Neutral Citation Number: [2017] EWHC 654 (Comm)

Case No: CL-2014-000360

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 March 2017

Before:

MR JUSTICE ANDREW BAKER

- -

Between:

KYOKUYO CO LTD	**Claimant**
- and -	
A.P. MØLLER – MAERSK A/S trading as "Maersk Line"	**Defendant**

- -
- -

Robert Thomas QC and Benjamin Coffer (instructed by **Clyde & Co LLP**) for the **Claimant**
Sara Masters QC and Daniel Bovensiepen (instructed by **Messrs Bentley Stokes & Lowless**) for the **Defendant**

Hearing date: 1 March 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker:

Introduction

1. The claimant claims as receiver of three container loads of frozen tuna, shipped at Cartagena (Spain) for carriage by the defendant ('Maersk Line') to Japan. Using the labels adopted in the evidence:

    i) Container A was discharged to the claimant at Yokohama on 15 February 2013.

    ii) Container B was discharged at Yokohama on or about 22 February 2013; the claimant says it was then carried by road to Shimizu and delivered to the claimant there on 27 February 2013.

    iii) The Replacement Container was discharged at Yokohama on or about 1 March 2013; the claimant says it was then carried by road to Shimizu and delivered to the claimant there on 5 March 2013. The contents of this container were shipped in Container C, but re-stuffed into the Replacement Container at Barcelona after a possible malfunction of Container C's refrigeration equipment.

2. The three container loads of tuna comprised frozen bluefin tuna loins, each weighing at least c.20 kg, and up to c.75 kg, and bags of frozen bluefin tuna parts, each bag weighing 20 kg ± c.10%. The frozen loins were stuffed into the containers as individual items of cargo, without any wrapping, packaging or consolidation. The bags were stuffed into the containers as individual bags, without (additional) wrapping or packaging, and without consolidation. The three loads were made up as follows:

    i) Container A contained 206 frozen loins and the bags (said by the claimant to number 460).

    ii) Container B contained 520 frozen loins.

    iii) Container C / the Replacement Container contained 500 frozen loins.

3. The claimant alleges that the tuna as delivered to it was damaged through raised temperatures during carriage and/or rough handling during re-stuffing into the Replacement Container (in the case of the Container C tuna). It says that the damage should be valued for the purposes of compensation at c.¥ 121 million (then c.£858,000) in aggregate.

4. It is common ground that Maersk Line's liability (if any) is governed by its standard terms and conditions of carriage current at the time ('the Maersk Terms') and by either the Hague-Visby Rules or Articles I to VIII of the Hague Rules, Article IV rule 5 of which creates monetary limits of liability. Those limits are £100 'per package or unit' in the Hague Rules (and that is £100 sterling, not gold value, in the absence of Article IX) and, in the Hague-Visby Rules, the greater of 666.67 units of account 'per package or unit' or 2 units of account 'per kilogramme of gross weight of the goods lost or damaged'. The unit of account under the Hague-Visby Rules is the IMF's

special drawing right ('SDR'), currently worth c.£1.10 so that 666.67 units of account is worth c.£733.

5. The parties disagree as to which set of Rules applies; and in either case as to how the limit of liability thereunder falls to be applied. In particular (as to the latter), whether it be Hague or Hague-Visby, the parties disagree as to whether the material 'package or unit' is the container or the individual tuna loins (or bags). The arguments are not identical as between the older and newer Rules, because of the requirement under the latter for an enumeration in the bill of lading of the contents of containers in container shipments in terms that satisfy Article IV rule 5(c), if cargo interests are to avoid the container being the only relevant 'package or unit'. Article IV rule 5(c) was introduced by the Visby Protocol amendments.

6. By an order made by consent in October 2016, Knowles J. directed the trial of four preliminary issues and this is my judgment upon that trial. Knowles J. made his order after Statements of Case but before any other case management in the claim; and since the parties were agreed, he did so on paper (without a hearing). The issues ordered to be tried as preliminary issues were these:

    i) Is liability limited pursuant to Article IV r 5 of the Hague Rules or is it limited pursuant to Article IV r 5 of the Hague-Visby Rules (whether applicable compulsorily or contractually)?

    ii) Whichever of the Hague or Hague-Visby Rules applies, does limitation fall to be calculated by reference to the Cargo in all three containers collectively, or should limitation be calculated by separate treatment of the Cargo in each container individually?

    iii) If liability is limited pursuant to Article IV r 5 of the Hague Rules, are the relevant packages or units the containers or the individual pieces of tuna?

    iv) If liability is limited pursuant to Article IV r 5 of the Hague-Visby Rules, are the containers deemed to be the relevant package or unit for the purposes of Article IV r 5(a), or are the individual pieces of tuna the relevant packages or units? In particular:

        a) For the purposes of Article IV r 5(c), is it relevant to look at what is enumerated in the Draft Bill of Lading, or is it only relevant to look at what is enumerated in the Waybills?

        b) Were all or any of the individual pieces of tuna, packages or units enumerated in the relevant document as packed in each container for the purposes of Article IV r 5(c)?

7. The reference to a 'Draft Bill of Lading' and 'Waybills' in Issue (iv)(a) above will become meaningful when I set out the facts, below. I should record now though that at trial Mr Thomas QC for the claimant conceded that the answer to Issue (iv)(a) is 'the latter' (look at the Waybills only), so I shall say no more about that Issue in this judgment.

8. The agreed, and ordered, terms for the trial of the preliminary issues included that they were to be tried, "*on the basis only of the common ground set out in the first witness statement of Paul Charles Crane dated 19 September 2016, the documents in Exhibit PCC 1 [to that statement], and relevant provisions of COGSA 1971, the Hague Rules and the Hague-Visby Rules.*" Mr Crane is the partner at Bentley, Stokes and Lowless with conduct of the case on behalf of Maersk Line. His statement sets out matters of common ground that are in addition to matters of common ground on the pleadings and that are, as he explains, "*agreed, so they would not need to be revisited and proved subsequent to any preliminary issues hearing*". Thus, the agreed proposal that the court order this trial of preliminary issues was put forward on the basis that "*The preliminary issues are not reliant on hypothetical assumptions*".

The Facts

9. I have described the cargo in paragraph 2 above. That description is common ground. The rest of what I say about the facts in this section of this judgment is also all part of the common ground upon the basis of which it was agreed and ordered that the preliminary issues are to be determined.

10. Containers A, B and C were received by Maersk Line at Cartagena pursuant to a contract or contracts of carriage incorporating the Maersk Terms and containing an implied term entitling the shippers to demand that a bill or bills of lading be issued by Maersk Line. (For brevity's sake, in the rest of this section I shall express myself on the basis that there was a single contract covering all three Containers rather than separate contracts, one per container, which is in my judgment the correct analysis as I explain in the next section.)

11. The contract was for carriage to and discharge at Yokohama. Carriage was booked by Ricardo Fuentes e Hijos SA ('Fuentes'), as confirmed by a Maersk Line Booking Confirmation dated 16 November 2012. Fuentes is named in the Booking Confirmation as both the party making the booking and the 'Contractual Customer', although in the e-mail correspondence leading to the final booking Fuentes stated that the booking was "*for Kyokuyo*" and that the containers being booked for Japan were "*All in Kyokuyo's name*".

12. The booking was for the carriage of twelve 'Super Freezer' 40' x 9'6" containers at -60°C, from Cartagena Terminal to Maersk Yokohama Terminal via Valencia and Singapore. The booked voyage itinerary was for carriage by *Maersk Tangier* from Cartagena to Valencia, *Maersk Emden* from Valencia to Singapore and *Skagen Maersk* from Singapore to Yokohama.

13. Maersk Line drew up and provided to the claimant a draft, straight consigned bill of lading ('the Draft B/L') numbered 558670598 (which was the Booking Confirmation number). A bill of lading issued in the form of the Draft B/L would have acknowledged shipment of "*11 containers said to contain 5782 PCS FROZEN BLUEFIN TUNA LOINS*", listing those containers (which included Containers B and C) and the number of "*PCS*" and weight of tuna in each, and "*1 Container Said to Contain 666 PCS, 206 PCS FROZEN BLUEFIN TUNA LOINS, 460 BAGS FROZEN BLUEFIN TUNA OTHER PARTS*", identifying Container A as that container, repeating its contents as "666 PCS" and stating a weight for those contents.

14. The typed cargo description I have just summarised came in the section of the Draft B/L headed "*PARTICULARS FURNISHED BY SHIPPER*", below the standard-form introduction, "*Kind of Packages; Description of goods; Marks and Numbers; Container No./Seal No.*"

15. Towards the bottom of the front page of the Draft B/L, "*12 containers*" was entered under the standard-form words, "*Carrier's Receipt (see clauses 1 and 14). Total number of containers or packages received by Carrier*". I take the reference to "*clauses 1 and 14*" to be a reference to the Maersk Terms.

16. The Draft B/L was a draft for a straight consigned bill, naming Caladeros del Mediterraneo S.L. ('Caladeros') as shipper and the claimant as consignee.

17. All twelve containers were in fact shipped on *Maersk Tangier*, as arranged, on 24 November 2012. She sailed from Cartagena to Valencia, where nine of the twelve containers were transshipped on to *Maersk Emden* as expected on 3 December 2012, but Containers A, B and C were not. They were transshipped instead onto *Maersk Eindhoven*, which departed Valencia on 3 January 2013.

18. Due to an alarm triggering on Container C, it was discharged from *Maersk Eindhoven* at Barcelona. Its contents were re-stuffed into the Replacement Container, which was then shipped on *Maersk Tangier* on 13 January 2013.

19. The claimant requested on 17 and 18 January 2013 that the destination of Container B and the Replacement Container be altered to Shimizu, requiring onward carriage by road from Yokohoma to Shimizu. Maersk Line agreed to this request.

20. No bill of lading for Containers A, B and C, or the Replacement Container, or any of them, was ever issued. In order to avoid further delay in delivery, the claimant and Maersk Line agreed to the issue of sea waybills rather than bills of lading. In an e-mail to the claimant on 28 January 2013, Maersk Line proposed: "*If you need not issue in Japan, we will revise to Sea Waybills. Please confirm.*" The claimant agreed to this proposal, over the telephone.

21. Maersk Line therefore issued three sea waybills, one for each Container, numbered 559191456, 559117970 and 559291996 ('the Waybills'). Those for Containers A and B were dated 8 February 2013; the Waybill for the Replacement Container was dated 12 February 2013. Each Waybill identified itself as a "*NON-NEGOTIABLE WAYBILL*" and named Caladeros as shipper and the claimant as consignee; in the Waybill for the Replacement Container, the claimant was also named as notify party.

22. As regards the goods covered:

    i) Like the Draft B/L, each Waybill contained a central section on its face headed "*PARTICULARS FURNISHED BY SHIPPER*", above standard-form introductory words, "*Kind of Packages; Description of goods; Marks and Numbers; Container No./Seal No.*"

    ii) The entry in that section was in each case "*1 Container Said to Contain [no.] PCS FROZEN BLUEFIN TUNA LOINS*", followed by particulars identifying respectively Container A, Container B and the Replacement Container (not

Container C). The number of "*PCS*" stated in each case was the number of individual frozen tuna loins, i.e. 206, 520 and 500 respectively.

iii) Thus, the Waybill for Container A made no mention of the bagged tuna parts. It stated a total weight of 18,740 kg for the 206 frozen tuna loins whereas the Draft B/L had stated that for the weight of 666 items, namely the 206 frozen tuna loins plus 460 bags of other parts.

iv) Towards the bottom, on the left, each Waybill had a box for "*Carrier's Receipt. Total number of containers or packages received by Carrier*", in which the entry was "*1 container*".

23. Finally, as I noted at the outset: Container A was discharged to the claimant at Yokohama on 15 February 2013; Container B and the Replacement Container were discharged at Yokohama on or about 22 February 2013 and 1 March 2013 respectively and (says the claimant) delivered at Shimizu on 27 February 2013 and 5 March 2013 respectively. The claimant says that as thus received by it in Japan, the tuna in all three Containers was in damaged condition, and that Maersk Line is responsible for that damage.

The Applicable Relationship

24. Issue (i) as drafted – "*Is liability limited pursuant to … the Hague Rules or … the Hague-Visby Rules …?*" – does not identify the legal relationship by reference to which any liability of Maersk Line's to the claimant was incurred. That legal relationship is not a matter of common ground on the Statements of Case. Nor is it identified as a matter of agreed fact in the common ground set out in Mr Crane's statement.

