

CA on appeal from Commercial Court (Mr Justice Langley) before Aldous LJ; Judge LJ; Longmore LJ. 3rd April 2003.

Lord Justice Longmore:

1. The question in this appeal is whether a carrier by sea, who carries cargo on deck in breach of a contract of carriage which is governed by the old Hague Rules, can take advantage of Article IV rule 5 to limit his liability for loss or damage to that cargo. Hirst J answered that question in the negative in *The Chanda* [1989] 2 Lloyd's Rep 494; in the present case Langley J has answered the question in the affirmative [2002] EWHC 1306 (Comm), declining to follow *The Chanda*.
2. The proceedings arise out of the partial loss of and damage to a consignment of 34 new excavators carried on the Bulgarian vessel Kapitan Petko Voivoda from Korea to Turkey in September to November 2000.
3. The First Defendant was the charterer of the vessel. The cargo was carried pursuant to a charterparty between the First Claimant and the First Defendant and pursuant to 6 bills of lading issued by or on behalf of one or other of the Defendants.
4. For the purposes of the trial of preliminary issues the parties agreed a statement of assumed facts. It reads (so far as relevant) as follows:
 - "1. At all material times one or other of the Claimants were the owners of or otherwise entitled to sue in relation to a cargo of 34 brand new excavators ...
 2. The First Claimant and First Defendant concluded a contract of carriage (of the cargo) as partly evidenced in writing by a fax dated 22nd August 2000 ... This contract was subject to and/or incorporated the Conline terms ...
 3. The First Defendant was at all material times the Charterer of the Vessel Kapitan Petko Voivoda from the Second Defendant, the owner of the Vessel, pursuant to the terms of a Charter Party in the Gencon form dated 20th July 2000 ...
 4. The excavators were shipped aboard the Vessel between 1st to 3rd September 2000 at Incheon in Korea in apparent good order and condition, and stowed and lashed underdeck for carriage to Istanbul.
 5. Six bills of lading dated 4th September 2000 were issued in respect of the shipment. None of the bills stated that the excavators were stowed on deck.
 6. The contracts of carriage contained in/evidenced by the bills of lading and the contract between the First Claimant and the First Defendant provided for carriage of the excavators to Istanbul in Turkey.
 7. The vessel sailed from Incheon on 3rd September. On about 5th September the Vessel arrived at Xingang in China where 26 excavators were discharged from the Vessel then restowed on deck. The Defendants do not allege that notice of/consent to the restowage was given to/obtained from cargo interests.
 8. The Vessel sailed from Xingang on 10th September and on 12th September 2000 was in the Yellow Sea bound for Zhanjiang when she encountered heavy weather ... On that day, at about 20:20hrs, 8 of the excavators on deck broke free of their lashings and were lost overboard. In addition other excavators stowed on deck suffered minor damage including rusting/wetting damage.
 9. The loss of and damage to the excavators was caused by one or more of the following causes ... :
 - (1) perils of the seas (within the meaning of Art IV rule 2(c) of the Hague or Hague Visby Rules);
 - (2) inadequate lashing at Xingang;
 - (3) carriage of the excavators on deck;
 - (4) insufficiency of packing (this applies only in relation to the damage apart from the loss of the 8 excavators overboard).
 10. There is no enactment of the Hague Rules in Korea.
 11. The Hague Rules have been enacted in Turkey (the precise scope of enactment is or may be in issue between the parties but this issue is not material for the determination of the preliminary issues)."
5. The fax dated 22nd August 2000 provided that the carriage would be "underdeck only" (number 17). The Conline terms contained a General Paramount Clause (clause 2) the effect of which on the basis of the assumed facts is that the Hague Rules (but not the Hague-Visby Rules) as enacted in Turkey applied. The bills of lading also included the Conline terms.
6. The relevant provisions of the Hague Rules are:-

"Article I In these Rules the following expressions have the meanings hereby assigned . . .

(c) "Goods" includes goods. . . of every kind whatsoever except . . . cargo which by the contract of carriage is stated as being carried on deck and is so carried.

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

Article III

 1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
 - (a) make the ship seaworthy;
 - (b)
 - (c) make the holds ... and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

...

6. . . . In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods ...

Article IV

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and ... to make the holds, ... and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

...

(c) Perils, dangers, and accidents of the sea or other navigable waters.

...

(n) insufficiency of packing

...

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding [£100] per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

This declaration if embodied in the bill of lading shall be *prima facie* evidence but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

...

Article V

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities, or to increase any of his responsibilities and obligations under this convention provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this convention. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average."

7. Although not relevant in the present proceedings, it is to be noted that the Hague-Visby Rules contain an exception to the application of the limitation of liability in the terms of the replacement Article IV rule 5, provided for by Article 2 of the Visby Protocol. The limitation itself appears in Article 4 rule 5(a) in substantially the same terms as rule 5 of the Hague Rules, save as to amount.

