The 1924 Bills of Lading Convention and its 1968 and 1979 Protocols (Hague-Visby Rules)

Action for Indemnity (Art. 3 (6 bis))

France

Cour de Cassation (Ch. Com) 15 March 2005, *M.me Maurel* v. *M. Tessah, Panalpina France Transports Internationaux and Delmas* (2005 DMF 536)

M. Tessah purchased from Mrs. Maurel a press for delivery at Douala. Mrs. Maurel requested Panalpina France Transports Internationaux to perform the carriage for delivery of the press at destination by 14 January 1998 and Panalpina sub-contracted the carriage to Delmas. Since the press never arrived at destination the buyer brought an action against the seller for the avoidance of the contract. The seller on 22 November 1999 brought an action for indemnity against Panalpina and Delmas.

The Tribunal de Commerce in which the action was brought and then the Cour d'Appel of Toulouse with judgment of 13 June 2003 declared the contract discharged but rejected the actions against Delmas on the ground that it had been brought after the lapse of the one year time limit.

Mrs. Maurel and Panalpina appealed to the Cour de Cassation stating that their actions had been brought within the three months additional period set out in article 32(2) of law 18 June 1966, corresponding to article 3(6 bis) of the Hague-Visby Rules.

Held, by the Corte di Cassazione, that:

> *[1] The action for indemnity reference to which is made in article 32(2) of law 18 June 1966 (corresponding to article 3(6 bis) of the Hague-Visby Rules) relates to the situation where the main action is based on a contract and therefore, an action brought against the carrier by the seller who is sued by the buyer because the goods sold never arrived at destination is the main action reference to which is made in article 31(1) (corresponding to article 3, paragraph 6, sub-paragraph 4 of the Hague-Visby Rules).*

AMOUNT RECOVERABLE (Art. 4. 5(b))

England

Mediterranean Shipping Company S.A. v Trafigura Beheer BV (C.A.) [2007] EWCA Civ 794 Case No. 2007 0997 A3

This is a case in which cargo-owners have sued shipowners for conversion and breach of contract in relation to a consignment of copper stowed in 18 containers shipped at Durban for delivery in Shanghai. Fraudsters arranged to create and present a false bill of lading against which the shipowners gave a delivery order entitling the fraudsters to delivery from the Hudong Container Terminal warehouse, in which the goods had been stored after arrival. Customs at Shanghai will not permit cargo to be taken out of the container terminal in the port without payment of customs duty and VAT and production of a delivery order stating that payment has been so made. The fraudsters have paid the customs duty and their delivery

order has been endorsed by Customs to that effect. Only a day later the cargo-owners presented their (genuine) bill of lading and the shipowners were able to ensure that delivery to the fraudster did not take place. Although the shipowners gave another delivery order to the cargo-owners, that delivery order has not been stamped with any record of duty having been paid and the cargo-owners cannot therefore obtain delivery from the warehouse. This impasse has continued and still existed at the time of the judgment. In these circumstances the cargo-owners sued the shipowners and obtained an order from Aikens J ordering the shipowner to deliver the cargo or pay the full value of the cargo. From that order the shipowners appealed contending that their liability is only a limited one. This depended on whether the shipowners' liability was governed by the Hague Rules or the Hague-Visby Rules or the terms contained in the bill of lading.

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

The shipowners submitted that the 1924 Rules applied after discharge so that they were entitled to limit the claim to £100 per package or unit. The cargo-owners submitted that the Hague Rules (in whichever version), if one looked at the Rules themselves, only applied for the period between loading and discharge. The period after discharge was therefore governed by the terms of the bill of lading. Although the parties could agree that the Rules applied to any part of the shipowners' obligation that occurred before loading and after discharge, they had not so agreed in this case. The judge accepted the cargo-owners' submissions.

Clauses 4(ii) and (iii) provided:

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

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

Clause 7 provided, inter alia:

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

Held, by the Court of Appeal, that:

[1] If the carrier fails to deliver the goods against production of the bill of lading once the sea carriage is over the damages suffered by the holder of the bill of lading must be assessed on the basis of the value of the goods at the date of the judgment.

Italy

Corte di Cassazione 27 October 1998, n. 10692, *Adriatic Shipping Company S.r.l.* v. *Continentale Italiana S.p.A.–The "Mirna"* (2000 Dir. Mar. 505)

A shipment of cereals in bulk was carried from Port Sudan to Venice on board the m/v *Mirna*. Upon its discharge in Venice it was found that foreign materials were mixed with cereals and that a shortage had occurred. The consignees, Cerealmangimi S.p.A., sued the agents of the carrier before the Tribunal of Venice claiming damages and stating inter alia that they had to replace a part of the cargo by purchasing other goods of the same quality. The claim was rejected in part by the Tribunal of Venice and its judgment was affirmed by the Court of Appeal of Venice. Cerealmangimi then appealed to the Supreme Court.

Held, by the Corte di Cassazione, that:

(1) The liability of the carrier is not excluded by the lack of proof by the consignee that he has replaced the goods lost or damaged with other goods or that he has incurred an expense for such purpose. The invoice price of the goods can be presumed to correspond to their market price.

BILLS OF LADING (Art. 1 (b))

England

J. C. MacWilliams Co. Inc. v. Mediterranean Shipping Company S.A. – The "Rafaela S." (C.A.) [2003] EWCA Civ. 556; [2003] 2 Lloyd's Rep. 113; 2003 A.M.C. 2035

Four containers with printing machinery were carried from Durban to Felixstowe on the m/v *Rosemary* and then from Felixstowe to Boston, their final destination, on the m/v *Rafaela S.* Both vessels were owned by or demise chartered to Mediterranean Shipping Co. S.A. (MSC) of Geneva. A straight bill of lading was issued by MSC at Durban. On the way to Boston the machinery was badly damaged. One of the issues decided by the arbitrators to which the dispute was submitted was whether the straight bill of lading was a bill of lading or a similar document of title within the English Carriage of Goods by Sea Act 1971 which gives to the Hague-Visby Rules the force of law.

If the Hague-Visby Rules did not apply, the US Cogsa limit of liability of US$ 500 per package would have applied. The arbitrators decided that this was not the case and their decision was upheld by the Commercial Court.

Permission was given to the claimants to take a second appeal to the Court of Appeal

Held, by the Court of Appeal, that:

(1) A straight bill of lading, the production of which is required on delivery, is a bill of lading or similar document of title to which the Hague-Visby Rules apply

Germany

The MV "New York Express", Oberlandesgericht Hamburg (Court of Appeal) 2 November 2000, (Transportrecht 2001, p. 87)*

Two containers with machinery were carried from Bremerhaven to Newark/New Jersey on the MV *New York Express*. The carrier issued an express cargo bill. The express cargo bill provided for the application of German law. After discharging had been completed at Newark and in the course of the handling of the cargo on the terminal, the terminal operator being the carrier's subcontractor, part of the cargo was damaged. The consignee claimed damages

from the carrier under the contract of carriage. The issue to be decided by the Court was whether the express cargo bill constituted a bill of lading.

Held, by Hambug Oberlandesgericht (Court of Appeal), that:

[1] An express cargo bill is not a bill of lading or similar document of title within the meaning of Art. 1(b) of the Hague-Visby Rules or para. 662 German Commercial Code.

* By the courtesy of Dr. Cristoph Horbach, Lebuhn & Puchta Rechtsanwälte, Vorsetzen 35, D-20459 Hamburg - cristoph.horbach@lebuhn.de

BILLS OF LADING (Art. 1 (b))

Hong Kong Special Administration Region

Carewins Development (China) Limited v. Bright Fortune Shipping Limited and Carewins Development (China) Limited v. Hecny Shipping Limited, High Court of the Hong Kong Special Administrative Region, 27 July 2006
(http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp - Case no. HCCL 29/2004)

In March 2003 Carewins Development (China) Limited of Hong Kong gave instructions to Bright Fortune Shipping Limited and to Hecny Shipping Limited for the carriage from Hong Kong to Los Angeles of 45 containers of footwear products. All bills of lading were issued by Bright Fortune on its form but some were signed by Bright Fortune "as agents only" and on the reverse side the clause headed "Definitions" so provided, inter alia:
The term "Carrier" means Hecny Shipping Ltd.
All such bills of lading named the buyer of the goods, Artist Fashion, Inc. of Los Angeles as consignee.
Out of the 45 containers 23 were delivered to the warehouse of Artist Fashion, without production of the relevant bills of lading and were subsequently seized by another company , Burberry Limited, who alleged that Artist Fashion had infringed trade marks owned by Burberry.
Carewins, who had net received payment of the goods loaded in the 23 containers, brought proceedings in the High Court of Hong Kong Special Administration against Bright Fortune and Hecny claiming damages for the delivery of the containers without production of the bills of lading.
Hecny denied that it had entered into any contract of carriage with Carewins, since the bills of lading had been issued on a Bright Fortune form and had been signed by Bright Fortune

CARGOWORTHINESS

Held, by the High Court of the Hong Kong Special Administrative Region, that:

[1] A straight bill of lading must be surrendered to the carrier in order obtain delivery of the goods.

BURDEN OF PROOF (Art. 3.(1)-(2); Art.4.(1)-(2))

United States

Steel Coils, Inc. v. M/v "Lake Marion", in rem; Lake Marion, Inc. and Bay Ocean Management, Inc., in personam - v. Western Bulk Carriers K/S Oslo - v. Itochu International, Inc. United States Court of Appeals for the Fifth Circuit, May 13, 2003 (2003 AMC 1408)

Steel Coils, Inc., an importer of steel products with its principal office in Deerfield, Illinois, ordered flat-rolled steel from a steel mill in Russia. Itochu International, Inc., which then owned ninety per cent of the stock of Steel Coils, purchased the steel and entered into a voyage charter with Western Bulk Carriers K/S Oslo for the m/v *Lake Marion* to import the steel to the United States. Western Bulk had time chartered the vessel from *Lake Marion*. Inc. As Lake Marion, Inc.'s manager, Bay Ocean Management, Inc. employed the master and crew of the vessel.
The *Lake Marion* took on the steel coils at the Latvian port of Riga and discharged them at New Orleans and Houston. Steel Coils alleged that the coils were damaged by salt water and filed suit under COGSA against the m/v *Lake Marion in rem* and against Lake Marion, Inc., Bay Ocean Management and Western Bulk *in personam*, requesting US$ 550,000 in damages, with a separate claim of negligence against Bay Ocean.
After a bench trial, the U.S. District Court for the Eastern District of Louisiana held the defendants jointly and severally liable to Steel Coils for US$ 262,000 and Bay Ocean liable for an additional US$ 243,358.94.
From this judgment the vessel interests appealed and Steel Coils and Western Bulk cross-appealed.

Held, by the U.S. Court of Appeals for the Fifth Circuit, that:

(1) COGSA provides a complex burden-shifting procedure. Initially, the plaintiff must establish a prima facie case by demonstrating that the cargo was loaded in an undamaged condition and discharged in a damaged condition and for the purpose of determining the condition of the goods at the time of receipt by the carrier, the bill of lading serves as prima facie evidence that the goods were loaded in the condition therein described. If the plaintiff presents a prima facie case, the burden shifts to the defendants to prove that they exercised due diligence to prevent the damage or that the damage was caused by one of the exceptions set forth in section 1304(2) of COGSA, including "[p]erils, dangers, and accidents of the sea or other navigable waters" and "[l]atent defects not discoverable by due diligence." If the defendants show that the loss was caused by one of these exceptions, the burden returns to the shipper to establish that the defendants' negligence contributed to the damage. Finally, if the shipper is able to establish that the [defendants'] negligence was a contributory cause of the damage, the burden switches back to the [defendants] to segregate the portion of the damage due to the excepted cause from that portion resulting from the carrier's own negligence.

CARGOWORTHINESS (Art. 3. 1(c))

Italy

Court of Appeal of Venice 1 March 1999, *Plaumann & Co. GmbH* v. *Adriatica di Navigazione - The "Egizia"* (2001 Dir. Mar. 1450)>

Plaumann and Co. GmbH of Hamburg purchased 480 tons onions which were loaded in Alexandria, Egypt on the m/v *Egizia* of Adriatica di Navigazione S.p.A. and carried from Alexandria to Trieste. A clause was inserted in the bills of lading to the effect that the consignment consisted of perishable goods and that the vessel was not responsible for damages. At discharge the goods were found to be seriously damaged and their sale for human consumption was denied. Plaumann and Co. commenced proceedings before the Tribunal of Venice against Adriatica di Navigazione claiming damages. The claim was rejected by the Tribunal of Venice and Plaumann and Co. appealed to the Court of Appeal of Venice.

Held, by the Court of Appeal of Venice, that:

< *(1) The bill of lading clause which exonerates the carrier from liability in respect of damage to perishable goods stowed in the holds is null since it is in conflict with Art. 3 r. 1(c) of the Hague-Visby Rules which expressly provides that the carrier has the duty to make the holds fit and safe for the reception, carriage and preservation of the goods, as well as with Art. 3 r. 8 which provides that any clause relieving the carrier from liability is null and void.*

DANGEROUS GOODS (Art. 4. 6)

England

Bunge S.A. v. *ADM do Brasil Ltda and Others*, High Court of Justice, Queen's Bench Division, Commercial Court [2009] EWHC 845 (Comm.) *

This is an appeal against eight arbitration awards issued by maritime arbitrators in relation to a dispute concerning the shipment of allegedly dangerous cargo. The cargo in question was 44,337.515 tonnes of Brazilian soyabean meal pellets, "SBMP", loaded on board the *Darya Radhe* at Paranagua by nine shippers between 20 and 27 January 2004. The arbitrators found that there had been introduced with this cargo during loading less than 20 and probably no more than 14 live rats. Discovery of the rats during loading was said by Bunge SA, ("Bunge"), who were the time charterers of the vessel, to have been responsible for their incurring extraordinary expenditure and delay in dealing with the matter in an appropriate way.

Their loss was put at in excess of US$2 million. Bunge say that SBMP loaded with accompanying rats is a dangerous cargo. Bunge accordingly brought claims for damages against the nine shippers to each of which it had issued at least one bill of lading.

Held, by the Queen's Bench Division, Commercial Court, that:

[1] It is most unlikely that the word "dangerous" can be intended when used in Article IV Rule 6 of the Hague Rules to bear a meaning going beyond physical danger. The owner has the right under the Rule at any time before discharge and without incurring a liability to pay compensation to land "dangerous" cargo at any place or to destroy it or to render it innocuous. Quite apart from the obvious pointer given by the expression "render it innocuous" it would be very surprising if the owner had the right without incurring any

liability whatsoever either to land at a non-contractual destination or even to destroy cargo which posed no physical threat to either ship or other cargo carried. The arbitrators made no error of law but on the contrary came to the correct conclusion that Bunge could not establish a breach of contract, or liability under the Hague Rules, even assuming that it could show that one or more of the shippers was responsible for the introduction of one or more rats.

* By the courtesy of Adv. Filippo Lorenzon, Lecturer in Law and Member of the Institute of Maritime Law, University of Southampton (F.Lorenzon@soton.ac.uk)

Effort Shipping Co. Ltd. v. *Linden Management S.A. and Another–The "Giannis NK"* House of Lords 22 January 1998 ([1999] 1 Lloyd's Rep. 337).

In November 1990 a cargo of ground-nut extraction mill pellets was loaded into hold 4 of the m/v *Giannis NK*. Cargoes of bulk wheat pellets had been loaded into other holds at previous loading ports. The ground-nut pellets were fumigated after loading and an SGS certificate was issued. The vessel then crossed the Atlantic, discharged at St. Juan in Puerto Rico part of the grain pellets and then proceeded to Rio Haina in the Dominican Republic to discharge the balance of the cargo. Upon arrival it was inspected by the Agricultural Authorities and live insects and shed skins were found in the cargo and the vessel was quarantined. After fumigation live insects were still found in the vessel holds and the vessel was ordered to leave the port with both the ground-nut cargo and the wheat cargo still on board. Then the vessel sailed back to St. Juan and after examination of the cargo by the State Department of Agriculture a notice was served on the owners requiring them either to return the cargo to its country of origin or to dump it at sea. The vessel then proceeded out to sea and dumped both the ground-nuts and the balance of the wheat still on board.

The owners claimed against the charterers and the shippers stating the ground-nuts cargo was a dangerous cargo by reason of the fact that it contained khapra beatle and claimed that they could recover from the shippers pursuant to art. IV, r. 6 of the Hague Rules which were incorporated into the contract of carriage evidenced by the bill of lading. Judgment in favour of the claimant was issued by the Commercial Court ([1994] 2 Lloyd's Rep. 171) and the decision of the Commercial Court was affirmed by the Court of Appeal ([1996] 1 Lloyd's Rep. 577). Leave to appeal to the House of Lords was granted.

Held, by the House of Lords, that:

(1) The word "dangerous" in the expression "goods of … [a] dangerous nature" must be given a broad meaning. Goods may be dangerous if they are dangerous to other goods, even though they are not dangerous to the vessel itself. A groundnut cargo is of a dangerous nature if it is liable to give rise to the loss of the other cargo loaded on the same vessel by dumping at sea. The liability of the shipper under article 4(6) of the Hague Rules is strict irrespective of fault or neglect on his part.

United States

In Re M/V DG Harmony, United States Court of Appeals – Second Circuit, 3 March 2008*

The M/V *DG Harmony*,owned by Navigator Shipping Ltd. and chartered to several charterers, in her voyage from New York to South America in October 1998 loaded at Newport News, Virginia ten containers each of which contained approximately 16,000 kilograms of calcium hypochlorite (hydrated) (calhypo). The shipper of the container was PPG Industries Inc. When the vessel was off the northern coast of Brazil an explosion ripped through the third hold, where the calhypo was stowed, and all efforts of the crew to fight

against the fire that developed after the explosion were of no avail. The fire resulted in a constructive total loss of the vessel. The owners of the vessel and of other cargo on board as well as of the insurers brought proceedings against PPG in the United States District Court for the Southern District of New York holding them strictly liable under § 4(6) of the Carriage of Goods. The order of the District Court finding PPG strictly liable was appealed by PPG.

Held, by the U.S. Court of Appeals-II Circuit, that:

[1] Shippers cannot be held strictly liable in respect of loss or damage caused by the dangerous nature of their cargo if the carrier was generally aware of such dangerous nature, even though he may not have been aware of its precise characteristics. In such circumstances, however, the shipper may be .liable on account of his negligent failure to warn the carrier about the dangers inherent in the cargo, provided the carrier demonstrates (a) that the shipper failed to warn him about dangers inherent in the cargo of which the stevedore and ship's master could not reasonably have been expected to be aware; and (b) that an absent warning, if given, would have impacted stowage.

* By the courtesy of David Martin Clark (www.onlinedmc.co.uk)

Contship Containerlines, Ltd. v PPG Industries, Inc. - The "Contship France", United States Court of Appeals for the Second Circuit 21 March 2006 (not yet reported)

PPG Industries, Inc. shipped 512 drums of Cal Hypo aboard the *Contship France,* operated by Contship Containerlines, Inc. which sailed from Charleston, South Carolina in late September 1997. Upon the ship's arrival in Tahiti, a fire broke out. The source of the fire was one batch of Cal Hypo, consisting of 80 drums each weighing 425 pounds. The particular type of Cal Hypo at issue, designated "UN 2880" by Department of Transportation regulations, is known to be flammable. When exposed to heat at or above its "critical temperature," Cal Hypo will generate heat from decomposition faster than the heat can dissipate, resulting in a "thermal runaway" that can ignite surrounding materials. The critical temperature of a given drum of Cal Hypo depends in part on the volume of the drum. Contship brought proceedings against PPG in the US District Court, Southern District of New York, claiming damages. Contship conceded awareness (based on published specifications) that Cal Hypo could ignite at temperatures over 55°C; and PPG conceded awareness that the cargo could ignite at lower temperatures. After a bench trial, the district court found that the proximate cause of the fire was Contship's failure to consider the impact of heat on the cargo when it stowed the cargo in a spot that sustained temperatures of at least 47°C. On appeal, Contship argued that the district court erred in dismissing its claims of strict liability and duty to warn.

Held, by the United States Court of Appeals for the Second Circuit, that:

[1] A carrier cannot invoke strict liability if it knows that a cargo poses a danger and requires gingerly handling or stowage, and nevertheless exposes the cargo to the general condition that triggers the known danger, regardless of whether the carrier is aware of the precise characteristics of the cargo.
[2] The liability of the shipper of dangerous goods does not arise where, should warning have been given, that would not have prevented stowage of inflammable cargo near a source of heat.

American Home Assurance Co. v. M/v Tabuk et Al., United States District Court, Southern District of New York, November 5, 2001 (2002 AMC 184)

One container in which one hundred missiles, placed on pallets had been stowed, was loaded on the deck of the m/v *Tabuk* for carriage from Wilmington to Kuwait. In the course of the

voyage the container was lost overboard during a storm. American Home Assurance Co. indemnified the shipper, Raytheon System Company and brought an action against the m/v *Tabuk* and the carrier, United Arab Shipping Company, claiming US$ 2,560,250.00 in damages, stating that the package limitation was not applicable because the stowage of the container on deck was an unreasonable deviation and in any event the deviation was per se unreasonable, the total number of containers on deck exceeded that contemplated in the stowage manual of the ship and the container was improperly secured.

Held, by the U.S. District Court, Southern District of New York, that:

(1) Loading on deck of hazardous material (missiles) does not constitute an unreasonable deviation

DECK CARGO (Art. 1(c))

Belgium

Cour de Cassation 1 December 2000, *The "Kintampo"* (www.cass.be)

Two containers were carried on deck by the *Kintampo* without this having been mentioned in the bill of lading. The consignee claimed damages in respect of loss of or damage to the cargo. By judgment of 24 February 1997 the Cour d'Appel of Antwerp held that the failure by the carrier to declare in the bill of lading that the cargo had been loaded on deck prevented him to invoke the limit of liability. The carrier appealed to the Supreme Court.

