JUDGMENT : The Hon. Mr Justice Morison : Commercial Court. 14th March 2006

1. This is an appeal against a final declaratory arbitration award dated 1 March 2005. The dispute between the parties arose from an explosion on board a vessel owned by a German company [the Owners] which was chartered by the owners' predecessors in title to a South American company [the Charterers] by a charterparty on an amended New York Produce Exchange (1946) form. The explosion severely damaged the vessel and the Owners brought a claim against the Charterers for loss of hire and loss and damage which they contended had been caused by the loading of a container of calcium hypochlorite. The amount of the claim was some US$63 million. The Charterers counterclaimed for some US$12 million. The cause of the explosion has yet to be determined by the arbitrators, who are all distinguished members of the LMAA: namely Christopher Fyans [who replaced the late Michael Ferryman], nominated by the Owners, George Henderson, nominated by the Charterers and Patrick O'Donovan, the third arbitrator, duly appointed by the other two.

2. As I understand the position, there are two rival contentions as to why the container exploded: one is that the cargo was inherently unstable and volatile; the other is that it exploded due to the fact that it was stowed adjacent to a bunker tank which was heated during the voyage causing the cargo to become unstable, and explode. The issues with which this appeal is concerned arise from the second scenario, namely the stowage and bunker tank heating. Essentially there are two issues:

   (1) What is the proper interpretation of clause 8 of the charterparty, which places the responsibility for stowage on the charterers, in the light of clause 24 which expressly incorporated as a clause paramount the Hague Visby Rules [the equivalent of similar COGSA provisions]? In other words, if the stowage was done in such a way as to render the vessel unseaworthy, are the Owners or Charterers responsible under the contract for the losses? Clause 8 provides so far as is material that "*Charterers are to load stow and trim the cargo at their expense under the supervision of the Captain*".

   (2) Assuming as a fact that the bunkers were heated to a temperature above what was required to keep the fuel oil reasonably thin and that this was causative of the explosion, do Owners have a defence to a claim for breach of Article III Rule 2 ["*failing to care for .. the goods carried*"] by reason of Article IV Rule 2; in other words was this an "*act neglect or default … in the management of the ship*"?

3. It is convenient to deal with each issue separately. The first involved extensive submissions as to the relationship between seaworthiness obligations and the stowage provisions; the second is a much shorter point and involves, I think, not so much a question of identifying the correct principles of law; rather, how undisputed principles should be applied.

A. STOWAGE & SEAWORTHINESS

The relevant Terms

4. The following provisions of the charterparty are relevant:

   "25-26: loading of any other cargo than containers shall be done entirely at Charterers risk, time and expense.

   2. That the Charterers shall provide and pay for all the fuel except as otherwise agreed, Port Charges, compulsory and customary Pilotages, Stevedoring, Tallymen…

   7…Charterers have the liberty to stow non containerized cargo on deck subject to Masters discretion / approval but at Charterers' risk.

   8. That the Captain shall prosecute his voyages with the utmost despatch, 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, lash, secure, unlash, trim and discharge and tally the cargo at their expense under the supervision of the Captain, who is to sign or if required by Charterers to authorise them or their agents to sign Bills of Lading for cargo as presented in strict conformity with Mate's or tally Clerk's receipts. But Mate's or Tally Clerks receipts to be signed by Master of Vessel's Office.

   12. That the Captain shall use due diligence in caring for the ventilation of the cargo.

   15 That in the event of loss of time from deficiency strike and/or default of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease fo the time thereby lost…

   19.That all derelicts and salvages shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and Crew's proportion. General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1994 and subsequent amendments, if any, in London…

   20. Fuel used by the vessel while off-hire to be agreed as to quantity and the cost of replacing same to be allowed by Owners.

   24. It is also mutually agreed that this Charter is subject to all the terms and provisions of an all the exemptions from liability contained in the Act of Congress of the United States approved on 13th 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:

USA 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 the Act. If any terms of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent and no further, or Canadian Clause Paramount or Chamber of Shipping Clause Paramount where applicable.*

26.Nothing herein is to be construed as a demise of the vessel to the Time Charterers. The Owners to remain responsible for the navigation of the vessel, acts of pilots or tugboats, insurance, crew and all other matters same as when trading for their own account.

30 Provided Master will be informed soonest possible and gets all necessary papers/dangerous cargo manifests etc in good time Charterers have the option to load upto a maximum permitted by regulations in accordance with certificate of compliance of containerized dangerous I.M.O cargo on and under deck provided packed/labelled/loaded/stowed/lashed/secured/discharge according to board of trade/I.M.O. regulations and or local regulations, and time lost and expenses for complying with port and said regulations, additional safety equipments or other necessary deliveries, etc., if any, to be for Charterers account. Any extra insurance, if any, to be for Charterers account.

32.Should the vessel put back whilst on a voyage by reason of an accident or breakdown, the hire shall be suspended for the time from putting back until she is in the same or equivalent position and the voyage resumed therefrom.

39. Charterers are not to be responsible for Stevedore or other damage to the vessel unless notified in writing by the Master at the time of occurrence of damage or as soon thereafter as reasonably possible.

45 No drydocking during the course of this Charterparty except in the case of emergency (but see below). Vessel to be off-hire from time she deviates to drydock until she returns to the same or equivalent position.

53 Charterers have the option to load in and/or on all hatches empty and/or full containers, but in agreement with the Master with reference to the strength of the hatches and stability of the vessel. The crew to daily watch at sea, weather permitting, conditions of containers carried and relash same or tighten the lashes whichever may be necessary.

58. If, during the currency of this Charter Party, the vessel puts back whilst on voyage or any loss of time caused by accident, breakdown or sickness of the crew…hire shall not be paid for the time so lost and the extra fuel consumed which to be paid at actual cost and other avoidable direct expenses incurred shall be for Owners' account until vessel is in same or equivalent position where deviation took place and voyage resumed therefrom.

59. Should the vessel be off-hire for a period in excess of 30 consecutive days, the vessel shall remain off-hire until such time she can be reinstated datewise back into charterers' service to comply with the charterers' master schedule sailing ex port where she went off hire within her trading pattern. Any such off-hire time needed by the Charterers to reinstate the vessel datewise back into their service not to exceed 30 days and to be added to the time charter period.

61.Timecharter hire to include (but not limited to) rendering customary assistance by the crew and following works:

a) *Rigging, raising and lowering of derricks and cargo gear*
b) *Opening and closing of hatches*
c) *Removing and/or replacing of beams*
d) *Shifting operations and docking/undocking*
e) *Bunkering*
f) *Maintaining power while loading and/or discharging and care of winches/cranes*
g) *Supervision of loading and/or discharging*
h) *Clearing and stowage of dunnage*
i) *To prepare vessel's hatches/holds and cargo gear prior to arrival to ports or commencement of operations*

Above services to be rendered provided port regulations permit it and shall be considered as a minimum and shall in no way be construed as an alteration or reduction in the standard of services from Officers and crew under this Charter Party.

