JUDGMENT : Mr Justice Aikens : Commercial Court. 26th April 2007

A. Outline of the case

1. This case arises from an international conspiracy to steal 18 containers which held 360 tonnes of copper cathodes ("the cargo"). The containers were shipped on board the defendants' containership ***"MSC Amsterdam"*** (respectively "*the shipowner*" or "MSC" and "*the ship*") at Durban, South Africa on 30 September 2005. The conspirators were able to use employees of the ship's agents in Durban to produce a fraudulent second set of bills of lading, naming a company in Shanghai as the consignee when it was not. The ship's cargo manifest was also altered. This was all done without causing suspicion because the bills of lading and manifest were all produced electronically. The false bills of lading were sent to the fraudsters in Shanghai, who were able to obtain a delivery order for the containers from the ship's agents there. Using this delivery order, the fraudsters paid customs duty and VAT on the cargo and thus obtained the authority of the customs to discharge the containers holding the cargo from a container terminal in which they were being held.

2. When the Claimants, as the true consignees, tried to obtain delivery orders for the cargo, they were told that delivery orders had already been given. Investigations revealed the fraud. Luckily, the shipowner was able to instruct the container terminal not to release the containers from the terminal without further instructions. The cargo is now worth over 2US$ million.[1] There is currently litigation in the Maritime Court of Shanghai between the fraudsters, the shipowners and their agents in Shanghai over the ownership of the cargo.

3. The genuine bill of lading contains a "*Law and Jurisdiction*" clause, which provides that any claim or dispute arising from the contract of carriage evidenced by the bill of lading is to be subject to the exclusive jurisdiction of the High Court of Justice in London and English law is to apply. The Claimants issued a claim form against the shipowner in the Commercial Court on 13 February 2006. The claim is for delivery up of the cargo or damages from the shipowner for the conversion of the cargo.

4. The containers remain in the container terminal in Shanghai pending resolution of these disputes in both courts.

5. In the present trial, which took place over four days, I heard evidence from one witness of fact and two experts. Most of the evidence was concerned with the subject of "hedging", which I describe in more detail below. The witnesses were truthful and helpful and ultimately there was little that was in dispute between them. I had very full and helpful written submissions from Mr Kendrick QC for the Claimants and Mr Parsons QC and Mr Karia for the defendants. These submissions were supplemented by oral argument. I reserved judgment.

B. The facts leading to the conversion of the containers

6. The cargo of copper had been sold by Rustenburg Platinum Mines Limited ("Rustenburg") to Trafigura Beheer BV Amsterdam office ("Trafigura") on FOB terms, under a Memorandum of Agreement between Rustenburg and Trafigura dated 2` February 2005. By this contract, which was effective as from 1 January 2005, Trafigura agreed to purchase 6000 tonnes of copper cathodes from Rustenburg during the period 1 January to 31 December 2005. The purchases were to be in 500 ton lots per month, all FOB Durban, South Africa.

7. A bill of lading *("the bill of lading")* on the form of the defendants, Mediterranean Shipping Company SA, was issued to Rustenburg on 30 September 2005. The bill of lading is in the conventional *"box"* form. It names Rustenburg as the shippers. In fact the carriage had been arranged by Trafigura (as FOB buyers) through its shipping agents/freight forwarders on about 29 August 2005.[2] So Trafigura was the real shipper and was a party to the contract of carriage with the shipowner evidenced by the bill of lading. The bill of lading was made out "***To Order***" and the "***notify party***" was identified as C Steinweg Warehousing (FE) Pte Ltd, Shanghai. That company is the Chinese subsidiary of one of the world's largest LME[3] warehousing companies. Shanghai was named as the discharge port in the bill of lading.

8. Trafigura had sold the cargo to Shanghai HMC Company Limited ("HMC"), the second claimant, which is a company incorporated in the People's Republic of China ("PRC"). HMC is wholly owned by persons affiliated to Trafigura. The sale contract, dated 19 October 2005,[4] was for the sale of 360 tonnes of *"Off – grade Amplates Copper metals"* on *"CIF Liner Terms"* Shanghai. The price of this CIF sale was not fixed at the time of the sale contract. The contractual terms for calculating the price of the cargo are complex. I will set them out below. They may have to be considered in detail in relation to part of the Claimants' claim for damages. In the event, Trafigura has not yet been paid by HMC for the cargo.

9. The bill of lading was produced and issued by employees of Mediterranean Shipping Co (Pty) Ltd ("MSC South Africa"), which is MSC's South African agent. The information needed for the entries in the "*shipper", "consignee"* and *"notify party"* boxes on the bill of lading was provided by the shipper's (ie. Trafigura's) agents, who were Windward Shipping (Pty) Ltd. The bill itself was generated when the information was put onto a "*template"* bill of lading displayed on a computer screen. The first and genuine bill of lading, which has the number MSCUDN

[1] It has increased in value since it was sold to Trafigura, the first claimants, in September 2005. The sale price then, (fixed by reference to the London Metal Exchange official prices) was US$1,331,759.

[2] The UK based shipping agents for Trafigura were African Cargo Services Ltd ("ACS"). The South African agents of ACS were Windward Shipping (Pty) Ltd.

[3] Standing for: London Metal Exchange.

[4] The evidence in the witness statement of Mr Richard Tildesley, Risk Manager for Trafigura, is that the decision to sell the cargo to HMC was taken several weeks before 30 September 2005, but Trafigura "*did not get round to documenting the sale until later in October. This is a common occurrence as between Trafigura and HMC*". I accept that evidence.

065539, was signed by an authorised employee of MSC South Africa, as agent for the Master.[5] The *"set"* of three original and genuine bills of lading was released to Rustenburg (supposedly as *"shipper"*) in early October 2005, against payment of the freight. That totalled US$6,570 for the 18 containers. In evidence, Mr Richard Tildesley (Trafigura's Risk Manager) accepted that it was not the habit of Trafigura to declare to a shipowner the value of copper shipped in containers.[6] Nor did Trafigura expect the value of the copper to be declared on the bills of lading.[7] Neither was done in this case. However, it was Trafigura's practice to notify the sale invoice value of the cargo to its cargo insurers when the cargo is declared to them.[8]

10. At the same time that the bill of lading was prepared, employees of MSC South Africa also entered details of the cargo, shippers, consignee and notify party on a computerised form of ship's cargo manifest.

11. Trafigura paid Rustenburg's invoice for the cargo on 12 October 2005. The invoice price was US$1,399,396.69. When Trafigura paid Rustenburg for the cargo, the three original bills of lading which had been issued to Rustenburg were endorsed by it and the set of three was sent to Trafigura, via Trafigura's shipping agents, ACS.

12. It is now clear that an international group of professional fraudsters procured the issue of a second, unauthorised and fraudulent bill of lading and also procured an unauthorised and fraudulent alteration in the ship's cargo manifest.[9] Like the genuine bill of lading, this second bill of lading was generated by computer at the offices of MSC South Africa. It is likely that two junior employees of MSC South Africa were complicit in these frauds.[10] On the second bill of lading "Ningbo Toptrade Imp & Exp Co Ltd" ("*Ningbo*") was named as both the consignee and the "*notify party*". Although this company does exist and is incorporated in the PRC, it was neither consignee nor the notify party. The fraudulent bill of lading is different in other respects from the genuine one. A comparison of the terms of the two bills is set out in Appendix One to this judgment. The fraudulent bill was, of course, given the same number as the genuine one, ie. MSCUDN 065539.

13. The computer record of the ship's cargo manifest was also altered to show Ningbo as the consignee of the cargo and the notify party. The false cargo manifest details were transmitted to the ship's computer as being the correct cargo manifest. The second bill of lading and the false version of the ship's cargo manifest were also sent electronically to MSC's agents in Shanghai, China Marine Shipping Agency Shanghai Co Ltd, which is known as "*Sino – Agent"* or "*Sinotrans"*.

14. If cargo is to be discharged at a port in the PRC, the shipowner must transmit electronically a copy of the ship's cargo manifest to the customs authorities at the discharge port. Without the cargo manifest the customs authorities will not accept any import cargo declaration. So the production and transmission of the false cargo manifest was the key to the prosecution of the fraud in this case.

15. The ship arrived at Shanghai on 23 October 2005 and began to discharge her container cargo. The cargo was discharged and taken to a yard designated by the shipowners. That yard is run by the Shanghai East Container Terminal Co Ltd ("SECT"). The yard is also known as the Hudong Container Terminal.[11] The containers are still in this container terminal.

16. On 24 October 2005, someone representing Ningbo attended Sino – Agent's office and presented an *"original"* of the fraudulent bill of lading. Sino – Agent checked this against the false cargo manifest, which had, of course, been altered to conform with the fraudulent bill. Sino – Agent accepted this bill of lading as genuine and so took it and in return gave to Ningbo a Delivery Order, ("DO"), which was made out on Sino – Agent's form. That form identifies the ship, consignee (in this case Ningbo), the bill of lading number and the numbers on the 18 containers. It also states the *"name"* of the cargo (ie. "*STC copper cathodes*") and the total weight of the cargo.

17. The effect of the DO is to indicate to the container yard (SECT) and also to the Chinese Customs authorities, that Sino – Agent as agents for the shipowners, has authorised the release of the containers to Ningbo. Ningbo therefore took the DO to the customs authorities, who have an office in the SECT container terminal itself. The customs authorities checked the fraudulent bill of lading and the DO against the false ship's cargo manifest that had been forwarded to them electronically by the shipowners' agents. As both the DO and the fraudulent bill of lading accorded with the details on the fraudulently altered manifest, the customs authority was prepared to grant customs clearance for the cargo, once import duty and VAT was paid. Ningbo paid these and the customs authority stamped the DO to show that the documentary process was complete and that the cargo could be released from the container terminal to Ningbo's order.

18. On 25 October 2005, Mr Zhou, an employee of HMC's customs clearing agent in Shanghai, Shanghai Changshen Customs Broker Co Ltd, ("Changshen"), went to Sino – Agent (as the shipowners' agent) to exchange the original, genuine, bill of lading for a Delivery Order. Mr Zhou was told that Sino – Agent's internal computer system showed Ningbo as the consignee and "notify party" on the bill of lading. Sino – Agent also informed Mr Zhou that Ningbo had already exchanged an "original" bill of lading for a DO.

[5] There is no dispute that MSC, as shipowner, is the contracting carrier under the bill of lading contract.
[6] XX: Day 1/page 55.
[7] XX: Day 1/page 56 lines 12 – 15.
[8] XX: Day 1/page 58 lines 14 – 18.
[9] It is likely that this involved a London based company, officers in Ningbo Toptrade Imp & Exp Co Ltd and others in South Africa and Zimbabwe. I was informed that other cargoes were also involved, but that is irrelevant to this case.
[10] Two junior employees were dismissed by MSC South Africa for fraud after a formal disciplinary investigation.
[11] The name "Hudong Container Terminal" is based on the Chinese (Mandarin) pronunciation of the terminal's name.

19. This information caused consternation to HMC. Two of its employees[12] went to MSC's Shanghai office and spoke to Ms Yu, explaining that HMC was the owner of the cargo and showing her the original, genuine bill of lading. Although MSC was outwardly non – committal to HMC, it appears that it instructed SECT not to release the containers to anyone without further orders from MSC. It did so by sending to SECT a "*Work – Coordination*" Note, dated 26 October 2005. This note explained that Sino – Agent was the agent of MSC. It identified the relevant bill of lading and the numbers of the 18 containers. The note said that Sino – Agent had been informed by MSC that these containers "*might be involved in a trade dispute and subject to legal proceedings*". The note stated that Sino – Agent had issued a DO to Ningbo and then said: "*..in order to prevent the situation from going worse, we hereby request you to detain the 18 x20 containers under the above B/L with details [that were then set out]*".

20. On 17th January 2007 Mr Zhao Yuesheng, a senior partner of Zhao & Co, lawyers in Shanghai acting for HMC, went to the SECT container Terminal and met there Mr Xu Guanfang, the planning and Controlling Manager of the Operations Department of SECT. Mr Xu had been the recipient of the "*Work Co-ordination Note*" that was sent by Sino – Agent. At the meeting on 17 January 2007, Mr Xu confirmed to Mr Yuesheng that the containers were being held by the terminal to the order of Sino – Agent, who were (and are), of course, the agent of MSC.

21. On the basis of these facts, I think that the correct analysis is as follows: when the containers were discharged from the ship, they were discharged into the container terminal. Neither Trafigura/HMC nor Ningbo produced a bill of lading to obtain discharge of the containers into the container yard. Although Ningbo obtained the DO from Sino – Agent in return for the surrender of the fraudulent bill of lading, thus entitling Ningbo to obtain custody of the containers from the container yard, Ningbo has never been able to do so. This is because of Sino – Agent's "*Work – Coordination Note*", which was sent to the container terminal SECT, on the instructions of MSC. Therefore, from that time onwards, the only party that had effective control over the movement of the containers has been MSC.

22. On 2 November 2005, Trafigura and HMC applied to the Shanghai Maritime Court for an order for the release of the cargo to them. On 4 November 2005 the court made an order that MSC deliver up the cargo to HMC immediately. Eventually, on 10 November, MSC issued a second DO in favour of HMC. This second DO stated: "*…This delivery order shall only be valid with both the ship agent and Customs releasing stamp…*". HMC's customs clearance agent, Changshen, presented this second DO to the customs authority to obtain its releasing stamp. The customs authority refused to stamp the new DO, because clearance for Ningbo had already been granted.

