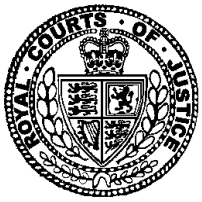

Neutral Citation Number: [2023] EWHC 26 (Comm)

Case No: CL-2022-000044

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2023

Before :

SIR NIGEL TEARE
Sitting as a Judge of the High Court

- -

Between :

TRAFIGURA PTE LTD	**Claimant**
- and -	
TKK SHIPPING PTE LTD	**Defendant**

- -
- -

John Russell KC and Benjamin Coffer (instructed by **Stephenson Harwood LLP**) for the **Claimant**
Nevil Phillips and Peter Stevenson (instructed by **MFB Solicitors**) for the **Defendant**

Hearing dates: 15 December 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

SIR NIGEL TEARE

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 13 January 2023 at 12:00 noon.

Sir Nigel Teare :

1. This is an application pursuant to section 45 of the Arbitration Act 1996 for the determination of a point of law arising in the course of an arbitration. The interesting point of law relates to the true construction and application of Article IV(5)(a) of the Hague-Visby Rules which limits the carrier's liability to a sum based upon the weight of the "goods lost or damaged".

2. The application is made with the agreement of the Defendant. It is to be determined on the basis of agreed or assumed facts.

3. The Claimant was at all material times the owner of a bulk cargo of zinc calcine with a gross weight of 10,287.07 WMT which was loaded on board the vessel THORCO LINEAGE for carriage from Baltimore, USA to Hobart, Australia pursuant to a bill of lading dated 31 May 2018 issued in Geneva, Switzerland.

4. The contract of carriage incorporated the terms of a charterparty dated 15 May 2018, including the law and arbitration clause. That clause provided for English law and arbitration in London.

5. On 31 May 2018 the vessel loaded the cargo into holds 1 and 2.

6. On 21 June 2018, whilst en route to the discharge port, the vessel lost power following an engine failure. On 23 June 2018 the vessel grounded on Raroia Atoll in French Polynesia. As a result she suffered extensive damage. Several ballast tanks were punctured, her rudder was lost and her propeller was damaged beyond repair. It is to be assumed for the purposes of this application that the casualty was caused by a breach of the contract of carriage by the carrier.

7. On 25 June 2018 a Lloyd's Standard Form of Salvage Agreement (No Cure No Pay) ("the LOF") was signed by the master on behalf of the property to be salved with Smit Singapore Pte and The Nippon Salvage Company Limited ("the Salvors"). The LOF contained the SCOPIC clause which was invoked by the Salvors on 25 June 2018.

8. On 27 June 2018 the vessel was refloated and taken to Papeete, French Polynesia for inspection and temporary repairs. She was subsequently towed under the LOF to South Korea for repairs, departing Papeete on 19 July 2018.

9. On 5 September 2018 the Claimant provided an Average Bond.

10. The vessel arrived at Gwangyang, South Korea, under tow on 11 September 2018 where some cargo was discharged and stored ashore.

11. The vessel then proceeded to Yeosu shipyard for further repairs, arriving on 16 September 2018 when she then discharged further cargo.

12. On 21 September 2018 the LOF was terminated.

13. Pursuant to clause 4.7 of the Lloyd's Salvage and Arbitration Clauses 2011 ("the LSSA Clauses") the Salvors had a maritime lien on the property salved for their salvage remuneration until security was provided. If security was not provided the Salvors could

and would have exercised their maritime lien. Pursuant to clause 4.8 of the LSSA Clauses the property salved could not be removed without the consent of the Salvors.

14. The Claimant was required to put up General Average Security in order to obtain possession of the cargo. If it were not provided the shipowner could and would have exercised their lien in respect of General Average over the cargo.

15. On 5 November 2018 Axa XL provided a General Average Guarantee in respect of the cargo.

16. On 6 November 2018 the Claimant provided salvage security in the sum of US$8 million.

17. On 26 December 2018 some of the cargo was shipped on board MV MERWEDEGRACHT for carriage to the intended port of discharge where it was delivered.

18. In the result 9,523 WMT of cargo were not lost or physically damaged and 764.07 WMT were lost or physically damaged. It is assumed for the purposes of this application that the carrier's breach of contract caused the Claimant the following loss and damage:

    i) Liability to pay the Salvors US$7,355,000.

    ii) Physical loss and/or damage to the cargo US$278,658.31.

    iii) On-shipment costs in respect of the cargo (some of which was physically damaged and some of which was not) US$723,831.85.

    iv) Costs incurred in arranging for the salvage sale and/or disposal of some of the physically damaged cargo US$58,934.74.

19. By a letter dated 3 May 2019 the Defendant warranted that it was the carrier under the bill of lading.

20. On 15 June 2020 the Claimant commenced arbitration proceedings. The Tribunal consists of Luke Parsons KC, Mr. David Martin-Clark and Mr. Jon Elvey.

21. In the arbitration the Claimant claims an indemnity, alternatively, damages for loss, damage and expense in respect of the cargo including the costs of salvage, on-shipment costs, disposal costs and a sum in respect of the lost or damaged cargo.

22. The Hague-Visby Rules have the force of law in relation to the bill of lading and contract of carriage. Article IV r.5(a) thereof provides as follows:

> "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 the equivalent of 667.67 units of account per package or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher."

23. The question of law for the court, which arises in respect of the claim in respect of the Claimant's liability for salvage and the on-shipment costs, is:

> Whether on the agreed and assumed facts, the Defendant is entitled to limit its liability, and if so, in what amount in respect of each head of loss ?

The Claimant's case

24. It is submitted by John Russell KC on behalf of the Claimant that:

i) The Defendant's liability in respect of the Claimant's liability to pay salvage and the on-shipment costs is limited by reference to the weight of the salved cargo because the words "goods lost or damaged" at the end of Article IV r.5(a) refer to goods lost or damaged, physically or economically. The whole cargo suffered economic damage by reason of the Claimant's liability to pay salvage and on-shipment costs. The limit calculated on that basis exceeds the value of the claim.

ii) Further or alternatively, the Defendant's liability in respect of the Claimant's liability to pay salvage and the on-shipment costs is limited by reference to the weight of the salved cargo because the maritime lien on the cargo for salvage damaged the Claimant's proprietary or possessory title in the cargo so that the cargo was damaged. Again, the limit calculated on that basis exceeds the value of the claim.

iii) Further or alternatively, if submissions (i) and (ii) are not accepted then, pursuant to the decision of Burton J. in *Serena Navigation v DERA Commercial Establishment, "The Limnos"* [2008] 2 Lloyd's Reports 166 the Defendant's liability in respect of the Claimant's liability to pay salvage and the on-shipment costs is not subject to any limit pursuant to Article IV(5)(a).

The Defendant's case

25. It is submitted by Nevil Phillips on behalf of the Defendant that:

i) The Defendant's liability in respect of the Claimant's liability to pay salvage and the on-shipment costs is limited by reference to the weight of the goods which were damaged physically because the words "goods lost or damaged" at the end of Article IV(5)(a) refer to goods which have been lost or goods the physical state of which has been changed.

ii) The cargo was not damaged by reason of being subject to a maritime lien and the Defendant's liability is not unlimited.

26. Since only a small amount of the cargo was physically damaged the limit of the Defendant's liability to the Claimant was, I was told, about $800,000. Thus the question of law is of some importance to the parties.

Limitation of liability in the Hague and Hague-Visby Rules

27. Article IV r.5 of The Hague Rules provided as follows:

> 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……...

28. Article IV r.5 of the Hague-Visby Rules provides as follows:

> (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 667.67 units of account per package or 2 units of account per kilogram 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. The value of the goods shall be fixed according to the commodity exchange price, or if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.
>
> (c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.
>
> (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 seised of the case.
>
> ……

29. The Hague-Visby Rules at their inception provided for limits to be assessed by reference to the Poincaré franc. But soon after the introduction of the Hague-Visby Rules the value of the Poincaré franc collapsed. A diplomatic conference in 1979 led to the SDR Protocol and to the replacement of the franc by the Special Drawing Unit of the IMF. Thus paragraph (d) above replaced a similar paragraph explaining the meaning of franc.

Approach to construction

30. The approach which the Court should follow when construing an international agreement such as the Hague-Visby Rules has been summarised by Popplewell J., with the approval of the Court of Appeal, in *Glencore Energy UK Ltd. v Freeport Holdings*

Ltd. [2017] EWHC 3348 (Comm) at paragraph 27, and [2019] EWCA 388 (at paragraph 24), as follows:

(1) The Hague Rules as convention treaty obligations are subject to Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. As such the primary duty of the Court under Article 31 is to ascertain the ordinary meaning of the words used, not only in their context but also in the light of the evident object and purpose of the convention. The language of the text is to be taken as a whole against this background.

(2) Because the Hague Rules are the outcome of international conferences and have an international currency, being applied by foreign courts, it is in the interests of uniformity that they should be construed on broad principles of interpretation which are generally accepted rather than rules of construction particular to English law. For the same reasons, their interpretation is not to be controlled by the English law cases which preceded the Rules, and the court should not pay excessive regard to earlier decisions of English courts in construing the international code. Where there are words or expressions which have received judicial interpretation as terms of art, the words may be presumed to have been used in the sense already judicially imputed to them; but the words have to be given their plain meaning, which should be given effect to without concern as to whether that involves altering the previous law.

