Case No: CL-2016-000070

Neutral Citation Number: [2016] EWHC 2514 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th October 2016

Before:
Sir Jeremy Cooke
Sitting as a Judge of the High Court

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Between:

Vinnlustodin HF Vatryggingaffelag Islands HF	Claimants
- and -	
Sea Tank Shipping AS (formerly known as TANK INVEST AS)	Defendant

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Mr Lionel Persey QC and Mr Benjamin Coffer (instructed by Clyde & Co LLP) for the Claimants
Mr Charles Debattista (instructed by Winter Scott LLP) for the Defendant

Hearing dates: 5th and 6th October 2016

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Judgment

Sir Jeremy Cooke:

Introduction

1. There are two issues in this Part 8 claim, namely whether the package limitation provisions in Article IV r.5 of the Hague Rules ("Article IV r.5") apply to bulk cargoes and, if they do, how they apply to the damaged cargo of fishoil with which this action is concerned. Article IV r.5 provides that the carrier's liability for loss or damage to or in connection with goods shall not exceed £100 "per package or unit". The Defendant's case is that Article IV r.5 can be applied to bulk or liquid cargo by reading the word 'unit' as a reference to the unit used by the parties to denominate or quantify the cargo in the contract of carriage. The Defendant relies on the description of the cargo in the charterparty as "2,000 tons cargo of fishoil in bulk". The Claimants' case is that the word 'unit' can only refer to a physical item of cargo, or to a combination of physical items bundled together for shipment. Article IV r.5 does not apply to a liquid or other bulk cargo: when cargo is shipped in bulk, there are no relevant "packages" or "units".

2. Although, perhaps surprisingly, there is no English authority which has determined whether Article IV r.5 applies to bulk cargo, I was taken to a number of decisions where the point has been directly or indirectly referred to, to Commonwealth authorities, to many text books and commentaries discussing the issue and to the travaux préparatoires to both the 1924 Statute and the Scheduled Convention represented in the Hague Rules and the later Convention which contained the Hague-Visby Rules.

The undisputed facts

3. There was no issue as to the facts which were set out in the Claim Form and witness statement of Mr Jai Sharma, a partner in Clyde & Co LLP, the solicitors acting for the Claimants. I take those facts largely from the summary in the Claimants' Skeleton argument:

    1) The dispute arises out of damage to a cargo of fishoil which was carried on board the tanker "AQASIA" pursuant to a charterparty contained in and/or evidenced by a 'Fixing Note' dated Reykjavik 23 August 2013 ("the Charterparty").

    2) The Charterparty provided for the carriage of 2,000 tons of fishoil in bulk, 5% more or less in Charterers' option, from the Westmans Islands and Faskrudsfjordur in Iceland to Stokmarknes, Averoy and Stavanger in Norway on board the tanker "WEST STREAM" or a substitute, for freight of "Nok 817,500, - lumpsum".

    3) The Fixing Note provided that the Charterparty was to be on the "London Form". The London Form is an old tanker voyage charter form, which has been replaced in common usage by Intertankvoy 76. The London form charter provides:

> "… 26. – The Owners in all matters arising under this Contract shall also be entitled to the like privileges and rights and immunities as are contained in Sections 2 and 5 of the Carriage of Goods by Sea Act 1924 and in Article IV of the Schedule thereto …"

4) By clause 26, the Charterparty thus incorporated Article IV of the schedule to the Carriage of Goods by Sea Act 1924. The schedule to the 1924 Act contains the Hague Rules. Article IV r.5 provides:

> "… 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 100l 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 ...."

5) The Fixing Note also incorporated ten rider clauses numbered 25 to 35 which included terms providing that the contract would be "governed by the Laws of the United Kingdom" (clause 27) and that disputes would be resolved by arbitration in London (clause 28).

6) The Defendant nominated the tanker "AQASIA" ('the Vessel') to perform the Charterparty in substitution for "WEST STREAM". The Defendant was the disponent owner of the vessel and was not party to the contract contained in or evidenced by the Bill of Lading signed by the Master.

7) On 6 September 2013, the Vessel loaded 2,056,926 kgs of the First Claimant's fishoil in bulk at Faskrudsfjordur and Vestmannaeyjar. About 550,000 kgs was loaded into tanks 1P, 2P and 5S. This parcel is referred to by Mr Sharma as 'the Subject Cargo'.

8) The Master (or his agent) signed a Congenbill bill of lading acknowledging shipment of the cargo in apparent good order and condition. The bill recorded the shipper's description of the goods as "Icelandic Fishoil in bulk - 2.056.926 kgs".

9) The bill of lading issued by the Owners, not the Defendant, named the First Claimant as the shipper of the cargo. It is common ground that it is the Charterparty which contains and/or evidences the contract of carriage between the First Claimant and the Defendant.

10) After loading the cargo, the vessel sailed to Lovund in Norway and there loaded a further cargo of fishoil. Part of this further cargo was loaded into tanks 1P, 2P and 5S. This caused it to become commingled with the Subject Cargo.

11) On arrival at the discharge port(s), 547,309 kg / 547.309 mt of the Subject Cargo was found to have suffered damage.

12) The First Claimant claims damages from the Defendant in respect of losses which it has suffered as the owner of the Subject Cargo and/or the party at whose risk the Subject Cargo was at the time the damage occurred. The First Claimant's claim is for US$367,836, together with interest and costs.

13) The Second Claimant was the insurer of the cargo. The Second Claimant has been joined in these proceedings out of an abundance of caution, in case it be alleged that title to sue has somehow passed from the First Claimant to the Second Claimant by virtue of the insurance of the cargo.

14) The Defendant accepts in principle that it is liable for the damage to the cargo but argues that it is entitled to limit its liability to the sum of £54,730.90 (i.e. to £100 per mt of cargo damaged) pursuant to Article IV r.5.

15) The parties agreed that, notwithstanding the arbitration agreement in the Charterparty, the Commercial Court should have jurisdiction to determine an agreed preliminary "Limitation Issue": namely whether the Defendant is entitled to limit its liability to £54,730.90.

The issues in dispute

4. The limitation issue gives rise to two questions:

1) Is Article IV r.5 of the Hague Rules capable in principle of applying to bulk cargo?

and

2) if so, is the applicable limitation figure £54,730.90 as the Defendant contends?

