HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

GREAT CHINA METAL INDUSTRIES CO LIMITED APPELLANT

AND

MALAYSIAN INTERNATIONAL SHIPPING CORPORATION BERHAD RESPONDENT

Great China Metal Industries Co Limited v Malaysian International Shipping Corporation Berhad
(S44/1997) [1998] HCA 65
22 October 1998

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

R B S Macfarlan QC with P E King for the appellant (instructed by Mallesons Stephen Jaques)

A J Sullivan QC with N G Rein for the respondent (instructed by Ebsworth & Ebsworth)

CATCHWORDS

Great China Metal Industries Co Limited v Malaysian International Shipping Corporation Berhad

Shipping – Sea carriage of goods – Bill of lading – Hague Rules – Damage to cargo – Cargo properly stowed – Vessel seaworthy and fit in all respects for voyage – Bad weather conditions foreseeable – Perils of the sea – *MV Bunga Seroja*.

Words and phrases – "perils of the sea".

Sea-Carriage of Goods Act 1924 (Cth), Sch, Art III rr 1 and 2, Art IV rr 1 and 2(a), (c).

1 GAUDRON, GUMMOW AND HAYNE J. In 1989, 40 cases of aluminium can body stock in coils were consigned from Sydney to Keelung, Taiwan. The respondent issued a bill of lading dated 5 October 1989, acknowledging receipt of the goods in apparent good order and condition. The vessel named in the bill as the intended vessel was the *MV Bunga Seroja*.

2 The shipper named in the bill was Strang International Pty Ltd ("Strang") as agent for Comalco Aluminium Ltd. Strang packed the containers in which the cargo was shipped. The appellant was named in the bill as "the notify party" and property in the goods duly passed to it.

3 The bill provided that it should have effect subject to legislation giving effect to the Hague Rules. By the *Sea-Carriage of Goods Act* 1924 (Cth)[1], the Hague Rules applied to the carriage of the goods. The parties to the bill of lading were deemed by ss 4(1) and 9(1) of that statute to have intended to contract according to the Hague Rules.

4 In the course of its passage across the Great Australian Bight, the vessel encountered heavy weather. That weather had been forecast before the vessel left port. Some of the goods were damaged.

5 Although, as will appear, it is not determinative of the outcome of the appeal, the question to which submissions primarily were directed is the meaning and effect of Art IV r 2(c) of the Hague Rules that:

> "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 ..."

The appellant contended that:

- this exception (the "perils of the sea" exception) does not apply if damage to cargo results from sea and weather conditions which could reasonably be foreseen and guarded against;

- the weather encountered by the *Bunga Seroja* was foreseen; and

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1 s 4(1). This has now been replaced by the *Carriage of Goods by Sea Act* 1991 (Cth), which incorporates the Hague-Visby Rules.

- the statement of Mason and Wilson JJ in *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd*[2] that "sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea" is wrong and should not be followed.

6 The appellant pleaded that the respondent had failed to meet its responsibility under Art III r 1 of the Hague Rules to exercise, before and at the beginning of the voyage, due diligence to make the ship seaworthy, to properly man, equip and supply the ship and to make the holds and all other parts of the ship in which the goods were carried fit and safe for their reception, carriage and preservation. It also pleaded failure by the respondent to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried (Art III r 2). By its defence, the respondent relied upon various immunities specified in Art IV r 2. In particular, the respondent pleaded that it was not responsible for any loss or damage to the goods arising or resulting from perils of the sea and that any damage to the goods resulted or occurred by reason of that matter.

7 The trial judge (Carruthers J) entered judgment for the respondent. His Honour concluded[3]:

> "In my view, the [respondent] has established to the requisite degree that the damage to the subject cargo was occasioned by perils of the sea. … In summary, the evidence satisfies me that, bearing in mind the anticipated weather conditions: (i) when the *Bunga Seroja* sailed from Burnie she was fit in all respects for the voyage; (ii) the [respondent] properly and carefully loaded, handled, stowed, carried, kept and cared for the subject cargo; and (iii) there was no neglect or default of the master or other servants of the [respondent] in the management of the ship or cargo.
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> I am satisfied that the damage to the subject cargo was occasioned by perils of the sea, in that, the pounding of the ship by reason of the heavy weather caused the coils within the container to be dislodged and thereby sustain damage."

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2 (1980) 147 CLR 142 at 166.

3 *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455 at 470-471.

The New South Wales Court of Appeal[4] dismissed an appeal. The appeal to this Court also should be dismissed.

8 The facts giving rise to the appeal, and the course of the proceedings below are set out, in detail, in the reasons of other members of the Court and we do not repeat them.

9 In understanding the operation of the Hague Rules, there are three important considerations. The rules must be read as a whole, they must be read in the light of the history behind them, and they must be read as a set of rules devised by international agreement for use in contracts that could be governed by any of several different, sometimes radically different, legal systems. It is convenient to begin by touching upon some matters of history.

History of the Hague Rules

10 By the early 19th century, shipowners had come to be regarded as common carriers by both English and American law[5]. Accordingly, the carrier was strictly liable for damage to or loss of cargo that was damage or loss occurring in the course of carriage unless the carrier could prove not only that its negligence had not contributed to the damage or loss, but also that one of four excepted causes (act of God, act of public enemies, shipper's fault or inherent vice of the goods) was responsible for the loss[6].

11 To avoid this liability (sometimes spoken of as tantamount to that of an insurer[7]) carriers began to include more and wider exculpatory clauses in their bills of lading. In England, it was held that carriers and shippers could agree to terms

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4 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1996) 39 NSWLR 683.

5 At least where the ship was a "general ship", that is, a ship put up to carry goods for anyone wishing to ship them on the particular voyage on which the ship is bound; see, eg, *Laveroni v Drury* (1852) 8 Ex 166 at 170 [155 ER 1304 at 1306]; *Liver Alkali Co v Johnson* (1874) LR 9 Ex 338 at 340-341.

6 *Benedict on Admiralty*, 7th ed (rev), vol 2A § 11 at 2-1. See also *Laveroni v Drury* (1852) 8 Ex 166 at 170 [155 ER 1304 at 1306]; *Nugent v Smith* (1876) 45 LJ (CL) 697 at 701; *Propeller Niagara v Cordes* 62 US 7 at 22-23 (1859).

7 *Forward v Pittard* (1785) 1 TR 27 at 33 [99 ER 953 at 956] per Lord Mansfield.

by which the carrier assumed virtually no liability, even for its own negligence[8]. In *Australasian United Steam Navigation Co Ltd v Hiskens*, Isaacs J said[9]:

> "Common law relations based on reasonableness and fairness were in practice destroyed at the will of the shipowners, and as fast as Courts pointed out loopholes in their conditions, so fast did they fill them up, until at last the position of owners of goods became intolerable."

In the United States, however, the federal courts held that contractual clauses which purported to exonerate carriers from the consequences of their own negligence were void as against public policy[10], and strictly interpreted clauses which attempted to exonerate carriers for the failure to provide a seaworthy ship[11]. This did not help United States cargo interests when much of their trade was carried on British ships pursuant to bills of lading containing choice of forum clauses nominating England as the place in which suit must be brought.

12 These problems led, in the United States, to the *Harter Act* of 1893[12] ("the Harter Act"). This Act was a compromise between the conflicting interests of carriers and shippers. A carrier could not contract out of its obligation to exercise due diligence to furnish a seaworthy vessel[13] or to relieve it from "liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge"[14].

13 New Zealand, Australia and Canada each passed legislation modelled on the Harter Act: the *Shipping and Seamen Act* 1903 (NZ), the *Sea-Carriage of Goods*

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8 *In re Missouri Steamship Company* (1889) 42 Ch D 321.

9 (1914) 18 CLR 646 at 671.

10 See, eg, *Railroad Co v Lockwood* 84 US 357 at 384 (1873); *Phoenix Insurance Co v Erie and Western Transportation Co* 117 US 312 at 322 (1886); *Liverpool and Great Western Steam Co v Phenix Insurance Co* 129 US 397 at 441-442 (1889); *Compania de Navigacion la Flecha v Brauer* 168 US 104 at 117 (1897).

11 See, eg, *The Caledonia* 157 US 124 at 137 (1895); *The Carib Prince* 170 US 655 at 659 (1898).

12 46 USC App §§ 190-196.

13 Harter Act § 2, 46 USC App § 191.

14 Harter Act § 1, 46 USC App § 190.

Act 1904 (Cth)[15] and the *Water Carriage of Goods Act* 1910 (Can). All of these Acts, although modelled on the Harter Act, made some changes to the model. Thus the 1904 Australian Act was, in some respects, more generous to cargo interests than the Harter Act[16].

14 Pressure grew for uniform rules. In February 1921, the British Imperial Shipping Committee recommended uniform legislation throughout the British Empire based on the Canadian Act[17]. Draft rules were prepared, considered and amended. By 1922 the Comité Maritime International had adopted a draft. The Diplomatic Conference on Maritime Law then took up the matter and in August 1924 the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading was concluded and opened for signature[18]. Australia enacted the *Sea-Carriage of Goods Act* 1924 (Cth) as soon as the final diplomatic steps had been taken[19].

15 The new rules quickly gained international acceptance, although United States legislation was not passed until 1936[20]. By the start of World War II

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15 *Australasian United Steam Navigation Co Ltd v Hiskens* (1914) 18 CLR 646 at 672 per Isaacs J.

16 For example, under the Harter Act, statutory exemptions from liability were available if the owner exercised *due diligence* to make the ship seaworthy and properly manned, equipped and supplied (§ 3, 46 USC App § 192). By contrast, under the *Sea-Carriage of Goods Act* 1904 (Cth), the statutory exemptions were available only if the ship *was* at the beginning of the voyage seaworthy and properly manned, equipped and supplied (s 8(2)).

17 Sturley (ed), *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990), vol 2 at 138.

18 *Benedict on Admiralty*, 7th ed (rev), vol 2A § 15 at 2-14.

19 The Act received the Royal Assent on 17 September 1924; the Convention was concluded and opened for signature on 25 August 1924.

20 Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 36-55.

"the overwhelming majority of the world's shipping was committed to the Hague Rules"[21].

16 The Hague Rules represent a compromise about the allocation of risk of damage to cargo (a compromise which was different from what had been represented in domestic statutes). Thus, to take only one example, shipping interests gained the advantage in Australia and the United States of elimination of the rule established in *McGregor v Huddart Parker Ltd*[22] and *The Isis*[23]. In those cases, the High Court of Australia and the Supreme Court of the United States held that a carrier could claim exemption from liability on the bases set out in the 1904 Australian Act and the Harter Act if (and only if) the carrier had complied with its obligation relating to the seaworthiness of the vessel, regardless of whether the cargo's loss or damage was caused by lack of seaworthiness. Under the Hague Rules, however, some causal connection must be shown between the loss and the matter in respect of which due diligence was not demonstrated[24].

17 The complexity of the history which we have touched on is such that, as Dixon J said in *William Holyman & Sons Pty Ltd v Foy & Gibson Pty Ltd*[25], "[t]he case law, English, Australian and American, dealing with other legislation thought to be *in pari materia* cannot be applied to the Hague Rules, except with great care and discrimination."

18 Similarly, it may be that similar care and discrimination must be shown in applying decisions about marine insurance to the Hague Rules. Many of the issues which arose under the exempting provisions of bills of lading issued before the Hague Rules find parallels with issues arising under policies of marine insurance. Whether, however, principles developed in connection with one area should be applied in the other was open to argument for many years and may still be so. In *Arbib & Houlberg v Second Russian Insurance Co*[26], the Court of Appeals for the

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21 *Benedict on Admiralty*, 7th ed (rev), vol 2A § 15 at 2-17. See also Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 56.

22 (1919) 26 CLR 336.

23 *May v Hamburg-Amerikanische Packetfahrt Aktiengesellschaft* 290 US 333 (1933).

24 Art IV r 1.

25 (1945) 73 CLR 622 at 633.

26 294 F 811 at 816 (2nd Cir 1923).

Second Circuit identified as follows the distinction drawn in the United States between the two areas:

> "The phrase 'perils of the seas' occurs in bills of lading, where it is used as a ground of the carrier's exemption from liability, and it is also employed in policies of insurance in stating the ground of the insurance company's liability. In the interpretation of the phrase when used in bills of lading, the courts have adopted great strictness, as the carrier is seeking exemption of liability; but in the interpretation of the phrase when used in insurance policies, the courts in many cases have given to it great elasticity of meaning."[27]

Further, given the importance of obligations of utmost good faith in insurance law but the absence of any such obligation in a contract for carriage of goods, the possible difficulty resulting from any unthinking application of the decisions made in one area to problems arising in the other is obvious. In addition, the term "perils of the seas" is given a defined meaning in the "Rules for Construction of Policy" contained in the Second Schedule to the *Marine Insurance Act* 1909 (Cth)[28]. These are not, however, issues which fall for decision in this case.

The Hague Rules as an international agreement

19 It is necessary to recall that the rules were reached as a matter of international agreement. Several things follow from their origin.

20 First, the rules necessarily take a form different from domestic statutes like the Harter Act (and equivalent Australian, Canadian and New Zealand Acts) because, while those domestic acts "were written to be read in the context of domestic law, the new rules were designed to create a self-contained code (at least in the areas it covered) that would not require reference to domestic law"[29].

21 Secondly, because the rules were created by international agreement, it is not desirable to begin from an assumption that they are to be construed like a contract governed by Australian law or some other common law system.

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27 See also Couch, *Cyclopedia of Insurance Law*, 2nd ed (1982), vol 11 § 43:93.

28 Rule 7 states:

> "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

29 *Benedict on Admiralty*, 7th ed (rev), vol 2A § 15 at 2-12.

22 Thirdly, while any action brought in a national court on a contract of carriage governed by that nation's law will be framed in a way that reflects that law, it cannot be assumed that the rules take the form which they do in order to reflect some particular cause of action or body of learning that is derived from, say, the common law. Thus questions of burden of proof and the like are questions that may well arise in any action brought in a common law court but it cannot be assumed that the Hague Rules reflect, say, the rules about burden of proof as between a bailor and bailee for reward at common law. For this reason, we very much doubt that principles established in cases like *The Glendarroch*[30] can be used as an aid to construing the Hague Rules[31]. They are principles which apply in common law actions between bailor and bailee but that is very different from using them as some guide to understanding what the Hague Rules mean.

23 At common law, the contract of carriage is one of bailment for reward and under the common law system of pleading the plaintiff sufficiently pleaded its case by alleging non-delivery of the goods. It was for the carrier to set up a contractual exception, such as perils of the sea. To that, the plaintiff might plead a contractual proviso to the exception, namely that the loss was the result of negligence of the carrier. This meant that "negligence" as a matter of construction of the contract "came in as an exception on an exception"[32]. Accordingly, there must be real difficulty in construing the Hague Rules by reference to the common law rules of pleading, particularly when it is understood that, as to the substantive law, "pro tanto the Hague Rules upon their enactment displaced the common law"[33].

Reading the Hague Rules as a whole

24 The "perils of the sea" exception cannot be properly understood if it is divorced from its context. It is an immunity created in favour of the carrier and the ship and it is necessary, then, to consider what are the responsibilities of the carrier.

25 Article III is headed "Responsibilities and Liabilities" and Art IV is headed "Rights and Immunities". The responsibilities cast on the carrier by Art III rr 1

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30 [1894] P 226.

31 cf *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 216.

32 *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 217.

33 *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 at 622 per Lord Steyn.

and 2 may be seen as central to an understanding of the Hague Rules and their operation[34]. Those rules provide:

> "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) properly man, equip and supply the ship; and
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> (c) make the holds, refrigerating and cool chambers, 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 IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

26 Unlike r 2 of Art III, r 1 is not expressed as being subject to the provisions of Art IV. However, the text of r 1 of Art IV indicates that the carrier may establish a claim to exemption in respect of loss or damage that has resulted from unseaworthiness, by proving the exercise of due diligence on its part to make the ship seaworthy. Article IV r 1 states:

> "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 secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers 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 section."

The phrase "loss or damage arising or resulting from" appears also in Art IV r 2. The obligation of the carrier to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried, which is imposed by Art III r 2, is subject to the denial by par (c) of Art IV r 2 of responsibility of the carrier for loss

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34 *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 at 602-603.

or damage arising or resulting from perils, dangers and accidents of the sea or other navigable waters.

27 Several things may be noted about the obligation imposed upon the carrier by Art III r 1 to make the ship seaworthy. First, it fixes the time at which the obligation operates as "before and at the beginning of the voyage". It therefore resolves the dispute that had been litigated in relation to time policies and voyage policies of marine insurance about whether a warranty of seaworthiness implied in such a policy was a warranty about the condition of the vessel at the time of sailing, or at the commencement of each of several distinct and different parts of a voyage, or was a warranty extending to the whole of the period of the policy[35]. Secondly, it is not an absolute warranty; the obligation is to exercise due diligence[36]. In cases where loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence is on the carrier (Art IV r 1). Thirdly, however, seaworthiness is to be assessed according to the voyage under consideration; there is no single standard of fitness which a vessel must meet[37]. Thus, seaworthiness is judged having regard to the conditions the vessel will encounter[38]. The vessel may be seaworthy for a coastal voyage in a season of light weather but not for a voyage in the North Atlantic in mid winter.

28 Thus, definitions of seaworthiness found in the cases (albeit cases arising in different contexts) all emphasise that the state of fitness required "must depend on the whole nature of the adventure"[39]. The vessel must be "fit to encounter the ordinary perils of the voyage"[40]; it must be "in a fit state as to repairs, equipment,

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35 *Dixon v Sadler* (1839) 5 M & W 405 [151 ER 172]; affd (1841) 8 M & W 895 [151 ER 1303]; *Gibson v Small* (1853) 4 HLC 353 [10 ER 499].

36 cf *Dixon v Sadler* (1839) 5 M & W 405 at 414 [151 ER 172 at 175] per Parke B; *McFadden v Blue Star Line* [1905] 1 KB 697 at 703 per Channell J.

37 cf *Burges v Wickham* (1863) 3 B & S 669 at 683 [122 ER 251 at 256] per Cockburn CJ, 689-696 [258-261] per Blackburn J (implied warranty of seaworthiness in voyage policy of marine insurance); *Kopitoff v Wilson* (1876) 1 QBD 377 at 380-381 per Field J (implied warranty of seaworthiness in contract of affreightment); *Gibson v Small* (1853) 4 HLC 353 at 373 [10 ER 499 at 507] per Martin B (implied warranty of seaworthiness of owner of a "general ship").

38 *Huddart Parker Ltd v Cotter* (1942) 66 CLR 624 at 663 per Williams J; *McFadden v Blue Star Line* [1905] 1 KB 697; *The Southwark* 191 US 1 at 9 (1903).

39 *Burges v Wickham* (1863) 3 B & S 669 at 695 [122 ER 251 at 260] per Blackburn J.

40 *McFadden v Blue Star Line* [1905] 1 KB 697 at 703 per Channell J.

and crew, and in all other respects, to encounter the ordinary perils of the voyage insured"[41].

29 Further, if the question of seaworthiness is to be judged at the time that the vessel sails, it will be important to consider how it is loaded and stowed[42]. If the vessel is overladen it may be unseaworthy. If it is loaded or stowed badly so, for example, as to make it unduly stiff or tender[43] it may be unseaworthy[44].

30 Nor is the standard of fitness unchanging. The standard can and does rise with improved knowledge of shipbuilding and navigation[45].

31 Fitness for the voyage may also encompass other considerations as, for example, the fitness of the vessel to carry the particular kind of goods or the fitness of crew, equipment and the like. The question of seaworthiness, then, may require consideration of many and varied matters.

32 Some of these matters find direct expression in the Hague Rules. The obligations to "properly man, equip and supply the ship" 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" are found in Art III r 1(b) and (c).

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41 *Dixon v Sadler* (1839) 5 M & W 405 at 414 [151 ER 172 at 175] per Parke B; affd (1841) 8 M & W 895 [151 ER 1303].

42 *Kopitoff v Wilson* (1876) 1 QBD 377 at 379 per Field J.

43 The trial judge found that ([1994] 1 Lloyd's Rep 455 at 463):

> "A tender ship will be much easier to incline and is slow and sluggish in returning to the upright position. Therefore, the time period taken to roll from side to side will be comparatively long ... A stiff ship tends to be comparatively difficult to incline and will roll from side to side very quickly. If a ship is thought to be too tender, this can be corrected by raising the ship's centre of gravity. Conversely, if a ship is thought to be too stiff, this can be corrected by lowering the centre of gravity."

44 *Kopitoff v Wilson* (1876) 1 QBD 377 at 379 per Field J.

45 *Burges v Wickham* (1863) 3 B & S 669 at 693 [122 ER 251 at 260] per Blackburn J; *Tidmarsh v Washington Fire & Marine Insurance Co* 23 Fed Cas 1197 at 1198 (DC Mass 1827) per Story J; Phillips, *A Treatise on the Law of Insurance*, 4th ed (1854) at 399; *Arnould on Insurance*, 2nd ed (1857) § 256 at 712-713.

33 What is important for present purposes is not the detailed content of the obligation to make the ship seaworthy, it is that making the ship seaworthy (or, as the Hague Rules provide, exercising due diligence to do so) requires consideration of the kinds of conditions that the vessel may encounter. If the vessel is fit to meet those conditions, both in the sense that it will arrive safely at its destination and in the sense that it will carry its cargo safely to that destination, it is seaworthy.

34 Further, under the Hague Rules, not only must the carrier exercise due diligence to make the ship seaworthy (Art III r 1) with the burden of proving the exercise of due diligence whenever loss or damage arises or results from unseaworthiness (Art IV r 1), but "[s]ubject to the provisions of Article IV", it "shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" (Art III r 2). Whether the goods are properly and carefully stowed must also depend upon the kinds of conditions which it is anticipated that the vessel will meet. The proper stowage of cargo on a lighter ferrying cargo ashore in a sheltered port will, no doubt, be different from the proper stowage of cargo on a vessel traversing the Great Australian Bight in winter.

35 Thus, the performance of the carrier's responsibilities under Art III rr 1 and 2 will vary according to the voyage and the conditions that may be expected.

