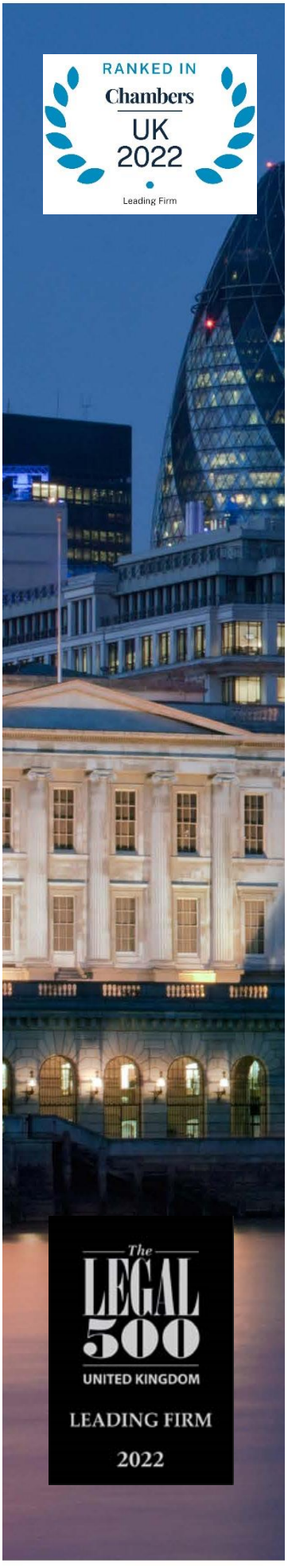
The Limnos No Longer



• A recent decision in the High Court has disagreed with the ruling in The Limnos that under the Hague-Visby Rules, a cargo interests' ability to recover for loss and damage from carriers is limited in accordance with the weight of goods physically lost or damaged.

• The decision held that a carrier's liability in respect of cargo interests' loss and damage is subject to the weight limitation even if the loss and damage is of an economic nature, including liability to pay salvors and on-shipment costs.

• The Defendant did not obtain leave to appeal so it may be some time before the judgments in The Limos and Trafigura PTE LTD v TKK Shipping PTE LTD are reconciled by the Court of Appeal.

In Brief

When a vessel's cargo is lost or damaged, there are numerous liabilities which the parties involved will consider. Of course, a cargo receiver will be anxious to obtain their cargo and/or be paid for loss and damage to or in connection with it. Conversely, the contractual carrier of the cargo will look to limit its liability for the costs of recovering and on-shipping the cargo and any loss or damage to it. Usually, therefore, contracts of carriage incorporate international rules for carriage of goods by sea. Very often, the Hague-Visby Rules[1] are selected and incorporated using the Clause Paramount.

When adopted, Article IV r.5(a) of the Hague-Visby Rules limits the claims for loss or damaged goods, or indeed the damages connected to them, by reference to the weight of the goods lost or damaged.

A recent High Court decision *Trafigura PTE LTD v TKK Shipping PTE LTD [2023] EWHC 26 (Comm)* has elucidated and addressed the disharmony brought about by *The Limnos [2008] 2 Lloyd's Rep. 166* in relation to Article IV r.5(a) of the Hague-Visby Rules.

In The Limnos, Burton J held the type of loss and damage which was recoverable by cargo interests under the Hague Visby Rules was limited in accordance with the weight of goods actually physically lost or damaged, rather than goods which, while undamaged, depreciated in value owing to the carrier's breach of contract of carriage[2]. Sir Nigel Teare in his recent

