Case No: A3/2014/1285

Neutral Citation Number: [2016] EWCA Civ 101

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE MALES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2016

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE TOMLINSON
and
THE RIGHT HONOURABLE LORD JUSTICE MCCOMBE

- -

Between:

YEMGAS FZCO & ORS	**Appellants**
- and -	
SUPERIOR PESCADORES S.A.	**Respondent**

- -
- -

Mr Robert Thomas QC (instructed by **Clyde & Co LLP**) for the **Appellants**
Mr David Goldstone QC & Mr Ben Gardner (instructed by **Davies Johnson**) for the **Respondent**

Hearing date: 15th December 2015

- -

Judgment

Lord Justice Longmore:

Introduction

1. Article IV Rule 5 of the (old) Hague Rules (1924) contains a provision entitling a shipowner to limit its liability to £100 gold per package or unit. Article IV Rule 5(a) of the (new) Hague-Visby Rules (1968) contains a provision entitling a shipowner to limit its liability by reference to units of account known as special drawing rights as defined by the International Monetary Fund. This limit is sometimes (but not always) higher than the limit provided for in the old Hague Rules. Article IV Rule 5(g) however provides that the parties to a bill of lading contract may agree other maximum limits provided that no maximum amount so fixed is less than the limit provided for in Article IV Rule 5(a). The main question in this appeal is whether in a case which is otherwise governed by the new (1968) rules, a common form of Paramount Clause incorporates the (old) Hague Rules which in fact give rise to a higher limit than that provided for in the (new) Hague-Visby Rules and whether, in that event, the old (and higher) limit is available to the cargo-owner if the cargo is lost or damaged.

2. The Paramount Clause, set out on the reverse side of the bills of lading in the present case, provided as follows:-

> "**2. Paramount Clause**
>
> The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply."

Although the bills of lading were not issued on the standard Congenbill form, this wording is (with one immaterial change) identical to the wording of the clause paramount which that widely used bill of lading form contains.

The Facts

3. Machinery and equipment, intended for use in the construction of a liquid natural gas facility in Yemen, were loaded on the vessel "SUPERIOR PESCADORES" at the port of Antwerp in Belgium in early January 2008. The shipowners issued six bills of lading in the Conline form acknowledging shipment of the cargo in apparent good order and condition for carriage from Antwerp to Balhaf in Yemen.

4. The vessel sailed from Antwerp on 12th January 2008. On about 17th January 2008, while the vessel was crossing the Bay of Biscay, the cargo in hold no.1 shifted, causing significant damage to part of the cargo. The claimants' total losses resulting from this incident (ignoring package limitation) are said to be in excess of US $3.6 million.

5. On 12th October 2012 the Britannia Steamship Insurance Association Ltd gave a letter of undertaking to the cargo-owners to pay such sum as might be agreed or adjudged in respect of the claim and further agreed on the shipowners' behalf that the claim would be subject to English law and jurisdiction. That law includes the Carriage of Goods by Sea Act 1971 which renders the Hague-Visby Rules (referred to formally as the Brussels Protocol (1968)) applicable as a matter of statute law when the carriage is from a port in a contracting state. Belgium is such a state.

6. Proceedings had been started in January 2012. The Particulars of Claim served in April 2012 relied on the clause paramount as a contractual incorporation of the Hague (not Hague-Visby) Rules and pleaded that to the extent that the Hague Rules provide for higher limits than the Hague-Visby Rules, the claimants were entitled to those higher sums.

7. In the case of some of the bills of lading the Hague Rules limit is always higher than the Hague-Visby limit, and the claimants have claimed this higher limit. In the case of bill of lading no. 4, however, application of the Hague Rules yields a higher limitation figure for four of the six packages, while for the remaining two packages the Hague-Visby limit is higher. In the case of each package the claimants have claimed whichever limitation figure is the higher. We were told by counsel that the effect of the different limitation formulae for which the two regimes provide is that (at current values) the Hague Rules limit is higher for packages weighing up to about 10 tonnes, while for packages weighing more than this the Hague-Visby limit is higher.