36 In the present case, the trial judge found that when the *Bunga Seroja* sailed from Burnie she was fit in all respects for the voyage and that the respondent had properly and carefully loaded, handled, stowed, carried, kept and cared for the subject cargo[46]. It followed from those findings that the respondent, the carrier, had discharged its responsibilities under Art III rr 1 and 2. There was thus no loss or damage to the goods arising or resulting from unseaworthiness of the ship and no question arising under Art IV r 1 as to whether such loss or damage having occurred it had been caused by want of due diligence on the part of the carrier to make the ship seaworthy. Nor if, as Carruthers J found, the carrier had properly and carefully loaded, handled, stowed, carried, kept and cared for the subject cargo (thereby discharging its responsibility under Art III r 2) did any question arise of the immunity from what otherwise would be the responsibility of the carrier, by reason of the loss or damage having arisen or resulted from any act, neglect or default of the master in the navigation or in the management of the ship (Art IV r 2(a)) or from perils of the sea (Art IV r 2(c)). Nevertheless, his Honour went on to make express findings both that the damage to the cargo was occasioned by perils of the sea and that there was no neglect or default in the master or other servants of the respondent in the management of the ship.

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46 [1994] 1 Lloyd's Rep 455 at 471.

37 Notwithstanding the above, as the meaning and application of the "perils of the sea" immunity conferred by par (c) of Art IV r 2 was put in issue on the appeal, it is appropriate to deal further with it.

Uniform construction

38 Because the Hague Rules are intended to apply widely in international trade, it is self-evidently desirable to strive for uniform construction of them. As has been said earlier, the rules seek to allocate risks between cargo and carrier interests and it follows that the allocation of those risks that is made when the rules are construed by national courts should, as far as possible, be uniform. Only then can insurance markets set premiums efficiently and the cost of double insurance be avoided[47].

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47 Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 *Virginia Journal of International Law* 729 at 736.

39 In *Gamlen*, Mason and Wilson JJ note that[48]:

> "[t]here is a difference between the Anglo-Australian conception of 'perils of the sea' and the United States-Canadian conception. According to the latter, 'perils of the sea' include losses to goods on board which are peculiar to the sea and 'are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence': *The Giulia*[49] adopting *Story on Bailments*, s 512(a). In the United Kingdom and Australia it is not necessary that the losses or the cause of the losses should be 'extraordinary' (*Carver, Carriage by Sea*, vol 1, 12th ed (1971), s 161; *Skandia Insurance Co Ltd v Skoljarev*[50]). Consequently sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea."

When reference is made to occurrences identified as "extraordinary", the question arises as to the nature of the relativity which is contemplated. Thus it has been said that the events which occurred "may be considered extraordinary as compared with an even voyage upon a placid sea; and yet [they] may be an entirely ordinary occurrence as compared with transportation by sea generally"[51].

40 It may be that the difference between Anglo-Australian and American-Canadian construction of the "perils of the sea" exception is less than might appear from reference to cases such as *The Giulia*[52] or *The Rosalia*[53] - both decisions of the Second Circuit Court of Appeals. In *The Rosalia* a peril of the sea was described[54] as "something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in

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48 (1980) 147 CLR 142 at 165-166.

49 218 F 744 (2nd Cir 1914).

50 (1979) 142 CLR 375 at 386-387. The Court was construing r 7 of the Rules for Construction of Policy set out in the Second Schedule to the *Marine Insurance Act* 1909 (Cth). Mason J stated (at 384) that this provision is identical with r 7 of the First Schedule to the *Marine Insurance Act* 1906 (UK) which was a codification of the antecedent common law.

51 *Clinchfield Fuel Co v Aetna Insurance Co* 114 SE 543 at 546 (SC 1922).

52 218 F 744 (2nd Cir 1914).

53 264 F 285 (2nd Cir 1920).

54 264 F 285 (2nd Cir 1920) at 288 per Judge Hough.

safety"[55]. More recent authority in the United States has, perhaps, placed less emphasis on whether what happened was extraordinary and catastrophic[56]. But whether or not that is an accurate reflection of more recent developments, there is great force in what Judge Learned Hand said in *Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha*[57]:

> "The phrase, 'perils of the sea', has at times been treated as though its meaning were esoteric: Judge Hough's vivid language in The Rosalia[58] ... has perhaps given currency to the notion. That meant nothing more, however, than that the weather encountered must be too much for a well-found vessel to withstand[59] ... The standard of seaworthiness, like so many other legal standards, must always be uncertain, for the law cannot fix in advance those precautions in hull and gear which will be necessary to meet the manifold dangers of the sea. That Judge Hough meant no more than this in The Rosalia ... is shown by his reference to the definition in The Warren Adams[60] ... as the equivalent of what he said. That definition was as follows: 'That term may be defined as denoting "all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence."' It would be too much to hope that The Rosalia ... will not continue to be cited for more than this, but it would be gratifying if it were not."

41 We agree, with respect, that perils of the sea should not be treated as having some esoteric meaning. Nor can its meaning be identified in a single all embracing definition capable of unvarying application to all circumstances. There is no single criterion which, standing alone, will identify whether what happened is or is not properly to be called a peril of the sea.

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55 See also *The Warren Adams* 74 F 413 (2nd Cir 1896); *Duche v Brocklebank* 40 F 2d 418 (2nd Cir 1930).

56 *J Gerber & Co v SS Sabine Howaldt* 437 F 2d 580 (2nd Cir 1971); *Nichimen Co v MV Farland* 462 F 2d 319 (2nd Cir 1972); *Taisho Marine & Fire Insurance v MV Sea-Land Endurance* 815 F 2d 1270 (9th Cir 1987); *Thyssen Inc v SS Eurounity* 21 F 3d 533 (2nd Cir 1994); *Complaint of Tecomar SA* 765 F Supp 1150 (SDNY 1991).

57 106 F 2d 32 at 34-35 (2nd Cir 1939).

58 264 F 285 at 288 (2nd Cir 1920).

59 *Duche v Brocklebank* 40 F 2d 418 (2nd Cir 1930).

60 74 F 413 at 415 (2nd Cir 1896).

42 It would be an odd reading of the "perils of the sea" exception to read it as exempting the carrier from liability only if the loss or damage were caused by something that was wholly unforeseen or unpredicted. If the ship was fit to encounter the ordinary perils of the voyage, it was fit to encounter sea and weather conditions which could reasonably be foreseen and guarded against. If, despite being fit to encounter those conditions and despite proper stowage and handling of the cargo, the cargo is damaged when the foreseen conditions happen, the question is which interests, carrier or cargo interests, are to bear the loss. Holding the carrier liable would be to transform the obligation to use due diligence to make the ship seaworthy into an obligation very like the obligation of the owner of a general ship, which the whole history of the development of the rules in this area would deny.

43 The conduct of the trial in the present case illustrates the point that whether the "perils of the sea" exception applies will seldom be the only question in issue in a proceeding about loss of or damage to cargo. The very fact that cargo has been damaged does not demonstrate want of seaworthiness. At most it presents a case for inquiry - why has the cargo been damaged? Was it for want of seaworthiness? Was it for want of proper and careful handling and stowage? Was it for reasons beyond the control of the carrier? Evidence that is called at the trial of the proceeding will, inevitably, tend to emphasise particular features of the weather that was encountered and the way that the ship, its master and crew dealt with it. Often there will be great emphasis upon whether the conditions were foreseeable (or as the United States cases say, "expectable"[61]). If they were foreseeable or expectable, the cargo interests will point to the fact that the cargo was damaged and say that it follows that the ship was not fit to encounter those conditions or that the goods were not properly stowed and so on. Often there will be emphasis upon whether the vessel suffered structural damage (as this vessel did)[62]. The suffering of structural damage may be eloquent testimony of the force of conditions encountered[63].

44 It is, then, hardly surprising that the features of evidence led at trial which were emphasised by one side or the other receive similar emphatic treatment in the reasons for judgment. But all of the matters we have just mentioned are matters which show the need for very great care before extracting statements made in reasons for judgment about the operation of the "perils of the sea" exception and, divorced from the context in which they were written, seeking to apply them to

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61 *Complaint of Tecomar SA* 765 F Supp 1150 at 1175 (SDNY 1991).

62 cf *Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha* 106 F 2d 32 (2nd Cir 1939).

63 *Benedict on Admiralty*, 7th ed (rev), vol 2A § 153 at 15-8 - 15-12.

different circumstances. Expressions like "extraordinary", "catastrophic", "not foreseeable" or "not expectable" will often find a place in describing why properly stowed cargo on a ship fit for the ordinary perils of the voyage was damaged. But they are not to be understood as limiting the "perils of the sea" exception to those events which are beyond the ordinary experience of mariners.

45 Again, as the Second Circuit Court of Appeals said of perils of the sea, in a marine insurance case, *New Zealand Insurance Co v Hecht, Levis & Kahn*[64]:

> "We may concede *arguendo* that they cover only 'extraordinary occurrences,'[65] ... but if so, while they do not include those injuries which are the run of all voyages, they certainly do include occasional visitations of the violence of nature, like great storms, even though these are no more than should be expected."

Thus there are statements to be found in the United States authorities that a "perils of the sea" exception may apply even if the weather encountered was no more than expected.

46 Nor should statements made in the many English cases dealing with perils of the sea be read divorced from their context. Some can, we think, be seen as no more than decisions about particular facts[66]. Others examine questions of onus of proof[67] and concurrent causation[68] which do not arise in this case. Particular reference need be made to only two of the English cases - *The "Xantho"*[69] and *Hamilton, Fraser & Co v Pandorf & Co*[70]. Both cases pre-dated the Hague Rules and concerned the construction of an exception in bills of lading in favour of "dangers and accidents of the seas". We mention *The "Xantho"* for the distinction

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64 [1941] AMC 1188 at 1189 per L Hand, Chase and Clarke JJ.

65 *Hazard v New England Marine Insurance Co* 33 US 557 at 585 (1834).

66 For example, *The "Tilia Gorthon"* [1985] 1 Lloyd's Rep 552.

67 *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 216.

68 *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 218-219; *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1929] AC 223 at 241 per Viscount Sumner.

69 *The "Xantho"* (1887) 12 App Cas 503.

70 (1887) 12 App Cas 518.

drawn by Lord Herschell between perils of the sea and other losses of which the sea is the immediate cause. He said[71]:

> "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure."

The distinction drawn by his Lordship is important and must be borne in mind when considering the operation of the "perils of the sea" exception.

47 The second case, *Pandorf*, is worthy of note because it shows that there may be damage resulting from a peril of the sea despite there being no great catastrophic event. It was held, there, that a cargo was damaged by "dangers and accidents of the seas" when, during the voyage, rats gnawed a hole in a pipe thus allowing water into the hold. It is important to note, however, that it was admitted or proved that the ship was seaworthy and that the damage occurred without fault on the part of the crew[72]. Those facts being accepted, what other explanation for the occurrence could be given save that it was a peril of the sea? If the decision appears strange to the modern eye, its oddity lies not in the conclusion reached but in the premises from which that conclusion proceeded: that the ship was seaworthy and that the loss was not caused by default of the crew. But we need not say whether those findings of fact would now be regarded as open.

48 Many other cases were mentioned in argument or can be found in the books. We think it desirable to touch briefly on only three other streams of authority. First, it seems that in German law, a peril of the sea need not be an extraordinary event and that a storm of a certain force is regarded as a peril of the sea[73]. Similarly, in French law a peril of the sea need not be "unforeseeable and

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71 (1887) 12 App Cas 503 at 509.

72 (1887) 12 App Cas 518 at 530 per Lord Herschell.

73 *General Motors Overseas Operation v SS Goettingen* 225 F Supp 902 at 904-905 (SDNY 1964).

insurmountable"[74]. Finally, the Supreme Court of Canada held in *Goodfellow Lumber Sales v Verreault*[75] that:

> "... even if the loss is occasioned by perils of the sea, the ship owner is nevertheless liable if he failed to exercise due diligence to make the ship seaworthy at the beginning of the voyage and that unseaworthiness was a decisive cause of the loss."[76]

49 How then are these disparate streams of authority to be brought together? In our view one must begin by recognising that the inquiry is, in large part, a factual inquiry - is the carrier immune in respect of what otherwise would be its failure to discharge its responsibilities under Art III because the loss or damage to the goods arose or resulted from a cause which brings the carrier within the immunity conferred by Art IV r 2?

50 If cargo has been lost or damaged and if the vessel was seaworthy, properly manned, equipped and supplied, what led to the loss or damage? Did it arise or result from want of proper stowing (Art III r 2)? Did it arise from the "act, neglect or default of the master … or the servants of the carrier in the navigation or in the management of the ship" (Art IV r 2(a))? Or, did it result from some *other* cause peculiar to the sea? The last is a peril of the sea.

51 In *Gamlen* Mason and Wilson JJ said that "sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea"[77]. The fact that the sea and weather conditions that were encountered could reasonably be foreseen, or were actually forecast, may be important in deciding issues like an issue of alleged want of seaworthiness of the vessel, an alleged default of the master in navigation or management, or an alleged want of proper stowage. Similarly, the fact that the conditions encountered could have been guarded against may be very important, if not decisive, in considering those issues. (Their decision may then make it unnecessary to consider the "perils of the sea" exception.) But if it is necessary to consider the "perils of the sea" exception, the fact that the conditions that were encountered could reasonably be expected or were forecast should not be taken to conclude that question. To that extent we agree with what was said by Mason and Wilson JJ in *Gamlen*. Such an approach, even if it is different from the American and Canadian approach, better reflects the

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74 Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 441.

75 [1971] SCR 522 at 528.

76 See also *Canadian National Steamships v Bayliss* [1937] SCR 261.

77 (1980) 147 CLR 142 at 166.

history of the rules, their international origins and is the better construction of the rules as a whole.

The present appeal

52 In the present case the trial judge held that there was no breach of Art III r 1 or r 2. That is, the trial judge rejected the contentions that due diligence had not been exercised to make the ship seaworthy, to properly man, equip and supply the ship 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"[78]. Indeed the trial judge found that in fact the vessel was fit in all respects for the voyage when it left port. Further, the trial judge rejected the contention that the carrier had not properly and carefully stowed the goods. It follows, as we have indicated earlier in these reasons, that the owner having failed to prove any breach of the carrier's responsibilities under Art III, the applicability of the defence of perils of the sea within the meaning of par (c) of Art IV r 2 did not strictly arise. However, in the light of the findings made at the trial, the conclusion that the damage to the cargo was occasioned by perils of the sea was correct. The fact that the weather encountered had been forecast before the vessel left port does not deny that conclusion.

53 It was submitted by the appellant that the master should not have left port or should have diverted so as to avoid the weather which was forecast. The former contention appears not to have been made at trial. The latter was, but was rejected. The trial judge, having heard the evidence of experts called by both parties, said that he was "unable to conclude that any deficiencies in the conduct of the ship and her cargo by [the ship's master] have been demonstrated"[79]. There is no basis for departing from that finding. Once it was made, the trial judge's conclusion that there was no neglect or default of the master or other servants of the carrier in the management of the ship or cargo was inevitable. To the extent that the appellant now seeks to expand its contention to include the proposition that the vessel should not have left port, it is enough to say that, if the judge's finding does not meet the contention, it is a contention that could be made only with evidence to support it and there was none.

54 Contrary to the appellant's contentions, nothing in this case turned on the allocation of the burden of proof. The trial judge made the findings which he did in light of the evidence that was called on the issues. As his Honour said, the case

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78 Art III r 1(c).

79 [1994] 1 Lloyd's Rep 455 at 469.

did not turn "upon any nice questions of onus of proof"[80]. It is, therefore, not necessary to consider those questions.

55 The failure of the submissions by the appellant makes it unnecessary to consider grounds urged in support of the decision of the Court of Appeal by the respondent in its Notice of Contention.

56 The appeal should be dismissed with costs.

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80 [1994] 1 Lloyd's Rep 455 at 471.

McHUGH J.

Issue

57 Special leave was granted in this case to determine whether the carrier of cargo, which was damaged after striking heavy weather in the Great Australian Bight, could rely on the immunity from liability given by Art IV r 2(c) of The Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading[81]. That Article gave immunity for damage "arising or resulting from ... perils, dangers and accidents of the sea". The cargo in question had been shipped from Sydney to Keelung in Taiwan pursuant to bills of lading which incorporated the Hague Rules. Those Rules regulate international contracts for the carriage of goods by sea and determine the responsibilities, liabilities, rights and immunities of the carrier[82]. They are incorporated into bills of lading issued in respect of cargo carried from an Australian port to overseas destinations by the *Sea-Carriage of Goods Act* 1924 (Cth)[83].

Summary of conclusions

58 Upon the facts of the case, I think that the damage to the cargo did result from the perils of the sea. Given other findings of fact by the trial judge, it was unnecessary for the learned judge to decide that issue. Nevertheless, I could not accept the argument of the appellant, the cargo owner, as to the circumstances in which the perils of the sea defence is inapplicable. The owner submits that the perils of the sea defence is applicable only when the perils, dangers or accidents of the sea "could not be reasonably foreseen and guarded against by the carrier". Such a construction does not accord with the text of the Article which provides the immunity, and it is incompatible with the general scheme of the Hague Rules[84]. The foreseeability of a peril which results in damage is not determinative of whether a carrier can rely on the perils of the sea immunity conferred by those Rules. The foreseeability of the peril and the possibility of guarding against its consequences are relevant factors in determining whether the damage results or arises from the perils of the sea. But that is all. In an appropriate case, the foreseeability of the peril and the failure to guard against it may show that the effective cause of the loss was the negligence of the carrier rather than the perils

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81 25 August 1924, 51 Stat 233 TS No 931, 120 LNTS 155.

82 Art II, the Hague Rules.

83 Now repealed and replaced by the *Carriage of Goods by Sea Act* 1991 (Cth) which incorporates the Hague Visby Rules, being the 1924 Hague Rules as amended by the Visby Protocol of 23 February 1968.

84 *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142.

of the sea[85]. But foreseeability of the peril does not by itself prevent the carrier relying on the perils of the sea exemption from liability.

Procedural history

59 The appeal is brought by the owner of cargo against an order of the Court of Appeal of the Supreme Court of New South Wales. That Court dismissed the owner's appeal against an order of the Supreme Court, Admiralty Division, entering a verdict for the carrier in an action brought by the owner for damages. In the Supreme Court, the trial judge, Carruthers J[86], held that the carrier had not breached any of the obligations imposed upon it by the Hague Rules and was immune from liability because the damage to the cargo resulted from the "perils of the sea". The Court of Appeal upheld his Honour's findings on fact and law.

Factual background

60 The owner contracted with the carrier to carry a cargo of aluminium coils of about five tonnes each from Sydney to Keelung. The contract of carriage was evidenced by three bills of lading[87] each of which incorporated the Hague Rules. The cargo was stowed in forward hold 5. On the Burnie to Fremantle section of the journey, the ship encountered a series of violent storms while crossing the Great Australian Bight. During the storms, eight above deck containers were swept overboard and the cargo of the owner, which was stowed below deck in containers, was damaged.

61 The Master of the ship gave evidence that, at the height of the storm, "we had about ten metres of a swell coming onto us and then we pitched into the sea ... So that was one of the serious points and at one juncture I think we have recorded we rolled 25 degrees and at that juncture the edge of the ship actually was parallel to the sea. The deck edge was immersed by water". The Master said that: "the weather and the wind was tremendous. It was not good and safe to send any men, any of the seamen out, anybody out there because we would extremely endanger their life and chance of accident or of being swept overboard". The wind was described as being force 11 on the Beaufort Scale of Windforces. Force 11 indicates a "violent storm". Force 12 is a hurricane.

62 The Master knew that the Great Australian Bight is renowned for severe weather. For that reason, he said that, before leaving Sydney on 5 October 1989 he had planned for the worst possible weather conditions. Before leaving on the

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85 *Gamlen* (1980) 147 CLR 142.

86 *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455.

87 Dated 5 October 1989.

Melbourne to Burnie section of the journey on 8 October 1989, he had received a weather bulletin containing a gale warning for the oceans south of the Australian continent. The ship departed Burnie bound for Fremantle on 9 October 1989. Further weather reports were received by the Master on 12 and 13 October 1989 during the journey from Burnie to Fremantle. Those reports warned of gales, rough to very rough seas and a moderate to heavy swell.

63 The damage to the cargo appears to have occurred at the peak of the storms on 14 October 1989. The ship also suffered some structural damage during the storms. The immediate cause of the damage to the cargo was the pounding which the carrier's vessel suffered as the result of the very heavy weather which it encountered. For that reason and because there was no negligence or breach of the Hague Rules on the part of the carrier, Carruthers J and the Court of Appeal held that the damage arose from or resulted from the perils of the sea.

64 The owner contends that the perils of the sea defence is applicable only when the perils, dangers or accidents of the sea "could not be reasonably foreseen and guarded against by the carrier". The heavy weather in this case was both reasonably foreseeable and actually foreseen by the carrier. That being so, the owner contends that the carrier cannot rely on the perils of the sea defence and is not exempt from liability for the damage which the cargo suffered.

The proceedings at first instance

65 In its action in the Supreme Court[88] the owner pleaded that the damage was caused by the carrier's breach of its obligations under Art III rr 1 and 2 of the Hague Rules which require the carrier to exercise due diligence to make the ship seaworthy and properly man, equip and supply the ship and, "[s]ubject to the provisions of Article IV", to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. In its defence, the carrier relied upon Art IV r 2 which provides that a carrier is not responsible for damage "arising or resulting from: (a) act, neglect or default of the master ... or the servants of the carrier in the navigation or in the management of the ship, ... (c) perils, dangers and accidents of the sea, ... (n) insufficiency of packing".

66 Carruthers J held that the correct approach in determining the perils of the sea issue was to consider whether any negligence by the carrier had been demonstrated. He held that the two issues of negligence and perils of the sea had to be considered together[89].

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88 *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455.

89 *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455 at 462.

67 His Honour rejected the argument of the owner that the test for determining whether a storm constitutes a peril of the sea is whether the storm was expectable[90]. In rejecting this argument, his Honour relied upon this Court's approach in *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd*[91] and in particular on the passage in the joint judgment of Mason and Wilson JJ[92] which concludes:

> "Consequently sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea."

