Chapter 8

Carriage of Goods by Sea: Bills of Lading and the Carriage of Goods by Sea Act 1971

Chapter Contents

Introduction

The bill of lading, as indicated in Chapter 7, plays an important role in most international sale transactions. Among others, the bill of lading is a contract of carriage between the carrier and the consignee[1] or endorsee. Terms contained in the bill of lading play a central part in determining the rights and liabilities of the parties to the contract. Most bills of lading issued today are subject to international conventions – the Hague Rules, the Hague-Visby Rules and the Hamburg Rules[2] – which impose on the carrier minimum responsibilities and liabilities that cannot be lessened with suitable clauses in the contract. The current legal regime relating to bills of lading, however, is a consequence of developments that started approximately 200 years ago.

At common law, the carrier was strictly liable for the safe transport of the cargo to its destination and delivery to the designated person.[3] The carrier could, however, disclaim this strict liability by inserting suitable clauses in the contract of carriage. The increase in ocean traffic in the 19th century increased the use of exemption clauses.[4] It was also an important era for English contract law becuase of the rise of the *laissez faire* philosophy, which promoted unrestricted freedom in commercial agreements. The courts perceived their role simply as one of ensuring that the parties kept to the terms of their agreement and were reluctant to intervene in the contract between men. This tolerant attitude benefited those in a better bargaining position.

In the context of contracts of carriage of goods by sea, the shipowner, the stronger of the contracting parties, inevitably inserted all embracing exclusion clauses. Carriers were exempted from liability for loss or damage from perils of the sea, decay, strikes, deviation to unseaworthy ships and their own negligence.[5] The exclusion clauses operated totally in the carrier's favour, and the goods were carried entirely at the merchant's risk. Judges in Britain, following the tenor set by the *laissez faire* philosophy, were sympathetic to such clauses. And Britain, a nation with huge maritime interests, had a lot to gain with the increase in the volume of ocean traffic. The liberal British attitude to disclaimers in bills of lading was not followed in other jurisdictions. The US Supreme Court, for instance, read exclusion clauses extremely restrictively and subjected them to a number of overriding obligations, such as the obligation to provide a seaworthy ship and to take due care of the cargo.[6] US Congress, in response to approaches made by the shipping interests, addressed the inequities by enacting the Harter Act in 1893,[7] which limited the shipowner's freedom of contract and sought to protect the cargo owner.[8] However, it was felt that an international convention was required to

1 In most cases, the consignee is likely to be the buyer. This does not preclude the seller to name himself as the consignee.

2 See Chapter 9. The text of all these conventions is available in Carr and Goldby, *International Trade Law Statutes and Conventions*, 2nd edn, 2011, Routledge-Cavendish. They are also available at www.jus.uio.no/lm.

3 Ocean carriers were also strictly liable under Roman law to transport safely the goods in their custody. They were liable for loss or damage to goods caused by themselves or their employees but were not liable for shipwreck or damage caused by pirates that could not be resisted (*vis maior*). Strict liability was imposed on ocean carriers since they were presumed to be dishonest (*improbitas*). See Justinian Digest § 4.9.3.1; Berger, *Encyclopedic Dictionary of Roman Law under Receptum Nautae*, 1953, American Philosophical Society, at pp 668–9.

4 For an interesting overview of shipping policies from the 15th to 20th centuries, see Sweeney, 'From Columbus to cooperation – trade and shipping policies from 1492 to 1992' (1989/1990) 12 Fordham International LJ 481.

5 See Colinvaux (ed), *Carver's Carriage by Sea*, 2 vols, 13th edn, 1982, Stevens (hereinafter '*Carver's Carriage by Sea*'), for a list of the various exclusion clauses found in bills of lading. See also *Tessler Bros Ltd v Itaipacific Line* 494 F2d 438 (1974).

6 See Gilmore and Black, *The Law of Admiralty*, 1975, Foundation Press, at pp 140–1. Clauses excluding liability for negligence were viewed as unenforceable (see *Liverpool and Great Western Steam Co v Phoenix Insurance Co* 129 US 397 (1889)).

7 46 USC App (1988) §§ 190–96.

8 According to Kozolchyk, 'Evolution and present state of the ocean bill of lading from a banking perspective' (1992) 23(2) JMLC 161, the Harter Act 1893 is a precursor of consumer protection law. He also suggests the drafters of the Act did not regulate charterparties since they viewed the parties to such contracts as having equal bargaining strength. The view that parties to a charterparty are of equal bargaining strength is a legal myth and is dependent on market conditions. For instance, if international trade is buoyant, cargo owners are likely to be the weaker of the two parties until saturation point due to an expansion of the shipping sector. See Peck, 'Economic analysis of the allocation of liability for cargo damage: the case for the carrier, or is it?' (1998) 26 Transportation LJ 73.

redress the imbalance caused by the *laissez faire* philosophy. To this end, the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, 1924[9] (hereinafter 'Hague Rules') was drafted between 1921 and 1923 and signed by major trading nations in August 1924.[10] Many of the convention's provisions are modelled on provisions found in the Harter Act. The Hague Rules set a minimum level of liability that could not be contracted out of by the carriers. The United Kingdom (UK) implemented the Hague Rules with the Carriage of Goods by Sea Act 1924.

Failings of the Hague Rules, however, surfaced over time as a consequence of litigation and developments in shipping technology. For instance, the defences and limitation of liability afforded by these Rules did not extend to the servants or agents of the carriers, and the calculation of limitation of liability in terms of packages or units was not sufficiently flexible to accommodate consolidation of cargo in containers.[11] This led to the drafting of the Brussels Protocol, which revised the Hague Rules (hereinafter 'Hague-Visby Rules') in 1968. The Hague-Visby Rules were implemented in the UK with the Carriage of Goods by Sea Act 1971, which repealed the earlier Act of 1924. The Hague-Visby Rules were not adopted by all the signatories to the Hague Rules with the result that both the Hague Rules and the Hague-Visby Rules exist side by side. The US, for instance, is not a party to the Hague-Visby Rules. This means that a bill of lading issued for goods sent from the US to the UK may, in some circumstances, be subject to the Hague Rules, rather than the Hague-Visby Rules.

The implementing legislation, the Carriage of Goods by Sea Act 1971 to which the Hague-Visby Rules are attached as a schedule, provides in s 1(2) that the Rules shall have the force of law. In other words, the Rules must be treated as if they are a part of directly enacted statute. The consequence of this, according to *The Hollandia*,[12] is that the parties' intentions are overridden by the provisions of the Rules.

Since, for the most part, the Hague Rules are similar to the Hague-Visby Rules, all references are to Hague-Visby Rules in this chapter, although attention to the Hague Rules is drawn where required.

Interpretation of The Hague-Visby Rules in the English Courts

The Hague-Visby Rules, unlike some of the more recent international conventions (e.g., Art 7 of the United Nations Convention on Contracts for the International Sale of Goods 1980,[13] which states that 'in the interpretation of this convention, regard has to be had to its international character, and to the need to promote uniformity in its application and the observance of good faith in international trade') are silent regarding their interpretation.

9 The US implemented this convention only in 1936, even though it was based on its Harter Act.

10 See *Owners of Cargo Lately on Board The River Gurara v Nigerian National Shipping Line Ltd* [1997] 1 Lloyd's Rep 225. The matter at issue was whether containers constituted package or unit under Art IV(5) of the Hague Rules. The court held that parcels loaded in a container were packages for the purposes of Art IV(5). What constituted relevant packages could not be based on the parties' agreement since a carrier could evade the minimum liability set by the Hag s it?' (1998) 26 Transportation LJ 73.

11 See *Owners of Cargo Lately on Board The River Gurara v Nigerian National Shipping Line Ltd* [1997] 1 Lloyd's Rep 225. The matter at issue was whether containers constituted package or unit under Art IV(5) of the Hague Rules. The court held that parcels loaded in a container were packages for the purposes of Art IV(5). What constituted relevant packages could not be based on the parties' agreement since a carrier could evade the minimum liability set by the Hague Rules by applying the agreed definition to containers. (The clause in the bill of lading that said that the container was to be regarded as package if goods were packed by shipper in the container was held to be void.) The plaintiff had the burden of proving the number of packages in the container with extrinsic evidence and liability to be calculated on that basis rather than by reference to the description in the bill of lading.

12 Aka *The Morviken* [1983] 1 Lloyd's Rep 1.

13 See Chapter 2 for further comments on Art 7.

English judges, however, are conscious of the international nature of the Hague-Visby Rules, as well as other international conventions and periodically urge the need to seek uniformity in the law of all states adhering to the convention. The House of Lords in *Stag Line Ltd v Foscola, Mango and Co*[14] advocated the view that interpretation of the Hague Rules should not be rigidly controlled by domestic precedents of antecedent date, but that the language of the convention must be construed on broad principles of general acceptation (at p 350). Recent decisions (e.g., *The Rafaela S*) seem to be following the principles enunciated in *Stag Line*. This conscious need for harmonisation is reflected in the interpretation of other transport conventions, such as the Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 1929.[15] For instance, Lord Denning in *Corocraft Ltd v Pan American Airways Inc*[16] said 'even if I disagreed, I would follow [decisions of other courts] in a manner which is of international concern. The courts of all countries should interpret [the Warsaw Convention] in the same way' (at p 655).

It is not uncommon for the courts to look to the decisions of courts in other jurisdictions as an aid to interpretation of the Hague-Visby Rules for purposes of achieving uniformity.[17] If any doubts regarding the wording in the Hague-Visby Rules arise, these will be resolved by looking at the French text.[18] Both the French and English texts are authentic. The more recent case of *Effort Shipping Co Ltd v Linden Management SA and Others (The Giannis K)*[19] indicates that the courts will be willing to consider not only the *travaux préparatoires*, but also the historical setting of the Hague Rules for the purposes of interpretation.

Regardless of the English courts' tolerant attitude and forward thinking in their commendable promotion of the international character of the Hague/Hague-Visby Rules, they are prone to conflicting interpretations across jurisdictions and seem to be influenced largely by domestic law and national concerns. For instance, perils of the sea, deck carriage and the nature of the seaworthiness obligation are all interpreted variously. The causes are diverse: ambiguous provisions;[20] lack of judicial expertise in interpreting international conventions;[21] differences in legal tradition as reflected in techniques of interpretation; and the influence of national/economic policies. The end result is uncertainty. With uncertainty comes greater risk, which, in the long run, may undermine free trade vehemently supported and promoted by policy makers, national and international. One possible way to counteract this problem would be to give extensive definitions and also allow the courts to refer to the organisation responsible for drafting international conventions to provide guidance on interpretation. Alternatively, an international court of appeals for international disputes involving international conventions may bring about the required level of harmonisation and certainty.[22] However, not all would go along with such solutions on the grounds that they undermine a nation's

14 [1932] AC 328. See also *The Rafaela S* [2004] QB 702.

15 See Chapter 10, Approach to the interpretation of the Warsaw Convention in the English courts.

16 [1969] 1 QB 616.

17 Hellenic Steel Co v Svolomar Shipping Co Ltd (The Komninos S) [1991] 1 Lloyd's Rep 370. See also Owners of Cargo Lately on Board The River Gurara v Nigerian National Shipping Line Ltd [1997] 1 Lloyd's Rep 225, at pp 227–28; The Rosa S [1988] 2 Lloyd's Rep 574, at p 581.

18 Pyrene v Scindia Navigation Ltd [1954] 2 QB 402. See also ibid The Komninos S.

19 [1998] 2 WLR 206. See also 'Dangerous goods', below.

20 In 'International uniform rules in national courts: the influence of domestic law in conflicts of interpretation' (1987) 27(4) Virginia Journal of International Law 729, at pp 797–98, Sturley is of the opinion that ambiguous provisions in the Hague Rules drive national courts to reconcile the uniform law with their own domestic legal doctrines, and, since domestic legal doctrines are not the same, they give rise to conflicting interpretations.

21 The CMI has recently set up a database consisting of cases involving the Hague and the Hague-Visby Rules. This is likely to introduce some degree of uniformity of interpretation. Visit http://comitemaritime.org for further information. The database also includes cases interpreting the Hamburg Rules (see Chapter 9).

22 See Black, 'The Bremen, COGSA and the problem of conflicting interpretation' (1973) 6 Vanderbilt Journal of Transnational Law 365.

sovereignty[23] and interests. As Tetley pertinently observes, '. . . the persistence of nationalism, even in the 21st century, also accounts for some problems in achieving greater harmony on maritime law matters within the community of nations. States do not easily surrender sovereignty in fields where they perceive that their "vital interests" are, or could be, adversely affected by subscribing to new international regimes and standards'.[24] Although it is easy to empathise with the primacy of national values and interests, it is debatable whether such a view can be sustained when the world is marching steadfastly toward a global community fuelled by the goal of economic prosperity through international trade.[25] Sovereignty, at best, is an excuse for not engaging in a meaningful discussion to resolve issues, be they legal, economic or social and seems to be of 'value for purposes of oratory and persuasion rather than of science and law'.[26]

Carrier's responsibilities and liabilities

Before considering the responsibilities of the carrier, it is essential to establish who is the 'carrier' for the purposes of the Hague-Visby Rules. Article I(a) defines carrier to *include* the owner or charterer who enters into a contract of carriage with the shipper. The identity of the carrier is a matter of utmost importance since the Hague-Visby Rules impose a time limit of one year within which the action should be brought. If the action is not brought within the time limit set by the Hague-Visby Rules, the cargo owner loses any claims he has for breach of contract against the carrier. The identity of the carrier is normally established on the basis of the bill of lading and other documents.[27]

Generally, where there is a voyage charterparty or time charterparty, the bills of lading are signed by the master on behalf of the shipowner. In these circumstances, the shipowner would be deemed the carrier who enters into the contract of carriage with the shipper.[28]

It is possible that the charterer may have an express agreement to sign the bill of lading on behalf of the shipowner as in cl 8[29] of the NYPE (New York Produce Exchange) 1981 and cl 30(a)[30] of NYPE 93 standard time charter form. Here, the shipowner would be regarded as the carrier for the purposes of the Hague-Visby Rules. Where the charterer signs the bill of lading as the shipowner's agent, of course, applying the laws of agency, the shipowner would be liable.

There may be situations where the charterer issues the bill of lading in his own name.[31] Here, the charterer will be regarded as the principal and, hence, liable on the contract of carriage.

23 See, for example, Krasner, *Sovereignty: Organized Hypocrisy*, 1999, Princeton UP for an interesting analysis of sovereignty.

24 'Uniformity of international private maritime law – the pros, cons and alternatives to international conventions – how to adopt an international convention' (2000) 24 Tulane Maritime LJ 775, at p 810.

25 See the Preamble to the World Trade Organization (WTO) Agreement. See also Singer and Ansari, *Rich and Poor Countries*, 4th edn, 1988, Routledge.

26 See Fowler and Bunck, *Power and the Sovereign State*, 1995, Pennsylvania State UP.

27 See Davies, 'The elusive carrier: whom do I sue and how?' (1991) 19 ABLR 230; Tetley, 'Whom to sue – identity of the carrier', in Block *et al* (eds), *Liber Amicorum Lionel Tricot*, 1988, Kluwer; Tetley, 'Who may claim or sue for cargo loss or damage' (Pts I and II) (1986) 17 JMLC 153, at p 407.

28 See *The Khian Zephyr* [1982] 1 Lloyd's Rep 73, at p 75. See also *The Venezuela* [1980] 1 Lloyd's Rep 393.

29 Clause 8, in relevant part, reads:

> . . . The captain (although appointed by the owners) shall be under the orders and direction of the charterers . . . Charterers are to perform all cargo handling at their expense under the supervision of the captain, who is to sign bills of lading for cargo . . . However, at charterers' option, the charterers or their agents may sign bills of lading on behalf of the captain . . .

See Pritchett, 'Charterer's authority to sign bills of lading under standard time charter terms' [1980] LMCLQ 21.

30 It reads:

> The master shall sign the bills of lading or waybills for cargo as presented in conformity with mate's or tally clerk's receipts. However, the charterers may sign bills of lading on behalf of the master, with the owner's prior written authority, always in conformity with mate's or tally clerk's receipts.

31 See 'Scope of Application', Chapter 9, and pp 256–7 below for incorporation of charterparty terms in bills of lading.

The meaning of the word 'carrier' in Art I(a) was elaborated upon by Robert Goff J in *The Khian Zephyr*[32] in the following manner:

> . . . the function of Art I(a) . . . in providing that the word 'carrier' includes the owner or charterer who enters into a contract of carriage with a shipper, is to legislate for the fact that you may get a case – for example, under bills of lading – where the bills of lading are charterers' bills; and where there are charterers' bills, of course, the charterer is in a contractual relationship with the cargo owner and is responsible under the bills of lading to the cargo owners. In those circumstances, the effect of the definition in Art I(a) is to ensure that provisions which apply to the carrier under the Hague Rules shall likewise apply not only to the shipowner in whose ship the goods are physically being carried and through whose servants and agents, the master and crew of the ship he is physically in possession of the goods, but shall also apply to a charterer who has contracted as the other party to the bill of lading. That makes good sense, and provides a common sense explanation why the definition of 'carrier' should be so defined in Art I(a) as to include the owner or the charterer who enters into a contract of carriage with a shipper [at pp 75–76].

However, bills of lading issued in the charterer's name may contain a demise clause that seeks to transfer contractual liability to the shipowner. The English courts are tolerant toward such clauses. In *The Berkshire*,[33] the demise clause used in a bill of lading issued by the sub-charterer, which was effective in transferring liability, read as follows:

> If the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary), the bill of lading shall take effect as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agents and shall be under no personal liability whatsoever in respect thereof.

Use of demise clauses has come under considerable attack from academics since they create uncertainty regarding the identity of the party with whom the shipper is contracting – an undesirable result given the short time within which the cargo owner has to institute proceedings.[34] However, Brandon J in *The Berkshire*[35] did not foresee any problems in holding demise clauses as effective; he did not perceive them as extraordinary clauses at all but as entirely usual and ordinary clauses.

Where the charterer is a demise charterer, he would be liable since he has taken over complete possession of the ship and its management. The shipowner who has chartered the vessel has no control over the master. The master of the ship is the agent of the charterer and, therefore, bills of lading bind the charterer as principal.[36]

The difficulties in determining the party liable under the contract of carriage from the documentation are amply illustrated by *Homburg Houtimport BV v Agrosin Pvt Ltd and Others (The Starsin)*.[37] *The Starsin* was time chartered to Continental Pacific Shipping Ltd (CPS). Liner bills of lading on CPS shipping forms were issued. Clause 1 defined 'carrier' as the party on whose behalf the bill of lading was signed and all bills of lading were signed 'as agents' for CPS. The bill of lading contained further clauses relating to the party liable under the contract of carriage. Clause 33 relating to the identity of

32 [1982] 1 Lloyd's Rep 73. See also *The Venezuela* [1980] 1 Lloyd's Rep 393.

33 [1974] 1 Lloyd's Rep 185.

34 Tetley, *Marine Cargo Claims*, 3rd edn, 1988, Blais, at p 248.

35 [1974] 1 Lloyd's Rep 185.

36 Baumwoll Manufactur von Carl Scheibler v Furness [1893] AC 8.

37 [2003] 1 Lloyd's Rep 571.

the carrier stated that the contract evidenced by the bill of lading was between the merchant and the owner of the vessel who was to be liable for any damages that arose out of the contract of carriage. Clause 35 stated that, 'if the vessel is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract of carriage with the owner'.

At the court of first instance the bills of lading were held to be charterer's bills. On appeal, however, cll 1(c), 33 and 35 were read together and, by a majority the court, concluded that the bills were shipowner's bills. On further appeal, the House of Lords held that the carrier was plainly identified by the language on the face of the bill of lading, which took priority. They also went on to say that the commercial community, including banks (that is Art 23 of Uniform Customs and Practice for Documentary Credits 1994), expected the identity to be given on the face of the bill of lading and not printed on the reverse.[38] The bills were, therefore, charterer's bills.