(3) Recourse may be had to the travaux préparatoires, in accordance with Article 32 of the Vienna Convention, but only in the circumstances there identified, namely to confirm the ordinary meaning, or where without them the meaning would be ambiguous, obscure or lead to a result which is manifestly absurd or unreasonable. The travaux will only be determinative in a case in which they clearly and indisputably lead to a definite legal intention. In the words of Lord Steyn in ***The Giannis N.K.*** "Only a bull's-eye counts. Nothing less will do."

31. The circumstances in which it is appropriate to have recourse to the travaux préparatoires have also been explained by the Supreme Court in *The Ocean Victory* [2017] 1 WLR 1793 at paragraphs 71-75 per Lord Clarke of Stone-cum-Ebony and by the Court of Appeal in *The Aqasia* [2018] 1 Lloyd's Reports 530 at paragraphs 34-35 per Flaux LJ. The travaux préparatoires may be used to confirm the ordinary meaning of the Convention but only after that ordinary meaning has been ascertained in its context and in the light of the evident object and purpose of the Convention.

32. In *The Libra, Alize 1954 v Allianz Elementar Vesricherungs AG* [2021] UKSC Lord Hamblen again summarised the correct approach to the construction of the Hague Rules at paragraphs 34-42. Of particular note is his reference (at paragraph 38) to the "note of caution" in the use of the travaux préparatoires expressed by Lord Bingham in *The Rafaella S, JL MacWilliam Co Inc v Mediterranean Shipping Co SA* [2005] 2 AC 423 at paragraph 19:

> "It must be remembered that in a protracted negotiation such as culminated in adoption of the Hague Rules there are many participants, with differing and often competing objects, interests and concerns. It is potentially misleading to

> attach weight to points made in the course of discussion, even if they appear to the time to be accepted. In the present case, I do not think that either party can point to such a clear, pertinent and consensual resolution of the issues before the House as would provide a sure ground of decision."

33. The terms of the Vienna Convention recognise that in ascertaining the ordinary meaning of words the Court may consider whether they appear to give rise to manifestly absurd or unreasonable results. I was referred to examples of courts doing so; *The Captain Gregos* [1990] 1 Lloyd's Reports 310 at p.315 rhc ("practical problems") and p.316 lhc ("injustice"), *Pirelli General PLC v PSA Corp* [2003] SGHC 31 at paragraph 38 ("alarmingly disproportionate") and *Kyoku Co. Ltd. v AP Moller-Maersk A/S* [2017] 1 Lloyd's Reports 580 at paragraph 108 ("very odd") and paragraph 109 ("significant oddity").

34. However, in considering whether a construction gives rise to manifestly absurd or unreasonable results the Court must be careful not to re-write the Convention to "give effect to what [the contracting states] might, or in an ideal world would have, agreed"; see *R (European Roma Rights Centre v Immigration Officer at Prague Airport* [2005] 2 AC 1 at 31 per Lord Bingham.

35. Since the ordinary meaning of the words used in Article IV r.5(a) is to be ascertained in the light of the evident object and purpose of the Hague-Visby Rules it is necessary to identify what that object and purpose was.

36. The object and purpose of the Hague Rules is well known. I refer again to the judgment of Popplewell J. in *Glencore* which I have mentioned above:

> 28. The essential feature of the Hague Rules was a compromise whereby shipowners accepted statutory restrictions on their freedom to contract out of their strict liability as common carriers. In ***The Giannis N.K***. Lord Steyn said at p. 621:
>
> > "This much we know about the broad objective of the Hague Rules: it was intended to rein in the unbridled freedom of contract of owners to impose terms which were "so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility" (1992) 108 LQR 501, 502; it aimed to achieve this by a pragmatic compromise between the interests of owners and shippers; and the Hague Rules were designed to achieve a part harmonisation of the diverse laws of trading nations, at least in the areas which the convention covered."

37. The object and purpose of Article IV(5) of the Hague-Visby Rules can be identified from the travaux préparatoires and in particular from the report by Professor Van Ryn, Chairman of the Working Party, delivered at the Diplomatic Conference on 22 May 1967 and from an address by Sir Kenneth Diplock, then Diplock LJ, as Chairman of the Drafting Committee delivered at the adjourned Diplomatic Conference on 22 February 1968. (The travaux préparatoires have been set out at length by Allsop J. in the Federal Court of Australia in *El Greco v Mediterranean Shipping* [2004] 2 Lloyd's Reports 537 but he did so with particular relevance to the question of the limit per package or unit in the context of containers. The emphasis in the present case is on the limit per kilogramme of weight of the "goods lost or discharged" and so I must address the travaux préparatoires with that question in mind.)

38. Professor Van Ryn stated that the aim was to modify Article (IV) r.5 to deal with the "irregular situation" whereby the £100 limit had been converted into national currencies and was extremely variable and had also fallen below the level fixed in 1924. It was also to give "more clarity" to the expression "per package or unit". It had become "increasingly clear that the 1924 solution based on limitation per package or unit is no longer satisfactory". The limit was "derisory" in the case of machinery or heavy engineering products and in the case of bulk cargoes "it has been necessary to have recourse to some form of fiction and consider every ton or every item as separate units or packages". Further, the development of transport by containers had "aggravated the imperfection of the present system".

39. With regard to clarifying the limit per package or unit some suggested the replacement of the limit per package or unit with a limitation based upon weight. Others suggested a combination of the two. The Diplomatic Conference was then adjourned (at the suggestion of Sir Kenneth Diplock) to enable further consultation and an assessment of the consequences of the proposed changes to take place.

40. At the adjourned Diplomatic Conference in February 1968 there was much debate and different proposals were put forward by the USA, Norway, the UK, Germany, Finland, Sweden, the Netherlands, Denmark, Belgium and Argentina. (The proposals of the UK and Germany have been mentioned in the submissions of counsel for the Defendant and I shall comment on them later in this judgment.)

41. On 20 February 1968, following a long debate, the President of the Diplomatic Conference proposed the creation of a drafting committee under the presidency of Sir Kenneth Diplock with members from the USA, Germany, France, Sweden and the Netherlands.

42. On 21 February 1968 Professor Van Ryn advised the delegates that his working party favoured a mixed or alternative system "based on a fixed sum per unit or package, on the one hand, or a fixed sum per kilogram of gross weight of the lost or damaged goods". He advised the delegates of the proposed limits in terms of francs and that the higher limit of the two would prevail. However, several further questions had arisen, in particular, the problem of containers. In that regard he noted that a text had been finalised "thanks to the persevering efforts of the drafting committee chaired by Lord Justice Diplock". A further long debate ensued which was closed by the Chairman of the Conference, who noted that there had been more proposed amendments at the last minute and that "the night will always bring advice".

43. On 22 February 1968 voting took place. But before the vote was taken Sir Kenneth Diplock was asked to address the Conference. Sir Kenneth reminded the delegates that Article IV r.5 of the Hague Rules was designed to deal with goods of exceptional value. In such a case there was to be a limit of £100 per package or unit. The delegates in 1924, mindful of the traditional methods of shipping cargo, were able to agree that £100 represented "the turning point between the exceptionally valuable cargo and the ordinary average run of cargo which the shipowner would expect." Since 1924 there had been a considerable change in the value of money and there was now "the problem of the big container" which may weigh 30-40 tons and in respect of which the limit was "inappropriate". Sir Kenneth said that the several paragraphs in the new Article IV r.5 were a "package deal" and were "closely interrelated". He explained that they were to deal with 80-90% of cases where goods are lost or damaged and the claimant will

recover the value of the goods. Thus, for the "great majority of goods this clause will not apply at all because the value will be below the maximum." The limit of 10,000 Poincaré francs per package or unit was chosen to "represent a fair figure for the average cargo packed in the ordinary way." The limit of 30 francs per kilogram was for large packages such as a container which might have a considerable weight. The limit of 30 francs was chosen "to meet the requirements of the cargo of ordinary value packed in the large container". Sir Kenneth then explained the paragraph which dealt with the question of package or unit in a container (now article IV r.5(c)). Sir Kenneth made no mention of the need to deal with the issue of bulk cargoes. But there is no reason to doubt what Professor Van Ryan said at the outset of the Diplomatic Conference, namely, that the new Article was in part to clarify the limit with regard to bulk cargoes. Dealing with that issue does not appear to have caused any debate and that probably explains why Sir Kenneth made no mention of it. It is possible, indeed likely, that the reason that there was no debate was that the limit chosen per kilogram of weight would usually be sufficient for bulk cargoes and therefore was not expected to cause any problem.

44. After Sir Kenneth's address the delegates voted. Certain amendments to the proposed text were first voted on and rejected. The text was then voted on and was adopted, 24 in favour, 1 against, with 16 abstentions.

