



IN THE COURT OF APPEAL

AT NAIROBI

Coram: Hancox JA, Chesoni & Nyarangi Ag JJA

CIVIL APPEAL NO. 16 OF 1982

BETWEEN

CARL RONNING.....APPELLANT

AND

SOCIETE NAVALE CHARGEURS DELMAS VIELJEUX

(THE FRANCOIS VIELJEUX).....RESPONDENT

(Appeal from the High Court at Mombasa, Kneller J)

JUDGMENT

On February 14, 1979 the vessel *Francois Vieljeux* bound for Rotterdam Hamburg and Bremen in West Germany, and having sailed from Mombasa in this country on January 26, encountered severe weather conditions and sank off the Coast of Portugal, some 30 miles from the port of Vigo. Twenty-three people were drowned in the disaster and the cargo was a total loss. Only the Master of the ship, the chief officer, and three others, survived. They were French, as were all the crew, and the ship was registered in France and sailed under the French flag.

An inquiry was set up by the French Ministry of Merchant Marine to investigate the conduct of the Master. This was in the nature of a criminal proceeding and, in due course, the Master was found not guilty of that which may be said to be criminal negligence. The result would not, however, be conclusive in subsequent civil proceedings in the French Courts and the Master could still be found to have committed "Imprudence" amounting to a "*Faute De Nautique*", which may be compendiously described as bad seamanship.

Some of the allegations made against the Master as amounting to bad seamanship relate to his handling of the vessel during and as a result of the weather conditions she encountered on the night of February 13 and 14, in the course of which a list of 7 degrees to starboard developed. It is said on behalf of the plaintiff in the action, who is the appellant in this interlocutory appeal, that this occurred because the consignment of 500 tons of copper loaded before the ship docked in Mombasa had become loose due to a consignment of zinc in the same hold, which had been unloaded, not being replaced, as expected, by a consignment of coffee. Thus the consignment of copper was enabled to shift in the hold.

On the morning of February 14 the list increased first to 8 1/2 degrees and then to 22 degrees probably

causing, in turn, other cargo to slide to starboard with, no doubt, a cumulative effect. Attempts to correct this by the transfer of water ballast were unsuccessful and the Master headed into the weather, that is, away from the Port of Vigo, at about 10.00 am, though he failed to reduce the speed of the vessel. At midday the ship made a half turn to port, that is towards Vigo, but failed to gain the shelter of that port because the starboard watertight door astern was smashed by the heavy waves, which achieved that which was described in one of the affidavits as a 'pyramidal' effect. The water rushed in and consequently the list increased to 35 or 40 degrees, with the result that the vessel capsized and sank at about 12.45 hours.

The criticisms which are still leveled against the Masters' conduct are, shortly, that he, or his crew under his direction, failed to survey the cargo holds after the 7 degree list became apparent; that he failed to turn towards Vigo as a port of shelter instead of into the weather at 10.00 am; that he failed to reduce speed when he turned into the weather (which in any event was wrong); that when he did eventually turn towards Vigo it was too late; and that he did so by turning to port instead of to starboard, thus presenting the low side of the ship to the heavy seas.

Whether these criticisms will, in the event, prove justified will no doubt be ascertained, *inter alia*, in the action which the appellant had (in common with fourteen other cargo owners) brought in Mombasa against the respondents, as carriers, for failing to deliver 1400 bags of Kenya Coffee, Grade AB, consigned on the *Francois Vieljeux* to Bremen under Bill of Lading number 21, and in the other actions which have been filed in France. This was issued by the Svedel Line who are named as the second respondents, and who, as I understand the position, are owned as to half by the first respondents (who are also the registered owners of the vessel) and as to half by Salenrederierna of Stockholm in Sweden, but is managed by the first respondent (SNCDV). Svedel is the name by which the second respondents are compendiously known and under which they trade. SNCDV is a French company and both it and Svedel have their place of business, and indeed carry on business, in Paris.

Before this action, in which the appellant claims 308,280 US Dollars as the invoice value of the consignment coffee, and to which Svedel entered an appearance under protest, could come on for hearing the plaintiff was met by an application for a stay of the proceedings on the grounds, set out in the affidavit of the then solicitor to SNCDV, Mr Sheppard, in support, that the claim should be decided in the French Courts, because of the terms of clause 3 of the Bill of Lading which states:

"Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein."

(It is of course the last phrase upon which Mr Pollock, on behalf of the appellant, relies because he says that there is provision elsewhere in the Bill of Lading by reason of the paramount clause and the consequent bringing into operation of article III rule 8 of the Hague Rules) one matter to which Mr Sheppard referred was that the appellant had itself commenced another action for 146, 580 US Dollars in the French Courts for the loss of the goods comprised in Bill of Lading Number 8 of January 24, 1979, said to have been loaded in Tanzania for shipment in the same vessel. Other matters advanced in support of the application were, even if it be accepted (which as I understand Mr Hunter who appears for the respondents in this appeal, it is not) that there was bad stowage and that this was a causative factor of the disaster, that the witnesses will all be in France, that a trial in Kenya would involve extensive translations of oral and documentary evidence, that the vessel was French with a French flag; that the carriers' principal place of business is in France, where one inquiry has already been held, and that geographically, France is closer than Kenya to Germany, which is where the consignees are.

Matters relied on by the appellant in support of its contention that the trial should take place in Kenya were that the alleged faults on the part of the Master (which I have summarized above) inevitably pointed to one initial sole cause, namely improper stowage of the cargo at Mombasa, without which all the other misfortunes that befell the ship on the night proceeding and the day of the disaster, even if due to the Master's fault, would not have happened. Since this premise was unlikely to be challenged, the necessity for factual evidence would be eliminated and it would establish unseaworthiness under the law of Kenya. Thus, the plaintiffs' chances of success were said to be good if the trial was held in Kenya, because of the carriers' liability under article III rule I of the schedule to the Kenya Act, that is to say under the Hague

Rules, to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage. Under French law, however, the alleged improper storage was unlikely to amount to unseaworthiness as opposed to “*faute nautique*”, and therefore the interpretation of the Hague Convention Rules by the French courts might well absolve the respondents from liability. Moreover the mode of procedure before trial in France inhibited free and frank disclosure of documents and other matters by each side. Consequently the trial of the action in France would be gravely prejudicial to the appellant. Finally, apart from the nationality of the vessel and of its Master and crew, the contract could not otherwise be said to have any substantial connection with France.

These matters, though expanded and added to by the appellant’s counsel in argument before the judge, were to a large extent set out in the affidavit of Mr Inamdar, his junior, dated October 23, 1980. Mr Sheppard frankly stated in his initial affidavit that there were differences between the emphasis placed on, and the conclusions drawn from, the carriers’ (in this case the shipowners’) stated obligations to exercise due diligence to make the ship seaworthy under article III of the Hague Rules under French law, on the one hand, and under certain other systems of law, including English law, on the other hand. But it is right at this stage to say that further affidavits were filed by Maitre Villeneau, the legal representative of SNCDV and Svedel in France, and by Mr Byron, who is Mr Sheppard’s successor as solicitor to SNCDV, refuting Mr Inamdar’s contentions, and, in particular, his views as to the application of the Hague Rules and the constructions, and, in particular, his views as to the application of the Hague Rules and the construction which the French Court would put upon clauses 2 (the Paramount Clause), and 3 (the Jurisdiction Clause) of the Bill of Lading. Shortly, therefore, the result of the action, when it comes to be tried, may well hinge on the nature and scope of the ‘carriers’ duty to make the ship seaworthy under article III para 1 (a) of the Hague Rules, which are applied to this contract by clause 2 of Bill of Lading. This states:

“The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading dated Brussels the 25th August, 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said convention shall apply.”

After a hearing occupying 5 days in which leading counsel addressed the judge at length and cited many authorities, the chamber summons which (so it appears) was by consent treated as a motion and heard in open court, was decided by Kneller J sitting at Mombasa in favour of the respondents and he granted the stay sought with costs against the appellant. In reaching his conclusion Kneller J, *inter alia*, listed the issues with which the trial would be concerned and extensively considered the terms of the bill of lading and of the Hague Rules which are scheduled to our Carriage of Goods by Sea Act (cap 392). He then set out the considerations, which he took from *The Eleftheria* [1969] Lloyd’s Reports at p 242, to which he would pay particular regard in deciding the issue of the forum, as follows:

“a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of this on the convenience and expense of trial in France or Kenya?

b) Whether the law of the French Court applies, and if so, whether it differs from Kenyan Law in any material respect:

c) With what country either party is connected and how closely?

d) Whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantage?

e) Whether the plaintiff would be prejudiced by having to sue in the French Court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in Kenya; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial?”

These principles were set out in relation to the arbitration clause in *The Regal Scout (No 1)* [1983] (*infra*) about which much argument development during the closing stages of the appeal.

As is apparent from the opening words of clause 2 of the Bill of Lading, the countries which were parties to the Brussels Convention of 1924 adopted a unified set of rules which would thenceforth govern the carriage of goods by sea from and to ports within the countries concerned and from the ports of one country to the ports of another country. Accordingly the provisions of the English Carriage of Goods by Sea Act 1924, apart from the transposition of the section relating to the short title of the Act, and the terms of the section relating to the carriage of dangerous goods, are in virtually identical terms to the Kenya Act. Equally the rules scheduled to those Acts are identical except for the transposition of the definition relating to the carriage of goods, and of the contents of article IX of the Hague Rules (which provides that monetary units are to be taken as gold value) – to article 1 rule 2.

The English Act was replaced by the Carriage of Goods by Sea Act 1971, which came into force in July 1977, and which contained certain modification to the Hague Rules as a result of the Brussels Protocol of 1968. These became known as the Hague-Visby Rules. They are the subject of a paper presented at a seminar in 1977 by Mr Anthony Diamond, QC, in which he traces their evolution and practical objective. Amongst other amendments, such as the addition of article IV BIS, the new article IV paragraph 5(a) substantially increased the upward limit of liability for loss or damage to goods shipped (unless so declared before shipment) from the existing Sterling Pounds 100 per package or unit to the equivalent for ten thousand francs per package or unit, or thirty francs per kilo of gross weight of the goods, whichever should be the higher. It was this which led the House of Lords recently to consider the jurisdictional point in *The Hollandia* [1983] Lloyd’s Reports p 1 and [1982] 3 All ER 1141, (also known as *The Morviken*), because at the time of the issue of the bill of lading in that case the Netherlands (the law of which was the law applicable under clause 2 thereof) had not ratified the 1968 Brussels protocol, and its courts would therefore have applied the lower maximum under the 1924 Rules: whereas under English law the higher maximum was applicable. Consequently to apply the law of the Netherlands would bring Article III rule 8 into operation. That rule states :

“8. (1) 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 connection 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.”

It is incorporated in the Kenya Schedule as rule 8(1).

I think I may fairly summarise the substance of Mr Pollock’s proposition as being that this action, if tried before the French courts, will almost assuredly fail. Consequently that would produce a diminution of the liability of the carrier (because of the view the French courts will take that unseaworthiness does not include bad stowage at the beginning of the relevant voyage) and clause 3 of this Bill of Lading would thus be caught by para 8(1) of article III of our Schedule. This is so because the effect of the clause, if not so caught, would be to bring into operation that diminishing effect, which would not be so under Kenya law. In other words the courts cannot allow the parties to get away from legislation that a Sovereign legislature has passed, namely the Carriage of Goods By Sea Act (which by section 2 provides that the Hague Rules shall have effect), by substituting another system of law under which the obligations which the sovereign Legislature has imposed on the carrier are diminished, because to do so would invoke article III paragraph 8(1), which has also been adopted by the Sovereign Legislature.

Mr Pollock said that even if bad stowage occurring at the commencement of the relevant voyage, that is to say the voyage from Mombasa to Bremen, should turn out to be only one of the causes of the loss of the ship, not even necessarily the dominant cause, then the carriers would be liable under Kenyan law for

the loss of the cargo unless they could prove that they exercised due diligence to ensure that the ship was seaworthy before and at the beginning of the voyage. It matters not which of the persons involved in the loading were at fault, whether the chief officer, the supervisors or the stevedores at the port, because their fault would be the ultimate responsibility of the carriers as owners of the ship. Furthermore, if several causes combined to cause the loss of the ship, then the owners would be liable unless they were exempted from liability for all of those causes. There is authority for this in the judgment of Hobhouse J in *The Torenia* (infra) at p 218 which is referred to towards the end of the judgment.

Mr Pollock continued by submitting that the stowage of the cargo at Mombasa is likely to have been the initiating cause of the disaster, in the sense that all the other causes, whether due to the negligence of the Master or not, would not have occurred without it, but nonetheless, Mr Pollock says, this initial cause could still properly be regarded as one of several causes for which the respondents will, in due course, be held liable, even if it occurred first in point of time. Indeed the whole of the appellant's argument before this court is on the basis that the manner of stowage at Mombasa constituted unseaworthiness and led to the shifting of the consignment of copper, which was the direct cause of the initial list.

If this is right, and if it is accepted that it is the policy of the Kenya Legislature, and of the Kenya courts, that the Hague Rules should apply, which is self evident from their inclusion as a schedule to the Act and from the terms of section 4 thereof, then Mr Pollock says, it follows that any cutting down of the rights of the shipper as contained in that schedule, that is to say as contained in the Hague Rules, must result in the striking down *in limine* of the clause in question, in this case the jurisdiction clause. The Hague Rules are thus compulsorily applicable. But the same position is achieved, he says by a parallel approach, if regard is paid only to the terms of the Bill of Lading which, by the paramount clause (clause 2) applies the Hague Rules to the contract. In either case the result is that clauses 2 and 3 are in conflict, and, because of article III par 8, clause 3 must be struck down. In his reply, Mr Pollock posed four, or, as I think, five alternatives as to the way in which he had to show that there would be a diminution of the appellant's rights on the application of the clause. He submitted that the course most consistent with achieving justice to the shippers was to adopt the standard of being satisfied that there was a genuine and arguable case that their rights would be diminished. It certainly appears from the *Indussa Case* (infra) that the US Courts, would regard any foreign jurisdiction Clause as leading to a potential lessening of the shippers' rights.

The injustice of any course other than the one he suggested was manifest, Mr Pollock said, because if anything more than a genuine and arguable case is required then it might result in the claim as to bad stowage never being tried at all (thus loading the dice against the cargo owner), whereas a trial in Mombasa would result in no injustice to the respondents, since the issue could still be tried on evidence and, if the evidence so demonstrated, resolved in their favour, so that there could be no possible prejudice to them.

Mr Hunter said that this was not so, and that alternative 3, that is to say a *prima facie* case (which Mr Pollock had taken together with the genuine and arguable case approach) with the probability of the success of the allegation that the shippers' rights would be lessened by the application of clause 3, had to be shown, rather on the lines of the decision of this court's predecessor in *Abel Salim v Okongo* [1976] KLR p 42, in relation to the standard required to be shown for the grant of temporary injunction. In support he cited *The I Congreso Del Partido* [1977] 1 Lloyd's Reports 536, which was an action by cargo owners *in rem* against the Congreso in respect of cargo shipped on two other ships, one said to be owned by a Cuban State enterprise and one to be the subject of a demise charter to it, the voyages in respect of which were diverted by the Government of Cuba because of a revolution in Chile, (the country of destination). The evidence was wholly on affidavit, and Robert Goff J rejected the contention of the plaintiffs that the three motions to set aside the writs should be tried on oral evidence with cross-examination of witnesses, (Mr Pollock's fourth (or fifth) alternative). He held that the question of jurisdiction which had been raised could only be tried on affidavit evidence at that stage of the action. This decision of Robert Goff J was the subject of much divergence of judicial opinion on appeal to the Court of Appeal, and to the House of Lords (1981) 2 Lloyd's Law Reports, 367, in which the applicability of the restrictive doctrine of state immunity, (that is to say that it does not confer immunity in respect of trading acts as opposed to those *jure imperii*, whether the action is *in rem* or *in personam*) was recognized (as before Robert Goff J) but Lord Denning MR and all the members of the House of Lords, disagreed

with the trial judge as regards the character of the acts of the Government of Cuba in relation to the first ship and most of them did so with regard to the second ship. None of the subsequent judgments, however, affected the principle regarding affidavit evidence to which I have just adverted.

I tend to agree with Mr Hunter that the terms “*prima facie*” case, and “genuine and arguable” case do not necessarily mean the same thing, for as Hobhouse J said in *The Torenia* [1983] 2 Lloyd’s Reports, 210, at p 216, in using another term, namely a sustainable cause of action, the words “*prima facie*” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case. I would certainly think that it would be in the appellant’s interest to adopt the genuine and arguable case standard, rather than one of a *prima facie* case, the former being, in my opinion, the lesser standard of the two.

Before inviting us to consider the United States Legislation relating to the carriage of goods by sea, or COGSA as it is almost universally called, which was enacted in 1936 and is now contained in a separate chapter, of the United States Code, Mr Pollock dealt extensively with the Privy Council decision in *Vita Food Products Inc v Unus Shipping Co (in liquidation) Ltd* [1939] 1 All ER 513. That decision disapproved the earlier Court of Appeal decision in *The Torni* [1932] ER 374, where the corresponding Palestine COGSA provision was held to apply. The Palestine provision contained in the Government of Palestine Carriage of Goods by Sea Ordinance 1926, section 4, however, went further than the English section 3, and our section 4, and provided that the contract (ie the Bill of Lading) should be deemed to have effect subject to the Hague Rules notwithstanding the omission (as had occurred in that case) of the express statement to which I have just referred. On a preliminary question as to whether the Palestine Ordinance applied, so as to render certain exceptions in the bills of lading void under article III rule 8 of the Hague Rules, both Langton J and the Court of Appeal resolved the issue in the affirmative, in favour of the Cargo owners, notwithstanding an express provision in the bills of lading that they were to be construed in accordance with English Law.

Mr Hunter, on behalf of the respondents, cited certain passages from the judgments of Scrutton and Greer LJ in *The Torni* (which was disapproved in the *Vita Food Products* case), the former of which at least was adopted by Lord Denning in the English Court of Appeal in *The Morviken* [1982] 1 Lloyd’s Reports 325 (by which name I will henceforth refer to that case). The result of the court rejecting the choice of law clause, in *The Torni* was that it upheld the applicability of the Hague Rules (because the Palestine Ordinance contained the deeming provision), Scrutton LJ saying that to hold otherwise, so that in effect the Hague Rules would be struck out, would be to open the door wide for every shipowner to defeat the whole purpose of the Hague Convention by simply putting a clause such as :

“This Bill of Lading is to be construed by the law, not of the place where it is made, but by the law of the place to which the ship is going.”

(The vessel in that case was going from Jaffa in Palestine (now Israel) to Hull in England). This passage particularly appealed to Lord Denning because of the gap which existed (which was mentioned by Mr Pollock, and to which *Dicey & Morris* in the 10th Edition of their work at p 859 refer as being opened by the *Vita Foods* case probably closed by the English Carriage of Goods by Sea Act, 1971), due to the Hague Rules only applying (except in the United States) when cargo was shipped from a port in a contracting country. To my mind Greer LJ’s words were even more illustrative of the situation in the following extract from his judgment:

“I agree with my Lord that it would be extremely unfortunate if the result of this case were to be, as it would be, to bring to naught the attempt that has been made by means of the conventions with the various countries, to secure a uniform bill of lading a more or less uniform bill of lading – to be recognized by one country in regard to the goods shipped from that country, and by the other party to the convention with regard to the goods shipped from his country. I am not persuaded by the argument that we are bound to bring this convention to the unfortunate nullity that would come upon it if we decided this case otherwise than in the way we are deciding it.”