68 Carruthers J said that[93]:

> "[T]he evidence satisfies me that, bearing in mind the anticipated weather conditions: (i) when the [ship] sailed from Burnie she was fit in all respects for the voyage; (ii) the defendant properly and carefully loaded, handled, stowed, carried, kept and cared for the subject cargo; and (iii) there was no neglect or default of the master or other servants of the defendant in the management of the ship or cargo.
>
> I am satisfied that the damage to the subject cargo was occasioned by perils of the sea, in that, the pounding of the ship by reason of the heavy weather caused the coils within the container to be dislodged and thereby sustain damage."

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90 *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455 at 462.

91 (1980) 147 CLR 142.

92 (1980) 147 CLR 142 at 166.

93 *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455 at 471.

The Court of Appeal

69 The Court of Appeal[94] affirmed the findings of the primary judge and held that he had correctly adopted and applied the reasoning of this Court in *Gamlen*[95].

Treaty interpretation

70 The Schedule to the *Sea-Carriage of Goods Act* enacts the Hague Rules as domestic law. Prima facie, the Parliament intended that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty[96]. The guiding principles of treaty interpretation are found in the Vienna Convention on the Law of Treaties[97]. Article 31 provides that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of its object and purpose. Under Art 32, interpretative assistance may be gained from extrinsic sources in order to confirm the meaning resulting from the application of Art 31 or to determine the meaning of the treaty when the interpretation according to Art 31 leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". Those extrinsic sources include the *travaux préparatoires* and the circumstances of the conclusion and history of the negotiation of the treaty. Primacy must be given, however, to the natural meaning of the words in their context, as I recently pointed out in *Applicant A v Minister for Immigration and Ethnic Affairs*[98].

71 International treaties should be interpreted uniformly by the contracting States, especially in the case of treaties such as the Hague Rules whose aim is to harmonise and unify the law in cases where differing rules previously applied in the contracting States. So far, however, uniformity of interpretation has not been a feature of the Hague Rules. In particular, courts in the United States and Canada on one hand and in France, Germany, England and Australia on the other have diverged in their approach to what causes of damage can be described as perils of

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94 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1996) 39 NSWLR 683.

95 (1980) 147 CLR 142.

96 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265 per Brennan J.

97 The principles of interpretation of Treaties as contained in the Vienna Convention on the Law of Treaties may properly be considered even though the Vienna Convention entered into force after the Hague Rules because the Vienna Convention is a codification of the customary law rules of the interpretation of treaties: *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 356.

98 (1997) 71 ALJR 381; 142 ALR 331; see also *Koowarta* (1982) 153 CLR 168; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 93.

the sea for the purpose of the Hague Rules. It may be, as Mason and Wilson JJ suggested in *Gamlen*, that the result of the United States and Canadian approach is not much different from that adopted in England and Australia. Nevertheless, the approach in principle in the United States and Canada is different from that which exists in this country.

72 If uniformity of interpretation could be achieved by abandoning the approach taken by this Court in *Gamlen*, I would be in favour of overruling *Gamlen*. But to overrule that decision would not yield uniformity - the approach of courts in England, Germany and France would remain different. Moreover, the approach laid down in *Gamlen* for Australian courts is, in my opinion, in accordance with the text of the Hague Convention and probably accords with the intention of those who drafted the Convention.

History of the Rules

73 The historic development of the Hague Rules and the *travaux préparatoires*[99] is described in some detail in the reasons for judgment of other members of the Court. The aim of the Rules was to harmonise the diverse laws of trading nations and to strike a new arrangement for the allocation of risk between cargo and carrier interests. However, the Hague Rules were a compromise rather than a codification of any accepted and uniform practice of shippers. Consequently, one needs to be cautious about using the pre-existing law of any country in interpreting the Rules. But that said, the fact is that the "immediate impetus for the Hague Rules came from the British Empire"[100]. Furthermore, British lawyers and representatives of British carrier and cargo interests dominated the Committees responsible for the drafting of the Rules which eventually became the Hague Rules[101]. That being so, it seems likely that the English common law rules provided the conceptual framework for the Hague Rules - certainly the key terms of Arts III and IV are the subject of much common law doctrine. The Rules should be interpreted with that framework in mind. That conclusion is strengthened by the fact that there appears to have been very little discussion at the Convention of Arts III r 2 and IV r 2(c).

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99 Collected in Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990) vols 1-3.

100 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990) vol 1 at 8.

101 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990) vol 1 at 8-14.

In particular, there was no discussion indicating that the perils of the sea defence was intended to be restricted in the manner for which the owner contends[102].

The common law concept of perils of the sea

74 At common law, a shipowner who operated a "general ship"[103] was a common carrier, strictly liable for any loss or damage occurring during the voyage. The only defences available were act of God, the inherent vice of the goods, act of public enemies, shipper's fault and perhaps necessity to jettison cargo to save the ship. Moreover, even when a ship owner did not hold itself out as a common carrier, contracts for the carriage of goods by sea were subject to warranties which practically equated the shipowner with common carriers. Thus, there was an implied warranty that the ship was seaworthy[104]. The warranty commenced with the voyage, and the ship had to be fit to carry its cargo safely and ride out any weather likely to be encountered on the voyage[105]. When it sailed, the vessel had to be in such condition and its cargo so stowed that it was reasonably fit to encounter the ordinary perils that might be expected at that time of the year[106].

75 The shipowner was therefore liable for failure to deliver goods in the state in which they were received unless it could bring itself within one of a number of narrowly defined exceptions. But even these defences were not available if the shipowner

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102 The perils of the sea defence was dealt with in two lines during the proceedings at the Hague. See Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990) vol 1 at 259.

103 A general ship was one where the ship was available to carry the goods of anyone wishing to ship them on the voyage in question. *Laveroni v Drury* (1852) 8 Ex 166 at 170 [155 ER 1304 at 1306].

104 *Lyon v Mells* (1804) 5 East 428 [102 ER 1134]; *Kopitoff v Wilson* (1876) 1 QBD 377; *Steel v State Line Steamship Company* (1877) 3 App Cas 72.

105 *Cohn v Davidson* (1877) 2 QBD 455.

106 *Steel* (1877) 3 App Cas 72 at 91; see also *Stanton v Richardson* (1875) 33 LT 193; 45 LJCP 78 where ship pumps were unable to remove molasses which might be expected to drain from a cargo of wet sugar with the result that the sugar was damaged; *Kopitoff* (1876) 1 QBD 377 where armour plates being carried became loose in heavy weather and went through the side of the ship.

had contributed to the loss by negligence[107], by deviation[108] or by providing an unseaworthy ship[109].

76 To overcome their potential liability, carriers naturally sought to exempt themselves by exculpatory clauses in the bill of lading. A clause exempting the carrier from loss or damage resulting from the perils of the sea became common, as did many of the immunities later set out in Art IV r 2 of the Hague Rules[110]. From early in the history of the common law of insurance, marine policies had also specifically exempted the carrier from liability for losses arising from perils of the sea, the standard "perils" clause for Lloyd policies having been settled as long ago as 1779[111]. The law reports of the United Kingdom and the United States during the nineteenth century contain numerous cases concerned with bills of lading and marine policies raising the issue whether loss or damage to goods resulted from the perils of the sea. Consequently, those who drafted the Hague Rules had available to them a vast body of case law indicating the circumstances in which the perils of the sea immunity could exempt the carrier from liability. Consciously or unconsciously, the effect of the common law rules must have shaped the Convention's thinking as to when and in what circumstances immunities such as the perils of the sea would exempt the carrier from liability.

77 For a loss to fall within the exception, the peril had to be "of the sea" and not merely on the seas[112]. A peril of the sea was something which was fortuitous, accidental or unexpected and not something that was usual such as the damage

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107 *The "Freedom"* (1871) LR 3 PC 594; 8 Moore NS 29 [17 ER 224]; *Notara v Henderson* (1872) LR 7 QB 225.

108 *Davis v Garrett* (1830) 6 Bing 716 [130 ER 1456]; *Internationale Guano en Superphosphaatwerken v Robert Macandrew & Co* [1909] 2 KB 360.

109 *Lyon* (1804) 5 East 428 [102 ER 1134]; *Steel* (1877) 3 App Cas 72.

110 This defence sprang up gradually after the reign of Elizabeth I. It was certainly known by the reign of Charles I (see *Pandorf v Hamilton* (1886) 17 QBD 670 at 684).

111 Parks, *The Law of Marine Insurance and Average*, (1987) vol 1 at 272.

112 *Cullen v Butler* (1816) 5 M & S 461 [105 ER 1119]; *The "Xantho"* (1887) 12 App Cas 503; *Hamilton Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 527; *P Samuel & Co v Dumas* (1922) 13 Lloyd's Rep 503 at 505.

caused in the ordinary course of navigation by the natural action of the sea, wind or waves[113]. As Lord Justice Scrutton pointed out in *P Samuel & Co v Dumas*[114]:

> "[T]here must be a peril, an unforeseen and inevitable accident, not a contemplated and inevitable result; and it must be of the seas, not merely on the seas. The ordinary action of the winds and waves is of the seas, but not a peril."

78 In *Canada Rice Mills Ltd v Union Marine and General Insurance Co*[115], Lord Wright gave some examples. His Lordship said:

> "Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is prima facie a loss by perils of the sea. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the sea water which is the peril of the sea in such cases."

79 In England, the term "perils of the sea" had the same meaning in bills of lading as it had in policies of marine insurance[116]. That seems to have been the position in the United States although in that country the burden of proof is different in insurance cases from that in contracts of carriage[117]. Furthermore in marine policies, if the peril of the sea was the immediate or proximate cause of the loss, the insurer would be liable even though the entry of seawater or other harm

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113 *The "Xantho"* (1887) 12 App Cas 503 at 509.

114 (1922) 13 Lloyd's Rep 503 at 505.

115 [1941] AC 55 at 68-69.

116 *The "Freedom"* (1871) LR 3 PC 594 at 601-602; 8 Moore NS 29 at 39 [17 ER 224 at 227]; *Hamilton Fraser* (1887) 12 App Cas 518 at 524-528; *The "Xantho"* (1887) 12 App Cas 503 at 510, 517; *Canada Rice Mills* [1941] AC 55 at 67-68.

117 Parks, *The Law of Marine Insurance and Average*, (1987) vol 1 at 274. But see *Arbib & Houlberg v Second Russian Insurance Co* 294 F 811 at 816 (2nd Cir 1923).

causing act was the result of negligence unless the policy provided otherwise[118]. In an action on a bill of lading, the perils of the sea immunity also exempted the carrier from liability even though its negligence had contributed to the loss if the bill exempted the carrier from its own or servants' negligence. In *The "Freedom"*[119], the Judicial Committee of the Privy Council said:

> "The words in the Bills of lading - 'dangers of the Seas'- must, of course, be taken in the sense in which they are used in a Policy of Insurance. It is a settled rule of the Law of Insurance, not to go into distinct causes, but to look exclusively to the immediate and proximate cause of the loss."

Thus, damage to cargo by the entry of seawater arising as the result of the negligence of the shipowner or its servants was held to be damage from a peril of the sea where the bill of lading excused the negligent acts of the servants[120].

80 At common law, the real question was whether the peril of the sea or the action of the shipowner or those for whose acts the shipowner was responsible was the proximate cause of the loss or damage[121].

81 Furthermore, at common law, damage arising from perils of the sea was not confined to damage caused by the entry of seawater into the ship. Thus, damage resulting from a collision occurring at sea without fault on the part of the master could be caused by the perils of the sea[122]. However, loss or damage caused by a collision which is the result of negligence of the master was not caused by a peril

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118 *Davidson v Burnand* (1868) LR 4 CP 117; *The "Xantho"* (1887) 12 App Cas 503; *Trinder Anderson & Co v Thames and Mersey Marine Insurance Company* [1898] 2 QB 114; *Mountain v Whittle* [1921] 1 AC 615.

119 (1871) LR 3 PC 594 at 601-602; 8 Moore NS 29 at 39 [17 ER 224 at 227].

120 *Blackburn v Liverpool, Brazil and River Plate Steam Navigation Company* [1902] 1 KB 290 where the ship's engineer negligently allowed seawater to enter a tank and damage sugar.

121 *The "Freedom"* (1871) LR 3 PC 594 at 601-602; 8 Moore NS 29 at 38-39 [17 ER 224 at 227]; and see the direction to the jury given by Blackburn J in *Kopitoff* (1876) 1 QBD 377 at 379-380.

122 *Buller v Fisher* (1799) 3 Esp 67 [170 ER 540]; *Martin v Crokatt* (1811) 14 East 465 [104 ER 679]; *The "Xantho"* (1887) 12 App Cas 503; *Reischer v Borwick* [1894] 2 QB 548; *William France, Fenwick & Co Limited v North of England Protecting and Indemnity Association* [1917] 2 KB 522 (collision with wreck which had been torpedoed shortly before the collision).

of the sea[123]. Other causes of loss or damage to goods or to the ship which have been held to be caused by perils of the sea include piracy[124], rats gnawing a hole in a pipe causing seawater to escape and damage cargo[125], overheating causing damage to cargo as the result of lack of ventilation brought about by the necessity to close the ventilators for seven days during a storm of exceptional severity and duration[126], grounding in a harbour by reason of a heavy swell[127], taking in seawater while being towed as the result of strong swells[128], listing of a ship while being loaded causing loss of portion of cargo[129], the unexplained sinking in smooth water of a ship shortly after leaving port[130] and running aground[131].

82 Causes of loss or damage which were held not to be caused by perils of the sea included imperfect insulation causing seawater to disable a transatlantic telegraph cable[132] and the grounding of a vessel when the tide ebbed[133].

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123 cf *Lloyd v General Iron Screw Collier Co* (1864) 3 H & C 284 [159 ER 539].

124 *Pickering v Barkley* (1648) Style 132 [82 ER 587].

125 *Hamilton Fraser* (1887) 12 App Cas 518.

126 *The Thrunscoe* [1897] P 301.

127 *Fletcher v Inglis* (1819) 2 B & Ald 315 [106 ER 382].

128 *Hagedorn v Whitmore* (1816) 1 Stark 157 [171 ER 432].

129 *The Stranna* [1938] P 69.

130 *Reynolds v North Queensland Insurance Co* (1896) 17 LR(NSW) 121; *W Langley & Sons Ltd v Australian Provincial Assurance Association Ltd* (1924) 24 SR(NSW) 280; *Skandia Insurance Co Ltd v Skoljarev* (1979) 142 CLR 375.

131 *The "Zinovia"* [1984] 2 Lloyd's Rep 264; cf *The Board of Management of the Agricultural Bank of Tasmania v Brown* (1957) 97 CLR 503.

132 *Paterson v Harris* (1861) 1 B & S 336 [121 ER 740].

133 *Magnus v Buttemer* (1852) 11 CB 876 [138 ER 720]. But see *Fletcher* (1819) 2 B & Ald 315 [106 ER 382] where the vessel grounded in a harbour whose bed was uneven and the ebbing of the tide was accompanied by a heavy swell.

The scheme of the Hague Rules

83 The Hague Rules set out the responsibilities and liabilities, rights and immunities of the carriers in relation to the loading, handling, stowage, carriage, custody, care and discharge of goods[134]. They apply to every contract of carriage of goods by sea[135]. Article III describes the responsibilities and liabilities of the carrier and the cargo interests while Art IV establishes the relevant exceptions and immunities to these responsibilities and liabilities. The "perils, dangers and accidents of the sea" exception in Art IV r 2(c) must be construed therefore within the overall scheme of the Hague Rules. To the scheme of those Rules, I now turn.

84 The relevant Articles of the Hague Rules are as follows:

"ARTICLE III

Responsibilities and Liabilities

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) properly man, equip and supply the ship; and

(b) make the holds, refrigerating and cool chambers, 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 IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

...

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134 Art II.

135 Art II.

ARTICLE IV

Rights and Immunities

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 secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers 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 section.

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

(a) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(b) fire, unless caused by the actual fault or privity of the carrier;

(c) perils, dangers and accidents of the sea or other navigable waters;

(d) act of God;

(e) act of war;

(f) act of public enemies;

(g) arrest or restraint of princes, rulers or people, or seizure under legal process;

(h) quarantine restrictions;

(i) act or omission of the shipper or owner of the goods, his agent or representative;

(j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;

(k) riots and civil commotions;

(l) saving or attempting to save life or property at sea;

(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;

(n) insufficiency of packing;

(o) insufficiency or inadequacy of marks;

(p) latent defects not discoverable by due diligence;

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Seaworthiness

85 Article III imposes a positive obligation on the carrier to exercise due diligence to make the ship seaworthy. This obligation is an overriding obligation which is not subject to the exceptions to liability listed in Art IV r 2[136]. This interpretation is consistent with the omission to make Art III r 1 subject to Art IV r 2, in contrast with Art III r 2, which deals with the proper care of goods carried and is specifically expressed to be "[s]ubject to the provisions of Article IV". It also seems consistent with the understanding of the parties at the time of agreement of the convention as recorded in the *travaux préparatoires*[137].

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136 *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538 at 548; *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 at 602-603. Note that Art III r 2 is subject to Art IV r 1, but this clause merely restates the obligation in the negative form.

137 See the discussion by Mr Rudolf and Lord Phillimore during proceedings at the Palace of Peace, the Hague, 30 August 1921, Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990) vol 1 at 250-251:

> "Mr Rudolf: [discussing Art III r 1 and Art IV r 2] I can conceive a case of a vessel going to sea in an unseaworthy condition, and the operation of the sea on that vessel leads to a loss, and apparently under that section 2 that is a loss which the shipowner is exempt from.
>
> Lord Phillimore: No; the law is well settled the other way .... These are old and well settled exceptions.

(Footnote continues on next page)

86 In Art III r 1, the term "seaworthiness" should be given its common law meaning. Nothing in the Rules generally or in the *travaux préparatoires* suggests otherwise. It was a term well known at common law and, for the reasons I have given, it is probable that that was the meaning that the drafters of the Rules intended it to have. What constitutes "seaworthiness" depends on the voyage to be undertaken[138]. The ship must be seaworthy to undertake the voyage planned and to face any expected weather or storms[139]. If, as was the case here, the ship is expected to sail through an area of sea which is renowned for its severe weather, appropriate precautions must be taken to ensure that the ship is fit to undertake that voyage both in respect of the ship itself and the stowage of the cargo. The carrier must exercise due diligence at the start of the voyage to make the ship seaworthy in the light of the anticipated weather conditions[140].

87 If the goods are carried on a ship that is unseaworthy and as a result are lost or damaged, the loss may and ordinarily will also be caused by the perils of the sea. But since the carrier is under an obligation to carry the goods on a ship that is seaworthy and otherwise complies with Art III r 1, the loss or damage, although directly caused by a peril of the sea, is caused by the anterior breach of Art III r 1. If unseaworthiness is relied on, the cargo owner must prove that the loss or damage resulted from that unseaworthiness. Once that is proved, the burden is on the carrier to prove that it exercised due diligence to make the ship seaworthy[141]. On the other hand, if the cargo owner alleges a breach of Art III r 1(b) or (c), it must prove both a lack of due diligence in respect of that matter and that the loss or damage resulted from that breach.

88 Article III r 1 therefore effectively imposes an obligation on the carrier to carry the goods in a ship which is adequate in terms of its structure, manning, equipment and facilities having regard to the voyage and the nature of the cargo. If the carrier breaches that obligation and, as a result, the goods of the owner are lost, it is not to the point that a concurrent cause of the loss was a peril of the sea or one of the other matters enumerated in pars (a)-(q) of Art IV r 2. Of course, it is possible that one of the matters referred to in those paragraphs may be the sole

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> Mr Rudolf: I know they are settled, but I was wondering whether the effect of making those two paragraphs is going to alter what is the recognised law. That is what I have in mind.
>
> Lord Phillimore: No."

138 *Huddart Parker Ltd v Cotter* (1942) 66 CLR 624 at 663.

139 *McFadden v Blue Star Line* [1905] 1 KB 697 at 703.

140 *Kopitoff* (1876) 1 QBD 377 at 379.

141 Art IV r 2.

cause of the loss or damage even though the ship is unseaworthy. In that event, the cargo owner's claim will fail – not because the carrier comes within the immunities identified in Art IV r 2 but because the owner has failed to prove that the loss or damage has resulted from unseaworthiness.

89 In this case the primary judge, after hearing the details of the packing and preparation of the ship and the opinions of expert witnesses, concluded that the ship was "fit in all respects for the voyage". That being so, no question of the perils of the sea defence arose. The owner failed to prove that the ship was unseaworthy. The owner therefore failed to prove a breach of Art III r 1. If it had proved a breach of the obligation to make the ship seaworthy, Art IV r 2 would have provided no defence or immunity.

Properly care for goods

90 Article III r 2, however, imposes an additional obligation on the carrier in relation to the goods carried. The obligation is to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried". The responsibility under Art III r 2 is expressly made subject to the exemptions in Art IV. But that does not mean that the duty of care imposed by Art III r 2 is some way qualified by Art IV r 2.

91 Notwithstanding the opening words of Art III r 2, the terms of Art IV r 2 do not in my opinion affect the content of the obligations imposed by Art III r 2. The carrier remains under an obligation to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried". But the carrier is not liable if the "loss or damage" to the goods arises or results from one of the matters identified in pars (a)-(q) of Art IV r 2. Where the owner alleges a breach of Art III r 2 and the carrier relies on one of the identified matters in pars (a)-(q) as a defence, the liability of the carrier will turn on whether the loss or damage arose or resulted from the breach or from the identified matters.

92 In that respect, Art III r 2 and Art IV r 2 effectively track the common law doctrine applicable to bills of lading. The common law position was stated by Willes J in *Grill v General Iron Screw Collier Co*[142]:

> "In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the

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142 (1866) LR 1 CP 600 at 612. This passage was cited with approval by Lord Herschell in *The "Xantho"* (1887) 12 App Cas 503 at 510-511.

> sea is caused by the previous default of the shipowner he is liable for this breach of his covenant."

93 In *The "Xantho"*[143] Lord Herschell said:

> "Now, I quite agree that in the case of a marine policy the causa proxima alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils."

94 Thus, the relationship between Art III r 2 and Art IV r 2 is similar to that at common law where there was a finding of negligence but the bill of lading contained exceptions such as perils of the sea.

