vol 316, cc 1028-43.
[1258] *The Jordan II* [2004] UKHL 49; [2005] 1 Lloyd's Rep 57, paras [27]– [29].
[1259] ibid, para [19] (Lord Steyn).

Reviewing the position in different jurisdictions, in response to the claimant's argument, Lord Steyn referred to the Australian,[1260] New Zealand,[1261] Pakistani[1262] and Indian[1263] case law that has applied *Renton v Palmyra* precedent, and concluded that there was no dominant international view on the issue:

> The weight of opinion in foreign jurisdictions is fairly evenly divided. The argument that the law as enunciated in *Renton* ought to be brought into line with subsequently decided United States decisions, which did not address the arguments in *Pyrene* and *Renton*, is rather weak. This plank of the cargo owners' case cannot therefore materially assist in the challenge to the decision of the House in *Renton.*[1264]

In 1990 UNCTAD published a comparative analysis on the charterparties,[1265] which specifically dealt with a scope of responsibilities of the carrier. With references to *Pyrene v Scindia* and *Renton v Palmyra* cases that paper stated as follows:

> … in regard to loading, stowage or discharging, the Hague Rules, on these authorities, only impose obligations if the shipowner has contractually undertaken to perform those obligations, if under the terms of a charter party the shipowner will also be relieved of responsibility for loading, stowing or discharging as against a third party bill of lading holder, always providing that the bill of lading and charter contain sufficiently widely drawn clauses. This will be so even if the bill is subject to The Hague or Hague-Visby Rules: and even if the third party bill of lading holder has neither seen the charter party referred to, nor has any advance notice of the relevant charter party clauses.[1266]

Diamond similarly asserted that the operation of The Hague-Visby Rules has been under constant review. In 1968 an opportunity arose to improve the operation of the Hague Rules. But an international conference took the view that only limited changes were necessary. If the decision in *Renton v Palmyra* had worked unsatisfactorily in practice, one would have expected that to have appeared for discussion at the conference which led to the Protocol signed at Brussels and the adoption of the Hague-Visby Rules. The

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[1260] *Shipping Corporation of India v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 and *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd* (1993) 117 ALR 507; doubts were expressed in *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NS WLR 371.
[1261] *International Ore & Fertilizer Corp v East Coast Fertilizer Co Ltd* [1987] 1 NZLR 9.
[1262] *East and West Steamship Co v Hossain Brothers* (1968) 20 PLD SC 15.
[1263] *The New India Assurance Co Ltd v M/S Splosna Plovba* [1986] All IR Ker 176.
[1264] *The Jordan II* [2004] UKHL 49; [2005] 1 Lloyd's Rep 57, para [24] (Lord Steyn).
[1265] *Charter Parties: A Comparative Analysis*, Trade and Development Board, Committee on Shipping, Working Group on International Shipping Legislation, Twelfth Session, Geneva, 22nd October 1990.
[1266] ibid, para [342].

interpretation assigned to Article III Rule 2 by the English Courts was an important part of the corpus of law governing the application of the Hague Rules. Article III rule 2 remained unaltered in the new Rules.[1267]

Tetley in *Marine Cargo Claims* argued that the latest US case law was correct in affirming that the carrier's duties to properly and carefully load, stow, keep, carry, care for and discharge under Section 3(2) of COGSA are non-delegable. Clauses such as FIO, FILO, and FIOS, although acceptable in charterparties,[1268] are unenforceable because of *the public policy rule* of Article III Rule 8 in contracts for the carriage of goods by sea under the Rules and similar national legislation, to the extent to which they relieve or lessen the carrier's liability for improper loading, stowing and/or discharging cargo.[1269]

In *Vimar Seguros Y Reseaguros v m/v Sky Reefer*[1270] the US Supreme Court characterized the "properly and carefully" obligation one of several "substantive obligations and particular procedures that para 3(8) [of US COGSA] prohibits a carrier from altering to its advantage in a bill of lading".[1271]

It is improper for a carrier to invoke such clauses against a consignee or endorsee of the bill of lading, who is a third party where the bill is issued by the carrier to the shipper, and who, in any event, has nothing to do with the arrangements between the shipper and the stevedore. Even as between the shipper and carrier, however, these clauses in a bill of lading are unenforceable where they reduce or eliminate the carrier's ultimate responsibility (and therefore ultimate liability) for loading, stowing and discharging.

Schoenbaum in Maritime and Admiralty Law argued that *The Jordan II* does not accommodate one of the basic aims of the Hague Rules, namely the maintenance of a balance between the carrier's and the cargo owners' interests, rendering in that way Article III Rule 8, which is a lynchpin of the Rules, meaningless.[1272]

[1267] See Anthony Diamond, QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 228.

[1268] See, for example, *Continental Grain Co v Puerto Rico Maritime Shipping Authority* 972 F 2d 427 (1st Cir 1992), where the court held that the parties may alter the general rule that the duty to load, stow, trim, and discharge generally falls on the shipowner. As pointed out by the Second Circuit in *Associated Metals & Minerals v M/V Arktis Sky* 978 F 2d 47, 50 fn 2, 1993 AMC 509, 513 fn 2 (1993), however, *Continental Grain* involved a 'private carriage of goods'. See also the discussed case *Canadian Transport Co Ltd v Court Line Ltd* [1940] AC 934, (1940) 67 Ll L Rep 161 (HL).

[1269] On this point, see *ibid*, F 2d 50, AMC 514, holding that the words 'otherwise than as provided in this Act' in COGSA, 46 USC Appx 1303(8), modifies the "damage limitations" (i.e. the USD 500 package limitation) of s 1304(5), but '… does not affect the statute's prohibition on agreements relieving carriers of liability for negligence in carrying out their duties under the Act'.

[1270] *Vimar Seguros Y Reaseguros, SA v M/V Sky Reefer, her Engines, etc* 515 US 528, 1995 AMC 1817 (1995).

[1271] ibid, 515 US 528 at page 535, 1995 AMC 1817 at page 1822 (1995); cited in *Fireman's Fund Insurance Co v M/V DSR Atlantic* 131 F 3d 1336 at page 1339, 1998 AMC 583 at page 587 (9 Cir 1997); and *Kelso Enterprises, Ltd v M/V Wisida Frost* 8 F Supp 2d 1197 at page 1204, 1998 AMC 1351 at page 1361 (CD Cal 1998).

[1272] Thomas J Schoenbaum, *Admiralty and Maritime Law* (4th edn, West Academic Publishing 2004), Volume I, page 663, paras [10] – [19]. See reference in Nikaki T, 'FIOST – Responsibility for Cargo Work – Bills of Lading – Hague Rules – Article III Rule 2 (Analysis and Comment: *The Jordan II*)' (2005) 11 JIML 13, 17.

Some of the English academic commentators have similarly upheld this position.
Nikaki argues that 'similar to the *Pyrene* and *Renton* decisions, the decision in *The Jordan II* does not produce the fair and balanced results aimed at in the Hague and the Hague-Visby Rules.' The decision promotes only the carriers' interests providing the parties to the contract with unlimited freedom to reallocate between themselves the responsibility for cargo operations in a situation when the cargo interests are 'the weak party to the contract'.[1273] According to the UNCITRAL Report[1274] it may be detrimental to the shippers' interests to allow carriers to exclude their liability for a broad array of operations under standardized contract terms.[1275] Carriers may take advantage of a FIO or similar clause and exonerate themselves for their negligence under the Hague-Visby Rules by agreeing that they will perform loading, stowage and discharge operations on behalf of the cargo interests.[1276]

On the other hand, in cases where a bill of lading, issued on behalf of a shipowner, transfers responsibility for the cargo operations to the charterer of the vessel and the cargo is damaged or lost in the course of the loading, stowage or discharge, the consignee is still entitled to initiate an action against the charterer in tort or bailment, and not in the contract of carriage, as there is no privity of contract between them.[1277]

In *The Jordan II* it was noted that the *ratio decidendi* of the *Renton v Palmyra* case was still open to doubt, as the issue in that case concerned neither loading nor unloading but the cargo-carrying voyage. In giving the judgment Lord Steyn specifically stated that he expressed no concluded view as to whether this had initially been the correct interpretation of the relevant provision of the Rules.[1278]
Lord Nicholls agreed.[1279]

[1273] Nikaki T, 'FIOST – Responsibility for Cargo Work – Bills of Lading – Hague Rules – Article III Rule 2 (Analysis and Comment: *The Jordan II*)' (2005) 11 JIML 13, 17.
[1274] UNCITRAL Document A/CN.9/510 of 7 May 2002, Report of the Working Group on Transport Law on the work of its ninth session. See also an elaborative article by Professor William Tetley, 'Reform of Carriage of Goods - The UNCITRAL Draft and Senate COGSA 99' (2003) 28 Tul Mar LJ 1.
[1275] UNCITRAL Document A/CN.9/510 of 7 May 2002, page 38, paras [125] & [126].
[1276] ibid, page 40, para [125].
[1277] Nicholas Gaskell, 'Shipowner Liability for Cargo Damage Caused by Stevedores – The Coral' [1993] LMCLQ 170, 174.
[1278] *The Jordan II* [2004] UKHL 49, para [32] (Lord Steyn): 'I would express no concluded view on the issue of the interpretation of art. III, r. 2. I would refuse to depart from the *Renton* decision'.
[1279] ibid, para [2] (Lord Nicholls): '… But for the reasons given by my noble and learned friend Lord Steyn I agree this interpretation should not now be disturbed'.

What obligations are possible to transfer under Article III Rule 2? Varying views

There remains a difficult issue where the carrier pays for and selects the stevedores but purports to transfer responsibility to the shipper. This was the position in *The Saudi Prince (No. 2)*[1280] where the bill of lading provided that the shipowner in employing the stevedores had acted as the shipper's agent. Bingham J, whose decision was upheld by the Court of Appeal,[1281] held the matter to be governed by Italian law, which applied a very strong presumption that the shipowner is responsible for the loading of a part cargo on board a general ship,[1282] and even if the master acted as the owners' agent in appointing stevedores at the discharge port, it was his duty to take care to appoint competent stevedores. The stevedores were incompetent in particular in failing to use mechanical means widely accepted as the only proper means of unloading a cargo of this kind, the master had not taken such care and the owners were liable for his default.[1283]

In order to decide otherwise, clear proof would be required both of practical contractual intent and contractual application. On the facts, that proof was lacking because the contractual reality was that the shipowner both paid for and arranged for the stevedoring. Even if this was done in the name of the receivers, the underlying reality was that the shipowner had accepted responsibility for loading, stowing and discharging.[1284]

Bingham J, however, expressed the view that, under English law, it might be possible in a properly drawn contract for the shipowner to provide that his functions would begin after stowage and end before unloading, with stevedores being appointed by him as agents of cargo interests, at any rate where the appointment was made in their name. Such a clause, though, would seem to run counter to Lord Steyn's observation that Devlin J's purposive interpretation 'permits transfer of the responsibility for such functions to the party who selects and pay for the stevedores' at para [19].[1285] If the carrier itself is the party who selects and pays for the stevedores, then a clause of this nature would not have this effect. The clause would, instead, fall to be treated as an exceptions clause, which would be rendered null and void by Article III Rule 8: as was the outcome of a similar clause in *The Lucky Wave*[1286].

[1280] *The Saudi Prince (No 2)* [1986] 1 Lloyd's Rep 347 (HC).
[1281] *The Saudi Prince (No 2)* [1988] 1 Lloyd's Rep 1 (CA).
[1282] *The Saudi Prince (No 2)* [1986] 1 Lloyd's Rep 347, 354 col 2 (Bingham J).
[1283] ibid, 355 col 2 (Bingham J).
[1284] Simon Baughen, 'Defining the Limits of the Carrier's Responsibilities' [2005] LMCLQ 153, 158.
[1285] *The Jordan II* [2005] 1 Lloyd's Rep 57, para [19] (Lord Steyn).
[1286] *The Lucky Wave* [1985] 1 Lloyd's Rep 80, 83 col 2 (Sheen J): '(1) under the Hague-Visby Rules it was the duty of the carrier to discharge the goods properly and carefully; there was nothing in the conditions of carriage contained in the bill of lading which changes that obligation; accordingly the defendants remained bailees of the plaintiffs coils of wire until those coils were landed … ; if those goods were in good condition when they landed there was no reason to think that their condition

It also clear that even if the result of express agreement or an agreement implied from conduct, the risk of the operations of loading and discharging is to fall upon the shipowner, the expense for such operations may, by agreement, be placed upon the shipper or consignee.[1287]

Alternative legal routes for absolving the carrier of responsibility where the shipper actively interferes in stowage arrangements are by use of the doctrine of estoppel or invocation of Article IV(2)(i) of the Rules.[1288]

would have changed … , when they were surveyed; and there was no way in which an unbroken coil of wire could have been damaged while it was lying in the warehouse…'

[1287] See *The Arawa* [1977] 2 Lloyd's Rep 416, 424–425.

[1288] *Ismail v Polish Ocean Lines, The Ciechocinek* [1976] 1 Lloyds Rep 489, [1976] QB 893.

Chapter 9: Liability in Tort and Himalaya Clause

Liability in Tort of the Carrier and Liability of the Servants and Agents of the Carrier

It is a fundamental principle of good business practice for persons who cause damage to cargo and/or who is responsible for its loss to be held accountable for that damage or loss. Otherwise, they will continue to be negligent and will do nothing to alter their wrongdoing practice.[1289] A more radical route is to argue that such persons should either owe no duty of care at all or else only a duty to the extent of liabilities in the main contract.[1290]

The common law, traditionally, has not permitted a third party to benefit under a "side" contract.[1291] Nothing was said in the Hague Rules in respect of the liability regime applicable in case of actions in tort against the carriers, which had resulted in claimants attempting to circumvent the exonerations from and limitation of liability granted by the Rules, either to sue the carrier in tort or to bring proceedings against his servants or agents, with varying results in different jurisdictions. While the first alternative had created problems in certain civil law jurisdictions,[1292] the second alternative, of actions against servants or agents, had created problems in common law jurisdictions inasmuch as a person who is not a party to a contract can derive no benefit from it.[1293] For example, it was held in England,[1294] Australia[1295] and the USA[1296] that stevedoring companies had been personally liable in tort for negligent damage to cargo and could not rely on the package limitation or time-bar of the Rules.

[1289] For a discussion with regards to the insurance practices, see Professor William Tetley, *Marine Cargo Claims* (4th edn, Cowansville, Québec, Les Editions Yvon Blais 2008), The Himalaya Clause – Heresy or Genius?

[1290] See *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299, approved by Lord Goff in *The Makhutai* [1996] AC 650, 665, despite what had been said in the earlier House of Lords decision of *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785; [1985] 1 Lloyd's Rep 199.

[1291] *Dunlop Pneumatic Tyre v Selfridge and Co Ltd* [1915] AC 847, 853 (HL) (Viscount Haldane): 'My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract'. The classic criticism of this position is A. Corbin, 'Contracts for the Benefit of Third Parties' (1930) 46 LQR 12. Further, the same "fundamental principle" was questioned by Lord Denning (dissenting) in *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446, 483, [1961] 2 Lloyd's Rep 365, 380 as not being so fundamental, but only 'a discovery of the nineteenth century'. The principle, that no person may benefit from a contract to which he is not a party, was modified by the emergence of negligence as an independent tort, as first enunciated in 1932 in *Donoghue v Stevenson* [1932] AC 562 (HL).

[1292] For example, according to Francesco Berlingieri, it has been repeatedly held in Italy, prior to the entry into force of the Visby Protocol, that claimants are not entitled to sue the carrier in tort:
Corte di Cassazione 4 March 1960, no. 407, *Maritime Insurance Company v Lloyd Triestino* (1963) Dir Mar 27;
Court of Appeal of Genoa 14 March 1964, *Perrotta v Carmelo Noli* (1965) Dir Mar 439.

[1293] Francesco Berlingieri, *International Maritime Conventions, Volume I: The Carriage of Goods and Passengers by Sea*, (1st edn, Informa Law from Routledge 2014), para [4.8].

[1294] *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446, [1961] 2 Lloyd's Rep 365.

[1295] *Wilson v Darling Island Stevedoring and Lighterage Co* (1955) 95 CLR 43, [1956] 1 Lloyd's Rep 346.

[1296] *Krawill Machinery Corp and Others v Robert C Herd & Co Inc* 359 US 297 (1959); [1959] AMC 879; [1959] 1 Lloyd's Rep 305, with different reasoning because the absence of a strong privity of contract doctrine in the US meant that the decision did not turn on that issue. But see *Norfolk Southern Rly Co v James N Kirby Pty Ltd*, 125 S Ct 285 (2004).

Or in England if an action was brought against the captain or an officer of the ship on which the goods that had been lost or damaged were carried, he could not avail himself of the protection granted to the carrier. To that effect, it was necessary for an Act of Parliament and that could be achieved by an amendment of the Hague Rules and the consequent amendment of the Carriage of Goods by Sea Act by which the Hague Rules had been implemented.[1297] At the time it had been held that employees of the carrier (the ship's master and the bosun of a passenger line) were liable personally in tort for injuries caused by their negligence.[1298]

Such separate actions might in the end entail a global liability of the carrier in excess of the limit established by The Hague Rules, since the carrier would normally refund his servants or agents the sums paid to the claimants. However, existing insurance practices are based on the assumption that cargo claims are mostly challenged through mandatory conventions like the Hague Rules as well as through one of two international tonnage limitation conventions. To allow claims to circumvent these channels would lead to the imposition of an extra layer of insurance cover which would lead to an increase in shipping costs.[1299]

These results were evaded by the insertion into bills of lading of a special provision – a *Himalaya clause* – extending the protection of the Rules to such parties (Lord Roskill claimed to have been the draftsman) and, in the words of Lord Goff, preventing 'cargo-owners from avoiding the effect of contractual defences available to the carrier by suing in tort persons who perform the contractual services on the carrier's behalf',[1300] or even purporting to confer complete immunity by way of Circular Indemnity Clause.