8. The replacement Article IV rule 5(e) reads:-

"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage or recklessly and with knowledge that damage would probably result"

9. Preliminary issues were ordered to be tried in the Commercial Court in the following terms:-

1. Whether deck stowage was a breach (a) of the terms of the charterparty and (b) the bills of lading;

2. If so, on each of the following assumptions, namely

(a) deck carriage was the effective cause of the loss and/or damage;

(b) the loss and/or damage was caused by deck carriage and one or more of (i) inadequate lashing, (ii) perils of the sea, or (iii) insufficiency of packing.

Are the Defendants precluded by reason of the unauthorised deck carriage from relying on:

(a) the limitation provisions

(b) the other defences provided by the Hague Rules.

The judge answered the first question Yes and there is no appeal from that conclusion. He answered question 2(a) No and question 2(b) by saying that it was unlikely that the Defendants would be able to rely on the Hague Rules defences but that it would depend on the facts. The answer to 2(b) has not been appealed and only the answer to question 2(a) remains in issue.

10. Mr Hamblen QC, for the Claimant cargo-interests, stressed the importance of the carrier's obligation to carry underdeck several times in his submissions. He categorised the breach of the obligation as a very serious breach

and Mr Lord QC, for the carriers, did not in any way dissent from the proposition. Neither do I. However, the seriousness of the breach is no longer a self-sufficient yardstick for determining whether exception or limitation clauses apply to particular breaches. The doctrine of fundamental breach or breach of a fundamental term was discredited in *Suisse Atlantique Société d'Armement Maritime S.A. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 and given its formal burial in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 which decided that the question whether particular clauses applied to excuse or limit liability was solely a matter of construction of the contract. But the doctrine of fundamental breach never sprang fully fledged from the heads of judges in the middle years of the last century; it had a respectable commercial origin in the 19th century cases relating to "serious" breaches of contract such as deviation from the contractual voyage and storing goods in a warehouse other than that originally agreed. It has not yet been conclusively decided whether what I may call the deviation cases and the warehouse cases must be regarded as dead and buried along with the doctrine of fundamental breach. Mr Hamblen's submission was that the obligation to carry cargo underdeck had the same importance as the obligation not to deviate and the obligation to store in the contractual warehouse – he even categorised carriage of cargo on deck as a "quasi-deviation"; he then submitted that, as a matter of construction, it could not have been the intention of the parties to apply the Hague Rules limitation to such a serious breach. By travelling the path of construction of the contract, he thus arrived at the cargo-owners' desired destination.

11. This is a respectable argument with reputable antecedents and was skilfully deployed. Mr Hamblen made the following submissions on which I have ventured the occasional comment of my own:-

(1) In *Suisse Atlantique* [1967] 1AC at pages 433-4 Lord Wilberforce apparently approved of both the deviation cases and the warehouse cases by the citation of both Lord Russell of Killowen in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 347:- "it was well settled before the Act [of 1924] that an unjustifiable deviation deprived a ship of the protection of exceptions. They only applied to the contract voyage."

and Scrutton LJ in *Gibaud v Great Eastern Railway Co* [1921] 2 KB 426, 435 where, after citing *Lilley v Doubleday* (1881) 7 QBD 510, he said:- "if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way which you had contracted to do it."

In *Photo Production Ltd v Securicor*, however, Lord Wilberforce said ([1980] AC 827, 845) it was preferable to treat the deviation cases "as a body of authority *sui generis* with special rules derived from historical and commercial reasons", one such special rule being the displacement of an exceptions clause with apparently retrospective effect.

(2) The 18th edition of Scrutton on *Charterparties and Bills of Lading* (1974) page 163-4 stated (as had many previous editions):-

"The shipowner . . . will only be authorised to stow goods on deck: (1) by a custom . . . or (2) by express agreement by the shipper of the particular goods so to stow them.

The effect of deck stowage not so authorised will be to set aside the exceptions of the charter or bill of lading, and to render the shipowner liable under his contract of carriage for damage happening to such goods."

The authorities cited for these propositions were *Lilley v Doubleday* and *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11 where a carrier who had stowed cargo on deck was held to be unable to rely on an exception of "jettison".

(3) The same edition's commentary on Art IV rule 4 of the Hague Rules in relation to deviation asked the question (page 440) what the effect would be of a deviation not permitted by the Hague Rules and answered by saying that, as at common law, the carrier would not be protected by the exceptions contained in Art IV rule 2 of the rules. More equivocally, the commentary continued:-

"But perhaps the carrier could still rely on Article III rule 6 [the one year time bar] and on Article IV, rule 5, in view of the words "in any event" at any rate in a case where an English court is dealing with a bill of lading issued in the United Kingdom, and would give effect to these Rules as part of the statute law. The position is probably different where the court is dealing with a foreign bill of lading incorporating the Rules as a matter of contract."