Duty to provide a seaworthy ship

The carrier, under Art III(1), is under an obligation before and at the beginning of the voyage to exercise due diligence[39] to:

- make the ship seaworthy;
- properly man, equip and supply the ship; and
- make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation.

Seaworthiness relates to both the physical state of the ship and cargoworthiness as under common law.[40] For instance, a mechanically unsound ship or an incompetent crew can render the ship unseaworthy,[41] so can stowing dangerous goods below deck in breach of international regulations.[42] The question of whether due diligence has been exercised is one of fact. In *The Amstelslot*,[43] where the vessel during the voyage suffered an engine breakdown due to failure of her reduction gear, the courts treated due diligence similarly to negligence. According to Lord Devlin:

> Lack of due diligence is negligence; what is at issue . . . is whether there was an error of judgment that amounted to professional negligence [at p 235].

The standard for ascertaining the exercise of due diligence is determined in terms of the actions of other skilled men in similar circumstances.[44] The question to be posed is 'would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?'.[45] It must be noted that the seaworthiness undertaking under the Hague-Visby Rules is not an absolute

38 See Chapter 15 for more letters of credit. Would it have made a difference if there was a printed clause on the face of the bill of lading referring to the terms and conditions on the reverse of the bill?

39 The due diligence standard, as opposed to the absolute duty found in common law, was adopted from the US Harter Act.

40 See Chapter 7, Implied obligations of the shipowner.

41 See *Rey Banano del Pacifico CA and Others v Transportes Navieros Ecuatorianos and Another (The Isla Fernandina)* [2000] 2 Lloyd's Rep 15 – a voyage charterparty incorporating the Hague Rules where the claimants were unsuccessful in establishing that the defendants had not exercised due diligence to properly man the ship. See also *The Star Sea* [1997] 1 Lloyd's Rep 360.

42 See Northern Shipping Co v Deutsche Seereederei GmbH and Others (The Kapitan Sakharov) [2000] 2 Lloyd's Rep 255.

43 [1963] 1 Lloyd's Rep 223.

44 *The Toledo* [1995] 1 Lloyd's Rep 40.

45 MDC Ltd v NV Zeevaart Maatschappij 'Beursstraat' [1962] 1 Lloyd's Rep 180; Fyffes Group Ltd and Carribbean Gold Ltd v Reefer Express Lines Pty Ltd and Reefkrit Shipping Inc (The Kriti Rex) [1996] 2 Lloyd's Rep 171; UBC Chartering Ltd v Liepaya Shipping Co Ltd (The Liepaya) [1999] 1 Lloyd's Rep 649.

undertaking as at common law.[46] This is specifically reinforced by s 3 of the Carriage of Goods by Sea Act 1971, which states:

> . . . there shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Due diligence must be exercised by the shipowner 'before and at the beginning of the voyage' (Art III(1)). This phrase was considered in *Maxine Footwear Co Ltd v Canadian Government Marine Ltd*.[47] Shortly before the vessel was due to sail, an officer of the ship ordered and supervised the thawing of a frozen drain pipe with an oxyacetylene torch. This started a fire in the cork insulation of the ship, and the master had to scuttle the ship. During the scuttling operation, the appellant's cargo was lost.

The respondent relied on the exception relating to fire in Art IV(2)(b) and argued that they were not liable for the lost goods since the fire did not result from their actual fault or privity. Further, on the construction of Art III(1), the obligation to exercise due diligence to make the ship seaworthy arose at the commencement of loading and at the commencement of the voyage. The Privy Council held that the interpretation of the word 'before' in the context of the absolute undertaking of seaworthiness under common law did not apply and that the Hague Rules had to be construed in the light of their language. And from the words used in the Hague Rules, it was clear that the phrase 'before and at the beginning of the voyage' meant the period from at least the beginning of the loading until the ship started on her voyage. Therefore, the vessel was unseaworthy and the respondent was liable for the damage caused to the appellant's goods.

The obligation created by Art III(1) is an overriding obligation such that where the damage is caused by its non-fulfilment, the carrier will lose the immunities available to him under Art IV(2). Until recently, it was commonly held, at least by commentators,[48] that breach of the seaworthiness obligation did not affect the rights imparted by Art IV(6). However, in *Mediterranean Freight Services Ltd v BP Oil International Ltd (The 'Fiona')*,[49] a cargo of oil exploded as a result of contamination with residues of cargo previously carried. Since it was a breach of the seaworthiness obligation, an overriding obligation, the court held that the carrier could not rely on Art IV(6), which, along with others, imparted a right to an indemnity. Diamond J, although saying that he disagreed with Scrutton, expressed his views thus:

> Article IV(6) contains provisions some of which are in the nature of exceptions clauses and one of which confers on the carrier a right to an indemnity. The exceptions are very far reaching. If goods of an inflammable, explosive or dangerous nature are shipped and if they become a

46 See Chapter 7, Implied obligations of the shipowner.

47 [1959] AC 589. See also *A Meredith Jones and Co Ltd v Vangemar Shipping Co Ltd (The Apostolis)* [1997] 2 Lloyd's Rep 241. In this case, a cargo of cotton caught fire. The claimant was unable to prove that the welding (which was taking place on the ship) was the probable cause of the fire as opposed to a discarded cigarette end. Neither was there anything about the ship that rendered her unseaworthy. The holds were safe and the welding was not taking place to render her seaworthy. It was held that the shipowner could not be held to be in breach of the Art III(1) obligation on the basis that welding exposed the cargo to an ephemeral risk of ignition. *Maxine Footwear* was distinguished on the basis '. . . it was fire in the fabric of the vessel, namely the cork lining of the hold, which rendered her unseaworthy' (at p 245). But what if there had been more than an ephemeral risk of ignition? Would this have changed the decision in any way? Probably not. Should the welding work have been allowed to take place where there was a possibility of the cargo catching fire, however remote? Of course, the cargo owner of the destroyed cargo can always raise a breach of Art III(2). The obvious disadvantage is that Art III(2) is not an overriding obligation. Note also that the fire exception available under the Merchant Shipping Act 1995 (see 'Fire', below).

48 According to Boyd, Burrows and Foxton (eds), *Scrutton on Charterparties and Bills of Lading*, 20th edn, 1996, Sweet & Maxwell (hereinafter '*Scrutton on Charterparties*'), 'the shipowner can presumably exercise his rights under this rule (viz Art IV(6)) even if in breach of his obligations as to seaworthiness' (at p 453).

49 [1993] 1 Lloyd's Rep 257.

> danger to the ship or cargo, then whether or not the carrier consented to the shipment and whether or not he had knowledge of their nature and character at the time of shipment, the carrier may land and destroy the goods without incurring liability to the shipper except in general average; see both the first and second paragraphs of the rule. It would be wholly contrary to the scheme of the rules and likewise inconsistent with equity and commercial common sense that a carrier should be entitled to destroy dangerous goods without compensation and without liability except to general average if the cause of the goods having to be destroyed was a breach by the carrier of his obligations as to seaworthiness. The exception in Art IV(6) is clearly in my judgment subject to the performance by the carrier of his overriding obligation set in Art III(1). So also in my judgment is the right to an indemnity conferred by the first paragraph of the rule [at p 286].[50]

Once the carrier has exercised due diligence to make the ship seaworthy before she sets sail, he is not in breach of Art III(1) should faults develop during the voyage or while calling at an intermediate port. The common law doctrine of stages, which requires that the ship is seaworthy at each stage, does not apply. In *Leesh River Tea Co v British India Steam Navigation Co*,[51] chests of tea were shipped aboard *The Chybassa* for carriage from Calcutta to London, Hull and Amsterdam via Port Sudan. While the vessel was in Port Sudan, the stevedores, when unloading goods from the ship, removed the brass cover plate from one of the ship's storm valves. As a result, water entered the hold and damaged the tea. The court found that the defendants were not in breach of the obligation imposed by Art III(1).

However, it is possible that faults that develop after the vessel has set sail are traceable to the unseaworthy state of the ship before she set sail. Where this is the case, the shipowner would be in breach of Art III(1).[52]

Responsibility of exercising due diligence to make the ship seaworthy is personal to the carrier even where the work has been delegated to a servant of the carrier or to a reputable independent contractor. In *The Muncaster Castle*,[53] cases of tinned ox tongues were shipped under bills of lading from Sydney to London. On discharge, the cases were found to be damaged by sea water. It was found that defective storm valve covers had let the sea water enter into the hold. The inspection covers had been removed for inspection shortly before the vessel started on her voyage. The covers had not been properly refitted by the fitter employed by the firm of ship repairers who had been instructed by the carrier to carry out the survey. The cargo owner alleged lack of due diligence to make the ship seaworthy on the part of the carrier. The carrier argued that, by employing a firm of reputable ship repairers to carry out the task, he had discharged his obligation of exercising due diligence to make the ship seaworthy. The court, however, came to the conclusion that no other solution was possible than to say that the shipowner's obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done. In other words, Art III(1) requires due diligence not only in the acts of the shipowner, but also in the acts on the part of those to whom he may have committed the work of fitting the vessel for sea and this obligation of due diligence is personal to the shipowner.

50 Also see 'Monetary unit for calculation', below, on the relationship of Art III(1) and Art IV(5)(a).
51 [1966] 2 Lloyd's Rep 193.
52 In *The Subro Valour* [1995] 1 Lloyd's Rep 509, three possible causes for fire in the engine room were identified: discarded cigarette, ignition of flammable material on the exhaust or ignition of wiring. On the basis of evidence, the fire was most likely to have been caused by damage to wiring as a result of shelving rubbing against it. In the absence of unexpected voyage conditions or any suggestion that the shelving was rubbing against the wiring after the voyage began, the court concluded that the wiring was in a vulnerable state before the ship set sail and the carriers were in breach of the seaworthiness obligation at the commencement of the voyage.
53 [1961] 1 Lloyd's Rep 57.

A certificate issued by a Lloyd's surveyor will be inadequate to establish the seaworthy state of the ship if the defect is apparent on a reasonable inspection of the ship.[54] So, if the carriers are to escape liability, they must prove that due diligence has been exercised not only by themselves and by their servants, but also by a Lloyd's registered shipping surveyor.[55] So, where the surveyor is negligent, the shipowner will be liable under the Hague-Visby Rules.

A cargo owner may wish to sue the classification society that employs the surveyor in tort for damages. Such an action will be unsuccessful under English law. In *Marc Rich and Co AG and Others v Bishop Rock Marine Co Ltd (The Nicholas H)*,[56] the English courts examined the issue of whether a classification society owes a duty of care to the cargo owners giving rise to liability in damages. In this case, the ship, carrying a cargo of zinc and lead from South America to Italy under bills of lading incorporating the Hague Rules, developed a crack in its hull. The surveyor employed by the vessel's classification society recommended permanent repair in dry dock. The owners, however, carried out temporary repairs and were able to convince the surveyor to change his recommendation. He agreed that the vessel could proceed on its voyage as long as the repairs carried out underwent further examination and attended to as soon as possible after the discharge of the cargo. Soon after the vessel set sail, the temporary repair work cracked, and she sank a week later. The cargo owners, who received damages calculated in terms of tonnage limitation for the vessel from the shipowner, looked to the classification society for the balance of their loss. At the court of first instance, Hirst J had no difficulties in establishing a necessary close relationship between the parties and concluded that he did not see any reason based on public policy for denying a duty of care on the part of the classification society to the cargo owners.[57] The classification society appealed from the judgment of Hirst J. The Court of Appeal[58] concluded that the Hague Rules were an internationally accepted code that balanced the rights and duties existing between shipowners and shippers. To impose an identical or almost identical duty on the classification society without any of the internationally recognised balancing factors (available to shipowners under the Hague Rules) would be unfair. Allowing the appeal, Saville LJ said:

> The balance of rights and duties between the principal parties (cargo owners and shipowners) has been settled on an internationally acceptable basis and I can see no justice or good reason for altering this by imposing on the society a like duty to that owed by the shipowners, but without any of the checks and balances which exist in the present regime [at p 697].

On appeal to the House of Lords,[59] the majority agreed with the Court of Appeal in holding that there was no duty of care on the part of the classification society toward the cargo owner. According to Lord Steyn, to recognise such a duty would be unfair, unjust and unreasonable for a number of reasons. First, it would impose a greater burden on the shipowner who at the end of the day will have to bear the financial burden of the classification society's liability. This would tip the balance of the internationally recognised legal framework embodied in the Hague Rules. It was not as if the cargo owner was left without any remedy. He was protected, albeit limitedly, under the Rules and the tonnage

54 *The Amstelslot* [1963] 2 Lloyd's Rep 223.
55 It is debatable whether the obligation in respect of the ship is personal to the carrier under Art 5 of the Hamburg Rules (see Chapter 9).
56 [1995] 3 All ER 307.
57 See [1992] 2 Lloyd's Rep 481.
58 See [1994] 3 All ER 686.
59 [1995] 3 All ER 307. Lord Lloyd gave a dissenting judgment. He disagreed with the Court of Appeal's view that the existence of a contract of carriage between cargo owners and the shipowners militated against the liability of the surveyor in tort. Equally, he felt that the incorporation of the Hague Rules was an irrelevant factor (at p 317).

limitation provisions. The cargo owner, if unhappy about the level of damages available under the existing system, could always take out adequate insurance to meet the shortfall. Second, classification societies act for the collective welfare. Imposing liability on them might well force the societies into taking a protective stance. There is a 'risk that classification societies might be unwilling from time to time to survey the very vessels which most urgently require independent examination' (at p 332).

It must be said that, although Lord Lloyd's dissenting judgment is well reasoned and extremely persuasive, against the backdrop of an international convention designed to promote an agreed framework for allocation of risks (however disagreeable it may be from a cargo owner's perspective), Lord Steyn's conclusion is the correct one.

What about defects that exist in the ship before the ship comes under the carrier's control? Presumably, the carrier will be held responsible for defects that existed when the ship came under his control if those defects would have been discoverable on a reasonable inspection. Where the defect was latent and could not have been reasonably discovered, the carrier would not be responsible.

As for burden of proof, Art IV(1) states that:

> . . . neither the carrier nor the ship shall be liable for loss or damage rising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy . . . in accordance with the provisions of Art III(1). 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.

A reading of this article together with policy considerations would suggest that the onus to show that due diligence has been exercised should be on the carrier since he is the party with better access to facts relating to the ship's condition. The courts, however, have interpreted this provision differently. In *The Hellenic Dolphin*,[60] a cargo of asbestos shipped in good order and condition was destroyed as a result of ingress of sea water through an indent in the ship's plating. The defendant pleaded perils of the sea and the court found that he could avail himself of the exception since the plaintiffs failed to prove that the vessel was unseaworthy before the commencement of the voyage. This suggests that the onus is initially on the shipper to establish that the vessel was in an unseaworthy state, on which the onus is cast on the carrier to disprove lack of due diligence.[61] This approach is open to criticism since it places the shipper under too onerous a burden which would, by and large, prove very difficult to displace.[62] Conversely, it may be said to be fair given that the obligation to provide a seaworthy ship is an overriding obligation that deprives the carrier of the benefit of immunities available under Art IV where a breach is established.

Cargo management

The carrier is under an obligation to 'properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried' (Art III(2)).[63] The word 'carefully' has been construed as requiring reasonable care. As to whether the word 'properly' adds anything further to the standard of care

60 [1978] 2 Lloyd's Rep 336.

61 See Eridania SPA and Others v Rudolf A Oetker and Others (The 'Fjord Wind') [2000] 2 Lloyd's Rep 191; Guinomar of Conarky v Samsung Fire & Marine Insurance (The Kamsar Voyager) [2002] 2 Lloyd's Rep 57.

62 See Chapter 9. See also Ezeoke, 'Allocating onus of proof in sea cargo claims: the contest of conflicting principles' [2001] LMCLQ 261; Mankabady, 'The duty of care for the cargo' [1974] European Transport Law 2.

63 Normally, the master would be responsible for ensuring that the cargo is loaded properly and carefully, and cared for. Where the master is in breach, the carrier would be liable. See *Vinmar International Ltd and Another v Theresa Navigation SA* [2001] 2 Lloyd's Rep 1, at p 12.

has seen judicial discussion. In *Albacora SRL v Westcott & Laurance Line*,[64] the cargo consisted of wet salted fillets of fish for carriage from Glasgow to Genoa. The fish deteriorated because of bacterial action. The fish had been stored away from the boilers on instructions from the shipper. The cargo was not stored in refrigerated compartments. The courts had to consider whether the carrier had carried the goods 'properly' in accordance with Art III(2). The House of Lords came to the conclusion that the carrier had fulfilled the obligation required of him under Art III(2). 'Properly' means in accordance with a sound system, or in an appropriate manner in the light of all the knowledge that the carrier has or should have about the nature of the goods. It is tantamount to providing an efficient system and did not require the carrier to provide a system 'suited to all the weaknesses and idiosyncrasies of a particular cargo'.[65]

Article III(2) is generally taken to impose a continuous obligation to take care from tackle to tackle on the presumption that the carrier has undertaken to load and discharge the goods. Where the duties of loading and discharge have been varied expressly by contract, the period of responsibility will run presumably from the time the goods have come under the charge of the carrier.[66]

The obligation relating to cargo management, like the seaworthiness obligation, is personal to the carrier and reliance on the advice of a competent surveyor is not adequate to lessen the liability of the carrier under the Hague-Visby Rules. In *International Packers v Ocean SS Co*,[67] the ship was carrying a cargo of tinned meat from Melbourne to Glasgow (via Freemantle). During the course of the voyage, sea water entered into the hold containing the cartons. The master of the ship sought advice from a surveyor. On the surveyor's advice, part of the cargo was sold and the remainder carried to the original destination. On arrival, it was found that the remaining cargo was also damaged by dampness in the hold and the heating of wet canary seeds stored above the cartons of tinned meat. The cargo owners alleged breach of duty in failing to deal adequately with the cargo at Freemantle. The defendants denied negligence on the part of their officers or their surveyors and contended that, even if the surveyor gave negligently wrong advice, they were not liable for the acts of the surveyor. The court held, on the facts, that the surveyor had been negligent in formulating advice without insisting on accurate data and this act of the surveyor was imputable to the owners so as to make them liable. Presumably, if the advice had not been negligent, then the shipowner would not have been liable for failure to take care of the cargo.[68]

64 [1966] 2 Lloyd's Rep 53.

65 As Lord Reid stated:

> The argument is that in this Article 'properly' means in the appropriate manner looking to the actual nature of the consignment, and that it is irrelevant that the shipowner and ship's officers neither knew nor could have discovered that special treatment was necessary.
>
> This construction of the word 'properly' leads to such an unreasonable result that I would not adopt it if the word can properly be construed in any other sense. The appellants argue that, because the article uses the word 'properly' as well as 'carefully', the word 'properly' must mean something more than carefully. Tautology is not unknown even in international conventions, but I think that 'properly' in this context has a meaning slightly different from 'carefully'.
>
> In my opinion, the obligation is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods and, if that is right, then the respondents did adopt a sound system. They had no reason to suppose that the goods required any different treatment from that which the goods in fact received [at p 58].

66 According to *Jindal Iron and Steel Co v Islamic Solidarity Shipping Co* [2005] 1 Lloyd's Rep 55, Art III(2) does not place the shipowner under an obligation to provide the loading and discharge operations, but, if he does provide these services, he must perform them properly and carefully. See also *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft MBH & Co KG* [2006] 2 Lloyd's Rep 66 wherein a clause stating responsibility for loading and stowing at charterer's expense under the supervision of the captain was held to place the responsibility on the charterer (see paras 41 and 42).

67 [1955] 2 Lloyd's Rep 218.

68 In *Balli Trading Ltd v Afalona Shipping Co Ltd (The Coral)* [1993] 1 Lloyd's Rep 1, the Court of Appeal seems to be making the (disturbing) suggestion that the carrier may not, in some circumstances, be liable for improper storage of cargo by stevedores. See Gaskell, 'Shipowner liability for cargo damage caused by stevedores' [1993] LMCLQ 171 for an excellent discussion of this case.

