JUDGMENT : Mr Justice Burton : Commercial Court. 15th May 2008

1. This has been the hearing of a preliminary issue ordered by Christopher Clarke J, at a case management conference of proceedings in which a counterclaim has been brought by the First Defendant Dera Commercial Establishment (the Cargo Owner) against Serena Navigation Ltd (the Owner/Carrier). For the purpose of this preliminary issue all that is necessary to set out, so far as the context of the proceedings is concerned, is that the counterclaim is brought in respect of a shipment of US corn from Louisiana to Aqaba, on the Limnos. The Cargo Owner is the lawful holder of the bill of lading, to which the Carrier was party. None of the terms of the bill of lading is relevant, save that it incorporates the Hague-Visby Rules.

2. The pleadings have been carried forward since the case management conference, both by amendment and otherwise, but it is common ground that the facts as now set out in the pleadings as they stand before me are to be assumed for the purposes of the determination of the preliminary issue. Save for the fact that there was some limited wet-damage to the cargo, for reasons which the Carrier does not accept would render it in breach of contract, all of the facts which are assumed for the purposes of this hearing will be in issue. But the context in which this preliminary issue has been ordered is that, if the interpretation of the Hague-Visby Rules for which the Cargo Owner contends is correct, then its claim is very substantial, while, if the Carrier's interpretation is the correct one, then the claim, even if the Carrier were liable, would be very small. I have been greatly assisted by Counsel, Mr Rainey QC and Miss Hosking for the Carrier and Mr Akka and Miss Parry for the Cargo Owner, in their submissions in respect of a point which, notwithstanding the regular international use of the Hague-Visby Rules, has not, it seems, been the subject of consideration by any court.

3. The assumed facts are that on arrival at Aqaba, after a passage through very heavy weather, a small amount of wetting damage was discovered in the holds, primarily holds 2 and 3, but also, it is alleged, to a limited extent, holds 5 and 8, apparently caused by leakages through the vessel's hatch covers. The quantity of wet damaged cargo (said variously to be 7 or 12 metric tons ("tons")) was segregated and disposed of, though there is, by amendment, an issue (assumed in favour of the Cargo Owner, as above) as to whether some wet damaged kernels were not segregated, and were discharged along with the apparently sound cargo. In addition, there is a further amended allegation that up to 250 tons of cargo in holds 2 and 3 had to be discharged by bulldozers, and, as a result, suffered an increased number of broken kernels. The quantity said to have been physically damaged prior to or at the time of the discharge of the cargo from the vessel at Aqaba is thus 7/12/>250 tons, and there is no issue (subject to proof hereafter) that this "*conceded tonnage*" would fall within the contested definition of "*goods lost or damaged*" which is the subject matter of this preliminary issue, as I shall explain.

4. The following further factual assumptions are applied for the purposes of the preliminary issue:
   i) As a condition of allowing any discharge of the cargo from holds 2 and 3, Jordan Silos and Supply General Co (as recommended by the Jordanian Ministry of Agriculture) required that the whole of that cargo be fumigated and treated with chemicals and transferred to pre-fumigated and disinfected silos.
   ii) In order to carry out the required fumigation and treatment, the cargo had to be moved within the silos, and, as a result, the number of broken kernels within the cargo increased, resulting in a depreciation in value of the cargo amounting to US $362,142.
   iii) The whole of the cargo as a result acquired a reputation in the market as a distressed cargo, and its sound arrived market price was depressed as a result by US $13 per ton: thus the total cargo of 43,998.66 tons (less the 12 tons damaged) was reduced in value by US $13 per ton, namely a loss of US$ 571,842.26.
   iv) A range of other expenses and liabilities were incurred by the Cargo Owner in relation to the fumigation, segregation and silo storage of the cargo, as set out in paragraph 16(v) to (xi) of the Amended Defence and Counterclaim of the First Defendant.

5. The Cargo Owner's case is summarised as follows in paragraph 28 of that pleading:

   "*28. By reason of the matters alleged above, Dera has suffered loss and damage and has been put to expense.*

   Particulars

   (a) Dera claims the market value at the date of delivery of the quantity of cargo which was not delivered, namely US$ 1,742.40 [the 12 tons]

   (b) Dera claims the losses/expenses referred to in paragraph 16 above, which losses/expenses were caused by the matters complained of, or alternatively were incurred in reasonable mitigation of the loss which would otherwise have been incurred, namely the loss of the whole cargo."

6. So far as (b) is concerned, the total loss claimed, in the light of the assumptions set out in (i) to (iv) of paragraph 4 above, is just short of US $1.55m exclusive of interest.