In the present case the Rules are, of course, applicable as a matter of contract not as a matter of statute. Mr Lord was, however, able to point out that the contractual incorporation provided for the Rules to be "paramount".

(4) In *Evans and Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078 the Court of Appeal held that the carrier could not rely on his usual exceptions (including a limitation of liability to £50 per ton) as a result of an express oral undertaking that the goods would be carried under deck. Apparently Roskill LJ had observed, during the argument (perhaps remembering the passage in Scrutton at (2) above) that, if the carrier broke a promise to carry goods under deck in a case governed by the Hague Rules, he could not rely on the limitation clause. Lord Denning MR relied on this proposition in his judgment in favour of the cargo-owners.

(5) The repetition of the passage at (2) above at page 167 of the 19th edition of Scrutton (1984). By this time the Hague-Visby Rules (1971) had replaced the original Hague Rules, but the remarks cited at (3) above remained in the commentary on the unchanged Article IV rule 4.

(6) In *The Chanda* [1989] 2 Lloyd's Rep 494, the original Hague Rules were incorporated into the contract by a clause paramount in the form in which they were enacted in Germany. Part of an asphalt drying and mixing plant had been shipped on deck in breach of contract. The question for the court was whether the shipment on

deck disentitled the shipowner from relying on Article IV rule 5. Hirst J cited *Royal Exchange Shipping Co v Dixon, Evans v Merzario* (neither of which, he said, rested on the discredited fundamental breach rule), and Lord Wilberforce's dicta in *Suisse Atlantique* and *Photo Production* from all of which he derived a principle of construction (page 505):-

"that clauses which are clearly intended to protect the shipowner provided he honours his contractual obligation to stow goods under deck do not apply if he is in breach of that obligation."

He then said that the limitation clause fell fairly and squarely within this category:-

"Since it can hardly have been intended to protect the shipowner who, as a result of the breach, exposed the cargo in question to such palpable risk of damage. Otherwise the main purpose of the shipowners' obligation to stow below deck would be seriously undermined."

In a note on this case ((1989) 105 LQR 521, 524) the late Mr Brian Davenport QC aptly quoted Lord Bridge's criticism of a decision of this court which had *"come dangerously near to re-introducing by the back door"* the doctrine of fundamental breach. Mr Davenport then added:-

"Although in the Chanda . . . any return to the doctrine was disclaimed, may [it] not have come dangerously close to re-introducing it by the side-door?"

- (7) Developments in the United States; some circuits have definitively treated shipment of cargo on deck as a deviation and, for that reason, held that Article IV rule 5 was inapplicable, at any rate if the deviation is unreasonable within Article IV rule 4. Thus the Supreme Court in *St Johns Shipping Cpn v SA Companhia Geral* (263 US 119) held that a carrier who stows goods on deck becomes liable *"as for a deviation"* and Weinfeld DJ followed that authority to hold in New York that the carrier could not rely on Article IV rule 5 to limit his liability for loss or damage to cargo stowed on deck, *Jones v The Flying Clipper* 116 F Supp 386 (1953) cited in the 18th edition of Scrutton at page 440 n 24 and followed in later authorities such as those mentioned in Cooke, *Voyage Charters*, 2nd ed (2001) paras 12.99-12.101.

12. As against this barrage of authority Mr Lord was able to rely on the following arguments:-

- (1) There is no English authority for treating stowage on deck in breach of contract as a deviation and now was not the time to start. Whatever the status of the deviation cases might be, the proposition for which they supposedly stood (viz. that any deviation automatically deprived the shipowner of the right to rely on any exceptions) was a peculiar doctrine of the common law and should not be extended;
- (2) The passage in the 18th edition (1974) and 19th edition (1984) of Scrutton had been considerably amended in the 20th edition (1996);
- (3) Neither Mr Hamblen's submissions nor *The Chanda* gave any force to the critical phrase *"in any event"* in Article IV rule 5:-
"Neither the carrier nor the ship shall in any event be or become liable . . . in an amount exceeding . . ."
- (4) Important as the obligation not to stow on deck was, it could not (necessarily or at all) be said to be more important than other obligations of the carrier such as (at common law) to provide a seaworthy ship or (under the Hague or Hague/Visby Rules, Article III rule 1) to exercise due diligence to make the vessel seaworthy. It had been held in *The Happy Ranger* [2002] 2 Lloyd's Rep 357 that Article IV rule 5 applied to enable the shipowner to limit his liability for such breaches of contract; liability for failure to carry under deck should be no different.
- (5) The Court of Appeal in *The Antares* [1987] 1 Lloyd's Rep 24 held that the time limit of one year contained in Article III rule 6 applied to a claim for failure to carry under deck; the package limit in Article IV rule 5 was not inherently different.
- (6) Even if it was right to say that a shipowner who had carried cargo on deck was not entitled to rely on the exceptions to liability in his contract, a limitation clause was different and should not be construed by reference to the specially exacting standards applicable to exclusion clauses, see *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 WLR 964.