The Claim in Contract

25. The Particulars of Claim are not a model of analytical clarity. Following the unfortunate modern habit of starting with a long chronological narrative, the allegation that there was a contract of carriage with Maersk Line, or in the alternative several contracts of carriage, does not appear until paragraph 28. Even then, it is not a proper allegation of the conclusion of any contract or contracts, but is as follows: "*The … Cargo was delivered into the possession of [Maersk Line] pursuant to a contract or contract(s) [sic.] of carriage ('the Contracts of Carriage') which were partly contained in and/or evidenced by the Draft Bill of Lading and the Waybills*". That fails to plead any case as to when precisely, how or with whom Maersk Line concluded any contract or contracts, save that it is an allegation that any contract or contracts was or were concluded prior to the delivery of Containers A, B and C, as stuffed with the claimant's tuna, to Maersk Line at Cartagena. There is no pleaded case that the claimant acquired contractual rights at any subsequent time, whether under the Carriage of Goods by Sea Act 1992 ('COGSA 1992') or otherwise. The pleading also fails to articulate or explain the nature of the issue it assumes to exist as to whether there was one or more than one contract of carriage; it is unrevealing therefore as to the claimant's case on that issue.

26. Paragraph 1 of the Particulars of Claim alleges that the claimant owned or was entitled to immediate possession of the tuna at "*all material times*". The next few

paragraphs of the Particulars of Claim plead a chronology of the tuna being caught, processed and frozen at sea, the stuffing of Containers A, B and C, and the delivery of those containers, as stuffed, to Maersk Line at the Cartagena container yard.

27. The pleaded claim in contract, therefore, appears to me to be that the tuna was the claimant's (either by ownership or by at least the right to possession) from the moment it was caught; by inference, that the tuna was caught, processed, frozen and stuffed, and full Containers A, B and C were delivered into Maersk Line's possession at Cartagena, all on behalf of the claimant; and that by further inference either a single contract of carriage, or in the alternative a contract of carriage for each Container, was concluded with Maersk Line on behalf of the claimant, pursuant to which the full Containers, respectively the full Container in question, was so delivered to Maersk Line.

28. The claimant's ownership or right to possession of the tuna at any material time is not admitted in the Defence or in Mr Crane's statement. Likewise, the Defence makes no admissions as to the catching, processing and freezing of the tuna at sea and nor does Mr Crane's statement. The stuffing of Containers A, B and C is admitted as pleaded by the claimant, likewise their delivery to Maersk Line at Cartagena, save for: (i) points of detail that are immaterial for present purposes; (ii) a positive averment that "*The containers were stuffed by the shippers or their agents.*" The direct response to paragraph 28 of the Particulars of Claim (quoted in paragraph 25 above), then, is this: "*Save that it is admitted that Containers A, B and C were delivered into the possession at the container yard at Cartagena pursuant to contracts of carriage partly evidenced by the Waybills, paragraph 28 is denied*".

29. This follows the unhelpful lead set by the Particulars of Claim in failing to identify the parties to the contracts of carriage thus admitted to have been concluded prior to the delivery of the full Containers to Maersk Line at Cartagena. But the inference from the pointed pleading that the containers were stuffed by the shippers or their agents is, I think, that Maersk Line's case is that there were three material contracts of carriage (one per Container, I infer), each concluded originally with Caladeros (the shippers named in the Waybills) contracting for themselves and not as agents for the claimant.

30. If that be the correct analysis, it seems to me its consequence on the facts (although the Defence does not go on to say anything about this) is that upon the Waybills being issued, the claimant had transferred to it all rights of suit under the contract(s) of carriage as if it had been a party thereto, under s.2(1)(b) of COGSA 1992:

    i) By s.2(1)(b) of COGSA 1992, rights of suit under a contract of carriage are transferred to a person if and only if that person is (a) not an original party to that contract and (b) the person "*to whom delivery of the goods to which a sea waybill relates is to be made by the carrier <u>in accordance with that contract</u>*" (my emphasis).

    ii) Where those conditions are satisfied, the person in question has rights transferred to and vested in him as if he had been a party to the contract in question "*by virtue of becoming … the person to whom delivery is to be made*".

iii) On Maersk Line's pleaded case, as I read it, Maersk Line admits or avers three contracts of carriage (one per full Container) between Caladeros and Maersk Line, and then: the claimant was not an original party; when each Waybill was issued, the claimant was the party to whom delivery of the goods to which that Waybill related was to be made by Maersk Line; therefore, the question under s.2(1)(b) would be whether the delivery to the claimant required of Maersk Line by the Waybill was a delivery required "*in accordance with [the original] contract[s]*".

iv) Given the evidence of the booking and the Draft B/L (paragraphs 11 to 16 above), the contract(s) concluded at the outset did provide for delivery to be made to the claimant.

v) The conclusion, bearing in mind always the agreement and direction that the preliminary issues be determined solely on the basis of the common ground, is thus that delivery to the claimant was indeed the delivery required by the contract(s) of carriage as originally concluded.

31. If the contract(s) as originally concluded by the shippers had not provided for delivery to the claimant, the correct analysis might be that s.2(1)(b) did not apply and the claimant's subsequent, direct agreement with Maersk Line, for delivery to the claimant and issue to it of the Waybills, amounted to a new contract (or new contracts) upon which alone the claimant could bring a contractual claim. But I do not need to consider that possibility any further in this judgment. I decline to interpret the direct dialogue between the claimant and Maersk Line, as regards delivery and shipping documents, as the creation of some new contract(s), where it is explicable by the fact that the claimant was the originally nominated 'straight run' consignee. There is no need to attribute to it any intention to create some fresh, direct contract(s). That the consequent issuance of the Waybills to the claimant vested contractual rights in the claimant is a statutory effect rather than a matter of (fresh) contract.

32. Thus, on the pleadings, there are issues between the claimant and Maersk Line as to whether there was one contract of carriage covering (or covering *inter alia*) the three full Containers delivered to Maersk Line at Cartagena, for carriage to Japan, or one such contract of carriage per Container, and as to whether the claimant was privy to that contract (or those contracts) from the outset, or is in law to be treated as having been so privy by operation of s.2(1)(b) of COGSA 1992. However, there is no question but that I am concerned with a contract (or contracts), upon the Maersk Terms, concluded prior to the delivery to Maersk Line at Cartagena of Containers A, B and C, already stuffed, upon which the claimant is now entitled to sue; and that in my judgment explains passages in Mr Crane's statement said by Mr Thomas QC to show that in agreeing and proposing the preliminary issues, the parties were proceeding on the basis that the claimant was claiming upon a contract (or contracts) concluded at the outset, and not upon any new contract, or contractual variation, concluded only when the Waybills were agreed to be issued or actually issued. I do not read those passages as making it common ground on Mr Crane's statement, when it is not on the pleadings, that the claimant was privy to that contract (or those contracts) from the outset.

33. For completeness, I should also record from the argument that Mr Thomas QC said that the claimant in fact purchased the tuna (from whom he did not say) on FOB

terms, although that is not in evidence and is contrary to the case pleaded in the Particulars of Claim as I read them (see paragraphs 26-27 above). Thankfully, that would not alter the conclusion reached in the preceding paragraph. However, it would mean that whether the shippers were acting on behalf of the claimant at the outset could not sensibly be determined without the sale contract and surrounding facts. For example, if the FOB sale terms were for payment against shipping documents, the inference might be that the claimant's seller (depending on who that was) was Maersk Line's counterparty, the intention being to transfer rights against payment. Or again, the circumstances in which Maersk Line provided the Draft B/L to the claimant might then need to be identified in more detail. (The Particulars of Claim also allege that Maersk Line later prepared and provided to the claimant an individual draft bill of lading for each Container; but that is not admitted in the Defence and is not addressed in the common ground set out in Mr Crane's statement.)

34. Overall, therefore, it seems to me that I can proceed upon the basis that the claimant does have good contractual 'title to sue', on one or other of the two grounds identified in paragraph 32 above; but if choosing between them would make a difference to the answer to Issue (i), then I may be unable to do more for the parties than give two contingent answers.

35. Finally, on the subject of the applicable contract or contracts, it seems to me plain on the evidence of the booking and the Draft B/L (paragraphs 11 to 16 above again) that there was, at the outset, a single contract, for the shipment, carriage and discharge upon the Maersk Terms of all twelve containers.

The Claim in Bailment

36. The claimant pleads a claim for breach by Maersk Line of its duties as bailee of the tuna. The Particulars of Claim allege that upon taking possession of the full Containers, Maersk Line became bailee. Unsurprisingly, that is admitted in the Defence. Echoing the plea about the stuffing of the Containers, though, the Defence goes on to aver that the tuna was bailed "*by the shippers and/or their agents*". It then does not admit that any duty as bailee was owed to the claimant and notes that the Particulars of Claim do not allege any attornment creating a duty in bailment owed to the claimant. The Reply admits that the tuna was bailed by the shippers and/or their agents, but avers that Maersk Line attorned to the claimant by issuing the Waybills.

37. As I read those pleadings, it is common ground that any duty as bailee was owed initially to the shippers (or their agents), rather than to the claimant. On that basis, I agree with the claimant on its plea in the Reply that there was an attornment to the claimant by the issue to it of the Waybills. It is common ground that those Waybills incorporated the Maersk Terms; any duty as bailee owed to the claimant arising from that attornment was therefore upon those Terms. That would be so, I think, whether or not the original bailment by the shippers (or their agents) was on those Terms, although in fact it is common ground that it was.

38. The claimant thus has, in my judgment, good 'title to sue' in bailment, upon a bailment on the Maersk Terms. The identification of the species of bailment involved, which may depend on whether the claimant is right to say that it owned or was entitled to possession of the tuna at all material times, does not matter, I think, for the purposes of the preliminary issues. Indeed, for those purposes, I do not think the

claim in bailment can affect matters at all. The Hague-Visby Rules will apply compulsorily (if at all), by operation of the Carriage of Goods by Sea Act 1971 ('COGSA 1971'), only to the claimant's claim in contract. If (i) the Hague-Visby Rules do apply compulsorily, but (ii) by the Maersk Terms the Hague Rules would apply and (iii) the limit of liability applicable under the Hague Rules would be higher, then that higher limit would apply to the claim in contract notwithstanding the compulsory application of the Hague-Visby Rules. Article IV r 5(g) of the Hague-Visby Rules would apply to give effect to the higher contractual limit of liability. (Article III r 8 does not affect provisions increasing the carrier's liability as against liability under the Hague-Visby Rules.)

Issue (i)

Is liability limited pursuant to Article IV r 5 of the Hague Rules or is it limited pursuant to Article IV r 5 of the Hague-Visby Rules (whether applicable compulsorily or contractually)?

COGSA 1971

39. By s.1(2) of COGSA 1971 the Hague-Visby Rules as set out in the Schedule to the Act have the force of law. They are thus applicable compulsorily (as Issue (i) puts it) where they are applicable on their own terms. By s.1(6) of COGSA 1971 the Hague-Visby Rules also have the force of law, i.e. apply compulsorily in this jurisdiction "*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, and*
>
> *(b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading.*"

40. It is plain to my mind was that s.1(6) does not apply: there was in fact no bill of lading, so s.1(6)(a) could not apply; although the claimant contended, for two of the Waybills, that the Maersk Terms provided for the Hague-Visby Rules to apply, that was not done (if it was done at all) by an express provision that those Rules were to govern as if the Waybill were a bill of lading, so s.1(6)(b) does not apply.

41. The provisions of the Hague-Visby Rules as to their own applicability that are material to the present case are Articles I(b), I(e), II and X(b). By Article II, the carrier is subject to the responsibilities and liabilities, and is entitled to the rights and immunities, set out in the Rules, "*under every contract of carriage of goods by sea*". Article I(e) provides that "*Carriage of goods*" covers the period from the time when the goods are loaded on, to the time they are discharged from, the ship. Article I(b), which is the key provision in this case, provides that:

> "*"Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as each document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which*

> *such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.*"

42. Thus, on their own terms the Hague-Visby Rules apply only where there is a contract of carriage "*covered by a bill of lading or … similar document of title*", and then only so far as it relates to the carriage of the goods by sea. The present case does not turn on the meaning or effect of a "*similar document of title*", so I shall refer simply to being covered (or not) by a bill of lading.

43. To complete the picture, Article X provides that the Rules apply to bills of lading (Article X assumes that Article I(b) is first satisfied) in three cases, one of which (Article X(b)) is where carriage is from a port in a contracting State. Here, carriage was from a port in Spain, which is a contracting State.

