機船 E.R. Hamburg 号事件英国高等法院（商事部）判決
参考資料(判決をよりよく理解するために)

September 9, 2006
Compiled by Seiji Ando

Index:

The Hague-Visby Rules

The Hague Rules as Amended by the Brussels Protocol 1968

Article III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy;

(b) Properly man, equip and supply the ship;

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

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 these Rules, 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.

Article IV

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(c) Perils, dangers and accidents of the sea or other navigable waters.

(i) Act or omission of the shipper or owner of the goods, his agent or representative.

(q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

国際海上物品運送法

第三条　運送人は、自己又はその使用する者が運送品の受取、船積、積付、運送、保管、荷揚及び引渡につき注意を怠つたことにより生じた運送品の滅失、損傷又は延着について、損害賠償の責を負う。

２　前項の規定は、船長、海員、水先人その他運送人の使用する者の航行若しくは船舶の取扱に関する行為又は船舶における火災（運送人の故意又は過失に基くものを除く。）により生じた損害には、適用しない。

第四条　運送人は、前条の注意が尽されたことを証明しなければ、同条の責を免かれることができない。

２　運送人は、次の事実があつたことを及び運送品に関する損害がその事実に

より通常生ずべきものであることを証明したときは、前項の規定にかかわらず、前条の責を免かれる。ただし、同条の注意が尽されたならばその損害を避けることができたにかかわらず、その注意が尽されなかつたことの証明があつたときは、この限りでない。

一　海上その他可航水域に特有の危険

六　荷送人若しくは運送品の所有者又はその使用する者の行為

3　前項の規定は、第九条の規定の適用を妨げない。

（航海に堪える能力に関する注意義務）

第五条　運送人は、自己又はその使用する者が発航の当時次の事項につき注意を怠つたことにより生じた運送品の滅失、損傷又は延着について、損害賠償の責を負う。

一　船舶を航海に堪える状態におくこと。

二　船員を乗り組ませ、船舶を艤装し、及び需品を補給すること。

三　船倉、冷蔵室その他運送品を積み込み場所を運送品の受入、運送及び保存に適する状態におくこと。

2　運送人は、前項の注意が尽されたことを証明しなければ、同項の責を免かれることができない。

（特約禁止）

第十五条　第三条から第五条まで・・・・・の規定に反する特約で、荷送人、荷受人又は船荷証券所持人に不利益なるものは、無効とする。・・・・

2　前項の規定は、運送人に不利益な特約をすることを妨げない。この場合には、荷送人は、船荷証券にその特約を記載すべきことを請求することができる。

（特約禁止の特例）

第十六条　前条第一項の規定は、船舶の全部又は一部を運送契約の目的とする場合には、適用しない。ただし、運送人と船荷証券所持人との関係については、この限りでない。

FILIKOS SHIPPING CORPORATION OF MONROVIA v. SHIPMAIR B.V. (THE "FILIKOS") (C.A.), [1983] 1 Lloyd's Rep. 9, 11

Sir JOHN DONALDSON, M.R.:

[A]t common law the task of loading from ship's rail, stowing and discharging overside is the sole responsibility of the shipowner. However either or both of the duties of (a) arranging for these processes to be carried out and (b) paying for them to be carried out may be transferred by contract to the charterers. So too can liability for

breach of the duty of care in carrying out these processes, whether or not either or both the duties of arranging and paying for their performance have been so transferred.

Pyrene Company, Ltd. v. Scindia Steam Navigation Company, Ltd. (Q.B.), [1954] 1 Lloyd's Rep. 321, 329

Mr. Justice DEVLIN:

"The phrase 'shall properly and carefully load' [in Art. III, Rule 2] may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the Rules. Their object, as it is put, I think, correctly in Carver, 9th ed., p. 186, is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide."

G. H. Renton & Co., Ltd. v. Palmyra Trading Corporation. (H.L.), [1956] 2 Lloyd's Rep. 379, 390-391, 393

Viscount KILMUIR, L.C.:

The natural and ordinary meaning of "properly" in antithesis to "carefully" in the phrase "properly and carefully load, handle, stow, carry, keep, care for and discharge" is in accordance with a sound system. It has not a geographical significance. (Note: The Lord Chancellor said nothing about the observations of Mr. Justice Devlin in *Pyrene v. Scindia*.)

Lord MORTON OF HENRYTON:

I construe the words "shall properly and carefully . . . carry . . . and discharge the goods carried" as meaning that the carrier must perform the duties of carriage and

discharge imposed upon him by the contract in a proper and careful manner. In *Pyrene Company, Ltd. v. Scindia Navigation Company, Ltd.*, [1954] 2 Q.B. 402, at pp. 417 and 418; [1954] 1 Lloyd's Rep. 321, at pp. 328 and 329, Devlin, J., said: "There is, however, a third interpretation to Art. III, r. 2. The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in *Carver's Carriage of Goods by Sea*, 9th ed. (1952), p. 186, is to define not the scope of the contract service but the terms on which that service is to be performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide."

My Lords, I agree with this passage, save that, to my mind, not only is the construction approved by Devlin, J., more consistent with the object of the Rules, but it is also the more natural construction of the language used.

Lord TUCKER:

Whether on its true construction the object of Art. III, r. 2, is to define not the scope of the contract service but the terms on which that service is to be performed, it is only by reference to the terms of the contract that it is possible to ascertain the proper port to which the goods are to be carried and at which they are to be discharged. Once it is determined that, in the existing circumstances, Hamburg was such a port, no question of improper carriage or discharge in a geographical sense can arise. It would therefore seem to me that a decision, with perhaps far-reaching consequences, on the extent and nature of the obligations imposed by the rule in relation to the various operations referred to, is not called for.

Lord COHEN:

I find myself in ..... complete agreement with [my noble and learned friend Lord

Morton of Henryton.]

Lord SOMERVELL OF HARROW:

The general ambit of the Hague Rules is to be found in Art. III, r. 2, which has already been cited. It is, in my opinion, directed and only directed to the manner in which the obligations undertaken are to be carried out. Subject to the later provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes properly and with care. This question was considered by Devlin, J., in *Pyrene Company, Ltd. v. Scindia Navigation Company, Ltd*., [1954] 2 Q.B. 402, at pp. 417 and 418; [1954] 1 Lloyd's Rep. 321, at pp. 328 and 329, in relation to the words "shall properly and carefully load." I agree with his statement, which has already been cited.

Nikolay Malakhov Shipping Co Ltd v S.E.A.S. Sapfor Ltd & Anor Matter No CA 40459/97 [1998] NSWSC 65 (25 March 1998), The Supreme Court of New South Wales Court of Appeal

HANDLEY JA:

Article III r 2 relevantly provides that "the carrier shall properly and carefully ... discharge the goods carried". The presently settled construction of this article in Anglo-Australian law leaves the parties free to allocate among themselves the responsibility for performing the operations covered by this article. The effect of the rule is that where the carrier has undertaken responsibility for performing such an operation in whole or in part it will be bound to do so properly and carefully. As Devlin J said in *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 at 418, the object of this rule "is to define not the scope of the contract service but the terms on which that service is to be performed". See also *G H Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149 at 169-70, 174 (Renton); *Albacora SRL v Westcott & Laurance Line, Ltd* [1966] 2 Lloyd's Rep 58 at 64 (Albacora); *The Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd* (1980) 147 CLR 142 at 163 (Gamlen).