The question of which party must prove or disprove the lack of proper care has not been consistently answered. The shipper's initial claim is generally based on showing that the goods have arrived damaged or have not arrived. According to *Gosse Millard v Canadian Government Merchant Marine*,[69] this initial claim sets up a *prima facie* liability of the carrier for breach of duty under Art III(2). If the carrier is to avoid liability, he must prove that he has taken proper care of the cargo and the loss is covered by one of the exceptions in Art IV(2). According to Wright J:

> . . . [the carrier] has to relieve himself of the *prima facie* breach of contract in not delivering the goods as received from the ship. I do not think that the terms of Art III put the preliminary onus on the goods owner to give affirmative evidence that the carrier was negligent. It is enough if the goods owner proves that the goods were not delivered or were delivered damaged [at p 435].

The judgment in *Albacora SRL v Westcott and Laurance Line*, however, suggests that the carrier can simply discharge his burden of proof by showing that the loss was covered by one of the exceptions and that it is not necessary to disprove negligence.

Specific reference was made to the judgment in *Gosse Millard*, and Lord Pearce doubted the correctness of the statement made by Wright J that an additional onus lies on the defendant to show lack of negligence. This suggests that, if the carrier can show that the cause of the loss falls within the Art IV exceptions, the burden of proof will shift to the shipper to show negligence on the part of the carrier. Since *Albacora* is a House of Lords' decision and is likely to be followed, the shipper has once again the extremely difficult task of showing negligence on the part of the carrier without access to all the facts surrounding the loss.

Documentary responsibilities

The carrier is under an obligation *on demand* by the shipper to issue a bill of lading that contains, among other things, the leading marks necessary for the identification of the goods, the number of packages or pieces, the quantity or weight of the goods and the apparent order and condition of the goods (Art III(3)). The right to demand the issue of this document seems to exist in favour of the shipper and does not extend to the consignee or the indorsee.

The statements made on the bill of lading are regarded as *prima facie* evidence of the goods as described according to Art III(4). Proof to the contrary may be provided by the carrier while the bill of lading is in the hands of the shipper. However, where the bill has been transferred to a third party acting in good faith, the carrier cannot submit proof to the contrary.

Where the quantity or leading marks acknowledged on the bill of lading based on the information provided by the shipper later turn out to be false, Art III(5) implies an indemnity to cover losses in favour of the carrier. This does not, however, extend to statements regarding the condition of the goods.

The carrier is allowed to make some reservations on the bill of lading. According to Art III(3), the carrier, master or agent is not bound to state or show in the bill of lading any marks, number, quantity or weight when he has reasonable grounds that the information regarding such information is not accurately represented or where he has no reasonable means of checking them. It is fairly common for the carrier to qualify the entries in relation to weight and quantity with phrases such as 'weight unknown'[70] and 'quantity unknown'. Where such phrases are entered on the bill of

69 [1927] 2 KB 432.

70 See *The Esmeralda* [1988] 1 Lloyd's Rep 206 (Australia, Sup Ct NSW); *The Atlas* [1996] 1 Lloyd's Rep 642; and *Agrosin Pte Ltd v Highway Shipping Co Ltd (The Mata K)* [1998] 2 Lloyd's Rep 614.

lading, the bill of lading does not provide *prima facie* evidence for the weight or the quantity shipped against the carrier. As Longmore J explained in *Noble Resources Ltd v Cavalier Shipping Corp (The Atlas)*:[71]

> The words of Art III(4) '. . . such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods . . .' refer back to the words of Art III(3) '. . . the carrier . . . shall . . . issue to the shipper a bill of lading showing . . . (b) either the number of package . . . or the quantity, or weight . . .'
>
> Do the . . . bills show the number of packages or weight (as furnished in writing by the shipper)? In one sense, it can be said they do, because the bills have figures which were in fact provided by the shipper in writing. But 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 of weight is. He can of course be required to show it under Art III(3) but, unless and until he does so, the provisions of Art III(4) as to *prima facie* evidence cannot come into effect [at p 646].

Duty to pursue the contract voyage

The carrier is under a general duty to proceed on the contract voyage. Deviation,[72] however, is justified in certain circumstances and, therefore, not deemed a breach of contract. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation, will not be an infringement or breach of the Hague-Visby Rules or of any contract of carriage, and the carrier will not be liable for the resulting loss or damage (Art IV(4)).[73] Deviation for the purposes of saving life is a mirror image of an instance of deviation justified at common law.[74] What is of interest is deviation for the purposes of saving property and reasonable deviation.

At first sight, it seems that deviation solely for the purpose of saving property will not be an infringement of the Hague-Visby Rules. It is not clear whether the carrier will be well within his rights under Art IV(4) to conduct salvaging operations or whether he will be allowed to salvage property only where he deviates to save life. If the former, it places the carrier in an extremely advantageous position. Indeed, it seems to provide an incentive to deviate purely for saving property – a highly profitable operation that may be conducted at the expense of the cargo owners since the carrier may be well aware that the goods could be lost during the operations or could arrive damaged. It is questionable whether this was intended by drafters of the Hague-Visby Rules given the policy reasons for the convention.

If Art IV(4) is construed as giving the carrier the liberty to deviate solely for the purposes of saving property regardless of the circumstances, the cargo owner will be unable to invoke Art IV(5)(e), which deprives the carrier from the benefit of the limitation of liability if it is proved that damage resulted from an act or omission of the carrier, done with the intent to cause damage or recklessly and with the knowledge that damage would probably result. The reason for this is that Art IV(5)(e) assumes that the carrier comes within one of the provisions that attracts the application of limitation of liability. However, Art IV(4) is a provision that takes the carrier outside the parameters of liability, which means that it does not come within the bounds of Art IV(5) at all, unless some limitation is placed on the extent to which the carrier can deviate to save property.

According to commentators,[75] a similar liberty to deviate clause in the US Harter Act of 1893 was construed as extending only to the necessity of the particular case. So, where a ship carries

71 [1996] 1 Lloyd's Rep 642.

72 The doctrine of deviation at common law is often traced to *Davis v Garrett* (1830) 130 ER 1456. See also Dockray, 'Deviation: a doctrine all at sea?' [2000] LMCLQ 76 for an excellent comprehensive account of the historical background of the doctrine.

73 See Morgan, 'Unreasonable deviation under COGSA' (1977–78) 9 JMLC 481.

74 See Chapter 7, Deviation.

75 See, for example, Carver's Carriage by Sea.

on a salvaging operation despite the presence of tugs that could render the same service, it would be regarded as going beyond the necessity of the particular case. As to how much reliance can be placed on the interpretation of similar phrases in the Harter Act, however, is open to debate given the statements made about interpretation of the Rules in *Stag Line v Foscola, Mango and Co.*[76] Nonetheless, the historical context seems to contribute to imparting meaning to the provisions.[77]

The better approach would be to view Art IV(4) as justifying deviation for the purposes of saving property during the course of saving lives or deviation for the purposes of saving the adventure – for instance, where deviation is necessary to repair the ship or to unload unfit cargo that may affect other cargoes in the hold or the ship itself.

The concept of reasonable deviation is another source of uncertainty since it is not elucidated in the Hague-Visby Rules. There is some judicial opinion on what this concept might embody. In *Stag Line v Foscola, Mango and Co*, the vessel, on a voyage from Swansea to Constantinople, had on board two engineers to test and adjust fuel-saving apparatus. It deviated to St Ives so the engineers could disembark. The ship did not then return to the recognised route but remained very close to the coast, as a result of which she hit a rock. The House of Lords held that the deviation was not a reasonable deviation and attempted to define the concept. A number of different meanings were put forward by their Lordships, but Lord Atkin provided a fuller opinion. He suggested that reasonable deviation should not be confined simply to the question of:

(a) deviation to avoid some imminent peril, or
(b) deviation in the joint interest of cargo owner or ship, or
(c) deviation as would be contemplated by both cargo owner and ship.

According to Lord Atkin's suggestion, deviation may be regarded as reasonable deviation even though it is made solely in the interests of the ship or indeed in the direct interests of neither as – for instance, where the presence of a passenger or a member of the ship or crew is urgently required after the voyage had begun on a matter of national importance or where some person on board was a fugitive from justice and there were urgent reasons for his immediate presence. The question for determining reasonable deviation is:

> . . . what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time including the terms of the contract and the interests of all the parties concerned but without obligation to consider the interest of any as conclusive [at pp 343–44].

It is common for bills of lading to include clauses that allow the carrier to deviate from the contract voyage. Prior to *Stag Line v Foscola, Mango and Co*, it was unclear whether the combined operations of Art III(3) and Art IV(4) may render liberty to deviate clauses ineffective. It is now well settled that express liberty to deviate clauses define the scope of the voyage and do not affect Hague-Visby Rules, which define the terms on which the voyage is to be performed. The liberty to deviate clause is a misnomer in that it does not excuse a carrier were he to deviate; it defines the voyage permitted by the contract.

Unjustified deviation at common law was regarded as a fundamental breach of the contract and the carrier was, as a rule of law, deprived of the protection of the exclusion clauses on the principle that some breaches of contract are so contrary to the basic requirements of a particular contract that the benefit of any exclusion clause is lost to the party in breach. The justification for this draconian

76 [1932] AC 328. See 'Interpretation of the Hague-Visby Rules in the English Courts', above.
77 See 'Dangerous goods', below.

measure is the need to protect the cargo owner against loss of insurance cover since he is insured only for the contract voyage.[78] Where the voyage is different from the one contemplated, the cargo owner will not be covered and, in these circumstances, the law places the shipowner in the insurer's shoes.

In *Stag Line v Foscola, Mango and Co*, the House of Lords approached the effect of unjustifiable deviation on the contract in the time honoured way. The carrier, therefore, lost the benefit of the exemptions provided to him under the Hague Rules. However, since this decision, there has been the historic decision of *Photo Productions v Securicor*,[79] where the House of Lords categorically stated that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach or to any breach of contract, is a matter of construction of the contract. Unfortunately, Lord Wilberforce also expressed the opinion that it may be preferable to preserve deviation cases as a body of authority *sui generis* with special rules derived from commercial and historical reasons.

There have been no cases on deviation since the *Photo Productions* case to put Lord Wilberforce's obiter statement to the test. However, in *The Antares*[80] and subsequently in *State Trading Corporation of India Ltd v M Golodetz Ltd*,[81] Lloyd LJ has expressed the view that deviation cases should be assimilated into the ordinary law of contract.

What would be the effect on deviation under the Hague-Visby Rules if Lloyd LJ's opinion was followed?[82] The question of whether the carrier can rely on the exception clauses contained in the Rules will become entirely a matter of construction of those clauses. The only impediment to accepting the 'matter of construction' approach would be the loss of insurance cover in the event of deviation.[83] However, this is not an obstacle since insurance policies with a 'held covered' clause are available for an extra premium. Such a policy would cover the cargo owner should there be a deviation. In any event, where the standard Institute Cargo Clauses (Clauses A, B or C) drafted by the Institute of London Underwriters to replace the Lloyd's SG Policy (Ships and Goods Policy) attached to the Marine Insurance Act 1906 as a model are used, cl 8.3 of all three sets of clauses provides:

> This insurance shall remain in force . . . during delay beyond the control of the assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charters under the contract of affreightment.
>
> No extra premium is required of the assured under this clause.[84]

It seems, however, from *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another (The Kapitan Petko Voivoda)*[85] (albeit a case of unauthorised deck stowage and Art IV(5)), that the court said the Hague Rules were an international convention and should be constructed on broad precedents of general acceptation. They were unwilling to import the principle of deviation into unauthorised deck stowage like the US courts since it was a peculiar creature of common law. If this reasoning

78 Section 46(1) of the Marine Insurance Act 1906.
79 [1980] AC 827.
80 [1987] 1 Lloyd's Rep 424.
81 [1989] 2 Lloyd's Rep 277.
82 See Baughen, 'Does deviation still matter?' (1991) LMCLQ 70; Debattista, 'Fundamental breach and deviation in the carriage of goods by sea' [1989] JBL 22; Mills, 'The future of deviation on the law of carriage of goods' [1983] LMCLQ 587; Cashmore, 'The legal nature of the doctrine of deviation' [1989] JBL 492; Hubbard, 'Deviation in contracts of sea carriage: after the demise of fundamental breach' (1986) 16 Victoria University of Wellington LR 147. For a comparative article, see Sarpa, 'Deviation in the law of shipping: the United States, United Kingdom and Australia – a comparative study' (1976) 11 Journal of International Law and Economics 476. On Australian law, see Davies, 'Deviation is alive and well and living in New South Wales' (1991) 19 ABLR 379.
83 See Chapter 14, Deviation.
84 For more on Institute Cargo Clauses, see Chapter 14.
85 [2003] EWCA Civ 451.

reflects the current approach to international conventions and the consequences following from it, the English courts in the future will move away from the doctrine of fundamental breach in deviation cases.

Carrier's immunities

The Hague-Visby Rules provide an extensive list of exceptions in favour of the carrier that reflect the exceptions commonly found in most contracts of affreightment. Hence, the interpretation of similarly worded exceptions under common law will be useful for an understanding of the extent of protection given by the Hague-Visby catalogue of exceptions. The carrier, however, under the Rules cannot increase the list of exceptions since they will be regarded as an attempt to lessen his liability and, therefore, void under Art III(8).[86]

Unseaworthiness

The carrier is not liable for loss or damage that is a consequence of unseaworthiness as long as he has exercised due diligence to make the ship seaworthy (Art IV(1)). However, the exercise of due diligence has been construed to be personal to the carrier whereby he is liable for the negligent acts of his servant, agent or independent contractor he may have employed to put the ship into a seaworthy state.[87] In these circumstances, this provision seems to give protection only against latent defects in the ship not discoverable on a reasonable inspection.

Negligence in navigation or management of the ship

The carrier is not liable for loss or damage to the goods as a result of the act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or management of the ship (Art IV(2)(a)). The two limbs of this exception – fault in navigation and fault in management – have been difficult to interpret. Fault in the navigation of the ship has been construed as applying to situations where, because of the negligent act on the part of the master or crew, the vessel has been grounded or has collided with another vessel.[88]

More recently, the House of Lords had to consider whether the Art IV(2)(a) exception could be raised where a master did not comply with the charterer's order to proceed on the shortest route in *Whistler International Ltd v Kawasaki Kisen Kaisha (The Hill Harmony)*,[89] although the issue was decided in the context of a time charterparty, as a result of paramount clauses[90] in the charterparty. Art IV(2)(a) of the Hague Rules was incorporated into the charterparty. The judgment, therefore, is of relevance to bills of lading affected by the Hague-Visby Rules. In brief, the facts are as follows: Under a time charterparty[91] (seven to nine months), the vessel performed two trans Pacific voyages: one from Vancouver to Yokkaichi and the other from Vancouver to Shiogama. The master, instead of following the shortest route (because of bad weather, he had experienced on that route on a previous voyage) as instructed by the charterer, took the rhumb line route with the result that one voyage took six

86 See 'Contracting Out', below.
87 See 'Duty to provide a seaworthy ship', above.
88 *The Xantho* [1887] 12 AC 503; *The Portland Trader* [1964] 2 Lloyd's Rep 443. See also Lee and Kim,' A carrier's liability for commercial default and default in navigation or management of the vessel' (2000) 12 Transportation LJ 205.
89 [2000] 1 AC 638.
90 On paramount clauses, see Scope of application.
91 NYPE form with amendments.

and a one-half days long and consumed 130 tons more fuel; the other three and one-third days long with an increased consumption of 60 tons fuel. The charterer sought to recover loss of $89,800 from the owners. The arbitrators found for the claimants on the basis of breach of the duty to follow the charterer's order and failure to prosecute the voyage with utmost dispatch.[92] Both the Queen's Bench and the Court of Appeal on appeal held otherwise. Clarke J held that the dispute related to matters of navigation.[93] Similar reasoning was also followed in the Court of Appeal.[94] The House of Lords allowed the appeal on the grounds that there was a contractual duty to proceed with due dispatch and the choice of route in the absence of an overriding factor was a matter of employment, rather than navigation. The planning of the voyage was not a matter of navigation. Lord Hobhouse expressed his views thus:

> The meaning of any language is affected by its context. This is true of the words 'employment' in a time charter and of the exception for negligence in the 'navigation' of the ship in a charterparty or contract of carriage. They reflect different aspects of the operation of the vessel. 'Employment' embraces the economic aspect – the exploitation of the earning potential of the vessel. 'Navigation' embraces matters of seamanship . . . What is clear is that to use the word 'navigation' in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful . . . where seamanship is in question, choices as to the speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason, as did Clarke J, from the fact that the master must choose how much of a safety margin he should leave between his course and a hazard or how and at what speed to proceed up a hazardous channel to the conclusion that all questions of what route to follow are questions of navigation [at pp 657–58].[95]

Interpretation of the phrase 'fault in management' also poses difficulties, since the difference between cargo damage due to events that are attributable to lack of proper care of that cargo and those that are attributable to fault in management of the ship may not always be apparent as illustrated by *Gosse Millard v Canadian Government Merchant Marine*.[96] The plaintiffs shipped a cargo of tinplates from Swansea to Vancouver. The ship went to Liverpool to load more cargo and, while undocking, collided with a pier. She had to be dry docked for repairs. On arrival, the tinplates stored in hold 5 of the ship were found to have sustained serious damage caused by fresh water. The repairers had been careless in moving and replacing the tarpaulins covering hold 5 where repairs were carried out, as a result rain water entered the hold. The cargo owners alleged breach of the duty to take care of the cargo under Art III(2) on the part of the carrier. The carrier relied on Art IV(2)(a).

In the opinion of the House of Lords, the negligent act in not replacing the tarpaulins was primarily a neglect of the cargo, not a neglect of the ship which affected the cargo. The carrier was,

92 Under cl 8 of the charterparty, the captain was to prosecute the voyages with the utmost dispatch and was, although appointed by the owners, to be under the orders and directions of the charterer as regards employment and agency.
93 He said:
> In my judgment, an order as to where the vessel was to go, as for example to port A or B to load or discharge or to port A or port B via port C to bunker, would be an order as to employment which the master would be bound to follow, subject of course (as all parties agreed) to his overriding responsibility for the safety of his ship. An order as to how to get from where the ship was to port A, B or C would not, however, be an order as to employment but an order as to navigation [[1999] QB 72, at p 81].

See also Davenport, 'Rhumb line or direct circle? – that is a question of navigation' [1998] LMCLQ 502.
94 See Potter LJ [2000] QB 241, at p 261.
95 Does it follow from Lord Hobhouse's statement that a master is obliged to enter a port even in the face of risk? The answer is 'no'. As Lord Hobhouse acknowledged, 'the master remains responsible for the safety of the vessel, her crew and cargo. If an order is given, compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it; indeed, as the safe port cases show, in extreme situations the master is under an obligation not to obey it' (at p 658).
96 (1927) 29 Lloyd's Rep 190.

therefore, liable. In other words, the distinction between care of cargo and management of ship is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo. Or, as Greer LJ expressed it, 'if the negligence is not negligence towards the ship but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not . . . relieved' (at p 200).

Fire

The carrier, under Art IV(2)(b), is excluded from responsibility for loss or damage arising or resulting from fire, unless caused by the actual fault or privity of the carrier.[97]

The courts have defined fire to mean a flame and not merely heat. So, mere heating, which has not arrived at the state of incandescence or ignition, is not regarded as fire, according to *Tempus Shipping Co v Louis Dreyfus*.[98]

In the event of loss or damage due to fire, if the operative cause is a failure to exercise due diligence to make the ship seaworthy on the part of the carrier, this exception will not be available to the carrier. In *Maxine Footwear Co Ltd v Canadian Merchant Marine*,[99] the carrier could not invoke Art IV(2)(b) when the cargo was lost because of a fire caused by oxyacetylene torches used for thawing frozen pipes.

