Neutral Citation Number: [2025] EWHC 1990 (Comm)

Case No: CL-2024-000292

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN LMAA ARBITRATION

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 30/07/2025

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between:

SINO EAST TRANSPORTATION LTD

Claimant ("Charterers")
(Respondent in arbitration)

- and -

GRAND AMAZON SHIPPING LTD

Defendant ("Owners")
(Claimant in arbitration)

- -

Alexander Wright KC (instructed by **Pennington Manches Cooper LLP**) for the **Claimant**
Stewart Buckingham KC and Michael Proctor (instructed by **MFB Solicitors**) for the **Defendant**

Hearing date: 26 March 2025
Further written submissions: 21 and 23 May 2025
Draft judgment circulated to parties: 25 July 2025

Approved Judgment

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Mr Justice Henshaw:

(A) INTRODUCTION

1. This is an appeal brought under section 69 of the Arbitration Act 1996 by the Claimant, Sino East Transportation Ltd ("***Charterers***") in respect of an arbitration award dated 26 April 2024 (the "***Award***") in favour of the Defendant, Grand Amazon Shipping Ltd ("***Owners***"). The claim in the arbitration was heard by an experienced tribunal comprising Simon Gault, Christopher Hancock KC, and Stephen Hofmeyr KC (the "***Tribunal***").

2. The Award concerned m.v. "Grand Amanda" (the "***Vessel***"). In summary, the Award concluded that Charterers were liable to pay US$6,030,603.53 by way of indemnity to Owners. Owners had incurred losses and expenses totalling that amount by reason of an adverse judgment against Owners by a court in the People's Republic of China (the "***PRC Judgment***") for US$5,374,756.66, and by way of recoverable costs of defending the claim in the PRC courts of US$655,846.87.

3. The central issue on the appeal is whether the implied indemnity against losses and expenses arising as a result of charterers' orders extends to a situation where liability was imposed on owners by a court following carriage of a lawful, permitted cargo that was, however, affected by inherent vice. Charterers submit that the Tribunal erred in law in concluding that it did.

4. For the reasons set out below, I have concluded that the Tribunal was correct in its conclusions and made no error of law. The losses fell within the implied indemnity. The appeal must therefore be dismissed.

(B) BACKGROUND

(1) Facts

5. The Tribunal set out an account of the facts at §§ 1-12 of the Award, and a fuller account at §§ 3-44 of the separate document containing the Reasons for the Award ("***Reasons***"). I summarise below the facts relevant to the appeal.

6. Grand Changjiang Shipping Ltd ("***Grand Changjiang***") was the registered owner of the Vessel. Owners held the Vessel under a bareboat charter at all relevant times. Fuk Hing Steamship Company Ltd ("***FHS***"), a member of the same corporate group as Owners, managed the Vessel as Owners' agents.

7. On 1 April 2014, FHS concluded a transaction for Owners to time charter the Vessel to Charterers for a trip (the "***Charterparty***") carrying lawful and harmless cargoes via the East Coast of South America to the Far East. The Charterparty was agreed by way of a fixture recap email dated 1 April 2014 incorporating a previous charterparty for M/V "*Grand Marcia*".

8. On 3 April 2014, Charterers sub-chartered the Vessel to China National Chartering Co Ltd by way of voyage charter for the carriage of soyabeans in bulk from Uruguay and Argentina to China.

9. On 1 April 2014, Charterers' agents sent voyage instructions to the Vessel's master. On 1 May 2014, the Vessel arrived and tendered Notice of Readiness at Montevideo. On 27 May 2014, the loading of the cargo was completed and a clean bill of lading (the "***Montevideo Bill***") was issued evidencing the shipment of Uruguayan soyabeans in bulk (the "***Montevideo Cargo***"). The Montevideo Bill was on the CONGENBILL 2007 form, incorporating the law and arbitration clause in the Charterparty by condition (1) of the Conditions of Carriage on the reverse of the bill. The CONGENBILL 2007 form incorporates the Hague or Hague-Visby Rules, Article IV(2)(m) of which states that *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from - … (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods…*".

10. On 28 May 2014, the Vessel arrived at Bahia Blanca, Argentina, to load a further cargo. Loading was completed on 5 June 2014 and a clean bill of lading (the "***Bahia Blanca Bill***") was issued evidencing the shipment of Argentine soyabeans in bulk (the "***Bahia Blanca Cargo***").

11. The two cargoes were inspected during the Vessel's voyage. On 11 July 2014 the Montevideo Cargo was found to show signs of discolouration and/or mould and/or self-heating.

12. On 20 July 2014 the Vessel berthed at Zhoushan, China to undertake part discharge. Her holds were inspected by CIQ, the Chinese inspection and quarantine authorities, and surveyors acting for interested parties (the "***Cargo Interests***"). The Montevideo Cargo was found to be mildewed, discoloured, caked and blackened.

13. On 25 July 2014, the Vessel arrived at Jiangyin, China and discharged the balance of her cargo. Discharge was completed on 12 August 2014. The Bahia Blanca Cargo was in good order and condition on discharge.

14. On 2 September 2014, Cargo Interests and their subrogated insurers began proceedings against Grand Chiangjiang and Owners in Wuhan Maritime Court (the "***PRC Proceedings***"). The PRC Proceedings were served on 13 November 2014.

15. The Swedish Club, with whom Owners had entered the Vessel for P&I insurance, decided to defend the claim on its merits in China, rather than to challenge jurisdiction or take steps in England.

16. On 31 August 2018, the PRC Proceedings resulted in the PRC Judgment in favour of Cargo Interests, for a sum roughly 20% less than that originally claimed. The court was not persuaded that the damage to the Montevideo Cargo was due to inherent vice. Owners were held liable on the basis of their failure to take adequate care.

17. It was common ground, both before the Tribunal and on appeal, that the damage to the Montevideo Cargo was in fact due to inherent vice.

18. Successive appeals to the Hubei Higher People's Court and the People's Supreme Court were dismissed on 12 October 2019 and 28 June 2021 respectively.