8. The shipowners' Defence served on 18th May 2012 admitted liability to pay the amount of the Hague-Visby package limit, equivalent to just over US $400,000, and contended that "it is not open to the Claimants to pick and choose between the Hague-Visby package limit and the Hague package limit, depending on which gives them more". The undisputed Hague-Visby amount (plus interest) has since been paid.

9. The claimants will be entitled to recover additional damages up to a further sum of about US$ 200,000 at current values if they are entitled to rely on the Hague Rules limit.

The Issues

10. The first issue is whether, on the true construction of the Paramount Clause, it operates as an agreement between the cargo owner and the shipowner, that the (old) Hague Rules apply or that the Hague-Visby Rules apply. If it is an agreement that the Hague-Visby Rules apply, then there is no agreement between the parties that a different regime in the form of the (old) Hague Rules is to apply. But if it is an agreement that the (old) Hague Rules apply, a second issue arises namely whether the Paramount Clause constitutes an agreement to fix maximum amounts other than those contained in Article IV Rule 5(a) of the Hague-Visby Rules for the purposes of Article IV Rule 5(g) of those rules. There is then a third issue namely whether the date of conversion into relevant currency of the limit of £100 gold per package or unit is the date when the cargo was delivered in its damaged condition or the date of the judgment.

The Rules

11. Article IV Rule 5 of the (old) Hague Rules provided:-

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.
>
> By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named."

Article IX provided that the limit of £100 per package or unit is to be taken to be "gold value".

12. The relevant provisions of the Hague-Visby Rules are:-

> "Article III – Responsibilities and Liabilities
>
> ...
>
> Rule 8
>
> Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods ... or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. ...
>
> Article IV – Rights and Immunities
>
> ...
>
> Rule 5
>
> (a) 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 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.
>
> (b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at

which the goods are discharged from the ship in accordance with the contract or should have been so discharged. …

…

(d) The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if 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.

…

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.

Article V – **Surrender of Rights and Immunities, and increase of Responsibilities and Liabilities**

A carrier shall be at liberty to surrender in whole or in part all or any part of his rights and immunities or to increase any of his responsibilities and liabilities under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. …"

13. Paragraphs (a) and (d) of Article IV Rule 5 in their current form set out above were inserted into the Schedule to the 1971 Act by section 2 of the Merchant Shipping Act 1981. The same section provided that the date for conversion of the special drawing rights into national currency under English law was the date of judgment. These provisions are now contained in Schedule 13 to the Merchant Shipping Act 1995.

14. The package limitation regime contained in Article IV Rule 5 of the Hague-Visby Rules differs from the equivalent Hague Rules regime in several respects. The judge identified five. First, the previous limit of £100 in gold is replaced by a limit calculated by reference to IMF special drawing rights, the value of which is based upon a basket of currencies. Second, paragraph (a) spells out that it is the higher of two figures, calculated by reference to the number of packages or the weight of the goods respectively, which constitutes the relevant limit. Third, paragraph (b) is new, providing for the method by which damages are to be calculated. Fourth, paragraph (c), dealing with containerisation, is new. Fifth, paragraph (e) provides for the

circumstances in which the carrier may lose the benefit of limitation. The Hague Rules contained no equivalent provision, although resort would sometimes be had to the common law principles of deviation. Paragraph (g), however, permitting agreement on a higher maximum amount, existed in materially the same terms in the Hague Rules.

The Judgment

15. Males J decided (1) the Paramount Clause on its true construction incorporated the (old) Hague Rules not the Hague-Visby Rules but (2) it did not operate as an agreement for a higher limit pursuant to Article IV rule 5(g) of the Hague-Visby Rules. The cargo-owners were therefore confined to recover damages limited by reference to Article IV rule 5(a) of the Hague-Visby Rules. That limit was calculated at the date of judgment as required by the Merchant Shipping Acts, so the third issue did not arise. If it had, he would have held that the limit was to be calculated as at the date of delivery of the cargo. Neither side is satisfied with this decision.

Hague or Hague-Visby?