23. Faced with this "Catch – 22" situation, the Claimants asked Changshen to re-apply for customs clearance, but it would not do so. Thereupon the Claimants instructed another customs clearance agent, Shanghai Zhongqing International Forwarding Co Ltd ("SZ"), to re-apply. SZ re-applied for customs clearance of the second DO on 17 November 2005, but that was rejected again. SZ reported to HMC that the customs official, Mr Wu, had informed SZ that customs duty and VAT could not be accepted, nor customs clearance granted for the second DO, unless and until Sino – Agent "*…arranged a transfer procedure with the customs authorities and cancelled the delivery order that they had wrongly issued in favour of Ningbo…*".[13]

24. Under the relevant PRC law, SECT, the container terminal, can only release the cargo to the Claimants against a DO that has been stamped by the customs authorities. However, SECT will not release the cargo to Ningbo, because of the instructions of SECT's principals, MSC, through its agent, Sino – Agent, not to do so. Therefore the cargo remains in the container terminal in Shanghai.

25. On 14 April 2006 Ningbo began proceedings in the Shanghai Maritime Court against MSC and Sino – Agent. The object of that litigation is to determine whether, as against MSC or Sino – Agent, Ningbo is entitled to claim the cargo. There have been attempts at mediation and settlement but these have come to nothing so far.

26. The Claimants' case is that there were two conversions of the cargo by the defendant shipowners. The first was on 24 October 2005, when Sino – Agent, as agent for MSC/shipowners, issued the first DO to Ningbo upon the presentation of the fraudulent bill of lading. The agreed market value of the cargo at that date is: US$1,445,498.96. The Claimants say that the second conversion was on the following day, 25 October 2005, when the defendants failed to deliver up the cargo to the Claimants upon presentation of the original, genuine, bill of lading. The agreed market value of the cargo on that day is: US$1,468,354.83.

27. The defendants accept that they converted the cargo. They say that the conversion occurred on 24 October 2005 when their agents issued the DO to Ningbo against the fraudulent bill of lading. The claimants argue that the second conversion is the relevant one, because it was only on that date that they were aware that there was any problem with the cargo.

28. The Claimants' principal claim is for the delivery up of the cargo by MSC, within a short period of time. If it is not delivered up, the Claimants say they are entitled to the value of the cargo and consequential damages. The Claimants' primary case is that they are entitled to the value of the cargo as at judgment date. But if they entitled only to the value of the cargo at the time of the conversion in October 2005, then they claim consequential losses, in particular the costs of "hedging", which I explain next. The Claimants say that they have suffered other consequential losses, in particular the legal fees for the litigation in Shanghai.

[12] Mr Simon Mao, Vice General Manager, and Ms Fiona Xue, then Traffic Operator for HMC, although now Traffic Operator at Trafigura Trading (Shanghai) Co Ltd.

[13] Witness statement of Fiona Xue, para 15: C1/tab 1/page 4.

C. "Hedging"

29. The evidence of the three witnesses who gave oral evidence at the trial, (one witness of fact and two experts) was principally concerned with the issues of hedging, the claimants usual practice in relation to hedging and the extent to which shipowners had knowledge of hedging practices used by metal traders.[14] As this topic is only potentially relevant to damages, it is not sensible to outline the legal bases on which hedging may become pertinent until later in the judgment. But it is sensible here to describe in outline the practice of hedging and what has happened in fact in this case.

30. Both claimant companies are commodity traders, dealing in particular with metals such as copper. Both use the technique of hedging in order to limit the risks caused by fluctuations in the value of copper on the world market. Hedging has a long history. It involves the use of a market such as the LME, to enter "*forward*" contracts to buy and sell a commodity for "delivery" at a future date, which is usually a date three months after the date of the contract.[15] But in fact the physical delivery of the commodity will never take place when it is the subject of a hedging or forward contract.

31. Because of the possible volatility in prices between the date of a contract for the sale/purchase of physical copper and delivery, most contracts for the sale of a physical cargo of copper will be the subject of a related hedging transaction at some time during the shipment of the cargo to the delivery point. In general terms, if a trader makes a purchase of physical metal, such as copper, which is traded on the LME, then the price is typically fixed by reference to the LME price for an agreed pricing period. To that price a premium is usually added.[16] This pricing period is called "*the quotational period*". In the case of the Trafigura purchase of copper from Rustenburg, the quotational period for the purchase price agreed between the parties was the month of shipment of the copper. When a trader sells - on the physical metal it has bought, the sale price will also usually be fixed by reference to the LME price for a fixed quotational period at a certain point in the future (usually around the estimated delivery date), plus a premium.[17]

32. Because there is always the possibility of a significant time gap between the date fixed for the purchase and sale of physical goods, there is the possibility of a significant fluctuation between the two prices that are fixed by reference to two different quotational periods. The more cautious trader will hedge against these possible fluctuations and will be content with the profit made on the premium above the LME price which is fixed in the on - sale contract.

33. I accept the evidence of Mr Tildesley that Trafigura and HMC habitually hedged all their trades in metals against movements in the LME price, so as not to be exposed to the type of fluctuations in price I have described. I accept that hedging is common practice amongst metal traders. The extent to which shipowners may be aware generally of the extent and practice of hedging by metal traders who ship cargo in containers on board container carriers is a different matter. So also is the question of whether MSC were ever aware of the likelihood of the claimants engaging in hedging activities, either in relation to this particular cargo, or as part of a general "book" of copper purchases and sales. If necessary I shall return to those two issues later in this judgment.

34. In order to mitigate any changes between the purchase price of metals that Trafigura has purchased and the price obtained by Trafigura on a sale to a customer (in this case HMC), Trafigura makes a "hedge" by selling forward an equivalent amount of metal to that purchased. But because Trafigura has a great many purchase and sale contracts, it does not try to match particular purchases with particular forward, hedge, sale contracts. Instead, Trafigura maintains a *"Base Metals Unpriced Contracts Report"*. Maintenance of this report was one of Mr Tildesley's responsibilities. The report sets out all the sales and purchases made by Trafigura's traders in LME copper cathodes in a particular month. The report is actually divided into three parts. The first part sets out contracts where the price of the sale or purchase is not yet known. The second part sets out those contracts where the price of the sale or purchase is by reference to an average monthly LME cash settlement price for that month. The third part sets out those contracts that are priced on a partial average for that particular month.

35. For each month a net position is taken on the purchases and sales of copper cathodes which were priced during that month, eg. September 2005. The report for that month shows that there were more physical sales (priced) than physical purchases (priced), to the extent of 5,422.7760 tonnes.[18] Trafigura does not enter into hedging contracts itself. Its hedging arrangements are made through Trafigura Derivatives Limited ("TDL"), which is a wholly owned subsidiary of Trafigura and which has a separate "*profit centre*". TDL carries out the hedging requirements of all entities in the Trafigura group. TDL will net off any compatible hedging requests that are received from all the entities in the Trafigura group and then go into the LME market and make net forward sales or purchases as need be. Then TDL will attribute to particular Trafigura entities the forward sale or purchase price as appropriate, so that an entity (such as Trafigura itself) can work out whether it will make a profit or loss on the copper cathode trading of that particular month.

[14] The witnesses were Mr Richard Tildesley, Trafigura's Risk Manager; Mr Simon Everton, a shipbroker, called as an expert by the Claimants; and Mr John Mawson, Master Mariner, who was called as an expert by the Defendants. The two experts were called to give opinions on the extent to which a shipowner engaged in the carriage of containers would, in 2005, have known about hedging practices of metal traders generally; and, in particular in relation to metal cargoes shipped in containers on board container ships.

[15] The LME began its "copper contract" for fixing a price of copper 3 months in the future in 1877. At that time most of the production of copper was in Chile, Australia and the Far East. Vessels from those parts took about 3 months to reach the UK, then the largest manufacturer of copper products in the world. See second report of Mr John Shaw, expert in "hedging practice" for the claimants: D1/Tab 4/page 143 paras 8.1 – 8.9.

[16] Sometimes there is a discount, depending on the market conditions, ie. availability and demand for the metal at the point of sale.

[17] Again, there can be a discount, depending on market conditions, as above.

[18] The LME deals in "lots" of 25 tonnes, so this is equal to about 217 lots LME.

36. Mr Tildesley made three hedge requests of TDL that were priced at the September 2005 average LME cash settlement price. They were made on 26 August 2005 (to buy 100 lots); and twice on 1 September (to buy 137 lots and to sell 20 lots).

37. Mr Tildesley's evidence is that Trafigura normally priced a sale contract for physical copper by reference to a "*quotational period*" around the anticipated date of delivery of the physical goods. In the sale contract with HMC, the sale price provisions were:

"3. ***Price***

Any unknown LME Copper Seller's quotation during the Quotational Period adjusted at market to prompt date of 16 November 2005 plus a flat premium of US$0.00 (Zero) per Metric Tonne.

4. ***Quotational Period.***

4.1 The Buyer has the right to price on any LME working day or days starting from the contract being signed until 16 November 2005.

The Q/P may be extended by mutual agreement between Seller and Buyer.

Should Buyer not have price fixed the contractual tonnage prior by 11.30 AM London time on 16 November 2005 and no Q/P extenson has been agreed as per above mentioned QP extension clause, then any remaining unpriced quantity shall be automatically price fixed basis the LME Official Copper Settlement Quotation of 16 November 2005…."

38. Mr Tildesley said that the normal practice is to fix the price of the sale contract first. Once that is done, then that sale price will be taken into account in the hedging requirements for that month. At the same time that the sale contract is priced, the priced purchase contract (from Rustenburg) will be removed from the list of priced contracts for the relevant month (ie. September 2005) and the hedging requirements of that month adjusted accordingly.

39. In this case, because Trafigura has never been in a position to deliver the physical copper to HMC, HMC has been unable to find a buyer in China, because a PRC buyer would only be interested if the copper could be physically delivered. So the two parties to the sale contract (ie. Trafigura and HMC) have agreed that it should not be priced. HMC and Trafigura have, effectively, agreed to vary the sale contract terms as set out above. The effect of this is that Trafigura has not been able to take the Rustenburg/Trafigura purchase contract out of the account for the purposes of calculating the September 2005 Trafigura overall hedging requirements.

40. Mr Tildesley says that, as a consequence of Trafigura having to "*keep open*" the hedge position so far as the Rustenburg/Trafigura purchase contract is concerned, Trafigura has incurred costs at the end of each three month period, because the "*open*" hedge position has had to be rolled over after each period. These costs are called "*rollover*" costs or, sometimes (and confusingly), "*backwardation*" costs. Mr Tildesley was content to use another, generic, term for these costs, which he called "spread costs" [19] A figure for the total of these costs, which Trafigura says are attributable to the Rustenburg/Trafigura purchase contract and its associated hedges, is agreed at US$154,343.72. Trafigura says that these "*backwardation*" or "*spread*" costs constitute the difference in the price of the LME copper that is "borrowed" in order to close out and roll over a hedge position.[20] So, if there had been a hedge by way of a forward sale for the period 1 November to 1 February, and the hedge is to be kept open, then at the end of the three month period (ie. 1February), that forward sale will be matched by a forward purchase (using *"borrowed"* LME copper), at the prevailing spot price on 1 February. The forward sale hedge is then *"rolled over"* into the next 3 month period, from 1 February to 1 May. However, Mr Tildesley accepted in cross – examination that *the "borrowing loss"* figures[21] formed part of an internal record and calculation within Trafigura. It did not represent a sum that Trafigura had had to pay to TDL in order to hedge the Rustenburg/Trafigura purchase contract. MSC submits that Trafigura has failed to prove that any of these costs have actually been incurred.

41. Trafigura also claims that because the notional forward hedge sale in respect of the Rustenburg/Trafigura purchase contract has never been "*closed out",* there is a danger of a final "*hedging loss".* Whether there is a *"hedging loss"* and how much it will be is dependent upon two things. First, the date and secondly the price at which the sale of the physical copper from Trafigura to HMC is fixed.[22] However, Mr Tildesley accepted that when a hedge is "*closed out*" by TDL, it does not close out a specific futures contract that matches a particular physical contract. All that happens is that a particular physical contract is priced and the hedge requirements of the Trafigura group is adjusted accordingly.[23]

D. The Bill of Lading Terms

42. These are central to the arguments of the parties. It is agreed that, for the purposes of the bill of lading contract, Trafigura were actually the shippers of the cargo as the FOB buyers from Rustenburg and the CIF sellers to HMC. It is also agreed that the terms of the contract of carriage between Trafigura and MSC are contained in the bill of lading terms set out on the face and the reverse of the genuine bill of lading. It is further agreed that because

[19] XX: Day 1/page 108. "Backwardation costs" is confusing because the term "backwardation" is also widely used in forward trading to describe the market where a spot or "cash" price is higher than a 3 month forward price. The opposite is a "contango" market, where the spot or "cash" price is lower than the forward price.

[20] XX: Day 1/page 108- 109.

[21] B1/page 148: see XX Day 1/page 109.

[22] Once the price for the physical sale is fixed, then the "hedging loss" will be any difference between the price for the physical copper and the price fixed for the forward hedge sale which will be finally closed out at the time of the physical sale.