44. The issue, therefore, is whether the contract of carriage here was "*covered by a bill of lading*" within the meaning of Article I(b). The particular question of principle arising is whether a contract of carriage is so "*covered*" if (a) when concluded, it provides for the issue of a bill of lading on demand, but (b) by express, subsequent agreement, a document other than a bill of lading is issued instead. That is the question here because on the agreed facts: (a) the contract of carriage concluded prior to shipment provided for the issue on demand of a bill of lading and had a bill of lading then been issued, Article I(b) would have been satisfied without doubt (even if it would have been a straight consigned bill in line with the Draft B/L drawn up by Maersk Line, since straight consigned bills are within Article I(b): see *The Rafaela S* [2005] 2 AC 423); (b) no bill of lading was in fact issued, but rather the Waybills were issued, and they were non-negotiable ship's receipts marked as such and not (any species of) bills of lading, and they were issued by agreement between the claimant and Maersk Line expressly instead of bills of lading.

45. Subject to s.1(6) (which does not apply in this case), it is a necessary condition for the Hague-Visby Rules to have the force of law under COGSA 1971 that "*the contract expressly or by implication provides for the issue of a bill of lading or … similar document of title*": see s.1(4). The claimant's submission is that that is also sufficient. It is common ground that it is not necessary that a bill of lading in fact be issued. The claimant contends that, on the case law, that is held not to be necessary because it is held to be sufficient that the contract provided for a bill of lading to be issued (which includes provision that a bill be issued on demand). Maersk Line distinguishes the case law on the basis that in none of the prior decisions was there a subsequent agreement to issue something other than a bill of lading, expressly instead of issuing any bill of lading. Maersk Line contends that it is unnecessary, and would be illogical, to hold that the Rules have the force of law on the basis that the contract was "*covered by a bill of lading*" where, by agreement, the contract in question "*was not <u>in fact</u> covered by a bill of lading, but by a different kind of transport document altogether*" (quoting, with original emphasis, from Maersk Line's skeleton argument).

46. I agree with Maersk Line that none of the prior decisions involved the present facts – in none was it agreed at or towards the end of the carriage that sea waybills be issued, rather than bills of lading, so as to avoid further delay in delivery. However, I agree with the claimant that the basis of decision in the prior authorities has been that whether a contract of carriage is "*covered by a bill of lading*" for present purposes is defined by whether, when concluded, the contract provided for a bill of lading to be

issued. In short, I accept Mr Thomas QC's submission that that is sufficient to satisfy Article I(b) and therefore sufficient (assuming other requirements to be satisfied) for the Hague-Visby Rules to have the force of law here under s.1(2) of COGSA 1971, as well as being necessary for the Rules to have the force of law here because of s.1(4).

47. The prior authorities are these (for which it should be noted that Article I(b) was not amended by the Visby Protocol, so it matters not whether a prior decision was on the Hague Rules rather than on the Hague-Visby Rules):

i) In *Harland & Wolff Ltd v Burns & Laird Lines Ltd* (1931) 40 Ll.L.Rep. 286, the Court of Session decided that Article I(b) was not satisfied where the contract of carriage in question did not provide for the issue of a bill of lading. The proper focus of attention was upon the terms of that contract, because where a bill of lading is in fact issued pursuant to such a contract, it is nonetheless not the contract but a document that "*vouches and identifies the conditions of the pre-existing independent contract … . In this way the bill of lading "covers" the contract … made between the shipper and the shipowner*" (*per* Lord President Clyde at 287 rhc).

ii) In *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, a fire tender was damaged in the course of loading, but prior to crossing the ship's rail. Devlin J. (as he was then) held that if applicable to the contract of carriage, the Hague Rules applied to the whole loading operation contracted to be carried out by the carrier and not only to matters arising after the ship's rail. No bill of lading was ever issued, but Article I(b) was nonetheless satisfied because (*per* Devlin J. at 419), "*whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply.*" Devlin J. saw himself as accepting and following the reasoning of Lord President Clyde in *Harland & Wolff*.

iii) *Pyrene v Scindia* was applied by the Canadian Supreme Court in *Anticosti Shipping v St Anand* [1959] S.C.R. 372, where a draft bill of lading was prepared but never signed and eventually mislaid. That the shipper "*did not see fit to demand a bill of lading–as by art. III rule (3) he had the right to do–it cannot affect what on both sides was contemplated*" (*per* Rand J., delivering the judgment of the court, at 375). It was also applied by the Supreme Court of Western Australia in *The Beltana* [1967] 1 Lloyd's Rep 531, a case in which non-negotiable shipping receipts were issued at the outset, but on terms entitling the shipper to the issue of bills of lading thereafter, where no bill was in fact ever demanded or issued. Neville J., like Rand J. before him, took from *Pyrene v Scindia* that the failure to insist upon the issue of a bill of lading was an omission immaterial to the applicability of the Hague Rules under Article I(b). (This view was not necessary to the decision in *The Beltana* since there was in any event a contractual incorporation of the Hague Rules, so that Article III rule 6 applied come what may, which is what mattered.)

iv) In *The Happy Ranger* [2002] EWCA Civ 694, [2002] 2 Lloyd's Rep 357, the Court of Appeal rejected an argument that under *Pyrene v Scindia* it was necessary, before Article I(b) could be satisfied in a case in which no bill of

lading was issued, that the bill of lading to be issued was to contain the terms of contract applicable between shipper and carrier, an argument that had prevailed before Tomlinson J. (as he was then) at first instance. I read the Court of Appeal as unanimous on this point (contrary to the impression the Lloyd's Rep headnote might convey that Rix LJ dissented on it). Both Tuckey LJ at [24]-[25] (with whom Aldous LJ agreed) and Rix LJ at [41] held that it was sufficient to satisfy Article I(b) that the contract of carriage, as originally concluded, provided for a bill of lading to be issued.

48. The thrust of the leading commentaries is to like effect: see Aikens et al., *Bills of Lading* (2nd Ed.), at para.10.74; *Scrutton on Charterparties* (23rd Ed.), at para.14-031; *Carver on Bills of Lading* (3rd Ed.), at para.9-085, referring to a paper by Anthony Diamond QC (as he was then), *The Hague-Visby Rules*, in (1978) 2 LMCLQ 225, at 261-262. Ms Masters QC drew particular attention to what she submitted was the tentative language of *Carver*, where the view expressed is that it is "*perhaps also arguable*" that the Rules apply on their own terms where a shipper entitled to demand a bill of lading "*in fact accepts some form of waybill or non-negotiable receipt*". I do not read that turn of phrase as reflecting more than a cautious recognition that those precise facts had not surfaced for decision (until now, that is). But be that as it may, in my judgment there is sound logic behind that view. That logic is that there is no reason to distinguish between the shipper who, by never demanding a bill of lading, does not insist upon his right to a bill of lading, from the shipper who, by agreeing to accept something 'less' than a bill of lading, does not insist upon that right. Assuming in both cases a contract of carriage providing, originally, for a bill of lading to be issued, in my judgment there is no reason for the failure to insist upon a bill to be immaterial in the first case, yet critical in the second, to the question whether under Article I(b) the contract of carriage was a contract "*covered by*" a bill of lading.

49. Maersk Line did not contend that the agreement for the Waybills to be issued rather than bills of lading amounted to a variation of the contract of carriage, nor that it gave rise to any waiver, election or estoppel. As Ms Masters QC put it in her skeleton argument, "*Agreement to the Waybills was not a term of the contracts, and in any event the relevance of such agreement is only that it precludes the Claimant from denying the fact that the Waybills were issued instead of bills of lading. [Maersk Line] does not rely on this agreement as in some way being an agreement to dis-apply the compulsory application of the HVR. … [Maersk Line] relies simply on the fact of the issue of the Waybills instead of bills of lading …*". Maersk Line's only case was that that fact necessarily meant that the contract of carriage was "*covered by*" the Waybills and not by any bill of lading.

50. However, where the contract of carriage has not been varied, so as to remove any right to bills of lading if required, and the right to have bills of lading, if required, has not been waived (or in effect lost by operation of an estoppel), I can see no reason whatever for a different result than that which obtained in *Pyrene v Scindia*, *The Happy Ranger*, *Anticosti* and *The Beltana*. What has happened on the facts of this case is that bills of lading were not required in the event to enable the carriage to be undertaken and completed, so the right to have bills of lading, if required, became in practical terms otiose. The contract of carriage was still, however, a contract "*covered by*" a bill of lading in the sense used and discussed in the cases.

51. It is therefore unnecessary to consider further the effect of such a variation, had there been one, although provisionally I do not find it easy to see why its effectiveness would not be subject to Article III rule 8 of the Hague-Visby Rules as compulsorily applicable to the contract (*ex hypothesi*) as it stood prior to the variation. That is not necessarily to say that the variation would be ineffective. The question would remain whether its effect would be to lessen the carrier's liability (see again the logic of paragraph 38 above). If Article III rule 8 would indeed apply to prevent an express variation from being effective to 'dis-apply' the Hague-Visby Rules, then whether they could be effectively ousted by conduct not amounting (purportedly) to a variation but which, absent Article III rule 8, might give rise to waiver or estoppel, also seems to me, provisionally, somewhat problematic.

52. Ms Masters QC posed a counter-example to seek to show error in the view I have preferred, given its focus upon the terms of the contract of carriage as originally concluded. Suppose, she countered, a contract of carriage in a trade with no customary practice entitling the shipper to a bill of lading, in which there was no particular term (express or implied) on the point. Without more, she submitted (and I agree), Article I(b) would not be satisfied. What if, she asked, a bill of lading was in the event issued? She answered that, "*Surely the court should not be precluded from concluding that the contract of carriage was throughout covered by a bill of lading, if asked the question after [the] bill of lading [had] been issued.*"

53. It seems to me that this counter-example does not admit so readily of such an unqualified answer. By s.1(4) of COGSA 1971, unless s.1(6) applies the Hague-Visby Rules do not have the force of law unless "*the contract [of carriage] expressly or by implication provides*" for the issue of a bill of lading. The counter-example as stated says nothing as to the issue of a bill not originally required by the contract except that it came to be issued. If that occurred in the absence of obligation, as it seems to me s.1(4) would indeed preclude the Rules from having the force of law under COGSA 1971. (To complicate things further, whether it was the case that the bill was issued without obligation might itself depend upon whether the question arose between the carrier and the shipper (or other original party), or between the carrier and a subsequent holder of the bill.) If the issue of a bill of lading occurred in circumstances that created, albeit subsequent to the conclusion of the contract, an obligation under it to issue, then there is no difficulty: s.1(4) of COGSA 1971 is then satisfied by the subsequent variation of the contract. For the reason I gave in paragraph 51 above, Article III rule 8 means there is not necessarily the symmetry of result between a variation creating a right to a bill of lading and a variation purporting to remove such a right upon which Ms Masters QC's counter-example argument depends. But even if there were or ought to be such symmetry, that would not affect the outcome in the present case where variation (or waiver or estoppel) is not asserted.

54. For completeness, I note that if I am right to propose that s.1(4) of COGSA 1971 would prevent the Hague-Visby Rules from having the force of law where a bill of lading was issued gratuitously, then a little care may need to be taken over what Tuckey LJ said in *The Happy Ranger* at [24]. There he said that what matters is "*the fact that [a bill of lading] is issued or that its issue is contemplated*" and that if a bill of lading "*is or is to be issued*", both Article I(b) of the Hague-Visby Rules and s.1(4) of COGSA 1971 are satisfied. That was said, of course, in a case concerned with a contract that did provide for the issue of a bill of lading and the *Pyrene v Scindia*

problem that no bill had in fact been issued. As regards s.1(4) (as opposed to Article I(b)), having regard to its plain terms, I respectfully do not think it can be right that the Rules have the force of law under s.1(2) where a bill of lading is issued although the contract of carriage did not require it, unless s.1(6)(a) is satisfied so as to 'trump' s.1(4). Whether that is right or not is a subtlety that does not, I think, affect the conclusions that matter in this case.

55. To summarise, those conclusions are that:

i) following the approach adopted by and since *Pyrene v Scindia*, both Article I(b) and s.1(4) are satisfied where the terms of a contract of carriage require a bill of lading to be issued (and that is so where the requirement is to issue a bill on demand, not only where it is to issue come what may), but no bill of lading is in fact issued;

ii) it is immaterial to Article I(b) and s.1(4) that the right to a bill of lading was not insisted upon;

iii) subject to (iv) below, that is so equally for a case such as the present where, after the event, sea waybills are, by agreement, issued instead of bills of lading, as for a case where there is just a failure to demand any (further) document so that no bill is issued;

iv) if in iii) (but which is not this case) such agreement were effective (despite, in particular, Article III rule 8 of the Rules) as a variation of the contract of carriage, or as a waiver or estoppel removing any right to a bill of lading, then s.1(4) would not be satisfied, so that the Rules would have the force of law only if s.1(6)(b) applied.