The question of whether bill of lading terms can protect third parties was raised in a number of cases. A possible ground of the invalidity of a Himalaya clause, especially specific to bills of lading, was illustrated by *The Starsin.*[1301] The goods were damaged while being carried in a chartered ship under a bill of lading constituting a contract between charterer and shipper. The shipowner relied on the wording in Clause 5 which provided for the "servant or agent of the carrier" to be deemed to be a party to the bill of lading contract,[1302] exempting him from "any liability whatsoever to the shipper" for loss resulting from acts

[1297] See elaborative speech of Cyril Miller to the CMI Committee on Bills of Lading Clauses at the CMI Stockholm Conference in June 1963, *Travaux Préparatoires*, 599–601.
Francesco Berlingieri, *International Maritime Conventions Volume I: The Carriage of Goods and Passengers by Sea* (1st edn, Informa Law from Routledge 2014), Chapter 1, para [4.8], Liability in tort of the carrier and liability of the servants and agents of the carrier.
[1298] *Adler v Dickson* [1955] 1 QB 158.
[1299] See an elaborative speech of Lord Steyn in *The Nicholas H* [1995] 2 Lloyd's Rep 299, 314, 315 with reference to Dr Malcolm Clarke, 'Misdelivery and Time Bars' [1990] LMCLQ 314.
[1300] *The Makhutai* (PC) [1996] AC 650, [1996] 2 Lloyd's Rep 1, 9 (Lord Goff).
[1301] *Homburg Houtimport BV v Agrosin Private Ltd and Others, The Starsin* [2003] UKHL 12; [2004] 1 AC 715; [2003] 1 Lloyd's Rep 571.
[1302] This part of the clause was regarded as crucial to the outcome by Lord Hoffmann at para [114] and Lord Hobhouse at para [155] and Lord Millett at para [208], but not by Lord Bingham at para [34].

done. The shipowner argued that was entitled to avail itself of the benefit of the Himalaya clause incorporated in the bill of lading.

The Hague Rules were incorporated in the same bill. After specifying certain obligations of the carrier and making available to him certain exemptions from and limitations of liability, by way of Article III Rule 8 it provided that any clause in the contract 'lessening such liability otherwise than as provided in this convention, shall be null and void'.

In the House of Lords, it was questioned whether Clause 5 was the Himalaya clause as drafted to protect the shipowner against liability towards the owners of the cargo. The Hague Rules apply only to contracts of carriage by sea covered by a bill of lading or similar document and to which the party which seeks relief from liability is a party.[1303] The doubt, therefore, arose 'whether the contract between the cargo owner and the owner or demise charterer of the ship created by the Himalaya clause is a contract for the carriage of goods by sea within the meaning of the Hague Rules',[1304] or it is 'a contract of exemption [limitation] which is ancillary or collateral to other contractual arrangements (the time charter and the bill of lading) which were necessary to achieve the carriage of the goods on the chosen vessel'.[1305]

The next "critical" question is 'whether the exemption [limitation] of the owner or demise charterer of the ship on which the goods were carried (as distinct from a mere stevedore for example) from liability for loss or damage to the goods is contrary to The Hague Rules, to which the bills of lading were expressly made subject'.[1306]

Unanimity was not achieved in answering these questions; the variations of reasoning were quite considerable. The majority of the House had to face the problem as to why the actual carrier is not also subject to the positive liabilities of the Rules as to seaworthiness and care of cargo.

Lord Steyn was of the opinion that it should be permissible to so structure the contracts as to "channel" to the charterers,[1307] concluding that the exemption in the Himalaya clause protected the owner against any liability in tort.

[1303] See Article I(b) and *J Gadsden Pty Ltd v Australian Coastal Shipping Commission* [1977] 1 NWSLR 575.
[1304] *The Starsin* [2003] UKHL 12, para [34] (Lord Bingham), and para [202] (Lord Millett).
[1305] ibid, para [205] (Lord Millett).
[1306] ibid, para [201] (Lord Millett).
[1307] ibid, paras [57] – [62] (Lord Steyn) in consideration of Himalaya clause.

> One cannot, …, construe Article III Rule 8 in isolation, and Article III Rules 1 and 2 of The Rules are relevant … Once one has concluded that the exemption is contained in a contract of carriage that must hold good for all the provisions of The Hague Rules including the obligation to make the ship seaworthy, etc. That would indeed be a curious and implausible result flowing from a contract for an exemption clause. It would mean that the cargo-owners of damaged parcels … would in principle have had contractual remedies not on the bill of lading but on the Himalaya contract. That cannot be right. This factor reinforces the interpretation of Article III Rule 8. I would therefore hold that in The Hague Rules a contract of carriage means an agreement to carry and not an agreement simply for an exemption albeit that the consideration for the promise involves performance by the vessel.[1308]

However, this view was rejected.

Lord Millett, referring to the terms of Article III Rules 1 and 2, submitted that the collateral contract was not a contract of carriage, as 'if a contract entered into for the sole purpose of granting a party exemption from liability had the paradoxical effect of subjecting it to liabilities to which it would not otherwise be subject'.[1309]

The Himalaya clause had the effect of bringing into being a separate or collateral contract between the cargo-owner and a third party, usually an independent contractor such as a stevedore, under which the third party enjoys exemption from liability to the cargo owner. The weight of authorities established that 'the contract is a unilateral or "if" contract by which the third party undertakes no obligation to the cargo-owner of any kind, but the cargo-owner promises that if the third party does anything in the course of its employment that damages the cargo it will have the benefit of the protective provisions of the clause'.[1310]

Lord Millett stated:

> Such a [collateral] contract is a promise for an act, not a promise for a promise. If in the course of its employment the third party performs an act in relation to the goods, which it is under no obligation to the cargo-owner to perform, it will at the one and same time bring the contract with

[1308] ibid, para [60] (Lord Steyn).
[1309] ibid, para [206] (Lord Millett).
[1310] *The New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd, The Eurymedon* [1974] 1 Lloyd's Rep 534; [1975] AC 154, 168 (Lord Wilberforce); reiterated in *The Starsin*, para [168] (Lord Millett).

the cargo-owner into existence and supply the consideration for the cargo-owner's promise of exemption from liability.[1311]

The words "or the ship" in Article III Rule 8 must have been intended to cover the case where the shipowner (or demise charterer) had not entered into a contract of carriage directly.[1312]

Lord Hobhouse and Lord Hoffmann thought that preserving the dual liability of contracting and actual carriers, one in contract and one in tort, but on the terms of the Rules, was the correct objective.[1313] Lord Hobhouse believed that the collateral contract created by the Himalaya clause was itself a contract of carriage (though not for carriage) and hence attracted the Rules, including Article III Rule 8 directly.[1314] His Lordship stated that if the Owners' submissions where correct and they were held to be entitled to exemption of or from any liability whatsoever in respect of the cargo, i.e. to assert 'a total exemption from any legal liability no matter what breaches of sub-bailment they have committed', it would provide the actual performing carrier with a route for evading by means of a bill of lading clause the Hague Rules scheme. This situation 'will put English law at odds with those legal systems which are not based upon privity of contract and where the Hague Rules as amended by later international instruments take direct legal effect as part of their commercial or maritime codes (i.e. do not have to go through a contractual gateway): see for example art. 437 of the German Commercial Code... They run counter to the Hague-Visby Rules, art. IV bis, made part of British law by the Carriage of Goods by Sea Act, 1971 and art. 10 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules).'[1315]

Lord Bingham was apparently of the same view. He concluded that it would seem anomalous to give the actual carrier the benefits of the Himalaya Clause but take no account of Article III Rule 8, which sets limits on them.[1316]

Lord Hoffmann submitted that the collateral contract was not a contract of carriage, but that it extended to the actual carrier the exemptions and limitations of the bill of lading, which included Article III Rule 8 as restricting their effect.[1317] Their Lordships widely referred to the general policy of the Hague Rules, 'which was to provide an acceptable balance in distributing the risks of loss and damage between carrier and cargo-owners' and '[were] intended to preserve the common law remedies which cargo-owners would

[1311] *The Starsin* [2003] UKHL 12, para [197] (Lord Millett).
[1312] ibid, para [212] (Lord Millett).
[1313] ibid, paras [115] & [116] (Lord Hoffmann), and paras [141] & [142] (Lord Hobhouse).
[1314] ibid, para [162] (Lord Hobhouse).
[1315] ibid, para [140] (Lord Hobhouse).
[1316] ibid, para [34] (Lord Bingham).
[1317] ibid, paras [114] and [115] (Lord Hoffmann).

have in English law for loss of or damage to the cargo in the circumstances there specified'.[1318] The preservation of these remedies must also be considered in relation to the procedures available for enforcement under the Supreme Court Act.[1319] Thus there should be the importance of retaining the possibility of arrest of the carrying ship.

Finalising the case, a clear majority (4:1) of their Lordships reached the same conclusion as had been reached by the Court of Appeal, albeit by a different route, that the Hague Rules Article III Rule 8 had the effect of circumscribing the protection which the "hybrid" Himalaya clause sought to extend to the shipowners. The protection was limited to that which was available under the Hague Rules. Although the shipowner was not subject to the positive obligations laid upon the carrier in Article III Rules 1 & 2 of The Hague Rules, it would have been "anomalous" to take no account of Article III Rule 8 while giving the shipowner the benefit of a Himalaya clause. The dual liability was the solution adopted by the Hamburg Rules,[1320] and was found consistent with the apparent intention of the Hague-Visby Rules;[1321] and it appears that the solution is one favoured internationally.[1322]

The Starsin*, an actual carrier and other sub-contractors: the difference*

In all previous cases considered by the courts in the past, the third party was either a stevedore or some person other than the owner or demise charterer of the ship,[1323] or relied on the clause not to claim exemption from liability but merely to claim the benefit of a time limit or jurisdiction clause.[1324] In *The Starsin* the act performed to bring any contract into existence between the shipowner and the cargo-owners was carriage of the goods. And the main question is whether that factual difference in merits of the cases gives rise to a legal difference.

The answer was given by Lord Hobhouse in the following terms:

[1318] ibid, para [115] (Lord Hoffmann).
[1319] ibid, para [115] (Lord Hoffmann).
[1320] The Hamburg Rules, Article I(2), identifying the 'Actual Carrier'
[1321] Especially Article IV_*bis*, which extended the benefits of the Rules to certain third parties.
[1322] *The Starsin* [2003] UKHL 12, para [143] (Lord Hobhouse).
[1323] *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd, The Eurymedon* [1974] 1 Lloyd's Rep 534; [1975] AC 154 (PC); *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon* (*Australia*) *Pty Ltd, The New York Star* [1980] 2 Lloyd's Rep 317; *Sidney Cooke Ltd v Hapag-Lloyd Aktiengesellschaft* [1980] NSWLR 587; *Chapman Marine Pty Ltd v Wilhelmson Lines A/S* [1999] FCA 178.
[1324] *The Mahkutai* [1996] AC 650; *The Pioneer Container* [1994] 1 Lloyd's Rep 593; [1994] 2 AC 324 (PC); *Gadsden v Australian Coastal Shipping Commission* [1977] 1 NSWLR 575

> The stevedore is not a carrier. A stevedoring contract is not a contract of carriage. The "Barwick"[1325] contracts did not include any element of carriage. A fundamental peculiarity of [*The Starsin*] case is that the shipowners were the actual carriers who "enacted" the "Barwick" contract by becoming sub-bailees and performing the carriage of the claimants' cargo. The shipowners have escaped from being the original contracting carriers by relying upon the doctrine of privity of contract and the way in which the bills of lading were signed. They have brought themselves back in as a contracting carrier by relying upon Clause 5 [the Himalaya clause] in the bills of lading and the privity of contract which it expressly creates.[1326]

Lord Steyn stated:

> The decisions in *The Eurymedon* and *The New York Star* were taken in the context of classical English contract law. It is true that this result can now be achieved more simply and directly by a combination of the Carriage of Goods by Sea Act, 1992 and the Contracts (Rights of Third Parties) Act, 1999. Nevertheless, the plain objective of the decisions in *The Eurymedon* and *The New York Star* was to enable businessmen to make sensible and just commercial arrangements, and thereby further international trade. Legal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting. They must be left free to decide on the allocate commercial risks. In my view there can be no good reason to set at naught on an interpretative basis the allocation of risk in the Himalaya clause.[1327]

[1325] The definition is coming from consideration (a dissenting judgement) of Barwick CJ in *Salmond and Spraggon (Australia) v Port Jackson Stevedoring, The New York Star (PC)* [1979] 1 Lloyd's Rep 298, 304–305, 308
[1326] *The Starsin* [2003] UKHL 12, para [154] (Lord Hobhouse).
[1327] ibid, para [57] (Lord Steyn).

Circular Indemnity Clause

Because of the problems which flowed from the application of Himalaya clauses, another solution was found and another type of clause was developed: it contains a promise by the shipper or cargo interests not to sue employees, agents and subcontractors of the carrier and to indemnify against any loss caused to the carrier by actions brought in breach of this promise. Thus, the cargo owner and/or the merchant and/or the cargo interests and/or the person who has a valid title to sue will be eventually caught by his own claim, hence the circular indemnity.[1328]

Such type of clause does not depend on any agency relationship between the carrier and sub-contractors. It avoids all the difficulties to which the agency requirement gives rise in relation to Himalaya clauses. As a matter of construction, the circular indemnity clause must be read together with the definition clause,[1329] which is to be found in the same contract.[1330]

The effect of the circular indemnity clause was upheld in *The Elbe Maru.*[1331] Ackner J ruled that the clause would give 'the carriers an indemnity against the costs properly incurred by them in dealing with any claim which was made following the respondents' hypothetical breach of contract'.[1332] The carrier could apply to the court, under Section 41 of the *Supreme Court of Judicature* (*Consolidation*) *Act* 1925, for a stay of proceedings to prevent the cargo owner from pursuing his claim against the subcontractor.[1333] The judge noted that proof of a fundamental breach on the part of the carrier or of his servant, agent or sub-contractor might, however, overcome the circular indemnity clause.[1334] Whether a financial interest in compliance with the covenant not to sue should be a pre-condition in obtaining a stay was considered in

[1328] The circular indemnity clause may be read as follows:
'Sub-Contracting ... (2) The Merchant undertakes that no claim or allegation shall be made against any servant, agent or subcontractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the Goods and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof'.
[1329] For example, 'Definitions ... 'Merchant' includes the Shipper, Holder, Consignee, the receiver of the Goods, any person owning or entitled to the possession of the Goods or this Bill of Lading and anyone acting on behalf of any such persons …'
[1330] This was the definition clause in *The Elbe Maru*. *A* more modern circular indemnity clause adds a second sentence which is in effect a Himalaya clause: 'Without prejudice to the foregoing, every such servant, agent and sub-contractor shall have the benefit of all provisions herein benefitting the Carrier as if such provisions were expressly for their benefit; and, in entering into this contract, the Carrier, to the extent of those provisions, does so not only on its own behalf but also as agent and trustee for such servants, agents and sub-contractors'.
See *Godina v Patrick Operations* [1984] 1 Lloyd's Rep 333,334 (NSW CA)
[1331] *Nippon Yusen Kaisha v International Import & Export Co Ltd, The Elbe Maru* [1978] 1 Lloyd's Rep 206.
See also *Chapman Marine Pty Limited v Wilhelmsen Lines A/S* 1999 AMC 1221 (Federal Court of Australia).
[1332] *The Elbe Maru* [1978] 1 Lloyd's Rep 206, 210
[1333] ibid, 210.
[1334] ibid, 210.

Snelling v John G Snelling Ltd.[1335] Thus, a circular indemnity clause operates not upon substantive rights of the parties but procedurally.

The circular indemnity clause was also upheld twice in the Supreme Court of New South Wales. In *BHP v Hapag-Lloyd*,[1336] it was held that because of commercial considerations, the cargo owner's contractual undertaking not to make a claim should be enforced.[1337] The carrier, who was the beneficiary of the cargo owner's promise, should be relieved from the risk of 'further protracted and expensive litigation'.[1338] In *Sidney Cooke v Hapag-Lloyd*[1339] it was found that the circular indemnity clause did not contravene Article III Rule 8 of the Hague Rules because 'the carrier to whom had been contracted the sea-leg of a combined transport operation, was not a party to the contract of carriage covered by the bill of lading and therefore not a "carrier" for the purposes of Article III Rule 8'.[1340] At least one other decision has since upheld the circular indemnity clause.[1341]

Professor William Tetley argues that the circular indemnity clause has the same defect as the Himalaya clause – it grants a negative right to a third party. If a claim under the clause related to the period when the Hague or Hague/Visby Rules applied, the clause would be contrary to Article III Rule 8 of the Rules, just as the "both to blame clause" has been held invalid in the United States for attempting to deprive the cargo owner of full recovery from the non-carrying ship by means of a stipulation in a bill of lading.[1342] If the circular indemnity clause is to be valid, it should be much more specific than the clause in *The Elbe Maru* and should refer specifically to "stevedores" and "terminal operators". These latter terms should also have entered into a contract with the carrier obligating the carrier to so protect them.[1343]

The issue has most recently been considered in *The Marielle Bolten*[1344]. Each of the Owners' bills, which were issued in respect of goods carried on a time-charterers ship, contained 'an exclusive English jurisdiction clause" and a Circular Indemnity Clause by which the "merchant" (presumably the shippers) undertook that no claim in connection with the goods 'shall be made against any servant, agent, stevedore

[1335] *Snelling v John G Snelling Ltd* [1973] 1 QB 87.
[1336] *Broken Hill Proprietary Co Ltd v Hapag-Lloyd Aktiengesellschaft* [1980] 2 NSWLR 572.
[1337] ibid, 583.
[1338] ibid, 584.
[1339] *Sidney Cooke Ltd v Hapag-Lloyd Aktiengesellschaft* [1980] 2 NSWLR 587.
[1340] ibid, 595.
[1341] *Godina and Another v Patrick Operations Pty Ltd* [1984] 1 Lloyd's Rep 333 (NSW CA).
[1342] *Esso Belgium* (*USA) v Atlantic Mutual* 343 US 236, 1952 AMC 659; [1952] 1 Lloyd's Rep 520.
[1343] William Tetley, *Marine Cargo Claims* (4th edn, Cowansville, Québec, Les Editions Yvon Blais 2008), 1893
[1344] *Whitesea Shipping & Trading Corp and Another v El Paso Rio Clara Ltda and Others, The Marielle Bolten* [2009] EWHC 2552 (Comm); [2010] 1 Lloyd's Rep 648; [2009] 2 CLC 596 (QB).

or subcontractor of the carrier' and that such persons should 'have the benefit of all provisions herein benefiting the carrier'.[1345] The bills also incorporated the Hague Rules by way of a clause paramount.[1346]

In breach of the exclusive jurisdiction clause of the bills of lading, insurers subrogated to the cargo interests brought proceedings in Brazil against the third parties; and the shipowners in turn brought proceedings in England against those insurers for an injunction to restrain their Brazilian proceedings against the third parties. The shipowners' case was that these proceedings constituted a breach of the covenant not to sue their sub-contractors pursuant to the Circular Indemnity clause in the bills of lading. Thus, the claimants should be entitled to enforce that covenant by injunction.[1347]

The insurer defendants [to the English proceedings] argued that the provision gave rights both to the carriers and to the sub-contractors under the Himalaya provision that appeared later in the Circular Indemnity clause. Once the third party performed "carriage" obligations then, even though the third party is not actually a party to the bill of lading contract, the Himalaya contract is itself a contract of carriage that is subject to the Hague Rules. The effect of entitling either the carrier under the bill of lading contract or the third party to enforce the covenant not to sue in the first part of Clause 3(b) would be to confer blanket immunity upon the third party, which is contrary to Article III Rule 8 of the Hague Rules to which the Himalaya contract is subject. Accordingly, the first part of Clause 3(b) is null and void and of no effect.[1348]

Thus, the defendants' argument heavily relied on the decision of the House of Lords in *The Starsin*. However, Flaux J rejected this argument and distinguished *The Starsin* on the ground that in that case the Himalaya contract was a "contract of carriage" only because the Himalaya clause there expressly provided that the third parties were for the purposes specified in it: 'deemed to be parties to the contract contained in or evidenced by this Bill of Lading';[1349] and there was no similar deeming provision in the Himalaya clause in *The Marielle Bolten*.