Held, by the Cour de Cassation, that:

(1) Article 91A paragraph I(c) of book II of the Code of Commerce, corresponding to article 1(c) of the Hague-Visby Rules whereby the provisions of the Convention are not applicable to goods which by the contract are stated as being carried on deck and are so carried requires such declaration only in order to protect the third party holder of the bill of lading and not in order to allow the carrier to benefit of the limit of liability. The decision that the carrier who carries goods on deck without so stating in the bill of lading cannot benefit of the limitation of liability is not in conflict with article 91 of book II of the Code of Commerce which gives effect to the Hague-Visby Rules.

France

Court of Appeal of Orleans 9 April 2004, *Ahlron MTE and Lloyd's of London* v. *Alstom Power Turbomachines and Others* (2004 DMF 549).

GEC-Alsthom and GEC-Alsthom Electromécanique instructed a forwarding agent, Someport Walon, to procure the carriage of parts of an electrical plant, including two steam turbines, from Bourget (France) to Kawas (India). Several cases were carried by road to Antwerp and loaded on board the *Ethnos* under time charter to Maritime Transport Entreprises (subsequently called Alhron MTE) who issued, through its agent Navitainer, a clean bill of lading. During the passage the vessel went through a storm in the Gulf of Gascogne and the content of one of the cases, loaded on deck, was seriously damaged. Alstom Power Turbomachines, to which the rights of GEC-Alsthom and GEC-Alsthom Electromécanique had been assigned, and its insurers commenced proceedings against Ahlron MTE and Someport Walon in the Tribunal de Commerce of Paris in order to obtain the payment of the damages suffered by the cargo.

By judgment of 12 December 1996 the Tribunal de Commerce held that Someport Walon and MTE were jointly liable for the 95% of the loss, the negligence of Alstom having contributed for the remaining 5%.

The Court of Appeal of Paris decided instead that they were liable for 100% of the loss and that they should bear the full amount of such loss owing to the damage having been caused by their "faute inexcusable" (a short description of an act or omission done recklessly an with knowledge that damage would probably occur).

The Cour de Cassation by judgment of 14 May 2002 quashed the decision of the Court of Appeal on the ground that it had not given sufficient reasons in respect of the existence of a "faute inexcusable" and remitted the case to the Court of Appeal of Orléans.

Held, by the Court of Appeal of Orléans, that:

[1] Loading of cargo on deck without the consent of the shipper who has not been given notice thereof at any time entails the application of the Hague-Visby Rules nor is such application excluded by a clause in the bill of lading authorising loading on deck irrespective of notice being given to the shipper, such consent being required by article 1(c) of the Rules.

[2] Although loading on deck without the consent of the shipper only entails a fault of the carrier, such fault is qualified as "inexcusable", as defined by article 4(5)(e) of the Hague-Visby Rules when a storm warning is issued prior to the sailing of the vessel and when the packing of the deck cargo having been damaged by the heavy weather and was exposed to wetting, no serious measures for the preservation of the cargo were adopted by the carrier, who had been given notice thereof as well as of the rust that had started to affect the steel, nor was the cargo stowed under deck, as it had been suggested.

Portugal

Supremo Tribunal de Justiça 31 May 2001, *Victor Hugo Garcia Hierro Cardinali* v. *Vieira & Silveira Transporte Maritimos S.A. and Empresa do Cabresante Lda. – The "Alfama"* (unreported)

The owners of the Circ Cardinali instructed an agent in Funchal, Empresa Cabresante, to load on board the m/v *Alfama*, owned by Vieira & Silveira Transporte Maritimos S.A. various materials of the circ in view of intended performances in Lisbon. All such materials, including a trailer, were loaded on deck. In particular, the trailer had necessarily to be stowed on deck owing to its dimensions. During the passage the weather conditions worsened and on account of a sudden rolling movement of the vessel, the trailer fell overboard.

Held, by the Supremo Tribunal de Justiça, that:

(1) Pursuant to Art. 4(2)(q) of the Hague Rules, which is made applicable to deck cargo by Art. 9(3) of D.L. 352/86 when stowage on deck is made with the consent of the shipper, and of Articles 798 and 799 Civil Code the carrier is not liable for the loss of cargo stowed on deck on account of bad weather if he proves that such loss is due to deficiencies of the cargo that the carrier did not know and could not have known by the exercise of the diligence of an average man.

DUE DILIGENCE (Art. 3.1)

France

Court of Appeal of Paris 17 October 2007, *Someport Walon* v. *SNC GE Energy Products* (2008 DMF 250)

By contract dated 30 July 1999 S.A. Someport Walon agreed with GE Energy to carry materials for the construction of a gas plant in Bangladesh. During the transshipment in the port of Antwerp of a gas turbine from a barge to the m/v *Alemania* the turbine fell owing to the wire of the vessel's crane having broken.

GE Energy and its insurers brought proceedings against Someport Walon and others in the Tribunal de Commerce of Paris claiming damages in the amount of US Dollars 3,033,172. By judgment of 30 May 2005 the Tribunal de Commerce found Someport Walon liable for the full amount of the claim on the ground that the carrier could not invoke the limit of liability pursuant to Article 4(5)(e) of the Hague-Visby Rules. Someport Walon appealed to the Cour d'Appel Paris.

Held, by the Cour d'Appel of Paris, that:

[1] The obligation under article 3(1) of the Hague-Visby Rules to exercise due diligence to make the ship seaworthy is a personal obligation of the carrier.

Germany

Federal Supreme Court (Bundesgerichtshof) 26 October 2006 – M/v "Cita", I ZR 20/041

In the morning of 26 March 1997 the M/v "*Cita*" stranded off the Scilly Isles and sank. The cause of the stranding was that the first officer, who had been keeping watch on his own, had changed the course of the vessel and then had fallen asleep. The vessel was equipped with a functioning watch alarm the purpose of which was to ensure that the watch keeper does not fall asleep, but it had been switched off as it apparently was the general practice on board. After the establishment of a limitation fund by the time charterers of the vessel, who were the carrier, the assignees of certain cargo interests brought a claim against the fund for the amount of the loss and argued that the carrier was liable because the vessel had been unseaworthy because the behaviour of the first officer, who was only qualified as second officer, evidenced that he was unable to manage the vessel properly because he had been keeping watch without a second watch keeper, as required by the STCW Convention and without the watch alarm. The Landgericht Hamburg held in favour of the claimants but then its judgment was reversed b y the Court of Appeal. The timecharterers appealed against this latter judgment to the Federal Supreme Court.

Held, by the Federal Supreme Court (Bundesgerichtshof), that:

*[1] The vessel was not unseaworthy under §559 HGB (corresponding to art.3.1 of the Hague-Visby Rules)because the manning complied with the Safe Manning Certificate and although the crew was unaware of the requirement of two watch keepers, it could not be assumed that such ignorance was due to any fault in the organisation on the part of the carrier since even if at the time of the occurrence the requirement of the two watch keepers was in force in England (the place of the casualty), it was not in force under the law of the vessel's flag and it would be too high a standard of duty to demand from the carrier that he research in advance the legal provisions that might apply to the route taken by the vessel in any particular time.**

* The Editor wishes to thank Mr. David Martin-Clark and BBL Rechtsanwälte of Hamburg for having made available information on this judgment.

United States

Steel Coils, Inc. v. M/v "Lake Marion" et Al., United States District Court, Eastern District of Louisiana, November 23, 2001 (2002 AMC 1680)

Western Bulk voyage chartered the *Lake Marion* to Itochu International or its guaranteed nominee. The parties used a standard GENCON form with a typewritten "rider". Under Clause 2, the owner warranted that the vessel would be seaworthy and equipped to carry the cargo. Clause 31 of the rider incorporates a number of standard shipping terms into the charter party as if written in extenso. In particular, Clause 31 incorporates the USA Paramount Clause.
Hot-rolled coils, cold-rolled coils, and galvanized coils were loaded into the vessel at the load ports in Riga and Ventspils, Latvia.
The vessel departed from Ventspils on March 7, 1997 and arrived at its first stop, Camden, New Jersey, on March 28, 1997. During the voyage, the vessel encountered rough weather. The vessel's logs reported that the worst weather that the vessel encountered was wind that reached Beaufort Scale Force of 11-12 for about one hour on March 26. Captain Musial testified that he was aware that he might encounter Force 12 winds in the North Atlantic during the late winter. During the rest of the voyage, the vessel did not encounter winds exceeding Beaufort Scale 10, and most readings were below Beaufort Scale 9. Although Captain Musial filed a Note of Protest at the first port of call, he did not claim any structural damage to the ship as a result of the weather that the vessel had encountered during the voyage,
At the first discharge port, Camden, the vessel discharged cold-rolled coils from holds No. 1, 2, 4, and 7. Attending surveyors reported evidence of seawater entry into all of these holds. Another report at Camden criticized the vessel's condition and noted specific deficiencies in each of the seven hatch covers and hatch cover closing fixtures.
The vessel then travelled to New Orleans, where she discharged hot-rolled coils, cold-rolled coils, and galvanized coils from holds No. 1, 2, 3, 4, 6, and 7. Captain Rasaretnam, the cargo surveyor in attendance, reported that the vessel's hatch covers were in "apparent non-watertight condition, with signs of leakage and/or water ingress into all holds". The survey indicated positive silver nitrate reactions on the cargo in the stow of holds 1, 3, 4, 6, and 7, which confirmed that seawater had entered the holds. In New Orleans, the No. 1 hold of the vessel flooded up to 16 inches as a result of a crack in the plating that separated the No. 1 hold from the port wing ballast tank. Rasaretnam observed the flooding and inspected the crack. He believed that the crack was an extension of an old crack over which a doubler plate had been welded.

Held, by the U.S. District Court, Eastern District of Louisiana, that:

(1) The carrier who failed to test the watertight integrity of the hatch covers through which seawater penetrated into the holds and to make the necessary repairs to the covers failed to exercise due diligence to ensure the seaworthiness of the vessel before the commencement of the voyage.

Steel Coils, Inc. v. M/v "Lake Marion", in rem; Lake Marion, Inc. and Bay Ocean Management, Inc., in personam - v. Western Bulk Carriers K/S Oslo - v. Itochu International, Inc. United States Court of Appeals for the Fifth Circuit, May 13, 2003 (2003 AMC 1408)

The vessel interests appealed and Steel Coils and Western Bulk cross-appealed from the judgment of the U.S. District Court.

DUTY TO LOAD AND DISCHARGE THE CARGO (Art. 3 (2))

England

Jindal Iron and Steel Co. Ltd. and Others v. *Islamic Solidarity Shipping Company Jordan Ltd. - The "Jordan II",* (H.L.) 25 November 2004 [2005] 1 Lloyd's Rep. 57; 2005 AMC 1

By a charterparty on the Stemmor form dated 4 December 1997 the owners chartered the *Jordan II* to TCI Trans Commodities A.G. for a voyage from Mumbai in India to Barcelona and Motril in Spain. Jindal Iran and Steel Company Limited and Hiansa S.A. were respectively the sellers and purchasers of 435 steel coils. The goods were shipped from Mumbai aboard the vessel as evidenced by two bills of lading on the Congenbill form, both dated 2 January 1998, which were issued on behalf of the shipowners at Mumbai. The bills of lading contained or evidenced contracts of carriage from Mumbai to Motril. The bills of lading named Jindal Iron and Steel Company Limited as the shippers and Hiansa S.A. as consignees and incorporated the voyage charterparty. The Hague-Visby Rules as enacted in Indian legislation were applicable to this shipment. They correspond to the draft Hague Rules as enacted in the United Kingdom by the Carriage of Goods by Sea Act 1924, which in material respects are the same as the Hague-Visby Rules scheduled to the Carriage of Goods by Sea Act 1971.
Clauses 3 and 17 of the charterparty, so far as material, provided:
3. Freight to be paid at the after the rate of US$ ... per metric ton F.I.O.S.T. - Lashed/Secured/Dunnaged ...
17. Shippers/Charters/Receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel.
In February 1998 the cargo was discharged at Motril. The shippers and consignees alleged that the cargo was damaged by rough handling during loading and/or discharging, and/or inadequate stowage due to failure to provide dunnage, failure to secure the coils and/or stacking them so that the bottom layers were excessively compressed.
Shippers and Receivers commenced proceedings against the Shipowner in the High Court of Justice (Commercial Court) claiming damages. They denied that clauses 3 and 17 transferred the responsibility of the loading, stowing and discharge functions to them and maintained that, if this had been the case, such clauses would have been null and void pursuant to article 3 r. 8 of the Hague Rules.
After their contentions had been rejected by the Commercial Court and the Court of Appeal, Shippers and Consignees appealed to the House of Lords, the only issue before it being whether clauses 3 and 17 were invalidated by article 3 r. 8 of the Hague Rules.

Held, by the House of Lords, that:

[1] The rule, existing under the common law, that the duty to load, stow and discharge the cargo prima facie rested on shipowners, could be transferred by agreement to cargo interests.
[2] Although under the Practice Statement the House of Lords might be persuaded to depart from an earlier decision (G.H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama [1956] 2 Lloyd's Rep. 379), where that decision has been demonstrated to work unsatisfactorily in the market place and produce manifestly unjust results, it has not been shown that this is the case for the rule whereby the shipowner may transfer responsibility for loading, stowing and discharge the cargo on the shipper and the consignee.
[3] Devlin J. adopted in Pyrene v. Scindia Navigation [1954] 1 Lloyd's Rep. 321 a principled

and reasonable interpretation of article 3 r. 2 of the Hague Rules, and his interpretation was not based on any technical rules of English law, but was founded on a perspective relevant to the interests of maritime nations generally.

ENTRY INTO FORCE OF THE 1968 AND 1979 PROTOCOLS (Art. 13 of the 1968 Protocol and Art. VIII of the 1979 Protocol)

Italy

Corte di Cassazione 14 February 2001, No. 2155, *Brendani AB* v. *Magazzini Generali & Frigoriferi S.p.A.* (2002 Dir. Mar. 227).

A consignment of paper rolls carried on the m/v *Lech* was discharged in Naples in damaged conditions. The consignee sued the carrier in Naples. The Tribunal of Naples held the carrier liable for the damage and its decision was affirmed by the Court of Appeal of Naples who found that the provisions of the Hamburg Rules applied, since its ratification had been authorized by Italy with Law 25 January 1983, No. 40. The carrier appealed to the Supreme Court.

Held, by the Corte di Cassazione, that:

(1) The 1968 and 1979 Protocols to the 1924 Bill of Lading Convention entered into force in Italy on the same day when such Convention ceased to be effective following its denunciation.

EVIDENTIARY VALUE OF THE BILL OF LADING (Art. 3. 4)

England

The Owners of the cargo lately laden on board the ship "David Agmashenebeli" v. The Owners of the ship "David Agmashenebeli" (High Court of Justice - Q.B.D. (Admiralty Court)) [2003] 1 Lloyd's Rep. 92.

On 10 April 1995 Agrosin Pte Ltd. of Singapore sold to Grand Prestige Enterprises of Hong Kong 35,000 metric tons urea in bulk C&F Free Out CQD one safe berth one safe port South China for delivery during May 1995 and commenced negotiations for the charter of the m/v *David Agmashenebeli* from Baff Shipping, Riga. The latter company on 19 April 1995 entered into a voyage charter under which it chartered the vessel from Meezan Shipping and Trading Inc. of Toronto who had time chartered it from its owners Georgian Shipping Company of Valletta, Malta. Clause 45 of the charter party between Meezan and Baff provided:
"Under supervision of independent surveyor together with Master's/Officers' assistance no damaged cargo to be loaded into the holds. If such fact will take place Master has the right to stop loading but Charterers and Shippers to be immediately informed to arrange removing of any contaminations for Charterers' expenses/time.
Quantity/quality of cargo as determined by an International Independent Surveyor (SGS or another neutral international organisation) together with Master to be final and binding for both parties. Owners to be responsible for quantity of cargo taken on board."
On the same day Agrosin sub-chartered the vessel from Baff on substantially the same terms. On the following day, 20 April 1995, Meezan instructed the vessel's master that the vessel was to load bulk urea under a voyage charter between Meezan and Baff for carriage from Kotka to China. The vessel arrived at Kotka and gave notice of readiness to load at 09.30 on 24 April 1995. It had 6 holds and had previously carried a coal cargo and a grain cargo before that. After a dispute on the suitability of the holds on 26 April the original supplier of the urea

informed their local agents that with the assent of Agrosin it permitted the commencement of loading. But within three hours of the commencement of loading the master sent a message to all parties stating that the cargo contained rust, plastics and other contaminants and was of a dirty colour. Upon completion of loading the master claused the mate receipt with the following statement: "cargo discoloured also foreign materials, eg. plastic, rust, rubber, stone, black particles found in cargo". Notwithstanding a dispute as to whether the bills of lading should be similarly claused, the master did so.
After a dispute on payment of freight had been settled, the cargo was discharged and the amount of contamination was found to be very small. However having the ultimate buyer's bank refused to accept the claused bills of lading, and following a discussion between the parties a discounted price was agreed.

Held, by the Queen's Bench Division (Admiralty Court), that:

(1) The duty of the carrier under the Hague-Visby Rules is to issue a bill of lading which records the apparent order and condition of the goods according to the reasonable assessment of the master. [That is not any contractual guarantee of absolute accuracy as to the order and condition of the cargo or it apparent order and condition].

(2) There is, however, a breach of that duty if the master, even if entitled to clause the bill of lading to refer the fact that a small proportion of the cargo is not in apparent good order and condition, qualifies the bill of lading in a manner that conveys the meaning that the whole or a substantial part of the cargo is not in good order and condition.

Germany

Oberlandesgericht Hamburg (Court of Appeal), 9 November 2000 (Transportrecht 2001, page 92)*

A lot of wheat was carried from Tianjin to Rotterdam. The carrier issued a bill of lading providing for the application of German law stamped with "said to weigh" and containing a "free in liner out, loaded and stowed free in at owners' nominated berth" clause. The consignee claimed damages from the carrier under the bill of lading because the carrier had delivered less wheat than described in the bill of lading. The issue to be decided by the court was whether the carrier could rely on the stipulations contained in the bill of lading so as not to be responsible for the difference in weight.

Held, by Oberlandesgericht Hamburg (Court of Appeal), that:

[1] The carrier cannot rely on the meaning of the clause "said to weigh" for an exclusion of liability because it follows already from Article 3 para. 3 (b) Hague-Visby Rules or para. 645 subs. 1 German Commercial Code that the weight stated in the bill of lading depends on the information provided by the shipper.

[2] It does not follow from the clause "free in liner out, loaded and stowed free in at owners' nominated berth" that the carrier has not had reasonable means of checking the weight of the cargo pursuant to article 3 para. 3 Hague-Visby Rules or para. 645 subs. 2 fig. 2 German Commercial Code. The carrier should in fact state that it had no reasonable means of checking the cargo's weight so as to exclude its liability.

* By the courtesy of Dr. Cristoph Horbach, Lebuhn & Puchta Rechtsanwälte, Vorsetzen 35, D-20459Hamburg - cristoph.horbach@lebuhn.de

EXCEPTED PERILS – ACT OF PUBLIC ENEMIES (Art. 4.2(f))

United States

Anvil Knitwear, Inc. v. *Crowley American Transport, Inc. et Al.* (United States District Court, Southern District of New York, 27 July 2001, 2001 AMC 2382)

In May, 1999, Anvil Knitwear, Inc. contracted with Crowley American Transport, Inc. to transport shipments of tee-shirts from a manufacturing plant in Santa Barbara, Honduras, C.A., to its United States' plant in South Carolina.

Pursuant to this contract, Crowley issued a bill of lading on June 18, 1999, covering the 786 cartons of cotton tee-shirts that were packed into a container. The bill of lading covered the transportation of the container from Santa Barbara, Honduras, to the load port, Puerto Cortes, Honduras, the ocean transportation via the *Ambassador*, and the ultimate delivery in South Carolina. The bill of lading stated that the Carriage of Goods by Sea Act of the United States, 46 U.S.C. app. §1300, *et. seq*. would govern the contract throughout the entire time Anvil's goods were in Crowley's possession. The "exceptions clause" of the bill of lading set out a long list of events for which Crowley could not be held liable, including hijacking.

Crowley's local agent, Transportes Hispanos, picked up Anvil's cartons on or about June 16, 1999 from Anvil's vendor, M.J. Honduras S.A. Shortly after departing from the vendor's plant, the truck carrying the shipment was hijacked and the goods were stolen. Both parties have stipulated to the fact the Transportes Hispanos driver, Mr. Ramon Enrique Rosales, was not in any way involved with the hijacking.

Held, by the U.S. District Court, Southern District of New York, that:

(1) Hijacking, mentioned in an exception clause of a bill of lading, is not sufficiently similar to some COGSA §1304(2) exceptions and more specifically to the exception under §1304(2(f) – act of public enemies – so to fall thereunder and, therefore, it falls under §1304(2)(q). Therefore the carrier has the burden of proving the absence of fault.

EXCEPTED PERILS – ACTUAL FAULT OR PRIVITY (Art. 4. 2(q))

Japan

Court of Appeals of Tokyo 1 October 2001, *Tokyo Kaijo-kasai Hoken KK.* v. *Coastal Magic Shipping Ltd.* (Kin'yu Shoji Hanrei no. 1132, p. 16)*

Fish meal carried in bags from Ecuador to Japan was found on arrival damaged partly by heat and partly by moisture and mould. The consignee sued the carrier claiming damages. The carrier alleged that the damage had been caused by inherent defect of the cargo because of the insufficient antioxidant added to the fish meal. The consignee denied that allegation and stated that the damage had been caused by rain water that entered into the hold due to the improper closure of the hatches and because of the improper stowage of the cargo.