72. Owners shall supply and maintain throughout the currency of this Charterparty all necessary restraint/securing devices under and on deck including relevant loose lashing material required to stow and secure to Master's satisfaction up to full capacity of TEU's. Such equipment shall be placed on board by Owners prior to delivery.

73. Any Charterer's special equipment placed on board for loading, securing, covering, separating and discharging cargo must be signed for by Master and/or another Officer and to be returned accordingly to the Charterers or their agents as directed by them…

85.Whenever possible, Charterers or their agents to furnish Master with Shipper's declared weights for containers. Charterers to be responsible for any consequences, delays and expenses as may arise in port or at sea from lack of container weights and/or discrepancies between manifest and actual container weights.

94 Lashing/securing/unlashing/unsecuring of containers to be performed by shore labour to the satisfaction of the Master and under the supervision of officers and crew. Provided local port regulations permit and subject to

availability of crew, lashing/unlashing/securing/unsecuring may be performed by ship's crew as Charterers servants, subject to Master's approval, which is not to be unreasonably withheld...."

The Decision of the Arbitrators

5. I start with the relevant passages from the Award to show how the Arbitrators approached the question.

6. They concluded that the container should not have been stowed next to a bunker tank and that had the Chief Officer understood the computer programme he was using he would have realised that the location of the container was close to a source of heat and not "*away from*" "*sources of heat*" as the IMDG Code required. Therefore he was negligent: [Paragraphs 50 – 52].

7. They then turned to the question as to whose responsibility it was under clause 8.

8. They started with the proposition that it was "*trite law following the decision of the House of Lords in Canadian Transport Limited v Court Line Limited*" that the effect of clause 8 was to transfer responsibility for stowage from the Owners ("*who would otherwise be responsible for stowage at common law*") but that there were exceptions [which they called the *Court Line* exceptions] which they identified as
   (1) where the master actually supervises the cargo operations and loss or damage is attributable to that supervision and
   (2) where loss and damage is attributable to the want of care "*in matters pertaining to the ship of which the master was (or should have been) aware but the charterers were not, such as for example, the stability characteristics of the particular ship*" – paragraph 53(ii)].

9. In relation to the first exception, the Arbitrators concluded that what was required for the exception to apply was "*actual supervision*" or "*intervention*". On the facts, as they found them, they rejected the Charterers' contention that there was any 'actual supervision' by the Chief Officer [paragraphs 60 – 62]

   "In summary, they [Charterers] said, there was actual supervision in the stowage by the Chief Officer taking it upon himself to control the Charterers' proposed stowage positions and to approve them as his own stowage positions for the dangerous goods. The Charterers' responsibility for the ensuing stowage position was "limited in the corresponding degree". They said that if the Owners chose to control that choice of the stowage position and to vet it and to approve it for themselves, they could not then turn round and blame the Charterers for the initial proposal of that position. Effectively, it was said, they were estopped by what they had done from complaining about what the Charterers had done. Here the control was total, whether the Owners ultimately approved or rejected the Charterers' proposal.

   We agreed with the Owners' response to this argument, made in opening and repeated in closing and reply submissions, that the logical effect of this part of the Charterers' case was startling. If correct, then any chief officer on any ship chartered pursuant to an NYPE form with clause 8 unamended would, by the simple fact of reviewing the stowage proposed by the Charterers, be assuming on behalf of his owners full legal responsibility for the stowage (good or bad) on board his ship. Perhaps unsurprisingly, it appeared to be common ground between the experts that a prudent chief officer should, as a matter of course, review the stowage proposed by a charterer. Thus, in all cases where a ship has been chartered on a NYPE form, the owners will be taken to have assumed responsibility for safe stowage of all cargoes, regardless of whether clause 8 is amended or unamended. We agreed with the Owners that that is not the effect of the unamended clause 8 and it is precisely to achieve that result that the words "and responsibility" are added.

   As the Owners pointed out, if the Charterers' argument were correct, the only way they could avoid assuming responsibility would be if the Chief Officer or Master simply turned a blind eye and refused to review the proposed stowage plan altogether (a course of action which elsewhere the Charterers characterised as being "grossly negligent"). Thus, as a matter of law, the mere fact of reviewing the stowage plan and requesting a change, which request would be assessed by the central planner in the light of the cargoes to be loaded further along the route, did not in any way limit the Charterers' right to control the stowage. The central planner would then propose an alternative stow for the Chief Officer's consideration. The mere fact of reviewing the stow and requesting an alternative does not operate in a way that limits the Charterers' control. In essence, there is a "shuttlecock" exchange with the ultimate decision being taken by the central planner – in effect, as Counsel for the Owners puts it, "the Owners propose, the Charterers dispose". Accordingly, Exception 1 did not apply."

10. In relation to the second exception, the Arbitrators dealt with this in paragraphs 63 – 66.

    "*The Charterers' case here was that there was nothing wrong with the stowage position of 15-09-06 if the bunkers were not going to be heated on the relevant leg of the round liner voyage on which the container was to be carried. Whilst it was true (they said) that they knew from the ship's plan that there was a side deep bunker tank, that was all they knew. Matters such as the day-to-day distribution of bunkers between tanks, the operational schedules of usage and heating in bunkers were matters which were unknown to them and were solely within the province and knowledge of the ship. They said that information such as this, which bore directly on whether 15-09-06 would become next to a heat source, was a "matter pertaining to the ship, which the Master was (or should have been) aware, but the Charterers were not".*

    The Owners retorted that this was an overly simplistic view, given the facts of the case. They submitted that it was the Charterers' obligation pursuant to clause 8 and 30 of the charterparty to produce an IMDG compliant stow. Mr. Nelson Araya had all the information necessary to do this – in particular, he knew where the bunker tanks were. The

fact that he did not know whether (and if so when) that tank was to be heated was irrelevant: all he had to do was to choose a location that was IMDG compliant. In fact, he was well aware that the container was next to a bunker tank and, on that basis (the Owners said), he had a duty to correct the non-compliance by planning a re-stow.

We agreed with the Owners' approach and found that there was no relevant matter of which the ship was aware but of which Mr. Nelson Araya was not, which prevented him from producing a safe and IMDG compliant stow of the container.

Accordingly, neither of the first two exceptions mentioned in Wilford applied on the facts of this case."

11. They then turned to what they called Exception 3, namely Mr Rainey QC's contention, repeated on this appeal, that the Owners were under a duty to intervene in the stowage of the cargo "to avoid unseaworthiness". Since this lies at the heart of the appeal I will set out the Arbitrators' findings in full [paragraphs 67 – 77].