16. The judge would like to have held that the Paramount Clause incorporated the Hague-Visby rather than the Hague Rules but felt constrained by authority to hold that on its true construction (even in 2015 in respect of a contract made in 2008) the 1924 Hague Rules rather than the 1968 Hague-Visby Rules should apply. It will therefore be necessary to look at those authorities. Before doing so, however, it may be said that the conclusion which the judge unwillingly reached is an odd conclusion. Most maritime nations have adopted the Hague-Visby Rules; the United Kingdom did so as early as 1971 in the Carriage of Goods by Sea Act of that date; it did not come into force until a certain number of other countries had signed up but that happened as long ago as 23rd June 1977. Can it really be the case that a Paramount Clause in a contract made over 30 years later in 2008 is still to be taken as incorporating the 1924 Rules rather than the 1968 Rules?

17. The actual terms of the Paramount Clause are, of course, important. It identifies the Hague Rules contained in the International Convention of 25th August 1924 but provides that it is those Rules

> "as enacted in the country of shipment"

which are to apply to the contract. The country of shipment was Belgium which adhered to the Hague-Visby Rules on 6th December 1978.

18. The judge had no evidence as to the method by which Belgium in fact enacted the Hague-Visby Rules and had, therefore, to proceed on the assumption that Belgian law was the same as English law, an assumption which is perhaps likelier in the present case than in some cases where the assumption is applicable. In this country the (old) Hague Rules had been enacted by the Carriage of Goods by Sea Act 1924. The Carriage of Goods by Sea Act 1971 ("the 1971 Act") repealed that Act, see section 6(3) of the 1971 Act and provided by section 1:-

> **"1 Application of Hague Rules as amended**

> (1) In this Act, "the Rules" means the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25th August 1924, as amended by the Protocol signed at Brussels on 23rd February 1968 [and by the Protocol signed at Brussels on 21st December 1979].
>
> (2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.
>
> ..."

The schedule to the Act, referred to in section 1(2) is entitled

> "THE HAGUE RULES AS AMENDED BY THE BRUSSELS PROTOCOL 1968."

The schedule then enacts that Brussels Protocol which, as I have said, is the formal designation of the 1968 Hague-Visby Rules. On any ordinary and sensible view of English law, therefore, the Hague Rules "as enacted" in England are the Hague Rules as enacted by the schedule to the 1971 Act, a schedule which in its title refers to the Hague Rules "as amended". The position in Belgium must be taken to be the same.

19. This was the judge's own inclination. He said (para 34):-

> "I would see no real difficulty, if the point were free of authority, in holding that the version of the Hague Rules which is enacted in the country of shipment in the present case is the Hague-Visby Rules, with the consequences that those Rules apply not just as a matter of the compulsory application of the 1971 Act but also as a matter of contract."

20. It is, therefore, necessary to consider the authorities by which the judge felt constrained to come to a contrary conclusion.

21. The first such authority is Nea Agrex S.A. v Baltic Shipping Co. Ltd (The Agios Lazaros) [1976] QB 933; [1976] 2 Lloyd's Rep 47 a case decided after the 1971 Act had been passed but before it had come into force in respect of a contract made in 1972. It was a charterparty case and neither set of Rules was compulsorily applicable but the charter itself provided "Paramount Clause deemed to be incorporated in this Charter Party". Donaldson J held that the purported incorporation of a Paramount Clause was ineffective since it did not specify the terms of such a clause; some such clauses only incorporated the Article IV exceptions or only applied if compulsorily applicable by the law of the place of shipment. He therefore disregarded the purported incorporation with the result that the one year time limit for claims imposed by Article III rule 6 of the Hague Rules did not apply.

22. This court disagreed and held that the intention of the parties was to incorporate all the Hague Rules including the one year time limit for claims. Lord Denning MR held that the right approach was to ask what the phrase "Paramount Clause" would mean to shipping men. He answered that question by saying (pages 943-944):-

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

23. It is not clear why Lord Denning referred to the Hague-Visby Rules at all, since they also included a one year time limit but since England had already enacted the Hague-Visby Rules but they were not yet in force, his expression of opinion is not, perhaps, surprising.