45. Thus the object and purpose of Article IV r.5, as evidenced by the travaux préparatoires, was to provide a maximum limit of liability in the minority of cases where the value of the goods was exceptional. That had been the aim of Article IV r.5 of the Hague Rules and it remained the aim or object of Article IV r.5 of the Hague-Visby. Article IV r.5(a) had been amended (a) to bring the limit up to date, (b) to deal with large and therefore heavy containers and (c) to apply the limit to bulk cargoes.

46. However, that general aim "tells us nothing" (to use the language of Lord Steyn in *The Giannis NK, Effort Shipping v Linden Management* [1998] AC 605 at p.622 A) about the meaning of Article IV r.(5)(a). One must look to the language of that Article as the "authoritative guide" to the intentions of delegates.

The rival submissions

47. Counsel for the Claimant submitted that Article IV r.5(a) should be read as a whole. It is just one sentence. When doing so account must be taken of the circumstance that the liability subject to limit is "liability for any loss or damage to or in connection with the goods". That liability plainly includes liability for economic loss or damage, for example, loss of market value where, although the goods have been delivered in sound condition, they have been delivered late as a result of a breach of the carrier's obligations. In that context the words at the end of the Article, which quantify the value of the limit, namely, the weight of "the goods lost or damaged", must reasonably have been intended as "shorthand" for the goods to which, or in connection with which, there has been loss or damage, or, more simply, as goods lost or damaged physically or economically.

48. Counsel for the Defendant submitted that the ordinary meaning of "goods lost or damaged" was goods which had been lost or had suffered a change in their physical condition. That this was the ordinary meaning of that phrase was clear from the phrase earlier in the Article which applied the limit to liability "for any loss or damage to or in

connection with the goods.". It was the words "in connection with the goods" which brought within that phrase economic loss or damage.

49. The principal argument in support of the Claimant's submission is that unless the words "goods lost or damaged" mean "goods lost or damaged physically or economically", there will be no limit for liability for economic losses in respect of the goods, such as liability for delayed delivery of the goods where there is no physical damage to the goods. The carrier's liability for such economic losses would be subject to the limit (by reason of the earlier phrase in the Article) but there would in fact be no limit to the claim because there were no "goods lost or damaged". This renders the Article incoherent and produces a result which cannot have been intended, because the earlier phrase in the Article identifies a claim for economic loss or damage in connection with the goods as one subject to the limit.

50. The principal argument in support of the Defendant's submission is that the narrow meaning of "goods lost or damaged" is to be contrasted with the wider language of the earlier phrase in the Article, "in connection with the goods", which is not to be found at the end of the Article in the phrase "goods lost or damaged". The Claimant's submission involves adding words to the end of the Article which the delegates to the Diplomatic Conference did not add. It has been held by Burton J. in *The Limnos, Serena Navigation v Dera Commercial Establishment* [2008] 2 Lloyd's Reports 166 that "damaged" did not mean economically damaged.

Discussion

51. I have to ascertain "the ordinary meaning of the words used, not only in their context but also in the light of the evident object and purpose of the convention."

52. I see the force of the objection that the Claimant's construction seeks to re-write Article IV r.5(a). It would have been very easy for the delegates to have provided that the limit was to be quantified or defined by the weight of the goods lost or damaged *physically or economically* but such words were not used.

53. But there is also force in the submission that where the delegates have demonstrated their intention to apply the limit to liability for economic losses which arise in connection with the goods but without physical damage to those goods the delegates cannot have intended to prevent there being such a limit by requiring the presence of physical damage to the goods.

54. The dispute is whether the words "goods lost or damaged" refer and refer only to physically lost or damaged goods. The context in question is the carriage of goods by sea. In the typical case a merchant will have bought the goods on board the ship on cif, fob or ex ship terms. The merchant will expect to have his goods delivered to him at the discharge port pursuant to the contract of carriage contained in or evidenced by the bill of lading in the same good order and condition as they were in when shipped on board. If they are not so delivered they will be regarded as damaged. There is, I think, no dispute as to that. But, as illustrated by many cases decided in this court since its creation in 1895, casualties can occur at sea which imperil both ship and cargo as a result of which the goods can only be delivered at the discharge port in sound condition as a result of additional and unexpected expense being incurred by the merchant. The master may have engaged the services of salvors on the basis of LOF. If the salvage

service is successful the owners of the vessel and the owners of cargo will be obliged to pay for the salvage service in proportion to their respective salved values. Where the safe place to which the salvors take the vessel and cargo is not the port of discharge the owners of the cargo may be obliged to incur the costs of on-carriage to get the cargo to the port of destination. This case is an example of two such expenses, salvage payable pursuant to LOF and the cost of on-shipping goods from a place of safety to the port of discharge. In such cases the goods, though in sound condition, will have for the merchant a diminished value at the port of discharge to the extent of the additional expense which he has incurred. In such cases it can fairly be said, and I have no doubt would be said by the merchant, that the goods have suffered economic damage as a result of the casualty at sea. The cargo is as much the victim of the casualty as it is where physical damage is caused. Another consequence of events at sea may be delay in the arrival of the goods at the discharge port. A merchant may have bought both perishable and non-perishable goods. If the ship is delayed in reaching the port of destination the merchant may suffer two types of loss. The perishable goods may have deteriorated so that their value at the port of destination is reduced. The non-perishable goods will not have suffered any physical damage but in the period of delay the market price of the goods may have fallen. In both cases the merchant has suffered a diminution in the value of his goods. In the one case the physical condition of the goods has deteriorated so that they can fairly be regarded as damaged physically. In the other case it can fairly be said, and I have no doubt would be said by the merchant, that the goods have suffered economic damage. The common feature in all of these cases is that the value of the goods to the merchant at the discharge port has been diminished. Where such diminution in value has been caused by the incurring of additional and unexpected expense or by delay there has been economic damage. I therefore think that when one has regard to the context of the carriage of goods by sea there is a cogent argument that the ordinary meaning of "lost or damaged goods" in Article IV r.5(a) of the Hague-Visby Rules can include goods which have been economically damaged. Otherwise one is closing one's eyes to the risks inherent in such carriage and the typical consequences of such risks.

55. Reference was made to the OED which defines "damage" as "loss or detriment caused by hurt or injury affecting estate, condition or circumstances; or injury, harm, esp. physical injury to a thing, such as impairs its value or usefulness". "Damaged" is defined as "that has suffered damage: injured (esp. physically)". "Damaged goods" is a phrase said to be used in the sense of "merchandise that has deteriorated in quality through unsaleability, exposure to the elements etc." I am not sure that such reference really assists after one has considered the ordinary meaning of "goods lost or damaged" in the particular context of the carriage of goods by sea. But if it is necessary to consider the dictionary definitions of "damage", "damaged" or "damaged goods" then it may be observed that the OED definitions would appear to encompass economic damage, for physical injury is mentioned as an especial example of "damage" or "damaged". The inference is that the ordinary meaning is wider than that. Indeed, it encompasses injury or harm which "impairs the value" of the object in question. That is consistent with the view I have formed when examining the meaning of the words used in the particular context in which they are found. The dictionary definitions require a hurt or injury. In the context of contracts for the carriage of goods by sea the hurt or injury is the maritime casualty which gives rise to the need for salvage services or on-shipment costs or the fact of a delayed delivery.

56. Against that it can be said that the particular linguistic context in which the words are found suggests that the words "goods lost or damaged goods" were intended to have a narrow meaning of "goods lost or physically damaged". The wider language of "in connection with the goods" in the earlier part of the Article which can include economic loss or damage was not used at the end of the Article. However, to construe the words "goods lost or damaged" as requiring the presence of physical damage to define or quantify the limit would not in my judgment properly reflect the intention of the delegates to confer a right to limit in respect of liability for loss or damage or in connection with the goods.

57. I am therefore minded to accept the submission made on behalf of the Claimant that "goods lost or damaged" includes goods which are economically damaged. But before reaching a final conclusion I must also have regard to the travaux préparatoires (to see whether they confirm that meaning), the authorities to which I was referred, including in particular the decision of Burton J. in *The Limnos* who concluded that the words did not include economically damaged goods, and the textbooks and commentaries.

The travaux préparatoires

58. I have already referred to these in order to ascertain the aim and object of Article IV r.5(a) of the Hague-Visby Rules. I now do so in order to see whether they confirm my view of the ordinary meaning of the words in question.

59. The travaux préparatoires do not confirm that meaning because the particular issue does not appear to have been addressed. There is no discussion of the meaning of the words "goods lost or damaged". Sir Kenneth Diplock stated in his address that the delegates were dealing with "shipowners' liability for goods lost or damaged". But there was no discussion of the meaning of "goods lost or damaged".

60. Counsel for the Defendant referred to an amendment submitted by the United Kingdom which provided that the extent of the carrier's liability "for any loss or damage to or in connection with the goods" shall not exceed the value of "such goods" at the place and time at which the goods are discharged or should have been discharged from the ship, and no further damages shall be payable" (see p.546 of the travaux préparatoires). Although the Working Party voted to adopt this "in principle" it does not appear to have survived as a limit of liability. Rather, as Professor Van Ryn explained, it was "a provision dealing with the mode of calculation of the indemnity. It is not then, properly speaking, a limitation of liability; it is a mode of calculation." Professor Van Ryn "insisted on this point because the text translating the proposal of the British delegation, which appears in paragraph 2, could lead one to think that it is an additional limitation." Thus, although Article IV r.5(b) refers to "the total amount recoverable" that is not a limit but a mode of calculating value. The limit of liability is provided by Article IV r.5(a).