If the fire is caused by the actual fault or privity of the carrier, he is not protected from liability under this exception. Whether there is actual fault or privity on the carrier's part is a question of fact. The question of establishing the actual fault or privity of the carrier becomes a difficult issue where the carrier is a public company. The reason for this is that the company acts through individuals and not all negligent acts of the individuals working in a company need be necessarily the negligent act of the company. According to *Lennard's Carrying v Asiatic Petroleum*,[100] the negligent act of the individual will be ascribed to the company only where he stands in an extremely special relationship to the company – a relationship where it would be natural to say that the person acts and speaks as the company. In other words, to make the company liable, the negligent act must be the act of that individual who is the directing mind or the brain of the company. As Viscount Haldane expressed it:

> . . . the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy [at p 713].

Where the carrier does not supervise the work of his employees adequately, then it seems, according to *The Marion*,[101] that it would be regarded as actual fault or privity of the carrier.

The carrier, in some circumstances, may be able to take advantage of the statutory provisions of s 186 of the Merchant Shipping Act 1995 (previously s 18 of the Merchant Shipping Act 1979) as a result of the combined operations of Art VIII of the Hague-Visby Rules and s 6(4) of the Carriage of Goods by Sea Act 1971. Section 186 of the Merchant Shipping Act 1995 provides that 'the owner of a United Kingdom ship shall not be liable for any loss or damage . . . where any property on board the ship is lost or damaged by reason of fire on board the ship'. 'Owner', for the purposes of this section, includes any part owner and any charterer, manager or operator of the ship.

97 See *Macieo Shipping Ltd v Clipper Shipping Lines Ltd* (The MV Clipper Sao Luis) [2000] 1 Lloyd's Rep 645.
98 [1930] 1 KB 699.
99 [1959] 2 Lloyd's Rep 105.
100 [1915] AC 705.
101 [1984] 2 All ER 243.

At first sight, s 186 protection appears extensive. It must be pointed out, however, that this provision is operative only where the goods are destroyed *on board the ship*. So, where goods catch fire on shore or on a lighter while awaiting loading or discharging, then s 186 will be inoperative.

Another important point that must be noted about s 186 is that it protects the shipowner even where the fire has been caused by the unseaworthiness of the vessel. It is, therefore, of greater advantage than the fire exception under Art IV(2) of the Rules since the exceptions are not available to the carrier under the Rules where he has not exercised due diligence to make the ship seaworthy. Note that s 186 is available *only to UK ships*.

The carrier cannot rely on s 186 if 'it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result'. The onus to establish this is on the cargo owner and this, in practice, may prove to be extremely difficult since he does not have the opportunity to access all the facts surrounding the incident.

Perils of the sea

The carrier is not liable for loss or damage to the goods where it has occurred due to the perils, dangers and accidents of the sea or other navigable waters (Art IV(2)(c)). Common law has interpreted the phrase 'perils of the sea' to refer to any damage that has been caused by storms, sea water, collision, stranding and other perils that are peculiar to the sea or to a ship at sea that could not have been avoided by the exercise of reasonable care. This exception only refers to perils encountered at sea, not to those encountered on land or any other form of transport.[102] Article IV(2)(c), however, extends the perils exception to other navigable waters, which would include rivers and other inland waters.[103]

Act of God

The carrier is not liable for loss or damage to the goods that has resulted from an act of God (Art IV(2)(d)). At common law, this has been interpreted to mean acts that are independent of human intervention that could not have been prevented by the exercise of foresight and reasonable precaution. In *Nugent v Smith*,[104] the death of a horse through injuries received in a storm was held to be an act of God, which the carrier was unable to prevent by taking reasonable measures.

Act of war, public enemies and riots

The carrier is not liable for loss or damage on account of act of war (Art IV(2)(e)). War has been construed by common law to include a state of hostilities between states where diplomatic relations may not have been severed.[105] This exclusion is also probably wide enough to cover acts done in civil war.

102 Hamilton Fraser and Co v Pandorf and Co (1887) 12 App Cas 518.
103 An issue that has been discussed in relation to this exception in some Commonwealth jurisdictions is whether it could be raised when goods lost or damaged by the event constituting perils of the sea is reasonably foreseeable. In *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad (The Bunga Seroja)* [1994] 1 Lloyd's Rep 455, the New South Wales Supreme Court, following the Anglo-Australian approach, held that 'damage to cargo . . . occasioned by a storm which was "expectable" does not, of itself, exclude a finding that the damage was occasioned by perils of the sea' (at p 470). See also the following US and Canadian decisions: *Re Complaint of Tecomar SA (The Tuxpan)* (1991) 765 F Supp 1150 (SDNY); *JJ Gerber and Co v SS Sabine Howaldt* 437 F 2d 580 (2d Cir) (1971); *New Rotterdam Insurance Co v SS Loppersum* 215 F Supp 563 (1963) (SDNY); *Charles Goods Fellow Lumber Sales Ltd v Verrault* [1971] 1 Lloyd's Rep 185. According to the US-Canadian approach, 'perils of the sea' refers to events peculiar to the sea and are of 'an extraordinary nature or arise from irresistible force or overwhelming powers, and which cannot be guarded against by the ordinary exertions of human skill'.
104 (1876) 1 CPD 423.
105 *Kawasaki Kisen v Bantham SS Co* [1939] 2 KB 544.

The carrier is excluded from liability for loss or damage to the goods due to the act of public enemies (Art IV(2)(f)). This probably includes the acts of enemies of the state and perhaps those of terrorists and pirates.

The carrier is also not liable for loss or damage due to riots and civil commotions. This probably covers disturbances that do not amount to civil war Art IV(2)(k)).

Act of authorities and quarantine

The carrier is exempt from liability for loss or damage to the goods due to the arrest or restraint of princes or rulers or people or seizure under legal process (Art IV(2)(g)). Under common law, exclusion clauses worded similarly have been interpreted to apply to a number of situations. For instance, it has been construed to cover loss or damage where the government of a country takes possession of the goods through embargo, arrests or blockades; where there is a prohibition against the import of goods; and where goods cannot be discharged due to quarantine restrictions. The Hague-Visby Rules, however, specifically exclude liability for loss or damage to the goods caused due to quarantine restrictions (Art IV(2)(h)).

Act or omission of shipper

The carrier is relieved of liability where the cargo has been damaged or lost because of the act or omission of the shipper or owner of the goods, his agent or representative (Art IV(2)(i)). It is difficult to envisage what this exception covers since there are specific exceptions relating to loss or damage caused due to defective marking, defective packing or inherent vice of the goods.[106] It has been suggested that the exception could cover damage to the goods caused by improper stowage due to the misdescription of the goods provided by the shipper.[107]

Strikes and lock outs

The carrier is relieved of liability for loss or damage on account of strikes or lock outs or restraint of labour from whatever cause, whether partial or general (Art IV(2)(j)). The word 'strike' has been defined by Lord Denning as:

> . . . a concerted stoppage of work done by men with a view to improving their wages or conditions, or giving vent to grievance, or making a protest about something or other, or supporting or sympathising with other workmen in such endeavour. It is distinct from a stoppage brought about by an external event such as bomb scare or by apprehension of danger.[108]

Bills of lading normally have clauses (known as the *Caspiana* clause)[109] that allow the carrier to discharge goods bound for a strike-bound port at any other safe and convenient port. The inclusion of such clauses in bill of lading governed by the Hague-Visby Rules are not construed as a lessening of the carrier's obligation toward cargo management under Art III(2) and, therefore, void under Art III(8). Article III(2), as interpreted in *Renton v Palmyra*, applies only to the method of loading, carrying and discharging and not to the place of discharge.

106 See 'Wastage and inherent vice', below.
107 See Carver's Carriage by Sea, at para 537.
108 *The New Horizon* [1975] 2 Lloyd's Rep 314, at p 317.
109 Named after *Renton v Palmyra Trading Corp of Panama* [1957] AC 149.

Saving life or property and deviation

The carrier is not liable for loss or damage to the cargo while saving or attempting to save life or property at sea (Art IV(2)(l)). It is not clear whether this provision covers deviation to save life, or property at sea. Presumably, this exception refers to situations where the vessel, while on the contract route, is delayed in completing the voyage because of attempts to save life or property on board the carrier's ship itself or on other ships it may have encountered on course. Further under Art IV(4), the carrier is also not liable for loss or damage that is a result of reasonable deviation.[110]

Wastage and inherent vice

The carrier is also protected from liability for wastage in bulk or weight or any other loss or damage from inherent defect, quality or vice of the goods (Art IV(2)(m)). Inherent vice has been construed as the unfitness of the goods to withstand the ordinary incidents of the voyage despite the exercise of care required of the cargo.[111]

Defective packing and marking

The carrier is not liable for loss or damage that is a consequence of insufficiency of packing (Art IV(2)(n)). Goods are regarded as insufficiently packed if they cannot withstand the kind of handling that the goods are likely to undergo during the course of the voyage.[112] If the carrier, however, issues clean bills of lading, he cannot exclude liability for insufficient packing as against the consignee or indorsee acting in good faith.[113]

Where goods are lost or damaged due to insufficiency or inadequacy of marks, the carrier is protected by the Hague-Visby Rules (Art IV(2)(o)). However, where the bill of lading is transferred to a third party acting in good faith, the carrier will not be able to rely on this exception. If the marks acknowledged on the bill of lading turn out to be inaccurate, the carrier can claim indemnity from the shipper (Art III(5)).[114]

Latent defects

The carrier is not liable for loss or damage to the goods that is caused by latent defects not discoverable by due diligence (Art IV(2)(p)). It is not clear what this exception might cover. If it refers to latent defects in the ship that seems to be already covered by Art IV(1).[115] It has been suggested that this exception bears a wider meaning and may protect the carrier where, for instance, damage is caused by a shore crane belonging to him because of a latent defect that would not have been discovered by the exercise of due diligence. This provision may also give an immunity additional to that specified in Art IV(1) in that it would cover defects that would not have been discovered by the exercise of due diligence in situations where the carrier could not show that he had in fact exercised due diligence.[116]

110 See 'Duty to pursue the contract voyage', above.
111 *Albacora SRL v Westcott Laurance Line* [1966] 2 Lloyd's Rep 53. According to Lord Reid, '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' (at p 59).
112 *Silver v Ocean Steamship Co* [1930] 1 KB 416.
113 See also 'Documentary responsibilities', above.
114 See 'Shipper's guarantee', below.
115 See 'Unseaworthiness', under 'Carrier's Immunities' above.
116 *Scrutton on Charterparties*, 20th edn, 1996, at p 445. See also *Corporacion Argentina de Productores v Royal Mail Lines Ltd* (1939) 64 Ll LRep 188, at p 192; *The Antigoni* [1991] 1 Lloyd's Rep 209.

Catch-all exception

Neither the carrier nor the ship is liable for loss or damage that arises or results from any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier (Art IV(2)(q)).

The opinion of commentators is that this provision cannot be given an *ejusdem generis* interpretation since the list of exceptions provided in Art IV(2) does not form a single genus.[117] It is, therefore, to be regarded as referring to circumstances not covered by Art IV(2)(a)-(p).

The carrier can take advantage of this provision only if it can be established that the loss or damage occurred without the actual fault or privity of the carrier *and* without the fault or neglect on the part of his servants or agents. This exception was successfully invoked in *Leesh River Tea Co v British India Steam Navigation*.[118] where cargo was damaged by theft of a storm valve cover by stevedores employed by the carrier. The court came to the conclusion that the carrier was not responsible for the act of the stevedore since the stevedore was not performing a duty for the shipowner when the theft took place. In other words, the act of the thief was the act of a stranger; it was not done in the course of employment.

The suggestion that a carrier could escape liability for an act that affects the cargo but where it is done outside the parameter of duties entrusted to the servant or the independent contractor is irrational since it is reasonable to expect the carrier to be in control of the servants or independent contractors who are on the ship with his permission. Therefore, should he not be held responsible for all their acts – whether they are carried out in the course of discharging their duties for which they were employed or not?

The onus of disproving negligence or privity is on the person claiming the benefit of this exception. The burden is not discharged, however, where the cause is inexplicable. This, however, does not mean that the carrier has to establish the precise cause. It is sufficient if he can disprove negligence. In *Goodwin, Ferreira & Co v Lamport and Holt*,[119] a crate, while being lowered onto a lighter, broke open and damaged some other cargo in the vessel. The carrier was able to establish that he had adopted a sound system of work and therefore escaped liability.

Limitation of liability

The Hague-Visby Rules contain provisions in respect of the extent of liability and time limitation and the carrier is not allowed by the Rules to lower the liability limits or lessen the specified time limits.[120]

Liability for 'loss or damage'

Under the Hague-Visby Rules, the carrier is liable for loss or damage. It is not clear from the Rules whether the phrase 'loss or damage', which is used in a number of provisions,[121] covers only the loss or damage to the goods carried or whether it includes loss or damage that the cargo owner suffers – for instance, as a result of late delivery of the cargo by the carrier. The phrase was construed in the context of Art III(8) as covering loss in connection with goods due to discharge at the wrong port and not restricted to actual loss or physical damage.[122] Likewise, the phrase in the context of Art IV(1) and IV(2) was construed as covering loss caused to the cargo owner as a

117 Scrutton on Charterparties, 20th edn, 1996, at pp 445–6.
118 [1966] 2 Lloyd's Rep 193.
119 (1929) 34 Ll LR 192.
120 See 'Contracting out', pp 262–5.
121 eg, Arts III(8), IV(1), IV(2), IV(4) and IV(5).
122 See *Renton v Palmyra* [1957] AC 149.

result of late delivery or misdelivery on the reasoning that the Rules, in dealing with contractual liabilities, must have foreseen that contractual liabilities are not restricted purely to physical damage. Devlin J stated the position in *Anglo-Saxon v Adamastos Shipping Co*[123] thus:

> The last question asks whether the words 'loss or damage' in s 4(1) and (2) of the Act relate only to physical loss of or damage to goods. The words themselves are not qualified or limited by anything in the section. The Act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual liabilities are not limited to physical damage. A carrier may be liable for loss caused to the shipper by delay or misdelivery, even though the goods themselves are intact [at p 253].

Liability in contract and in tort and availability of limitation

The defences and limits of liability provided for in the Hague-Visby Rules according to Art IV *bis* (1) apply in an action for loss or damage to goods covered by a contract of carriage whether the action is founded in contract or in tort.[124] Defences and limits of liability in respect of loss or damage to goods as set out in the Hague-Visby Rules are available under Art IV *bis* (1) and (2) to the carrier and to the servant or agent of the carrier as long as the servant or agent is not an independent carrier.[125] So, where the carrier employs independent contractors like stevedores to load and discharge the goods from the ship; they cannot avail themselves of the extended protection available under these provisions.

Until recently, if independent contractors wanted to avail themselves of the immunities provided in the Rules, the carrier needed to expressly include clauses that extend the protection to them.[126] This express inclusion was to get around the privity rule in English law under which only parties to the contract could rely on the contractual terms.[127] The clauses are known as 'Himalaya' clauses – named after the ship in *Adler v Dickson*,[128] where a crew member was unable to invoke the exception clause contained in the contract between passenger and shipowner because of the common law doctrine of privity of contract. The courts regard Himalaya clauses as effective in protecting the stevedores. In *New Zealand Shipping Co Ltd v AM Satterthwaite and Co Ltd (The Eurymedon)*,[129] the bill of lading contained the following clause:

> It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of the

123 [1957] 2 QB 233.
124 This provision was introduced by the Brussels Protocol.
125 An amendment introduced by the Brussels Protocol.
126 *Adler v Dickson* [1954] 2 Lloyd's Rep 267. See also *Scruttons v Midland Silicones Ltd* [1962] AC 446. Both of these cases establish the sanctity of the privity of contract doctrine in English law. However, the House of Lords in the latter indicated the circumstances in which a clause inserted in a contract may protect a third party. According to Lord Reid:
126 I can see a possibility of success . . . if [first] the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability; [secondly] the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, should apply to the stevedore; [thirdly] the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice; and [fourthly] that any difficulties about consideration moving from the stevedore were overcome . . . [at p 474].
127 Another means of protecting sub-contractors is to use circular indemnity causes whereby the cargo owner promises not to sue the sub-contractors and also promises to indemnify the carrier if it does (see *Nippon Yusen Kaisha v International Import and Export Co Ltd (The Elbe Maru)* [1978] 1 Lloyd's Rep 606). Typically, if a cargo owner sues a sub-contractor in breach of the circular indemnity clause, the carrier is likely to seek a stay of action or injunction from the courts.
128 [1954] 2 Lloyd's Rep 267.
129 [1975] AC 154.

> bill of lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and, for the purpose of all the foregoing provisions of this clause, the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract on or evidenced by this bill of lading.

The cargo was damaged during the unloading operations carried out by an independent firm of stevedores. When sued, the stevedores relied on the clauses excluding liability in the bill of lading. The Privy Council held that the bill of lading was a contract between the stevedores and the cargo owner that had been affected through the carrier who acted as the agent. Hence, the stevedores could rely on the exemption clauses contained in the contract of carriage. Technical points in the law of contract formation like consideration were dealt with swiftly on the basis that the law must take a pragmatic approach to commercial transactions.[130] Subsequent cases, such as *Salmond and Spraggon (Australia) Pty Ltd v Port Jackson Stevedoring Pty Ltd*,[131] have applied the approach taken in the *New Zealand Shipping* case, and it is common to include Himalaya clauses in bills of lading. In *New Zealand Shipping*, Lord Wilberforce stated specifically that the principle was applicable to exemptions, limitations, defences and immunities contained in the bill of lading (at p 169). Does this mean that the stevedore will not be able to avail of other clauses in the contract – for instance, a jurisdiction clause?

This issue came up for consideration by the Privy Council in *The Mahkutai*.[132] The relevant clause read:

> Carrier means the PT Rejeki Sentosa Shipping Co and/or subsidiary companies on whose behalf the bill of lading has been signed . . .
> 4 Sub-contracting
>
> (i) The carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing . . .

130 Of course, if the Himalaya clause had been held to be ineffective, the cargo owner could avoid the exception clauses that operate to his disadvantage by suing the third party who is unprotected by the exception clauses. As Lord Goff observed in *The Mahkutai* [1996] AC 650:

> . . . recognition has been given to the undesirability, especially in a commercial context, of allowing plaintiffs to circumvent contractual exception clauses by suing in particular the servant or agent of the contracting party, thereby undermining the purpose of the exception, and so redistributing the contractual allocation of risk which is reflected in the freight rate and in the parties' respective insurance arrangements [at p 661].

Third party protection through contractual clauses has generated a great deal of academic discussion. See, for example, Reynolds, 'Himalaya clause resurgent' (1974) 90 LQR 301; Clarke, 'The reception of the Eurymedon decision in Australia, Canada and New Zealand' (1980) 29 ICLQ 132. See also *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd and Another (The Antwerpen)* [1994] 1 Lloyd's Rep 213. For a review of the American position on such clauses, see Zawitoski, 'Limitation of liability for stevedores and terminal operators under the carrier's bill of lading and COGSA' [1985] JMLC 337. For a German view, see Schmidt, 'The Himalaya clause under the law of the Federal Republic of Germany' [1984] European Transport Law 675.

131 [1981] 1 WLR 138. See also the following where the Himalaya clause was ineffective: *Raymond Burke Ltd v The Mersey Docks and Harbour Co* [1986] 1 Lloyd's Rep 155; *Lotus Cars Ltd and Others v Southampton Cargo Handling Plc and Other and Associated British Ports (The Rigoletto)* [2000] 2 Lloyd's Rep 532.

132 [1996] AC 650.

> The merchant undertakes that no claim or allegation shall be made against any servant, agent or sub-contractor of the carrier, including but not limited to stevedores and terminal operators . . . every such servant, agent and sub-contractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were made expressly for their benefit . . .
>
> 19 Jurisdiction clause
>
> The contract evidenced by the bill of lading shall be governed by the law of Indonesia and any dispute arising hereunder shall be determined by the Indonesian courts according to that law to the exclusion of the jurisdiction of the courts of any other country.