SHELLER JA:

In *Pyrene Co Limited v Scindia Navigation Co Limited* [1954] 2 QB 402 at 417-8, Devlin J said:

"The phrase `shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the rules. Their

object as it is put, I think, correctly in *Carver's Carriage of Goods by Sea*, 9th ed; (1952), p186, is to define not the scope of the contract service but the terms on which that service is to be performed. ..... I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play." In *GH Renton & Co Limited v Palmyra Trading Corporation of Panama* [1957] AC 149 at 170,172, 173 and 174, at least four members of the House of Lords agreed with what Devlin J said.

On the other hand the United States Court of Appeals, Second Circuit, in *Associated Metals & Minerals Corporation v M/V Arktis Sky* 978F 2d 47 (Second Cir 1992) at 49 confirmed earlier decisions of the Second Circuit that Article III r2 of the Hague Rules as incorporated in the United States Carriage of Goods by Sea Act 1936 (COGSA) created a non-delegable duty on behalf of the vessel to load, handle, stow, carry, keep, care for and discharge the goods carried. A conclusion that vessels could be held liable for cargo damages only in cases where the vessel exercised control over the stowage or the stevedores was said to be directly contrary to the equivalent of Article III r8. At 52 the Court said that the parties cannot by private agreement circumvent the legislative purposes of the Act. The vessel might exonerate its responsibility by carrying its burden of proof that the damage did not occur because of its own acts under the equivalent of Article IV r2 (i) and (q). No mention was made of the English cases. Devlin J suggested that the interpretation preferred by the Court of Appeals might fit the language more closely. Professor Martin Davies has observed ("Two Views of Free In and Out, Stowed Clauses in Bills of Lading", 22 *Australian Business Law Review*, 198 at 203 and following) that this interpretation accords with the express intention of those responsible for drafting that part of the Hague Rules.

In *Gosse Millerd* in the Court of Appeal [1928] 1 KB 717 at 732, Scrutton LJ said that except in some exceptional periods the United States of America had not been a shipowning country and had approached shipping matters from the point of view of the cargo owners. "I cannot think that their decisions, while treated with great respect, should necessarily control the shipping decisions of the Courts of the greatest ship owning country of the world." Devlin J's dictum may, in an appropriate case, call for review. If it does, the United States approach rather than the English approach, may be apposite in Australia.

JINDAL IRON & STEEL CO. LTD AND OTHERS v. ISLAMIC SOLIDARITY SHIPPING CO. JORDAN INC. AND ANOTHER (THE JORDAN II), [2003] 2 Lloyd's Rep. 87, 97-99, 105

Mr. Nigel Teare, Q.C. sitting as a Deputy Judge of the High Court

60. Mr. Rainey's argument centred upon the travaux preparatoires to the Hague Rules. This was because Mr. Justice Devlin, while expressing the view that the language of art. III, r. 2 favoured the interpretation for which Mr. Rainey contended, that the carrier shall perform the cargo operations listed in art. III, r. 2 and that he shall do so properly and carefully, nevertheless regarded the object of the rules to be more consistent with the interpretation that the carrier shall perform whatever cargo operations he has undertaken to perform properly and carefully.

61. Reference to travaux preparatoires was first recognized as legitimate long after *Pyrene v. Scindia* was decided; see *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251. In *Effort Shipping Co. Ltd. v. Linden Management S.A.*, [1998] A.C. 605 Lord Steyn described the correct approach to the construction of an international convention in these terms:

Although the text of a convention must be accorded primacy in matters of interpretation, it is well settled that the travaux preparartoires of an international convention may be used as "supplementary means of interpretation"; compare article 31 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969. Following *Fothergill v. Monarch Airlines*, 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 preparatoires clearly and indisputably point to a definite legal intention; see *Fothergill v. Monarch Airlines Ltd.* per Lord Wilberforce, at p. 278C. Only a bull's eye counts. Nothing less will do.

62. To my mind the language of art. III, r. 2 supports Mr. Rainey's submission. This was the view of the language of art. III, r. 2 favoured by Mr. Justice Devlin. It was also the view favoured by textbook writers after the introduction of the Hague Rules; see Scrutton on Charterparties 12th ed. (1925) at p. 495 (which view was continued through to the 15th ed. (1948), Temperley on The Carriage of Goods by Sea Act 1924, 1st ed. (1925) pp. 27-28 and 3rd ed. (1927) pp. 25-28, and Carver on Carriage by Sea 7th ed. (1925) at pars. 76(a) and 273 (continued through to the 8th ed. (1938)).

63. However, Lord Morton in *Renton v. Palmyra* thought that the more natural

construction of the language was that the carrier must perform the duties of carriage and discharge imposed upon him by the contract in a proper and careful manner. This was the preferred view in the 9th ed. of Carver published in 1952.

64. In these circumstances it can fairly be said that there are truly feasible alternative constructions of art. III, r. 2. Mr. Rainey therefore explored the travaux preparatoires to the Hague Rules. (Although the bills of lading were subject to the Hague-Visby Rules there was no change to art. III, r. 2 in the Hague-Visby Rules.) the travaux preparatoires are now readily accessible in "The Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules (1990) by Professor Sturley. Mr. Rainey was not able, I think, to point to any express reference in the travaux preparatoires to the particular point which has arisen in this case, namely, can the merchant and the shipowner agree that the merchant shall perform the obligations of loading, stowage and discharge? However, while it was not until the Diplomatic Conference in Brussels in October, 1923 that art. III, r. 2 emerged in its final form, there are certain statements in the travaux preparatoires which strongly suggest that art. III, r. 2 was not intended to permit a shipowner to contract out of his duty to load, stow and discharge. Indeed Mr. Young accepted that there were passages which appeared to support Mr. Rainey's argument.

65. In May, 1921 a sub-committee of the Maritime Law Committee of the International Law Association produced the first draft of the rules. The draft was approved by the International Law Association and its Maritime Law Committee in the Hague in September, 1921. The draft became known as the Hague Rules, 1921. At the World Shipping Conference in November, 1921 (at which shipowners reviewed the Hague Rules, 1921) Sir Norman Hill (who, as secretary of the Liverpool Steamship Owners' Association and representative of the carriers, had been a dominant member of the drafting sub-committee of the Maritime Law Committee) said this:

So far I have laid stress on the advantages the shipowners gain under the Rules. On the other hand, the shipowner assumes, under Article III, the definite obligation to provide for the proper and careful handling, loading, stowage, carriage, custody, care and unloading of the goods throughout the period covered by the Rules that is, from loading to discharge tackle to tackle. The liability is only qualified by the terms of Article IV, which exempts the shipowner from liability for the perils there defined, including negligence in the navigation or in the management of the ship. The Rule will place on the shipowners full responsibility for damage resulting within the period in question from bad stowage or from theft and the like. It is a substantial extension

of the shipowners' liability, but it does not go, except on one point with which I will deal, beyond the obligations imposed by the Harter and Dominion Acts.