[23] XX: Day 1/pages 102 – 104.

HMC has never paid Trafigura for the goods, then Trafigura remains the owner of the cargo and therefore has title to sue. Accordingly, I will refer to Trafigura hereafter, rather than "*the Claimants*".

43. There are important provisions on the face of the bill of lading in addition to the ones I have already mentioned. In particular at the foot of the face of the bill of lading there is a box containing the following wording:

"*IN ACCEPTING this BoI the Merchant expressly agrees to be bound by all the terms, conditions, limitations and exceptions, whether printed, stamped or written hereon and page 1…*

IN WITNESS wherof the no. of Original Bills of Lading shown at the top right corner of this contract have been signed. If this is negotiable (To Order) BoI the goods will only be delivered if one original BoI, properly endorsed by the shippers and/or the Bank concerned (and not by the Notify Party) is surrendered the others being considered null and void".

44. The standard wording on the reverse of the bill of lading on which the parties rely is in typical long and convoluted form. I will not set out here all the clauses to which counsel referred. They are set out at Appendix Two to this judgment. I will set out individual clauses as necessary in the body of the judgment when I am considering the various arguments. The bill of lading clauses that are or may be relevant are: the *"Definitions"* clause; clause 1 ("*Paramount Clause*"); clause 4 ("*Period of Responsibility*"); clause 7 ("*Loading, discharging and delivery of the cargo*"); clause 9 ("*Departure and arrival dates, delays and consequential loss*"); clause 11 ("*Declaration of nature, weight or measurement of goods and of contents of package*"); clause 15 ("*Special cargo*"); clause 22 ("*Claims, valuation, package limitation time-bar*"); and clause 30 ("*Equipment demurrage*").

E. The arguments of the parties

45. The primary case of Trafigura is that the shipowner was guilty of converting the cargo in two ways. First, the shipowner interfered with the title of Trafigura by the action of Sino – Agent (agents for MSC, the shipowner) in giving Ningbo a DO in return for a fraudulent bill of lading. Secondly, MSC interfered with the title of Trafigura to the goods by the action of its agent, Sino – Agent, in failing to delivery up the cargo to Trafigura, despite the presentation of the genuine bill of lading to Sino – Agent, on 25 October 2005. Other causes of action in tort that might be available to Trafigura were pleaded, but they were not specifically pursued at the trial.

46. Trafigura could maintain the same claims, but put as breaches by MSC of the contract of carriage contained in the bill of lading. Other potential breach of contract claims had also been pleaded. None of these were specifically pursued at the trial.

47. MSC amended its pleadings shortly before the trial to admit that it had converted the cargo when its Chinese agent, Sino – Agent, issued a DO in favour of Ningbo, in exchange for the fraudulent bill of lading on 24 October 2005. MSC also accepts that this action was a breach of the bill of lading contract.

48. The argument between the parties therefore concentrated on the monetary liability of MSC to Trafigura as a consequence of MSC's conversion of the cargo. MSC relies on the terms of the bill of lading and claims that they provide it with complete protection from any monetary liability to Trafigura. Alternatively, MSC says that its monetary liability is very limited.

49. Whether MSC can rely on the clauses in the bill of lading that purport to exclude or limit liability for the conversion of the cargo depends on two key groups of questions, upon which much of the legal argument turned at the trial. The first group can be summarised thus: was the contract of carriage subject to the Hague Rules or the Hague – Visby Rules (respectively "*the HR*" and "*the HVR*"); and if the HVR apply, do they do so by contract or by force of law?

50. The second key group of questions, which arises whether the HR or the HVR apply, in summary, is: do the HR or HVR apply to any period when MSC, the shipowners, had custody of the cargo after it had been discharged from the ship, but before it had been delivered to the rightful owners (ie. Trafigura) ; and if so, which set of terms apply and to which period?

51. This first group of questions focuses on clause 1 on the reverse of the bill of lading - the Paramount Clause. Mr Kendrick submits that, because this contract is expressly governed by English law, then on the true construction of paragraph (a) of the clause, the bill of lading is subject to the HVR either by virtue of statute, meaning the English ***Carriage of Goods by Sea Act 1971 ("COGSA 1971")***, or by virtue of the wording of the clause and the terms of the South African ***Carriage of Goods by Sea Act 1986***. Mr Parsons submits that, on its true construction, clause 1(a) makes the bill of lading contract subject to the HR, excluding Article IX.[24] He submits, and Mr Kendrick agrees, that if the HR apply, then they do so by contract, not "*the force of law*".

52. The second group of questions focuses in particular on clauses 4, 7 and 22 of the bill of lading terms. Mr Kendrick submits that the parties are free to agree whether the HVR will apply to the period after the discharge of the cargo from the ship, but during the period when the cargo remains in the custody of the shipowner, but in its capacity as a bailee rather than as an ocean carrier.[25] Mr Parsons accepts this general proposition. Mr Kendrick says that it is clear from the wording of clauses 4 and 7 of the bill of lading that in this case the shipowner and goods owner agreed that the contractual carriage of the cargo would end once there had been discharge of the

[24] That is the so – called "Gold value clause) of the HR, which provides: "*The monetary value mentioned in these [Hague] Rules are to be taken to be gold value*".

[25] ***Pyrene v Scindia*** *[1954] 2QB 402 at 418 per Devlin J.*

cargo from the ship.[26] Thereafter, MSC is no longer a sea carrier of the goods, but it remains a bailee and is subject to the contractual terms of the bill of lading. Therefore, the HVR do not govern the rights of the parties in relation to the period after discharge of the cargo from the ship. (The same reasoning would apply if the HR are incorporated into the bill of lading contract). Mr Kendrick submits that, as a matter of construction, clause 22 does not limit the liability of the shipowner for a conversion of the cargo that occurs after discharge from the ship but whilst the cargo remains in the shipowner's custody ashore, as happened in this case.

53. Mr Parsons submits that the HR do apply to limit the liability of the shipowner in the case of conversion of the cargo after discharge from the ship, but whilst the goods are in its custody ashore. He submits that the shipowner's duty to keep and care for the goods under ***Article III(2)*** of the HR or HVR is not limited to the period before discharge of the goods from the vessel. In this case the shipowner was under an express obligation to deliver the goods against a bill of lading. In the case of container carriage, such delivery will frequently be after discharge. Therefore, the parties have agreed that liability of the shipowner will be governed by the HR, less Article IX.[27] Accordingly, by virtue of the express words of clause 22 (ie. that each container will constitute one package for the purposes of limitation of the carrier's liability) and the provisions of ***Article IV(5)*** [28] of the HR, the applicable limit of liability of the shipowner is £100 Sterling per container. Mr Parsons relies particularly on the words "*…in any event…"* in ***Article IV(5)*** of the HR and submits that the cases show that these words are to be given a very broad scope and so they cover liability for the shipowner's conversion of the cargo. Mr Parsons also relies on the words of clause 22 which stipulate that "*…this limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes"*. Thus, MSC's total liability for the conversion of the cargo is limited to £1800 if the HR apply.

54. Mr Parsons' alternative argument is that if the HVR govern the contract of carriage, then the HVR also govern the relations of the parties for the period after the discharge of the cargo, but whilst it is still in the custody of the shipowner in the container terminal. Therefore, by virtue of the terms of clause 22 and ***Article IV(5)(a)*** of the HVR,[29] MSC's liability is limited to 720,816 Special Drawing Rights - "SDRs".[30] In the further alternative, Mr Parsons argues that if neither the HR nor the HVR applies after discharge, then the wording of clause 22 limits the liability of MSC, either to £1800 or SDR 720,816. In the defendants' Outline Argument some reliance was also placed on clauses 9 and 15 of the bill of lading terms, but argument based on those clauses was not developed orally by Mr Parsons.

55. The final group of questions arise only if Mr Kendrick succeeds in his arguments that the shipowner cannot take advantage of either the HR or the HVR to limit its liability to £1800 or 720,816 SDRs. In that circumstance, if MSC does not deliver up the cargo, then it is agreed that Trafigura is entitled to damages for conversion. If there is no limitation of liability involved, then the normal measure of damages is the value of the goods at the time of conversion, plus any consequential losses that are not too remote in law.

56. Mr Kendrick accepts that the normal measure of damages in a conversion case is the value of the goods at the date of conversion. But he points out that, under the wording of the ***Torts Interference with Goods Act 1977 section 3(2)(a) and (b)***, the court is entitled to award the value of the goods as damages, without reference to any specific date. In appropriate cases, of which this is one, justice requires that the damages should be the value of the copper cargo at the date of judgment. This is because: first, there has been great uncertainty about what would happen to the cargo, so it was reasonable to not to go out and buy replacement goods for delivery to HMC. Secondly, as Trafigura owns the goods, it was reasonable to continue the hedge arrangements. Indeed, MSC, through its solicitors, encouraged Trafigura to continue the hedging arrangements so as to limit any potential losses. Awarding damages equal to the current value of the cargo would mean that Trafigura would recover some or all of its hedging losses. Thirdly, if MSC has to pay damages for conversion equal to the value of the goods, then it will be entitled to take the cargo. It would be unjust if MSC could take the cargo with its current (higher) value but only pay damages equal to its value in 2005.

57. Mr Kendrick's fallback submission is that if Trafigura is only entitled to obtain damages equal to the value of the cargo at the date of conversion, then it is entitled to recover Trafigura's hedging losses either as consequential losses or as "mitigation losses". The hedging position that Trafigura had to take and the hedging orders it had to give to TDL were caused, in part, by the fact that the sale to HMC could never be priced.

58. Mr Parsons submits that the usual measure of damages for conversion applies in this case: viz. the damages are equal to the value of the cargo at the date of conversion which was 24 October 2005. All further claims, whether put as damages for consequential loss or "mitigation loss" are too remote or were not caused by the conversion. He submits (and Mr Kendrick must agree) that the shipowner did not have any information about Trafigura's

[26] Mr Kendrick relied in particular on the sentence in clause 7 which provides: *"Such discharge [ie. from the vessel] shall constitute due delivery of the goods under this Bill of Lading"*.

[27] The "gold value clause": see footnote 24 above.

[28] This provides: *"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding £100 per package or unit…unless the nature and the value of the goods have been declared by the shipper before shipment and inserted in the bill of lading"*.

[29] The relevant part provides: *"Unless the nature and value of the 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 become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit…."*.

[30] The original wording of the HVR was changed by a Protocol in 1979, which provided that the units of account were henceforth to be valued by reference to a "Special Drawing Right" which is itself based on the value of a basket of currencies. In September 2006 an SDR was worth about US$1.5.

hedging arrangements at the time that the contract of carriage was concluded. Further, Trafigura cannot demonstrate that the hedging losses were what everyone will know will arise in the majority of cases where there has been conversion of a cargo of copper in containers. Mr Parsons submits that the hedging losses were caused by Trafigura's decision to agree with HMC to vary the sale contract, so as to continue to keep the cargo unpriced past the latest contract date of 16 November 2005 and Trafigura's decision to maintain the hedge position. Therefore, assuming all the other defences of MSC fail, MSC's liability is limited to the value of the cargo on 24 October 2005 ie. US$1,445,498,96.

F. The Issues for Decision.

59. On the basis of these arguments, the following issues arise for decision:

(1) On the true construction of clause 1(a) of the bill of lading terms, do the HR or the HVR apply to the bill of lading contract? If the HVR apply do they do so by contract or the force of law?[31]

(2) On the true construction of the bill of lading terms, in particular clauses 4, 7 and 22, do the HR or the HVR apply to the period after the cargo had been discharged from the ship but whilst the containers remained in the container terminal to the order of MSC ("*the post – discharge period*")?

(3) If the HR, alternatively HVR, ***do*** apply to the post – discharge period, then, on the true construction of ***Article IV(5)*** of the HR or the HVR (whichever is applicable), is MSC entitled to limit its monetary liability for conversion of the cargo during the post – discharge period? If so, to what amount?

(4) If the HR, alternatively HVR, do ***not*** apply to the post – discharge period, then does clause 22 exclude or limit any monetary liability of MSC if it converts the cargo during the post – discharge period?

(5) If the HR, alternatively HVR, do ***not*** apply to the post – discharge period and MSC ***cannot*** exclude or limit its monetary liability for conversion of the cargo by virtue of the terms of the bill of lading, then what is the proper measure of damages for conversion of the cargo by MSC on the facts of this case? In particular: (a) is Trafigura entitled to claim damages based on the value of the cargo at the time of judgment or is that claim limited to the value of the cargo at the time of conversion (ie. 24 or 25 October 2005); and (b) is Trafigura entitled to recover, in addition to the value of the cargo, any of its "*hedging losses*"?

60. In the Outline Arguments of the parties there was extensive discussion on the effect, if any, of a conclusion that employees of MSC South Africa were involved in the fraudulent conspiracy to issue the second, fraudulent set of bills of lading and fraudulently to alter the ship's cargo manifest. However, as I understood the parties' positions at the trial, it was accepted that this issue was no longer relevant to the other issues that I have to decide. I heard no argument on that point.

61. Before I consider each of the issues I have identified, I will put them in their legal context. First, it is agreed that the relationship between Trafigura, as owner of the cargo, and MSC as the carrier of the cargo, is governed by the bill of lading terms. This must be so given the terms on the face of the bill of lading that I have set out at paragraph 43 above.