Held, by the Court of Appeals of Tokyo, that:

(1) The carrier is exonerated from liability pursuant to Art. 4(2)(q) in respect of damage by mould to fish meal stowed in bulk in the lower deck since the IMDG code permits fish meal of Class 9 to be so stowed.

* A summary of this judgment has been kindly supplied by Prof. Souichirou Kozuka of the Sophia University, Tokio - s-kozuka@hoffman.cc.sophia.ac.jp

EXCEPTED PERILS - ARREST OR RESTRAINT OF PRINCES (Art. 4.2(g))

France

Cour d'Appel of Rouen 23 May 2001, *Hanjin Shipping Co. Ltd. v. Thyssen Ascenseurs S.A.* (2002 DMF 44).

A container with parts of elevators was shipped by Thyssen Ascenseurs S.A. on the m/v *Hanjin San Francisco* of Hanjin Shipping Co. Ltd. for carriage to Haiphong in China. The container was transhipped at Hong Kong on the *Vosa Carrier* but never arrived at destination. It was subsequently found that it had been confiscated by a Chinese Coastguard vessel and that such confiscation had been illegal. Thyssen Ascenseurs S.A. commenced proceedings against Hanjin Shipping Co. Ltd. in the Tribunal de Commerce of Le Havre, whose judgment, allowing the claim, was appealed by the carrier.

Held, by the Cour d'Appel of Rouen, that:

[1] The carrier is exonerated from liability, pursuant to article 4.2(g) of the Hague-Visby Rules, for the loss of a container confiscated by the police of a State when the confiscation has been illegal.

EXCEPTED PERILS – BURDEN OF PROOF (Art. 4. 2)

Italy

Tribunal of Genoa 4 December 2002, Llloyd Italico Assicurazioni S.p.A. v. Grandi Traghetti S.p.A. di Navigazione – m/v "Maringa" [2004] Dir.Mar. 1473

A consignment of 1995 bags of coffee, stuffed in containers supplied by the carrier, was loaded at Matadi on the m/v *Maringa* and carried to Genoa and then by rail from Genoa to the inland terminal of the carrier at Rivalta Scrivia.
When the containers were inspected they were found damaged and several bags of coffee were found wet and stained. The cargo insurers, Lloyd Italico Assicurazioni S.p.A., settled the claim of the consignees and brought an action against the carrier, Grandi Traghetti S.p.A. di Navigazione, in the Tribunal of Genoa.

Held, by the Tribunal of Genoa, that:

(1) The consignee has the burden of proving that the loss of or damage to the goods occurred when the goods were in the custody of the carrier who in turn, in order to be exonerated from liability, has the burden of proving that the loss or damage was caused by one of the excepted perils enumerated in art. 4(2) of the Hague-Visby Rules.

Court of Appeal of Genoa 6 June 2002, Ignazio Messina & Co. S.p.A. v. Pietro Trombi – m/v "Jolly Rubino" [2004] Dir.Mar. 191

On 9 May 1995 a car owned by Pietro Trombi was loaded on the m/v *Jolly Rubino* in Genoa. Place of destination was Abidjan, where the vessel was supposed to call in the outward voyage. The car was however discharged heavily damaged when the vessel called at Abidjan in the homeward voyage.
Pietro Trombi brought an action against the carrier in the Tribunal of Genoa claiming a full indemnity. By judgment of 10 October 2000 the Tribunal of Genoa found the carrier liable for the full amount of the loss. The carrier appealed on the ground that the limit of liability set out in art. 4.5(e) of the Hague-Visby Rules should have been applied.

Held, by the Court of Appeal of Genoa, that:

(1) Pursuant to article 4.2 of the Hague-Visby Rules, if the carrier proves that the loss or damage has been caused by one of the excepted perils, it shall be presumed that neither his fault nor that of his servants or agents has caused or contributed to the loss or damage, whereupon the claimant may overcome such presumption by proving that the loss or damage has actually been caused or contributed to by the personal fault of the carrier or the fault of his servants or agents.

United States

*United States of America*v. *Ocean Bulk Ships, Inc.*, m/v *"Overseas Harriette"* and m/v *"Overseas Marilyn"* (United States Court of Appeals-5th Circuit 10 April 2001) (2001 AMC 1487)

Between 1994 and 1996, the United States, through its Commodity Credit Corporation (CCC), and with the assistance of several private relief organizations, shipped cargoes to famine-stricken areas of Africa on behalf of the Agency for International Development (AID). The cargoes were shipped under various charter parties made expressly subject to COGSA on the m/v *Overseas Harriette* and the m/v *Overseas Marilyn*, vessels owned by the defendants, Ocean Bulk Ships, Inc., and Transbulk Carriers, Inc. The shipments included a variety of foodstuffs such as vegetable oil, corn, and bulgur wheat, which were shipped to the African ports of Mombasa, Kenya; Beira and Maputo, Mozambique; Freetown, Sierra Leone; and Tema, Ghana. Clean bills of lading were issued for each shipment after the cargo was stowed, indicating that the cargo was received by the carrier in good condition. Unfortunately, the goods were not received in the same quantity or quality when discharged in Africa. Survey reports documenting the loss and damage indicated several problems. Some parts of the cargo were simply not received at all. Some parts of the cargo were received in a damaged and unusable condition. The total amount of documented loss and damage to the cargo was $203,319.87.

In December 1998, the United States filed the first of five lawsuits, seeking damages for the lost and damaged cargo under COGSA. In February 1999, these suits were consolidated. In September 1999, the matter was tried to the bench. In December 1999, the district court entered judgment in favor of the United States for the limited sum of $7,300.08, the amount of damage that the defendants admit occurred prior to discharge. The judgment was appealed.

Held, by the U.S. Court of Appeals for the 5th Circuit, that:

(1) There does not appear to be any consensus among circuits, or even in the 5th Circuit, concerning which Cogsa party bears the burden of persuasion (and the risk of non persuasion) with respect to the applicability of the statutory exceptions codified at § 1304(2)(a)-(p) once the shipper makes out a prima facie case.

(2) The exception codified at § 1304(2)(q) requires the carrier to bear the burden of persuasion.

(3) Without regard to whether the carrier's rebuttal burden under § 1304(2)(n) is one of production or persuasion, the law is absolutely clear that the carrier must do more than offer mere speculation as to the cause of lost or damaged cargo. When the carrier's negligence is at least a concurrent cause of the loss, the carrier bears the burden of establishing which portion of the loss is not attributable to its negligence.

EXCEPTED PERILS - FAULT IN NAVIGATION OR MANAGEMENT (art. 4.2(a))

Germany

Federal Supreme Court (Bundesgerichtshof) 26 October 2006 – M/v "Cita", I ZR 20/04

(The summary of facts may be found in the section "Due diligence")

Held, by the Federal Supreme Court (Bundesgerichtshof), that:

[1] The action of setting a new course which led to the grounding of the vessel, the failure to keep a watch with two persons and the switching off of the alarm that would ensure that the personnel on watch does not fall asleep are all faults in the navigation and management of he vessel for which the carrier is not liable.
[2] The exoneration of liability of the carrier under § 607.2.1 HGB applies also where the action or omission in the navigation or management is intentional.

New Zealand

Tasman Orient Line Line CV v. *New Zealand China Clays Ltd. and Others*, Court of Appeal of New Zealand 9 April 2009, [2009] NZCA 135.

The *Tasman Pioneer* left Yokohama, Japan, in the evening of 1 May 2001, bound for Pusan in South Korea, intending to sail west along Japan's Pacific coast and then via the Japan Inland Sea across the Korea Strait. On 2 May, the master of the Tasman Pioneer, realising that the ship was behind schedule, decided that, rather than passing west of Okino Shima, the usual route for vessels entering the Inland Sea from the south, he would shorten steaming time by some 30-40 minutes by taking the channel between the island of Biro Shima and the promontory of Kashiwa Shima, the south-western extremity of the island of Shikoku.

Shortly after the master altered course to enter the channel at 0250 hrs on 3 May, the ship lost all images on its starboard radar. It appeared that the master then tried to abort the passage through the channel. This manoeuvre was not successful and the ship struck bottom off Biro Shima with such force that her speed was immediately slowed to some 6 or 7 knots from her running speed of 15 knots. Shortly afterwards the ship took a list to port and water was discovered in the forward ballast tanks and in the forward cargo holds 1 and 2. On the orders of the master, the ship's pumps were activated. However, the master did not alert the Japanese Coastguard, as he should have done, or seek other assistance. The ship then sailed at close to full speed for a further two hours (some 22 nautical miles), before anchoring in a sheltered bay. It was only then that the master contacted the ship managers in Greece, without, however, specifying the cause of damage or its full extent. The managers then arranged for the Coastguard to be advised of the incident and for salvors to be engaged on LOF 2000. The master's initial explanation of the casualty was that the ship had hit an unidentified floating object and he schooled the crew to adopt this explanation in the enquiry conducted by the Japanese coastguard, in the course of which the truth eventually emerged.

New Zealand China Clays Ltd. and other cargo owners brought proceedings against Tasman Orient Line Line CV, the owners of the ship, in the New Zealand High Court, Auckland Registry claiming damages for the loss of their cargo.

By judgment of 31 August 2007 the High Court held that the actions of the master of a ship who, after the ship grounded suffering damages, fails to notify promptly the Coastguard and his managers of the casualty and the ship's position and condition and fabricates the

story that the ship hit an unidentified submerged object do not amount to an "act, neglect or default in the "bona fide" navigation and management of the ship" and, as a result, the carrier is not entitled to the benefit of exemption from liability set out in article 4 (2)(a) of the Hague- Visby Rules.

Tasman Orient Line Line appealed.

Held, by the Court of Appeal of New Zealand that:

[1] The nineteenth century ascendancy of the United Kingdom in shipping continued until after WWI. It remained influential in the drafting of the Hague Rules. But to what extent can the former common law of England still be said to inform the interpretation of the Rules? The Rules are to be construed as a comprehensive international convention, unfettered by any antecedent domestic law, and the practice of text writers and some judges to hear back to the old English common law is erroneous. But because such practice is deep-seated and relied upon by the High Court it is necessary for us to outline briefly what we are departing from and how the Hague Rules took a different course.

Certainly, as the cases show, for the most part the courts must defer to the conduct of the master. The Hague-Visby Rules, hammered out by international expert participants and widely endorsed in domestic legislation, has secured international assent to a trade-off between the competing interests of shippers and ship-owners. Article 4.2(a) is not to be read narrowly so as to substitute second guessing by lay judges for navigational decision-making by expert mariners.

Nor however is it to be read so widely as to render meaningless the obligation of the carrier under art 3.2. To exonerate a carrier from conduct of similar quality to deviation, namely conduct that is radically at odds with the art 3.2 obligation, by sacrificing the shipper's interests for wholly incompatible selfish interests of the master, goes over the boundary of the art 4.2(a) protection.

New Zealand China Clays Ltd. v. Tasman Orient Line CV – The "Tasman Pioneer" – New Zealand High Court, Auckland Registry, 31 August 2007 (http://www.maritimelaw.org.nz/0907.html)*

The *Tasman Pioneer* left Yokohama, Japan, in the evening of 1 May 2001, bound for Pusan in South Korea, intending to sail west along Japan's Pacific coast and then via the Japan Inland Sea across the Korea Strait. On 2 May, the master of the Tasman Pioneer, realising that the ship was behind schedule, decided that, rather than passing west of Okino Shima, the usual route for vessels entering the Inland Sea from the south, he would shorten steaming time by some 30-40 minutes by taking the channel between the island of Biro Shima and the promontory of Kashiwa Shima, the south-western extremity of the island of Shikoku.

Shortly after the master altered course to enter the channel at 0250 hrs on 3 May, the ship lost all images on its starboard radar. It appeared that the master then tried to abort the passage through the channel. This manoeuvre was not successful and the ship struck bottom off Biro Shima with such force that her speed was immediately slowed to some 6 or 7 knots from her running speed of 15 knots. Shortly afterwards the ship took a list to port and water was discovered in the forward ballast tanks and in the forward cargo holds 1 and 2. On the orders of the master, the ship's pumps were activated. However, the master did not alert the Japanese Coastguard, as he should have done, or seek other assistance. The ship then sailed at close to full speed for a further two hours (some 22 nautical miles), before anchoring in a sheltered bay. It was only then that the master contacted the ship managers in Greece, without, however, specifying the cause of damage or its full extent. The managers then

arranged for the Coastguard to be advised of the incident and for salvors to be engaged on LOF 2000. The master's initial explanation of the casualty was that the ship had hit an unidentified floating object and he schooled the crew to adopt this explanation in the enquiry conducted by the Japanese coastguard, in the course of which the truth eventually emerged.

Held, by the New Zealand High Court that:

[1] The actions of the master of a ship who, after the ship grounded suffering damages, fails to notify promptly the Coastguard and his managers of the casualty and the ship's position and condition and fabricates the story that the ship hit an unidentified submerged object do not amount to an "act, neglect or default in the "bona fide" navigation and management of the ship" and, as a result, the carrier is not entitled to the benefit of exemption from liability set out in article 4 (2)(a) of the Hague- Visby Rules.

* By the courtesy of David Martin Clark (www.onlinedmc.co.uk)

EXCEPTED PERILS - FIRE (Art. 4.2 (b)

England

Papera Traders Co. Ltd. and Others v. *Hyundai Merchant Marine Co. Ltd. and Another - The "Eurasian Dream"* [2002] 1 Lloyd's Rep. 719.

On July 23, 1998, a fire started on deck 4 of the pure car carrier *Eurasian Dream* while in port at Sharjah. The fire, which was not contained or extinguished by the master and crew, eventually destroyed or damaged the vessel's cargo of new and second-hand vehicles and rendered the vessel itself a constructive total loss.
The relevant cargo interests commenced proceedings in London against the carrier before the Queen's Bench Division (Commercial Court)

Held, by the Queen's Bench Division (Commercial Court), that:

(1) Where the cargo owners allege that the fire that destroyed or damaged the cargo was due to the unseaworthiness of the vessel they have the burden of proving (i) that the vessel was unseaworthy before and at the beginning of the voyage and (ii) that the loss or damage was caused by that unseaworthiness.
(2) If the cargo owners discharge the burden in respect of 1(i) and (ii) above, the burden passes to the carrier to prove that it and those for whom it is responsible exercised due diligence to make the ship seaworthy in the relevant respects. If it fails to do so, it is not entitled to rely upon the exceptions in Article 4 r. 2, including the fire exception.
(3) The fire is caused by the unseaworthiness of the vessel if it would not have broken out if the master and crew had been properly instructed and trained.

EXCEPTED PERILS – INHERENT VICE (Art.4. 2(m))

Japan

Court of Appeals of Tokyo 1 October 2001, *Tokyo Kaijo-kasai Hoken KK.* v. *Coastal Magic Shipping Ltd.* (Kin'yu Shoji Hanrei no. 1132, p. 16) *

Fish meal carried in bags from Ecuador to Japan was found on arrival damaged partly by heat and partly by moisture and mould. The consignee sued the carrier claiming damages. The carrier alleged that the damage had been caused by inherent defect of the cargo because of the insufficient antioxidant added to the fish meal. The consignee denied that allegation and stated that the damage had been caused by rain water that entered into the hold due to the improper closure of the hatches and because of the improper stowage of the cargo.

Held, by the Court of Appeals of Tokyo, that:

(1) The excepted peril under Art. 4(2)(m) cannot be invoked to the extent that the damage to a cargo of fish meal has been caused by rain entered into the hold due to the hatch cover having not been properly closed.

* A summary of this judgment has been kindly supplied by Prof. Souichirou Kozuka of the Sophia University, Tokio - s-kozuka@hoffman.cc.sophia.ac.jp

Scotland

Albacora S.r.l.v.Westcott & Laurence Line Limited (Inner House, Court of Session, Edinburgh, 23 March 1965 (reported 1965 S.L.T. 270) *

Following a voyage from Glasgow (Scotland) to Genoa (Italy) a cargo of fish shipped on board the m.v. *Maltasian* was found to be damaged. The bills of lading provided that the liability of the carrier would be determined by the Hague Rules contained in the 1924 Convention on Bills of Lading.

The damage was caused by bacteria within the fish cargo. The bacteria, although present while the fish were alive, multiplied when temperature in the holds increased. The issue arose as to whether the cargo had been properly and carefully carried by the vessel in terms of Article 3 of the Convention; and whether the carrier might benefit from the exception contained in Article 4 of the Convention as "damage arising from inherent defect, quality or vice of the goods".

Held, by the Court of Session (Inner House), that:

(1) The damage to cargo was caused by 'inherent vice' within the meaning of the 1924 Convention; the Defenders were not negligent in the carriage, and accordingly were not liable to the shipper for any losses sustained.

* The synopsis of this decision has been kindly prepared by Ed Watt, LLB (Hons) LLM, Solicitor, Henderson Boyd Jackson W.S., 19 Ainslie Place, Edinburgh EH3 6AU, UK. Fax +44 131 225.2086 – E-mail: e.watt@HBJ.co.uk – Internet: www.shippinglawyer.com

EXCEPTED PERILS - LATENT DEFECTS (Art. 4.2(p))

Italy

Corte d'Appello of Genoa 28 December 1998, *Hori Maschinen und Anlagen GmbH* v. *Tarros S.p.A.–The "Vis"* (2000 Dir. Mar. 538)

A consigment of potatoes, loaded at Tripoli, Lybia on the m/v *Vis* of Tarros S.p.A., arrived to La Spezia, Italy in damaged conditions owing to the excessive duration of the voyage caused by the breakdown of the vessel's engine. The consignees, Hori Machinen und Anlagen GmbH, sued Tarros before the Tribunal of Genoa claiming damages. The judgment of the Tribunal, allowing a very small amount to the claimant, was appealed both by the claimant and by the carrier who alleged that the engine breakdown was due to a latent defect.

Held, by the Corte d'Appello of Genoa, that:

(1) Failing the proof that before sailing it has carried out all necessary checks in respect of the conditions of the engine, the carrier cannot invoke, in order to exonerate himself from liability, the possibility that the damage occurred after the commencement of the voyage was due to a latent defect.

EXCEPTED PERILS – PERILS OF THE SEA (Art. 4. 2(c))

Australia

Great China Metal Industries Co. Ltd. v. *Malaysian International Shipping Corp.–The "Bunga Seroja"* (High Court, 22 October 1998, 1999 AMC 427):

A consignment of 40 cases of aluminium can body in coils loaded in Sydney on board the m/v *Bunga Seroja* was partly damaged during the passage from Sydney to Keelung, Taiwan on account of heavy weather. Great China Metal Industries Co. Ltd., to which the property in the goods had passed, claimed damages from the carrier, Malaysian International Shipping Corp. but the claim was rejected by the trial Judge whose decision was affirmed by the New South Wales Court of Appeal. The claimant appealed to the High Court of Australia contending that the exception of perils of the sea did not apply because damage to the cargo resulted from sea weather conditions which could reasonably be foreseen and guarded against. The question to which the submission primarily was directed was the meaning and effect of art. 4 r. 2(c) of the Hague Rules.

Held, by the High Court of Australia, that:

(1) The perils of the sea exception cannot be limited to those events which are beyond the ordinary experience of mariners or that are wholly unforeseen or unpredicted.

France

Cour d'Appel of Aix-en-Provence 14 May 2004, *Compagnie Marocaine de Navigation* v. *Comitran*, *Office de Commercialisation et d'Exportation and Covea Fleet - The "Al Hoceima"* (2005 DMF 322)

In March 1987 the Moroccan company Office de Commercialisation et d'Exportation-OCE loaded at Tangiers on board the *Al Hoceima*, of Compagnie Marocaine de Navigation-COMANAV 47 trailers with its merchandise. The trailers were owned by Rentco France and had been let by Rentco to OCE.
The trailer were loaded on board and secured by the stevedoring company COMANAV.
The vessel sailed from Tangiers on 27 March 1987 and, having met bad weather, with wind

force 8 and 9 of the Beaufort Scale, was compelled to seek refuge in the roads of Vinaroz, where the crew carried out a general control of the conditions of the vessel and its cargo. After having found that everything was in order and that the weather appeared to have improved, the master sailed off the place of refuge but during the night the weather considerably worsened with wind force 9-10 of the Beaufort Scale. While the master was trying to alter course and seek again shelter in the bay of Rosas, the vessel took a lift of 30°. Since the lift increased even further, the crew abandoned the vessel that soon after sunk.
The insurer of the trailers, La Neuchateloise, after having settled the claim of Rentco for the loss of all its trailers, brought proceedings against COMANAV and OCE in the Tribunal de Commerce of Perpignan. Subsequently Covea Fleet, to whom La Neuchateloise had assigned its claim, joined the proceedings.
With judgment of 26 July 1994 the Tribunal de Commerce of Perpignan found the carrier COMANAV and COMITRAN jointly liable, the former in the proportion of 75% and the latter in the proportion of 25%. On appeal by COMITRAN the Cour d'Appel of Montpellier held that COMANAV only was liable for the loss of the trailers. The decision of the Cour d'Appel was quashed by the Cour de Cassation and the case was remanded to the Cour d'Appel of Aix-en-Provence.