Professor Morris, at the beginning of his article in the 1979 *Law Quarterly Review* appears to support the view of Lord Denning in *The Morviken*, as regards the effect of *The Torni & The Vita Foods* case. The difficulty remained, however, that, as is made clear in both the editions of *Scrutton on Charter-Parties* to which we were referred, the 1924 Act, and therefore the Kenya Act and, indeed section 1 of the Newfoundland Act, only applied to outward bills of lading.

In these cases the court was not sitting in the country of shipment. As regards what would have happened if it had been, Mr Pollock cited Professor Morris' article, which said in reference to the *Vita Food* case that the majority opinion amongst textbook workers was that a carrier could not contract out of the rules scheduled to the Carriage of Goods by Sea Act. Earlier in the same article he contrasts the wording in the preamble to the 1924 Act and section 1. Mr Pollock also said that insofar as the learned authors of 18th Edition of *Scrutton* suggest that the statutory implied terms take effect only if the proper law of the contract is English, they are plainly wrong.

It does not seem to me that *Scrutton* does suggest that. At page 404 the authors say that the Hague Rules must in the English courts be interpreted as rules of statute law, and not as terms of the contract, and cites the *Vita Food Products* case in a footnote as authority for this statement. I doubt that the *Vita Food* case goes this far, but it is not an authority that the statutory terms of the relevant country are not so interpreted when the proper law of the contract is other than English, for Lord Wright was at pains to make clear that had the governing law been other than English, the courts of that other country would give effect to the contract in accordance with and subject to its statutes – see in particular his remarks and the quotation from Lord Halsbury in *Re Missouri Steamship Company* [1889] 42 Ch D 321, at p 525 of the *Vita Food* case.

The third of trilogy of cases of this kind, to which Professor Morris refers in his article (95 QLR 59) which was not cited to us, is *Ocean Steamship Co v Queensland State Wheat Board* [1941] 1 KB 402. This was a case where the choice of law clause, clause 16, whereby English law was stated to be the governing law, was held to be null and void, since it was inconsistent with clause 1, which provided that the Australian Sea Carriage of Goods Act, 1924, should apply, and that anything inconsistent therewith should to that extent be null and void. In that case an English Court was dealing with the shipment of wheat from Australia to England. This Australian case, *The Torni* and *The Vita Food* case, are also referred to by Professor Jackson, but both his and Professor Morris's were written before *The Morviken* was decided in 1982.

In the *Vita Foods Products* case, the Privy Council rejected the contention that the omission of the paramount clause, that is to say the express statement required to be inserted by the section corresponding to our section 4, namely the Newfoundland Carriage of Goods By Sea Act 1932, section 3 (which had also occurred in that case), rendered the whole of the bills of lading illegal, with the consequence that the ship owners could not rely on exemptions therein from liability for the master's negligence. They held that the section was directory and not imperative. In this respect they differed from the supreme court of Nova Scotia, (which was where the ship was registered) though the appeal was dismissed on the grounds that the clauses in the bills of lading providing that the contract should be governed by English Law should be upheld, even though there was no direct connection with English Law. Hence the English rules relating to the conflict of laws should be applied to determine how the bills of lading were affected by the ship owners' agents' omission to include in them the express statement required. Applying those rules the bills were not illegal by the law of Nova Scotia, whatever might be the view that would be taken by a Newfoundland court (which was where the Bills of Lading were issued and the cargo shipped) had the action been tried there. The final result was the clause 7 exempting the ship owners from loss or damage due to the negligence of their servant, the master, in so navigating the ship that it ran aground on the shore of Nova Scotia, was held to be valid and the ship owners were not liable.

It is again emphasized in the 10th Edition of the *Conflict of Laws* by Dicey & Morris, at pages 858 and 859, that the court in the *Vita Foods Products* case was not sitting in the port of shipment. Consequently there was a gap in the legislation because, as Lord Denning points out in the Court of Appeal in *The Morviken*, the Nova Scotia Courts, while they could have applied the version of the Hague Rules included in the Nova Scotia legislation, (which at that time was the Canadian Water Carriage of Goods Act,

(1910)), as a matter of course, had the goods been shipped from Nova Scotia, were required to consider whether the Newfoundland Hague Rules applied, Newfoundland at that time being a separate Dominion. It was this gap which in England is now said to have been closed by the enactment of the Carriage of Goods by Sea Act, 1971, which, by section 1(2), provides that the (Hague) Rules set out in the Schedule shall have the force of law. The 1971 Act also incorporates in the schedule a new Article X, whereby the provisions of the rules are applied to every bill of lading relating to the carriage of goods between ports in two different countries, if the bill of lading is issued in a contracting country, not necessarily in the country of shipment.

However, the importance of the *Vita Food Products* decision from Mr Pollock's point of view is this: that (as Mr Hunter pointed out), the 1924 English Act did not say in terms that the rules should have the force of law, but that they should have effect (though the preamble to the 1924 Act, unlike the Kenya Act, does recite that it was "expedient" that the Rules should be given the force of law). Nevertheless it is his case that was meant even before the 1971 Act (and therefore by our Act), as shown by Lord Wright's words at page 519 E where, after referring to the preamble, he said:

"The rules (meaning the Hague Rules) which are thus given the force of law are set out in the Schedule to the Act."

and this "notwithstanding any stipulation in the bill of lading or other similar document". Lord Wright continued by contrasting the Rules with the bills of lading, which are documents of title as well as setting out the (contractual) conditions of carriage, and, at page 528, said that an English court applying foreign law must give effect to the bargain of the parties, unless debarred by some provision of the foreign law which binds the court. In this case the court cannot, Mr Pollock says, give effect to the bargain of the parties as contained in clause 3, because it is debarred from doing so by the domestic law, the law of Kenya, which binds the court and contains the overriding provision in article III rule 8. The *Vita Food Products* case is discussed at length in Mr Arnold Knauth's book on *The American Law of Ocean Bills of Lading*, to which Mr Pollock referred.

It is with this background in mind that I will shortly turn to consider the United States cases which Mr Pollock cited. Before I do so I shall just deal with the passage in *Dicey & Morris*, which occurs in relation to the statement at page 852 of that work, that in certain instances, in the absence of evidence of intention of the parties, the proper law of the contract will be the law of the flag under which the ship sails, in the instant case of course the French flag. It is perfectly true that the authority cited in the footnote to that passage, *Lloyd v Guibert* [1865] LR 1QB 115, contains the dictum as to the flag being sufficient notice that the ship is governed by the law of the nation concerned, but the text continues by stating that the law of the flag is only one of the factors by which the parties' intention as to the proper law may be inferred, and is of no greater weight than many of the other factors, for example the opposing factors put forward in the instant case, namely the place where the contract was made, on the one hand, and the place at which the parties carry on their business, on the other. Indeed the portion in which the passage is contained ends with the words:

"The proposition that one must look, in the first instance; to the law of the country to which the ship belongs is no more accurate than it is to say that the law of the country which the contract was made must govern."

In the next paragraph it is pointed out (*Dicey & Morris*, 10th Edition, page 853) that there is only one modern decision in favour of the law of the flag as the proper law, and that in modern times when flags of convenience are prevalent the English courts at least are unlikely to apply the law of the flag as such. Certainly in this case I would not regard the ship's flag as a determining factor. To this extent, therefore, I agree with this part of Mr Pollock's submissions.

Mr Pollock traced the development of the United States decisions, which he submitted eventually came down on the side of the line for which he was contending, namely that an American court would not hold that a bill of lading covering an ocean shipment of goods (to or) from the United States would be subject to foreign, rather than American, law under a choice of jurisdiction clause. The first such case is *Carbon*

Black Export Inc v The SS Monrosa [1958] 254 f 28, 297 which concerned an action (referred to as “a libel”) for damages against an Italian ship for the nondelivery of 30,000 bags of carbon black from American ports to three Italian ports. The relevant clause provided that no legal proceedings should be brought except in Genoa, Italy. There were concurrent claims *in rem* against the ship, the *Monrosa*, and *in personam* against the Italian owner of the vessel. The Fifth Circuit Court of Appeals reversed the district court, which had declined jurisdiction, and, distinguishing the *Muller* case [1955] 224 F 2d, 806, (where there was no *in rem* action), held that agreements in advance of controversy where the object is to oust the jurisdiction of the courts are contrary to public policy and would not be enforced. This principle was adopted and the decision followed in *Insurance Co of North America v NV Stoomvaart – Natsschappij “Oostzee”* [1961] 201 F Supp 76, another action both *in personam* and *in rem*, in which the New Orleans district court rejected the *Muller* decision, and refused to give effect to a clause stating that action should be brought before the district court in Amsterdam to the exclusion of other courts unless the carrier should submit himself to another jurisdiction.

Although, from a reading of the Carbon Black decision it does not appear to be so, two subsequent decisions cited by Mr Pollock, *Amigale Industries Inc & SS Rantum* [1966] 250 F Supp 534, & *Indussa Corporation v SS Ranborg* [1967] 377 F 2d 200, which was said to be the starting point of the United States decisions in his favour, indicate that the *Carbon Black* decision very largely turned on the fact that the main proceedings were *in rem* and that exclusionary clause was not wide enough to cover an action *in rem*.

In the *SS Rantum* no process or seizure had been served or levied on the vessel, so the action was squarely *in personam* against the German Shipping Corporation in respect of water damage to bales of rayon staple fibre shipped from Bremen, the bills of lading in respect of which provided for exclusive jurisdiction in the German courts. The district court judge followed the *Muller* case, a decision of the second circuit Appeals Court, said to be pre-eminent among the nine circuits in the United States, which had held that a jurisdiction clause is valid and does not violate the American Carriage of Goods by Sea Act if it is reasonable. It appears that the court in *Muller* did not regard the matter as one of ouster or deprivation of the jurisdiction of the American Court, but as one of the exercise of its jurisdiction in recognising, in a preliminary ruling, that the forum which the parties have chosen is a reasonable one, See the 1958 *Columbia Law Review* at page 219, cited by Mr Hunter, and *The Bremen (infra)* at p 12. It therefore held that the contract would be governed by Swedish law. Similarly to the instant appeal, the *Rantum* was staffed with a German crew, the witnesses were all in Germany and, additionally, the cargo was loaded by German stevedores in Germany. Consequently the district judge concluded that the jurisdiction clause was reasonable and that it should be enforced.

However, Mr Pollock said, the *Indussa* Case changed all that and it would seem, from the extract he quoted from the *Columbia Law Review*, which was presumably before the *Carbon Black* case, restored the position as it was before the *Muller* case. Thereafter, he submits, there has been an increasing tendency in the American Courts, at any rate in those which can be regarded as influential in their decisions, to reject a forum selection clause as being contrary to the United States carriage of goods by sea legislation. This legislation began with that which became known as the Harter Act of 1893, which was supplanted in 1936, so far as the carriage of goods was concerned, by the United States Carriage of Goods by Sea Act 1936, though the Harter Act still applies to contracts relating to goods before loading on the ship and after discharge therefrom. This legislation is now in codified form and appears as chapter 28, section 1300 to 1313 of the United States Code. There is one essential difference between it and all the other countries’ legislation to which we were referred, because by section 1312 the Chapter is made to apply expressly to contracts for carriage of goods by sea to or from ports of the United States in foreign trade. This is, of course, so far as action in America are concerned, goes some distance towards meeting the gap referred to by Lord Denning in *Morviken*.

It is with this statutory background that I approach the *Indussa* case, so heavily relied on by Mr Pollock. The importance of the case is twofold, first because the appeal from the district court declining jurisdiction was referred from three judges to the full court sitting in banc for the purpose of reconsidering the *Muller* decision, and secondly because it was a decision by the respected Second Circuit of the United States Court of Appeals. The goods in question were a cargo of nails and barbed wire shipped from

Antwerp in Belgium and found on their arrival in San Francisco to be damaged by rust. This was an action *in rem*, the vessel having been located in American waters, but it seems that the applicability of the jurisdiction clause did not necessarily depend on whether the action was *in rem* or *in personam* (a matter on which the dissenting judgment of Moore J laid emphasis).

In the course of its judgment the Court of Appeals, Second Circuit said :

“We think that in upholding a clause in a bill of lading making claims for damages to goods shipped to or from the United States triable only in a foreign court, the *Muller* Court leaned too heavily on general principles of contract law “(which is of course the thread running through the English decisions)” and gave insufficient effect to the enactments of Congress governing bills of lading for shipment to or from the United States.”

The court went on to hold that the wording, in particular, of the statutory provisions corresponding to sections 1300 and 1312 in the Code, would seem to forbid an American court from a holding that would subject a bill of lading to foreign, rather than American, law in litigation.

There are two things which, to my mind, are noticeable about this case. The first is that the value of the cargo was only \$2,600, a factor which seemed to have a considerable bearing on the decision, for Friendly J in delivering the decision of the majority of eight said :

“Even if we were to adhere to *Muller* requiring an American consignee claiming damages in the modest sum of \$2,600 to journey some 4200 miles to a court having a different legal system and employing another language is so harsh a result that we would be strongly disposed to find means for distinguishing the *Muller* decision if such were fairly available. One basis for distinction has already been suggested – the difference in the practical effect of requiring resort to a distant forum when the claim is for \$2,600 as against the \$55,000 in that case” (the *Muller* case).

Moreover there was substantial connection with Sweden in the *Muller* case, but only the Norwegian ownership of the vessel in the *Indussa* case, to connect it with Norway.

Secondly the wording to the United States Legislation, the Scheme of which is different from ours, weighed heavily with the court for, as I have just said, it laid emphasis on sections 1300 and 1312, the latter section beginning with the words :

“This Chapter shall apply to all contracts for the carriage of goods by sea to or from ports of the United States in foreign trade.”

This seems to me to be stronger language (Mr Hunter called it overriding language) than our statute, section 2 of which commences with the words “subject to the provisions of this Act” and says that the schedule shall “have effect” in relation to the carriage of goods by sea from any port in Kenya.

Another interesting feature of the *Indussa* case is the court’s recognition of the difficulties that will arise, if another forum is held to govern the contract, in attempting to forecast the result of litigation in that other forum, or to attempt other expedients to prevent a lessening of the plaintiff’s rights, for at page 202, Friendly J said:

“Pretrial litigation over the place of trial, always to a certain degree undesirable, becomes especially so when the court is required to make a forecast as to the merits on the basis of conflicting affidavits of experts concerning what a foreign court would decide both as to choice of law and as to substantive law and there can be no real assurance that the prophecy will be validated by the result.”

Sentiments with which I find it difficult not to sympathise. The reasoning behind this passage seems to be that in many, if not all, cases, if the jurisdiction clause is recognized, it may be very difficult to say that

the carriers' liability will not be lessened (so as to be caught by section 1303(8), because, even if the country specified had enacted a Carriage of Goods by Sea Act, and had applied the Hague Rules:

“requiring trial abroad might lessen the carrier’s liability since there could be no assurance that it would apply them in the same way as would an American tribunal, subject to the uniform control of the Supreme Court, and s 3(8) can well be read as covering a potential and not simply a demonstrable lessening of liability.”

I have emphasized the phrase “a potential and not simply a demonstrable lessening of liability” because it accords with the first head of Mr Pollock’s summary of the effect of the American and Canadian decisions, and of the *Vita Food Products* case, as read in the light of *The Morviken*, in his opening address, and also because it is in support of the second of his alternatives as to the degree to which he needs to establish the likelihood of the cargo owner’s rights being diminished.

During his submissions on this aspect of the case Mr Hunter drew attention to the early case of *Botany Worsted Mills v Knott* [1900] Fed Rep 479; 179 US 69 neither of which report is available to us, which was a clear authority that section 1 of the Harter Act, which provided that the ship owner should be liable for negligence for the loss of or damage to cargo, overrode a stipulation that the law of the ship’s flag should govern as “the power of Congress to include such cases cannot be denied in a court in the United States”.

As the Court of Appeals pointed out in the *Indussa* case, *Botany Worsted Mills v Knott* was not cited in the *Muller* case, with the result that the Muller court did not have specifically in mind the principle advanced in the later decisions which Mr Pollock cited that the United States Congress intended that COGSA should have an overriding effect. *Botany Worsted Mills v Knott* is quoted in *Carver on Carriage of Goods*, 13th Edition, to which both leading counsel referred, which contains an interesting comparison between the development of the United Kingdom and United States Legislation since the nineteenth century, with the contrasting commercial interests of ship owners and cargo owners in each country, the one being essentially maritime with, at that time, powerful shipping interests, and the other part of a continental land mass in which internal commercial interests could be expected to prevail. The model bills of lading to which the learned authors of *Carver* refer were attempted as a compromise solution between these competing interests, but it was not for many years of that which *Carver* describes as a “pitiable” story of resolutions and disagreements that the various countries came together and caused the formulation of the Hague Rules, first in 1921, and then in 1923. Statutes had already been passed in some countries, such as Canada, but in others, such as Australia and the United Kingdom, they were passed very shortly after the Hague Convention. The next case cited by Mr Pollock, *Roach v Hapag-Lloyd* [1973] 358 F Supp 481 fell into that class of case which categorized as anti-*Indussa*, in the sense that the district judge in California declined to follow that decision, and upheld the choice of forum clause, which provided that any dispute arising under the bill of lading should be decided by the Hamburg courts in Germany. It is difficult to see why the *Indussa* case, which depended on whether the provisions of COGSA had an overriding effect, could be thought to have any real bearing on the *Hapag-Lloyd* case, which involved third party proceedings between the German ship owners of the *MV Wolfsburg* and the German manufacturers of certain crane parts which fell on the plaintiff, a longshoreman, injuring him during the unloading of a ship. As the district judge said, there were three essential differences between *Hapag-Lloyd* and *Indussa*, (which was a decision of a different circuit), first, that application of the rule that forum selection clauses in bills of lading are *per se* invalid would have no bearing on an action for personal injuries, secondly the issue was not between an American corporation and a foreign ship owner as in *Indussa*, but between two German corporations, and thirdly the position that a plaintiff might be required to assert his claim in a distant court was reversed because it was the third party who would be required to come to the United States and defend the claim against it by the defendant ship owner. Since the rule in the *Bremen* case (*infra*) required that the burden was on the ship owners, who in this case were challenging the forum selection clause, to show that its enforcement would be unreasonable and unjust, and they had failed to discharge that burden, the motion to dismiss the third party complaint in the United States Court was granted.

The remaining five United States cases were put forward as falling into the pro-*Indussa* category. In the

first of these, *Northern Assurance Co Ltd v MV Caspian Carrier* AMC 421, the district court in Northern California within the Ninth Circuit of the Court of Appeals, distinguishing the *Bremen* case, in which COGSA was not applicable, held that a clause in the bill of lading providing for a Japanese forum was not enforceable. This case expressly followed *Indussa* and also cited *The Law of Admiralty*, 2nd (1975) Edition, by Gilmore and Black, in which the learned authors comment

“COGSA allows a freedom of contracting out of its terms but only in the direction of increasing the ship owners liabilities and never in the direction of diminishing them”.

This, they say, is to prevent the impairment of the value and, negotiability of bills of lading. Professor Morris in his article refers to the carrier indirectly attempting to diminish his liabilities by providing that a law other than that of the place of shipment shall apply.