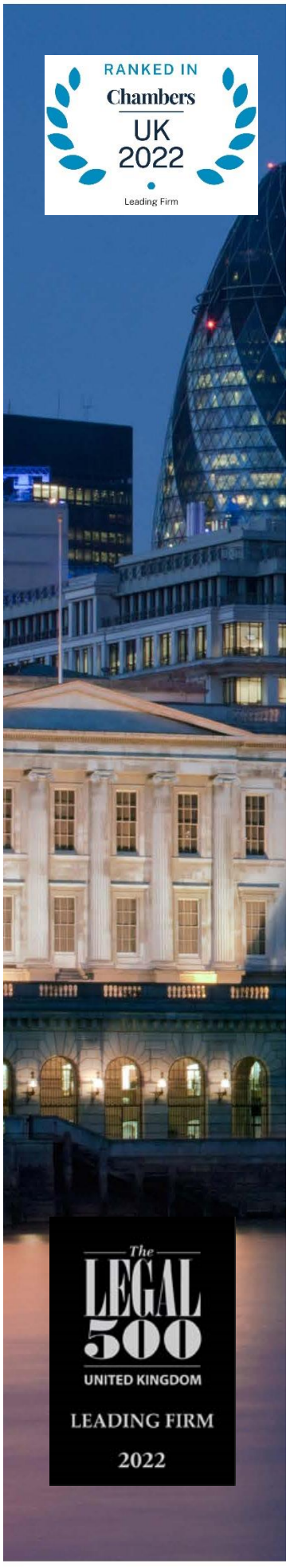
[1] Carriage of Goods by Sea Act 1971 - Schedule

[2] Simon Baughen, Economic Loss Claims and the Hague-Visby Gross Weight Limitation Figure [2008] L.M.C.L.Q. 439

High Court judgment, however, found that the limit on liability was with respects to the cargo interests' entire cargo.

This article takes a brief look at the alternative legal position (for both cases are in the High Court) in relation to limitation under Article IV r.5(a) of the Hague Visby Rules and what this might mean for carriers and receivers.

Permission to appeal to the Court of Appeal was denied by Sir Nigel Teare, so it may be some time before the subject is determined finally, but time will tell as to which of the two High Court decisions is generally preferred



Background

The Claimant was the owner of a bulk cargo of zinc calcine (the "**Cargo**"), which was loaded onto the vessel THORCO LINEAGE (the "**Vessel**") in Baltimore, USA. The Vessel was on her way to Australia, where the Cargo was due to be delivered under the bill of lading contract, when she suffered an engine failure and grounded in French Polynesia. The Vessel suffered extensive damage.

An LOF contract was signed by the master on behalf of the property to be salved, following which the Vessel was re-floated and taken for temporary repair in French Polynesia. The Vessel was then towed under LOF to South Korea, where she discharged some of her Cargo and had it stored ashore. She went to the South Korean shipyard for additional repairs before discharging further cargo.

The Claimants put up security in the form of a General Average Security so that they could take possession of the Cargo as the salvors had a maritime lien over the property salvaged which the salvors could have exercised in the absence of security provision.

Most of the Cargo was successfully shipped to the intended port. 764.07 WMT was lost or physically damaged. Some 9,523 WMT of Cargo was neither lost nor physically damaged. The Claimants commenced arbitration against the contractual carrier of the Cargo (the "**Defendant**") under the bill of lading contract.

The Law

The Claimant made an application to the High Court pursuant to s.45 of the Arbitration Act for determination of a point of law arising in an arbitration.

Article IV r.5(a) of the Hague-Visby Rules

Article IV r.5(a) of the Hague-Visby Rules, which contain the law in relation to bills of lading and contracts of carriage, provide that the carrier's liability is limited to a sum based on the weight of the goods "*lost or damaged*"[3].

Indeed, Article IV r.5(a) of the Hague-Visby Rules reads:

[3] Carriage of Goods by Sea Act 1971 Schedule Article IV r.5 (a)

"(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 667.67 units of account per package or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher."

The Claimant's question was whether the Defendant was entitled to limit liability under Article IV r.5(a) and if so, in what amount in respect of each head of loss.

These heads were:

a) Liability to pay the salvors (because the cargo interests had first put-up security and then made payment to salvors under the subsequent adjustment);

b) On-shipment costs in respect of the cargo;

c) Physical loss and damage to the cargo; and

d)Costs incurred in arranging the salvage sale and disposing of physically damaged cargo.