56. For the purpose of answering Issue (i), therefore, the starting point is that the Hague-Visby Rules have the force of law in this case under s.1(2) of COGSA 1971. That does not necessarily mean that any liability herein is limited by Article IV rule 5 of the Hague-Visby Rules, for two reasons. Firstly, again, the Hague-Visby Rules as thus compulsorily applicable allow Maersk Line to accept by contract a higher limit of liability. Secondly, the Hague-Visby Rules as thus compulsorily applicable only govern Maersk Line's carriage of the goods by sea, so that for Container B and the Replacement Container it is in principle open to Maersk Line to rely on a lower limit of liability, if there is one under the Maersk Terms, in respect of damage arising out of the final stage of transit, after completion of discharge at Yokohama. It remains necessary, therefore, to consider the meaning and application of the Maersk Terms, even though in argument both sides rather treated that aspect of the analysis as relevant only if the claimant lost on COGSA 1971.

57. Before I leave COGSA 1971, I should record that upon my analysis of Article I(b) and s.1(4), it does not matter whether the claimant's title to sue in contract is as original party to the contract of carriage, or under s.2(1)(b) of COGSA 1992. Either way, Article I(b) and s.1(4) are satisfied by the term that the shipper was entitled to a bill of lading on demand which it is agreed the contract contained.

The Maersk Terms

58. Clauses 5, 6 and 7 of the Maersk Terms contain a detailed set of provisions, not always easy to follow or construe, as to the liability regime applicable, depending on whether "*Carriage*" is "*Port-to-Port Shipment*" or "*Multimodal Transport*", and if the latter depending on whether the stage of "*Carriage*" where loss or damage occurred is known. Although my decision on COGSA 1971 does not render it irrelevant to consider the Maersk Terms, it does mean that I can do so relatively briefly. Clauses 5, 6 and 7 of the Maersk Terms are set out in full in the Appendix to this judgment.

59. Upon the basis that the Hague-Visby Rules have the force of law in this case under COGSA 1971, the key definition in Clause 1 of the Maersk Terms is the definition of "*the Hague Rules*" to mean the Hague Rules including the Visby Protocol amendments "*but only if such amendments are compulsorily applicable to this bill of lading. (It is expressly provided that nothing in this bill of lading shall be construed as contractually applying the said Rules as amended by said Protocol)*". That is to say, and subject to the meaning of that last sentence, where the Maersk Terms refer to "*the Hague Rules*" they mean the Hague Rules or (if compulsorily applicable) the Hague-Visby Rules.

60. The last sentence of the definition is not entirely easy but I do not think it affects the present case. It seems to me to be a nod to Article X(c) of the Hague-Visby Rules, by which they apply on their own terms to any bill of lading that provides expressly for them to govern. So that last sentence, I think, only seeks to ensure that if the Hague-Visby Rules would not otherwise have the force of law, they are not caused to have the force of law (via Article X(c)) by reason that they are included in the "*Hague Rules*" definition so as to be within the "*Hague Rules*" as a defined term where that is used in the Maersk Terms. There is a logical circularity to the concern thus addressed that means it is not really a concern and the last sentence is therefore unnecessary. But I do not for that reason strive to find any different meaning for it, or believe in particular that it might have a meaning that could have an impact in this case.

61. The position in this case, for Container A, is that carriage was and remained "*Port-to-Port Shipment*", so by Clause 5.1 of the Maersk Terms the "*Hague Rules*" (as defined) applied, i.e. the Hague-Visby Rules since they are compulsorily applicable under COGSA 1971.

62. For Container B and the Replacement Container, carriage as originally contracted was "*Port-to-Port Shipment*", but by Clause 5.4(b) of the Maersk Terms, upon Maersk Line's agreement to deliver to Shimizu rather than merely discharge at Yokohama, the Maersk Terms must be applied as if that had been specified at the outset, in which case Clause 6 would have applied. Then:

    i) If it is shown in due course that any damage occurred prior to discharge at Yokohama the only issue between the parties is whether the Hague-Visby Rules applied under Clause 6.2(b) (as the claimant says, Maersk Line disputing that Clause 6.2(b)(ii) was satisfied) or the "*Hague Rules*" (as defined) applied under Clause 6.2(c). But the latter is (also) the Hague-Visby Rules in this case, so that issue is academic.

ii) If it is not shown in due course where any damage occurred, then the applicable limit of liability will still be the limit under Article IV rule 5 of the Hague-Visby Rules. In the Maersk Terms, Clauses 6.1 and 7.2 would apply. For Clause 7.2(a) to make sense, its second case ("*if the Hague Rules apply under clauses 5.1 or 6.2(c)*") must be understood, I think, as limited to the situation in which the "*Hague Rules*" apply as a matter of contract only, under Clause 5.1 or Clause 6.2(c), in which case that would be the Hague Rules and not the Hague-Visby Rules. On that basis: the present case is not within the second case in Clause 7.2(a); therefore, the limit of liability according to Clause 7.2 would be either, by Clause 7.2(a), the limit under Article IV rule 5 of the Hague-Visby Rules, applied "*as national law*" under COGSA 1971, or, by Clause 7.2(c), 2 SDRs per kg weight of the goods lost or damaged. But if Clause 7.2(c) applied rather than Clause 7.2(a), and if the weight-based limit would be less than the 'package or unit' limit under Article IV rule 5 of the Hague-Visby Rules, the latter would prevail because of Article III rule 8, compulsorily applied, given Maersk Line's inability (*ex hypothesi* if Clause 6.1 is applicable) to show that the damage occurred after discharge at Yokohama so as to be damage in respect of which it could limit its liability to a greater extent than allowed by Article IV rule 5.

iii) Finally, if it is shown in due course that any damage occurred between Yokohama and Shimizu, there is nothing before me upon the basis of which I could find that any international convention or national law fell to be applied under Clause 6.2(b). By Clause 6.2(c)(ii), liability would therefore be limited to 2 SDRs per kg gross weight of the damaged goods under Clause 7.2(c), since there is no evidence of any inland contract terms or tariff providing for any lesser limit. In this situation, however, that would not yield to Article IV rule 5 of the Hague-Visby Rules if the 'package or unit' limit thereunder would be higher, since (a) *ex hypothesi* Maersk Line would have established that the damage occurred after completion of the carriage by sea to which the Rules applied compulsorily, and (b) the Rules are not applied by contract by the Maersk Terms to the final stage of the adventure, after Yokohama.

Conclusion on Issue (i)

63. Drawing all the threads together, in my judgment the answer to Issue (i) is that liability in this case is limited by Article IV rule 5 of the Hague-Visby Rules, which apply in this case with the force of law, except in relation to any damage to tuna from Container B or the Replacement Container that may be shown by Maersk Line to have arisen out of the final stage of transit, after completion of discharge of the Container at Yokohama, in respect of which Maersk Line's liability is limited by Clause 7.2(c) of the Maersk Terms to 2 SDRs per kg gross weight of the tuna thus damaged.

Issues (ii), (iii) and (iv)(b)

64. Issues (iii) and (iv)(b) ask how the 'package or unit' limit of liability under Article IV rule 5 of the Hague Rules and Hague-Visby Rules (respectively) applies to the facts of this case. Although Issue (iii) does not now arise, given my conclusion upon Issue (i), I find it convenient to consider the notion of 'package or unit' under the Hague Rules first anyway, not least because there is nothing in Article IV rule 5(a) of the Hague-Visby Rules (or the *travaux préparatoires* of the Visby Protocol amendments) to

indicate any change of meaning of 'package or unit' as between the Hague Rules and the Hague-Visby Rules, and that meaning (whatever it may be) is the primary context for Article IV rule 5(c) of the Hague-Visby Rules, the specific deeming provision about *inter alia* containerised cargo introduced by the Visby Protocol amendments. Ms Masters QC suggested in a skeleton argument footnote that if, as Maersk Line says, 'units' in the Hague Rules means articles of cargo that can be loaded onto a ship as they are in the absence of containerisation, then Article IV rule 5(c) may mean that 'units' has a different meaning in the Hague-Visby Rules. I found that a little convoluted, but it only arises if Maersk Line is right about 'units' under the Hague Rules. So the convenience of still considering Issue (iii) fully is only reinforced.

65. Furthermore, I prefer to consider Issues (iii) and (iv)(b) before Issue (ii). Issue (ii) asks a specific question about how the applicable Article IV rule 5 limit applies that is important because the extent of damage, as alleged, varies quite significantly between the Containers. The damage to the tuna in Containers A and B is said to involve depreciation in value of 35% and 31% respectively; the tuna in the Replacement Container is said to have been depreciated by 85%. The essential point behind Issue (ii) is to know whether any 'unused balance' of the Article IV rule 5 limit referable to the tuna in Containers A and B (or for that matter the completely 'unused' Article IV rule 5 limit referable to the tuna in the other nine containers in respect of which there is no claim at all) is available to the claimant as compensation for the heavy damage to the tuna in the Replacement Container.

Issue (iii)

If liability is limited pursuant to Article IV r 5 of the Hague Rules, are the relevant packages or units the containers or the individual pieces of tuna?

66. It is of course the classic *modus operandi* of modern container transport that empty boxes will be delivered to cargo interests for stuffing and return to or collection by carriers. In this case, Maersk Line's responsibility for care and carriage attached only upon delivery to it of the full containers at its Cartagena container yard. In another case, the attachment point might be earlier in a multimodal transit, e.g. upon collecting a stuffed container from a shipper's premises inland for carriage by road to a container yard for shipment on a container ship for one or more ocean legs. But wherever that attachment point in a given case, the norm will be that the cargo interests or their agents have undertaken entirely the process of filling the container, including any prior process of preparing the goods (including, it may be, wrapping, packaging or consolidating them) for stuffing.

67. Whatever the process of preparation and stuffing has been, all that is in fact presented to the carrier for carriage by sea (with or without any pre-shipment transit leg under that carrier's responsibility) is the full container. It would not be incoherent, therefore, to say for containerised cargo that the Hague Rules 'package or unit' is always the container, on the basis that cargo interests' remedy if unhappy with the resulting limit of liability is to have the shipper declare the nature and value of the goods inside and insist upon the insertion of that declaration in the bill of lading. On any view, however, that is not the law, and it was common ground that where goods are shipped already stuffed into a container, the Hague Rules 'package or unit' is not necessarily the container, *The River Gurara* [1998] QB 610, [1998] 1 Lloyd's Rep 225 being sufficient authority for that proposition.

68. *The River Gurara* is also sufficient authority for the proposition that what is the Hague Rules 'package or unit' in the case of any given container depends upon a consideration of its actual contents, as stuffed by the cargo interests or their agents, and not upon how, if at all, those contents are described in the bill of lading or other transport document or carrier's receipt. It follows, and *The River Gurara* is also specific authority for this further proposition, that where a container as shipped in fact contains several (or perhaps many) separate items, each a Hague Rules 'package or unit', any provision of the contract of carriage purporting to provide that the container was the only 'package or unit' would be null and void under Article III rule 8, if applicable. The 'Carrier's Receipt' statements in the Draft B/L and the Waybills therefore cannot affect the outcome, even if they purported to provide that the only 'packages or units' were the containers. In fact, though, that is not their purport, in my judgment: they are merely statements as to what Maersk Line as carrier admits having received, confirming that the container contents are not admitted (and would thus be not admitted even if they were not described in 'said to contain' terms); that view is confirmed by Clause 14 of the Maersk Terms (e.g. Clause 14.1 is that the bill of lading is to be "*prima facie evidence of the receipt by the Carrier in apparent good order and condition, except as otherwise noted, of the total number of Containers or other packages or units indicated in the box entitled "Carriers Receipt" on the reverse side hereof*"); for completeness, if Clause 14 had purported to limit liability by treating the container as the only 'package or unit', contrary to the true position and (for the Hague-Visby Rules) contrary to a sufficient enumeration on the face of the bill, it would be ineffective under Article III rule 8 anyway. That means the 'Carrier's Receipt' statements in the Waybills likewise have no impact upon the operation of the Hague-Visby Rules under Issue (iv)(b) below.

