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Case No: 2012 Folio 102

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2014

Before :

THE HON. MR JUSTICE MALES

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Between :

(1) YEMGAS FZCO **(2) YEMGAS FZCO (YEMEN BRANCH)** **(3) YEMGAS FZCO T/A YEMGAS (YEMEN BRANCH)** **(4) YEMGAS LNG COMPANY LIMITED**	**Claimants**
- and -	
SUPERIOR PESCADORES S.A. PANAMA	**Defendant**

"SUPERIOR PESCADORES"

- -
- -

Mr Robert Thomas QC (instructed by **Clyde & Co LLP**) for the **Claimants**
Mr David Goldstone QC (instructed by **Davies Johnson & Co**) for the **Defendant**

Hearing date: 21st March 2014

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Judgment

Mr Justice Males :

INTRODUCTION

1. This is a fairly typical cargo claim which has given rise to three issues concerning the effect of a clause paramount in a bill of lading and the package limitation provisions of the Hague and Hague-Visby Rules. The first issue is as to the meaning in a clause paramount of the phrase "the Hague Rules … as enacted in the country of shipment".

What is the position if the country of shipment has enacted the Hague-Visby Rules? The second issue concerns Article IV Rule 5(g) of the Hague-Visby Rules which permits the parties to the bill of lading contract to agree a higher limitation figure than that provided for by paragraph (a) of that Rule. In short, what is the position when the parties' contract provides for the application of the Hague Rules which will sometimes but not always result in a higher package limitation amount than the compulsorily applicable Hague-Visby Rules? The third issue is whether, under Article IV Rule 5 and Article IX of the original Hague Rules, the time for converting the gold value into money is the date of judgment or some other earlier time.

2. These issues arise on an application for summary judgment by the claimant cargo interests against the owners of the MV "SUPERIOR PESCADORES". However, the parties agreed that they are all issues of law which do not depend on any disputed issues of fact and can therefore be finally decided one way or the other.

THE FACTS

3. The claim arises out of damage to machinery and equipment intended for use in the construction of a liquid natural gas facility in Yemen. This cargo was loaded on the vessel at the port of Antwerp, Belgium in early January 2008.

4. On 11 January 2008, the owners issued six bills of lading numbered ABA01 to ABA06 acknowledging shipment of the cargo on board the vessel in apparent good order and condition for carriage from Antwerp to Balhaf in Yemen. Each of the bills was for a number of packages and contained on its reverse side a "Paramount Clause" in the following familiar terms:

> "**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."

5. 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.

6. The vessel sailed from Antwerp on 12 January 2008. On about 17 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.

7. Agreement was subsequently reached 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 applicable as a matter of statute law when the carriage is from a port in a contracting state. Belgium is such a state.

8. Proceedings were started in January 2012, well outside the one year time limit, although as no point was taken on that it is safe to infer that the time for commencing proceedings had been extended by agreement. 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.

9. Examination of the claim reveals that in the case of some of the bills of lading the Hague Rules limit is always higher than the Hague-Visby limit, and that 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. I was 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.

10. The shipowners' Defence served on 18 May 2012 admitted liability to pay the amount of the Hague-Visby package limit, equivalent to just over US $400,000, and contended without further explanation 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.

11. The remaining issue, therefore, is how limitation should be calculated and in particular whether the claimants are entitled to recover the Hague Rules limit where this would give them a higher recovery than the Hague-Visby limit. If they are, I understand that the claimants will be entitled to recover additional damages up to a further sum of about US$ 200,000.

WHICH RULES ARE INCORPORATED BY VIRTUE OF THE CLAUSE PARAMOUNT?

12. The premise for the claimants' argument that they are entitled to rely on the Hague Rules limit where this is higher is that it is the Hague Rules and not the Hague-Visby Rules which are incorporated into the bill of lading by virtue of the clause paramount set out at [4] above. The claimants recognise that in a case such as the present, where the carriage is from a port in a contracting state, the Hague-Visby Rules apply compulsorily by reason of section 1(2) of the 1971 Act and Article X of the Hague-Visby Rules themselves, but they rely on the permission given by those Rules to agree contractually on a higher package limitation figure than that for which the Rules provide. They say that the parties have so agreed (to the extent that it produces a higher limit) by incorporating the limit provided for by the Hague Rules.