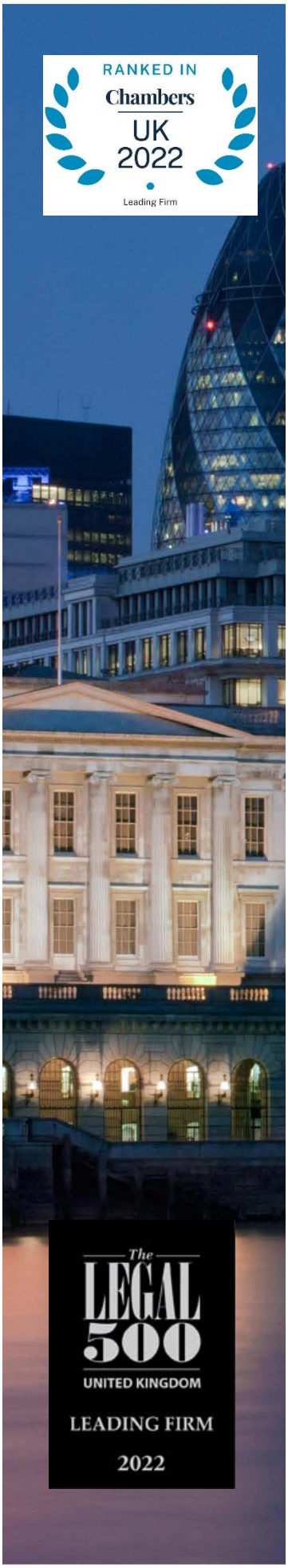
Limitation of carriers' liability constrained to physical loss?

The Claimant submitted that the Defendant's liability in respect of the Claimant's liability to pay (a) salvage fees and (b) on-shipment costs is limited to the weight of the salved cargo because the words "goods lost or damaged" refer to goods which are lost **or** damaged physically or economically. They argued that the entire cargo suffered economic damage because of the Claimant's liability to pay salvage and on-shipment costs.

It was submitted that, logically, if "goods lost or damaged" means "goods lost or damaged physically", the Article is incoherent. There is disconnect between (a) the carriers' liability for the loss suffered and (b) the goods by reference to which the limitation was calculated. The carrier, it was put forward, is liable for the economic losses because the article plainly refers to *"any loss or damage to or in connection with the goods*".

However, there would then be no limit on this liability for economic loss because there would be no goods lost or damaged (if indeed economic losses are excluded). So, the effect is that there would be no limit on the liability of cargo interests for economic losses in respect of the goods.

The Defendant, meanwhile, submitted that the Defendant's liability in respect of the Claimant's liability to pay salvage and on-shipment costs is limited by reference to the weight of the goods which were damaged because the words "goods lost or damaged" refer to goods wherein the physical state or condition has changed.



The maritime lien argument

On an alternative argument, the Claimant submitted that the salvors' maritime lien over the cargo rendered the goods "damaged" because the proprietary and/or possessory rights of the owners of the cargo were damaged.

The Limnos

The submissions revisited *The Limnos*, whereby part of a cargo of corn suffered wet damage during a voyage which encountered heavy weather. Some physically undamaged corn had its value diminished because it had to be fumigated and treated with chemicals after discharge, therefore increasing the damage and "*acquiring a reputation as distressed cargo*"[4]. The bill of lading was subject to the Hague-Visby Rules.

The carriers sought to limit their liability using Article IV r5(a) to the conceded tonnage, meaning the tonnage which was physically lost or damaged. Receivers argued that the phrase "goods lost or damaged" under Article IV r5 (a) should be held to encompass economic loss or damage, rather than be limited to physical loss and damage. Carriers argued that this would lead to a "cascade" of economic claims, so the limit should be fixed at the time of discharge or delivery[5].