19. The Swedish Club paid the judgment sums to the Cargo Interests and their subrogated insurers.

(2) The Charterparty

20. The Charterparty incorporated an amended NYPE 1946 form (the "***NYPE Form***") with rider clauses.

21. Clause 6 of the Recap provided that the Charterparty was for carriage "*with harmless lawful cargoes*".

22. Clause 8 of the NYPE Form provided that "*... The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency…*".

23. Clause 43 of the Charterparty provided that *"[l]iabilities for cargo claim shall be borne by the Owners and the Charterers in accordance with NYPE Inter-Club Agreement 1996 or latest updated version"* (the "***ICA***"). Clause 8(d) of the ICA provided as follows:-

> "(4) Apportionment under this Agreement shall only be applied to Cargo Claims where:
>
> …
>
> (c) the claim has been properly settled or compromised or paid.
>
> …
>
> (8) Cargo Claims shall be apportioned as follows:
>
> (a) Claims in fact arising out of unseaworthiness and/or error or fault in navigation or management of the vessel:
>
> 100% Owners
>
> save where the Owner proves that the unseaworthiness was caused by the loading, stowage, lashing, discharge or other handling of the cargo, in which case the claim shall be apportioned under sub-clause (b).
>
> (b) Claims in fact arising out of the loading, stowage, lashing, discharge, storage or other handling of cargo:
>
> 100% Charterers
>
> unless the words "and responsibility" are added in clause 8 or there is a similar amendment making the Master responsible for cargo handling in which case:
>
> 50% Charterers 50% Owners
>
> save where the Charterer proves that the failure properly to load, stow, lash, discharge or handle the cargo was caused by the unseaworthiness of the vessel in which case:
>
> 100% Owners
>
> (c) Subject to (a) and (b) above, claims for shortage or overcarriage:
>
> 50% Charterers 50% Owners
>
> unless there is clear and irrefutable evidence that the claim arose out of pilferage or act or neglect by one or the other

> (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim.
>
> (d) All other cargo claims whatsoever (including claims for delay to cargo):
>
> 50% Charterers 50% Owners
>
> unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim."

24. Clause 59 stated:-

> "Clause 59 - Protective Clauses :
>
> Clause Paramount, U.S. Clause Paramount, Canadian Clause Paramount, wherever applicable, shall be deemed to form part of this Charter Party and shall be contained in Bill(s) of Lading issued hereunder. Conwartime 2004 War Risk Clause, Both-to-Blame Collision Clause and New Jason Clause, also form part of this Charter Party."

The Clause Paramount stated:-

> "The Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier or any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this Bill of Lading repugnant to said applicable Act to any extent, such term shall be void to that extent, but no further."

Paragraph 4(2)(m) of the US Carriage of Goods by Sea Act 1936 ("***USCOGSA***") provides that *"[n]either the carrier nor the ship shall be responsible for ... loss or damage arising from inherent defect, quality, or vice of the goods"*.

25. Clause 12 of the Recap identified destinations to which the Vessel could not be ordered to trade. The PRC was not a prohibited destination.

26. Clause 82 of the Charterparty set out a list of cargo exclusions, and a list of cargoes where Owners enjoyed additional protections. The Montevideo and Bahia Blanca Cargoes did not engage those exclusions or protections.

(C) THE ARBITRATION

(1) The cases before the tribunal

27. Before the Tribunal, Owners argued that they were entitled to recover from Charterers their liability under the PRC Judgment and the costs of defending the PRC Proceedings.

Owners based their claim alternatively on (a) the agreed allocation of liability under the ICA or (b) the implied indemnity arising from the employment and agency provision in clause 8 of the NYPE form.

28. Charterers contended before the Tribunal that FHS did not conclude the Charterparty as agent for Owners (as undisclosed principal), and that the terms of the Charterparty were inconsistent with FHS having done so. Charterers defended the claim under the ICA on the basis that the requirements in Clause 4(c) (in particular that "*the claim has been properly compromised or settled and paid*") had not been met. They argued in the alternative that even if Clause 4(c) did apply, then under Clause 8(d) the correct apportionment of liability was 50% to each of Owners and Charterers.

29. Charterers submitted that the implied indemnity was not engaged by ordinary trading risks that Owners agreed to bear and for which they were remunerated by the payment of hire; and that, on the facts, hire was paid in consideration of Owners carrying lawful and permitted cargo within the permitted trading limits in the Charterparty, relying on paragraph [11] of *The Kos* [2012] 2 AC 165 (see § 60 below). In addition, Charterers pointed out that this was not a case where the cargo itself caused damage but where liability had been wrongly imposed by the PRC courts, and where the cause of Owners' complaint against Charterers should not have led to any liability being incurred by them. Whether analysed as a matter of the scope of the indemnity or causation, Charterers said, there was no basis for imposing liability upon them for a loss that could not be said to have been the natural or ordinary consequence of the loading of a cargo affected by inherent vice. Charterers submitted that that was particularly so in circumstances where the risk of an adverse judgment from the PRC courts was one which Owners must be taken to have known about when the Charterparty was fixed (referring to *The Island Archon* and to a lecture delivered by Sir Nicholas Hamblen, both considered below).

(2) The Tribunal's findings

30. The Tribunal concluded that FHS did conclude the Charterparty as agent for Owners, as undisclosed principal, and that the terms of the Charterparty were not inconsistent with such an arrangement.

31. Owners' claim under the ICA failed. The Tribunal concluded that Clause 4(c) was not satisfied where a cargo claim is established by award or judgment, rather than by a consensual settlement. However, they stated that if the ICA had been applicable to the circumstances before them, then the amount of the cargo claims and associated costs should have been apportioned 100% to (i.e. payable by) Charterers. The following paragraphs regarding causation, forming part of the Tribunal's reasoning in respect of the ICA claim, are also relevant context when considering the implied indemnity claim:-

> "123. In the light of the findings we have made on Chinese law, we have had little difficulty reaching the conclusion that Grand Amazon acted reasonably in dealing with the cargo claims brought by the Cargo Interests in the PRC. Obtaining a London arbitration award containing a declaration of non-liability (or an award of damages, if it were possible) would not have assisted