95 The words "arising or resulting from" which appear at the very beginning of Art IV r 2 indicate that the loss or damage must be caused by one or more of the matters enumerated in pars (a)-(q) before the carrier can escape liability. If it results or arises from any other cause such as the negligence of the carrier, the carrier is liable. The presence of r 2(a) which creates a limited but separate exemption for the carrier for damage resulting from the negligence of its master or servants in relation to the navigation or management of the ship is a further textual indication of this interpretation. The presence of this express immunity suggests that the parties to the Convention had turned their minds to negligence as a cause of loss and deliberately limited the carrier's immunity for loss caused by negligence to situations involving the negligence of the master or servants of the carrier in relation to the management and navigation of the ship. If negligence is established and has caused the loss or damage to the goods, the carrier is liable unless the negligence comes within the specific exception of par (a).

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143 (1887) 12 App Cas 503 at 510.

Gamlen

96 The foregoing analysis of Arts III and IV is in accord with the reasoning of Mason and Wilson JJ in *Gamlen*[144] where this Court considered the interaction between the obligations in Art III r 2 and the exceptions in Art IV r 2. Their Honours held that, on the correct construction of these clauses, the carrier is able to claim an exemption listed in Art IV r 2 only where the effective cause of the damage or loss to the cargo is the exemption claimed. The carrier cannot rely on Art IV r 2 where the effective cause of the loss is the negligence of the carrier. Their Honours' reasoning in *Gamlen* is in my respectful opinion correct. Mason and Wilson JJ, with whom Gibbs and Aickin JJ agreed, undertook a detailed textual analysis of the relevant clauses. They said that[145]:

> "There is a ... persuasive answer ready to hand to explain why Art IV, r 2 does not expressly preserve liability for negligence in all cases. It is that pars (c) to (o) inclusive, with the exception of (l), are all matters which in themselves are beyond the control of the carrier or his servants. Any reference in that context to negligence is inappropriate, because they are events which of their nature occur independently of negligence on the part of the carrier. For example, one would not expect to see the rule relieve the carrier from responsibility for damage resulting from 'act of God, unless caused by the fault or neglect of the carrier, his agents or servants'. The remaining paragraphs of r 2 carry their own explanation. Paragraph (a) has its origin in s 3 of the *Harter Act,* and has attracted a particular history (cf *Gosse Millerd*[146]). Paragraph (b) relates to fire, and reflects its own particular statutory history (see the *Merchant Shipping Act*, 1894 (UK), s 502). Paragraph (l) deals with deviation to save life and property, and receives fuller treatment in Art IV, r 4. Paragraph (q) is of the greatest assistance in the task of construction, because in our opinion it expresses the fundamental scheme of the Rules. That scheme is to impose certain responsibilities and liabilities on the carrier of goods by sea, from which he cannot contract out (cf Art III, r 8)".

Perils of the sea

97 Since the owner failed to prove any breach of Art III r 2, the applicability of the defence of the perils of the sea does not arise. Even if the bill of lading had not incorporated the immunities identified in Art IV r 2, the owner's claim would fail.

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144 (1980) 147 CLR 142.

145 (1980) 147 CLR 142 at 164-165.

146 [1929] AC 223 at 230, 236

It would fail because it has not proved any breach of the obligations of the carrier set out in Art III r 2.

98 No doubt the failure to deliver the coils of aluminium in the condition in which they were received is evidence of a breach of the obligations imposed by Art III. But I do not think that a contract of carriage under the Hague Rules contains any implied obligation for the carrier to deliver the goods in the state in which it received them. Article II[147] should be taken as declaring the rights and immunities and responsibilities and liabilities of the parties, subject to the right of the carrier under Art V to surrender the whole or part of its rights and immunities or to increase its responsibilities and liabilities by the terms of the bill of lading. As Professor Sturley points out[148] "the new rules were designed to create a self-contained code (at least in the areas it covered) that would not require reference to domestic law." The delivery of the goods in a damaged state is evidence of a breach of Art III and imposes an evidentiary burden on the carrier to show that no breach of Art III has occurred. But unlike the common law, failure to deliver the goods in the state received does not cast a legal onus on the carrier to prove that the state of, or non-delivery of the goods, was not due to the carrier's fault.

99 Once Carruthers J found that there was no breach of the carrier's obligations in this case, the immunities conferred by Art IV r 2 became irrelevant. However, the meaning of "perils of the sea" is important, and I should deal with it.

100 The owner contends that, on its proper construction, "perils, dangers and accidents of the sea" means perils at sea which were not reasonably foreseeable and could not be reasonably guarded against by the carrier. This construction seeks to strain the language of the exception by grafting onto it a limiting phrase.

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

148 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990) vol 1 at 9.

The owner relied on United States[149] and Canadian[150] authority in support of this interpretation. In a leading United States case - *The "Giulia"* - the Second Circuit Court of Appeals said that the perils of the sea must be "of an extraordinary nature or arise from irresistible force or overwhelming power, and [such as] cannot be guarded against by the ordinary exertions of human skill and prudence"[151]. This is contrary to the law, as it has long been understood, in Australia. In *Vacuum Oil Co Pty Ltd v Commonwealth and Dominion Line Ltd*[152], McArthur J said that he could find nothing in the cases to justify the statement:

> "that that which might have been foreseen and guarded against cannot be a peril of the sea. On the contrary, they make it quite clear, in my opinion, that it is not an essential element of a peril of the sea that it cannot be foreseen or guarded against."

101 Under the Anglo-Australian approach, the critical question is not whether the peril can be foreseen or guarded against but whether the harm causing event was of the sea and fortuitous, accidental or unexpected. If it was, a further question arises as to whether that event was the effective cause of the loss. This approach restricts the immunity of the carrier for the loss or damage by reference to the carrier's negligence rather than by reference to the foreseeability or severity of the peril[153].

102 The reasoning of the majority of this Court in *Gamlen* correctly indicates that the foreseeability of the peril does not preclude the carrier from relying on the perils of the sea immunity. Mason and Wilson JJ said that "sea and weather conditions which may reasonably be foreseen and guarded against may constitute

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149 *The "Giulia"* 218 F 744 at 746 (2nd Cir 1914); *The Demosthenes* 189 F 2d 488 (1951); *States Steamship Co v United States* 259 F 2d 458 (1958); *Gerber & Co v SS Sabine Howaldt* 437 F 2d 580 (1971); *Thyssen Inc v SS Eurounity* 21 F 3d 533 (2nd Cir 1994).

150 *Canadian National Steamships v Bayliss* [1936] SCR 261 at 263; *Goodfellow Lumber Sales Ltd v Verreault* [1971] SCR 522 at 528; *Kruger Inc v Baltic Shipping Co* [1988] 1 FC 262 at 278 per Pinard J; *Francosteel Corp v Fednav Ltd* (1990) 37 FTR 184 at 191; *Canastrand Industries Ltd v The "Lara S"* [1993] 2 FC 553 at 575.

151 *The "Giulia"* 218 F 744 at 746 (2nd Cir 1914).

152 [1922] VLR 693 at 698.

153 *The "Xantho"* (1887) 12 App Cas 503 at 510; *Hamilton Fraser* (1887) 12 App Cas 518 at 525; *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* [1929] AC 223 at 230; *Silver v Ocean Steamship Co* [1930] 1 KB 416 at 435; *Paterson Steamships* [1934] AC 538 at 548.

a peril of the sea"[154]. This statement accords with the view of McArthur J in *Vacuum Oil*. The owner criticised this statement of Mason and Wilson JJ and contended that it is inconsistent with the construction placed on the phrase "perils of the sea" by some United States and Canadian courts. So it is. But the criticism is misplaced. Many perils of the sea may be reasonably foreseen. The sinking of a ship after hitting an iceberg while crossing the North Atlantic in mid winter is a clear example. And hitting an iceberg does not cease to be a peril of the sea because it could have been avoided by lessening speed or keeping a proper lookout. Subject to the effect of Art IV r 2(a) in a case governed by the Hague Rules, the failure to lessen speed or to keep a proper lookout may prevent the carrier from relying on the defence of "perils of the sea". But that is because the negligence of the skipper and not the peril of the sea is the effective cause of the loss or damage. The *Titanic* was sunk by one of the perils of the sea even though the presence of icebergs in the relevant latitude was reasonably foreseeable and the collision could have been avoided by reducing the speed of the ship.

103 In this case, knowledge of the weather in the Great Australian Bight was a critical factor in determining whether the carrier was negligent. However, the primary judge, Carruthers J, held that the carrier was not negligent in the precautions which it took to meet the expected weather conditions and that the cause of the loss or damage was a peril of the sea. As I have pointed out, once his Honour found that no breach of Art III had occurred, it was not necessary for him to determine whether the carrier could rely on the perils of the sea immunity. Nevertheless, once his Honour made that finding, the only identifiable cause of the damage was the extreme pounding of the waves as the result of the heavy weather encountered in the Great Australian Bight. The damage to the owner's goods, therefore, resulted from a peril of the sea.

104 The appeal should be dismissed.

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154 (1980) 147 CLR 142 at 166.

105 KIRBY J. This appeal comes from the New South Wales Court of Appeal[155]. As presented, its principal concern was the meaning to be given to the phrase "perils, dangers and accidents of the sea" ("perils of the sea") appearing in Art IV r 2(c) of the Hague Rules[156]. Those Rules govern international contracts for the carriage of goods by sea. The idea of "perils of the sea" lies deep in the English language and literature. In the law, it long enjoyed an established provenance in cases concerned with bills of lading and marine insurance[157]. But in this case, literature and law must give way to the meaning of the phrase as it is derived from its context in the Hague Rules. The Australian Parliament has made these Rules part of the domestic law of this country[158]. Only a close consideration of the Rules, read as a whole[159], will yield the true meaning and operation of the phrase and answer the questions raised by this appeal.

Damage to cargo carried by sea

106 On 5 October 1989, Malaysian International Shipping Corporation Berhad ("MIS") (the respondent) issued a bill of lading naming as "the notify party" Great China Metal Industries Co Ltd ("GCM") (the appellant). The bill of lading provided that MIS would carry a cargo of aluminium can body stock from Sydney, Australia to Keelung, Taiwan. MIS undertook the delivery of the cargo in the same good order and condition as when it was shipped. The bill of lading showed that the goods were shipped on the *Bunga Seroja* in apparent good order and condition. GCM was the owner and consignee of the goods. MIS was the owner and operator of the ship. The cargo in question was stowed in the hold of Bay 5. Upon inspection in Fremantle, and subsequent delivery to GCM at Keelung, the cargo

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155 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1996) 39 NSWLR 683.

156 The Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, 51 Stat 233 TS No 931; 120 LNTS 155.

157 Early cases include *Lawrence v Aberdein* (1821) 5 B & Ald 107 [106 ER 1133] and *Gabay v Lloyd* (1825) 3 B & C 793 [107 ER 927].

158 The Amended Hague Rules are now Sched 1 to the *Carriage of Goods by Sea Act* 1991 (Cth). It incorporates the Hague-Visby Rules, being the Hague Rules 1924 as amended by the Protocol dated 23 February 1968 known as the "Visby Protocol". The present appeal was conducted on the footing that the Rules applicable were those incorporated into Australian law by the *Sea-Carriage of Goods Act* 1924 (Cth), s 4(1) and Sched 1 (since repealed). There is no material difference in the expression of the applicable Rules.

159 cf *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 at 613-614.

was found to be in a damaged condition. These proceedings represent the attempt by GCM to recover from MIS the losses it thereby suffered.

107 The cargo was shipped in ten 20 ft FCL containers said to contain "40 cases of aluminium can bodystock in coils alloy". The evidence showed that the coils were not packed in cases. Four were stowed in each container. Each coil was fixed to a pallet and weighed about five tonnes. Accordingly, a fully loaded container weighed over 20 tonnes. The coils were strapped and wrapped with aluminium sheeting to prevent water damage. Once four coils had been placed in each container, timber was nailed to the base of the container to prevent lateral movement. Nevertheless, in extreme weather conditions, a coil might jump vertically due to pitching, rolling and pounding of the ship. If this happened, all coils in the container were at risk of damage.

108 The primary judge (Carruthers J) rejected the contention by MIS that the packing by the agent of GCM had been insufficient[160]. Nor was any fault found in the system by which the containers were loaded onto, and distributed within, the ship. Specifically, Carruthers J rejected the suggestion that the ship was "too stiff".

109 Having received her cargo, the *Bunga Seroja* left Sydney for Melbourne. On 8 October 1989, she departed for Burnie in Tasmania. Before departing from Melbourne the Master of the vessel (Captain G Singh) received a weather bulletin which included a gale warning for the oceans south of the Australian continent. The passage to Burnie was extremely rough. On the evening of 8 October 1989, four containers above deck in Bay 9 were damaged. One, in the same bay, was swept overboard. The ship berthed at Burnie on 9 October 1989. She sailed for Fremantle that evening. It was the events which followed, and which, at given times, occasioned the damage to GCM's cargo, that give rise to the proceedings.

Severe weather in the "Roaring Forties"

110 Because there is no land mass between the southern coast of Australia and Antarctica, storms in the "Roaring Forties" commonly cause a strong swell, high seas and strong and variable winds. There are some stretches of sea on the earth's surface (such as the North Atlantic Ocean off the coast of North America) which, at given times, are well known for severe oceanic conditions, reflected in many

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160 Within the meaning of the Hague Rules, Art IV r 2(n).

reported maritime cases[161]. The Southern Ocean in the vicinity of the Great Australian Bight is one such stretch of sea, long known to navigators[162].

111 On 12 October 1989 a weather forecast was received at sea by radio from Adelaide. It renewed the gale warning. It predicted "very rough to high seas and heavy swell". From that time, the Master described the weather and the wind experienced as "tremendous". He regarded it as unsafe to send any seamen on deck because of the extreme danger to their lives from the chance of being swept overboard. He spent long hours at the bridge directing manual steering of the vessel. By 14 October 1989 conditions had deteriorated still further. The wind was described as Force 11 on the Beaufort scale[163]. Once again, the Master changed course to adjust to the prevailing conditions. Later that day, the *Bunga Seroja* had reached the southwest point of Australia. The deck log records winds of Force 10/11. It was at this point, in the late afternoon and early evening hours of 14 October 1989, that containers in Bay 6 were seen to move their positions. The ship's speed was reduced still further. This notwithstanding, containers in Bay 6 fell forward in tandem. Three were immediately washed overboard, followed later by a further five. Damage was also observed to three containers in the hold of Bay 5, including one of the containers belonging to GCM. Independently of the loss of, and damage to, the containers just described, the heavy weather caused structural damage to the ship. Most of this was reported as having occurred as the

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161 For example *The City of Khios* 16 F Supp 923 (1936); *Edmond Weil Inc v American West African Line* 147 F 2d 363 (1945); *Benedict on Admiralty*, 7th ed (rev), vol 2A §153 at 15-12.

162 The mishap in *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 also arose from conditions in the Great Australian Bight; cf *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455 at 469, quoting the evidence of the Master, Captain G Singh: "It is known to be an area where there is always bad weather."

163 As it was devised in 1805, the Beaufort Wind Force Scale was a scale from 0-12, based purely upon observation of the effect of wind force at sea, with no mention of the speed of the wind. Various attempts, particularly during this century, have been made to correlate the two. Thus it is generally agreed that Force 8 is a "gale" (62-74 kmph); Force 9 is a "strong gale" (75-88 kmph); Force 10 is a "storm" (89-102 kmph); Force 11 is a "violent storm" (103-114 kmph); and Force 12 is a "hurricane" (117 kmph and above): Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 1268-1269. In 1955, Beaufort force numbers 13-17 were added by the United States Weather Bureau. But even now, these are frequently ignored. See eg, *Benedict on Admiralty*, 7th ed (rev), vol 2A §153 at 15-7.

falling containers struck the bulwark from the break of the forecastles resulting in damage to the bulwark and gunwale[164].

112 When the weather subsided on 15 October 1989, the ship and the cargo were inspected at sea. The windlass motor was found inoperable. A length of cable in the water was slowly retrieved. It was discovered that the port anchor was lost. On inspection after arrival at Fremantle it was found that two of GCM's containers had been damaged. When the ship eventually arrived at Keelung on 2 November 1989, it was discovered that the contents of two further containers had been damaged[165].

Dismissal of the claim

113 GCM sued MIS in Admiralty in the Supreme Court of New South Wales to recover damages for breach of the contract of carriage and negligence. MIS pleaded various defences, many of which are not now relevant. Specifically, it accepted that the bill of lading, evidencing the contract of carriage, was subject to the *Sea-Carriage of Goods Act* 1924 (Cth) and the Hague Rules scheduled to that Act. It admitted that it was bound to exercise due diligence to make the ship seaworthy and all parts of the ship in which goods were carried fit and safe for their carriage. However, MIS denied any breach of such obligations. Moreover, it specifically denied an allegation that it was a bailee for reward of the cargo and liable for breach of duty as a bailee. It was MIS's case that its sole liability was pursuant to the bill of lading subject to the Hague Rules. Pursuant to the Rules, MIS raised several defences including that it was not responsible for the loss or damage to the cargo in so far as this had arisen or resulted from perils of the sea[166]; insufficiency of packing[167]; an act or omission of the shipper or owner of the goods, his agent or representative[168]; or any other cause arising without the actual

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164 The report of structural damage recorded that the bow rails on the forecastle deck were broken off partly; the anchor motor, winch cover and gear cover were missing; the port anchor was lost with a length of anchor cable missing; the starboard bulwark and gunwale were buckled by falling containers and bulwark stays ripped off; an air pipe was broken; catwalk rails were partly dented and welding joints parted; an aft life-raft suffered cracks in the outer cover area; and there were indentations on one of the hatch covers.

165 The eventual claim was for damage and water stains to five coils. Ten other coils were said to be severely distorted or crushed and were treated as a total loss.

166 Hague Rules, Art IV r 2(c).

167 Hague Rules, Art IV r 2(n).

168 Hague Rules, Art IV r 2(i).

fault or privity of the carrier or without the actual fault or neglect of the servants or agents of the carrier[169].

114 At trial, MIS did not dispute the damage to GCM's cargo. Its principal case was that the "proximate cause"[170] for the damage to the cargo was a fortuitous accident arising during the voyage by reason of the excessive weather conditions. It contended that the pounding of the ship by extremely heavy seas had caused coils within the containers to jump, resulting in movement of other coils, thereby occasioning damage for which it was not, by law, liable in contract, nor by the common law of bailment or negligence. Much of MIS's case at trial depended upon whether the evidence of the Master, Captain Singh, was accepted and whether various criticisms of his seamanship, including his response to the severe weather conditions, were made out. GCM called a marine surveyor, Captain Fairburn, in an attempt to establish one or more defects in the loading of the cargo and the seamanship of those in charge of the *Bunga Seroja*. These criticisms included the suggestion that the loading of the ship had rendered her "relatively stiff" and so liable to roll too quickly; that the vessel had maintained too high a speed for the conditions; and that a different course should have been taken to round Cape Leeuwin (at the southwest point of Australia) at a location likely to have reduced the excessive pounding and rolling to which the ship was subjected. Captain Fairburn suggested that Captain Singh had been trying to keep to a schedule for the owner's [ie MIS's] benefit.

115 The foregoing evidence was contradicted both by Captain Singh and by the marine surveyor called for MIS, Captain Kirkland. The loading had been performed by qualified agents with appropriate expertise. In any case, Captain Singh accepted ultimate responsibility for the loading of the ship. He and Captain Kirkland denied that the *Bunga Seroja* was "too stiff". Similarly, the extent of the reduction of speed was defended by reference to the existence of a critical point below which further reduction would have given rise to dangers to the vessel in such conditions. As to adopting a different course, Captain Singh asserted that this would have involved "slamming" his ship into a "wall of sea". Carruthers J preferred the evidence of Captain Singh whose record of seamanship he described as "unblemished" and whose conduct on the subject voyage attracted the "unequivocal support" of Captain Kirkland[171]. These factual findings disposed of most of the issues which the parties tendered for decision at trial. In particular,

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169 Hague Rules, Art IV r 2(q).

170 *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455 at 462 cited in (1996) 39 NSWLR 683 at 691.

171 [1994] 1 Lloyd's Rep 455 at 467.

Carruthers J rejected GCM's arguments that MIS had failed to discharge its obligations under the Hague Rules[172] by:

1. Not establishing a sound system for loading the ship[173];

2. Negligently failing to reduce the ship's metacentric height which made the ship unseaworthy[174];

3. Failing to prove that it could not have guarded or taken all steps to guard the cargo against such heavy weather[175]; and

4. Failing to prove that it had navigated the vessel at a speed and course appropriate to the conditions to protect the cargo[176].

116 The rejection of GCM's complaints about the conduct of the Master in the navigation and management of the ship and the stowage of the cargo was relevant to the defences pleaded by MIS based upon particular provisions of the Hague Rules, Art IV rr 2(c), (i), (n) and (q). Ultimately, Carruthers J determined the case on the view which he took of the scope of the immunity provided in Art IV r 2(c) ("perils of the sea"). Read in the context of the responsibilities and liabilities of a carrier such as MIS, viewed in the light of his conclusions as to the suggested negligence of the ship's Master, agents and crew which GCM contended, Carruthers J concluded that MIS was entitled to the "perils of the sea" immunity.

117 In the appeal to the Court of Appeal, GCM argued, in effect, that Carruthers J had made three mistakes:

(1) In construing the immunity provided for "perils, dangers and accidents of the sea" read in the context of the Hague Rules. (The "perils of the sea" point).

(2) In determining the cause of the subject loss of, or damage to, cargo as required by the opening words of Art IV r 2. (The causation point).

(3) In misapplying the onus of proof so as to cast on GCM the obligation to establish negligence in the carrier if it was to disqualify MIS from the immunity for "perils of the sea". Instead, GCM contended, the primary judge

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172 Hague Rules, Art III rr 1, 2.

173 [1994] 1 Lloyd's Rep 455 at 469.

174 [1994] 1 Lloyd's Rep 455 at 466.

175 [1994] 1 Lloyd's Rep 455 at 470-471.

176 [1994] 1 Lloyd's Rep 455 at 467.

ought to have imposed on MIS the obligation of proving proper and careful loading, handling, stowage and carrying of the goods (as the common law of bailment would require in the case of a bailee for reward) and, as GCM argued, the Hague Rules required. (The onus of proof point).