66. This passage does not sit happily with the possibility that shipowners could avoid their obligations under art. III, r. 2 by entering into an agreement which removed from their sphere of activity the duty to load, stow and discharge.

67. In May, 1922 the rules were amended slightly by Sir Norman Hill and Andrew Marvel Jackson, a leading representative of the cargo interests, at a conference arranged by the Board of Trade. In October, 1922 at a conference of the Comite Maritime International in London the rules were put into a form which could be adopted at a diplomatic conference. These were the Hague Rules, 1922. At the Diplomatic Conference on Maritime Law in Brussels, held later in October, 1922, the rules were discussed. The chairman of the conference, Louis Franck, introduced the rules and said this:

. . .In so far as it [the draft rules] deals with the handling, receipt, custody, stowage and delivery of the goods, it makes a uniform law obligatory in relations between the shipowner and the holder of the bill of lading.

68. Because many of the delegates lacked authority to commit their governments to the final text a further diplomatic conference was required. That took place in Brussels in 1923. It was at this stage that the final form of art. III, r. 2 emerged. The chairman was again Louis Frank. He said this about art. III, r. 2:

Article 3(2) contained an essential clause highlighting that the carrier, except as provided for in article 4, was responsible for seeing that everything required for loading, handling, stowage, carriage, custody and unloading was provided for the goods to be carried. And the inclusion of every clause permitting the shipowner, without incurring responsibility, to fail in its essential duty of overseeing the preservation of the goods from the point of view of successful stowage, loading, and unloading was null and void. That was the main element of the convention because it was in this way that, in the past, the use of immunity clauses had given cause for the greatest criticism. The result had been the creation of different sorts of bills of lading that still bore the form, but whose content was completely destroyed by the force of the immunity clauses.

69. Again it can be said that this passage does not sit happily with the possibility that shipowners could avoid their obligations under art. III, r. 2 by entering into an agreement which removed from their sphere of activity the duty to load, stow and discharge.

70. The Court can only be influenced by these travaux preparatoires if they clearly and indisputably point to a definite legal intention. The degree of clarity is graphically illustrated by Lord Steyn's remark that only "a bull's eye" counts. Since the travaux preparatoires do not deal expressly with the question raised in this case I find it difficult to say that Mr. Rainey has scored a bull's eye although he has come very near to doing so (particularly in the case of Sir Norman Hill's address to the shipowners at the World Shipping Conference in November, 1921). My difficulty can be illustrated by examining the statement of the chairman of the diplomatic conference in 1923 (when art. III, r. 2 was in its final form) which I have quoted. He does not say in terms that art. III, r. 2 prevents a shipowner and a merchant from agreeing that the merchant shall load, stow and discharge. He refers to a clause which permits a shipowner to fail in his duty to load, stow and discharge and refers to such clauses as *immunity* clauses. The distinction between, on the one hand, having a duty and seeking to protect oneself from a failure to perform that duty and, on the other hand, having no duty may be a fine one but it is a clear distinction nevertheless. The chairman did not say expressly or by necessary implication that a shipowner and merchant would be unable to agree that the merchant would load, stow and discharge the goods. For this reason I have concluded that Mr. Rainey has not been able to find a clear and indisputable legal intention on that point.

71. Mr. Rainey has also submitted that the Courts of the United States of America have taken a different view of art. III, r. 2 from that taken by Mr. Justice Devlin in *Pyrene v. Scindia* and that their view supports his submission on the effect of art. III, r. 2 and r. 8. In this regard he has relied upon the importance attached by the House of Lords to a uniform approach to questions arising under an international convention; see for example *Effort Shipping v. Linden Management*, [1998] A.C. 605 at p. 624 per Lord Steyn. As to the position in the U.S.A. Mr. Rainey referred to the decision of the U.S. Court of Appeals Second Circuit in *Associated Metals and Minerals v. The Arktis Sky*, 978 F.2d 47 (2nd Cir.) 1992. Mr. Rainey also submits that the Courts of Canada, South Africa, Italy and France have taken a different view of art. III, r. 2 from that of Mr. Justice Devlin. However, he accepts that the Courts of Australia have followed Mr. Justice Devlin but he has pointed to a judicial suggestion that this may call for review; see *Nikolay Malakhov Shipping v. Seas Sapfor*, (1998) 44 N.S.W.L.R. 371 at pp. 380, 387-388 and 418.

72. I have not analysed in detail the foreign case law upon which Mr. Rainey relies but I am prepared to assume that the Courts of several major trading countries have reached a different conclusion as to the scope of art. III, r. 2 from that reached by Mr.

Justice Devlin. However, in circumstances where a commercial Judge as distinguished as Mr. Justice Devlin expressed his preference for one of two competing interpretations of art. III, r. 2 as long ago as 1954 and where that preferred interpretation has been regarded as settled law by English Courts ever since (see the cases listed above in par. 46) I do not consider that it is right, at any rate for a Court of first instance, to disturb that well established understanding of art. III, r. 2. In commercial law there is generally accepted to be a special need for certainty, consistency or continuity; see for example *The Hannah Blumenthal*, [1983] A.C. 855 at p. 913 (per Lord Brandon). It may be that if England is out of step with most other jurisdictions that factor is not as potent as it would otherwise be and that the House of Lords may not feel inhibited from altering what has been regarded in English law as settled. But so far as concerns a first instance Court it is still, in my judgment, an important factor. So although I consider that Mr. Rainey's interpretation of art. III, r. 2 fits the language of art. III, r. 2 better than the interpretation preferred by Mr. Justice Devlin, I would have rejected Mr. Rainey's submission had there been no binding authority on the question.

Lord Justice TUCKEY:

33. It is clear ..... that a majority of their Lordships [in *Renton v. Palmyra*] expressly approved what Mr. Justice Devlin said in *Pyrene v. Scindia* and I think there is no doubt that this was one of the reasons why they dismissed the appeal. .....

34. ..... The ratio is split but the majority are clear on the point in question. If this view of art. III, r. 2 applies to the obligation to carry, which is the essence of the contract, it must also apply to the incidental obligations including loading, handling and stowing referred to in this article.

Demsey & Assoc., Inc. v. S.S. Sea Star, 1972 AMC 1440, 1446

United States Court of Appeals, Second Circuit

HAROLD R. MEDINA, Ct. J.:

Under Sections 1303(1) and (2) of COGSA, the carrier is bound to exercise due diligence to make the ship seaworthy, to make the ship fit and safe for the reception, carriage and preservation of the cargo, and to properly load, handle, stow and discharge the goods being shipped. Every claim for cargo damage creates a maritime lien against the ship which may be enforced by a libel *in rem.* 1303(8) prohibits a shipowner from contracting out of this liability. The fact that the [vessel] was operated under charter to [the time charterer] does not affect the liability of the vessel.