The approach to construction of the Charter and Article IV

5. There was some dispute between the parties as to the proper approach to construction of the Charterparty and the parts of the Hague Rules incorporated in it but I doubt if anything ultimately turns on this. Although the Charterparty does not per se incorporate all of the Hague Rules and provides that the Defendant is entitled to "the like privileges and rights and immunities as are contained in sections 2 and 5 of the Carriage of Goods by Sea Act 1924 and in Article IV of the Schedule thereto", the effect must be that the Defendant is entitled to rely on the package or unit limitation only in the same circumstances as it would be entitled to do, if there had been a full incorporation of the Hague Rules.

6. The Defendant argued that, when read as a whole as a contractual term in the Charterparty, Article IV was clearly intended by the parties to apply to a bulk cargo because there was no other type of cargo in prospect. My attention was drawn to the description of the cargo and the nature of the London form of charter which in various clauses makes it plain that a liquid cargo is envisaged. The effect of the Defendant's submission was that all of Article IV had to apply to the cargo carried under the Charterparty in order to give meaning to the parties' agreement that the Defendant had the privileges, rights and immunities afforded by Article IV.

7. I do not accept the Defendant's submission that the effect of Clause 26 is that the words of Article IV are written into the Charterparty with the result that every provision in that Article must be given meaning and effect in the context of carriage of the bulk cargo contemplated by the parties when concluding the Charterparty. The effect of the clause is to allow the Defendant the like privileges, rights and immunities as are contained in Article IV, where they apply. Although it is true to say that the Charterparty was expressly a charter for the carriage of a bulk cargo of fishoil in a tanker, the Defendant is entitled to rely on no more than what is provided by the limitation in Article IV, so that if the word *unit,* as used in Article IV, does not apply to bulk cargoes as a matter of construction of the Rules, it cannot change its meaning because of the nature of the contract of carriage. There may be parts of Article IV which are applicable and other parts which are inapplicable. It is accepted that Article IV r.1, 2 and 4 provide protection to the owner but it is self-evident that Article IV r.2(n) which exempts the owner from liability for "insufficiency of packing" cannot apply to a cargo which is not packed. Such a provision, although part of the charter, is inapplicable to the factual situation which obtains in the carriage of a bulk cargo. Similarly, it is accepted that the words "per package" in Article IV r. 5 cannot apply to a bulk cargo, so the determinative issue is whether or not the word "unit" in that Article can do so.

8. I reject therefore the Defendant's submission that construction of the Charterparty and ascertainment of the parties' intentions in accordance with the principles set out in well settled authority could potentially lead to a different result from that reached by interpreting the provisions of the Carriage of Goods by Sea Act and the Hague Rules scheduled thereto, in accordance with ordinary principles of statutory construction and the construction of international conventions.

9. In exploring that issue, the Claimants are right to point to authorities which state that the language of International Conventions should be construed "on broad principles of general acceptation" and should be given a purposive construction rather than a narrow literalistic one, because of the international dimension involved. The courts should ascertain the ordinary meaning of the words used, not just in their context, but also in the light of the evident object and purpose of the convention. In my judgment it is also right to lean towards an interpretation which is consistent with the approach taken in other jurisdictions, where that is possible and a reasonable construction of the language and intent of the words used. The dictum of Colman J in *The River Gurara* [1996] 2 Lloyd's Rep 53 at p 62 supports this proposition, but I would

not hesitate to differ from a decision of a foreign court where it was clear to me that it was wrong. International uniformity is desirable, but courts can err. In the Court of Appeal in the same case, [1988] 1 Lloyd's Rep at p. 228, Phillips LJ said:

> "First, it is legitimate when construing the Rules to have regard to their objects as disclosed by the travaux préparatoires of the Convention. Second, particular respect should be paid to decisions of other jurisdictions in respect of the meaning of the Rules, for the stated object of the Convention was the unification of the domestic laws of the Contracting States relating to Bills of Lading."

The language of Article IV r.5

10. It is accepted that as a matter of ordinary language, the word "unit" is capable of referring to either an individual physical item or object on the one hand, or to a unit of measurement on the other, such as a kilogram or cubic metre, a bushel, a barrel or a metric tonne. The Defendant drew attention to other provisions of Article IV and other Articles in the Hague Rules in support of the submission that the word here meant a unit of measurement and referred to the phrase used in the later 1936 US Carriage of Goods by Sea Act which, in its parallel provision referred to a limit "per customary freight unit".

    1) The Defendant focussed on the use of the word "goods" in Article IV r.5 and the definition of that word in Article I of the Rules:

    > "'Goods' includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

    It was submitted that the verb "includes"; the noun "merchandises"; the adjectival phrase "of every kind whatsoever"; and the express and narrow exception made for live animals and deck cargo showed that the word "goods" in Article IV r.5 was intended to be as broad as possible.

    2) It was submitted that the Hague Rules, taken as a whole, pointed towards the inclusion of bulk goods rather than towards their exclusion. Thus, Article III r.3 reads as follows in relevant part:

    > "3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things –
    >
    > > (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

…

> Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking." [Emphasis added]

Had the intention been, as suggested by the Claimants in the context of Article IV r.5 of the Rules, to exclude bulk cargoes by using the phrase "package or unit" in that Article, then there would have been no mention in Article III r.3 of "quantity, or weight", both of which words are consistent both with commodities shipped in bulk and with the word *"unit"* in Article IV r.5.

3) The same point was said to apply to Article III r.5 which reads as follows:

> "The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. …" [Emphasis added]

4) It was submitted that it was difficult to see why bulk goods would be excepted from the limitation established in Article IV r.5, but not from the total exclusion of liability in Article IV r.2. That Article, reads in relevant part:

> "2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –
>
> (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods." [Emphasis added]

It was said that if "wastage in bulk" was envisaged in Article IV .2 then it had also to be included in Article IV r.5. The phrase "wastage in bulk" meant that bulk goods were included when it came to *excluding* liability. It would be difficult as a matter of principle to justify why bulk goods should then not take the benefit of limitation of liability.