118 As other members of this Court have demonstrated, the issue presented by Art IV r 2(c) of the Hague Rules, referring to "perils of the sea", does not logically arise as a ground of immunity from the liability otherwise imposed on the carrier if it is found, at the threshold, that the carrier fully discharged its responsibilities under Art III. It appears that Carruthers J found that the carrier was exempt from any default under Art III, including Art III r 2. The latter is expressed to be subject to the provisions of Art IV, including Art IV r 2(c). Therefore, on the face of things, the "perils of the sea" point was not presented on his Honour's findings. However, because Carruthers J clearly treated the issues as inextricably interrelated and appears to have reached his conclusion about the carrier's liability under Art III r 2 influenced by the view he took of the applicable "perils of the sea" as envisaged by Art IV r 2(c), it is appropriate, as the Court of Appeal did, to respond to the parties' arguments addressed to that paragraph. What constitutes proper and careful loading, handling, stowage etc within Art III r 2 of the Hague Rules will obviously depend, to some extent, upon the particular "perils of the sea" against which it is necessary and reasonable to take precautions. Although in the structure of the Rules and in pure logic the issues are separate, in reality and in the evidence typically tendered in these cases, the issues are closely intermeshed. I shall return to this point.

Decision of the Court of Appeal

119 In the Court of Appeal each of the criticisms of the reasons of Carruthers J was rejected. Sheller JA, who gave the leading judgment[177], disposed of the listed complaints, as well as several others (including complaints about factual findings) which have not concerned this Court.

120 Determinative for Sheller JA's treatment of the "perils of the sea" point was the decision of this Court in *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd*[178]. Specifically, his Honour rejected the central argument for GCM that international authority on the phrase "perils of the sea", appearing in the Hague Rules, favoured the construction that to be a "peril" (or "danger" or "accident") of the sea, it was necessary that the event or circumstance relied upon

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177 With which Clarke JA concurred ((1996) 39 NSWLR 683 at 686) and Gleeson CJ agreed (at 685).

178 (1980) 147 CLR 142.

must have been unforeseeable and such as could not have been guarded against[179]. Carruthers J had earlier rejected this view. He had observed that, "[i]nteresting as the American and Canadian cases" relied upon by GCM to support its contention might be[180], it was his duty to follow the passage in *Gamlen* where Mason and Wilson JJ had said[181]:

> "[S]ea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea."

121 In the Court of Appeal, Gleeson CJ was of the same view[182]. His Honour pointed out that, although in *Gamlen* Stephen J had reserved his opinion on whether an event or circumstance might qualify as a "peril of the sea" if it were foreseeable and could have been guarded against[183], the same hesitations had not been expressed by the other members of this Court. Gibbs J[184] and Aickin J[185] agreed with the view taken by Mason and Wilson JJ. Gleeson CJ suggested that the reservation expressed by Stephen J on this point might have been explained by a view earlier expressed by his Honour[186]. This was to the effect that an expansive notion of "perils of the sea", for the purposes of the immunity provided by the Hague Rules, Art IV r 2(c) might have developed in England reflecting "the interests of great fleet-owning nations"[187]. The narrower view, more favourable to cargo interests, would favour nations of cargo owners (such as the United States of America, Australia and many developing nations)[188].

122 On the causation point, Sheller JA noted how, in recent decisions of this Court, the previous use of epithets and adjectives (such as *proximate* cause etc) or

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179 (1996) 39 NSWLR 683 at 697-698.

180 [1994] 1 Lloyd's Rep 455 at 470.

181 (1980) 147 CLR 142 at 166.

182 (1996) 39 NSWLR 683 at 685-686.

183 (1980) 147 CLR 142 at 156.

184 (1980) 147 CLR 142 at 149.

185 (1980) 147 CLR 142 at 168.

186 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 258-260.

187 (1978) 139 CLR 231 at 258.

188 (1978) 139 CLR 231 at 258-259.

the application of the "but for" test to explain all disputable decisions on causation, had given way to a somewhat different approach[189]. Sheller JA accepted, as determinative of the availability of the various immunities in Art IV r 2 of the Hague Rules, the application of "common sense to the facts of each particular case"[190]. His Honour also accepted that, if the loss of, or damage to, cargo in the present case arose, or resulted from, "perils of the sea", neither the carrier nor the ship would be responsible. If, on the other hand, the loss or damage arose, or resulted in whole or in part, from the carrier's negligence, the loss did not fall within the immunity. Sheller JA considered that the primary judge had applied the correct test. Having excluded the various suggestions of want of proper and careful conduct on the part of the Master, agents and crew, by which GCM had sought to render MIS responsible, Carruthers J experienced no difficulty in attributing the cause of the loss or damage to the cargo in question exclusively to "perils of the sea". Sheller JA saw no error in this approach and confirmed it.

123 As to the onus of proof point, by reference to *Gamlen*[191], Sheller JA rejected GCM's argument that the onus rested on MIS to disprove negligence in order to qualify for the immunity under Art IV r 2(c). His Honour observed[192] that the two issues of "perils of the sea" and negligence by the carrier could not ordinarily be considered in isolation from one another. Carruthers J, at the close of his reasons, had remarked[193]:

> "This is not a case which, in my view, turns upon any nice questions of onus of proof. Unlike many perils of the sea cases, [MIS] is able to identify with some precision the actual perils of the sea which caused the subject damage."

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189 (1996) 39 NSWLR 683 at 693, referring to *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 590.

190 (1996) 39 NSWLR 683 at 693, citing *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 681 per Lord Reid, applied in *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 515.

191 (1980) 147 CLR 142 at 168 approving *Gamlen Chemical Co v Shipping Corporation of India* [1978] 2 NSWLR 12 at 23-24 per Samuels JA; cf *The Glendarroch* [1894] P 226 at 231 per Lord Esher MR.

192 (1996) 39 NSWLR 683 at 694, approving in this respect the comment of Carruthers J in his reasons. See [1994] 1 Lloyd's Rep 455 at 460.

193 [1994] 1 Lloyd's Rep 455 at 471.

124 This passage from the reasons of the primary judge immediately preceded his conclusion (quoted by Sheller JA)[194] that the *Bunga Seroja*, when she sailed from Burnie, "was fit in all respects for the voyage"; that MIS had "properly and carefully loaded, handled, stowed, carried, [etc]" the cargo; that there was "no neglect or default of the master" or others for whom MIS was liable in the management of the ship or cargo; and that "the damage to the subject cargo was occasioned by perils of the sea, in that, the pounding of the ship by reason of the heavy weather caused the coils within the container to be dislodged and thereby sustain damage".

125 From the rejection by the Court of Appeal of GCM's challenges to these conclusions, the appeal now comes, by special leave, to this Court.

Arguments of the cargo owner

126 GCM submitted that the decisions below, and the passage in *Gamlen* (quoted above) on which those decisions rested, were erroneous; out of harmony with a correct understanding of the Hague Rules; based on an imperfect appreciation of international authority; incompatible with applicable or analogous principles of the common law obtaining in Australia; and neglectful of relevant considerations of legal policy to which, it was argued, this Court would pay regard in construing the Hague Rules and applying them to the facts of this case.

127 The essence of GCM's attack on the construction of Art IV r 2(c) expressed by the majority in *Gamlen* was that, if sea and weather conditions which might reasonably be foreseen and guarded against could constitute a "peril of the sea", this would effectively relieve a carrier of the duties imposed by Art III, including the obligation to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried" contained in Art III r 2. Although that Rule, by its opening words, is expressed to be "[s]ubject to the provisions of Article IV" (and in that respect is distinct from the unqualified obligations of due diligence imposed by Art III r 1) both Rules appear together in the coordinated scheme of the Hague Rules. Each must play a part, in interaction with the other, to produce a result which is compatible with the language and structure of the Rules as well as commercially sensible. GCM argued that, if sea and weather conditions could reasonably be foreseen and guarded against, a carrier which failed to do so would not be properly and carefully conforming to the obligations in Art III r 2. It urged that the obiter remarks on this point by Mason and Wilson JJ in *Gamlen* should be distinguished or overruled. In effect, GCM argued that Stephen J had been correct to perceive the point as unnecessary for decision in *Gamlen*.

128 In support of this argument, GCM assembled a substantial legal fleet. It submitted that the view adopted in *Gamlen* was inconsistent with an opinion

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194 (1996) 39 NSWLR 683 at 692, quoting from [1994] 1 Lloyd's Rep 455 at 471.

expressed by this Court only a year earlier about the scope of "perils of the sea" in a policy of marine insurance[195]. It effectively reversed the usual common law rules applicable to a bailee for reward seeking to secure exemption from liability for damage for foreseeable and preventable risks[196]. It was inconsistent with much applicable and analogous legal authority, not only in the United States[197] and Canada[198] (acknowledged in *Gamlen*), but also in England[199] and in leading text authorities[200].

129 The appellant submitted that this Court, construing an international instrument such as the Hague Rules, should strive, as far as possible, to ensure that Australian law conformed to the meaning adopted in many jurisdictions. It could do so more comfortably because that construction would also be consistent with the Court's general approach to the interpretation of exemption clauses, and specifically those designed to relieve carriers of the immunity to which they were otherwise subjected by contract or other applicable law[201]. Doing so would also (so it was submitted) produce a just outcome in the instant case. It would promote proper protection for cargo owners in a position equivalent to GCM. Why, it was asked rhetorically, should the carrier in this case escape the liability undertaken by

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195 *Skandia Insurance Co Ltd v Skoljarev* (1979) 142 CLR 375 at 384 where Mason J said (with Barwick CJ, Gibbs and Aicken JJ concurring): "Losses caused by the natural and inevitable action of the wind and waves are not due to perils of the sea because they are foreseen and expected."

196 See *Pitt Son & Badgery Ltd v Proulefco* (1984) 153 CLR 644 at 647.

197 See *Davison Chemical Co v Eastern Transportation Co* 30 F 2d 862 at 864 (4th Cir 1929); *Middle East Agency v The John B Waterman* 86 F Supp 487 at 489 (1949); *Taisho Marine & Fire Insurance Co Ltd v M/V Sea-Land Endurance* 815 F 2d 1270 at 1272 (9th Cir 1987); *Thyssen Inc v S/S Eurounity* 21 F 3d 533 at 539 (2nd Cir 1994).

198 *Canadian National Steamships v Bayliss* [1937] SCR 261 at 263; *Goodfellow Lumber Sales v Verreault* [1971] SCR 522 at 528; *Canastrand Industries Ltd v The Lara S* [1993] 2 FC 553 at 575 n 1.

199 *The "Xantho"* (1887) 12 App Cas 503 at 509; *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 524, 530; *The "Tilia Gorthon"* [1985] 1 Lloyd's Rep 552 at 555; *The "Coral"* [1992] 2 Lloyd's Rep 158 at 162.

200 *Scrutton on Charterparties and Bills of Lading*, 20th ed (1996) at 225; Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 432; *Payne and Ivamy's Carriage of Goods by Sea*, 13th ed (1989) at 187.

201 See *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 259.

the contracts evidenced in the bill of lading, and imposed pursuant to statute by the Hague Rules, when it had actual forewarning of the weather conditions that were encountered? It had led no evidence that it could not have avoided the loss of or damage to cargo resulting from such conditions. This was not, therefore, a case of a freak wave, "queer seas" or unexpected perils of intolerable force at sea. In the words of Captain Singh himself "what we anticipated materialised". Having been warned by the experience of the loss of, and damage to, containers on the passage from Melbourne to Burnie, and having received the weather forecasts predicting gales with very rough to high seas and heavy swell, it was for MIS (so it was argued) to prove that it was impossible or unreasonable for it to take steps protective of the cargo entrusted to it, including by GCM. Whether this might have been achieved by delaying departure from Burnie; by diverting to Adelaide; by altering course on the journey to Fremantle; or otherwise was for MIS to prove and not (as had been held below) for GCM to establish.

130 For MIS, it was accepted that, if there were a breach of the obligation to take reasonable care of the cargo, it could not rely on the immunity in Art IV r 2[202]. If MIS was shown to have been negligent and if its lack of proper and careful loading, handling, stowage, carrying, etc was a cause of the loss or damage to the cargo, MIS would be responsible. It could not succeed in claiming any of the immunities in Art IV r 2, including that applicable for loss or damage arising or resulting from "perils of the sea"[203].

131 To resolve these differences between the parties, it is necessary to understand the requirements of the Hague Rules and to appreciate how those Rules are intended to operate in a trial where it is essential that each party should know those matters which must be proved to bring itself within (on the one hand) the provisions of the Hague Rules imposing responsibilities and liabilities (Art III) and (on the other) the provisions (relevantly Art IV) defining the rights of, and affording immunities to, a carrier such as MIS.

The Hague Rules

132 In Australia, the Hague Rules apply by statute[204], relevantly, to the carriage of goods in ships from any port in the Commonwealth. Although every bill of lading or similar document of title issued in the Commonwealth must contain an

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202 See *Carver's Carriage by Sea*, 13th ed (1982), vol 1 at pars 134-135.

203 See *Gamlen* (1980) 147 CLR 142 at 166.

204 In this case *Sea-Carriage of Goods Act* 1924 (Cth), s 4(1). See now *Carriage of Goods by Sea Act* 1991 (Cth), s 8.

express statement that it is to have effect subject to the provision of the Rules[205], the latter are "applied" by the Act. The regime of the Rules is therefore statutory, not contractual[206]. By Art II (subject to Art VI) the carrier is subject to the responsibilities and liabilities, and entitled to the rights and immunities, set out in the Rules. It is important to note the language and scheme of the Rules as a whole. However, it suffices to draw particular attention to Arts III and IV, which are set out in the reasons of other members of this Court.

133 In construing the Hague Rules and elucidating the interaction of the rights, liabilities and immunities for which they provide, courts have frequently remarked on the importance of understanding their history[207]. Before they were adopted and incorporated into municipal law, nearly all bills of lading contained exemptions from liability for damage to cargo resulting from "acts of God" and "perils of the sea"[208]. When, to overcome excessive contractual exemptions commonly imposed by carriers of goods by sea, national legislation was adopted in several jurisdictions to impose a standard legal regime, such laws usually afforded exemption from liability for "dangers" or "perils" of the sea[209]. Such provisions were quite frequently interpreted as affording an exemption only for "something so catastrophic as to triumph over those safeguards by which skillful and vigilant" carriers bring goods safely into harbour[210]. It was a concern at the proliferation of such national legislation[211], that ultimately led to a search for an international

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205 *Sea-Carriage of Goods Act* 1924 (Cth), s 6. The 1991 Act is worded somewhat differently, but achieves a like result: *Carriage of Goods by Sea Act* 1991 (Cth), ss 11, 16.

206 As to the interaction of statute and contract see *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 at 617-618, 621-622.

207 *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807 at 836; *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 at 623-625; *Encyclopaedia Britannica Inc v SS Hong Kong Producer* 422 F 2d 7 at 11-12 (2nd Cir 1969); cf *Sun Oil Co of Pennsylvania v M/T Carisle* 771 F 2d 805 at 809-810 (3rd Cir 1985).

208 *Benedict on Admiralty*, 7th ed (rev), vol 2A §151.

209 *Harter Act* 1893 (US) [27 Stat 445] (now codified at 46 USC App §§190-196); *Carriage of Goods by Sea Act* 1936 (US) [49 Stat 1207]; *Carriage of Goods by Sea Act* 1924 (UK). See also Roskill, "Reviews and Notices", (1992) 108 *Law Quarterly Review* 501 at 502.

210 *The Rosalia* 264 F 285 at 288 (2nd Cir 1920).

211 The *Harter Act* in the United States stimulated similar legislation in several jurisdictions including Japan, Canada, New Zealand and Australia. See Commercial

(Footnote continues on next page)

regime which would be acceptable to the competing demands of carrier and cargo interests.

134 In 1921, an Imperial Conference adopted model rules based on the *Water-Carriage of Goods Act* 1910 (Canada)[212]. All Dominions of the British Empire were committed to introducing such legislation. The model rules required of the carrier the exercise of due diligence to make the ship seaworthy and properly and carefully to load, carry and stow the cargo. In return, the carrier was afforded exemption from liability for various causes including, relevantly, "dangers of the sea"[213]. The proposed regime was criticised in Britain. Lord Justice Scrutton, a great expert on this body of law, declared, in words which have proved prescient, that the rules were unclear and were liable to lead to increasing litigation[214]. The draft model rules were defended by their proponents. The ambiguities were explained by references to the compromises that had to be struck[215]. Substantially, the Imperial compromise was adopted by the Hague Rules. For more than a decade, it attracted few participating States outside the British Empire. Cargo interests in the United States were particularly suspicious that the compromise was unduly favourable to [British] carrier interests and against [United States] cargo interests. Nevertheless, the chief proponent of adoption by the United States pointed out that the exculpatory provisions in Art IV r 2 only applied where the ground relied upon was shown to be the *cause* of the loss or damage to cargo[216].

Code (Japan), Art 592 (translated in Hang, *The Commercial Code of Japan*, (1911) at 249); *Shipping and Seamen Act* 1903 (NZ); *Sea-Carriage of Goods Act* 1904 (Cth); cf *Gamlen* (1980) 147 CLR 142 at 158-159. The history is told in Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 5-6, 10-18.

212 cf Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 19.

213 *Water-Carriage of Goods Act* 1910 (Canada), ss 6, 7.

214 *Report from the Joint Committee on the Carriage of Goods by Sea Bill (HL). House of Commons Report No 106* (1923) ("the Sterndale Committee Report") at 86-87, 99, collected in [1923] 5 *Parliamentary Papers* 735, cited in Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 34.

215 Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 34.

216 Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 52.

Eventually, the United States joined the new regime. When it did the other nations chiefly involved in the carriage of goods by sea quickly followed suit[217].

135 Despite the successful establishment of the new international system found in the Hague Rules, the difficulties of ambiguous language and apparently competing provisions remained as Lord Justice Scrutton had predicted. Relevantly, the difficulties have included the adoption of a meaning for the several immunities in Art IV r 2 which will not rob the responsibilities and liabilities in Art III r 2 of any real content. In many of the immunities (such as "act of God"[218], "act of war"[219] and "act of public enemies"[220]), no question of any want of proper and careful conduct on the part of the carrier arises. But this is not necessarily so in the case of "perils of the sea"[221]. From the start, it was recognised that this paragraph addressed a group of sea hazards which it would be difficult to define. Judges have repeatedly emphasised that there is no "bright line" to distinguish the ordinary action of wind and waves from a "peril of the sea"[222]. "No Beaufort Scale index exists which divides cases into those qualifying for the peril of the sea exception and those which do not."[223] To say that the inquiry involves an intensive examination of the facts[224] is correct enough. But that statement merely serves to emphasise the unique character of each maritime misfortune. Inevitably, it has produced decision-making which has laid emphasis upon particular factual criteria. It is in this context that the cases referring to the extraordinary or exceptional nature of the sea hazard, or to its unexpected and unpredicted occurrence, must be understood.

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217 Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 56.

218 Art IV r 2(d).

219 Art IV r 2(e).

220 Art IV r 2(f).

221 Art IV r 2(c).

222 *Taisho Marine & Fire Insurance Co Ltd v M/V Sea-Land Endurance* 815 F 2d 1270 at 1272 (9th Cir 1987).

223 *Taisho Marine & Fire Insurance Co Ltd v M/V Sea-Land Endurance* 815 F 2d 1270 at 1273 (9th Cir 1987).

224 *Continental Insurance Co v Lone Eagle Shipping Ltd (Liberia)* [1997] AMC 1099 at 1120-1121.

Construction of international rules

136 The parties advanced competing submissions as to the approach which this Court should take to the construction of the Hague Rules in order to elicit their requirements for the three issues argued in the appeal. GCM emphasised that their authority derived, in Australia, from federal legislation incorporating them into Australian law. That law recognises the special obligations of bailees for reward. The Hague Rules were therefore to be understood as affording principles grafted onto local contracts which were otherwise intended to conform to applicable common law[225], including that developed for contracts of bailment. Whilst contesting this submission, MIS argued that this Court should adhere to the differentiation which it had discerned in *Gamlen* between the approach of Australian and English law to the definition of "perils of the sea" (on the one hand) and the decisions of courts in North America[226] (on the other). MIS urged the Court to adhere to its own authority. To that extent, each of the parties made submissions emphasising local rather than international considerations.

137 The approach of this Court to the construction of an international legal regime such as that found in the Hague Rules must conform to settled principle. Reflecting on the history and purposes of the Hague Rules, the Court should strive, so far as possible, to adopt for Australian cases an interpretation which conforms to any uniform understanding of the Rules found in the decisions of the courts of other trading countries[227]. It would be deplorable if the hard won advantages of international uniformity, secured by the Rules, were undone by serious disagreements between different national courts[228]. What is at stake is not merely theoretical symmetry in judicial interpretation. There is also the practical matter that insurance covers most losses occurring in the international carriage of goods by sea. It is therefore important, so far as possible, that the parties and their insurers should know in advance who will bear the loss and thus who should carry the direct cost of insurance premiums[229]. Disparity of outcomes and uncertainty

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225 *Gamlen Chemical Co v Shipping Corporation of India* [1978] 2 NSWLR 12 at 21.

226 (1980) 147 CLR 142 at 166.

227 *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] AC 807 at 840-841; *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 at 615, 624; Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 *Virginia Journal of International Law* 729 at 731-732.

228 *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 at 471.

229 Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 *Virginia Journal of International Law* 729 at 736.

about the Rules produce costly litigation without positive contribution to the reduction of overall losses to cargo. This said, the achievement of a uniform construction of an international standard is often elusive[230].

138 In construing a text such as the Hague Rules, this Court, to the greatest extent possible, should prefer the construction which is most consistent with that which has attracted general international support rather than one which represents only a local or minority opinion[231]. That is a reason why it would be a mistake to interpret the Hague Rules as a mere supplement to the operation of Australian law governing contracts of bailment. That law, derived from the common law of England, may not be reflected in, or identical to, the equivalent law governing carriers' liability in civil law and other jurisdictions. The Hague Rules must operate in all jurisdictions, whatever their legal tradition. Similarly, care must be taken in importing into decisions about the Hague Rules, judicial authority derived from the time before those Rules were adopted. In particular, there may be dangers in using authority concerned with marine insurance where the expression "perils of the sea" defines the scope of the insurer's risk[232]. Such a context invites a wider connotation than where the phrase is used (as it is in the Hague Rules) to mark out an area of exemption from liability[233].