Nichimen Co. v. M.V. Farland, 1972 AMC 1573, 1587
United States Court of Appeals, Second Circuit
HENRY J. FRIENDLY, Ch. J.:
[I]n any event, under §3(2) of COGSA, the carrier's duty to "properly and carefully load ... (and) stow ... the goods carried' is non-delegable.

SUMITOMO CORPORATION OF AMERICA *v.* M/V SIE KIM, 1987 AMC 160, 173-174,
UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
LEE P. GAGLIARDI, Senior D.J.:
It is true that a carrier must exercise due diligence to make vessel seaworthy and that 46 U.S.C. sec. 1303(2) states that a carrier "shall properly and carefully load, handle, [and] stow . . . the goods carried." Courts have suggested somewhat casually in dicta that carriers have a non-delegable duty to stow cargo. See *Nichimen Company v. M.V. Farland*; *Demsey & Associates v. S.S. Sea Star*. Those cases, however, did not concern a shipper freely contracting not only to pay for, but also to exercise control over, the loading and stowage process. In *Nichimen,* the consignee paid the cost of loading, but the time-charterer supervised and directed loading and stowage through a hired specialist. *Demsey* involved a dispute between a vessel's time and voyage charterers.
Where courts have considered the possibility of shipper control, their analyses suggest that carriers may indeed contract with shippers or consignees with respect to responsibility and control of loading and stowage. See *Atlas Assurance Co., Ltd. v. Harper Robinson Shipping Co.*, 1975 AMC at 2369; *Caterpillar Overseas, S.A. v. S. S. Expeditor*, 1963 AMC 1662, cert. denied, 375 U.S. 942, 1963 AMC 2697 (1963). Read in context and applied to the facts of this case, then, the language of 46 U.S.C. sec. 1303 seems most properly interpreted not as imposing a genuine non-delegable duty to load and stow, but rather as mandating that carriers remain liable for their negligence (or the negligence of their agents) in loading and stowage as long as they in fact control those processes. .....
Under COGSA an ocean carrier has a duty to exercise due diligence to ensure that a vessel is seaworthy. 46 U.S.C. sec. 1303(1). The test for seaworthiness is "whether the vessel is reasonably fit to carry the cargo she has undertaken to transport." *Atlantic Banana Co. v. M.V. Calanca,* 1972 AMC at 886. Stowage can influence seaworthiness. See, e.g., *Blanchard Lumber Co. v. S.S. Anthony II,* 1967 AMC 103

(SDNY 1966). Even under a FILO shipment, the Master and carrier retain the power to veto use of any stowage techniques which may endanger the ship or other cargo. See *Nichimen Company v. M. V. Farland*. The Master and carrier must exercise that veto when due care requires. It does not follow, however, that all failures to "properly and carefully stow" cargo raise issues of seaworthiness. 23(23) See e.g., *Demsey & Associates v. S.S. Sea Star*; *Nichimen Company v. M.V. Farland*. Further, it is clear that there can be no recovery of damages on a claim of unseaworthiness absent proof of causation. See, e.g., *Nichimen Company v. M.V. Farland,*; *Atlantic Banana v. M.V. Calanca*.

ASSOC. METALS v. *ARKTIS SKY*, 1993 AMC 509, 513
United States Court of Appeals, Second Circuit
Donald P. Lay, Senior Ct.J.:

We find *Nichimen* and *Demsey*'s statutory analysis to be persuasive. Under the district court's enforcement of the FIOS clause, 46 U.S.C. App. §1303(8) would have no meaning. The plain language of §1303(8) forbids enforcement of agreements to relieve carriers of liability for negligence in carrying out the
duties set forth in §3 of COGSA. See Anthony N. Zock, *Charter Parties in Relation to Cargo*, 45 Tul. L. Rev. 733, 47-48 (1975) (stating that "any provision in the charter party or the bill of lading that stipulates for an obligation, liability, or exemption that conflicts with the terms of either COGSA or the Harter Act will have no effect"). One of the duties assigned to carriers is that of properly and carefully loading cargo. See 46 U.S.C. App. §1303(2) (1988). Thus, an agreement such as the one in question here is "null and void" under the statute because it purports to relieve a carrier of liability for negligence in one of its duties, the stowing of cargo. 2(3) It is of no consequence that, unlike in *Demsey* and *Nichimen*, indemnification for damages is not in issue here.

COURT LINE, LTD. v. CANADIAN TRANSPORT COMPANY, LTD. [1940] 67 Ll.L.Rep. 161, 166, 168-169, 172-173 (H.L.)
Lord ATKIN:

The first answer which the charterers made was that there was no such liability because the duty of the charterers was expressed to be to stow, &c., "under the supervision of the captain." This, it was said, threw the actual responsibility for stowage on the captain; or at any rate threw upon the owners the onus of showing that the damage was not due to an omission by the master to exercise due

supervision. This, we were told, was the point of commercial importance upon which the opinion of this House was desired.

My Lords, it appears to me plain that there is no foundation at all for this defence; and on this point all the Judges so far have agreed. The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage

is likely to impose a liability upon his owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage, no doubt they might escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely; .....

Lord WRIGHT:

It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly, not only in the interests of the seaworthiness of the vessel, but in order to avoid damage to the goods, and also to avoid loss of space or dead freight owing to bad stowage. In modern times the work of stowage is generally deputed to stevedores, but that does not generally relieve the shipowners of their duty, even though the stevedores are under the charter-party to be appointed by the charterers, unless there are special provisions which either expressly or inferentially have that effect. But under Clause 8 of this charter-party the charterers are to load, stow, and trim the cargo at their expense. I think these words necessarily import that the charterers take into their hands the business of loading and stowing the cargo. It must follow that they not only relieve the ship of the duty of loading and stowing, but as between themselves and the shipowners relieve them of liability for bad stowage, except as qualified by the words "under the supervision of the captain," which I shall discuss later. The charterers are granted by the shipowners the right of performing a duty which properly attaches to the shipowners. Presumably this is for the convenience of the charterers. If the latter do not perform properly the duty of stowing the cargo, the shipowners will be subject to a liability to the bill of lading holders. Justice requires that the charterers should indemnify the shipowners against that liability on the same principle that a similar right of indemnity arises when one person does an act and thereby incurs liability at the request of another, who is then held liable to indemnify. That such a liability on the part of the charterers is contemplated is shown by the last words of Clause 8, which supposes that the

charterers may incur liability for "damage to cargo."

So far I think is clear. What, then, is the effect of the words "under the supervision of the captain"? These words expressly give the master a right, which I think he must in any case have, to supervise the operations of the charterers in loading and stowing. The master is responsible for the seaworthiness of the ship and also for ensuring that the cargo will not be so loaded as to be subject to damage, by absence of dunnage and separation, by being placed near to other goods or to parts of the ship which are liable to cause damage, or in other ways. A striking instance of bad stowage of this character is Elder, Dempster & Co. v. Paterson, Zochonis & Co., [1924] A.C. 522. But I think this right is expressly stipulated not only for the sake of accuracy, but specifically as a limitation of the charterers' rights to control the stowage. It follows that to the extent that the master exercises supervision and limits the charterers' control of the stowage, the charterers' liability will be limited in a corresponding degree. The learned arbitrator was evidently of this opinion. He expressly found that there was no evidence of the extent, if any, to which there was supervision by the captain or of protest or approval by him in respect of the stowage. He obviously held, and as I think rightly held, that there was in this case no ground for imposing any limitation on the charterers' liability to the shipowners in respect of the improper stowage. .....