7. The relevant Article of the Hague-Visby Rules, which has been the subject of the dispute before me, is Article IV Rule 5(a), which I cite below (as amended by the substitution of Special Drawing Rights for "*Units of account*" as originally provided):

   "*5(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.77 [Special Drawing Rights] per package or unit or 2 [Special Drawing Rights] per kilogram of gross weight of the goods lost or damaged, whichever is the higher.*"

8. The Carrier's case is that the limit of liability under Article IV.5(a) where, as here, gross weight is the applicable test, and loss of the goods is not in issue, is by reference to the gross weight of the goods physically damaged –

in this case the *conceded tonnage*. Hence, if that be right, the limit will be, at 2SDRs per kilo, 14,000 SDRs (7 tons) or 24,000 SDRs (12 tons) or up to 52,400 SDRs (the 12+ < 250 tons). The Cargo Owner asserts that the limit is applicable by reference to the whole cargo of 43,999.86 tons, which would more than cover the entirety of the sum claimed.

Common Ground

9. There were some areas of common ground as to the legal background to the issue before me. The first related to the approach to construction of the Rule. Both sides drew my attention to the seminal passages in the authorities: the words of Lord Macmillan in ***Stag Line Ltd v Foscolo, Mango & Co Ltd*** [1932] AC 328 at 350, of Longmore LJ in ***CMA CGM SA v Classica Shipping Co Ltd*** [2004] 1 Lloyds Rep 460 at 463-4 (making express reference to Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, to which the United Kingdom is a party), and of Lord Steyn, both in **Jindal Iron & Steel Co Ltd & Others v Islamic Solidarity Shipping Co (Jordan) Inc (The Jordan II)** [2005] 1 Lloyds Rep 57 at 64 and, in relation to travaux préparatoires, in ***The Giannis NK*** [1998] AC 605 at 623. From these passages the proposition can be drawn that what the court is seeking to do is to deduce the ordinary meaning of the words used (especially per Longmore LJ at 464), by reference to broad and generally acceptable principles of construction rather than a rigid domestic approach, and without English law preconceptions (Lord Macmillan at 350 and Longmore LJ at 463): and consistently with the evident object and purpose of the Convention or international rule in question, as to which regard may be had to travaux préparatoires (per Longmore LJ at 464), which, however, will only be determinative of the question of construction if they amount to a "*bull's-eye*" (per Lord Steyn in ***The Giannis NK*** in 623F).

10. I have endeavoured, with the assistance of the parties, to apply that approach in this judgment. As for any other assistance to questions of construction, Mr Akka did not, before me, although Mr Rainey QC in his skeleton asserted that he thought that he might (and was ready to deal with it), rely on any *contra proferentem* approach. However, he rested a good deal of his argument, as will be seen, on the well established canon of construction articulated in relation to commercial contracts by Lord Diplock in ***The Antaios*** [1985] 1 AC 191 at 200-201, namely that "*if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense*". Notwithstanding that this canon was prescribed for the purpose of construing commercial contracts, Mr Rainey QC did not suggest that it was not also an available tool with regard to the construction of an international rule applicable in, and incorporated into, commercial transactions.

11. The second matter of common ground was that, if it ever had been, it was, and was rightly, not in dispute before me that, whatever be the proper construction of the controversial words in Article IV.5(a) "*goods lost or damaged*", the limit to be applied was by reference only to that part of the cargo which could be so described, as opposed to the whole cargo (although, of course, in this case Mr Akka submitted that, on the assumed facts, the whole cargo fell within that definition). Thus, although Mr Rainey dedicated some part of his skeleton argument to this proposition – by reference for example to the words of the editors of Carver on Bills of Lading (2nd Edition, 2005) at 9-267 "*Is the limit calculated by reference to the weight of the damaged goods or by reference to the weight of the whole consignment? … It seems clear that reference should be made to the weight of what is damaged*" - this was not in issue between the parties and the passage in Carver was not addressed to the question now before me.

12. The third matter of common ground is that economic loss and damage is recoverable by a cargo owner within the Hague-Visby Rules. Thus, a claim in respect of *loss or damage*, to include economic loss, may form the basis of a notice, and is subject to the time bar, in Article III.6, and liability for *loss or damage to or in connection with goods* (including economic loss) cannot by reason of Article III.8 be excluded (but could be excluded where it arose or resulted from unseaworthiness, by reference to Article IV.1). As to this, the decisions of the courts, in relation either to those or similar clauses, are clear: see ***GH Renton & Co Ltd v Palmyra Trading Corporation of Panama*** [1957] AC 149 (re Article III.8) especially at 169 per Lord Morton of Henryton, ***Goulandis Brothers Ltd v R Goldman & Sons Ltd*** [1957] 2 Lloyds Rep 207 (in relation to Article III.6) per Pearson J, ***Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd*** [1957] 1 Lloyds Rep 79 per Devlin J (especially at 88, referring to Article III.8), and to similar effect in the House of Lords in 1958 1 Lloyds Rep 73, especially per Viscount Simmonds at 83, and ***The OT Sonja*** [1993] 2 Lloyds Rep 435 per Hirst LJ at 443-4.

