Neutral Citation Number: [2025] EWHC 368 (Comm)

Case No: CL-2023-000331

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 27 February 2025

Before :

MR JUSTICE BRIGHT

- -

Between :

Tanga Pharmaceuticals Plastics Limited
and others

Claimants

- and -

Emirates Shipping Line FZE

Defendant

- -
- -

Benjamin Coffer and Caleb Kirton (instructed by Kennedys Law LLP) for the Claimants
Michael Collett KC and Patrick Dunn Walsh (instructed by Ehlermann Rindfleisch Gadow) for the Defendant

Hearing dates: 13 February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10:00am on 27/02/25 by circulation to the parties' representatives by e-mail and by release to the National Archives.

.....

Mr Justice Bright:

1. This judgment is concerned with the application of the Defendant for summary judgment against the Claimants, on the basis that the Claimants' claims are time-barred.

The assumed facts

2. It was common ground that, for the purposes of this hearing, the following facts could be assumed.

3. The Claimants are the owners of, or have interests in, 548 containers and their contents (the "Cargo"), which was shipped aboard MV "Alion" (the "Vessel"), for carriage by sea to Mombasa in September 2021. The Defendant was the carrier under the applicable bills of lading.

4. The Defendant chartered the Vessel from her owners, Alion Maritime Limited, under a time charter dated 9 August 2021.

5. The Cargo was shipped under identical bills of lading (the "Bills of Lading"), for carriage from India, the UAE, and Saudi Arabia to Mombasa, Kenya. The Bills of Lading were all issued by the Defendant and were all expressly governed by English law and subject to English jurisdiction.

6. The Vessel suffered a motor engine failure on 15 September 2021, off Salalah coast, in the Arabian Sea.

7. On 20 September 2021, Tsaviliris Salvage International ("Salvors") rendered salvage services under the terms of a Lloyd's Standard Form of Salvage Agreement ("LOF") to the Vessel and its cargo. The LOF was terminated and thereafter general average declared on or around 5 October 2021.

8. With the assistance of salvage agents, the Vessel discharged at Mombasa on 6 December 2021.

9. The Cargo was subsequently released to receivers at Mombasa, when salvage security and general average security had been provided.

10. Settlement agreements were reached between the Defendant and Salvors on 29 July 2022. The Claimants reached a settlement with Salvors at around the same time.

11. On 3 November 2022, the Claimants notified the Defendant of claims they intended to bring under the contract of carriage contained in or evidenced by the Bills of Lading, seeking indemnity for their liability to Salvors and (in some cases) for particular average.

12. On 18 November 2022, the Defendant granted the Claimants an extension agreement until 20 March 2023, expressly on condition that the claims were not already time barred. This extension was later renewed until 20 June 2023.

13. The Claimants issued a claim form dated 16 June 2023, asserting claims against the Defendant under the contracts of carriage contained in or evidenced by the Bills of

Lading. As previously indicated, the claims related to the settlement with Salvors and to particular average costs and expenses.

14. On 27 June 2024, the Claimants obtained an order from the court, extending the period of the validity of the claim form for service, until 16 December 2024. Service took place on 5 July 2024.

The Bills of Lading

15. The front of each Bill of Lading identified the relevant container(s) and what it was said to contain, and included typical wording stating that they had been received for carriage:

> "… on the terms and conditions hereof INCLUDING THE TERMS AND CONDITIONS ON THE REVERSE SIDE HEREOF."