24. Goff LJ (Sir Reginald not, as counsel seemed to think, Sir Robert) agreed. He referred to evidence having been before the judge that there were a number of forms of paramount clause which led the judge to conclude that there was no means of choosing between them. But he held that the phrase "paramount clause" was a term of art which referred to (and was therefore intended to incorporate) the Hague Rules as a whole. He accepted that a possible area of uncertainty was whether it was intended to incorporate the (old) Hague Rules or the (new) Hague-Visby Rules but he had no difficulty in saying that the intention was to refer to the Hague Rules in their original form (949C):-

> "At the date of the charterparty the Visby rules had not been adopted in any country, nor indeed I think have they even now, but that does not matter. The form taken from a bill of lading and entitled Hague-Visby Paramount Clause had not been published and the Visby variant was not in any kind of general use."

25. Shaw LJ agreed saying (954A):-

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

26. This decision is helpful as showing what this court thought shipping men meant by the phrase "clause paramount" in 1972 but is, perhaps of little assistance in determining what the phrase "the Hague Rules … as enacted in the country of shipment" meant to shipping men in 2008.

27. The judge referred to The Marinor [1996] 1 Lloyd's Rep 301 in which the paramount clause incorporated the provisions of the Canadian Carriage of Goods by Water Act "as amended". Colman J had no difficulty in holding that those words did incorporate the (new) Hague-Visby Rules. In the present case, of course, it is not the Hague Rules "as amended" but "as enacted". The Marinor is not therefore directly relevant save to show that there is a form of words which will lead to the definitive conclusion that the new Rules are intended to apply.

28. In Lauritzen Reefers v Ocean Reef Transport Ltd S.A. (The Bukhta Russkaya) [1997] 2 Lloyd's Rep 744 a "general paramount clause" was to apply in a 1995 charterparty. The claim was made by a charterer who had settled with bill of lading holders and wanted to claim an indemnity from the shipowner. The Hague-Visby Rules permitted a claim for an indemnity to be brought if it was brought within 3 months of the settlement (Art III Rule 6bis) but the original Hague Rules required any claim to be brought within one year of delivery. It was therefore critical to determine which Rules applied. For the charterers, Mr Michael Coburn of counsel relied on a passage from the 4th edition of Wilford Coghlin & Kimball on Time Charters page 561 which, after referring to the Agios Lazaros stated:-

> "However, if a paramount clause is incorporated into a Baltime charterparty governed by English law it is likely, following the coming into force in 1977 of the Carriage of Goods By Sea Act 1971, the Hague-Visby Rules would be regarded as incorporated."

Thomas J did not deal with this argument of Mr Coburn because he held, on the evidence before him, that the words "general paramount clause" in a time charterparty referred to a particular clause or more accurately any of a number of clauses that had the following essential terms (page 746):-

> "(1) if the Hague Rules are enacted in the country of shipment, then they apply as enacted; (2) if the Hague Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination applies or, if there is no such legislation, the terms of the Convention containing the Hague Rules apply; (3) if the Hague-Visby Rules are compulsorily applicable to the trade in question, then the legislation enacting those rules applies."

29. In the light of this conclusion Thomas J held that, since the Hague-Visby Rules were specifically referred to in the "general paramount clause" as being applicable (by contract) if compulsorily applicable (presumably by the proper law) which they were not in the case before him, it was the old Hague Rules which applied to the case, the voyage being one from Mauritania to Japan neither of which countries had enacted the Hague-Visby Rules by the date of the charter. That is perhaps not a surprising decision in a case where the incorporating clause itself expressly refers to both the Hague Rules and the Hague-Visby Rules and makes clear that the Hague-Visby Rules are only to apply in certain defined circumstances. The judge went out of his way to say (page 747) that it was, therefore, not necessary to consider Mr Coburn's argument and it was not apposite to deal with it.