In the judge's view, it was important to test the defendant's argument by reference to the functions which the relevant third parties were actually performing: were they of what might be called an administrative

[1345] Pursuant to bill of lading Clause 3 SUBCONTRACTING para (b).
[1346] *The Marielle Bolten* [2009] EWHC 2552 (Comm), para [8] (Flaux J): 'The bills also all contained a clause paramount, by virtue of which the Hague Rules applied in relation to bill 001 and the US Carriage of Goods by Sea Act 1936 (incorporating the Hague Rules) applied in relation to bills 002, 004 and 005, because the carriage was to the United States'.
[1347] ibid, para [22].
[1348] ibid, para [23].
[1349] Clause 5(3) in Lord Bingham's edited version set out in *The Starsin* [2003] UKHL 12, para [20].

or managerial nature or did those services amount to 'the actual carriage of the goods'.[1350] It was found that the services were of the former kind, and this may be regarded as a further ground for the decision that the resulting contract (between one of the parties to the bill of lading contract and the third party) was not a "contract of carriage".

Flaux J concluded by stating:

> Once it is seen that none of the third parties undertook the sea carriage or was in fact the carrier within the meaning of the Hague Rules (unlike the owners in *The Starsin*), the conclusion that the enforcement of the covenant not to sue is not contrary to article III rule 8 is clearly correct.[1351]

Article IV_bis Rule 1 of the Hague-Visby Rules

As seen from the *travaux preparatoires* the original purpose of Article IV_*bis* Rule 1 of the Hague-Visby Rules was simply to make clear that it should not be possible for one who has a cause of action in contract to avoid the terms of the Rules by suing the contractual carrier in tort for loss of or damage to property. In other words, 'the principal object of the rule is to ensure that the cargo interests are in no better position by suing in tort than they would be if suing in contract'.[1352] This refers to the *contracting* carrier, and, for example, may cover an action against a carrier by a goods owner who contracted with a freight forwarder, who in his turn consolidated the goods with other goods and obtained a bill of lading for them.

In *The Starsin* Lord Millett stated:

> the identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. If it is uncertain, there is no contract. Like the nature and amount of the consideration and the intention to create legal relations it is a question of fact and may be established by evidence. Such evidence is admissible even where the contract is in writing, at least so long as it does not contradict its express terms, and possibly even where it does.[1353] But bills of lading are transferable documents of title, and the claimants are

[1350] *The Marielle Bolten* [2010] 1 Lloyd's Rep 648, para [49] (Flaux J).
[1351] ibid, para [52].
[1352] *Compania Portorafti Commerciale SA v Ultramar Panama Inc., The Captain Gregos No 1* [1990] 1 Lloyd's Rep 310; see a clarification in *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [14-099]. See also Anthony Diamond QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 248–253.
[1353] *Young v Schuler* (1883) 11 QBD 651.

holders of the bills by endorsement. Consequently, the evidence must be found within the four corners of the bills themselves.[1354]

The Hague Rules provide a definition of carrier which is explicitly open-ended and not at all exhaustive.[1355] The Hague-Visby Rules contain a minor additional indication of the identity of the carrier by way of Article 4_*bis* Rule 2 which is, however, subject to different construction.[1356] While the Hamburg Rules[1357] and the Multimodal Convention[1358] specifically identify the carrier.

On the other hand, as shown in *The Starsin*, shipowners and charterers are not only bound by contract but share the responsibilities of a carrier under the Hague and Hague/Visby Rules together. And these responsibilities cannot be severally excluded, lessened, or contracted out of using Article III Rule 8, because it would require justification by highly controversial application of agency reasoning and, as proposed by *Carver*, would require a further suggestion for law reform.[1359] For example, such reasoning was rejected in Canada.[1360]

Article IV_bis Rules 2 and 3 of the Hague-Visby Rules

Rules 2 and 3, dealing with the carrier's servants and agents, derived from the proposals made at the CMI Conference at Stockholm of 1963 and were added to the Hague Rules by the Visby Protocol in 1968. Similar to Rule 1, the main purpose was to entitle employees of the carriers to the protections of the Rules and hence to prevent evasion of the Rules by simply suing the person responsible for loss or damage in tort. Rule 2 was intended to apply outside a contractual context even if Rule 1 was not.[1361]

[1354] *The Starsin* [2003] UKHL 12, para [175].

[1355] Article 1(a) provides: 'Carrier includes the owner or the charterer who enters into a contract of carriage with a shipper'. The word "includes" makes it clear that other persons may be the carrier and does not indicate whether those persons must have entered directly into a contract of carriage with the shipper. Nor does the use of the word "or" in the definition of "Carrier" exclude the possibility that both the owner and the charterer are together the carrier.

[1356] Article 4_*bis* Rule 2 in the French language text (equally official with the English text), uses the words 'un préposé du transporteur' for 'a servant or agent of the carrier (such servant or agent not being an independent contractor)', which term could include the charterer when the owner contracts and vice versa.
See A. Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 248–249.

[1357] United Nations Convention on the Carriage of Goods by Sea, signed at Hamburg 31st March 1978, Articles 1(1), 1(2), 10 & 15(1)(c).

[1358] United Nations Convention on International Multimodal Transport of Goods, UNCTAD, signed at Geneva on 24th May 1980, Articles 1(2) & 15.

[1359] See *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), paras [9-300] and [9-301].

[1360] *Jian Sheng Co Ltd v Great Tempo SA, The Trans Aspiration* [1998] AMC 1864, (1998) 225 NR 140;
holding the 'joint venture' concept incompatible with decisions of the Supreme Court of Canada in *Paterson SS Ltd v Aluminium Co of Canada Ltd* [1951] SCR 552; and *Aris SS Co Inc v Associated Metals & Minerals Corp* [1980] 2 SCR 322; see also *Union Carbide Corp v Fednav Ltd, The Hudson Bay* [1998] AMC 429, (1997) 131 FTR 241.

[1361] In spite of a doubt which may be cast by the judgement of Bingham LJ in *The Captain Gregos No 1* [1990] 1 Lloyd's Rep 310 CA, where the narrower interpretation was preferred.

Where the Hague-Visby Rules apply by statute, the servant or agent enjoys a statutory defence under Rule 2. Where the incorporation is merely contractual, it is argued that the doctrine of privity of contract may defeat its intended effect. However, the true effect of Rule 2 is to confer authority on the carrier to make a contract with the bill of lading holder on behalf of his servants or agents, and to involve the operation of The Contracts (Right of Third Parties) Act 1999 Section 6(5).[1362]

When we turn to consider the statutory protection of servants, agents and independent contractors[1363] contained in Article IV *bis*, we may be confronted with certain problems of interpretation. In 1963, the minority of the sub-committee on Bill of Lading Clauses suggested the following: 'a distinction should be drawn between on the one hand the carrier his servants or agents and on the other hand, the independent contractor. The servants and agents should be protected for social reasons and should have the benefits of the Convention whereas in view of the minority, these reasons do not apply to the independent contractor who should thus not have this benefit'.[1364]

The definition of "agents" was the subject of much discussion when the Visby Protocol was drafted. Without any specific exclusion, the word "agent" could at common law be taken in a very broad sense of anyone performing (in this context) carrier's functions, which could even include stevedores. So the English view was that "servant or agent" was a well-known phrase often used in drafting and the best to use.[1365] But in other countries, an "agent" was by definition an independent contractor, which of course caused problems with the eventual exclusion of independent contractors.[1366]

When the independent contractor is sued in tort, The Contract (Rights of Third Parties) Act 1999 entitles a third party to enforce a term in a contract to which it is not a party if the contract expressly provides that it may; or the term purports to confer a benefit on it.[1367] Section 7 of the 1999 Act lists a number of

[1362] This view is supported by *Voyage Charters* (4th edn, Informa Law from Routledge 2014), paras [85.471] and [85.472] and by *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para [9-302].
[1363] For definition of 'servant' and 'independent contractor' see *Pollock on Torts* (12th edn, Stevens & Sons 1923), 79–80, cited in *Performing Right Society v Mitchell and Booker* (1924) 1 KB 762, 766–769 in a well-known passage of McCardie, J: 'A servant is a person subject to the command of his master as to the manner in which he shall do his work … An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand'.
[1364] International Subcommittee on Bill of Lading Clauses, Report of 1963 Conference, page 85.
See also Anthony Diamond, QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 250, fn 70.
[1365] The point was considered by Michael Mustill in his Oslo lecture [at page 709] where he said that 'it seems that in order to give some effect to the sub-Rule, the court will have to depart from the well-recognised meaning of "independent contractor"; but what alternative interpretation will be adopted is very difficult to predict'.
See also Mr Cyril Miller who said at Stockholm that 'we don't quite know what "servant or agent" means, but it has not caused much trouble in the past'.
[1366] Anthony Diamond, QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 249 –252.
[1367] The Contracts (Rights of Third Parties) Act 1999, Section 2(1).

exceptions including under sub-Section 7(4)(a) a contract for the carriage of goods by sea, except that a third party may in reliance on Section 2 avail itself of an exclusion or limitation of liability in such a contract.[1368] It follows that independent contractors may now rely on Section 2 of the 1999 Act[1369] to enforce Himalaya clauses and that the restrictions imposed by the doctrine of privity (e.g. relating to agency) may not now apply.[1370]

There can be situations where an independent contractor acting personally or through an employee may make the person using his services liable in tort because he can be said to be performing agency functions in connection with a contract, rather than simply carrying it out. In this aspect, the ultimate test suggested by Diamond was formulated as follows: 'is the servant or agent one for whom, if acting in the course of his employment, the carrier would incur vicarious liability in tort?'[1371]

The conclusion reached by Michael Mustill:[1372] 'It seems that in order to give some effect to the sub-Rule, the court will have to depart from the well-recognised meaning of "independent contractor"; but what alternative interpretation will be adopted is very difficult to predict'. The French text of the 1968 Protocol does not throw any light on the meaning of the rule either.[1373] In this instance, we may turn back to the previous authorities. Thus, it is well established that, as a general rule of English law, an employer is not liable for the acts of his independent contractors in the same way as he is for the acts of his servants and agents, even though these acts are done in carrying out the work for his benefit under the contract. The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done but retains the control of the actual performance, in this case, the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor.[1374]

[1368] The Contracts (Rights of Third Parties) Act 1999, Section 6(5).
[1369] Where a third party has a right under The Contracts (Rights of Third Parties) Act 1999, Section 1
[1370] Professor Yvonne Baatz, 'Institute of Maritime Law: Marine Cargo Claims Masterclass to RaetsMarine Insurance B.V.', Session 4, Rotterdam, June 2016.
[1371] Anthony Diamond, QC, 'The Hague-Visby Rules' [1978] LMCLQ 225, 250.
[1372] Michael J. Mustill, QC, 'The Carriage of Goods by Sea Act 1971' (the paper is based upon a lecture given before Norwegian Maritime Law Association in Oslo on 18th October, 1971), 709.
[1373] Three words *prepose du transporteur* are in place of the 15 words 'servant or agent of the carrier (such servant or agent not being an independent contractor)'. Actually the evolution of the French text is interesting though ultimately unhelpful. The word '*prepose*' does not correspond at all closely either to '*servant*' or to '*agent*' though it is capable of referring to either. But '*prepose*' does convey a good deal of the same meaning as a whole phrase consisting of 15 words to be found in the English text. There is a doubt whether the slightly different shade of meaning throws any real light on the meaning of the English text.
[1374] *Honeywell and Stein v Larkin* (1934) 1 KB 191, 196 (Slesser LJ).

Scrutton[1375] argues that it is believed that the intention of wording 'such servant or agent not being an independent contractor' was to exclude from the protection of the Rules persons such as stevedores and to preserve the effect of *Midland Silicones v Scruttons*[1376]. *Voyage Charters*[1377] similarly argues that the intention of Article IV_bis rule 2 was to reverse, for the purposes of the carriage of goods by sea governed by the Hague-Visby Rules, the practical effect of two important English decisions: *Adler v Dickson*[1378] and *Midland Silicones v Scruttons*[1379], as the common law had undergone a considerable way to solving the "third party" problem by use of Himalaya clause.[1380]

[1375] *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [14-100].
[1376] *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 (HL); [1961] 2 Lloyd Rep 365.
[1377] *Voyage Charters* (4th edn, Informa Law from Routledge 2014), para [85.471].
[1378] *Adler v Dickson* [1955] 1 QB 158.
[1379] *Midland Silicones v Scruttons* [1962] AC 446.
[1380] See elaborative speech of Lord Reid in *Midland Silicones v Scruttons* [1962] AC 446.

Chapter 10: Incorporation of The InterClub Agreement and The Hague / Hague-Visby Rules

The Inter-Club NYPE Agreement: evolution and the main issues

Liability for cargo operations is not always clearly allocated by the express terms of the contract, which may appear to be not exhaustive of the question of how cargo claims are to be apportioned. This particular problem arises in time charterparty context where the charterers are 'to load, stow, trim and discharge the cargo under the supervision of the master'. It was held that where the words "and responsibility" are added after the word "supervision", it shall be construed as 'effecting a *prima facie* transfer of liability for bad stowage to the owners but that if it could be shown in any particular case that the charterers by, for example, giving some instructions in the course of the stowage had caused the relevant loss or damage the owners would be able to escape liability to that extent'.[1381]

Thus although the wording of Clause 8 largely facilitated owners and charterers to avoid disputes as to formal responsibility, it has still been necessary to obtain some evidence to ensure that there was no intervention by either party to shift responsibilities back, leaving the owners with no, or reduced, liability in circumstances where they would have been liable under the Hague Rules regime.[1382]

The Inter-Club Agreement was developed in 1946 as a memorandum of agreement between the various P&I Clubs as to apportionment of liability for cargo claims and disputes arising under the New York Produce Exchange Agreement. The Agreement of 1970 was formulated exactly in response to problems in the interpretation of the wording of Clause 8 of the NYPE charter,[1383] in order 'to make the terms of an agreement between clubs applicable directly between charterer and owner',[1384] but it was neither designed nor drafted to govern contractual relationships between shipowners and time charterers.[1385] It was designed to establish financial as opposed to moral responsibility by using 'a more or less mechanical apportionment of financial liability which is wholly independent of [the] standards of obligation'.[1386] The Agreement was based upon an arithmetical formula supposing to achieve a 'rough and ready

[1381] *AB Marinetrans v Comet Shipping Co Ltd, The Shinjitsu Maru No 5* [1985] 1 Lloyd's Rep 568, 575; see also the decisions in *MSC v Alianca Bay Shipping Co Ltd, The Argonaut* [1985] 2 Lloyd's Rep 216; and *Alexandros Shipping Co of Piraeus v MSC of Geneva, The Alexandros P* [1986] 1 Lloyd's Rep 421.
[1382] See *Time Charters* (7th edn, Informa Law from Routledge 2014), para [20.51].
[1383] See, for example, *The Strathnewton* [1982] 2 Lloyd's Rep 296, 298 (Goff J): 'The agreement relates specifically to the New York Produce Exchange form of charter, and obviously arose from the fact that the clubs found themselves repeatedly facing certain arguments arising out of the provisions of cl. 8 of that charter'.
[1384] *Nippon Yusen Kaisha v Pacifica Navegacion SA, The Ion* [1980] 2 Lloyd's Rep 245, 248 (Mocatta J).
[1385] *Time Charters* (7th edn, Informa Law from Routledge 2014), para [20.47].
[1386] *The Strathnewton* [1983] 1 Lloyd's Rep 219, 225 (Kerr LJ).

apportionment of financial liability as between owners and charterers …'[1387] with avoidance of protracted and expensive litigation.