> Grand Amazon as such an award would not in practice have been enforced in the PRC against Cargo Interests. Nor would an English High Court anti-suit injunction against Cargo Interests have assisted as the injunction would not have been enforceable against the Cargo Interests in the PRC. Nor would it have been of any practical assistance to Grand Amazon to seek to challenge the jurisdiction of the PRC Courts as such a challenge would have had no realistic prospect of success. Further, we find that it was not unreasonable for Grand Amazon to have defended the cargo claims in the PRC on the ground that the Vessel's crew had properly ventilated and cared for the cargo during the voyage.
>
> …
>
> 131. The critical question under clause 8(d) is one of causation. In our view it is difficult to see why the shipment of an unstable cargo which gives rise to cargo claims should not be an "act" of the charterers (within the meaning of clause 8(d) of the ICA) for which the charterers are responsible. It was from the loading of the Montevideo Cargo (with its particular characteristics) and the instruction for the carriage of the Montevideo Cargo to the PRC that the Charterer's responsibility arose under the ICA. The relevant "act" is not the mere shipment of a cargo, but the shipment of an unstable cargo. The conclusion we have reached is consistent with the analysis of Teare J and the Court of Appeal in *The Yangtze Xing Hua* as to the meaning of the word "act" where it appears in clause 8(d) of the ICA.
>
> 132. This is not an end to the matter, however. The Charterer has two further arguments. First, it contends that the "act" was not an act of the Charterers, their sub-contractors or servants; and, secondly, for the purposes of clause 8(d), the Charterer contends that it cannot be said that there is clear and irrefutable evidence that the cargo claims "arose out of" any "act" by the Charterer. We can deal with these submissions shortly.
>
> (1) In our view it was from the loading of the Montevideo Cargo (with its particular characteristics) and the instruction for the carriage of the Montevideo Cargo to the PRC that the Charterer's responsibility would have arisen under the ICA. This was the relevant "act".
>
> (2) Further, it was this act which gave rise to the cargo claims by Cargo Interests."

32. Owners' claim under the implied indemnity succeeded. The Tribunal referred to Charterers' submissions that the implied indemnity was not engaged by ordinary trading risks that Owners agreed to bear and for which they were remunerated by the payment of hire; that hire was paid here for carrying lawful and permitted cargo within

the permitted trading limits; and that § [11] of *The "Kos"* supported Charterers' case. The Tribunal continued as follows:-

> "136. The Charterer also points out that this is not a case where the cargo itself caused damage but where liability has been wrongly imposed by the Chinese Courts, and where the cause of Grand Amazon's complaint against the Charterer should not have led to any liability being incurred by them. Whether analysed as a matter of the scope of the indemnity or causation, the Charterer says, there is no basis for imposing liability upon the Charterer for a loss that cannot be said to have been the natural or ordinary consequence of the loading of a cargo affected by inherent vice. The Charterer submits that this is particularly so in circumstances where the risk of their being an adverse judgment from the Chinese Courts was one Grand Amazon must be taken to have known about when the Charterparty was fixed. It is not a risk which was unknown at the time of contracting. In this regard it referred the Tribunal to *The Island Archon* [1994] 2 Lloyd's Rep 277 and to the 36th Donald O'May lecture delivered by Sir Nicholas Hamblen, *Under charterers' orders - to indemnify or not to indemnify*, reported at [2019] LMCLQ 200.
>
> 137. In our view the alleged defence is without merit. Grand Amazon's liability to Cargo Interests in respect of the damaged Montevideo Cargo was not an ordinary cost or risk associated with the performance of the chartered service. It was not one of the broad range of physical and commercial hazards which are normally incidental to the chartered service. It was a loss arising from a cost or risk which it had not expressly or impliedly agreed in the Charterparty to bear. For such liability Grand Amazon was not being remunerated. A cargo with a propensity to self-heat is outside the limits of the Charterparty, and outside the kind of risk which Grand Amazon agreed to bear under the Charterparty…
>
> 140. … In the present case the Charterer's direction gave rise to a loss suffered by Grand Amazon without its fault, arising directly from the delivery of the Montevideo cargo in accordance with the Charterer's instructions. In our view the loss is squarely within the scope of the implied indemnity. It arose directly from the Charterer's orders and, on a fair reading of the Charterparty, Grand Amazon cannot be understood to have accepted this risk when it agreed to act on the Charterer's instructions.
>
> 141. In this context, the issue of causation is whether the chain of causation between the Charterer's "act" and the loss suffered by Grand Amazon was broken. The Tribunal's findings on causation in the context of a claim under the ICA are dealt with at paragraph 123 above. The position is a fortiori in this context.

> Grand Amazon did not fail to take reasonable steps to enforce its rights in London arbitration proceedings and the cause of its loss was not any failure on its part. Grand Amazon's loss arose out of compliance with the Charterer's orders under the Charterparty."

33. The Tribunal made the following comments in respect of *The Island Archon*, on which Charterers had relied:-

> "138. The *Island Archon*, on which the Charterer relies, concerned a very different set of circumstances. It concerned the chaos prevalent in Iraqi courts at the time of the facts giving rise to that dispute, chaos referred to as the "Iraqi system". The arbitrator found that:
>
> "*At the relevant time – and this was well-known in shipping circles – chaos was prevalent in Iraqi ports, and in all aspects of their operation including the handling and supervision of cargoes and the pursuit of cargo claims … put shortly, any ship ordered to discharge general cargo in Iraq was almost bound to have cargo claims made against it and to have those claims taken to court locally, leading to adverse judgments, regardless of whether there was any actual shortage or damage, or otherwise any liability on the ship under the bills of lading*."
>
> 139. As regards the carriage of general cargoes to China in 2014 the position was very different. Cargo claims were not almost inevitable. Cargo claims were only brought in respect of damaged cargo. The risk of unjustified cargo claims was not a risk which had been accepted by Grand Amazon."

34. Accordingly the Tribunal concluded that Charterers were liable to indemnify Owners against their liability to Cargo Interests under the PRC Judgment and the costs incurred in the PRC Proceedings.

(D) GROUNDS OF APPEAL

35. Leave to appeal was granted under section 69 Arbitration Act 1996 by Andrew Baker J dated 1 November 2024 on the following question of law (the "***Ground of Appeal***"):-

> "Where liability is wrongly imposed on an owner by a foreign court following shipment of a lawful harmless and permitted cargo that is affected by inherent vice, can the owner recover that liability from a time charterer under the general implied indemnity?"