13. Mr Akka submits that, because it is thus not in dispute that *loss and damage* in the first part of the disputed Article IV.5(a), prior to the imposition of the limit, must therefore also include economic loss, so, as a matter of consistency, and what he calls co-extensiveness (drawing from the ***OT Sonja*** at 443-444), or of uniformity (which he draws from a decision of the United States Court of Appeals (2nd Circuit), ***Comercio Transito Internationale Ltd v Lykes Bros Steamship Co*** [1957] AMC 1188), the words *lost or damaged goods* must carry a similar meaning. To achieve this, he puts forward, as will be seen, constructions to that effect:

    i) *Damaged* includes and means *economically damaged*, and/or

    ii) In order to emphasise that the words *goods lost or damaged* are to be construed as the same as what is referred to in the first part of the clause, whereby the carrier is *liable for any loss or damage to or in connection with the goods*, they must be construed as meaning the *goods in respect of* ...or *in connection with) which the loss and damage was suffered*: or *the goods affected* or *the goods the subject of the claim or dispute* which letter would both feature in other/later Conventions or formalities – see paragraphs 16(i) and 16(iii) below.

14. If, Mr Akka submits, the limit is by reference to goods physically damaged, then what if there are no goods lost or damaged, such as will arise in relation to a claim for delay (which it is common ground can be brought within the Hague-Visby Rules)? Or what if substantial expenses are incurred in successfully eliminating most of the loss or damage, but such that only a very small quantity of damage is left – why should there be such a low and irrelevant limit as would arise if it was by reference only to the small amount of physical damage?

15. Mr Rainey QC submits that there is nothing odd about the straightforward meaning and approach of the clause, namely that the losses suffered, including economic and consequential losses, are then limited by reference to the weight of the goods physically damaged. As to Mr Akka's two questions, to which I shall return below, Mr Rainey submits, in relation to the first of them, that, where the claim is entirely for economic loss, such as a claim for delay, there is no limit: with regard to the possibility that substantial expenses may be incurred in mitigation of loss, that would be a rare scenario, and not one such as to lead to any need to move away form the ordinary meaning of Article IV.5(a).

16. The last area of common ground relates to other Conventions, at which we had a brief look, not least because (particularly by reference to the judgment of Bingham J, as he then was, in ***Datacard Corp & Others v Air Express International Corp & Others*** [1983] 2 AER 639 (***"Datacard"***), to which I shall refer below) it was of some assistance to do so to understand the context:

    i) The Warsaw Convention, as most recently amended in Montreal in 1975, provides by Article 22(2)(c) that:

    "*In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same airway bill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.*"

    ii) The Hamburg Rules, pursuant to the United Nations Convention on the Carriage of Goods by Sea 1978, provide, as, on the submissions of Mr Rainey QC, the Hague-Visby Rules do not, a limit of liability in respect of the liability of the carrier for delay in delivery, by Article 6(1)(b). Article 6(1)(a) reads as follows:

    "*The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of Article 5 is limited to an amount equivalent to … per kilogram of gross weight of the goods lost or damaged, whichever is the higher.*"

    iii) The United Nations Commission on International Trade Law ("UNCITRAL") presently has a working group engaged upon proposing a new draft Convention to replace the Hague-Visby Rules. The latest version, as at April 2007, also has a proposed limit of liability for loss caused by delay in the draft Article 63. As for the proposed limitation of the carrier's liability in cases other than delay, that is covered by the proposed Article 62, which, as presently drafted, reads (in material part):

    "*The carrier's liability for breaches of its obligations under this Convention is limited to … per kilogram of the gross weight of the goods that are the subject of the claim or dispute.*"

17. It is common ground that the contents of other Rules, or of subsequent amendments or proposed amendments to these Rules, are of no materiality, although it is noteworthy, as will be seen, that Bingham J in ***Datacard*** did look at the subsequent amendment to the form of the Warsaw Convention with which he was then dealing. The contents of the above Rules are consequently in no way determinative of my conclusion: indeed, of course, as is so often the case in relation to subsequent statutory amendment, one side could assert that the subsequent amendment only indicates that, prior to the amendment, the law was otherwise, while the contrary, namely that the subsequent law is only clarificatory of the earlier, is also usually argued. Nevertheless, it can be seen that some of Mr Akka's submissions set out in paragraph 13(ii) above can be said to draw life from one or more of the above wordings, while the Hamburg Rules, which of course have an entirely different business base to the Hague-Visby Rules, appear to be close to the wording presently in issue.