The question at issue was whether the shipowner as sub-contractor could rely on the jurisdiction clause. Did the word 'provisions' in the Himalaya clause bring within it the jurisdiction clause? The Privy Council came to the conclusion that it could not since a jurisdiction clause did not benefit only one party. It was not like an exception or limitation clause. It 'embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes' (at p 666). Could the word 'provision' in the clause have made a difference, given that it appeared in the centre of a series of words that share the same characteristic, imparting benefits as opposed to rights that entail correlative obligations on the cargo owner? The word 'provision' in their opinion was 'inserted with the purpose of ensuring that any other provision in the bill of lading which, although it did not strictly fall within the description "exceptions, limitations . . . conditions and liberties" nevertheless benefited the carrier in the same way in the sense that it was inserted in the bill of lading for the carrier's protection, should enure for the benefit of the servants, agents and subcontractors . . . It cannot therefore extend to . . . an exclusive jurisdiction clause, which is not of that character' (at p 666). Of course, it is possible to get around the decision in *The Mahkutai* by drafting a clause suitably worded to include the jurisdiction clause.

Although clever drafting may widen the extent of protection offered to an independent contractor, the Himalaya clause is subject to the mandatory limitations imposed by the Hague-Visby Rules. So, in *The Starsin*,[133] the court held that the Himalaya clause protected the owner to the same extent as the carrier was itself protected under its contract of carriage. A wider exemption available to the independent contractor would be void under Art III(8).

Reforms to the doctrine of privity as reflected by the Contracts (Right of Third Parties) Act 1999 mean that extensive clauses are not required in contracts for a stevedore to take advantage of the exemptions and limitations in the contract. The reform came about as a consequence of discontent with the doctrine of privity. Widely regarded as outdated,[134] the doctrine came under pressure not only from academics, but also the judiciary. For instance, Steyn LJ in *Darlington BC v Wiltshier Northern Ltd*[135] expressed his discontent clearly:

> The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often, the

133 [2003] 1 Lloyd's Rep 57.

134 Countries with a common law background, such as the US and New Zealand, abolished the privity rule well before England.

135 [1995] 1 WLR 68.

> parties and particularly third parties organise their affairs on the faith of the contract. I will not struggle with the point further since nobody seriously asserts the contrary [at p 76].

The Law Commission, which started work on the reform of privity in 1990, published its final report *Privity of Contract: Contracts for the Benefit of Third Parties* in 1996,[136] which also included a draft Contracts (Rights of Third Parties) Bill. With further amendments, the Bill received the Royal Assent on 11 November 1999 and came into force on 11 May 2000.

Section 1(1)(a) of the Contracts (Rights of Third Parties) Act 1999[137] enables the third party to enforce contractual terms, including exclusion clauses and limitation clauses (s 1(6)), where there is express provision that he may. There is no requirement that the third party be named according to s 1(3), so wording such as 'independent contractors shall have the right to enforce the contract' will suffice. Section 1(1)(b) enables a third party to enforce the contractual terms where the contract purports to confer a benefit on that third party, and there is no indication that the parties did not intend the term to be enforceable by the third party.[138] Section 6 of the Act lists the exceptions and, according to s 6(5):[139]

> Section 1 confers no rights on a third party in the case of:
>
> (a) a contract for the carriage of goods by sea; or . . .
>
> except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.

Definitions of contract for the carriage of goods by sea and bills of lading are dealt with in s 6(6) and (7):

> . . .
>
> means a contract of carriage:
>
> (a) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction; or
> (b) under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction.
>
> (7) For the purposes of sub-s (6):
>
> (a) 'bill of lading', 'sea waybill' and 'ship's delivery order' have the same meaning as in the Carriage of Goods by Sea Act 1992; and
> (b) a corresponding electronic transaction is a transaction within s 1(5) of that Act which corresponds to the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship's delivery order.

Although the Act excludes bills of lading for obvious reasons – to avoid overlap with the Carriage of Goods by Sea Act 1992 – s 6(5) does specifically provide that a third party can avail of the

136 Law Com No 242. For an analysis, see Burrows, 'Reforming privity of contract: Law Commission Report No 242' [1996] LMCLQ 467.

137 Available in Carr and Goldby, *International Trade Law Statutes and Conventions*, 2nd edn, 2011 Routledge-Cavendish. Also available at www.hmso.gov.uk.

138 Note that s 2 allows variation and rescission by the contracting parties. Broadly, it revolves around assent/reliance, and, once the third party has communicated assent or reliance, the third party's entitlement cannot be varied without consent.

139 Note that this exclusion does not affect charterparties. For further analysis of the effect of the Act on carriage of goods by sea, see Treitel, 'The Contracts (Rights of Third Parties) Act 1999 and the law of carriage of goods by sea', in Rose (ed), *Lex Mercatoria (Essays on International Commercial Law in Honour of Francis Reynolds)*, 2000, LLP.

exclusion and limitation of liability in such a contract. This means that s 1 would be available to a third party provided the conditions set out in s 1(1)(a) or (b) are met. Being limited to exclusion and limitation of liability, the issue of whether a third party can avail himself of a jurisdiction clause will need to be addressed specifically through an appropriately worded Himalaya clause in the contract.

Calculation of liability

Package/unit/weight[140]

The amount of liability under Art IV(5)(a) is calculated in terms of package, unit or weight of the cargo, and the shipper can invoke that calculation that yields a higher amount. The words 'package' and 'unit' have not attracted analysis in the English courts, and the words are used interchangeably.

In calculating liability for damage under Art IV(5)(a), it seems reference will be made only to the physical damage as at the date of discharge.[141]

Container

If a container is used, the method for calculating the amount of liability is set out in Art IV(5)(c), which states:

> Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units concerned. Except as aforesaid, such article shall be considered the package or unit.

It is not clear, however, from this Article, as to who shoulders the responsibility of entering the number of units in the container – the shipper or the carrier. In practice, the shipper packs the container and enters the number of packages in the container on the bill of lading. Presumably, where the shipper is the party responsible for the entry of details on the bill of lading, they need not be taken as conclusive evidence in the event of calculating damages, since, under Art III(3), the carrier can make his reservations known on the bill of lading with phrases like 'said to contain'.[142] Carver suggests that it would be wise for the carrier to take such precautionary measures where he has not had the opportunity to check the number of packages in the container.[143] Conversely, the

140 The Hague Rules 1924 do not have a special provision in respect of containers. For the US approach to containerisation and per package limitation, see, for example, Alexander, 'Containerisation, the per package limitation and the concept of fair opportunity' (1986) 11 Maritime Lawyer 123; Luciano, 'Much ado about packages: containers and the COGSA limitation of liability provision' (1982) 48 Brooklyn LR 721.

141 See Serena Navigation Ltd v Dera Commercial Establishment and Another (The Limnos) [2008] EWHC 1036 (Comm) at paras 37–44.

142 In *Owners of Cargo Lately Aboard the River Gurara v Nigerian National Shipping Line Ltd* [1997] 1 Lloyd's Rep 225, the bill of lading governed by the Hague 1924 stated that the container was said to contain eight cases inside the container. The court held that liability was to be calculated in terms of the number of packages in the container. However, where the contents of the container were expressed in a manner that did not make clear whether the goods were packed separately, the container would be treated as the package. It seems that use of words such as 'said to contain' may not be sufficient. However, see *Ace Imports Ltd v Companhia de Navegacao Lloyd Brasileiro (The Esmeralda)* NSW Sup Ct, 12 Aug 1987, where the bill of lading stated that the container was said to contain 437 boxes and along the margin the words 'particulars furnished by shipper of goods'. There was also a clause on the bill of lading above the master's signature which read:
Shipped on board the above vessel . . . weight, measure, . . . quantity, condition, contents . . . if mentioned in this bill of lading were furnished by the shippers and were not or could not be ascertained or checked by the master unless the contrary has been expressly acknowledged and agreed to. The signing of this bill of lading is not considered as such an agreement . . .
The court held that any inference about the number of packages in the container was rebutted by the terms of the bill of lading.

143 Carver's Carriage by Sea, at para 557.

carrier could always cover the risk he undertakes in issuing a bill of lading with no reservations by charging additional freight.

Doubts have been raised by legal commentators about the flexibility of Art IV(5)(c) to handle novel methods of cargo transportation. For instance, Scrutton states that the provision does not make room for roll-on roll-off trucks.[144] However, as Carver states, it is difficult to understand why this uncertainty about Art IV(5)(c) exists at all given that it acknowledges the possibility of items of transport similar to containers that are used to consolidate the goods.[145] Further, given the judicial expertise at sleight of hand, there should be no difficulty in applying Art IV(5)(c) suitably to novel methods of transport in the future.

Where containers are used for consolidation, it seems that items as packaged will have to be indicated to qualify as units for the purposes of Art IV(5)(c). A reference to 200,945 pieces of posters and prints without any indication of how they were packaged was regarded as one unit for purposes of limitation.[146]

Monetary unit for calculation

The unit of account for calculation purposes is the Special Drawing Right (SDR) as defined by the International Monetary Fund (Art IV(5)(d)). The UK replaced the Poincaré Franc as drafted in the 1968 convention with the SDR since it is a party to the Brussels Protocol of 1979. The SDR is based on a basket of currencies and is not tied to the price of gold.

The limitation amounts prescribed by the Hague-Visby Rules are 666.67 units of account per package or unit or 2 units of account per kilo of the gross weight of the goods lost or damaged, whichever is the higher (Art IV(5)(a)). These amounts are to be converted into national currency on the basis of the value of the currency on a date to be determined by the law of the court seized of the case.

If the shipper declares the value of the goods and it is inserted in the bill of lading, then the limitation of liability under the Hague-Visby Rules can be broken. However, insertion of the value as declared by the shipper on the bill of lading is only *prima facie* evidence and is not binding or conclusive evidence on the carrier (Art IV(5)(f)). In practice, cargo owners rarely declare the full value of the cargo. The reason is purely financial since the amount payable for an increase in freight charges is likely to be far greater than that of obtaining insurance cover.

A question likely to arise in the context of Art IV(5)(a)[147] is whether the carrier can rely on the limitation amount in the event of his breach of the overriding Art III(1) obligation.[148] It appears from *The Happy Ranger*[149] that the inclusion of the phrase 'in any event' would allow the carrier to limit his liability. Referring to two decisions, one in the US[150] and the other in Canada,[151] Tuckey LJ said:

> . . . if the loss resulted from unseaworthiness . . . caused by want of due diligence on the part of the carrier . . . the exceptions from immunity are of no avail to the carrier but the limitation to liability in r 5 where the words 'in any event' are used applies . . . I think the words 'in any event' mean what they say. They are unlimited in scope and I can see no reason for giving them anything other than their natural meaning . . . [at p 364].

144 Scrutton on Charterparties, at Chapter 15, p 451.

145 Carver's Carriage by Sea, at para 557.

146 *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co* [2004] 2 Lloyd's Rep 537.

147 It reads:

> Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in *any event* be or become liable for any loss or damage to or in connection with the goods in an amount exceeding . . . [emphasis added].

148 See *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] 2 Lloyd's Rep 105 for effect of breach of Art III(1) on Art IV(2) and *The Kapitan Saharov* [2002] 2 Lloyd's Rep 255 for effect on Art IV(6).

149 [2002] 2 Lloyd's Rep 357.

150 *The John Weyerhaeuser* [1975] 2 Lloyd's Rep 439.

151 *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd* [1969] 2 Lloyd's Rep 277.

The carrier and shipper may agree to fix a higher maximum of liability but cannot reduce the maximum that is set by the Hague-Visby Rules (Art IV(5)(g)). Any clause that attempts to reduce the level of liability to a level below that set by Art IV(5)(a) will be null and void (Art III(8)).

Under the Hague Rules, the amount recoverable is 100 pounds sterling per package (Art IV(5)), and the monetary units are taken to be as gold value.[152]

Loss of limitation

Carrier

The carrier and the ship lose the benefit of the limitation provisions where it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result (Art IV(5)(e)).

The Hague-Visby Rules do not provide any guidelines on establishing recklessness. The courts may look to other conventions where similar phrases have attracted analysis for guidance. For instance, in *Goldman v Thai Airways*,[153] the concept of recklessness in the context of Art 25 of the Warsaw Convention as amended at The Hague in 1955 and implemented in the UK by the Carriage by Air Act 1961 was examined. The court there held that the test of recklessness was subjective, not objective, in that the state of the pilot's mind was of paramount importance. The court did not see it fit to attribute to the pilot knowledge that another pilot may have possessed or which he himself should have possessed.

Servant/agent of carrier

The servant or the agent of the carrier will lose the benefit of both the limitation provisions and the defences available to him under Art IV *bis* (4) where it is proved that the damage resulted from the act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Time limitation

The carrier and the ship shall, in any event, be discharged from all liability in respect of the goods, unless suit is brought within one year of their delivery or of the date on which they would have been delivered (Art III(6)). This period, however, may be extended if the parties so agree after the cause of action has arisen.[154] It is not clear from the Hague-Visby Rules whether delivery is seen as occurring during or at the end of the discharge or when the goods are received by the consignee.[155]

152 See *The Rosa S* [1988] 2 Lloyd's Rep 574, clarifying that the words of Art IX were intended to have the effect of expressing the sterling figure as a gold value figure (at p 578). Of course, as Justice Hobhouse stated in this case, the purpose of the gold value is to escape from the principle of nominalism (at p 579). See also *Feist v Societe Intercommunale Belge de Electricite* [1934] AC 161.

153 [1983] 1 WLR 1186. See Chapter 10, Loss of limits of liability.

154 Note that the parties cannot agree to reduce the period. However, where the claim is in relation to matters that fall outside the scope of the Rules, the parties are free to determine the time limit. See *The Ion* [1971] 1 Lloyd's Rep 541 and *The Zhi Jiang Kou* [1991] 1 Lloyd's Rep 493 (NSW, Australia).

155 See *Trafigura Beheer v Gold Stavraetos Maritime Inc (The Sonia)* [2003] 2 Lloyd's Rep 211, where time ran from actual discharge. The facts of the case are peculiar and may have influenced the decision.

The courts have construed this provision restrictively in favour of the defendant. If the action is not to be time barred, suit must be brought within one year in the jurisdiction in which the dispute is finally decided. In *Compania Columbiana de Seguros v Pacific SN Co*,[156] the plaintiff initiated the action in the US, even though the bill of lading had provided for exclusive English jurisdiction. By the time the mistake was discovered, the one-year time limit had lapsed and the action was held to be time barred in the English court.

The word 'suit'[157] has been construed as including arbitration proceedings provided the bill of lading has an arbitration clause or the parties have agreed to go to arbitration after the cause of action has arisen. In *The Merak*,[158] the arbitration clause of the charterparty had been incorporated into the bill of lading, and the court held that the time bar applied to the arbitration clause thus imported.

In the event of arbitration, s 12 of the Arbitration Act 1996[159] provides beneficial relief by allowing the court to extend time for beginning arbitral proceedings. The issue in the context of the Rules is whether the courts can extend the time using this provision despite the one-year time bar imposed by Art III(6). The Arbitration Act 1950 in s 27 gave a similar discretion to the courts to extend the time for beginning arbitral proceedings. In *Nea Agrex SA v Baltic Shipping Co Ltd and Intershipping (The Agios Lazaros)*,[160] where the charterparty attracted the application of the Hague Rules through a clause paramount, the court was of the opinion that the discretion under s 27 would apply. According to Goff LJ:

> . . . in my judgment, it is wrong to say either that the discretion under s 27, though applicable, can never be exercised otherwise than adversely to the applicant, which is illogical anyway, or even that it can only be exercised in exceptional circumstances. Moreover, although the importance of the factor that one is dealing with the time bar imported by the Hague Rules may make it rare, it is not a matter of principle that it should only rarely be exercised. At the end of the day in my judgment, the court must consider, having regard to all the facts and circumstances, whether the applicant has made out a case of 'undue hardship' which is the criterion laid down by the statute and whether it would be fair to extend the time.
>
> I would, therefore, allow the appeal and hold that the respondents were subject to the time in Art III(6), but on the cross notice I would hold that the plaintiffs commenced arbitration in due time and the claims are not barred and, although on this finding it is academic, I would also hold that s 27 of the Arbitration Act 1950 applies and that the discretion under that section is exercisable in accordance with the principles I have enunciated, and in this case, if contrary to my view arbitration was not effectively commenced by the letter . . . I would extend the time [at p 56].

What is the position then with regard to a bill of lading that attracts the mandatory application of the Hague-Visby Rules? It seems from *Kenya Railways v Antares Co Pte Ltd (The Antares) (Nos 1 and 2)*[161] that the courts will have no discretion to extend the time limit. Article III(6) excludes the operation of s 27.[162]

156 [1963] 2 Lloyd's Rep 527.

157 An issue likely to arise (given the popularity of mediation as an alternative form of dispute resolution) is whether mediation will come within the ambit of 'suit' for the purposes of Art III(6). Since it covers arbitration, there is no reason it should not. However, it is possible to argue the contrary, since mediation does not share the features of arbitration, for example, formality, enforceability, and so on (see Chapter 20).

158 [1964] 2 Lloyd's Rep 527. See also *Nea Agrex SA v Baltic Shipping Co Ltd and Intershipping (The Agios Lazaros)* [1976] 2 Lloyd's Rep 47; *The Ion* [1971] 1 Lloyd's Rep 541. The position with respect to the application of time bar on arbitration clauses is different in the US. See *Son Shipping Co Inc v de Fosse and Tanghe* (1952) 1999 Fed Rep (2nd) 687.

159 Note that the Arbitration Act 1996, although giving freedom to the parties to agree when arbitral proceedings are to be regarded as commenced in s 14, lists the circumstances in which the arbitration is to be regarded as commenced. See *Seabridge Shipping AB v AC Orsleff S Eftf's A/S* [1999] 2 Lloyd's Rep 685 and *The Smaro* [1999] 1 Lloyd's Rep 225.

160 [1976] 2 Lloyd's Rep 47.

161 [1987] 1 Lloyd's Rep 424. See also *The Ion* [1971] 1 Lloyd's Rep 541, where an agreement between the parties for a three-month time limit for arbitration (in a charterparty) incorporated into a bill of lading was held invalid to the extent it was in conflict with the Rules.

162 See Lloyd LJ at p 428.

Where there is a breach of contract as in unauthorised deck stowage, the time limit, as specified in the Hague-Visby Rules, still applies, since s 1(2) of the Carriage of Goods by Sea Act 1971 provides that the Rules 'shall have the force of law' and Art III(6) states that the carrier shall *in any event* be discharged of all liability. Where there is unjustified deviation, the time limitation clause would be available for the same reasons. Of course, where the Hague-Visby Rules have been incorporated voluntarily by the parties, the question would be a matter of construction.

The Hague-Visby Rules allow the parties to extend the time limit after the cause of action has arisen, but there is no reason why an agreement to extend the time limit before the action has arisen will not be permitted. Presumably, the conduct of the parties, although not amounting to an express agreement, would also be regarded as sufficient for waiver of the provision of time limit specified under the Hague-Visby Rules.

Article III(6) has far-reaching consequences. Not only has it the effect of barring the claim, but it also extinguishes it. In *Aries Tanker Corp v Total Transport Ltd (The Aries)*,[163] cargo had been short delivered, and the cargo owners made a deduction in the freight to cover the short delivery. The carrier sued two years after delivery for the balance of the freight, and the cargo owner claimed the defence of set-off. The House of Lords held that the defence was inadmissible since any right on which it might have been initially based had been extinguished by the time lapse.

Given the consequences of Art III(6), it is important that the correct claimant and the correct defendant are sued in the competent jurisdiction within the stipulated period since the correct claimant or defendant cannot be joined once the period has expired.[164]

An action for indemnity, however, may be brought outside the 12-month period according to Art III(6) *bis*,[165] provided the action for indemnity is initiated within the normal limitation period of the courts seized of the case. In England, ss 2 and 5 of the Limitation Act 1980 bar the initiation of a claim in contract or tort, respectively, after the expiration of six years.