Held, by the Cour d'Appel of Aix-en-Provence, that:

*[1] The master of a vessel who, after having sought shelter in a roadstead on account of the adverse weather conditions, sails out of the shelter notwithstanding the adverse weather conditions, with the consequent loss of the vessel commits a nautical fault for which the carrier is not liable under article 27(b) and (d) of law 18 June 1966.**

--
* In law 18 June 1966 enacted in French domestic law reference is made to the nautical faults of the master, pilot or other servants of the carrier; in article 27(d) reference is made to events not imputable to the carrier.

United States

Steel Coils, Inc. v. *M/v "Lake Marion", et Al.*, United States District Court, Eastern District of Louisiana, November 23, 2001 (2002 AMC 1680)

Western Bulk voyage chartered the *Lake Marion* to Itochu International or its guaranteed nominee. The parties used a standard GENCON form with a typewritten "rider". Under Clause 2, the owner warranted that the vessel would be seaworthy and equipped to carry the cargo. Clause 31 of the rider incorporated a number of standard shipping terms into the charter party as if written *in extenso*. In particular, Clause 31 incorporated the USA Paramount Clause.
Hot-rolled coils, cold-rolled coils, and galvanized coils were loaded into the vessel at the load ports in Riga and Ventspils, Latvia.
The vessel departed from Ventspils on March 7, 1997 and arrived at its first stop, Camden, New Jersey, on March 28, 1997. During the voyage, the vessel encountered rough weather. The vessel's logs reported that the worst weather that the vessel encountered was wind that reached Beaufort Scale Force of 11-12 for about one hour on March 26. Captain Musial testified that he was aware that he might encounter Force 12 winds in the North Atlantic during the late winter. During the rest of the voyage, the vessel did not encounter winds exceeding Beaufort Scale 10, and most readings were below Beaufort Scale 9. Although Captain Musial filed a Note of Protest at the first port of call, he did not claim any structural damage to the ship as a result of the weather that the vessel had encountered during the voyage.
At the first discharge port, Camden, the vessel discharged cold-rolled coils from holds No. 1,

2, 4, and 7. Attending surveyors reported evidence of seawater entry into all of these holds. Another report at Camden criticized the vessel's condition and noted specific deficiencies in each of the seven hatch covers and hatch cover closing fixtures.
The vessel then travelled to New Orleans, where she discharged hot-rolled coils, cold-rolled coils, and galvanized coils from holds No. 1, 2, 3, 4, 6, and 7. Captain Rasaretnam, the cargo surveyor in attendance, reported that the vessel's hatch covers were in "apparent non-watertight condition, with signs of leakage and/or water ingress into all holds". The survey indicated positive silver nitrate reactions on the cargo in the stow of holds 1, 3, 4, 6, and 7, which confirmed that seawater had entered the holds. In New Orleans, the No. 1 hold of the vessel flooded up to 16 inches as a result of a crack in the plating that separated the No. 1 hold from the port wing ballast tank. Rasaretnam observed the flooding and inspected the crack. He believed that the crack was an extension of an old crack over which a doubler plate had been welded.

Held, by the U.S. District Court, Eastern District of Louisiana, that:

(1) The peril of the sea defence is not applicable when the winds and waves encountered by the vessel (wind up to Beaufort Scale 11-12) were foreseeable in the North Atlantic during the late winter months and no damage to the vessel resulted from the voyage.

Steel Coils, Inc. v. M/v "Lake Marion", in rem; Lake Marion, Inc. and Bay Ocean Management, Inc., in personam - v. Western Bulk Carriers K/S Oslo - v. Itochu International, Inc. United States Court of Appeals for the Fifth Circuit, May 13, 2003 (2003 AMC 1408)

The vessel interests appealed from the judgment of the US District Court and Steel Coils and Western Bulk cross-appealed.

Held, by the U.S. Court of Appeals for the Fifth Circuit, that:

(1) The wind velocity and the time during which a given velocity prevailed as well as the nature and extent of damage to the ship itself are of great importance in determining whether a storm constitutes a peril of the sea.

EXCEPTED PERILS - SEAWORTHINESS AS AN "OVERRIDING OBLIGATION" (Art. 4. 2)

England

Paper Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd. and Another - The *"Eurasian Dream"* (2002) 1 Lloyd's Rep. 719.

On July 23, 1998, a fire started on deck 4 of the pure car carrier *Eurasian Dream* while in port at Sharjah. The fire, which was not contained or extinguished by the master and crew, eventually destroyed or damaged the vessel's cargo of new and second-hand vehicles and rendered the vessel itself a constructive total loss.
The relevant cargo interests commenced proceedings in London against the carrier before the Queen's Bench Division (Commercial Court).

Held, by the Queen's Bench Division (Commercial Court), that:

(1) The exceptions under art. 4, r. 2, may not be relied upon where the carrier is in breach of the "overriding obligation" to provide a seaworthy ship under art. 3, r. 1 and that breach is causative of the loss/damage.

EXCEPTED PERILS – WHEN MAY BE INVOKED (art.4(2))

France

Cour de Cassation 3 May 2006, *IMTC v. Weisrock* (2006 DMF 49)

On request of Robert Weisrock Co., a forwarding agent (Comti) agreed to carry from Saulcy-sur-Meurthe (France) to Rabat (Morocco) two trailers loaded with wood beams and Comti subcontracted the carriage by sea to IMTC. During the carriage by sea the beams loaded on one of the trailers became loose and were damaged. The damaged beams beams were rejected by the consignee and carried back to France where Robert Weisrock Co. took care of the necessary repairs and subsequently brought an action against Comti and IMTC in the Tribunal de Commerce of Marseille, claiming the cost of transportation back to France and the cost of repairs. By judgment of 3 November 2000 the Tribunal de Commerce allowed the claim on the ground that the remark made by the carrier on the manner in which the stowage of the beams on the trailer had been made by the shipper had not been endorsed on the bill of lading. The decision of the Tribunal de Commerce was affirmed by the Court of Appeal of Aix-en-Provence with judgment dated 23 September 2004. Weisrock appealed to the Cour de Cassation.

Held, by the Cour de Cassation, that:

[1] The failure by the carrier to insert a qualifying clause in the bill of lading does not prevent the carrier from proving that the damage to the cargo was caused by one of the excepted perils enumerated in article 4(2) of the Hague-Visby Rules.

FREEDOM OF CONTRACT (art. 7)

France

Cour de Cassation (Ch.Com.) 22 May 2007, *CMA-CGM Antilles-Guyane v. Axa Corporate Solutions Assurance and Others* (2007 DMF 811)

A refrigerated container with foodstuff was shipped on board the "*Fort Fleur d'Epée*"at Le Havre for transportation to Pointe-à-Pitre. Delivery was agreed to take place alongside. On arrival at destination the carrier after giving notice of arrival to the consignee unloaded the container and left it on the quay. The consignee having been unable to collect the container, the foodstuff deteriorated due to the lack of supply of electricity to the container. The insurers after having settled the claim of the consignee, brought proceedings against the carrier in the Tribunal de Commerce of Le Havre. The judgment of the Tribunal de Commerce whereby the carried was held liable for the loss of the goods was affirmed by the Cour d'Appel of Paris on the ground that it was the duty of the carrier to make sure that the consignee was in a position to take delivery of the container alongside the ship. The carrier appealed to the Cour de Cassation stating that the decision of the Court of Appeal was in breach of article 7 of the Hague-Visby Rules, since the clause alongside exonerated the carrier from any liability for loss of or damage to or in connection with the custody and care of the goods subsequent to their discharge from the ship.

Held, by the Cour de Cassation, that:

[1] Where the delivery of the goods at destination has been agreed alongside delivery is not deemed to have taken place if the carrier after having giving notice of arrival of the goods to the consignee does not prove that the consignee would have been in a position to collect the goods.

IDENTITY OF THE CARRIER (Art. 1(a))

France

Cour de Cassation 5 November 2003, *Compagnie Maritime d'Affrètement* v. *Power Shipping Company - The "Oriental Knight"* (2004 DMF 368)

On 14 June 1992 several containers in which drums of phosphorus were stuffed were loaded in Hong Kong on board the *Oriental Knight* by Power Shipping Company.
A bill of lading was issued by the Compagnie Maritime d'Affrètement (CMA) in which a carrier's identity clause provided that the registered owner should be deemed to be the carrier.
A fire broke in the hold where the containers had been loaded and CMA brought an action against Power Shipping in the Tribunal de Commerce of Marseilles, claiming damages.
Following the rejection of the claim by the Tribunal of Marseilles and the appeal of Power Shipping the Cour d'Appel of Aix-en-Provence held that CMA had no right of action since the carrier's identity clause identified the carrier in the registered owner.
CMA appealed to the Cour de Cassation denying the validity of the identity clause under the Hague Rules.

Held, by the Cour de Cassation, that:

(1) A carrier's identity clause is not prohibited by the Hague Rules.

Court of Appeal of Aix-en-Provence 25 April 2005, *Möller A.P. v. GIE Réunion Européenne and Others - The "Christian Maersk"* (2006 DMF 207)

A refrigerated container was loaded at the Havre by Omega Trading on board the *Christian Maersk* with destination Cotonou. A bill of lading with the heading "Maersk Line" was issued by S.A. Maersk France as agents. On arrival a destination the cargo of apples stuffed in the container was found damaged and its insurers, Les Mutuelles du Mans IARD Assurance, GIE Reunion Européenne and other insurance companies, acting in subrogation of the shipper, brought proceedings in the Tribunal de Commerce of Salon de Provence against Möller A.P. and the master of the vessel. By judgment dated 7th September 2001 the Tribunal de Commerce of Salon de Provence held that the defendants were liable for the payment to the plaintiffs of the insurance indemnity. The defendants appealed and A.P. Moller stated that from the bill of lading it appeared that S.A. Maersk France had acted as agents for Dampskibsseslskabet af 1912 Aktieseiskab and Aktieselskabet Svendborg as carrier.

Held, by the Court of Appeal of Aix-en-Provence, that:

[1] Even though the name of A.P.Möller did not appear on the bill of lading, that name appeared on the stationery of S.A. Maersk France from which the claim had been handled; that although A.P. Möller had stated that the names of Dampskibsseslskabet af 1912 and Aktieselskabet Svendborg appeared in small type in the bill of lading under the signature of S.A. Maersk France, followed by the description as carrier, in the verso of the bill of lading they were described as owners or charterers, whilst from the ships registry the owner was indicated as Maersk A/S Arthus; that no explanation was given as to the capacity in which the two companies had acted in connection with the carriage in question; that there appeared to be a flow and a curtain of smoke created by the drafters of the bill of lading and by S.A. Maersk France which permits, on the strength of the doctrine of the "apparence" to hold that A.P. Möller had acted as carrier.
[2] Even if service of the proceedings against the Master has been made to the agents, the agent had accepted it on behalf of the owners and/or charterers and therefore it entails the summons of the carrier.

Hong Kong Special Administration Region

Carewins Development (China) Limited v. Bright Fortune Shipping Limited and *Carewins Development (China) Limited v. Hecny Shipping Limited,* High Court of the Hong Kong Special Administrative Region, 27 July 2006 (http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp - Case no. HCCL 29/2004)

(The summary of facts may be found in the section "Bills of lading")

Held, by the High Court of the Hong Kong Special Administrative Region, that:

[1] Where a bill of lading is signed by the person whose name appears on its heading "as agent only" and contain on its reverse side a carrier's identity clause carrier must be deemed to be the person whose name is indicate in the identity clause.

Italy

Court ofAppeal of Genoa 3 May 2007, *Banco Espanol de Credito SA – Banesto v. Porto Leone Shipping Company, Ltd. – The "Apollo"* (not yet published)

A shipment of 850,000 kilograms of olive oil was loaded in Motril (Spain) on the m.v. "*Apollo*", owned by Porto Leone Shipping Company, Ltd. with destination Imperia (Italy). The bill of lading was issued on the Congenbill form and on the recto contained the following clause: "Freight payable as per charter party dated 24/06/98". Clause 1 overleaf so provided: "All terms and conditions, liberties and exceptions of the charter party dated overleaf are herewith incorporated". The bill of lading did not indicate the name of the carrier and was signed by the master of the vessel "as master".

Following the misdelivery of the entire shipment Banco Espanol de Credito SA – Banesto, to whom the bills of lading had been endorsed in pledge, brought proceedings in the Tribunal of Imperia (Italy) claiming the full value of the shipment. The judgment of the Tribunal of Imperia by which the claim was allowed, was appealed by Porto Leone inter alia on the ground that the claimant had no right of action since it was not the owner of the goods and that carrier had been a different company.

Held, by the Court of Appeal of Genoa, that:

[1] If the name of the carrier is not indicated in the bill of lading and the bill of lading is signed by the master the registered owner of the vessel must be deemed to be the carrier, nor the identity of the carrier may be established on the basis of a charter party incorporated by reference in the bill of lading which is not made available to the holder of the bill of lading.

JURISDICTION CLAUSE (Art. 3. 8)

United States

Kanematsu USA, Inc. et Al. v. *m/v Ocean Sunrise et Al., U.S.* District Court, Eastern District of Louisiana, 23 May 2003 (2003 AMC 2200)

A shipment of steel tubing was carried on the m/v *Ocean Sunrise* from Japan to New Orleans, Louisiana and Houston, Texas. When the steel tubing arrived at the ports of New Orleans and Houston, the tubing was allegedly damaged and depreciated in value. Plaintiffs, Kanematsu USA Inc., and Mitsubishi Corporation, as owners of the cargo, and Tokio Marine & Fire Insurance Company, as insurer of the cargo, brought an admiralty action under the Carriage of Goods by Sea Act, 46 U.S.C. app. §1300, et seq. seeking recovery for the damage

to the cargo. Defendant Sirhan Compania Maritime S.A., the vessel owner, filed a motion to dismiss in favor of litigation in Japan, based on a forum selection clause in the bill of lading.

Held, by the U.S. District Court, Eastern District of Louisiana, that:

(1) A forum selection clause providing for Japanese jurisdiction is null and void and of no effect under COGSA, 46 U.S.C. app. §1303(8) (art. 3(8) of the Hague-Visby Rules) where there is a substantial uncertainty as to whether Japanese courts would treat the claim against the owner of the carrying vessel as a contract claim, rather than a tort claim.

Reed & Barton Corp. and Others v. *MV "Tokio Express" and Others* (U.S.D.C. Southern District of New York 22 February 1999, 1999 AMC 1088)

Plaintiffs Reed & Barton Corp. and Others brought an action against *MV "Tokio Express"* and the shipowners of the vessel Pol Gulf International (Pte.) Ltd. to recover damages in admiralty for non delivery and damage to cargoes on board the *"Tokio Express"*. Defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(d) on the grounds of a mandatory forum selection clause in the bill of lading covering the action. The clause so provided:>

25. Law and jurisdiction. Except as otherwise provided specifically herein any claim or dispute arising under this bill of lading shall be governed by the law of the Federal Republic of Germany and determined in the Hamburg Courts to the exclusion of the jurisdiction of the Courts of any other place. In the event this clause is inapplicable under local law then jurisdiction and choice of law shall lie either in the port of loading or port of discharge at carrier's option.

Held, by the U.S. District Court, Southern District of New York, that:

(1) A jurisdiction clause in a bill of lading whereby any claim or dispute arising thereunder shall be governed by German law and shall be determined in the Hamburg Courts is broad enough to cover in rem claims and the unavailability of in rem proceedings in Germany does not deprive the plaintiffs of their substantive rights under COGSA when they have agreed to accept a Letter of Undertaking giving up their right to arrest the vessel.

LIMITS OF LIABILITY (Art. 4. 5)

Australia

El Greco (Australia) Pty Ltd. v. Mediterranean Shipping Company S.A., Federal Court of Australia, Queensland District Registry, 10 August 2004 (2004 AMC 2886)

(The summary of facts may be found in the section "General principles - Rules of interpretation")

Held, by the Federal Court, that:

[1] For the purpose of Article 4 rule 5(c) of the Hague-Visby Rules the enumeration of the number of packages or units in the bill of lading needs not to be contractually binding and cannot be adversely affected by any contrary statement of the carrier.

[2] The reference in Article 4 rule 5(c) to the number of packages or units enumerated in the bill of lading "as packed" in the container indicated that the bill of lading must use words which make clear the number of packages or units separately packed for transportation and, therefore, an enumeration of a number of pieces of cargo that could be packed in a variety of ways is not an enumeration called for by Article 4 rule 5(c).

England

Serena Navigation Ltd. v. *Dera Commercial Establishment – The "Limnos"*, Queen's Bench Division (Commercial Court) 28-29 April; 15 May 2008, [2008] 2 Lloyd's Rep, 166.

A shipment of US corn was carried from Louisiana to Aqaba on the vessel *Limnos* owned by Serena Navigation Ltd. arrival at Aqaba, after a passage through very heavy weather, a small amount of wetting damage was discovered in the holds, primarily holds 2 and 3, but also, it is alleged by the Cargo Owners, to a limited extent, holds 5 and 8, apparently caused by leakages through the vessel's hatch covers. The quantity of wet damaged cargo was segregated and disposed of, though the owners alleged that some wet damaged kernels were not segregated, and were discharged along with the apparently sound cargo and that up to 250 tons of cargo in holds 2 and 3 had to be discharged by bulldozers, and, as a result, suffered an increased number of broken kernels.

As a condition of allowing any discharge of the cargo from holds 2 and 3 it was required that the whole of that cargo be fumigated and treated with chemicals and transferred to pre-fumigated and disinfected silos.

In order to carry out the required fumigation and treatment, the cargo had to be moved within the silos, and, as a result, the number of broken kernels within the cargo increased, resulting in a depreciation in value of the cargo amounting to US $362,142.

The whole of the cargo as a result acquired a reputation in the market as a distressed cargo, and its sound arrived market price was depressed as a result by US $13 per ton: thus the total cargo of 43,998.66 tons (less the 12 tons damaged) was reduced in value by US $13 per ton, namely a loss of US$ 571,842.26.

A range of other expenses and liabilities were incurred by the Cargo Owner in relation to the fumigation, segregation and silo storage of the cargo.

In proceedings brought by the shipowners against the Cargo Owners, Dera Commercial Establishment, counterclaimed, in addition to the market value of the cargo which was not delivered, for the total amount of US$ 1,742.40, all losses and expenses referred to in paragraphs (i)-(ii). The preliminary issue that had to be decided was how the limitation of liability had to be calculated.

The Carrier's case was that the limit of liability under Article IV.5(a) of the Hague-Visby Rules, where, as in that case, gross weight is the applicable test, and loss of the goods is not in issue, is by reference to the gross weight of the goods physically damaged. The Cargo Owner asserted instead that the limit was applicable by reference to the whole cargo of 43,999.86 tons.

Held, by the Commercial Court, that:

[1] Under article 4, paragraph 5 (a) of the Hague Visby Rules the limit of liability applies only to the goods that are physically lost or damaged and therefore cannot apply to goods in respect of which only an economic loss has occurred

Germany

The MV *"New York Express"*, Oberlandesgericht Hamburg (Court of Appeal) 2 November 2000, Transportrecht 2001, p. 87 *

Two containers with machinery were carried from Bremerhaven to Newark/New Jersey on the MV *New York Express*. The carrier issued an express cargo bill. The express cargo bill provided for the application of German law. It further contained a Paramount Clause in favour of the US COGSA extending the application of the US COGSA also to losses and damages occurring prior to the loading and after the discharging of the cargo. After discharging had been completed at Newark and in the course of the handling of the cargo on

the terminal, the terminal operator being the carrier's subcontractor, part of the cargo was damaged. The consignee claimed damages from the carrier under the contract of carriage. The issue to be decided by the Court was whether the limitation of liability was effective.

Held, by Oberlandesgericht Hamburg (Court of Appeal), that:

[1] The Carrier can limit its liability to US$ 500.00 per package pursuant to US COGSA para. 1304 (5) (cfr. Art. 4 para. 5 Hague-Visby Rules).

* By the courtesy of Dr. Cristoph Horbach, Lebuhn & Puchta Rechtsanwälte, Vorsetzen 35, D-20459 Hamburg - cristoph.horbach@lebuhn.de

Italy

Tribunal of Naples 27 February 2004, *Fertilizers and Chemicals Ltd.* v. *Grimaldi Compagnia di Navigazione S.p.A.* [2004] Dir.Mar. 451

A truck loaded at Rotterdam on the m/v *Grande Africa*, of Italian flag, with destination Lagos, was not delivered at destination. Fertilizers and Chemicals Ltd., holder of the bill of lading issued by the carrier, Grimaldi Compagnia di Navigazione S.p.A., commenced proceedings against Grimaldi in the Tribunal of Naples, claiming as damages the value of the truck, in the amount of US$ 24,727. The carrier invoked the application of the limit of liability of the Hague-Visby Rules.

Held, by the Tribunal of Naples, that:

[1] If the carrier fails to deliver at destination the goods and is incapable to provide any explanation on the cause of the loss, such loss must be deemed to have been caused by his gross negligence.

[2] When the loss of the goods is due to the gross negligence of the carrier the limit of liability provided by the Hague-Visby Rules is null and void, since it is contrary to ordre public.

Tribunale of Naples 7 October 2003, *Embroidered Centre S.a.s.* v. *Air Seatransport Inc. and Coscos S.r.l. - The "Hua Li He"* [2004] Dir.Mar. 451

A consignment of textiles, stowed in a container carried from Quingdao to Naples on the m/v *Hua Li He*, arrived in damaged conditions and the consignee, Embroidered Centre S.r.l., brought proceedings against the agents in Naples of the carrier, Cosco S.r.l. and the logistic provider, Air Seatransport Inc., in the Tribunale of Naples.
A dispute arose between the parties on the conversion of the 100 gold pounds limit of the Hague Rules, applicable to the contract of carriage.