Object and Purpose of the Rules

18. I turn then to consideration of the matters which were in issue. I consider first the question of *the evident object and purpose* of the Rules, if such can be ascertained, with a view to addressing purposive interpretation, as per paragraph 9 above. I found nothing that was put before me of any material assistance. A learned article on the Hague-Visby Rules in Lloyds Maritime and Commercial Law Quarterly 1978 by Anthony Diamond QC, as he then was, addressed the historical background to the Rules and suggested (at page 226) that, apart from producing standardisation of the most important terms of bills of lading, the Rules had "*redressed the imbalance which had formerly existed as between ship and cargo as regard the risk of loss or damage occurring to goods in the course of a sea transit*", such that (at page 239) he determined that "*when the limit was first set in 1924 one of the intentions … was to fix a liberal amount so as to preclude ship owners from inserting value clauses in their bills of lading which might otherwise have limited their liability to ridiculously low amounts*". Tomlinson J, in ***Linea Naviera Paramaconi SA v Abnormal Load Engineering Ltd*** [2001] 1 Lloyds Rep 763 at 769 recorded that "*the Hague Rules represent a negotiated bargain between ship owners whose interest lies in maximum immunity and cargo owners whose interest lies in maximum redress*". But Lord Steyn's words in ***The Giannis NK*** at 621 ring very true:

"*This much we know about the broad objective of the Hague Rules: it was intended to rein in the unbridled freedom of contract of owners to impose terms which were "so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility" (1992) 108 LQR 501, 502; it aimed to achieve this by a pragmatic*

compromise between the interests of owners and shippers; and the Hague Rules were designed to achieve a part harmonisation of the diverse laws of trading nations, at least in the areas which the convention covered. But these general aims tell us nothing about the meaning of Article IV r3 or Article IV r6. One is therefore remitted to the language of the relevant part of the Hague Rules as the authoritative guide to the intention of the framers of the Hague Rules."

19. This is, in my judgment, also the case here. I see no guidance from a purposive construction in order to assess whether the limit now arrived at should be interpreted more favourably towards cargo owners than to carriers. If a purposive construction is to embrace what Mr Akka called, by reference to the ***OT Sonja*** at 443 "co-*extensiveness*" whereby "*good sense required the scope of the limitation provisions to be co-extensive with the scope of the liabilities*", I am again unpersuaded that it is necessary that, though economic loss is recoverable, it should not be limited in the way Mr Rainey QC contends. Nevertheless this principle may be of assistance when I turn below to consider the meaning of the words "*lost or damaged goods*".

Travaux préparatoires.

20. There is no "*bull's-eye*". With the assistance of Counsel I have searched through the extracts that have been put before me for some indication. Mr Rainey has submitted that the use of the words "*actually lost or damaged*" in a proposed amendment put forward by the Government of the Federal Republic of Germany is of some assistance – but there would still be dispute as to its meaning, such as there would not be if the words were "*physically damaged*"; and in any event the word "*actually*" did not in fact survive through to the final draft.

21. The chronology seems to be that the United States suggested an amendment which was said to propose "*the same limitation as that of the CMR, namely 25 germinal francs per kg of goods lost or averaged*". This amendment was almost the one eventually adopted, but the United Kingdom made a slight adjustment. The Federal Republic of Germany then suggested an amendment whereby the limit was in part to be by reference to "*25 francs per kilogram of the goods actually lost or damaged*", which, in their accompanying comments, was in fact said to deal with the issue raised by Carver discussed in paragraph 11 above, namely "*to avoid that in case of large packages, e.g. containers, the often considerable weight of the whole package practically will abolish the limitation of liability at all*".

22. Then the United Kingdom proposed a further amendment, which was to superimpose an additional upper limit, had it gone through, with an overriding cut-off based upon the value of the goods, only a residue of which has survived into what is now Article IV.5(b), referred to in paragraph 35(iv) below. The amendment which the United Kingdom suggested, by way of an additional clause, was as follows:

"*When, under the provisions of this Convention the carrier and/or the ship is liable for any loss or damage to or in connection with goods, the extent of such liability shall not exceed the value of such goods at the place and time at which the goods are discharged or should have been discharged from the ship and no further damages shall be payable.*"

23. On the face of it, this wording could support the contentions of Mr Akka, because of the reference to "*such goods*" rather than to "*goods lost or damaged*", not to speak of "*goods actually lost or damaged*". However:

i) The amendment was not adopted.

ii) It was accompanied by an explanatory memorandum by the United Kingdom Government, which makes clear their interpretation of it, as its author. They explained the proposed superimposed new limit as follows:

"*It is the value of the actual cargo lost or damaged which is in the majority of cases the true measure of the cargo owners' loss … Accordingly it is suggested that the fairest and most practical solution of the problem is to adopt as the measure of the carrier's upper or maximum limitation of liability the value of the cargo actually lost or damaged at the place and time at which such cargo is discharged.*"

They thus seem to have regarded the reference in the amendment to "such goods" as implicitly to *goods lost or damaged*.