69. So far, so good. But none of that helps very much to determine what <u>is</u> required for an item inside a container to be a Hague Rules 'package or unit'. In that regard, the question arises for decision, I believe for the first time, whether it is a necessary characteristic of a Hague Rules 'package or unit', in the case of containerised cargo, that it could have been shipped 'as is' if not containerised.

70. In the present case, the individual frozen tuna loins, stuffed into the Containers without any wrapping, packaging or consolidation, could not on any view be called 'packages'. The claimant says they were 'units', precisely because they were stuffed into the Containers individually in that way, it being immaterial whether they could have been shipped 'as is' if not containerised. Maersk Line says that a Hague Rules 'unit' is an item that could be shipped 'as is' if not containerised, and these frozen loins, it says, could not be. (The claimant does not accept that the frozen loins could not be shipped 'as is' without containerisation, but I have no evidence as to whether there are break-bulk cargo ships in the world with the 'deep freeze' holds or compartments that would be required.)

71. Before discussing the frozen loins further, let me deal with the bags of frozen tuna parts. Bagged items are naturally described as 'packaged' goods, each bag a separate 'package'. Maersk Line's skeleton argument on Issue (iii) did not address the bagged tuna at all, but only the question whether the individual frozen loins were 'units', and Ms Masters QC did not address the bagged tuna in oral argument either. I thus do not understand it to be suggested that a 'package' under the Hague Rules, in the case of containerised cargo, has to be capable of being shipped 'as is' if not containerised;

and there is no hint of that in *The River Gurara*, even when considering the problem of packages within packages, such as the containers in that case containing pallets each of which consolidated a number of bales of rubber wrapped in polythene. The problem of packages within packages does not arise, as there is no suggestion that the frozen tuna parts were sub-packaged in any way within the bags.

72. As regards Container A, therefore, however the frozen tuna loins would be treated under Article IV rule 5 of the Hague Rules, in my judgment each of the bags of frozen tuna parts was a separate Hague Rules 'package'.

73. The rest of my discussion of Issue (iii), therefore, concerns only the frozen loins as putative Hague Rules 'units'.

74. Ms Masters QC relied *inter alia* on *Bills of Lading, supra*, in which the learned authors say this, at para.10.321: *"The main current controversy revolves around the question of whether the word unit refers to a "physical" unit, that is one separate item or article, without regard to whether it has to be packed in order to be shipped; or whether the word refers to a "shipping" unit, being an item that is ready to be shipped with no, or no further, packing or consolidation. The prevalent view, as discussed below, is that "unit" means a shipping unit.*" (I suggest, with respect, that for clarity in this context "*packed*" and "*packing*" ought to be "*packaged*" and "*packaging*".)

75. The support for that view cited in the discussion that follows in *Bills of Lading* is that within the extensive consideration of Article IV rule 5 of the Hague and Hague-Visby Rules by the Federal Court of Australia in *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co S.A.* [2004] 2 Lloyd's Rep 537, the majority view at [278]-[284] includes the view that 'unit' refers to an item that could be transported without packaging. I shall return to that below – the relevant passage in *El Greco* in fact favours the claimant in the present case.

76. Care must be taken not to read too much into the particular language used in *Bills of Lading* to define 'shipping unit'. As the learned authors recognise at para.10.323, containerisation adds complexity, the key issue for my purposes being, as they articulate it, "*the effect of differences between what can be carried, without being "separately packed", in a ship and what can be so carried in a container*" (although, again, I respectfully prefer "*separately packaged*" to "*separately packed*"). Thus, I do not think it can be said that the learned authors intend by their definition of 'shipping unit' to exclude an item that is ready, with no (further) packaging or consolidation, to be stuffed into a container, for containerised sea carriage, on the ground (if this be the case) that it would not have been suitable for shipment 'as is' without containerisation.

77. Commenting on *El Greco, Bills of Lading*, at para.10.331, suggests that the approach to Article IV rule 5(c) of the Hague-Visby Rules of the majority, Black CJ and Allsop J, is to be preferred to the dissenting view of Beaumont J. I shall come back to that when considering Issue (iv)(b) and Mr Thomas QC's submission (if he needs it) that *El Greco* is wrongly decided and should not be followed here. But of relevance to the present discussion, the learned authors go on to say that "… "*units" can include unboxed and unpackaged articles if packed inside a container*" so that under Article IV rule 5(c), if a bill of lading said the cargo was a container containing "*100 car*

engine parts packed inside", there would be "*100 units for limitation purposes*", which seems to me inconsistent with any suggestion that to be a 'unit', in the case of containerised cargo, the item of cargo must have been suitable for shipment 'as is' if not containerised.

78. Ms Masters QC also referred me to Tetley, *Marine Cargo Claims* (4th Ed.), p.2178, where it is said that: "*The word "unit", in the English and Canadian case law, has come to mean shipping units – generally large, unboxed and unpackaged objects, such as cars, generators and tractors – rather than freight units as in the United States.*" The use of the 'freight unit' or 'customary freight unit' in this context is indeed peculiar to the United States. But, again, care must be taken as to what, then, is meant (in this case by Tetley) by 'shipping unit', in particular in the context of containerisation.

79. The only English decision cited by Tetley is *Studebaker Distributors Ltd v Charlton Steam Shipping Co Ltd* [1938] 1 KB 459, which decided (at 467) that "*a motor-car put on a ship without a box, crate or any form of covering*" is not a 'package', so that an express bill of lading term limiting liability to US$250 per package had no application to a cargo of 60 un-boxed motor cars. That is not any decision on the meaning of 'unit' in Article IV rule 5 of the Hague Rules. But Goddard J. (as he was then) did refer to Hague Rules 'units' in his reasoning, expressing the view (*ibid*) that "*any individual piece of cargo*" is apt, in principle, to be such a 'unit'. In the present case, plainly to my mind the 'individual pieces of cargo' were the individual frozen tuna loins, unless there is some special rule for containerised cargo that puts the focus onto how the cargo could have been shipped if not containerised rather than how it was in fact stuffed into the container.

80. As illustrated by the facts of *Studebaker*, away from container transport, the word 'unit' in the Hague or Hague-Visby Rules is unlikely to cause difficulty under English law, since it does not use the 'freight unit' developed in the US case law, "*because small unpackaged items are unlikely to be presented for loading into a ship's hold. So the few cases under the Hague Rules have concerned fairly obvious examples: large but unpackaged items such as trucks, generators and cars*", as Prof. Reynolds QC put it in his case note on *El Greco*, "*The Package or Unit Limitation and the Visby Rules*" [2005] LMCLQ 1, at p.2. Prof. Reynolds QC and Sir Guenter Treitel QC as editors of *Carver* (3rd Ed.) adopt the view that under English law, "*… the unit referred to in Art.IV.5(a) … is an identifiable article or piece of goods that cannot be called a package …*" (para.9-261). That view is unchanged from the 2nd Ed., where it was at para.9-254, which is cited by Tetley. That citation, and the reference to *Studebaker*, leads me to conclude that by 'shipping units' Tetley means no more than identifiably separate items of unpackaged cargo, as shipped. Thus again, as with what is said in *Bills of Lading*, the real question is whether the focus, for containerised cargo, is upon how *ex hypothesi* unpackaged cargo was stuffed into the container, or upon how it would have been (or would have had to be) prepared for shipment if not containerised, bearing in mind that (see *The River Gurara*) we do not treat containerised cargo as by definition packaged cargo ('package' = container).

81. I mean no disservice to the Canadian case law cited by Tetley if for present purposes I simply summarise it by saying that it rejects the US view that 'unit' means 'freight unit' and adopts instead the view that "*the word in this context means a shipping unit, that is a unit of goods*", *per* Ritchie J giving the judgment of the Supreme Court of

Canada in *Falconbridge Nickel Mines Ltd et al. v Chimo Shipping Ltd et al.* [1973] 2 Lloyd's Rep 469 at 475 lhc. (The other Canadian cases cited by Tetley are *Anticosti, supra, Sept Iles Express v Clement Tremblay* [1964] Ex.C.R. 213 and *N.S. Tractors v M/V Tarros Gage* (1986) 1 F.T.R. 243, 1986 AMC 2050.) To like effect, in New Zealand, Tompkins J. concluded, following *Studebaker*, that: *"… a package imports the notion of articles packed together … . A unit on the other hand, imports something which is a separate thing, such as a single manufactured article, though of course any single article, if accepted for transport as a separate article, would be a unit*", *New Zealand Railways v Progressive Engineering Co Ltd* [1968] NZLR 1053.

82. More recently than any of the textbooks is *The Aqasia* [2016] EWHC 2514 (Comm), [2016] 2 Lloyd's Rep 510. Sir Jeremy Cooke decided that a carrier's liability in respect of its carriage of 2,000 m.t. of fishoil shipped in bulk was not limited by Article IV rule 5 of the Hague Rules (as applicable to the subject fixture which incorporated the old 'London Form' tanker voyage charter). There was no 'package or unit' by reference to which the Article IV rule 5 limit could have application. *The Aqasia* is thus authority confirming that under English law, and as was the assumption behind the Visby Protocol in introducing the alternative weight-based limit in the Hague-Visby Rules, the Hague Rules 'package or unit' limit of liability has no application to bulk cargoes. It was not necessary to the decision in *The Aqasia* to determine definitively what is required for there to be a 'unit', let alone to ask that question for containerised goods. I note though that the learned judge undertook a comprehensive review of the authorities, the *travaux préparatoires* and the textbooks/commentaries, before expressing the basis of his decision thus (at [59]): "*… I have no hesitation in coming to the conclusion that the word "unit" in the Hague Rules can only mean a physical unit for shipment and cannot mean a unit of measurement or customary freight unit as is the case in the United States*" (my emphasis).

83. Mr Thomas QC referred to *Bekol BV v Terracina Shipping Corporation et al., The Jamie* (Leggatt J, 13 July 1988, [1988] Lexis Citation 1141). In that case, timber shipped in nine bundles created by fastening individual timber pieces together was damaged, wrongfully having been carried on deck. The Hague Rules applied. Leggatt J (as he was then) decided that the relevant 'packages or units' for the purpose of Article IV rule 5 were the bundles. He noted that each individual length of timber, "*measuring typically two or three inches by four or five inches in cross-section and many feet in length, viewed by itself is a single item and therefore capable when considered in isolation of being called a unit. If pieces of this kind were carried loose, each of them might be said to constitute a unit; but when, as here, a number of pieces are fastened together with steel straps they become a composite shipping unit.*" This confirms that under English law, when considering 'units' under the Hague Rules, the search is for the identifiably separate items of cargo, as in fact shipped. It does not address the issue raised by containerisation.

84. Finally, as I said I would, I return briefly to the *El Greco* decision. It is a decision on how Article IV rule 5(c) of the Hague-Visby Rules applied to the enumeration of the contents of a 20' general purpose container in the bill of lading in that case. As stuffed into the container for containerised transport, the cargo consisted of about 2,000 bundles of posters and prints. There were in total around 130,000 individual posters and prints. The majority view, delivered by Allsop J, included this, at [276]:

"*The word "units", if looked at in isolation, might be seen as satisfied by reference to any articles, however they might be packed and however unsuitable for carriage as individual items they might be; or it might be seen as satisfied only by a reference to articles individually packed (by which I do not mean "packaged") as separate articles in the container. I favour the latter view, Beaumont, J, favours the former*" (my emphasis). It seems difficult to imagine that the individual bundles of posters and prints would have been suitable 'as is' for break-bulk shipment; but in any event, the focus is plainly on how the cargo was made up for stuffing into the container, not on how it might have had to be prepared for shipment without containerisation. When, therefore, at [278] (as noted by *Bills of Lading* – see paragraph 75 above), the majority view is that 'unit' is intended for individual articles "*capable of being carried without packaging*", and at [277] the view is that 'unit' was not intended for "*any article of cargo, however small and however unsuitable for transportation without being made up for transport*" but only for "*an article of cargo suitable for carriage as such*", the suitability for carriage without packaging or for carriage (transportation) 'as such' that is referred to, is suitability for carriage in a container, in the case of containerised cargo. That is why I said that on this point, the majority view in *El Greco* in fact favours the claimant in the present case; and in differing from Beaumont J on this aspect, it seems to me the majority was proceeding on the basis that the individual posters and prints would not have been suitable for carriage 'as is', even in a container. Had they been suitable for such carriage and actually stuffed individually (all 130,000 of them!), the logic of the majority in *El Greco*, as I see it, would have it that they were indeed individually 'units' susceptible in principle of attracting the 'per package or unit' limit of liability, subject to the sufficiency of the enumeration in the bill of lading under Article IV rule 5(c) if the Hague-Visby Rules applied rather than the Hague Rules.