62. Secondly, it is agreed that MSC retained custody of the cargo after the cargo had been discharged from the ship and put in the container terminal. Thirdly, it is not now in dispute that the cargo has remained in the container terminal in the custody of and to the order of MSC, for the reasons that I have set out in the narrative at paragraphs 19 to 24 above.

63. Fourthly, during the post - discharge period although MSC was no longer a carrier of the cargo, it was the bailee of the cargo and Trafigura was the bailor. Fifthly, this bailment was a contractual bailment on terms, which are those contained in the bill of lading.

64. Sixthly, clause 2(a) of the bill of lading terms applies to the facts of this case, so that the parties' relations are governed by English law.

65. The parties do not differ on many of the general principles of English law that apply to a genuine bill of lading, all of which are well established. [32] The bill is a receipt for the goods by the shipowner. It is, or is evidence of, the contract of carriage and bailment with the shipowner. It is also a transferable document of title to the cargo referred to in the bill. Further, in this case it is clear from the wording on the face of the bill of lading that I have set out at paragraph 43 above that the bill of lading is the cargo owner's *"key"* to regaining possession of the goods from the custody of the shipowner after the carriage of the cargo at the contractual destination. This is because the bill of lading in this case was "*negotiable*" (as it was made out "to order")[33] and MSC expressly agreed on the face of the bill of lading not to give delivery the goods to anyone unless presented with an original bill of lading properly endorsed. The phrase *"delivery of the goods"* must include the act of giving the presenter of the original bill a Delivery Order which will entitle the holder of the DO to obtain possession of the goods themselves.

[31] It is agreed that the HR will apply, if at all, by virtue of the contract provisions in clause 1(a), ie: "*For all trades, except for goods shipped to or from the United States of America, this B/L shall be subject to the 1924 Hague Rules with the exclusion of Article IX…*"

[32] The well – known law was recently affirmed by Lord Hobhouse of ***Woodborough in Homburg Houtimport BV v Agrosin Ltd ("The STARSIN")*** *[2004] 1 AC 715 at 770D, para 132.*

[33] Many cases have pointed out that a bill of lading is not a "negotiable instrument" in the manner of, say, a bill of exchange. But a bill of lading made "to order" is still commonly described as "negotiable". Lord Hobhouse's phrase "transferable document of title" is, with respect, more accurate.

66. Therefore, by the express terms on the face of the bill of lading contract, the shipowner agrees with the shipper (and any subsequent party to the bill of lading contract) to deliver the goods (in the broader sense I have just indicated) only to the person who presents an original and genuine bill of lading. That person will, at least on the face of things, be the person with title to the goods. This undertaking by the shipowner has been described, in the context of a bill of lading contract, as an obligation of "*fundamental importance*".[34] The shipowner is obviously not entitled to deliver the goods, or give a DO (entitling the holder to obtain the goods) to someone presenting a fraudulent or forged "original" bill of lading.[35] Such a document has been described as a "*worthless piece of paper",* which in law is a "*nullity".*[36] Delivery up of the cargo against such a bill is a "*misdelivery"* by the shipowner, which is a breach of the obligation of fundamental importance in the shipowner's contract with the cargo owner and a conversion of the goods.

67. In principle, of course, a contractual term can exclude liability of a contracting party for both a breach of contract or an act or omission that is tortious. But it is also well settled that the courts will scrutinise with great care any clause in a bill of lading which purports to exclude a shipowner's liability for a misdelivery of the goods. The court will only hold a clause effective to exclude a shipowner's liability for misdelivery if it is apt to excuse a shipowner from performance of that obligation of fundamental importance and also if the clause would be without adequate content if it were not given that construction.[37]

68. Lastly, there is no real dispute over the basic features of the tort of conversion. The nature of the tort impinges on the discussion not only of the scope of the clauses in the bill of lading that purport to exempt or limit the shipowner's liability, but also the issues concerning the correct measure of damages. Conversion is one of the species of tort constituting a wrongful interference with goods that is covered by the ***Tort (Interference with Goods) Act 1977: see section 1(a).*** In ***Kuwait Airways Corporation v Iraqi Airways (Nos 4 and 5),***[38] Lord Nicholls of Birkenhead said that there are three basic features to the tort of conversion, which he described as follows:

"*First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion".*

69. The act of MSC on 24 October 2005, in giving a DO to Ningbo in return for the fraudulent bill, plainly interfered with the rights of Trafigura, as owner of the cargo and clearly satisfies all of Lord Nicholls' requirements. Mr Parsons accepted this was so. In my view it is also plain that the failure of MSC to give Trafigura/HMC a DO on the following day also fulfilled all Lord Nicholls' requirements. Despite the order of MSC to the container terminal not to release the containers except on MSC's instructions, the consequences of MSC's earlier conduct is that Trafigura and HMC are excluded from the use and possession of the goods, although it is still possible that they might regain it at some stage in the future.

G. Issue One: On the true construction of clause 1(a) of the bill of lading terms, do the Hague Rules or the Hague Visby Rules apply to the bill of lading contract? If the latter apply, do they do so by contract or the force of law?

70. Clause 1(a) of the bill of lading has the heading **"*Paramount Clause*".** Its terms are as follows:

"This B/L shall have effect as follows:

(a) For all trades, except for goods shipped to and from the United States of America, this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX, or, if compulsorily applicable, subject to the 1968 Protocol (Hague – Visby) or any compulsory legislation based on the Hague Rules and/or the said Protocols. Where Hague – Visby or similar legislation is compulsorily applicable, the Hague – Visby 1979 Protocol ("SDR" Protocol) shall also apply whether or not mandatory".

71. Mr Kendrick and Mr Parsons agree that the phrase "*for all trades"* means "*for all voyages between any ports (other than to and from the USA) for carriage of any type of cargo*".[39] It is also agreed that for such voyages the parties to the bill of lading have agreed that the "default" position is that the HR will govern the bill of lading. That is the effect of the words "*this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX…".* The argument turns on whether the default position is altered so as to make the HVR govern in this case. Difficulties in construction arise because the contract contained in the bill of lading is subject to English law, but the country of shipment of the cargo, South Africa, has not become a party to the Hague or the Hague – Visby Convention, ie. is not a "C*ontracting State*".[40] Accordingly, the route used by the majority of the Court of Appeal in the ***Happy Ranger*** case to apply the HVR to the contract of carriage is not available in this case.[41]

[34] See the ***Motis case,*** referred to in footnote 37 below.

[35] The back of the fraudulent bill of lading was not in fact endorsed. It only bore Ningbo's own stamp: E/tab 12/page 131.

[36] See ***the Motis case****,* referred to in footnote 37 below at *page 216, para 20, per Stuart – Smith LJ.*

[37] See: ***Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg*** *[2000] 1 Lloyd's Rep 211 at 216 paras 19 and 20 per Stuart – Smith LJ; per Mance LJ at page 217, paras 3 – 5 and 8. Mummery LJ* agreed with both judgments.

[38] *[2002] 2AC 883 at 1084 para 39.*

[39] Compare ***The Happy Ranger*** *[2002] 2 Lloyd's Rep 347 at para 19 per Tuckey LJ; para 47 per Rix LJ.* The Paramount Clause in that bill of lading was similar, but not identical. It referred to "*…trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on 23 February 1968 – the Hague Visby Rules – apply compulsorily…".*

[40] A "Contracting State" is one that signed and ratified the 1968 Protocol, or has since acceded to it, but the phrase also includes Contracting States in respect of the unamended Hague Convention: *Merchant Shipping Act 1995, Sch 13, para 45(1) and (7).* The list of Contracting States is set out in a statutory instrument: currently the *Carriage of Goods by Sea (Parties to Convention) Order IS 1985/443* and the *Carriage of Goods by Sea (Parties to Convention) (Amendment) Order IS 2000/1103.* South Africa is not amongst them.

[41] *[2002] 2 Lloyd's Rep 357.* In that case the country of shipment was Italy, a Contracting State.

72. The phraseology of clause 1(a), in common with many Paramount Clauses, is neither simple nor elegant. The first part of the first sentence of clause 1(a), up to the words *"…Article IX…"*, sets out the "*default rule*" that the Hague Rules will apply to the contract of carriage. In my view, the correct reading of the second part of the sentence, starting with the phrase "*…or, if compulsorily applicable…"*, is that there are two alternative means by which the HVR ("*the 1968 Protocol*") or compulsory legislation based on the HVR, might govern the contract of carriage. Thus, in the first situation, the contract will be subject to the HVR if *"the 1968 Protocol"* (ie. the HVR) is "*compulsorily applicable*". The question here must be: what is embraced by the words "*compulsorily applicable"*. Secondly, the bill will be subject to "*…any compulsory legislation based on the Hague Rules or said Protocols [ie. the HVR]…"*. So there are two questions that have to be answered to see if that part of clause 1(a) is applicable. First, is there any relevant legislation "*based on the"* HVR; secondly, is such legislation "*compulsorily applicable*"?

73. The starting point for all discussion must be the relevant English law statute, viz. ***COGSA 1971***. The pertinent provisions of that are:

"*1. (1) In this Act, "the Rules" means the International Convention of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968 and by the Protocol signed at Brussels on 21 December 1979.*

(2) The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.

…….

(6) Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to –

(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract,

……..

Schedule. *The Hague Rules as amended by the Brussels Protocol 1968.*

……..

Article X

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if

(a) the bill of lading is issued in a Contracting State; [42] or

(b) the carriage is from a Contracting State; or

(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person."

74. In ***The Hollandia,***[43] Lord Diplock stated that the effect of ***section 1(2)*** of ***COGSA 1971*** is plain:

"*The Hague – Visby Rules, or rather all those of them that are in the Schedule [to the Act] are to have the force of law in the United Kingdom: they are to be treated as if they were part of directly enacted statute law"*.

Lord Diplock went on to say that an English court must give the provisions of the HVR, as set out in the Schedule, a "*purposive rather than a narrow literalistic construction"*.

75. To complete the picture, I should set out the relevant parts of the South African legislation, which is the ***Carriage of Goods by Sea Act No 1 of 1986***. That provides, in ***section 1:***

"*1. Application of Hague Rules. – (1) Those Rules contained in the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25 August 1924, as amended by the Protocol signed at Brussels on 23 February 1968, which are set out in the Schedule (hereinafter referred to as the Rules) shall, subject to the provisions of this Act, have the force of law and apply in respect of the Republic in relation to and in connection with –*

(a) the carriage of goods by sea in ships where the port of shipment is a port in the Republic, whether or not the carriage is between ports in two different States within the meaning of Article X of the Rules;

(b) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract".

It is thus clear (and was not in dispute) that the South African Act is legislation that comes within the wording of Article X(c) of the HVR as being "*…legislation of any State giving effect to …"* the HVR. It must also be clear that, at least as a matter of South African law, this legislation is compulsorily applicable to contracts of carriage where the port of shipment is in South Africa, as it was in this case.

76. The contract contained in the current bill of lading is governed by English law and the case is being determined by the English court. Therefore English law, including its conflicts of laws rules and rules of construction, must be applied. ***COGSA 1971*** has the force of law so far as the English Court is concerned. Accordingly, it must follow that the bill of lading contract is subject to the English law set out in the Schedule to ***COGSA 1971***, including Article X of the HVR. Thus, in the first place, the provisions of the HVR must govern the bill of lading contract if one or other of the conditions set out in Article X of the HVR is fulfilled. (None of the other possible circumstances set out in ***section 1(3), (4)*** and ***(6)*** of ***COGSA*** apply in this case).

[42] See footnote 40.

[43] *[1983] AC 565 at 583*

77. It is also agreed that this bill of lading relates to the carriage of goods between two different States. It is also accepted that Articles X(a) and (b) are not relevant, because South Africa is not a contracting State to either the HR or the HVR.

78. I return to the two possible routes by which the bill of lading will be subject to the HVR. The first is if they are "*compulsorily applicable*". The most obvious way that they would be compulsorily applicable according to English statute law (ie. "*have the force of law*") is if one of the two circumstances set out in *Article X(c)* applies.

79. The first circumstance is if the bill of lading (ie. clause 1(a) in this case) "*…provides that these Rules*" (ie. the HVR) are to govern the contract? It does not do so directly. It only says that the HVR is to govern if they are "*compulsorily applicable*". But the HVR will only be "*compulsorily applicable*" if some statute or other principle of law makes them so. So this phrase in clause 1(a) simply takes matters round in a circle. It must follow, in my view, that the first part of *Article X(c)* of the HVR does not apply to make the HVR applicable to this contact of carriage.

80. Therefore I must consider the second part of *Article X(c)* and ask: does clause 1(a) of the bill of lading provide that "*…legislation of any State giving effect to [the HVR] are (sic) to govern the contract…*"? There is a point of construction of Article X(c) involved at this stage, on which there is no direct authority, so far as I know. Does this wording mean that the bill of lading has to identify the legislation of a *particular State* and then say that the legislation of that state (giving effect to the HVR) is to govern the contract? Or, does this part of *Article X(c)* mean that the bill of lading can provide generally that the legislation of any State giving effect to the HVR will govern the contract; so that the provisions of the HVR will apply, in accordance with the opening words of *Article X*?