13. The first question is therefore whether the parties have indeed incorporated the Hague Rules and not the Hague-Visby Rules by virtue of the clause paramount. That depends

on what is meant, in this bill of lading, by the phrase "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 …" It is common ground that if this does not refer (or is not capable of referring) to the Hague-Visby Rules which have been enacted in Belgium, the Hague and not the Hague-Visby Rules are incorporated by virtue of the second sentence of the clause.

The parties' submissions

14. Mr Robert Thomas QC for the claimant cargo interests submitted, in summary, that this question is determined in his favour by the judgment of Tomlinson J in *The Happy Ranger* [2001] 2 Lloyd's Rep 530 and is also supported by other authority; and in any event that the clause is clear in incorporating the original Hague Rules and not the Hague Rules "as amended", as the words "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" are only capable of referring to the original Hague Rules.

15. Mr David Goldstone QC for the defendant shipowners sought to distinguish *The Happy Ranger* and submitted, again in outline, that the Hague-Visby Rules are capable of falling within the expression "the Hague Rules … as enacted in the country of shipment" and should be construed as doing so if there is no contrary indication in the clause (such as a distinction drawn elsewhere in the clause between the Hague and Hague-Visby Rules).

The authorities

16. In considering the authorities it is necessary to distinguish between cases (usually charterparty cases) which have addressed the question of what is meant by general expressions such as "clause paramount" without spelling out what the terms of such a clause paramount are intended to be and other cases (usually bill of lading cases) which have addressed the terms of particular clauses. It is also necessary to bear in mind that in a charterparty case there is freedom of contract, so that the parties are entitled to agree whatever they wish. That will not necessarily be so in a bill of lading case, where (under English law) the application of the Hague-Visby Rules is compulsory in the cases falling within section 1 of the 1971 Act and Article X of the Rules, although not in other cases. Taking them chronologically, the authorities relied on by counsel are as follows.

17. *The Agios Lazaros* [1976] 2 Lloyd's Rep 47 was a charterparty case which provided for the incorporation of a "clause paramount" into the charter but without identifying further the terms of that clause. Lord Denning MR held that the right approach was to ask "what would 'paramount clause' or 'clause paramount' mean to shipping men?" and that this referred to the original Hague Rules:

> "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."

18. Although Goff LJ's conclusion was the same, his reasoning depended to some extent on the fact that the Hague-Visby Rules were not in any kind of general use at that time. Shaw LJ's approach, however, was the same as Lord Denning's:

> "A more productive approach 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 party had in contemplation, namely that by the phrase 'paramount clause' they meant simply the Hague Rules."

19. While this is an authoritative decision as to the meaning of the phrase "clause paramount" without more in a charterparty, which remains binding in the absence of evidence that this meaning has changed in the intervening years, it is of only limited assistance in construing the terms of any specific clause. It does, however, demonstrate that what shipping men (in those days it was men and to a large extent it still is) meant by a "clause paramount" is the Hague Rules.

20. *The Marinor* [1996] 1 Lloyd's Rep 301 was also a charterparty case, which included a Canadian clause paramount incorporating "the provisions of the Carriage of Goods by Water Act … as amended, enacted by the Parliament of Canada". At the relevant time Canada had repealed its original Carriage of Goods by Water Act enacting the Hague Rules and had passed new legislation enacting the Hague-Visby Rules. Counsel for the charterers (as it happens, Mr Stephen Tomlinson QC) submitted that since the original Canadian Act was repealed and not "amended" in 1993, the clause did not incorporate the Hague-Visby Rules. Colman J was not impressed by this distinction and held that the Hague-Visby Rules were incorporated:

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

> I therefore hold that the 1993 Canadian Act came to be incorporated and with it the Hague-Visby Rules."