61. Counsel for the Defendant made two submissions based upon the British proposal and one submission based upon the address by Sir Kenneth Diplock. The justification for doing so was said to be that the meaning counsel submitted should be given to Article IV r.5(a) was confirmed by reference to the UK proposal and Sir Kenneth's address. In considering counsel's submissions I have kept in mind the note of caution expressed by Lord Bingham in *The Rafaella S* which was relied upon by Lord Hamblen in *The Libra*.

62. In his Skeleton Argument Counsel submitted that "the drafters expressly rejected a formulation" which provided for the linkage now contended for by counsel for the Claimant between "loss or damage to or in connection with the goods" and "goods lost or damaged". In this connection Counsel had in mind the use of the words "such goods" in the amendment originally proposed by the United Kingdom which would have avoided the problem which has emerged in the present case. However, the amendment proposed by the United Kingdom was one which provided for the value of the goods to be the limit. It sought to amend the proposal by the Federal Republic of Germany which had suggested a limit per package or unit or per kilogram of the goods "actually lost or damaged" (see p. 542 of the travaux préparatoires). The United Kingdom's proposal did not survive, although its formula for valuing the goods survived in Article IV r.5 (b). Nor did Germany's reference to goods "actually lost or damaged" survive. Instead, a limit per package or unit or per kilogramme of weight of the "goods lost or damaged" was adopted. Whilst it is clear that a limit based upon value did not survive (and was never put to a vote on 22 February 1968) I do not think that anything more can be gleaned from the terms of the United Kingdom's proposal as to the intention of the drafters in adopting a different limit expressed in different language.

63. In the Appendix to his Skeleton Argument Counsel advanced a different point based upon the United Kingdom's amendment. He described it as having a "singular focus upon physical loss or damage" which "could not refer to wider economic losses". Counsel also noted that the British delegation had been asked whether the purpose of the text was "to limit reparation to material and direct damage (intrinsic damage)" to which the British delegation responded "yes." However, since Professor Van Ryn said expressly with regard to the UK amendment that it was not a limit but a mode of calculating value, I do not consider that the United Kingdom amendment (which became Article IV r.5(b) and deals with valuation) can be invested with the significance which Counsel suggests.

64. Finally, Counsel based a submission upon the address by Sir Kenneth Diplock which referred to the shipowner paying the value of the goods in 80-90% of cases. Counsel submitted that this comment showed that where there is a "wider economic loss" the intention was "to limit liability solely to the physical loss/damage element (in order to impose a compromise which nevertheless reflects the majority of cases – which are simple cases of physical loss or damage)". I was not persuaded by this submission. Sir Kenneth was making the point that limitation was only relevant in the minority of cases. So, at the end of his address, he said: "For the great majority of goods this clause will not apply at all, because the value will be below the maximum." Whether the limit "per kilo of gross weight of the goods lost or damaged" applied in cases of economic loss or damage such as delay and, if so how, was not debated. Indeed, as Counsel accepted, there is no "bull's eye" which would resolve any ambiguity in the language used in Article IV r.5(a). One is simply left with the fact that the meaning of "goods lost or damaged" was not discussed.

65. Thus the travaux préparatoires are of no assistance in this case. There is neither a "bull's eye" to resolve any ambiguity nor confirmation of any meaning of "goods lost or damaged".

The authorities

66. Counsel for the Defendant referred me to *Renton v Palmyra* [1957] AC 149. In that case there was an issue as to whether certain clauses in the bill of lading fell foul of the effect of Article III r.8. One question was whether "loss or damage to or in connection with goods" referred only to actual loss of the goods or physical damage to the goods. Lord Morton of Henryton did not think they were so limited. He said (at p.169) that the submission amounted to reading the words as if they were "loss of or damage to goods" and to give no effect to the words "or in connection with". Lord Morton said:

> "In my view, the phrase covers four events – (a) loss to goods (whatever that may mean); (b) damage to goods; (c) loss in connection with goods; (d) damage in connection with goods……."

67. The same point is made by Viscount Kilmuir (at p.169) and by Lord Somervell (at p.175).

68. I accept that this approach to the construction of "loss or damage to or in connection with goods" provides support for the submission made by Counsel for the Defendant in this case. But the House of Lords was construing that wide phrase. It was not addressing its collective mind to the meaning of the words "loss or damage to goods" had they stood on their own goods or to the meaning of those words as used in Article IVr.5 (a) of the Hague-Visby Rules. Thus the support afforded by Lord Morton's approach is limited.

69. Shortly after that decision Devlin J. decided *Anglo-Saxon Petroleum Co. Ltd. v Adamastos Shipping Co. Ltd.* [1957] 2 WLR 509. That case concerned the US Carriage of Goods by Sea Act 1936 and in particular sections 4(1) and (2) which, like the Hague Rules, provide that the carrier shall not be liable for "loss or damage" arising from unseaworthiness unless caused by want of due diligence and that the carrier shall not be liable for "loss or damage" arising from any of the named exceptions. At p.518 Devlin J. said:

> "The last question asks whether the words "loss or damage" in section 4(1) and (2) of the Act relate only to physical loss 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. I can see no reason why the general words "loss or damage" should be limited to physical loss or damage."

70. Pausing there, the approach of Devlin J. reflects the approach which I have adopted in ascertaining the ordinary meaning of "goods lost or damaged". I accept that the phrase I have to construe is not the same as that which Devlin J. had to construe. But the words before him were "loss or damage" whilst the words before me are "goods lost or damaged". Devlin J. had to construe the nouns "loss" and "damage" in the context of a contract for the carriage of goods by sea. I have to construe the adjectives "lost" and "damaged" as they apply to goods in the context of a contract of carriage of goods by sea. I regard the approach of Devlin J. as reflecting and giving some support for my understanding of the words "goods lost or damaged" in Article IV r.5(a).

71. Devlin J. went on to say:

> "The only limitation which is, I think, to be put upon them is that which is to be derived from section 2 which is headed: "Risks". The "loss or damage" must, in my opinion, arise in relation to the "loading, handling, stowage, carriage, custody, care and discharge of such goods," but is subject to no other limitation. In *Renton v Palmyra Trading Corporation of Panama* the House of Lords held that the words "loss or damage to or in connection with goods" in Article III rule 8 of the Hague Rules were not limited to actual loss of or physical damage to the goods; and I should give the same meaning to "in relation to" as to in connection with."

72. It does not appear that Devlin J. understood the House of Lords as giving a narrow (physical) meaning to "loss or damage to …..goods" in the context of carriage of goods by sea.

73. When *Adamastos* went to the House of Lords Devlin J.'s approach was upheld; see [1959] AC 133 at p.157 per Viscount Simonds (see also Lord Keith at p.181 and Lord Somervell at p.186).

74. Although I think that the approach of Devlin J. gives some support for my understanding of the words "goods lost or damaged" in Article IV r.5(a) that support must be regarded as limited in circumstances where Devlin J. was not addressing the meaning of the words "goods lost or damaged" as found in the particular context of Article IV r.5(a).

75. Counsel for the Defendant referred to *Data Card Corp. v Air Express International Corporation* [1983] 2 Lloyd's Reports 81. This was, as its title implies, a case concerning the carriage of goods by air. One of 8 packages containing two embossing machine systems was dropped from a forklift truck at Heathrow Airport and was damaged. The claimant said that without the one damaged item the whole system was useless. The question for the court concerned the application of the limit of liability in The Warsaw Convention. Article 22 r.2 described the limit as "250 francs per kilogramme". The claimant submitted that the limit was 250 francs per kilogramme of the weight stated in the airway bill. The defendant submitted that the limit was 250 francs per kilogramme per package, not per the entire consignment. Bingham J. accepted the submission of the defendant. He held that the limit was 250 francs per kilogramme of the package which was handed over to the carrier. He added: "A requirement that that the limit should be calculated by reference to goods neither lost nor damaged would……require express language or clear implication……" I do not consider that I can gain much assistance from this case. The words being construed were different and came from a different convention.