"*There was an issue between the parties as to whether such a duty exists. It was the Charterers' case that there is an exception to the transfer of responsibility for bad stowage to the Charterers where the bad stowage renders the vessel unseaworthy because, in that event, the ship is obliged to take steps to correct matters or prevent/avoid that unseaworthiness and, if it does not do so and the vessel is unseaworthy and loss occurs as a result, then the Owners cannot recover under the clause 8 transfer. Thus, if the cause of the explosion was the heating and not the calcium hypochlorite exploding on its own, then plainly the stowage of the calcium hypochlorite next to a heat source rendered the vessel unseaworthy because the vessel was endangered by that stowage.*

That was the Charterers' case in outline. Much of the way that they developed that case was responsive to what the Owners said, in particular, to the latter's reliance on the decision of Langley J. in The ***"IMVROS"*** *[1999] 1 Lloyd's Rep. 848. That concerned a case where there was a finding of fact that both the charterers' supercargo and the master knew or should have known of contravention of the IMO Code of Practice for Ships Carrying Timber Deck Cargo – improperly spaced lashings. The charterers in that case contended that there was an absolute obligation of seaworthiness on the owners, who were under an overriding duty to intervene to prevent the vessel sailing in unseaworthy condition, so the owners were in breach of the charterparty and the authors of their own loss. The owners in that case said that the terms of the charterparty placed the responsibility for proper loading and lashing on the charterers, and that was so whether or not the consequence of bad stowage or lashing was to make the vessel "unseaworthy" in any sense of the word.*

The Owners in this case relied upon the following passage in the judgment of Langley J.

"Looked at free from authority, as a question of the construction of the terms of the charter-party, in my judgment the owners are right in their contention and so also the arbitrators were right in their award.

(1) There are express absolute obligations of "seaworthiness" on the owners in lines 21-22 and cl.1. They are in limited terms. They were not broken. The due diligence obligations under COGSA were expressly deleted. If the charterers are right therefore a further and more extensive obligation is to be spelt out of cl. 8 than is found in the express provisions. That is not in accord with normal principles of construction.

(2) The obligation to load and lash is expressly placed upon the charterers by cl.8 and additional cll. 48, 87 and 91. Both the latter clauses refer in terms to that obligation extending to the seaworthiness of the vessel.

(3 The reference to loading and lashing under the supervision of the captain (cl. 8) and to the master's satisfaction (additional cl. 91) are not expressed as qualifications upon the obligations of the charterers but in the language of a right to be satisfied or to supervise its performance. A right to intervene does not normally carry with it a liability for failure to do so let alone relieve the actor from his liability.

(4) It would be a remarkable construction which produced the effect that so long as the loading was carried out by the charterers badly enough to put the or other cargo but not the vessel at risk the charterers would be liable and the owners would not but the moment the loading was so badly carried out that it made the vessel itself unseaworthy the entire responsibility fell upon the owners and the charterers were relieved of it. That would mean the worse the loading the better for the charterers and it is often not an easy question (as the arbitrators noted) to determine the moment when the line between bad stowage and unseaworthiness is crossed. Nor is it an answer to say that the issue is one of causation. If the charterers are right they must be right even in a case where the master does nothing at all by way of supervision of the loading and indeed when they know as much. Even where the master did intervene ordinary principles of causation would not entitle the charterers to say they were not in breach of their obligations nor would it follow that any breach by them was not the or an effective cause of damage to the cargo without more.

The Charterers sought to distinguish The ***"IMVROS"*** *on the basis that the charterparty under consideration in that case imposed only very limited obligations on the Owners as to the seaworthiness of the vessel. The Hague Rules obligation of due diligence to make the vessel seaworthy in all respects had been expressly deleted and, accordingly, the result of the charterers' argument in that case was that the owners would be under a wider seaworthiness obligation that the charter actually provided for. They said that it was trite law that the due diligence obligation to make a vessel seaworthy under the Hague Rules extends to the avoidance of bad stowage which endangers the ship (and in this context they relied on The* ***"KAPITAN SAKHAROV"*** *[2000] 2 Lloyd's Rep. 255, a Court of Appeal case decided after The* ***"IMVROS"****). They said that, even where a charterer is in breach of his duty not to ship dangerous goods under Article IV Rule 6, the owner must still establish that he has exercised due diligence to avoid*

unseaworthiness through bad stowage and, if he cannot and the failure to exercise due diligence is an effective cause of the loss, he cannot recover.

Accordingly, the Charterers said, the Chief Officer had a duty to intervene to correct the stowage where the stowage endangered the ship and thereby rendered it unseaworthy, and if he did not, then the Owners were liable for any loss.

*They said that if The **"IMVROS"** were applicable, it should not be followed on the basis that it was difficult to reconcile with the later decision in **The "KAPITAN SAKHAROV"** and that it was at odds with a proper reading of the Court Line case as interpreted by Steyn J. (as he then was) in **The "PANAGHIA TINNOU".** Otherwise, it would lead to the unacceptable result that a vessel can actively permit or court unseaworthiness due to bad stowage, simply because the charterers are stowing the vessel under clause 8.*

*We agreed with the Owners that the attempt to distinguish The **"IMVROS"** involved an attempt to introduce an unpleaded case on unseaworthiness by the back door and we had no hesitation at all in concluding that that would not be appropriate. We thought that The "IMVROS" was, on the face of it, plainly in point as an authority on the proper construction of an unamended Clause 8 of the NYPE form and that the only question, therefore, was whether we should or should not follow it, given (as the Charterers would have it) that it was at odds with the proper reading of Court Line as interpreted by Steyn J. (as he then was) in The **"PANAGHIA TINNOU".***

Notwithstanding the criticisms that have been made of the decision in The "IMVROS"(in themselves hardly determinative of the matter), we did think it appropriate to follow it, not least because (as we have said already) it seems to us to be a case wholly in point.

The "KAPITAN SAKHAROV" was distinguishable on its facts and was a case about unseaworthiness (not, as we have noted, a pleaded issue in this case). We did not think that the case assisted us in this context although, as noted above, it was relevant and of assistance in the context of the reasonableness of the Chief Officer's interpretation of the IMDG Code (specifically, the meaning of "away from").

*Steyn J. in The **"PANAGHIA TINNOU"** did not in fact say in unequivocal terms that such a duty exists. The Learned Judge noted that the contract did not impose such a duty and said that it was noteworthy that the speeches in Court Line refer to the master's rights to supervise. At most, the Learned Judge was saying that there might be circumstances in which such a duty might arise. That is barely the basis upon which we could justify a decision not to follow what would otherwise be binding precedent.*

Much was made of the commercial consequences of this finding (the unacceptable result that a vessel can actively permit or court unseaworthiness due to bad stowage – a point raised by us during the course of argument). However, as appears from the passage quoted above, Langley J. himself points out the fact that the Charterers' argument means that "the worse the loading the better for the charterers" – itself a decidedly bizarre result."