21. The next case was *The Bukhta Russkaya* [1997] 2 Lloyd's Rep 744, a charterparty case where the clause in question referred to "the general paramount clause" without further detail. Again the question was whether this incorporated the Hague or Hague-Visby Rules into the charterparty. As in *The Agios Lazaros*, this was treated simply as a question of construction of the phrase "the general paramount clause". What would shipping men mean by that phrase? That question was answered, on the evidence in that case, by reference to a BIMCO general paramount clause which provided as follows:

> "(a) 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 Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable the terms of the said convention shall apply.
>
> (b) *Trades where Hague-Visby Rules apply:* in trades where the International Brussels Convention 1924 as amended by the protocol signed at Brussels on February 23rd, 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of respective legislation shall apply to this Bill of Lading.
>
> (c) The carrier shall in no case be responsible for loss of or damage to cargo howsoever arising prior to the loading into and after discharge from the Vessel or while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals."

22. Having set out that typical example of a general paramount clause, Thomas J continued:

> "There appear to be some very minor variations in the wording of several of the clauses that have been put before me. However each of the clauses described as "the general paramount clause" has the following essential terms: (1) if the Hague Rules are enacted in the country of shipment, then they apply as enacted; (2) if the Hague Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination applies or, if there is no such legislation, the terms of the Convention containing the Hague Rules apply; (3) if the Hague-Visby Rules are compulsorily applicable to the trade in question, then the legislation enacting those rules applies.
>
> …

> Thus, on the evidence before me I am satisfied that shipping men would have understood 'the general paramount clause' to have referred to a clause with the essential features which I have spelt out. Applying the terms of that clause to the circumstances of this case, it is clear on what is common ground as to the applicable legislation at the ports of shipment and destination, that the Hague Rules apply."

23. This is a decision as to what is meant by the phrase "general paramount clause" and identifies the essential features of such a clause. It does not directly address the question of what is meant by "the Hague Rules … as enacted in the country of shipment", a question which did not arise as neither the country of shipment (Mauritania) nor the country of destination (Japan) had enacted either the Hague or Hague-Visby Rules. However, Thomas J's statement as to the essential features of a "general paramount clause" was made in the context of standard clauses which expressly draw a distinction between the Hague Rules and trades where the Hague-Visby Rules apply. That would suggest a general understanding that the first part of the clause would not be effective to incorporate the Hague-Visby Rules, for which separate provision was necessary.

24. *Seabridge Shipping AB v A.C. Orsleff's Eftf's A/S* [1999] 2 Lloyd's Rep 685 was another charterparty case where the same question arose. The charter incorporated a "Paramount Clause" but without identifying its terms. Thomas J held that there was no reason to depart from the approach of the majority of the Court of Appeal in *The Agios Lazaros*. In particular, the facts that the Hague-Visby Rules had since been brought into force in the United Kingdom (on 23 June 1977 -- the 1971 Act was not yet in force when *The Agios Lazaros* and *The Bukhta Russkaya* were decided) and that this was a case where the country of shipment (Poland) had enacted the Hague-Visby Rules did not justify a different approach, not least because the legislation did not apply to charterparties.

25. The decision in this case therefore affirms the continuing application of the approach in *The Agios Lazaros* case despite the changes brought about by the intervening years.

26. The principal case relied on by Mr Thomas is *The Happy Ranger* [2001] 2 Lloyd's Rep 530 at first instance. The contract of carriage contained a general paramount clause which provided as follows:

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

> In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on 23 February 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading…"

27. This was similar to the BIMCO clause considered by Thomas J in *The Bukhta Russkaya*, save for the exclusion of Article IX of the Hague Rules when not enacted in the country of shipment. The contract was for carriage from Italy, which had enacted the Hague-Visby Rules. Accordingly it might have been expected that the effect of the 1971 Act would be that the Hague-Visby Rules would apply compulsorily. However, Tomlinson J held that this was not so because the contract of carriage was not a bill of lading or similar document of title within the meaning of the 1971 Act. Accordingly the Rules would only apply if incorporated by contract. The claimant cargo interests contended (see [19] of the judgment) that "the version of the Hague Rules enacted in Italy is the Hague-Visby Rules so that those rules are applicable pursuant to the first sentence of clause 3", while the defendant shipowners' argued (see [21]) that the Hague-Visby Rules were not the Hague Rules as enacted in Italy. That was said to be so "not only because of the various important differences between the two codes but also because, as they contend, the wording of clause 3 itself draws a clear distinction between enactment of the Hague Rules and enactment of [the] Hague-Visby Rules".