139 An inclination to adopt the interpretation of the Hague Rules which represents a clear international standard may sometimes be frustrated by national decisions which lay emphasis upon particular considerations[234]. It may even be impossible when there is a direct conflict between the approaches of courts in

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230 Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 *Virginia Journal of International Law* 729 at 738-744 suggests a number of reasons including (1) conflicts in the methodology used by municipal courts, eg access to *Travaux Préparatoires*; (2) different legal traditions colouring the approach of the judicial officer; and (3) different perceptions of local public policy and national interest. In connection with the last, reference may be made to *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231 at 285, noted by Sturley at 766 n 215.

231 Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 *Virginia Journal of International Law* 729 at 746, 801.

232 Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 432.

233 cf *Parrish & Heimbecker Ltd v Burke Towing & Salvage Co Ltd* [1943] SCR 179 at 183-184; *Scrutton on Charterparties and Bills of Lading*, 20th ed (1996) at 225.

234 As, it was suggested, did the decision of United States, Canadian, United Kingdom and Australian courts. See *Gamlen* (1980) 147 CLR 142 at 165-166.

countries which enjoy significant trade with each other. Thus, German law is reportedly critical of the approach that has been taken, particularly in the United States, to the definition of "perils of the sea"[235]. In German courts this expression appears to have been given a broader meaning. Thus, there is no need to establish that the hazard represented an extraordinary event, was a "storm of a certain force" or was unforeseeable[236]. In this way, well entrenched and differing national approaches may make the attainment of a uniform construction of the Hague Rules impossible. But the objective is so important[237] to the purposes of the Hague Rules that national courts should certainly search for common ground. The best way to find it will often be to increase awareness of the approaches of others[238], to avoid undue influence by local legal and professional assumptions and to return to the text and structure of the Rules themselves. It is also as well to accept that perfect certainty and predictability in such matters is impossible. In part, in the context of the Hague Rules, this is because the text is often ambiguous, reflecting the compromise which it was designed to strike. In part, it is because no rule of thumb is available which can define with absolute precision, in advance, those precautions which a carrier must necessarily take to meet the manifold dangers of the sea[239] and those dangers from which it is exempt because they constitute "perils of the sea".

Exceptional and unpredictable events

140 Out of deference to GCM's argument that this Court's decision in *Gamlen* represented a departure from the mainstream of international judicial opinion on "perils of the sea", it is useful to examine the contention that, properly understood, this phrase imports, in this context, a connotation of a maritime event that is in some way exceptional or extraordinary or unpredictable and unexpected. It will

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235 *General Motors Overseas Operation v SS Goettingen* 225 F Supp 902 at 905 (1964).

236 *General Motors Overseas Operation v SS Goettingen* 225 F Supp 902 at 904-905 (1964). Other areas of conflict are listed in Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation", (1987) 27 *Virginia Journal of International Law* 729 at 737-738.

237 cf *Stag Line Ltd v Foscolo, Mango & Co* [1932] AC 328 at 350; *Buchanan & Co v Babco Ltd* [1978] AC 141 at 152; *Gamlen* (1980) 147 CLR 142 at 159.

238 Sturley, "The History of COGSA and the Hague Rules", (1991) 22 *Journal of Maritime Law and Commerce* 1 at 2.

239 *Duche v Brocklebank* 40 F 2d 418 at 420 (2nd Cir 1930); cf *Philippine Sugar Centrals Agency v Kokusai Kisen* 106 F 2d 32 at 34 (2nd Cir 1939); *Benedict on Admiralty*, 7th ed (rev), vol 2A §153 at 15-5.

be remembered that in *Gamlen* four Justices of this Court[240] rejected the necessity to establish these features of the marine hazard, as a prerequisite to the availability of the immunity. Only Stephen J reserved his position on whether an event "can qualify as a peril of the sea if it is foreseeable and could have been guarded against"[241].

141 I reach the linchpin of the case for GCM. It argued that, not only could the "perils of the sea" for the cargo on the *Bunga Seroja* be foreseen by MIS, they were, in fact, predicted and expected. GCM invoked numerous decisions[242], not only of courts in the United States and Canada[243] which, it said, established that the element of the fortuitous or unexpected was the litmus test for whether severe weather conditions or other sea hazards did, or did not, amount to a "peril of the sea". If the disturbance of waves and wind was foreseeable, although it was a hurricane, it had to be guarded against by the carrier before the immunity could be invoked[244]. It was only conditions which could *not* be foreseen and guarded against by the carrier, as necessary and probable incidents of the adventure, that attracted the exceptional immunity from the obligations imposed by Art III r 2[245].

Textual analysis

142 To resolve GCM's principal argument, that hazards in this case did not constitute "perils of the sea" within Art IV r 2(c) it is necessary, as the Court did in *Gamlen,* to examine both the language and structure of the Hague Rules. It is rudimentary to an understanding of the Rules that they must be read as a whole so as to achieve the comprehensive objectives suggested by their language, history

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240 *Gamlen* (1980) 147 CLR 142 at 166 per Mason and Wilson JJ; with whom Gibbs J (at 149) and Aickin J (at 168) agreed.

241 *Gamlen* (1980) 147 CLR 142 at 156.

242 *Davison Chemical Co v Eastern Transportation Co* 30 F 2d 862 at 864 (4th Cir 1929); *Canada Rice Mills Ltd v Union Marine and General Insurance Co* [1941] AC 55 at 69; *Neter & Co Ltd v Licenses and General Insurance Co Ltd* [1944] 1 All ER 341 at 343; *Middle East Agency v The John B Waterman* 86 F Supp 487 at 489 (1949); *Cia Panameña de Seguros v Prudential Lines Inc* 409 F Supp 835 at 836 (1976); *Ferrara v A & V Fishing Inc* 99 F 3d 449 at 454 (1st Cir 1996).

243 *The "Xantho"* (1887) 12 App Cas 503 at 509; *The Friso* [1980] 1 Lloyd's Rep 469 at 472; *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 214-215; *The "Coral"* [1992] 2 Lloyd's Rep 158 at 162.

244 *Kruger Inc v Baltic Shipping Co* [1988] 1 FC 262 at 278, affd (1989) 57 DLR (4th) 498 at 504.

245 *Scrutton on Charterparties and Bills of Lading*, 20th ed (1996) at 225.

and purposes. Clearly, they are intended to strike a commercially practical and reasonable balance between the competing claims of cargo owners, which have suffered loss, and carrier interests bound to standards of proper and careful conduct, but no more.

143 The integrated character of the Rules was emphasised in *Gamlen*[246]. So was the feature of Art III, by which the responsibilities and liabilities imposed in r 2 were expressly subjected to the immunities contained in Art IV[247]. Whereas the fundamental duties to exercise due diligence collected in Art III r 1 are not expressed to be subject to the immunities in Art IV (but are "overriding" duties[248]), the duties imposed by Art III r 2 are not those of exercising "due diligence" to produce defined results. Instead, they are obligations of the carrier "properly and carefully" to conduct itself in relation to the goods carried. This is a standard which falls short of that of an insurer. Whilst the safe delivery of cargo is plainly the objective of the Rules, a failure of delivery is not necessarily a default if the carrier has "properly and carefully" conducted itself[249]. The word "properly" in juxtaposition to "carefully" has been held to import an obligation on the part of the carrier to establish a sound system and an element of skill that goes beyond care[250].

144 Obviously, the responsibilities and liabilities imposed by Art III r 2 are intended to have real value for the protection of the cargo owner. It would "denude the obligation ... of much of its substance"[251] if, every time a ship met high winds or turbulent waves at sea and cargo was lost or damaged, the carrier could plead immunity from liability by reliance on Art IV r 2(c). This much has been recognised since the Hague Rules were adopted. It is accepted by carrier and cargo interests alike. What has proved elusive has been the reconciliation of the conflict within the Rules in a way which accords real work to be done by all of them. Two different approaches to the text of the Rules have been used by courts to resolve the conflict:

1. The first places its focus on the phrase "perils, dangers and accidents of the sea". It reads that phrase in the context of the responsibilities and liabilities

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246 *Gamlen* (1980) 147 CLR 142 at 162.

247 *Gamlen* (1980) 147 CLR 142 at 152, 162.

248 *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 at 602-603, quoted in *Gamlen* (1980) 147 CLR 142 at 152.

249 *Albacora SRL v Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep 53 at 63; cf *Gamlen* (1980) 147 CLR 142 at 163.

250 *Gamlen* (1980) 147 CLR 142 at 163.

251 *Gamlen* (1980) 147 CLR 142 at 164.

imposed by Art III r 2. It takes into account the common features of the other immunities collected in Art IV r 2 so as to embrace sea hazards of a particular character, going beyond the ordinary effects of wind and waves. It is this approach which has led courts, in the light of particular facts, to look to the exceptional degree of a hazard or to its unexpected provenance in order to decide whether the loss of or damage to cargo is within the immunity in Art IV or is properly classifiable as within the responsibilities and liabilities expressed in Art III.

2. The second approach has invoked notions of causation. The textual footing for this approach is the requirement in Art IV r 2 that the loss or damage in question must arise or result from the particular head of immunity invoked. If, properly classified, the cause of the loss or damage to cargo is a failure of the carrier properly and carefully to load, handle, stow, carry etc the cargo, that will be designated the cause of the loss or damage. Then it will not have arisen or resulted from the ground of immunity pleaded but from the negligence of the carrier.

145 Each of these approaches, having its source in the text of the Hague Rules, has legitimacy. Each invites the characterisation of conduct of the carrier. Each requires the drawing of lines. These are tasks with which courts are familiar. The advantage of the first approach is that it has given birth to various rules of thumb which those with a taste for relatively arbitrary, but reasonably predictable, outcomes embrace. Thus, it has been suggested that unless a certain point is reached on the Beaufort scale, there is no occasion for the carrier to invoke the immunity reserved for "perils of the sea"[252]. In others, it is not the force of the weather, as such, but the predictability of the conditions which calls forth the obligation of the carrier to provide proper and careful carriage apt to the circumstances anticipated[253]. The disadvantage of the first approach is that it tends to impose on the phrase "perils, dangers and accidents of the sea" more burdens than the words can easily bear. This may be why court decisions in Germany[254] and France[255] do not appear to have embraced the concept of unpredictability of

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252 *Taisho Marine & Fire Insurance Co Ltd v M/V Sea-Land Endurance* 815 F 2d 1270 at 1273 (9th Cir 1987).

253 *Artemis Maritime Co v Southwestern Sugar & Molasses Co* 189 F 2d 488 at 491 (4th Cir 1951).

254 Noted in *General Motors Overseas Operation v SS Goettingen* 225 F Supp 902 at 904-905 (1964).

255 Noted in Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 441 n 67 citing cases from the Court of Appeal of Aix (9 May 1973, DMF 1973, 654 and 11 June 1974, DMF 1975, 720); the Court of Appeal of Paris (2 February 1971, DMF 1971, 222); and the Commercial Tribunal of Marseilles (7 September 1971, DMF 1972, 366).

violent weather as being necessarily involved in the words appearing in Art IV r 2(c). On their face, and read in isolation, "perils of the sea" constitute all "perils", not simply those that are exceptional or unpredictable.

146 The advantage of focussing attention on the words "arising or resulting from", appearing in Art IV r 2, is that they do not oblige the reader to derive from "perils of the sea" prerequisites not immediately apparent in those words. They take a court into questions of causation with which courts are also relatively comfortable and familiar. Yet much reasoning on the issue of causation for legal purposes is unsatisfying. Earlier attempts to resolve the tension between Arts III r 2 and IV r 2(c) by a quest for the "proximate"[256], "direct"[257], "dominant"[258] or "decisive"[259] cause, or the occurrence "but for" which the loss or damage would not have happened[260] have lately given way to a recognition (sometimes also reflected in earlier authority[261]) that the assignment of a cause for legal purposes is inescapably controversial and disputable[262]. In the context of the Hague Rules it has been accepted that if the carrier's want of proper and careful conduct is *a cause* of the loss or damage, the immunity contemplated by Art IV r 2(c) is not available to it[263]. Similarly, if the cause is undiscovered, it has been held that neither the carrier nor the ship may invoke the immunity to relieve it of the duties of proper and careful conduct under Art III[264].

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256 *The Schickshinny* 45 F Supp 813 at 818 (1942).

257 *The Christel Vinnen* [1924] P 208 at 214.

258 *Monarch Steamship Co Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196 at 227 per Lord Wright.

259 *Goodfellow Lumber Sales v Verreault* [1971] SCR 522 at 538.

260 *Carver's Carriage by Sea*, 13th ed (1982), vol 1 at par 216.

261 See the comment in *Smith, Hogg & Co v Black Sea and Baltic General Insurance Co* [1940] AC 997 at 1007 that "effective", "real" or "actual" add nothing by way of meaning.

262 cf *Chappel v Hart* (1998) 156 ALR 517.

263 *Smith, Hogg & Co v Black Sea and Baltic General Insurance Co* [1940] AC 997 at 1007 cited in *Gamlen* (1980) 147 CLR 142 at 154-155 per Stephen J.

264 *The Folmina* 212 US 354 at 362 (2nd Cir 1909).

"Perils of the sea": conclusions

147 The argument of GCM that, to qualify as a "peril of the sea" within Art IV r 2(c), a carrier must in every case show that the sea hazard giving rise to the loss or damage was unpredictable and unforeseen, should be rejected. The requirement does not appear in the language of par (c). Nor is it necessary to, or inherent in, the concept of the immunity stated. It is a mistake to elevate particular factual *indicia* to controlling legal criteria for the application of the Hague Rules. By the same token, it is a misreading of what this Court held in *Gamlen* to suggest that the predictability of a storm, and whether it was actually expected, is a completely irrelevant factual consideration. All that the Court decided in *Gamlen* was that neither the precise force nor the foreseeability of sea and weather conditions necessarily determines whether they constitute a "peril of the sea"[265]. To that extent, this Court was expressing its disagreement with any authority which suggested that these considerations were necessary preconditions to the availability of the immunity in Art IV r 2(c). *Gamlen,* and this case, serve to direct attention to the real issue for decision presented by the interaction of Arts III r 2 and IV r 2(c). Whether explained in terms of causation ("arising or resulting from") or by reference to the kind of sea hazard contemplated ("perils, dangers and accidents of the sea") that interaction starts with the prima facie imposition of responsibilities and liabilities on the carrier. It relieves the carrier where the events and circumstances relied upon, rather than the carrier's want of proper and careful conduct, is the cause of the loss of or damage to the cargo complained of[266]. In deciding whether a particular sea hazard amounts to a "peril of the sea" within the immunity, it may be relevant to have regard to a number of factual considerations. These might include the construction of the vessel[267], the size and capacity of the vessel[268], whether the vessel was suitably constructed, normally equipped and properly maintained[269], whether the event giving rise to the damage or loss was a freak occurrence[270], the intensity and predictability of any weather or other hazard encountered[271] and whether it could have been guarded against by the ordinary

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265 (1980) 147 CLR 142 at 166 per Mason and Wilson JJ.

266 *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 218.

267 *Canadian National Railway Co v E & S Barbour Ltd* [1963] SCR 323 at 327-328.

268 Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 441 citing the decision of the Commercial Tribunal of Paris (13 January 1984, DMF 1984, 750).

269 Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 443.

270 *Ferromontan Inc v Georgetown Steel Corp* 535 F Supp 1198 at 1210 (1982).

271 *Canastrand Industries Ltd v The Lara S* [1993] 2 FC 553 at 575 n1.

exertions of a carrier's skill and prudence. Yet none of these circumstances is decisive. They are no more than factual *indicia*.

148 No error has been shown either in the approach of the Court of Appeal or of Carruthers J on this point. None of the judges below treated the intensity of the weather conditions, or the fact that gales had been forecast, as irrelevant. Neither did they treat them as determinative in the way that GCM urged. Instead, they adopted the correct course of examining all of the facts and circumstances. They concentrated attention upon whether the hazards encountered were such as could, and should, have been prevented by the carrier's properly and carefully conducting itself with this particular vessel in this place and these circumstances. They asked whether the loss or damage shown arose, or resulted from, the sea hazard or from a want of proper and careful conduct on the part of the carrier. Not only was the approach taken by their Honours clearly open to them. In my view, it was correct. The conclusion reached was inevitable.

149 Once Carruthers J had rejected the various assertions of negligence on the part of the carrier, the Master and the servants and agents of the carrier, it was unsurprising that he should reach the conclusion which he did. The extremes of weather encountered by the *Bunga Seroja* went beyond the gale conditions forecast. They were so extreme that structural damage was done to the ship. This is a factual consideration often regarded as relevant in these cases[272]. The various alternatives propounded to avoid the loss of or damage to cargo were convincingly rejected. The only one which remained for this Court (not having been seriously propounded below) was that the ship should not have ventured forth from Burnie. Assuming, contrary to my inclination, that such an argument was available at such a late stage of the litigation[273], it could not succeed. If every ship of the size, structure and functions of the *Bunga Seroja* were obliged to remain in, or return to, harbour upon receipt of weather forecasts predicting gales in the Great Australian Bight or like stretches of ocean, serious inefficiencies would be introduced into the sea carriage of goods. The consequent costs of ships standing by would be wholly disproportionate to the marginal utility of such precautions[274]. The first argument of GCM therefore fails.

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272 *Benedict on Admiralty*, 7th ed (rev), vol 2A §153 at 15-8-15-10 citing *Kufuku Maru* [1927] AMC 1803 at 1804-1805; *The Skipsea* 9 F 2d 887 at 889 (2nd Cir 1925).

273 cf *Coulton v Holcombe* (1986) 162 CLR 1 at 7.

274 See Posner, *Economic Analysis of Law*, 4th ed (1992) at 104.

The causation and onus points

150 The foregoing conclusion is also enough to dispose of the other matters argued by GCM. However, it is appropriate to say something briefly about the causation and onus points.

151 It is not sufficient for a carrier to show a hazard which qualifies generally for the description of a "peril of the sea". It remains for the carrier, claiming immunity on this ground, to establish that the loss or damage arises or results from the claimed ground of immunity, in the sense that it was caused by it[275]. Logically, I suppose, the two questions are separate. But as both Carruthers J and Sheller JA remarked, it is usually impossible to consider the two issues in isolation. This is because, for the application of the Hague Rules read as a whole, where want of proper and careful conduct on the part of the carrier is shown, that default is regarded, in law, as the cause of the loss or damage. Such loss or damage is not then regarded as arising or resulting from the peril of the sea relied on[276]. If in any real and commonsense way the loss or damage may be regarded as attributable to the carrier's want of proper and careful conduct, that is enough to assign liability to the carrier. Only if the carrier shows that, for legal purposes, the loss or damage "arises or results" from "perils of the sea", will the immunity be available to it. Naturally, fine questions arise in decisions about causation and in the classification of particular sea hazards as within, or outside, the immunity. The resolution of such questions will be found in a reflection upon all of the proved facts and a consideration of the carrier's conduct measured against the touchstone of what it was reasonable to expect of such a carrier in such circumstances. The trial judge and the Court of Appeal approached these questions correctly. No error has been shown in their conclusions.

152 Finally, GCM complained about the way, in effect, that the primary judge had assigned to it the burden of establishing negligence on the part of the carrier in order to take the case outside the "perils of the sea" exemption in Art IV r 2(c). This argument raised once again the course which a case of this kind must take, having regard to the evidentiary obligations imposed respectively on a cargo owner (claiming for loss of or damage to cargo) and a carrier (defending by reference to one of the immunities provided in Art IV r 2). In the past, it has been said that to show the kind of applicable negligence which will take a sea hazard out of the category of "perils of the sea", involves establishing an exception to an exception. On this basis, it has been held that it is for the owner of the cargo to prove such

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275 *Colonial Steamships Ltd v The Kurth Malting Co* [1954] SCR 275 at 276.

276 cf *The Schickshinny* 45 F Supp 813 at 818 (1942).

negligence on the part of the carrier as would disentitle it from relying on an immunity such as that provided for "perils of the sea" otherwise applicable[277].

153 The answer to GCM's complaint is found in the statement of Carruthers J[278] that this "is not a case which ... turns upon any nice questions of onus of proof". His Honour reached this conclusion because, unlike other cases, in this one the carrier was able to prove precisely the hazards which had occurred and the measures taken to respond to them.

154 Long before the Hague Rules were adopted and enacted in municipal law, similar problems arose in the ascertainment of the evidentiary burdens resting respectively upon the carrier and the cargo owner under bills of lading providing for liabilities of carriers and exemptions in the case of "perils of the sea". In *The Glendarroch*, it was held that, according to the "ordinary course of practice", ie of pleading, each party would "have to prove the part of the matter which lies upon him"[279]. It would be enough for the cargo owner to prove the contract and non-delivery. From this, a breach of the obligation of proper and careful conduct would be inferred. Once that was established, it would be for the carrier to bring itself within the exceptional immunity. The onus of doing so would lie upon it. The exposition of Lord Esher MR went on[280]:

> "Then the plaintiffs have a right to say there are exceptional circumstances, viz, that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception."

155 GCM contested the correctness of this approach in the context of the Hague Rules. It argued that, to bring itself within an immunity under Art IV r 2, a carrier had to show every element of the immunity, including the absence of disqualifying want of proper and careful conduct on its part and on the part of those for whom it was responsible. In *Gamlen,* this Court endorsed as the "correct sequence of pleading" (and as applicable to the Hague Rules) the approach adopted by Lord Esher[281] in the passage just cited. The issue raised by this part of GCM's arguments

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277 *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 217.

278 [1994] 1 Lloyd's Rep 455 at 471.

279 [1894] P 226 at 231 per Lord Esher MR.

280 [1894] P 226 at 231.

281 *Gamlen* (1980) 147 CLR 142 at 168 (see also at 153) approving *Gamlen Chemical Co v Shipping Corporation of India* [1978] 2 NSWLR 12 at 23-24; cf *F C Bradley & Sons Ltd v Federal Steam Navigation Co* (1927) 27 Ll L Rep 395 at 396; *Gosse Millard v Canadian Government Merchant Marine* [1927] 2 KB 432 at 437.

is somewhat artificial, given the circumstances of this case and the stated conclusion of Carruthers J. It would have been preferable to elucidate the onus point in a case where the facts and findings required it. Even if GCM's submission as to the onus of proving the considerations that would disqualify the carrier from reliance on the immunity in Art IV r 2(c) were fully accepted, it would make no difference to the outcome of this appeal.