The Parties' Arguments

12. In the light of the Arbitrators' reasoning, I now summarise the extensive arguments presented to the court on this appeal. Inevitably, in the process of producing a summary, some of the points made will be dealt with on a rather broader basis than was urged upon me in argument, and for that I apologise. This summary purports to be an indication of the *essence* of the submissions made.

The Charterers

13. In a comprehensive submission, Mr Rainey QC made the following points:

14. The ***Imvros*** turned on a pure question of construction. There was no clause paramount, as in this charterparty, placing the Owners under the seaworthiness regime contained in the Hague or Hague/Visby Rules and their USA equivalent, nor any consideration of the question whether the Owners were under a 'duty to intervene' during the loading process. To the extent that the arbitrators relied on this decision they were wrong to do so, as it should have been distinguished. The parties to that charterparty had deleted the clause paramount option in the form. Although there were express seaworthiness obligations "*they are in limited terms*" [per Langley J. in The *Imvros* at page 851, column 1]. That case was rightly decided "*but that decision had and has no bearing on how to construe the present charterparty. The arbitrators wrongly treated the case as laying down a rule for all cases, irrespective of any charter terms"* [skeleton argument paragraph 52].

15. Incorporation of the Hague Rules [which by Article V do not apply to charterparties unless the parties agree to their incorporation] requires the contract into which they have been incorporated to be read as though the Rules formed an integral part of the express terms including Article III Rule 8, which provides that "*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 is provided in these Rules shall be null and void and of no effect.*"

16. Therefore there were three questions
    (1) Absent any contrary provision in the charterparty, would Article III.1 [the seaworthiness obligation, subject to due diligence] require the Owner to correct bad stowage so as to render the vessel seaworthy at the beginning of each voyage?
    (2) If yes, as a matter of construction of the charterparty as a whole, including Article III.1, have the parties transferred that part of the operation to the charterers or, in other words, have the Owners been relieved of liability for the stowage which rendered the vessel unseaworthy?
    (3) If yes, is such conclusion permissible having regard to Article III.8?

17. Article III.1 places a duty on a shipowner which is not delegable: ***Riverstone Meat Company Pty Ltd v Lancashire Shipping Co. Ltd*** [1961] AC page 807 at page 871, per Lord Keith:

> *"The obligation is a statutory obligation imposed in defined contracts between the carrier and the shipper. There is nothing novel in a statutory obligation being held to be incapable of delegation so as to free the person bound of liability for breach of the obligation, and the reasons for this become, I think, more compelling where the obligation is made part of a contract between parties. We are not faced with a question in the realm of tort, or negligence.*
>
> *The obligation is a statutory contractual obligation. The novelty, if there is one, is that the statutory obligation is expressed in terms of an obligation to exercise due diligence, etc. There is nothing, in my opinion, extravagant in saying that this is an inescapable personal obligation. The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure. The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory obligation. Perform it as you please. The performance is the carrier's performance. As was said in a corresponding case under the Harter Act: "The Act requires due diligence in the work "itself" – The Colima. Ample other authority in the same direction has already been cited by my noble and learned friends. I am only concerned here to say that it seems to me to proceed on sound principle. I should only add that when I refer to the repairers I include sub-contractors brought on to the ship by the repairers to enable them to perform the work which they contracted to do. Their failure, in my opinion, must also be the failure of the carrier on whom the statutory duty rests, unless in some very exceptional circumstances their employment can be said to be without any authority, express or implied, of the carrier, a case which can be considered if ever it arises.*

18. Whilst an owner may divest himself of the task of making his vessel seaworthy, he cannot divest himself of the consequences of operating an unseaworthy vessel.

19. As to question (2), there is either a conflict between the seaworthiness obligation and clause 8 of the charterparty or there is not. Neither clause 8 nor clause 30 is dealing with unseaworthiness and the clauses can be read harmoniously together. Clause 8 is silent about unseaworthiness; clause 30 contains nothing to suggest that the problem of unseaworthiness has been transferred from owner to charterer. Thus clause 8 and Article II rule 1 can be read harmoniously together. Alternatively, if there is a conflict, then Article III.1 prevails. The clauses in the charterparty must yield to it. Clause 24 makes the provisions of the Hague Rules "paramount" and Article III rule 8 reinforces the point. It would need very clear terms to exclude or qualify responsibility for seaworthiness.

20. As to question (3), if clause 8 was an attempt to shift responsibility for unseaworthiness arising from stowage onto the charterers that was prohibited by Article III.8.

21. Contrary to the views of the arbitrators, the result contended for was not either 'bizarre' or un-commercial. In the first place the majority of the House of Lords in the ***Court Line*** case [1940] AC 934, "*arguably contemplated*" [paragraph 61(i) skeleton argument] that the transfer of responsibility for stowage to charterers would not extend to absolve the owner of his responsibility for the vessel being seaworthy. Mr Rainey QC relied upon various passages from the speeches; notably dicta of Lord Atkin and Lord Wright, with whom Lord Romer agreed.

22. Lord Atkin at page 937 said this: *"By clause 8 of the charterparty "….the charterers are "to load stow and trim the cargo at their expense under the supervision of the captain who is to sign bills of lading for cargo, as presented in conformity with mates' or tally clerks' receipts." By clause 24 the charter was expressly made subject of the terms of the Carriage of Goods by Sea Act of the United States, April 1, 1936, and the Canadian Water Carriage of Goods Act, 1936. On arrival at the port of discharge, wherever it was, a claim was made by holders of bills of lading of wheat in bulk against the shipowners for damage to the goods. The damage was due to improper stowage. The case finds that the owners were liable to pay to the receivers under the bills of lading 101l. 3s. 4d. We are not told why, but if, as we were informed, the ship loaded at Vancouver, presumably the liability arose under Article III. 2 of the Rules under the Canadian Water Carriage of Goods Act which correspond to those in the English Carriage of Goods by Sea Act, 1924. The shipowners claimed to recover this sum which had been paid to the bill of lading holders from the charterers on the ground that they were liable to the owners for improper stowage under the provisions of clause 8. 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, etc., "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 propose stowage would have cause no damage no doubt that might enable them to escape liability. Bu 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; any more than the stipulation that a builder in a building contract should build under the supervision of the architect relieves the builder from duly performing the terms of his contract. This view of the clause is supported by the decision of Lord Fairfield, Greer J., as he then was, in **Brys and Gylsen, Ld. v. J. and J. Drysdale & Co. (I)** It is true that the judge does not refer to the words "under the supervision of the master" which were in the relevant clause; but this seems to me all the more significant. It is obvious that the very experienced judge attached*

no importance to the words as affecting the liability of the charterers arising from their contract to "provide and pay a stevedore to do the stowing of the cargo under the supervision of the master." The charterers were held liable for dead freight due to fault stowage by the stevedore. This defence fails."