28. Tomlinson J held that the Hague and not the Hague-Visby Rules were applicable, saying at [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 clause 3 of the specimen bill of lading. Quite apart from the important differences between the two codes, in the first two sub-clauses of clause 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 clause 3 refers."

29. The point that repeal of the Hague Rules and enactment of the Hague-Visby Rules was not within the first paragraph of the clause appears to contain at least an echo of the argument which did not find favour with Colman J in *The Marinor*.

30. When the case reached the Court of Appeal ([2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357), the arguments appear to have been different. 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.

32. *The MSC Amsterdam* [2007] EWCA Civ 794, [2007] 2 Lloyd's Rep 622 was another bill of lading case, but the terms of the relevant clause were materially different from the clause in the present case.

Decision

33. In circumstances where the Hague-Visby Rules are widely applied all over the world and have been enacted by legislation in many countries, I would be inclined to hold that the expression "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 …" is capable of referring to the Hague-Visby Rules, and (as submitted by Mr Goldstone) that they do so refer in the absence of any contrary indication in the clause. Such a contrary indication would include a distinction drawn elsewhere in the clause between the Hague and Hague-Visby Rules, as in the BIMCO clause and the clause considered in *The Happy Ranger*. However, there is no such distinction in the clause in the present case.

34. The Hague-Visby Rules are in fact an amended version of the Hague Rules. The 1968 Protocol by which they were agreed was described as a "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ('Visby Rules') (Brussels, 23 February 1968)" and went on to identify the amendments rather than to enact an entirely new code. 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 consequence that those Rules apply not just as a result of the compulsory application of the 1971 Act but also as a matter of contract. It appears that in the United States the Second Circuit Court of Appeals has taken a similar view: *The Seijin* 124 F.3d 132 (1997).

35. It would seem odd that in a case where English law applies and the parties must be taken to have known that the Hague-Visby Rules would therefore apply compulsorily to a shipment from Belgium, a clause which provides for the application of the Hague Rules as enacted in the country of shipment would be construed as an agreement for the Hague and not the Hague-Visby Rules to apply. Because the Hague-Visby Rules do apply compulsorily anyway, the parties must have realised that a contractual choice of the Hague Rules would be largely ineffective. It would therefore seem implausible to attribute to them such a contractual choice. I would, moreover, be inclined to agree with Colman J in *The Marinor* that it should make no difference to

the application of the clause whether the legislative technique adopted in the country of shipment was to amend the existing Hague Rules legislation in the same way as the 1968 Protocol does or to repeal that legislation and enact the Hague-Visby Rules.

36. However, the point is not free from authority. While in theory the cases reviewed above can all be distinguished as being concerned with different clauses (in particular, clauses which unlike the present case do draw an express distinction between the Hague and Hague-Visby Rules) or with the meaning of a phrase such as "clause paramount" in a charterparty where no specific clause is identified, I do not think that this would be a valid ground of distinction. The decision of Tomlinson J in *The Happy Ranger* is a decision that the language of the present clause is not apt to refer to the Hague-Visby Rules, while Tuckey LJ's statement in the Court of Appeal is to the same effect. Even if not strictly binding, these are highly persuasive statements and I should follow them, supported to some degree as they are by the charterparty cases to which I have referred.

37. I conclude, therefore, that the clause paramount at clause 2 of the bill of lading constitutes a contractual agreement that the Hague Rules shall apply, albeit one which the parties must have realised would be largely ineffective in the present case.

38. This conclusion makes it unnecessary to consider Mr Thomas' further submission that elsewhere in the bill of lading, in a clause dealing with Scandinavian trades, there is express reference to the Hague-Visby Rules, and thus that the bill of lading contract as a whole is indistinguishable from the clause considered in *The Happy Ranger*. While I would accept that a contract must be read as a whole, 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 Scandinavia and therefore, at least arguably, did not even form part of the contract in a case having nothing to do with Scandinavia. As it is, however, the point does not arise.

CAN THE CLAIMANTS TAKE ADVANTAGE OF THE HAGUE RULES LIMIT WHERE THAT IS HIGHER?