5) Furthermore, given the title of Article IV, namely "Rights and Immunities"; given the inclusive definition of "goods" in Article I (b); and given the terms of Article II, it was submitted that it was difficult to see how it could be said that the legislative intention behind the

Hague Rules was to exclude bulk goods from Article IV Rule 5. Article II reads as follows:

> "subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."

As "Rights and Immunities" were explicitly set forth in Article IV, if the intention was to exclude a particular part of those rights and immunities from their application to goods shipped in bulk, one would have expected that to have been done in much clearer terms. To base such an exclusion on the two words "or unit", was to place far too heavy a burden on one slender phrase.

11. None of these arguments in my judgment carries any real weight in the current debate. Whilst "goods" are widely defined in Article I and the provisions of Article III do require the number of packages or pieces or the quantity or weight to be stated in the Bill of Lading, if the shipper so demands, neither assists in the construction of Article IV r.5 which is directed to a different point and uses different language. Whilst limitation and exclusion of liability might be thought to be similar kinds of provision, the phrase "wastage in bulk or weight" in Article IV r.2 can apply to goods which are not bulk cargo. None of these provisions helps in determining the meaning of "unit". What the Defendant's argument amounts to is saying that it would be rational to provide a limitation for bulk cargoes as for packages, but this does not overcome the fact that the wording used in Article IV r.5 is "package or unit". It is not a question of whether the terms of the Rules are apt to exclude bulk cargo, but whether the word "unit" is apt to include it.

12. So although the Defendant focussed on the question whether the Rules were clear in excluding bulk cargoes from the terms of Article IV Rule 5, the real issue with which this court is concerned is the true meaning of the word "unit" in that Rule. If "unit" does not mean a unit of measurement, then there is no basis upon which bulk cargoes could be subject to limitation, however desirable an object that might seem to be. It is not right to resort to fictions to achieve that objective when construing an international convention and what is plain is that, at the time of the Convention, the price of such bulk cargoes as were being shipped was such that the limitation provisions would not have been seen as relevant. It is the increase in the price of commodities and the increase in bulk shipments in bulk carriers which has given rise to a perception on the part of some, especially owners, that the provisions of Article IV r.5 ought to apply to such cargoes. The economics now are very different from the position in 1921-1924 as appears later in this judgment and the issue is whether on the proper construction of the word "unit", which is the only word which could conceivably apply to bulk cargoes, the Rules do have that effect.

13. The Claimants argued that the context in which the word 'unit' is used in Article IV r.5, i.e. in the phrase "per package or unit", indicated that it was intended to refer to a physical item (or composite of items) rather than to a unit of measurement. A package is undoubtedly a physical item. The use of the words "unit" and "package" together and in the same context suggested that both terms were concerned with physical items rather than abstract units of measurement, on the principle of *noscitur a sociis*. There was nothing in the words to suggest that units of measurement, or of freight, were intended. The term "package" was also used in Article III r.3(b), which required the carrier to issue to the shipper a bill of lading showing "Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper." Here the word "packages" was paired with the word, "pieces", meaning an individual physical item of cargo, and quantity and weight were seen as different and specified accordingly.

14. I find these arguments compelling, as have others, since, despite the Defendant's best efforts, as set out above, I can see nothing in the Hague Rules which lends any support for the argument that the word unit connotes a unit of measurement, in circumstances where the Rules specifically refer to quantity or weight when measurable units are in mind.

15. The Defendant did not submit that the word "unit" in the Rule meant a unit of measurement for all purposes, because it was accepted that it covered unpackaged items for shipment. The Defendant argued, however, that the word was apt to cover unpackaged physical items as units of shipment but was also apt to cover a unit of measurement in the case of bulk cargoes. This creates an obvious issue, where the word is given different meanings for different types of cargo. It also can be seen as creating a problem in the case of a package where a weight or volume also appears on the Bill of Lading. If there is one package and a weight, which give rise to different limitation amounts, which is to be taken? Unlike the Hague- Visby Rules which provide for the application of the higher of the limits assessed in accordance with their terms, there is no such provision here. Moreover, if the word is apt to cover both a shipping "unit" in the sense of an unpackaged item, such as a car, and a unit of measurement expressed on the Bill of lading, such as the weight of such a car, which of those two measures is to be taken, in the absence of any guidance in the Rules themselves? These appear to me to be powerful points against the argument that "unit" can mean both a shipping unit in the sense of a physical unpacked object and a unit of measurement, whether for freight purposes or otherwise. The choice, as appears from many commentaries, lies between a shipping unit in the sense described and a unit of measurement, and most invariably, if not always, seen as that utilised for freight purposes in the light of the "customary freight unit" which is the expression employed in the US Carriage of Goods by Sea Act 1936, instead of the word "unit" used in r.5.

16. As appears later in this judgment, the construction of "unit" which I adopt as a physical shipment unit is the one favoured by the majority of the commentaries and text books on the point and is the construction accepted by courts in other common law jurisdictions.

The Hague-Visby Rules

17. The Defendant submitted that although the limitation provision at issue was found in the Hague Rules, not the Hague-Visby Rules, the terms of Article IV r.5(a) of the latter were instructive in showing that the phrase "per package or unit" in the Hague Rules could not reasonably be construed to exclude bulk goods. Article IV r.5(a) of the Hague-Visby Rules reads 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 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher." [Emphasis added]

18. The weight limitation multiplier was introduced in the Visby Protocol of 1968. It was argued that if the weight limitation had been introduced in order to include bulk goods within the limitation regime because the Hague Rules had excluded them as the Claimants suggest, then the last sentence above would have stopped at the words "lost or damaged". Had the new Visby version of Article IV Rule 5 simply provided for two levels of limitation without saying "whichever is the higher", the result would indeed have been a package or unit limitation for goods not in bulk and a weight limitation for goods that were in bulk, thus making up for the alleged omission of bulk goods from the Hague Rules. However, the addition of the words "whichever is the higher" must mean that the higher of the two limits would apply either to the package or unit limit or to the weight limit, irrespective of the nature of the cargo. The purpose in the Visby Protocol was clearly not to introduce a bulk goods limitation that (on the Claimants' case) did not exist before, but to add an alternative weight limitation that would apply to goods of any nature if it were higher than the package or unit limitation. The value added by the Visby Protocol was not the application of limitation to a new type of goods, but the application, in cargo-interests' favour, of two alternative types of limitation whatever goods were shipped.