In *The Hawk*,[1388] the court had to consider the terms of the 1970 Agreement, which did not contain the express requirement that bills of lading must be authorised under the charterparty. Judge Diamond QC found that there was 'an apparent lacuna' in Clause 1(i)[1389] in that it did not clearly identify the category of bills of lading which had been qualified for apportionment of cargo claims other than bills of lading which incorporated The Hague or Hague-Visby Rules.[1390] To fill this lacuna, Judge Diamond QC felt it necessary to imply a term in Clause 1(i) that *the bills of lading must be authorised under the charterparty*. However, it was necessary to apply such a term 'broadly and flexibly so as to give effect to the commercial purpose of the Inter-Club Agreement and so as not to reduce its effectiveness'. [1391]

Although the 1984 revised version made a few changes to the original Agreement, both the 1970 and 1984 Agreements were arrangements between the clubs themselves and not between owners and charterers, and the cargo claims that are advanced must be claims under the bill of lading and not claims based upon some other liability.[1392]

By the time of the drafting of the 1996 Agreement, a number of issues that the ICA had meant to resolve were decided by the courts and the Agreement itself spawned its own disputes.[1393] However, the 1996 version did remove some of the doubts that had arisen under the 1984 version and became more concise and simpler in its terms. This version covers cargo claims pursued under any authorised contract of carriage, including waybills and voyage charters,[1394] provided that their terms are no less favourable than those contained in the Hague and the Hague-Visby Rules, or the Hamburg Rules,[1395] where compulsorily applicable.[1396]

[1387] ibid, 223 (Kerr LJ).
[1388] *Oceanfocus Shipping Ltd v Hyundai Merchant Marine Co Ltd, The Hawk* [1999] 1 Lloyd's Rep 176.
[1389] The Inter-Club Agreement provided, inter alia for clause 1(i): 'It shall be a condition precedent to settlement under the Agreement that the cargo claim … shall have been property settled or compromised … under a bill of lading'.
[1390] *The Hawk* [1999] 1 Lloyd's Rep 176, 184 (Judge Diamond QC).
[1391] ibid, 185 (Judge Diamond QC). The judge found himself in agreement with three essential elements of the decision of Mr Hobhouse J in *A/S Iverans Rederei v KG MS Holstencruiser Seeschiffahrtsgesellschaft mbH & Co and Others, The Holstencruiser* [1992] 2 Lloyd's Rep 378.
[1392] See explanations, for example, in *The Holstencruiser* [1992] 2 Lloyd's Rep 378, 384 (Hobhouse J).
[1393] Steven J. Hazelwood, David Semark, *P&I Clubs Law and Practice* (4th edn, Informa Law from Routledge 2010), para [15.4].
[1394] The ICA 1996, Clause 4(a).
[1395] The ICA 1996, Clause 4(a)(iv).
[1396] *P&I Clubs Law and Practice* (4th edn, Informa Law from Routledge 2010), para [15.58].

But at least, it became clear that where the NYPE was unamended, the charterer was responsible for physical damage to the cargo by bad stowage unless there was proof that the master intervened in the method of stowage or it was caused by something under the control of the master or owners.[1397]

In *The Elpa*,[1398] a shipment of cotton had been damaged by fire. Having settled the claim with cargo interests, the owners sought an indemnity from the charterers, who argued that the subject claim arose out of unseaworthiness, thus, to be apportioned 100% for the owners' account under the ICA.[1399] The owners, in their turn, argued that the ICA did not operate to deprive them of a claim because the bills of lading signed by the captain were ante-dated and not claused in accordance with mate's receipts. If the bills were not regular or properly issued under that charter, then the charterers could not establish a necessary pre-condition for the operation of the ICA, and as such would not apply to defeat their claim. The dispute was referred to arbitration and the tribunal held that the ante-dating and issuance of clean and not claused bills had no bearing on the particular cargo claims, and the claims fell to be apportioned as per the ICA.

The owners appealed, contending that the arbitrators had erred in law in that it was a condition precedent to the applicability of the ICA that all relevant bills of lading should have been bills authorised by the charter-party. An ante-dated bill was by definition not authorised, since it was potentially a fraudulent document and, on this basis, the cargo had not been carried under a bill of lading to which the ICA applied and the charterers had failed to establish the necessary pre-condition for the operation of the ICA. The arbitrators had also ignored the facts which showed that the bills had not been properly issued. The charterers, in their turn, argued that the ICA was not rendered inapplicable by an irregularity in the bills of lading which had no bearing on the cargo claim.

Finding for the charterers, Morison J stated:

> Absent authority, I would take the following approach. The charter determines the rights and obligations of the parties *inter se*. The ICA is dealing with what should happen to third party claims successfully made against one or other of them. The ICA applies only to cargo claims which have been brought under bills of lading which contain the Hague-Visby Rules governing the carriage. If the goods were never shipped so that the bills never applied to the cargo then the

[1397] See *Canadian Transport v Court Line* (1940) 67 Ll L Rep 216 (HL); *Government of Ceylon v Chandris, The Agios Vlasios* [1965] 2 Lloyd's Rep 204, 213 (Mocatta J); *CHZ 'Rolimpex' v Eftavrysses Compania Naviera, The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586, 589, 591 (Steyn J). See also the later decision in *The Imvros* [1999] 1 Lloyd's Rep 848.
[1398] *Transpacific Discovery SA v Cargill International SA, The Elpa* [2001] 2 Lloyd's Rep 596.
[1399] The charter-party by Clause 59 provided that cargo claims were to be apportioned in accordance with the latest edition of the New York Produce Exchange Inter-Club Agreement.

> claim would be outwith [outside] the ICA. If the goods were shipped but the bills were not issued in accordance with the charter, provided the cargo claim was not affected, that is provided the claim was still a claim under the bill and subject to the regime of the rules, then the ICA applies. *The ICA only ceases to apply if the cargo claim is not made under the bill [for any reason] or alternatively, for any reason, the protections and limits in the rules are lost*. There is no need to search for any implied term. The ICA operates as it stands: there must be a cargo claim under the bill and the bill must contain the Hague-Visby Rules or their equivalent.[1400]

The judge concluded that 'once it was established that the cargo claims were based upon bills of lading which incorporated the necessary limitations then that would be sufficient to cross the threshold into the application of the ICA'.[1401]

The Elpa, therefore, became an authority for the view that the Inter-Club Agreement will apply in practically all circumstances, provided only that the bill of lading, under which the cargo claim is made is subject to the Hague/Hague-Visby Rules or an equivalent regime – even if it does not conform to the terms of the charterparty.[1402]

Clearly where a bill of lading is issued that is manifestly unauthorised, such as for cargo which is never loaded, apportionment under the Agreement would not be available.[1403] Where, however, the discrepancy is such as to render the bill of lading technically unauthorised in a manner which may be regarded as "*de minimis"* and which has no causal effect whatsoever upon the loss or the cargo claim, there is no reason why an apportionment under the Agreement should not proceed. Should a charterer sign a bill of lading which is unauthorised under the charter and the owner suffers loss or liability thereby the owner is, in any event, entitled to an indemnity under the charter.[1404]

Clause 2, which does not appear in the 1984 Agreement, is an overriding provision in the 1996 version. It contains a general statement (and a specific statement concerning a time bar) with a clear emphasis that the terms of the Agreement 'shall apply notwithstanding any provision of the charterparty or rule of law to the contrary'. This means that, where the parties have incorporated the Agreement, cargo claims for which it provides an apportionment must be dealt with between owners and charterers on that basis and not under whatever charter provisions would otherwise have governed. However, *Time Charters* argue

[1400] *The Elpa* [2001] 2 Lloyd's Rep 596, 600 (Morison J).
[1401] ibid, 601 (Morison J).
[1402] *P&I Clubs Law and Practice* (4th edn, Informa Law from Routledge 2010), para [15.56].
[1403] *Cf* Clause 8(c), where claims for shortage are specifically referred to.
[1404] *P&I Clubs Law and Practice* (4th edn, Informa Law from Routledge 2010), para [15.57].

that Clause 2 cannot override an express provision in the contract which is specifically drafted to vary the terms of the Agreement as they are to apply under a particular charter.[1405]

The ICA 1996 was further extended to claims for delay and claims arising out of negligent navigation or management and covered a residual category of "all other cargo claims whatsoever".[1406]

The Position under the ICA when the Rules are not incorporated in the Contract

In *The Benlawers,*[1407] there was an appeal from an arbitration award, where the owners of the vessel claimed against the time charterers under a contract of time charter,[1408] which provided, *inter alia*, the ICA,[1409] indemnity clause,[1410] and Clause 8 that 'the charterers were to load, stow, trim and discharge the cargo at their expense under the supervision and responsibility of the captain …' On the second-round voyage, the vessel loaded a part cargo of onions from Chile to the UK. The owners' bills of lading incorporated the Hague Rules, but the charter did not. On discharge, the surveyor reported that various stows showed considerable evidence of sprouting and several onions subsequent to discharge were of wasted and soft condition. As later found by the Tribunal, the true cause of damage was that the vessel was not fitted with a ventilation system that could supply adequate ventilation for safe carriage of the cargo on the voyage in question.

The owners settled the receivers' claim and sought to recover that sum from the charterers by way of a claim for an indemnity. The arbitrators did not uphold the owners' position and the owners further appealed to the Commercial Court contending that they did have such an express right given to them by the indemnity clause and were entitled either to full or 50 percent compensation under the ICA.

In making the decision Hobhouse J widely considered *The Strathnewton*[1411] case, where the charter-party itself incorporated the Hague Rules [in contrast with this case] and the essence of that decision was that the ICA had provided its own code that was independent of the incorporation of the Hague Rules into the charter-party.

[1405] *Time Charters* (7th edn, Informa Law from Routledge 2014), para [20.54].
[1406] The ICA 1996, Clause 8.
[1407] *Ben Line Steamers Ltd v Pacific Steam Navigation Co, The Benlawers* [1989] 2 Lloyd's Rep 51.
[1408] Based on The New York Produce Exchange 1946 form.
[1409] Clause 47: 'Cargo claims under this Charter Party to be settled between Owners and Charterers under the inter club New York Produce Exchange Agreement'.
[1410] Clause 48: '… the Charterer agrees to indemnify the Owners in respect of any cargo claims which under the terms of this Charter Party are the liability of the Charterer'.
[1411] *The Strathnewton* [1983] 1 Lloyd's Rep 219.

The judge found that pursuant to Clause 42,[1412] the scheme of the contract between the parties was that the bills of lading issued under the charter should be subject to the Hague Rules. Pursuant to Clause 48, if the Owners' bills of lading were issued there was a *prima facie* right of indemnity against the Charterers, but that right of indemnity was not in contradiction of the other charter-party terms. The cargo claims were expressly provided to be settled and borne by the parties in accordance with the provisions of the ICA.[1413]

Hobhouse J accepted the various findings of fact that had been made by the arbitrators,[1414] and upheld that the Owners must bear 100% of financial loss for damage to the cargo of onions. It was stated that if the Owners wished to have a different result, they should have limited the cargoes that could be carried under the charter-party and should have made a special provision excluding such cargoes. The parties had freedom of contract and could agree to what terms they wished. [1415]

The position under the ICA when the Rules are incorporated in the Contract

Where provisions of the ICA coexist in the same charter with a clause paramount, the clauses of the Agreement will prevail over the Articles of the Rules. Thus, for example, the one-year time limit on cargo claims by charterers against owners, to which a charter on the NYPE form is normally subject as a result of the incorporation of the Rules,[1416] does not apply to claims dealt with by the ICA under a charter into which that Agreement has been incorporated.

In *The Strathnewton,*[1417] the owners let their vessel to the charterers for a time charter trip. The contract was based on the NYPE form and provided, *inter alia*, Clause 24, which incorporated the USA Clause Paramount, and Clause 55, which incorporated the ICA, setting out how cargo claims were to be apportioned as between owners and charterers. During performance of the charter, part of the cargo was

[1412] The incorporation of the Hague Rules into the charter-party has been deleted and there is instead Clause 42, which read as follows: 'Each Bill of Lading issued hereunder shall contain or be deemed to contain the following clause …'
It then set out a Hague Rules clause paramount with provision also for The Hague-Visby Rules. Then it went on: 'Charterers warrant that all Bills of Lading issued under this Charter Party will not be on less favourable terms and conditions than Hague Rules'.
[1413] *The Benlawers* [1989] 2 Lloyd's Rep 51, 57.
[1414] ibid, 59 col 1 (Hobhouse J): '…In other words, at common law, the vessel was not fit by her structure and condition safely to undertake a voyage from Valparaiso to Avonmouth with a cargo of onions; she was in fact uncargoworthy for the purpose of the performance of the voyage in question'.
[1415] ibid, 61 col 1.
[1416] See, for example, *The Agios Lazaros* [1976] 2 Lloyd's Rep 47.
[1417] *D/S A/S Idaho v Peninsular and Oriental Steam Navigation Co, The Strathnewton* [1982] 2 Lloyd's Rep 296 (HC); [1983] 1 Lloyd's Rep 219 (CA).

‘lost, damaged, short delivered and/or overcarried as a result of act, neglect or defaults of the servants or agents of the owners’.

The charterers had properly settled claims brought by the holders of the bills of lading in respect of the loss or damage to the discharged cargo and further claimed to be entitled to an indemnity of 100% or 50% of each item of these expenses. However, they failed to bring any suit against the owners within one year of the delivery. Thus, the owners alleged that the charterers’ claims were time-barred by Section 3(6) of the US COGSA 1936. The dispute was referred to arbitration and the arbitrator stated a consultative case the question being whether the charterers’ claims were so time-barred.[1418]

At first instance, it was found that ‘the Inter-Club Agreement presupposed a claim of a certain kind under the charter’. If the specified criteria had been complied with, such a claim was to be settled in the manner provided in the Agreement.[1419] It was further held that the ICA ‘provided an agreed mode of settlement in certain specified circumstances of certain claims under the charter whether by the owners against the charterers or by the charterers against the owners; it could not fairly be described as an independent code’.[1420]

On appeal by the Charterers, the main issue was whether any part of the Hague Rules and in particular the time bar under Article III Rule 6, has any relevance to the settlement of cargo claims under the Inter-Club Agreement.[1421] The Court of Appeal held that:

> (1) in relation to the claims under the bills of lading issued under the charter, which did not incorporate the Inter-Club Agreement, all cargo claims had to be dealt with by reference to the responsibilities and defences laid down in the Hague Rules;[1422]
>
> (2) there was no connection intended by the parties between a settlement under the Inter-Club Agreement … and the Hague Rules; the agreement cut right across any allocation of functions and responsibilities based on the Hague Rules and it was common ground that [the ICA] prevailed notwithstanding Article III Rule 8 of the Hague Rules which invalidated any agreement which relieved the carrier to any extent ‘from liability for loss or damage to or in connection with the goods’;[1423]

[1418] *The Strathnewton* [1982] 2 Lloyd's Rep 296, 296.
[1419] ibid 300, col 2 (Goff J).
[1420] ibid 301, col 2 (Goff J).
[1421] *The Strathnewton* [1983] 1 Lloyd’s Rep 219, 222, col 2 (Kerr LJ).
[1422] ibid, 223, cols 1–2.
[1423] ibid 225, col 2.

(3) Article III Rule 6 of the Hague Rules was formulated in order to give certain protections to carriers by sea when the standard of their obligation in relation to cargo was that which was prescribed by the Hague Rules as a whole; the Inter-Club Agreement however, provided a more or less mechanical apportionment of financial liability which was wholly independent of these standards of obligations; in these circumstances Article III Rule 6 had no application in a settlement between owners and charterers under the Inter-Club Agreement;[1424]

(4) the condition precedent for the application of that agreement was that the bill of lading holders' claims 'shall have been properly settled or compromised';[1425] it contained no reference whatever to 'the delivery of the goods or the date when the goods should have been delivered' and this was conclusive against the owners' contentions;[1426]

(5) the submission by the owners that interposed between claims by the bill of lading holders against the owners or charterers and a consequential claim under the Inter-Club Agreement pursuant to Clause 55, an actual or notional claim based on the terms of the charter and the incorporation within it of The Hague Rules had to be envisaged, would be rejected; there was no such basis for it; the word "settled" in [the ICA] merely meant "paid" or "dealt with" or "disposed of" and there was no intermediate stage to which the provisions of the Hague Rules or of the charter had any application;[1427]

(6) there was no justification for the application of the time bar in Article III Rule 6 of The Hague Rules.[1428]

In giving the judgment, Kerr LJ extensively considered the effect of Clause 8 and the allocation of functions of loading, stowing, trimming and discharging when the Rules are incorporated in the time charter. He stated:

> … the incorporation of the Hague Rules into the charter by a Clause Paramount does not solve the problems of Clause 8, because it is settled law that even when the rules are obligatorily applicable – as they generally are in relation to bills of lading – they do not preclude the parties

[1424] ibid 225, col 2, 226 col 1.
[1425] For interpretation of this wording see *The Benlawers* [1989] 2 Lloyd's Rep 51, 62 col 2 (Hobhouse J): '… The mere way the case is presented by the cargo-owner may provide no answer: the case may be settled without any adjudication; the claim may be put forward on some mistaken basis which the owners and charterers know to be mistaken but which the cargo-owner does not. So there are many situations where the test sought to be applied by owners before me would simply not be capable of application or would only be capable of application on a basis that is manifestly inappropriate. I suppose that is why the word "proper" has been introduced into the way that proposition has been advanced by owners before me. Once you start introducing a word such as "proper", then of course you have to look at the evidence to see what the true cause of the loss or damage was'.
[1426] *The Strathnewton* [1983] 1 Lloyd's Rep 219, 226, col 1.
[1427] ibid, 227 col 2, 228 col 1.
[1428] ibid, 228 col 1 & 2.

> from agreeing that some of the functions mentioned in Article III (2) are to be transferred to the shipper or receiver of the cargo, and that the carrier will in that event not be responsible for their proper performance.[1429]

To that extent, it was submitted that Article III Rule 8 of the Rules presented no impediment, *as the same Rules were incorporated by agreement and not by incorporation of law*. The agreed apportionment has nothing to do with the Hague Rules and is in fact designed to overcome many of the difficulties that would result from their application.