85. For completeness, and contrary to a submission by Ms Masters QC, the focus in the *travaux préparatoires*, in explaining the inclusion of 'unit' in Article IV rule 5 of the Hague Rules, upon large, unpackaged items, such as whole boilers, or vehicles, at a time before containerisation, is not in my judgment reason to restrict the concept, in the case of containerised cargo, to articles that could have been shipped without (further) packaging or consolidation if not containerised.

86. Drawing the threads together, in my judgment, for the Hague Rules under English law:

    i) The possible reading of Article IV rule 5 for containerised cargo that it is, by definition, packaged cargo, the containers being the only relevant packages, was authoritatively rejected by *The River Gurara*.

    ii) In providing for a limit of liability 'per package or unit', the sense of 'or' is 'whichever (if either) be relevant to the cargo in question', and the focus is upon the cargo as in fact transported. Any given item of cargo cannot be both packaged and unitised cargo, although the entire cargo can be neither (e.g. bulk cargoes are neither: see *The Aqasia*). The cargo can of course be a mix, so (e.g.) there is no difficulty in principle here over the possibility that the frozen loins might be 'units' but the bagged tuna was packaged cargo, each bag being a 'package'.

iii) It follows that if cargo as in fact transported is packaged, the limit of liability for that cargo applies per package, even if what has been packaged would have been suitable for transportation without that packaging: see *The Jamie*. The further question, for packaged goods, of packages within packages, dealt with in *The River Gurara* and discussed in *El Greco*, does not arise in the present case and I need make no particular decision about it.

iv) If cargo as in fact transported is not packaged, but is made up of identifiably separate items of transportable cargo, those items are 'units'. For break-bulk shipments, the identification of any 'units' will be by reference to the cargo as in fact shipped. For containers, what is in fact shipped (in the strict sense) is the containers; but following *The River Gurara* (see i) above) the container walls are transparent under the gaze of Article IV rule 5; or to put it another way, irrespective of any allocation of responsibility for the stuffing of the container or of where (if at all prior to shipment in the strict sense) any responsibility for the care and carriage of the container attaches to the carrier, from the perspective of the cargo and how it is made up (if at all) for transportation, the journey begins at the door of the container not at the ship's rail. That is of the essence of the efficiency of modern container transport, to the mutual benefit of cargo interests and carriers.

v) There is no reason of language or purpose why 'units' should not be identified, for a container load, by reference to the characteristics of the cargo as it was stuffed into the container. To the contrary, in the light of iv) above in particular, that is the natural way of assessing any question of the characteristics of a containerised cargo, if (always) it is not for the relevant purpose to be determinatively characterised by the container itself. There is no source in the language or purpose of Article IV rule 5 for a special, added, rule calling for a focus not upon the cargo as shipped, but upon how (if at all) the cargo could have been shipped if not containerised.

vi) In this case, looking through the notionally transparent walls of the three Containers to examine the cargo as shipped (or, if this be the preferred way of looking at it, watching the Containers being stuffed to see what the cargo was, as stuffed), one sees: individual frozen tuna loins, transportable and shipped/stuffed 'as is'; bags. The natural, and correct, conclusion if asked whether, and if so how, the cargo as shipped comprised 'packages or units', is that the cargo was a mixed cargo of 'packages' (the bags, each bag one package) and 'units' (the unpackaged tuna loins, each loin being one unit since each was identifiable as a separate article for transportation as such, within the container).

87. In conclusion upon Issue (iii), therefore, for the purposes of Article IV rule 5, the cargo in fact comprised:

i) in Container A, 206 'units', each frozen tuna loin being a separate 'unit', and 'packages', the claimant says 460 of them, each bag of frozen tuna parts being a separate 'package';

ii) in Container B, 520 'units', each frozen tuna loin being a separate 'unit'; and

iii) in Container C / the Replacement Container, 500 'units', each frozen tuna loin being a separate 'unit'.

Issue (iv)(b)

If liability is limited pursuant to Article IV r 5 of the Hague-Visby Rules, are the containers deemed to be the relevant package or unit for the purposes of Article IV r 5(a), or are the individual pieces of tuna the relevant packages or units? In particular, were all or any of the individual pieces of tuna, packages or units enumerated in the relevant document as packed in each container for the purposes of Article IV r 5(c)?

88. As I indicated in saying that I would consider Issue (iii) fully even though I had concluded under Issue (i) that the Hague Rules do not apply in this case, in my judgment 'package or unit' must have the same meaning in Article IV rule 5(a) of the Hague-Visby Rules as it has in Article IV rule 5 of the Hague Rules. The only contrary suggestion raised in argument does not arise, as it depended on Maersk Line being correct about Issue (iii) (see paragraph 64 above).

89. Furthermore, that meaning is not altered by Article IV rule 5(c); nor in my judgment does 'packages or units' in rule 5(c) have a different meaning than 'package or unit' in rule 5(a). Article IV rule 5(c) applies "*Where a container, pallet or similar article of transport is used to consolidate goods*" and is, explicitly, a deeming provision for that situation. Its effect for containerised cargo is to make the container the only 'package or unit' for the purpose of rule 5(a), whether or not that would otherwise be the correct conclusion (upon looking into the container under *The River Gurara*), unless there is a sufficient specification of how the cargo inside comprises 'packages or units'.

90. In that regard, rule 5(c) requires, for a sufficient specification, that "*the number of packages or units … as packed in [the container]*" be "*enumerated in the bill of lading*". That, I should acknowledge, re-orders the words used in rule 5(c), but it expresses the gist of those words as they appear in rule 5(c), as I read them. (The actual word order is this: "*… the number of packages or units enumerated in the bill of lading as packed in [the container] shall be deemed the number of packages or units … as far as these packages or units are concerned.*") As will be seen below, the controversy concerns "*as packed*", or perhaps it is just "*as*". Is the sense of rule 5(c) that the bill of lading must enumerate the contents of the container, the items enumerated being in fact 'packages or units' given how the container was packed; or is the sense that there must be in the bill of lading an enumeration of the contents that specifies how the items enumerated were packed into the container? The majority in the *El Greco* case thought the latter; but the decision in that case would have been the same either way.

91. The easy application of Article IV rule 5(c) here is to the bags of frozen tuna parts in Container A. The claimant has conceded what was Issue (iv)(a) – whether for these purposes it is possible to look outside the Waybills. The Waybill for Container A makes no mention of bags of tuna. Therefore, the 'package or unit' limit of liability under Article IV rule 5(a) applicable to the bagged tuna in Container A is 666.67 units of account, on the basis that the container is deemed by rule 5(c) to be the (only) relevant package or unit, even though if one looked into the container one would

immediately identify that there were many packages (bags of tuna), in fact (the claimant says) 460 of them.

92. For the individual frozen tuna loins, the claimant's case is as follows:

i) Each frozen loin was a 'unit' within the meaning of Article IV rule 5. The claimant is right about that: see Issue (iii) above.

ii) Therefore, the number of packages or units as packed was: 206 in Container A; 520 in Container B; 500 in Container C / the Replacement Container. The claimant is also right about that, given my decision on Issue (iii).

iii) The Waybills stated that the Containers were 'said to contain' frozen bluefin tuna loins, numbering respectively 206, 520 and 500 'PCS'. The claimant is right about that, on the facts.

iv) That stated the number of – it enumerated – what were in fact the 'units' of cargo as packed. The claimant is again right about that, given my conclusion on Issue (iii).

v) Nothing more is required by Article IV rule 5(c). No problem arises of false enumeration (whether as to the number stated or as to the items numbered being 'packages or units' within the meaning of Article IV rule 5), which is ultimately what *El Greco* is about.

93. The issue is whether that last step in the claimant's logic is correct. Maersk Line says, relying heavily on *El Greco* but also saying this is naturally the purport of the language of rule 5(c), that the language of enumeration used must specify (or at least must be consistent only with the possibility) that the enumerated items were so packed as to be 'packages or units'.

94. To deal with three specific points first:

i) Contrary to a submission by Ms Masters QC, the 'Carrier's Receipt' statements in the Waybills do not assist: see paragraph 68 above.

ii) Contrary to a submission by Mr Thomas QC, the relevant burden of proof (which includes the burden of persuasion as to matters of interpretation) is on the claimant. The substance of Article IV rule 5(c) is that where cargo is containerised, the container is deemed to be the only relevant 'package or unit' unless there is a sufficient enumeration in the bill of lading. The carrier need prove only the use of a container, pallet or other similar article to consolidate, to establish *prima facie* a 'package or unit' limit of liability of 666.67 units of account per container (etc.), i.e. an exclusion of any greater liability. To claim that there was such an enumeration as displaces that limit in favour of something more generous to the cargo claimant is, therefore, to claim that the case falls within an 'exception to an exception'.

iii) Contrary to a submission by Ms Masters QC, I do not think the *travaux préparatoires* observation on behalf of the UK by Diplock LJ (as he was then), to the effect that the intention behind Article IV rule 5(c) was to ensure that

> where the application of the 'package or unit' limit was not by reference to the container, that would be apparent on the face of the bill of lading, provides the answer. Firstly, there is nothing to suggest that Diplock LJ had in mind the problem of inaccurate enumerations, or statements enumerating a number of items that were not in fact the 'packages or units' that had been stuffed into the container. Secondly, and perhaps more fundamentally, that purpose is served if an enumeration is sufficient if it (a) in fact enumerates the 'packages or units', considering how the cargo has been packed in the container, and (b) is consistent with the proposition that the items enumerated are 'packages or units' for the cargo "*as packed*". Such an enumeration, *ex hypothesi*, does not mislead the carrier (nor a third party, e.g. banker, transacting on the strength of the document). For example, were it not for any awareness he might have of the *El Greco* decision, a reasonable carrier asked to issue a bill of lading stating the cargo to be "*one container said to contain 100 car engine parts*" would surely act on the basis that, on the face of things, there were 100 separate items inside the container, if the consequence would have any impact on him, e.g. as to the freight he would wish to charge (the consequence being that, unless the weight-based limit of liability applied instead, his limit of liability would be 666.67 units of account per engine part, rather than 666.67 units of account for the entire contents).

95. Coming then to the *El Greco* case, I have said already that the container load as packed comprised about 2,000 packages (each a bundle of posters and prints, there being about 130,000 posters and prints in all). The statement in the bill of lading alleged to satisfy Article IV rule 5(c), so that the container was not the only 'package or unit', was that there was one container "*said to contain 200,945 pieces posters and prints*". Thus, the bill of lading enumerated (wildly inaccurately to boot) the total number of individual posters and prints present inside the container, whereas the contents of the container, as a cargo, in fact comprised 2,000 packages.

96. Those simple facts generated a divergence of views in the Australian court: at first instance it was said there were 200,945 Hague-Visby Rules 'packages or units'; Beaumont J, in the minority on the appeal, said there were 2,000; the majority on appeal said there was only the container. Nonetheless, and despite the enormous length of the judgments, to my mind it is quite plain that there was no Article IV rule 5(c) enumeration: the 'packages or units' of the cargo as stuffed (the 2,000 bundles) were nowhere mentioned in the bill of lading. As a result, the decision of the majority on the appeal that the default rule under rule 5(c) was not displaced is correct, and therefore, as the majority held, the 'package or unit' limit of liability applied by reference to the container (only).

97. Furthermore, although this is not necessary to see that the decision is right, surely the finding would have been that the enumeration ("*200,945 pieces posters and prints*") was unequivocally inconsistent with being an enumeration of 'packages or units' as packed into the container. Even if it took only 5 seconds per poster or print, packing 200,945 items individually would take 279 man hours. It is surely inconceivable – without needing to be told any more – that posters and prints of such dimensions and weight that over 200,000 fitted inside a single 20' container, were suitable for transportation and had been stuffed for transportation, individually without any consolidation into 'packages'.