16. The terms on the reverse included the following:

> "**1. DEFINITIONS**
> "Carrier" means Emirates Shipping Line DMCEST
> …
> "Hague Rules" means the provisions of the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 or any national legislation making such Rules compulsorily applicable to this Bill of Lading.
> …
> **2. CLAUSE PARAMOUNT**
> (1)Save where the English Carriage of Goods by Sea Act 1971 applies the Hague Visby Rules compulsorily to this Bill of Lading, in which event this Bill of Lading shall be subject to the Hague Visby Rules, the Hague Rules shall apply and the Carrier shall be entitled to the benefit of all privileges, rights and immunities contained in Articles I to VIII of the Hague Rules, save that notwithstanding the provisions of Article III Rule 8 of the Hague Rules, the limitation sum for the purpose of Article IV Rule 5 of the Hague Rules shall be £100 pounds sterling.
> (2) Notwithstanding Clause 2(1) above, for shipments to and from the United States, this Bill of Lading shall be deemed to incorporate and shall give effect to the provisions of the United States Carriage of Goods by Sea Act (hereinafter "COGSA") approved April 16, 1936 and nothing herein nor contained in the said Act shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities thereunder, nor shall the Carrier be deemed to have warranted the seaworthiness of the Vessel. The provisions stated in COGSA shall govern the Goods before they are loaded on and after they are discharged from the Vessel and throughout the entire time that they are in the custody of the Carrier at a United States port and/or in the custody of any pre-carriers, on-carriers or subcontractors in the United States. The Carrier shall also have the benefit of Sections 181 to 189, inclusive of title 46 US Code and the benefits of Sections 4281 to 4286 inclusive and Section 4289 of the

United States Revised Statutes, as amended, the same as if it were the owner of the Vessel or other water craft used to transport the Goods.
(3) Notwithstanding Clauses 2(1) and 2(2) above, if this Bill of Lading is subject to legislation which makes the Hamburg Rules compulsorily applicable to it, then this Bill of Lading shall have effect subject to the Hamburg Rules when an action is brought in the country from or to which the Goods have been shipped (without prejudice to Clause 24) and the Hamburg Rules are compulsorily applicable in such country, which shall nullify any stipulation derogating therefrom to the detriment of the shipper or consignee. If the Hamburg Rules are compulsorily applicable to this Bill of Lading by reason of the aforesaid, it is hereby agreed that the date of delivery of the Goods shall be six (6) months from the date of shipment.

…

9.CARRIERS RESPONSIBILITY PORT-TO-PORT SHIPMENTS, TRANSSHIPMENTS

Save as otherwise indicated on the face hereof, where the Carriage under this Bill of Lading is from the Port of Loading to the Port of Discharge, the liability (if any) of the Carrier for the loss of or damage to the Goods occurring from and during the loading onto any seagoing Vessel up to and during discharge from said Vessel or from another vessel into which the Goods have been transshipped shall be determined in accordance with Clause 2 hereof. Notwithstanding the above, the Carrier shall be under no liability whatsoever for loss of or damage to the Goods howsoever occurring, when such loss or damage arises prior to the loading on or subsequent to the discharge from said Vessel(s) unless the Goods are loaded or discharged at ports in the United States and save where the Hamburg Rules apply compulsorily.
Where the Goods under this Bill of Lading are to be transhipped and/or forwarded, then save as otherwise indicated on the face hereof the Carrier's responsibility as Carrier shall terminate when the Goods are delivered to the party transhipping and/or forwarding and the Carrier shall thereafter be under no liability whatsoever for loss of or damage to the Goods howsoever occurring. The party transhipping and/or forwarding the Goods shall thereafter be solely responsible vis-a-vis the Merchant and/or any interested party(ies) (owners of the Goods, shippers and/or consignees) for any loss of or damage to the Goods howsoever occurring after the moment when Carrier's responsibility shall terminate as aforesaid. In making arrangements for transshipment and/or forwarding, the Carrier shall (and is hereby authorised to) act only as AGENT for and on behalf of the MERCHANT.

…

18. NOTICE OF LOSS OR DAMAGE, TIME BAR

Unless notice of loss or damage and the general nature of such loss or damage is given in writing to the Carrier or his agent at the Port of Discharge or Place of Delivery as the case may be before or at the time of the removal of the Goods into the custody of the Merchant or if the loss or damage is not apparent, within three days after delivery, such removal shall be prima facie evidence of the delivery by the Carrier of the Goods as described in this Bill of Lading.