Burton J held that "weight of the goods lost or damaged" did not include economically impacted goods, so the figure should be calculated using the gross weight of the conceded tonnage. He stated

"*their value may have been affected. There may be depression in respect of their price. The goods may be depreciated. But in my judgment they cannot sensibly be described as damaged*[6]"

So, the carrier's liability for the losses was limited to the weight of the goods actually damaged.

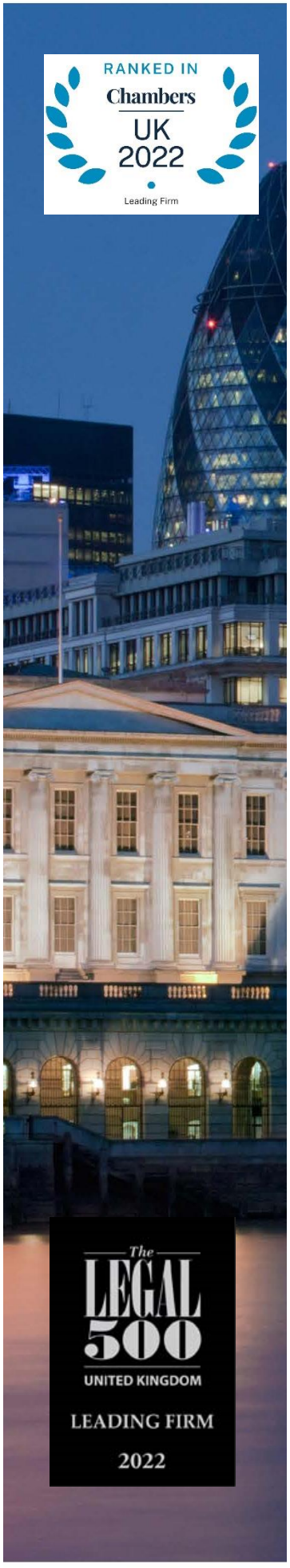
This left significant discord; indeed, Voyage Charters has grappled with this:

"The disharmony between what type of loss and damage is recoverable under the Hague-Visby Rules (and subject to the limitation provisions of Article III rule 6) and the limitation applicable to such claims is somewhat surprising, especially since limitation is a defence to carriers and would normally be construed suitably strictly against them.[7]*"*

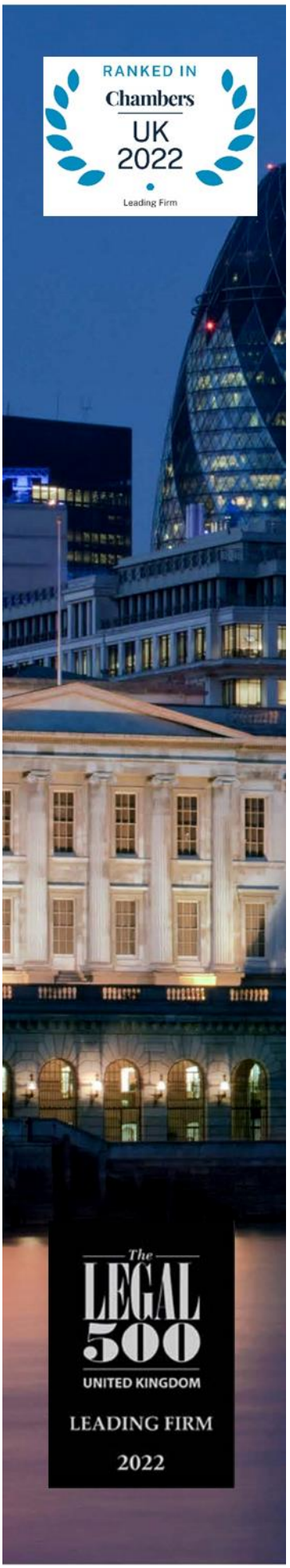
This anomaly means, in particular, that:

1. A carriers' liability for economic loss would not be limited whatsoever by the rules; and

[4] The Limnos [2008] 2 Lloyd's Rep. 16 at [4]
[5] Economic Loss Claims and the Hague-Visby Gross Weight Limitation Figure [2008] L.M.C.L.Q. 439 (p.441)
[6] The Limnos [2008] 2 Lloyd's Rep. 16 at [39]
[7] Voyage Charters at 66.404



2. A cargo interest would not be incentivised to spend its own money recovering or mitigating damage to the goods because the more goods that were physically damaged, the more it could recover, unless all physical damage could be avoided in which case a claim would be unlimited.