98. It was therefore not necessary to the decision for the majority to say, as in effect they did, that even a true enumeration of the number of 'packages or units' of the cargo as stuffed in that case, e.g. "*said to contain 2,000 bundles of posters and prints*", might not suffice if the language used was not consistent only with the proposition that the enumerated bundles had not been (further) consolidated. The suggestion that such a further requirement is present in Article IV rule 5(c) appears in the majority judgment at [284]. It is said to follow from the discussion that precedes it, but I do not think it does at all. In particular, I agree with the immediately prior conclusion, at [282], that "*The words "as packed …" are not a proviso; rather, they are a part of the rule's description of what is to be enumerated in the bill …: the packages or units as packed.*" To my mind, it does not follow that more is required than what I have just called a true enumeration, i.e. a statement identifying, and putting a number on, the items that do in fact comprise the cargo "*as packed*". That is, as I have indicated, all that Article IV rule 5(c), as I read it, has ever called for. Nothing in the history, the authorities or the *travaux préparatiores* explored at huge length in the judgments in *El Greco*, seems to me to point to any need to introduce the further, and rather technical, linguistic requirement proposed by the majority.

99. Ms Masters QC argued that to reject that requirement (allowing the present case to involve a sufficient enumeration of the frozen tuna loins as 'units' of the cargo "*as packed*") would mean that *El Greco* was wrongly decided – the claimant there, she suggested, would then have been entitled to at least 130,000 odd 'package or unit' limits. I disagree. In *El Greco*, the cargo "*as packed*" comprised a number of bundles of posters and prints, each bundle a 'package' under Article IV rule 5. The individual posters and prints were <u>not</u> themselves relevant 'packages or units' (see *The Jamie*, if necessary, i.e. if (*sed quaere*) the individual posters and prints could have been stuffed 'as is'). Therefore, stating the contents to be 130,000 odd posters and prints (or over-stating them to be 200,945 posters and prints) was <u>not</u> enumerating the 'packages or units' of the cargo "*as packed*". If (contrary to paragraph 97 above) that was not obvious (objectively), the carrier might have contemplated from the bill of lading he was asked to issue that there could be 130,000 odd (or 200,945) 'packages or units', but that would not bind him in the event of a claim when the truth of what the cargo "*as packed*" had been would out. There is no need to distort, or read things into, the language of Article IV rule 5, to protect carriers from purported enumerations of container contents that do not in truth enumerate the 'packages or units' packed inside.

100. The learned authors of *Bills of Lading*, as I have mentioned, express the view at para.10.331, that the majority approach in *El Greco* is to be preferred to that of Beaumont J. But they do not appear to consider the approach that I prefer (and which, I note again, does not challenge the correctness of the actual decision in *El Greco* that the default rule ('package or unit' = container) was not displaced). Further, they acknowledge, without it seems to me attempting to justify, that the majority's additional requirement gives a restrictive meaning to the enumeration provision in Article IV rule 5(c), leading to fine differences of wording producing markedly different results including results that appear anomalous. They illustrate by saying that "*one container with 100 car engine parts packed inside*" is a sufficient enumeration but "*one container said to contain 100 car engine parts*" is not. I regard that as anomalous indeed, and not an outcome I would endorse unless the language of rule 5(c) compels it. In my judgment, there is no such compulsion.

101. My conclusion upon Issue (iv)(b), as regards the frozen tuna loins, therefore, is that the 'packages or units' of the cargo as packed were the individual frozen loins and since they were identified and enumerated in the Waybills as being the cargo, by operation of Article IV rule 5(c) of the Hague-Visby Rules they are the 'packages or units' (in fact 'units') for the purposes of Article IV rule 5(a). The language of enumeration is consistent with the truth (namely that the enumerated frozen loins were, "*as packed*", individual articles of cargo, i.e. 'units'). That suffices. If it were necessary under Article IV rule 5(c) that the language of enumeration be consistent only with the proposition that the enumerated loins were, "*as packed*", individual articles of cargo (so as to be 'units'), then I would have said there was no sufficient rule 5(c) enumeration here.

Issue (ii)

Whichever of the Hague or Hague-Visby Rules applies, does limitation fall to be calculated by reference to the Cargo in all three containers collectively, or should limitation be calculated by separate treatment of the Cargo in each container individually?

102. There is an ambiguity in Issue (ii). What is meant by "*separate treatment of the Cargo in each container individually*". Does it mean that a single limit of liability is to be calculated for each container, applicable (in aggregate) to any claim for damage to the cargo in that container? Or does it mean that a limit of liability is to be calculated for each 'package or unit' within each container (if the container is not itself the relevant 'package or unit')? Furthermore, for the Hague-Visby Rules, what does Issue (ii) take to be the contest as to how the weight-based limit of liability applies?

103. The parties did not address these questions, or say much at all about Issue (ii), in their skeleton arguments, which on both sides approached Issue (ii) on the basis that whether the Hague or Hague-Visby Rules applied, the limit was an aggregate limit and the dispute was whether it was an aggregate limit across all three containers applicable to all claims across those containers (the claimant's case), or three aggregate limits, one for each container applicable to all claims in respect of tuna in that container (Maersk Line's case). That would make a difference, I was told, only if the Hague-Visby Rules applied and each frozen loin was a separate 'package or unit' (as I have in the event decided). For then, the claimed extent of damage across Containers A and B would not exhaust the limit of liability across those containers. The balance would be available on the claimant's argument, but not on Maersk Line's, against the claimed extent of damage in the Replacement Container which exceeds the limit of liability across that container, however calculated.

104. It did not seem to me clear that this approach was correct and I wanted to consider whether, instead, at all events for the 'package or unit' limit (under either version of the Rules), the limit was truly a limit 'per package or unit', meaning that the claimant can recover, for each frozen tuna loin or bag individually, up to the limit, with no carry over of 'unused' balances between them. I raised this with the parties at the start of the hearing and there was agreement that the point had not been considered but should be. Following the hearing, I invited supplementary argument in writing, with the opportunity for further oral argument if the parties wished. They agreed to deal with the matter by supplementary written submissions only and I am grateful for that further assistance.

105. It seems logical to start with that aspect of Issue (ii), having decided that the frozen tuna loins were the relevant 'packages or units' (likewise the bags, if the Hague Rules had applied). If the 'package or unit' limit applies severally to each 'package or unit', Issue (ii) as framed rather misses the point for that limit as the containers are then of no relevance to its application.

106. Mr Thomas QC submitted that Article IV rule 5 creates a single limit of liability, calculated by reference to the total number of packages or units which have been damaged. That reflects, he contended, the natural and ordinary meaning of limiting liability '*per* package or unit' (my emphasis). To illustrate, he noted that a roofer contracting to charge £10 per square foot for a roof of 1,500 square feet, does not expect to render 1,500 invoices, one per square foot, but a single invoice for the total contract price of £15,000.

107. I do not find that example helpful. It provides its own context, which proves the result, but that context is different. In quoting a price of £10 per square foot, the roofer is indicating by the use of a pricing rate how the contract price will be calculated. That cannot answer the question here, which is, precisely, whether saying that liability in respect of the carriage of goods shipped as 'packages or units' is limited to a fixed sum 'per package or unit' is saying that there will be a single limit of liability (akin to a single contract price), calculated at that rate.

108. Nor would the result of the example, if it were apposite, support the result for which Mr Thomas QC contended in relation to Article IV rule 5. The logic of the roof pricing, applied to Article IV rule 5, would be that there was a single limit of liability calculated by multiplying the number of 'packages or units' carried by the limit of liability rate. But the result contended for is that there is a variable aggregate limit of liability, varying with how many 'packages or units' are damaged. That to my mind is very odd. For example, suppose that Containers A and B had both contained 300 frozen loins and 300 bags. Each is identically mishandled resulting in materially identical damage to the frozen loins; the bagged tuna in Container A is unharmed, but in Container B there is very slight damage, but not *de minimis*, across all the bags. There seems to me no coherent reason why the compensation available for the damaged loins in Container B should be radically different, yet that is the result of Mr Thomas QC's argument.

109. That flaw would not be suffered by a single, aggregate limit of liability for all claims calculated upon the number of 'packages or units' carried (as would in fact result from the logic of the roof pricing example). But that limit would display a different significant oddity. Here, there was a single contract for twelve containers containing (in total) c.6,000 'packages or units'; but the same carriage could equally have been booked as twelve separate orders, or four orders each for three containers, or as the case may be. On the roofing price logic, the limit of liability applicable where (say) the contents of just one of the containers is damaged varies greatly across those different ways of booking the transit. It seems to me odd to read a provision that the carrier will not be liable for more than a limit amount 'per package or unit' as variable in that way.

110. As well as having their own individual reasons, those negative reactions to the possible alternatives are also reflections of my view that the ordinary meaning, of a statement that liability for cargo shipped as 'packages or units' is limited to a limit

amount 'per package or unit', is that there is a separate limit for each. In other words, that is to my mind what the language of Article IV rule 5 conveys. A better analogy than that of Mr Thomas QC's roofer is a cargo insurer covering the tuna but only up to a limit of £1,000 per loin. If there are 500 loins per container (6,000 loins in all), the insurer is not providing a fixed, single limit of indemnity of £6,000,000, nor a fixed, single limit of indemnity per container of £500,000, nor a variable, single limit of indemnity of £1,000 x no. of loins damaged, nor a series of such variable, single limits, one per container. Rather, he is insuring each loin and the amount of his liability if a claim arises is to be calculated accordingly. That is no less so because, in law, if a single insured event damaged many loins there would be a single cause of action and any judgment would be for a single amount of compensation calculated by reference to those limits.

111. Likewise here, Maersk Line's duties of care extended to each loin and the 'package or unit' limit under Article IV rule 5 calls for the amount of its liability, a claim having arisen, to be calculated accordingly, even if (which may or may not be the case on the facts, if there be liability at all) a single breach of duty resulted in all the damage so that there is a single cause of action that will lead to a single damages award.

112. There is no decision on this point, but: *Carver*, *supra*, at para.9-250 describes the Article IV rule 5 limit as "… *a fixed sum per package or unit* …"; as I read *The Jamie*, *supra*, Leggatt J arrived at his conclusion that liability was limited to £900 on the basis that, strictly speaking, each bundle of timber attracted a separate limit of £100; and in *The Rosa S* [1989] 1 QB 419, where 1 case in a consignment of 222 was damaged, it does not seem to have occurred to anyone that the 221 undamaged cases had any involvement in calculating the applicable limit. Furthermore, I agree with Ms Masters QC that the several nature of the 'package or unit' limit in the Hague-Visby Rules is confirmed rather than contradicted (as Mr Thomas QC suggested) by the decision to specify that the new weight-based limit was a limit per kg "*of the goods lost or damaged*". No such express language has ever been needed for the 'package or unit' limit, as it seems to me, because it naturally reads as creating a separate limit for each.

113. I also agree with Ms Masters QC that there is no practical difficulty in that reading. By definition the cargo will have comprised identifiable, and identifiably separate, packages or units; it is the routine undertaking of cargo surveyors and loss adjusters to assess the nature and extent of loss or damage item by item where it occurs and is not uniform across a cargo. Ms Masters QC also highlighted in her submission the oddity, for a limit of liability 'per package or unit', that two identical, high value 'units', identically damaged, might benefit from very different limits of liability depending on whether they were carried together with other items, e.g. (her particular example) a valuable car packed alone in a container or packed together with a large number of low value packs of minor spares, each a separate 'package'. My preferred reading, that the 'package or unit' limit applies 'package or unit' by 'package or unit', prevents any such oddity from arising.

114. I conclude, therefore, that under Article IV rule 5 of the Hague-Visby Rules in this case, the meaning and effect of the 'package or unit' limit of liability is that Maersk Line is liable for up to 666.67 units of account for each frozen tuna loin, considered separately. (The same would hold true for the Hague Rules, save of course that the limit would be £100 rather than 666.67 units of account.) For the bagged tuna, under

the Hague-Visby Rules there is a single 'package or unit' limit of liability of 666.67 units of account, because of Article IV rule 5(c); but under the Hague Rules, had they applied, Maersk Line would have been liable for up to £100 for each bag, considered separately.

115. There is one further point to consider for the Hague-Visby Rules. If the weight-based limit also applies 'package or unit' by 'package or unit', then it is relevant only to the bagged tuna: each frozen loin as a separate 'unit' attracts a separate limit of 666.67 units of account and weighed much less than the 333.34 kg needed for the weight-based limit to be greater; for want of any rule 5(c) enumeration, the bagged tuna attracted (in aggregate) only a single 'package' unit of 666.67 units of account, the 'package' being Container A, but it weighed (assuming the claimant is right that there were 460 bags) 9,200 kg ± c.10% and so the weight-based limit would apply unless it should transpire that only c.3.5% (or less) of the bagged tuna by weight was in fact damaged. However, if, unlike the 'package or unit' limit, the weight-based limit creates a single, aggregate, limit of liability calculated at the rate of 2 units of account per kg on the total weight of cargo lost or damaged, it is perhaps possible that it could produce a higher recovery for the claimant on the loins than the 'package or unit' limit (I have no way of judging that at this stage).