156 There is some force in GCM's proposition that for a carrier, such as MIS, to be entitled to any of the immunities in Art IV r 2, it must establish all of the elements of such immunity. Thus, the legal burden is on it to prove that the loss or damage arose or resulted from the specified ground of immunity pleaded. Similarly, it is for it to establish that the hazard described in the evidence partakes of the character necessary to attract the terms of Art IV r 2 as that paragraph has been construed. So much is clear as a matter of law. But where, in a forensic setting, the carrier, to rebut the inference that it has not properly and carefully conducted itself for the purpose of Art III r 2, calls evidence which suggests that a causative factor in the loss or damage was a sea hazard that may amount to a "peril of the sea", a forensic burden, at least, rests on the cargo owner to displace that conclusion. It will be enough for it to show that one element in the cause of the loss or damage was the carrier's want of proper and careful conduct. If that be shown, the cargo owner will succeed. It will do so because the carrier has failed to prove that it is entitled to the immunity in Art IV r 2. It will have failed either because it has failed to establish that the sea hazard revealed in the evidence constituted a "peril of the sea", as that phrase has been interpreted. Or because the loss and damage proved has not been shown as "arising or resulting from" such peril[282].

Conclusion and order

157 The Court of Appeal was correct to affirm the judgment of Carruthers J. The attack on that judgment by GCM fails. The appeal should be dismissed with costs.

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282 cf Commercial Court of Antwerp, 25 April 1972, [1972] ETL 1007; Commercial Court of Antwerp, 1 April 1977, JPD 1977/78, 77 and other cases cited in Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 442.

CALLINAN J

The facts

158 The *Bunga Seroja*, a converted container ship, carrying ten of the appellant's containers stowed in forward hold 5 and packed with aluminium coils, en route to Keelung, Taiwan, from Sydney via Melbourne, Burnie and Fremantle, encountered heavy weather whilst crossing the Great Australian Bight in October 1989. The Master of the ship, Captain Singh, had had a forewarning of rough weather during the voyage to Burnie. Further bad weather for the next leg to Fremantle was predicted and was well within the Master's expectation before he embarked upon this leg. Weather bulletins confirmatory of the earlier prediction were received and noted by him after the departure of the ship from Burnie.

159 The log book recorded that by 14 October, the wind had reached Force 10/11 on the Beaufort Wind Force Scale ("the Beaufort Scale"), the latter of which is, according to that scale, a "violent storm"[283]. The Sea Criterion referred to by the primary judge, Carruthers J, and which accompanies the Beaufort Scale, describes the phenomena to be observed in a such a storm in this way[284]:

> "Exceptionally high waves.… The sea is completely covered with long white patches of foam lying along the direction of the wind. Everywhere the edges of the wave crests are blown into froth. Visibility affected."

160 At 1715 hours on 14 October, when the wind was Force 10, containers were seen by crew to have moved and to have been damaged. By 2200 hours a total of eight containers had been washed overboard. Damage to, and movement of containers in the hold had also been observed.

161 Upon arrival in Fremantle, it was established that the contents of two of the appellant's containers were damaged. At Keelung, the contents of two more of the appellant's containers were found to be damaged.

The trial and the appeal to the Court of Appeal

162 There was no doubt that the appellant's containers were in the care and control of the respondent when they were damaged.

163 The case was conducted at all stages upon the footing that the Hague Rules (to which reference was made in the Bills of Lading) governed the contract for the shipment and carriage of the containers. Section 6 of the *Sea-Carriage of Goods*

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283 See Tetley, *Marine Cargo Claims*, 3rd ed (1988), Appendix F.

284 *The "Bunga Seroja"* [1994] 1 Lloyd's Rep 455 at 458.

Act 1924 (Cth) ("the Act") requires that there be a reference in appropriate terms in all bills of lading to the Rules.

164 The appellant's case on trial before Carruthers J in the Admiralty Division of the Supreme Court of New South Wales, was founded principally upon Art III r 2 of the Hague Rules:

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

165 The respondent relied upon two of the exceptions contained in Art IV r 2:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –
>
> (a) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
>
> …
>
> (c) perils, dangers and accidents of the sea or other navigable waters;
>
> …"

166 There was also an issue at the trial whether the respondent was in breach of Art III r 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) properly man, equip and supply the ship; and
>
> (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

167 In support of its case that the respondent was under no pressing necessity to subject the ship to the risks that were realized in the Great Australian Bight, the appellant made the point that the Bills of Lading imposed neither a route nor a date of discharge upon the respondent.

168 The trial judge made findings generally favourable to the respondent: that the *Bunga Seroja* was fit in all respects for the voyage; that the respondent properly

and carefully loaded, handled, stowed, carried, kept and cared for the appellant's goods; and, that there was no neglect or default of the Master or other servants of the respondent in the management of the ship or cargo. These findings were made despite some evidence in a contemporaneous report of the Master (who also gave oral evidence) that the location and juxtapositioning of some heavy containers in the hold may have caused or contributed to the damage to the appellant's aluminium coils.

169 The central issue before the Court was whether the damage to the coils was caused by "perils of the sea". On this issue also, the respondent had succeeded at the trial. His Honour held that the damage was caused by the pounding of the ship by the heavy weather, and, that this was a peril of the sea. His Honour held that the onus on this issue lay upon the respondent and had been satisfied by it.

170 The Court of Appeal affirmed the findings of the primary judge[285] and held that his Honour had correctly applied *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd*[286].

The appeal to the High Court

171 During argument in this Court, the appellant's counsel was asked what measures the respondent could and should have adopted to avoid the damage sustained. Mr Macfarlan QC responded by saying that the Master should have either postponed his departure from Burnie; put in at Adelaide or elsewhere, or turned back, or navigated a different course after 13 October. This last submission was the subject of a specific finding adverse to the appellant by the primary judge.

172 A number of questions were ventilated in this Court: what is a "peril of the sea"; is there a difference between the approach of the courts of North America and those of the United Kingdom and Australia to this question[287]; in respect of what matters do the respective onuses lie; assuming that a peril of the sea was a causative factor, what other causative factors (if any) were present and may have operated to defeat the exceptional defence of a peril of the sea? Whether the expression "perils of the sea" should be given the same meaning in the Hague Rules as in policies of marine insurance was also discussed.

173 Some reliance in the courts below, and here, was placed by the respondent on the fact that the ship's structure was damaged by the action of the sea during the

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285 *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1996) 39 NSWLR 683 at 697-698.

286 (1980) 147 CLR 142.

287 See also Richardson, *The Hague and Hague-Visby Rules*, 4th ed (1998), at 34.

crossing of the Great Australian Bight. Support for the evidentiary value of such a consequence is to be found in numerous cases, especially North American cases. Many of these are collected and summarised in *Benedict on Admiralty*[288].

174 I do not think that the structural damage that the ship sustained in this instance is persuasive. It is not entirely clear just how substantial that damage was. Nor is it entirely clear that the damage was not in part at least caused by the placement and movement of heavy containers during the voyage.

175 With respect to the authorities in the common law countries, Mason and Wilson JJ in *Gamlen* said this in a passage which was relied on by the Court of Appeal[289]:

> "There is a difference between the Anglo-Australian conception of 'perils of the sea' and the United States-Canadian conception."

176 Their Honours then said in the following passage, that the practical consequences of the result may be, in effect illusory, notwithstanding perceived differences in approach[290]:

> "What is important for present purposes is that [*Story on Bailments*'] description of 'perils of the sea' excludes losses which could be avoided by the carrier's skill and prudence. Despite the broader concept of 'perils of the sea' which prevailed in the United Kingdom and Australia a similar result was achieved in cases in which the loss or damage to the goods brought about by the action of the sea would not have occurred but for negligence on the part of the carrier or those for whom he was responsible. It was held, looking beyond the proximate cause, that the effective cause of loss was the carrier's negligence and that accordingly he could not take advantage of the 'perils of the sea' exception in the bill of lading[291]. The United States decisions turn on a narrower concept of 'perils of the sea' whereas the English decisions turn rather on the issue of causation, looking more to the requirement that the exception is for loss or damage which results from or arises from 'perils of

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288 *Benedict on Admiralty*, 7th ed (rev), vol 2A, § 153; *The Hyades* 124 F 58 (2nd Cir 1903); *The Newport News* 199 F 968 (SDNY 1912); *The Skipsea* 9 F 2d 887 (2nd Cir 1925); *The Edith* 10 F 2d 684 (2nd Cir 1926); *The Kofuku Maru* [1927] AMC 1803; *The Mauretania* 84 F 2d 408 (2nd Cir 1936); *The Naples Maru* 106 F 2d 32 (2nd Cir 1939); *The Tofevo* 222 F Supp 964 (SDNY 1963); *Chiswick Products v SS Stolt Avance* 387 F 2d 645 (5th Cir 1968).

289 (1980) 147 CLR 142 at 165.

290 (1980) 147 CLR 142 at 166.

291 *The "Xantho"* (1887) 12 App Cas 503 at 510 per Lord Herschell; *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 525 per Lord Watson.

the sea'. But in each case the decisions give effect to the language of the bills of lading that constituted the contract of carriage."

177 I am not, with respect, entirely satisfied that the practical consequences of the application of the different concepts as their Honours state them, would usually be, or are, the same. A consideration of the authorities in the respective jurisdictions tends to show that the courts have frequently used similar language in giving meaning to the expression, "perils of the sea".

178 A review of the authorities shows that the English courts too have often used language which would limit the meaning of the words "perils of the sea". Indeed, the appellant was able to refer to a number of English cases in which the courts appeared to adopt the narrower definition preferred fairly consistently in North America.

179 In *Gamlen*, Mason and Wilson JJ stressed the international nature and operation of the Rules, and referred to the desirability of a construction of them that recognises these factors[292]:

> "It has been recognized that a national court, in the interests of uniformity, should construe rules formulated by an international convention, especially rules formulated for the purpose of governing international transactions such as the carriage of goods by sea, 'in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation', to repeat the words of Lord Wilberforce in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*[293]; see also *Stag Line Ltd v Foscolo, Mango & Co Ltd*[294].
>
> It is important that we should adhere to this approach when we are interpreting rules which have been formulated for the purpose of regulating the rights and liabilities of parties to international mercantile transactions where great store is set upon certainty and uniformity of application.
>
> To say this is not to assert that we should exclude from our consideration of the rules settled by an international convention the meaning which has been consistently assigned by a national court to words and expressions commonly used in the documentation by which international trade is transacted, when the convention, in seeking to regulate the rights and

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292 (1980) 147 CLR 142 at 159-160.

293 [1978] AC 141 at 152.

294 [1932] AC 328 at 350.

> liabilities of parties to international transactions, uses those words and expressions. There is a high probability that when such words and expressions have been incorporated in a convention, they have been incorporated with knowledge of the meaning which has been given to them by national courts. Nor do the principles of interpretation of an international convention exclude recourse to the antecedent municipal law of nations for the purpose of elucidating the meaning and effect of the convention and the new rules which it introduces. It would be extremely difficult to interpret the new rules as if they existed in a vacuum without taking into account antecedent municipal law and the problems which its application generated. However, in resorting to antecedent municipal law we need to recollect that it is the language of the Hague Rules that we are expounding, the antecedent law providing a background for that exposition by enabling us more readily to gauge the sense and direction of the new rules which the convention introduces."

180 Reference to authority beyond the common law countries is not novel in marine matters[295] and I would, with respect, agree with their Honours' approach subject to one matter only. Whilst no chauvinistic view of the Rules should be taken, it has to be remembered that Australia is a cargo country: it is one of the largest exporters in the world of sea borne commodities such as coal, beef, sugar, iron ore and wheat. The construction and application of the Rules in other jurisdictions should therefore have relevance and persuasive value in this country, according to the extent that the Courts of other jurisdictions give due weight, in cases of uncertainty, to reciprocity of obligation and interest between shippers and carriers.

181 The appellant's principal submission in this Court was that the trial judge and the Court of Appeal fell into error in concluding that the seas and the weather that the *Bunga Seroja* met in the Great Australian Bight were perils of the sea. This conclusion, it was contended, was wrong because the weather was not only foreseeable but was also actually predicted to the Master of the ship. In support of this argument the appellant pointed to a passage in the judgment of Mason J (with whom Barwick CJ, Gibbs and Aickin JJ agreed) in *Skandia Insurance Co Ltd v Skoljarev*[296]:

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295 See for example Pollock CB in *Laveroni v Drury* (1852) 8 Ex 166 at 170-172 [155 ER 1304 at 1306-1307] where foreign texts were received and discussed, although not applied, in a case in which the keeping of cats by a ship's master was held to be no defence to a claim for damage to cargo by rats, although it may have been under continental laws.

296 (1979) 142 CLR 375 at 384.

> "Losses caused by the natural and inevitable action of the wind and waves are not due to perils of the sea because they are foreseen and expected."

182 That was an insurance case. The appellant here advanced the obviously attractive proposition that it would be commercially sensible for the phrase "perils of the sea" to be given the same meaning in the Hague Rules as in policies of marine insurance. However, as Mason J points out in *Skandia Insurance*, the *Marine Insurance Act* 1909 (Cth) actually defines "perils of the sea" as fortuitous accidents or casualties of the seas[297]. This probably accounts for the different expressions his Honour used in *Skandia Insurance* from those in *Gamlen*[298] although Stephen J in *Gamlen* regards it as settled that the phrase has the same meaning in both contexts[299].

183 The Australian *Marine Insurance Act* relevantly follows the English *Marine Insurance Act* 1906 (UK). The wording of the latter may similarly explain a different approach sometimes discernible in insurance cases from cases on the Hague Rules in England. The insurance rules and cases are discussed in *Halsbury's Laws of England*[300].

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297 (1979) 142 CLR 375 at 384.

298 See (1980) 147 CLR 142 at 166; cf (1979) 142 CLR 375 at 384.

299 (1980) 147 CLR 142 at 156.

300 *Halsbury's Laws of England*, 4th ed, vol 25, §151-152;

> "**Meaning of 'perils of the seas'.** The term 'perils of the seas', as used in a marine policy, does not include every casualty which may happen to the subject matter of the insurance on the sea; it must be a peril of or due to the sea. …
>
> Moreover, the purpose of a marine policy is to secure an indemnity against accidents which may happen, not against events which in the ordinary course of things must happen. …
>
> **Extraordinary violence of wind or waves not necessary**. Having regard to certain dicta to be found in some judgments and to the wording in the Marine Insurance Act 1906 [see s 30(2), Sch 1 r 7], it is important to notice that losses by perils of the seas are not confined to those occasioned by extraordinary violence of the wind or waves, but include all losses proximately occasioned by fortuitous action of the wind and waves".

184 The phrase "perils of the sea", and like phrases have strong roots in Judeo-Christian literature and religions[301]. It is possibly not too fanciful to assume that a dread of, and respect for the might and power of the sea, might have influenced the thinking of merchants, seamen and the Admiralty Courts.

185 The history of the development of the Hague Rules is recorded in *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* compiled by Professor Michael F Sturley. The author there writes of the respective different interests and their advocacy, by Britain as a major shipping power on the one hand, and, on the other, by the United States and the Dominions

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301 See Revelation 20:13, "And the sea gave up the dead which were in it; and death and hell delivered up the dead which were in them: and they were judged every man according to their works."

Paul's Second Letter to the Corinthians 11:26, "*In* journeyings often, *in* perils of waters, *in* perils of robbers, *in* perils by *mine own* countrymen, *in* perils by the heathen, *in* perils in the city, *in* perils in the wilderness, *in* perils in the sea, *in* perils among false brethren."

Isaiah 57:20, "But the wicked *are* like the troubled sea, when it cannot rest, whose waters cast up mire and dirt."

Psalm 107:23, "They that go down to the sea in ships, that do business in great waters."

Book of Common Prayer; Forms of Prayer to be Used at Sea, "preserve us from the dangers of the sea."

Hughes, *The Book of the Revelation: A Commentary*, (1990) at 222, "As the vision unfolded St John observed that ***the sea was no more***. The disappearance of the sea does not imply that it was regarded as evil in itself, but rather that its aspect was one of hostility to man. It held in its depths the bodies of unnumbered persons who had perished in its waters (hence the concept of the sea giving up its dead at the last judgment, 20:13). Its calms were deceptive. Its restless turbulence was a picture of the instability of the wicked (Is 57:20f). And because its expanses separated men and peoples from each other, its removal may symbolize the harmonious unification as well as the security of all mankind in the renewed creation."

Verse 3 of William Whiting's hymn, *Eternal Father Strong to Save* (1860):

> "O Holy Spirit, who didst brood
> Upon the waters dark and rude,
> And bid their angry tumult cease,
> And give for wild confusion peace:
> O hear us when we cry to thee
> For those in peril on the sea."

as major producers of, and exporters of commodities, in the formulation and development of the Rules[302]. The United States did not adopt the Rules until the passage of the *Carriage of Goods by Sea Act* in 1936[303].

186 The views of Scrutton LJ in 1923, who was a witness before the Joint Committee of the House of Lords and House of Commons chaired by the Master of the Rolls, Lord Sterndale, are of more than passing historical interest by reason of their forewarning of ambiguity and the likelihood of prolonged litigation. Professor Sturley summed up these, and the response to them in his History[304]:

> "Two of the witnesses raised serious objections of a legal nature. Lord Justice Scrutton, a judge of the Court of Appeal, the author of the authoritative treatise on charterparties and bills of lading, and the most respected commercial jurist of his generation, argued that the rules were unclear and would most likely lead to increased litigation. He supported these charges by giving 'some ten or fifteen cases in which it does not appear … that the Rules are clear as to what will happen if certain very ordinary events occur, or that the Rules are clear as to whether the existing law is maintained or is altered'. Frank Mackinnon, a barrister and Scrutton's co-author on later editions of his treatise, testified to the same effect. The committee apparently found this testimony troubling enough to recall Sir Norman Hill to respond to it, and he did so convincingly. In the end, the committee report, recognizing the force of some of the objections, noted that ambiguous drafting 'was to be expected when it represented compromises and concessions necessarily made in order to secure an agreement'. On balance, however, the objections did not 'outweigh the advantages to be gained by giving statutory force to an agreement concluded by those chiefly affected by the legislation'."

187 In *Effort Shipping Co Ltd v Linden Management SA*[305] Lord Steyn aptly described the compromise that emerged as the Hague Rules, as a "multilateral trade

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302 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990), vol 1 at 8-11.

303 49 Stat 1207.

304 Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1990), vol 1 at 14-15.

305 [1998] AC 605.

convention"[306]. His Lordship later spoke about the objectives of the parties to the Rules[307]:

> "This much we know about the broad objective of the Hague Rules: it was intended to reign in the unbridled freedom of contract of owners to impose terms which were 'so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility'[308]; it aimed to achieve this by a pragmatic compromise between interests of owners and shippers; and the Hague Rules were designed to achieve a part harmonisation of the diverse laws of trading nations at least in the areas which the convention covered."

188 His Lordship was also somewhat critical of the views of Lord Justice Scrutton, for his criticism of the Rules (after the event of their adoption) and for what his Lordship (and Lord Roskill) thought had turned out to be a false prophecy of endless litigation[309].

189 In 1887 in *The "Xantho"*[310], the House of Lords had to decide what meaning should be given at common law to the phrase "perils of the sea". Their Lordships

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306 [1998] AC 605 at 621.

307 [1998] AC 605 at 621.

308 See Lord Roskill's review of Sturley's, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, (1992) 108 *Law Quarterly Review* 501 at 502.

309 [1998] AC 605 at 624.

310 (1887) 12 App Cas 503.

decided that a peril of the sea is one that is unforeseen[311]. Lord Herschell said[312]:

> "There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure."

Some cases in the United Kingdom since the Hague Rules became operative

190 *The "Friso"*[313] was a case in which the crew had abandoned ship for fear that she was about to founder in bad, but not unusually bad weather. She remained afloat and was salvaged. In the ensuing litigation, Sheen J used language upon which the appellant relies here[314]:

> "Those particulars [of the defence and counterclaim] do not include an allegation that the weather conditions were exceptional or such as could not reasonably have been anticipated. …
>
> If the matter had stopped there I would have held that the facts pleaded do not amount to 'perils of the sea'."

191 In *The "Torenia"*[315] Hobhouse J rejected the plaintiffs' contention that the ship was unseaworthy, and the defendants' defence that the conditions encountered were perils of the sea, but still found for the carrier. This conclusion is probably explicable on the ground that appropriate diligence on the part of the carrier within Art III r 1(a) had been established. However his Lordship described a peril of the sea in terms which lend weight to the argument of the appellant here[316]:

> "The first of … [the defendants'] submissions was a particularly bold one since it sought to treat the fact that the vessel's shell plating fractured in weather conditions of a type which ought to have been, and no doubt were, well within the contemplation and expectation of the vessel's owners and crew as liable to be encountered at some stage during the voyage as a wholly

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311 (1887) 12 App Cas 503 at 509 per Lord Herschell, 514 per Lord Bramwell, 517 per Lord Macnaghten; see also *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518 at 524 per Lord Halsbury LC, 530 per Lord Herschell; cf 528 per Lord FitzGerald.

312 (1887) 12 App Cas 503 at 509.

313 [1980] 1 Lloyd's Rep 469.

314 [1980] 1 Lloyd's Rep 469 at 472.

315 [1983] 2 Lloyd's Rep 210.

316 [1983] 2 Lloyd's Rep 210 at 214-215.

neutral occurrence which carried with it no implication of the unfitness of the vessel for that voyage. Whereas in the days of wooden ships or in the days when the design of steel ships and their construction was less advanced or the forces they were liable to encounter were less well known and understood there may have been many instances where unexplained losses at sea gave rise to no inference of unseaworthiness, it will now be rare for such an inference not to arise in the absence of some overwhelming force of the sea or some occurrence affecting the vessel from outside."

192 *The "Tilia Gorthon"*[317] also provides some support for the appellant's case:

"[The] evidence as to the weather has not satisfied me that the conditions encountered were such as could not and should not have been contemplated by the shipowners."

193 *The "Coral"*[318] is a case in which the language of forseeability was used:

"The unsuitability of the ship does not provide the defendants with a defence. The weather encountered by *Coral* was such as ought to have been contemplated."