Judgment in the present case

Sir Nigel Teare examined the objective and purpose of the Hague-Visby Rules to give them their "ordinary meaning and purpose", that being to *"rein in the unbridled freedom of contract of owners to impose terms which were "so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility"*[8]. Sir Nigel Teare held that the object of Article IV r.5's is to "*provide a maximum limit of liability in the minority of cases where the value of the goods was exceptional."* [9]

Sir Nigel Teare looked at a "typical" case, whereby a merchant buys the goods on a ship on terms and will expect the goods to be delivered on those terms in the same order and condition as when they boarded the ship. . However, casualties can occur at sea which imperil the cargo, meaning the merchant incurs extra expenditure (as in this case payment to the salvors and on-shipping). Perishable goods can deteriorate, and non-perishable goods may gain or lose value on the market. Perishable goods may go on to become physically damaged even if they were not originally so. Sir Nigel Teare said that to exclude economically damaged goods would be "*closing one's eyes to the risks inherent in such carriage and the typical consequences of such risks*"[10].

The judgment went on to look at the risk which is balanced in the construction of Article Iv r.5(a). The first phrase in the article reads "*either the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods*", therefore identifying the liabilities which are subject to the weight limit, and which does include economic losses. The second phrase reads "goods lost or damaged" and defines and quantifies said limit. So, if the second phrase is read to include only physical loss, the carrier will be liable for indefinite economic losses – there will be no limit because the carrier will be liable for economic losses but without the application of the weight limit whatsoever.

This produces risk that cargo interests may not be encouraged to mitigate losses to cargo should they know that it might diminish their claim value. Sir Nigel Teare suggested that making mitigation a gamble is contrary to commercial common sense: if the cargo interest can mitigate the damage and remove all physical loss then under the rule, there is no limit to the loss they can claim, but if some physical damage remains, then the loss that can be claimed remains limited to the weight of the cargo physically lost.

[8] Trafigura PTE LTD v TKK Shipping PTE LTD [2023] EWHC 26 (Comm) at [36]
[9] Trafigura PTE LTD v TKK Shipping PTE LTD [2023] EWHC 26 (Comm) at [45]
[10] Trafigura PTE LTD v TKK Shipping PTE LTD [2023] EWHC 26 (Comm) at [54]

Therefore, Sir Nigel Teare concluded that the "the goods" refers to the subject of the contract of carriage on the construction of Article IV r5(a) and *The Limnos*, in light of its anomalies, was not followed.

In obiter, it was held that the goods on the vessel were physically damaged within the meaning of Article IV r.5(a) because of the maritime lien placed on the Claimant's proprietary or possessory rights.

CONCLUSION

1. Readers may wonder what to make of this or feel that the fight over the meaning of "goods lost or damaged" is a lawyer's problem. Perhaps it is. But the effects of this decision are truly commercial, and Sir Nigel Teare has kept abreast of commercial impacts when making a decision in respect of this clause.

2. Interpreting the Hague-Visby Rules requires a delicate balancing act in terms of apportioning the liability of carriers and cargo interests; to interpret the rules one must look at their ordinary meaning, alongside their purpose and objective. As the rules are subject to international agreement and compromise, there may be unusual side effects, but the intention is clear: to limit shipowners ability to run off into the wind without liability for damage to cargo which occurs during a maritime adventure.