19. In my judgment, the terms of the Hague-Visby Rules cannot affect the construction of the Hague Rules and the use of the word *unit* in Article IV r.5 of the latter. The fact is however that the later convention provided for limitation "per package or unit or per kilogramme of gross weight of the goods lost or damaged", which undoubtedly means that bulk cargoes can be subject to limitation (by reference to the weight of the lost or damaged goods) as well as individual packages or objects. Moreover, the claimant can recover in the case of the latter the higher of the two measures – per package or per unit on the one hand or per kilogramme on the other, which suggests that *per unit* did not carry the latter meaning. It does not suggest that the words "per unit" were apt to catch bulk cargoes where the "per kilogramme" provision plainly takes effect.

20. Moreover, Article IV r.5(c) also strongly suggests the draftsmen of the Hague-Visby Rules considered that a "unit" constitutes a physical item rather than a freight unit:

> "… 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 …"

The word "unit" in the phrase "packages or units" must signify a physical item of cargo: otherwise, it would be meaningless to speak of the "the number of packages or units enumerated in the bill of lading as packed in such article of transport".

The Travaux Préparatoires

21. The parties were agreed that the right approach for the Court was to be found in the words of Lord Steyn in *The Giannis NK* [1998] 1 Lloyd's Rep 337 at 437-8, where, he said:

> "Following Fothergill v Monarch Airlines Ltd., [1980] 2 Lloyd's Rep 295; [1981] AC 251, I would be quite prepared, in an appropriate case involving truly feasible alternative interpretations of a convention, to allow the evidence contained in the travaux preparatoires to be determinative of the question of construction. But that is only possible where the Court is satisfied that the travaux préparatoires clearly and indisputably point to a definite legal intention: see Fothergill v Monarch Airlines Ltd., per Lord Wilberforce, at p. 202 col. 1; p.278C. Only a bull's eye counts. Nothing less will do."

22. The Claimants maintained that they could score a bull's eye by reference to the travaux préparatoires for the Hague Rules, whilst the Defendant maintained that they could not do so and that there was nothing in them which excluded the application of the Rules to bulk cargoes. The path of examination of these travaux préparatoires has been trodden before me by Allsop J in the Federal Court of Australia in *El Greco v Mediterranean Shipping* [2004] 2 Lloyd's Rep 537 and by others to a greater or lesser extent. I was taken through them and have come to the same conclusion as Allsop J.

23. It would be wearisome to recite in this judgment all the passages in the travaux préparatoires to which I was referred in the records prepared by the Comité Martime International (the CMI) and in Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires*. Much of this material appears in paragraphs 155-278 of Allsop J's judgment. In his judgment he draws upon the works of others including articles by Mr Anthony Diamond QC and Mr Michael Mustill QC (as they then were) to which I was referred also in relation to the attempt to bring international uniformity and balance to the carriage of goods by sea under bills of lading. The conclusions which I have drawn are the same as those of Allsop J, to whose judgment

reference can be made, and if necessary to the travaux préparatoires themselves.

24. As submitted by the Claimants, the first draft of the code which subsequently became the Hague Rules was discussed by the International Law Association at its conference in 1921 and the draft text submitted to the conference contained wording in the relevant provision to the effect that:

> "neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods for an amount greater than £____ to a package or £_____ per cubic foot or £ per cwt (as declared by the shipper and inserted in the contract of carriage, whichever shall be the least (of the goods carried), unless the nature and value of such goods have been declared by the shipper and inserted in the bill of lading …"

25. What appears from the contributions made, and in particular that by M. Dor, a French jurist, who largely took the part of cargo interests, was the desire to be rid of the limitation by reference to volume or weight and to include a provision of limitation by reference to package alone in the Rules. The fear was that, with a valuable item in a small package and a limitation being the least sum calculated on the basis of the "package, volume or weight test", the owners would be able to restrict liability to very small sums in those circumstances where it mattered most. In discussing this M. Dor stated that the limitation of liability was concerned only with parcels and the United Kingdom representative spoke of the need of the liner trade to know the high value of any packages so that responsibility could be assumed for them with an appropriate freight rate. There was also some discussion of the possibility of a limitation figure calculated as a multiple of the freight charged.

26. M. Dor saw the inclusion of a limitation by reference to cubic feet or cwt as nothing but a trap and speaking of bags of wheat he said that there was no need for a limit of liability at all (because the values were so small). The only need for a limit of liability was where there were packages of extraordinary value, worth more than the £100 then being suggested as the limit per package. The trap to which he referred was the possibility of the wording suggested whereby a shipowner could limit his liability to the lesser of a figure assessed by reference to package or weight where the weight was small compared to the value of the item such as silk. "The whole question only turns upon packages of great value and that is what the committee must not lose sight of". By the end of the 1st September 1921, there appeared to be a general consensus on the wording: "neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods to an amount beyond £100 per package unless the nature of such goods has been declared …".

27. What transpired overnight was a drafting amendment made by the Rt Hon Sir Henry Duke, the then President of the PDA division (later Lord Merrivale) and the chairman of the conference, in which, for the first time, the word "unit" appeared in the phrase "£100 per package or unit". He said:

> "As you know, there are goods to which the Code will apply which are not described as per package, and the matter was raised yesterday, and upon consideration the Committee thought that by adding the words "or unit" the intent would be made clear". There had been discussion the previous day of such items as a car and a boiler, as well as bags of silk or bags of wheat. Cargoes in bulk did not however feature in the discussion.