The next three authorities *MG Chemical Corporation v M/V Sun Castor* [1978] AMC 1756, *Mitsui & Co Ltd v M/V Glory River No 2* [1978] 464 F Supp 1004, and *Pacific Lumber & Shipping Company Inc & Others v Star Shipping A/S & the M/S Star Clipper* [1979] 464 F Supp 1314, were all District Court cases, two within the Ninth Circuit, and one in Alaska. They all followed the *Indussa* case and held that the respective forum selection clauses were not enforceable, the first and the second because they were directly violative of COGSA and the third (also following *Mitsui*), additionally because the shippers had had no option to have the London arbitration clause deleted. Thus the bill of lading was a contract of adhesion, that is to say a contract in which, according to Mr Pollock, due to the inequality of bargaining power the ship owner can dictate terms and the cargo owner has no alternative but to submit to them.

Before I deal with that which I think was the last of the United States cases to which Mr Pollock referred, which is the decision of the 4th Circuit of the Court of Appeals in *Union Insurance Society of Canton v SS Elikon* (*infra*), it is necessary for me to consider the United States Supreme Court decision in *The Bremen v Zapata Off-Shore Co* [1971] 407 US 1, which I think I may fairly describe as the cornerstone of this area of Mr Hunter’s submissions. The salient feature of *The Bremen* (also referred to under the name given to oil rig concerned *The Chaparral*) was, as was demonstrated in *Union Insurance Society of Canton v SS Elikon*, that it was not a COGSA case, but one concerning an oil drilling rig, which Unterweser, a German Corporation, had successfully tendered for towing from Louisiana to Italy. While in the Gulf of Mexico a storm caused severe damage to the *Chaparral* and *Zapata* instructed the deep sea tug used by Unterweser, the *Bremen*, to tow it to Tampa, in Florida. *Zapata* then commenced an action against Unterweser *in personam* and the *Bremen in rem* for negligent towage. The contract contained a provision that any dispute should be ‘treated’ before the London High Court of Justice. Unterweser invoked the forum selection clause and moved to dismiss the action (a) for lack of jurisdiction and (b) on the grounds of *forum non conveniens*. In a concurrent action in London by Unterweser, *Zapata* unsuccessfully challenged the forum selection clause, but the district court in Tampa denied two motions by Unterweser to stay the action pending a decision in London. A majority of the Fifth Circuit Appeals Court affirmed the district court’s decision. The Supreme Court of the United States, however, adopted the views of the minority of the Court of Appeals, and in the course of delivering the judgments of the court, Chief Justice Burger said at pp 9-10 :

“Forum selection clauses have historically not been favoured by American Courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were “contrary to public policy,” or that their effect was to “oust the jurisdiction” of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.”

The reasoning appears in this passage at pp 11-12 :

“Not surprisingly, foreign businessmen prefer, as do we, to have dispute resolved in their

own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arms length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honoured by the parties and enforced by the courts.

The argument that such clauses are improper because they tend to “oust” a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum selection clause “ousted” the district court of jurisdiction over Zapata’s action. The threshold question is whether that court should have exercised its jurisdiction to do more than given effects to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause”.

And at pages 13-14 :

“That the accident occurred in the Gulf of Mexico and the barge was towed to Tampa in an emergency were fortuities. It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.”

It would not, however, be right for me to leave this case without emphasizing Chief Justice Burger’s remarks (at page 15) when he said that a contractual choice of forum clause should be held enforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision. This is, of course, the key to the pro-*Indussa* decisions in the COGSA cases.

In the English suit between Unterweser and Zapata in London, *Unterweser Reederei GmbH v Zapata Off-shore Company (The Choppal) CA*, [1968] 2 Lloyd’s Law Reports 158, which concerned leave to serve the writ out of the jurisdiction; the Court of Appeal, as might be expected, adhered to the English principle that the parties to a contract will be held to the bargain into which they have entered, and that if they have stipulated that disputes shall be referred to a particular court, to give effect to that stipulation. In stating this to be the policy of courts, Willmer LJ referred to his own direction in *The Fehmarn* [1957] 1 Lloyd’s Law Reports 511, as follows:

“Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be overridden and that proceedings in this country should be allowed to continue”.

This direction was approved in the Court of Appeal in *The Fehmarn* [1957] 2 Lloyd’s Rep 551 (where the stipulation for a foreign court was overridden) and in *The Makefjell* [1976] 2 Lloyd’s Rep 29, in which a cargo of frozen bakery products suffered damage after being in unrefrigerated sheds at Milwall docks, and in which a stay was granted in favour of a Norwegian choice of law clause. It was also referred to by the Chief Justice of Canada, dissenting, in the passage quoted in *The Regal Scout No 1 (infra)*. Mr Hunter referred to Cairns LJ’s judgment in the appeal in *The Makefjell* where, in upholding Brandon J (as he then was) he said at p 35 :

“Lord Justice Widgery (at p 164) emphasized that court should not interfere with the

exercise of the Judge's discretion on an issue of this kind unless he had gone wrong in law or in the basis on which he exercised his discretion or was plainly wrong in the way in which he exercised it."

He said that those criteria applied in the instant case, and that there existed no grounds for interfering with the judge's decision granting the stay.

Reverting to the American cases, the next two decisions cited respectively by Mr Hunter and Mr Pollock, one of the Second Circuit of this Court of Appeals and one of the fourth Circuit, would appear to be at variance as regards the impact which *The Bremen* has had on the *Indussa* case. In *Bense v Interstate Battery System of America* [1982] 683 F 2d 718, which was not a COGSA case, nor, indeed, a case involving international law, but was one relating to franchise for the distribution of car batteries, in which the forum selection clause designated Dallas, Texas as the venue for bringing suits or actions, the Second Circuit Court of Appeals upheld the clause, in the process stating that the suggestion that *The Bremen* only applied to cases brought under Federal admiralty jurisdiction lacked merit, in view of the Supreme Court decision in *Scherk v Alberto-Culver* [1974] 417 US 506, (a report which, unfortunately, we do not have). Furthermore, the Court of Appeals said that several of the lower courts had adopted the reasoning of the *Bremen* in cases unrelated to either admiralty or international law.

Mr Hunter referred to *Bense's* case as a landmark decision, even though he was earlier of the view that the American authorities did not take the present case very far, and that if any assistance could be derived from them they were in the respondent's favour. I think, however, that the *Bense* decision should be read in the light of Mr Pollock's last American authority, namely *Union Insurance Society of Canton v SS Elikon and Deutsche Dampeschiffahrts-Gesselschart* ("HANSA") [1982] AMC 588, though it was decided a year earlier than *Bense* and was not referred to in the course of that decision.

The facts were that the insurers paid a substantial sum to the General Electric Co who had delivered air conditioners to the SS Elikon, owned by Hansa, where they were found to be damaged on delivery. They brought an action against the Elikon, *in rem*, and Hansa, *in personam*, to recover their loss. Clause 20 of the printed bills of lading provided that the laws of West Germany should apply to actions thereon, and that such actions were to be brought exclusively in the court of *Bremen*. The Insurers brought their action in the District Court of Eastern Virginia, where the cargo was shipped and the bills of lading exchanged, pursuant to chapter 28 (section 1300 *et seq*) of the United States Code (COGSA). The District Court upheld Hansa's reliance on the forum selection clause. After citing the relevant statutory provisions, the Fourth Circuit of the Court of Appeals said :

"The statute essentially represents the American enactment of the Hague Rules, developed at a series of international maritime conferences in the 1920's. COGSA is thus part of an international effort to achieve uniformity and simplification of bills of lading used in international trade. It was intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo. By strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading. Subsequent holders of a bill subject to COGSA can give value for it in confidence that they can ultimately obtain satisfaction thereon without elaborately investigating the circumstances of the shipment. See Uniform Ocean Bills of Lading Hague Rules, HR Rep No 2213, 74 Cong, 2d Sess. (1936)." "It is against this statutory background that the Court of Appeals for the Second Circuit invalidated the forum selection clause in *Indussa Corp v SS Ranborg*, 1967 AMC 589, 377 F 2d 200 (1967) (*en banc*)"

The court then considered whether the *Bremen* case had superseded *Indussa*, and, as I said, pointed out that the *Bremen* was not a COGSA case, and, further, that the Supreme Court had upheld the forum selection clause because ...

"of the bargained nature of the contract, the reasonableness of the forum selected, and the

general policy encouraging private contractual choice for dispute resolution particularly in the context of international trade”

“While the *Bremen* holds that forum selection clauses are presumptively valid, particularly in international transactions, it only expressed this view in the absence of any congressional policy on the subject, much less a contrary congressional policy. COGSA applies to Hansa’s bills of lading in this case, but those bills clash with the statute on their face by their provision for German law in clause 20. The terms of the bill were not agreed to through hard bargaining, but rather represent the form clauses of an adhesion contract.” “We think the general policy here must recede before the specific policy enunciated by Congress through COGSA. The district court erred in declining jurisdiction in this case solely on the basis of the foreign forum selection clause in the bills of lading.”

The emphasis is mine.

However the Court of Appeals said that COGSA did not expressly require the Virginia Court to hear the case and that *Indussa* left open the application of the principles of *forum non conveniences* to suits on COGSA bills of lading. The court therefore reversed the district court on the grounds that it was wrong in not following *Indussa* and in recognizing the forum selection clause, but they expressly remanded the case back to the district court for consideration as to whether the Virginia Court was or was not the convenient forum for the case to be decided, setting out certain factors which the Court of Appeals thought were relevant to that issue, for example that the parties were, by then, both foreign nationals, the fact that the bill of lading was in English, the possible defence of faulty packaging before shipment, and the whereabouts and availability of witnesses.

It therefore seems to me, in the light of the *Union Insurance Society of Canton* case, that only is it by no means settled United States law that the bargain of the parties, in the shape of a forum selection or choice of law clause, will prevail against the express provisions of COGSA, but that the explanation of the apparent conflict between the later decisions is that the Supreme Court decided the way it did in *The Bremen* because in that case there was no COGSA to consider and thus no congressional statutory policy engrafted on the common law, under which, as in English law (subject to the United Kingdom COGSA which I will consider later) the bargain of the parties is upheld. Moreover in *The Bremen* the contract was not one of adhesion as its terms were negotiated “at arms’ length”.

It might be that the *Scherk* case, which was also a Supreme Court decision, provides justification for the second Circuit of Appeals remarks in *Bense’s* case that the *Bremen* decision applied to cases other than those brought under Federal admiralty jurisdiction and that its reasoning has been adopted in non-COGSA cases – and that the Supreme Court regards the *Indussa* reasoning as a “provincial attitude” or a “parochial concept” regarding other tribunal – but we have not seen the *Scherk* case, nor is the report available to us and so it is impossible to examine that decision. Professor Jackson as late as 1980, in his article in *Lloyd’s Maritime & Commercial Law* [1980] 2 LMCLQ, P 159, seems to take the view that the *Indussa* case was still good law in America, and that if followed in England no forum selection clause would be valid. Moreover he goes on to say in a footnote (page 1660 that in the *Bremen* the Supreme Court, while stating the presumption that a forum selection clause would be upheld, specifically indicated that COGSA had no application to that case. Furthermore, Professor Jackson says early in his article that if the law of the country where the suit is brought takes the view that the rules are mandatory, (and they are enacted substantively in chapter 28 in the United States Code), then it will ignore any choice of law clause which attempts to evade its version of the Hague Rules. Thus to borrow Mr Hunter’s phrase in reverse it would appear that in America *Indussa* has won the day.

However it is clear from the *Union Insurance Society* case that within that which I may call the paramountcy of the United States COGSA legislation, the question of *forum conveniens vel non* is a legitimate matter for consideration by a court faced with an application for a stay or for dismissal. In other words, provided the principle of congressional statutory policy is preserved, the Court of the United States may still entertain questions of venue on grounds of convenience. Moreover, and this matter I shall have to consider in more depth later on, though I have already mentioned it while dealing with the

Indussa case, there are differences in the form of the legislation in the United States and in Kenya. This may be a matter of substance, or of legislative technique, as Mr Pollock says.

It will be convenient at this stage to deal with the two Canadian authorities put forward by the appellant and upon the second of which there was at one stage considerable divergence between counsel. The first Canadian case, *United Nations Food & Agricultural Organisation v Atlantic Seaways Corporation and Another* [1979] AMC 398, has in my view very little bearing on the questions we have to decide, because the Canadian Court was required to adjudicate upon the validity of a clause in a bill of lading covering goods which had been shipped from New Orleans in the United States to Hodeidah in the Persian Gulf, which provided that the contract should be governed by Canadian law, and that disputes should be determined by the Federal Court of Canada. The action was *in personam* and the contract had no other connection with Canada. Not surprisingly the Canadian Court declined to exercise jurisdiction. For myself I doubt whether if a court in London had been seized of a similar case it would necessarily have accepted jurisdiction. *The Vita Food Products* case was different because there could be said to be substantial connection with Nova Scotia (even though the goods were shipped from Newfoundland) since that was where the respondents were incorporated, and where the ship was registered and subsequently ran aground.

The next case is known as “*The Regal Scout*” but its full title is *Agro Company of Canada Ltd And Toshoku America Inc And Toshoku Ltd v The Owners And All Others Interested In The Ship Regal Scout and Argonaut Marine Inc* [1983]. I presume the report handed to us in court is of the *Regal Scout No 2*, because it is dated May 26 1983, and the other application in relation to the vessel to which Cattenach J referred had come before Walsh J, and was decided on April 1983. We were provided with the report of *The Regal Scout No 1* after the hearing. I have referred to this in detail because in his first address (since he was given leave further to reply to Mr Pollock’s lengthy submissions in reply) Mr Hunter said that Cattenach J’s reasons were “riddled with errors”. Mr Pollock appeared to take exception to this and Mr Hunter, having considered it over the short adjournment on the last day of the hearing, said that he had assumed, because of the lateness of having been provided with the report, that *The Regal Scout No 1* was the case to which reference had earlier been made. Mr Hunter then accepted the criticism which he had made of the judge’s remarks at pages 4 and 5 of the report of the *Regal Scout No 2* was misconceived.

As is evident from their titles, both cases concerned the same vessel, on which 15,500 long tons of feed barley were loaded at Vancouver, Canada, for shipment to Toshoku Ltd in Tokyo, Japan. On arrival the cargo was found to be contaminated by salt water, and on its return to Canada the vessel was arrested and subsequently released on usual undertakings. The first action was concerned with whether arbitration had been agreed to by the parties to the bill of lading, and, if so, whether it would be just and reasonable to arbitrate in Japan. Since the court held that the parties had not agreed to arbitrate that matter might have ended there, but in the first application Walsh J also considered extensively the issue of *forum conveniens* in relation to the proposed arbitration. He cited a recent Federal Court of Appeal decision in *The Ship M/V Seapearl and Patmos Navigation Co v Seven Seas Dry Cargo Shipping Corporation* [1982] (no A-170-82) in which the majority of the court held that strong reasons are needed to depart from the rule that contractual undertakings (the arbitration clause in that case) must be honoured. They said that this was the principle now applied in England (I do not think that is seriously disputed, unless the clause is struck down by article III rule 8 or its equivalent) and in the United States (which is doubtful in view of the analysis of these decisions which I have made earlier in this judgment). Walsh J said that the plaintiffs had failed to convince him that it would not be reasonable or just to arbitrate the matter in Japan, but this was subject, as I said, to the point as to whether the parties had agreed to arbitration, which Walsh J decided in favour of the plaintiff cargo owners. I shall need to return to this shortly.

The second case was concerned with a forum selection clause designating the Tokyo District Court and Japanese law respectively as the venue and the law applicable.

“...Except only as otherwise agreed herein or as otherwise determined by controlling foreign law.”

I set out those words only as showing that the first portion of it is similar to the excepting words at the

end of clause 3 of the bill of lading in this case, but the second portion presumably contemplates an extension of that clause, in as much as the parties could go before yet another forum if the stated controlling law, that is the law of Japan, so determined. For myself I should have thought that those words alone would have been sufficient to cast doubt on the clause, given, as Chief Justice Burger says, that one of the main objects of upholding the bargain of the parties is the elimination of uncertainty as to where suit could be maintained.

Affidavit evidence was adduced in *The Regal Scout No 2* as to the fact of the law of Japan. After considering the affidavits Cattenach J concluded that the effect of Japanese law (in contrast to that of Canadian law, in the absence of a demise charter) was that the shipowners, Argonaut, would not be regarded as a party to the contract of carriage, that is the bill of lading, because this was issued and executed by the agent of a concern called Yamashita Shinnihon Steamship Co Ltd, who would be regarded as the contracting party by the law of Japan, and who also, I note, featured in *The Caspian Carrier* (*supra*). Consequently

“.. this would not only have the effect of lessening the liability, but of totally obliterating it.”

That is said, of course, in relation to article III rule 8 of the Hague Rules, which are scheduled to the Canadian Carriage of Goods By Water Act 1936.

The judge set out the relevant portion of Lord Diplock’s speech at page 7 of the report to *The Morviken*, which is that if a choice of law clause, or, as I respectfully think, a more accurate expression, a forum selection clause, will have an effect which, when it comes into operation by the fulfillment of the condition subsequent, that is to say by the coming into existence of a dispute between the parties, is proscribed by article III rule 8, it will be treated as of no effect. Cattenach J therefore held that the Canadian court was commanded by the statute to treat the forum selection clause as of no effect.

Mr Pollock relied strongly on this case as being on all fours with the present one. He accepted that the reasons for judgment were expressed elliptically, but, that, properly understood, it contained no errors at all. Whether elliptical or not, the reasons have at least the merit of being concisely expressed, but in order to arrive at a proper understanding of Mr Hunter’s criticisms, save the one he withdrew, it will be necessary to refer to the law relating to the charter of ships by demise, which, as I understand the position, differ from time charters and voyage charters in that the charterer takes the ship, with or without captain and crew, so that he has full possession of and control over the ship and can use and employ it without reference to the owner.

In the instant case there has been no question that the ship owners and the carrier are not one and the same entity, so that there could have been no charter or hire of the vessel itself so far as the voyage from Mombasa to Bremen is concerned. Mr Hunter referred to the demise clause set out at page 69 of the 18th Edition of *Scrutton*. The reason for it is stated to be to avoid the possibility of the court holding that the form of the bill of lading is such that a charterer might be held liable on it, without the corresponding statutory protection. Accordingly if Mr Hunter’s remarks relating to *The Regal Scout* are to be fully understood, a brief explanation of demise charters and demise clauses is necessary.

The statement by Lord Esher MR as to the nature of a demise charter in *Baumvoll Manufactur Von Scheibler v Gilchrest* [1892] 1 QB at page 259, can be taken as a convenient starting point. He said that the test is :

“Whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent, that he has given to the charterer a power and right independent of him and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship. That has been called a letting or a demise of the ship. The right expression is that it is a parting with the possession and control of the ship: and in such cases the captain is not the captain of the owner, and if so he has no authority to bind the owner by any bill of lading

or by any contract.”

It is not necessary for me to go into any detail as to the facts of that case. Although Kay LJ said that the position of the parties was a peculiar one and unlikely to occur again, its relevance is that the captain had (without any authority) signed some of the bills of lading, and it was held that during the four month period of the agreed charter, before the property in the ship was intended to pass to the defendant Gilchrist (if the purchase money was then paid), the owner, Furness, had (as Lord Herschell LC says in the House of Lords in the appeal from the Court of Appeal *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC at p 17), so dealt with the vessel as to give all the rights of ownership for a limited time to another person. Consequently the shippers were not entitled to sue the original owner on the bills of lading signed by the captain (who was *ex hypothesi*, not his agent), neither, it seems, could they do so in tort for negligence for the same reason.