30. On the facts, of the present case, however, it is necessary to consider the argument which Mr Coburn made in that case and whether Mr Wilford's book on Time Charters was correct in the view it expressed. Subject to any further authority which remains to be considered, I think the late Mr Wilford was indeed correct to say that since 1977 a typical clause paramount, which did not differentiate in terms between the two sets of rules, would be taken by shipping men to incorporate the Hague-Visby rules in a Baltime charter governed by English law and, by extension, to other charters and to bills of lading subject to such a clause (such as the Conline bills in the present case).

31. We were, by agreement, shown the present (or, at least, an updated) form of the Conline bill which (in clause 3(a)) incorporates the Hague Rules "as amended" by the Protocol signed at Brussels on 23rd February 1968 ("the Hague Visby Rules"). Counsel for the cargo-owners argued that since it was possible to incorporate the Hague-Visby Rules by express words and it had been done in a later form than that used for the instant cargo carrying voyage, the court could safely assume that there was no intention to incorporate the Hague-Visby rules in the present case. Such an argument is not to my mind decisive. The court has to construe a contract made by shipping men in 2008; the fact that they could have used a clause which made the position clear does not absolve the court from deciding what the clause means when the position is not clear. I see little argument against Mr Wilford's view as expressed in his book and much to commend it. Thomas J's decision in Seabridge Shipping AB v Acorsleff's Eftf's A/S [1999] 2 Lloyd's Rep 685 takes the matter no further.

32. There remains, however, the authority on which the judge chiefly relied to hold that in these bills of lading it was the 1924 rather than the 1968 rules which were incorporated. That is Parsons Corporation v C.V. Scheepvaartonderneming Happy Ranger (The Happy Ranger) [2001] 2 Lloyd's Rep 530 (Tomlinson J) and [2002] 2 Lloyd's Rep 356 (CA). The main point of contention was whether the Hague-Visby Rules applied if the contract was contained not "in a bill of lading or any similar document of title" but in what might be called an ordinary contract for goods to be carried (from Italy to Saudi Arabia) which merely provided that the carrier's regular form of bill of lading was to form part of the contract. Tomlinson J held that no bill of lading or document of title was in fact issued and, therefore, that the Hague-Visby Rules were not "compulsorily applicable" because the contract was not covered by a bill of lading or any similar document of title as required by Articles I (b) and X, but that the Hague Rules did apply. This court held that there was in fact a bill of lading and the Hague-Visby Rules were "compulsorily applicable" (with their, in that case, higher limit).

33. The relevant general paramount clause was in the form discussed by Thomas J in The Bukhta Russkaya with its express reference to the incorporation of the 1924 Convention but of the Hague-Visby Rules where they "apply compulsorily". Its precise terms were:-

> "GENERAL PARAMOUNT CLAUSE
>
> The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, Articles I to VIII of the

> Hague Rules shall apply. In such case the liability of the Carrier shall be limited to £100 – sterling per package.
>
> Trades where Hague-Visby apply
>
> In trades where the International Brussels Convention 1924 as amended by the protocol signed at Brussels on 23rd February 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of lading ...."

34. At first instance the cargo-owners contended that the version of the Hague Rules enacted in Italy was the Hague-Visby Rules so that it was those rules which were applicable pursuant to the first sentence of the clause; the shipowners argued that the Hague-Visby Rules were not "the Hague Rules ... as enacted" in Italy

> "not only because of the various important differences between the two codes but also because ... the wording of clause 3 itself draws a clear distinction between enactment of the Hague Rules and enactment of [the] Hague-Visby Rules."

Tomlinson J accepted this submission saying at para 31:-

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

35. My Lord can, of course, speak for himself but I do not regard this paragraph of the judgment as saying that the words "as enacted in the country of shipment" could not refer to the Hague-Visby Rules if, for example, the particular paramount clause made no specific reference to the Hague-Visby Rules in some other part of the same clause but those Rules had in fact been enacted in the country of shipment. If he were saying that (and the judge seems to have thought that he was), I would, very respectfully, disagree with him and prefer the views of Mr Wilford in respect of the differently drafted clause with which we are concerned.

36. In the Court of Appeal Tuckey LJ observed (at para 11):-

> "The Hague Rules are not enacted in Italy so the first sentence of the first paragraph of clause 3 of the bill is not applicable."