Discussion: (1) Deviation

13. The starting point for resolution of these conflicting arguments must be that the Hague Rules are an international convention; although they must in this case be construed as incorporated into a contract governed by English law, their interpretation is *"not to be rigidly controlled by domestic principles of antecedent date but they are rather to be construed on broad principles of general acceptance"* see per Lord Macmillan in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350 and Mance LJ in *Tilbury v International Oil Pollution Compensation Fund* 7th February [2003] EWCA Civ 65, paras 16 and 21.
14. It may be difficult to know in any given case what *"broad principles of general acceptance"* are to prevail over domestic principles but the approach must be very relevant where it is sought to rely on the peculiarly common law principle derived from the deviation cases. This is not an appropriate case to decide whether what Lord Wilberforce called *"a body of authority sui generis with special rules"* [1980] AC at page 845 is consistent with the law as expounded in the *Photo Production* case. It is, however, on any view a peculiar creature of the common law. Although it appears to have been received into the United States and, indeed, to have been extended to apply to cases of carriage on deck in breach of contract, it cannot be described as a *"broad principle of general acceptance"*. Mr Lord commented that Article IV rule 4 itself abrogated the common law rule of deviation; he was also able to show that, at any rate in relation to deck cargo, the deviation principle does not apply in Holland, France or Italy where courts have decided that the carrier can rely on the Article IV rule 5 limit in deck cargo

cases. Of course, such decisions cannot constitute precedents but they do at least show that the principle for which the deviation cases are authority is very far from being a principle "of general acceptance". It is a question of some controversy whether they now exemplify even a principle of English law. As Lloyd LJ said in *The Antares* [1987] 1 Lloyd's Rep 424, 430:-

"Whatever may be the position with regard to deviation clauses strictly so called (I would myself favour the view that they should now be assimilated into the ordinary law of contract), I can see no reason for regarding the unauthorised loading of deck cargo as a special case."

I respectfully agree. Moreover at page 429 Lloyd LJ (with whom both Glidewell and O'Connor LJ agreed) expressly disapproved the passage about deck cargo which was contained in the 18th and 19th editions of Scrutton. It now only appears in the current (20th edition), as I have said, in an amended form.

15. It seems to me, therefore, that the cargo-owners can derive no benefit from the supposed principle stated in the deviation cases or, indeed, the warehouse cases. The duty of the court is merely to construe the contract which the parties have made.

(2) Construction

16. Once the problem is treated purely as a question of construction the words "in any event" become very important. Their most natural meaning to my mind is "in every case" (whether or not the breach of contract is particularly serious; whether or not the cargo was stowed under deck). The French wording "*en aucun cas*" would, I think, support that view. Hirst J in *The Chanda* made no reference to these words at all which is surprising since he purported to treat the question before him as a pure question of construction. On any view they are highly relevant words. Mr Hamblen submitted that the phrase was, as he put it, "conjunctive and neutral" and meant no more than "*notwithstanding the foregoing*". Since the rule foregoing Article IV rule 5 is Article IV rule 4 disapplying the strict common law rule about deviation it does not seem to me that Mr Hamblen's construction particularly advanced the argument.

17. It is, moreover, on this aspect of the matter that the *Antares* and the *Happy Ranger* are particularly relevant. The question in the *Antares* was whether a shipowner who carried cargo on deck in breach of contract could rely on Article III Rule 6 of the Hague-Visby Rules which relevantly provided:-

"... the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year"

As Lloyd LJ pointed out this wording is wider than the original Article III rule 6 which omits the word "*whatsoever*"; he held, therefore, that the shipowner could rely on the rule. In the light of his rejection of the "*deviation*" argument, I doubt if the conclusion would have been different, if the question had arisen under the old form of the rule. Hirst J in *The Chanda* relied on the fact that in the *Antares* the Hague/Visby rules were incorporated as a matter of statute into the contract. But again I doubt if the conclusion would have been any different if they had been incorporated by virtue of a clause paramount. Professor Sir Guenther Treitel and Francis Reynolds make the perfectly valid point (Carver, *Bills of Lading* (2001)) that for deck cargo there is a stronger case for holding the package limitation to be inapplicable than the time limitation since deck stowage exposes the goods to unanticipated risks which, however, do not make it more difficult to start a claim in time. But it would be curious if the words "in any event" had a different meaning in Article IV rule 5 from that which they had in Article III rule 6.