The second authority to which I have adverted on this question is *Wehner v Dene Shipping Co & Others* [1905] 2 KB 92 in which the vessel *Ferndene* was chartered to an American Company, who sub-chartered it to the plaintiffs. In any action by them to recover Sterling Pounds 890, when the question arose as to the defendant ship owner’s lien for sums due from the plaintiffs under the charter party, Channel J held that the charter did not amount to a demise of the vessel, that the possession and control of it remained with the defendants and that therefore the contract contained in the bill of lading covering a consignment of phosphate was made between the shipper and the defendants. Consequently the plaintiffs were held entitled to recover the Sterling Pounds 800 which had been paid to a common agent for both, but which had been received by the agent on behalf of the defendants, less the amounts due at the relevant date under the charter-party. Both this case and the *Baumvoll* case made it clear that in ordinary cases, that is to say where the charter is not a demise charter, the owner is still bound by the bill of lading and therefore remains in direct contractual relationship with the holder thereof.

Despite this the decisions which are set out in *Scrutton* show that the courts do, on occasion, hold a charterer to be the contracting party, and to guard against this there arose the practice of inserting the bills of lading and a demise clause, the form of which is given by *Scrutton* as follows:-

“If the ship is not owned by or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof.”

I now turn to *The Regal Scout*. In that case the shippers were the Agro Company of Canada, the first plaintiffs, the consignees were Toshoku Ltd of Japan, and the shipowners Argonaut Marine Inc the second defendants. Yamashita were the head charterers and Toshoku America Inc the sub-charterers. It seems from both sets of reasons that Yamashita did not charter the vessel under a demise charter. Assuming Canadian law to be similar in this respect, as indeed would appear from page 6 of the reasons in the second case then, applying the principles which I have just endeavoured to extract, the bill of lading covering the barley would thereunder have constituted a contract between Agro & Argonaut, and not between Agro & Yamashita or North Pacific, nor even between Agro & Toshoku America Inc. This emerges clearly from the reasons given by Walsh J, who found for the defendants on this issue, but he went on to hold that arbitration clause in the sub-charter party was not properly incorporated by express words into the bill of lading, the relevant clause of which only used general words to incorporate the terms of the charter party. He therefore dismissed the defendant’s application for a stay of the Canadian proceedings in favour of an arbitration in Tokyo.

As I understand Mr Hunter’s criticism, it is that Cattenach J fell into error, in particular, in saying that the carrier was party to the contract of carriage, that is the bill of lading. This depends, I suppose, upon to whom he was referring to as the carrier. But under the above principles, if I am correct in my statement of them, it would seem that, the charter not being a demise charter, Yamashita never became the carriers under Canadian law, and were therefore not a party to the contract of carriage, whether or not there was a

demise clause of the kind envisaged in *Scrutton*, and that therefore the owners of the ship remained as carriers. There was, of course, no information as to whether there was or was not a demise clause; it is not mentioned either in the reasons for judgment, or in Walsh J's reasons for his order.

Mr Hunter had also said that the passage at pages 4 and 5 of the reasons that:-

“The owner remains the carrier for the shippers and in issuing bills of lading the captain acts as the owner's agent, as too are the charterers and ship's agent (see *Paterson Steamships Ltd v Aluminium Co of Canada Ltd* [1951] SCR 812 at page 854)”

constituted an error, a statement which, as I said, he subsequently withdrew. In the *Paterson Steamship* case the facts were that the appellant company, a ship owner and operator, granted a time charter of the *SS Hamidoc* to Saguenay Terminals Ltd, Demarara Bauxite Company Ltd, shipped a cargo of bauxite upon the vessel from a port in British Guyana for delivery to a port in Trinidad, for reforwarding to the plaintiff at Arvida. The bill of lading was signed by an agent of Saguenay Terminals, Ltd at Georgetown on behalf of the master. The cargo was lost at sea, owing to the unseaworthiness of the vessel, and the holder of the bill of lading, claiming as the owner and consignee of the goods contended that it was not bound by the contract evidenced by the bill of lading and that there was no privity of contract as between the parties. The action was maintained by the Superior Court and by the Court of Appeal for Quebec. On further appeal it was held that since the charter party was not a demise of the ship, the shipowner remained the carrier and was in contractual relationship with the owner and consignee of the goods, who could therefore sue him on the bill of lading.

It would therefore seem that the extract from the reasons for judgment which I have just set out is correct, and that it was in this sense, that is that of the owner remained the carrier of the shipper, in which Cattenach J was referring to the carrier as a party to the contract of carriage at the end of page 6. It was perhaps, with respect, incorrect to say that this was “by virtue of article III rule 8”, but I think the judge really meant that this was the way in which the expression “carrier” was to be read in that rule. For these reasons I would regard Mr Hunter's criticisms of Cattenach J's decision in the *Regal Scout* as unjustified, and I would regard it as an authority in support of Mr Pollock's case.

Having dealt extensively with the authorities cited by Mr Pollock I turn to consider those referred to by Mr Hunter. Before I do so I must say a word about the way in which Mr Hunter presented his case. It was that this was an exercise by the appellants amounting to that which he described as forum shopping. This was a phrase coined by Lord Denning MR in the *Atlantic Star* [1974] AC 436 and referred to in the *El Amria* (*infra*). They were hedging their bets, he said, hoping to improve their chances of success by bringing this action in Kenya, and in so doing ignoring that which they had freely entered into, namely the jurisdiction clause in the bill of lading.

This criticism might well be a valid one if it could be said that there existed in the circumstances of this case no reasonable ground for the appellant, as plaintiff, to bring this action in Mombasa. However it cannot be gainsaid that this case has at least some connection with Kenya, unlike, for instance the Canadian case of *United Nations Food & Agricultural Organisation v Atlantic Seaways Corporation* (*supra*), in relation Canada, inasmuch as the contract was made in Mombasa, the defendants carry on business there through their agent, the consignment was loaded there and it appears from Mr Inamdar's affidavit that

“the evidence relating to the stowage of the goods is, so far as the plaintiffs are concerned, only available in Kenya”.

So it could be said that there were potentially some witnesses who would be in Mombasa, though Mr Pollock resiled from this position towards the end of his reply. As against that it is manifest that probably the most important witness as to the loading of the cargo and the storage thereof in the hold is the chief officer, M Lanoe, who is, as are the other survivors of the disaster, of French nationality and physically in France. For my part I see nothing wrong in plaintiffs in shipping cases protecting their position by suing in another jurisdiction if they are advised to do so, short of a merely tenuous connection with that

jurisdiction which is being used only for tactical advantage.

As background to his claim that the appellants were forum shopping on a grand scale, Mr Hunter summarized the proceedings that have so far been brought in respect of the cargo on the ill-fated *Francois Vieljeux*; fourteen complaints filed initially in Mombasa, which contain claims totaling \$2,985,421.80, with another five subsequently filed, plus \$16.5 million worth of claims which, in all, will be filed in Paris. Apparently a further four new actions in respect of Tanzanian cargo on the same ship have also been recently filed.

I think it is necessary in this case to guard against being influenced unduly by the number of other actions which have been brought and as to where they have been brought. The issue for us to determine is whether in this case the learned judge was right in granting a stay in favour of proceedings in France, subject to the question as to whether clause 3 of the bill of lading should be struck down under article III rule 8 of the Schedule to the Kenya Act, on the grounds advanced by Mr Pollock. The issue of *forum conveniens* was also considered in some depth by the judge and I apprehend that that is a legitimate question for our consideration also. I use this Latin expression as indicative of the process of weighing up and balancing conflicting considerations in deciding on the forum, but as Stephenson LJ pointed out at the end of the report of the *El Amria*, the second principle enunciated by Brandon J in *The Eleftheria* possibly prevents the court from considering the case simply as one of *forum conveniens*, but only in the context of enforcing the agreed foreign jurisdiction clause in the absence of strong reason to the contrary.

I therefore now proceed to consider the first case to which Mr Hunter referred, which was the *Makefjell*, the brief facts of which have already set out. For my part I accept, with respect, the principles stated by Cairns LJ as to when an appeal court should interfere with an exercise of discretion by the court of first instance. In saying this I appreciate, of course, that Mr Pollock is saying that there was no room for the exercise of discretion in this case: that if it be found that the jurisdiction clause does offend against rule 8 then it must follow that it is struck down. This is the effect of Lord Diplock's statement in *The Morviken* that the court is "commanded" to treat it as of no effect. *The Makefjell* in which there were concurrent actions *in rem* and *in personam*, is a strong authority in favour of the court's recognition of the bargain which the parties have struck as regards jurisdiction. Mr Hunter agreed with me that the basis of this recognition, as stated in the *Kislovodsk* [1980] Lloyd's Report at page 186, is that, for better or worse, the parties have both accepted the risk that the system of justice applied by the foreign law selected might be less favourable than that of the country of shipment. As to this Stephenson LJ expressly approved Brandon J's statement of the basic principle that:

"a party who has promised for good consideration to submit a claim or dispute to a foreign tribunal for decision should be held to his promise unless there is strong reason for allowing him to depart from it."

However, it must be recognized that in *The Makefjell* there was no statutory provision competing, as it were, with the jurisdiction clause. There was no suggestion that there was an actual or potential cutting down of the carrier's liability. It was a straightforward case calling for the exercise of discretion after duly weighing the factors for and against Norwegian law, followed by an appeal against Brandon J's decision, which the Court of Appeal were satisfied constituted a proper exercise of his discretion. It is in fact an authority on *forum conveniens* and on the principles relating to an appeal against the exercise of a discretion. It was in this context that Mr Hunter referred to *The Eleftheria* (*supra*), from which the principles stated by Brandon J relating to the grant of a stay of an action on the ground of an agreement in a jurisdiction clause have already been set out by me and by the learned judge. They have been widely accepted. Equally in that case the decision turned on the balance between factors in favour of a trial before the Greek Court and those in favour of continuing the hearing in London, and though there was a paramount clause incorporating the Hague Rules, the jurisdiction clause was not alleged to have the effect of diminishing the cargo owners' rights. I agree with Mr Hunter that the paramount and jurisdiction clauses are identical to those in the present case I nevertheless think that that case does not take us any further in deciding whether the jurisdiction clause should be struck down. I further agree, however, that where the case rests solely on the exercise of discretion in granting a stay, both decisions are in favour of Mr Hunter inasmuch as in the *Eleftheria* it was clearly stated that the burden is on the person resisting the

stay to show strong cause against it, and in both cases that the discretion should be exercised in favour of granting a stay unless strong reasons be shown for not complying with the jurisdiction clause.

The *Adolf Warski and the Sniadecki* [1976] 2 Lloyd's Rep 241 was another appeal from Brandon J which he had held fell on the other side of the line. In deciding on a clause in the respective bills of lading that any claims arising thereon should be settled according to Polish law, in relation to cargoes of melons and onions shipped on Polish ships from Chile and Peru found to have seriously deteriorated on arrival in Swansea, in the United Kingdom, Brandon J, applying the principles of *The Eleftheria* and *The Makefjell* and indeed, of *The Fehmarn*, held that by reason mainly of necessity of calling evidence on both sides from English surveyors and English plant pathologists as to the state of the cargo on arrival, there was a strong balance of argument in favour of rejecting the Polish jurisdiction clause and of trial in England.

Applying the principles in relation to appeals adopted in *The Makefjell*, to which I have already referred, the Court of Appeal upheld that decision. I quote from the judgment of Cairns LJ at page 246, in relation to whether "exceptional" reasons (phraseology used in *The Makefjell*) had been shown for departing from the forum selection clause:

"If, however, it be asked how this case differs from the general run of cases that might be expected under these bills of lading, the short answer is the necessity of calling English expert witnesses on a highly technical matter" (and the difficulty (per Sir Gordon Willmer) of giving such evidence through interpreters in Poland)."

Mr Hunter expanded his analysis of *The Eleftheria* by putting it forward as showing how the pendulum, which starts off in favour of the stay being granted, swings back and forth as the factors on each side, for and against, are considered. If, said Mr Hunter, the net result is to leave the pendulum where it was at the beginning of the case then the *prima facie* case for granting the stay remains. So, in the present case, the respondents started with an agreed forum selection clause in their favour, and it is for the appellants to displace it, which, Mr Hunter submits, has not been done.

The Kislovodsk (supra) was another case of the exercise of discretion in which *The Eleftheria* was followed, Sheen J deciding in favour of upholding a clause giving jurisdiction to the courts of the USSR notwithstanding the very heavy costs thereof however, the point which Mr Pollock has taken in this case was touched on, and the words "except as provided elsewhere herein" in the jurisdiction clause were held to be a reference to the Kenya Carriage of Goods by Sea Act (the cargo of coffee having been loaded at Mombasa). Mr Pollock, who also appeared in that case, contended that this would mean that the Russian limit of liability would apply, but no decision on this point was arrived at because the plaintiffs would not concede that that limit was less favourable than that of Kenya, and I presume there was no evidence to that effect.

In *The El Amria* [1981] 2 Lloyd's Law Reports page 119, which was the last of the series of cases cited in this area of Mr Hunter's argument, the principles which had been enunciated by Brandon J (as he then was) in *The Eleftheria* were referred to by Stephenson LJ as 'cardinal' principles. They were again set out *in extenso* and adopted by Brandon LJ who delivered the leading judgment.

The *El Amria* related to a cargo of potatoes shipped from Alexandria in Egypt to Liverpool in England, and the bill of lading contained a jurisdiction clause identical to the one in the present case, the principal place of business of the carrier being Egypt. Sheen J decided in favour of rejecting the clause in favour of the English courts but was held by the Court of Appeal to have erred in principle in these respects in weighing up the relevant factors, with the consequence that the Court of Appeal exercised its own discretion, and, applying the cardinal principles to the same factors, arrived at the same result. They deprecated the comparison made by Sheen J between the two systems of law resulting in a supposed inferiority of the Egyptian system, adding a quotation from Willmer LJ in *The Fehmarn (supra)* which I think is important to bear in mind in considering the present case, as follows:

".. the court must assume, and I do assume that equal facilities for trying the case exist in Russia as exist in this country, and that the parties will get just as fair a trial in Russia as

they will get here.”

I would finally observe in regard to *The El Amria* that in addition to the presence of both sides’ expert surveyors and agronomists in England (a factor regarded as decisive in *The Adolf Warski*) the court regarded it as undesirable that as the result of a second action which had had to be commenced in England against the dock company, there would be the risk of different decisions on the same issues by courts in two different countries. That is another factor which I regard it as necessary to bear in mind, in view of that which I think I may fairly describe as the multiplicity of proceedings which have now been brought in relation to the cargo on the *Francois Vieljeux*. It is perfectly true, and I bear in mind, that there might be a risk of conflicting decisions in many of these proceedings, particularly if a stay is not granted. This would not have arisen, for example, in *The Morviken* because there the Dutch court, if seized of the case, would have decided the case under the former Hague Rules, and therefore the issues would not have been the same in both systems of law.

The only other authority to which Mr Hunter referred on this issue was the very much old case of *Hamlyn & Co v Talisker Distillery & Others* [1894] AC 202, in which there was no issue regarding carriage of goods by sea. The House of Lords was constrained to uphold the parties’ agreement to a clause providing for arbitration in London where there was a conflict between English and Scots law. They reversed the Scottish Court of Session which had held that the effect of the clause was to be determined by the *lex loci* solutions, that is to say the law of Scotland.

Having now dealt with the decisions referred to by Mr Pollock and Mr Hunter as regards the effectiveness or otherwise of a foreign jurisdiction clause, or forum selection clause, as I prefer to call it, the overall effect of the United States decisions, in my judgment, is that such a clause will not prevail against the expressed congressional policy in the American COGSA legislation. Indeed the reverse is the case, and the paramountcy of the legislation is recognized by those courts. As I said, *The Bremen*, although upholding the forum selection clause, did not deal with it in relation to COGSA, and accordingly the authority of *Indussa*, a decision of the respected second circuit of the Court of Appeals, followed as it has been in subsequent decisions, including the *Union Insurance Society of Canton* case, remains unimpaired. Neither in my view did *Bense’s* case alter that position, for though it was a 2nd circuit decision, it was not a COGSA case, nor one involving the conflict of two systems of law, so that the court’s dicta regarding the wider applicability of the *Bremen* were obiter. Again, as I indicated, *The Scherk* case may have affected this situation, but it is not an authority before us; and it would appear from *Northern Assurance Co Ltd v M/V Caspian Carrier* (supra), at page 424, that it was not a case governed by COGSA. It follows that I regard the American authorities as being in support of Mr Pollock’s submission for the appellant in this appeal. The only Canadian case of relevance, *The Regal Scout No 2*, I have also subjected to as close an analysis as is possible in the circumstances, and that case too, in my opinion, supports the appellant. Equally the English decisions cited by Mr Hunter, with one or two exceptions, support the view that the parties’ bargain as to the law applicable will ordinarily be upheld and enforced.

Thus the English cases support the respondents to that extent. But none of them, except *The Torni* and *The Morviken* (and of course the *Vita Food Products* case, which was Mr Pollock’s authority), involves a conflict with COGSA legislation. It may well be that the Act was applicable to the respective bills of lading in those cases but none of the arguments or decisions rested on that point. Accordingly the English decisions and *The Bremen* to my mind only afford support for Mr Hunter’s case as he presented it for the respondents, inasmuch as the submissions of the parties, instead of being, as it were, for and against a particular proposition, or case, followed different paths, the one expressly considering the impact of COGSA legislation on a forum selection clause, and the other considering the principles applied, mainly by the English courts, in relation to such a clause without (save as I have mentioned above) expressly taking COGSA into account. As I understand *Kneller J’s* judgment, though he referred to the appellants’ case that the effect of the legislation was to strike down clause 3, he decided the case on the second basis.

Before coming to the allegation of bad stowage and the arguments of counsel relating to causation, under which heading I include the cases of *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd & Monarch SS Co v A/B Karlshamns Oljefabriker* (infra) & *The Torenia* (supra), I propose to deal with their submissions relating to the effect of the English Carriage of Goods by Sea Act 1924, which is

closely followed by the Kenya Act, as compared with the 1971 English Act and the American legislation. I need only set out section 2 of the Kenya Carriage of Goods by Sea Act, cap 392, since its terms are virtually identified to the 1924 English Act. It provides:

“Subject to the provisions of this Act, the provisions of the schedule of this Act shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Kenya to any other port whether in or outside Kenya.”

Both Acts then schedule the 1924 Hague Rules as formulated after Brussels Convention of 1924, with the exception of article X. The preamble to the 1924 Act states *inter alia*:

“And whereas it is expedient that the said rules as so amended and as set out with modifications in the Schedule to this Act (in this Act referred to as “the Rules”) should, subject to the provisions of this Act, be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading:”

However, the (English) Carriage of Goods by Sea Act, 1971, contains the following provisions:-

Subsection (2) of section 1:

“The provisions of the rules “(meaning the Hague-Visby Rules after the amendments introduced by the Brussels Protocol of 1968)” as set out in the schedule to this Act, shall have the force of law”.

Subsection (3) provides:

“Without prejudice to subsection (2) above, the said provisions shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different states within the meaning of Article X of the rules”.

I have already referred to the new article X, the language of which is that the provisions of the Rules shall apply to every bill of lading as therein specified. Mr Pollock submitted that the 1924 Act, and therefore the Kenya Act, had an overriding effect and that the difference in wording between the 1924 and the 1971 Acts did not mean that the earlier Act was not intended to have the force of law. This, he said is obvious because of the clear purpose of the 1923 Hague Convention, which was not only to achieve uniformity in Bills of lading, but to enforce the provisions of the Hague Rules, because the parties to the Convention were intended to, and did, pass legislation giving effect thereto. Thus the intention was to make the Hague Rules compulsorily applicable, without which that uniformity would not be attained. Moreover the preamble to the 1924 Act provided confirmation of this intention, if confirmation were needed.