> Any claim against the Carrier for any adjustment, refund of or with respect to freight, charges or expenses or any claim other than for loss or damage to Goods must be submitted fully documented to the Carrier or its agent in writing within 20 days from the day when the Goods were or should have been delivered, failing which such claim will be time-barred.
> …
> In any event, the Carrier and the Vessel shall be discharged from any liability for loss of or damage to the Goods or with respect to freight, charges or expenses, or the refund thereof or any claim of whatsoever kind, nature or description, with respect to or in connection with the Goods unless suit is brought within one year of delivery of the Goods or the date when the Goods should have been delivered, failing which all such claims will be time-barred. If this Bill of Lading shall be subject to the Hamburg Rules, any claim in relation to the Carriage of Goods is time-barred if judicial proceedings have not been instituted within a period of two (2) years from the day of delivery of the Goods or from the last day on which the Goods should have been delivered. Suit shall not be considered to have been brought within time specified unless process shall have been actually served and/or jurisdiction obtained over the Vessel or Carrier within such time.
>
> **19. CLAIMS, TIME BAR – INTERMODAL SHIPMENTS**
> …Claims must be filed and suit commenced within the time limit provided by law and the terms of the bills of lading…
> …
> **24. LAW AND JURISDICTION**
> This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. The Merchant irrevocably submits to this jurisdiction."

17. Also relevant are the Hague Rules, in particular the provisions of Article III Rules 6 and 8:

> "6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.
> If the loss or damage is not apparent, the notice must be given within three days of the delivery.
> The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.
> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within

> one year after delivery of the goods or the date when the goods should have been delivered.
> In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.
> …
> 8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

The legal common ground

18. It was common ground that the Hague Rules were applicable as a matter of contract, pursuant to clause 2(1) of the Bills of Lading, this not being a case where the UK Carriage of Goods by Sea Act 1971 or where the Hague-Visby Rules or USCOGSA or the Hamburg Rules might be applicable.

19. It was common ground that, in such circumstances, the combination of clauses 2 and 9 is intended to apply the Hague Rules not only where the only carriage is from one port to another, but also to the port-to-port element of intermodal carriage. In other words, the word "where" in the first line of clause 9 is intended to mean "in so far as".

20. It was also common ground that, if the Hague Rules had been compulsorily applicable (rather than merely by contract), and in the absence of any contractual provisions to the contrary, Article III Rule 6 would have applied to the Claimants' claims and the limitation period would have been one year from the date of delivery or the date when the goods should have been delivered. Furthermore, Article III Rule 8 would have made any contractual provision that sought to relieve the carrier's liability, by imposing more stringent limitation provisions, null and void.

21. It therefore was common ground that, in those hypothetical circumstances, the Claimants' claims would not have been time-barred. Under English law and procedure, suit is commenced when the claim form is issued. The claims were not yet time-barred when the first extension was granted, because this was less than one year after delivery. The claim form was issued before the extensions expired.

22. This follows inevitably from the long-established principle that Article III Rule 6 is not confined to claims for actual loss of or physical damage to the goods, but applies to any claim for loss or damage suffered by the claimant which is related to the goods: see *Cargill International SA v CPN Tankers (Bermuda) Ltd (The "OT Sonja")* [1993] 2 Lloyd's Rep. 435, and the line of authorities referred to by Hirst LJ.

The arguments before me

23. Mr Collett KC, for the Defendant, argued for a different result on the basis of two sentences in clause 18:

i) The second sentence, which was referred to as the "20-day Provision":

> "Any claim against the Carrier for any adjustment, refund of or with respect to freight, charges or expenses or any claim other than for loss or damage to Goods must be submitted fully documented to the Carrier or its agent in writing within 20 days from the day when the Goods were or should have been delivered, failing which such claim will be time-barred."

ii) The final sentence, which was referred to as the "Service Provision":

> "Suit shall not be considered to have been brought within time specified unless process shall have been actually served and/or jurisdiction obtained over the Vessel or Carrier within such time."

24. Mr Collett KC said that, because the Hague Rules applied only as matter of contract, it was open to the parties to agree to amend or depart from the Hague Rules limitation regime.

25. Mr Collett KC accepted that the 20-day Provision had the effect of relieving the Defendant from liability which would have otherwise attached, but said that the incorporation of the Hague Rules – including Article III Rules 6 and 8 – was intended to be subject to clause 18, in so far as that had a contrary effect. He said that the Claimants' claims are with respect to charges or expenses, and in any event are not claims for "loss or damage to Goods".

26. Mr Collett KC took a slightly different stance in relation to the Service Provision. He relied on the same argument as before, in so far as necessary – i.e., that clause 18 prevailed over clause 2. However, he also said that, even if Article III Rule 8 were applicable, the Service Provision should not be regarded as relieving or lessening the Defendant's liability in a way that engages Article III Rule 8. Article III Rule 6 does not prescribe any specific way of identifying when suit is brought. In many countries, suit is not considered to have been brought until service. The Service Provision is consistent with this and still has the result that time under Article III Rule 6 runs until suit is brought, up to one year after delivery.