76. I now come to *The Limnos, Serena Navigation v Dera Commercial Establishment* [2008] 2 Lloyd's Reports 166. This case concerned a cargo of US corn shipped from Louisiana to Aqaba on terms which incorporated the Hague-Visby Rules. The facts were (see paragraphs 3-4) that after a period of very heavy weather there was found on arrival at Aqaba a small amount of wetting damage, primarily in holds 2 and 3 but also in holds 5 and 8, apparently caused by leakages in the vessel's hatch covers. The quantity of wet damaged cargo was between 7 and 12 metric tonnes. It was segregated and disposed of. In addition, some 250 tonnes of cargo in holds 2 and 3 had to be

discharged by bulldozers and as a result suffered damage (broken kernels). As a condition of allowing any discharge from holds 2 and 3 the Jordan Ministry of Agriculture required the whole of that cargo to be fumigated and treated with chemicals and transferred to pre-fumigated and disinfected silos. As a result of moving the cargo within the silos to enable the required fumigation and treatment the damage to the kernels increased. The whole of the cargo acquired a reputation as a distressed cargo and its sound market value was depressed by US$13 per tonne. In addition a range of other expenses and liabilities were incurred by the cargo owner in relation to the fumigation, segregation and silo storage of the cargo. All these losses were claimed (see paragraph 5). They had either been caused by the carrier's breach of contract or were incurred in reasonable mitigation of the loss which would otherwise have been incurred, namely, the loss of the whole cargo. The carrier's case (see paragraph 8) was that the limit of its liability was the limit per kilogramme of the goods physically damaged. The cargo owner said that the limit was per kilogramme of the whole cargo, which would more than cover the sum claimed.

77. Counsel for the cargo owner in *The Limnos* made the same submission as Counsel for the Claimant in the present case. He submitted (see paragraph 13) that since "loss and damage" in the first part of Article IVr.5(a) includes economic loss the words "good lost or damaged" at the end of the Article must bear the same meaning. Thus "damaged" includes "economically damaged" and the words "goods lost or damaged" are to be construed consistently with the "loss and damage" in the first part of the clause, that is, as "goods in respect of (or in connection with) which the loss and damage was suffered". Counsel highlighted, as has been done in the present case, the case of delay where no goods are physically damaged (see paragraph 14). Counsel for the carrier said, as has been said in the present case, that it was clear that the limit was by reference to the weight of goods physically damaged and that in cases of delay where there was no physical damage there was no limit (see paragraph 15).

78. Burton J. referred to the travaux préparatoires. He said that there was no bull's eye but "something for everyone" in them. He concluded that he was taken no further forward by reference to them (see paragraphs 20-24). Burton J. referred also to *Data Card* but was unassisted by it (see paragraphs 25-30). He then set out counsel's submissions in more detail (at paragraphs 31-34) and addressed the wording of Article IV r.5 (a) at paragraphs 37-44.

79. Burton J. said that "…the expression *lost or damaged goods* is referring to two categories of goods, goods that are *lost* in the sense of vanished, gone, disappeared, destroyed and goods that are *damaged*, in the sense of not being lost, but surviving in damaged form". He concluded that the expression "loss or damage" and the expression "goods lost or damaged" do not carry the same meaning and so counsel's attempt to construe the latter by reference to the former failed (see paragraph 37).

80. Burton J. did not consider it possible to describe the physically undamaged goods in the case as economically damaged. "Their value may have been affected. There may be depression in respect of their price. The goods may be depreciated. But in my judgment they cannot sensibly be described as damaged" (see paragraph 39).

81. With regard to the submission that "goods lost or damaged" meant "goods in connection with which loss or damage has been suffered" Burton J. had regard to Lord Morton's explanation of the phrase "loss or damage to or in connection with the goods" in *Renton*

v Palmyra. Burton J. regarded the goods in question as being the goods which were damaged. "In my judgment therefore, what is permitted by article IV r.5(a) is a claim in respect of (lost or) damaged goods, and a claim for loss or damage in connection with those (lost or) damaged goods, but in the second part of the clause the weight of those (lost or) damaged goods is then taken as the limit" (see paragraphs 41 and 42). For this reason the submission was rejected.

82. Burton J. then addressed the anomalies which would be created in the event that "goods lost or damaged" did not include economically damaged goods. They were, first, that liability for economic loss caused by delay would not be limited and, second, that the cargo owner would have no incentive to incur expenditure in mitigating damage because the fewer goods that were damaged the smaller would be the limit, unless all physical damage was avoided in which case there would be no limit at all (see paragraphs 32 and 34 for counsel's submissions in this regard). Burton J. was not impressed by these suggested anomalies because unusual or unwanted effects were to be expected where an international agreement had been reached by negotiation and compromise. Further, economic loss caused by delay was not frequent and the expenditure of substantial sums in mitigation would be rare and unusual (see paragraph 43).

83. Burton J. therefore concluded that the cargo claim was limited by reference to the weight per kilogramme of the physically damaged goods.

84. In the present case counsel for the Claimant invited me to depart from the decision of Burton J. on the grounds that it was in error. Counsel for the Defendant invited me to follow parts of Burton J.s reasoning, in particular, those parts where Burton J. concluded that "lost or damaged goods" did not extend to economically damaged goods; see paragraphs 56-60 of Counsel's Skeleton Argument. However, my understanding of paragraphs 6 and 51 of Counsel's Skeleton Argument is that Counsel did not seek to uphold the part of the judgment in which Burton J. held that in the phrase "loss or damage to or in connection with the goods" the goods in question were the goods which had suffered loss or damage.

85. The doctrine of precedent does not require me to follow the decision of Burton J., notwithstanding that Burton J.'s decision has stood for almost 14 years. However, he was an experienced and greatly respected member of this court and his decision is obviously of persuasive authority. But in circumstances where I have been invited not to follow it I must address the issue myself. If I am satisfied that it was wrong then I may depart from it.

86. I first refer to Burton J.'s decision that "goods lost or damaged" did not extend as a matter of language to economically damaged goods. Burton J. said: "Their value may have been affected. There may be depression in respect of their price. The goods may be depreciated. But in my judgment they cannot sensibly be described as damaged."

87. Burton J. was, with respect, right to say that the value of the physically undamaged goods had been "affected", that there had been a "depression in respect of their price" and that the goods had been "depreciated". Those words explain what had happened to the whole of the cargo as a result of a casualty at sea (heavy weather causing a leakage into the cargo holds which physically damaged part of the cargo but caused an economic loss to the whole of the cargo by reason of its reputation as a distressed cargo). But the

question is whether that form of economic loss enables one to say that the whole cargo had been "damaged". I think it does, for the reasons given earlier in this judgment having regard to the particular context of carriage of goods by sea. I would therefore, with great respect, differ from Burton J. when he said a depreciation in value did not amount to damage. In my respectful opinion that conclusion fails to give proper effect to the context of carriage of goods by sea.

88. I next refer to Burton J.'s holding that in the phrase "loss or damage to or in connection with the goods" the goods in question were the goods which had suffered loss or damage. On the facts of *The Limnos* the depreciation in value of the whole cargo caused by the cargo having acquired a reputation as a distressed cargo *was* in connection with the cargo which had suffered physical damage. Indeed, the economic loss was consequential on the physical damage; see paragraph 39(iii) of Burton J. s judgment. But it is clear from paragraphs 41 and 42 of his judgment that Burton J. held that as a matter of construction of Article IV r.5(a) the "goods" in the phrase "loss or damage to or in connection with goods" referred to the goods which had been physically damaged.

89. I respectfully disagree with this holding. In *Renton v Palmyra* the cargo owners sought to recover the cost of forwarding the goods from Hamburg where they had been taken by the shipowner (because of strikes in the discharge ports of London and Hull). There was no physical damage. In the passage in the speech of Lord Morton relied upon by Burton J. Lord Morton said that the words "in connection with" were wide enough to cover the loss or damage sustained by the cargo in forwarding the goods. There is nothing in Lord Morton's speech which required "the goods" to have suffered loss or damage. In my judgment "the goods" must refer to the goods which are the subject of the contract of carriage. If loss or damage occurs in connection with them then the shipowners' liability is within the class of claims which are subject to the limit. Delayed delivery is an example of loss or damage in connection with the goods where there is no physical damage.

90. Counsel for the Defendant did not seek to uphold this part of Burton J.'s reasoning. Instead, he submitted that it was not critical to Burton J's decision. However, it was, I think, critical to his decision to reject counsel's submission that "goods lost or damaged" means "goods in connection with which loss or damage has been suffered". It was Burton J.s understanding of what Lord Morton said which gave rise, in Burton J.'s view, to "a real problem" for counsel.

91. Lastly, I refer to Burton J.'s treatment of the anomalies relied upon by counsel. Burton J. observed, correctly in my judgment, that where an international agreement has been reached after negotiation and compromise, there will be unusual and unwanted effects. I would add that it is not the court's function to seek to construct a different compromise from that which the international parties have made. Burton J. concluded that the suggested anomalies did not get near to flouting business common sense or to being contrary to commercial good sense. I would, with great respect, differ from this conclusion.

92. With regard to the claims for economic loss caused by delay the result of Burton J'.s construction of Article IV r.5(a) is that they are not subject to a limit. In circumstances where the early part of that Article purports to apply a limit to such claims that is an anomaly which is inconsistent with the aim or object of Article IV r.5(a) which was to provide a limit to such claims. I accept that one must treat suggestions of anomalies

with "caution and circumspection" (as submitted by Counsel for the Defendant; see paragraph 89 of Counsel's Skeleton Argument) lest one seeks to rewrite the compromise agreed by the contracting states. But the contracting parties' intention to limit the carrier's liability for economic loss or damage where it is in connection with the goods which are the subject of the contract of carriage is clear from Article IV r.5(a). To construe the words "goods lost or damaged" consistently with that intention is not to rewrite the compromise reached by the contracting states or to "superimpose a purpose or intention which is not apparent from the words" (as suggested by Counsel for the Defendant at paragraph 90 of his Skeleton Argument). It is to give effect to that compromise.