The judge regarded this as an endorsement of what he (Males J) thought Tomlinson J was saying. But I respectfully doubt that. Tomlinson J had expressly held (para 35) that the (old) Hague Rules did apply with their limitation of £100 sterling per

package. As I read Tuckey LJ's sentence as cited above, he is saying (obiter) that the (old) Hague Rules were not (any longer) enacted in Italy with the result that if the Hague-Visby Rules were not compulsorily applicable pursuant to the second part of the clause, there would be no limitation at all. That, however, was not the position because there had been a bill of lading and the Hague-Visby Rules were therefore compulsorily applicable and the claim was limited to about US$2 million by reason of Art IV rule 5 of the Hague-Visby Rules (see para 32).

37. But on any view of the matter, Tuckey LJ's remarks were obiter and I would regard this court as free to form its own view of the matter. For the reasons I have given I consider that any case, in which a bill of lading is issued in 2008 incorporating the Hague Rules as enacted in the country of shipment and in which the country of shipment has (as here) enacted the Hague-Visby Rules, should be regarded as a case which is subject to the Hague-Visby Rules rather than the (old) Hague Rules.

38. I am confirmed in this view by the fact that it is the same view as that of the second circuit of the United States Court of Appeals in an appeal from the District Court for the Southern District of New York where the Hague-Visby Rules have not been enacted. Nevertheless in JCB Sales v Wallerian Lines (The Seijin) 124 F 3d 132 (1997), [1997] AMC 2705, to which Mr Goldstone QC for the shipowners referred us, a contract which stated that it was to be governed by "the Hague Rules contained in the international convention for the unification of certain rules relating to bills of lading ... as enacted in the country of shipment" was held to be governed by the Hague-Visby Rules where the country of shipment (England) had enacted those rules at any rate where that enactment described the new rules as being "the Hague Rules as amended by the Brussels 1968 Protocol", see paragraphs 27-34 of the judgment of the court delivered by Van Graafeiland CJ. That seems to me the good sense of the matter.

39. Mr Robert Thomas QC sought to rely on an Additional Clause B at the foot of the bill of lading headed Scandinavian Trades providing for the Hague-Visby Rules to be incorporated

> "in trades where one of the Scandinavian Maritime Codes apply compulsorily."

He submitted that this showed the parties to the bill of lading could refer to the Hague-Visby Rules when they wished to do so and that the bills of lading in the present case were therefore similar to those before Thomas J and Tomlinson J which referred to the Hague-Visby Rule in the incorporating clause itself. I cannot accept that this Scandinavian tail can wag the general ocean-going dog. Nor did the judge who said that if he had had to decide the point

> "I would have been cautious about construing a reasonably prominent and widely used clause paramount by reference to another clause buried in the small print of the bill which stated that it was "to be added" in a trade with Scandinavian and therefore, at least arguably, did not even form part of the contract in a case having nothing to do with Scandinavia."

I would applaud the judge's instincts in this respect just as much as his instincts on the main point of the case, if not his actual decision on the point.

Agreement "fixing" other maximum amounts within Art IV rule 5(g)

40. My conclusion that clause 2 of the bills of lading incorporated the (new) Hague-Visby Rules rather than the (old) Hague Rules makes it unnecessary to consider whether clause 2 constituted an agreement fixing other amounts within Article IV rule 5(g). The judge thought it did not because it would be odd in a case, governed compulsorily as a matter of English law by the 1971 Act, to find that £100 gold value came in "by a side wind" as a result of a clause purporting to incorporate the Hague Rules which the parties must be taken to know would, in general, not be applicable. There is much to be said for the judge's view although it might be said, against it, that it was by no means obvious at the time when the contract was made that English law was applicable at all. The bill of lading was governed by the law of the country where the carrier had his principal place of business which might or might not have made the Hague-Visby Rules compulsorily applicable. It was only over 4 years later that English law was agreed to be the law applicable to the contract. In the event it is unnecessary to express any view on the matter.