Held, by the Tribunale of Naples, that:

[1] The limit of liability of the carrier under article 4(5) of the Hague Rules must be converted into Italian currency on the basis of the market value at the time of the occurrence of the gold content of the gold pound in 1924.

Japan

The Buen Viento, Chiho Saibansho (District Court) of Tokyo, 16 October 2003, Kaijihou Kenkyûkaishi no.178, p.66.*

The owners of the *Buen Viento*, that has sunken during a voyage from Japan to the United States, commenced limitation proceedings under the Japanese law that implemented the LLMC Convention (Act on Limitation of Liability of Shipowners) in the District Court (Chiho Saibansho) of Tokyo. The owners of some valuable cargo claimed the full value of the cargo but other claimants objected that the amount of the claim should be calculated on the basis of the per kilo limitation set out by the Japanese law that implemented the Hague-Visby Rules (International Carriage of Goods Act).

Held, by the Tokyo District Court (Chino Saibansho) that:

[1] The per kilo limitation set out by the International Carriage of Goods Act applies automatically to any claim against the carrier, irrespective of the carrier invoking its application or not.

[2] The amount of the claim in respect of loss of or damage to cargo that may be filed in limitation proceedings is not based on the value of the goods lost or damaged, but on the amount that may be claimed on the basis of the per kilo limitation of the International Carriage of Goods Act.

* By the courtesy of Prof. Souichirou Kozuka of the Sophia University, Tokio - s-kozuka@hoffman.cc.sophia.ac.jp

Tokyo Chiho Saibansho (Tokyo District Court) 13 May 1998, *Nicholas D. Carner* v. *Global Silver Hawk, Inc. et al.* (Hanrei Jihô no. 1676, p. 129) *

Nicholas D. Carner shipped on board the *"Silver Hawk"* owned by Global Silver Hawk Inc. unspecified goods and, at the time he entered into the contract of carriage, declared to the carrier the value of the goods that had been delivered to it. However the declaration of the value was not inserted in the bill of lading. Upon arrival at destination in Japan, loss and damage was found in the consignment and the shipper sued the carrier before the Tokyo District Court claiming payment of the damages on the basis of the value declared to the carrier. The carrier denied the validity of the declaration of value on the ground that it had not been inserted in the bill of lading.

Held, by the Tokyo District Court, that:

(1) The declaration of the nature and value of the goods does not need to be endorsed on the bill of lading when it is made to the performing carrier.

* Summary prepared by by Prof. Souichirou Kozuka, Sophia University, Tokyo.

New Zealand

Dairy Containers Ltd., Moriah Co. Ltd. and Posteel v. The Ship "Tasman Discoverer" and Tasman Orient Line CV (High Court of New Zealand-Auckland Registry 27 July 2001, [2002] 1 NZLR 265; [2002] 2 Lloyd's Rep. 528 *

During the voyage from Busan (Korea) to Tauranga (New Zealand) 55 coils of electrolytic tin plates part of a consignment of 70 coils loaded on board the m.v. *Tasman Discoverer* were damaged as a result of sea water ingress, and were sold as scrap. After salvage recovery, the agreed net claim of the receiver, Dairy Containers Ltd. was US$ 613,667.25. The carrier, Tasman Orient Line CV, accepted liability but stated that the package

limit of £ 100 applied. Dairy Containers instead stated that the applicable limit was per each package the present value in gold of £ 100 in 1924. Clause 6(B)(b)(i) of the bill of lading provided that where no international convention or national law was applicable the liability of the carrier would be determined by the Hague Rules contained in the 1924 Convention on Bills of Lading and for the purpose of that provision the limitation of liability was deemed to be £ 100 sterling lawful money of the United Kingdom per package or unit. Clause 8.2 provided that any provision in conflict with the applicable international convention or national law shall be null and void. Dairy Containers commenced proceedings *in rem* against the m.v. *Tasman Discoverer* and *in personam* against Tasman Orient Line before the High Court of New Zealand-Auckland Registry.

Held, by the New Zealand High Court, that:

(1) The Hague Rules being incorporated in the bill of lading the effect of clause 8.2 is to nullify the package limitation in clause 6(B)(b)(i) to the extent that it may be in conflict with or repugnant to the Hague Rules.

(2) The first paragraph of article 9 of the Hague Rules is intended to qualify the reference in article 4(5) to £ 100, so that the figure in sterling must be taken to be a gold value figure, viz. the gold value of $ 100 sterling in 1924.

* A copy of this judgment has been kindly provided by Dr. Paul Myburgh, University of Auckland.

On appeal by Tasman Orient Line CV the New Zealand Court of Appeal reversed the decision and held that the limitation of liability under the Hague Rules was determined by both articles 4(5) and 9 and the effect of clause 6(B)(b)(i) was to replace the limit set out by the provisions of the Rules by the £100 sterling limit nor was the application of that limit prevented by article 3(8) of the Rules since the intention of the parties had been to incorporate the Rules subject to the change of the limit of liability.
Dairy Containers Limited appealed from the decision of the Court of Appeal of New Zealand to the Privy Council. The decision of the Court of Appeal was affirmed by the Privy Council (Judicial Committee) with judgment dated 20 May 2004 [2004] 2 Lloyd's Rep. 647.

Held, by the Privy Council, that:

[1] The opening words of cl. 6(B)(b)(i) serve to incorporate the Hague Rules if no international convention or national law governs and the loss or damage is proved to have occurred at sea or on inland waterways. One of the subsequent deeming provisions, expressed to take effect "for the purposes of this sub-paragraph", is to the effect that the deeming provision gives effect to art. IV, r. 5 as it if were unqualified by art. IX.
[2] A term in the bill cannot be repugnant to any provision of the Hague Rules if the term in question represents a modification of the Hague Rules provision agreed by the parties in exercise of their freedom to agree what they will. It would similarly be absurd to hold that a clear contractual limitation agreed by the parties is invalidated by art. III, r. 8 of the Hague Rules.

United States

Ferrostaal, Inc. v. *m/v Sea Phoenix, Delaro Shipping Co. Ltd., Interway Shipping Co. Ltd. and Others,* United States Court of Appeals for the Third Circuit, 3 May 2006 (http://www.ca3.uscourts.gov/opinarch/051837p.pdf)

Ferrostaal, Inc., the consignees of a shipment of 402 coils, carried from Tunisia to Gloucester City, New Jersey, sued the Sea Phoenix and its owners, Delaro Shipping Company, in the U.S. District Court for the District of New Jersey claiming that 280 coils had been exposed to sea water for a total damage of $ 507,892. Delaro moved for partial summary judgment claiming that COGSA paragraph 4(5) limited their liability to $ 500 per package. The District Court granted the motion for partial summary judgment. It found that COGSA applied and then applied the fair opportunity doctrine and concluded that the bills of lading provided Ferrostaal with the necessary opportunity. At Ferrostaal's request, the District Court certified for immediate appeal the issue whether an ocean carrier is entitled to invoke COGSA in order to limit recovery of damages without having incorporated a reference to COGSA or COGSA's $ 500 per package limitation in the bill of lading.

Held, by the United States Court of Appeals for the Third Circuit, that:

[1] The fair opportunity doctrine is not consistent with the text and the policies of COGSA paragraph 4(5).

United States of Americav. Ocean Bulk Ships, Inc., m/v "Overseas Harriette" and m/v "Overseas Marilyn" (United States Court of Appeals-5th Circuit 10 April 2001, 2001 AMC 1487)

Between 1994 and 1996, the United States, through its Commodity Credit Corporation (CCC), and with the assistance of several private relief organizations, shipped cargoes to famine-stricken areas of Africa on behalf of the Agency for International Development (AID). The cargoes were shipped under various charter parties made expressly subject to COGSA on the m/v *Overseas Harriette* and the m/v *Overseas Marilyn*, vessels owned by the defendants, Ocean Bulk Ships, Inc., and Transbulk Carriers, Inc. The shipments included a variety of foodstuffs such as vegetable oil, corn, and bulgur wheat, which were shipped to the African ports of Mombasa, Kenya; Beira and Maputo, Mozambique; Freetown, Sierra Leone; and Tema, Ghana. Clean bills of lading were issued for each shipment after the cargo was stowed, indicating that the cargo was received by the carrier in good condition. Unfortunately, the goods were not received in the same quantity or quality when discharged in Africa. Survey reports documenting the loss and damage indicated several problems. Some parts of the cargo were simply not received at all. Some parts of the cargo were received in a damaged and unusable condition. The total amount of documented loss and damage to the cargo was $203,319.87.

In December 1998, the United States filed the first of five lawsuits, seeking damages for the lost and damaged cargo under COGSA. In February 1999, these suits were consolidated. In September 1999, the matter was tried to the bench. In December 1999, the district court entered judgment in favor of the United States for the limited sum of $7,300.08, the amount of damage that the defendants admit occurred prior to discharge. The judgment was appealed.

Held, by the U.S. Court of Appeals for the 5th Circuit, that:

(1) Cogsa allows the shipper to declare the cargo's value, and inclusion of this value on the bill of lading evidences the carrier's acquiescence to this declaration. The declared value

is therefore prima facie evidence of the cargo's value and, absent any rebuttal evidence from the carrier, is adequate to set the value of the cargo for damage calculation purposes.

LOSS OF RIGHT TO LIMIT LIABILITY (Art. 4. 5(e))

France

Court of Appeal of Paris 17 October 2007, *Someport Walon* v. *SNC GE Energy Products* (2008 DMF 250)

By contract dated 30 July 1999 between GE Energy and S.A. Someport Walon agreed to carry materials for the construction of a gas plant in Bangladesh. During the transshipment in the port of Antwerp of a gas turbine from a barge to the m/v Alemania the turbine fell owing to the wire of the vessel's crane having broken.

GE Energy and its insurers brought proceedings against Someport Walon and others in the Tribunal de Commerce of Paris claiming damages in the amount of US Dollars 3,033,172. By judgment of 30 May 2005 the Tribunal de Commerce found Someport Walon liable for the full amount of the claim on the ground that the carrier could not invoke the limit of liability pursuant to Article 4(5)(e) of the Hague-Visby Rules. Someport Walon appealed to the Cour d'Appel Paris.

Held, by the Cour d'Appel of Paris, that:

[1] The damage caused to a turbine during its loading on board the ship owing to the wire of the crane having broken resulted from an omission of the carrier done recklessly and with knowledge that damage would probably result when it is proved that the wire was worn out and corroded

Borchard Lines Limited v. *Alte Leipziger – The "Grace Church Comet"*, Cour de Cassation 5 December 2006 (2006 Revue de Droit Commercial, Maritime, Aerien et des Transports, 208)

In January 1999 Spare Time France requested Borchard Lines to carry from Marseilles to Ashdod in Israel a container loaded with ball point pens. The container was delivered to Intramar Acconage, acting as agent for the carrier, on 19th January 1999 and was stacked on the ground in an area where no watch service was provided, waiting for its loading on the m/v *Grace Church Comet*, expected to take place on 25th January 1999. At the time of its loading on board it was found that the seals of the container had been replaced and that that container was empty.

Alte Leipziger, the insurers of the cargo of pens, settled the claim of Spare Time France and commenced proceedings in the Tribunal de Commerce of Marseilles against Borchard Lines and Intramar Acconage claiming the full amount of the indemnity paid to their assured, being € 160,457.92. The case was then submitted to the Cour d'Appel of Aix-en-Provence who by judgment dated 10th June 2004 held the carrier fully liable and denied the benefit of limitation of liability on the ground that by stacking the container in such a manner the carrier acted recklessly and with knowledge that the theft of the goods would probably occur. Borchard Lines and Intramar Acconage appealed to the Cour de Cassation.

Held, by the Cour de Cassation, that:

[1] The carrier who prior to the loading of a container on board stacks the container for several days in an open area, without any watch service acts recklessly and with knowledge that damage or loss would probably occur and therefore cannot invoke the limit of liability in case of theft of the goods loaded in the container.

Groupement d'Intérêt Economique Scadoa and Others v. *Société de Navigation et Transports–The "Woemann Bannière"* (Cour de Cassation 4 January 2000, 2000 DMF 466)

The Groupement d'Intérêt Economique Scadoa carried on board the vessel "*Woemann Bannière*" two cases of electrical materials from Le Havre to Douala in Cameroon. One of the cases was damaged during carriage on account of bad weather conditions and the other one was short delivered. The cargo underwriters, acting under subrogation of the owners of the goods, sued the carrier before the Tribunal de Commerce of Le Havre requesting the payment of damages in respect of the case short delivered and held that the limit of liability was not applicable on the ground that the loss was attributable to a "faut inexcusable". The claim was allowed and the decision of the Tribunal de Commerce was upheld by the Cour d'Appel of Rouen. The judgment of the Cour d'Appel of Rouen was appealed to the Cour the Cassation by the carrier.

Held, by the Cour de Cassation, that:

(1) The unexplained loss of a case during carriage implies an action or omission of the carrier done recklessly and with knowledge that damage would probably result.

Cour d'Appel of Rouen 18 February 1999, *Hapag Lloyd GmbH* v. *Cie Mutuelles du Mans Assurance IARD – The "Düsseldorf Express"* (2000 DMF 231)

An industrial press carried from New Orleans to Le Havre on board the *Düsseldorf Express* was discharged in damaged conditions. Mutuelles du Mans Assurance IARD settled the claim to their assureds and sued the carrier, Hapag Lloyd GmbH, before the Tribunal de Commerce of Le Havre. By judgment of 4 July 1997 the Tribunal de Commerce held that the carrier should pay the full amount of the damages because the package/kilo limitation was not applicable. Hapag Lloyd appealed.

Held, by the Cour d'Appel of Rouen, that:

(1) The benefit of the limit cannot be invoked when the damage is the consequence of the carrier having performed the voyage in conditions such as to initially give rise to such damage.

Italy

Corte di Cassazione 19 April 2001, No. 8328, *Empresa Consolidada Cubana de Aviacion v. Maria Angela Toscano and Others* [2002] Dir.Mar. 1288

On 3 September 1989 an aircraft owned by Empresa Consolidada Cubana de Aviacion crashed in the vicinity of the airport of Habana, Cuba, almost immediately after having taken off in adverse meteorological conditions, notwithstanding the warning of the control tower. All the 113 passengers and the crew lost their lives in the accident.
The next-of-kin of several passengers, all of Italian nationality, sued the air carrier before the Tribunal of Milano. By judgment of 10 January 1996 the Tribunal of Milano held the carrier liable for the accident and held further that the benefit of the limitation of liability under article 22 of the Warsaw Convention, as amended by the Hague Protocol of 1955, was not applicable since the pilot acted recklessly and with knowledge that an accident would probably occur. The decision of the Tribunal of Milano was affirmed by the Court of Appeal of Milano with judgment of 13 January 1999. The Empresa Consolidada Cubana de Aviacion appealed to the Supreme Court.

Held, by the Corte di Cassazione that:

(1) Pursuant to art. 22 of the 1929 Warsaw Convention, as amended by the 1955 Hague Protocol, in order that the carrier loses the right to limit its liability it must have acted recklessly, i.e. contrary to the most elementary rules of prudence, and with knowledge that damage would probably occur, i.e. with the subjective awareness of the likelihood of a damage and is comparable, in Italian law, to the fault with foresight of its consequences reference to which is made in art. 61.3 of the penal code.

Court of Appeal of Turin 15 December 2005, *Medlift S.r.l.* v. *Zati S.p.A. and Others - The "Tina Med"*(not yet reported)

A transformer, loaded at Southampton on the MV *"Tina Med"* of Italian flag for carriage to Genoa, during unloading operations fell into the hold and was severely damaged. It was established that the accident occurred owing to the steel wire of the derrick, with which the transformer was lifted had broken. The consignees brought an action in the Tribunal of Turin against the forwarding agents claiming damages. The forwarding agents denied that they had acted as carrier and joined in the proceedings the owner of the ship, Medlift S.r.l. By judgment dated 21 November 2003 the Tribunal of Turin found the forwarding agents liable but allowed their recourse action against the owner of the ship. Medlift appealed to the Court of Appeal of Turin. In the appeal proceedings the issue of the limit of liability under the Hague-Visby Rules was discussed and the claimants alleged that the limit was not applicable.

Held, by the Court of Appeal of Turin, that:

[1] The carrier is not entitled to the benefit of the limitation of liability provided for in article 4(5)(a) of the Hague-Visby Rules because the damage resulted from an act or omission of the crew done recklessly and with knowledge that damage would probably result.

Court of Appeal of Genoa 6 June 2002*, Ignazio Messina & Co. S.p.A. v. Pietro Trombi – m/v "Jolly Rubino"* [2004] Dir. Mar. 191

On 9 May 1995 a car owned by Pietro Trombi was loaded on the m/v *Jolly Rubino* in Genoa. Place of destination was Abidjan, where the vessel was supposed to call in the outward voyage. The car was however discharged heavily damaged when the vessel called at Abidjan in the homeward voyage.
Pietro Trombi brought an action against the carrier in the Tribunal of Genoa claiming a full indemnity. By judgment of 10 October 2000 the Tribunal of Genoa found the carrier liable for the full amount of the loss. The carrier appealed on the ground that the limit of liability set out in art. 4.5(e) of the Hague-Visby Rules should have been applied.

Held, by the Court of Appeal of Genoa, that:

(1) The subjective situation to which pursuant to art. 4.5(e) of the Hague-Visby Rules is linked the loss of the limit of liability corresponds, in its psychological and vouluntaristic components, to that qualified in the Italian penal system as dolus eventualis, characterized by the fact that the crime though not pursued nor considered as certain and unavoidable by the person liable, is deemed committed intentionally in that it is accepted by him as a consequence of his action or omission with acceptance of the related risk.

(2) The claimant who challenges the benefit of the limit of liability on the ground that the loss suffered by him was due to the greater length of the voyage has the burden of proving the causal relationship between the loss and the length of the voyage and the facts in connection with which the reckless behaviour of the carrier and his knowledge that a loss would probably result must be assessed

United States

Doris Cristina Piamba Cortes v. *American Airlines. Inc.* (Court of Appeals, Eleventh Circuit, 15 June 1999, 1999 AMC 2286)*

On December 20, 1995, American Airlines flight 965 crashed as the plane attempted to navigate its arrival to the Alfonso Bonilla Aragon Airport in Cali, Colombia. The crash killed 151 passengers, including Maria Constanza Piamba Cortes, who was returning home. Doris Cristina Piamba Cortes started suit in the Florida State Court and then the case was removed to the Federal Court where it was consolidated for multidistrict pretrial proceedings with almost 160 other passengers lawsuits. The District Court concluded that all the passengers suits against American Airlines fell under the terms of the Warsaw Convention and held that the decision of the pilot to continue descending at night in mountainous terrain when the circumstances made clear that the plane had strayed dramatically from the published arrival route amounted to anything less than wilful misconduct. The District Court reached this conclusion by applying its objective standard for reckless disregard although the Court held on the alternative that, even if reckless disregard contemplates a subjective test, the evidence compelled a conclusion that the pilot engaged in wilful misconduct.

American Airlines appealed arguing inter alia that wilful misconduct requires a subjective rather than an objective test and the evidence created a question of fact for the jury under this test.

Held, by the United States Court of Appeals, Eleventh Circuit, that:

(1) As it is known, the first Convention in which the wording now adopted in order to describe the situations in which the right to limit is lost is the Warsaw Convention, as amended by the 1955 Hague Protocol. The history of the amendment of Art. 25 is, therefore, relevant for all subsequent conventions.

* The interpretation of Montreal Protocol No. 4 which has adopted the language of Art. 25 of the Warsaw Convention as amended by the 1968 Hague Protocol is relevant because the language of Art. 4 r. 5(e) of the Hague Visby Rules is the same and when this provision was adopted its origin was known. Although very little discussion took place in respect of this provision, when article 4 bis was discussed at the CMI Stockholm Conference in 1963 reference was expressly made to Article 25 of the Hague Protocol (The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules, edited by F. BERLINGIERI, p. 622).

Bayer Corporation v. British Airways PLC (U.S. Court of Appeals-4th Cir., 17 April 2000, 2000 AMC 1947)

Bayer Corporation contracted with British Airways to transport seventy cartons of medical products from London Heathrow airport in England to Dulls international airport in Virginia. Before the flight the medical products were packed in wet ices. The air bill noted "packed in wet ices, store between 2-8 degrees C. Do not freeze". The labels did not note how long the reagents would be safe without refrigeration. After arrival at Dulls, British Airways placed the cargo in its refrigerated warehouse such as it had done with past Bayer shipments. Because of past dealings, Bayer and its customs broker were aware that British Airways did not provide refrigerated storage at Dulls. According to the course of conduct established among the parties, Bayer custom agents did immediately pick up the cargo and the result of such cargo being unrefrigerated for nine days, the shipment was determined to be a total loss.

Held, by the United States Court of Appeals for the Fourth Circuit, that:

(1) Pursuant to Art. 25 of the Warsaw Convention as amended by Montreal Protocol No. 4 the claimant must show that the carrier either intended to cause the damage or acted recklessly with subjective knowledge that the damage would probably result.

MANAGEMENT OF THE SHIP AND MANAGEMENT OF THE CARGO (Art. 4 r.2(a)

France

Cour de Cassation 20 February 2001 Island Insurance Co. v. Delmas (2001 DMF 919).

A cargo of sugar carried to Le Havre was delivered damaged by sea water owing to the valve connecting the ballast tank to the hull having been opened by mistake by one of the officers.

Held, by the Cour de Cassation, that:

(1) The fact that an operation relates to the management of the ship does not necessarily entail that the fault committed during such operation has the same nature. Consequently the Court of Appeal that did not state in which manner the fault affected the safety of the ship rather than the cargo has not given a legal basis to its decision.