27. Mr Coffer, on behalf of the Claimants, said that the effect of incorporating the Hague Rules, including Article III Rule 8, in Bills of Lading that were subject to English law and the jurisdiction of the English court, was that the only step required to prevent the claim from becoming time-barred was the issue of the claim form within the relevant period. He also said that the 20-day Provision did not apply in this case, because (i) it is not intended to apply if the claim is for "loss or damage to Goods" and (ii) the claims here fall within that phrase.

28. I am grateful to both sides for the excellent quality, clarity and economy of their submissions.

29. It follows that there are three principal questions:

i) Is the incorporation of the Hague Rules in clause 2 made subject to clause 18, such that clause 18 prevails in so far as there may be any inconsistency?

ii) If clause 18 prevails, does the 20-day Provision apply?

iii) In any event, is the Service Provision compatible with Article III Rule 6 and Rule 8?

Does clause 18 prevail over the incorporation of the Hague Rules in clause 2?

30. There is no doubt that, where the Hague Rules apply only as a matter of contract, the parties are able to modify them, by agreeing to do so: *Dairy Containers Ltd v Tasman Orient Line CV (The "Tasman Discoverer")* [2004] UKPC 22, at [16]. However, if a party wishes to exclude or limit liability, clear words must be used: ibid. at [12], citing *Homburg Houtimport BV v Agrosin Private Ltd (The "Starsin")* [2003] UKHL 12, at [144].

31. Also relevant here is that parties do not forego valuable rights without it being made clear that that was their intention: *MUR Shipping BV v RTI Ltd* [2024] UKSC 18, per Lord Hamblen and Lord Burrows at [43]. I consider this apt in the context of Bills of Lading that contain a provision such as clause 2, as I explain further below.

32. In general, where provisions that are incorporated from a text outside the contract are incorporated by a mere incorporation clause, an express provision in the body of the main contractual text may be presumed to have been intended to take precedence, in the event of inconsistency. This applies to the Hague Rules, when incorporated into a bill of lading, as it does to any other incorporated text: *Finagra (UK) Ltd v OT Africa Line Ltd* [1998] 2 Lloyd's Rep. 622, per Rix J at p. 627 lhc.

33. However, as Rix J's judgment in *Finagra* demonstrates, this is a principle whose application will depend on the circumstances. Sometimes, the various clauses of the incorporating document will give indications as to which takes precedence over the others. Sometimes, the specific incorporating provision will indicate whether it, or the text that it incorporates, is to take precedence. This can be achieved in a number of ways, including the use of what are sometimes called repugnancy clauses – clauses that state in terms that they and the provisions associated with them are to have priority over anything inconsistent or repugnant. These may include repugnancy clauses in the incorporating document, or they may include a repugnancy clause in the incorporated text – as is the case where the incorporated text includes Article III Rule 8. They must all be read together, and in their context.

34. Putting matters more broadly, what is required is careful contractual construction, by a unitary exercise following the iterative process that has been explained so often, not least by Lord Hodge in in *Wood v Capita Insurance Services Ltd.* [2017] A.C. 1173, at [10]–[15].

35. Sometimes, the exercise can be complex, as it was in *Finagra*. Here, it is not. I have no doubt that clause 18 does not prevail over the Hague Rules – or, more particularly, over Article III Rules 6 and 8 – for the following reasons.

36. First, it is highly significant that clause 2 is entitled "CLAUSE PARAMOUNT". In the context of bills of lading, contracts of carriage and the shipping industry, this is a very familiar term. The meaning it is generally intended to convey is well-known and legally recognised: *Nea Agrex SA v Baltic Shipping Co Ltd (The "Agios Lazaros")* [1976] QB 933 per Lord Denning MR at 943D–E:

> "What does "Paramount clause" or "clause paramount" mean to shipping men? Primarily it applies to bills of lading. In that context its meaning is, I think, clear beyond question. It means a clause by which the Hague Rules are incorporated into the contract evidenced by the bill of lading and which overrides any express exemption or condition that is inconsistent with it."