28. As Allsop J explained in *El Greco* at §177:

> "… The goods which "are not described as per package", but to which the Code was intended to apply and which were "raised yesterday", as referred to by Sir Henry Duke, can be seen to be there referred to in Sturley, vol. 1 pp. 286 and 292 and C.M.I. Travaux, pp. 454-455 and 458: a car, and a boiler of 20 tons. The discussion on Sept. 1 assumed such articles were covered by the limitation, though not packaged in any way. They were articles of cargo, shipped as such. From an examination of the record of Sept. 1, 1921 (Sturley, vol. 1 pp. 277-314 and C.M.I. Travaux, pp. 450-467) the reference by Sir Henry Duke to the "matter" raised the previous day as to "goods as to which the Code will apply which are not described as per package" and so covered by the word "unit" appears to be to items shipped as single units and not packaged in any way ..." This apparent intention of the introduction of the words "or unit" would have the words fulfilling a function not necessarily directly connected to the word "pieces" in Art III r3. In Art.III r3 the aim was (if the carrier could check the cargo) to require the carrier to issue a bill showing the cargo- the packages or pieces- in a manner which would be binding to a degree. Here in Art IV r4 [later r5] a word was chosen to widen the notion of package to refer to, apparently, articles of cargo, shipped as such, to be subject to a limitation, as if they were individual packages."

It has, I think, never been suggested that the intention behind the drafting committee's addition of the words "or unit" was somehow to introduce (or reintroduce) limits of liability based on weight or volume and it was accepted by Mr Debattista for the Defendant that the objective in mind was to cover unpackaged items for shipment. It is clear that although the concepts of weight and volume were discussed initially, they were abandoned and were never resurrected, whether by the introduction of the word *unit* or otherwise.

29. In the *El Greco* at paragraph 278 Allsop J accurately summarized the position as follows:

> "… The terms of art. IV, r. 5 of the Hague Rules were negotiated and agreed upon as a package limitation […] The addition of the words "or unit" can be seen to have been intended to clarify the rule by making unnecessary any debate

> in individual cases about the extent and nature of wrapping and the like, so that individual articles capable of being carried without packaging - boilers, cars and the like, and which could be seen as units of cargo as shipped - would be covered. This approach involves a rejection of the notion that "or unit" was inserted to cover bulk cargo by reference to freight unit, as in U.S. COGSA. The weight of judicial and other views that I have earlier referred to makes this a safe conclusion …"

30. In October 1922, the question of limitation was again the subject of discussion at the Diplomatic Conference. A Sub-Committee chaired by a US judge, Judge Hough, proceeded on the basis that limitation provision did not apply to bulk cargoes because bulk cargoes could not be packages. It was again pointed out that limitation was unnecessary in the case of bulk cargoes because of their low value. The judge stated that the draft provision would only apply where the declared value was greater than £100 "per piece or item". Furthermore, on 7th October 1923, when the sub-committee met again, an exchange between Mr Bagge and Sir Leslie Scott showed that their understanding was that Article IV r.5 did not apply to bulk cargoes.

The United States Carriage of Goods by Sea Act

31. The United States Department of State saw the definition used in US COGSA as an intended clarification of the meaning of the Convention. In *Falconbridge Nickel Mines v Chimo Shipping* [1973] 2 Lloyd's Rep 269 (see below) however, the Supreme Court of Canada concluded that the US statute constituted a change from the Hague Rules and therefore did not offer any guidance in considering the meaning of the words "per package or unit". That reasoning has been followed since in Canada. In *The Bill* (94) 55 F. Supp. 780 (D. Maryland) District Judge Chesnut referred to the expression "per customary freight unit" as one which was intended to be "more definite" than the shorter phrase "per unit" in the Hague Rules. Professor Tetley's work, Marine Cargo Claims (4th edition) at page 2175, in a footnote makes reference to the US Department of State Memorandum of June 5th 1937 describing the differences in wording between US COGSA and the Hague Rules. There it was stated that "the foregoing differences from the Convention made in the Carriage of Goods by Sea Act are intended primarily (1) to clarify provisions in the Convention which may be of uncertain meaning thereby avoiding expensive litigation in the United States" for purposes of interpretation and (2) to co-ordinate the Carriage of Goods by Sea Act with other legislation for the United States. A later note from the US State Department affirmed the belief that neither the understandings to which the ratification was made subject nor the provisions of the Carriage of Goods by Sea Act or the Pomerene Bills of Lading Act were out of harmony with the provisions of the Convention."

32. In Cooke on Voyage Charters (4th edition, 2014) at paragraph 85 A.36-41, there is discussion of the Customary Freight Unit. There it is said that one of the earliest decisions in the United States defined a "customary freight unit" as the "unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged". The definition illustrates that a "customary freight unit" relates to the way in which the

carrier collects money which may have nothing to do with the physical attributes of the cargo. In earlier cases the US courts attached significant weight to the "customary" aspect of the "customary freight unit" and looked for evidence of the freight unit that was customarily used in the relevant trade. Since the 1980s however, the US courts have dropped any expectation that a freight unit be "customary" in that sense. The focus is instead on the actual freight used by the parties to calculate freight for the shipment at issue and the authors of Cooke then referred to the decision in *Ulrich Ammann Building Equipment Ltd*, a decision to which I refer later in this judgment.

The Travaux Préparatoires to the Hague-Visby Rules

33. In 1967, the Norwegian delegate, Mr Rein referred to a proposed draft amendment to the limitation provisions of the Hague Rules. He said:

> "The second proposal is in regard to the so-called unit limitation. This is a point where international unity has never been achieved. The unit limitation rule has been interpreted differently in the contracting states, not only by the judiciaries of those states but even by the legislators. Therefore, the unity aimed at has not been achieved and there is no harm in looking for a better solution. We believe that a better solution is to be found because the unit limitation in itself, apart from the fact that international unity has not been achieved, is not a good one. Since the unit limitation was introduced as a novelty in the Hague Rules we now have other conventions on the transport of goods by rail, road and air. In all these conventions the simple kilogramme limitation has been adopted. We believe that the time has come when maritime transport should join the other industries. There is no longer any reason for this maritime peculiarity."

34. Elsewhere, he stated that "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, according as to whether the freight is calculated per ton or per item".

35. The majority of the International Sub-Committee referred to the lack of uniformity through different interpretations in the different courts but felt it best not to try to define "unit" any more closely. Reference was made to the different wording in the United States and the view of the majority was against introducing the concept of a freight unit which, in their view led to inconsistent and undesirable consequences.