Canadian cases

194 There is a body of Canadian authority for the proposition that foreseeably bad weather conditions may not constitute a peril of the sea.

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317 [1985] 1 Lloyd's Rep 552 at 555 per Sheen J.

318 [1992] 2 Lloyd's Rep 158 at 162 per Sheen J.

195 In *Kruger Inc v Baltic Shipping Co*[319], Pinnard J said:

> "Therefore, it is not so much the severity of the storm that must be considered here as the fact that it could have been foreseen or guarded against as [a] probable incident of the intended voyage in the North Atlantic, at that time of the year."

196 In *Goodfellow Lumber Sales Ltd v Verreault*[320], Ritchie J (who delivered the judgment of the Court) said this:

> "I do not think that Lord Wright's judgment [in *Canada Rice Mills v Union Marine and General Insurance*[321]] affects the proposition that, in a bill of lading case, the damage done to the cargo must be shown to have occurred as a result of some peril 'which could not have been foreseen or guarded against as one of the probable incidents of the voyage' before the defence of 'perils of the sea' can be said to have been made out."

(*Canada Rice Mills* was a case of marine insurance).

United States cases

197 No case in which Art IV r 2(c) has been considered in the United States Supreme Court since the enactment of the Hague Rules by the *Carriage of Goods by Sea Act* was cited to us. However, cases in the Circuit Courts of Appeals were.

198 In *Thyssen Inc v S/S Eurounity*[322] in the United States Court of Appeals (Miner, Walker and Munson JJ), Second Circuit, the Court said:

> "A peril of the sea occurs when conditions 'are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be

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319 [1988] 1 FC 262 at 278-279. See also *Canadian National Steamships v Bayliss* [1937] SCR 261 at 263 per Duff CJ; *Grace Plastics v The Bernd Wesch II* [1971] FC 273; *Consolidated Mining and Smelting Co v Straits Towing Ltd* [1972] FC 804; *Bruck Mills Ltd v Black Sea Steamship Co* [1973] FC 387; *The Washington* [1976] 2 Lloyd's Rep 453; *Francosteel v Fednav* (1990) 37 FTR 184; *Canastrand Industries Ltd v The Lara S* [1993] 2 FC 553 and on appeal (1994) 176 NR 231.

320 [1971] 1 Lloyd's Rep 185 at 189.

321 [1941] AC 55 at 70.

322 21 F 3d 533 at 539 (2nd Cir 1994).

guarded against by the ordinary exertions of human skill and prudence.'[323] The determination of whether given conditions constitute a peril of the sea is wholly dependent on the facts of each case and is not amenable to a general standard[324]. Relevant factors that should guide a court's determination include wind strength, the nature and extent of damage to the ship and the extent of cross-seas[325]. Courts also must be cognizant that their ultimate conclusions should turn on whether the weather conditions were foreseeable, given the location and time of the year[326]. We review *de novo* the district court's conclusion that Licetus and the Vessel failed to prove that there was a peril of the sea[327].

The Vessel's peril of the sea defense is premised on the fact that the storm encountered on January 4, 1989 was unique because of the winds and cross-seas created by the rapid decrease in pressure incident to the storm. We cannot agree, however, that the weather conditions created by this storm constituted a peril of the sea. The Vessel's bridge log book, which the district court relied upon, recorded Beaufort Scale winds that did not exceed a level of 10-11 on January 4, 1989[328]. Expert testimony at trial indicated that there were significant wave heights of between 10 and 11.5 meters. We find nothing of an extraordinary nature, nor do we find irresistible force or overwhelming power in these conditions. Indeed, the testimony of the meteorological expert witnesses for both sides revealed that, for the most part, the weather conditions experienced by the Vessel were not unusual in the North Atlantic in the wintertime[329]. Dr Austin Dooley, the defendants'

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323 *J Gerber & Co v SS Sabine Howaldt* 437 F 2d 580 at 588 (2nd Cir 1971), quoting *The Giulia* 218 F 744 at 746 (2nd Cir 1914).

324 See *Duche v Thomas & John Brocklebank Ltd* 40 F 2d 418 at 420 (2nd Cir 1930); *Kane International Corporation v MV Hellenic Wave* 468 F Supp 1282 at 1283 (SDNY 1979), aff'd 614 F 2d 1287 at 1288, 1290 (2nd Cir 1979).

325 *J Gerber & Co v SS Sabine Howaldt* 437 F 2d 580 at 596 (2nd Cir 1971).

326 *Complaint of Tecomar SA* 765 F Supp 1150 at 1175 (SDNY 1991)

327 See *RT Jones Lumber Co v Roen SS Co* 270 F 2d 456 at 458 (2nd Cir 1959); *J Gerber & Co v SS Sabine Howaldt* 437 F 2d 580 at 594 (2nd Cir 1971).

328 The Beaufort Scale winds of 10-11 were listed only for one four-hour period. Otherwise, the log book indicates Beaufort Scale winds of Force 9 or 10 on January 4.

329 cf *Complaint of Tecomar SA* 765 F Supp 1150 at 1176 (SDNY 1991) (North Atlantic waters are widely regarded as a hostile environment during the winter months); *Kane*

(Footnote continues on next page)

expert, testified that Force 11 winds and significant wave heights of 10 to 11.5 meters were foreseeable. Similarly, the plaintiffs' expert, Robert Raguso, testified that the weather conditions encountered by the Vessel were foreseeable. Although the Vessel experienced strong cross-seas, perhaps stronger than usual, due to the decrease in pressure attributable to the ultra bomb of January 4, both experts indicated that cross-seas generally could have been expected[330]. Moreover, the district court also found that 'the [V]essel took waves over the hatch covers throughout the voyage, suffered strong rolling and was hove to in the winds of only 6, 7, 8 and 9 of the Beaufort Scale.' Given that severe storms occur on a regular basis in the North Atlantic and that the winds, waves and cross-seas experienced by the Vessel were to be expected, we conclude that the Vessel has not proven that it is entitled to exoneration based on a peril of the sea."

199 The view expressed in the *Eurounity* was recently approved in *Ferrara v A & V Fishing Inc*[331].

200 In *Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha*[332], Learned Hand J delivering the judgment of the Court, said that the sea, "was no more than was to be expected in those waters at that time". His Honour elsewhere described the storm as "one of unusual severity"[333] and noted that the storm was bad enough to crush a lifeboat "and a good deal of the steel superstructure was twisted, broken or carried away"[334].

201 Subsequently, in delivering the judgment of the Court in *Edmond Weil v American West African Line*[335] Learned Hand J wrote an opinion reversing a District Court's finding that winter winds in the Atlantic, blowing up to Force 10 on the Beaufort Scale were perils of the sea. His Honour's decision was that, "gales – indeed even

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International Corporation v MV Hellenic Wave 468 F Supp 1282 at 1285 (SDNY 1979) (same).

330 The district court also found that the Vessel "sustained some damage to deck equipment resulting from the intensity of the wind and the waves." However, this statement does not indicate that the damage was extraordinary.

331 99 F 3d 449 (1st Cir 1996).

332 106 F 2d 32 (2nd Cir 1939).

333 106 F 2d 32 at 34 (2nd Cir 1939).

334 106 F 2d 32 at 34 (2nd Cir 1939).

335 147 F 2d 363 (2nd Cir 1945).

'whole gales'[336] – are to be expected in such waters at such a season"[337]. In other cases, his Honour concurred in opinions that relied heavily on the fact that the storms under consideration in those cases were to be expected[338].

202 In the Fourth Circuit (covering the maritime south-east coast of the United States) in *The Demosthenes*[339] the Court of Appeals held:

> "The excepted 'peril of the sea' does not come into play merely upon proof that the vessel encountered heavy seas and high winds, if the weather encountered might reasonably have been anticipated and could have been withstood by a seaworthy vessel."

203 In the Fifth Circuit, in *Waterman Steamship Corp v United States Smelting, Refining and Mining Co*[340] the Court of Appeals adopted the Second Circuit's definition in *The Giulia*[341] and held that if the weather was foreseeable there could be no peril of the sea.

204 In *RT Jones Lumber Co v Roen Steamship Co*[342] the Second Circuit Court

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336 Force 10 on the Beaufort Scale.

337 147 F 2d 363 at 366 (2nd Cir 1945); see also his Honour's opinion to the same effect in *Franklin Fire Insurance Co v Royal Mail Steam Packet Co* 58 F 2d 175 at 176 (2nd Cir 1932) where the weather was described as "at no time greater than is usual at that season in the Atlantic" and in *Societa Anonima Cantiero Olivo v Federal Insurance Co* 62 F 2d 769 at 771 (2nd Cir 1933).

338 *The Skipsea* 9 F 2d 887 at 889 (2nd Cir 1925); *The Rosalie Hull* 4 F 2d 985 at 987 (2nd Cir 1925).

339 189 F 2d 488 at 491 (4th Cir 1951).

340 155 F 2d 687 at 692 (5th Cir 1946).

341 218 F 744 (2nd Cir 1914).

342 270 F 2d 456 at 458 (2nd Cir 1959).

of Appeals was content to rely on what had been said in *The Giulia*[343]:

> "Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."

205 In *Taisho Marine and Fire Insurance v M/V Sea-Land Endurance*[344] the Ninth Circuit Court of Appeals acknowledged some differences in the language variously used by the courts:

> "While 'perils of the sea' is a term of art not uniformly defined, the generally accepted definition is 'a fortuitous action of the elements at sea, of such force as to overcome the strength of a well-found ship or the usual precautions of good seamanship.'[345] Case law fails to set out a bright line to determine whether cargo was lost by a peril of the sea. Rather, the cases indicate that the validity of the statutory defense depends on the nature and cause of the loss under the particular facts of a case".

206 In *States Steamship v United States*[346] the Ninth Circuit Court of Appeals concluded that the storm in which the ship there sank, was not a peril of the sea. The decision was based on testimony that storms of that magnitude were neither unusual nor unexpected in those waters at that time of year.

Statements in the texts

207 The editors of *Scrutton on Charterparties and Bills of Lading*[347] cite the decision of the Supreme Court of Canada in *Goodfellow* together with English authorities, including the common law case of *The "Xantho"*, as authority for the proposition

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343 218 F 744 at 746 (2nd Cir 1914).

344 815 F 2d 1270 at 1272 (9th Cir 1987).

345 Gilmore & Black, *The Law of Admiralty*, 2nd ed (1975) § 3-32 at 162; *Philippine Sugar Centrals Agency v Kokusai Kisen Kabushiki Kaisha* 106 F 2d 32 at 34-35 (2nd Cir 1939); *RT Jones Lumber Co v Roen Steamship Co* 213 F 2d 370 at 373 (7th Cir 1954); *States Steamship v United States* 259 F 2d 458 at 460-461 (9th Cir 1958), *cert. denied*, 358 US 933 (1959);

346 259 F 2d 458 at 461-462 (9th Cir 1958).

347 Boyd et al, *Scrutton on Charterparties and Bills of Lading*, 20th ed (1996) at 225 n 40.

that the term "perils of the sea" whether in policies of insurance or bills of lading or charterparties, means[348]:

> "any damage to the goods carried caused by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure".

208 In *Marine Cargo Claims*[349], Professor Tetley states:

> "Whether or not a storm is a peril depends on the intensity of the storm and the weather conditions which could normally be expected in that geographic area, at that time of year.
>
> … a peril of the sea may be defined as some catastrophic force or event that would not be expected in the area of the voyage, at that time of the year and that could not be reasonably guarded against".

209 This definition was cited with approval by Reed J in the Canadian case of *Canastrand Industries v The Lara S*[350]. Her Honour's decision was affirmed on appeal, although the citation of Tetley was not referred to in the appellate court.

210 *Payne and Ivamy's*, *Carriage of Goods by Sea*[351] refers to *Goodfellow* with approval as explanatory of English law.

211 The authorities and texts cited to the Court (apart from *Gamlen*) do provide a formidable body of authority to support the appellant's case, and it is not a sufficient answer to say that the cases and the statements of principle extracted from them depend simply upon the facts of those cases. There is too much similarity of language for that.

212 On the other side, the respondent was not able to point to as large a body of authority to further its case. We were referred to *The "Hellenic Dolphin"*[352] and *The "Theodegmon"*[353] which, although not directly on point, do support the

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348 Boyd et al, *Scrutton on Charterparties and Bills of Lading*, 20th ed (1996) at 225.

349 Tetley, *Marine Cargo Claims*, 3rd ed (1988) at 431-432.

350 [1993] 2 FC 553 at 575.

351 13th ed (1989) at 187 n 7.

352 [1978] 2 Lloyd's Rep 336.

353 [1990] 1 Lloyd's Rep 52.

respondent's contention that in the absence of proof of appropriate diligence, the carrier will in general, not be liable. One case which offers some comfort to the respondent is *Keystone Transports Ltd v Dominion Steel & Coal Corporation Ltd*[354]. The carriage there was governed by the *Water Carriage of Goods Act* 1936 (Can) which adopted the Hague Rules. The Supreme Court of Canada (Rinfret, Kerwin, Hudson and Taschereau JJ, Bond ad hoc dissenting) took the view that a loss may be attributable to a peril of the sea by the violent action of the wind and waves if the damage could not be attributed to someone's negligence. Taschereau J, after a review of the authorities said[355]:

> "From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence."

213 If the matter rested there, the respondent might be hard pressed to hold its judgment.

214 In general however, the judgments in the cases and the texts do not attempt detailed analyses of the Rules. In *Gamlen*, such an exercise was partially undertaken by Mason and Wilson JJ, but only to the extent necessary on the facts of that case[356]. An analysis of this kind has also been undertaken by the House of Lords in the recent case of *Effort Shipping*, but again, as was necessary on the facts of that case. There, their Lordships had to consider the operation and effect of Art IV r 6, and, in doing so, turned their minds to the relationship that this Rule has to other Rules and the larger context in which that Rule appeared[357].

215 In my opinion, the correct approach is to look at the Rules and to seek to give them meaning as a coherent whole in the same way as Pollock CB construed the Bill of Lading in *Laveroni v Drury*[358].

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354 [1942] SCR 495.

355 [1942] SCR 495 at 505.

356 (1980) 147 CLR 142 at 160-165.

357 [1998] AC 605 at 613-615 per Lord Lloyd, 620-625 per Lord Steyn, 626-627 per Lord Cooke of Thorndon.

358 (1852) 8 Ex 165 [155 ER 1304]. See Pollock CB at 171, 1306, "But, however eminent their [foreign texts and cases] authority, and however worthy of attention and consideration their works are, we cannot act upon them in contradiction to the

(Footnote continues on next page)

The application of the Hague Rules to this case

216 Article I of the Rules contains various definitions.

217 Article II, which is headed "Risks", is in this form:

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

218 The introductory words, "Subject to the provisions of Article VI", are important but so too is the subsequent subjection of what might otherwise appear to be an absolute obligation (absent a different agreement) of that obligation to the immunities set forth.

219 Article III then prescribes the specific duties of a carrier:

> "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) properly man, equip and supply the ship; and
>
> (c) make the holds, refrigerating and cool chambers, 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 IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.
>
> 3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading …
>
> 4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described …

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plain and clear meaning of the words of the bill of lading which is a contract between the parties."

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars …

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods … such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading …

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading …

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connexion with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

220 Again, one provision, r 2, is stated to be subject to another set of provisions, Art IV which provides:

"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 secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers 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 section.

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

(a) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(b) fire, unless caused by the actual fault or privity of the carrier;

(c) perils, dangers and accidents of the sea or other navigable waters;

(d) act of God;

(e) act of war;

(f) act of public enemies;

(g) arrest or restraint of princes, rulers or people, or seizure under legal process;

(h) quarantine restrictions;

(i) act or omission of the shipper or owner of the goods, his agent or representative;

(j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;

(k) riots and civil commotions;

(l) saving or attempting to save life or property at sea;

(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;

(n) insufficiency of packing;

(o) insufficiency or inadequacy of marks;

(p) latent defects not discoverable by due diligence;

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

4. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding One hundred pounds 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 connexion with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any."

221 In my opinion, a detailed analysis of the Rules leads to a different result from what might be reached on the basis of the statements made in many of the cases cited and does, with respect, form a sound basis for the observations made by Mason and Wilson JJ in *Gamlen*. It is immediately obvious that the Rules are intended to confer a very wide range of immunities upon carriers. Rule 1 strongly conveys the notion that liability should be sheeted home to the carrier only in respect of a want of appropriate care (due diligence) on its part. In some respects therefore, the specific instances of immunities set out in r 2, might be regarded as superfluous. Each of items 2(d), (e), (f), (g), (h), (j), (k), (l), (m), (n) and (p) in all or most cases would involve no fault on the part of the carrier. The notion that the carrier is not

to be liable without actual fault is reinforced by (q). It seems to be going a long way, as (a) does, to exculpate the carrier from vicarious liability for its servants or agents in managing and navigating the ship. However the antidote may be that the carrier does have a duty "to properly man … the ship" pursuant to Art III r 1(b) and by doing that should be regarded as having fulfilled its obligations in that regard to the shipper.

222 Art IV r 1 expressly imposes an onus (of proving due diligence) on the carrier when loss or damage has resulted from unseaworthiness. However, r 2 (except for r 2(q)) which operates to exonerate the carrier is silent as to who bears the onus, notwithstanding that most of the excepting events would be ones peculiarly within the knowledge of the carrier.

223 Rule 3, which provides for an exemption of liability in favour of the shipper for non-negligent damage to the ship or the carrier, also makes no reference to the burden of proof.

224 In *Effort Shipping*, Lord Steyn speaks of the difficulties occasioned by the language used, and the futility of reference, in the search for the meaning of the Rules, to the history of their formulation and contemporaneous commentary on them[359]. In the end, the words have to be construed in their context and according to their ordinary language without resort to those other materials and against the background of the cases that have been decided since their passage into law in the various jurisdictions.

225 As I have already said, there is authority for, and much to commend, the proposition that the expression "perils of the sea" should be confined to unforeseen or exceptional events, or overwhelming force of the sea: in short, events that could not be reasonably guarded against. The fact that advances in shipbuilding technology, communications, and navigational aids provide the means of significantly reducing exposure to the perils of the sea however defined, make such a proposition in modern times more attractive still[360]. Similarly, more reliable methods of assessing the force of the elements are now becoming available. The Beaufort Scale derives from the necessarily subjective observations of Rear-Admiral Sir Francis Beaufort over his long career at sea for 44 years before the first recorded use in an official log, by Fitzroy and Darwin aboard the *Beagle* on 22 December 1831, of the wind force scale which bears his name[361].

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359 [1998] AC 605 at 622-625.

360 cf the observations of Hobhouse J in *The "Torenia"* [1983] 2 Lloyd's Rep 210 at 215.

361 Friendly, *Beaufort of the Admiralty: The Life of Sir Francis Beaufort 1774-1857*, (1977) at 142-147. See also Crowder, *The Wonders of the Weather*, AGPS (1995)

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226 However the thrust of the relevant Rules taken as a whole is, in my opinion clear. They are designed principally to exonerate shippers and more particularly, carriers who have not been guilty of want of due diligence or fault. Accordingly, in cases in which the carrier has acted as expressly required by the Rules, and is not guilty of negligence, and, events at sea can be shown to be the cause of the loss and damage, the carrier should be entitled to immunity.

227 This interpretation does not however resolve the problems of proof and onuses that may confront the parties and judges in shipping cases. For example, it is possible to conceive of cases in which neither party can be shown, as a matter of proof, to have been negligent or wanting in diligence, and yet damage is caused to cargo[362]. Add to that scenario an absence of any evidence of such conditions at sea as would cause the damage. Does it therefore necessarily follow that the damage must have been caused by [non specific] perils of the sea? I am inclined to think not: however I express no concluded view on this matter as that is not this case.

228 The conclusion that I have independently reached, does accord with the conclusion and statements of principle of Mason and Wilson JJ in *Gamlen*[363] which, is a recent, considered decision in this Court.

229 I would also adopt with respect their Honours' important pronouncement, which should go some way towards resolving difficulties of proof and onuses, as the evidentiary onus in a case shifts, that the carrier's entitlement to rely upon Art IV r 2(c)[364] will require it to be assessed by reference to all of the circumstances of

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at 84: The Scale was devised having regard to the effect of various conditions at sea upon a "fully rigged man-of-war" of the early nineteenth century; Garbett, "Admiral Sir Francis Beaufort and the Beaufort Wind Scale" (1926) 52 *Quarterly Journal of the Royal Meteorological Society* 161; National Weather Service Chicago, *The Beaufort Scale*, http://taiga.geog.niu.edu/nwslot/beaufort.html.

362 cf *Muddle v Stride* (1840) 9 Car & P 380 at 382-383 [173 ER 877 at 879], in which Lord Denman CJ summed up to a jury upon the basis that in such a case at common law, a plaintiff shipper should fail:

> "If, on the whole, in your opinion, it is left in doubt what the cause of the damage was, then the defendants will be entitled to your verdict; because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be attributable to the one cause as to the other, then also the defendants will not be liable for negligence."

363 (1980) 147 CLR 142 at 166.

364 And it follows, the other items in Art IV r 2.

the case[365]. So too, the form and order of pleading referred to by Lord Esher in *The Glendarroch*[366] and endorsed by Mason and Wilson JJ[367] throws light upon the correct procedure and the carrying of onuses in a case of this kind.

230 There is a further question: whether, to obtain the benefit of an indemnity under Art III, the excepting cause must be the exclusive cause. If it were necessary to decide that matter here, I would be strongly inclined to adopt the reasoning of Mason and Wilson JJ[368] in *Gamlen*, that to obtain the benefit of the perils of the sea, those perils must be the exclusive cause of the loss or damage. This view better accords, I think, with the justice of most situations, and might go some way towards restoring the balance of the Rules, tilted as they somewhat unfairly are, in favour of carriers in these times of immensely improved marine technology and communications. In practice there will be probably few situations in which a peril of the sea will be an exclusive cause of loss or damage.

231 In this case, on the findings of the trial judge, his Honour and the Court of Appeal correctly held for the respondent.

232 I would therefore dismiss the appeal with costs.

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365 (1980) 147 CLR 142 at 165.

366 [1894] P 226.

367 (1980) 147 CLR 142 at 168.

368 (1980) 147 CLR 142 at 163 and 164; see also 156 per Stephen J.