Date for Conversion under the Hague Rules

41. Nor is it necessary to express any concluded view about the date of converting £100 gold per unit into the national currency. I would only express my agreement with the judge that I would be entirely happy to decide the point in accordance with the unarticulated assumptions of Hobhouse J in The Rosa S [1998] QB 419. The judge's statement that, in a case of this kind, Hobhouse J's unarticulated assumptions are "worth quite a lot" is a considerable understatement.

Conclusion

42. As it is, I would dismiss this appeal and uphold the judge's conclusion that the Hague-Visby limit applies, even if my reasons for doing so are not the same as those in the judgment below.

Lord Justice Tomlinson:

43. I agree with my Lord, essentially for the reasons he has given.

44. The contracts contained in or evidenced by the bills of lading were, when made, governed by the law of the country where the carrier has his principal place of business. The carrier is a Panamanian company, although it seems doubtful that its principal place of business is to be found there. There is no evidence on that score.

45. The history of this litigation is curious. The Particulars of Claim simply asserted that the Hague-Visby Rules were applicable to the contracts of carriage pursuant to the Carriage of Goods by Sea Act 1971, whilst at the same time asserting that the contracts of carriage incorporated the Hague Rules.

46. The Defence admitted liability to pay the Hague-Visby limit, did not take issue with either proposition set out at paragraph 45 above, but as my Lord has recorded, denied the Claimants' entitlement to pick and choose between the two package limit regimes.

47. Perhaps when, nearly five years after the contracts of carriage were made, and five months after pleadings were closed, the cargo underwriters and the shipowners' P. & I. Club agreed that the claims for damage to cargo arising out of the alleged breach of these contracts should be subject to English law, they were giving effect to an unspoken assumption that the Hague-Visby Rules were applicable. However that may be, retrospective agreement that English law governed the claim had the effect, as my Lord has described at paragraph 5 above, of rendering the Hague-Visby Rules applicable by reason of Article X of Schedule 1 to the Carriage of Goods by Sea Act 1971.

48. I am not sure what is the provenance of the expression "the Hague-Visby Rules". Strictly speaking there are no such Rules. There was signed at Brussels on 23 February 1968 a "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Visby Rules")". Those "Certain Rules" are of course the Hague Rules. The Protocol prescribes a series of amendments to the Hague Rules, and it is that series of amendments which in the title to the Protocol is termed the "Visby Rules". Visby is a port on the Swedish Island of Gotland. I am indebted to Professor W Tetley QC of the Faculty of Law at McGill University, Montreal, for the information in Marine Cargo Claims (4th ed.) (2008) Vol. 1 pages 11-12 that:-

> "The Visby Rules (the Brussels Protocol of 1968 amending the Brussels Convention of 1924) were the outcome of the successful deliberations of the Comité Maritime International Conference in Stockholm in 1963, where changes to the Brussels Convention of 1924 were adopted. The Comité met in the historic City of Visby after the Conference and thereby gave the Visby Rules their name."

Professor Tetley also states:

> "The Visby Rules (the Brussels Protocol of February 23, 1968) should not be considered as a separate convention. The Visby Rules are amendments to the Brussels Convention 1924 and art. 6 of the Protocol stipulates:
>
> > "*As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument. A Party to this Protocol shall have no duty to apply the provisions of this Protocol to bills of lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.*"
>
> Thus the result of ratification of or accession to the Visby Protocol by a nation is that the nation consents to be bound by the Hague/Visby Rules."

It is perhaps inevitable that the Convention and the Protocol should have become together known compendiously as the Hague-Visby Rules, although I note that Professor Tetley terms them the Hague/Visby Rules.

49. Had I been as well-informed about these matters in 2001 as I am now as a result of studying the materials helpfully produced by Counsel for the purposes of this appeal, I think that in my judgment in The Happy Ranger, above, I would have expressed myself differently at paragraph 31. I do not think that I would simply have said that Italy has enacted the Hague-Visby Rules, because I am confident that when I said that I did not appreciate that the Hague Rules as amended by the Visby Rules had never in fact been promulgated as a single autonomous instrument, the Hague-Visby Rules. It would have been more accurate to say that Italy, like the UK, has enacted the Hague Rules as amended, which is exactly what is said in the sub-title to section 1 of the Carriage of Goods by Sea Act 1971.