23. Lord Wright said at pages 943 - 945 *It is, apart from special provisions or circumstances, part of the ship's duty to stow the goods properly, not only in the interest 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 charterparty 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 charterparty 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 master"? 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*** *(I). 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 matter is one of some importance in mercantile affairs because a clause of this type is not uncommon. The amount involved here is small, but the liability in other cases may be very considerable. A vessel may be totally lost owing to improper stowage or very severe damage done to cargo. But there does not appear to be any express decision on the point, though in ***Bys and Gylsen v. Drysdale (I)*** *Greer J. seems to have been of the same opinion as that which I have expressed. The master's power of supervision is obviously not limited to matters affecting seaworthiness."*

24. At pages 951/2, Lord Porter said: "*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 on 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, 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 stevedores 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 the 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, howver, 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.*"

25. Mr Rainey QC also drew attention to statements in text books which suggested, at least, that the master had a *duty* to control stevedores [Carver, Carriage by Sea].

26. The Owners have relied on Article III.2, which provides that "*Subject to the provisions of article IV, the carrier, or the master or agent of the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.*"

27. Relevantly, Article IV.2 exempts the carrier and the ship from responsibility for loss or damage arising or resulting from: "*Act or omission of the shipper or owner of the goods, his agent or representative.*"

28. These provisions were recently considered by the House of Lords in ***Jindal Iron & Steel Co Ltd and Others v Islamic Solidarity Shipping Co Jordan Inc ['Jordan II']*** [2005] 1 WLR page 1363, per Lord Steyn: *"Devlin J did not base his interpretation on linguistic matters. He relied on the broad object of the Rules. It has often been explained that the*

Hague Rules and Hague-Visby Rules represented a pragmatic compromise between the interests of owners, shippers and consignees. The Hague Rules were designed to achieve a part harmonisation of the diverse laws of trading nations. It achieved this by regulating freedom to contract on certain topics only: ***Chandris v Isbrandtsen-Moller Co Inc*** *[1951] I KB 240, 247. In interpreting article III, rule 2, its purpose and context is all important. For example, it is obvious that the obligation to make the ship seaworthy under article III, rule I, is a fundamental obligation which the owner cannot transfer to another. The Rules impose an inescapable personal obligation:* ***Riverstone Meat Co Ptd Ltd v Lancashire Shipping Co Ltd*** *[1961] AC 807. On the other hand, article III, rule 2, provides for functions some of which (although very important) are of a less fundamental order eg loading, stowage and discharge of the cargo. Those who are not attracted to literal interpretations of an international Convention, reliant principally on linguistic matters, may find it entirely possible to conclude that the context and purpose of article III, rule 2, would not be undermined by permitting owners to transfer responsibility for loading, stowage and discharge to shippers and others. Devlin J thought that it was difficult to believe that the Rules were intended to impose a universal rigidity about such essentially practical secondary functions. This reasoning is supported by the reality that in practice shore based stevedores rather than the crew load and discharge vessels. Who must pay them? This can not reasonably be viewed as an economic matter which the parties may determine by their specific contracts. A literal interpretation of the Rules no doubt leads to the conclusion that, where shippers and consignees select and pay for stevedoring, as they often do in practice, cargo claimants may recover compensation from owners for the negligence of cargo owners or the negligence of their stevedores. The point was touched on by Greer J in* ***Brys & Gylsen v J and J Drysdale & Co*** *(1920) 4 Ll L Rep 24. He said, at p 25:*

"It would be an odd state of things if one were to hold that a shipowner who has no contract whatever with the stevedore, and who cannot say to the stevedore: You have broken your contract with me, and therefore I will not have you any longer in my vessel; and who has no control over what is to be paid to the stevedore, should be responsible for the failure of the stevedore to do his duty."

A purposive interpretation such as Devlin preferred, which permits transfer of the responsibility for such functions to the party who selects and pay for the stevedores, avoids these unreasonable results. On balance I am satisfied that Devlin J adopted a principled and reasonable approach to the interpretation of article III, rule 2. And his interpretation was not based on any technical rules of English law: it was founded on a perspective relevant to the interests of maritime nations generally. Moreover, it may be right to say that where conflict arises between purely linguistic considerations and the broad purpose of an international convention, the latter should generally prevail. In my view the case for the adoption of Lord Devlin's interpretation, if it were proper to consider the matter afresh today, is formidable.

29. However, Mr Rainey QC submitted that the Owners have failed to make a convincing argument that where they have delegated responsibility for loading they are somehow or other excused from their duties under Article III.1 which is to ensure that at all times the vessel is in a seaworthy condition, whether before, during or after loading.

30. Mr Rainey QC's alternative case was that The *Imvros* was wrongly decided and that there remains on the Owner a responsibility for stowage such that he is obliged to intervene where it impacts upon the seaworthiness of the vessel. There is nothing in the contractual provisions which represent a clear and effective transfer of the Owner's common law responsibilities to take responsibility for stowage. Part of the responsibility was transferred; but not that part which related to seaworthiness. As Lord Atkin put it in the *Court Line* case the master "*has in any event to protect his ship from being made unseaworthy*."

The Owners' Arguments

31. In a succinct and compelling submission, Mr Russell QC, on the Owners' behalf submitted that:

32. The relevant relationship with which the court is now concerned is the contractual allocation of responsibility for stowage *as between Owners and Charterers*. The fact that the Owners may have responsibilities to their crew or to holders of bills of lading arising from unseaworthiness due to bad stowage is irrelevant to the contractual allocation of responsibility: see Lord Wright in the *Court Line* case. "*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 owners are relieved of the liability not just in a dispute between themselves but also because they would be entitled to an indemnity from the charterers if sued by a third party because of the way the cargo had been loaded.

33. "*[W]hen construed as a whole, the terms of the contract place the entire responsibility for the planning and execution of the loading, stowing, lashing, securing, unlashing and discharging of all cargo on board the vessel squarely on the Charterers"* [skeleton argument paragraph 7]. Thus, for example, if charterers wish to load a dangerous cargo it is they who are required to comply with all relevant regulations including the IMDG Code. The argument advanced by Mr Rainey QC that if charterers breach their contractual obligations so badly that they cause the vessel to become unseaworthy and this then becomes the responsibility of the Owners, is absurd and commercially unreasonable.

34. It is not necessarily an easy question to decide whether the quality of the stowage or lashings is such as to render the vessel unseaworthy or not. When is the line between the two crossed? If the Charterers' arguments are right, effectively Owners would have to take on responsibility for the loading of their vessel, which would have the effect that their contractually agreed allocation of responsibility would be meaningless. Clause 8 is in its

unamended for. There is a simple way in which the Charterers could have the result for which they contend, namely the addition of the words "and responsibility" after the word "supervision". This is a well recognised formula and there must be a distinction in law between a charterparty which contains those words and one which does not.