24. There is accordingly something for everyone in the travaux préparatoires which, as Bingham J said in ***Datacard*** with regard to the travaux préparatoires to which he was invited to pay regard at 644B-C, "*perusal of these materials in the present case serves only to highlight the wisdom of the courts' cautious approach to such material.*" I am taken no further forward by reference to them.

Authorities

25. Before addressing the words of the Rule itself, I turn to any assistance that could be gained from authority. I have already indicated in paragraph 2 above that there is no previous decision of any court to which I have been referred on this point. The authorities to which I referred in paragraph 12 above are all dedicated to whether economic loss falls within the Hague-Visby Rules, which it does. The only authority which approaches anywhere near the issue in this case is ***Datacard***. This was a decision by Bingham J on the construction of the unamended Warsaw Convention (not that set out in paragraph 16(i) above). The relevant clause, Article 22(2), provided as follows (in material part):

"*In the carriage of … cargo, the liability of the carrier is limited to a sum of 250 francs per kilogram.*"

26. Short and sweet. The issue, naturally, was '*per kilogram*' of what? The factual context of ***Datacard*** is not entirely clear from the judgment, even though it incorporates a set of agreed facts. One package was dropped from a forklift truck, causing the contents severe damage, in circumstances for which the carrier was liable. This package

formed part of a total consignment of eight packages. The other seven packages were not damaged. However it formed part of the agreed statement of facts (set out at 640j) that:

"*… each complete system was designed to operate as a single unit and … none of the individual items separately quoted could function on its own. Further each system was designed and constructed by the Plaintiffs to an individual customer's specification and was thus unique … Without the one damaged item, the whole system was useless to the consignee or any one else. Accordingly the damage to that one item affected the value of the other items.*"

27. What is not clear is the way the claim was put. It is not stated whether the claimants were claiming (subject to the contested limit) the value of all eight packages, or whether they were seeking only the value of the damaged package but arguing that the limit should be set by reference to the *affected packages*. It seems to have been assumed that there was no liability for economic loss – although Article 18(1) of the then Convention, set out at p641 of the judgment, would seem to suggest the availability of recovery for economic loss. That no recovery for economic loss is assumed appears from Bingham J's summary of the submissions of Counsel at 643a-b:

"*… he had no liability except for goods lost or damaged. He had no liability for goods which arrived safely. It was very odd, counsel submitted, if the limitation of damages had reference to goods for which there was no liability at law anyway. Why should the limit escalate in proportion to the number of undamaged packages?*"

This appears to suggest that there was not a claim for *economic damage* to the seven packages, but simply a claim for physical damage to the one package, while the limit was sought to be increased by reference to the economic consequential loss.

28. As can be seen from the material passage from the then Article 22(2), cited in paragraph 25 above, there were no words, such as in our case, expressly pinning the kilograms to the gross weight of the goods lost or damaged. This was the carrier's contention, namely (at 642d) "*that the limit was determined by the weight of the package lost or damaged, in this case the weight of the package which was dropped*". Bingham J had no difficulty (at 643f) in accepting that contention:

"*The words '250 francs per kilogram' do, I accept, pose the question 'per kilogram of what?', but the natural and grammatical answer to derived from the clause itself seems to me to be 'per kilogram of the package that was handed over to the carrier'. A requirement that the limit should be calculated by reference to goods neither lost nor damaged would, as it seems to me, require express language or clear implication which is not to be found in the paragraph.*"

29. On the face of it, this is powerfully in favour of the Carrier's interpretation in this case, albeit that the decision is on a different convention, but it might be said to be a fortiori, by virtue of Bingham J's having regarded it as obvious that the words "*of the goods lost or damaged*" should be understood. However, Mr Akka forcefully points out that, if indeed there were, or were assumed, agreed or conceded to be, no liability for, or recoverability of, economic loss under the Convention of which Article 22(2) formed part, then the conclusion that Bingham J set out above would be obvious; and such conclusion gives no guidance whatsoever for this case, in which there is such liability. It is, Mr Akka suggests, for this reason, that the argument was not even considered to be the cargo owner's best point, their "*strongest point*", albeit also rejected by Bingham J, being that which I too have cast aside in paragraph 11 above, namely that it was, or should be, a more easily calculable approach to base a claim on the total weight shown on the air waybill (643g).