93. With regard to the financial costs of taking steps to mitigate loss and damage the same analysis applies. They are another example of economic loss or damage in connection with the goods, the carrier's liability for which was intended to be limited. If the steps to mitigate are wholly successful so that there is no physical loss or damage then, on Burton J.'s approach, there is no limit. That would be an anomaly given the intention to limit such liability. It can be avoided by construing "goods lost or damaged" so as to give effect to that contention.

94. But the argument based upon mitigation goes further. A cargo owner has a duty to mitigate loss caused by the carrier's breach of contract. If, despite attempts to mitigate, there is some small physical damage the cargo owner will have succeeded in reducing the limit of the carrier's liability to an amount based upon the weight of the small amount of cargo which was, despite his efforts, damaged. If he is successful in preventing all physical damage then there is no limit at all. It makes mitigation something of a gamble. This appears to me to be wholly contrary to commercial good sense because it would be a disincentive to mitigate. It entitles one to ask whether it truly reflects the ordinary meaning of the words used in Article IV r.5(a) having regard to its context and the aim and object of the Hague-Visby Rules. If the words "goods lost or damaged" are interpreted to mean "goods lost or damaged physically or economically" so as to accord with the intention to limit liability for economic loss or damage then the surprising "gamble" of mitigation is removed.

95. Burton J. also said that claims for economic loss without physical loss by reference to delay were not frequent and that the scenario which posited substantial sums being expended on mitigation would be rare and unusual. These matters are perhaps matters of impression based upon one's experience. I do not consider that I could be confident that delay claims without physical damage are not frequent or that claims for substantial sums spent on mitigation are rare and unusual. But even if Burton J.'s impression is correct the anomalies are nevertheless so striking that, in my judgment, they cause one to doubt the construction of Article IV r.5(a) which gives rise to them. In so far as it matters the types of economic loss suffered in the present case, liability to pay salvage and on-shipment costs are, in my experience, very common.

96. I have endeavoured to consider with care the decision of Burton J. I have noted that in paragraph 37 he said that the expression "loss or damage to or in connection with goods" and the expression "goods lost or damaged" do not carry the same meaning. I accept that there must be some contexts where the former expression can be wider than the latter expression and include economic loss where the goods themselves have not been lost or damaged. I also accept that where different phrases are used in the same clause they will often have different meanings. But in the present context the two

phrases are very closely linked. The first phrase is in that part of the Article which identifies the liabilities which are subject to limit and the second phrase defines or quantifies that limit. In that context one would expect that "goods lost or damaged" would have a meaning which reflects and gives effect to the liabilities which are subjected to the limit. Put the other way, one would not expect "goods lost or damaged" to have a meaning which resulted in liability for economic loss or damage, which is stated by the first phrase to be subject to limit, not to be limited after all. This consideration strongly suggests that "goods lost or damaged" includes not only physically damaged goods but also economically damaged goods. Burton J. noted this point when recounting the submissions of counsel; see paragraphs 32-33. But when he rejected the submissions of counsel for the cargo owner in paragraph 37 he made no reference to it. He simply stated that "the two expressions do not carry the same meaning" without explaining why the close linkage between the two phrases does not suggest that the second phrase should be construed in a manner which gives effect to the limit created by the first phrase.

97. Thus, when considering whether I am persuaded that Burton J. reached the wrong conclusion, I have to bear in mind (i) that he appears to have reached the conclusion that the wording of the two phrases had different meanings without dealing with the close connection between the two, which must be an important part of the context; (ii) that he erred in his understanding of "the goods" to which reference is made in the first phrase; and (iii) that, for the reasons I have described above, his construction of Article IV r.5(a) gives rise to anomalies of such nature that they cause one to doubt that that construction is correct. Having borne those matters in mind and having examined again the reasons I have given for thinking that a depreciation of the value of goods at the discharge port can amount to "damage" in the particular context of the carriage of goods by sea, I am persuaded that the decision of Burton J. was, with very great respect, wrong and that I should not follow it.

98. The final case to which I should refer is *The Aqasia, Vinnlustodin HF v Sea Tank Shipping*, [2018] 1 Lloyd's Reports 530. In that case the Court of Appeal held that Article IV r.5 of the Hague Rules did not provide a limit in the case of bulk cargoes. Flaux LJ reached the "firm conclusion" that on the true construction of the words "package or unit" in Article IV r.5 of the Hague Rules "unit" meant a physical item of cargo and was not a unit of measurement; see paragraph 23 and ff. Yet it could have been said that the opening words of Article IV r.5 applied the limit to liability for any loss or damage to or in connection with goods, wording which is wide enough to include bulk cargoes, and in that context the words used to define or quantify the limit could not reasonably have been regarded as not applying to bulk cargoes. This submission was not made in terms but a submission rather like it, based upon the wide definition of "goods", was made and dismissed; see paragraph 27. The decision thus suggests that the words defining or quantifying the limit at the end of Article IV r.5(a) can ultimately determine what is, and what is not, covered by the limit provided earlier in the Article. Counsel for the Claimant suggested that the decision in *The Aqasia* did not really assist because the Hague Rules never set out to limit claims in respect of bulk cargoes. In this regard I have noted that in 1924 the price of bulk cargoes was such that the limitation provision would not have been seen as relevant; see paragraph 30 of Flaux LJ's judgment. The decision nevertheless suggests that although the first part of the clause may appear to apply a limit to certain claims the clause must be looked at as a whole before one can conclude that those claims are indeed subject to the limit defined or

quantified at the end of the Article. However, *The Aquasia* was concerned with the meaning of "unit" which, for several reasons, was found to be clear. Those reasons are set out in paragraphs 24-26 and 28-29 of Flaux LJ.'s judgment. Moreover, the "firm conclusion" reached by Flaux LJ was supported by the courts in other common law jurisdictions, was favoured by the majority of academic commentators and textbooks and was confirmed by the travaux préparatoires for the Hague Rules (see paragraph 33). Indeed "the clear meaning" (see paragraph 53) of "unit" was supported by a "bull's eye" such that the travaux préparatoires "clearly and indisputably point[ed] to a definite legislative intention". In the result, there is little to draw from the dismissal of the argument in paragraph 27 which can assist in understanding the meaning of the words "goods lost or damaged" in Article IV r.5(a) of the Hague-Visby Rules, which words were not before the Court of Appeal and were not considered by it.

The textbooks and commentaries

99. *Voyage Charters by Young et al* 5th.ed. describes the decision in *The Limnos* as "not altogether satisfactory", commenting that "the disharmony between what type of loss and damage is recoverable under the Hague Rules ……and the limitation applicable to such claims is somewhat surprising" (see paragraph 66.405). The editors also suggest that the effect of the decision was that it was difficult to see what incentive a cargo owner would have to mitigate loss and damage if he thereby limits the damages he can recover. The editors remarked that it was not an uncommon experience in some parts of the world that modest surface-damaged cargo can prevent discharge of the whole cargo.

100. *Carver on Bills of Lading* 5th.ed. states (at paragraph 9-289) that "on principle it seems clear that reference should be made to the weight of what is damaged" but the comment does not appear to have been made with reference to cases where the whole cargo suffers economic damage. The editors then observe that the decision in *The Limnos* "might seem a surprising conclusion, particularly as it involved treating "goods lost or damaged" as having a different meaning from "loss or damage to or in connection with the cargo in the same subrule (a) of Art.IVr.5. It also produces surprising results in a claim for delay, where there are no goods damaged to start the calculation off." But then it is also observed that "overall, it is difficult to get any other meaning out of the words, which seem to have been used without any thought as to this particular problem. It should be remembered that not all delegates at Brussels may have thought of recovery for economic loss as being appropriate or permitted by Article IV r.5 (a) at all" (see paragraph 9-290).

101. *Bills of Lading* 3rd.ed *by Aikens et al* suggests, following *The Limnos*, that "in pure economic loss cases there is no limit, as the carrier argued in that case" (see paragraph 11.351). However, the editors think that the issue with regard to mitigation is more problematic but, like the judge, thought it was unlikely to arise in practice.

102. Professor Baughen in his case note on *The Limnos* in 2008 LCMLQ 439 entitled *Economic Loss Claims and the Hague-Visby Gross Weight Limitation Figure* refers to the result that there is no limitation figure in cases of pure economic loss, such as delay, as an anomaly. "The first phrase in Art. IV r.5(a) subjects such claims to limitation but then the second phrase means that no limitation figure can be calculated , and the claims are not therefore subject to limitation after all. One wonders whether the drafters of the Visby amendments really intended to create such a two tier system of gross weight

limitation (at p.443).” He doubted that such claims were rare, citing *The Heron II.* He also thought that there was much to be said for the argument that the decision may act as a disincentive to mitigation.

103. These comments and observations, whilst questioning the decision in *The Limnos,* do not provide me with any ready solution. I have to decide this case on the basis of the arguments which have been addressed to me.