35. On a proper interpretation of the contract, the responsibility for unseaworthiness due to bad stowage was transferred to the Charterers and does not fall within the scope of Article III.1. As Lord Devlin put it in *Pyrene v Scindia* [1954] 2 QB 402 [as subsequently approved in ***Renton v Palmyra*** [1957] AC 149] at page 416 "*the operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time*" and again at page 418: *"Their object … 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."*

36. Thus Article III.1 applies a non-delegable duty only to those functions or obligations in respect of loading and stowing which the shipowner has contracted to perform.

37. In ***The Strathnewton*** [1983] 1 Lloyd's Law Reports page 219, at page 222, Lord Justice Kerr discussed the relationship between clause 8, in its unamended form and the Hague Rules. He pointed out that clause 8 was capable of causing difficulties; for example the words "*under the supervision of the captain*" may raise issues as to the extent to which the captain did or "*was bound or was able to exercise a controlling supervision*". He continued

"*Under the Hague Rules, on the other hand the position is more straightforward, since Article 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 in to the Charter by a clause paramount does not solve the problems of clause 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 Article 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. [**Pyrene** and **Renton** were cited]*

To that extent, Article III.8 of the Hague Rules presents no impediment. A fortiori, such a transfer of responsibility, may by agreement be cast on the charterers under a charterparty, 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 clause 8. Indeed, their incorporation may well add to the difficulties since the interaction of the Hague Rules with clause 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."

38. The Charterers' contention that clause 8 would be inconsistent with Article III.8 if it relieved the Owners of their seaworthiness obligations arising from the loading process, was wrong. Logically, the argument would lead to the same conclusion in relation to clause 54 [which incorporated the Inter-Club Agreement]. The Inter-Club Agreement clearly has the effect of relieving the carrier from liability for loss of or damage to cargo; yet to the question "*What connection can the parties have intended between a settlement under the Inter-Club Agreement and the Hague Rules in relation to such settlement, the Answer is "None*": see *The Strathnewton* at page 225. It is a matter of interpretation and the clear intention of both clauses 8 and 55 [clause 54 in the present case] is that they stand on their own and are unaffected by the provisions of the Hague Rules.

39. The approach of the US courts on this question should be followed:

Nichimen Company Inc v MV FARLAND 462 F 2d 319 [1972], 2nd Circuit Court of Appeals. In that case a vessel was chartered on an NYPE form with clause 8 unamended. The cargo was damaged due to bad stowage. The Charterers argued (inter alia) *"that in performance of the owners' responsibility for the seaworthiness of the vessel the Captain was obligated to correct any improper stowage where, as is alleged to have been the case here, such improper stowage threatened the seaworthiness and safety of the vessel."* [page 331 col 2]. In rejecting this argument, Friendly CJ stated *"…the position urged by [the charterers] would drain too much meaning from clause 8's delegation of responsibility for the cargo the charterer. Many heavy items of cargo can threaten the safety or stability of the ship if they become loose; serious threats to seaworthiness also may be posed by cargo that may cause fire or explosion unless properly stowed. To hold the shipowner primarily responsible in all such cases would effectively undermine the charterer's obligation under clause 8. The charterer's prime responsibility for loading and stowage is not destroyed by the qualification that this shall be "under the supervision of the Captain", a phrase doubtless intended to make plain the Master's right to veto a plan that might imperil the seaworthiness of the vessel,…not to impose on him a duty as the owner's agent, to supervise the charterer's stow…the primary negligence was of the charterer's agent, and we can discern no valid reason why the charterer should now be allowed to shift the cargo damage to the owner on the theory that the Captain, on behalf of the owner, should have corrected its improper stowage".* [pages 331-332]

In *Fernandez v Chios Shipping Co Ltd* 458 F supp 821 [1976] District Court, the vessel was chartered on an NYPE form with clause 8 unamended. In holding the time charterers liable to indemnify the Owners for injury to a stevedore caused by bad stowage which rendered the vessel unseaworthy, the Court stated as follows [at page 827]: *"It seems clear to this Court that, as construed by the Court of Appeals in Nichimen, clause 8 shifts primary responsibility for the active control of cargo operations to the charterer… Moreover, where, as in this case, the finding of unseaworthiness against the shipowner, is, in fact, predicated upon unsafe conditions created by stevedore and shipper rather than upon any conditions created by the shipowner, there seems to be no basis in equity for denying indemnity from the charterer, when the ship's Captain retained such limited responsibility for cargo operations under the charter agreement."*

Duferco SA v Ocean Wilde Shipping Corp [2000] 210 F Supp 2d 256, [2001] District Court, which confirmed (inter alia) that the principle in ***Nichimen*** had been extended beyond cargo damage liability to include damage to a vessel [see page 265].

The Decision

40. Like Langley J. in the *Imvros* I regard the answer to the question at issue as dependent upon the true construction of the charterparty. What did the parties intend by the terms of clause 8 [and of the other clauses dealing with stowage, especially clause 30] and of the paramount clause introducing the provisions of the Hague Rules into the contract?

41. The question is not whether the Owners were under a duty to intervene in the loading process, but rather whether they owed that duty to the Charterers, as Mr Russell QC rightly submitted. In my judgment, there is no authority which assists the Charterers' case. In the *Court Line* case, Lord Atkin robustly rejected ["*there is no foundation at all for this defence*"] the defence that the words "*under the supervision of the captain*" placed responsibility for stowage or to exercise due supervision over stowage upon the Owners. His next remark that *"[t]he 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*" does not, and, in context, could not be read as impacting on the duty owed by the Owners to the Charterers for stowage. He has just rejected this line of defence. Furthermore, later in the same passage, he said this: "*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*"* [my emphasis].

42. As I read the speech, Lord Atkin is simply saying that a master is entitled to seek to protect his vessel from stowage which renders the vessel unsafe and that he would have that right whether or not the contract expressly conferred it on him. But there is clearly a difference between a right to supervise and require re-loading, on the one hand, and a duty to do so, on the other. This case was dealing with damage to cargo caused by bad stowage, rather than damage to the vessel herself, where there was an unamended clause 8 and an express incorporation of the Hague Rules, as here. However there is no suggestion at all that the question of the relationship between stowage and seaworthiness in a contract such as this was not in the minds of the members of the House, as can be seen from Lord Wright's speech and the passage relating to safety in Lord Atkin's speech. A clear distinction was drawn between an entitlement to supervise, on the one hand and a duty to do so [owed to the charterers] on the other. An Owner might be liable under a bill of lading to a cargo owner if the stowage was such as to render the vessel unseaworthy and the Owners were guilty of a lack of due diligence in 'looking after' the vessel and the goods, but, as Lord Wright explained, the effect of clause 8 was to transfer that responsibility to the charterers from whom the Owners would be entitled to an indemnity. The ***Kapitan Sakharov*** [2000] 2 Lloyd's Law Reports 255 is an example of a case where bad stowage caused the vessel to be unseaworthy: see the passage of Auld LJ's judgment at page 271-272 but it says nothing about the issue which arises in this case.