50. Accordingly, I fear that in the first sentence of paragraph 31 of my judgment in The Happy Ranger I was intending to say that the words "the Hague Rules as enacted in the country of shipment" could not refer to the Hague-Visby Rules even if the particular paramount clause made no specific reference to the Hague-Visby Rules in some other part of the same clause, but those Rules had in fact been enacted in the country of shipment. I agree with my Lord that in the light of the manner in which "the Hague-Visby Rules" came into being, that is a mistaken approach.

51. I still consider that my approach to the construction of the paramount clause in that case may have been correct, subject of course to the point on which I was overruled by the Court of Appeal, which was a separate point as to whether there had in that case been issued a bill of lading or similar document of title. The paramount clause there under consideration drew a distinction between the Hague Rules and the Hague-Visby Rules.

52. As Males J points out at paragraph 30 of his judgment below, when The Happy Ranger reached the Court of Appeal the arguments were different.

> "30. . . . The cargo claimants no longer suggested that the first sentence of the clause ("The Hague Rules ... as enacted in the country of shipment") referred to the Hague-Visby Rules. Instead they contended that the Hague-Visby Rules applied by virtue of the second part of the clause in that case, referring to trades where the Hague-Visby Rules applied. That argument was rejected as a matter of construction: the majority (Tuckey and Aldous LJJ, Rix LJ dissenting) held that the second part of the clause only operated when the Hague-Visby Rules applied compulsorily, which would only be the case when there was a bill of lading or similar document of title. However, reversing Tomlinson J, all three members of the Court held that there was such a bill in this case and therefore the Hague-Visby Rules did apply compulsorily. It did not matter, therefore, whether the clause purported to apply the Hague or Hague-Visby Rules. It is nevertheless of interest that Tuckey LJ said at [11]:
>
> > "The Hague Rules are not enacted in Italy so the first sentence of the first paragraph of clause 3 of the bill is not applicable."
>
> 31. Although strictly this point did not arise for decision in view of the fact that the shipowners' reliance on this part of the

> clause as a route to the application of the Hague-Visby Rules was no longer pursued, this constitutes a clear statement of the position for which Mr Thomas contends in the present case."

Although it does not perhaps greatly matter, as what was said on this point was on any view obiter, for my part I do consider that Tuckey LJ was agreeing with my approach when at paragraph 11 of his judgment he remarked: "The Hague Rules are not enacted in Italy so the first sentence of the first paragraph of clause 3 of the bill is not applicable." I had held that the Hague Rules applied by virtue of the second limb of the first sub-clause of clause 3 of the bill of lading. I think that Tuckey LJ was recording the by then common ground that if the second paragraph, or second sub-clause, of clause 3 applied the Hague-Visby Rules, there would be no scope for the application of the second limb of the first sub-clause because that was a default provision, and there was no default.

53. However that may be, we are at liberty to form our own view as to the effect of the paramount clause in this case. I agree with my Lord that the Hague Rules as enacted in the UK are the Hague Rules as enacted by the Schedule to the Carriage of Good by Sea Act 1971. Those are the Hague Rules as amended, as pointed out both by the sub-title to section 1 of the Act and the title to the Schedule. It may be that it was common ground before the judge that the position in Belgium is the same – see paragraph 13 of his judgment. But in any event, as my Lord points out, the position in Belgium must in the absence of evidence to the contrary be taken to be the same as in the UK.

54. I am sorry to have been in part responsible for preventing the judge following his first inclination. As it is, I agree that he came to the right overall conclusion, albeit for the wrong reason.

Lord Justice McCombe:

55. I am happy to say that, having read the judgment of Males J below, having read and heard the admirable arguments in this court and having read the drafts of my Lords' judgments in this case, my own inclination on first reading of the documents as to the correct outcome of the matter was precisely the same as that of my Lords. Having been educated by all these materials, I am also pleased to find that our mutual inclination also corresponds with the law that my Lords have so carefully explained in their judgments, with both of which I agree. I too would dismiss the appeal.