18. The *Happy Ranger* was a case where Article IV rule 5 of the rules was held to apply where there had been a breach of the seaworthiness obligation contained in Article III rule 1. The court held that the Hague/Visby rules applied. There was no question of the damage being caused deliberately or recklessly so only Article IV rule 5(a) was in play, in materially the same terms as Article IV rule 5 of the old rules. The argument was that since the Privy Council had decided in *Maxine Footwear v Canada Government Merchant Marine* [1959] AC 589 that the seaworthiness obligation contained in Article III rule 1 was an overriding obligation and that the exceptions in Article IV rule 2 could not be relied on in the event of breach of that overriding obligation, so also the shipowner could not rely on Article IV rule 5. Tuckey LJ said (para 38):-

"... I think the words "*in any event*" mean what they say. They are unlimited in scope and I can see no reason for giving them anything other than their natural meaning. A limitation of liability is different in character from an exception. The words "*in any event*" do not appear in any of the other article IV exemptions . . . and as a matter of construction I do not think that they were intended to refer only to those events which give rise to Article IV exemptions." Aldous and Rix LJ agreed.

Although Mr Hamblen asserted (and Mr Lord accepted) that the obligation to carry under deck was an extremely important obligation, it could not be said that it was "*overriding*" in the same sense as the seaworthiness obligation. The *Happy Ranger* is thus a stronger case than the present and I would respectfully adopt its reasoning.

(3) Authority

19. As stated, the *Antares* and the *Happy Ranger* favour the carriers' argument. *Evans v Merzario* was a different case on its facts. Critical to all the judgments was the fact that the merchandise had previously been packed in crates on trailers but the carriers were proposing that in future it should be packed in containers. There was a conversation between the importer's representative Mr Leonard and the carrier's representative, Mr Spano. In Lord Denning MR's words Mr Spano assured Mr Leonard "*if we do use containers, they will not be carried on deck*". There was thus a wholly separate and collateral promise which induced the business to continue; Lord Denning

called it an "oral promise or assurance" (page 1081F); Roskill LJ emphasised (page 1083G) that "the plaintiffs were only willing to agree to that change [viz containers instead of trailers] if they were promised by the defendants that those containers would be shipped under deck and would not have agreed to the change but for that promise"; Geoffrey Lane LJ called it a "new express term" (page 1084G). The defendant's printed terms and conditions had been incorporated into the previous contracts made between the parties and (1) excused the defendants unless the loss or damage occurred while the goods were in their actual custody and under their actual control and (2) limited their liability to £50 per ton. Not surprisingly these clauses were held not to apply in the event of a breach of the new express term to carry under deck. Roskill LJ said [1976] 1 WLR 1078, 1084G:-

" . . . one has to treat the promise that no container would be shipped on deck as overriding any question of exempting condition. Otherwise, as I have already said, the promise would be illusory."

There was no question of any application of the Hague Rules in that case; Lord Denning MR's adoption of Roskill LJ's observations made in argument was obiter and cannot, with respect to them both, stand with the later decisions of this court in the *Antares* and the *Happy Ranger*. (This is a good example of the reason why Counsel should cite authorities in the official law reports. We were provided with copies of the case in the Lloyd's Law reports and spent much time puzzling over the previous but one sentence in Roskill LJ's judgment. It is however, accurately transcribed in the Weekly Law Reports.)