The fundamental difference between the judgment (in *The Strathnewton*) at first instance and at the Court of Appeal was that 'the Judge at first instance had held that before the indemnity could be invoked there had to be established a right of indemnity under the charter-party in general and then the Inter-Club Agreement was to be applied; whereas the Court of Appeal said no, the Inter-Club Agreement had its own code for dealing with the apportionment and the bearing of cargo claims as between the charterer and the shipowners'.[1430]

Clause 6 of the ICA 1996 provides for a clearer time bar than that under the 1984 Agreement; thus, written notification of the cargo claim must be given 'to the other party to the charterparty within 24 months of the date of delivery of the cargo or the date the cargo should have been delivered', except where the Hamburg Rules ("or any national legislation giving effect thereto") apply where the period shall be 36 months to take account of the two-year time bar for claims under those Rules'. In effect, the time bar under the Agreement seeks to be one year after the underlying cargo claim should expire. The time starts running upon "delivery" as opposed to "discharge", and this presumably means delivery in accordance with the contract of carriage, which could mean at a time considerably later than discharge, particularly where the contract is a through transport or combined transport bill of lading for delivery at a distant inland destination. The old phrase "or as soon as possible" has been omitted and so any conflict between the stated time or as soon as possible has been removed. It is also provided that such notice shall, if possible, include details of the contract of carriage, nature of the claim and the amount claimed.[1431]

The decision delivered by Teare J in *The Genius Star 1*[1432] confirmed that where there are multiple and conflicting time bar provisions in a charterparty, the ICA two-year time bar limitation will prevail. A

[1429] ibid, 222 (Kerr LJ), with further reference to *Pyrene v Scindia* and *Renton v Palmyra*.
[1430] *The Benlawers* [1989] 2 Lloyd's Rep 51, 56 (Hobhouse J).
[1431] *P&I Clubs Law and Practice* (4th edn, Informa Law from Routledge 2010), para 15.66.
[1432] *MH Progress Lines SA v Orient Shipping Rotterdam BV, The Genius Star 1* [2012] 1 Lloyd's Rep 222; [2011] EWHC 3083 (Comm).

dispute arose as to whether or not the one-year time limit in Clause 39[1433] of the head charter applied to cargo claims which were to be settled and apportioned in accordance with the ICA 1996.

While the judge agreed with the owners' submission that a specific arbitration clause in the NYPE_1946 amended form was 'a "stand-alone" clause dealing with the application of English law and arbitration and, as an integral part of the arbitration process, the time limit for bringing claims by way of arbitration', he did not accept the argument that 'whereas the time bar in Article III Rule 6 does not apply to claims under ICA 96 the time bar in clause 39 does apply to such claims'.[1434] Teare J put a strong emphasis on the provision in Clause 2 of the ICA 1996 that 'the terms of this Agreement shall apply notwithstanding anything to the contrary in any other provision of the charterparty'. In the judge's view, 'a reasonable man having the background knowledge reasonably available to the parties' would read this wording as prevailing over the time bar in an amended CENTROCON Arbitration Clause.

Conclusion, from a practical aspect:

- The ICA terms 'cut across the liabilities and defences set out in the other terms of the charterparty'. This includes time bars and even the Hague Rules when incorporated into the charterparty;

- Clause 6 of the ICA 1996 requires written notification of the claim within 24 months of the date of delivery (36 months for Hamburg Rules), yet not the commencement of legal proceedings. The purpose of this clause is to grant the claiming party a further year to notify their intention to seek apportionment;

- Clause 2 of the ICA 1996, however, nullifies any time bar which is contrary to the provision of Clause 6; the ICA notification period is therefore an additional requirement to any contractual or statutory time bar. If the contractual time bar is, for example, one year, it would be struck down (by Clause 2) as being contrary to the ICA notification period (in Clause 6). However, if a contractual time bar is of 4 years then this period could lead to a workable construction of the two provisions for not being mutually exclusive;

- The contractually stipulated one-year time bar shall be dismissed and the absence shall be filled by the statutory six-year bar;[1435] the practical consequences of the ruling in *The Genius Star* is that the claiming party, having made a notification within the 24 months allowed by Clause 6, would then have a further four years to commence proceedings in accordance with the six-year statutory limitation period;

[1433] Clause 39 contained a London arbitration clause, and also provided: "Any claim must be made in writing and the claimant's arbitrator appointed within 12 months of final discharge and where this provision is not complied with the claim shall be deemed to be waived absolutely barred.
[1434] *The Genius Star 1* [2012] 1 Lloyd's Rep 222, para [39].
[1435] The effect of *MH Progress Lines SA v Orient Shipping Rotterdam BV, The Genius Star 1* [2011] EWHC 3083 (Comm).

- The burden of proof that the claim is within the scope of the Agreement is generally upon whichever of the parties brings a claim to contribution under the Agreement.[1436]

As submitted by the P&I Clubs, the overall ICA regime makes sense on a commercial level.
On the other hand, the ICA does not cover all claims in respect of loss of or damage to cargo which might be put forward by charterers against owners under a charter-party in the NYPE form. For example, it would not apply to claims by the charterers when they are the owners of the cargo; it would not apply to claims by the shipowners against the charterers for the shipment of a dangerous cargo under Article IV Rule 6; or to claims by the charterers as bailees;[1437] or possibly to claims for a breach of the shipowners' obligation under Article III Rule 2 'properly and carefully to … carry, keep, care for … the goods', e.g., by failing to pump the bilges during the voyage, which might damage the cargo without endangering the safety of the ship.

Similarly, the ICA does not cover the apportionment of non-cargo claims in fact arising out of error or fault in navigation, as for example, in *The Flinterstar* (see Abstract).[1438] On the other hand, the Owners were able to avail themselves of defence in Article IV Rule 2(a), and the charterers were barred to recover their part of costs for the removal of the wreck of the sunk vessel which were ordered by the Court of Appeal of Ghent. There was no room for arguing in that case that Article III Rule 8 relieved the Owners or the ship from liability for loss or damage to, or in connection with goods arising from negligence, fault, or failure in the duties and their obligations. In that instance the ICA did not solve insurance problems and made no sense on a commercial level.

[1436] *P&I Clubs Law and Practice* (4th edn, Informa Law from Routledge 2010), para [15.33].
[1437] Such as claims against third parties, which were upheld in *The Oakhampton* [1913] P 173.
[1438] See also *P&I Clubs Law and Practice* (4th edn, Informa Law from Routledge 2010), para [15.69] in regards to an error of navigation exemption.

Conclusion

The End of the Story but Not the End of Litigation

On 22nd February 2016, The Court of Appeal of Ghent confirmed the initial decision of the President of the Commercial Court of Bruges to proceed with removal of the wrecked vessel 'FLINTERSTAR,' even though the owners of the vessel had established a limitation fund. The Owners and the charterers were obliged to make a contract in two and a half months with a competent salvage company for the removal of the wreck under a penalty of EUR 300,000 per day.

The Court of Appeal stated that the obligation under Article 13 of the *Wrakkenwet* — that is, the obligation for the owners to remove the wreck — was entirely separate from the possibility of the owners limiting their liability under Article 18 and also Article 14, which allowed public authorities to proceed themselves with the removal. These articles were arguably not connected.[1439]
Thus, the main question was whether the right to limit (Article 18) took priority over the duty to raise the wreck (Article 13).

In January 2017, the Belgian Court of Cassation reversed the decision of the lower Courts. This was curious because this decision conflicted with the ruling in the recent case known *The Luxembourg* river barge, which had almost identical facts. In *The Flinterstar,* the highest court held that the decision by the Ghent Court of Appeal had violated Article 18 of the *Wrakkenwet,* as it did not allow an Owner, obliged to remove a wrecked vessel, to limit his liability according to the scale provided for in the statute.

However, at no point in three instances of the courts, the question arose if the time charterers fell outside the definition of "Owners" (as a matter of Belgian law). Their liability for wreck removal was not interrupted.

On 31st August 2016, the last part of what was called m/v 'FLINTERSTAR' was lifted from the seabed off the Belgian coast. On 15th September 2016, surveillance with the government vessel was completed. No debris was found on the seabed. At the same time, the court proceedings are still on-going and the time charters of m/v FLINTERSTAR' are still involved in the dispute as one of the legal owners of the vessel.

[1439] See elaborative discussion in Baris Soyer, Andrew Tettenborn, *Maritime Liabilities in a Global and Regional Context* (1st edn, Informa Law from Routledge 2018), para 11.2.9.

Unification of Law Applicable to Carriage of Goods by Sea. Why is it Necessary?

In an address to the University of Turin in 1860, the jurist Mancini stated: "The sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of judicial regime."[1440] Those involved in the world of maritime trade need to know that wherever they trade the applicable law will, by and large, be the same. Such uniformity is achieved by means of international conventions or other forms of agreements negotiated between governments and enforced domestically by these governments.[1441]

The main problem is that the conventions are drafted as multi-cultural compromises between different schemes of law, normally having less merit and lacking coherence and consistency than most of the individual legal systems from which they have been derived. They introduce uncertainty where no uncertainty existed before. As Hobhouse stated, 'uniformity is a utopian not a practical concept in a world composed of independent states with widely differing legal traditions and institutions'. The courts of each country approach the resolution of any dispute from a viewpoint of its legal and commercial culture. The divergent influences are far stronger than the influence of any convention.[1442]

Obstacles to uniform interpretation of international treaties are discussed in Chapter 1 of this thesis. Knowledge of decisions in other jurisdictions are inevitably limited and unreliable and may not be taken into consideration by the local courts.

The pursuit of uniformity is simply too broad and ambitious and lacking in any unifying discipline. As the IMO Assembly directed, conventions and the other instruments designed to harmonize international maritime law should only be produced where a compelling need is established.[1443] It is necessary to determine whether time and effort should be devoted to a particular project, as the area of law covered by the instrument may be not suitable for harmonization.[1444]

[1440] Quoted in Albert Lilar & Carlo van den Bosch, Le Comite Maritime International, 1897–1972.
[1441] Patrick J S Griggs, 'Obstacles to Uniformity of Maritime Law the Nicholas J. Healy Lecture' (2003) 34 J Mar L & Com 191, 192–193.
[1442] John Stewart Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) 106 LQR 530, 533.
[1443] IMO Resolutions A.500(xii) and A.777(18).
[1444] See, for example, John Stewart Hobhouse, 'International Conventions and Commercial Law: The Pursuit of Uniformity' (1990) LQR 530, 535: 'Only conventions which demonstrably satisfy the well proven needs of the commercial community should be ratified and legislation should only be agreed to if is demonstrably fit to be enacted as part of the municipal law of this country'.

Moreover, the longer and more complex a document the less likely it is that national goverments will embrace it. Complex documents create endless opportunities for arguments about interpretation.

While the only instrument of harmonization is a convention, however, there are also such kind of instruments as model laws, codes, rules and guidelines, which may be more appropriate than a convention for harmonization of law. But the problem with these instruments is that they are unenforceable and may be ignored by the shipowners and flag states.

The national laws applicable to carriage of goods by sea are not unified to any extent. There is no doubt that governments find it difficult to convert an international convention into accessible piece of domestic legislation. Some States implement the convention *en bloc*, whilst others may pick only those parts of which they approve and amend their existing legislation to reflect the terms of the convention.

Contractual adoptions of charter parties and bills of lading, if not considered in the light of all relevant national laws, may result in unexpected and unfavorable consequences, especially to the third parties. In protecting their interests, the Courts of one country may adopt wholly different approaches from the Courts of another country,[1445] so similar terms and clauses may be construed differently under the different national laws.

In 1893, the first attempt was made to reach unification by way of mandatory legislation — the US Harter Act, which provided an important step in the development of the law of maritime carriage. However, some argued that it was still a great disappointment: while it provided for the exercise of due diligence as the minimum duty as to seaworthiness and made this obligation as a condition precedent to the exemption for faults and errors of management and navigation, it left unanswered some of the most vital complaints. The Harter Act was said to be, at best, a partial or intermediary, or, at worst, an unsatisfactory solution.[1446]

Consequently, the Hague Rules and the Hague-Visby Rules, as the product of an international convention, were incorporated into the domestic legislation of a large number of seagoing nations for the purpose of elimination of the legal uncertainties arising out in the different jurisdictions. While many of the substantive provisions of the Hague and Hague-Visby Rules have not been changed, the points of difference included: the extension of the defenses and limits of liability to claims in tort, the extension of

[1445] See, for example, an elaborative discussion in Per Gram, 'Chartering Problems from an International Point of View' (1974-1975) 49 Tul L Rev 1076, 1076.
[1446] See discussion in Benjamin W. Yancey, 'Carriage of Goods: Hague, Cogsa, Visby, and Hamburg' (1982-1983) 57 Tul L Rev 1238, 1241.

the defenses and limits of liability to servants or agents of the shipowner, the alternative weight limitation of liability, and the possibility of breaking the limits of liability.

The Hague Rules took effect in the UK by virtue of the UK Carriage of Goods by Sea Act 1924. Section 3 provided for express incorporation of the Hague Rules into the outward bills of lading from the UK "subject to the provisions of the said Rules." This form of incorporation created certain difficulties, discussed in Chapter 2 of this thesis.

The Hague-Visby Rules took effect by virtue of the UK Carriage of Goods by Sea Act 1971, which appended the Rules. Sections 1(2), (3), (6) and (7) provided for the amended [Hague-Visby] Rules to have 'the force of law' subject to application under Articles I(b) and X. So, bills of lading need not contain a stipulation in regard to express incorporation of the Rules.

The Effect of Incorporation of the Rules in the Bills of Lading: From Strict Liability to a Modified Regime

The carrier's liability at common law is usually strict and depends on whether or not he is deemed to be a common carrier.

If the shipowner is deemed to be a common carrier, he will be called an 'insurer' and the common law will impose upon him exceptionally stringent obligations:[1447] "that is, he [is] absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies."[1448] So, the goods must be carried safely to the destination without unreasonable deviation and with reasonable dispatch. Moreover, the period before loading when the goods are delivered in the custody of the carrier or his agent or servant, but before cargo operations start, is still his responsibility. That is why most of the common carriers seek to reduce their liability by expressly providing in their bills of lading or dock receipts a *caveat* that before the actual loading of the goods on board the ship, the carrier's obligations shall be those of an ordinary bailee or that any eventual liability will be excluded altogether, as a bailee at common law has a lower degree of responsibility and shall be bound to exercise reasonable care or due diligence, rather than being an insurer.

[1447] *Coggs v Bernard* (1703) 2 Ld Raym 909; 92 ER 107; *Morse v Slue* (1671) 1 Ventris 198; 86 ER 129.
[1448] *Canadian Co-operative Wheat Producers Ltd v Paterson Steamships Ltd* [1934] 49 Ll L Rep 421, 426; [1934] AC 538, 544 - 545 (Lord Wright). For enumerated exceptions, see for example, *Nugent v Smith* (1876) 1 CPD 423, 45 LJCP 19: the act of God, or King's enemies, or the vice of the goods themselves, or defective packing, or jettison.

The Hague and the Hague-Visby Rules distinguish themselves from the law governing bailees and common carriers by applying to the 'ship' as well as to the 'carrier' and by applying as well in civil law jurisdictions where the terms 'common carrier' and 'bailee' are unknown and have no place. It is therefore in fact dangerous to compare the responsibility of the carrier under the Hague or Hague-Visby Rules with the responsibility of bailees and common carriers under common law.

The incorporation of the Rules exempts a shipowner from the absolute liability of a common carrier, but not from the consequences of the want of reasonable skill, diligence, and care.[1449] Thus, Article III Rule 2 imposes a degree of 'due care.' The carrier's responsibility before loading is still subject to the common law of contract, tort, and bailment. A further effect of incorporation is the limitation regime conferred by Article IV Rule 5 and the list of exceptions given in Article IV Rule 2, which are incorporated in addition to any exception clause found in a bill of lading. However, the carrier may lose this protection if it can be shown that the overriding due diligence obligation under Article III Rule 1 was breached.

The Hague-Visby Rules are compulsorily applicable to any contract of carriage which expressly or impliedly provides the shipper with the right to demand the issue of a bill of lading, whether or not that right is exercised, and whether or not some other carriage document (such as a waybill) is eventually issued. Under the Carriage of Goods by Sea Act 1992 a straight bill of lading is treated as a sea waybill.[1450] However, it does not affect its status under the Hague or the Hague-Visby Rules.[1451]

The primary complexity that arises in the bill of lading context comes from the scope of the incorporated Rules, which depends on the different variants of clause paramount. Chapter 4 deals with this point in detail. Greater difficulty arises with clauses that provide that certain Rules or statutes are incorporated "where applicable" or "where compulsorily applicable" or "mandatorily applicable" or "as enacted in the country of shipment." Thus under English law, the Hague-Visby Rules are not mandatorily applicable simply by virtue of shipment from a country that applies the Rules as part of its national law without having become a contracting state as well.

[1449] See also the earlier case *Notara v Henderson* (1872) LR 7 QB 225 in regard to the specific excepted perils.
[1450] For reasons see the views of the Law Commission Report No. 196.
[1451] *The Rafaela S* [2005] 1 Lloyd's Rep 347, para [22] (Bingham LJ) and para [30] (Steyn LJ).

It is submitted that in order to avoid all the conflicts in wording that arose, for example, in cases like *The MSC Amsterdam,*[1452] *The Happy Ranger*[1453] , and *The Superior Pescadores,*[1454] no clause paramount is needed for bills of lading issued in the country of shipment which has enacted some version of the Hague or the Hague-Visby Rules by mandatory national law. The common form of words in bills of lading that the Hague-Visby Rules apply to a bill of lading in trades where those Rules compulsorily apply will not achieve the effect of incorporating the Rules.

However, when no such enactment is in force, and/or a non-negotiable bill of lading or a waybill is issued, it is suggested that the most appropriate clause paramount should be drafted according to the following formula:[1455]

(1) If the Hague Rules are enacted in the country of shipment, then they apply as enacted;
(2) If the Hague Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination applies or, if there is no such legislation, the terms of the Convention containing the Hague Rules apply; or
(3) If the Hague-Visby Rules are compulsorily applicable to the contract of carriage in question, then the legislation enacting those rules applies.