36. Andrew Baker J gave reasons for his grant of leave to appeal, as follows:-

> "(ix) Question 3 concerns the ground on which the arbitrators upheld the owner's implied indemnity claim. Their essential

> reasoning was that on the proper construction of the subject time charter, the owner had not expressly or impliedly agreed to bear the relevant risk. I consider the correctness or otherwise of that reasoning, in the context of facts such as those of the present case, to be a question of general public importance, and in my view the correctness of the arbitrators' reasoning (and therefore of their decision that the *Island Archon* claim should be upheld) is open to serious doubt.
>
> (x) I note in particular that there seems to be both (a) what may be a contradiction in the Reasons, in that the arbitrators appear to accept (or proceed on the basis) that the cargo was a lawful and permitted cargo under the charter, the inherent vice notwithstanding, and yet also say that it was a cargo "outside the limits of the Charterparty", and (b) what may be a misunderstanding of *The Island Archon*, which (in relevant respect) did not turn on the near inevitability of a cargo claim under the "Iraqi system", but on the fact that the existence of that system, and thus the risk of suffering loss under it, was not notorious when the charter was concluded – Evans LJ expressly contemplated that otherwise the result might have been different (*ibid* at 236 rhc), and an appeal here may provide an opportunity for that to be explored and tested in a case where it will be determinative."

37. Leave to appeal was refused on two questions concerning the ICA:-

> "(1) Does the ICA apply or potentially apply to Cargo Claims
>
> (2) Does the loading of a lawful harmless and permitted cargo that is affected by inherent vice amount to an "act" of the charterers for the purposes of Clause 8(d) of the ICA, such that any cargo claims caused thereby are borne 100% by the charterers rather than 50/50 between the charterers and the owners?"

as to which Andrew Baker J noted that:

> "… it was the charterer's case that Inter-Club Agreement apportionment did not apply so that the owner had no claim under that Agreement and was limited (on the facts of this case) to an Island Archon indemnity claim, which the charterer in turn defended on grounds now giving rise to [the question on which leave was granted]. In fact, according to the award, it was common ground, at all events at the final hearing, that Inter-Club Agreement apportionment did not apply."

(E) THE PARTIES' ARGUMENTS

38. In brief summary, Charterers argue on appeal that the implied indemnity should not cover a situation where liability to cargo interests is wrongly imposed on owners in respect of cargo damage caused by inherent vice, for the following reasons:-

    i) The express terms of the Charterparty made detailed provision concerning which cargoes and ports were outside the bounds of the charterparty. They did not preclude the cargo and destination involved in this voyage. That was an indication that Owners accepted the risks arising from such carriage. Charterers also contended (in an argument elaborated in oral and post-hearing submissions) that the ICA provided a complete code for the allocation of responsibility for cargo claims, such that the implied indemnity should not operate, alternatively should operate only to the extent that the ICA would have operated i.e. a 50% apportionment.

    ii) A proper interpretation of *The Island Archon* and other authorities suggest that a risk such as that in the present case is not covered by the implied indemnity. In particular, where a risk has not changed between the time of chartering and the time when it causes loss, and where liability arises under bills of lading with terms no more onerous than those envisaged by the charterparty, the implied indemnity should not operate.

    iii) Commercial considerations support the allocation of risk for which Charterers contend.

    iv) There should be no difference in principle between situations where the cargo has suffered from inherent vice, or where it has not. In either case the owner has accepted the risk of cargo claims consequent on carrying lawful, permitted, harmless cargo to a port within the bounds of the charterparty.

39. Owners argued that the Award should be upheld, for reasons which can be briefly stated as follows:-

    i) Charterers are seeking to appeal a finding of fact.

    ii) The Tribunal's analysis of *The Island Archon* and other relevant case law was correct.

    iii) The risk which gave rise to Owners' loss was not an ordinary trading risk that Owners had agreed to bear.

    iv) The express terms of the Charterparty point towards the allocation of risk for which Owners contend.

    v) The incorporation of the ICA did not preclude an implied indemnity in cases to which the ICA did not apply.

(F) PRINCIPLES

(1) Appeals on a point of law

40. Under s69(1) Arbitration Act 1996, an appeal may only be brought in respect of '*a question of law*'.

41. The grant of permission to appeal does not preclude a finding by the judge hearing the appeal that there was no point of law involved (*The Ocean Crown* [2009] EWHC 3040 (Admlty) at [53]). It has been stated that the judge hearing the appeal itself should be reluctant to revisit the leave decision except in unusual circumstances (see *Agile Holdings v Essar Shipping* [2019] Bus. L.R. 1513 and *CVLC Three Carrier Corporation and Another v Arab Maritime Petroleum Transport Co* [2021] EWHC 551 (Comm)). That does not, however, preclude the court on the appeal from concluding that no error of law was made because the aspects of the arbitrators' reasons which are challenged are, properly analysed, conclusions on matters of fact rather than law.

42. As to the distinction between questions of law and fact, Mustill J in *The Chrysalis* [1983] 1 Lloyd's Rep 503 (cited with approval in *Covington Marine Corp v. Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm)), identified three stages in the arbitral process:-

    i) Ascertaining the facts, which includes findings on any facts which are in dispute.

    ii) Ascertaining the law. This includes identification of the relevant legal principles, the identification and interpretation of the relevant parts of the contract and the identification of facts which must be taken into account.

    iii) Reaching a decision, in light of the facts and law ascertained.

43. Mustill J stated that the second stage of the process is the proper subject matter of an appeal under section 69. The third stage may involve "*an element of judgment on the part of the arbitrator"* on which there "*is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong*." However, Mustill J suggested that in some cases it may be possible to infer an error of law where a correct application of the law to the facts found would lead inevitably to one answer whereas the arbitrator has arrived at another .

44. Misapplication of the correct principles to the facts is not an error of law (*Coal Authority v Davidson* [2008] EWHC 2180 (TCC), Coulson J, [6(a)]; *Merkin, Arbitration Law (Service Issue no. 98)* §§21.7; 21.9).