37. Second, it is significant that Article III Rules 6 and 8 are incorporated at all. Clause 2 is not a mere, 'vanilla' incorporating provision, which incorporates the entire Hague Rules, but says nothing more. On the contrary, it deliberately does not incorporate the entire Hague Rules – notably, omitting Article IX. If the parties' intention had been for clause 18 to prevail, one easy way to achieve this would have been to omit Article III Rule 8; or, taking the Defendant's case at its highest, Article III Rule 6 (which, on that case, can have no useful function). This has not been done.

38. Third, clause 2 does not merely incorporate Article III Rule 8 in general terms. It then goes on to identify a specific circumstance where Article III Rule 8 is not to prevail – viz., in relation to the limitation sum for the purposes of Article IV Rule 5. This would not be necessary if Article III Rule 8 were never intended to prevail. The implication is that, outside the specifically identified circumstance, it has its usual effect, as an incorporated repugnancy clause.

39. Fourth, on the basis that (as agreed between Mr Collett KC and Mr Coffer) clause 9 is intended to apply both to pure port-to-port carriage and to the port-to-port element of intermodal carriage, the first sentence of clause 9 expressly provides that the Defendant's liability is to be determined in accordance with clause 2. In this case, that means according to the Hague Rules. This is a clear indication that clause 2 and the Hague Rules prevail over other provisions – not vice versa.

40. Mr Collett KC resisted this, on the basis of the opening words of clause 9: "Save as otherwise indicated on the face hereof…" He said that the face of the Bills of Lading means, or includes, the reverse page; therefore clause 18 prevails, because it is on that page. I cannot accept this for two reasons. First, the face of each Bill of Lading is its front page; the reverse is not generally referred to as the face. Second, if Mr Collett KC were right to regard clause 9 as treating anything printed on the reverse of the Bills of Lading as "on the face hereof", then clause 2 itself would be on the face of the bill – which would make the intention of clause 9 somewhat obscure.

41. Fifth, clause 18 does not contain any indication that it is intended to prevail over clause 2. Mr Collett KC referred to the words "In any event,…" at the beginning of the sixth sentence. Leaving aside the fact that this cannot help the Defendant in relation to the 20-day Provision, it seems to me necessary to consider these words in the context of clause 18.

42. The words "In any event, …" mean that the sentence that contains them is to apply, whether or not notice of loss or damage has been given as per the first sentence, and whether or not the 20-day Provision has been complied with, and no matter whether the claim is for loss or damage to Goods, and whether or not notice has been given of loss or damage in respect of perishable goods. (Whether they also mean that this sentence is to apply notwithstanding the third or fourth sentences is less obvious.) In all such cases, and in any event, there is a time limit that requires suit to be brought within one year of delivery or the date when the Goods should have been delivered. This, of course, is entirely consistent with the Hague Rules. In other words, far from indicating an intention to override the Hague Rules, the words "In any event,…" in fact have the result that the outcome prescribed by Article III Rule 6 will apply even more widely than the Hague Rules require. They effectively make Article III Rule 6 more potent, not less potent.

43. Sixth, given the incorporation of the Hague Rules by the Clause Paramount in clause 2, and in the light of clause 9, the Bills of Lading are subject to Article III Rules 6 and 8. If it had been intended that the Claimants were to forego the valuable rights under Article III Rules 6 and 8, it is to be expected that this would have been made clear. The principle in *MUR Shipping BV v RTI Ltd* at [43] is relevant.

44. My firm conclusion that clause 18 does not prevail over the Hague Rules, as incorporated, is significant both for the 20-day Provision and for the Service Provision. It is fatal to the Defendant's reliance on the former.

Does the 20-day Provision apply?

45. My answer to the previous question means that answering this question is not necessary to the determination of the Defendant's application. Even if the 20-day Provision does apply, the Claimants can still rely on Article III Rules 6 and 8 of the Hague Rules, with the result that all their claims are ones in respect of which the 20-day Provision is null and void. This means that the observations that follow are strictly obiter.

46. The relevant words are the requirement that any claim "… with respect to… charges or expenses or any claim other than for loss or damage to Goods" must be submitted (etc.) within 20 days.

47. Mr Collett KC submitted that a claim for indemnity for liability to Salvors (i.e., as determined by the Claimants' settlement with Salvors) is a claim for Salvors' charges, and/or for the expense of the salvage operation.