3. Under Article IV r5(a) of the Hague-Visby Rules, the meaning of 'goods lost and damaged' extends to goods which were physically or economically damaged. Depreciation of the value of goods can amount to damage in the context of carriage of goods by sea. For the majority of goods this clause will not apply because the value will be below the maximum anyway, but the effect of the rule is to allow cargo interests to pursue claims against carriers' economic losses suffered by virtue of damage or loss to their cargo on a vessel, but this is limited by the weight of the cargo lost.

4. The imposition of a maritime lien has the effect of causing cargo to be considered damage.

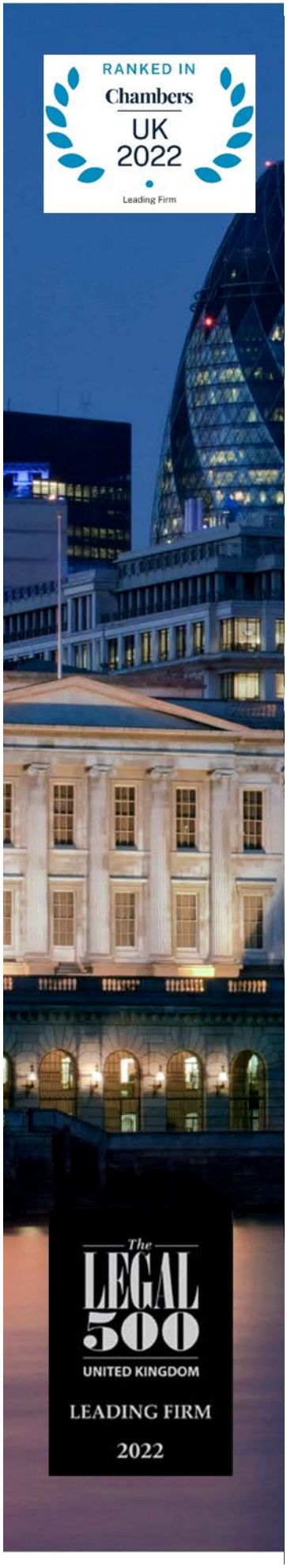
5. The Defendant did not obtain leave to appeal so it may be some time before the judgment in *The Limos* and *Trafigura PTE LTD v TKK Shipping PTE LTD* are reconciled by the Court of Appeal.

REFERENCES

Statute and convention

Carriage of Goods by Sea Act 1924
Carriage of Goods by Sea Act 1971
The Travaux Préparatoires of the Hague Rules and of the Hague Visby Rules

Cases The Limnos [2008] 2 Lloyd's Rep. 166
Trafigura PTE LTD v TKK Shipping PTE LTD [2023] EWHC 26 (Comm)



Books

Sir Richard Aikens et al, *Bills of Lading* (3rd Edition, 2020) Contractual rights and obligations: The Hague Rules, Chapter 11

Timothy Young KC et al, *Voyage Charters* (5th, 2022) Chapter 66, Paragraph 404

Articles

Simon Baughen, *Economic Loss Claims and the Hague-Visby Gross Weight Limitation Figure* [2008] L.M.C.L.Q. 439

Websites

Gard News 193 'English law - Hague-Visby Rules package limitation - Goods lost or damaged' (193, February/April 2009) <https://www.gard.no/web/updates/content/52777/english-law-hague-visby-rules-package-limitation-goods-lost-or damaged#:~:text=Article%20IV%20Rule%205(a)%20refers%20to%20claims%20for%20lost,for%20the%20limitation%20of%20liability> accessed 15 January 2023

Clyde & Co Market insight 'Limitation of liability for maritime claims in the UAE – the Golden Ray' (03 October 2021) <https://www.clydeco.com/en/insights/2021/08/limitation-of-liability-for-maritime-claims-in-the#:~:text=Article%20IV%20Rules%205%20of,gross%20weight%2C%20whichever%20is%20higher>accessed 15 January 2023

Steamship Mutual 'Cargo Claims for Economic Loss' (September 2008) <https://www.steamshipmutual.com/publications/articles/economicloss0908> accessed 13 January 2023

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