The master's power of supervision is obviously not limited to matters affecting seaworthiness.

Lord PORTER:

In my opinion, by their contract the charterers have undertaken to load, stow, and trim the cargo, and that expression necessarily means that they will stow with due care. *Prima facie* such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores. It may indeed be that in certain cases as, e.g., where the stability of the ship is concerned, the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge. It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers'. The primary duty of stowage, however, is imposed

upon the charterers and if they desire to escape from this obligation they must, I think, obtain a finding which imposes the liability upon the captain and not upon them.

The "Shinjitsu Maru No. 5" (Q.B. (Com. Ct.)) [1985] 1 Lloyd's Rep. 569, 575
Lord Justice NEILL:

[I]n practice ..... stowage is treated as a joint undertaking with both the charterers and the ship playing their part.

In the end I have come to the conclusion that the correct approach is to construe the words "and responsibility" as effecting a prima facie transfer of liability for bad stowage to the owners but that if it can be shown in any particular case that the charterers by, for example, giving some instructions in the course of the stowage, have *caused* the relevant loss or damage the owners will be able to escape liability to that extent. In my judgment, this approach is consistent with that of the House of Lords in the *Court Line* case where it was clearly contemplated that the party primarily responsible might be relieved from liability for loss caused by the other party's intervention. There may therefore be cases where it will be necessary to consider the dominant cause of particular damage.

If this analysis is correct, the added words "and responsibility" will place the *primary* duty on the master and owners but with the possibility that their liability will be affected by some intervention by the charterers.

JINDAL IRON & STEEL CO. LTD AND OTHERS v. ISLAMIC SOLIDARITY SHIPPING CO. JORDAN INC. AND ANOTHER (THE JORDAN II), [2003] 2 Lloyd's Rep. 87, 104
Lord Justice TUCKEY:

26. ..... In the course of the hearing before the Judge the claimants said that they would be relying on what has been called "the intervention proviso" if their construction arguments failed. This proviso is derived from the decision of the House of Lords in *Canadian Transport v. Court Line Ltd.*, [1940] A.C. 934. In that case the House decided that responsibility for stowage had been transferred to charterers but at p. 944 Lord Wright said: "..... to the extent that the master exercises supervision and limits the charterers' control of the stowage, the charterers' liability will be limited in a corresponding degree." and at p. 952 Lord Porter added: "..... if it were proved that the master had. . .intervened in the stowage, again the responsibility would be his and not the charterers."

27. There was some discussion before us as to the legal basis for relieving charterers from liability in such circumstances. Mr. Young accepted that it might be a liability in tort for the negligent act of the master or for a failure to act where he had assumed a duty to act but failed to do so. I think this analysis is probably correct but it is not essential for determination of this appeal. The circumstances in which the intervention proviso can be relied on were not argued and the position may be unclear (see Voyage Charters at par. 16.42) so I shall say no more about this.

G. E. Dobell & Co. v. Steamship Rossmore Company, Ltd., [1895] 2 Q.B. 408, 416

Lord Justice Kay:

The essential question then is, Was there want of due diligence on the part of the owners? It is said that they did all that they could by providing proper equipment and appointing proper agents. It was the duty of the ship's carpenter to close this porthole, and they appointed a carpenter to whose competence no one makes any objection. It is said, therefore, that they personally exercised diligence, and thereby fulfilled the condition. I do not agree with this contention. It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent. It is obvious that the shipowner cannot himself with his own hands make the ship seaworthy; he must act through other persons; but I do not read the contract as exempting him from liability in the case of the negligence of the agents whom he employs to act for him in this respect. . . .

The Colima, (1897) 82 Fed. 665, 678, (S.D.N.Y.),

Brown J.:

This section [i.e., the 3rd section of the Harter Act] has been in several cases adjudged to require due diligence, not merely in the personal acts of the owner, but also on the part of the agents he may employ, or to whom he may have committed the work of fitting the vessel for sea. The act requires in other words, due diligence in the work itself. . . . On any other construction, owners would escape all responsibility for the seaworthiness of their ships by merely employing agents of good repute, whether any diligence and care to make their vessels seaworthy were in fact exercised or not. . . .

Smith, Hogg & Co., Ltd. v. Black Sea & Baltic General Insurance Company, Ltd., (1939) 64 Ll.L.Rep. 87, at p. 89

Lord Justice MacKinnon:

The limitation and qualification of the implied warranty of seaworthiness, by cutting it down to use "due diligence on the part of the shipowner to make the ship seaworthy," is a limitation or qualification more apparent than real, because the exercise of due diligence involves not merely that the shipowner personally shall exercise due diligence, but that all his servants and agents shall exercise due diligence, as is pointed out in a note in Scrutton on Charter-parties, [14th ed., p. 110] which says that this variation will not be "of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants, or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g., a defect causing unseaworthiness but of so latent a nature that due diligence could not have discovered it) are not likely to occur often."

In the same case, on appeal to the House of Lords, (1940) 67 Ll.L.Rep. 253, 257

Lord Wright:

. . . The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect such an exception can only excuse against latent defects. The overloading was the result of overt acts.

Australian Newsprint Mills, Ltd. v. Canadian Union Line, Ltd., and Others, [1952] 1 D.L.R. 850, at p. 854,

Mr. Justice Coady, in the Supreme Court of British Columbia:

. . . It seems to me that the due diligence imposed by the statute and as interpreted by the authorities is not made out by evidence that this duty someone else was engaged to perform on the behalf of the defendants someone on whom the defendants relied and in whom the defendants had confidence. The duty of the defendants was to exercise due diligence and this applies to their servants and agents and that duty is absolute, except as to latent defects not discernible by . . . due diligence . . .

[I]t is my view on the authorities, that the defendants cannot avoid liability . . . by attempting to cast upon the shoulders of some third party, engaged by them . . . a duty which the Act places upon the defendants. . . .

International Packers London, Ltd. v. Ocean Steam Ship Company, Ltd., [1955] 2 Lloyd's Rep. 218, 236

Mr. Justice McNair:

. . . The obligation imposed by Art. III, r. 2, like the obligation imposed by Art. III, r. 1, to exercise due diligence to make the ship seaworthy, is an obligation imposed upon the shipowner himself which he cannot escape on proof that he employed a competent independent contractor who was in fact negligent. . . .