48. As to this, words such as "charges" or "expenses" might be appropriate for a fixed fee salvage contract, but they are not the most natural way of describing how the salvors' remuneration is established, and then becomes payable, under the LOF terms. Quantum is not established, and so no debt exists, until either the claim is settled or the LOF tribunal makes its award.

49. Mr Collett KC accepted that the claims for particular average were claims for loss or damage to Goods. However, he said that the claims relating to Salvors were not. He submitted that "loss" means the loss of the goods, i.e. that they are literally lost; and that "damage to Goods" means physical damage, as distinct from economic damage.

50. Mr Coffer submitted that "damage to Goods" can include economic damage, and relied on *Trafigura Pte Ltd v TKK Shipping Pte Ltd (The "Thorco Lineage")* [2023] EWHC 26 (Comm), holding at [104] that the words "goods lost or damaged" in Article IV.5 of the Hague-Visby Rules include goods that are economically damaged.

51. In *The Thorco Lineage*, the explanation given by Sir Nigel Teare for his conclusion on this point related to the textual context of Article IV.5(a). Strictly, therefore, his reasoning is not directly applicable. However, it proceeded as follows:

> "The textual context in which the words "goods lost or damaged" are found in article IV rule 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."

52. In this case, the context of the words "damage to Goods" in clause 18 is one concerned not with a quantum limit, but with the claimant's right to bring a claim, the steps the claimant must take to preserve this right, and the way that the passing of time can give rise to a time-bar. For this reason, it is impossible to read clause 20 without also having in mind clause 2 and Article III Rules 6 and 8 of the Hague Rules. I regard it as practically inconceivable that the draftsman of clause 18 did not have those provisions in mind. They are concerned with the running of time in relation not only to claims for physical damage to goods (howsoever that phrase can be understood), but for claims for damage that are related to goods (as I have already noted). They undoubtedly include economic damage, by which Mr Collett KC and Mr Coffer meant, and I think Sir Nigel also meant, circumstances such that, even though the goods are physically unaltered in themselves, their value has been adversely affected.

53. I therefore consider that, even though *The Thorco Lineage* at [104] is not directly applicable, the reasoning of Sir Nigel Teare can without difficulty be applied by analogy. It leads to the conclusion that this is a case where there has been "damage to Goods" within the meaning of clause 18. In arriving at his decision, Sir Nigel Teare declined to follow the judgment of Burton J in *Serena Navigation Ltd v Dera Commercial Est. (The "Limnos")* [2008] EWHC 1036 (Comm). I am not strictly bound by either decision, since both related to Article IV.5 of the Hague-Visby Rules, not to the 20-day Provision in clause 18 of the Defendant's Bills of Lading. However, I prefer the reasoning in *The Thorco Lineage*, for the reasons given by Sir Nigel Teare, which I find entirely compelling.

54. That would be sufficient to dispose of the points on the 20-day Provision. I have some further brief observations.

55. First, the judgments in *The Limnos* and in *The Thorco Lineage*, and certainly the submissions before me, proceeded as though there is a clear dividing-line between physical damage to goods and economic damage to goods. I question this. For

example, when goods are lost overboard and sink to the bottom of the ocean, it sometimes happens that they are truly lost, in that their location is unknown and/or it is genuinely impossible to recover them. However, it is sometimes the case that it might be theoretically possible to recover them, but the cost would exceed their value (even if their packaging remains intact and they are not physically altered in themselves). In insurance terms, they are a constructive total loss. Are such goods, on the sea-bed, a physical loss or an economic loss? I would say both, in that their physical situation has been adversely affected (even though they may be unchanged in themselves), and their economic value has been destroyed. More importantly, an example of this kind tests the meaning of these epithets beyond the point where they are actually useful.