81. I have no hesitation in preferring the first of these two constructions. If it were otherwise, then it would be impossible to know which legislation is applicable in a particular case and there may be variations in different national legislation giving effect to the HVR. In the present bill of lading, no particular state's legislation giving effect to the HVR is identified. Therefore, the second part of *Article X(c)* is not applicable.

82. However, I think that, as a matter of contractual construction, the words "*….or, if compulsorily applicable, subject to the 1968 Protocol (Hague – Visby)…*" are intended to cover another situation. The parties to the bill of lading contract agreed, by clause 1(a) that *"this B/L shall have effect as follows: for all trades….if compulsorily applicable, subject to the [HVR]"*. It is agreed that "*trades*" means voyages and covers all types of cargo. So the parties intended that the HVR should apply to the contract of carriage in all voyages when the HVR are "*compulsorily applicable*". The words do not limit the situation to cases where the HVR are "*compulsorily applicable*" because of English statute law, although English law is the applicable law of the contract. In my view the parties intended to give that phrase a wider meaning and intended it to embrace (at least) any voyage where, at the port of shipment, the HVR are compulsorily applicable. Like Rix LJ in ***The Happy Ranger***,[44] I note in this case that the parties to the bill of lading link the applicability of the HVR to "*trades*" - ie. voyages - where the HVR are "*compulsorily applicable*". In my view this means that the parties intended that the HVR should govern the bill of lading contract in cases where a voyage starts from a port of shipment in a state whose law made the HVR "*compulsorily applicable*". That appears to be the only way in which to give full effect, as a matter of construction, to the wording "*…for all trades….if compulsorily applicable, subject to the [HVR]…*".

83. In this case the bill of lading covers a shipment from South Africa. The South African COGSA is "*compulsorily applicable*", by South African law, to all contracts of carriage of goods by sea where the port of shipment is in the Republic of South Africa: ***section 1(1)(a)***. Therefore, in my view, as a matter of contractual construction, the HVR govern this contract of carriage, because the HVR are "*compulsorily applicable*" to this voyage from South Africa.

84. This conclusions means that I do not have to consider the alternative way in which the bill of lading contract can be governed by the HVR, ie. if "*…any compulsory legislation based on the…[HVR]…*" is compulsorily applicable. But I should express my view. The phrase "*…any compulsory legislation based on the…*" HVR must refer to legislation which sets out rules that are modelled on those set out in the HVR themselves. The legislation need not set out the Rules *verbatim*. Nor, perhaps, need the wording be very similar. But the rules in the legislation must be recognisably "*based on*" the HVR. The South African COGSA is not legislation of this type, because it is not simply "*based on*" the HVR. On the contrary, ***section 1(1)*** of the South African Act provides that the HVR, which are set out in a schedule to the Act, "*…shall have the force of law and apply in respect of the Republic…*". Therefore, in my view, the HVR do not govern this contract of carriage by virtue of this part of clause 1(a).

85. It follows from the conclusion that I have reached in paragraphs 82 and 83 above that the HVR apply in this case as a matter of contract, rather than by "*force of law*" under the ***COGSA 1971***.

H. Issue Two: On the true construction of the bill of lading terms, in particular clauses 4, 7 and 22, do [the HR or] the HVR apply to the period after the cargo had been discharged from the ship but whilst the containers remained in the container terminal to the order of MSC ("the post – discharge period").

86. I have held that the bill of lading contract is governed by the HVR as a matter of contract, rather than by the force of law of the UK or that of any other country. Therefore what was described in argument as the "*temporal*" scope of the HVR is something that must be determined as a matter of construction of the terms of the bill of lading as a whole.

87. As I have already noted, it is accepted that parties to a bill of lading contract are free to agree the extent to which the HVR will apply after the carriage of the cargo has finished. Mr Kendrick submits that clauses 4 and 7 of

[44] *[2002] 2 Lloyd's Rep 357 at para 47.*

the bill of lading terms makes it plain that the parties agreed that the HVR (or HR if applicable in other situations) are to apply only up to the completion of discharge of the cargo from the ship. He submits that this is clear as a result of a combination of the terms of ***Articles I(e), II*** and ***VII*** of the HVR, together with the wording of clauses 4(ii) and (iii), part of the provisions of clause 7 and one part of the provisions of clause 22 of the bill.

88. ***Articles I(e)*** and ***II*** of the HVR provide as follows:

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

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

*"**Article VII.** Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea"*

89. Clauses 4(ii) and (iii) of the bill of lading provide:

(ii) The responsibility of the Carrier is limited to that part of the Carriage from and during loading onto the vessel up to and including discharge from the vessel and the Carrier shall not be liable for loss of damage to the goods during the period before loading onto and the period after discharging from the vessel, howsoever such loss or damage may arise. Loading and discharge take place when the goods pass the vessel's rail or ramp.

(iii) When the goods are in the custody of the Carrier and/or his subcontractors before loading and after discharge, whether being forwarded to or from the vessel or whether awaiting shipment landed or stored, or put into hulk or craft belonging to the Carrier, or pending transhipment, they are in such custody for the risk and account of the Merchant without any liability of the Carrier".

90. The parts of clause 7 that Mr Kendrick relies on are:

"The vessel may commence discharging immediately on arrival without notice to the consignee or any other party….on to quay or into shed, warehouse, depot,….vehicle, vessel or craft as the Carrier or his agents may determine. Such discharge shall constitute due delivery of the goods under this Bill of Lading……Whether the vessel's tackles or shore cranes or other means be employed in the course of delivery onto Quay or otherwise, any loss of, of damage to the goods….shall, after the end of the Hague Rules period, be at the sole risk of the consignee in every respect whatsoever…."

91. The part of clause 22 that Mr Kendrick relies on is:

"*…Notice in writing of loss or damage must be given to the Carrier's Agent at the Port of Discharge or Final Destination, promptly after delivery of the goods and in any case within 3 running days from the date of delivery as defined in Clause 7…"*

92. Mr Parsons points out that in many cases[45] the courts have not only said that the temporal scope of the HR or the HVR is something for the parties to decide, but also held that the obligations of a carrier to "*keep and care for*" the goods imposed by ***Article III (2)*** of the HVR is apt to apply after discharge of the goods as well as before. He submits that the obligation to "*keep and care for*" the cargo in this case must embrace the express obligation of the shipowner on the face of the bill of lading to deliver the cargo only against production of an original (genuine) bill of lading. The parties would have appreciated that delivery of the cargo against an original bill of lading may well only take place after discharge. Therefore, the parties must have intended the HVR régime (or HR if applicable) to extend to the time when that obligation was undertaken, ie. even after discharge.

93. Mr Parson's alternative argument is that whatever the position concerning the shipowner's HVR other obligations and privileges after discharge of the cargo, it is still entitled to rely on the terms of ***Article IV(5).*** That, he submits, would reflect the broad wording of the Article: "*…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…".* He emphasises the use of the words *"…in any event…",* in the Article. Tuckey LJ said, in ***The Happy Ranger case***[46] that those words "*…mean what they say*". In ***Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd ("The Capitan Petko Voivoda"),***[47] Longmore LJ stated that those words connote "*in every case*". Mr Parsons submits that this means that in this case of the shipowner's failure to deliver the cargo against production of an original bill of lading, it is entitled to rely on ***Article IV(5)*** of the HVR to limit its liability to 720,816 SDRs. In this regard, Mr Parsons relies, by analogy, on the well – known case of ***Salmond and Spraggon (Australia) Pty Ltd v Port Jackson Stevedoring Pty Ltd (The "New York Star"),*** [48] in which the Privy Council held that the words "*….in any event…*" in a time bar clause in a bill of lading were broad enough to cover a case of misdelivery of cargo by agents of the shipowner, who handed over the goods to a thief without production of proper shipping documents.

[45] He relied in particular on ***Pyrene Co Ltd v Scindia Navigation Co Ltd*** *[1954] 2 QB 402 at 417 – 8 per Devlin J;* ***Compania Portorafti Commerciale SA v Ultramar Panama Inc ("The Captain Gregos" No 1)*** *[1990] 1 Lloyd's Rep 310 at 315 per Bingham LJ;* ***PS Chellaram & Co Ltd v China Ocean Shipping Co ("The Zhi Jiang Kou")*** *[1991] 1 Lloyd's Rep 493 (Supreme Ct of New South Wales) particularly per Gleeson CJ at 498 and Kirby P at 515.*

[46] *[2002] 2 Lloyd's Rep 357 at para 38.*

[47] *[2003] 2 Lloyd's Rep 1 at para 16*

[48] *[1980] 2 Lloyd's Rep 317.*

94. The HVR rights and obligations are concerned with the carriage of goods by sea. I accept that this phrase must include activities both before loading on board and after discharge from the sea – carrying vessel. But it is clearly established that it is up to the parties to the bill of lading to define the temporal scope of the HVR rights and obligations, in particular whether they apply after discharge. That is the effect of ***Article VII*** of the HVR (and the HR). In this case the general approach of the bill of lading terms, but in particular those of clauses 4(ii) and (iii) is to limit the responsibilities of the carrier to the time when the goods are on board. Clause 7 emphasises that "*due delivery*" of the goods takes place by discharge onto the quay, or into a shed, warehouse, depot or other premises.

95. It is implicit in this wording, but also in particular the sentence of clause 7 that states: "*…any loss of, or damage to the goods….shall, after the end of the Hague Rules period, be at the sole risk of the consignee in every respect whatsoever.*" that there will be an end to the HR (or HVR) period before the consignee has taken custody of the goods but at some earlier period. In my view the phrase "*..after the end of the Hague Rules period…*" is referring to the moment after the goods have been discharged. That is what the parties have apparently agreed as the "*delivery*" of the goods, as is clear from the wording of clause 22.[49]

96. Therefore, my general answer to Issue Two is no, the HVR do not apply to the period after discharge but whilst the cargo was still in the custody of MSC in the container yard.

97. That still leaves the alternative submission of Mr Parsons that the shipowner can still rely on ***Article IV(5),*** because of the broad wording of that article. But I cannot accept this argument. The parties have agreed that the "*Hague Rules period",* or the Hague Visby Rules period, is limited to a certain time, in this case until discharge (and hence "*delivery*") of the goods. This must mean that the parties have agreed that all the HR or HVR are confined to that period, unless there is something in the wording of clauses 4, 7 or 22 of the bill of lading to suggest that certain of the HR or HVR are to carry on after the end of the HR or HVR period. But there is not. In this case, the shipowner continued to have custody of the goods. It did so as a bailee, on terms. But none of the HVR, including the limitation provisions in ***Article IV(5)*** can apply.[50]

98. The same reasoning would have applied had I concluded, on Issue One, that the HR applied to the bill of lading contract. It follows from these conclusions that, in my view, Issue Three is irrelevant. But I will state my view as the point was argued before me and broadly similar points arise under Issue Four.

99. I realise, of course, that clause 22 also provides, that:

"*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 the limitation allowed under the Hague Rules or the Hague – Visby Rules/SDR limitation or the COGSA limitation, depending on which of these is contractually or compulsorily applicable, per package or unit unless the nature and the value of such goods have been declared by the Merchant before shipment and inserted in the Bill of Lading".*

100. The effect of that wording is dealt with under Issue Four.

I. Issue Three: If the HVR do apply to the post – discharge period, then, on the true construction of Article IV(5) of the HVR, is MSC entitled to limit its monetary liability for conversion of the cargo during the post – discharge period? If so, to what amount?

101. The crucial question under this issue is whether, on the correct construction of the opening sentence of ***Article IV(5)(a)*** of the HVR, the words: *"…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 [the relevant SDRs]…"*

apply to limit a shipowner's liability in the case of misdelivery of cargo in the sense used in this judgment.

102. Under this head, Mr Parsons emphasises the fact that the HVR (and indeed the HR) were framed as an international bargain between shipowning and cargo interests, under which shipowners were persuaded to give up their rights to assert wide – ranging contractual exemptions from liability in return for a financial limitation of their liability to cargo owners. Therefore, the scope of ***Article IV(5)*** should be broad, so as to encompass all situations for which a shipowner might be liable to a cargo owner "*…in any event…for any loss or damage to or in connection with the goods…*" in the agreed amount. In this regard he relies on the arguments and the cases I have referred to in paragraph 93 above. He also relies upon two further overseas decisions concerned with ***Article IV(5).*** First, the decision of the Supreme Court of New South Wales in ***The "Zhi Jiang Kou"*** case[51] which held that the time bar provisions in bill of lading terms[52] applied to a situation where there had been a misdelivery of cargo by the shipowner subsequent to the discharge of the cargo, but whilst it remained in the shipowner's custody. Secondly, a decision of the US Court of Appeals, Second Circuit.[53] He also relies on two further English decisions concerning misdelivery, in which the court held that a bailee was entitled to rely on the applicable limitation[54] or exclusion provision.[55]

[49] This refers to "*…the date of delivery as defined in clause 7….*".