36. The Defendant draws attention to the fact that that there is nothing in the Hague-Visby Rules travaux préparatoires which suggests that the weight limitation was introduced specifically to fill a lacuna which was thought to exist in the Hague Rules with regard to bulk cargoes. Indeed, the UK delegate appears to have considered that "unit" could be interpreted as "freight unit" in the case of bulk cargoes, even if others considered it a fiction. It is recognised by both parties here that there is no "bull's eye" in the Hague-Visby travaux.

37. When regard is had however to the travaux préparatoires of the Hague Rules it can be seen that the underlying intention when including the words "or unit" was as described by Allsop J. Bulk cargo was simply not in mind because, at that time, the limitation provision could not be relevant to it, given the value of such cargoes. The value would not approach anything like £100 (gold) per unit of measurement, whether expressed in kilogrammes, tons, barrels, hundredweight, bushels or quarters. The Claimants, by reference to the US Department of Agriculture, Economic Research Service, state that the price of crude oil in 1924 was about US$1.43 per barrel and wheat cost approximately US$1.24 per bushel. The point is made by the authors of Temperley & Vaughan, *Carriage of Goods by Sea Act 1924* (4th edition 1932) where they state that "A consignment described as '1000 quarters of grain bulk' would be composed of 1000 units of measure. In practice of course the maximum liability of £100 per unit would in such cases never be reached."

38. Whilst Mr Debattista is correct in saying that the fact that the limit could not have been envisaged as engaged at that time does not mean, in itself, that the limitation could not apply to bulk cargoes, the fact remains that, when the word "unit" was included, bulk cargoes were not in mind whereas unpackaged items for shipment were.

39. In short, the travaux préparatoires clearly support the *noscitur a sociis* construction of unit, as being something akin to a package, namely a shipment unit, being a suitable item for shipment, not a unit of measurement.

The authorities

40. There is no English authority directly on point in the context of the Hague Rules but in *Studebaker Distributors Ltd v Charlton Steam Shipping Co Ltd* [1938] 1 KB 459, Goddard J had to consider a bill of lading clause which limited liability to $250 for "each package" where unboxed cars had been carried from the USA to London. In his judgment, he said this:

> "… The goods are expressly stated to be unboxed, and the case was argued before me by both parties, who doubtless want a decision on what are known to be the actual facts, on the footing that the cars were put on board without any covering, or, to state it in another way, just as they came from the works. I confess I do not see how I can hold that there is any package to which the clause can refer. "Package" must indicate something packed. It is obvious that this clause cannot refer to all cargoes that may be shipped under the bill of lading; for instance, on a shipment of grain it could apply to grain shipped in sacks, but could not, in my opinion, possibly apply to a shipment in bulk. If the shipowners desire that it should refer to any individual piece of cargo, it would not be difficult to use appropriate words, as, for instance, "package or unit," to use the language of the Hague Rules …"

41. As the claimants submit, it is clear that the judge considered that the words "package or unit" in the Hague Rules covered "any individual piece of cargo" and did not refer to a unit of measurement.

42. I was also referred to *Bekol BV v Terracina Shipping Corporation*, an unreported decision by Leggatt J (as the then was) in 1988 and decision of Hobhouse J (as he then was) in *The Troll Maple*, an unreported decision in 1990. Neither of these gave much assistance save that each proceeded on the assumption that a "unit" referred to a physical item rather than a unit of measurement.

43. In *The Aramis* [1987] 2 Lloyd's Rep 58, Evans J, as he then was, after dealing with the main points of dispute, which related to the existence or otherwise of a *Brandt v Liverpool* contract, went on to deal with limitation and Article IV r.5 of the Hague Rules in one paragraph. He said:

> "… There is no relevant "package" for an undivided part of a bulk cargo, and there is a long-standing debate as to the proper meaning of "unit". The view put forward by the defendants, which receives some support from *Scrutton on Charterparties* (18th ed.) pp. 441-443, is that for a bulk cargo the "freight unit" or "customary freight unit" should be adopted. This contention only avails the defendants if that unit can be identified in the present case as one tonne. The bills of lading do not do so. The weight is expressed in kilos, both in print and in type. There is no evidence that the customary freight unit is one metric tonne. I reject this contention, therefore, as being unsupported by, or contrary to, the evidence before me ..."

44. As the Claimants submit, Evans J did not need to decide which of the two views as to the meaning of "unit" was to be preferred but decided that, on the facts, the limitation argument could not succeed regardless. He was conscious of the longstanding debate and did not decide the point.

45. There are however, authoritative decisions in Canada, Australia and New Zealand which are directly on point. I have already made reference to the leading Australian case of *El Greco* and paragraph 278 of Allsop J's judgment, with which the Chief Justice agreed. Whilst the decision related to the amended Hague-Visby Rules contained in the Australian Carriage of Goods Act 1991, the terms of paragraph 278 constituted part of the reasoning for the conclusion arrived at in relation to the terms of Article IV r.5(c) of the Hague-Visby Rules.

46. The Canada Supreme Court in *Falconbridge* (*ibid.*) had to decide whether a tractor and generator set constituted "units" for the purpose of limitation of liability under Article IV rule 5 of the schedule to the Canadian Water Carriage of Goods Act 1936. In deciding that there were two units for the purpose of limitation, reliance was placed on the decision in *Studebaker*, to which I have already referred. Ritchie J gave the judgment of the Court and at page 475-476 decided in terms that the word "unit" in Article IV r.5 applied to

a physical unit of goods and not a unit of measurement. In this context he said:

> "The meaning of the word "unit" as it occurs in the phrase 'package or unit' in Rule 5 has given me very great difficulty but I am now satisfied that no substantial assistance can be obtained from the U.S. cases because of the clear difference in the wording of the Rules and such authorities as exist in this country and in England appear to me to bear out the statement of Mr Justice Rand that the word in this context means a shipping unit, that is a unit of goods."

47. He also cited with approval the dictum of Mr Justice Kearney where he said that although the different wording in the US Carriage of Goods by Sea Act, referring to "customary freight unit", was said to have been included to clarify the meaning of "unit" rather than change it, he was not satisfied that this was the case. He concluded that it was only after considerable debate that the US adopted that form of words in their statute and he was satisfied that the words "per package" or, in the case of goods not shipped in packages, "per customary freight unit", did constitute a change from the Hague Rules as adopted in the UK and in Canada and did not afford any practical guidance to the solution of the problem of the meaning of the phrase "per package or unit", in Article IV r. 5.