39. On the basis that the Hague-Visby Rules apply compulsorily by virtue of the 1971 Act but (as I have held) the clause paramount is to be read as providing for the application of the Hague Rules, the question arises whether the claimant cargo interests are entitled to take advantage of the Hague Rules package limitation figure when that would yield a greater recovery than the Hague-Visby limit.

The Hague-Visby Rules

40. The provisions of the Hague-Visby Rules which are relevant to this issue are as follows.

> "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. …"

41. 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.

42. 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. It is sufficient to mention 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 parties' submissions

43. Mr Thomas for the claimant cargo interests submitted, in summary, as follows:

    a. The effect of the clause paramount is to incorporate the Hague Rules as a matter of contract, so that the parties have agreed that the owners' liability will be limited in accordance with the relevant provisions of the Hague Rules.

    b. To the extent that this express contractual agreement leads to greater liability for the owners, it is expressly permitted under the relevant provisions of the Hague-Visby Rules, but to the extent (and only to the extent) that it has the effect of reducing their liability it is of no effect.

    c. There is nothing to prevent the parties from agreeing on a limit which may sometimes be higher than the limit provided for by Article IV Rule 5(a) and sometimes lower. When that occurs, effect can be given to that agreement in the former case while in the latter case the agreement will be of no effect.

    d. The question whether the parties' agreement results in such a higher limitation figure must be considered separately in relation to each bill of lading and (where a bill is for more than one package) each package.

44. Mr Goldstone for the defendant owners submitted, again in summary:

a. There is in principle no difficulty about the parties agreeing a higher limit (eg that the Article IV Rule 5(a) limit should be 4 SDR per kg rather than 2 SDR per kg), but an agreement which could result in a limit which may turn out to be either higher or lower than the Hague-Visby limit is not permitted by paragraph (g) and is struck down by Article III Rule 8 at the outset.

b. That is the effect of the clause paramount in the bill of lading because, depending upon the weight of the particular package that is subsequently damaged or lost and depending upon the respective values of gold and SDRs at the date of loss/judgment, the package limit applied by clause 2 (ie the Hague Rules limit) could be more or less than the Hague-Visby limit.

c. Accordingly clause 2 of the bill of lading is rendered null and void by Article III Rule 8 in all cases where the Hague-Visby Rules are compulsorily applicable.

d. Clause 2 must be either valid or invalid in each bill of lading contract. An approach which results in it being valid in relation to some packages and null and void in relation to others is unworkable.

Decision

45. Some of the parties' arguments were concerned with the operation of Article III Rule 8 and the decision of the House of Lords in *The Hollandia* [1983] AC 565. The House of Lords held that the time for deciding whether a clause (in that case, a jurisdiction clause) which did not on its face offend against Article III Rule 8 was in fact rendered null and void was when the defendant carrier sought to rely upon it. In my judgment, however, Article III Rule 8 has little to do with the present issue. Article III Rule 8 renders null and void a clause which purports to lessen the carrier's liability, but the issue here is whether clause 2 of the bill of lading is an agreement which increases that liability. Article V permits such an agreement generally, but it is Article IV Rule 5(g) which deals specifically with the present issue and on which attention must focus. There is no doubt that an agreement which increases the carrier's liability is permitted. The issue is whether paragraph (g) imposes any limits on the parties' freedom of contract in making such an agreement.

46. On that issue there appears to be no authority although paragraph (g) is considered in *Cooke, Voyage Charters*, 3rd Edition (2007) at paragraph 85.413:

> "**85.413** The subparagraph contemplates that the maximum amount should be 'fixed', which appears to imply a specific sum being agreed, although it is submitted that it does not prevent the fixing of a formula, as indeed is done in subparagraph (a), so long as that formula cannot produce a lower figure than would be produced by the formula in subparagraph (a). If there may be circumstances when the agreed maximum amount would produce a smaller figure than in subparagraph (a), it appears that Article III rule 8 would render it null and void, even in a case where those circumstances do not exist, but it may be that the court would

> treat the agreement as invalid only to the extent that it in fact does in the particular case produce a limit lower than as permitted by the Rules."