[50] I therefore agree with the analysis of *Carver on Bills of Lading (2nd Ed), para 9 – 131.*

[51] *[[1991] 1 Lloyd's Rep 493*

[52] There was a contractual time – bar, clause 10(2), which provided that "*…the Carrier shall be discharged of all liabilities under this bill of lading unless suit is brought and written notice thereof give to the carrier within nine months after delivery of the goods…*". The bill also incorporated the Hague Rules, including *Article III(6).*

[53] *BMA Industries v Nigerian Star Line Ltd 786 F.2d 90 (1986)*

[54] ***Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd*** *[2004] 2 Lloyd's Rep 251.*

[55] ***Shaw v the Great Western Railway Company*** *[1894] 2 QB 495.*

103. Mr Kendrick counters these arguments by pointing out that there are no English decisions which hold that ***Article IV(5)*** of the HVR is applicable to a case of misdelivery of the goods (by handing them – or a DO – to someone who presents a fraudulent bill of lading), after the discharge of the goods from the carrying ship. He points to the fact that all of the English cases on which Mr Parsons relies are cases concerning ***Article III(6)*** of the HR or HVR, which has different wording which is more decisively in favour of a shipowner on this issue.[56] He submits that there was no intention by the draftsmen of the HR or the HVR to limit the liability of shipowners under ***Article IV(5)*** in the case of misdelivery, particularly if that took place after the cargo had been discharged from the vessel.

104. This issue arises on the assumption that the parties have agreed that the HVR regime is to apply as between shipowner and cargo owner after the discharge of the goods from the ocean carrying vessel, but whilst the goods remain in the custody of the shipowner ashore. On that assumption, ***Article IV(5)*** must apply to the potential liability of the shipowner "*…in any event…for any loss or damage to or in connection with the goods…*". The same interpretation of the words "*….in any event*" must be given to them whether they appear in the HR, as in ***The "Kapitan Petko Voivoda"***,[57] or the HVR, as in ***The "Happy Ranger"***.[58] The words "*…mean what they say…*", as Tuckey LJ put it in the latter case; that is, they mean "*…in every case…*" as Longmore LJ stated in the former case. So the shipowner is entitled to limit his liability "in every case" *…for any loss or damage to or in connection with the goods….*".

105. Lord Morton of Henryton pointed out in ***Renton &Co Ltd v Palmyra Trading Corporation***,[59] that the phrase "*…loss or damage to or in connection with goods…*" as used in ***Article III(8)*** of the HR (and the HVR), covers four different situations: loss of goods, damage to goods, loss in connection with goods and damage in connection with goods. That gives the phrase a very broad scope. In ***Article IV(5)*** of the HVR the wording is, if anything, even wider. It refers to "*…any..*" loss or damage etc., and it refers to "*…the goods…*" which must mean the goods the subject of the contract of carriage.

106. In my view, therefore, if the HVR applied to the period after discharge, then the shipowners' duty under ***Article III (2)*** to "*…keep and care for…*" the goods, must have extended throughout that period. By failing to do so, but giving up the goods to someone who was not entitled to take them, the shipowner breached that duty. Such "*misdelivery*" is a very serious breach of duty, about as serious as there could be. But it must fall within the phrase "*…in any event…*" in ***Article IV(5)***, if that phrase means "*in every case*". And the shipowner's liability must be limited if his liability for misdelivery is one for "*…loss or damage…in connection with the goods*". To my mind a shipowner's liability to the cargo owner, whether in contract or conversion, for loss suffered by the latter as a result of misdelivery of the cargo by the shipowner, is obviously a liability for "*…loss…in connection with the goods*".

107. Therefore, if the parties had agreed that the HVR regime continued after discharge of the goods from the ship, I would have held that the shipowner could have relied on ***Article IV(5)*** of the HVR to limit liability. It is agreed that the limit of liability is 720,816 SDRs.

108. The same words appear in the relevant part of ***Article IV(5)*** of the HR, although much of the remainder of that Article was radically altered in the later Convention. But it must follow that if I had concluded that the HR governed the contract of carriage and that they had governed the period after discharge, then the shipowner would have been able to limit liability under ***Article IV(5)*** of the HR. The agreed limit on this basis is £1800.

J. Issue Four: If the HR, alternatively HVR, do not apply to the post – discharge period, then does clause 22 exclude or limit any monetary liability of MSC if it converts the cargo during the post – discharge period?

109. In this circumstance, the argument centres on the construction of the following part of clause 22 of the bill of lading terms: "*….Neither the Carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding the limitation allowed under the Hague Rules or the Hague – Visby Rules/SDR limitation or the COGSA limitation, depending on which of these is contractually or compulsorily applicable, per package or unit, unless the nature and the value of such goods have been declared by the Merchant before shipment and inserted in the Bill of Lading….This limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes…..*"

110. Similar arguments apply whether (as I have held) the HVR apply to the pre – discharge part of the contract, or the HR do so. It is agreed, of course, that there was no declaration of the value of the goods nor insertion of their value on the bill of lading.

111. Mr Kendrick submits that this wording of clause 22 must be construed against the background of the terms of clauses 4 (ii), (iii) and 7 of the bill of lading, the relevant parts of which I have quoted already. Those provisions make it clear that, as a matter of contract, the shipowner's period of responsibility and liability ends with discharge from the vessel. Thus clause 7 states that "*..Such discharge shall constitute due delivery of the goods under this bill of lading*". Therefore, Mr Kendrick argues, any limitation of liability provision in favour of the shipowner in clause 22 must be confined to breaches of contract (or other duties) that occur before the stated period of responsibility ends, unless there are some clear words to extend the period during which the limitation of liability regime prevails to that outside the period when the shipowner acknowledges responsibility. But there is nothing in the wording of clause 22 on which the shipowner can rely to indicate that the parties agreed that the liability of the shipowner could be limited in respect of any breaches of duty (by the shipowner) outside that defined period

[56] In the Australian case of ***The "Zhi Jiang Kou"***, Carruthers J had held (in the Admiralty Court of the Supreme Court of New South Wales) that *Article IV(5)* of the HR applied to a case of misdelivery by negligence – as he held it to be in that case. The point was not argued on appeal.

[57] *[2003] 2 Lloyd's Rep 1 at para 16 – 18 per Longmore LJ*

[58] *[2002] 2 Lloyd's Rep 357 at para 38 per Tuckey L*

[59] *[1957] AC 149 at page 169*

of its responsibility. Therefore the shipowner cannot limit liability at all for a conversion of the cargo during the period after discharge. Mr Kendrick argues in the alternative that, even if, as a matter of construction, the limitation of liability can apply to that period, it cannot embrace so serious a failure of duty as a misdelivery, unless very clear words indicate that such a failure is within its scope. Such words are not used in this case.[60]

112. Mr Parsons submits that there is no express or implied temporal limit on the scope of the limitation of liability in the crucial wording of clause 22. The words ""*…in any event…"* apply to all contractual and other claims and at all stages. Neither clause 4 nor clause 7 cuts down the temporal ambit of clause 22, which does not state that it is subject to the other provisions of the bill of lading. The words *"…in any event"* are wide enough to cover cases of misdelivery.

113. The shipowner expressly undertakes, by the wording on the front of the bill of lading, only to deliver the cargo up if an original (genuine) bill of lading is surrendered. In the ***Motis case***, Stuart – Smith LJ characterised the obligation of proper delivery of the cargo as one of "fundamental importance".[61] In that case a clause purported to exempt a shipowner as follows: "*…the Carrier shall have no liability whatsoever for any loss or damage to the goods while in its actual or constructive possession before loading or after discharge over ship's rail, or if applicable, on the ship's ramp, however caused".*

The Court of Appeal held that this wording could not exclude liability for a misdelivery to someone who had produced a fraudulent bill of lading.

114. The present bill of lading wording is different in two respects. First, clause 4 (ii) and (iii) expressly limit the responsibility of the shipowner to the period from loading to discharge. They provide that if goods are in the custody of the shipowner or his subcontractors outside that central period then they are at the risk and account of the cargo owner "*..without any liability of the [shipowner]".* Secondly, clause 7 states that delivery from the vessel is "*due delivery under this Bill of Lading".* In my view clause 22 has to be read in that context. The question is: in the context of those statements of the scope of the shipowners' liability, is it reasonable to construe clause 22 to mean the parties intended the limitation of liability to extend to a period outside that for which the shipowner accepts it has responsibility for the goods? In my view the answer is "no". The words "*in any event"* have to be read in the context of the period of responsibility which the shipowner accepts. The obvious ambit of those words in that context must be confined to the potential liability for loss of or damage to or in connection with the goods during the period for which the shipowner accepts he has responsibility for the cargo. The wording of the clause does not purport to extend the temporal scope of either the responsibility or the limitation for liability of the shipowner. Two further points should be noted. First, the sentence that applies the limitation of liability to contractual and any claims arising from other causes also does not extend the temporal scope of the limitation. Secondly, the reference to the HVR or HR limitation amounts is, in my view, no more than that; it does not extend the periods for which the limit applies.

115. As both Stuart – Smith and Mance LJJ point out in the ***Motis case,***[62] a court has to give the *"natural*" meaning to a clause in a bill of lading, particularly one that exempts or limits liability. A "*natural"* meaning and proper effect can be given to the limitation of liability provisions of clause 22 if it is confined to the period for which the shipowner accepts some responsibility for the goods. There is no need to give it additional scope to give effect to the clause. There is no need to extend it to cover the breach of an obligation of such fundamental importance as proper delivery, outside the period for which the shipowner accepts responsibility, unless the words make it plain that this is what the parties intended. In my view they did not clearly have that intention.

116. Therefore, my answer to the question posed by Issue Four is "*no".*

K. Issue Five: If the HR, alternatively HVR, do not apply to the post – discharge period and MSC cannot exclude or limit its monetary liability for conversion of the cargo by virtue of the terms of the bill of lading, then what is the proper measure of damages for conversion of the cargo on the facts of this case? In particular: (a) is Trafigura entitled to claim damages on the basis of the cargo at the time of judgment or is that claim limited to the value of the cargo at the time of conversion (ie. 24 or 25 October 2005); (b) is Trafigura entitled to recover, in addition to the value of the cargo, any of its "*hedging*" losses?

117. ***Section 3 of TIGA 1977*** deals with the form of judgment that may be obtained by a claimant when goods have been detained by a defendant. It provides as follows:

(1) In proceedings for wrongful interference against a person who is in possession or in control of the goods relief may be given in accordance with this section, so far as appropriate.

(2) The relief is –

(a) an order for delivery of the goods, and for payment of any consequential damages, or

(b) an order for delivery of the goods, but giving the defendant the alternative of paying damages by reference to the value of the goods, together in either alternative with payment of any consequential damages; or

(c) damages

(3) Subject to rules of court –

(a) relief shall be given under only one of paragraphs (a), (b) and (c) of subsection (2) ……..

[60] Mr Kendrick relied in this regard on **the *Motis case*** *[2000] 1 Lloyd's Rep 211, particularly at page 216, per Stuart – Smith LJ; page 217 per Mance LJ.*

[61] Para 20. Mummery LJ agreed with that judgment.

[62] Paras 20 and 5 of their respective judgments.

(5) Where an order is made under subsection (2)(b) the defendant may satisfy the order by returning the goods at any time before execution of judgment, but without prejudice to liability to pay any consequential damages."

118. ***Section 5*** of ***TIGA*** deals with the issue of the extinction of the title of the claimant, upon satisfaction of the claimant's claim for damages. It provides:

"(1) Where damages for wrongful interference are, or would fall to be, assessed on the footing that the claimant is being compensated –

(a) for the whole of his interest in the goods, or

(b) for the whole of his interest in the goods subject to a reduction for contributory negligence

payment of the assessed damages (under all heads) or as the case may be settlement of a claim for damages for the wrong (under all heads) extinguishes the claimant's title to that interest. ……..

(3) It is hereby declared that subsection (1) does not apply where damages are assessed on the footing that the claimant is being compensated for the whole of his interest in the goods, but the damages paid are limited to some lesser amount by virtue of any enactment or rule of law."

119. It is accepted that these statutory provisions mean that the court has the power to order the return of the goods, with an alternative order that if that is not done, then damages shall be paid instead. The damages to be paid will be "*by reference to the value of the goods",* which phrase could refer to the value of the goods at the date of conversion or some other date. In addition, the defendant can be liable for "*consequential damages".* The statute does not elaborate on what this expression covers. But it is agreed that any head of damages for conversion, whether "consequential" or not, must be of a type that is reasonably "*foreseeable",* as distinct from being of a type of damage that flows "*directly and naturally*" from the conversion.[63] It is also agreed that the effect of ***section 5(3)*** of ***TIGA*** is that if I had concluded that either the HR or HVR or clause 22 applied to limit the liability of the shipowner for the conversion of the cargo, then payment by MSC of that limited amount of damages (even with consequential damages in addition) would mean that ***section 5(1)(a)*** of ***TIGA*** would not apply. The consequence of that is that Trafigura would retain title to the cargo as well as obtaining some, albeit limited, damages for its conversion.

120. The first sub - question to arise under this issue is whether the date for assessing the principal head of damages, the value of the cargo, should be the time of the two conversions (ie. either 24 or 25 October 2005), as MSC asserts, or the date of judgment, as Trafigura asserts. The second sub – question is whether Trafigura can recover any "consequential" damages in this case.