48. He also referred to Temperley & Vaughan's text book on the Carriage of Goods by Sea Act 1924 (4th edition, 1932) at pages 81-82 as follows:

> "…
>
> The word unit connotes one of a number of things rather than a thing standing by itself, and with reference to goods carried by ship, it does not seem appropriate to describe the whole of a cargo or parcel of cargo in bulk. Further, the natural interpretation of the word "unit" in the phrase "package or unit" appears to be that it has been added in order to cover parts of a cargo similar in a general way to a package, but not strictly included in that term which properly implies something packed up or made up for portability and would therefore not include such a thing as a log of wood or a bar of metal. The word "unit" has, it is suggested, been added in order to embrace such things and not to extend the scope of the Rule to bulk cargoes or parts thereof. Moreover, the whole purpose of Rule 5, which is directed against excessive claims for things of undisclosed abnormal value, supports this limited interpretation of the word.
>
> The learned authors of this work then refer to "an alternative view for which there is much to be said" and which they describe as follows:
> … inasmuch as the term "unit" is commonly used to mean a standard of measure or enumeration, or one of a series of things split up either physically or notionally for the purpose of enumeration or measurement, the phrase "package or unit" here used must refer back

> to the particulars of enumeration or measurement which must be shown on the bill of lading as provided by Article III Rule 3 …
>
> It is clear, however, that the authors prefer the former view. This interpretation is further borne out by the note to be found in Halsbury's Laws of England, 3rd ed., vol. 35 at p. 535 where the learned editors observed in a cryptic note speaking of the word "unit" as used in the Rule: "… which latter term is no doubt apt to indicate an unboxed vehicle."

49. In New Zealand, the Supreme Court (the then equivalent of the High Court in our system) had reached the same conclusion about the meaning of "unit" in *New Zealand Railways v Progressive Engineering Company Ltd* [1968] NZLR 1053 where Tompkins J, after referring to *Studebaker*, concluded that "a package imports the notion of articles packed together as these were. A unit on the other hand, imports something which is a separate thing, such as a single manufactured article, though of course any single article, if accepted for transport as a separate article, would be a unit."

The textbooks/commentaries

50. Counsel for the Claimants, Mr Lionel Persey QC, drew my attention to a number of text books and articles on the point at issue, which has been the subject of debate for many years. Mr Debattista submitted that these did not really advance the position but relied on an article by Michael Mustill QC, as he then was, where he discussed the controversy as to whether "unit" was capable of being read as referring to a unit of weight stated in the contract of carriage. The author said "It was logical to assume that the word did convey this meaning" but the result was frequently unsatisfactory since the amount of the limit could be greatly affected by the way in which the shipper happened to state the weight in the bill of lading. To my mind, the unsatisfactory nature of that result puts in doubt the logicality of the construction suggested and the article failed to deal with the points which I have found compelling in coming to the conclusion that I have. Moreover, importantly, at the time when the article was written, it was impermissible to have regard to the travaux préparatoires, a matter which has only become clear since the decision of the House of Lords in *Fothergill v Monarch Airlines Ltd* [1980] 2 Lloyd's Rep 295; [1981] AC 251. As can be seen from the passages dealing with those travaux, earlier in this judgment, they support the conclusion on construction of the word "unit" at which I have arrived.

51. In an article on the Hague-Visby Rules, Mr Anthony Diamond QC concluded that the word "unit" in the Hague-Visby Rules was to be construed as referring to an individual article or piece of goods which was not a package and that, for true bulk cargo, whether bulk solids, such as grain, or bulk liquids such as oil, there was no "package" or "unit" as those concepts were irrelevant, with the result that the only limit should be based upon weight.

52. The authors of Carver on Bills of Lading (3rd edition), Sir Guenter Treitel and Professor F.M.B. Reynolds stated that the view that a unit meant a freight unit

was never accepted in England and had been specifically rejected in Canada. That meant that the unit referred to in Article IV.5, in those jurisdictions, was an identifiable article or piece of goods that could not be called a package. Moreover, Professor Reynolds, in two articles in 1990 and 2005 has expressed the view that there was no package or unit limitation applicable to bulk cargoes under the Hague Rules and drew attention to the judgment of Allsop J in the *El Greco* and his conclusion that the word "unit" appears to have been slipped, as an alternative to "package at a very late stage without much explanation", into the Rules and was to be "taken to cover unpackaged objects".

53. The editors of Aikens on Bills of Lading (2nd edition, 2015) express the view that it is reasonable to assume that "package" and "unit" must have the same meaning in the Hague and Hague-Visby Rules and the same meaning whenever they appear in the Rules. Whilst the phrase "unit" was said to be unclear in its meaning, the concept of it as a "freight unit" had been allegedly discarded and the prevalent view was that unit meant a shipping unit, being an item that was ready to be shipped with no further packing or consolidation. In a footnote, they refer to *The Aramis* but state that the better view is that there is no limit under the Hague Rules for a bulk cargo.

54. Griggs' Limitation of Liability for Maritime Claims (4th edition, 2005), relying on *Studebaker*, states that an English court is likely to hold that a carrier of a bulk cargo cannot rely on a limitation for a package or unit.

55. Professor Francesco Berlingieri, in International Maritime Conventions volume 1 (1st edition, 2014) states that, although the word "unit" may have different meanings, it appears that since this term has been used as a complement to package, there must be a similarity among them. The unit therefore is a physical unit that cannot be described as a package. That is the case for machinery, an automobile or a yacht. He goes on to state that since the purpose of the Hague Rules was that of creating a standard form of bill of lading for the liner trade, it was most unlikely that those who drafted the Hague Rules had in mind bulk cargoes when discussing the limit of a carrier's liability.