47. There is some attraction in construing paragraph (g) as requiring the agreed maximum amount to be fixed in such a way that it can be determined in advance whether the amount thus agreed is in fact higher than the amount "mentioned in sub-paragraph (a)". That would give effect to the word "fixed" and would promote certainty. However, the difficulty with that approach is that the amount "mentioned in sub-paragraph (a)" is not itself a fixed amount. The limit provided for by sub-paragraph (a) is denominated in special drawing rights, the value of which will vary with the value of the various currencies comprising that unit of account. In the United Kingdom, where the legislative choice has been made to convert the special drawing rights into national currency at the date of judgment, further uncertainty is introduced by the possibility of fluctuation in such values during the period between conclusion of the contract of carriage (usually on or close to the date of shipment) and the date of judgment. That uncertainty would be reduced but not eliminated if the relevant date for conversion were the date on which the goods either were or should have been discharged from the ship in accordance with the contract of carriage, as even then (save perhaps in the case of a very short voyage) such fluctuation would still be possible.

48. Unless the agreed maximum amount is also denominated in special drawing rights (as in Mr Goldstone's example of an agreed limit of 4 SDRs per kg rather than 2 SDR per kg), the potential problem exists that it may be difficult or impossible to know at the outset whether the agreed maximum is higher or lower than the maximum provided for in Article IV Rule 5(a). That will be so even if a fixed amount denominated in any given currency is agreed. There will of course be cases where the answer to that question is obvious, for example if the difference between the figure agreed and the value of 2 SDR is too great to be eliminated by any foreseeable fluctuations in the value of the currencies which together make up a special drawing right, but in other more marginal cases there may be no alternative to waiting until the date of judgment to ascertain whether the agreed figure is higher or lower than the figure provided for in Article IV Rule 5(a).

49. The initial uncertainty which exists even in the case of agreement on a fixed amount is exacerbated if the agreed amount can only be determined in accordance with a formula. That is the position in the present case where the contractually agreed amount is the Hague Rules limit of £100 in gold. The value of that amount will vary with the price of gold and will depend on which date is to be taken for the conversion of the gold value into national currency (the third issue in this case, considered below).

50. These potential problems will only be avoided so as to make it clear from the outset whether the agreed amount is higher or lower than the Article 4 Rule 5(a) limit if the contractually agreed limit is expressed in the same units of account, that is to say in special drawing rights. However, I do not think that it can have been intended that the only "other maximum amounts" permitted by paragraph (g) were amounts denominated in special drawing rights. That would severely limit the scope of the parties' freedom to agree a higher amount. Once that conclusion is reached, however, the argument based on certainty and the need for parties to know at the date of the

contract whether the relevant limitation figure is that provided for in paragraph (a) or a different figure agreed between the parties loses much of its force. Accordingly I would not adopt the view tentatively favoured by *Cooke*, that paragraph (g) only permits the use of a formula provided that there are no circumstances in which that formula could produce a lower figure than would be produced by the formula in paragraph (a).

51. Since establishing what is the Article 4 Rule 5(a) limit itself involves an element of "wait and see", I see no good reason why the same approach should not apply to a formula agreed pursuant to paragraph (g). There is in principle no objection to the use of such a formula, including if appropriate an agreement that the relevant limit shall be the original Hague Rules figure of £100 gold value. I would therefore accept the alternative view suggested by *Cooke*, namely that the agreement is invalid only to the extent that it in fact does in the particular case produce a limit lower than as permitted by the Rules.

52. I cannot help thinking, however, that on the facts of the present case to apply the Hague Rules limit in this way would be an odd result. It is one thing for the parties to agree in terms that instead of the Article 4 Rule 5(a) limit, the carrier's maximum liability shall be £100 gold value. They would then know that, to the extent that this agreement produces a higher figure for liability, effect will be given to it, and that to the extent that it does not, it will be of no effect as not falling within the permission granted by Article 4 Rule 5(g). But it seems quite another thing for the figure of £100 gold value to come in by a side wind as the result of a clause paramount purporting to incorporate the Hague and not the Hague-Visby Rules when the parties must have realised that it would be the Hague-Visby and not the Hague Rules which would apply to their contract as a result of the compulsory application of the 1971 Act.