The word 'enacted' in paras (1) and (2) makes it clear that if the country in question, although a contracting State, enacts the Rules in a slightly modified form, such as in the USA, that form applies. But, as *Carver* argues, a more difficult issue is involved if the State in question is not a contracting State but enacts the Rules, or something similar, as part of their national law.[1456] The word 'compulsorily' in para (3) refers to the stronger methods used in the Visby Protocol to close the *Vita Food*[1457] gap,[1458] so the reference must be to the law that applies compulsorily to the contract by English law, i.e., the governing law, or to the law of the court hearing the case.[1459]

It is likely that the reasonable person working in the shipping industry would regard the phrase "the Hague Rules as enacted" as referring to legislation that enacts the Hague Rules, or something similar, as part of the State's national law, rather than to legislation which blindly enacts the Hague-Visby Rules.

[1452] *The MSC Amsterdam* [2007] EWHC 944 (Comm) and [2007] EWCA Civ 794.
[1453] *The Happy Ranger* [2001] 2 Lloyd's Rep 530 and [2002] 2 Lloyd's Rep 357.
[1454] *The Superior Pescadores* [2014] 1 Lloyd's Rep 660 and [2016] 1 Lloyd's Rep 561.
[1455] With reference to *The Bukhta Russkaya* [1997] 2 Lloyd's Rep 744, 746 (Thomas J).
[1456] *Carver on Bills of Lading* (04th edn, Sweet & Maxwell 2017), para [9-093].
[1457] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.
[1458] *Carver on Bills of Lading* (04th edn, Sweet & Maxwell 2017), para [9-095].
[1459] *The MSC Amsterdam* [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep 622.

The latest edition of Paramount Clause General 1997 was drafted by BIMCO based on 'the greater adherence on a worldwide basis to the Hague-Visby Rules'. This clause *primarily* refers, especially in the first paragraph, to the Hague-Visby Rules as the governing liability regime. It further provides for a term that even in a voyage from a non-Hague-Visby Rules state to a jurisdiction which only applies the Hague-Rules to outward shipments, such rules still apply. The second paragraph of the clause provides for a "fall back position" and states that 'in those trades where the Hague-Visby Rules are not applicable mandatorily or otherwise, the Hague Rules (when compulsorily applicable …) shall apply'. Thus BIMCO paid due respect to those states still signatories to the Hague Rules. The same paragraph also takes care of "all other trades" where neither the Hague-Visby Rules nor the Hague Rules apply compulsorily and provides for application of the Hague-Visby Rules as a default regime.[1460]

As Bundock stated it is true that the Hague-Visby Rules are a revised version of the Hague Rules and were never issued as a separate convention. However, it is important to recognise that: (a) it is everyday practice in the shipping business to refer to them as the Hague and Hague-Visby Rules, exactly as if they were totally distinct instruments; (b) there are "important differences" between the Hague and Hague-Visby Rules; and (c) those differences are common knowledge in the maritime world.[1461]

In most cases, the cargo liabilities are included in the terms of the P&I cover. There is a strict requirement of the underwriters to have a clause paramount incorporated in the bill of lading, so the terms of carriage must not be more onerous than those under the Hague or the Hague-Visby Rules.[1462] The carrier's responsibilities shall start no earlier or continue no further than is provided in the Brussels Convention. However, the Club, by its discretion or if contractually agreed, may extend the cover to liabilities arising under the Hamburg Rules where, for example, the contract of carriage is compulsorily subject to these Rules by operation of law. The Clubs generally recommend clauses for incorporation in contracts of carriage.

[1460] See explanatory notes: https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/paramount_clause_general_1997

[1461] Bundock M, 'The Clause Paramount: Hague or Hague-Visby Rules? (*The Superior Pescadores*: Analysis and Comment)' (2018) 24 JIML 100, 104.

[1462] See, for example, the terms of INSURE Marine Underwriting N.V. (acting as Underwriting Agency for North of England P&I Association Ltd) which provides *inter alia* for: "the insurance shall not cover liabilities, losses, expenses and costs arising out or relate to … the carriage of cargo on terms which are not made subject to the Hague Rules or the Hague-Visby Rules (or terms which do not provide equal or similar protection to the carrier), and as a consequence the Assured incurs a liability which is greater or more extensive than if the carriage had been subject to those Rules, there will be no recovery to the extent of such additional liability".

A further question arises: if the wording which is stated for bills of lading shall be the same for the charter parties. In order to safeguard the 'back-to-back' position, the answer shall be affirmative. However, it leads to certain difficulties in the interpretation of charter parties.

The Interpretation of Contracts: Clarity in Contract Terms. Why Is It Important?

There is no standard commercial code that regulates international trade or shipping, only the standard forms used throughout the world, for example, the Lloyd's form of standard marine policy, the various forms of charter parties and bills of lading, and agreements for the sale of commodities.[1463] This kind of contract is often negotiated and fixed within hours or even minutes.

It is not uncommon that so little attention is given to the wording of the terms and content of the clauses. An average businessman has no time to read contracts, especially the detailed provisions of the same. The parties are more focused on negotiating the 'most commercially important elements', such as the points of delivery and re-delivery of the vessel, ports of loading and discharging, freight rates, or rates of hire.

Even if they read all the detailed provisions, an average businessman would probably not understand them. Even if they are understood, it is unlikely he/she will reject or object them, as such kinds of contracts are mostly concluded on a take-it-or-leave-it basis.[1464] The parties are forced to rely on forms that are in common use. But badly drafted charter party clauses may affect third party bill of lading holders, who have no control over the provisions of a contract that may impose serious obligations upon them. Some would probably expect that the relevant wording of both charter party's bills of lading and the charter party clauses incorporated therein should be the same and clearly represent the rights and obligations of the parties. But it is not always the case.

Most of the standard form contracts, especially charter parties, were drafted a long time ago and have become insufficiently comprehensive in the modern world of shipping. In 1990 it was argued in a comparative analysis provided by the UNCTAD Secretariat that the international shipping industry has not, in general, appeared to have developed any sufficiently effective mechanisms for discouraging the use of outdated forms or encouraging the use of modern better-drafted forms. The older forms of contracts that gave rise to most disputes in the past contain wording that is too vague to adequately provide for

[1463] See, for example, an elaborative speech of Lord Goff, 'Opening Address', Second Annual JCL Conference in London on 11th September 1991 (1992) 5 JCL 1, 3.
[1464] See, for example, speech of Lord Reid in *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361; [1966] 1 Lloyd's Rep 529, 544-549.

potentially complex circumstances. A few forms of charter party and bills of lading that have been criticized for decades as being badly drafted, obscure, and prone to dispute, still remain in widespread use today. The shipping community has appeared to be quite conservative in this respect.

The old forms of contracts have become expanded with additional typescript clauses attached to standard terms. These printed provisions are themselves extensively deleted and amended and not negotiated on each and every occasion, but are often taken from a previous contract, followed by the vague wording 'with logical amendments.' Such forms of incorporation give rise to contradictions between the printed and additional clauses themselves. Lack of clarity in the wording results in a situation where a clause or a single expression may convey one meaning to an ordinary member of the shipping community but may be held to have quite different meanings when subjected to close legal analysis by lawyers, arbitrators, or the Courts.

The objective interpretation of clauses embodied in the standard forms is of paramount importance.
It should be necessary that 'a particular clause or phrase has received an *authoritative* judicial interpretation than that it has received the *best possible* judicial analysis'.[1465] This is because the law is concerned with the objective appearance, rather than with a mere fact of agreement. The approach of the courts to the interpretation of terms in standard form contracts is mostly influenced by policy concerns of facilitating transactions and promoting certainty.[1466] Moreover, contracting parties are similarly expected to follow certain standards of behavior, as there are still terms that are implied into many contracts as a matter of law rather than as a product of the agreement of the parties.

The principles of construction of contracts are not a detailed body of rules.[1467] They are merely guides and not the masters.[1468] As Llewellyn argued, there can be two opposing canons on almost every point.[1469] Over the past 50 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts. This discussion depended on two closely related concepts: the "surrounding circumstances" and "commercial common sense".

[1465] *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, Oxford University Press 2017), para [1.59].
[1466] ibid, para [1.58].
[1467] In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) Lord Hoffmann described his restatement of English law as 'principles'. In contrast, in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251 his Lordship described the old approach as adopting 'rules of construction', at para [55]. In the same case Lord Clyde observed that 'the exercise is not one where there are strict rules', at para [78].
[1468] *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, 80 (Salmon LJ).
[1469] See Karl Nickerson Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 Vand L Rev 395.

The idea that the surrounding circumstances may be relevant to the meaning of language was not a modern invention,[1470] but was authoritatively formulated in *Prenn v Simmonds*[1471] and *The Diana Prosperity*[1472], where Lord Wilberforce pointed out that when reading a contract the court must put itself in the position in which the parties stood at the time it was made, with all the knowledge that they had at the time about the origin and purpose of the transaction and the circumstances in which it would fall to be performed.[1473] The surrounding circumstances were not proposed to be used as an alternative way of discovering the parties' intention, but as they were simply facts which assisted in interpreting the words.

The second concept relates to the decision of the House of Lords in *The Antaios (No 2),*[1474] the case where Lord Diplock famously declared that 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'.[1475] On the face of it, Lord Diplock was commending the use of commercial common sense not as a means of understanding the language of the contract, but as means of overriding it. Commenting on the decision two decades later, Lord Steyn observed that it was part of a "shift from literal methods of interpretation to a more commercial approach".[1476]

On the other hand, it has recently been submitted that the common law never, since the modern law of contract was developed in the nineteenth century, adopted literalism as a canon of construction.[1477] It has always recognised that language is imprecise, that context may modify its meaning, and that words may be used in a special sense.[1478]

Somehow, the end of the last century was a period when traditional views about the interpretation of all written instruments were under challenge. The ultimate point which "the flexibility of language can attain"

[1470] The legal principle was established in the earlier cases: *Leader v Duffey* (1888) 13 App Cas 294 and *Smith v Cooke* [1891] AC 297 (Lord Halsbury LC).
[1471] *Prenn v Simmonds* [1971] 1 WLR 1381 (HL).
[1472] *Reardon Smith Line Ltd v Yngvar Hansen-Tangen and Sanko Steamship & Co Ltd, The Diana Prosperity* [1976] 1 WLR 989 (HL); [1976] 2 Lloyd's Rep 621.
[1473] *The Diana Prosperity* [1976] 2 Lloyd's Rep 621, 624-625, with reference to *Lewis v Great Western Railway* (1877) 3 QBD 195 (Brett LJ); *Hvalfangerselskapet Polaris Aktieselskap Ltd v Unilever* (1933) 39 Com Cas 1, page 3 (Lord Atkin), page 19 (Lord Russell), page 25 (Lord Macmillan); *Charrington & Co Ltd v Wooder* [1914] AC 71, page 77 (Viscount Haldane), page 80 (Lord Kinnear), page 82 (Lord Dunedin).
[1474] *Antaios Compania Naviera SA v Salen Rederierna AB, The Antaios (No 2)* [1985] AC 191; [1984] 2 Lloyd's Rep 235.
[1475] ibid, [1985] AC 191, 201.
[1476] *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] UKHL 54; [2004] 1 WLR 3251; [2005] 1 Lloyd's Rep 461, para [19]. The rationale of this approach was explained in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771A-B (Lord Steyn).
[1477] Lord Jonathan Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts', Harris Society Annual Lecture, Keble College, Oxford, 08th May 2017, page 4.
See also Kate Gibbons, 'The Strange Death of Literal England' (2009), an elaborative article published by Clifford Chance: https://www.cliffordchance.com/briefings/2009/11/the_strange_deathofliteralengland0.html
[1478] See, for example, *Ford v Beech* (1848) 11 QB 852, 866 (Baron Parke): 'greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent'.

was reached in *Charter Reinsurance v Fagan*[1479] when the Court of Appeal and the House of Lords held that the words "actually paid" did not mean that the reinsured had to have or actually paid in settlement of claims. It was enough that the reinsured was liable to pay it although he had not done so and in view of his insolvency probably never would.[1480]

The idea of interpreting contracts in line with "commercial common sense" was further stretched in *Mannai Investment v Eagle Star Life Assurance*.[1481] But the final moment came in 1998 in one of the most influential decisions on the construction of contracts, *ISC*,[1482] in which Lord Hoffmann delivered the leading speech and formulated five principles. Although his Lordship's judgment was only a restatement of canons which were already familiar and uncontroversial, it changed the mood among judges and lawyers dealing with commercial contracts.

As Lord Sumption noted, 'the most striking of his five principles were the fourth and fifth': the fourth principle was founded on a distinction between language and meaning; the fifth principle was based on the proposition that the traditional adoption of the "natural and ordinary meaning" of the language is no more than a rebuttable presumption that 'people mean what they say in formal documents. If the background suggests that something has gone wrong with the words, the law may attribute a different intention to them'.[1483]

As from that time, English law has adopted a more pragmatic, purposive, or sensible approach deploying the broader principles of interpretation applied in the past that have subsequently become more universal.[1484] The meaning that is to be given to the words used in the contract shall be 'the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made',[1485] against the background as it existed at the time it was made.[1486] Words and phrases are interpreted 'in a way in which a reasonable commercial person

[1479] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313; [1996] 2 Lloyd's Rep 113.
[1480] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313; [1996] 2 Lloyd's Rep 113, pages 117–119: Lord Mustill based his analysis on the technical meaning given to the concept of payment in the world of insurance and in the case law extending back for more than a century; pages 121–122: Lord Hoffmann proposed a more radical approach that language is such a flexible instrument that words commonly have no "ordinary and natural meaning".
[1481] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19; [1997] AC 749; [1997] 3 All ER 352.
[1482] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 All ER 98.
[1483] Lord Jonathan Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts', Harris Society Annual Lecture, Keble College, Oxford, 08th May 2017, page 6 & 7.
[1484] Thus, in *Bank of Credit and Commerce International SA (in compulsory liquidation) v Munawar Ali* [2001] UKHL 8; [2002] 1 AC 251 it was held that there no special rules for construing compromises. The ordinary rules of contractual interpretation applied: esp. see para [8] (Lord Bingham); paras [26], [31] (Lord Nicholls); para [39] (Lord Hoffmann); and para [78] (Lord Clyde).
[1485] *Bank of Credit and Commerce International SA v Munawar Ali* [2001] UKHL 8, para [26] (Lord Nicholls).
[1486] *Seadrill Management Services Ltd v OAO Gazprom, The Ekha* [2010] EWCA Civ 691; [2010] 1 CLC 934, para [17].

would construe them'.[1487] Argumentation in terms of opposing canons and the deployment of Latin maxims became of less importance. The background circumstances became an alternative guide to the parties' intentions instead of a means of interpreting their language.

For example, in *Chartbrook v Persimmon Homes*[1488] there was no apparent error of drafting in a contract between a landlord and a developer. However, the House of Lords held that something had gone wrong with the language; and to interpret the definition of an "Additional Residential Payment" in accordance with ordinary rules of syntax made no commercial sense. There was no limit to the amount of "red ink" or verbal rearrangement or correction which the court was allowed when determining whether there was a clear mistake. All that was required was that it should be clear that something had gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.[1489] The House of Lords reaffirmed that evidence of pre-contractual negotiations between the parties were not admissible when interpreting a contract.[1490] The course of negotiations cannot tell us what the contract objectively meant.

In *Attorney-General of Belize v Belize Telecom Ltd*[1491] Lord Hoffmann, delivering the advice of the Privy Council, came close to abolishing the implication of terms as a direct legal concept, at least in cases where the implication was said to arise from the particular facts rather than from any general principle of law. As his Lordship stated, it was all a question of construction.

However, the point about the implied term is that the parties have not expressed it, but implication fills a gap in the written instrument. Thus, in *Marks & Spencer v BNP Paribas*[1492] it was reaffirmed that the traditional distinction between construction and implication still exists.[1493]

[1487] *Society of Lloyd's v Robinson and Another* [1999] UKHL 22; [1999] 1 All ER (Comm) 545, 551 (Lord Steyn).
[1488] *Chartbrook Ltd v Persimmon Homes Ltd and Others* [2009] UKHL 38; [2009] 1 AC 1101; [2009] BLR 551.
[1489] With application of the principles established in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 All ER 98; *East v Pantiles (Plant Hire)* [1982] 2 EGLR 111; (1982) 263 EG 61, CA (Civ Div) and *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363; [2007] Bus LR 1336; [2007] 4 WLUK 506.
[1490] With reference to *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd, The Karen Oltmann* [1976] 2 Lloyd's Rep 708. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL), at page 913 Lord Hoffmann described the exclusion of precontractual negotiations as being based on "reasons of practical policy". See also Ewan McKendrick, 'Interpretation of Contracts and the Admissibility of Pre-Contractual Negotiations' (2005) 17 SAcLJ 248; Francis N Botchway and Kartina A Choong, 'Not Ready for Change – The English Courts and Pre-Contractual Negotiations' (2011) 45 Int'l Law 625.
[1491] *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988.
[1492] *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co* [2015] UKSC 72; [2016] AC 742.
[1493] Anthony Kennedy, 'Unnecessary Complications, *Marks & Spenser v BNP Paribas*' [2016] LMCLQ 190.

The discussion about the correct approach to be adopted to the interpretation, or construction, of contracts finally culminated in *Rainy Sky v Kookmin Bank*.[1494] The Supreme Court held that the wording "such sums" had two possible meanings, and it was therefore 'appropriate for the court to have regard to considerations of commercial common sense', even without establishing that a literal meaning of the words would produce an irrational or absurd result. Lord Clarke, in his leading judgment, emphasised that the object was to understand rather than override the language.[1495]

However, there is a clear problem about the approach to construction which have been adopted: the point is that the language of the parties' agreement, read as a whole, is the only direct evidence of their intentions which is admissible. 'Language, properly used, should speak for itself and it usually does. The more precise the words used and the more elaborate the drafting, the less likely it is the surrounding circumstances will add anything useful … The surrounding circumstances may well enable to discover what the objective was, but not how far it was achieved. The parties are the masters of their own agreement, and anything which limits the weight of words in the process of construction is a direct assault on their autonomy.'[1496]

Language is a flexible instrument but let the judges not exaggerate its flexibility. The argument for literalism is certainty. It is highly likely that the literal words as they have been written will be upheld. Purposive interpretation has been regarded as a dangerous departure from the underlying foundation of English contract law that the contract reliably "does what it says on the label".