20. It is important to remember Langley J's unappealed answer to question 2(b) of the preliminary issues to the effect that the defendants in the present case would be unlikely to be able to rely on the defences provided by Article IV rule 2 of the Hague Rules but that it would depend on the facts. The reason for this answer is that, granted there has been a breach of contract by shipment of cargo on deck, the loss will probably be caused by that breach of contract and the claimant will therefore be able to recover. If goods are shipped on deck in breach of contract and are also insufficiently packed with the result that they are lost, the shipment on deck is at any rate a cause of the loss. If they had been shipped in the holds, as they should have been, the insufficiency of packing is unlikely to have mattered and Article IV rule 2(n) could not be relied on. The same will apply to an exception of jettison whether stated as such in the contract or pursuant to Article IV rule 2(l). It is likely that the cargo shipped on deck will be the cargo to be jettisoned; if it had been loaded underdeck it would probably not have been that cargo which was jettisoned. That was the position in *Royal Exchange Shipping Co v Dixon* (1886) 12 App Cas 11, see especially the speech of Lord Halsbury LC which was thus never an authority that in the case of any on deck carriage the carrier could never rely on any exemption. It needs hardly to be added that Langley J was, of course, right to give the cautious answer he did to question 2(b), since the events giving rise to some of the exclusions from liability might apply whether the cargo was loaded on deck or not. Fire, act of God and act of public enemies furnish possible examples.
21. It follows that Hirst J's reliance on *Royal Exchange Shipping Co v Dixon* and *Evans v Merzario* in *The Chanda* was misplaced. He extracted from them the principle of construction that clauses intended to protect the shipowner provided he honours his contractual obligation to stow goods under deck do not apply if he is in breach of his obligations. This, with respect, does little more than state the obvious and gives no guide as to how a judge is to ascertain (otherwise than by bald assertion) whether any particular clause is only intended to apply if a shipowner ships under deck or is not intended to apply if he ships the cargo on deck. Not surprisingly, when Hirst J comes to state his decision, it is only by assertion that he does so:-
". . . the package limitation falls fairly and squarely within this category since it can hardly have been intended to protect the shipowner who, as a result of the breach, exposed the cargo in question to such palpable risk of damage. Otherwise the main purpose of the shipowners' obligation to stow below deck would be seriously undermined."
A relevant breach of the seaworthiness obligation will cause a "palpable risk of damage". A limitation or exclusion from liability for that breach "seriously undermines the obligation" yet it is now established by the *Happy Ranger* that Article IV rule 5 applies to such breach. So also, for the same reasons, must it be the case that it applies to breach of the obligation to stow on deck.
22. Hirst J's final conclusion was that the package limitation clause "being repugnant to and inconsistent with the obligation to stow below deck, was inapplicable". This is, no doubt, a reference to the repugnancy principle of construction whereby, if a clause is inconsistent with other provisions of the contract, the main purpose of the contract will prevail. But once one takes account of the words "in any event" there is no such repugnancy. I would therefore agree with Langley J's "diffident" conclusion in para 28 of his judgment that the *Chanda* should not be followed, because the words "in any event" were never addressed and the supposed repugnancy of Article IV rule 5 cannot be justified as a matter of construction. The *Chanda* has been followed in New Zealand in *The Pembroke* [1995] 2 Lloyd's Rep 290 but without any independent reasoning. In my judgment we should now overrule *The Chanda* and should approve the contrary decision of Sheen J in *The Nea Tyhi* [1982] 1 Lloyd's Rep 606 where, however, there is no sign that the point was argued.