53. If they thought about the clause paramount at all, the parties must be taken to have understood that the original Hague Rules would not apply because Belgium was a Hague-Visby state. They would therefore have viewed the clause paramount purporting to incorporate the Hague Rules as surplusage which would have no application in this case and could for all practical purposes be ignored. It seems to me most unlikely that the parties intended a clause paramount which they knew would be ineffective to result in some but not all cases to the application of the Hague Rules limit to the rather different Hague-Visby limitation regime. As Mr Goldstone put it, it seems improbable that the parties could have intended a single contract of carriage to be covered simultaneously by two differing limitation of liability regimes with differing provisions. The claimants' "pick and mix" approach, taking the benefit of whichever bits of the two package limitation regimes are in their favour, seems a surprising thing for rational business people to wish to agree.

54. The oddness of that approach is underlined by the result for which the claimants contend in the case of bill of lading no. 4. I would readily accept that each bill of lading is a separate contract. However, it is hard to think that sensible parties could have intended a single bill of lading to be subject to two different package limitation figures as a result of what would have been regarded by them if they thought about it as an ineffective clause paramount which would not apply to the voyage which was the subject of the bill of lading. I see no good reason to construe the bill of lading in a way which attributes this uncommercial intention to the parties.

55. Accordingly, while I would accept that it would in theory be possible for the parties to a bill of lading contract to which the Hague-Visby Rules apply to agree on the original Hague Rules limitation figure of £100 gold value, and that effect would be given to that agreement to the extent that it results in a higher limit of liability than the amount provided for by Article IV Rule 5(a) of the Hague-Visby Rules, I do not accept that the parties have in fact made any such agreement in this case. This means that the applicable package limitation amount is the Article IV Rule 5(a) amount which the owners have paid.

WHAT IS THE RELEVANT DATE UNDER THE HAGUE RULES FOR CONVERTING THE GOLD VALUE INTO MONEY?

56. The final issue arises only if, contrary to the conclusion reached above, the relevant package limitation figure is the Hague Rules limit. Article IX of the Hague Rules provides that the Article IV Rule 5 limit of £100 per package or unit is a gold value. In *The Rosa S* [1989] QB 419 Hobhouse J held that this refers to the gold value of £100 sterling as defined by the Coinage Acts, not its nominal or paper value, so that the applicable limitation figure is the value of the quantity of gold which was the equivalent of £100 sterling in 1924, that is to say 732.238 grams of fine gold. This decision was followed by the Privy Council in *The Tasman Discoverer* [2004] UKPC 22, [2005] 1 WLR 215.

57. The present issue is whether the time at which this gold value is to be converted into national currency is the date of judgment (as Mr Thomas submitted) or some earlier date.

The parties' submissions

58. Mr Thomas submitted that there is no authority on this point, it having been assumed without argument in *The Rosa S* that the relevant date was the date when the damaged goods were delivered, and that the same logic which led the legislature to take the date of judgment for the purpose of converting special drawing rights to national currency under the Hague-Visby Rules (see [41] above) ought to lead to the same conclusion in the case of the Hague Rules. Mr Goldstone contended for the date of delivery of the goods in their damaged condition.

Decision

59. I consider that the relevant date is the date of delivery (or, in the case of loss, the date when the goods ought to have been delivered). That is when a claimant's loss crystallises and the cause of action accrues. I accept that there appears to have been no argument about this issue in *The Rosa S* and that Hobhouse J did not explain in any detail why this was the relevant date, but I do not accept that he did not apply his mind to the point. I consider that it is sufficiently clear from his judgment not only that it was a conscious decision to take the date of delivery as the relevant date but also that this was because that was when the cause of action accrued. But even if that is not so, this is a field of law in which Hobhouse J's unarticulated assumptions are worth quite a lot and I agree with them. I would add that *Cooke* at paragraph 85.367 also considers that this is the relevant date. I do not accept that the legislative choice made by the United Kingdom for converting special drawing rights into national currency for the purpose of the Hague-Visby Rules has any bearing on this issue.

Whatever the logic of that choice, it was not the only possible choice that could be made and, in any event, a single state's choice made in 1981 cannot help to determine the meaning of an international convention concluded in 1924.

CONCLUSION

60. For the reasons given above the Hague-Visby limit applies in this case. It was accepted that, in that event, as they have paid that limitation amount, there must be judgment for the defendant owners.