RIVERSTONE MEAT COMPANY, PTY., LTD. v. LANCASHIRE SHIPPING COMPANY, LTD. (THE "MUNCASTER CASTLE") [1961] 1 Lloyd's Rep. 57, 83, 87

Lord RADCLIFFE:

What I think should determine this appeal, however, is what we know of the history of these words "due diligence to make the ship seaworthy" in connection with sea carriage of goods and what I regard as the settled interpretation of their significance which has been alluded to from time to time in the English Courts. These sources seem to me to be wholly in favour of the appellants' claim. We have, to begin with, the common learning that the words in question were adopted by international convention in the Hague Rules at a time when they had been for many years familiar in the Harter Act, 1893, of

the United States. We know what content successive decisions of American Courts had given those words: that the carrier was responsible to the cargo-owner unless due diligence in the work had been shown by every person to whom any part of the necessary work had been entrusted, no matter whether he was the carrier's servant, agent or independent contractor. "Merely employing agents of good repute" was not enough.

Lord KEITH OF AVONHOLM:

The Hague Rules abolished the absolute warranty of seaworthiness. They substituted a lower measure of obligation. The old law no doubt worked hardly on shipowners and charterers, in the absence of exception or exclusion. The change in the law, not confined entirely to England, operated to afford relief to shipowners, as well as some protection to shippers. It would, however, be a most sweeping change if it had the result of providing carriers with a simple escape from their new obligation to exercise due diligence to make a ship seaworthy. If this were the plain effect of the statute, *cadit quaestio*. But *in dubio* the Courts should, in a change of the suggested dimensions, lean the other way. The language of the Hague Rules does not, I think,

lead to the result contended for by the respondents. The carrier will have some relief which, weighed in the scales, is not inconsiderable when contrasted with his previous common-law position. He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence.

ANGLO-SAXON PETROLEUM COMPANY, LTD. v. ADAMASTOS SHIPPING COMPANY, LTD. (The "Saxonstar)" (HL) [1958] 1 Lloyd's Rep. 73, 75-76, 77-78, 81, 82

The charter-party provided: 52. It is agreed that the Chamber of Shipping War Risks Clauses dated April, 1937, New Jason Clause, Paramount Clause, and Both to Blame Collision Clause, as attached, are to be incorporated in this charter-party. The Paramount Clause attached was as follows: This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16th, 1936, which shall be deemed to be incorporated herein, and nothing herein contained 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 under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further. .....

Mr. Justice Devlin held ([1957] 1 Lloyd's Rep. 79) that the plain object of Clause 52 of the charter-party was to incorporate the Paramount Clause, and that adopting the principle *"Falsa demonstratio non noce*t" the Paramount Clause should be corrected to read, "This *charter-party* shall have effect subject to" the Act of 1936, notwithstanding Sect. 5 of the Act which provided that the provisions of the Act should not be applicable to charter-parties; and that accordingly the rights and liabilities of the parties were governed by the provisions of the Act of 1936, but that such provisions applied only to cargo-carrying voyages and not to non-cargo-carrying voyages, which remained governed by the express and absolute warranty of seaworthiness contained in Clause 1 of the charter-party. On appeal by shipowners and cross-appeal by charterers, the Court of Appeal (Denning, Parker and Sellers, L.JJ.) held ([1957] 1 Lloyd's Rep. 271) that even accepting that the Paramount Clause could be corrected to read "This *charter-party* shall have effect subject to" the Act of

1936, and that Sect. 5 of the Act could be ignored, there remained so many contradictions, inconsistencies and incongruities as to make it impossible for a Court to construe the Act to apply to the present charter-party. The appeal by shipowners was dismissed. The cross-appeal by charterers was allowed and the interim award in their favour was upheld. The shipowners appealed.

Viscount SIMONDS :

[The Paramount Clause] ..... opens with the words "This bill of lading" and it purports to incorporate the provisions of an Act of the United States which itself enacts that it shall not apply to charter-parties. ..... I can entertain no doubt that the parties, when they agreed by Clause 52 of the charter that the "Paramount Clause . . . as attached" should be incorporated in their agreement and proceeded physically to attach the clause, ... had a common meaning and intention which compels me to regard the opening words "This bill of lading" as a conspicuous example of the maxim *falsa demonstratio non nocet cum de corpore constat*. There can be no doubt what is the *corpus*. It is the charter-party to which the clause is attached. Nor, ... can I be driven to a wholesale rejection of the clause because the Act, whose provisions are in turn deemed to be incorporated, itself enacts that its provisions shall not apply to charter-parties. I cannot attribute to either party an intention to incorporate a provision which would nullify the total incorporation. .....

[the parties to a charter-party] wish to import into the contractual relation between owners and charterers the same standard of obligation, liability, right and immunity as under the Rules subsists between carrier and shipper: in other words they agree to impose upon the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon them. .....

[T]he Act, being an Act of the United states, is geographically confined to its own jurisdictional limits:

. . . every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.

Therefore, it is said, let it be granted that the incorporation of the Act is not altogether insensible and that the statutory standard of obligation is contractually imported into the charter-party. Yet why should it extend beyond the limits prescribed by the Act itself? Why should it apply to any other voyages than those to or from ports of the United States? I do not think that there is a clearer answer to this question than that given by the learned Judge. The contract between the parties is of

world-wide scope: the area of state jurisdiction is necessarily limited, and, because it is limited, the Act is given a restricted operation. No reason has been suggested, nor, as far as I am aware, could be suggested, why a similar restriction should be imported into the contract. On the contrary, to do so would, from the commercial point of view, make nonsense of it. I find it easy therefore, as did the learned Judge, to construe this contract as making the substituted standard of obligation coterminous with the enterprise.

HARTFORD FIRE INSURANCE CO. v. CALMAR STEAMSHIP CORP., 1976 AMC 2636, 2638-40, 1976

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SEATTLE DIVISION

WILLIAM T. BEEKS, Senior D.J.:

Weyerhaeuser (time charterers) and Calmar (shipowners) memorialized each charter agreement with a standard government time charter form incorporating numerous modifications reflecting the peculiar terms of their arrangement. Pertinent portions of said agreement follow: .....

"8. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, trim and discharge the cargo at their risk and expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

"24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all of the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc.," in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clauses, both of which are to be included in all bills of lading issued hereunder:

U.S.A. Clause Paramount.

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained 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 under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further. .....

In construing and giving legal effect to this charter I hold that the parties agreed in clause 24 to have their respective rights and duties controlled by the Carriage of Goods By Sea Act ("COGSA"), except insofar as they have expressly modified the COGSA scheme. Thus, the applicable COGSA provisions become a part of the parties' contract with the same force and effect as ordinary contract terms. The parties agreed to a significant departure from COGSA in clause 8 wherein Weyerhaeuser assumed full responsibility for the loading, stowing, trimming and discharge of the cargo, eschewing the incorporation of 46 U.S. Code, sec. 1303(2). On the other hand, applicable and relevant COGSA provisions include Calmar's duty to exercise due diligence to provide a seaworthy and properly equipped ship and the corresponding rules of liability and exoneration found in 46 U.S. Code, sec. 1304. In addition, if unseaworthiness is found to be the cause of a loss, then COGSA places on Calmar the burden of proving its exercise of due diligence to provide a seaworthy vessel in order to avoid liability.