Conclusion

23. Mr Hamblen painted a dire picture of cargo-owners' interests if his appeal should fail. He said that the Turkish sum used in Article IV rule 5 was 100,000 Turkish lira per package or unit and that was equivalent to about 5 pence for each of the excavators which were totally lost. This, he said, was the equivalent of a total exemption from liability. Mr Lord said that all depended on whether the gold equivalent of the Turkish lira sum was to be taken as the relevant limitation sum but accepted that, on any view, cargo owners would not be adequately compensated. But Mr Hamblen's fears are somewhat exaggerated. Cargo-owners can always declare the value

of their goods and cause that value to be inserted into the bill of lading. They would then be able to recover the value of their goods. Cargo-owners could also require the application of the Hague-Visby rules with their more favourable provisions rather than the old Hague rules. In this sense, this appeal is less far-reaching than Mr Hamblen suggested. I would dismiss it.

Lord Justice Judge:

24. I agree with Longmore LJ.
25. This appeal requires us to decide which of two conflicting decisions by respected Commercial Court judges relating to the construction of the Hague Rules 1924 is right. I shall therefore add some observations of my own.
26. The material facts are set out in Longmore LJ's judgment. They require no repetition. In breach of contract, the appellants' excavators were stored on deck, and not, as expressly agreed, under deck. Some were lost altogether, and some were damaged. On the assumption that none would have been lost or damaged if they had been carried under deck, the question for decision is whether the limitation provided by Article IV Rule 5 of the Hague Rules (which were incorporated into the contract) continued to apply to the advantage of the defendants, notwithstanding their breach of contract. Langley J decided that it did, and declined to follow the decision of Hirst J in *The Chanda* [1989] 2 Lloyd's Rep 494, in which he decided, in identical circumstances, that it did not.
27. The relevant provisions of the Hague Rules are also recited in Longmore LJ's judgment, and again, they require no repetition. Our direct concern is with the impact of part of Article IV Rule 5. Before coming to it, a number of other clauses providing for the avoidance or restriction of liability should be noted. Article IV Rule 2 is a true exemption clause. Langley J believed that this rule would be unlikely to avail the carriers in the present case, but the rule itself needs no further analysis in the present appeal. Article III Rule 6 does not, in the strictest sense, exclude liability. Rather, it imposes a contractual limitation period, so that, after this agreed period, any liability which might otherwise be established against the carrier is discharged, and the shipper's right to proceed is barred. Article IV Rule 4 covers deviation, normally a serious breach, but for the purposes of saving life and property, or where the deviation is reasonable, deemed not to constitute a breach at all. Any liability in the carrier is also precluded under Article IV Rule 5, if the shipper knowingly misrepresents the nature and value of the goods to be carried. Although in one sense providing an exemption from potential liability, this protection is built into the contract to ensure that the shipper is honest in his dealings with the carrier.
28. These different provisions form part of an overall framework governing the responsibilities and liabilities, and the rights and immunities of the carrier, and the obligation to load, handle, stow, carry, care for and discharge the goods "*properly and carefully*" is subject the provisions of Article IV.
29. The part of Article IV Rule 5 with which we are directly concerned limits potential liability for loss or damage to a prescribed amount. As a result of this clause, the amount recovered by the shipper will often be, as it is here, far less than the actual loss, frequently, indeed, derisory. There is a simple escape from this limitation clause. As between the contracting parties, all that is required is a truthful declaration by the shipper about the nature and value of the goods, and the insertion of this information in the bill of lading. It is also open to the parties to agree a different, but increased maximum, exceeding the sums prescribed in Rule 5. Another possibility arises under Article VI. Yet another alternative escape route is for the relevant Hague-Visby Rules to be incorporated into the contract. All that said, we are required to consider the limitation clause which the parties agreed, rather than one they did not. However, when considering the argument that this clause is so wide that it effectively protects the carrier from non-performance of the contract, it is not irrelevant to notice that, if that submission were right, it is precisely what the shipper agreed, notwithstanding the opportunity, expressly provided by the contract, for him to escape from the consequences of the limitation clause.
30. It was further suggested in argument that as the shipper believed that the excavators would be stowed under deck in accordance with the contract, there was no need to take advantage of the escape provisions. Provided the carrier complied with his contractual obligations, the possibility of loss and damage was significantly reduced. Therefore, the shipper need not have been over-concerned with the limitation clause. The argument would be more compelling if the limitation clause did not apply generally to loss and damage occasioned by breach of contract. If, for example, the vessel had been unseaworthy, and sunk, the excavators would have been lost whether stowed on deck or under it, but if liability were otherwise established, the limitation clause would have applied.
31. In summary, the issue is whether the carriers' breach of the obligation accepted by them, stowage on deck instead of under deck, fell outside the protective ambit of the limitation clause. It is obvious that stowage on rather than under deck was a serious breach of contract. Everyone understands that such stowage of itself significantly increases the risk of loss and damage. So from the shipper's standpoint, the express contractual requirement for under deck stowage would have been, and plainly was, extremely important. Our attention was drawn to the sensitivity of the common law to secure the performance of particular types of obligation, such as those relating to bailment, and, in shipping cases, in relation to deviation in the geographical sense, from the agreed route, and to the unauthorised carriage of cargo on rather than under deck. (See, for example *Gibaud v Great Eastern Railway Co* [1921] 2KB426 at 435; *Stag Line Ltd v Foscolo, Mango and Co Ltd* [1932] AC328 at 347; *Lilley v Doubleday* [1881] 7QBD 510; and *Royal Exchange Shipping Co v Dixon* [1886] 12AppCas11.) None of these authorities supports the proposition that a limitation clause of the kind presently under consideration, is deemed to be impermissible, or unenforceable, where the loss and damage have resulted from "*the unauthorised loading of deck cargo*" (*The Antares* [1987] 1 Lloyd's Rep 424). Ultimately, the question is one of construction of the contract (*Photo*

Production Ltd v Securicor Transport Ltd [1980] AC827). The debate is not illuminated by considering whether different, theoretical breaches of the contract may have had more or less serious adverse consequences than the actual breach with which we are concerned. Indeed, carried to its logical conclusion, the argument at one stage came very close to reviving the moribund, if not defunct principle of the "fundamental breach".