30. In relation therefore to the only potentially relevant authority, ***Datacard***, I am also, for those reasons, left unassisted in relation to the construction point now before me. It is however worth pointing out in the context of paragraph 17 above, that the claimant in that case sought to construe the words of Article 22.2 in the unamended Warsaw Convention by reference to the words of the subsequently amended Convention. This was a not unattractive proposition, given how clear it was, at least by reference to the agreed facts, that the value of the other seven packages was *affected* by the damage to the one. Bingham J however was himself unaffected by this argument (642cd, 644h):

"*… the plaintiffs contended that damages should be assessed on the basis that, for the purposes of art 22(2), the liability of the air carrier for damage to part of the cargo is limited to a sum of 250 francs per kilogram of the actual total weight of such packages of cargo covered by the air waybill as had their value affected by such damage. This basis has been referred to as 'the affected weight'. When the Warsaw Convention was amended at the Hague in 1955, art 22 was amended so as to achieve this result …*

The affected weight

This was, as I have said, the solution adopted by the Hague amendment to the Warsaw Convention. I find nothing whatever in the wording of the unamended Warsaw Convention, in travaux preparatoires of the Warsaw Convention, in any authority or any academic writing to suggest that art 22(2) in its unamended form was intended to have the meaning which it later bore after being amended at the Hague."

The Words of the Rule

31. Mr Rainey's case is straightforward. "*Goods lost or damaged*" means goods physically lost or physically damaged. Mr Akka submits that *lost or damaged* should be construed in accordance with the presumption of consistency (per Hirst LJ in ***The OT Sonja*** at 442) with other parts of the Rules. Although, he submits, the words *lost or damaged* do not appear, what does appear is *loss or damage*, and so the construction of *lost or damaged* must be consistent with:

i) The words *loss or damage* in Articles III.6, III.8 and IV.1, all of which include economic loss/damage, and in particular:

ii) The words in the first part of Article IV.5(a) "*any loss or damage to or in connection with the goods*".

Hence either the words *lost or damaged goods* must be interpreted in accordance with (ii) above, so that they mean goods in respect of which the loss and damage was suffered, or damaged goods must include "economically damaged" goods. This was the case in relation to the balance of the cargo which suffered very substantial depreciation as referred to in paragraph 4(i) and (iii) above. The value of those goods was *affected* just as was the value of the seven other packages in ***Datacard***, but in this case, unlike as was, or was assumed to be, the case under the then Warsaw Convention, economic loss is recoverable.

Delay

32. The position with regard to delay referred to in paragraph 15 above is submitted by Mr Akka to be anomalous at the least. Mr Akka's original point was met by Mr Rainey, as there set out. Mr Rainey's explanation is that there is a claim for economic loss due to delay, if it otherwise qualifies within the Rules – thus, although there may be no obligation in relation to expeditious carriage, the breach of one or more of the obligations in Article III.1 may, in certain circumstances, lead, and lead alone, to economic loss by virtue of delay. Therefore, on the face of it, a claim which is wholly in respect of economic loss does fall within the first part of Article IV.5(a) - "*Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to, or in connection with, the goods*", but there is then no limit, because such claim is not limited to the weight of *damaged goods* because there are no damaged goods.

33. Mr Akka however submits that this is unsatisfactory. His construction means that the economic loss claim is limited by the weight of the goods affected by the economic loss. Mr Rainey's however means that halfway through the clause the reader will then find that, although it would appear that a limit to such loss is to be imposed by reference to gross weight, yet since the gross weight is limited to *damaged goods*, and there are none, there is to be no limit: whereas, for example, in the Hamburg Rules and in the proposed UNCITRAL Rules there is a limit in respect of delay claims. This could be said on the one hand to amount to an unexpectedly generous approach towards cargo owners, and on the other to result in a somewhat eccentric situation in which there is no signpost for those with delay claims to appreciate that the limit does not apply to them.

Mitigation

34. There is what Mr Akka submits to be a *flouting of business common sense*, within ***Antaios***. If there is no physical damage to goods, then, in accordance with Mr Rainey's submissions, there is no limit. If however there is a small amount of physical damage and a large economic loss claim, the limit is by reference to the small physical damage. This is particularly stark, submits Mr Akka, in cases of mitigation. Although he asserts, as can be seen in paragraph 4 above, that it must be assumed to be in the course of attempted mitigation that all the loss occurred here, such as to add to an original approximately US $1700 claim in respect of physical damage $1.5m worth of economic loss, he posits another, hypothetical, scenario. On board a vessel, perhaps while it is in port en route, damage to the cargo is discovered, for which the carrier is not prepared, at that stage, to accept responsibility, and it could get wholly out of hand such as to affect the entire cargo if steps are not taken. Remedial steps are taken at great expense at the (initial) cost of the cargo owners. If, as a result, the cargo is all saved, then there is no physical damage at the date of discharge at the end of the voyage, and there is an economic loss alone, hence no limit. If the remedial work were not wholly successful, and 5 tons remained damaged, although the rest of the cargo was saved from what otherwise would have been damage, then the same enormous costs have been expended on mitigation, yet the limit is by reference to the 5 tons. This situation Mr Akka submits to be manifestly unfair. It would also be a disincentive to taking steps in mitigation.