D/S A/S IDAHO v. PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. (THE "STRATHNEWTON") (C.A.), [1983] 1 Lloyd's Rep. 219, 221-23,

Lord Justice KERR:

The issue ..... is whether the settlement of cargo claims between owners and charterers pursuant to the Inter-Club Agreement is subject to the time bar in art. III (6) of the Hague Rules. .....

It is first necessary to say something about cl. 8, because the Inter-Club Agreement owes its existence to the difficulties to which this clause has given rise. To put it generally, the clause is a provision of a type designed to allocate the functions of loading, stowing, trimming and discharging to the charterers, who would of course normally perform them by stevedores employed by them, but nevertheless to maintain a measure of responsibility for the proper performance of these functions on the part of the owners. In saying this, I am not intending to construe the clause, but merely to describe its purpose. I use the words "a measure of responsibility" because, while the responsibility for proper stowage has in this case been clearly placed upon the master on behalf of the owners, the words "under the supervision of the Captain" have given rise to considerable difficulty. Thus, in any particular case there may be issues as to the extent to which the master in fact did, or was bound or able to, exercise a

controlling supervision. There may also be issues as to whether damage to the cargo was due, for instance, to improper loading or trimming on the one hand, or to improper stowage on the other. .....

Under the Hague Rules, on the other hand, the position is more straightforward, since art. III (2) simply provides: The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

However, the incorporation of the Hague Rules into the charter by a Clause Paramount does not solve the problems of cl. 8, because it is settled law that even when the rules are obligatorily applicable -- as they generally are in relation to bills of lading -- they do not preclude the parties from agreeing that some of the functions mentioned in art. III (2) are to be transferred to the shipper or receiver of the cargo, and that the carrier will in that event not be responsible for their proper performance: see in particular *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*, [1954] 1 Lloyd's Rep. 321; [1954] 2 Q.B. 402 and *G.H. Renton Co. Ltd. v. Palmyra Trading Corporation of Panam*a, [1956] 2 Lloyd's Rep. 379; [1957] A.C. 149. To that extent, art. III (8) of the Hague Rules presents no impediment. A fortiori, such a transfer of functions, and consequently of responsibilities, may by agreement be cast upon the charterers under a charter-party, since this will only incorporate the Hague Rules by agreement and not by operation of law. It follows that the incorporation of the Hague Rules does not solve the difficulties of cl. 8. Indeed, their incorporation may well add to the difficulties, since the interaction of the Hague Rules with cl. 8 may cause additional problems of construction, and also in the allocation of responsibility for loss of or damage to cargo when there are disputes as to why, how, when or where such loss or damage occurred. As will be seen in a moment, the object of the Inter-Club Agreement was clearly to cut through all, or at any rate most, of these difficulties with a broad brush .....

[I]n relation to claims under the bills of lading issued under the charter -- which of course do not incorporate the Inter-Club Agreement -- all cargo claims have to be dealt with by reference to the responsibilities and defences laid down in the Hague Rules.

[T]he Inter-Club Agreement ..... is a memorandum of agreement between P. and I. Clubs . . . as to apportionment of liability for cargo claims arising under the New York Produce Exchange Charter. [I]t is analogous to "knock-for-knock" agreements in the field of motor insurance; the essential feature of such agreements is to avoid any investigation of blameworthiness as between the parties for the events which have occurred. .....

"What connection can the parties have intended between a settlement under the Inter-Club Agreement pursuant to cl. 55 and the Hague Rules in relation to such settlement?", it seems to me that the answer must be "None". The scheme of the Inter-Club Agreement lies precisely in the opposite direction. It cuts right across any allocation of functions and responsibilities based on the Hague Rules; indeed, the avoidance of such allocation is the very objective of the Inter-Club Agreement. In this connection it is common ground that cl. 55 must itself prevail notwithstanding art. III (8) of the Hague Rules, which invalidates any agreement which relieves the carrier to any extent "from liability for loss or damage to or in connection with the goods . . ." The Inter-Club Agreement clearly has this effect, since it may relieve either of the parties from liability, in whole or in part, from what would or at least might be their liability under the terms of the charter-party and/or the Hague Rules. Can it then have been the intention of the parties that one particular ingredient of the Hague Rules "package", the time bar in art. III (6), should nevertheless survive and apply to a settlement pursuant to cl. 55 when it so happens that the claims by the bill of lading holders have been made against the charterers, and when it is therefore the charterers who claim settlement under the Inter-Club Agreement? In my view the answer is again clearly "No". Article III (6) was formulated in order to give certain protections to carriers by sea when the standard of their obligations in relation to cargo is that which is prescribed by the Hague Rules as a whole. The Inter-Club Agreement, on the other hand, provides a more or less mechanical apportionment of financial liability which is wholly independent of these standards of obligation. The agreed apportionment has nothing to do with the Hague Rules, and is in fact designed to overcome many of the difficulties which would result from their application. It seems to me that in these circumstances art. III (6) has no place in a settlement between owners and charterers under the Inter-Club Agreement. The condition precedent for the application of that agreement is that the bill of lading holders' claims "shall have been properly settled or compromised". It contains no reference whatever to "the delivery of the goods or the date when the goods should have been delivered", which is the terminus a quo for the bringing of suit under art. III (6). One only has to read art. III (6) as a whole, let alone to read the Hague Rules as a whole, to see that the scheme of neither of them fits into the scheme of the Inter-Club Agreement in any way.

BEN LINE STEAMERS LTD. v. PACIFIC STEAM NAVIGATION CO. (THE "BENLAWERS") (Q.B.), [1989] 2 Lloyd's Rep. 51, 59-60, 62

Mr. Justice HOBHOUSE:

The Inter-Club Agreement was considered in the case of *The Strathnewto*n, [1983] 1 Lloyd's Rep. 219. .....

[I]n *The Strathnewton* the charter-party itself incorporated the Hague Rules (in contrast with this case) and the relevant question was whether there was a Hague Rules time limit applicable as between charterers and shipowners in respect of the indemnity claim that the charterers were making against the shipowners. .....

Lord Justice Kerr, who gave the judgment (with which other members of the Court of Appeal agreed) did express views about the general purpose of the Inter-Club Agreement and he also expressed views partly obiter, about how the agreement was to work. The fundamental difference between the Judge at first instance and the Court of Appeal was that the Judge at first instance had held that before the indemnity could be invoked there had to be established a right of indemnity under the charter-party in general and then the Inter-Club Agreement was to be applied; whereas the Court of Appeal said no, the Inter-Club Agreement has its own code for dealing with the apportionment and the bearing of cargo claims as between the charterer and the shipowners. .....

[I]t was argued [by the shipowners] that the use of the word seaworthiness in the Inter-Club Agreement does not embrace cargoworthiness, but only the ability of the vessel to withstand the perils of navigation .....

I have no doubt at all that it is to be read in the normal and broader sense. If it was read in a narrower sense it would create a curious and illogical lacuna in the scope of that agreement.