Mr Pollock then referred to the article by Professor Morris in the *Law Quarterly Review* (*supra*), at page 59, in which the learned author states that while the Act recited that it was expedient that the rules should have the force of law, section 1 merely provided that they should “have effect”, which Professor Morris says is “a very different thing”. He compared this with the text in *Carver*, 13th Edition at page 300, which relates the steps leading up to the passing of the legislation to which I referred earlier. Mr Pollock described Mr Hunter’s submission that the Act had only limited compulsory effect as a middle course or via media, which he said was not logically possible, the limited compulsory effect referred to being, of course, that while the Act provided for standardization of bills of lading, incorporated the Hague Rules into those bills of lading, and required an express statement that they were to be subject to the provisions of the rules to be inserted therein, it did not go so far as to override or strike down an express clause in the bill of lading.

Mr Hunter’s submissions in reply to this, were that whereas under the 1924 Act the terms of the bill of lading were a matter of agreement between the parties, the 1971 Act, by section 1(2), had ensured that

thenceforth the Hague Rules should be compulsorily applicable and this was because, as the decisions showed, the previous legislation had not produced that result, whether intended or not. Indeed all it had done was to produce in the country concerned a model set of rules, the purpose of which was to enable shipowners to comply with the Act. A parallel situation occurred, Mr Hunter said, in the Sale of Goods Act, in which it is possible for a party to avoid conditions and warranties otherwise written in to a contract by the statute. That would be an example of the limited effect for which he contended.

Mr Hunter continued by drawing to our attention the Carriage by Air Act, 1961, The Carriage of Passengers by Road Act, 1974, and the Sale of Goods Act, 1979, of the United Kingdom. In the first of these section 1 provides that the provisions of the Warsaw Convention shall have the force of law, article 28 in the first schedule makes specific provision for the territory in which an action for damages shall be brought, and article 32 provides that any clause in the contract, entered into before the damage occurred, by which the parties purport to infringe the rules of the convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Much stronger provisions, Mr Hunter says, than are contained in the 1974 English Act or the Kenya Carriage of Goods by Sea Act. Similarly in the Carriage of Passengers by Road Act, 1974, the provisions of the Convention of the Contract for the International Carriage of Passengers and Luggage by Road are stated to have the force of law in the United Kingdom, and, by article 3, paragraph 3, any clause assigning to an arbitral tribunal a jurisdiction stipulated before the event which caused the damage is stated to be null and void. Finally in the Sale of Goods Act, 1979, section 56, by reference to schedule 1, made specific provision for the continued application of the implied conditions notwithstanding a term specifying another law as the proper law of a contract.

It is appropriate at this juncture, before leaving this series of statutes referred to by Mr Hunter, to notice the case of *Corocraft v Pan American Airways Inc* [1969] 1 QB 616, in which the plaintiffs sent a consignment of jewellery by air from New York to London under an air way bill in which, though in compliance with article 8 of the Warsaw Convention, as scheduled to the 1932 Carriage by Air Act, it contained certain details of the consignment, there was left blank the space provided for the dimensions or volume thereof, in alleged contravention of paragraph (i) of that Article. (I presume the 1961 Act had not at the material time, May 10, 1962, come into force, rather in the same way as the Carriage of Goods by Sea Act, 1971, did not come into force for some years). On the preliminary issue as to whether the airline was entitled to limit its liability because of the supposed defect in the air waybill Donaldson J (as he then was) answered that question in the negative. The case was decided on appeal, reversing Donaldson J, on the basis that if recourse was had to the French text of the convention, which was the only official and authorized text, it was clear that the words in article 8(i) should be used disjunctively, so that if the weight of the goods, and possibly the quantity, was stated, it was not necessary to go further and state also the volume or the dimensions of the goods. It is worthy of note that sub-section (2) of section (1) of the 1961 Act now provides that the French text of the Warsaw Convention shall prevail in the event of any inconsistency, and that the French text is scheduled to the 1961 Act, though not to the 1932 Act.

At first sight the *Corocraft* case would appear to have little bearing on the present case (Lord Denning MR in the Court of Appeal called the point “a highly technical one, devoid of all merit”), but Mr Hunter drew attention to certain passages in Donaldson J’s judgment to which I find it necessary to refer. I echo that appearing at page 623 of the text where he says:

“No doubt if all the countries of the world not only adhered to the Warsaw Convention, but also took precisely the same view of its effect and incorporated it in their domestic law, all questions of conflict of laws would be eliminated whether one applied the domestic law of the forum or the proper law of the contract of carriage.”

Mr Hunter referred us to one of the defences put forward in that case, which was that the air waybill complied with the United States law on the subject, whereby the airbill needed to state one only of the four requirements specified in the corresponding statutory provision of the state of New York, which was the proper law of the contract. It transpired, however, that as neither party was able to produce any United States decision on the meaning of the American equivalent to paragraph (i) of article 8 the admission as to the effect of the United States law was withdrawn. The only assistance that could be obtained was from

the work “*Limitation of liabilities in International Air Law*”, by Professor H Drion, who expressed the view that only one of the specified particulars need be mentioned in the air waybill; a view with which, I may say, Lord Denning did not wholly agree.

I have not therefore found the *Corocraft* case to be of very much assistance, particularly as there is the specific provision in article 32 of the Warsaw Convention to which I have just referred, which would have the result, assuming the parties had chosen New York law, and that law was more favourable to the airline, as carrier, of rendering that choice of law null and void. Before leaving that decision, however, I note that Donaldson J, commented on the phrase “shall have the force of law in the United Kingdom” which is not, of course, quite the same wording as is now used in the Carriage of Goods by Sea Act, saying that that wording was not consistent with an English Court determining rights in accordance with the proper law of the contract, to the exclusion of the 1932 Act. Lord Denning also dealt with this phrase, stating that parliament had made the convention part of the law in England. But he was there dealing with the conflict between the French text of the rules of the convention and the English translation, and, in any event, there is no suggestion in this case that the rules of the Hague Convention are not part of the law of Kenya. The issue is whether they have an overriding effect sufficient to strike down clause 3.

Coming to the American legislation Mr Hunter said that the draftsman went further than the previous English legislation and, as the decisions cited show, intended that the United States COGSA should have an overriding effect. A reading of the decisions described by Mr Pollock as “pro-*Indussa*” show that in all of them the court regarded congressional policy as a decisive factor in those decisions. In the *Corocraft* case Lord Denning MR said that the decisions of the American courts are entitled to the highest respect, and there is no doubt that the courts here will so regard them. But the question is whether the American Statute, which is differently cast from that of Kenya, coupled with the United States courts’ view that any provision violative of congressional policy, has greater force than the Kenya Carriage of Goods by Sea Act, in other words whether, in the context of this case, it has an overriding effect while the Kenya Act does not.

Mr Pollock took us through a detailed comparison between the United States and the Kenya enactments. Section 1303, for instance, is in many respects similar to article III rule 1 of our schedule, save that I note that subsection (2) thereof is not expressly made subject to section 1304 (which matches our article IV). The American subsection (8) 7 of section 1303 is virtually identical to rule 8 of article III. The next four sections in the American code to a large extent match articles V to VIII in the Kenya schedule, with differences such as the third paragraph of Articles VI taking the form of a proviso in section 1306 of the Code. Section 1310 appears as section 6 of the Kenya Act. I note however that no provision corresponding to section 4, (which is the requirement of the express statement in the bill of lading) appears in the United States Act. The operative or dominant section, (as Lord Wright called it) section 2, has two counterparts in the Code, sections 1300 and 1312. The first of these reverses the language of section 2, in that it is the bill of lading which is to “have effect subject to the provisions of this chapter” in the former, while the provisions of the Schedule to the Kenya Act are to “have effect” in relation to and in connection with the carriage of goods by sea. Section 1312 is, as I said in relation to the *Indussa* case, stronger, in my judgment, and says that the chapter “shall apply” to all contracts for the carriage of goods by sea; language which the *Indussa* court said forbids an American court from giving effect to a forum selection clause. It may be, as Mr Pollock says, that section 1312 repeats 1300, but both, in my view, are stronger in their terms than the Kenya section 2.

Mr Hunter also compared the two statutes, saying that the Westminster model was not merely a matter of different legislative technique (as Mr Pollock claimed) but showed that the American Congress was using overriding language, and that ours was an indication that the legislature intended that the rules should be incorporated as a private matter only. Otherwise, he said, why are the words “shall have the force of law” in the 1971 English Act (and they are used twice, as if to give added emphasis).

Finally, on this aspect of his submissions, Mr Hunter advanced the proposition that where the question of the interpretation of a statute arises, it will not be recognized as having an overriding effect unless that necessarily occurs on the proper interpretation of the statute: so the legislature must spell out in clear terms that the statute has that overriding effect.

Before coming to Lord Denning's treatment of the words, "shall have the force of law", I must refer to the paper by Mr Anthony Diamond QC on the Hague-Visby Rules, to which Mr Pollock made extensive reference. Mr Diamond traces the history of the new rules since 1955, which was the time by which he concludes that the effectiveness of the previous rules could be assessed. Mr Diamond takes the view that the Hague rules had succeeded in that which he referred to as their main objective, namely the standardization of the most important terms of bills of lading. He continues by saying that these rules had acquired the force of law in a large part of the world due "in part to the fact that the great colonial empires were still intact". Moreover he states that the rules had succeeded in redressing the balance between the dominant position of the shipowner, (which was most marked in England), who previously could dictate the terms of the bill of lading to the cargo owner, who had to "take it or leave it", (that being Mr Pollock's "contract of adhesion"), so that thenceforth there was a measure of equality of risk as between ship and cargo.

Mr Diamond then proceeds to examine the effect of the former Hague rules in the light of the *Vita Food Products* case, and the fact that if the action was brought elsewhere than in the country of shipment, even if the other country was a party to the convention, the Hague Rules might well not apply, and, as in the *Vita Food Products* case, the carrier could escape liability for negligence under provisions of the bill of lading because, as Lord Wright said at page 519:

"The Act and rules only apply where the bill of lading is issued"

Accordingly Mr Diamond considers the solution put forward at the Comite Maritime International Conference in 1959 and in 1963, which was that the rules should apply both to outward and inward shipments, as in the United States, from or to any contracting state. Due apparently to the view, taken in particular by Britain, that this could amount to an unwarrantable intrusion upon the jurisdiction of other countries and over foreign nationals, the 1968 conference compromised, with the result that contracting states could apply the rules to inward cargoes if they so wished. Moreover, Mr Diamond points out, the words "contracting state" now appear in article X of the schedule to the 1971 Act, so that it is said that thenceforth an English court would not in the case of a shipment from overseas apply the paramount clause, as previously, but would apply the 1971 Act as a matter of English statute law. Finally, Mr Diamond draws attention to the absence of any provision corresponding to the Kenya section 4 requiring the inclusion in the bill of lading of an express statement which, in the instance case, is complied with by the insertion of the paramount clause.

It is therefore remarkable that Mr Diamond, having covered extensively the changes wrought by the 1971 legislation, does not mention (at least in the extract we have) the change in wording from "shall have effect" to "shall have the force of law". Perhaps this is because he earlier says that the 1924 Hague Rules had required the force of law. But for the reasons I am about to give I consider the difference was very material.

I take first Lord Denning's treatment of the new wording in the Court of Appeal in *The Morviken* where he said at page 328:

"The 1971 Act made far-reaching reforms. It brought in important new features. I will take them in order.

Section 1(1) – "The force of law"

Section 1(2) said that:

"The provisions of the rules, as set out in the schedule to this Act, shall have the force of law."

What does this mean? In my opinion it means that, in all courts of the United Kingdom, the provisions of the rules are to be given the coercive force of law. So much so that, in every case properly brought before the courts of the United Kingdom, the rules are to be

given supremacy over every other provision of the bill of lading which is inconsistent with the rules or which derogates from the effect of them, it is to be rejected. There is to be no contracting-out of the rules. Notwithstanding any clause in the bill of lading to the contrary, the provisions of the rules are to be paramount”.

This seems to me to be very strong authority for the interpretation of the earlier statute of which Mr Hunter contends. Lord Denning says “The 1971 Act made far-reaching reforms” of which he goes on to list subsection (2) of section 1 as the first. Then he says the rules are to be given “the coercive force of law ... so much so that they are to be given supremacy over every other provision of the bill of lading”, and that “the provisions of the rules are to be paramount”, “notwithstanding any clause in the bill of lading to the contrary”. Lord Diplock in the House of Lords, after reciting section 1 of the 1971 Act, commented that its provisions appeared to be free from any ambiguity perceptible to even the most ingenuous of legal minds. He continued:

“The Hague-Visby Rules or rather all those of them that are included in the Schedule, are to have the force of law in the United Kingdom: they are to be treated as if they were part of directly enacted statute law”.

With the proviso that their language should be construed on broad principles of general acceptance, and that they should be given a purposive rather than a narrow literalistic construction. I regard these words as applying not only to the purpose of the unification of the several domestic laws relating to the bills of lading, but also to the purpose of giving the rules the force of law in order to achieve that object.

Lord Denning’s words are very strong words, and in my view receive support in the speech of Lord Diplock. They exactly define the proposition for which Mr Pollock contends, had it been in relation to the 1971 Act. But it was not in relation to the 1971 Act. His proposition was in relation to the Kenya Act, which is the same for this purpose as the Carriage of Goods by Sea Act 1924. His proposition was in relation to the Kenya Act, which is the same for this purpose as the Carriage of Goods by Sea Act 1924. In the course of his reply Mr Pollock referred to the judgment of Ackner LJ who delivered the third judgment in the Court of Appeal in *The Morviken*, and suggested that it showed that there was no distinction between the 1924 and the 1971 Acts, so that under either Act no contracting out of its provisions was possible. With respect I do not so read Ackner LJ’s judgment. It is quite true that in dealing with *Maharani Woollen Mills Co v Anchor Line* [1927] 29 Lloyd’s Rep 169 the learned Lord Justice says that article III rule 8 is the same for all purposes in the 1924 Act as in the 1971 Act. However since in that case the forum selection clause, which specified India as the country for determination of disputes, was upheld, and as on a consideration of article III rule 8, Scrutton LJ held that the carrier’s liability under the clause remained exactly the same in both England and India, I do not see that that case provides support in any way for the proposition that article III rule 8 of the Schedule to the 1924 Act would strike down a jurisdiction clause on the grounds of a lessening of the carrier’s liability. Going back to the earlier part of that judgment, Ackner LJ begins his consideration of this question with the following passage:

“The question of statutory interpretation which arises is, can the carrier contract out of the rules scheduled to the 1971 Act by selecting some other law as the proper law of the contract? There is no reported English case and the textbook writers are in conflict. Scrutton, *Charterparties and Bills of Lading*, 18th Edition, pages 404 and 413 and Dicey and Morris, *The Conflict of Laws*, 10th Edition, Volume 2 pages 754 and 821, contend that there can be no such contracting-out. Carver, *Carriage by Sea British Shipping Laws*, Volume 1 (12th Edition), paragraphs 310 and 311 takes the contrary view. Our attention has been drawn to articles by Dr FA Mann in the *British Year Book of International Law* 1972-1973, Volume 46, pages 117-143 and in (1979) 95 *Law Quarterly Review*, pages 346-348, in which he maintains that the Act cannot be invoked except where the bill of lading is governed by English law. Dr JHC Morris, also writing in (1979) 95 *Law Quarterly Review* (see pages 59-67), strongly disputes this proposition.”

That is a clear reference to the 1971 Act, and that the judgment is dealing with the proposition as it is

under that Act and not as it was under the 1924 Act, is clear from Ackner LJ's reference to article X and to the "amended rules". He then poses the question:

"Is this rule "(article III rule 8)" apt to cover the situation where, as in this case, there is an express choice of law? Without the assistance of authority I should have concluded that the answer was clearly in the affirmative".

In my opinion Ackner LJ's judgment is in support of the other judgments in that case and is dealing with the situation in relation to the 1971 Act. Furthermore, the 18th Edition of *Scrutton* reinforces the view I have expressed above in the following passage at page 454:

"First it" (the 1971 Act) "demonstrates that the statutory implied terms take effect, not merely as part of the proper law, when that law is English, but as part of the statute law of England to which an English court must give effect ..."

With the foregoing in mind I will now turn to the point regarding the preamble to the Carriage of Goods by Sea Act 1924.

True it is that the preamble to the 1924 Act says it is "expedient" that the Hague Rules should be given the force of law, but what did the draftsman then do? He went on to use relatively lukewarm language by saying that the rules shall "have effect"; singularly inept language Mr Hunter says, to convey that the rules should have the force of law. Mr Pollock produced a passage from *Maxwell on Interpretation* with the heading "Preamble guide to intention", in which the text says that the preamble may legitimately be consulted to solve any ambiguity, to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever there is doubt in these respects. The words of Lord Alverstone CJ, in *London County Council v Bermondsey Bioscope Co* [1911] 1 KB at page 451:

"I may express in this connection my regret that the practice of inserting preambles in Acts of Parliament has been discontinued as they were often of great assistance to the courts in construing the Acts."

are set out in a footnote, but Lord Alverstone went on to say:

"It has never yet however been laid down that if the language of an Act is clear, full effect is not to be given to it because it goes beyond the title."

Conversely in my judgment, it is not permissible to extend the meaning of clear words by reason of the context of the preamble, for Lord Normand said in *Attorney General v Prince Ernest of Hanover* [1957] AC at p 467.

"There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the preamble".

.....

"It is only when "(the preamble)" conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail".

"When the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in case of some difficulty, after informing itself of what I have called the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction that construction will receive effect even if it is inconsistent with the preamble; but if the enacting words are capable of either of the

constructions offered by the parties, the construction which fits the preamble may be preferred.”