121. On the first sub – question, I must start with the general propositions set out by Lord Nicholls in the leading case on damages in conversion, that of ***Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5).***[64] First, he recalled that conversion is the principal means whereby English law protects the ownership of goods. The tort of conversion, as a species of interference with goods, is one of strict liability.[65] Secondly, the commission of the tort gives rise to an obligation to pay damages. But the tort does not stand apart and command awards of damages measured by some "*special and artificial standard of its own".*[66] As a consequence:

"The fundamental object of an award of damages in respect of this tort, as with all wrongs, is to award just compensation for loss suffered. Normally ("prima facie") the measure of damages is the market value of the goods at the time the defendant expropriated them. This is the general rule, because generally this measure represents the amount of the basic loss suffered by the plaintiff owner. He has been dispossessed of his goods by the defendant. Depending on the circumstances some other measure, yielding a higher or lower amount, may be appropriate. The plaintiff may have suffered additional damage consequential on the loss of his goods. Or the goods may have been returned".[67]

122. Mr Parsons argues that the prima facie measure of damages applies in this case and, in fact, the damages must be measured by the value of the cargo at the date of the first conversion on 24 October 2005. He submits that if Trafigura has suffered any further loss since the date of conversion of the cargo in October 2005, by virtue either of an increase in the value of the copper in the meantime, or in the form of "*hedging losses",* then these are all heads of "*consequential"* loss.[68] Such consequential loss could only be recovered if it was a "*reasonably foreseeable"* type of loss at the time of the conversion. He submitted that it was not, because MSC could not have foreseen the actions of Trafigura and HMC in keeping their sale contract "*unpriced",* with Trafigura maintaining the risk of the goods.

123. In this regard, Mr Parsons relied on the evidence of the two experts that the parties called to deal with the knowledge that a shipowner or his agent might be expected to have about copper trading and *"hedging*". Mr Simon Everton was called by Trafigura. For much of his career he has been a market shipbroker with specific experience of chartering tonnage in the container trade, but he had not been generally involved in the ship operations side of containers.[69] His evidence was that generally shipowners do not concern themselves with what

63 See ***Saleslease Ltd v Davis*** *[1999] 1 WLR 1664 (CA),* referred to by Lord Nicholls of Birkenhead in *the Kuwait Airways case [2002] 2AC 883 at para 100 on page 1097*

64 *[2002] 2 AC 883*

65 Paras 77, 78 and 80.

66 Paras 77 and 67.

67 Para 67.

68 He relied on *McGregor on Damages (17th Ed) para 33 – 019 and 33 – 063.*

69 Day 2/page 10, lines 17 – 18.

specific cargoes are in containers unless asked to do so by the shippers or unless it is a dangerous cargo.[70] He had a general knowledge of many trades that shippers engaged in, including metal trading and he knew that involved "*hedging*", to cope with the fluctuations in prices.[71] He had no detailed knowledge of how hedging was carried on by metal traders.[72] In his 15 years of fixing charters for containers for Canadian Lines in the 1980s/1990s, he had never come across any hedging claims being made against container operators.[73]

124. Mr John Mawson was called by MSC. He had been a deck officer in container carrying ships, before coming ashore and dealing with claims handling in relation to container disputes. He had been a member of the UK Containerlines Insurance and Claims Managers Committee for 10 years from 1995 – 2006. His evidence was that in 2005 he was not aware that those in the metal trades could make forward sales in order to cap a loss in relation to a cargo in a container.[74] Before he considered this case, he was not particularly conversant with hedging or the commodities market in general.[75] In the container shipping industry he had no experience of hedging claims by cargo interests. He had never seen such a claim from cargo interests in 20 years. In cross examination he said that he had never had any notification by a shipper that he had ever gone into the futures market to try and cut losses incurred as a result of either a misdelivery or delayed delivery.[76] He was not particularly aware that there was a futures market in commodities which might be used to cap a loss.[77]

125. Both witnesses gave assistance to the court. It is clear that MSC did not have any actual knowledge of the circumstances of the contract between Trafigura and HMC. I am satisfied that although a shipowner in the container trade will know that containers it has agreed to carry on board its ship may well contain metals such as copper, the shipowner will not know the details on which the metal is being bought and sold. I am also satisfied that the shipowner will not know of the mechanism by which the shipper or the consignee of a metal cargo carried in containers might wish to safeguard against increased loss as a result of either delayed delivery or misdelivery against fraudulent bills of lading. There is no evidence on which I could conclude that a shipowner such as MSC would reasonably forsee that if there was misdelivery of a cargo of copper in containers, then, as between shipper and consignee: (i) the contract would be "*unpriced*"; (ii) the parties might agree to keep the contract *"open"* and "*unpriced"* whilst the fate of the goods remained uncertain; or (iii) the shipper would hedge against possible fluctuations in the price of the copper by rolling over forward sales on the LME futures market, with the consequent possibility of "spread" costs and ultimate hedging losses.

126. On clear authority,[78] Mr Kendrick has to accept that any consequential losses resulting from the conversion of the cargo can only be recovered if they are of a type that is reasonably foreseeable to MSC as a shipowner at the time that the conversion was committed in October 2005. The *"hedging"* losses, whether the "*spread*" costs or any ultimate hedging loss, are, in my view, to be characterised as "*consequential"* losses in the sense used in ***TIGA***, as explained in ***IBL Ltd v Coussens***[79] and the ***Kuwait Airways case***.[80] On the evidence of the experts, none of those losses was reasonably foreseeable to MSC as shipowner in this case. Therefore none are recoverable as consequential losses. However, I accept that insofar as Trafigura has incurred legal costs (other than in relation to this action) in order to safeguard its position in relation to the cargo, those are consequential losses that are foreseeable and are recoverable.

127. This leaves what I have described as the first sub – question: should Trafigura be entitled to recover the value of the goods as at the time of the conversion or at the time of judgment? It is clear from the decision of the Court of Appeal in ***IBL Ltd v Coussens***[81] that, in assessing damages under ***section 3(2)(b)*** of ***TIGA***, the court must calculate them by reference to that value of the goods "*…as will fairly compensate the plaintiff for its loss if the defendant…"* pays the damages and keeps the goods. The appropriate value depends on the facts of the particular case.

128. In this case there was, from the outset, uncertainty as to what might happen to the cargo. The position will remain uncertain until the litigation in the Shanghai court is either resolved or (possibly) settled. Throughout 2006 there was correspondence between the London solicitors for Trafigura (Richards Butler – "RB") and those for MSC (Hill Dickinson – "HD"). Broadly, RB kept HD informed about the hedge positions being open and asked HD for information about the likelihood of release of the cargo to "*its rightful owners*". HD remained reasonably confident throughout this time, whilst preserving the position of MSC on whether Trafigura could recover "*hedging costs"* from MSC as damages.[82]

129. In this uncertain position Trafigura and HMC agreed to keep the sale value of the goods "*unpriced"* and rolled over the "*Quotational period"* during which the price could be fixed. This was agreed at a time when the copper prices were going up,[83] and HMC had not concluded any contract with a Chinese purchaser because they did not

70 Day 2/page 14, lines 9 – 22.
71 Day 2/page 16 line 6 to page 18 line 11.
72 Day 2/page 22 lines 14 – 15; page 23 lines 17 – 21.
73 Day 2/page 11, lines 6 – 11.
74 Day 2/page 42 lines 9 – 24.
75 Day 2/page 48 lines 2 – 10.
76 Day 2/page 41 line 6 to page 42 line 8.
77 Day 2/page 42 lines 17 – 24.
78 Referred to in footnote 63 above.
79 *[1991] 2 All ER 133.*
80 See particularly *para 67*.
81 *Ibid.*, particularly at *page 139H – I per Neill LJ* and *page 143J – 144B, per Nicholls LJ*.
82 See, eg. RB letter of 27.4.06 to HD and HD response of 2.5.06: Bundle G1/pp 46 – 49; RB to HD on 26.10.06 and HD response on 3.11.06: G1/pp 94 – 5 and 107 – 8.
83 See: Average LME Official Settlement prices for copper from July 2005 to December 2006: Bundle D1/Tab 5 pages 199 - 201.

wish to do so until the goods were cleared from customs.[84] At the same time, Trafigura has maintained its "hedge" position. Mr Kendrick stated that if Trafigura was awarded damages based on the value of the cargo at the time of judgment, then it would immediately close out the hedge position, which would counter any gain made on any increase in the value of the copper cargo since October 2005.

130. MSC has not seriously criticised the actions of Trafigura since October 2005, particularly in maintaining the hedge, as unreasonable. In my view it could not do so.

131. I have concluded that, on the facts of this case, the value of the goods that will most fairly recompense the claimant Trafigura for the loss suffered as a result of MSC's conversion of the cargo is the value as at the date of judgment. There are several reasons for this conclusion.

132. First, the fate of the cargo remained uncertain throughout this period. It was always possible that Trafigura might recover it. Secondly, the price of copper was going up throughout 2005 and 2006. If Trafigura had bought in replacement copper it would have been at a considerably higher price than that paid to Rustenburg. Thirdly, HMC had no resale contract for the copper. If Trafigura had bought in replacement cargo, it might have been faced with a position where it had two parcels of physical copper on its hands with no certain buyers, but continuing uncertainty as to the movement in copper prices. The only way Trafigura could have guarded against losses in respect of a further cargo if the price had fallen would have been to make a further hedge contract against the second parcel.[85]

133. Therefore, fourthly, it was reasonable for Trafigura not to get in further cargo and to keep open the hedge position on the existing cargo. Trafigura will close the hedge position on that cargo at the date of judgment. In its books it will have had to "pay" more to close out that hedge position. Therefore it will not make a windfall profit by being awarded the value of the cargo as at the date of judgment. Fifthly, on the other hand, if MSC has only to pay damages equal to the value of the cargo on conversion in October 2005, it would gain the benefit of any increase in value since that date, because title to the cargo would pass to MSC. That would be particularly unjust to Trafigura if MSC is not liable for any "consequential" losses because they are not foreseeable, although Trafigura's actions were reasonable.

134. As I understood it, Mr Kendrick maintained an alternative argument that the *"spread losses*" or "*backwardation"* costs are recoverable as "*mitigation losses",* even if they cannot be claimed as consequential loss (because too remote) and even though the value of the cargo is taken at the date of judgment. The "*spread losses"* are agreed to total US$ 154,343.72.[86] I have difficulty in seeing how these costs can be recovered as "mitigation losses" if they are too remote to be recovered as consequential loss. I accept that the decision of Trafigura to keep open the hedge was reasonable. But I would hold that mitigation losses cannot be recovered if the mechanism by which they are incurred (in this case by rolling over a hedge contract) is something that is not foreseeable to the innocent party at the time the contract was concluded or the tort committed.

135. I therefore answer Issue Five by holding that Trafigura is entitled to recover as damages the value of the cargo as at the date of judgment. But Trafigura cannot recover any consequential losses that were not reasonably foreseeable to MSC at the time of the conversion, in particular the hedging costs. However, the litigation costs in relation to the Chinese proceedings were foreseeable and are recoverable. Those costs are agreed, I understand, at HK$ 678,270.46.

L. Conclusions

136. My conclusions on each of the five issues are as follows:

(1) On the true construction of the bill of lading contract, in particular clause 1(a), the Hague Visby Rules apply to the bill of lading contract. They do so as a matter of contract, not by "force of law".

(2) On the true construction of the bill of lading, in particular clauses 4, 7 and 22, the Hague Visby Rules do not apply to the period after the cargo had been discharged from the ship but whilst the containers remained in the container terminal to the order of MSC – "the post discharge period".

(3) Issue Three therefore does not arise for decision. However, if I had concluded that the HVR (or the HR) did apply to the post discharge period, I would have concluded that MSC is entitled to rely on ***Article IV(5)*** to limit its liability in respect of the misdelivery of the cargo.

(4) On the footing that the HVR do not apply to the post discharge period, then clause 22 of the bill of lading does not exclude or limit any monetary liability of MSC if it converts the cargo during the post – discharge period, as it did in this case.

(5) The proper measure of damages to be recovered by Trafigura for MSC's conversion of the cargo (on the assumption that MSC does not deliver up the cargo upon judgment) is the value of the cargo at the date of judgment. No hedging costs or losses are recoverable as either consequential damages or "mitigation losses". Trafigura's costs of litigation in the PRC/Hong Kong are recoverable.

[84] Tildesley statement paras 8, 14 and 17: bundle C1/Tab 2.

[85] Expert report of John Shaw (metals trader) for Trafigura: Bundle D1/Tab 4, para 9.2.

[86] I understood Mr Kendrick not to advance a claim for any other hedging costs as "mitigation losses" in the event that the value of the cargo was taken as that at the date of judgment.

137. It is agreed, as I understand it, that if MSC is ordered to compensate Trafigura for the whole of its interest in the cargo, then Trafigura's interest in the cargo is extinguished by virtue of ***section 5*** of ***TIGA***.[87] If there is doubt on this or any other aspects of the proper form of the judgment and any other consequential orders that have to be made as a result of my conclusions, I will hear argument on them.