43. In my judgment, the Arbitrators correctly analysed the ***Court Line*** case in the passages cited above.

44. The only other potential support for the Charterers' case comes from a judgment of Steyn J. in ***The Panaghia Tinnou*** [1986] 2 Lloyd's Law Reports, page 586 at page 591. The Judge was concerned with a claim by charterers for damage to cargo caused by condensation. The charterparty was contained in a Novoy form (1964). The first question he had to decide was which of the two parties bore liability for improper stowage. At page 589, Steyn J. said: "*The first question raises a simple point which is covered by high authority. It is trite law that, at common law, the responsibility for stowing the goods rests on the owners. Both under the Hague Rules and the Hague Visby Rules, as respectively enacted in this country in 1924 and 1971, the owners and charterers were free to determine what part if any either shall play in the stowage of the cargo. [**Pyrene and Renton**] were cited. This is a liberty of which the parties availed themselves in the present case*".

45. He then proceeded to construe the contractual provisions before him. He then turned to the ***Court Line*** decision and having set out the relevant passages in the speeches he continued:

"*It follows that prima facie liability for the improper stowage is placed on the charterers in the present case and that the Master's undoubted right to supervise the stowage of the cargo does not* by itself *detract from the conclusion that the charterers are liable for the damage caused by improper stowage.*

It was argued however that in this case the master had both a right and a duty to intervene. The contract does not impose such a duty *and it is noteworthy that the speeches in [**Court Line**] refer to the master's right to supervise. It is also important to bear in mind that in the present case there is no finding of unseaworthiness* [in this case there is no

pleaded allegation of unseaworthiness] *which might have given rise to a duty on the part of the master to intervene*."

46. I mention this decision since it is, effectively, the only authority which even suggests that the *Court Line* decision might not apply when the stowage caused unseaworthiness. I agree with Langley J's analysis that Steyn J was not saying that as between charterer and owner, having regard to the terms of that charterparty, the charterers could escape their responsibility for the consequences of their bad stowage.

47. It follows, in my judgment, that there is no authority which supports the argument advanced by Mr Rainey QC.

48. The second main reason why I reject Mr Rainey QC's arguments is that they are contrary to authority. In the first place, I do not accept that the *Imvros* is to be distinguished on its facts. Langley J. was dealing with an unamended clause 8. There was a seaworthiness provision, albeit that clause 24 had been deleted.

However, the point made by the Judge applies with equal effect here namely that "*It would be a remarkable construction which produced the result that so long as the loading was carried out by the charterers badly enough to put the or other cargo but not the vessel at risk the charterers would be liable and the owners would not but the moment the loading was so badly carried out that it made the vessel unseaworthy the entire responsibility fell upon the owners and the charterers were relieved of it*."

49. Any construction of the contract which had that effect should be resisted because in reality no owner could safely and properly leave the stowage to the charterers.

50. Further, when properly understood, the decision of the House of Lords in *Court Line* is a complete answer to Mr Rainey QC's main submission.

51. And in any event it would, all other things being equal, be appropriate that the English courts should construe the same contract [which is widely used internationally] in the same way as the US courts. I regard the decisions in the three cases to which my attention was drawn as compelling. The reasoning in the *Nichimen* case seems to me to be correct.

52. Further, I am not persuaded that the InterClub Agreement would not 'work' out if Mr Rainey QC's argument is rejected. Here, the arbitrators have concluded that, on the factual hypothesis they were making, the dominant and effective cause of the improper stowage was not negligence on the part of the vessel but that of the Charterers. In these circumstances, it seems to me that the InterClub Agreement would work well. The unseaworthiness argument is something of a red herring because it was entirely the fault of the charterers if their improper stowage caused the vessel to become unseaworthy and founder. Making the vessel unseaworthy through improper stowage does not, contractually, make the owners liable; on the contrary, all damage caused directly by improper stowage will be for the charterers' account.

53. I should add that I do not regard the article by Professor Baughen, which is described in the latest edition of Wilford on Time Charters as having 'questioned' Langley J's approach, as other than of some limited interest. In my view, the author asserts, without any basis for it, that "*even where clause 8 is unamended the Master still remains responsible to ensure that the stowage of his vessel will not imperil its safety*." He has, with respect, fallen into the same trap as Mr Rainey QC. The question is whether as between Owner and Charterer under a contract such as this one, the Owner has any responsibility in law to the Charterer for damages consequent on improper stowage, even if it renders the vessel unseaworthy. The bare assertion, that the "*master still remains responsible*", begs the questions: "*responsible to whom*"*? And why?* And, to be convincing, he needed to deal with the remarkable and absurd consequence of distinguishing between improper stowage which does and improper stowage which does not render the vessel unseaworthy. Finally, I am not sure how he arrives at his conclusion in the light of the *Court Line* decision. In my judgment, Langley J. was plainly right and I should follow his decision and the Arbitrators' reasoning and conclusions cannot be faulted.

B. BUNKER TANK HEATING

54. The facts as found by the Arbitrators are these. The relevant tank is identified as No. 3 FFOTS ['the tank']. Steam heating to the tank, to thin the oil in it, was applied for the first time during the morning of 22 December 1998. *"[F]uel temperatures of 53°C and 63.3°C were recorded at the transfer pump in the engine room at some time prior to the explosion and fire*" [paragraphs 98 and 100 of the Award]. The practice adopted by the Chief Engineer to heat bunker fuel in the storage tanks to a temperature of between 50° and 60° was probably commonplace at sea [paragraph 107]. Although it may have been strictly unnecessary to heat the fuel to more than a temperature of perhaps 38°C, the "*unarguable technical point that it would be operationally possible to achieve the same result at a lower temperature did not seem to us to be sufficient to brand [the chief engineer's] practice as unreasonable or negligent in the circumstances*." [paragraphs 114 and 116].

55. The Arbitrators reached their conclusions in this way:

"It was common ground between the parties that the relevant test, approved by the House of Lords in Gosse Millard v. Canadian Government Merchant Marine [1929] A.C. 223 (H.L), was that of Greer L.J., dissenting, in the Court of Appeal:

"If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship or some part of it, as distinct from the cargo, the ship is relieved from liability; but if the negligence is not negligence towards the ship, but only

negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved." [1928] 1. K.B 717 at p. 749.

Again, both parties were agreed that the effect of the judgment is accurately paraphrased in Cooke on Voyage Charters (2nd edn.) at para. 85.261:

"The principal inquiry, therefore, is whether the act or default which caused loss or damage was done (or left undone) as part of the care of the cargo or as part of the running of the ship, not specifically related to the cargo. Some functions of machinery on board are clearly related only to cargo."