Shipper's duties and immunities

Delivery for loading

The Hague-Visby Rules are silent regarding the shipper's obligation to bring the goods alongside the ship for loading. According to Art 1(e), the carrier's responsibilities for the goods start from the time when the goods are loaded, which suggests that the shipper has to bring the goods alongside the ship. However, according to the judgment in *Pyrene v Scindia Navigation Ltd*,[166] the parties are free to determine the role each is going to play in the contract of carriage. Where such arrangements are made, the extent of the rights and obligations between the parties will be considered under the general principles of contract law.

Shipper's guarantee

The shipper is deemed to have guaranteed to the carrier at the time of shipment the accuracy of the marks, number, quantity and weight provided by him. Where the carrier incurs loss, damage and expenses as a consequence of the inaccuracies of the particulars, the carrier has a right of indemnity against the shipper (Art III(5)).[167]

163 [1977] 1 Lloyd's Rep 334.

164 See *The Jay Bola* [1992] 1 Lloyd's Rep 62; *The Havhelt* [1993] 1 Lloyd's Rep 523. On amendment of cause of action, see *The Pioneer* [1995] 1 Lloyd's Rep 223. See also *Fort Sterling Ltd and Another v South Atlantic Cargo Shipping NV and Others (The Finnrose)* [1994] 1 Lloyd's Rep 559.

165 There is no equivalent in the Hague Rules. See *Lauritzen Reefers v Ocean Reef Transport Ltd SA (The Bukhta Russkaya)* [1997] 1 Lloyd's Rep 744.

166 [1954] 2 QB 402.

167 See Jarvis, 'Expanding the carrier's right to claim indemnity under s 3(5) of COGSA for inaccurate bills of lading' (1986) 24 Duquesne Law Review 811.

There is, however, a problem with this provision. It does not specify whether the carrier has the right of indemnity as against the consignee or indorsee. Carver suggests that Art III(5) is carefully worded so as to make only the shipper liable since the guarantee is expressed as a recital of a collateral agreement that the shipper qua shipper has with the carrier. Therefore, the consignee or indorsee is not liable for the inaccuracies that are present.[168] Moreover, from a practical point of view, it may be possible to argue that the shipper, after all, is the person who has packed the goods and is, therefore, in a better position to guarantee the veracity of the statements made.

Where the carrier is aware that the statements made by the shipper are false, presumably, he will lose his right of indemnity.

Dangerous goods

Article IV(6) provides that, where goods of an inflammable, explosive, or dangerous nature are shipped without the consent of the carrier, the master or the agent of the carrier, the carrier is at liberty any time before discharge to land them at any place or destroy or render the goods innocuous. In the event of such action on the part of the carrier, he is not liable to pay any compensation to the shipper. The shipper will be liable for all damages arising directly or indirectly as a result of such a shipment.

Where goods are shipped with the carrier's consent and knowledge and the goods become a danger to other cargo or the ship, the carrier is at liberty to land them at any place, destroy them or render them innocuous. In the event of such an act, the carrier will be liable only in general average.

The Hague-Visby Rules do not make it clear whether the word 'dangerous' is restricted to goods that are physically dangerous. It is possible to argue that it is restricted to physically dangerous, applying the *ejusdem generis* rule of statutory interpretation.[169] A recent decision indicates that the word is not restricted to events that are 'physically dangerous'. In *Effort Shipping Co Ltd v Linden Management SA and Another*,[170] a cargo of processed nuts infested with a beetle of voracious appetite (Khapra beetle) was held to be dangerous for the purposes of Art IV(6). The shipper was held liable to the carrier for damages arising out of the need to destroy the cargo and fumigate the ship. The question of whether the presence of animal life, such as rats, in the cargo will be regarded as rendering the cargo dangerous will depend on the facts. For instance, in *Bunge SA v Adm Do Brasil Ltd and others (The Darya Radhe)*, the factual findings of the presence of a few rats in the cargo were insufficient to render the cargo dangerous[171].

Further, Art IV(6) does not make it clear whether the consignee or the endorsee is liable to the carrier. It could be that it affects only the shipper since he is the person in the best position to know the nature of the cargo shipped.

No fault

The shipper will not be held responsible for the loss or damage that is sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants (Art IV(3)).

Carver submits that this provision is not intended to relieve the shipper from liability for the guarantee he provides that the goods shipped are not dangerous under Art IV(6).[172] This suggestion

168 Carver's Carriage by Sea, at para 521.
169 See Carver's Carriage by Sea, para 566.
170 [1998] 2 WLR 206.
171 [2009] EWHC 845 (Comm).
172 *Carver's Carriage by Sea*, at paras 544 and 545.

is based on the belief that the guarantee is an absolute guarantee and the shipper is liable whether he knew the goods were dangerous or not. This view, however, seems to place the shipper under an unfair burden. Besides, there is no suggestion in Art IV(6) that the guarantee provided by the shipper applies in all eventualities. The better view, therefore, is that Art IV(3) will relieve the shipper of liability where goods the shipper reasonably believes to be safe subsequently become dangerous and cause damage.

A recent case, however, has put the above uncertainty to rest. The House of Lords, in *Effort Shipping Co Ltd v Linden Management SA*,[173] examined whether Art IV(3) qualified the liability imposed on the shipper by Art IV(6). Failing to find an answer in the *travaux préparatoires* of the Hague Rules, the House of Lords turned to the historical setting of the Hague Rules to find a solution. Since the approach taken in *Brass v Maitland*[174] was the prevalent view at the time the Hague Rules were drafted, Lord Steyn surmised that, if drafters had wished to adopt a position that ran counter to the widely accepted view of the time, they would have catered for this in Art IV(6). In the absence of any indication that the shipper's actual or constructive knowledge was relevant in Art IV(6), the provision was seen as free-standing, imposing strict liability on the shippers in relation to the shipment of dangerous goods, irrespective of fault or neglect on their part. According to Lord Steyn:

> . . . the overall position is that the language of Art IV(6), read with Art IV(3), tends to suggest that Art IV(6) was intended to be a free-standing provision . . . As against that there is the fact that the United States courts have interpreted Art IV(3) as qualifying Art IV(6). Given the desirability of uniform interpretation of the Hague Rules, the choice between the competing interests is finely balanced. But there is a contextual consideration which must also be weighed in the balance. It is permissible to take into account the legal position in the United Kingdom and in the United States regarding the shipment of dangerous cargo before the Hague Rules were approved. It is relevant as part of the contextual scene of the Hague Rules: *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd*.[175] In *Brass v Maitland*, the majority held that under a contract of carriage there is a term implied by law that a shipper 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*[176] and in *Great Northern Rly Co v LEP Transport and Depository Ltd*.[177] This view was controversial. It was disputed in a string of minority judgments in *Brass v Maitland and in Bamfield v Goole and Sheffield Transport Co Ltd*; see, also, *Mitchell, Cotts and Co v Steel Bros and Co Ltd* (1916);[178] and Abbott's *Merchant Ships and Seamen*, 13th edn, 1892, p 522. Nevertheless, the law of England was as held by the majority in *Brass v Maitland*. That view probably would have been regarded as authoritative in most countries in what was then the British Empire. In 1861, a court in the United States (the Massachusetts District Court) adopted the majority holding in *Brass v Maitland* as a sound rule on the policy grounds, *viz*, that 'It throws the loss upon the party who generally has the best means of informing himself as to the character of article shipped' (*Pierce v Winsor*;[179] see also Parsons, *A Treatise on the Law of Shipping and the Law and Practice of Admiralty*, Vol 1, 1869, pp 265–66). That remained the legal position in the United States until the conferences that led to the adoption of the Hague Rules. The United States was then already a great maritime power. Its shipping law was a matter of great importance. The British Empire was in decline but, collectively, the trading countries under its umbrella controlled a considerable proportion of the ocean-going world trade. That means that, at the time of the drafting of the Hague Rules, the dominant theory in a very large part of the world was that shippers were under an absolute

173 [1998] 2 WLR 206.
174 (1856) 26 LJ QB 49.
175 [1961] AC 807, at p 836, per Viscount Simonds.
176 [1910] 2 KB 94.
177 [1922] 2 KB 742.
178 [1916] 1 KB 610, at pp 613–14, per Atkin J.
179 (1861) 2 Sprague 35, at p 36.

> obligation not to ship dangerous goods. The circumstance must have been known to those who drafted and approved the Hague Rules. No doubt they also knew there was an alternative theory, namely, that the shipper of dangerous goods ought only to be liable for want of due diligence in the shipment of dangerous goods. If this contextual scene is correctly described . . . one is entitled to pose the practical question: What would the framers of the Hague Rules have done collectively had they been minded to adopt the step of reversing the dominant theory of shippers; liability for the shipment of dangerous goods? There is really one realistic answer: they would have expressly provided that shippers are only liable in damages for the shipment of dangerous goods if they knew or ought to have known of the dangerousness of the goods. In that event, the three parts of Art IV(6) would have had to be recast to make clear that the shippers' actual or constructive knowledge was irrelevant to the carriers' right to land dangerous cargo, but a condition precedent to the liability of the shippers for damages in the second part. Moreover, if this idea had been put forward for discussion, the *travaux préparatoires* would no doubt have reflected the observations of carriers on such a fundamental change to their rights. The idea was never put forward. The inference must be that the framers of the Hague Rules proceeded on what was at that time an unsurprising assumption that shippers would be absolutely liable for the shipment of dangerous cargo.
>
> In all these circumstances, I am constrained to conclude that, despite the decisions of the United States courts, the best interpretation of the language of Art IV(6) read with Art IV(3) seen against its contextual background, is that it created free-standing rights and obligations in respect of the shipment of dangerous cargo [at pp 221–23].

Interestingly, Lord Cooke, although agreeing that the scope of the obligation created by Art IV(6) is an absolute one, was unhappy with its description as a free-standing obligation. He preferred to read Art IV(6) as an integral part of the Hague Rules and apply the maxim *generalia specialibus non derogant* that would lead to the conclusion that on a fair reading of the Rules in its entirety, Art IV(6) is to take priority over Art IV(3) (at p 224).

Although this case was decided with regard to the Hague Rules, it applies equally to Art IV(6) in the Hague-Visby Rules, which is identical to Art IV(6) of the Hague Rules.

General average

The Hague-Visby Rules are silent regarding general average. Article V, however, states that the Rules shall not prevent the insertion in a bill of lading of any lawful provision regarding general average. So, the bill of lading can be made subject to both the Hague-Visby Rules and the York-Antwerp Rules.

Status of terms not included in the Rules

The Hague-Visby Rules are not a complete code regulating all matters relating to the contract of carriage by sea. They do not regulate, for instance, terms relating to freight, liens and demurrage that are commonly found in bills of lading. Hence, common law presumptions, English law of contract and statutory rights and liabilities as specified in the Bills of Lading Act 1855 (for bills of lading issued before 16 September 1992) and Carriage of Goods by Sea Act 1992 (for bills of lading issued after 16 September 1992)[180] are equally relevant to a bill of lading governed by the Hague-Visby Rules.

It is also normal for bills of lading to include arbitration clauses, choice of forum and choice of law clauses. Where arbitration clauses are included, it is well established that arbitration proceedings

180 See Chapter 6.

must be initiated within the one year time limit imposed by Art III(6) unless the parties agree otherwise.[181] Concerning choice of law and choice of jurisdiction clauses, the courts will recognise the parties' intentions unless the object of these clauses is to lessen the liability imposed by the Hague-Visby Rules or to avoid the operation of the Hague-Visby Rules altogether.[182]

Scope of application

Applicability of the Hague-Visby Rules to a contract of carriage is determined by a number of factors, such as:

(a) the type of document covering the contract of carriage,
(b) the kind of carriage and
(c) the kind of cargo.

Taking (a), the type of document covering the contract of carriage, the Hague-Visby Rules come into operation where the contract of carriage by sea is covered by a bill of lading or similar document of title (Art I(b)). The bill of lading or other similar document of title need not exist at the time of damage for the Hague-Visby Rules to apply. In *Pyrene Co Ltd v Scindia Navigation*,[183] one of the fire tenders was damaged while it was lifted aboard by the ship's tackle. At the time of the damage, there was no bill of lading, although one was issued eventually. The damage to the fire tender was not noted on the document, and the carrier, when sued, relied on the limitation of liability available under the Hague Rules. The plaintiff argued that since the damage to the tender occurred at a time when it was not 'covered by a bill of lading', the limits did not apply. The court held that, even though the bill of lading in fact was not in existence at the time of the damage, the parties had contemplated issuing a bill of lading in due course. In these circumstances, 'the contract is from its very creation "covered" by a bill of lading, and is, therefore, from its very inception a contract of carriage with the meaning of the Rules and to which the Rules apply' (at p 419).

Article I(b) states that the Hague-Visby Rules are applicable to documents of title that are similar to a bill of lading. At present, in British shipping practice, a document of title similar to a bill of lading is not issued. It is, however, possible that the custom of a trade may play a role in determining whether a particular document is a document of title. The creation of a document of title through mercantile custom is not unknown in English law. In *Lickbarrow v Mason*,[184] custom was admitted as establishing bills of lading as a document of title. And in the more recent case of *Kum v Wah Tat Bank Ltd*,[185] the court has acknowledged that in principle a document of title could be created by custom of trade. To qualify, however, the custom must be sufficiently widely known such that enquiries by an outsider would reveal it. As Lord Devlin stated in *Kum v Wah Tat Bank Ltd*:

> In speaking of a custom of merchants, the law has not in mind merchants in the narrow sense of buyers and sellers of goods. A mercantile custom affects transactions either in a

181 See 'Time limitation', above.
182 See 'Contracting out', below.
183 [1954] 2 QB 402. See also *Harland and Wolff Ltd v Burns and Laird Lines Ltd* (1931) 40 LIL Rep 286. See Chapter 11, for the position relating to consignment notes in relation to international carriage by rail and the CIM Rules (Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail).
184 (1794) 5 Term Rep 683.
185 [1971] 1 Lloyd's Rep 439.

> particular trade or in a particular place, such as a market or a port, and binds all those who participate in such transactions, whatever the nature of their callings. It is true that a document relating to goods carried by sea and said to be negotiated through banks could hardly be recognised as a document of title if the evidence did not show it to be treated as such by shipowners, shippers and bankers. But the limits of the custom, if it be established, are not to be defined by reference to categories of traders or professional men; if established, it binds everyone who does business in whatever capacity. To describe a custom as belonging to particular callings diverts attention from its true character which consists in its attachment to a trade or place.
>
> Universality, as a requirement of custom, raises not a question of law but a question of fact. There must be proof in the first place that the custom is generally accepted by those who habitually do business in the trade or market concerned. Moreover, the custom must be so generally known that an outsider who makes reasonable enquiries could not fail to be made aware of it. The size of the market or the extent of the trade affected is neither here nor there. It does not matter that the custom alleged in this case applies only to part of the shipping trade within the state of Singapore, so long as the part can be ascertained with certainty, as it can here, as the carriage of goods by sea between Sarawak and Singapore. A good and established custom . . . obtains the force of a law, and is, in effect, the common law within that place to which it extends . . . [at p 444].

Until recently, it was thought that the Hague-Visby Rules did not apply to non-transferable shipping documents, such as straight bills of lading[186] (since they lacked the quality of transferability). Straight bills of lading were seen as having the same status as mate's receipts, and delivery orders.[187] In *Macmillan Co Inc v Mediterranean Shipping Co Sa (The Rafaela S)*,[188] the cargo was shipped on a straight bill of lading. The carriage was from Durban to Felixstowe with the final destination specified as Boston. On discharge at Felixstowe, the cargo was reshipped to Boston. The cargo was damaged on its way to Boston. Both carriages were on ships owned by the same carrier. No bill of lading was issued in respect of the voyage to Boston. The Court of Appeal concluded that there were two voyages and a straight bill of lading would have been issued had there been a demand for a fresh bill of lading. Since Felixstowe was the port of shipment, the question was whether the straight bill of lading was subject to the Hague-Visby Rules. The straight bill of lading, even though it was drafted on a classic bill of lading form, was held to be a document of title for the purposes of Art I(b). A number of reasons were provided by Rix LJ in reaching this conclusion.

First, the focus of the Hague Rules was with the content of the contract of carriage and protection of the parties to the contract including third parties, not with transferability. A straight bill of lading, although not showing the succession of transfers associated with a classic bill of lading, is still capable of one transfer to the named consignee (a third party). So a named consignee under a straight bill of lading is within the purview of the Hague-Visby Rules. Second, in practice, the

186 See *Henderson v The Comptoir D'Escompte* (1873) LR 5 PC 253 – a bill naming a consignee lacking the words 'or order or assigns' is not transferable. As Tuckey LJ acknowledged in *The Happy Ranger* [2002] 2 Lloyd's Rep 357, 'a "straight" bill has no English law definition, but the term derives, it appears, from earlier US legislation referring to "straight" bill as one in which the goods are consigned to a specific person as opposed to an "order" bill where the goods are consigned to the order of any one named in the bill or bearer' (at p 363). Note, however, that the Carriage of Goods by Sea Act uses the phrase "sea waybills" and is defined s 1(3). See also *The Chitral* [2000] 1 Lloyd's Rep 529; *The Rafaela S* [2004] QB 702.

187 See *Comalco Aluminium Ltd v Mogul Freight Services Pty Ltd (The Oceania Trader)* (1993) 21 ABLR 377; (1993) ALR 677, where the Australian court held that the consignment note issued by a freight forwarder attracted the application of the Hague Rules since it possessed the essential elements of a bill of lading. See also *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 NSWLR 745; Hetherington [1992] LMCLQ 32. Tetley (*Marine Cargo Claims*, 2008, Blais) is of the opinion that the scope of applicability of the Hague-Visby Rules to shipping documents is to be determined by Art VI since the overriding authority to Art VI is given by Art II.

188 [2004] QB 702.

straight bill of lading is used like a classic bill as a document against which payment is required thus marking the transfer of property. Third, in practice, a straight bill of lading is required for the purpose of taking delivery of the cargo. In *The Rafaela S*, there was an attestation clause requiring surrender of a bill of lading against delivery of the cargo.

Does this mean that, in the absence of an attestation clause, the straight bill of lading will not be treated as a document of title? If so, then it is likely to create confusion, bringing with it uncertainty. Rix LJ makes reference to this issue and is of the opinion that it should not be treated differently since it would be 'undesirable to have a different rule for different kinds of bills of lading'.[189]

For shipping documents other than a bill of lading (straight or classic) to attract the application of the Hague-Visby Rules, the documents must expressly state that the Hague-Visby Rules are to govern as if the receipt were a bill of lading.[190] However, where the Hague-Visby Rules are incorporated, it is possible to include them partially. In *The European Enterprise*,[191] 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 the respective contents were to be regarded as one package or unit for the purposes of Art IV(5)(a) and that the carrier was entitled to limit his liability to 10,000 francs per package. The plaintiff argued that the clause reducing liability to an amount lower than that set by the Hague-Visby Rules was invalid since the Carriage of Goods by Sea Act 1971 had the force of law by virtue of s 1(6)(b). Construing the section literally, the court held that it imparted force of law to a voluntary incorporation of the Hague-Visby Rules into a contract only if the conditions laid down in that section were followed – that is, the consignment note must have expressly provided that 'the Rules are to govern as if the receipt were a bill of lading'. These words, however, were not included in the consignment note. Further, the defendant had incorporated the Hague-Visby Rules partially. In these circumstances, Steyn J felt that:

> . . . it would be curious if a voluntary paramount clause, which reflected only a partial incorporation of the Hague-Visby Rules, had a result that a statutory binding character was given to all the Hague-Visby Rules, even where there was no primary contractual bond . . . in enacting s 1(6)(b), the legislation did not intend to override the agreement of the parties when the parties had the freedom of choice whether or not to incorporate the rules into their contract.[192]

The Hague-Visby Rules do not apply to charterparties (Arts I(b) and V). However, it is fairly common for charterparties to voluntarily incorporate the Rules with a clause paramount.[193] Such paramount clauses, the purpose of which are to give the Rules contractual force, will be effective in incorporating the Rules, even though the Rules were drafted with bills of lading in mind, as *Anglo-Saxon Petroleum Co v Adamasatos Shipping Co*[194] indicates. Incorporation of the Rules with a clause paramount makes the Rules prevail over any of the exceptions in the charterparty.[195]

189 At p 752. See *Carewins Development China Ltd v Bright Fortune Shipping Ltd* [2007] 3 HKLRD 396 (available also on http://legalref.judiciary.gov.hk) where the Hong Kong Court of Appeal considered *The Rafaela* in detail and concluded that the straight bill of lading has to be produced for the named consignee to obtain delivery.