45. In *MRI Trading AG v Erdenet Mining Corp LLC* [2012] EWHC1988 (Comm), [2012] 2 Lloyd's Rep. 465 at [15]-[16], Eder J broadly accepted the following propositions about the determination of section 69 appeals:-

> "First, as a matter of general approach, the courts strive to uphold awards. This means that, when looking at an award, it has to be read in a reasonable and commercial way, rather than with a view to picking holes, or finding inconsistencies or faults, in a tribunal's reasoning…"

> "Secondly, where a tribunal's experience assists it in determining a question of law, such as the interpretation of contractual documents, the court will accord some deference to the tribunal's decision on that question. It will reverse the decision only if satisfied that, despite the benefit of that experience, the tribunal has still come to the wrong answer…".
>
> Thirdly, it is for the tribunal to make the findings of fact…and any question of law arising from an award must be decided on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators…".
>
> "Fourthly, when a tribunal has reached a conclusion of mixed fact and law, the court cannot interfere with that conclusion just because it would not have reached the same conclusion itself. It can interfere only when convinced that no reasonable person, applying the correct legal test, could have reached the conclusion which the tribunal did: or, to put it another way, it has to be shown that the tribunal's conclusion was necessarily inconsistent with the application of the right test… The same extremely circumscribed power of intervention applies when it is complained that a tribunal has incorrectly applied the law to the facts. It is only if the correct application of the law leads inevitably to one answer, and the tribunal has given another, that the court can interfere. Once a court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached…the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award…".

(2) The implied indemnity

(a) Basic principles

46. The implied indemnity in charterparties can be viewed as an application of the general principle recognised in *Sheffield Corporation v Barclay* [1905] A.C. 392, 397 where the Earl of Halsbury LC quoted with approval a submission made to, and adopted by, the Court of Common Pleas in *Dugdale v Lovering* (1875) L.R.10 C.P.196, 197:

> "When an act is done by one person at the request of another which act is not manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

The court in *Dugdale* itself traced the principle back to earlier cases, including *Toplis v Grane* (1839) 15 Bing. N. C. 636 where Tindal CJ said:

> "We think this evidence brings the case before us within the principle laid down in *Betts v. Gibbins* (1834) 2 Ad. & E. 57, that when an act has been done by the plaintiff under the express directions of the defendant

> which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof."

47. Coupled with the usual charterparty provision for the vessel's master to be under the orders of the charterer as regards employment, agency or other arrangements, for example clause 8 of the NYPE form charterparty in the present case:-

> "… The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency."

the principle gives rise to a *prima facie* implied right of indemnity in favour of the owner for losses or liabilities arising from the charterer's orders. Wilford, *"Time Charters"* (7th ed., 2014) explains the matter in this way:-

> "In the New York Produce form (unlike the Baltime form) there is no express indemnity given to the owners. But an indemnity will normally be implied against loss or damage suffered, or liability incurred, by the owners as a consequence of complying with the charterers' orders or directions unless, by the charter, the owners consented to bear the loss, damage or liability in question. The owners have put their ship at the disposal of the charterers, who can choose (within the agreed limits) what cargoes to load and where to send the ship, and for that arrangement to work effectively the master must be entitled and bound to follow the charterers' orders without undue question. It is therefore said to be not only reasonable, but necessary to give business efficacy to the contract, that the charterers should bear the consequences of their choices." (§ 19.15)

48. Wilford cites *inter alia* the observations of Mustill J in *The Athanasia Comninos and The George Chr. Lemos*, discussed below, and in *The Georges Christos Lemos (third party proceedings)* [1991] 2 Lloyd's Rep. 107, where Mustill J said:

> "Under a time charterparty the shipowner puts the vessel at the disposal of the charterer, who can choose for himself what cargoes he shall load and where he shall send the ship, provided that the limits prescribed by the contract are not exceeded. When deciding who has to bear the consequences of a choice being made in one way rather than the other, it is reasonable to assume that the consequences shall fall upon the person who made the choice, for it is the charterer who has the opportunity to decide upon the wisdom of the selection which he makes."

That passage was in turn cited by Evans LJ in *Triad Shipping Co v Stellar Chartering & Brokerage Inc. (The "Island Archon")* [1994] 2 Lloyd's Rep. 227, 237, [1994] C.L.C. 734, who added:-

> "… the implication is justified, in my view, first by 'business efficacy' in the sense that if the charterer requires to have the vessel at his

> disposal, and to be free to; choose voyages and cargoes and bill of lading terms also, then the owner must be expected to grant such freedom only if he is entitled to be indemnified against loss and liability resulting from it, subject always to the express terms of the charterparty contract; and secondly by the legal principle underlying the 'lawful request' cases such as *Sheffield Corporation v Barclay*; in other words, an implication of law."

49. As indicated in the opening words of Wilford § 19.15 quoted above, some forms of charterparty contain an express right of indemnity. The Baltime 1939 Uniform Time-Charter (revised 2001) in clause 9 (replicating a provision that had appeared in the form since its inception in 1909) provides that:-

> "… The Master shall be under the orders of the Charterers as regards employment, agency, or other arrangements. The Charterers shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying goods. The Owners shall not be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise. …"

As Sir Nicholas Hamblen in the article entitled *"Under charterers'' orders – to indemnify or not to indemnify"* ([2019] LMCLQ 200) said, *["t]he terms of the general right of indemnity are similar to the express general indemnity given under the Baltime form, namely a right to be indemnified against the consequences of compliance with the charterers' orders as to the employment of the vessel".* Similar wording also appears in the Shelltime 4 form:-

> "The master (although appointed by Owners) shall be under the orders and direction of Charterers as regards employment of the vessel, agency and other arrangements, and shall sign bills of lading as Charterers or their agents may direct (subject always to Clause 35(a) [War Risks] and 40 [Export Restrictions]) without prejudice to this charter. Charterers hereby indemnify Owners against all consequences or liabilities that may arise:
>
> > from signing bills of lading in accordance with the directions of Charterers or their agents, to the extent that the terms of such bills of lading fail to conform to the requirements of this charter, or (except as provided in Clause 13(b) [discharge without or otherwise than in accordance with bills of lading] from the master otherwise complying with Charterers' or their agents' orders;
> >
> > from any irregularities in papers supplied by Charterers or their agents." (clause 13(a))