32. In *The Chanda*, Hirst J concluded that the limitation clause did not apply where the goods were stowed on deck, rather than under deck. He based his conclusion on *Royal Exchange Shipping Co v Dixon*, and *J Evans and Sons (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 WLR1078.
33. I shall briefly examine *Royal Exchange Shipping Co v Dixon*, where, in breach of an express condition, goods were carried on and not under deck. The exemption clause relied on by the carriers referred exclusively to goods which were safely stored under hatches. The contrary was not argued. The main submission was that the loss of goods through "jettison" was not attributable to stowage on deck. Lord Halsbury LC described this argument as "hardly susceptible of plausible statement". Lord Watson concluded that the circumstances in which the goods were jettisoned fell outside the exemption clause. The goods were being carried "in breach of the contract, and were not within the exceptions specified in the bills of lading".
34. In my judgment this decision does not assist in the task of construing the limitation clause in the overall contractual context.
35. In *J Evans and Sons (Portsmouth) Ltd v Andrea Merzario Ltd*, beyond a passing reference in argument, the Hague Rules were not under consideration. For some years, machinery was packed in crates for shipment to England. The crates were stowed under deck. This course of dealings was subject to standard conditions, which, by condition 13 provided: "In no case shall the liability of the company exceed...".
36. A change to the packing arrangements was proposed, and agreed, subject to new charges, and an express contractual term, made orally, that the containers would be carried under deck. In the result, the containers were shipped on deck, whence they fell into the water.
37. In the Court of Appeal it was decided that condition 13 did not limit liability. Lord Denning MR treated the limitation clause as equivalent to an exemption clause, and on the basis of authorities in which oral promises had been held to be binding in spite of written exemption conditions, decided that they should be "rejected". Roskill LJ looked at all the evidence to discover "the bargain...struck between the parties". He concluded that there was an enforceable contractual provision that the machines would be shipped under deck. The agreement to change from packaging in crates to containers was dependent on the promise that the containers would be shipped under deck. Approaching the problem as a matter of construction, he disposed of any possibility of reliance on the exemption conditions by concluding that, if they applied, the promise that the goods would be carried under deck would have been "illusory". So the promise overrode any exempting conditions.
38. Neither judgment focused directly on whether there might be any distinction between exempting conditions and conditions which limited liability. That issue arises here because, whatever the impact or otherwise of the exemption conditions, we are concerned only with the limitation conditions. That question was directly addressed in the judgment of Geoffrey Lane LJ. He decided that the exemption conditions, including the limitation clause, were logically inconsistent with the "new" express terms.
"The effect of their agreement was to remove from the new terms the restrictions or exemptions contained in those trading conditions. Any other conclusion would be to destroy the business efficacy of the new agreement from the day it started...If...the bystander had been asked whether this term was to apply to the agreement, he would have replied unhesitatingly no."
39. The question decided in the Court of Appeal, therefore, was whether, given the new arrangements relating to containers, and the express oral promise that they would be carried under deck, the exemption clauses continued to be incorporated into the contract established by the course of previous dealings between the parties. By implication, Lord Denning concluded that, even if the standard conditions were incorporated, they were defeated by the oral promise. However, Roskill LJ identified the relevant terms of the contract, which were partly oral, partly in writing, and partly depended on inference from the conduct of the parties, and concluded that the exemption clauses did not override the oral promise. Geoffrey Lane LJ decided that the standard conditions implied from the previous dealings did not prevail over the new express terms. The contract was therefore not subject to the terms implied by the previous dealings.
40. In summary, therefore, the limitation clause in *Evans* did not apply, either because it was not incorporated into the contract then under consideration (Geoffrey Lane LJ) or because, looking at all the material, written and oral, or by way of inferences from conduct, in the contract under consideration, the exemption clauses did not avail the defendants (Roskill LJ).
41. In *The Chanda*, Hirst J relied on *Evans* to reach the conclusion that the limitation provisions in the Hague Rules did not apply to the claim for damages arising from unauthorised stowage on deck. *Evans*, he thought, illuminated a principle of construction that clauses
"which are clearly intended to protect the shipowner, provided he honours his contractual obligations to stow goods under deck, do not apply if he is in breach of that obligation...This rule is quite clearly based on contractual intention."

He expressed himself satisfied that the limitation clause "*can hardly have been intended*" to provide the party in breach of contract against protection from a serious breach of it, which exposed the cargo to "*such palpable risk of damage*".

42. In my judgment, the decision in *Evans* does not support this broad proposition. At the risk of stating the obvious, if the shipowner honoured his contractual obligations, he would not have been in breach of them: the exemptions and limitations do not normally arise for consideration unless there is a breach. They protect one of the parties against his own default. They often limit the remedies which would otherwise be available to the wronged party. In that broad sense, of course, they are discordant with the contractual obligations of the party in default, and the anticipation of the wronged party. That explains why exemption clauses are closely scrutinised, both to check that they do indeed form part of the contract, and to ensure that they provide exemption from liability which would otherwise be established. Nevertheless, the ultimate decision depends on the proper construction of the contract agreed by the parties.
43. It is not suggested, nor could it be, that Article IV Rule 5, or any part of it, was somehow excluded from the contract. I respectfully disagree with Hirst J that, as the limitation clause was "*repugnant to and inconsistent with the obligation to stow below deck*", it was "*inapplicable*". The authorities on which he relied did not justify this conclusion. The limitation clause took effect "*in any event*". This phrase appears on three relevant occasions, once in connection with the clause creating the time bar, and twice in the limitation clause with which we are concerned. It was suggested that the words should be read to mean, "*Notwithstanding the foregoing*." I doubt whether this meaning greatly improves the shippers' position, but whether it does or not, "*in any event*" are simple words, to be read in the context in which they appear, and it would be unwise to attempt to translate these three words into three, or fewer, or more different words. As Tuckey LJ pointed out in *The Happy Ranger* [2002] 2 Lloyd's Rep 357: "*...I think the words 'in any event' mean what they say. They are unlimited in scope and I can see no reason for giving them anything other than their natural meaning.*"
- In my judgment, the limitation clause applied to the event with which we are concerned. I agree with the decision and reasoning of Langley J below. Accordingly, this appeal should be dismissed.
44. By way of footnote, I should add that, notwithstanding that we are considering an international convention, I can see no advantage in commenting on decisions reached in different jurisdictions. I gratefully adopt Longmore LJ's analysis of them.

Lord Justice Aldous:

45. I agree with both judgments.

Order: Appeal dismissed with no order as to costs of the appeal. (Order does not form part of the approved judgment)

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