France

Cour d'Appel of Versailles 20 December 2001, S.A. CGM Antilles Guyane v. Les Mutuelles du Mans Assurances IARD and Others – The "Fort Fleur d'Epée" (2002 DMF 251)

Various refrigerated containers were loaded on the m.v. Fort Fleur d'Epée of CGM Antille Guyane at Havre and Montoir. During loading operations at Montoir the officer in charge ordered the filling of ballast tank no. 8 in order to prevent a list of the ship and seawater entered into the hold through a port hole incorrectly closed, flooding the containers. Upon arrival of the ship at destination it was found that the poultry loaded in the containers was lost. The cargo insurers commenced proceedings against the carrier before the Tribunal de Commerce of Nanterre which by judgment of 13 October 1998 allowed their claim. The carrier appealed against such judgment to the Cour d'Appel of Versailles alleging that the loss had been caused by a fault in the management of the ship.

Held, by the Cour d'Appel of Versailles, that:

(1) Nautical fault includes, in addition to the fault in the navigation, the fault in the management of the vessel that adversely affect the safety of the vessel and of the maritime adventure; while a fault that endangers the cargo is a commercial fault for which the carrier is responsible. A ballasting operation carried out during loading that, owing to a defective closing of an inspection port, causes the flooding of containers stowed in the hold is not a nautical fault.

NEGLIGENT STOWAGE (Art. 3.2)

United States

American Home Assurance Co. v. M/v Tabuk et Al., United States District Court, Southern District of New York, November 5, 2001 (2002 AMC 184)

One container in which one hundred missiles, placed on pallets had been stowed, was loaded on the deck of the m/v Tabuk for carriage from Wilmington to Kuwait. In the course of the voyage the container was lost overboard during a storm. American Home Assurance Co. indemnified the shipper, Raytheon System Company and brought an action against the m/v Tabuk and the carrier, United Arab Shipping Company, claiming US$ 2,560,250.00 in damages, stating that the package limitation was not applicable because the stowage of the container on deck was an unreasonable deviation and in any event the deviation was per se unreasonable, the total number of containers on deck exceeded that contemplated in the stowage manual of the ship and the container was improperly secured.

Held, by the U.S. District Court, Southern District of New York, that:

(1) Negligence of the carrier in properly loading and securing containers on deck is not an unreasonable deviation.

NOTICE OF LOSS OF DAMAGE (Art. 3.6)

Italy

Tribunal of Genoa 4 December 2002, Llloyd Italico Assicurazioni S.p.A. v. Grandi Traghetti S.p.A. di Navigazione – m/v "Maringa" [2004] Dir.Mar 1473

A consignment of 1995 bags of coffee, stuffed in containers supplied by the carrier, were loaded at Matadi on the m/v Maringa and carried to Genoa and then by rail from Genoa to the inland terminal of the carrier at Rivalta Scrivia.
When the containers were inspected they were found damaged and several bags of coffee were found wet and stained. The cargo insurers, Lloyd Italico Assicurazioni S.p.A., settled the claim of the consignees and brought an action against the carrier, Grandi Traghetti S.p.A. di Navigazione, in the Tribunal of Genoa.

Held, by the Tribunal of Genoa, that:

(1) If notice of loss of or damage to the goods is not given by the consignee to the carrier as prescribed by art. 3.6, the goods are deemed to be delivered in the conditions described in the bill of lading and the consignee has the burden of proving that the loss or damage was caused by a fault of the carrier.

OBLIGATION TO MAKE THE SHIP SEAWORTHY (Art. 3. 1)

Australia

Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corp.–The "Bunga Seroja" (High Court, 22 October 1998, 1999 AMC 427):

A consignment of 40 cases of aluminium can body in coils loaded in Sydney on board the m/v Bunga Seroja was partly damaged during the passage from Sydney to Keelung, Taiwan on account of heavy weather. Great China Metal Industries Co. Ltd., to which the property in the goods had passed, claimed damages from the carrier, Malaysian

International Shipping Corp. Berhad but the claim was rejected by the trial Judge whose decision was affirmed by the New South Wales Court of Appeal. The claimant appealed to the High Court of Australia contending that the exception of perils of the sea did not apply because damage to the cargo resulted from sea weather conditions which could reasonably be foreseen and guarded against. The question to which the submission primarily was directed was the meaning and effect of art. IV r. 2(c) of the Hague Rules.

Held, by the High Court of Australia, that:

(1) Seaworthiness must be judged having regard to the conditions the vessel will encounter. The standard of fitness rises with improved knowledge of shipbuilding and navigation. In Art. 3 r. 1 the term "seaworthiness" should be given its common law meaning; nothing in the Rules generally or in the travaux préparatoires suggests otherwise.

England

Papera Traders Co. Ltd. and Others v. Hyundai Merchant Marine Co. Ltd. and Another – The "Eurasian Dream" [2002] 1 Lloyd's Rep. 719.

On July 23, 1998, a fire started on deck 4 of the pure car carrier Eurasian Dream while in port at Sharjah. The fire, which was not contained or extinguished by the master and crew, eventually destroyed or damaged the vessel's cargo of new and second-hand vehicles and rendered the vessel itself a constructive total loss.
The relevant cargo interests commenced proceedings in London against the carrier before the Queen's Bench Division (Commercial Court).

Held, by the Queen's Bench Division (Commercial Court), that:

(1) Seaworthiness is not an absolute concept; it is relative to the nature of the ship, to the particular voyage and even to the particular stage of the voyage on which the ship is engaged and must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable.

(2) The components of the duty (as illustrated by the case law) are as follows:

(a) The vessel must be in a suitable condition and suitably manned and equipped to meet the ordinary perils likely to be encountered while performing the services required of it. This aspect of the duty relates to the following matters:
(i) The physical condition of the vessel and its equipment;
(ii) The competence/efficiency of the master and crew;
(iii) The adequacy of stores and documentation.
(b) The vessel must be cargoworthy in the sense that it is in a fit state to receive the specified cargo.

(3) Incompetence or inefficiency of the master and crew may consist of a "disabling want of skill" or a "disabling want of knowledge".

(4) Incompetence is to be distinguished from negligence and may derive from:

(a) an inherent lack of ability;
(b) a lack of adequate training or instruction: e.g. lack of adequate fire-fighting training;
(c) a lack of knowledge about a particular vessel and/or its systems;
(d) a disinclination to perform the job properly;
(e) physical or mental disability or incapacity (e.g. drunkenness, illness).

(5) The test as to whether the incompetence or inefficiency of the master and crew has rendered the vessel unseaworthy is as follows: Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this master and crew, with their state of knowledge, training and instruction?

(6) The duty of "due diligence" is an "inescapable personal obligation": it is non-delegable. The carrier will therefore be responsible for negligence of those to whom it delegates due diligence. The question is whether unseaworthiness is due to any lack of diligence in those who have been implicated by the carrier in the work of keeping or making the vessel seaworthy. Such persons are the carriers' agents whose diligence or lack of it is attributable to the carrier. This principle is relevant in two respects: (1) the carrier under the bills of lading is liable for the want of due diligence by the owners or managers; (2) the carrier is liable for the want of due diligence of the master insofar as the carrier or the owners or managers have delegated to him their duties as to seaworthiness.

France

Cour d'Appel of Versailles 20 December 2001, S.A. CGM Antilles Guyane v. Les Mutuelles du Mans Assurances IARD and Others – The "Fort Fleur d'Epée" (2002 DMF 251)

Various refrigerated containers were loaded on the m.v. Fort Fleur d'Epée of CGM Antille Guyane at Havre and Montoir. During loading operations at Montoir the officer in charge ordered the filling of ballast tank no. 8 in order to prevent a list of the ship and seawater entered into the hold through a port hole improperly closed, flooding the containers. Upon arrival of the ship at destination it was found that the poultry loaded in the containers was lost. The cargo insurers commenced proceedings against the carrier before the Tribunal de Commerce of Nanterre which by judgment of 13 October 1998 allowed their claim. The carrier appealed against such judgment to the Cour d'Appel of Versailles alleging that the loss had been caused by a fault in the management of the ship.

Held, by the Cour d'Appel of Versailles, that:

(1) The carrier is exonerated from liability for loss of or damage to the goods due to the unseaworthiness of the vessel only if it proves that it has complied with the obligations set out in article 21 of law 18 June 1966, namely that it has put the vessel in the condition to perform the service it has undertaken to do, account being taken of the voyage the vessel must carry out and of the goods to be carried.

(2) Nautical fault includes, in addition to the fault in the navigation, the fault in the management of the vessel that adversely affect the safety of the vessel and of the maritime adventure; while a fault that endangers the cargo is a commercial fault for which the carrier is responsible. A ballasting operation carried out during loading that, owing to a defective closing of an inspection port, causes the flooding of containers stowed in the hold is not a nautical fault

Japan

*Tokyo Kôtô Saibansho (Court of Appeals of Tokyo) 14 September 2000, Taiwan Fire and Marine Insurance Co. Ltd. v. Unison Navigation Corp. (Kôtô Saibansho Minji Hanreishu vol.53, no.2, p.124) **

The ship that had carried Malaysian lumber from Miri, Malaysia, to Su-ao, Taiwan, took a heavy list on her port side before unloading due to leakage caused by a crack in her port bow. All the lumber fell into the sea and was totally damaged by the oil spilt from the ship. The cargo insurer sued the carrier, alleging that the carrier had breached his duty to make the ship seaworthy. During the proceedings it appeared that the ship, fifteen years

old, had had her starboard bow repaired one month before the accident at issue, after a leakage due to another crack.

Held, by the Court of Appeals of Tokyo, that:

(1) The carrier has not exercised due diligence to make the ship seaworthy when, after a leakage in the port side had occurred and it was found that such leakage was due to a crack in the plate it failed to cause the starboard side to be inspected and the cargo was severely damaged as a consequence of a further crack in the hull.

** Summary prepared by by Prof. Souichirou Kozuka, Sophia University, Tokyo.*

OBLIGATION TO PROPERLY CARE FOR THE GOODS (Art. 3. 2)

Australia

Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corp.–The "Bunga Seroja" (High Court, 22 October 1998, 1999 AMC 427):

A consignment of 40 cases of aluminium can body in coils loaded in Sydney on board the m/v Bunga Seroja was partly damaged during the passage from Sydney to Keelung, Taiwan on account of heavy weather. Great China Metal Industries Co. Ltd., to which the property in the goods had passed, claimed damages from the carrier, Malaysian International Shipping Corp. Berhad but the claim was rejected by the trial Judge whose decision was affirmed by the New South Wales Court of Appeal. The claimant appealed to the High Court of Australia contending that the exception of perils of the sea did not apply because damage to the cargo resulted from sea weather conditions which could reasonably be foreseen and guarded against. The question to which the submission primarily was directed was the meaning and effect of art. IV r. 2(c) of the Hague Rules.

Held, by the High Court of Australia, that:

(1) The fact that responsibility under Art. 3 r. 2 is expressly made subject to the exemptions in Art. 4 does not mean that the duty of care imposed by Art. 3 r. 2 is in some way qualified by Art. 4 r. 2.

PARAMOUNT CLAUSE

England

Mediterranean Shipping Company S.A. v Trafigura Beheer BV (C.A.) [2007] EWCA Civ 794 Case No. 2007 0997 A3

(The summary of facts may be found in the section "Amount recoverable")

Held, by the Court of Appeal, that:

[1] In a Paramount Clause the words "compulsorily applicable" used in connection with the incorporation of the Hague-Visby Rules have consistently, as a matter of English law, been given the meaning of "applicable" according to the proper law of the contract.

Seabridge Shipping S.A. v. A.C. Orssleff's EFTF's A/S, Queen's Bench Division (Commercial Court) 6 and 9 August 1999 ([1999] 2 Lloyd's Rep.685).

By charter party on Gencon form dated 18th April 1996 A.C. Orssleff's EFTF's A/S chartered to Seabridge Shipping AB a vessel to be nominated for five voyages with cargoes

of equipment to Avondale Shipyard at New Orleans. The charter party was expressly governed by English law. Disputes were to be referred to arbitration in London, one arbitrator to be chosen by the charterers and one by the owners. Clause 27 provided as follows:
"P&I bunker clause, both to blame collision clause, New Jason clause and Paramount clause are deemed to be incorporated into this charter party".
The owners nominated the Fjellvang for the voyage. She loaded a cargo at Gdinya, Poland, under bills of lading issued by both owners and charterers. The cargo interests under a bill of lading issued by the charterers brought a claim against the charterers in respect of the cargo carried. The bill of lading incorporated the Hague Rules as enacted in the country of shipment; Poland had brought the Hague-Visby Rules into force by the time of that shipment.
On 17th June 1997, one day before the expiry of the 12 months time limit which would apply if the Hague Rules had been incorporated into the charter party, the charterers P&I Club sent a fax to Allan E. Oakley with copy to the owners asking Mr. Oakley if he would accept appointment as charterers arbitrator and asked owners if they were prepared to accept Mr. Oakley as sole arbitrator. Mr. Oakley replied accepting the appointment as charterers arbitrator whereupon, since the owners had not reacted, owners took steps to have Mr. Oakley appointed sole arbitrator.
Mr. Oakley held that the Hague Rules were incorporated and not the Hague-Visby Rules and that the arbitration had not been brought within the one year time limit applicable under the Hague Rules.

Held, by the Queen's Bench Division (Commercial Court), that:

(1) The provision in a charterparty that the Paramount Clause is deemed to be incorporated has the effect of incorporating the Hague Rules and not the Hague-Visby Rules.

United States

Foster Wheeler Energy Corp. v. An Ning Jiang MV and Industrial Maritime Carriers, United States Court of Appeals for the Fifth Circuit 13 September 2004 (2004 AMC 2409)

On December 13, 2000, Foster Wheeler filed suit against the An Ning Jiang, in rem, and IMC, as the carrier, in the Eastern District of Louisiana seeking to recover damages in the amount of $ 228,576.73 as a result of IMC's alleged breach of its duties under COGSA, 46 U.S.C. §§ 1300 et seq., and/or the Harter Act, 46 U.S.C. §§ 190 et seq. IMC answered that pursuant to the terms of the bills of lading, the quantum of its liability, if any, should be limited in accordance with COGSA's $500 per package limitation, which in this case would cap IMC's exposure for cargo damage at $39,453.74. The three bills of lading at issue contained the following pertinent conditions of carriage:

2. General Paramount Clause
The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th of August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments in which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.
Trades where Hague-Visby Rules Apply
In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23, 1968-the Hague Visby Rules apply compulsorily, the provisions of the respective legislation shall be considered incorporated into this Bill of

Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in charge of another carrier, and to deck cargo and live animals.
3. Jurisdiction
Any lawsuit arising under this Bill of Lading shall be filed at New Orleans, the Carrier's principal place of business, in the U.S. District Court for the Eastern District of Louisiana. U.S. Law shall apply.

IMC filed a motion for partial summary judgment seeking a declaration that, pursuant to the Jurisdiction clause, COGSA and its $500 per package liability limitation governed this action rather than the Hague-Visby Rules referenced in the bills' General Paramount Clause. Foster Wheeler opposed IMC's motion, contending that the Hague-Visby Rules as enacted in Spain and their higher limitation-of-liability provision, not COGSA, governed this carriage by operation of law and by incorporation into the bills of lading, entitling it on the facts of this case to a full recovery. Foster Wheeler further asserted that because Spain's Hague-Visby Rules applied compulsorily by force of law, Article III (8) of these Rules nullified any contractual term in the bills of lading - namely, the Jurisdiction clause - to the extent that it invoked COGSA's lower per package limitation. Foster Wheeler's uncontroverted summary judgment evidence included the affidavit testimony of an expert on Spanish maritime law attesting that a voyage from Spain to China is a trade line to which the Spanish enactment of the Hague-Visby Rules applies compulsorily. Nonetheless, on September 30, 2002, the district court granted IMC's motion, reasoning that the Jurisdiction clause designating "U.S. law" was a forum selection and choice-of-law clause "call[ing] for the application of COGSA" and, as such, was entitled to a presumption of validity that Foster Wheeler failed to overcome. The district court also found that, as a matter of contractual interpretation, the Jurisdiction Clause was specific, and therefore could not "be trumped by the terms of an amorphous General Paramount clause" that merely "suggest[ed] that in some circumstances the Hague-Visby rules might apply." In order to expedite Foster Wheeler's ability to appeal the district court's summary judgment ruling, the parties filed a joint notice of consent to entry of judgment. Accordingly, on December 9, 2002, the district court entered final judgment in favor of Foster Wheeler, calculating the quantum of damages owed under COGSA. Foster Wheeler filed notice of appeal.

Held, by the Court of Appeals, V Circ., that:

[1] Pursuant to the General Paramount clause, the Hague-Visby Rules as enacted in Spain govern claims involving cargo damage occurring during the tackle-to-tackle period, whereas U.S. law applies under the Jurisdiction clause to the litany of non-cargo maritime claims that may be brought as well as to cargo claims stemming from damage outside the tackle-to-tackle period.

PERIOD OF APPLICATION (Art. 1(e))

England

Mediterranean Shipping Company S.A. v Trafigura Beheer BV (C.A.) [2007] EWCA Civ 794 Case No. 2007 0997 A3

(The summary of facts may be found in the section "Amount recoverable")

Held, by the Court of Appeal, that:

[1] The parties to a contract of carriage subject to the Hague Rules of the Hague-Visby Rules are free to agree on terms other than the said Rules for periods outside the actual period of carriage but if no agreement is made for the period after discharge it might be easy to say that they have impliedly agreed that the obligations and immunities contained in the Rules continue after actual discharge until the goods are taken into the custody of the receiver.

Germany

*The MV "New York Express", Oberlandesgericht Hamburg (Court of Appeal) 2 November 2000, (Transportrecht 2001), p. 87**

Two containers with machinery were carried from Bremerhaven to Newark/New Jersey on the MV New York Express. The carrier issued an express cargo bill. The express cargo bill provided for the application of German law and contained an exclusion of liability for damages occurred prior to loading and after discharging of the cargo. After discharging had been completed at Newark and in the course of the handling of the cargo on the terminal, the terminal operator being the carrier's subcontractor, part of the cargo was damaged. The consignee claimed damages from the carrier under the contract of carriage. The issue to be decided by the Court was whether the exclusion of liability was effective.

Held, by Oberlandesgericht Hamburg (Court of Appeal), that:

[1] The carrier can exclude its liability for damages to the cargo which occur before loading on and after discharge from the ship pursuant to para. 663 subs. 2 fig. 2 German Commercial Code (cfr. Art. 1 (e) Hague-Visby Rules).

** By the courtesy of Dr. Cristoph Horbach, Lebuhn & Puchta Rechtsanwälte, Vorsetzen 35, D-20459 Hamburg - cristoph.horbach@lebuhn.de*

Hong Kong Special Administration Region

Carewins Development (China) Limited v. Bright Fortune Shipping Limited and Carewins Development (China) Limited v. Hecny Shipping Limited, High Court of the Hong Kong Special Administrative Region, 27 July 2006 (http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp - Case no. HCCL 29/2004)

(The summary of facts may be found in the section "Bills of lading")

Held, by the High Court of the Hong Kong Special Administrative Region, that:

[1] An exoneration clause contained in a bill of lading which incorporates the U.S. Carriage of Goods by Sea Act, 1936 is not subject to the provision of article III(8) is the loss of the goods has occurred after completion of discharge.

Italy

Tribunal of Genoa 4 December 2002, Lloyd Italico Assicurazioni S.p.A. v. Grandi Traghetti S.p.A. di Navigazione – m/v "Maringa" [2004] Dir.Mar. 1473

A consignment of 1995 bags of coffee, stuffed in containers supplied by the carrier, were loaded at Matadi on the m/v Maringa and carried to Genoa and then by rail from Genoa to the inland terminal of the carrier at Rivalta Scrivia.
When the containers were inspected they were found damaged and several bags of coffee were found wet and stained. The cargo insurers, Lloyd Italico Assicurazioni S.p.A., settled the claim of the consignees and brought an action against the carrier, Grandi Traghetti S.p.A. di Navigazione, in the Tribunal of Genoa.

Held, by the Tribunale of Genoa, that:

(1) The Hague-Visby Rules apply from the time when loading on the ship commences until the time when discharge from the ship terminates.

United States

United States of America v. Ocean Bulk Ships, Inc., m/v "Overseas Harriette" and m/v "Overseas Marilyn", United States Court of Appeals-5th Circuit 10 April 2001 (2001 AMC 1487)

Between 1994 and 1996, the United States, through its Commodity Credit Corporation (CCC), and with the assistance of several private relief organizations, shipped cargoes to famine-stricken areas of Africa on behalf of the Agency for International Development. The cargoes were shipped under various charter parties made expressly subject to COGSA on the m/v Overseas Harriette and the m/v Overseas Marilyn, vessels owned by Ocean Bulk Ships, Inc., and Transbulk Carriers, Inc. The shipments included a variety of foodstuffs which were shipped to various African ports. Clean bills of lading were issued for each shipment after the cargo was stowed, indicating that the cargo was received by the carrier in good condition. Unfortunately, the goods were not received in the same quantity or quality when discharged in Africa. Survey reports documenting the loss and damage indicated several problems. Some parts of the cargo were simply not received at all. Some parts of the cargo were received in a damaged and unusable condition. The total amount of documented loss and damage to the cargo was $203,319.87.
In December 1998, the United States filed the first of five lawsuits, seeking damages for the lost and damaged cargo under COGSA. In February 1999, these suits were consolidated. In September 1999, the matter was tried to the bench. In December 1999, the district court entered judgment in favor of the United States for the limited sum of $7,300.08, the amount of damage that the defendants admit occurred prior to discharge. The judgment was appealed by the United States.