The later (1969) Edition of *Maxwell*, under the heading corresponding to that quoted by Mr Pollock, says that considerably less space will be devoted to the use of the preamble in construction than in previous editions for two reasons namely:- “First, hardly any modern statutes have preambles, so that the importance of the preamble as an aid to construction is constantly declining. Secondly, the office of the preamble in interpretation has been authoritatively stated by the House of Lords in *Attorney-General v HRH Prince Ernest Augustus of Hanover*.” Viscount Simonds in the *Hanover* case did, it is true, dissent (at page 451) from the general proposition that if the enactment is clear and unambiguous it cannot be cut down by the preamble, but only: “If it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part.” And he later said: “I would suggest “(the rule)” is better stated by saying that the context of the preamble is not to influence the meaning otherwise ascribed to the enacting part unless there is a compelling reason for it.” I therefore agree with Professor Morris and conclude, with regard also to the preamble, that the words “shall have effect” and the words “shall have the force of law” are different things and that they have distinct and separate meanings. It would not in my opinion be legitimate to use the wording in the preamble to the 1924 Act so as to extend the words of section 1 thereof, and, by reflection, section 2 of the Kenya Act, that the rules “shall have effect” an “effect” being, according to the definition: “Something caused or produced, a result, consequence.” I have been unable to find any authority as to the meaning of those three words when used together, but in my judgment, they are not synonymous with “shall apply” and they do not mean that the rules became mandatorily applicable, as Mr Pollock submitted to the learned judge. They mean no more than, as Mr Hunter says, that their subject matter is imported into the document concerned, in this case the bill of lading, as a matter of agreement, in as much as they apply unless the parties agree otherwise. I do not accept that before the 1971 Act the rules were compulsorily applicable no matter what the parties had agreed. Whether Parliament in enacting the 1924 Act, of which the Kenya Act is virtually a copy, intended that the mischief of the lack of uniformity in bills of lading and of cohesion between the various countries in enforcing the duties of shipowners, and of those shipowners being able to contract out of their liability, virtually at will, thus reducing the integrity and negotiability of bills of lading to the prejudice of world trade, should wholly be remedied by giving the Hague Rules the force of law is debatable, but if that was its purpose, it did not in my judgment achieve the purpose by enacting section 1 of the 1924 Act in the form in which it was, as some of the decisions subsequent to it have shown. Accordingly, while not going quite as far as his proposition, as to the overriding effect of a statute, I agree with Mr Hunter that the 1971 Act and the history and content of the American legislation, particularly the Harter Act, was to render the American statutory provisions as having an overriding effect. No other conclusion is reasonable on a reading of that legislation and of the decided authorities, particularly of the *Indussa* case. Subject to considering the effect of the scheduling of the rules in the Kenyan and English legislation, as opposed to their enactment in the substantive part of the United States Code, I would hold that, unlike the American legislation, the 1924 English and 1926 Kenyan statutes did not have an overriding effect to the extent of striking down a clause which (even if it reduced liability on the part of the carrier), nevertheless contained a stipulation to which the parties agreed at the time of the issue of the bill of lading. Schedules to an Act of Parliament, according to *Craies on Statute Law*, 7th Edition page 224, may be merely forms or examples of the way in which an enactment is intended to be carried out; or they may contain provisions important in themselves. As regards the second category I start by considering the case of *Attorney General v Lamplough* [1878] 3 Ex 224, which was a case concerning whether stamp duty was exigible on a patent medicine, as constituting an artificial mineral water, under a general clause in a schedule to the Statutes 52 Geo 3 c 150, the specific part of which had been repealed. In holding that the preparation was not dutiable Brett LJ at page 229 said: “We come to the remaining part of the schedule. With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting – a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part”. This is reinforced by the following passage at page 292 of *Thornton’s Legislative Drafting*, which neatly sets out the function of a schedule: “The use of schedules is a legitimate and helpful device for the clearer presentation and more efficient communication of the content of legislation. The general practice is for matters of principle to remain in the sections of the statute while lesser matters of machinery or detail may be arranged in schedules. The principal purpose of this arrangement is to enable the presentation of the main sections of the enactment uncluttered by

material of secondary or incidental importance. It is essential to bear in mind that the device is no more than one of presentation, for the schedule is as much part of the enactment as is the section introducing it, or indeed any other section". The second authority cited for this is *Inland Revenue Commissions v Gittus* [1920], 1 KB 563, in which Lord Sterndale MR, said that if the language of the schedule goes outside the purpose of the statute to which it is appurtenant then effect must be given to it. While therefore a schedule is normally reserved for forms, repeals, and the like, if it contains matters of substance than those matters, if I may use the expression, rank equally with the substantive sections. The only proviso to this is that if a provision in a schedule does not correspond with the enacting part of the statute then the latter will prevail, and for this I quote two authorities of the same name, and the same year, *In re Baines* [1840] 41 ER at page 406, per Lord Cottenham LC and *R v Baines* [1840] 113 ER at page 799, per Lord Denman CJ. I would therefore agree with Mr Pollock's submission on this part of the case, on the form of the legislation, that the fact that the Hague Rules are contained in a schedule is a matter of legislative technique, and does not mean that they thereby have any the less force than sections enacted, for example in the United States Code. But for the reasons I have given I consider the wording used in the American legislation, (and now in the Carriage of Goods by Sea Act, 1971) is considerably stronger than the 1924 Act or the Kenya Act, and that is the explanation of *The Indussa* and the pro-*Indussa* decisions. It follows that in my judgment the parties in this case were entitled to include clause 3 in their bill of lading and that it is not struck down by article III rule 8 of the schedule of the Carriage of Goods by Sea Act, cap 392. The foregoing is sufficient to dispose of grounds 2 to 5 of this appeal, but before dealing with the issue of the judge's exercise of his discretion, I propose to consider in some detail the opposing submissions of counsel regarding the factual position, a summary of which has been set out at the beginning of this judgment, with particular regard to the allegation that bad stowage was, if I may use a neutral expression, a relevant cause of the disaster. The question of causation and the authorities cited thereon are a part of this aspect of the case. The evidence of what happened before and during this disastrous voyage is, as is usual, contained, at this stage of the action, and in many of the cases cited, in affidavit evidence – see in particular the *I Congress Del Partido* (*supra*) per Robert Goff J at pages 558 and 559. The evidence in the instant case consists of the affidavits or letters of: 1. Mr Sheppard, the former solicitor for the respondent, sworn on August 12, 1980. As Mr Pollock said in the High Court this contains very little factual material except a brief account of the events of February 13 and 14, 1979, in paragraph 6 (Respondents). 2. Maitre Fontaine, the French lawyer for the appellants, dated February 12, 1980. This is mentioned in 3 (Appellant). 3. Mr Inamdar, the appellant's junior counsel and advocate dated October 23, 1980. This is replied to in 5 (Appellant). 4. Maitre Villeneuve, the respondent's French lawyer, sworn April 22, 1981. This is referred to but not otherwise recited in 5 (Respondent). 5. Mr Byron, the Respondent's present solicitor, sworn on April 30, 1981 (Respondent). 6. In addition, the opinion of Mr Hammond, the defendant's expert, referred to in 5. Maitre Fontaine was permitted to see the respondent's internal report. From it he gives a fairly comprehensive sequence of events, including the stated opinion of the shipowners that the "casualty is due to a progressive breaking of the stowage due first to exceptionally heavy seas but principally to the faults of the master in the navigation of the ship". The first mention of the shifting of the copper, as being due to the stowage, is as follows: "February 14th from 9 to 10 pm. The 7° list noticed in the morning of the 14th is due to heavy weather causing partial dismantling of the stowage of "a consignment of 500 tons of copper stowed in the back of hold No 3 – the copper bars were stowed in 2.40m high piles. Before Mombasa, the piles were supported on each side by a zinc consignment which was unloaded at Mombasa and not replaced, as expected, by a consignment of coffee which should have been used to tighten the stowage". The account continues: "On the 14th, in the morning, the piles of copper started to dismantle, due to heavy rolling of the vessel with force 12 sea and 10 metres depth. The sliding of 500 tons of copper on half-width of the vessel was enough to cause a 8° 5 list which occurred very suddenly (before 9 am nothing was noticed and the vessel behaved satisfactorily during the preceding night at 15 knots speed, in spite of force 12 weather). The rest of the account relates to progressive increase of the list, followed by the sliding of the cargo, and the smashing of the watertight stern starboard door by the waves, causing the list to increase to 35-40 degrees and the sinking of the vessel. Apart from a reference to French law not regarding improper stowage affecting the stability of the ship as an aspect of unseaworthiness, but as a *faute nautique*, there is no further material relating to the stowage at Mombasa in Maitre Fontaine's letter. Mr Inamdar's source of information on this issue is necessarily confined entirely to that which he has taken from Maitre Fontaine's letter, but he concludes that portion of his affidavit by saying:-

“It is plain from the foregoing that the sole cause of the casualty was the fact that improper stowage at Mombasa allowed the cargo to shift when the vessel encountered weather which, although heavy, was of a type to be foreseeably encountered on the contractual voyage.”

With all respect I think this is an exaggeration. It does not follow from Maitre Fontaine’s letter that bad stowage was the sole cause of the casualty; indeed he said that the owners’ opinion was that the casualty was due to a progressive breaking of stowage due first to exceptionally heavy seas but principally to a series of faults of the master in the navigation of the ship. Neither do I think Mr Pollock went this far in his submissions. He said it was “pretty conclusive” that bad stowage was the initiating factor which led to the ship’s troubles, but he went on to say that he recognized that bad stowage might not necessarily have caused the loss of the vessel, but that it should have been envisaged then that there was the likelihood of bad weather at that time of the year and in that area. Mr Pollock submitted that the sequence of events as related by Maitre Fontaine was never denied by the respondents and that they had never resiled from or contradicted them.

Mr Pollock in my view accepted that the improper stowage was not the sole cause of the disaster. I think that he at one stage called it a cooperating cause, but, at all events, he was prepared to concede that the loss was caused by the interaction of a number of factors, that is to say bad stowage, bad weather, and the behaviour of the master of the vessel. It followed that when several causes combine to cause a loss then the shipowner is ⁵⁹ liable unless all the causes are expected causes. This receives support from Hobhouse J in *The Torenia (supra)* at page 218 so long, he said, as improper stowage was shown to be one of the causes then the appellant, as plaintiffs, must succeed on the facts.

Mr Inamdar’s affidavit complains that the respondents do not commit themselves to an explanation as to the cause of the loss of the ship, a complaint echoed by Mr Pollock in the submissions, and of course I recognise that the appellants are hampered by the fact that much of the evidence is, inevitably, under the respondents’ control, a matter which they say is grossly unfair to them. Nevertheless in the same affidavit Mr Inamdar depones that “virtually all” the evidence as to improper stowage affecting the stability and safety of the vessel is available from Stevedores in Mombasa. In view of this I find it surprising that Mr Pollock informed the court during his reply that the appellants had not obtained and would not be producing any such evidence, merely relying on their assertion of improper stowage for the court to infer it. In the result, if evidence is required, they would have to rely on that which is forthcoming from the respondents, in particular from the chief officer M Lanoe.

Mr Inamdar says that his clients are in danger of being gravely prejudiced (if their case is heard in France) by being bound by the findings of the two French official enquiries mentioned by Mr Sheppard, (a matter disputed by Maitre Villeneau). Mr Inamdar also compared the French system of trying commercial cases unfavourably with that obtaining in Kenya, oral testimony being rare, and the court’s decision frequently being based on the result of discussions between experts. Neither is there, in Mr Inamdar’s view, adequate provision for the discovery of documents (also a matter disputed by Maitre Villeneau). I recognize that some of these matters of procedure may be disadvantageous to the appellants, but I do not think this court can be unduly influenced by difference in procedure, which are virtually inevitable if any foreign law is to govern the case, particularly if the foreign law clause has been a matter of agreement between the parties – see Sheen J in *The Kislovodsk (supra)* at page 186.

Turning to Maitre Villeneau, who is, *inter alia*, the President of the Association Francais de Droit Maritime, much of his affidavit contains argument as to the correctness, or rather incorrectness, of Mr Inamdar’s prognostication as to what will happen to the appellants if they get into the clutches of French law, and leaves it to Mr Sheppard to refute the matters of fact referred to by Mr Inamdar (in the event of course it was Mr Byron who swore the further affidavit). With regard to the statement that improper stowage was the sole cause of the casualty, Maitre Villeneau says that that is likely to be very much in dispute. But if there was improper stowage then he agrees that French law would regard it only as a *faute nautique*, in respect of which the carrier can have his liability excluded under article IV rule 2. This necessarily involves the converse proposition that improper stowage affecting the stability and safety of the ship (a matter for which liability could not be excluded, if caused by want of due diligence), would

not under French law, be regarded as amounting to unseaworthiness under the Hague Rules. In this respect at least, then, Maitre Villeneau and Maitre Fontaine are at one.

Mr Byron, however, does purport to deal with the facts. My comments on this affidavit are subject to that which I shall say at the end of this judgment regarding ground 6 of the memorandum of appeal. Mr Byron makes it perfectly plain that the defendants do not necessarily accept that there was bad stowage of the copper. If there was, he says, there can be no true assessment of its significance as a contributing cause of the loss until the issues are tried. In effect he accuses Mr Inamdar of gross oversimplification of the issues when he says that the appellant is likely to challenge his conclusions and that “the necessity for factual evidence will be obviated”. Moreover Mr Byron hints that M. Lanoe’s evidence will result in their being no conflict of evidence as to how the stow was constructed. Finally Mr Byron submits that the relevant importance of the various factors which may have contributed to the loss of the vessel cannot be determined with any measure of certainty until the issues are tried by the court, and that all factual issues, which may include the construction and design of the vessel, should more conveniently be dealt with by the French courts. He therefore alleges that the appellants, as does Mr Hunter, are trying to improve their position in attempting to circumvent the jurisdiction clause by having the case heard in Kenya.

According to my understanding of Mr Byron’s affidavit, assuming all of it is admissible, he does not in terms state either that there was improper stowage or a shifting of the cargo. The most he says, a propos of the suggestion that the master of the ship did not reduce speed but kept it at 15 knots when turning into the wind, which was of force 10 or 11 and coming from the West South Westerly direction, in paragraph 7(i) is that the vessel slammed into a solid wall of water, in consequence of which there was a sudden increase in the list “probably caused” by a sudden shift of cargo to starboard. This is an inference rather than a statement of fact, and contrasts with Maitre Fontaine’s claim that the list “can only be explained” by the shifting of a solid ballast.

Before leaving Mr Byron’s affidavit I must deal with the matter of pyramidal wave. I must say that there is force in Mr Pollock’s contention that this is the first mention of the phenomenon and that nowhere in the other material available so far does there appear to be any basis for Mr Byron’s hypothesis. His suggestion to the learned judge was that the pyramidal wave was no more than theory invented by the respondents. Certainly there is not at this stage a strong basis for regarding the pyramidal wave as a causative factor in the loss of the *Francois Vieljeux*.

The only other person who has offered an opinion is Mr Hammond, the respondent’s expert, who is said by Mr Byron to take the view, supportive of his own, that if the stowage was open to criticism it was a minor importance as a causative factor in the loss.

What, therefore, is the state of the available evidence as regards improper stowage at Mombasa? The only solid statement is that of Maitre Fontaine to the effect that there was free space where the copper was stowed due to the removal of the zinc at Mombasa, coupled with Mr Byron’s statement that the copper “probably shifted” after the vessel slammed into the solid wall of water. Both these statements, if not legally hearsay, are second or third hand. The only direct evidence (since the appellants say they do not intend to produce any) will be that of Mr Lanoe. The respondents, I may say perhaps understandably, are not going to disclose their evidence at this stage on a matter which goes to jurisdiction only.

Mr Pollock sought to buttress his position by this argument. He says that the appellant never mentioned any question of unseaworthiness or bad stowage as amounting thereto in their plaint (quite correctly, see *Hobhouse J in The Torenia (supra)*) or in any of their letters, correspondence or affidavits until that of Maitre Fontaine, who gleaned his information solely from the respondent’s own internal report. Therefore, he said, why mention it at all unless the respondents recognized it as a genuine cause of the danger to the ship and its subsequent loss? It can only be, Mr Pollock submitted, because the respondents’ advisors perceived the danger of their being liable for bad stowage that they have attempted to rely on clause 3. Moreover why should they refer to the tightening of the stowage if the copper had not been badly stowed in the first place? That was, he said the icing on the cake.

In my opinion this argument to some extent begs the question. The most that the respondent’s internal

report does is to show that they envisaged that an issue as to the stowage of the copper would arise at the trial, but they are far from saying that such was the sole cause of the loss as Mr Inamdar claimed. Neither could this be so according to Lord Wright in the *Smith Hogg* case (*infra*) at p 410. The most the respondents say at this stage, in view of the other allegations in the letters regarding the Masters conduct and the appalling weather conditions, is that the stowage may have been one of the many factors which led to the loss of the vessel.

Mr Pollock complained that the respondents had been less than candid in their disclosures, that they had “backtracked” on that which they had previously said. Moreover the appellants were at a disadvantage inasmuch as they were wholly dependant on the information, which the respondents doled out to them. For my part I do not think the respondents have ever changed their stance on this issue, which is that bad, or imprudent, stowage, as Mr Pollock at one stage called it, was if it existed, a contributing factor together with all the other factors involved. This was the theme of Mr Hunters submissions in the High Court, inasmuch as he posed the question as to whether the stow was wrong, and if it was wrong could it be said to be a cause of the loss?

Accepting for the moment that improper stowage may have been a causative factor in the disaster, in the sense in which Lord Wright referred to it in *Smith Hogg and Co Ltd v Black Sea Insurance Co* [1940] 3 All ER 405, at page 409 namely:

“... causes may be regarded, not so much as a chain, but as a network. There is always a combination of cooperating causes out of which the lay ... will select the one or more which it finds material for its special purpose of deciding the case. That this is the test of the significance of an event from the standpoint of causation is clearly illustrated by this very doctrine of seaworthiness and its relation to kindred questions of negligence ...”

To what extent has it been established as such in this case?

Mr Pollock submitted that the matter should be tested in this way: Suppose in this case that the vessel had not encountered bad weather; suppose the Master had turned towards Vigo at 10.00 am; and suppose that the vessel had not started to list, then probably bad stowage would not have had any adverse effect. But if all those cooperating causes are there then imprudent stowage becomes a cause of the disaster. This derives support from Lord Wright’s concluding words in the *Smith Hogg* case at p 412 when he says that the negligence of the master in bunkering and in pumping out the foredeck of the *SS Lilburn* at Stornoway would not supersede or override the effectiveness of the antecedent unseaworthiness. Indeed it was doubtful if any event could do so once unseaworthiness is established as a cause. The same proposition is put differently by Hobhouse J in *The Torenia* when he said, at p 218, that where the facts disclose that the loss was caused by the concurrent causative effects of an excepted and a nonexcepted peril, the carrier can only escape liability to the extent that he can prove that the loss or damage was caused by the excepted peril alone. The unseaworthiness was constituted in the *Smith Hogg* case by the loading of a large quantity of timber on the ship’s deck at Soroka in such a manner that she sailed with a list of 5 degrees to port, which went over to 17 degrees to starboard when she arrived at Stornoway en route for another port.

Of greater use to Mr Pollock’s case in my view is Lord Wright’s earlier statement at paragraph 408:

“whether the master was negligent or not what he did could have done no harm if the *Lilburn* had not been unseaworthy.”

Lord Wright continues by saying that the shipowner will be liable for any loss with which the excepted causes (such as perils of the sea) cooperate if unseaworthiness is a cause, and he expands this term into “a real effective or actual cause”.

Lord Wright makes this point even more clearly in the other case cited on this issue, *Monarch Steamship Company Ltd v A/B Karlshamns Oljefabriker and Others* [1949] 1 All ER 1, in which a cargo of soya beans was shipped from Rashin to ports in the North Sea which the shippers could designate. The voyage

was greatly protracted due to the vessels unseaworthiness, a fact admitted for the purposes of the appeal. As a result the vessel was diverted to Glasgow but did not arrive there until after the outbreak of war in 1939. It was then prohibited by the British Admiralty from proceeding to the designated port. On the claim for damages by the buyers of the cargo the House of Lords upheld the decision of the Lower Courts against the shipowners, in the course of which Lord Wright said at pages 15 and 16:

“From one point of view unseaworthiness must generally, perhaps always in a sense, be a “remote” cause. To satisfy the definition of unseaworthiness it must exist at the commencement of the voyage. It must, however, still be in effective operation at the time of the casualty if it is to be a cause of the casualty, and from its very nature it must always, or almost always, operate by means of and along with the specific immediate peril. That is because the essence of unseaworthiness as a cause of loss or damage is that the unseaworthy ship is unfit to meet the peril. In other words the vessel would not have suffered the loss or injury if she had been seaworthy.”

And he continued:

“...unseaworthiness as a cause cannot from its very nature operate by itself. It needs the “peril” in order to evince that the vessel or some part or quality of it is less fit than it should have been if it had been seaworthy, and hence the casualty ensues. A fitter ship would have passed through the peril unscathed. In this way unseaworthiness is a decisive cause, or, as it is called, a dominant cause”.

These passages, then, support Mr Pollock to this extent, that it would be enough for him to establish bad stowage at Mombasa and that this was a cause of the disaster. I do not think it is necessary for him in this context necessarily to establish that it was a “front-runner”, a description which seemed to be something of a millstone until Mr Pollock explained that in the High Court he had meant to use this term in the context of meeting the case put forward there by Mr Hunter that bad stowage had no causative role to play in the loss. As I understood him Mr Pollock said that he had meant that bad stowage was a front runner for the cause he was putting forward, namely unseaworthiness, and not necessarily a front runner for the loss of the ship.