56. That point is also reinforced by Professor Tetley, Marine Cargo Claims (4th edition, 2008) where, under the heading of "What is a unit" he sets out the competing arguments in favour and against it being construed as a freight unit or an unpacked object. Amongst the "equally compelling arguments" that "unit" covers unpacked objects, he refers to the travaux preparatoires for the Hague Rules and the manner in which the word "unit" was added. He states that the word "unit" in English and Canadian case law has come to mean shipping unit – generally large, unboxed and unpackaged objects such as cars, generators and tractors rather than freight units as in the United States. He referred also to the *El Greco* as adopting the same approach, albeit in a case governed by the Australian enactment of the Hague-Visby Rules. As one of the arguments in favour of this approach, he states that this understanding of "unit" is more consistent with the approach taken under the Hague-Visby Rules with respect to the word "unit" in Article IV r.5(c). There he concludes that it must mean an unpacked object and not a freight unit.

57. The arguments which he puts forward as "equally compelling" to the alternative, are in my judgment, much more compelling.

58. Neither the authors of the latest edition of Scrutton on Charterparties, nor the authors of Voyage Charters express any concluded opinion on this point although they refer to the juxtaposition of "unit" and "package", to the *Falconbridge*, *El Greco* and *Studebaker* decisions and the fact that, given the English construction of £100 in *The Rosa S*, the point may be of little importance anyway. The latest edition of Scrutton is largely unhelpful in simply referring to the 18th edition and *The Aramis* in which Evans J referred to that earlier edition. In that edition, published in 1974, at a time when reference to the *travaux préparatoires* was not admissible, the two alternative constructions were set out (as recited later in this judgment) and it was pointed out that the concept of the shipping unit, unlike the freight unit, was not appropriate when applied to bulk cargo. It was said that whatever solution was adopted, anomalies were bound to arise. For the reasons which I have given, the anomalies which arise if the freight unit solution is adopted militate against that solution.

59. When regard is had to the English authorities, the commonwealth authorities, travaux préparatoires and the textbooks and commentaries, I have no hesitation in coming to the conclusion that the word "unit" in the Hague Rules can only mean a physical unit for shipment and cannot mean a unit of measurement or customary freight unit as is the case in the United States. It is not therefore necessary for me to determine how any limit based on a unit of measurement would apply in the present case but I do so nonetheless as the point was fully argued.

Application on a per unit basis

60. The Defendant argued for a limit per ton on the basis that the Charter party referred to a cargo of 2,000 tons, albeit that the Charterers had an option to declare 5% more or less. The Defendant did not contend that the court should apply the customary freight unit for which the US Carriage of Goods by Sea Act provides. The freight under the Charterparty was a lump sum freight and there is a decision of the United States District Court for the Southern District of New York, *Ulrich Amman Building Equipment Ltd v M/V Monsun* 609 F. Supp. 87 (S.D.N.Y. 1985) to the effect that a lump sum freight is simply one freight unit which would here give rise to a pitiable limit. The expression "customary freight unit" is defined in that case as meaning "the unit of cargo customarily used as the basis for the calculation of the freight rate to be charged".

61. Because the US Department of State had referred to the wording of the US statute as "clarification" of the original text of the Hague Rules, the argument over the years has presented the construction argument on Article IV r.5 as a choice between the shipping unit, the physical unit received by the carrier from the shipper and the freight unit, being the unit of measurement applied to calculate the freight. Thus the 18th edition of Scrutton on Charterparties, published in 1974, three years before the coming into force of the Hague-Visby Rules in the UK in 1977, stated the following:

> "What is a unit? The alternatives are (a) the 'freight unit', i.e. the unit of measurement applied to calculate the freight, or (b) the 'shipping unit', i.e. the physical unit as received by the carrier from the shipper. The 'freight unit' has been authoritatively rejected in Canada in favour of the 'shipping unit' at least so far as concerns individual articles such as automobiles not shipped in packages, and there is some authority in England for adopting this approach. But if the 'shipping unit' solution is adopted, it is not easy to see why the Rule treats 'package' as an alternative to 'unit', since 'shipping unit' would include a package. Furthermore the concept of the 'shipping unit', unlike the 'freight unit', is not at all appropriate when applied to bulk cargo: a possible solution is to apply the 'shipping unit' to individual articles not in packages and the 'freight unit' to bulk cargo."

62. The Defendant's argument does not therefore follow the classic line of argument adopted in the literature which generally follows the two lines of thought set out in Scrutton. The Defendant simply wishes to take the unit of measurement expressed for the cargo in the Charterparty and apply the limitation to that as if a ton was the relevant unit. It is pointed out by the Claimants that the bill of lading refers to the cargo as 2,056.926 kg and if the limits were applied to the kilogramme unit expressed there, the result would be a sum well in excess of the claim. As pointed out above, it is highly unsatisfactory that limitation should depend upon the happenstance of the manner in which the cargo is described, whether by shipper or owner in the Charterparty, the bill of lading, mate's receipt or any other documents relating to the carriage. It was doubtless for this reason that the customary freight unit became the basis of limitation in the United States and became the centre of debate as an alternative means of calculating limitation where there was no package or unpackaged physical item of the kind to which I have earlier referred.

63. If a choice had to be made between any of the relevant documents, it would seem to me logical to take the shipping contract between the relevant parties but in the case of a bill of lading, this would usually result in the figures selected by the shipper. The very difficulty to which this gives rise suggests that the Defendant's approach to limitation is not correct. The question is not therefore simply one of mathematical application to this cargo but turns on the question of principle previously discussed as to what a unit truly is. Because of the factual situation here, there was no benefit in the Defendant adopting the customary freight unit measure of limitation but it is, in my judgment, the only realistic alternative construction to the one I have accepted.

64. There was a further argument as to the applicability of the gold clause in Article IX of the Hague Rules. Clause 26 of the Charter however only referred to the privileges, rights and immunities contained in sections 2 and 5 of the 1924 Act and Article IV of the Schedule thereto. The terms of Article IX are therefore not applicable to the Charter and the gold clause could be of no application.

Conclusion

65. For the reasons set out above, I conclude that the word "unit" in Article IV Rule 5 of the Hague Rules is not apt to apply to bulk cargoes and that even if it could apply, the only legitimate application would be by way of interpreting the word "unit" as "freight unit". This cannot be done in the present case in a way which gives rise to a lower limitation figure than the claim because of the lump sum nature of the freight.

66. In these circumstances the Claimants are entitled to a declaration and costs must follow the event. The parties should be able to agree the form of order.