Held, by the U.S. Court of Appeals for the Fifth Circuit, that:

(1) Cogsa extends through discharge, and a Cogsa carrier is subject to statutory obligations to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried". However § 1304(2)(q) may shield a carrier from liability when the carrier has absolutely no control with respect to the selection of port stevedores and, further, no control with respect to how or when the cargo is discharged.

Schramm, Inc. and Atlantic Mutual Insurance Co. v. Shipco Transport, Inc. - m/v "Csav Guaya" and Others, U.S. Court of Appeals - IV Circuit 15 April 2004 (not yet reported).

In October 1999, Schramm sold a mobile drilling rig to Perforaciones San Rafael S.R.L. of Cochabamba, Bolivia. The drilling rig consisted of a large drill and the truck on which it was mounted. The total cost of the rig was $160,725.42, which included freight and insurance charges.

Schramm arranged to have Shipco transport the rig from the Port of Baltimore, Maryland, to the Port of Arica, Chile, via an oceangoing vessel. Shipco, a "non-vessel-operating common carrier," contracted with the owner of the m/v Csav Guayas to transport the rig from the United States to Chile.

The rig, secured on a flat rack container with a bottom and two sides, was loaded onto the vessel m/v Csav Guayas in Baltimore on October 21, 1999. While en route to Chile, the vessel stopped at an intermediate port in Charleston, South Carolina. There, on October 22, 1999, the vessel's operator ordered the rig offloaded so that it could be restowed on a lower deck of the vessel. The master retained Stevedoring Services of America ("SSA") to handle the offloading, transportation, storage, and reloading of the rig in Charleston. SSA offloaded the rig, still attached to its flat rack container, and placed it on a chassis for dockside transport. While it was being moved, the rig fell over onto the concrete dock and was damaged beyond repair. It was later declared a total loss by marine inspectors.

Pursuant to its insurance obligations, Atlantic Mutual paid Perforaciones San Rafael S.R.L. the purchase price and related costs, on Schramm's behalf. Then, on October 20, 2000, Schramm and Atlantic Mutual filed suit against Shipco, among other parties, to recover breach of contract damages from the destruction of the rig.

Shipco filed for partial summary judgment, claiming that its liability was limited to $500 either by COGSA or by the contractual bill of lading. At first, the district court denied Shipco's motion. It held that COGSA did not apply to the period of time during which the rig was destroyed - while the rig was being transported on land in Charleston and was not "hooked up" to the vessel.

Upon reflection, however, the district court granted Shipco's Rule 59(e) motion for reconsideration and concluded that COGSA did indeed apply to the period of time during which the rig was destroyed. It held that the "tackle-to-tackle" application of COGSA covers goods from the port of loading until the final port of destination, and that COGSA thus applies during restowage of cargo at intermediate ports regardless of whether damage occurs while goods are on land or aboard the vessel. The court thus granted appellants' motion for summary judgment against Shipco on the question of liability and granted Shipco's motion to limit its liability to $500. Appellants now challenge the district court's decision to limit Shipco's liability under COGSA

Held, by the Court of Appeals for the Fourth Circuit, that:

[1] Unloading of the goods from the carrying ship at an intermediate port for the purpose of restowing them does not constitute discharge under COGSA and, therefore, the 500 dollars limit of liability applies in respect of damage to the goods occurring when they are ashore at such intermediate port.

QUALIFYING CLAUSES (Art. 3. 3)

Italy

Corte di Cassazione 29 November 1999, No. 13341, Rocco Giuseppe & Figli S.p.A. v. DI.A.R. Maritime S.r.l. (unreported)

Out of a cargo of 17.200 tons of wheat unloaded at Naples from the m/v Lydi about 250 tons were found missing. The consignee sued the agents of the ship requesting payment of the quantity allegedly short delivered. The carrier objected that the claimant had not proved the quantity loaded, the statement of the weight in the bill of lading having been qualified by a clause "said to weigh". The claim was rejected by the Tribunal and then by the Court of Appeal of Naples.

Held, by the Corte di Cassazione, that:

(1) The Hague-Visby Rules do not exclude the validity, where the required conditions exist, of qualifying the description of the goods in the bill of lading rather than omitting such description.

A qualifying clause is effective even if in print, in view of the possibility of its deletion, when it is reasonably impossible to establish if the carrier has no reasonable means of checking the information furnished by the shipper. A clause qualifying the weight of a cargo of cereals in bulk is effective.

RIGHT OF SUIT

Italy

Court ofAppeal of Genoa 3 May 2007, Banco Espanol de Credito SA – Banesto v. Porto Leone Shipping Company, Ltd. – The "Apollo" (not yet published)

(The summary of facts may be found in the section "Identity of the carrier")

Held, by the Court of Appeal of Genoa, that:

[1] The rights under a bill of lading may be asserted by the holder of the document who is not required to prove an interest in the goods covered by the bill of lading.

Japan

*Tokyo Kôtô Saibansho (Court of Appeals of Tokyo) 25 October 2000, Tessin Sempaku KK v. Kyoei Kasai Kaijo Hoken Sogokaisha (Kin'yu Shoji Hanrei no. 1109, p. 43) **

After carriage from Shanghai, China, to Okayama, Japan, the cargo (artificial powder to be used as material for the production of bricks) was found soaked with water and had lost commercial value. The carrier alleged that the cargo had already been damaged prior to loading. The insurer subrogated to the right of the cargo owner, sued the carrier as holder of the bill of lading alleging that from the bill of lading it appeared that the cargo had been "shipped in apparent good order and condition". The District Court of Tokyo held the carrier liable for the damage to the cargo.

Held, by the Court of Appeals of Tokyo, that

(1) For the purposes of article 9 of the Act on International Carriage of Goods by Sea the expression holder of the bill of lading includes any person that can show having

*obtained the due transfer of the document, even if the continuity of the endorsements is lacking. ***

** Summary prepared by Prof. Souichirou Kozuka, Sophia University, Tokyo.*

*** Art. 9 of the Act on International Carriage of Goods by Sea provides as follows: "The carrier shall not rely on facts that are contrary to the statements in the bill of lading as against the holder of the bill of lading acting in good faith." The "holder of the bill of lading" here means the legally qualified holder of the bill. Since the holder of the bill of lading is entitled to exercise the right on the bill by proving that the document has been duly transferred to him, even when he lacks the formality of continuation of endorsements, it shall be understood that such a holder of the bill of lading as has proved the due transfer of the document is included in the "legally qualified holder."*

SCOPE OF APPLICATION (Art. 1 (b))

England

J. I. MacWilliam Company Inc. v. Mediterranean Shipping Company S.A. - The "Rafaela S.", [2005] URHL 11; [2005] 1 Lloyd's Rep. 347; 2005 Amc 913

In about January 1990 four containers of printing machinery were damaged in the course of their carriage by sea from Felixstowe to Boston, U.S.A. That carriage was the continuation of a carriage from Durban to Felixstowe in respect of which a straight bill of lading had been issued and although no document had been issued in respect of the leg from Felixstowe to Durban, it was agreed that if a document had been issued, it would have been in the same form. The arbitrators to whom the dispute was submitted concluded that a straight bill of lading did not fall within section 1(4) of the Carriage of Goods by Sea Act 1971 and article 1(b) of the Hague-Visby Rules and that therefore the applicable limit of liability was that set out in the US Cogsa of 1936. Their opinion on this point was shared by the Commercial Court [2002] 2 Lloyd's Rep. 403, but the Court of Appeal reached the conclusion that a straight bill of lading is subject to the Hague-Visby Rules [2003] 2 Lloyd's Rep. 113.

Held, by the House of Lords, that:

[1] The expression "bill of lading or any similar document of title" in article 1(b) of the Hague-Visby Rules is apt to cover a straight bill of lading.
[2] A straight bill of lading must be regarded as a document of title since its production is a necessary condition pre-condition of requiring delivery even when there is no express provision to that effect.

Parsons Corporation and Others v. C.N. Scheepvaartonderneming Happy Ranger and Others – The Happy Ranger (Queen's Bench Division – Admiralty Court [2001] 2 Lloyd's Rep. 530

By a contract dated 7 October 1997 between C. V. Scheepvaart onderneming Happy Ranger (the Owners) and Parsons Corporation the Owners agreed to carry on board the Happy Ranger three reactors from Porto Marghera (Venice) to Al Jubail in Saudi Arabia. Clause 5 of the contract provided that the carrier's regular form of bill of lading was applicable and was to form part of the contract. The specimen form of bill of lading provided inter alia:

3. General Paramount Clause.

The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels 25 August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, Articles I to VIII of the Hague Rules shall apply. In such case the liability of the Carrier shall be limited to £100 sterling per package.
Trades where Hague-Visby Rules apply
In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on 23 February 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading.

Clause 11 so provided:

The Master will deliver the cargo only upon presentation of duly endorsed original Bill(s) of Lading. In case of non-presentation of these documents all time lost in waiting to count as laytime or time for which damages for detention are due.

Clause 15 so provided:

Any dispute arising under this Contract of Carriage and Bill of Lading shall be decided by the competent Court of London and English Law shall apply.
On 11 March 1998 one of the reactors, when being loaded on board by two cranes of the vessel, fell to the ground owing to a hook of one of the cranes having broken. No bill of lading was issued. Parsons Corp. claimed damages in the amount of about US$ 2.4 million. The owners denied liability stating that if liability existed it would be limited to £ 100.

The trial of certain preliminary issues was ordered by the Commercial Court, including the following:

- Do the Hague/Hague-Visby Rules apply to the contract of carriage and if so which Hague Rules?
- Do the Hague Rules apply in relation to the loading of the process vessel (i.e. the reactor)?
- Can the defendants limit their liability by reference to art. IV, r. 5 of the Hague/Hague-Visby Rules?

Held, by the Queen's Bench Division (Commercial Court), that:

(1) Although the fact that no bill of lading was issued in respect of the goods is not of itself conclusive against the applicability of COGSA 1971 or of the Hague-Visby Rules, their applicability must be excluded if the parties did not intend or expect that as between themselves any bill of lading issued would be of any contractual effect independent of the contract made between themselves.

(2) The Hague-Visby Rules that have been enacted in Italy are not applicable pursuant to a clause paramount providing for the application of the 1924 Bills of Lading Convention "as enacted in the country of shipment", since Italy has repealed its enactment of the 1924 Convention when enacting the Hague-Visby Rules.

Held, by the Court of Appeal ([2002] 2 Lloyd's Rep. 359), that:

(1) If a bill of lading is or is to be issued or its issue is contemplated by the contract of carriage, the contract is "covered" by the bill of lading and consequently he contract is a "contract of carriage" as defined by Article 1(b) of the Hague-Visby Rules

(2) A bill of lading issued to a named consignee or to his assigns is not a "straight" bill of lading and, therefore, is a bill of lading within article 1(b) of the Hague-Visby Rules

Germany**

Oberlandesgericht Hamburg 19 August 2004, Transport insurer of X v. Freight forwarder Y - m/v "Atlantic Concert", Transport R 2004, 403

The defendant freight forwarder was instructed to arrange for the transport of a consignment of printing machines from Bremerhaven via Portsmouth to Durham, North Carolina, in the United States of America. The transport was covered by a Multimodal Bill of Lading issued by the defendant. The goods were stowed in crates, which were loaded onto mafi trailers. The trailers carrying the crates were loaded on board m/v "Atlantic Concert" at Bremerhaven. After arrival at Portsmouth, the trailers and crates were discharged and hauled to a warehouse for on-carriage by truck. After one crate had already been removed from one of the trailers and heaved onto the truck, the trailer was moved to allow the removal of the second crate. When the trailer was moved, the second crate (weight: 25,490 kgs) fell to the ground and the goods inside were severely damaged. After the defendants had compensated the plaintiffs on the basis of 2 SDR per kilogram, the plaintiffs claimed an additional amount of EUR 173,041. They argued that the limitation of liability was 8.33 SDR per kilogram pursuant to the general German law of transport. The loss had occurred during a separate land transport leg of the voyage and was thus not subject to the maritime law limitations and exclusions of liability. The defendants were of the opinion that the transhipment in port after discharge from the sea vessel constituted an annex to the sea voyage which was governed by maritime law.
The Landgericht Hamburg had ruled in favour of the defendants that the loss was governed by maritime law and that the defendants' liability was limited to 2 SDR per kilogram. The plaintiffs appealed.

Held, by the Oberlandesgericht Hamburg, that:

[1] The transport within the port area that covered a distance of several hundred meters of cargo discharged from a ship is a separate leg of the carriage and not part of the carriage by sea and is therefore governed by the general transport law and the limit of liability, pursuant to section 431 HGB, is 8.33 SDR and not 2 SDR per kilogram.

--
*** The Editor wishes to thank Mr. David Martin-Clark and BBL Rechtsanwälte of Hamburg for having made available information on this interesting judgment of the Oberlandesgericht Hamburg.*

Italy

Tribunal of Genoa 11 April 2005, Sharp Electronics (Italia) S:p.A. v. C.S.A. Agenzia Marittima and Others (not yet reported)

A container with products of Sharp Electronics was loaded at Yokohama on the m/v Hyundai Nobility. The bill of lading issued by the carrier indicated Genoa as port of discharge and Milano as place of destination of the container. The consignee, Sharp Electronics (Italia) S.p.A., found that part of the cargo was missing and commenced proceedings in the Tribunal of Genoa against the local agents of the carrier who denied the liability of the carrier on the ground that the loss had occurred during the transportation by railway from Genoa to Milano and, alternatively, invoked the Hague-Visby Rules limit of liability.

Held, by the Tribunal of Genoa, that:

[1] The Hague-Visby Rules are not applicable to a multimodal contract of carriage even if the sea leg is much longer than the subsequent railway leg.

Tribunal of Milano 13 October 2004, Ichemco S.r.l. v. SITTAM S.p.A. and Agenzia Marittima Le Navi S.p.A. (not yet published)

In January 2001 Ichemco S.r.l. entered into a contract of carriage of a consignment of 7,400 kilos of resins from Syracuse (New York) to Milano via La Spezia with the forwarding agent SITTAM S.p.A. SITTAM in turn entrusted the carriage by sea to Mediterranean Shipping Company (MSC). The goods arrived at destination in damaged conditions and Ichemco brought judicial proceedings against SITTAM and Agenzia Marittima Le Navi, as agent for MSC.

Held, by the Tribunal of Milano, that:

[1] The Hague-Visby Rules are applicable only to contracts of carriage performed exclusively by sea and therefore a mixed transport, partly by sea and partly by land, even if the sea leg is much longer is subject to the provisions on carriage of goods of the Italian Civil Code.

Tribunal of Gorizia 28 May 2003, Elifriulia S.r.l. v. Italia di Navigazione S.p.A. and Autamarocchi S.p.A. [2005] Dir.Mar 212

A container with parts of a helicopter was loaded at Los Angeles on the m/v D'Albertis of Italia di Navigazione S.p.A. with destination Monfalcone, in Italy. The container was discharged from the ship in Genoa and carried by road to Monfalcone, where the cargo was found damaged.
The bill of lading incorporated the U.S. Cogsa and so provided in section (C) of Clause 6:

"C) Combined Transport. Whenever the goods are to be precarried from an inland "place of receipt" and or on-carried to an inland "place of delivery" and freight is paid for the combined transport, the Carrier undertakes to perform the entire transport from the place where the goods are taken in charge to the place designated for delivery and to be fully liable to the Shipper for such combined transport.
When loss or damage occurs during the combined transport, but it can not be determined which carrier had custody or control of the goods at the time of the loss or of the damage, the Shipper and Carrier agree that it shall be deemed that the loss or damage occurred during sea carriage and the following clauses shall apply.

The consignee, Elifriulia S.p.A., brought an action against Italia di Navigazione and the road carrier, Autamarocchi S.p.A. in the Tribunal of Gorizia.

Held, by the Tribunal of Gorizia, that:

(1) When the carrier by sea has undertaken to perform a multimodal transport, by sea and road, the Hague-Visby Rules are not applicable, even if the sea leg of the carriage is significantly longer than the road leg.

Tribunal of Turin 5 June 2002, Chinese Polish Joint Stock Shipping Co. v. Zust Ambrosetti S.p.A. (2003 Dir. Mar. 1042)

In a contract of carriage of granite in containers from Genoa to Shanghai the shipper, Zust Ambrosetti S.p.A., agreed with the Italian agents of the carrier, Polish Joint Stock Shipping Co., that the carrier would also take care of forwarding the containers to the inland loading place and of their transportation to Genoa. Damage to the cargo was found upon arrival of

the containers at Shanghai and Zust Ambrosetti commenced proceedings against the carrier in the Tribunal of Turin. Amongst others, the question whether the contract was subject to the Hague-Visby Rules was debated between the parties.

Held, by the Tribunale of Turin, that:

[1] The Hague-Visby Rules are not applicable to a mixed road/sea contract of carriage, even if the carriage is characterized by the absolute prevalence of the sea leg.

SCOPE OF APPLICATION (Art. 1(e))

Germany

*Bundesgerichtshof 18 October 2007**

Plaintiffs, the cargo insurers of a German exporter, sued the carrier, which had been instructed by the insured to transport printing machines from Bremerhaven/Germany to Durham/North Carolina via Portsmouth/Virginia. During the ocean carriage from Bremerhaven to Portsmouth two crates of the consignment had been stowed on a mafi-trailer. After arrival in Portsmouth the mafi-trailer with the crates had been trucked for 300 metres out of the vessel into a warehouse to be loaded on a truck for the further road transportation.

After the chains securing the crates to the trailer had been removed, one of the crates was successfully loaded onto the truck. In order to bring it into a better position for loading the second crate onto the truck, the trailer had to be moved again. During that process the second crate fell off the trailer and was damaged.

Plaintiffs argued that the legal provisions for road transport should apply and consequently defendants should only be allowed to limit their liability to 8.33 SDR per kilogram which would be sufficient to cover the damages completely. Defendants argued that, at the time of the damage, the ocean carriage had not yet ended and therefore their liability should – according to the German enactment of the 1924 Bills of Lading Convention – be limited to 2 SDR per kilogram.

Held, by the Bundesgerichtshof, that:

[1] Although the haulage of the mafi-trailer out of the vessel and into the warehouse did not constitute a separate road leg of the multimodal transportation but was a dependent annex of the ocean carriage, the damage occurred during the process of loading the goods from the mafi-trailer onto the truck and that operation was part of the subsequent road transport. Consequently, the applicable limit of liability was 8.33 SDR per kilogram, according to §431 of the Handelsgesetzbuch.

* *By the courtesy of David Martin Clark (www.onlinedmc.co.uk)*

Italy

Corte di Cassazione 2 September 1998, No. 8713, Andrea Merzario S.p.A. v. Vismara Associate S.p.A. and Others (2000 Dir. Mar. 1349)

Vismara Associate S.p.A. and Fedegari Autoclavi S.p.A. entered into a contract of carriage of machinery from Pavia, Italy to Norfolk, Virginia with Andrea Merzario S.p.A. During the land carriage from Pavia to Genoa the machinery was damaged and the shippers commenced proceedings against Andrea Merzario in the Tribunal of Milano. Both the Tribunal and the Court of Appeal of Milano rejected the one year time bar defence under

Article 3 r. 6 of the Hague-Visby Rules raised by Andrea Merzario. Andrea Merzario appealed to the Supreme Court.

Held, by the Corte di Cassazione, that:

(1) A contract of carriage to be performed partly by sea and partly by road is not governed by the provisions of the Hague-Visby Rules but by the provisions of the Civil Code.

SCOPE OF APPLICATION (arts. 2 and 4))

Italy

Tribunal of Busto Arsizio 18 September 2006, Kenda Farben S.p.A. v. Bongiorno S.r.l. (non yet reported)

Kenda Farben S.p.A. brought proceedings in the Tribunal of Busto Arsizio against Bongiorno S.r.l. claiming damages on account of the breach by the defendant of the instructions to deliver the goods carried from Italy to Tunisia only against signature by the consignee of a bill of exchange for the price of the goods. The defendants stated that the claim was barred since the six months prescription period provided by Italian law had expired and the claimant stated that the time for suit was one year under the Hague-Visby Rules.

Held, by the Tribunal of Busto Arsizio, that

[1] The Hague-Visby Rules are not applicable in respect of a claim by the shipper based on the failure of the carrier to obtain, following the shipper's instructions, the signature by the consignee of a bill of exchange for the purchase price of the goods.

SCOPE OF APPLICATION - CLAIM BY A THIRD PARTY (art. 3(6 bis))

France

Cour d'Appel of Aix-en-Provence 14 May 2004, Compagnie Marocaine de Navigation v. Comitran, Office de Commercialisation et d'Exportation and Covea Fleet - The "Al Hoceima" (2005 DMF 322)

(The summary of facts may be found in the section "Excepted perils - Perils of the sea")

Held, by the Cour d'Appel of Aix-en-Provence, that:

[1] The claim against the carrier of the trailer used by the shipper for the shipment on board the carrying vessel of its goods and lost following the loss of the vessel is subject to the provisions of the Hague-Visby Rules.

SCOPE OF APPLICATION (Art. 10)

France

Cour d'Appel of Aix-en-Provence 2 December 1999, Roscoe Shipping Co. and Others v. Compagnie Sénégalaise d'Assurance et de Réassurance – The "World Apollo" (2001 DMF 308).

A consignment of 525,000 bags of rice was loaded on the World Apollo on 7 April 1994 at Koshichang (Thailand) with destination Dakar (Senegal). The bill of lading covering the consignment was issued by the agents of the carrier in Senegal and incorporated a

Paramount Clause providing for the application of the Hague Rules. The cargo was found damaged upon discharge at Dakar and the insurers, acting under subrogation, commenced proceedings against the carrier in the Tribunal de Commerce of Marseilles. By judgment dated 23 March 1996 the Tribunal de Commerce held that the contract was governed by the Hamburg Rules, ratified by Senegal. The carrier appealed.