Mr Pollock heaped criticism on the passage in the learned judge’s judgment when he says, at p 274 of the record:

“The cause of the loss of this vessel cannot be determined with any certainty until the issues have been answered at the trial and certainly not in this application to stay proceedings under a foreign jurisdiction clause. Bad stowage is probably not however, the sole reason for the sinking of this ship and I am not, with respect, persuaded it is the ‘front runner’ as Mr Pollock claimed”

and said it was inconsistent with that which he had previously said (at page 247). I have read that passage several times but I cannot with respect see that it contains any error. The judge was not excluding bad stowage as a cause but said that it was a matter which would have to be decided at the trial: This accords completely with that which Robert Goff J said in the *I Congreso (supra)* where, after dealing with the plaintiff’s submission that the issue as to whether the State Shipping Company or the Republic or Cuba were the owners of the vessel (of which the latter would attract sovereign immunity) should be tried on oral evidence with crossreports kenya law reports kenya law reports kenya law reports kenya law reports kenya law reports kenya kenya law reports kenya law examination of witnesses, which could be done by ordering the question of title to the ship to be an issue at the trial, he said at page 559:

“It follows as a matter of principle that any question of jurisdiction, such as the question in the present motions, must be dealt with on the motions, and cannot be dealt with as an issue in the actions. Of course, on the hearing of such a motion, evidence will be admitted. Usually, that evidence will be in the form of affidavits, though in theory oral evidence, for example by crossexamination of deponents of affidavits, might be allowed. There has

however been no application in the present case for any such oral evidence so admitted, which in the present case is purely affidavit evidence, the question of jurisdiction has to be decided, and it cannot be right for the decision on that question to be allowed to depend on the decision of some issue to be tried in the actions. If there is no jurisdiction as against Mambisa, they should not be troubled with the actions at all: indeed it cannot be decided whether the actions can be allowed to proceed until the question of jurisdiction has been determined.”

While accepting, as I have said, that it would be sufficient for the appellants to establish for their purpose that improper stowage of the vessel at Mombasa was a contributing or cooperating cause of the disaster, I do not consider the evidence at this stage does more than suggest it was a possible cause which led to the dismantling and therefore the shifting of the cargo of copper. I do not, as the Judge did not, exclude it, but it does not seem to me that the evidence goes far enough to support a submission as to jurisdiction. This is so, in my view, even if I adopt it as an aspect or a part of the standard which Mr Pollock favoured, of his having to show a genuine and arguable case that the enforcement of the forum selection clause would result in a diminution of the cargo owner’s rights, so as to attract the nullifying provision of article III rule 8. The only recent case in point, *The Morviken*, was different. In that case it was manifest that the carriers’ liability would be reduced if Dutch law obtained, because it was self evident from the Hague Rules. The court only had to compare them with the Hague-Visby Rules to see the difference. In the instant case I do not think I am under-stating the evidence when I say that it is at this stage little more than a matter of conjecture that the stow was bad and that this was a cause of the disaster. In my view, therefore, there was no error by the judge in failing to hold that bad stowage was the front runner as the cause of the casualty.

Since the forum selection clause is not in my judgment struck down by article III rule 8 of the Schedule to the Act, it became a matter of discretion for the learned judge’s exercise as to whether he should grant a stay. He considered the case on the basis of the condition laid down by Brandon J in *The Eleftheria*. Applying the test stated in *The Makefjell* and referred to with approval in *The Adolf Warski*, and in more detail by Brandon LJ in *The El Amria*, I am not satisfied that either:

- (a) The judge misdirected himself on law, or
- (b) that he misapprehended the facts, or
- (c) that he took account of considerations of which he should not have taken an account, or
- (d) that he failed to take account of considerations of which he should have taken account, or
- (e) that his decision, albeit a discretionary one, was plainly wrong.

In fact I consider he was plainly right in the decision at which he arrived. Accordingly I would hold that grounds 1, 7 and 8 of the appeal fail.

One other matter was referred to in this appeal. This was as to whether the pleading was correct in the form in which it is drafted. We were informed that this is the standard way of drafting complaints in these cases, and it certainly accords with the decision of Hobhouse J in *The Torenia*, which on this point is to the effect that, a contract of carriage being in essence a contract of bailment, it is sufficient to allege and prove the contract and the failure to deliver up the goods on demand, as has been done in this case. It was suggested in the course of the argument that on occasion the pleader may telescope the reply into his complaint, or statement of claim, and allege unseaworthiness, negligence or whatever else he may be relying on, but it is clearly not necessary, in law, to do so. As Hobhouse J said, it is essential to keep in mind the distinction between the evidential and the legal burden of proof.

Only one other ground of appeal remains and it is that the learned judge erred in law in holding that Mr Byron’s second affidavit supplied the deficiencies of his first affidavit (Ground 6). This was not seriously argued in the appeal. I agree that while in interlocutory matters the proviso to order XVIII rule 3 permits the inclusion in an affidavit of statements of information and belief, showing the sources and grounds thereof, the affidavit must nonetheless show which portions are statements of fact and which matters of information and belief, with reasonable precision. Mr Byron’s second affidavit does not do this, in that it does not tie in those portions of this first Affidavit which are not statements of fact with the sources

which he reveals in the second. The judge initially said that “all” that Mr Byron had put in his two affidavits should not be looked at by the court, but towards the end of his judgment he held, despite the deficiency to which I have referred, that the second Affidavit supplied the deficiencies of the first. In view of the opening words of the paragraph in which the first of these statements appears “Moreover, the plaintiff submits the affidavit of Mr Byron is deficient” it is obvious that the whole of that paragraph is devoted to the contention of the plaintiff on this issue. This follows the scheme of the judgment that the earlier part sets out the respective contentions and submissions of the parties and the latter part represents the conclusions at which the judge arrived.

After a consideration of the affidavits and the arguments of Mr Pollock and of Mr Hunter, it seems to me that the facts set out in Mr Byron’s first Affidavit (as opposed to the arguments which he advances) were assumed, for the purposes of this appeal, and of the order granting a stay of the proceedings, so long as they were only regarded as causative (though contentious) factors, together with the allegation of unseaworthiness. For instance, Mr Pollock, in dealing with the suggestion of the pyramidal wave, did not do so on the basis that that portion of the affidavit was inadmissible, but on the footing that it was one of a combination of disputed factors which should be looked at this stage of the case against the background of unseaworthiness which, as Lord Wright said, cannot operate by itself, but can only be evidenced by the precipitating cause of the peril, hence the casualty ensues. This is the basis on which I have considered Mr Byron’s affidavit. I would therefore hold in relation to Ground 6, that while the first affidavit did not comply strictly with the rules nevertheless the judge was correct in holding that the earlier deficiencies were made good sufficiently for the court to consider the facts stated in it for the present purpose. Whether the matters stated therein will, in the event, be proved at the trial is another question.

To summarise, therefore, I would hold, for the reasons I have stated, that clause 3 of the bill of lading is not struck down by article III rule 8 of the Schedule to the Carriage of Goods by Sea Act, cap 392. I would also hold that it was not established for the purpose of the application for a stay of the proceedings that there was improper stowage of the vessel *Francois Vieljeux* when it sailed from Mombasa. Finally, I would hold that the learned judge exercised his discretion correctly in granting the application for a stay in favour of the French Court. For these reasons I would dismiss the appeal, with costs, which I would certify as for two counsel.

Chesoni Ag JA: On February 5, 1982, Mr Justice Kneller, as he then was, sitting at Mombasa made an order by which he granted an application by the 1st defendant ship owner and the 2nd defendant cargo carrier, under the 1st defendant’s management, in a cargo damage suit for a stay of action on the ground that the bill of lading under which the plaintiff’s cargo was carried contained a foreign jurisdiction clause. This appeal is from that order.

The first defendant, *Societe Navale Chargeurs Delmas Vieljeux (SNCDV)* owned and operated a French ship known as *Francois Vieljeux*. On January 17, 1979, sailed from Mombasa northwards for Rotterdam, Hamburg and Bremen. She was carrying 7,200 tons of copper, 6,800 tons of general cargo consisting mainly coffee, pineapple and sisal and 123 containers on deck. The total cargo therefore weighed about 14,000 tons and was of a total value of approximately US \$ 28,000,000. The plaintiff’s 1,400 bags of coffee valued at US \$ 308,280 formed part of the general cargo of 6,800 tons. On reaching the Mediterranean Sea after leaving the Suez Canal the vessel met heavy weather on February 8, and 10, 1979 and she had to slow down speed and sail at a try on February 10. The weather worsened by February 13 and in the morning of February 14 a list to starboard was noticed. The listing increased from 8.5° to 22° and the Master after failing to redress the vessel decided to change route and head towards Vigo, but the watertight door astern starboard was smashed and the inflow of water increased the list to between 35° and 40° which led to the vessel sinking at 12.45 on the 14th. The disaster cost twenty three lives. The Master, the Chief Officer and the three others were the only survivors. The cargo on board the vessel was a total loss. In June 1980 the plaintiff (hereinafter called “the appellant”) filed a suit in the High Court of Kenya at Mombasa against the defendant (hereinafter called “the 1st and 2nd respondents”) respectively claiming damages of US \$ 308,280 plus interest and costs. The claim was based on the contract of carriage incorporated in Bill of Lading No 21 (hereafter referred to as “the bill of lading”).

The bill of lading was in the standard form entitled “Liner Bill of Lading” generally in use in shipping

contracts, and it provided for consignee to order and or notification to be given to M/S Joachim Ehlebracht, Sogestrasse 31-33, 2800 Bremen West Germany. The vessel was named and the Port of loading stated therein too. The gross weight of the 1,400 bags of Kenya Coffee Grade AB was given as 85,540 kgs. On the reverse of the bill of lading it was written “(Liner terms approved by the Baltic and International Maritime Conference)”. Clause 2 was the Paramount Clause incorporating the Hague Rules. It reads as follows:

“2. Paramount Clause

The Hague Rules contained in the international convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August, 1924 as enacted in the country of shipment shall apply to this contract.....”

There was also a jurisdiction clause (Cl 3) which provided as follows:

“Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein.”

The Hague Rules are incorporated in the Schedule to the Carriage of Goods by Sea Act (cap 392, Laws of Kenya) which was enacted in 1926. The date of commencement of the Act is September 28, 1926. The purpose of the Act is to regulate the carriage of goods by sea. The bill of lading was issued at Mombasa on January 26, 1979 by Kenya Shipping Agency Ltd., as agents for Svedel GIE, 2nd defendant.

The learned judge granted a stay because:

- (1) The evidence on the issues of fact is situated or more readily available, and the effect of this on the convenience and the expense of a trial favoured France as the forum.
- (2) The law applicable is French because that was what the parties chose.
- (3) There is no overriding language in the Kenyan Act or Rules and no public policy that demands it.
- (4) The plaintiff was bound by the contract he entered as incorporated in the Bill of Lading No 21.
- (5) The plaintiff will not be prejudiced by having to sue in the French Court because it will
 - (i) be deprived of security for its Claim;
 - (ii) be unable to enforce any judgment;
 - (iii) be faced with a time-bar not applicable in Kenya; or
 - (iv) for political, racial or other reasons be unlikely to get a fair trial.
- (6) The defendants genuinely desired trial in France and were not only seeking procedural advantages.

The learned judge said:

“And if the choice of law in the contract is not decisive then this inquiry into with what country the dispute is more or most closely concerned reveals it is France and that satisfies the test propounded by Lord Denning in *The Fehmarn* [1958] 1 WLR 159, 162 in the Court of Appeal, a decision which also is binding now.”

He added:

“The other general consideration is the undesirability of the plaintiff suing the defendants in France and in Kenya albeit in different actions about different cargos and the defendants having to defend in different actions in different countries under the same bills of lading for cargos lost in the one vessel at the same time.”

“The plaintiff has not persuaded this court with strong reasons to exercise this discretion and release it from its bargain and the defendants have reinforced the presumption with such reasons that they are entitled to a stay.”

There are eight grounds of appeal which Mr Pollock, for the appellant, argued together. His arguments and the reply by Mr Hunter, for the respondents, are set out in detail in the judgment of my learned brother Hancox JA and there is no need for reproducing them, though I shall set out the grounds of appeal, which are:

1. The learned judge erred in law in failing to hold that there were good grounds for refusing a stay.
2. The learned judge erred in law in not holding that the law of Kenya, and in particular the Carriage of Goods by Sea Act (cap 362), governed the relevant issues in dispute between the parties.
3. The learned judge erred in law in failing to hold that the said Carriage of Goods By Sea Act was to be given compulsory or mandatory effect by the Courts of Kenya in any case of the shipment of goods outbound from Kenya.
4. The learned judge erred in law in not holding that the Choice of Law and/ or Jurisdiction Clause in the bill of lading was inconsistent with the said Carriage of Goods by Sea Act and was therefore null and void and/ or of no effect in law.
5. The learned judge erred in law in not holding that considerations of public policy required him to refuse to give effect to the Choice of Law and/or Jurisdiction clause in the bill of lading.
6. The learned judge erred in law in holding that the second affidavit of Robert James Byron “supplied the deficiencies “ of his first affidavit.
7. The learned judge erred in failing to hold that on the affidavit evidence before him bad stowage was the “front runner’ as the cause of casualty.
8. The learned judge was wrong not to hold (if indeed he did not) that bad stowage was a relevant cause of the casualty.

The appellant has asked this court to allow the appeal with costs, set aside the learned judge’s order granting a stay, dismiss with costs the respondents’ application for a stay of proceedings and grant the appellant costs for two counsel together with a certificate for Queen’s Counsel both here and in the court below.

The basis of the respondents’ application of September 10, 1980 for a stay of further proceedings in the suit was, therefore, the terms of Clause 3 of the bill of lading which related to the choice of forum and law (see paragraph 8 of the affidavit of John Colin Sheppard). The respondents’ case was that as both SNCDEV and Svedel are based and have their principal place of business in Paris, France, they were entitled to require all claims against them under bills of lading issued for the cargo on *Francois Vieljeux* to be decided in France and in accordance with French law, and, therefore, the appellant’s suit and 13 others that had been filed in Kenya ought to be stayed. If clause 3 was valid, French law was the proper law of the contract between the parties and a French court was better equipped than a Kenya court to construe and interpret and deal with any points that may arise on French law. In the respondents’ view virtually all the available evidence concerning the loss of the ship and cargo is to be found in France, for example, the five survivors who included the Captain and Chief Officer. The respondents also argued that since the appellant had already commenced other similar actions in the same matter in France it was desirable to have the litigation in the same jurisdiction and in any event the claims were more closely connected with France than with any other country. There would be fair trial afforded the parties and the appellant, should he succeed, would be able to enforce the decision by execution.

The appellant opposed the application for stay because:

1. The forum clause (clause 3) was null and void on the ground that, according to the appellant, the cause of the casualty was improper stowage at Mombasa which resulted in unseaworthiness of the ship, and, improper which affects the stability of the ship is deemed under French law to be a “*faute nautique*” (an error in the navigation or management of the ship) and cannot amount to “unseaworthiness” and in the result the ship owners or carriers will be absolved from liability under article IV rule 2 of the Hague Rules notwithstanding

the provisions of article III rule I which would apply if the suits are tried in Kenya. In short, clause 3 of the bill of lading offends article III rule 8(1) of the Hague Rules, which a Kenyan Court would apply.

2. Even if the jurisdiction clause were valid there were strong reasons sufficient to support the conclusion that it would be unjust and unreasonable in the circumstances of this case to stay the proceedings and require the appellant to sue the respondents in France.

The appellant's arguments were embodied in the affidavit of Indaravadani Tribhadanda Inamdar dated October 23, 1980. Let me first set out what I consider to be the law applicable in this matter in this country. I have been unable to find any local authority reported or unreported on the issue before the learned judge and us.

The application before the court was for a stay of proceedings, as already stated, on the ground of a choice of forum clause. The principles upon which courts in other jurisdictions eg in England, have acted in such an application are set out by Mr Justice Brandon, as he then was, in *The Eleftheria* [1969] 1 Lloyd's Rep 237 at p 242. The same principles were applied in *Makefjell* [1976] 2 Lloyd's Rep 29; *The Adolf Warski* [1976] 2 Lloyd's Rep 241, *The Kislovodsk* [1980] 1 Lloyd's Rep 83 and *The El Amria* [1981] 2 Lloyd's Rep 119. The United States Supreme Court commented on those principles as it can be seen from the judgments of that court delivered by Chief Justice Burger in *The Chaparral* [1972] 2 Lloyd's Rep 315 and *The Bremen v Zapata Off-Shore Co* [1971] 407 US 1.

The carriage of goods by sea from any port in Kenya to any port within or outside Kenya is regulated by The Carriage of Goods By Sea Act. Section 2 of that Act reads:

"2. Subject to the provisions of this Act, the provisions of the Schedule to this Act shall have effect in relation to and in connexion with the carriage of goods by sea in ships carrying goods from any port in Kenya to any other port whether in or outside Kenya." (Underlining is mine).

The above section is obligatory to all shipments from a port in Kenya. The provisions of the schedule referred to contains the Hague Rules. Section 4 of the Act which relates to the statement which must be included in every bill of lading relating to outward bound goods from Kenya provides as follows:

"4. Every bill of lading, or similar document of title, issued in Kenya which contains or is evidence of any contract to which the said Schedule applies shall contain an express statement that it is to have effect subject to the provisions of the said Schedule as applied by this Act. (underline mine).

Again, every contract of carriage of goods by sea made in Kenya must comply with section 4 of the Act. The Hague Rules, which constitute the Schedule to our Act, are part and parcel of the Act and they become, by law, part of the terms of contract of carriage of goods by sea evidenced by bills of lading. In other words The Hague Rules are incorporated in every bill of lading issued in Kenya for goods shipped from Kenyan ports by legislation and not by contract.

Where the Hague Rules are incorporated in a bill of lading by legislation (in our case outward shipments) such bill of lading is subject to the Hague Rules and any clause in it which is inconsistent or mutually irreconcilable with any provision of the Rules is null and void and of no effect. For example a clause in a bill of lading which has the effect of relieving the shipowner of his liability or lessening it other than as provided in the Hague Rules would offend the provisions of article III clause 8 of the said Rules as applied in Kenya. The rules have made the responsibilities and liabilities of the carrier absolute and irreducible. Other common law countries like England and Canada have held a similar view: *Carver on The Carriage of Goods By Sea Act 1971* p 325, paragraph 472 footnote 13, *The Morviken* [1982] Lloyd's LR 325 at p 329, [1983] 1 Lloyd's LR 1 at p 7 Lord Diplock's Speech and *The Regal Scout (No 2)* Federal Court of Canada (unreported) and *The Split* [1973] 2 Lloyd's LR 535.

In *The Morviken* an asphalt road finishing machine shipped on board *Haico Holdwerde* from Scotland to Bonaire in the Dutch Antilles was transhipped in Holland on to the defendants' vessel *Morviken*. When the machine was being discharged at Bonaire it dropped and was severely damaged. The plaintiffs sued the defendants in the United Kingdom for damages. The defendants applied for a stay of all further proceedings in the action on the ground that all actions arising under the bill of lading should be brought before the Court of Amsterdam. The plaintiffs argued that the action ought not to be stayed on the ground that the jurisdiction clause was unenforceable or alternatively if the clause was enforceable there was strong reason for refusing the stay. The jurisdiction clause in the bill of lading issued in respect of the machine provided that the law of Netherlands in which the Hague Rules of 1924 were incorporated would apply to the contract and it fixed the maximum liability per package to a sum less than that to which the plaintiffs would be entitled in the United Kingdom under the Hague-Visby Rules, 1971. The clause also provided that all actions under the contract of carriage shall be brought before the Court of Amsterdam and no other court shall have jurisdiction.