Conclusion (on the primary argument)

104. In the light of all that has gone before I can express my conclusion shortly. Where goods are carried by sea they may, as a result of fault by the carrier, be damaged physically or economically. In the present case the goods were damaged economically because the value of the goods was diminished on arrival at the discharge port as a result of the Claimant having to incur salvage charges and on-shipment costs which were necessitated by reason of the casualty which befell the vessel and her cargo. The textual context in which the words “goods lost or damaged” are found in Article IV r.5(a) is one in which they serve to define or quantify the limit to which the claims described earlier in the Article are subject. In that context one would expect those words to give effect to, and not frustrate, the aim of the Article which was to limit the carrier’s liability for loss or damage to or in connection with the goods. If the phrase “goods lost or damaged” means “goods lost or damaged physically or economically” then the aim of the Article is achieved. Such a meaning is the ordinary meaning of “goods lost or damaged” in the context of contracts for the carriage of goods by sea.

105. On that construction of Article IV r.5 (a) the liability of the Defendant in respect of the Claimant’s liability to the Salvors is limited to 2 SDRs per kilogramme of the whole cargo. Likewise the liability of the Defendant in respect of the on-shipment costs incurred by the Claimant is limited to 2 SDRs per kilogramme of the whole cargo.

Alternative submissions

106. In the light of that conclusion it is unnecessary to decide the alternative submissions advanced by counsel for the Claimant. However, they were addressed in argument upon the assumption that Burton J.’s decision in *The Limnos* was correct, and so I think I should decide them.

107. The first alternative submission is made on the basis that, as held by Burton J. in *The Limnos*, “goods lost or damaged” means “goods lost or which survived in damaged form”. In that event it was submitted that the cargo in this case was physically damaged in that it was subject to the salvor’s maritime lien and so the Claimant’s proprietary or possessory title to the cargo was damaged.

108. Liability for salvage and the provision of a maritime lien on cargo in respect of a claim for salvage are well known internationally; see, for example, The International Convention on Salvage 1989, in particular articles 12, 13, 20 and 21. They are not simply matters of English law. Where ship and cargo have been salved and the salved property is encumbered by a maritime lien I consider that a cargo owner of any nationality would regard his proprietary interest in his cargo as having been damaged. He can no longer deal with the cargo as his own. Before he can do so he must provide security for the salvage claim. His proprietary interest is not what it was. It is now a

lesser interest because it is subject to a maritime lien. That interest has been damaged. The extent of the damage is measured in money but it is not purely an economic loss. The property in the goods has been damaged.

109. There is no decision to this effect with regard Article IV(5)(a). It did not arise in *The Limnos*. There are however two cases, one English and one Australian, which involve discussion of a maritime lien for salvage in other contexts.

110. *The Breydon Merchant* [1992] 1 Lloyd's Rep.373 concerned a shipowner whose vessel had suffered a fire in her engine room leading to the need for a salvage service. The shipowner sought a decree limiting his liability under the Limitation Convention. One of the claims brought against the owner was a claim by cargo owners for damages in respect of the cargo owners' liability to pay salvage. They argued that their claim was not subject to limitation. That depended upon whether it was a claim "in respect of …..loss of or damage to property" occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom. Sheen J. held that it was and reasoned thus:

> "The shipoowners' breach of contract made it necessary to engage salvors. As I have already said, the salvors had a lien upon the cargo for their reward. If the cargo-owners had not given security for the salvage claim, the cargo could have been arrested and, if necessary, ultimately sold on the application of the salvors. The amount due to the salvors in respect of each parcel of cargo was damage to that cargo. In a claim for damages to cargo, the measure of damages is the diminution of the value of that cargo. It matters not whether that diminution in value results from the physical damage or actionable delay or by a reason of a lien for salvage. In any of these circumstances, the owners of the cargo have been damnified by that damage."

111. This analysis supports my view as to counsel's first alternative submission. Counsel for the Defendant submitted that it was of no assistance. First, it was concerned with a different convention drafted in different terms. Second, there was little detailed analysis of the question. Third, it did not invoke the modern approach based upon the Vienna Convention. Fourth, it was founded on English case law. Fifth, it considered that any clam in which damages are quantified by reference to the value of the cargo constituted "damage to the cargo".

112. It is true that the case was concerned with a different convention drafted in different terms. However, it is an illustration of how a maritime line for salvage can fairly and reasonably be regarded as damage to cargo. It is true that the reasoning was short. That may be said to be a merit of the decision in circumstances where the reasoning is clear. It is true that no reference was made to the Vienna Convention but if Sheen J. had said that he was seeking to give effect to the ordinary meaning of the words used having regard to the context and the aim and object of the Limitation Convention it is improbable that he would have reached any different conclusion. It is true that Sheen J. made reference to one English case by way of comparison but I do not consider it correct to say that his decision was founded on English case law. Rather, it was founded upon the effect of a maritime lien for salvage upon the cargo owners' property which is internationally recognised. It is true that Sheen J. considered that any diminution in value amounts to damage. I have expressed the same view in this case where such diminution results from the incurring of additional and unexpected expense or from

delay. But at this stage of the debate I have to assume that such view is wrong. The question now is whether imposition of a maritime lien on the cargo for salvage amounts to damage to the cargo-owner's proprietary interest in the cargo. I consider that it does for the reasons I and Sheen J. have given.

113. The "*Ikan Jahan", Tritton Resources v Ever Rock Navigation* [2019] 2 Lloyd's Reports 235 is a case decided in the Federal Court of Australia by Derrington J. (one of the authors of *Derrington and Turner on Admiralty Matters*). This was another case which concerned a maritime casualty (a grounding) which led to the engagement of salvors. The cargo owners incurred a liability to pay salvage. The cargo was physically unaffected by the grounding and so the cargo owners' claim against the shipowner was only in respect of their liability to pay salvage (see paragraph 71). One of the questions which arose was whether one claimant, J.P.Morgan, had title to sue in tort (see paragraphs 147, 152, 154 and 156). It was suggested that J.P.Morgan did not have title to sue because it had suffered pure economic loss. The question arose upon an application for leave to amend a pleading.

114. At paragraph 156 Derrington J. said:

> "Additionally, once the grounding had occurred JP Morgan as owner became liable for the charges that would be incurred in the salvage of the ship…….. Consequently, its cargo became subject to the imposition of a lien in respect in respect of its portion of the charges. Had it not …..provided security for the cost of salvage the salvor's lien would have taken effect over the cargo and diminished it in value……."

115. At paragraph 157 Derrington J., having referred to *The Breydon Merchant*, said:

> "The effect of the imposition of the lien on the cargo is that its value is reduced as are the proprietary rights of cargo owners which are diminished to the extent that the lien attaches. The lien and accompanying rights of salvors cause a loss of property to the cargo owners. To this extent the loss is not merely a diminution in value of the goods, but it includes a loss of property or property rights in the goods. In this respect the cause of action in tort as sought to be formulated in the proposed amended statement of claim is one for property damage to the cargo and consequential loss."

116. Derrington J. then noted the submission of counsel for the shipowner that the physical integrity of the cargo remained unchanged and that the claim was for pure economic loss. She continued:

> "As this submission went to the question of whether leave ought to be given to amend the pleading it is not a question that needs to be answered definitively. That said, the consequence of the conduct of which JP Morgan complains is not merely a diminution in the value of the cargo. It is the loss of proprietary rights over and with respect to it by the crystallisation of the salvors' lien. Whilst the consequence of that might be that a sum of money needs to be paid to remove the lien and restore full ownership rights, it is more than arguable that that the loss is property damage rather than pure economic loss."

117. With regard to this clear exposition of the effect of a salvor's lien on the cargo owners' property rights counsel for the Defendant submitted that it was unhelpful because (i) it did not involve the construction of the words "goods lost or damaged" in the Hague-Visby Rules; (ii) it turned upon national concepts of what in law may constitute damage; and (iii) was not definitive.

118. It is true that the decision did not concern the construction of the Hague-Visby Rules. But for this purpose I am assuming that Burton J.'s construction of Article IV r.5 (a) is correct and considering whether it can fairly be said that the entire cargo on board *Thorco Lineage* had been damaged. It is true that Derrington J's analysis, like that of Sheen J., is based upon the common law's understanding of damage to property. But that analysis reflects concepts which are understood in all maritime jurisdictions, whether they be common law, civil law or other jurisdictions, namely, salvage, the liability of cargo to contribute to salvage, the salvors' maritime lien, the need to put up security to free the cargo from the lien, and the consequences of a failure or refusal to put up security. In those circumstances I consider that if I apply that analysis when considering whether the goods on board the vessel in this case were damaged I am adopting a sufficiently international approach which would be understood across the maritime world. Finally, I accept that Derrington J.'s decision was not definitive (because it arose on an application to amend) but it is clear and robust.

119. In opposition to these two cases which concerned with the effect of a maritime lien on property counsel for the Defendant referred to *Gwynt Y Mor Ofto PLC v Gwynt Y Mor Offshore Wind Farm Limited and others* [2020] EWHC 850 (Comm) in support of the proposition that "damage" was tied to a physical alteration in the condition of the item in question. That case concerned the construction of a sale and purchase agreement of a business and in particular the construction of an indemnity in respect of assets which were "destroyed or damaged" prior to completion. The context is entirely different from the context in the present case and I do not consider that the decision in that case assists at all.