Time of Discharge/Delivery

35. Mr Rainey submits that Article IV.5(a) should be construed so that the limit is by reference to the gross weight of the *goods lost or damaged* as at the date of discharge/delivery. Given that he submits that this means physical damage, it fixes the limit by reference to the physical damage (of course including any physical damage as yet unascertained, though previously incurred) as and when they leave the custody of the carrier: liability for subsequent consequential (economic) loss will continue, but always subject to the limit which will already have fructified. The result is, he submits, that (i) no further physical damage to goods not already physically damaged – e.g. in the silos – will be relevant (ii) the limit will be unaffected by continuing economic loss. This, he submits, makes sense, by fixing the limit once and for all, rather than by reference to what he describes in this case as a "*cascade*" of economic or other claims, as the months go by, each of which is said to increase the limit. If this is right, it is a helpful guide to the construction of the disputed words. Mr Rainey's submissions are as follows:

i) The date of discharge (or possibly delivery – see Article III.6 by reference to the notice of damage and the time bar) is the date when the owner's liability as carrier and/or bailee ceases: he refers to the following Rules:

"*Article I(e) "Carriage of Goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.*

Article II: … under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities … hereinafter set for.

Article III.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."

ii) The cause of action accrues to the cargo owner as at discharge/delivery, and the time bar, by reference to the requirement that "*suit is brought within 1 year of … delivery*" is triggered: see Article III.6 generally.

iii) The requirement for the giving of notice of loss and damage in Article III.6 is again tied to delivery (or, in the case of loss and damage which is not apparent, within 3 days thereafter), such that absence of such notice raises a prima facie case of good delivery.

iv) Assessment of the value of the goods is made "*at the place and time at which the goods are discharged from the ship*" by virtue of Article IV.5(b), which is all that is left of the proposed UK amendment referred to in paragraph 22 above.

36. Mr Akka submits that there is no reference in Article IV.5(a) to the time of delivery/discharge as being the time when it is to be ascertained whether the *goods are lost or damaged*: unlike the specific cross-reference to the place and time of discharge with regard to the assessment of the value of the goods in Article IV.5(b). On any basis, so long as the cargo owner's claim relates to a breach of obligation by the carrier prior to delivery, loss, whether physical or economic, arising after discharge/delivery is (if otherwise recoverable at common law as sufficiently proximate) claimable against the carrier. If loss continues to accrue for many months, the time bar may bar a claim, as it is based upon one year from delivery, but that is wholly unlikely to occur, and so long as there has been a sufficient notice giving *the general nature of such loss or damage* in accordance with Article III.6, the claim can continue to increase after delivery, and there is no reason why the limit cannot do so concomitantly.

Conclusions

The Words of the Rule.

37. I am not persuaded by Mr Akka's submission that *lost or damaged goods* are necessarily to be construed in the same way as *loss or damage*. Loss and damage is a familiar expression in the field of tort and contract. It normally, though not necessarily, suggests that loss is economic and damage is physical, though there seems to be no etymological reason why that should be so. The words are very frequently found together to cover all kinds of loss, in the sense of loss incurred. However, in my judgment the expression *lost or damaged goods* is referring to two categories of goods, goods that are *lost* in the sense of vanished, gone, disappeared, destroyed, and goods that are *damaged*, in the sense of not being lost, but surviving in damaged form. The two expressions, in my judgment, in this context do not carry the same meaning, and so Mr Akka's attempt to construe the latter by reference to the former fails.

38. Further, Mr Akka's submissions appear on analysis to disclose a degree of confusion as to precisely what is sought to be achieved by way of construction. Rather as in ***Datacard,*** it is not clear to me in this case what it is that the Cargo Owner is claiming:

i) Is it physical damage in respect of the *conceded tonnage* (and, if physical damage is permitted to be recoverable itself when it occurs after discharge, then also in relation to the goods damaged in the silo) plus 'economic damage' to the balance of the cargo?

ii) Or is it physical damage to the *conceded tonnage* etc with consequential economic loss (including the loss by reference to the balance of the cargo)?