190 Section 1(6)(b) of the Carriage of Goods by Sea Act 1971.

191 [1989] 2 Lloyd's Rep 185. See also Debattista, 'Sea waybills and the Carriage of Goods by Sea Act 1971' [1989] LMCLQ 403.

192 [1989] 2 Lloyd's Rep 185, at p 191.

193 Anglo-Saxon Petroleum Co v Adamastos Shipping Co [1957] 1 Lloyd's Rep 271.

194 [1959] AC 133.

195 Note also that the courts may have to consider priority on the basis of whether a clause is printed, typed or handwritten. The order of priority is as follows: handwritten clauses prevail over typed and typed over printed. This is justified on the basis that the parties have given more consideration to the written or typed terms. See *Metalfer Corp v Pan Ocean Shipping Co Ltd* [1998] 2 Lloyd's Rep 632; *Seven Sea Transportation Ltd v Pacifico Union Marina Corp (The Satya Kailash and Oceanic Amity)* [1984] 1 Lloyd's Rep 558; *Bayoil SA v Seawind Tankers Corp (The Leonidas)* [2001] 1 Lloyd's Rep 533.

Parties do not always indicate whether they wish the Hague Rules or the Hague-Visby Rules to apply in their paramount clause. This has been the subject of some judicial discussion in a number of cases. The matter is to be resolved, it seems, from what the term 'general paramount clause' means to shipping men. In *Nea Agrex SA v Baltic Shipping Co Ltd and Intershipping Charter Co (The Agios Lazaros)*,[196] the charterparty in cl 31 provided:

> . . . and also paramount clause are deemed to be incorporated to this charterparty.

The Court of Appeal, contrary to the position taken by the lower court,[197] reached the view that the paramount clause incorporated the Hague Rules. As Lord Denning said:

> What does 'paramount clause' or 'clause paramount' mean to shipping men? 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 . . . we have to see what its meaning is in this charterparty . . . It brings the Hague Rules into the charterparty so as to render the voyage, or voyages, subject to the Hague Rules so far as applicable to . . . [at p 50].[198]

This test was applied fairly recently in *Lauritzen Reefers v Ocean Reef Transport Ltd SA (The Bukhta Russkaya)*.[199] The relevant clause read:

> . . . in trades involving neither US nor Canadian ports, the general paramount clause to apply in lieu of the USA clause paramount.

The court, on the basis of the construction of the contract, concluded that the intention was to incorporate the Hague Rules in the contract.

Where a bill of lading clause states 'For all trades this B/L shall be subject to the 1924 Hague Rules . . . or, if compulsorily applicable, subject to the 1968 Protocol (Hague-Visby) or any compulsory legislation based on the Hague Rules and/or said Protocols', the phrase 'compulsorily applicable' will be construed as compulsorily applicable according to a particular system of law. In *Trafigura Beheer BV and Another v Mediterranean Shipping Co SA*,[200] the carriage was for goods from Durban (South Africa) to Shanghai and contained the paramount clause. It also contained an English law and jurisdiction clause. The judge at the lower court held that Hague-Visby Rules applied as a matter of contract. He construed the phrase 'compulsorily applicable' as including compulsory application at the port of shipment. On appeal, the Court came to a different conclusion. As a matter of contract the owners agreed to accept the Hague Rules, unless they were made to accept the Hague-Visby Rules by the proper law of the contract. Since South Africa was not a contracting state, the Hague-Visby Rules were not compulsorily applicable. In the words of Longmore LJ:

> I, therefore, agree . . . that the scheme of the bill of lading in the present case is that the owners, as a matter of contract, accept Hague Rules 1924 obligations but only accept HVR obligations if they are forced to do so. They can only be forced to do so if the proper law of the contract compels it (or if the place where the cargo owners choose to sue them compels it). Neither law compels it on the facts of the present case and they are not contractually obliged further than the law compels [at para 16].

196 [1976] 2 Lloyd's Rep 47.

197 Donaldson J held that it was unclear what paramount clause was to be incorporated and must be struck out as meaningless as in *Nicolene v Simmonds* [1953] 1 Lloyd's Rep 189. See, however, *Hillas and Co Ltd v Arcos* (1932) 147 LT 503.

198 See also Seabridge Shipping AB v AC Orsleff S Eftf's A/S [1999] 2 Lloyd's Rep 685.

199 [1997] 2 Lloyd's Rep 744.

200 [2007] EWCA Civ 794.

An issue that is likely to arise in the context of a clause paramount is whether the claims under the charterparty are subject to Art III(6), which provides that the carrier and the ship shall in any event be discharged from all liability in respect of the goods unless suit is brought within one year of their delivery or of the date on which they would have been delivered. In *Noranda Inc and Others v Barton Ltd and Another (Time Charter) (The Marinor)*,[201] the plaintiffs made a number of claims in respect of voyage 32: an amount by which the market price would have exceeded the actual price had the goods been sold uncontaminated; an amount in respect of the additional length of the voyage; and an amount in respect of additional port expenses. They also claimed for substitute tonnage, which *The Marinor* could not carry due to its defective condition. The court had no hesitation in holding that Art III(6) applied to the amounts claimed in respect of voyage 32 since the liability in respect of the goods and the claims were sufficiently connected with the goods shipped. As for the substitute tonnage claim, Art III(6) did not apply since it was not in respect of the cargo but a claim in respect of loss of use of the vehicle. As Colman J said:

> . . . liability 'in respect of goods' (the words of Art III(6) is not to be construed in the context of a periodic time charter as meaning a liability arising from 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 a 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 was referable to what was done with that cargo or was directly associated with it [at p 310].

It is also common practice to issue bills of lading under charterparties. Where bills of lading are so issued, they must comply with the terms of the Hague-Visby Rules.

Where goods are carried under a charterparty and bills of lading are issued to the charterer, as between the charterer and the shipowner, the terms of carriage are governed by the charterparty since the bill of lading in the hands of the charterer is a mere receipt. However, where a bill of lading is issued to a shipper other than the charterer, the bill of lading will be governed by the Hague-Visby Rules.

An interesting question that arises where a bill of lading is issued under a charterparty to a shipper is the status of the bill of lading in the hands of the charterer if it is subsequently endorsed to the charterer by the shipper. In *The President of India v Metcalfe Shipping*,[202] a bill of lading issued under a charterparty to a shipper was endorsed by the shipper to the charterer. The court held that the arbitration clause contained in the charterparty applied to the charterer, despite the fact that the bill of lading endorsed to the charterer did not have an arbitration clause. It seems that the rights of the charterer against the carrier are always determined by the charterparty, unless the terms of the charterparty include a supercession clause – a clause in the charterparty that states, as between the parties, the terms of the charterparty are to be superseded by the terms of the bill of lading given under it.

201 [1996] 1 Lloyd's Rep 301. In *Cargill International SA v CPN Tankers Ltd (The OT Sonja)* [1993] 2 Lloyd's Rep 435, where the time bar under Art III(6) operated in a claim for consequential financial loss and expense due to the state of the holds which had to be cleaned before loading of cargo could take place. See also *Interbulk Ltd v Ponte Deo Sospiri Shipping Co (The Standard Ardour)* [1988] 2 Lloyd's Rep 159.

202 [1970] 1 QB 289.

Incorporation of charterparty terms in bills of lading

Bills of lading issued under charterparties generally make reference to charterparty terms. Clauses importing terms of the charterparty into the bill of lading are viewed with tolerance by the courts, provided these are brought to the notice of the shipper and charterparty clauses are adequately incorporated into the bill of lading. Judicial interpretation of incorporation clauses, however, is very strict and a number of conditions need to be met for charterparty terms to be successfully included in a bill of lading as seen in *The Varenna*.[203] In this case, the bill of lading issued under a charterparty for the carriage of crude oil contained the following clause:

> cargo . . . to be delivered . . . to Petrofina SA upon payment of freight as per charterparty, all conditions and exceptions of which charterparty including the negligence clause are deemed to be incorporated in the bill of lading.

The charterparty provided *inter alia*:

> . . . any dispute arising under this charter shall be settled in London by arbitration.

It was argued the arbitration clause in the charterparty had been successfully incorporated into the bill of lading with the phrase 'all conditions and exceptions'.[204] The court, however, came to the conclusion that it was not incorporated. For successful inclusion:

- Effective words of incorporation must be found in the bill of lading itself. Words that require reference to the charterparty to realise the intentions of the parties to the contract – namely, the charterer and the shipowner – will be inadequate. A general reference in the bill of lading to charterparty terms will be insufficient to allow the court to discover from the charterparty as to what clauses were intended to be included in the charterparty.
- . . . an incorporation cannot be achieved by agreement between the owners and the charterers. It can only be achieved by the agreement of the parties to the bill of lading contract and thus the operative words of incorporation must be found in the bill of lading [at p 594].
- Words of incorporation must be sufficiently descriptive to indicate the precise charterparty clause sought to be included in the bill of lading. Use of phrases like 'all conditions and exceptions in the charterparty' would be read literally and will be insufficient to incorporate the arbitration clause. In *The Varenna*, the phrase was construed as referring to only those conditions and exceptions that are appropriate to the carriage of and delivery of goods and not extensive enough to cover the arbitration clause.[205]

Use of wide clauses may be effective in including all the terms of a charterparty into a bill of lading. In *The Miramar*,[206] the phrase 'all terms of the charterparty' was regarded as sufficiently descriptive to incorporate all the terms (including the demurrage clause) of the charterparty. Once the

203 [1983] 2 Lloyd's Rep 592; see Park, 'Incorporation of charterparty terms into bill of lading contracts – a case rationalisation' (1986) 16 Victoria University of Wellington Law Review 77.

204 See McMahon, 'The Hague Rules and incorporation of charterparty arbitration clauses into bills of lading' [1970] JMLC 1, for a comparative account of the US and English interpretations.

205 The courts are continuing to adopt a strict approach to clauses incorporating charterparty terms into a bill of lading as indicated by the recent case *Siboti v BP France* [2003] 2 Lloyd's Rep 364. See also *The Epsilon Rosa* [2003] 2 Lloyd's Rep 509.

206 Miramar Maritime Corp v Holburn Oil Trading Ltd [1984] 2 Lloyd's Rep 129. See also The Nai Matteini [1988] 1 Lloyd's Rep 452; Daval Aciers D'Usinor Et De Sacilor and Others (The Nerano) [1994] 2 Lloyd's Rep 50.

charterparty terms are incorporated into a bill of lading, the courts read the contents of the clauses literally and are unwilling to engage in any verbal manipulation. Where the clauses of a charterparty are included *verbatim* into the bill of lading and the clause states that the charterer is liable as in *The Miramar*, the courts will not substitute the word 'charterer' with the words 'the bill of lading holder'.

Where terms of the charterparty have been incorporated in the bill of lading, they must not conflict with the terms of the bill of lading. In the event of any inconsistency, the terms of the bill of lading will preside. And where the charterparty terms lessen the liability of the carrier below that set by the Hague-Visby Rules, the courts will regard these clauses as null and void under Art III(8).[207]

The strict approach taken by the courts to clauses incorporating charterparty terms into the bill of lading is justifiable both on pragmatic and equitable grounds. If incorporation clauses are interpreted liberally, uncertainties in respect of the extent of liabilities undertaken would affect the attractiveness of the document as security and will impede the ease of transferability – two of the major functions of a bill of lading. Further, it would be unjust to hold the consignee/indorsee liable on terms that he has no way of knowing since he is not privy to the charterparty.

Kinds of carriage

The Hague-Visby Rules apply to every bill of lading where the carriage is between ports in two different states in the following circumstances:

- where a bill of lading is issued in a contracting state;[208]
- where carriage is from a port in a contracting state;
- where the contract contained in or evidenced by the bill of lading specifies that the Hague-Visby Rules or the legislation of a state giving effect to them are to govern the contract.

Where a consignment is sent from a port in a non-contracting state to a contracting state, or a bill of lading is issued in a non-contracting state, the contract of carriage will not be subject to the Hague-Visby Rules, unless they are incorporated through a choice of law clause.

The ambit of the Hague-Visby Rules is extended by the implementing statute to apply to coastal trade.[209] Where goods, for instance, are sent from Southampton to Hull by sea and the voyage is covered by a bill of lading, the Hague-Visby Rules will be applicable.

Kinds of cargo

The Hague-Visby Rules are applicable to all goods, wares, merchandise and articles of every kind, except live animals and cargo, which, by the contract of carriage, is stated as being carried on deck and is so carried (Art I(c)).

207 See 'Contracting out', below.

208 The emerging commercial practice of issuing switch bills (issuing a second set of original bills of lading where different information regarding supplier, origin, etc, is inserted) may cause problems in respect of the applicability. For instance, in *Noble Resources Ltd v Cavalier Shipping Corp (The Atlas)* [1996] 1 Lloyd's Rep 642, the original Russian bills of lading were switched with bills issued in Hong Kong. According to Longmore J, the original bills were governed by the Hague Rules, and the switched bills governed by the Hague-Visby Rules. The practice of issuing switch bills poses legal problems and introduces a great deal of uncertainty regardless of whatever good commercial reasons (e.g., not divulging the supplier's name) there might be. As Longmore J correctly observed: 'No doubt this provision for a second set of bills of lading to come into existence was agreed for not unreasonable commercial motives but it is a practice fraught with danger; not only does it give rise to obvious opportunities for fraud (which is not suggested in this case) but also, if it is intended that the bills of lading should constitute contracts of carriage with the actual owner of the ship (as opposed to the disponent owner), the greatest care has to be taken to ensure that the practice has the shipowner's authority' [at p 644].

209 Section 1(3) of the Carriage of Goods by Sea Act 1971.

Live animals are excluded because of their peculiar characteristics – easy susceptibility to diseases, accidents and mortality, and stringent quarantine and health requirements. Since the Hague-Visby Rules do not apply to live animals, the carrier is at liberty to negotiate the terms of carriage. If he includes clauses exempting liability for damage or loss to the goods, he is not expected to make these clauses subject to the terms of reasonableness, as stipulated by s 2 of the Unfair Contract Terms Act 1977, unless the person he is contracting with is a consumer.[210]

If the parties so wish, the carriage of live animals can be made subject to the Hague-Visby Rules through express stipulation. This must be in the form stipulated by s 1(6)(a) and (b) of the Carriage of Goods by Sea Act 1971, if the rules are to have the force of law following the decision in *The European Enterprise*.[211] Where such a stipulation is made then, in the event of a clash between the terms of the Hague-Visby Rules and the express terms of the contract, the provisions of the contract will be overridden by those of the Hague-Visby Rules.

Deck cargo will fall outside the operation of the Hague-Visby Rules[212] provided the two requirements set out by Art I(c) are met:

- the cargo *must in fact* be stowed on deck and
- the stowage of the cargo on deck must be made explicit on the face of the bill of lading.

In practice, bills of lading generally contain clauses whereby the carrier reserves the right to stow goods on deck since he would want to utilise the ship's space to the fullest. Clauses that give liberty to carry on deck, however, are regarded as giving the carrier only authority to carry on deck, but are ineffective in ousting the operation of the Hague-Visby Rules.[213] In *Svenska Traktor v Maritime Agencies*,[214] the bill of lading issued for the carriage of tractors from Southampton included the following clause:

> Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or claim arising therefrom.

The cargo was carried partly on and partly below deck. One of the tractors carried on deck was washed overboard during the journey. The carriers contended that the liberty clause in the bill of lading gave them authority to carry the goods on deck and took the contract outside the scope of the Hague Rules. They could, therefore, exclude liability. It was held that though the liberty clause gave them authority to carry on deck, it did not meet the requirements set out by Art I(c). To take the cargo outside the operation of the Hague Rules, the bill of lading must on the face of it specifically state that the goods are carried on deck. The literal rendering of Art I(c) is of course aimed at protecting the consignee/indorsee who relies on the bill of lading for full knowledge of the terms of the contract of carriage. As Pilcher J said:

> . . . such a statement on the face of the bill of lading would serve as a notification and a warning to consignees and indorsees . . . that the goods that they were to take were shipped as deck cargo. They would thus have full knowledge of the facts when accepting the documents and would know that the carriage was not subject to the Act [at p 300].

210 Paragraph 2 of Sched 1 to the Unfair Contract Terms Act 1977 specifically states that ss 2–4 (excepting s 2(1)) do not extend to any contract for the carriage of goods by ship except in favour of a person dealing as a consumer.

211 [1989] 2 Lloyd's Rep 185.

212 If the Hague-Visby Rules do not apply, the carrier can exclude liability for loss or damage. He is at liberty to include clauses that exclude liability for the unseaworthy state of the ship. See *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd (The Imvros)* [1999] 1 Lloyd's Rep 848.

213 On American law, see Wooder, 'Deck cargo: old vices and new law' (1991) 22 JMLC 131; Bauer, 'Deck cargo: pitfalls to avoid under American law in clausing your bills of lading' (1991) 22 JMLC 287.

214 [1953] 2 QB 295.

It is generally customary in the trade for containers and cargoes like timber and highly inflammable goods to be stowed on deck. Practices prevalent in the trade, however, will be ineffective in bringing the bill of lading outside the parameters of the Hague-Visby Rules unless stipulations laid down in Art I(c) are met.[215]

In a recent case, *Siderdraulic Systems SpA and anor v BBC Chartering & Logistic GmbH & Co KG*,[216] the court had to examine whether the master's remarks on the front of the bill of lading was sufficient to meet the qualifications of deck cargo under the Rules. The bills of lading had been issued for the carriage of tanks for a water treatment plant from Italy to Alabama in the US. By a 'fixture recap'[217] the defendant agents recorded that the two shipments for carriage had been booked and a provision was included in the recap giving the defendants the liberty to carry the goods on deck. The first shipment, consisting of thirteen tanks, was carried under a bill of lading issued by the defendant, and, on the face of the bill under 'Master remarks', it stated.

'9 pieces . . . carried on deck at shipper's/charterer's/receiver's risk as to perils inherent in such carriage . . .'

The first shipment arrived safely. The second shipment's bill of lading also contained the following clause under 'Master's remarks' that 'all cargo carried on deck at shipper's/charter's/receiver's risk as to perils inherent in such carriage, any warranty of seaworthiness of the vessel expressly waived by the shipper/charterer/receiver ..'. During the voyage, one of the tanks was lost and another damaged. The question was 'did the cargo qualify as deck cargo?'.

The defendant's argument was that the master's remark on face of the bill of lading should not be read as a liberty clause, but the word 'is' should be inserted so that the clause read 'all cargo **is** carried on deck. . .'. The claimants argued that the master's remark was an exclusion of liability in case the goods were carried on deck. Since the meaning of the statement was ambiguous, it should be interpreted *contra preferentum* in the plaintiff's favour. The court, however, concluded against the linguistic backdrop that the defendant's interpretation was the more natural. Mr Justice Andrew Smith also went on to state that it would be unusual to state a contractual provision under 'Master's remarks'. What this case indicates in the absence of clear words is that the consignees and endorsees are placed in a difficult situation and they will not know the nature of the liability associated with the cargo. Was the court correct in inserting the word 'is' into the clause? Would it not have been better, keeping in mind the statement from Pilcher J, that the statement should have been specific such that it is immediately apparent on first reading that the cargo is being carried on deck.