Held, by the Cour d'Appel of Aix-en-Provence, that:

(1) The 1924 Bill of Lading Convention applies to a contract of carriage in respect of which a bill of lading has been issued in Senegal, notwithstanding the ratification by Senegal of the Hamburg Convention of 1978 (Hamburg Rules) since Senegal has not denounced the 1924 Convention.

Italy

Court of Appeal of Palermo 29 November 2003, Conatir S.p.A. v. Salvatore Patané - The "Espresso Trapani" [2005] Dir.Mar. 565

On 29 April 1990 the ferry Espresso Trapani sank off the Sicilian coast, near Trapani, with loss of lives and the complete loss of the cargo on board. The vessel was trading between the Italian mainland and Sicily.
The owners of goods loaded on a trailer commenced proceedings in the Tribunal of Trapani against the owners of the vessel, Conatir S.p.A., claiming damages, seeking the application of the Hague-Visby Rules. The claim was allowed by the Tribunal of Trapani. Conadir appealed to the Court of Appeal of Palermo.

Held, by the Court of Appeal of Palermo, that:

[1] The Hague-Visby Rules do not apply to a contract of carriage between Italian ports.

Tribunal of La Spezia 3 September 1998, Seafortune S.r.l. v. La Spezia Container Terminal-L.S.C.T. S.p.a. (2000 Dir. Mar. 936)

The yacht Lhurs Tournament carried from a port in the United States to La Spezia, Italy, was damaged after discharge from the carrying vessel. The terminal operator, from whom the consignee had claimed damages, stated that it had acted as agent for the carrier and that the Hague-Visby Rules applied.

Held, by the Tribunal of La Spezia, that:

(1) The provisions of the 1924 Brussels Convention on bills of lading to which Italy has given the force of law, owing to the special character inherent to all uniform rules prevail over those of State law; in particular art. 10 of the Convention prevails over the relevant private international law provision of the Code of Navigation.

SCOPE OF APPLICATION- CLAIMS AGAINST THE SHIPPER

Italy

Court of Appeal of Turin 24 October 2005, Chinese Polish Joint Stock Shipping Co. v. Zust Ambrosetti S.p.A. and ECSEL S.p.A. - The "Boleslaw Prus" (not yet reported)

By a contract of carriage made between Tripcovich S.r.l. as agents for the Chinese Polish Joint Stock Shipping Co.(the Carrier) and Zust Ambrosetti S.p.A. (the Shipper). the Carrier agreed to carry from Genoa to Shanghai at FCL/FCL terms 10 containers in which the Shipper would stow granite slabs. The agents of the Carrier delivered the empty containers to the Shipper who loaded therein the slabs. Upon arrival at destination then consignees

found that many slabs were broken, on account of bad stowage and brought proceedings against the Carrier in the court of Shanghai claiming damages. The Carrier then brought a recourse action in Italy, in the Tribunal of Turin, against the Shipper, claiming payment from the Shipper of all sums it would be ordered to pay to the consignee. By judgment dated 5 June 2002 (2003 Dir. Mar. 1402) the Tribunal of Turin held that the Hague-Visby Rules were not applicable to an action of the shipper against the carrier and that the Shipper was liable for the damages the Carrier would be required to settle to the consignee. The Shipper appealed.

Held, by the Court of Appeal of Turin, that:

[1] The Hague-Visby Rules are not applicable in respect of an action of the carrier against the shipper for damages resulting from the bad stowage of goods made by the shipper in containers carried under FCL/FCL terms.

SCOPE OF APPLICATION – CLAIM OF A SHIPPER AGAINST ANOTHER SHIPPER

France

Cour de Cassation (Ch.Com.) 10 March 2009, Amlin Underwriting Ltd. v. Gan Assurances Iard and Others (2009 DMF 369)

Several vehicles carried on board the m/c Panther were damaged by a fire originating from a lorry owned by Ar Mors Vivier during a voyage from Ireland to Cherbourg. The owners of the vehicles and their insurers, Amlin Underwriters Ltd., brought proceedings in the Tribunal de Commerce of Paris against Ars Mors Vivier and its insurers, Gan Assurances Iard claiming damages. The Tribunal rejected the claim and its decision was upheld by the Court of Appeal of Paris with judgment of 16 January 2007 (2007 DMF 756). Amlin Underwriters and the owners of the vehicles appealed to the Cour de Cassation.

Held, by the Cour de Cassation, that:

[1] When it is established that a claim of the owners of goods carried on a ship against the owners of other goods on board that ship for damages caused by such goods is not subject to the Hague-Visby Rules, there is no need for the Court to decide whether or not the Hague-Visby Rules are applicable to contracts of carriage.

[2] The owners of goods carried on a ship damaged during transportation by other goods on board that ship have a right of action against the owners of such goods pursuant to articles 25 and 26 of law 18 June 1966, the prescription period being one year.

SERVANTS OR AGENTS (art. 4 bis. 2)

Italy

Tribunal of La Spezia 18 February 2003, Royal Fish S.r.l. v. Agenzia Marittima Lardon & Co. [2005] Dir.Mar. 1365

A refrigerated container loaded on the m/v Trade Sol at Capo Town, was discharged at La Spezia from the vessel and then carried to its inland destination by road where the frozen fish stowed in the container was found damaged.
The consignee, Royal Fish S.r.l., brought an action in the Tribunal of La Spezia against the agents of the carrier by sea and the terminal operator.

Held, by the Tribunal of La Spezia, that:

(1) Article 4 bis(2) of the Hagye-Visby Rules applies also to independent contractors.*

The English and French text of Article 4 bis (a) differ. Whilst in fact the words "such servant or agent not being an indipendent contractor" have been added in the English text following a suggestion made by the U.S. Delegation at the CMI Stockholm Conference in order to clearly exclude indipendent contractors from the scope of that provision , the corresponding French words "pourtant que ce préposé ne soit pas un contractant indépendant" that appeared in the text prepared by the Commission during the 1967 session of the Diplomatic Conference, were subsequently deleted, probably for the reason that in French legal language a "préposé" cannot be an indipendent contractor. The Tribunal of La Spezia probably considered the French text and gave to it a wide interpretation, ignoring the* ***travaux préparatoires*

TIME BAR (Art. 3.6)

Israel

Bellina Maritime S.A. and Others v. Menorah Insurance Co. Ltd., Israel Supreme Court 29 May 2001; 3 June 2002 [2002] 2 Lloyd's Rep. 575.

Pardess Cooperative Society exported a shipment of citrus fruit from Israel to England by means of the sea carrier Bellina Maritime S.A. The shipment had been insured with Menorah Insurance Company Ltd. The carrying vessel arrived at the port of destination on 16 January 1996 and the goods were delivered the following day in damaged conditions. Menorah Insurance Company, after having settled the claim of the assured, instituted proceedings against the owner and the charterer of the ship in an Israel Magistrate Court on 15 March 1998. The claimant invoked the application of Article 3(6)(a) stating that its claim was for indemnity and that therefore the action was timely instituted the prescription period in Israeli's law being seven years.
The Magistrate Court rejected such constitution on the ground that according to the interpretation given in England art. 3(6) bis applies only when the law suit for indemnity relies on a bill of lading different from that on which the main action is founded, whilst in the present case the claim of the insurance company relied on the same bill of lading of the main action. The appeal of the insurance company was upheld by the District Court.
Leave to appeal to the Supreme Court was granted on the agreement of the parties.

Held, by the Supreme Court, that:

(1) The subrogation claim of an insurer against a carrier is not a claim against a third party covered by art. 3(6) bis and the time bar applicable is that set out in art. 3(6).

Italy

Tribunal of Bergamo 4 December 2002, Ditta Canali fu Camillo S.r.l. v. Zaninoni International Forwarding Agent S.p.A. - The "Nedlloyd Houtman" (not yet reported)

ST Logistics (UK) Ltd. entered into a contract with Zaninoni International Forwarding Agent S.p.A. for the carriage of a consignment of Fiat spare parts from Milano to Singapore.
Zaninoni sub-contracted the carriage to Zust Ambrosetti S.p.A. who in turn sub-contracted the carriage to Malaysia International Shipping Corporation Berhad (MISC) who issued the bill of lading. Upon arrival at Singapore the receiver, Singapore Technologies Logistics Pte. Ltd., found that nine cases were missing and obtained the payment of the insurance

indemnity from Mitsui Marine & Fire Insurance (Asia) Pte. Ltd.
The insurer brought an action against Zaninoni in the Tribunal of Bergamo. The defendants rejected the claim on the ground that the bill of lading provided for a time bar period of nine months and that the extension granted to the insurer was not valid, since the insurers were not parties to the contract of carriage.

Held, by the Tribunal of Bergamo, that:

(1) A clause of the contract of carriage whereby the claims against the carrier are time-barred if an action is not brought within nine months after delivery of the goods is null and void pursuant to article 3(8) of the Hague-Visby Rules incorporated in the contract by a Paramount Clause.

(2) For the purpose of the extension of the one year period the parties reference to whom is made in sub-paragraph 4 of article 3(6) must be deemed to include, in addition to the shipper and the carrier, the receiver and the insurer acting in subrogation of the receiver.

TIME FOR SUIT (Art. 3. 6)

England

Trafigura Beheer B.V. v. Golden Stavraetos Maritime Inc. - The "Sonia" (C.A.) 3 April and 15 May 2003 [2003] 2 Lloyd's Rep. 201

By a voyage charter party on amended Beepeetime form dated 16 December 1999 the owners of the Sonia, Golden Stavraetos Maritime Inc., chartered that vessel to Trafigura Beheer B.V. for a voyage from 1/2 safe ports in Saudi Arabia to 1/2 safe ports in various places including West Africa at charterers' option. Clause 46 provided that the provisions of articles III (other than r. 8), IV, IV bis and VIII of the Schedule to the Carriage of Goods by Sea Act, 1971 should apply to the charter party. Between 8 and 10 January 2000 the vessel was loaded with a cargo of some 30,596.93 tonnes of Jet A-1 fuel for carriage from Rabigh in Saudi Arabia to Mombasa in Kenya. The port of discharge was subsequently changed to Lagos in Nigeria where the vessel arrived on 2 February and the master tendered notice of readiness. The cargo was subsequently sampled by the receivers who rejected it on the ground that it was off specification.
On 11 February the charterers ordered the vessel to proceed to Abidjan for orders. The master complied and the vessel sailed from Lagos on the same day and arrived the following day at Abidjan where she remained until 11 March. Further samples were taken and the charterers indicated that they would like to sell the cargo, without prejudice to any future claim, in an effort to mitigate damages. Discussions then took place between the parties and the owners observed that the basis on which the vessel was presently employed had yet to be formalized and that for a new voyage an addendum to the present charter or a new agreement needed to be made. On 11 March the charterers orally agreed to the owners' quotation for freight for the voyage to the Mediterranean and to the proposal that they should pay storage charges at the demurrage rate plus the costs of the deviation to Abidjan. The vessel accordingly sailed from Abidjan towards Gibraltar for orders on 11 March. During the voyage the payment of freight and demurrage was discussed between the parties and on 14 March the owners faxed the charterers with an invoice covering the lump sum freight to Lagos under the charter party of US$ 21,370 in respect of deviation costs to Abidjan and US$ 426,257.64 in respect of "demurrage/storage" until departure from Abidjan. On 22 March the owners told the charterers that the vessel was proceeding to Gibraltar for orders "for the final port of discharge" and on the same day the charterers asked the owners to instruct the vessel to proceed to Agioi Theodori to deliver the cargo to

Motor Oil (Hellas) S.A. Still on 22 March the owners faxed the charterers with a further invoice in respect of freight from Abidjan to Agioi Theodori.
In the event discharge of the cargo at Agioi Theodori by delivery to Motor Oil (Hellas) S.A. was completed on 1 April.
No further written agreement was drawn up, either by way of fresh charter party or by way of addendum to the existing charter party.
The charterers claimed damages from the owners on the ground of the cargo having been severely damaged due to contamination by residues of a preceding cargo of soya bean oil plus additional freight and demurrage.
On 27 March 2001 the charterers brought proceedings against the owners in the Queen's Bench Division (Commercial Court) claiming that the owners were in breach of the charter party and of art. III rr.1 and 2 of the Hague-Visby Rules. The owners issued an application under Part 24 of the CPR on the basis that the claim had no real prospect of success.
They relied on art. III, r. 6 and contended that the claim was time barred by the time the charterers' claim form was issued on 27 March 2001. They said that the voyage from Abidjan to Agioi Theodori could not fairly be held to have been under the contract of carriage and that, accordingly, there was no delivery under the contract of carriage, albeit varied.
The Commercial Court held that the claim was time barred, on the basis that the one year period ran from the date that the goods should have been delivered at Lagos. The charterers appealed.

Held, by the Court of Appeal, that:

[1] On the basis of the following considerations:

(i) the cargo delivered was the same jetoil as was shipped in Rabigh. It remained on the same ship and was delivered by the same shipowners at the same charterers' request to receivers nominated by the charterers, albeit at a different destination;
(ii) although the voyage to Agioi Theodori was a new voyage it was made necessary because of problems at Lagos, whatever the causes of those problems were; both parties were faced with the problem of what should be done with the cargo on board after it had been rejected by the proposed receivers in Lagos;
(iii) in these circumstances both the voyage to Abidjan and the subsequent voyage to the Eastern Mediterranean arose out of the original charter-party and the fact that the cargo remained on board the vessel; whether the oral agreement was a variation of the charter-party or a new charter-party, it was not an entirely separate and distinct transaction; both parties contemplated that an addendum to the charter-party would be drawn up and that many of the terms of the charter-party would continue to apply;
(iv) there was no transhipment of the cargo and no new bill of lading was issued in respect of it;

there was delivery within the meaning of art. III r. 6 of the Hague-Visby Rules at Agioi Theodori and suit was therefore brought within a year of delivery.

France

Cour de Cassation 2 March 1999, Sea Land Service v. FMT Production (2000 DMF 245)

Out of a quantity of 226 containers of frozen meat carried from Rotterdam to Agadir and Casablanca 6 were rejected by the consignee and carried back to Rotterdam where the carrier, Sea Land Service, exercised its right of retention until payment of its claim for freight. Sea Land Service sued the shipper in the Tribunal de Commerce of Rochefort-sur-Mer claiming payment of freight and the shipper made a counterclaim for damages. The

counterclaim was allowed by the Tribunal de Commerce and then by the Cour d'Appel. Sea Land Service appealed to the Supreme Court inter alia because the counterclaim had been made after more than one year from the date when the containers should have been delivered.

Held, by the Cour de Cassation, that:

(1) The one year prescription period of Art. 3 r. 6 of the 1924 Brussels Convention on Bills of Lading does not run in favour of the carrier who refuses delivery invoking the right of retention of the goods.

Italy

Tribunal of La Spezia 17 December 2007, Consortium Group S.r.l. v. Tarros International S.p.A.(not yet reported).

A consignment of marble slates , stowed by the shipper in four containers, was loaded at Cagliari on board the m/v Vento di Maestrale of Tarros International S.p.A. with destination Istanbul. When the vessel called at La Spezia it was found that several slates were damaged and the carrier discharged the containers requesting shipper to collect its cargo. Since the shipper failed to collect its cargo the carrier brought proceedings against the shipper in the Tribunal of La Spezia seeking payment of the demurrage in respect of the containers. The shipper in turn claimed damages for the damage to the marble slates and the carrier alleged that the claim was time barred.

Held, by the Tribunal of La Spezia that

[1] The one year time bar period under article 3 (6) of the Hague-Visby Rules commences to run, in case the goods have not arrived at destination, from the date when they should have arrived and, where such date is unknown, from the date when the shipper has become aware of the loss of or damage to the goods

Corte di Cassazione 24 February 1999, F.lli Ferri S.p.A. v. Adriatica di Navigazione (2000 Dir. Mar. 239)

F.lli Ferri S.p.A. had purchased a parcel of seeds and had agreed that loading should take place partly in December 1983 and partly in January 1984. Payment of the second lot was made by F.lli Ferri against presentation of a bill of lading dated 26 January 1984. Subsequently the buyers established that loading had actually taken place in February 1984 and sued the carrier, Adriatica di Navigazione, before the Tribunal of Livorno claiming damages in contract and in tort. The claim was rejected by the Tribunal of Livorno. The Court of Appeal of Florence held that the claim was time barred under the Hague-Visby Rules and rejected the claim in tort. F.lli Ferri appealed to the Supreme Court, on the ground that a claim for damages caused by the antedating of a bill of lading was not governed by the Hague-Visby Rules.

Held, by the Corte di Cassazione, that:

(1) The one year time limit does not apply in respect of claims for damages arising out of the antedating of the bill of lading.

Corte di Cassazione 19 November 1999, no. 12829, Caleca & Costantino S.n.c. v. Sea Land Service Inc.–The "Panarea" (2000 Dir. Mar. 861)

A consignment of nuts carried on board the Panarea by Sea Land Service Inc. from Italy to London was delivered in damaged conditions on 18 October 1981. On 1 December 1981 the shippers, Caleca & Costantino S.n.c., applied to the Tribunale of Patti for the

appointment of a surveyor who filed his report five years later, on 3 November 1986. Caleca & Costantino then commenced proceedings against Sea Land Service on 26 November 1986 stating that the application for the appointment of an expert had prevented the running of the one year time bar. This was denied by the Tribunal of Patti and then by the Court of Appeal of Messina. The claimants appealed to the Supreme Court.

Held, by the Corte di Cassazione, that:

(1) The application to the Court for the appointment of an expert does not prevent the lapse of the one year time limit set out in art. 3.(6) of the Hague Rules.

Tribunale of Venice 15 June 2000, Helvetia Assicurazioni v. Elmar Shipping Agency - The "Balkan" (2001 Dir. Mar. 670).

Ilva S.r.l. arrested in Venice the m/v Balkan as security for a claim against the carrier for loss of and damage to a parcel of glasses, unloaded from the Balkan. The vessel was subsequently released upon the carrier providing security. Helvetia Assicurazioni paid the insurance indemnity to the consignee and sued the carrier in the Tribunal of Venice. The carrier alleged that the claim was time barred, service of proceedings having been made after the lapse of one year from delivery.

Held, by the Tribunal of Venice, that:

(1) The application for the arrest of the ship as security for the claim against the carrier prevents the running of the one year time limit set out in Art. 3 r. 6 of the Hague-Visby Rules.

TORT CLAIMS (Art. 4 bis. 1)*

United States

Polo Ralph Lauren L.P. and Others v. Tropical Shipping & Construction Co. Ltd. (U.S. Court of Appeals-11th Cir. 21 June 2000, 2000 AMC 2129)

While en route from the Dominican Republic to Florida, a container containing Polo's cargo was lost overboard in rough seas. Polo, in a three-count complaint against the carrier, Tropical Shipping & Construction Co. Ltd., filed in the Southern District of Florida, asserted claims for breach of contract, bailment, and negligence. In a motion for partial summary judgment, Tropical sought judgment on the contract claim or, in the alternative, to limit the extent of damages recoverable by Polo to the value of the fabric. The district court granted the motion as to the contract claim on the ground that Polo did not have standing because it was not named in the bills of lading. The court also granted summary judgment to Tropical on the bailment and negligence claims as preempted by COGSA. Polo appealed, challenging inter alia the district court's conclusion that COGSA provides an exclusive remedy.

Held, by the Court of Appeals for the 11th Circuit, that:

(1) Cogsa affords only one cause of action for lost or damaged goods and although claims under Cogsa comprise elements of both contracts arising from the breach of the contract of carriage, and tort, issuing from the breach of the carrier's duty of care, they are a unitary statutory remedy.

> The United States has not ratified the Visby Protocol.*

Steel Coils, Inc. v. M/v "Lake Marion", in rem; Lake Marion, Inc. and Bay Ocean Management, Inc., in personam - v. Western Bulk Carriers K/S Oslo - v. Itochu International, Inc. United States Court of Appeals for the Fifth Circuit, May 13, 2003 (2003 AMC 1408)

Steel Coils, Inc., an importer of steel products with its principal office in Deerfield, Illinois, ordered flat-rolled steel from a steel mill in Russia. Itochu International, Inc., which then owned ninety per cent of the stock of Steel Coils, purchased the steel and entered into a voyage charter with Western Bulk Carriers K/S Oslo for the m/v Lake Marion to import the steel to the United States. Western Bulk had time chartered the vessel from Lake Marion. Inc. As Lake Marion, Inc.'s manager, Bay Ocean Management, Inc. employed the master and crew of the vessel.
The Lake Marion took on the steel coils at the Latvian port of Riga and discharged them at New Orleans and Houston. Steel Coils alleged that the coils were damaged by salt water and filed suit under COGSA against the m/v Lake Marion in rem and against Lake Marion, Inc., Bay Ocean Management and Western Bulk in personam, requesting US$ 550,000 in damages, with a separate claim of negligence against Bay Ocean.
After a bench trial, the U.S. District Court for the Eastern District of Louisiana held the defendants jointly and severally liable to Steel Coils for US$ 262,000 and Bay Ocean liable for an additional US$ 243,358.94.
From this judgment the vessel interests appealed and Steel Coils and Western Bulk cross-appealed.

Held, by the U.S. Court of Appeals for the Fifth Circuit, that:

(1) The manager of a vessel, who is not a party to the contract of carriage can be held liable in tort outside of COGSA and, therefore, cannot avail itself of the COGSA package limitation.