39. If it is the former:

i) It is in my judgment not possible to describe the undamaged goods in this case as "*economically damaged*". Their value may have been *affected*. There may be depression in respect of their price. The goods may be depreciated. But in my judgment they cannot sensibly be described as *damaged*.

ii) As Mr Rainey points out, the case is not pleaded on this basis: see paragraph 5 above. Paragraph 28(a) claims the market value of damaged goods (the 12 tons) and (b) claims losses/expenses incurred in reasonable mitigation etc. Of course a pleading point could be resolved hereafter, but it is significant in the context of the argument.

iii) The effect on the value of the balance of the cargo and the monies spent on them were plainly (on the assumptions made) consequential upon the damage to the *conceded tonnage*. Mr Rainey points to the words of Lord Morton in ***Renton*** at 169, where he is referring to the words in Article III.8 "*loss or damage to or in connection with goods*". He says as follows:

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

This in my judgment assists in the conclusion that the goods by reference to which losses have been suffered consequential to the damage to the originally (physically) damaged goods fall into a different category from the goods originally damaged.

iv) I prefer Mr Rainey's submissions, set out in paragraph 35 above, as to the test for when and whether goods are damaged being as at the time of discharge/delivery, and for the reasons he gives. If therefore it is an appropriate question to ask whether goods are "*economically damaged*", then this must be tested as at the time of discharge/delivery. Although this might be possible (subject to my conclusion in (i) above), it would not achieve the end which the Cargo Owner would wish. The "*economic damage*" would have to be assessed as at that date, by reference to whether the goods had then depreciated, and whether there was then a likelihood that some monies might need to be spent in relation to them. This would of course be a different measure of damage from that which is sought in this case, which is the actual consequential economic loss. It might then mean that there would be contention as to whether a notice within Article III.6 giving the *general nature of such loss or damage* could be or had been given, when what would eventually be claimed would bear little relationship with the *economic damage* as assessed at the time of discharge.

I reject the suggestion that this, or any, claim for consequential loss is a claim in respect of *economically damaged* goods.

40. I turn to consider the alternative basis, which at least has the merit of being in accordance with Mr Akka's pleaded case. This needs the construction not that the goods themselves have been *economically damaged*, but that *goods lost or damaged* must be construed as meaning goods *in connection with which loss or damage has been suffered*. There is a real problem for Mr Akka in this regard. Looking at Lord Morton's four categories, his first category does not apply, there having been no loss of any goods. The *conceded tonnage* would fall within his category (b), the economic consequential loss would fall within his category (c) and the damage in the silos would presumably fall within his category (d). So far in particular as concerns the latter, the goods that were allegedly damaged in the silo were so damaged at a time when they had ceased to be in the custody of the Carrier.

41. It is plain in my judgment that all the loss or damage which was incurred after discharge was "*loss or damage in connection with the goods*" within the first part of Article IV.5(a). The *goods* in question are the goods which were damaged while in the Carrier's custody in connection with which other loss (partly in respect of other, undamaged, goods) was suffered. In those circumstances the reference in the last part of the clause is to those same "*goods lost or damaged*".

42. Thus, even if, instead of the words "*goods lost or damaged*", there had been used the phrase "*such goods*", as in the proposed UK amendment referred to in paragraphs 22 and 23 above, that would have been a reference back to the *goods in connection with* which loss or damage had been incurred. In my judgment therefore, what is permitted in Article IV.5(a) is a claim in respect of (lost or) damaged goods, and a claim for loss or damage *in connection with* those (lost or) damaged goods, but in the second part of the clause the weight of those (lost or) damaged goods is then taken as the limit. If Mr Akka's alternative construction were used, namely that it is the gross weight of the goods "*in respect of which the loss or damage was suffered*", it would still be the lost or damaged goods (the dropped package for example, in the ***Datacard*** case), *in connection with* which consequential loss or damage would have been suffered, which would provide the weight limit.

43. I agree with Mr Akka that there are anomalies both as to construction and as to effect, by reference to the submissions he has made as summarised in paragraphs 32-33 and 34 above . However, I am satisfied that such anomalies do not begin to drive me to adopt the ***Antaios*** canon of construction in this case, so as to conclude that the construction which I have determined to be the correct one, by reference to the analysis of the Article and the Rules, *flouts business common sense*. A claim for economic loss, without physical loss, by reference to delay is not frequent. The scenario which he posited of substantial sums expended on mitigation would be rare and unusual. Many, if not all, provisions, particularly ones arrived at after very considerable international negotiation and compromise, will have unusual or unwanted effects. I am not driven by Mr Akka's arguments to conclude, and do not consider, that to have an entitlement to claim economic loss, but one which is limited by reference to the weight of the physical damage caused while the goods were in the custody of the carrier, is inappropriate or contrary to commercial good sense.

44. I accordingly resolve the preliminary issue in favour of the Claimant Owner/Carrier. On the assumptions made for the purposes of this issue, the counterclaim will be limited to the gross weight of the *conceded tonnage*. What that *conceded tonnage* is, i.e. as to whether it was 7 tons or 12 tons or something up to 262 tons, will need to be resolved, and I will invite the parties to address me on directions for such trial and as to its venue.

Mr Simon Rainey QC and Miss Ruth Hosking (instructed by Holman Fenwick & Willan) for the First Claimant
Mr Lawrence Akka and Miss Angharad Parry (instructed by Barlow Lyde & Gilbert LLP) for the First Defendant