50. The 1993 revision of the NYPE form – not applicable in the present case, where the charterparty is based on the 1946 form – introduced specific indemnities in relation to deck cargo (§ 13(b)) and bills of lading inconsistent with the charterparty (§ 30(b)), but

no general right of indemnity. An article by David Foxton QC, *"Indemnities in time charters"* (in Rhidian Thomas (ed.), *"Legal Issues Relating to Time Charterparties"*, 2008) observes that *"[t]he implied indemnity in the NYPE was seen as a sufficiently secure basis for the owner's right that when the NYPE form was revised in 1993, the term was left implicit even though narrower rights of indemnity in particular circumstances were expressly included",* and that *"In this context, at least, the principle of expressio unius does not hold sway."* (§ 6.10)

51. The Court of Appeal's decision in *Strathlorne Steamship Co. v Andrew Weir & Co.* (1934) 50 Ll. L. Rep. 185 provides an example of the operation of the implied indemnity, and also illustrates that it can co-exist with an express right of indemnity. The relevant charterer's order there was to deliver goods against letters of guarantee without production of a bill of lading. (I gratefully adopt here the summary of *Strathlorne* later given by Neill J in *Telfair Shipping Corpn. (The "Caroline P")* [1984] 1 WLR 553, to which I return later.) The owners in *Strathlorne* entered into a time charterparty. By clause 16 of the charterparty, the charterers agreed:

> "to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the orders of charterers or of their agents, or in otherwise complying with the same."

The charterers sub-chartered the vessel by a voyage charterparty for a voyage from Rangoon to China. On arrival in China some of the goods were delivered without the production of the bills of lading but against letters of guarantee. That was done on the instructions of the charterers' agents. In proceedings in Scotland, the owners were found liable to the pledgees of the bills of lading for misdelivery, and they claimed an indemnity from the charterers. The owners relied on clause 16 of the charterparty, but also claimed a right to indemnity at common law, relying on a letter dated 5 August 1924 from the charterers' agents instructing the master to deliver against bills of lading or in the absence of bills against guarantees. The points of claim alleged that:-

> "as the said goods.. were released or delivered by the master on the orders or directions or at the request of the [charterers'] agents, the [charterers] were and are bound to pay the said claim and to indemnify the [owners] against the same."

Lord Hanworth M.R. considered the claim based on the letter of 5 August and applied the words of Tindal C.J. in *Toplis v. Grane* quoted in § 46 above. Slesser LJ agreed, citing the same passage from *Toplis* and adding:-

> "as it seems to me, in the facts of this case all the constituents of an implied promise to indemnify arise." (p.194)

Romer L.J. also agreed , but in addition also considered the matter on the basis of wrongful delivery by the ship's agents at the instigation of the charterers. He said:

> "Now, if the agents for the ship do a wrong to their own principals at the instigation of the time charterers, then plainly in accordance with the principle which was applied in the case of *Kruger & Co. Ltd. v. Moel Tryvan Ship Co. Ltd.* [1907] A.C. 272, the time charterers became liable to indemnify the principals against the consequences of the agents acting

> on their direction. For these reasons, as well as those given by the other members of the court, I think this appeal fails." (p.195)

52. Two straightforward examples of the express and the implied indemnities are *Royal Greek Government v Minister of Transport (The "Ann Stathatos")* (1950) 83 Ll.L.R. 228 and *The "Athanasia Comninos" and "Georges Chr. Lemos"* [1990] 1 Lloyd's Rep. 277. These cases show that, as stated in Wilford:-

> "an order to load a particular cargo has been held to be an order regarding employment. If the order to load that cargo causes loss to the owners, then the right to indemnity from the charterers arises." (§ 19.30)

53. In *The Ann Stathatos,* the charterparty included an express indemnity (clause 9 of the Baltime form) against consequences or liabilities arising from compliance with the charterers' orders. The vessel was damaged as a result of an explosion that took place when the vessel was carrying coal. The charterers argued that the consequences of the loading of the coal were not, upon the true construction of the clause, the subject of the indemnity. Devlin J rejected an argument that the reference to "*such orders*" in clause 9 was limited to charterers' orders relating to the signing of bills of lading or other documents (p.233 rhc), and later said:-

> "I am conscious that to grant to Clause 9 all the width which it literally demands might in some cases produce startling results and would certainly bring it into conflict with many other clauses. On the other hand, I see nothing incongruous in the idea that the clause was intended to have, as it were a life of its own and to be more than a bin for odds and ends left over from other clauses. Dangerous cargoes, trades, ports and places can all be prohibited by express provision; but many cases may arise which are outside the rigid framework of a prohibition clause, but where an owner, if he were free to choose, might prefer not to go to a particular place or take a particular cargo, not necessarily because he foresees any definite danger but because he feels it might lead to trouble. If he is to surrender his freedom of choice and put his master under the orders of the charterer, there is nothing unreasonable in his stipulating for a complete indemnity in return. (p.234 lhc)
>
> …
>
> Accordingly, I hold that an order to load a particular cargo is an order as to employment of the ship … and that the consequences of complying with such an order are within the scope of the indemnity provided by Clause 9. (p.235)
>
> …
>
> If the damage to the ship in the present case had resulted from an accident in the course of loading, it might well be argued that the damage could not in law flow from the order to load. But if the damage results from the nature of the cargo loaded and from particular properties which it possesses, it is, in my judgment, open to an arbitrator to find that the order to load caused the damage." (p. 235 rhc)

Citing the first of these passages, Wilford notes that *"implied indemnities do not have to be limited to matters outside the scope of other charter clauses … and an overlap of subject matter with such express clauses does not necessarily involve inconsistency*" (§ 19.20, also citing Timothy Walker J's decision in *Deutsche Ost-Afrika-Linie v Legent Maritime (The Marie H)* [1998] 2 Lloyd's Rep. 71).

Scrutton on Charterparties and Bills of Lading (25th ed., 2024) § 17-044 cites *The "Ann Stathatos"* and *The "Marie H"* for the proposition that *"an order to load a particular cargo is an order as to employment and the consequences of complying with such an order are within the scope of the indemnity"*, adding that this so even if the cargo is not dangerous or unusual (citing *The Athanasia Comninos and Georges Chr. Lemos*: see below).