56. Second, in this case, the Cargo should have proceeded on a direct, uninterrupted sea passage from port of loading to port of discharge, under the care and control of the Defendant. Instead, the voyage was not merely interrupted, possibly following a somewhat different course and certainly taking different positions per day from those that would have been taken but for the Defendant's assumed breach; more than this, the voyage was completed with the Cargo under the care and control of Salvors. Those Salvors had rights of lien over the Cargo, meaning that they were not obliged to discharge it, or then to deliver and release it, until settlement/payment. This is a sequence of events that evinces a number of legal differences, but there are also physical differences, in terms of where the Cargo was on any given date, and above all on the Bill of Lading holders' ability to take possession. They could not, without settling and/or paying, because the goods were physically secured and restrained. A Bill of Lading holder who attempts to remove goods that are secured in a bonded warehouse will find, if he attempts to pass the locked doors, that he encounters Newton's Third Law. This is profoundly physical.

57. Third, in so far as the LOF terms gave Salvors a maritime lien over the Cargo, this specific feature was considered in *The Thorco Lineage*, where Sir Nigel Teare expressed the view, obiter at [107] to [121], that such a maritime lien is a specific kind of damage that is sustained by the goods in question (rather than merely inflicting economic damage on their owner), within the meaning of Article IV.5 of the Hague-Visby Rules. He treated this, in effect, as a way of side-stepping the distinction between physical damage and economic damage: it is property damage to the goods, referring in particular to the decision of Derrington J in the Australian Federal Court, in *Tritton Resources Pty Ltd v Ever Rock Navigation SA (The Ikan Jahan)* [2019] 2 Lloyd's Rep. 235. This is related to my second observation, albeit Sir Nigel Teare focused on the legal nature of a salvor's maritime lien, rather than merely on its real-world physical consequences. Be that as it may, I again agree with him.

58. Fourth, I questioned in submissions whether it mattered that the Salvors' liens had been lifted, and the Cargo had been released, prior to the issue of the claim form. On reflection, I do not think that it can matter. This had been achieved only by the Claimants' settlement with Salvors, and (I assume) the payment of the settlement sum. In so far as the liens either constituted or had caused damage to the Cargo, the quantum of this damage – like ordinary physical damage – falls to be quantified by measures such as remedial cost. A claim for ordinary damage can still be made even if repairs have been completed and paid for before the claim form is issued. Settling and paying in order to remove Salvors' liens is no different, if it is right in principle to treat such liens as damage. It is a form of mitigation.

Is the Service Provision compatible with Article III Rule 6 and Rule 8?

59. While this question relates only to the Service Provision, it is the furthest-reaching and most significant of Mr Collett KC's arguments. Mr Collett KC said that a provision, such as the Service Provision, stipulating when suit is to be considered to have been brought, is not one that relieves the carrier form liability or lessens liability within the meaning of Article III Rule 8, because Article III Rule 6 is neutral as to what constitutes the bringing of suit. It is well-known that different jurisdictions take differing approaches to this, according to their respective law and procedure. In particular, in many common law countries, suit is brought when the claim form (or equivalent) is issued; whereas in many civil law countries, suit is brought upon service.[1] Therefore (he said) there is nothing offensive to the Hague Rules about what is, in effect, a deeming provision that assimilates the position to that which would in any event obtain in many other countries.

60. If correct, this argument would apply in every case to which the Hague Rules might apply – even paradigm cargo claims involving indisputable physical loss of or damage to cargo; and even where they apply compulsorily, rather than only in contract. Furthermore, it would also apply to the Hague-Visby Rules. Moreover, if it is acceptable in principle to stipulate that suit is only considered to have been brought in the event of service/jurisdiction being obtained, it is not obvious why it would not also be acceptable to stipulate for other events that are unlikely to occur within a year, or at all – e.g. suit shall not be considered to have been brought unless pigs fly, or England win the World Cup.

61. The problem with this argument is that the unitary approach to construction means that the argument falls to be considered bearing in mind clause 24. Clause 24 expressly provides for English law and jurisdiction. Under English law and procedure, suit is brought when the claim form is issued. If that is accepted as a relevant premise (as I think it must be, given clause 24), it is incontestable that the Service Provision is capable of relieving the carrier from liability. Indeed, it would do so in this case, on Mr Collett KC's argument. I therefore reject that argument.

62. I would add that this is a context where the principle in *MUR Shipping BV v RTI Ltd* at [43] is again relevant.

Conclusion

63. It follows that the Defendant's application fails.

[1] I should add that I am aware that, in some civil law countries, service is considered to be complete, for purposes such as time bar, when the necessary documents are with the *huissier* – rather than only when they have been delivered to the defendant.