116. In the paper cited in paragraph 48 above, Mr Diamond QC suggested at p.244 that Article IV rule 5 of the Hague-Visby Rules did not allow for a mixture of limits ('package or unit' limits and weight-based limits) in respect of a single consignment. The issue only arises where there are for these purposes 'packages or units' at all. For example, where the Hague-Visby Rules apply to a bulk cargo, the applicable limit will necessarily be the weight-based limit, as envisaged by the *travaux préparatoires* to the Visby Protocol and now confirmed by *The Aqasia*.

117. Where there are 'packages or units', Article IV rule 5(a) requires a comparison to be made between the 'package or unit' limit – which I have held to operate 'package or unit' by 'package or unit' – and a weight-based limit. I agree with Ms Masters QC that there is no linguistic or practical reason why that comparison should not be done 'package or unit' by 'package or unit'. Indeed the very requirement, to assess whether the weight-based limit will be higher than the 'per package or unit' limit, to my mind suggests that the weight-based limit must be applied, in the case of cargo comprising packages or units, in a manner consistent with the 'package or unit' limit. That is what will make for meaningful comparison and serves one of the purposes of introducing the weight-based limit, namely to allow a heavy individual article that is a single package or unit to attract a higher limit of liability based on its weight.

118. I add finally, by way of practical demonstration, that on the language of Article IV rule 5(a), I found it both natural and practicable in paragraph 115 above to identify and articulate for Container A how the frozen loins and the bagged tuna could call for separate treatment, with the loins attracting the 'package or unit' limit but the bagged tuna probably the weight-based limit.

119. My conclusion, then, on Issue (ii) is that:

    i) if the Hague-Visby Rules apply: each frozen loin as a separate 'unit' attracts a separate limit of 666.67 units of account; the limit of liability in respect of damage to the bagged tuna is the greater of 666.67 units of account and (2 x

W) units of account, where W is the gross weight in kg of the bagged tuna damaged;

ii) if the Hague Rules had applied: each frozen loin as a separate 'unit' would have attracted a separate limit of £100; for the bagged tuna, there would have been, also separately, a limit of liability of £100 for each bag.

Conclusion

120. I shall hear counsel if there is any issue as to the precise form of order to draw up on this judgment, and as to consequential matters including costs, to the extent such matters are not agreed.

121. I therefore close this judgment by collecting and re-stating in one place, for convenience, my conclusions upon the Issues. For the reasons set out above, they are as follows:

Issue (i)

Is liability limited pursuant to Article IV r 5 of the Hague Rules or is it limited pursuant to Article IV r 5 of the Hague-Visby Rules (whether applicable compulsorily or contractually)?

Liability in this case is limited by Article IV rule 5 of the Hague-Visby Rules, which apply with the force of law, except in relation to any damage to tuna from Container B or the Replacement Container that Maersk Line proves arose out of the final stage of transit, after completion of discharge of the Container at Yokohama, in respect of which liability is limited by Clause 7.2(c) of the Maersk Terms.

Issue (iii)

If liability is limited pursuant to Article IV r 5 of the Hague Rules, are the relevant packages or units the containers or the individual pieces of tuna?

This Issue does not arise (see Issue (i) above). Had it arisen, the answer would have been that each frozen tuna loin and each bag (for the bagged tuna in Container A) was a separate 'package or unit' under Article IV rule 5 of the Hague Rules.

Issue (iv)(a)

For the purposes of Article IV r 5(c) of the Hague-Visby Rules, is it relevant to look at what is enumerated in the Draft B/L, or is it only relevant to look at what is enumerated in the Waybills?

By agreement, it is only relevant to look at the Waybills.

Issue (iv)(b)

If liability is limited pursuant to Article IV r 5 of the Hague-Visby Rules, are the containers deemed to be the relevant package or unit for the purposes of Article

IV r 5(a), or are the individual pieces of tuna the relevant packages or units? In particular, were all or any of the individual pieces of tuna, packages or units enumerated in the relevant document as packed in each container for the purposes of Article IV r 5(c)?

This Issue does arise (see Issue (i)). The answer is that under Article IV rule 5(a)/(c) of the Hague-Visby Rules:

- each frozen tuna loin is a separate 'package or unit', but

- as regards the bagged tuna in Container A, there was only one 'package or unit', namely the Container.

Issue (ii)

Whichever of the Hague or Hague-Visby Rules applies, does limitation fall to be calculated by reference to the Cargo in all three containers collectively, or should limitation be calculated by separate treatment of the Cargo in each container individually?

If the Hague-Visby Rules apply (which they do for Container A and do for Container B and the Replacement Container except for damage shown by Maersk to have arisen out of the final stage of transit after discharge at Yokohama – see Issue (i)):

- each frozen loin as a separate 'unit' attracts a separate limit of 666.67 units of account, and

- the limit of liability in respect of damage to the bagged tuna is the greater of 666.67 units of account and (2 x W) units of account, where W is the gross weight in kg of the bagged tuna damaged.

If the Hague Rules had applied (which come what may they do not):

- each frozen loin as a separate 'unit' would have attracted a separate limit of £100, and

- each bag of bagged tuna in Container A as a separate 'package' would also have attracted a separate limit of £100.

Appendix – Maersk Terms, Clauses 5, 6 and 7

5. Carrier's Responsibility: Port-to-Port Shipment

5.1 Where the Carriage is Port-to-Port, then the liability of the Carrier for loss of or damage to the Goods occurring between the time of loading at the Port of Loading and the time of discharge at the Port of Discharge shall be determined in accordance with any national law making the Hague Rules compulsorily applicable to this bill of landing, or in the case of shipments to or from the United States shall be determined by US COGSA or in any other case in accordance with the Hague Rules Articles 1-8.

5.2 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, howsoever caused. Notwithstanding the above, to the extent any applicable compulsory law provides to the contrary, the Carrier shall have the benefit of every right, defence, limitation and liberty in the Hague Rules as applied by clause 5.1 during such additional compulsory period of responsibility, notwithstanding that the loss or damage did not occur at sea.

5.3 Where US COGSA applies then the provisions stated in the said Act shall govern during Carriage to or from a container yard or container freight station at the Port of Loading before loading on the vessel or at the Port of Discharge before delivery to the inland carrier. If the Carrier is requested by the Merchant to procure Carriage by an inland carrier in the United States of America and the inland carrier in his discretion agrees to do so, such carriage shall be procured by the Carrier as agent only to the Merchant and Carrier shall have no liability for such carriage or the acts or omissions of such inland carrier.

5.4 In the event that the Merchant requests the Carrier to deliver the Goods:

(a) at a port other than the Port of Discharge; or
(b) at a place of delivery instead of the Port of Discharge, and the Carrier in its absolute discretion agrees to such request, such further Carriage will be undertaken on the basis that the Terms and Conditions of this bill of lading are to apply to such Carriage as if the ultimate destination agreed with the Merchant had been entered on the reverse side of this bill of lading as the Port of Discharge or Place of Delivery.

6. Carrier's Responsibility – Multimodal Transport

Where the Carriage is Multimodal Transport, the Carrier undertakes to perform and/or in his own name to procure performance of the Carriage from the Place of Receipt or the Port of Loading, whichever is applicable, to the Port of Discharge or the Place of Delivery, whichever is applicable. The Carrier shall have no liability whatsoever for loss or damage to the Goods occurring before or after the applicable points, and, the Carrier

shall be liable for loss or damage occurring during the Carriage only to the extent provided herein:

6.1 Where the stage of Carriage where loss or damage occurred is not known.

(a) The Carrier shall be relieved of liability for any loss or damage where such loss or damage was caused by:

(i) an act or omission of the Merchant or Person acting on behalf of the Merchant other than the Carrier, his servant, agent or Subcontractor,

(ii) compliance with instructions of any Person entitled to give them.

(iii) insufficient or defective condition of packing or marks,

(iv) handling, loading, stowage or unloading of the Goods by the Merchant or any Person acting on his behalf,

(v) inherent vice of the Goods,

(vi) strike, lockout, stoppage or restraint of labour, from whatever cause, whether partial or general,

(vii) a nuclear incident,

(viii) any cause or event which the Carrier could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence.

(b) The burden of proof that the loss or damage was due to a cause(s) or event(s) specified in clause 6.1 shall rest on the Carrier, but if there is any evidence the loss or damage is attributable to one or more cause or event specified in clause 6.1(a)(iii), (iv) or (v), it shall be presumed that it was so caused. The Merchant shall, however, be entitled to prove that the loss or damage was not, in fact, caused either wholly or partly by one or more of these causes or events.

6.2 Where the stage or Carriage where the loss or damage occurred is known, subject to clause 18, the liability of the Carrier in respect of such loss or damage shall be determined;

(a) For shipments to or from the United States of America, (i) by the provisions of U.S. COGSA if the loss or damage occurred during Carriage by sea, any waterborne Carriage in the U.S., or Carriage to or from a container yard or container freight station at Port of Loading before loading on the carrying vessel or at the Port of Discharge before delivery to the inland carrier; and (ii) if the loss or damage occurred during any inland carriage in the U.S., in accordance with whichever imposes a lesser liability on the Carrier between either the contact of carriage or tariff of the inland carrier in whose custody the loss or damage occurred, or the provisions of U.S. COGSA.

(b) Where clause 6.2(a) does not apply, by the provisions contained in any international convention or national law which provisions:

(i) cannot be departed from by private contact to the detriment of the Merchant, and

(ii) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of the Carriage during which the loss or damage occurred and received as evidence thereof any particular document which must be issued if such international convention or national law shall apply; or

(c) Where neither clause 6.2(a) nor (b) apples, then (i) by the Hague Rules Articles 1-8 if the loss or damage is known to have occurred during Carriage by sea or waterborne Carriage not in the U.S.; and (ii) if the loss or damage occurred during any inland carriage not in the U.S., in accordance with the contact of carriage or tariffs of any inland carrier in whose custody the loss or damage occurred or in accordance clauses 6.1 and clause 7.2(c), whichever imposes less liability on the Carrier.

6.4 If the Merchant requests, and the Carrier agrees to amend the Place of Delivery, such amended Carriage will be undertaken on the basis that the Terms and Conditions of this bill of lading are to apply until the goods are delivered to the Merchant at such amended Place of Delivery.

7. Compensation and Limitation of Liability

7.1 Subject always to the Carrier's right to limit liability as provided for herein, if the Carrier is liable for compensation in respect of loss of or damage to the Goods, such compensation shall be calculated by reference to the value of the Goods plus Freight and insurance if paid. The value of the Goods shall be determined with reference to the commercial invoice, customs declaration, any prevailing market price (at the place and time they are delivered or should have been delivered), production price or the reasonable value of Goods of the same kind and/or quality.

7.2 Save as is provided in clause 7.3:

(a) If the Hague Rules apply as national law, by virtue of clause 5.1 or clause 6.2(b) the Carrier's liability shall in no event exceed the amounts provided in the applicable national law and if the Hague Rules apply under clauses 5.1 or 6.2(c), the Carrier's liability shall in no event exceed GBP 100 per package or unit.

(b) For shipments to or from the U.S., the liability of the Carrier and/or Vessel shall not exceed US$500 per package or customary freight unit, or any lesser limitation afforded per Clause 6.2(a)(ii).

(c) In all other cases, compensation shall not exceed 2 SDR per kilo of the gross weight of the Goods lost or damaged.

7.3 The Merchant agrees and acknowledges that the Carrier has no knowledge of the value of the Goods, and higher compensation that that provided for in this bill of lading may be claimed only when, with the consent of the Carrier, (i) for multimodal shipments from the U.S. where U.S. inland carriage is undertaken, the Merchant elects to avoid any liability limitation provided herein by prepaying extra freight and opting for full liability under the Carmack Amendment by complying with the terms in Carrier's Tariff; and (ii) in all other cases, the Shipper declares and the Carrier states the value of the Goods declared by the Shipper upon delivery to the Carrier has been stated in the box marked "Declared Value" on the reverse of this bill of landing and extra freight is pre-paid. In that case, the amount of the declared value shall be substituted for the limits laid down in this bill of lading, and any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

7.4 Nothing in this bill of lading shall operate to limit or deprive the Carrier of any statutory protection, defence, exception or limitation or liability authorised by any applicable laws, statutes or regulations of any country. The Carrier shall have the benefit of the said laws, statutes or regulations as if it were the owner of any carrying ship or vessel.