54. In *The Athanasia Comninos,* damage to the vessel was caused by the ignition of a mixture of air and methane gas, which had been emitted from a cargo of coal. Mustill J said:-

> "Clause 8 of the time charter reads as follows: —
>
> > 8 . . . The Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment …"
>
> It has long been established that a provision in this form impliedly requires the charterer to indemnify the shipowner against the consequences of complying with an order as to the employment of the ship. Mr. Tomlinson, for the time charterers, did not dispute that an order as to the receipt of cargo on board the vessel falls within the scope of the indemnity." (p.290rhc)
>
> and:
>
> "It seems to me perfectly possible to have a loss which is caused by the shipment of a cargo having certain properties, even if the properties of the cargo in question are no different from those of other cargoes of the same description. In the present case, if one asks the question (eliminating the possibility of fault on the part of the shipowner) "Why was there an explosion?", the answer is - "Because there was methane in the hold". And if one goes on to ask "Why was there methane in the hold?" the answer is - "Because the Time Charterers called on the vessel to load coal". This answer is in my opinion sufficient to found an indemnity, without proof that the coal was in any way unusual." (p.296)

55. Among other things, these two cases illustrate that the indemnity can arise even in respect of lawful contractual orders given by the charterer to carry a permitted cargo, and *"operates quite independently of any fault on the part of the charterers"* (Wilford § 19.23). *The Athanasia Comninos* also, incidentally, illustrates the difficulties of seeking to draw inferences as to the scope of the implied indemnity from the incorporation into the charterparty of terms such as the Hague Rules governing relations with the shipper. Mustill J said this at p.296 rhc:

> "Finally, I must deal with a point raised by Mr. Tomlinson in relation to art. IV, r. 3 of the Hague Rules, which were incorporated into the charter-party by reference. This reads as follows—
>
> > 3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or servants.
>
> Mr. Tomlinson maintains that the finding that the plaintiffs have failed to prove a breach of contract entails that they have also failed to prove "act, fault or neglect" of the shipper; that "the shipper" in the context of a time charter means the charterer; and that accordingly his clients are free from liability.
>
> This is not the place for a full discussion of the difficult problems raised by the incorporation of the Hague Rules into the inapposite context of a time charter. I will merely say that whatever result the parties may have intended to achieve when including the rules, and even if "shipper" can be read as meaning "charterer", they would need to use much clearer language than this to introduce the idea of fault into the shipowner's implied indemnity, where it has never been before. It may be that art. IV, r. 3 means nothing at all in the context of a time charter. It is unnecessary to decide this, but whatever the rule means in this context, I do not accept the interpretation for which Mr. Tomlinson contends."

(b) More onerous terms in bills of lading

56. One specific and common example of a charterer's order leading to loss is liability incurred by the owner due to charterers' presentation of a bill of lading containing terms more onerous than would be consistent with the terms of the charterparty. *Krüger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272 is often cited as an example. In that case, the charterparty exempted the owner from liability for navigation accidents, even if caused by the master's negligence, and provided that the master should sign clean bills of lading without prejudice to the charterparty. The charterer presented bills of lading which did not contain the negligence exemption. It was held in the House of Lords that the owner was entitled to an indemnity in respect of cargo lost through a navigation accident which was caused by the master's negligence. In fact, as Neill J analysed in *The "Caroline P"* at pp. 559-560, the decision of the House of Lords (and the majority of the Court of Appeal) appears to have been based on breach by the charterers of an implied contractual term rather than on the implied indemnity. It will be noted that the loss in *Kruger* flowed from charterers' orders solely by reason of the presentation of a bill of lading in a particular form. The underlying loss did not result from charterers' orders: to the contrary, it was caused by the master's negligence. That point should be borne in mind when one comes to consider the Claimant's suggestion in the present case that a liability incurred under a 'regular' bill of lading (i.e. one that is not inconsistent with the terms of the charterparty) cannot be the subject of an implied indemnity.

57. In *Elder Dempster & Co v C G Dunn & Co Ltd* (1909) 15 Com Cas 49, the charterparty provided that charterers were responsible for loading, stowing and trimming the cargo,

and that the captain was to sign bills of lading without prejudice to the charterparty. Some of the cargo, being bales of cotton, was marked in a way that did not correspond to the terms of the bills of lading, and consignees refused to accept them. The owners settled the consignees' claims and sued the charterers on two bases: first, that the charterers had requested the master to sign bills of lading on that form and therefore were liable to indemnify the owners "*from the consequent liability incurred by them*"; and, secondly, that by presenting the bills the charterers represented and warranted to the master that the marks specified there matched the marks on the bales. The House of Lords, in a short decision, held for the owners. As Neill J noted in *The "Caroline P",* the speeches indicate slightly differing grounds for the decision. Lord Loreburn LC stated that in his opinion both grounds succeeded. The Earl of Halsbury concurred, but seemed to base his decision mainly on a duty of the charterers under the charter to load the vessel taking care that the proper marks were there. Lord Gorell also concurred, adding that in his view the evidence supported the representation and warranty ground. Lord Shaw concluded that the charterers were in breach of their obligations under the charterparty relating to the loading of the vessel, and Lord Atkinson merely concurred. The case is relevant for present purposes mainly because it was the subject of comment by Scrutton LJ in *Dawson Line* and then by Bingham J in *The C Joyce*, both of which I consider below.

58. *Dawson Line Ltd v AG Adler für Chemische Industrie of Berlin* [1932] 1 KB 433 was another example of liability arising from an incorrectly drawn bill of lading. The charterparty required the master to sign bills of lading as presented by the charterers. The bills presented understated the weight of the cargo, leading to a dispute about the freight payable by the charterers to the owners, based on cargo weight. Scrutton LJ stated:

> "In those cases [*Kruger* and *Elder, Dempster*] I was counsel for the successful parties, and I remember that considerable discussion took place as to the lines upon which the claim to indemnity should be put. Some of the judges and law lords said that the charterers were liable on two grounds. The first of these was that a right to indemnity followed from the terms of the charterparty, because it required the master to sign bills of lading in a particular form, and consequently that the charterers must be liable if loss followed in consequence of presenting inaccurate bills of lading. The second ground — and this has nothing to do with the charterparty but turns upon the principle stated in *Sheffield Corporation v. Barclay* [1905] A.C. 392, and *Birmingham and District Land Co. v. London and North Western Railway Co* (1886) 34 Ch.D 261 , 272 — that a mere request from the charterers, involving, as it did, the shipowners in a liability in which otherwise they would not have been involved, raised the implication of an indemnity against those consequences. Some of the judges and law lords took one view, some the other, and some both. In this case it is sufficient to say that as the master was required to sign the bill of lading as presented to him, the charterers were bound to present an accurate bill of lading as to the weight shipped. The shippers were the charterers' agent to supply the cargo and present the bill of lading; they presented an inaccurate bill of lading with consequent loss. The charterers must therefore make good that loss." (p.439)