120. One of the cases to which Phillips LJ (the trial judge) referred (see paragraph 49) was a decision of the Supreme Court of Tasmania where it was held that, prima facie, "damage" referred to "a physical alteration or change …….which impairs the value of the things said to have been damaged." I do not know what the context was in that case and so I am wary of placing reliance upon it. It may however be said that it mirrors the approach of Burton J. in *The Limnos* who held that "goods ……damaged" in Article IV r.5 (a) referred to goods which have not been lost but have survived "in damaged form". But what does that test require ? Counsel for the Defendant submits that there must be a change in the physical state of the goods. Burton J. did not consider the meaning of "damaged form" in the context of a maritime lien on cargo for salvage because he did not have to. Those were not the facts of the case before him. I accept that a change in the physical state of the goods will amount to the goods being in "damaged form" (so long as the change affects the value of the goods) but I am not persuaded that those are the only circumstances in which it can be said that the goods are in "damaged form". As I have said earlier a cargo owner would be the first to say that, as a result of the imposition of a maritime lien on his cargo, his property rights had been damaged. He was no longer able to deal with the cargo as he could have done before the imposition of the lien and could only do so again if he provided security for the salvors' claim. I think that in such a case the cargo has survived but in damaged form. Reference was

made to the OED which defines damage as "loss or detriment caused by hurt or injury affecting estate, condition or circumstances; or injury, harm, esp. physical injury to a thing , such as impairs its value or usefulness". The imposition of a maritime lien is a loss or detriment and an injury or harm which impairs the value of the goods.

121. For these reasons I would have held, had it been necessary to do so, that the goods on board the vessel were physically damaged within the meaning of Article IV r.5(a) by reason of the imposition of a maritime lien on the Claimant's proprietary or possessory interest in them.

122. Thus, on this basis also, the liability of the Defendant in respect of the Claimant's liability to the Salvors would be limited to 2 SDRs per kilogramme of the whole cargo. However, the maritime lien is not in respect of the on-shipment costs incurred by the Claimant. Whether or not there is a limit in respect of them would depend upon the second alternative submission.

123. The second alternative submission is that, if Burton J. was correct in *The Limnos* and if the maritime lien does not result in the cargo being damaged, then the liability of the Defendant to indemnify the Claimant in respect of salvage and the on-shipment costs is unlimited because those economic losses are not consequential upon the relatively small amount of physical damage which was caused by the Defendant's (assumed) breach of contract.

124. In *The Limnos* the claims were limited to the value of the physically damaged cargo in circumstances where the effect of that damage on the value of the cargo as a whole and the monies spent on them were "plainly consequential" upon the physical damage; see paragraph 39 (iii) of the judgment of Burton J. This is to be contrasted with the present case where the salvage liability was caused by the salvage service and where the on-shipment costs were caused by the circumstance that the safe port to which the cargo had been taken was not the port of destination. There is no suggestion that either the salvage liability or the on-shipment costs were consequential upon the small amount of cargo which was physically lost or damaged.

125. In his oral submissions Counsel for the Claimant emphasised the need for such a "consequential link" between the physical damage and the economic losses. Where there was no such linkage – where the economic losses were not consequential upon the physical losses – then the liability for those losses must be unlimited because there is no relevant physically damaged cargo.

126. In his oral submissions Counsel for the Defendant responded to this argument by submitting that there was no requirement for the suggested linkage between the physical damage and the economic losses. Once there is a liability for "loss or damage to or in connection with the goods" then there is an automatic limit pursuant to the formula based upon the "goods lost or damaged" at the end of the Article. Counsel accepted that if there are no "goods lost or damaged" then the liability is not subject to a limit. With regard to the reasoning of Burton J. in *The Limnos* counsel accepted that on the facts of that case the economic losses were consequential upon the physical loss or damage but he submitted that such linkage was not a necessary part of Burton J.'s reasoning. If he were wrong about that then he submitted that in the present case there was "a causal association" in that the economic losses were caused by the assumed breach of Article III r.1 as was the physical damage to the cargo.

127. In *The Limnos* Burton J. at paragraph 39(iii) emphasised that the economic losses were consequential upon the physical damage (I have in mind his phrase "plainly consequential") and at paragraph 41 he explained that, on his construction of Article IV r.5(a), the limit was to be assessed by reference to the weight of the lost or damaged goods in connection with which consequential loss or damage had been suffered. That suggests that the consequential "linkage" was a necessary part of his reasoning. At any rate there is nothing in his judgment which suggests that he would have reached the same decision in the absence of that consequential connection. It seems to me improbable that he would have done so.

128. Although Article IV r.5(a) does not provide expressly for the linkage suggested by the Counsel for the Claimant, there is sense (on Burton J.'s construction of the Article) in quantifying the limit by reference to the tonnage of the lost or damaged goods where the carrier's liability is in respect of such lost or damaged goods or for loss consequential upon them. But it was submitted by Counsel for the Claimant that there was no sense in quantifying the limit by reference to the tonnage of lost or damaged goods where the carrier's liability for economic losses is not consequential upon the goods lost or damaged at all. In the present case it was, said Counsel for the Claimant, "pure happenstance" that the grounding not only caused the salvage liability and the on-shipment costs but also caused a small amount of physical damage.

129. However, it is common ground (see especially paragraph 6 of the Skeleton Argument of Counsel for the Defendant) that Burton J. was wrong to hold that "the goods" in the phrase "any loss or damage to or in connection with the goods" are those which are physically lost or damaged. In those circumstances the submission made by Counsel for the Defendant was, of necessity, not based upon Burton J.'s construction of Article IV r.5(a). Instead his submission was that if there is economic loss or damage in connection with the goods which were the subject of the contract of carriage then, if there is also physical loss or damage to such goods, the carrier's liability for the economic loss or damage is limited by reference to the weight of the physically lost or damaged goods and if there is no such physical loss or damage then the carrier's liability for the economic loss lor damage is unlimited. I have already rejected that submission. But in this part of my judgment I must assume that the submission is correct. The question then is whether, in the present case, where the carrier is assumed to be liable for some goods physically lost or damaged as a result of a maritime casualty caused by the carrier's breach of the contract of carriage, the carrier's liability for economic loss or damage arising out of the same maritime casualty in connection with the goods which were the subject of the contract of carriage is limited to a sum based upon the weight of the goods physically lost or damaged.

130. Counsel for the Claimant submits that there must be a linkage between the physical damage and the economic damage in the sense that the latter must be consequential upon the former. Counsel for the Defendant submits that there is no need for a linkage but that if there is then it is sufficient that both the physical damage and the economic damage are caused by the same breach of contract by the carrier.

131. Although Article IV r.5(a) does not expressly refer to the need for any linkage there must be an implicit link; otherwise how (on the Defendant's case) would one determine whether any physical damage to the cargo was relevant to the assessment of the limit ? The implicit linkage must, I think, be that both the physical damage and the economic damage are both caused by the same breach of contract by the carrier. That implication

seems to be necessary in the context of a limit to the carrier's liability ("neither the carrier nor the ship shall in any event be or become liable for"). There may also be, depending on the facts of the particular case, a "consequential" linkage but the common causality appears to me to be the minimum linkage necessary (on the Defendant's case).

132. That linkage exists on the facts assumed for the purposes of this application. I would therefore have to reject Counsel for the Claimant's second alternative submission that the carrier's liability for the losses in questions was unlimited.

133. It was said by Counsel for the Claimant that this would be an irrational result because the limit would depend upon the chance that the maritime casualty which gave rise to economic loss, say a salvage liability, also happened to cause some physical loss or damage. In the absence of such damage the liability for the economic loss would be unlimited. However, I am assuming at this stage of the judgment that the construction advanced by Counsel for the Defendant is the ordinary meaning of Article IV r.5(a) and on that assumption I must give effect to it notwithstanding that the result may be surprising.

Conclusion

134. For the reasons given in paragraphs 51-105 the limit of the Defendant's liability in respect of the Claimant's liability to pay salvage and the on-shipment costs is based upon 2 SDRs per kilogramme of the entire cargo. I am told that that limit exceeds the Defendant's liability.

135. If that conclusion is wrong then, for the reasons given in paragraphs 106-122, the Defendant's liability in respect of the Claimant's liability to pay salvage is again based upon 2 SDRs per kilogramme of the entire cargo. However, that would not apply to the liability in respect of on-shipment costs and, for the reasons given in paragraphs 123-133, the limit of the Defendant's liability in respect of the on-shipment costs would be based upon 2 SDRs per kilogramme of the physically lost or damaged cargo. Since the claim for on-shipment costs is in the sum of US$723,831.85 and since I was told that the limit on the Defendant's case was about US$800,000 it may be that the limit exceeds the Defendant's liability for on-shipment costs. However, I do not know that to be the case.

136. I am most grateful to counsel for their clearly focused and most skilful submissions which were of great assistance to me. May I ask counsel to agree an order giving effect to paragraph 134 of this judgment.