Thus, in the last few years the Supreme Court has sounded a change of approach with regard to contractual interpretation. A series of judgments have underlined the primacy of language even where this results in a one-sided, unfair, or even absurd decision. In *Arnold v Britton*[1497] Lord Neuberger, delivering the leading judgment, set out several principles which reasserted some traditional approach taken from earlier case law.[1498] His Lordship pointed out the danger of retrospectively applying a notion of commercial common sense influenced by what had gone wrong after the contract was made.

In *Krys v KBC Partners*[1499] the Privy Council reached a decision on the complex contract provisions which accorded with the natural meaning of the words, which they found to be unambiguous even if they

[1494] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2100; [2012] 1 Lloyd's Rep 34.
[1495] ibid, paras [21], [30], [40].
[1496] Lord Jonathan Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts', Harris Society Annual Lecture, Keble College, Oxford, 08th May 2017, page 9.
[1497] *Arnold v Britton and Others* [2015] UKSC 36.
[1498] ibid, paras [17] – [23].
[1499] *Krys and Others v KBC Partners LP and Others* [2015] UKPC 46.

led to economically harsh results for one of the parties.[1500] However, neither of these cases overruled or criticised the decisions in *ICS*[1501] or *Rainy Sky*[1502].

In *Wood v Capita Insurance Services*[1503] the Supreme Court again examined the principles of contractual interpretation and confirmed that textualism and contextualism should not be regarded as 'conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement'.[1504] The extent to which the court will rely on each tool will vary depend on the circumstances. The court was quick to reject the submission that *Arnold v Britton* involved any "rowing back" from *Rainy Sky* guidance.[1505]

In the end, all these cases reveal, or rather confirm, that there is always a tension for the courts when interpreting a contract in that they must decide whether they should stick with what the words say (despite the consequences) or whether they need to go further and decide what the words must mean (because of the consequences). For example, in *Arnold v Britton* Lord Neuberger defined the court's task as "to identify the intention of the parties". Lord Hodge, on the other hand, described it as to ascertain "the meaning of the words which the parties used". In *Wood v Capita Insurance Services* Lord Hodge again referred to the "objective meaning of the words the parties have chosen".[1506] It is also clear that arguing *business common sense* to escape an otherwise harsh result is going to be an increasingly hard exercise to use in the future.[1507]

The challenge for those drafting contracts is that, when subject to close scrutiny by the courts, different judges, applying the correct principles, can reach different opposing conclusions on the meaning of provisions. There is not a simple solution to this. Two parties battling the case out like two football teams or two tennis players, and the judge acting as a disinterested and detached referee – the traditional role of

[1500] ibid, para [15] (Lord Sumption): '… Even if the Board regarded these consequences as absurd, such arguments have limited force in the face of the clear language of the articles'.
[1501] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 All ER 98 (with dissent by Lord Carnwath).
[1502] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2100; [2012] 1 Lloyd's Rep 34 (with dissent by Lord Mance).
[1503] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] 2 WLR 1095; [2017] 4 All ER 615.
[1504] ibid, para [13] (Lord Hodge).
[1505] ibid, para [8] and [9].
[1506] Lord Hoffmann emphasised this point in his article 'Language and Lawyers' (2018) LQR 553.
[1507] See, for example, *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd* [2016] EWCA Civ 990, para [42] (Jackson LJ): 'Commercial common sense can only come to the rescue of a contracting party if it is clear in all the circumstances what the parties intended, or would have intended, to happen in the circumstances which subsequently arose'.

a common law judge is very much that of umpire in a contest, not the seeker after truth.[1508] He or she lets the parties and their lawyers prepare and present their cases, raising such arguments and adducing such evidence as they see fit. And, after the trial, judges then give a decision resolving issues of fact and law according to their assessment of the evidence and the arguments.[1509] As Lord Wilberforce put it in *Air Canada v Secretary of State for Trade*:[1510] 'The task of the court is to do, and be seen to be doing, justice between the parties … There is no higher or additional duty to ascertain some independent truth'.[1511]

Moreover, common law trials are constrained by rules. It is all the more important that judges are, and are seen to be, as fair and as unbiased as they can be. To non-lawyers, and even to many lawyers, taking part in a trial is a somewhat intimidating and artificial experience, and although the rules which govern the trial process are aimed at achieving justice generally, they inevitably can appear to work unfairly in a particular case. So, it is all the more important that the person ultimately responsible for running the trial and determining its outcome is, and is seen to be, scrupulously fair – or at least as scrupulously fair as possible.[1512] The creativeness of judges has become limited in this respect.

As it is submitted in Chapter 1, the approach of the English courts to the interpretation of the existing Hague and Hague-Visby Rules was not 'the best example of systematic adherence to the general principles of treaty interpretation'. The case is that the creativeness of judges went too far. For example, in *Pyrene v Scindia* Devlin J relied upon the French text and on the broad object of the Rules and disregarded interpretation based on linguistic matters. In *Jordan II* the House of Lords disregarded "the public policy rule" of Article III Rule 8 with "the fair and balanced result", which had been aimed by the Rules, and allowed to exclude the carrier's liability for a broad array of operations under Article III Rule 2.
Moreover, it is shown in Chapter 5.1 the decision in *The Saxonstar* triggered a long chain of cases with the unpredictable results.

[1508] See, for example, (David Maxwell Fyfe) Viscount Kilmuir, 'Introduction, The Migration of the Common Law' (1960) 76 LQR 41, pages 42–43: 'Now the first and most striking feature of the common law is that it puts justice before truth'.
[1509] Neuberger DE, 'The Role of the Judge: Umpire in a Contest, Seeker of the Truth or Something in Between?', Singapore Panel on Judicial Ethics and Dilemmas on the Bench: Opening Remarks (19th August 2016), paras [3], [5] and [9].
[1510] *Air Canada & Ors v Secretary of State for Trade* [1983] 2 AC 394 (HL); [1983] 1 All ER 161; [1983] 2 WLR 494.
[1511] ibid [1983] 2 AC 394, 438. The same difficulty has recently been expressed by Moore-Bick LJ in *PST Energy 7 Shipping LLC and Another v OW Bunker Malta Ltd and Another, The Res Cogitans* [2015] EWCA Civ 1058; [2016] 1 Lloyd's Rep 228, at para [19].
[1512] Neuberger DE, 'The Role of the Judge: Umpire in a Contest, Seeker of the Truth or Something in Between?', Singapore Panel on Judicial Ethics and Dilemmas on the Bench: Opening Remarks (19th August 2016), para [21].

Why Is It Necessary to Incorporate the Rules in the Charter Parties?

The majority of bill of lading contracts are governed by the Hague or the Hague-Visby Rules regime, which is not mandatorily applicable to charter parties,[1513] as "it has traditionally been felt that the bargaining power of charterers and owners is near enough equal that they may be left to contract freely." This situation is different when, for example, the shipping lines impose their terms of carriage on the shippers of packaged cargo.

In 1990 the Working Group on International Shipping Legislation of UNCTAD admitted in their Report that there is a need for improvement in the drafting of clauses so as to make the obligations undertaken by the parties clearer and to reduce the number of disputes.[1514] According to this report, many respondents to the inquiries made by the Secretariat complained that certain standard forms of charter party, especially BALTIME and GENCON, unduly favored shipowners. An attempt was made to produce a satisfactory dry cargo time charter party in favor of charterers. The FONTIME draft of 1976 was prepared by the Federal of National Association of Ship Brokers. However, upon analysis, this draft appears to go much too far in the charterer's favor, as it imposes upon the shipowner responsibilities for cargo and liabilities to the charterer that are equivalent to those of an insurer and greater than those of a common carrier.[1515]

Charterparties frequently contain an express stipulation as to seaworthiness, which may raise difficulties in connection with the term's meaning, the time of its application, and its exclusion. If the Rules are not incorporated into the standard form of the time charter party[1516], the shipowner's initial obligation of seaworthiness at the commencement and subsequent voyages are increased from those of the 'exercise of due diligence to make the ship seaworthy' to an absolute warranty of seaworthiness. So, the shipowner may be easily caught between two different standards of seaworthiness—under the bill of lading and under the time charter party.

Moreover, the non-inclusion of the Hague Rules has the result that the shipowner loses the protection of the wide exceptions stated in Article IV Rule 2, for example, against "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." The

[1513] Article V of the Hague or the Hague-Visby Rules.
[1514] UNCTAD, Charter Parties, A Comparative Analysis, dated June 1990, paras [5] – [8].
[1515] See, for example, Clause 9 of FONTIME appears to amount to a continuing absolute warranty of seaworthiness throughout the whole period of the charter party. And the exception Clause 26 of the same charter party being in the same terms as the exceptions clause in the NYPE 1946 and 1981 of ASBATIME, provides no exception against negligence – at least under English law.
[1516] For example, Clause 24 of the NYPE_1946 or Clause 31(a) of the NYPE_1993 are amended by deletion of these clauses.

reason for this is that the charter party exception clauses are mostly insufficiently widely drawn to constitute an effective exclusion of liability under English law.[1517]

Some writers have pointed to the legal difficulties that currently exist in the relationship between charter parties and bills of lading in connection with responsibility for cargo. One of the most serious difficulties identified that arises under the Rules is to determine the position of a bill of lading issued under a charter party. As long as there are different regimes applicable to bills of lading in force, the uncertainty inherent in the contractual incorporation of the Rules into charter parties will be doubly solved. It looks awkward that in cases where cargo is shipped under bills of lading with an underlying charter party a similar mandatory regime of carrier's responsibility for cargo does not apply to both contracts; they are either governed by two different set of Rules, or one of the contracts is not subject to the incorporated Rules at all. If bills of lading subject to the Rules are issued to the charterer and the bills are not negotiated or transferred and have the status of receipt, the regime of responsibility for cargo shall be governed by the terms of the charter party.[1518]

Shippers of cargo may, in the course of their ordinary trading, ship cargo on some occasions under liner bills of lading subject mandatorily to the Hague or Hague-Visby Rules and, on other occasions, be charterers under voyage charter parties to which no mandatory legislation is applicable. It is again awkward that the carrier's responsibilities for cargo should not be consistent.

UNCTAD argued in their comparative analysis that depending on whether the bills are negotiated on a given voyage and by whom and to whom, for example, by the charterers to third parties, goods may be carried for a certain period subject to one regime of cargo responsibility and then, upon the endorsement of the bill of lading, become subject to the regime of the Hague and the Hague-Visby Rules, without notice to, and without the knowledge of, the shipowner.[1519] However, it is submitted by the author of this thesis that endorsement will not affect the contractual regime under the bill of lading.

[1517] See, for example, *The Satya Kailash* [1984] 1 Lloyd's Rep 588, esp at page 597, where the Court of Appeal held that a shipowner was not protected by this exception clause for collision damage, caused by negligence of their master, because the clause was not widely enough drawn to cover negligence.
[1518] See, for example, *President of India v Metcalfe Shipping Co Ltd, The Dunelmia* [1969] 1 Lloyd's Rep 32 (HC) and [1969] 2 Lloyd's Rep 476 (CA).
[1519] See elaborative notes in UNCTAD, Charter Parties, A Comparative Analysis, dated June 1990, paras [364] – [371].

Then, if bills of lading previously in the hands of third parties are transferred back to the charterer or to parties regarded legally as agents of the charterer,[1520] the regime of responsibility for cargo carried under those bills of lading is again governed by the charter party terms.[1521]

Circumstances might occur, under English law, in which the voyage was completed, and goods were discharged, apparently under a regime of responsibility governed by the charter party, which was then transformed to a regime governed by the Rules upon presentation of a Hague Rules' bill of lading and the delivery of the goods against it.[1522]

Moreover, it may be the case where the effect of contractual incorporation of the Rules is different as in the case of mandatory application. For example, the deviation provision of Article IV Rule 4 may have a different effect, depending on whether it is applicable mandatorily or contractually: a deviation clause in a bill of lading is to be construed on common law principles and that, if valid on those principles, it is not affected by the compulsory application of the Rules.[1523] But if the Hague Rules are contractually incorporated into a charter party, then Article IV Rule 4 must be read together with the other terms of the charter party, with consequences that are different.[1524] The common law principles of construction of deviation clauses in bills of lading, which were developed mainly in the last century, may not be applicable in the construction of the deviation provisions of a charter party today.[1525] However, the recent case of *Dera v Derya*[1526] has confirmed that deviation from the usual geographic route deprived the carrier of the rights and defenses available under The Rules.

The shipowners will, in the first instance, be held liable for loss of or damage to cargo under the bill of lading contract, and they can seek an indemnity under the charter party. The extent of such an indemnity depends on the terms of the contract. Where there is no express indemnity in the charter, such a right may arguably be implied.[1527] In *The C Joyce*[1528] the Court rejected a shipowner's claim for indemnity against the charterers under a voyage charterparty containing the Owners' responsibility clause.[1529] There was an

[1520] *Kern v Deslandes* (1861) 10 CB (NS) 205.
[1521] See elaborative notes in UNCTAD, Charter Parties, A Comparative Analysis, dated June 1990, paras [364] – [371].
[1522] In *Brandt v Liverpool, Brazil & River Plate Steam Navigation Co Ltd* [1924] 1 KB 575 it was held that a contract might be inferred between a shipowner and the holder of a bill of lading who presents it, and who offers to pay the freight and accept delivery, where that offer is accepted by the shipowner.
[1523] See discussion in UNCTAD, Charter Parties, A Comparative Analysis, para [380].
[1524] See discussion in *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019), para [14-089].
[1525] Based on rejection of the doctrine of 'fundamental breach': see *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 and *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2.
[1526] *Dera Commercial Estate v Derya Inc, The Sur* [2018] EWHC 1673 (Comm).
[1527] *Naviera Mogor SA v Societe Metallurgique de Normandie, The Nogar Marin* [1987] 1 Lloyd's Rep 456, page 460 (Staughton J).
[1528] *Ben Shipping Co (Pte) Ltd v An-Board Bainne, The C Joyce* [1986] 2 Lloyd's Rep 285.
[1529] Pursuant to "Clause 2, the standard unamended GENCON owners' responsibility clause current in 1973".

additional clause[1530] that provided that all bills of lading issued under the voyage charter should contain a clause paramount. Bingham J held that the stipulation in the contract 'necessarily exposed the owners to the Hague Rules liability to an indorsee of the bills and if the owners wanted an indemnity from the charterers in that eventuality they should have asked for one…'[1531] The implication of such a term was not necessary to give business efficacy to the contract.

Where the claim for indemnity is brought by the shipowner against the charterer, the charterer may not rely upon the one-year time limit provision of Article III Rule 6.[1532] Thus, under English law, the shipowner has six years to bring his claim for indemnity in such circumstances.[1533] A claim for indemnity by a charterer may arise where the charterer is a party to the bill of lading contract and has to meet bill of lading claims that, as said under the terms of the charter, are the ultimate responsibility of the shipowner. Where the Rules are incorporated in a charter party, the shipowner may rely upon the one-year time-limit provision of Article III Rule 6.

The Effect of Incorporation of the Rules in the Charter Parties

In order to eliminate the inconsistencies and abnormalities enumerated above, many standard forms of charter party seek to incorporate the Hague or the Hague-Visby Rules, or particular provisions of the Rules, into the printed form by the inclusion of a 'clause paramount'. As considered in this thesis, such clauses take various forms. Sometimes the intention of the parties is stated in detail, but in most cases, reference is merely made to 'clause paramount' without specifying what exact clause is intended.

This 'device' was invented by the Carriage of Goods by Sea Act 1924, which provided *inter alia*, for Section 3, and was *primarily* designed to apply to bills of lading having effect "in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port"[1534] of the Contracting State (the UK) and had no relation to charter parties at all. Thus, the fields of loss, damage, and delay of goods and limitation of the carrier's liability were covered by such incorporation. But the other fields remained in the area of considerable disunity, as the Rules were not designed as a single solution for all

[1530] The parties had deleted Clause 9 of the GENCON charter party providing that the Captain is to sign bills of lading "without prejudice to this charter" and substituted a clause to the effect that all bills of lading subject to the Hague Rules were to be issued by the shipowners who had to settle cargo claims under them for which they would not have been liable had the bills been governed by the responsibility clauses in the charter party.
[1531] *The C Joyce* [1986] 2 Lloyd's Rep 285, 289 and 291.
[1532] *Freedom General Shipping SA v Tokai Shipping Co Ltd, The Khian Zephyr* [1982] 1 Lloyd's Rep 73.
[1533] The Limitation Act 1980, Section 5.
[1534] The Carriage of Goods by Sea Act 1924, Section 1.

shipping problems. Voluntary incorporation in the charter parties has given rise to both uncertainty and disputes, in particular:

- *The wording and meaning of the clause by itself*. The incorporating clause is sometimes clumsily/awkwardly drawn;[1535]

- *The scope of application*. It may be unclear whether the incorporating clause is, in law, effective to incorporate the Hague or Hague-Visby Rules into the contract at all. And if effective, which set of Rules is to take effect in the charter party context;[1536]

- *The extent of application and manner of incorporation*. It may be unclear at which extent the Articles of the Rules shall prevail over the contractual provisions, especially at which extent the clause is 'paramount', or whether, in certain respects, the Rules are overridden by other clauses of the contract;

- *The complication in the construction of charter parties.* It may be unclear whether the particular provisions of the Hague or Hague-Visby Rules have the same meaning in the contractual context of a charter party as they have in the context of a bill of lading;[1537]

- *Disputes as to rights of indemnity between shipowners and charterers*, in respect of cargo claims and disputes in the regimes of responsibility for cargo between bill of lading and charter parties and between head and sub-charterers; and

- *Different national laws may provide different answers to all these questions*

Basically, the mere *en bloc* incorporation of the Rules into a charter party overrides conflicting provisions, inconsistent exemption and limitation clauses.[1538] But this is not a firm rule, because if the Rules are

[1535] See, for example, NYPE_1993 Clause 31(a) 'Clause Paramount', it is not clearly expressed whether the clause paramount is just to apply to bills of lading or whether it is also to be incorporated into the charter.
[1536] See, for example, *Furness Withy (Australia) Pty v Metal Distributors (UK) Ltd, The Amazonia* [1990] 1 Lloyd's Rep 236, where the Court of Appeal decided that the whole Australian Sea Carriage of Goods Act 1924, including Section 9 (which provided for the law in force at the place of shipment) was incorporated into the charter by the paramount clause and therefore Clause 34 (which required any dispute arising under the charter to be settled by arbitration under English law) of the charter party was null and void.
[1537] See, for example the Australian case *Australian Oil Refining Pty Ltd v Miller & Co Pty Ltd* [1968] 1 Lloyd's Rep 448.
[1538] *The Saxonstar* [1958] 1 Lloyd's Rep 73 (HL); *The Agios Lazaros* [1976] 2 Lloyd's Rep 47; *The Agwimoon* 1929 AMC 570 4CCA; *Burdines Inc v Pan-Atlantic SS Corp* 1952 AMC 1942 5CCA; *JB Effenson Co v Three Bays Corp Ltd*, 238 F 2d 611, 1957 AMC 16 (5th Cir 1956); *The Mormackite* 1960 AMC 185 2CCA.
See also Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, 220–221.

contractually incorporated rather than mandatorily applied, the common principles of construction have to be applied.[1539] Even where it is clear that the Clause Paramount was intended to incorporate the Rules into the charter, it is not necessarily that there was an intention that the Rules should indeed be 'paramount' in all respects.[1540] A conflict between articles of the Rules and terms of the charter is principally a conflict between two provisions of the same contractual character.[1541]

When incorporated without any words of qualification, it will be taken that all the Rules are applied.[1542] If there is no conflict between the specific terms of the contract and the Rules, they are fused together in a way that "the combined terms interact between themselves. There is no line of demarcation or difference in quality or effect, save that if the incorporated clause is also a paramount one the Hague Rules will not merely supplement the specific contract but will operate also to modify any incompatible clause in it."[1543] If the clause paramount is in print and the other conflicting provision is in typescript, the latter may possibly prevail.[1544]

The main principles of incorporation had initially been settled by the decision in *The Saxonstar*[1545] and applied in a number of subsequent cases.[1546] In incorporating the provisions of the US COGSA 1936 into the charter party, the House of Lords adopted the rule laid down in relation to the incorporation of charter party terms into a bill of lading.[1547] Applying this rule, it was found that a large part of the Act, in relation to the charter party, was inapplicable and thus should be disregarded. What was therefore left relevant was Article IV Rule 1 and Rule 2 of the Hague Rules.