The Charterers said that, however the test is put, the overheating of bunkers causing the heating of cargo adjacent thereto, contrary to ordinary deck and engine room practice, is a neglect to take reasonable care of the cargo and was a default in the care of the cargo. It was not some failure to "run the ship as a ship" or to take care for the ship which incidentally led to cargo damage. They said that proper bunker heat management is a matter directly concerned with the proper preservation of the cargo where heat sensitive. It has nothing to do with the care of the ship (in the sense that the cases discuss it). They said that even if it is to do with both care of cargo and ship, it is like improper management of hatch covers (i.e. capable of both damaging cargo and sinking the ship).

We did not find the analogy of hatch covers helpful, because, as pointed out in Cooke at paragraph 85.262, negligence in the management of hatch covers will not often be within the exception, because one major purpose of having holds covered is to keep the elements out and away from the cargo. The bunker tanks fell into a completely separate category. They had nothing at all to do with the cargo.

*We found more apt the situations in the authorities cited by the Owners: The **"GLENOCHIL"** [1896] P.10 (pumping water into the ballast tanks to secure stability) and The "RODNEY" [1900] P.112 (breaking a pipe whilst trying to free it in order to get water out of the forecastle and thereby wetting cargo).*

*The Charterers' case effectively meant that the exception would almost never apply, because the question only arises where there has been damage to the cargo. As Greer L.J. said in a slightly earlier passage in **Gosse Millard:***

*"The effect of it is that, in the words of Gorell Barnes J. in **The Rodney**, "Faults and errors in the management of the vessel include improper handling of the ship as a ship which affects the safety of the cargo," and that construction merely follows, I think, and was intended by the learned judge to follow, his decision in **The Glenochil**. Both these cases of **The Glenochil** and **The Rodney** are supported in terms by Stirling L.J. in **Rowson v Atlantic Transport Co.**, to which my Lord has referred, and I think that those statements of the meaning of the word 'management' must be taken, so far as this Court is concerned, as being authoritative."*

In short, we agreed with the Owners that heating of bunker oil for transfer to the engine room is patently something done as part of the running of the ship not specifically related to the cargo."

56. The criticism which Mr Rainey QC makes of this part of the Award is as follows:

57. The arbitrators erred in four respects

(1) They never asked themselves the correct question, namely was the failure by the ship to control the heating of the bunker tank so as to protect the heat sensitive cargo adjacent to it from want of harm, a want of care of cargo or a want of care of the vessel indirectly affecting the cargo and was the cause of the damage primarily a neglect to take reasonable care of the cargo rather than of the ship? On the facts, the cargo was a heat sensitive cargo, which the Owners were under a duty to care for under Article III Rule 2; the bunkers could have been heated to a low temperature which would not affect the cargo; whereas the oil in the tank was heated to a much higher temperature than was operationally necessary.

(2) Instead the arbitrators asked themselves the wrong question which was directed to the question namely 'for what purpose was the tank being heated'? This 'purpose' test was precisely the error into which Scrutton and Sargant LJJs fell in Gosse Millerd.

(3) The Arbitrators wrongly drew an analogy with cases relating to ballast tanks "and then relied upon that as a ground for automatically categorising all bunker tank operations as "*management of the ship … They did not seek to derive or apply any statement of principle from those cases but merely referred to the factual situation being "more apt" and therefore as governing the outcome.*" [paragraph 96 of the skeleton argument].

(4) The Arbitrators wrongly rejected the Charterers' argument because of their view that if right it would mean that the exception would almost never apply.

The Owners' Arguments

(1) The Charterers' arguments fail to recognise that there are effectively two questions:
(a) what is the relevant "act neglect or default" and
(b) is that "act neglect or default" one that is properly described as being "in the management of the ship"?

(2) The Court must ask itself what was the primary purpose of heating the bunkers, which is identified as the act relied upon. In *Gosse* at page 744 Greer LJ said: "*In my judgment, the reasonable interpretation to put on the Articles is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1) negligence in caring for the safety of the ship; (2) failure to take care to*

prevent damage to the ship, or some part of the ship; or (3) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ships' purposes…"

(3) The position is properly summarised in Cooke on Voyage Charters which was cited by the Arbitrators. The correct question is, therefore, was the heating of the bunkers "*some operation connected with the movement of the hip or otherwise for ship's purposes*" or was it done *as part of the care of the cargo*? The Arbitrators answered this question at paragraph 125 of their Reasons: "*heating of bunker oil for transfer to the engine room is patently something done as part of the running of the ship not specifically related to the cargo*."

The Decision

58. I regard the question as to the application of Article IV.2(a) as quintessentially one of fact for experienced Arbitrators. The legal principles are clear and the parties accepted the statement of them in Cooke. There is no doubt that the Arbitrators were aware of the correct legal principles and I find it odd that it should now be submitted that in some way or another they have failed to apply the very test which they carefully set out in their Award, and which was common ground.

59. At the end of the day, I have come to the conclusion that Mr Rainey QC's arguments are quite unsustainable. Indeed, I think I can say that I would not have given permission for this point to be argued on the section 69 procedure.

60. Taking the Cooke test as right, an element of purpose is brought into the picture when the question arises as to whether the act [the heating of the bunker tanks] "*was done as part of the care of the cargo or as part of the running of the ship, not specifically related to the cargo*." 'Is an act done as part of this or that' begs the question 'why was the act done' or 'for what purpose was the act done'? In my view there can only be one answer to the question whether the [excessive] heating of the bunker oil was done as part of the care of the cargo or was done as part of the running of the ship not specifically related to the cargo. That is, the answer which the Arbitrators gave. The heating of the bunker tank was to facilitate the transfer of oil from it to the engines. It was a single act which did not relate in any way to the care of the cargo; albeit it may have indirectly adversely affected the cargo.

61. What Mr Rainey QC is arguing, I think, is that the Owners ought to have realised that by heating the bunkers adjacent to this dangerous cargo they were creating a risk of damage to cargo; therefore what they were doing was directly affecting the cargo and therefore the act was done as part of the care of the cargo. But this is perverting the structure of the Article, as interpreted by the Courts. The fact that the act damages the cargo is, so to speak, a given, otherwise the issue does not arise at all. By asserting that an act directly causes damage to the cargo does not alter the nature of the act itself. If the act was done as part of the running of the ship, then the damage to the cargo is indirectly caused by that act, whereas one would say that an act which was done as part of the care of the cargo and which caused cargo damage, directly caused that damage.

62. In my judgment, this ground of appeal is hopeless and should be dismissed.

63. Since the judgment was drafted and circulated, in draft, to counsel the Court has been informed that the parties have reached a settlement of the claim and counterclaim. Despite this, I have decided that this judgment should, nonetheless, be handed down.

Mr Simon Rainey QC and Mr Nicholas Craig (instructed by Clifford Chance LLP) for the Applicant
Mr Jeremy Russell QC and Mr Robert Thomas (instructed by Norton Rose) for the Respondents