Article III rule 8 of the Hague-Visby rules which apply in the United Kingdom is substantially identical with article III, rule 8 in the Hague Rules of 1924, which were, at the time of the suit, applicable in Netherlands. The relevant part of article III rule 8 says that:

“Any clause ... lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect.”

The Court of Appeal allowed the plaintiffs' appeal against the stay imposed by the trial judge and ordered all the actions to proceed in England. The defendants' appeal to the House of Lords was dismissed. Lord Diplock said at paragraph 7:

“My Lords, it is, in my view, most consistent with the achievement of the purpose of the 1971 Act that the time at which to ascertain whether a choice of forum clause will have an effect that is proscribed by article III, rule 8 should be when the condition subsequent is fulfilled and the carrier seeks to bring the clause into operation and to rely upon it. If the dispute is about duties and obligations of the carrier or ship that are referred to in that rule and it is established as a fact (either by evidence or as in the instant case by the common agreement of the parties) that the foreign Court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if article IV, rule 5 of the Hague-Visby Rules applied, then an English court is in my view commanded by the 1971 Act to treat the choice of forum clause as of no effect.”

Article III rule 8 in the Hague-Visby Rules, 1971 is in all material respects identical with the same rule in the Hague Rules incorporated in the Schedule to the Kenya Carriage of Goods by Sea Act of 1926. The Kenyan rule provides as follows:

“8 (1) 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 this Schedule, shall be null and void and of no effect.” (underlining mine).

Article III sets out the responsibilities and liabilities of the carrier. In the *Regal Scout (No 2) ibid*, the plaintiff shipped a cargo of feed barley on board the ship *Regal Scout* owned by the defendant from Vancouver to Otaru and Shiogama in Japan. On arrival the barley was found contaminated by salt water allegedly attributable to negligence on the part of the defendant, its servants and employees in failing to make and keep the defendant ship seaworthy and fit for the voyage.

The bill of lading issued by the agent of the carrier to the shipper contained a jurisdiction clause (clause 3) which read:

“3. JURISDICTION. Any dispute arising under this Bill of Lading shall be decided in the Tokyo District Court in Japan according to Japanese law, except only as otherwise agreed herein or as otherwise determined by controlling foreign law.”

There was no dispute to the fact that if the matter was tried in Tokyo Japanese law would apply whereby on the facts available the owner of the ship would not be construed to be a party to the contract of carriage, which would make it impossible for the cargo owners to recover any damages. Canadian courts applying Canadian law would construe the shipowner as being a party to the contract. The Federal Court of Canada (Cattanach J) after stating that jurisdiction clause would, under the Japanese law, not only have the effect of lessening the liability but of totally obliterating it followed *The Morviken* and held that a Canadian Court was commanded to apply the Canadian Carriage of Goods by Water Act and treat the choice of forum clause as of no effect.

Sections 2 and 4 of the carriage of Goods by Water Act of Canada and article III rule 8 of the Schedule to that Act are substantially identical with the same provisions in our Carriage of Goods by Sea Act and Article III rule 8 of the Schedule thereto.

All contracts of carriage covered by section 2 of our Act fall within the Act. The Act, therefore, applies to bills of lading for all outward shipments from Kenya ports irrespective of whether the proper law of the contract is Kenyan or foreign. The same appears to have been the position in England under the English Carriage of Goods by Sea Act, 1924 – see *Law of Obligations* by Dicey 9th Edition, p 754, footnote 22 and *Carriage of Goods by Sea Act, 1924 by Scrutton*, 18th Edition p 404. In my view our legislators intended the Carriage of Goods by Sea Act to apply to bills of lading for all outward shipments from all ports in Kenya, and it is the duty of our courts to ensure the proper application of the Act.

The principles stated in *The Eleftheria* are as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to

(4), the following matters, where they arise, may be properly regarded as:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign court.

(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for that claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in England; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

The spirit underlying the Hague Rules is that in the interest of international trade, all contracts of carriage of goods by sea should be subject to uniform rules governing the rights and liabilities of the parties and the extent of the liability. Thus, such rules should not differ from country to country or be according to

the place where the parties agree the disputes to be tried. All persons connected with or concerned about international trade want to be certain of what to expect in the contracts of carriage of their merchandise by sea. The only way to ensure this certainty is to deny parties liberty by any device, directly or indirectly to contract out of the Rules. I, to that extent, agree with what Lord Denning MR said in *The Morviken* in the Court of Appeal at p 329.

I would apply the above principles set out in *The Eleftheria* with necessary modifications, in Kenya, in cases where the plaintiffs sue in Kenya in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay. However, where the contract of carriage incorporating the choice of forum clause is subject to the Hague Rules, as in the present case, and, the plaintiffs show that such clause (choice of forum clause) is, in material respect, inconsistent with the Rules and hence unenforceable, the court, if satisfied that the inconsistency exists, need not go any further and consider the principles in *The Eleftheria*, for material inconsistency of a clause in the contract with the Hague Rules, is by itself a strong reason for refusing to grant a stay. I agree with what Chief Justice Burger said in *The Chaparral* [1972] 2 Lloyd's Rep at p 321 that:

“Thus in the light of the present day commercial reality and expanding international trade we conclude that the forum clause should control absent a strong showing reason that it should be set aside or not enforced (underlined words are mine).”

In the instant case there is no dispute that the parties agreed that any dispute relating to the bill of lading was to be decided in Paris by a French court in accordance with French law because that is where the defendants' principal place of business is. The bill of lading is for an outward voyage from a Kenyan port of Mombasa. Sections 2 and 4 of the Carriage of Goods by Sea Act have been complied with and the bill of lading is subject to the Hague Rules as incorporated in the Schedule to the Kenyan Act. Article III rule 8(1) prescribes contracting out of the Rules.

The plaintiff maintains that the casualty was caused by improper stowage at Mombasa which led to unseaworthiness of the ship. The defendants rely on heavy weather and the master's negligence as the causes of the casualty.

Both parties agree that whether the suits in this matter are tried in France or Kenya the Hague Rules as enacted in Kenya apply. Mr John Colin Sheppard, a Solicitor of the Supreme Court of Judicature, London, England, who is a partner in the firm of lawyers instructed on behalf of the defendants said, in paragraph 11(a) of his affidavit of August 12, 1980, in support of the application to stay the proceedings:

“Although the law concerning carriage of goods may be regarded as broadly similar in the various countries of the world, France has developed its own particular jurisprudence based upon its maritime code and decided case law. Clause 2 of the Bill of Lading expressly incorporates the Hague Rules; but such rules would have to be construed and interpreted in accordance with French Law. Similarly, the application of such rules to any given set of facts would have to be construed in accordance with French Law.” (underlining mine).

“b) The proper construction and interpretation of the Hague Rules and the application of such Rules to particular circumstances have been the subject of a considerable number of cases decided before the French Courts and there has as a result developed a very considerable and detailed jurisprudence under French Law concerning the rights and obligations of parties to a contract of carriage. The emphasis and conclusions arrived at under French Law are often very different from the emphasis and conclusions arrived at in other jurisdictions eg, in the English Courts. For example, there are considerable differences between French and English Law in relation to the nature and scope of the ship owners' obligations to exercise due diligence to make the ship seaworthy under Article III of the Hague Rules, and also in relation to the nature and scope of the exceptions which may be relied upon by the ship owners under article IV of the Hague Rules eg the nature and scope of the exception of “nautical fault” under the French Equivalent of article IV

2(a) of the Hague Rules (underlining mine)”.

The defendants therefore admitted what Mr Inamdar said in his affidavit of October 23, 1980, paragraph 10, that if the proceedings are instituted in France:

“The French court will, in all probability and notwithstanding the clear terms of clause 2 of the Bill of Lading, apply and interpret the Hague Rules in accordance with French case law.”

That admission is emphasized in the affidavit of Mr Maitre Jacques Villeneau, an expert on French Law whom Mr Sheppard said, in his own affidavit, the defendants may wish to call to inform the court of the relevant nature and effect of the French Law Mr Villeneau said:

“...what the French court would do is simply to construe the contract between the parties as one to which French Law applies and therefore to which French rules of construction apply.”

“11. I have not the slightest doubt what the court would not do is to interpret the Hague Rules according to Kenyan or English case law or rules of interpretation. (underlining mine – “not” had also been underlined before).”

“13Mr Sheppard was entirely right to say, as he did in paragraph 11(B) of his affidavit, that there are considerable differences in emphasis and conclusions between the Hague Rules as applied and interpreted under French Law and as applied and interpreted under English Law.”

The three affidavits I have referred to above indicate and counsel’s submissions revealed that there are differences in law between the way the French and Kenyan courts may interpret and apply the Hague Rules. The Kenya Act is based on the English Model of the Hague Rules. These differences are as follows:

(1) As to the present contract of carriage while the French court would read the Hague Rules into contract ie as forming part of the terms of the contract, a Kenyan court would apply the Rules as a matter of law.

(2) Perhaps the most important difference is what Mr Inamdar says in paragraph

9 of his affidavit which is as follows: “9. It is submitted that, if (as the plaintiffs contend) the Hague Rules as enacted and construed in Kenya apply to these cases, then according to Kenyan Law, improper stowage which affects the stability or safety of the vessel amounts to “unseaworthiness” and if it is established (as the plaintiffs hope to do) that there was a failure on the part of the shipowner or carrier to use due diligence in making the ship seaworthy ‘at or before the commencement of the voyage’ such shipowner or carrier will be precluded from relying upon any of the provisions of Article IV Rule 2 of the said Hague Rules and the plaintiffs must succeed in these actions. If on the other hand, French Law applies to these cases and the Hague Rules are interpreted and applied according to French case law, I am advised by the said Emmanuel Fontaine and verily believe that improper stowage which affects the stability of the ship is deemed in French law to be a “faute nautique” (an error in the navigation or management of the ship) and can never amount to “unseaworthiness”. This being the case, the shipowner or carrier will be able to absolve itself under Article IV Rule 2 without being affected by the provisions of article III Rule 1 of the Hague Rules. In this event, the plaintiffs must fail in their actions.” (underlining mine).

In fact according to Kenya law the plaintiffs would not be required to establish failure of the shipowner or carrier to use due diligence to make the ship seaworthy. All they have to establish is that the loss or

damage resulted from unseaworthiness. Once they establish that the onus of proving the exercise of due diligence would, by law, be on the shipowner or carrier. (See article IV rule 1(2)).

Mr Fontaine who is the plaintiff's expert and adviser on French law said the following in his letter of February 12, 1980:

“ I remind you that under French law, improper stowage affecting the stability of the vessel is never considered as unseaworthiness of the vessel but rather ‘a fault of the master in the management of the ship’.”

Mr Villeneuve, agreed in his affidavit, paragraph 16, with Mr Fontaine's advice for he said:

“.....I agree with the advice rendered by Maitre Fontaine (which appears not only in Mr Inamdar's affidavit but also in Maitre Fontaine's letter of advice to his clients of February 12, 1980) that if the Hague Rules are interpreted and applied according to French case law, then improper stowage affecting the stability of the ship is treated as “faute nautique” in respect of which the carrier is entitled to exclude his liability under article IV Rule 2 of the Hague Rules” (underlining mine).

I would accept the concurrent view of the two experts on French law, and also what Mr Inamdar says in paragraph 9 of his said affidavit. Thus, the major difference between the French law which a French court would apply and the Kenyan law which our court would apply is that, on the authorities on French case law, a French Court would not consider improper stowage affecting the stability of the ship as unseaworthiness but “*faute nautique*” whereas under Kenya law a Kenyan court would construe improper stowage which affects the stability or safety of the ship as unseaworthiness. The effect of the difference I have set out above is that under the French law the shipowners or carriers (defendants) would, even, if the plaintiff proves improper stowage leading to unseaworthiness of the ship, succeed to shield themselves behind the cover of Article IV rule 2 of the Hague Rules and escape liability with impunity, whereas under the Kenyan law the shipowners would take advantage of article IV rule 2 only if they satisfy the requirements of article IV rule 1(1) by proving that they exercised due diligence to make the ship seaworthy before or at the commencement of the voyage.

The appellant has from the start of his proceedings sought to rely on improper or bad stowage at Mombasa. Conclusive proof of that cause can only be established when all the evidence in the case is given. Improper stowage need not be the sole cause of the unseaworthiness, if the loss was partly due to unseaworthiness. It is enough if it is shown to be one of the causes. The respondents have not seriously denied bad stowage, but they say it did not cause or even contribute to the casualty. It is too early to determine whether it was an effective cause, but, in my view, the appellants have established an arguable case regarding the cause of the casualty and they should not be shut off from the proper forum. There will be no use in the appellants proving improper stowage leading to unseaworthiness, if the respondents' liability is already eliminated by a clause in the contract of carriage contrary to the Carriage of Goods by Sea Act of Kenya.

The ultimate effect if the defendants are allowed to enforce the choice of forum clause in the bill of lading would be total obliteration of the liability of the shipowners or carriers contrary to article III, rule 8, of the Hague Rules as enacted in Kenya, which rule, as already said herein above, declares null and void and of no effect any clause in a contract of carriage (bill of lading) designed to relieve the carrier or the ship from liability for loss or damage as provided in the said rule.

I would find as follows, taking into account the principles in *The Eleftheria*:

- “(a) the evidence on the issue of improper stowage is mostly situated in Kenya where the offloading of part of the cargo and further loading were done and to a less extent it is situated in France from Master and the Chief Officer;
- (b) the French law applies but it differs from Kenya law in material respects on the issue of the plaintiffs' version of the cause of the casualty;

- (c) the defendants are closely more connected with France than Kenya;
- (d) the defendants genuinely desire trial in France and are not only procedural advantages;
- (e) no case was made out for prejudice under paragraph(e) in *The Eleftheria* but the way a French Court would construe improper stowage affecting the stability of the vessel would highly prejudice the plaintiff's interest."

The plaintiff, by showing that if he were forced to sue in France he would be faced with a total obliteration of the defendants liability, has established a strong cause for exercising the court's discretion against granting a stay.

I have read and considered the American authorities of the Federal Courts cited by counsel but have not found it necessary to comment on each. Those cases have been interpreted on the basis of the USA Carriage of Goods by Sea Act whose language gives the Act overriding effect, and even then the views of that country's Supreme Court in the *Chaparral*, *ibid*, and *The Bremen v Zapata, supra*, agree with the line, I think, a number of common law countries, have adopted, based on the principles set out in *The Eleftheria*. I have deliberately not dealt with the *Vita Food Products v Unus Shipping Co Limited* [1939] AC 277 which I have also read because the facts of that case were dissimilar to those of our case. In that case the paramount clause was even omitted and whereas the Newfoundland Carriage of Goods by Sea Act, 1932, was applicable to the contract of carriage the case was tried in Nova Scotia.

The appellant should succeed on grounds 1, 2, 4, and 5. Ground 6 was not seriously argued. As to Ground 7 it is not possible at this stage to say whether bad stowage was the "front runner," but in my opinion, the appellant has made out a *prima facie* case that most probably it affected the stability of the ship. The learned judge in my view correctly said:

"The cause of the loss of this vessel cannot be determined with certainty until the issues have been answered at the trial and certainly not in this application to stay proceedings under a foreign jurisdiction clause. Bad stowage is probably not, however, the sole reason for the sinking of this ship and I am not, with respect, persuaded it is the 'front runner' as Mr Pollock claimed."

The implication is that bad stowage was probably one of the causes of the casualty, which I think was the farthest the learned judge could go at that stage of the proceedings.

As to the 3rd ground our Act does not have compulsory or mandatory effect, and, if it were so Parliament would have said it. Thus in a proper case where parties contract within the Hague Rules as enacted in Kenya, the court may enforce a choice of forum clause if it is reconcilable with the rules. For example if in the present case the parties had chosen as the exclusive forum a foreign court, like English, which would apply foreign law in conformity with the Hague Rules as enacted in Kenya the Kenya Court would most probably and properly enforce the choice of forum clause by exercising the discretion to grant a stay.

Grounds 3 and 8 of appeal should fail. On the facts of this case, bearing in mind that article III rule 8 in the Hague-Visby Rules on which *The Morviken* was decided and article III rule 8 of the Hague Rules, as enacted in Kenya, are substantially identical, and, for the reasons stated and it having been established on the parties' affidavits that the foreign court (French court) chosen as the exclusive forum would apply French case law which would result in relieving the carriers from liability contrary to article III rule 8 of the Hague Rules, I, like Lord Diplock, would find that the Kenyan court is commanded by the Kenya Carriage of Goods by Sea Act to treat the choice of forum clause as null and void and of no effect, and I would accordingly so hold. In my view it was clearly the intention of Parliament to give effect to the Kenyan interpretation and application of the Hague Rules where the port of shipment is situated in Kenya, as it was here, and in those circumstances the Kenyan interpretation and application of the Rules should prevail in case of any inconsistency with the French interpretation and application developed through French case law of the same Rules. That intention plainly prohibits parties from contracting out of the Rules, which the choice of forum clause purported to do in the instant case.

In conclusion I would allow the appeal, remove the order of stay, dismiss the application for stay and allow the action to proceed in Kenya. I would award the costs in the High Court and in this court to the appellant and certify such costs for two counsel in both courts.

Nyarangi Ag JA. I have had the advantage of reading Hancox JA's judgment and I agree with it. I would add a few observations. The action turns on The Carriage of Goods by Sea Act cap 392 (The Act) whose purpose is to regulate the carriage of goods by sea.

The interpretation and application of rule 8(1) of article III of the schedule to the matter is crucial to a proper determination of the dispute. The schedule which contains the Hague Rules applies by virtue of section 2 of the Act. Section 4 of the Act provides for the statement to be included in every bill of lading.

The material choice of forum clause in the bill of lading was willingly accepted by the parties who were fully aware that the French legal system might be less advantageous than that in Kenya. In the circumstances the parties should be held to the mutual undertaking. This court is entitled to assume that sufficient facilities for trying the case are available in France to the extent they are here. There is nothing to show that any party will suffer any deliberate injustice before a French court. I would agree that in general the American legislation and in particular the Harter Act just like the 1971 Act confer on the relevant American statutes an overriding effect. A decided case in support of that view is *The Indussa*.

As against that the Kenya Act and the 1924 English Act do not have such an overriding effect as would strike down a clause of the type the parties here accepted. *The Regal Scout No 2* can be fairly distinguished from this case on the facts in so far as in that case the owner of the ship would not even be heard before a Japanese court, not being regarded as a party to the contract. The parties to the choice of forum clause would be heard according to the appropriate French legal procedure.

The factual position would not in my view support a definite finding that the improper storage of the vessel at Mombasa was the cause of the casualty. The trial judge did not err as was suggested in the manner he dealt with the contention on the cause of the loss of the vessel. Having correctly decided that rule 8 of article III of the schedule did not strike down the forum selection clause, the trial judge could exercise his discretion to grant or refuse stay. Looking at the whole matter, I cannot say that the trial judge was plainly wrong in his decision. I would agree that the appeal be dismissed.

I agree with the order proposed by Hancox JA on costs.

Dated and Delivered at Nairobi this 9th day of February 1984.

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

.....

AG. JUDGE OF APPEAL

J.O.NYARANGI

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the
original.

DEPUTY REGISTRAR