In the context of a consecutive voyage charter, into which the Hague Rules were contractually incorporated, it was held that the words 'loss or damage' covered losses of profit suffered by the charterers from the reduction in the number of voyages the ship could perform as a result of unseaworthiness. In

[1539] See, for example, *The Satya Kailash and Ocean Amity* [1984] 1 Lloyd's Rep 588 and *The Mariasmi* [1970] 1 Lloyd's Rep 247.
[1540] See, for example, *The Mariasmi* [1970] 1 Lloyd's Rep 247, 255 (Mocatta J); in *The Satya Kailash and The Ocean Amity* [1984] 1 Lloyd's Rep 588 the Court of Appeal indicated that certain additional clauses in typescript might well override provisions of the US COGSA 1936 incorporated into the charter by a paramount clause. See also *The Westmoreland* 1936 AMC 1680 2CCA.
[1541] See discussion, for example, in Erling Selvig, 'The Paramount Clause' (1961) 10 Am J Comp L 205, 217.
[1542] See "all or nothing" approach taken in *The Agios Lazaros* [1976] 2 Lloyd's Rep 47, 51.
[1543] *The Agios Lazaros* [1976] 2 Lloyd's Rep 47, 59 (Shaw LJ).
[1544] See, for example, *The Satya Kailash and Ocean Amity* [1984] 1 Lloyd's Rep 588.
[1545] *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd, The Saxonstar, The Saxonstar* [1958] 1 Lloyd's Rep 73.
[1546] For example, *The Aliakmon Progress* [1978] 2 Lloyd's Rep 499; *The Aquacharm* [1982] 1 Lloyd's Rep 7; *The Satya Kailash and Ocean Amity* [1984] 1 Lloyd's Rep 588.
[1547] *Hamilton v Mackie* (1889) 5 TLR 677.

another voyage charterparty case, *The Mariasmi*,[1548] it was held that the same words covered expenses incurred by the charterers as a result of delay due to collision caused by the vessel's negligent navigation.

The principles applied in *The Saxonstar* to a consecutive voyage charter were further extended to time charter matters, especially to the contracts into which the Hague Rules were contractually incorporated.[1549] However, in view of some important differences in nature between time and voyage charter contracts,[1550] it remains questionable whether the principles laid down in *The Saxonstar* can be similarly applied in a time charter context.[1551]

For example, in *The Satya Kailash*,[1552] the words 'loss or damage' in the preface to Article IV Rule 2 of the Rules were given an even wider meaning than in the voyage charter context and were held to be effective to give an owner the protection of the statutory immunities with respect to not merely those matters specified in Article II, but also to other contractual activities performed by him under the charter.[1553] These words were held to mean physical or financial loss or damage arising in relation to the "loading, handling, stowage, carriage, custody, care and discharge" of goods carried under a bill of lading to which the Rules apply. In other words 'loss or damage' in Article IV of the Rules was defined by reference to Article II and Article I(b).

Moreover, as discussed in Chapter 5, the exceptions of Article IV Rule 2 may affect the non-cargo claim issues, for example, constituting a defense to a claim for damages for breach of an express speed warranty,[1554] or constituting a defense to a claim for financial losses resulting from the wreck removal, as happened in *The Flinterstar* case. Similarly, in *The Aliakmon Progress*,[1555] a vessel heavily struck the quayside and seriously damaged her hull. The owners were held not to be liable because the incident was due to the negligence of the master.

Anomalously, in the voyage charter context the Courts found and gave a limited provision of paramountcy to the articles of the Rules, for example in cases like *The Mariasmi*[1556] where the owners could not rely on exclusions in Article IV Rule 2. On the other hand, in the time charter context the Courts took a more

[1548] *Marifortuna Naviera SA v Government of Ceylon* [1970] 1 Lloyd's Rep 247.
[1549] For example, by virtue of the reference to the US COGSA 1936 in Clause 24 of the NYPE_1948 (alternatively, Clause 31(a) of the NYPE_1993).
[1550] A contract for services versus a contract for carriage of goods by sea.
[1551] See, for example, *The Hermosa* [1980] 1 Lloyds' Rep 638, page 647 – 648 (Mustill J).
[1552] *Seven Seas Transportation Ltd v Pacifico Union Marina Corporation, The Satya Kailash and Ocean Amity* [1984] 1 Lloyd's Rep 588 (CA).
[1553] ibid, 596.
[1554] *The Leonidas* [2001] 1 Lloyd's Rep 533.
[1555] *The Aliakmon Progress* [1978] 2 Lloyd's Rep 499.
[1556] *The Mariasmi* [1970] 1 Lloyd's Rep 247.

flexible approach, for example in cases like *The Aquacharm*[1557] and *The Satya Kailash and Oceanic Amity*[1558]. It is argued by the author of this thesis that the position shall be *vice versa*, as a voyage charterparty – is a contract for carriage of goods by sea and a time charterparty – is a contract for provision of service. Why shall a contract of service be affected by the terms of the international conventions on the carriage of goods by sea? Does it make sense?[1559]

Furthermore, in the context of varying national laws, the incorporation of the Rules in the time charter context may produce different results. For example, the law in the USA and England seems to differ as to the effect on the express absolute warranty of seaworthiness at the commencement of the charter. In the USA it was held that while the incorporation of the US COGSA 1936 into an NYPE form charter reduced the implied absolute warranty of seaworthiness to an undertaking to exercise due diligence to make the vessel seaworthy, but it did not affect the express absolute warranty that the vessel to be delivered should be "tight, staunch, strong and in every way fitted for service."[1560] By contrast, the position under English law appears to be that the incorporation of the Hague Rules into a time charter will replace both the express absolute warranty of seaworthiness and the implied absolute warranty of seaworthiness.[1561]

Surprisingly, among the clauses which were considered by UNCTAD for harmonization and/or improvement, there was no discussion of the clause paramount.[1562]

Is It Necessary to Disturb the Principles of Incorporation Laid Down in The Saxonstar*?*

This thesis questioned, *inter alia*, the well-established principles of incorporation laid down in *The Saxonstar*. It is submitted that the remedy of rectification served no useful purpose in that case. Moreover, it is submitted that incorporation of the Rules in a way that blindly applies Latin maxims neglected the subject of law reform and disregarded the whole purpose of the charter party.

As *The Saxonstar* gained in age, its language was called upon to deal with circumstances utterly uncontemplated at the time of its passage. The quest for the Courts was not only to bring sense to what was originally intended by the decision in the House of Lords but also to fit this sense in the light of

[1557] *The Aquacharm* [1982] 1 Lloyd's Rep 7 (CA).
[1558] *The Satya Kailash and Oceanic Amity* [1984] 1 Lloyd's Rep 588.
[1559] Not in agreement with *The Satya Kailash and Oceanic Amity* [1984] 1 Lloyd's Rep 588, pages 595-597 (Goff LJ), in regard to the 'subject matter of the contract'.
[1560] *Iligan International Corp v John Weyerhaeuser* 1974 372 F Supp 859, 1974 AMC 1719 (SDNY 1974) aff'd 507 F 2d 68 (2nd Cir 1974), cert denied, 421 US 956.
[1561] *The Fjord Wind* [1999] 1 Lloyd's Rep 307.
[1562] UNCTAD, Charter Parties, A Comparative Analysis, dated June 1990, para 398–407.

completely new situations, to apply this sense to the unforeseen. This is a very dangerous task because this way leads to finding an exception for the current case only – and that leads to a complicating multiplicity of refinement and distinction and unfortunate of extension. It leads to the twisting of precedent. This is what the proverb seeks to say: 'Hard cases make bad law.'[1563]

The business of the courts to constantly use precedents to make the law always a *little* better, to correct old mistakes, to recorrect mistaken or ill-advised attempts at correction – but always within limits set, not only by the precedents but the traditions of right conduct in judicial office. Rules should thrust toward reasonable simplicity and be made with a broader vision. The court must strive to make sense as a whole out of the law. It must "take music of any statute as written by the legislature; it must take the text of the play as written by the legislature".[1564] And the court's duty is to play it well, in harmony with the other music of the legal system. If a statute is to make sense, it must be read in the light of some assumed purpose. A precedent merely declaring a rule, with no purpose or objective, is nonsense.

> "Certainty of rights and duties, and predictability of dispute resolution, is the first imperative of a system of commercial law" … because it enables them "to consider properly the risks attendant upon an adventure, and to make suitable arrangements by way of contractual stipulations and the procuring of insurance cover."[1565]

Karl N. Llewellyn argued almost 70 years[1566] ago that there is a mistaken idea that many laws have about the system of application and development of precedent, the idea that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law. In fact, there is always more than one correct answer. The questions are which of the available correct answers will the court select, and most importantly – why. This selection depends on (a) the current tradition of the court; (b) the current temper of the court; and (c) the sense of the situation as the court sees that sense. There are other possible reasons, but these three are the most frequent and commonly the most weighty.[1567]

[1563] The phrase arguably propounded by Oliver Wendell Holmes Jr in *Northern Securities Co v United States*, 193 US 197 (1904), the case heard by the US Supreme Court in 1903.
[1564] Jerome Frank, 'Words and Music: Some Remarks on Statutory Interpretation' (1947) 47 Col L Rev 1259.
[1565] *Novorossisk Shipping Co v Neopetro Co Ltd, The Ulyanovsk* [1990] 1 Lloyd's Rep 425, 430 (Steyn J).
[1566] Llewellyn KN, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 Vand L Rev 395.
[1567] Llewellyn KN, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 Vand L Rev 395, 396.

Although the author of this thesis attacks the well-established principles of incorporation laid down in *The Saxonstar*, these principles have become deeply entrenched in the case law and the minds of shipping lawyers. In order to abandon this precedent, it would be necessary, first, to look over the prior application of the rule; second, to rework it into a wholly new formulation of the true rule or true principle that knocks out some of the prior cases as simply "misapplication"; and third, to build up the other precedents based on the newly created rule. However, all these steps may simply break the "beauty and symmetry of the law."[1568]

Right now it is too late to go through all these exercises with the decision in *The Saxonstar*, as disturbance will produce unwanted results and create a greater number of disputes rather than reasonable solutions.

In a partial solution, it is submitted that there is no need for a clause paramount in the contracts that merely split the role of carrier between a shipowner and a charterer as operator, for example, when a line takes extra tonnage, whether on time or on a voyage basis or when there is a series of back-to-back subcharterers. The rights of recourse between equal partners should be left to freedom of contract and be subject to the application of the InterClub Agreement. As said, charter parties by tradition are the documents that shall solve such kind of questions in detail.

A Need to Incorporate the Rules under the P&I Insurance Policy Cover

Insurance cover in respect of cargo liabilities is included in the indemnity class, which is subject to some exceptions, provisions, and conditions. In most cases, there is a strict requirement of the underwriters to have a clause paramount incorporated in the charter party, in the same way as with the bill of lading. So, the terms of carriage must not be more onerous than those under the Hague or the Hague-Visby Rules.

The effect of the Rules was said to distribute maritime risks between the cargo owner and the shipowner; and in practice, this means a distribution of risks between the cargo underwriter and the P&I underwriter. Most time charter parties are based on the assumption that the cargo claims shall be settled between the Clubs by way of the ICA, which was drafted as a memorandum of agreement between the various P&I Clubs as to apportionment of liability for cargo claims and as a direct response to difficulties in interpretation of Clause 8 of NYPE 1946. However, this mutual agreement does not always provide clarity, for example, in cases like *The Flinterstar*. Although the ICA is said to represent a "more or less

[1568] In the words of Jerome Frank, 'Words and Music: Some Remarks on Statutory Interpretation' (1947) 47 Col L Rev 1259.

mechanical apportionment of financial liability"[1569] and to apply regardless of any incorporation of the Hague, Hague-Visby, or Hamburg Rules, the arithmetical formula that is provided for cargo claims in Clause 8 of ICA 1996 does not work in non-cargo matters, where the Owners still can avoid liability for claims arising out of an error or fault in navigation or management of the vessel.

It may be questioned if a similar tool to the ICA is needed for incorporation in the voyage charterparty context. The author of this thesis submits that it is not. This kind of contract is something that is concluded between two parties who are in a position to look after their own interests by contracting only on terms that are acceptable to and well understood for both of them. Generally, the division of liabilities for loading, stowage, and discharging operations are clearly allocated in the terms of a contract with either FIOS or LINER terms. Further, in cases where the Rules are incorporated into the contract, the specific and partly non-transferable obligations under Article III Rule 2 rest with the carrier.

[1569] *The Strathnewton* [1983] 1 Lloyd's Rep 219, 225 (Kerr LJ)

The Final Conclusion

As practice shows, most of the disputes in regard to clause paramount arise out of disagreements over the proper interpretation of this particular wording and its effect in the context of the contract. The main point is that it is for the courts to decide on the proper interpretation of the terms of the contracts and not for the parties who actually create these contracts setting all these terms together, incorporating the clauses in a slapdash manner, neglecting the legal principles and "putting commercial cart in front of the legal horse."

In interpreting contracts, the courts do not need to discover the subjective intentions *of the parties* but need to ascertain the contextual meaning of the relevant contractual language, imputing the relevant intentions *to the parties*, following the so-said 'purposive approach' to contractual interpretation. As discussed in the thesis, this process of 'imputing' may be an extremely artificial exercise.

It is submitted that the Courts have gone too far down this purposive approach in construing a clause paramount. It is most unlikely that an average shipping man would expect such an outcome as the decisions in *The Lady M*[1570] or *The Tasman Pioneer*[1571] cases.

The problem with the incorporation of the clause paramount is that the outcome of the disputes that arise under this clause may be a complete mystery to the parties. This device proved not to be a reliable solution. It is plainly not satisfactory that the set of Rules drafted for application in the bills of lading contracts is applied without suitable adoption to charter parties on the so-called 'back-to-back' basis. The contractual incorporation not only creates legal difficulties in the relationship between charter parties and bills of lading issued under them but also in the interpretation of the charter parties themselves.

Both attempts to incorporate the Rules into charter parties contractually and exclusion of the Rules from charterparties and bills of lading creates serious difficulties and uncertainties. There are likely to be further issues of interpretation in respect of contracts of carriage and bills of lading that are subject to the Rules before the English courts. And these issues will be new ones.

It is considered that in order to effectively overcome these legal difficulties, a similar regime of responsibility to that as determined in the Hague and Hague-Visby Rules—a set of tailor-made rules that should be drafted to the charter parties, whatever the geographical applicability. These rules should be

[1570] *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd, The Lady M* [2019] EWCA Civ 388.
[1571] *Tasman Orient Line CV v New Zealand China Clays Ltd and Others, The Tasman Pioneer* [2010] 2 Lloyd's Rep 13.

formulated with specific reference to the following main areas: care of cargo, seaworthiness, limitation of liability; rights and immunities of the owners; and carriage of deck and dangerous cargo. The similar standards of responsibility as applied mandatorily to bills of lading should be adopted mandatorily to charter parties.[1572]

On the other hand, as submitted by UNCTAD any strict imposition of standard form contracts on the world shipping industry would be highly undesirable. The application of mandatory legislation to charter parties would eliminate the essential flexibility inherent in a system that allows the parties complete freedom to make the contract they want.[1573] Further, it is not clear what type of contracts should be covered by such a 'universal regime': voyage, consecutive, time, or bareboat charters. Moreover, some national laws will not leave to the parties the complete freedom to determine their own contract, with further evolving issues of interpretation in the local jurisdictions.

It is submitted that there is no need to go through this exercise because it will create a bigger state of uncertainty.

[1572] See Per Gram, 'Chartering Problems from an International Point of View' (1975) 49 Tul L Rev 1076; and the proposals in UNCTAD, Charter Parties, A Comparative Analysis, dated June 1990.
[1573] UNCTAD, Charter Parties, A Comparative Analysis, dated June 1990, para [412].

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