138. I am most grateful for the assistance of all counsel in this case.

Mr Dominic Kendrick QC (instructed by Reed Smith Richards Butler, Solicitors, London) for the Claimants
Mr Luke Parsons QC and Mr Chirag Karia (instructed by Hill Dickinson LLP) for the Defendant

APPENDIX ONE

LIST OF DIFFERENCES BETWEEN ORIGINAL AND FRAUDULENT BILL OF LADING

Box No./Name	Original Bill of Lading	Fraudulent Bill of Lading
Original Bill of Lading	"MSCUDN065539" is stamped	"MSCUDN065539" is typed
Number of Original Bol	"THREE/3"	"3/THREE"
Box 2 - Consignee	"To order"	"Ningbo Toptrade Imp & Exp.Co., Ltd 11F, Jinmao Building, Area K1ST, Xiaogang, Ningbo, 315803 CHINA Tel: 0086-574-26851000 Fax: 0086-574-26851066/26851099"
Box 3 - Notify	"C.Steinweg Warehousing (FE) Pte Limited Room 2404 Hong Kong New World Tower No. 300 Huai Hai Road (M) 20021 Shanghai, China"	"As per consignee"
Box 4 – Space for Carrier's Agent's Endorsements	Empty	"D595482"
Box 13 – Cargo description	"18X20' containers S.T.C. 236 bundles copper cathodes"	"Containers S.T.C. 236 bundles copper cathodes"
Box 14 – Identify marks of cont or other packages and seal number(s)	"As per attached ryder"	"Container/seal nos: As per attached ryder"
Box 14 – Corresp. number of cont or other packages	"18X20'"	Empty
Box 14 – Total number of ctrs or other packgs received by the carrier	Empty	"18X20'"
Box 15 – Payable at POL	"Durban"	Empty
Place and date of issue Durban	"30 SEP 2005" (stamped)	Empty
Shipped on board Date	"30 SEP 2005" (stamped)	"30/09/2005" (typed)
Signed on behalf of the Master	Stamp of "Mediterranean Shipping Company (Pty) Ltd Durban" and signature to the left of the box	Identical stamp of "Mediterranean Shipping Company (Pty) Ltd Durban" although in a slightly different position. Different signature to the bottom right of the stamp
Stamp – "shipped on board shipper's load, stowage and count"	Located at bottom right of box 13	Bottom of box 14
Stamp – "said to contain, the carrier had no means to verify shipper's representation…"	Located in box 15	Located at bottom right of box 13
Bill of lading number at bottom right of B/L	9336520 9336521	9337014 9337015

[87] Mr Parsons did not develop the alternative argument that if MSC is only liable to pay some damages, then it is subrogated (in equity) to the Claimants' interest in the cargo to the extent of the payment MSC has to make. But I note that the point was taken in MSC's Outline Argument: para 98.

APPENDIX TWO
RELEVANT TERMS ON THE REVERSE OF THE BILL OF LADING

DEFINITIONS CLAUSE. *This contract is between the Merchant and the Master, acting on behalf of the Carrier. Wherever the term "Merchant" appears in this Bill of Lading, (hereafter "B/L") it shall be deemed to include the Shipper, the Consignee, the Holder of the Bill of Lading, the Receiver and the Owner of the Goods (whose liability under this B/L is joint and several). "Carrier" shall mean the vessel and her owner or demise charterer for whom the Master has entered into this contract. The identity of the owners is available from Lloyd's Register of Ships or from Mediterranean Shipping Company (hereinafter "MSC"). MSC shall act as Agents of the owner or demise charterer in arranging the transport covered by this B/L. If, however, it is adjudged for any reason that any other charterer, carrier, manager, operator, agent or MSC is liable as Carrier, then such party shall have the benefit of all the defences, exceptions and limitations applicable to the Carrier herein. "Goods" includes the cargo supplied by the Merchant and includes any container whether or not supplied by or on behalf of the Carrier. "Container" includes any container, trailer, transportable tank, liftvan, pallet, flat or any similar article of transport used to consolidate goods.*

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1. ***PARAMOUNT CLAUSE.*** *This B/L shall have effect as follows:*

(a) For all trades, except for goods shipped to or from the United States of America, this B/L shall be subject to the 1924 Hague Rules with the express exclusion of Article IX, or, if compulsorily applicable, subject to the 1968 Protocol (Hague-Visby) or any compulsory legislation based on the Hague Rules and/or said Protocols. Where Hague-Visby or similar legislation is compulsorily applicable, the Hague-Visby 1979 Protocol ("SDR" Protocol) shall also apply whether or not mandatory.

The Carrier's tariffs and regulations are incorporated herein as if set forth at length, and copies may be requested in writing from the carrier or any of its agents.

(b) For goods shipped to or from the United States of America, this B/L shall be subject to the US Carriage of Goods by Sea Act, 1936, and the US Bill of Lading Act 1916 (Pomerene) which shall also apply by contract at all times before loading and after discharge as long as the goods remain in the custody and control of the carrier.

2. ***LAW AND JURISDICTION***

(a) Any claim or dispute arising from the Contract of Carriage evidenced by this B/L shall be subject to the exclusive jurisdiction of the High Court of Justice in London, and English law shall be applied

(b) Contrary to (a), any claim or dispute arising from the Contract of Carriage evidenced by this B/L relating to cargo carried to or from the United States of America shall be subject to the sole jurisdiction of the United States, U.S. District Court, Southern District of New York and United States law shall be applied

(c) In addition to the above, in case of any dispute relating to freights and other sums payable to the carrier under this contract, the Carrier may, at his option, apply to the court of the port of discharge and/or to the court of the place of final destination (in case of combined transport), provided that such application is not in conflict with the Brussels/Lugano Conventions.

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7. ***LOADING, DISCHARGING AND DELIVERY OF THE CARGO.*** *Loading, discharging and delivery of the cargo shall be arranged by the Carrier's Agent unless otherwise agreed. Landing, storing and delivery shall be for Merchant's account. Loading and discharging may commence without previous notice. The Merchant or his assignee shall tender the goods when the vessel is ready to load and as fast as vessel can receive and – but only of required by the Carrier – also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be relieved of any obligation to load such cargo and the vessel may eave the port, without further notice and deadfreight is to be paid. The vessel may commence discharging immediately on arrival without notice to the consignee or any other party, and discharge continuously with or without sorting the goods, or separating them from other goods (whether or not such other goods are in the same ownership) irrespective of whether by day or by night, Sundays and holidays included, any custom of the Port to the contrary notwithstanding, on to quay or into shed, warehouse, depot, hulk, lighter or other premises, vehicle, vessel or craft as the Carrier or his agents may determine. Such discharge shall constitute due delivery of the goods under this Bill of Lading. Demurrage-free time starts. The consignee shall bear any charges or expenses incurred by the Carrier wholly or partly in respect of sorting the goods or separating them from other goods (whether in the same ownership or not) onshore or onboard for any purpose whatsoever, including any charge or expenses in connection with storage onshore or afloat pending such sorting or separation and any apportionment of such charges or expenses by the Carrier among different consignees by any method whatsoever in the discretion of the Carrier shall for the purpose of this clause be final and binding upon the consignee. Delivery over side onto the consignee's lighters is at the vessel's options and, if declared, is subject to the consignee providing sufficient lighters and men to receive the goods as fast as the vessel can deliver, any custom of the Port to the contrary notwithstanding. Whether the vessel's tackles or shore cranes or other means be employed in the course of delivery onto Quay or otherwise, any loss of, or damage to the goods, lighters or injury to personnel employed directly or indirectly by the consignee shall, after the end of the Hague Rules period, be at the sole risk of the consignee in every respect whatsoever. The Carrier, his agents and servants shall not under any circumstances whatever be under any liability for failure to notify the consignee of the arrival of the goods, any custom of the port to contrary notwithstanding. All expenses connected with the loading and discharging up to and from ship's tackle are for the account of the Merchant. If the goods are not taken by the Merchant at the time when the Carrier is entitled to call upon him to take delivery, the Carrier shall be at liberty at the sole risk and expense of the Merchant to put the goods in safe custody. For cargoes of such nature that Port Authorities allow loading and discharge by direct delivery only, the Merchant shall be notified by the agent if so possible. Should the Merchant fail to arrange direct delivery all relevant charges including return freight and handling will be charged to the cargo interests.*

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*9. **DEPARTURE AND ARRIVAL DATES, DELAYS AND CONSEQUENTIAL LOSS.** The Carrier's liner position lists, sailing lists and other advertisements, are given without any warranty, and no claims shall be acceptable for any change in the dates nor even in the cases of the vessel's non-departure for whatever cause. Carrier shall have the right to change sailing and arrival dates without notice. The Carrier does not undertake that the goods shall arrive at the Pot of Discharge or Place of Delivery at any particular time or to meet any particular market or use and the Carrier shall under no circumstance be liable for direct, indirect or consequential loss or damage due to delay or any other cause whatsoever and howsoever caused.*

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*11. **DECLARATION OF NATURE, WEIGHT OR MEASUREMENT OF GOODS AND OF CONTENTS OF PACKAGE.** If the nature or the value of the cargo has been mis-stated to the Carrier, the Merchant is not liable to any indemnification whatsoever. In all cases incorrect statements shall be considered to have been wilfully misstated. The Merchant is bound to declare exactly the contents of the packages or containers, the weight and the measurement of the goods, and shall be liable for all consequences of damage; which might be caused to vessel or cargo owing to a false declaration, incorrect description, marks or numbers, or incomplete, incorrect or delayed requisite documentation. If on delivery of the goods it is ascertained, either at the time of loading or at any time of unloading that the weight or cubic measurement or value is greater than that declared, or that the goods belong to a higher category than that declared, the Carrier has the right to charge double freight on the ascertained difference, the Merchant to pay the labour and expenses of weighing and measuring the goods entered in this Bill of Lading, if any excess of weight or measurement should be found. This debt is claimable at the same time and in the same manner as the freight, and shall constitute a lien on the goods.*

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*15. **SPECIAL CARGO.** For theft and loss of gold, silver, precious metals, in a manufactured state or not, or specie, ornaments, watches, furs, laces, jewels, precious stones, securities, paper money, documents or other papers of value, silk paintings, porcelain, glassware or other precious articles or variable articles and for damage to precious articles easily damageable, the Carrier is only responsible if the value and nature of the cargo are declared to him before or at any time of reception of the cargo and inserted in the Bill of Lading and provided freight is calculated on the basis of such value. All cargo the value of which exceed 5 pounds Sterling per cubic foot measurement, or per cwt for weight cargo, is classed as previous. Money and all objects of value must be packed double bags with inside seams, or in boxes, both sealed with wax and the seal must be reproduced on the Bill of Lading and shipping orders. In case of such shipments this present B/L is deemed to become automatically not a B/L or document of title in respect of such cargoes, but to take the substance of a non-negotiable receipt, not subject to the Hague Rules, the Hague-Visby Rules the COGSA, which shall not apply.*

.....

*22. **CLAIMS VALUATION, PACKAGE LIMITATION TIME-BAR.** The indemnity payable by the Carrier for non-delivery of the cargo in whole or in part is calculated at the option of the Carrier on the basis of the invoice value or on the basis of market values at destination, less duties and expenses saved due to the shortage, except in USA jurisdiction where the sound market value at destination shall be considered. In any event the Carrier's liability shall not exceed the usual sound market value of the goods at the time and place of shipment. However, should the invoice value of the goods be lower than the usual sound market value at the time and place of shipment, the Carrier will only pay the invoice value. For lack of any usual sound market value or invoice value, this provision shall apply to the common value accordingly. Neither the Carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding the limitation allowed under the Hague Rules or the Hague-Visby Rules/SDR limitation or the COGSA limitation, depending on which of these is contractually or compulsorily applicable, per package or unit, unless the nature and the value of such goods have been declared by the Merchant before shipment and inserted in the Bill of Lading. However, declaration of value for the purpose of calculation of freight shall not be considered a declaration in the above sense. This limitation of liability shall apply to all contractual claims as well as to any claims arising from other causes. In so far as goods are shipped to or from the United States, the Carrier's liability shall be limited to $500 per package or customary freight unless excess value is inserted on the face hereof and extra charge paid. The words "customary freight unit" shall mean (under COGSA) the unit of weight or measurement customarily used to calculate freight. Where the goods have been packed into sealed containers by or on behalf of the Merchant, it is expressly agreed that each container shall constitute one package for the purpose of application of limitation of the Carrier's liability, since the Carrier cannot verify its contents. If the Merchant has a shortage in goods or numbers shipped under a Bill of Lading, the Carrier shall have the option to deliver as substitute any surplus goods of similar kind or quality. Notice in writing of loss or damage must be given to the Carrier's Agent at the Port of Discharge or Final Destination, promptly after delivery of the goods, and in any case within 3 running days from the date of delivery as defined in Clause 7, and the Carrier to be invited to participate, at his option, in a joint survey. The cargo is otherwise prima facie considered delivered by the Carrier in the same condition as described in the B/L. Claims are to be addressed to the MSC Agent supported by, at least, the following documents: claim narrative identifying clearly the claimant and providing evidence on his title to sue, Original B/L Commercial Invoice of damaged goods, Letter of Subrogation, if any, survey reports. In any event, the Carrier shall be discharged from all liability if suit is not commenced within one year after delivery of the goods or the date that the goods should have been delivered, for claim related to loss or damage during the carriage by sea and nine months for claims related to loss or damage during non-water inland port. Agreed claims will be settled by the Carrier only once with one of the parties that is entitled to sue, i.e. with the Shippers POL or with the Consignees at the POD, but not with both. Settlement of an agreed claim by the Carrier with either of the above discharges the Carrier from all and any liability for the same loss or damage under this B/L. ..... "*