Where deck cargo meets the requirements of Art I(c), the parties are free to negotiate the terms of the contract of carriage. Clauses excluding liability will not be expected to meet the requirements of reasonableness stipulated by the Unfair Contract Terms Act 1977 according to para 2, Sched 1 to the Act. However, where the shipper, or the ultimate bill of lading holder, is a consumer, requirements of reasonableness imposed by the Unfair Contract Terms Act 1977 need satisfied.

Where goods are stowed on deck on the basis of a liberty clause in the contract of carriage, deck stowage will not be construed as a breach of contract and the carrier will be able to rely on the immunities provided by the Hague-Visby Rules.

The important issue, however, is the availability of the immunities in the event of unauthorised deck stowage. This has seen some debate.[218] The general view is that unauthorised deck stowage should be regarded as a breach that would deprive the carrier of the protections provided by

215 For comparison with the Hamburg Rules, see Table 9.1, Chapter 9.

216 [2011] EWHC 3106(Comm).

217 This is the document that is transmitted once a fixture has been agreed, and it normally sets out the negotiated terms and details. It is normal to have fixture recap until operative documents, such as charterparties, are drawn up.

218 Livermore, 'Deviation, deck cargo and fundamental breach' [1990] 2 Journal of Contract Law 241.

the Hague-Visby Rules. This view was followed by the American courts in *Encyclopaedia Brittanica v Hong Kong Producer*,[219] where the limitation of liability under the Hague Rules was lost because of unauthorised deck stowage. A more extreme view is the suggestion that unauthorised deck stowage should be treated as a fundamental breach of the contract – that is, a breach of such a serious nature that the parties are no longer bound by any of the contract terms – meaning the carrier would naturally lose the benefit of the immunities available to him under the Hague-Visby Rules.

In the more recent case of *The Antares*,[220] none of the expressed views have been followed. In this case, the courts had to decide whether the owners could rely on the limitation period of one year under Art III(6) when there had been a breach of the contract of carriage as a result of unauthorised stowage. At first instance, it was held that the question of whether or not the breach was fundamental did not arise at all for consideration since the Hague-Visby Rules had the force of law which meant they had effect as if directly enacted by statute. Further, the Hague-Visby Rules had to be construed in the light of the language used therein, and no distinction between fundamental and non-fundamental breach was found. Therefore, the carrier could rely on Art III(6). On appeal, the decision of the lower court was upheld.

Subsequent to this decision, the English courts had to consider the effect of unauthorised deck stowage on the availability of limitation of liability to the carrier. In *The Chanda*,[221] part of an asphalt drying and mixing plant was stored on deck. The ship encountered rough weather, resulting in damage to the electronic control units of the plant. The shipowner sought to limit his liability under the Hague-Visby Rules incorporated into the bill of lading with a paramount clause. Hirst J rejected the 'fundamental breach' approach on the basis that the matter was one of construction. In the circumstances, he concluded that the limitation of liability clause could hardly have been intended to protect the shipowner, who, as a result of the breach, exposed the cargo to such palpable risks of damage.

The decision in *The Chanda* seems to be at odds with the decision in *The Antares*. However, according to Hirst J, there is no real conflict between the two decisions since, in the latter, the one-year time limitation had statutory force by virtue of Carriage of Goods by Sea Act 1971, and the time-limitation clause did not undermine the purpose of the shipowner's obligation to stow below deck.

It must, however, be pointed out that both Art III(6) relating to time limitation and Art IV(5) on limitation of liability state that they are available to the carrier 'in any event', which suggests that the provisions are applicable even where there is a breach of contract. And this seems to have been taken into account by the court recently. In *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another (The Kapitan PetkoVoivoda)*,[222] the Court of Appeal had an opportunity to examine the phrase 'in any event' in Art IV(5) where the bill of lading attracted the application of the Hague Rules, as enacted in Turkey, by virtue of a paramount clause. The goods from Korea to Turkey were carried on deck in breach of the contract of carriage. On the issue of whether the carrier could take advantage of Art IV(5) overruling *The Chanda*, the court held that the most natural meaning of the words 'in any event' is 'in every case', regardless of whether or not the breach is particularly serious, whether or not the cargo was stowed below deck. Does this mean that the list of exclusions provided under Art IV(2) will not be available to the carrier in the event of unauthorised deck stowage since the provision does not state that they will be applicable 'in any event'? It seems from the two English decisions that what is of fundamental importance is whether the Hague-Visby Rules are applicable by force of law. If they do apply, the immunities are available to the carrier, regardless of whether or not there is a breach. However, where they are applicable due to contractual incorporation, the issue becomes one of construction.

219 [1969] 2 Lloyd's Rep 536.
220 [1987] 1 Lloyd's Rep 424.
221 [1989] 1 Lloyd's Rep 494.
222 [2003] EWCA Civ 451.

Article VI of the Hague-Visby Rules stipulates that where particular goods are shipped, the parties are free to negotiate the terms of the contract. Particular goods are defined as shipments where the character, condition or circumstances of the goods carried justifies a special contract but excludes commercial shipments in the ordinary course of trade.[223] The kinds of cargo that may fall within this provision could be one-off shipments. However, for particular goods to fall outside the operation of the Hague-Visby Rules, it is essential that the contract of carriage is not covered by a document of title.

Where particular goods are carried and no negotiable document of title covers the contract of carriage, the parties are free to negotiate the terms of the contract. However, where the term negotiated relates to the seaworthiness of the ship, it should not be contrary to public policy. In England, there are no cases where a stipulation regarding the seaworthiness of a ship has been disallowed on grounds of public policy. It is difficult to state what this might be in the abstract, but acts that affect the interests of the state, or the interests of society or humanity may be well within the realm of public policy. Much will depend on the circumstances of the case. For instance, it is possible, where the cargo carried is highly radioactive nuclear waste, exclusion of liability for the seaworthy state of the ship may be disallowed on the grounds it would be injurious to environmental protection, and the courts might insist that the undertaking of seaworthiness does not fall below that set by the Hague-Visby Rules.

Period of application

The Hague-Visby Rules apply to the contract of carriage under Art I(e) from the 'time when the goods are loaded to the time when they are discharged from the ship'. It is difficult to enunciate a general principle to determine at what point loading begins and discharge finishes since varied methods of cargo handling are used depending on the kind of cargo carried. For instance, where cargo is packed in containers or packages, tackle may be used for getting the goods on board the ship. However, if the cargo consists of grain, it may be fed directly into the holds through shutes. So, each operation will have to be examined in terms of the nature of the cargo and the custom of the port or trade. As Devlin LJ said in *Pyrene v Scindia Navigation*,[224] the Rules are not intended to impose universal rigidity in respect of loading and discharging operations. It also seems that the parties have the freedom to decide the role that each is going to play in the loading and discharging operations. Where the parties enter into specific agreements, these will not be construed as affecting the Hague-Visby Rules since they are seen as defining the terms of the voyage and not the scope of the contract service. Where tackle is used, the Rules apply from the moment the ship's tackle is hooked on at the port of loading until the moment that cargo is landed and the ship's tackle released at the port of discharge.

The goods carried by a ship may be transhipped during the course of the voyage. This transhipment may be necessitated by circumstances. For instance, the ship may be unable to continue with the voyage because of damage, or the carrier may want extra space on the ship to accommodate other cargo at an intermediate port and it is commercially convenient for him to tranship. It is, therefore, common for bills of lading to have clauses that give carriers the liberty to tranship. A particular question that arises when the carrier exercises his liberty to tranship is: will the Hague-Visby Rules govern the contract of carriage when the goods are lying by the dockside or transported by road to another port for transhipment? Or could the carrier escape liability, if goods are damaged or lost while they are awaiting transhipment, on the basis that the Hague-Visby Rules apply only when the goods are carried on sea?

223 In *Harland and Wolff Ltd v Burns and Laird Lines Ltd* (1931) 40 LIL Rep 286.
224 [1954] 2 QB 402, at p 418.

In *Mayhew Foods v OCL*,[225] the contract was for the carriage of frozen chicken and turkey portions from Sussex to Jeddah. The cargo was to be transported by road to a port on the South coast of England from where it was to be sent to Jeddah. The bill of lading contained an extended liberty to tranship clause. The goods were shipped from Shoreham for Jeddah. At Le Havre, however, the carrier decided to exercise his liberty to tranship and discharged the container containing the frozen poultry pieces. The container remained at Le Havre for approximately five days. During this period, the contents of the container started decaying. The cargo was eventually found to be in a putrefied state due to inadequate refrigeration.

In an action brought by the shipper, the carrier sought to limit the amount of liability relying on a clause in the bill of lading, which specified an upper limit of US$2 per kilo of gross weight of the goods lost or damaged. They relied on this contractual clause limiting amount of liability on the basis that the Hague-Visby Rules were inapplicable while the goods were at Le Havre awaiting transhipment since they applied only in relation to and in connection with the carriage of goods by sea in ships. In support, they cited the Canadian case of *Captain v Far Eastern Steamship Co*.[226] In this case, goods had been shipped from Madras to Vancouver. The parties had envisaged transhipment en route. The goods discharged at Singapore for transhipment were stored for three weeks during which the cargo suffered damage. The court held that the Hague Rules did not apply during the period when the goods were stored in dock since they did not relate to carriage of goods by water.

The court in *Mayhew Foods v OCL*, however, found for the plaintiffs on the reasoning that the rights and liabilities attach to the contract and that, in the present instance, was for carriage from Shoreham to Jeddah. The operations carried out during transhipment were in relation to and in connection with the carriage of goods by sea in ships. Hence, the carrier could not escape liability to which he would have been subject by carrying the goods to Le Havre and storing them there before transhipment.

The Canadian case cited by the defendants was distinguished on two counts: first, the parties to the contract of carriage were aware that transhipment was likely to take place; and, second, separate bills of lading were issued for different legs of the journey.

Applying the general view propounded in *Pyrene v Scindia Navigation*, the operation of the Rules in the event of lighterage will depend on the particular contract of carriage and whether the carrier has contracted to perform the lightering operation as part of the discharging operation.

An issue of relevance in international trade is whether bills of lading, including transhipment, will be recognised as a valid tender for documentary credit purposes by banks. Where Uniform Customs and Practice for Documentary Credits (UCP) 500 govern the documentary credit, there should be no problems since Art 23[227] of the UCP allows banks to accept bills of lading involving transhipment, provided the letter of credit does not prohibit transhipment and excludes Art 23(d)(i) and (ii) of UCP.

Contracting out

Since the Hague-Visby Rules apply only where a bill of lading is issued, is it possible for the carrier to opt out even where the carriage is from a contracting state to Hague-Visby Rules by issuing a notice that he does not issue bills of lading in a particular trade? As Steyn J correctly observed in *The European Transporter*,[228] shipowners, if they are in a strong enough position, could escape the

225 [1984] 1 Lloyd's Rep 317.
226 [1979] 1 Lloyd's Rep 595.
227 See also para 88 of International Standard Banking Practice (ISBP), 2003, ICC Publishing SA.
228 [1989] 2 Lloyd's Rep 185, at p 188.

application of the Rules by taking the step of issuing non-transferable documents. However, given the policy reasons behind the convention, the equitable solution would be to interpret the Rules as applying to all outward-bound voyages from the UK, unless the shipper is not entitled to demand the issue of a bill of lading due to custom in a particular trade.[229]

Article III(8) of the Hague-Visby Rules renders null and void any 'clause, covenant or agreement which attempts to relieve or lessen that liability' which the carrier would otherwise have under the Hague-Visby Rules.[230] There are no clear guidelines to determine the dividing line between clauses that do and do not offend the Hague-Visby Rules. The status of such clauses has to be gathered on a case-by-case basis. Some guidance can be found in English judicial decisions.[231] In *Pyrene v Scindia Navigation Co*,[232] Devlin LJ stated that the object of the Hague Rules is to define the terms on which the service is to be performed and not the scope of such service. This has been used to justify some freedom of contract. Clauses defining, for instance, the extent of responsibility for loading and discharging of the goods would, according to Devlin LJ, be tolerated. Similarly, in *Renton v Palmyra*,[233] a clause giving liberty to deviate was construed by Hodgson LJ as defining the scope of the contract voyage and, therefore, not contrary to Art III(8). Presumably, where a liberty to deviate clause goes to the root of the contract, it would be possible to argue that the clause affects the terms of the carriage and therefore should be regarded as null and void.

However, the limited principle of freedom of contract allowed by the courts is curtailed when it is apparent that the carrier is seeking to limit his liabilities under the Hague-Visby Rules. A clause placing limitation on the amount to a level below that specified in Art IV(5)(a) would be rendered null and void.[234] Similarly, an attempt to lessen the obligation of due diligence to provide a seaworthy ship with a clause that states that a survey certificate should be deemed to be conclusive evidence of due diligence to make the ship seaworthy will be considered void.

Where the effect of a choice of jurisdiction clause is to oust the mandatory regime of the Hague-Visby Rules, the clause will once again be null and void. In *The Hollandia*,[235] machinery was shipped from Leith to the Dutch Antilles. The bill of lading included the following clauses:

> Law of application and jurisdiction: The law of the Netherlands in which the Hague-Visby Rules . . . are incorporated . . . shall apply to this contract.
>
> All actions under the present contract of carriage shall be brought before the Court of Amsterdam and no other court shall have jurisdiction with regard to such action.

The plaintiffs initiated action in the English courts. The carriers sought to have the action stayed on the basis that the choice of forum clause applied. The House of Lords, however, refused to stay proceedings on the reasoning that the Carriage of Goods by Sea Act 1971 had given the Hague-Visby Rules the force of law, and the bill of lading, in this case, was one to which the Hague-Visby Rules applied under Art X(a) and (b) since it was issued in a contracting state and the port of loading was in a contracting state. The foreign court chosen as the exclusive forum would apply a domestic substantive law, which would result in limiting the carrier's liability to a sum far lower

229 See Wilson, *Carriage of Goods by Sea*, 6th edn, 2008, Pearson Longman.
230 On Art III(8) and the Himalaya clause see *The Starsin* [2003] 1 Lloyd's Rep 571.
231 *European Gas Turbines Ltd v MSAS Cargo International Inc* (2000) unreported, 26 May and Tettenborn, 'The defaulting carrier's liability in respect of undamaged goods' [2001] LMCLQ 203, at p 205.
232 [1954] 1 Lloyd's Rep 321.
233 [1956] 1 QB 462.
234 See *Owners of Cargo Lately Aboard the River Gurara v Nigeria National Shipping Lines Ltd* [1997] 1 Lloyd's Rep 225, where a clause defining package for the purposes of Art IV(5) of the Hague Rules was held to be null and void under Art III(8).
235 [1983] 1 Lloyd's Rep 1. See also *The Benarty* [1985] QB 325.

than that to which the plaintiff would be entitled if Art IV(5) of the Hague-Visby Rules applied, and this would clearly contravene Art III(8). Furthermore, the court felt that giving effect to jurisdiction clauses that had the effect of lessening the amount of liability to an amount lower than that imposed by the Rules would only encourage shipowners to choose courts of convenience – that is, courts that would not apply the Hague-Visby Rules.

Although criticised for not giving primacy to the parties' intentions,[236] the decision in *The Hollandia* must be supported on policy grounds since the stated purpose of the Hague-Visby Rules when it was drafted was to prescribe an irreducible minimum of liabilities. And yet, it is this irreducible minimum that will be under jeopardy if effect is given to a choice of jurisdiction/law clause.

It seems from a recent decision that a jurisdiction clause will be effective provided the defendant gives an undertaking that he will not take advantage of the lower limit. In *Pirelli Cables Ltd and Others v United Thai Shipping Corp Ltd and Others*,[237] goods were carried from Southampton to Singapore and Bangkok under bills of lading. By virtue of Art X, the Hague Rules applied. The bill of lading contained a jurisdiction clause stating that disputes were to be determined in Thailand to the exclusion of the jurisdiction of any other country. Since Thailand was not a party to the Rules, the application of Thai legislation would result in lower limitation figures and the claimants were entitled to disregard the jurisdiction clause and bring proceedings in England, unless the defendant undertook he would not take advantage of the lower limit (at p 669).[238]

It seems that clauses that are repugnant to the Hague-Visby Rules will be valid where the bill of lading does not attract the automatic application of the Rules. In *The Komninos S*,[239] the plaintiff's cargo of steel coils was shipped at Thessaloniki for carriage to Ravenna and Ancona. On arrival at Ravenna, the coils were found corroded as a result of condensation of water due to lack of ventilation and failure to pump the bilges. The bill of lading contained exemption clauses, as well as a clause stating that all disputes were to be referred to British courts. The issue that the court had to decide on was whether the words 'all disputes to be referred to British courts' amounted to a provision that the legislation of the UK giving effect to the Hague-Visby Rules should govern the contract. If the effect of the above words was that the Hague-Visby Rules applied to the bill of lading, the exemption clauses would be invalidated.

The court held that, since the bill of lading was not issued in a contracting state to the Hague-Visby Rules and in the absence of an express provision incorporating the Hague-Visby Rules in the bill of lading, the forum clause did not import the automatic application of the Hague-Visby Rules. So, the carrier was able to successfully rely on the exclusion clauses. The judgment, as Bingham LJ said, is one that 'gives effect, for better or for worse, to what the parties expressly agreed' (p 377).

The carrier is at liberty to surrender in part or in whole any of the rights and immunities allowed to him under the Hague-Visby Rules. He can also increase his responsibilities and liabilities under the Hague-Visby Rules. The surrender or the increase, however, has to be embodied in the bill of lading that is issued to the shipper (Art V). Where there is a surrender of rights and

236 See Jackson, 'The Hague-Visby Rules and forum, arbitration and choice of law clauses' [1980] LMCLQ 159; Schnarr, 'Foreign forum selection clauses under COGSA: the Supreme Court charts new waters in the *Sky Reefer* case' (1996) 74 Washington University Law Quarterly 867. See also *Indussa Corp v SS Ranborg* 377 F 2d 200 (1967) and *Vimar Seguros Y Reaseguros SA v M/V Sky Reefer* 515 US 528 (1995). Courts in the US until recently did not recognise foreign jurisdiction clauses for a number of reasons – practical and ideological: difficulties of litigating in a foreign forum; lessening of liability where COGSA or Hague Rules were not applied; and lack of assurance that the foreign forum will reach the same results as the US courts even if it applied the Hague Rules or COGSA. In *Sky Reefer*, a clause allowing arbitration in Japan was held to be valid. The Supreme Court in this case also went on to say that it would follow similar reasoning in respect of forum selection clauses. The reasoning was followed in *Effron v Sun Lines Cruises* 67 F 3d 7 (1995).

237 [2000] 1 Lloyd's Rep 663.

238 Also see Baghlaf Al Zafer v Pakistan National Shipping Co [1998] 2 Lloyd's Rep 229.

239 [1991] 1 Lloyd's Rep 370.

immunities and an increase of responsibilities and liabilities that are embodied in the bill of lading, they presumably apply as against the shipper who is not the charterer and against third parties, but not against the charterer. The reason for this is that the bill of lading in the hands of the charterer is merely a receipt and the terms of the contract between the charterer and the shipowner are to be found in the charterparty.[240]

The future

Without doubt, the Hague and Hague-Visby Rules, with their stated purpose of protecting the cargo owner, were revolutionary and set a trend that would guide future developments. The emphasis on protecting the cargo owner found a new voice with the emergence of developing countries and the United Nations Conference on Trade and Development (UNCTAD) and their dissatisfaction (political and legal) with the Hague Rules saw the drafting of the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules), which introduced a broader scope of application and a simpler liability regime. The coming into force of this convention in 1992, however, has not displaced the Hague Rules and the Hague-Visby Rules. They still continue to apply to most contracts of carriage. The discontent with the current legal regime remains. The Comité Maritime International (CMI) along with the United Nations Commission on International Trade Law (UNCITRAL) recently adopted a new convention,[241] which is more far reaching than the existing conventions. As to whether legislators and politicians will discard the shackles of conservative attitudes and adopt this new convention, thus heralding a new era of uniformity, remains to be seen.

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