It must be recognized that the agreement may not be absolutely all-embracing, but there is no logic in a construction of that agreement which gives a limited interpretation to "unseaworthiness". Furthermore, I consider that the underlying concepts of this agreement are cargo liabilities which arise from cargo which is being carried under a bill of lading incorporating the Hague or Hague-Visby Rules. It therefore follows that when cargo liability is being contemplated it is contemplated that there will be liabilities that will arise under those rules and therefore in my judgment the broader use of the words "seaworthy" or "unseaworthiness" as is contemplated by those rules is the one to be adopted.

Article III, r. 1, and art. IV, r. 1, deal with this subject.

Article IV, r. 1, reads: "Neither the carrier nor the ship shall be liable for loss or

damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Section."

As in the opening phrase of that rule and the concluding sentence, the word "unseaworthiness" is clearly used so as to embrace all aspects of unseaworthiness, so in the present context in the Inter-Club Agreement, in my judgment, clearly "unseaworthiness" is to be used in its natural and broader sense. This argument fails before me as it did before the arbitrators.

Having regard to the agreement itself, it is quite clear that in the event of any dispute between time charterers and shipowners as to whether or not the loss or damage to cargo was due to unseaworthiness or whether it was due to some other matter, as for example bad stowage or handling, the dispute will ultimately have to be decided upon the evidence in order to decide what the correct apportionment is. The Inter-Club Agreement cuts across the scheme of the New York Produce Exchange form, and in particular across cl. 8 and the complications that arise from cl. 8, but it does not obviate wholly the need to investigate in certain cases what is the cause of the loss or damage the subject-matter of the claim by the cargo owner and the payment to the cargo owner.

A/S IVERANS REDEREI v. KG MS HOLSTENCRUISER SEESCHIFFAHRTSGESELLSCHAFT m.b.H. & CO. AND OTHERS (THE "HOLSTENCRUISER"), [1992] 2 Lloyd's Rep. 378, 383, 384, 386

Mr. Justice HOBHOUSE:

The problems raised by these summonses fall into two categories. The first category concerns the scope of the inter-club agreement as incorporated into these time charters and what critieria have to be satisfied in order to make it applicable to any given cargo claim. The second category relates to the effect of the agreement once it has been accepted or determined that the agreement applies. .....

[F]or the agreement to apply the claim must be a claim under a bill of lading and it must be a claim which is paid or settled on the basis of a liability under the bill of lading not some other liability. .....

Since the time charter makes express provision for the requirement that has to be satisfied before an authorized bill of lading covering specific goods may be issued ..... the charterers have to prove that the bill of lading was properly issued in accordance with that requirement. On this basis, they must be prepared to produce the relevant mate's receipt or tally clerk's receipt and show that the document was issued with the authority of the master. .....

In the context of the incorporation of the international club agreement into [the] time charters the scope of the operation of the agreement is effectively defined by the agreed form of bill of lading not by any question of the construction of the Hague/Hague-Visby Rules. .....

OCEANFOCUS SHIPPING LTD. v. HYUNDAI MERCHANT MARINE CO. LTD. (THE "HAWK"), [1999] 1 Lloyd's Rep. 176, 184, 185, 187-88

Judge DIAMOND, Q.C.:

I would then have found that there is an apparent lacuna in cl. 1(1) of the inter-club agreement in that there needs to be some way of identifying the category of bills of lading under which the relevant claim must be brought, otherwise than by saying that the bill must be one incorporating the Hague or Hague-Visby Rules. The agreement provides no means of identifying what bills are to qualify for "apportionment of cargo claims" (see cl. 2) otherwise than by saying that the bills must incorporate the rules. It cannot be contemplated, for example, that bills having no connection with cargo carried in the chartered ship can nevertheless qualify for apportionment. .....

Looking at the matter in the round I see little escape from the conclusion that it is to be implied in cl. 1(1) of the inter-club agreement, as incorporated in the charter-party, that to qualify for settlement under the agreement, the bill of lading under which the claim is brought must have been authorized by the charter-party. To my mind, however, it is important that this test be applied broadly and flexibly so as to give effect to the commercial purpose of the inter-club agreement and so as not to reduce its effectiveness as a means of settling the incidence of liability for cargo claims as between owners and charterers. I regard this point being as relevant both to the nature of the implied condition itself, namely that the bills must have been "authorised by the charterparty" and as to how that condition is to be applied in different factual circumstances. .....

2. Where a shortage claim is concerned and where a question arises as to whether the relevant goods were ever delivered into the possession of the owners or their agents at the port of lading, then, as held in *The Holstencruise*r, it is for charterers to prove that

the bill of lading was authorized in the sense that it was a bill which the master would have had the authority of the owners to sign. This normally involves that the charterers must prove that the relevant goods were actually received into the possession of the owners and to prove this they may need to produce and rely on the relevant mate's or tally clerk's receipt. The bill will be authorized to the extent that the goods acknowledged in it have in fact been received by the owners.

3. Where no issue arises of the kind mentioned in (2), then prima facie the bills will be authorized bills and any omission in the bills of notations to be found in the receipts will not, in itself, constitute a bar to recovery under the inter-club agreement.

4. Where, however, there is a causal connection between the cargo claims in respect of which indemnity is sought and the discrepancy between mate's receipts and the relevant bill of lading, the owners may be able to recover damages for breach of clauses such as cll. 8 and 50 of the present charter-party and such damages may either reduce or extinguish the contribution due to the charterers under the inter-club agreement.

In my judgment the arbitrators were entirely correct in the present case to reject what they described as a "blanket defence which would cause all the claims to fail *in limin*e" due to the discrepancies between the mate's receipts and the bills of lading. I dismiss the owners' appeal and uphold the award.

TRANSPACIFIC DISCOVERY S.A. v CARGILL INTERNATIONAL S.A. (THE "ELPA"), [2001] 2 Lloyd's Rep. 596, 598, 600, 601

Mr. Justice MORISON:

[The arbitrators] concluded that the ante-dating of the bills and the issuance of clean and not claused bills had no bearing on the particular cargo claims in question. .....

Absent authority, I would take the following approach. The charter determines the rights and obligations of the parties inter se. The ICA is dealing with what should happen to third party claims successfully made against one or other of them. The ICA applies only to cargo claims which have been brought under bills of lading which contain the Hague-Visby Rules governing the carriage. If the goods were never shipped so that the bills never applied to the cargo then the claim would be outwith the ICA. If the goods were shipped but the bills were not issued in accordance with the charter, provided the cargo claim was not affected, that is provided the claim was still a claim under the bill and subject to the regime of the rules, then the ICA applies. The ICA only ceases to apply if the cargo claim is not made under the bill [for any reason] or alternatively, for any reason, the protections and limits in the rules

are lost. There is no need to search for any implied term. The ICA operates as it stands: there must be a cargo claim under the bill and the bill must contain the Hague-Visby Rules or their equivalent. In short, I would agree with the arbitrators in this case. Their decision provides a sensible commercial solution. .....

I would uphold the arbitrators' award, although I do not consider that it was necessary for them to ask whether there was a causal connection between the matters relied upon and the settlement, since the causal connection may often not be possible to ascertain. In my view, once it was established that the cargo claims were based upon bills of lading which incorporated the necessary limitations then that would be sufficient to cross the threshold into the application of the ICA.

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