Greer LJ stated:-

> ".. I regard [*Elder, Dempster* and *Kruger*] as meaning this and no more, that if the charterer or some person for whom he is responsible, presents a bill of lading to the master which the latter is bound to sign as part of the terms of the contract, there may be implied from the act of presenting the bill of lading, taken together with the terms of the contract, a warranty of the correctness of the figures, description, or marks stated in the bill of lading." (p.440)

Slesser LJ agreed with Greer LJ.

59. *Telfair Shipping (The "Caroline P")* is a later example of liability arising from charterers presenting bills of lading imposing more onerous terms than provided for in the charterparty. Damage was held, by a court in Iraq, to have resulted from bad stowage. Clause 8 of the charterparty, in the NYPE 1946 form, provided for the master to sign bills *"as presented"*. The same clause also made the charterers responsible for loading, stowage and discharge. It was common ground that the bills of lading imposed more onerous duties on the owners. (The report does not specify in what way, though it will be familiar that Article III of the Hague Rules, where applicable, provides that (as between shipper and owners) the owner will, subject to the exclusions set out in Article IV, *"properly and carefully load, handle, stow, carry, keep, care for, and discharge the good carried"*.) Neill J held the charterers liable under the implied indemnity on that basis, including for the reasonable legal costs of defending the proceedings in Iraq.

(c) Limitation on the implied indemnity

60. The implied indemnity is subject to two main limitations. First, it does not apply where *"by the charter, the owners consented to bear the loss, damage or liability in question"* (Wilford § 19.15). Secondly, it applies only where the charterer's order was an effective cause of the owner's loss. Both limitations were summarised by Lord Sumption JSC in *The Kos* [2012] UKSC 17:-

> "11. In the first place, it has to be read in the context of the owners' obligations under the charterparty as a whole. The owners are not entitled to an indemnity against things for which they are being remunerated by the payment of hire. There is therefore no indemnity in respect of the ordinary risks and costs associated with the performance of the chartered service. The purpose of the indemnity is to protect them against losses arising from risks or costs which they have not expressly or implicitly agreed in the charterparty to bear. What risks or costs the owners have agreed to bear may depend on the construction of other relevant provisions of the contract, or on an informed judgment of the broad range of physical and commercial hazards which are normally incidental to the chartered service, or on some combination of the two. The classic example of a loss within the indemnity, and probably the commonest in practice, is one which arises from the master complying with the charterers' direction to sign bills of lading on terms of carriage more onerous than those of the charterparty. But the indemnity has been

> held to be applicable in principle to a wide variety of other circumstances, including compliance with an order to load cargo which is dangerous even on the footing that appropriate care is taken of it, or an order to proceed to a legally unsafe port. On the other hand, the indemnity will not apply to risks which the owners have contractually assumed, which will usually be the case where they arise from, for example, their own negligence or breach of contract or consequences such as marine fouling which are incidental to the service for which the vessel was required to be available.
>
> 12. Secondly, clause 13 itself limits the indemnity to losses which were caused by complying with the charterers' orders. Like all questions of causation, this one is sensitive to the legal context in which it arises. It depends on the intended scope of the indemnity as a matter of construction, which is necessarily informed by its purpose. We are not therefore concerned with question of remoteness and foreseeability of the kind which would arise in the law of damages, where the object is to limit the range of consequences for which a wrongdoer may be said to have assumed responsibility in the eyes of the law. Indeed, as Sir Donald Nicholls V-C pointed out in *Triad Shipping Co v Stellar Chartering & Brokerage Inc (The Island Archon)* [1994] 2 Lloyd's Rep 227, 238, the more foreseeable the owners' loss, the more likely it is to be an ordinary incident of the chartered service and therefore outside the scope of the indemnity. The real question is whether the charterers' order was an effective cause of the owner having to bear a risk or cost of a kind which he had not contractually agreed to bear. I use the expression "effective cause" in contrast to a mere "but for" cause which does no more than provide the occasion for some other factor unrelated to the charterers' order to operate. If the charterers' order was an effective cause in this sense, it does not matter whether it was the only one."

61. It is the first limitation, namely that an owner may not be indemnified against loss or expense arising out of risks which they agreed to bear, which is the focus of this appeal. A simple example, mentioned by Lord Sumption in quoted § 11 above, is the risk of marine fouling, which was the subject of *Action Navigation v Bottiglieri di Navigazione (The "Kitsa")* [2005] 1 Lloyd's Rep. 432. In that case, hull fouling was found to have been a foreseeable and foreseen consequence of the chartered service (remaining inactive in a warm water port) as at the date of the charterparty, although not an inevitable consequence, and Aikens J upheld the arbitrators' conclusion that the owners were not entitled to an indemnity. In the course of his judgment he said:

> "24. I accept Mr. Turner's submission that just because a particular risk of loss or expense is foreseen or foreseeable at the time a charter-party is made, that is not conclusive to determine whether that loss or expense is within the scope of an implied indemnity. But it is clear from the judgments of both Lord Justice Evans and Nicholls, V.-C. in *The Island Archon* that if, at the time that the charter-party is concluded, the occurrence and type of loss or expense to the shipowner flowing from the order as to employment of the vessel were unforeseen, then that will be a

> potent factor in deciding that the loss or expense will fall within the scope of the implied indemnity: particularly when the order was lawful.
>
> 25. It is also apparent from the decision of the Court of Appeal in The Island Archon that when a tribunal of fact has to decide whether particular expenses are within the scope of an implied indemnity under an NYPE charter-party, it is entitled, as a matter of law, to ask the question: was this type of risk one that the shipowners agreed to bear, at the time the charter was concluded: see p. 236. In the present case ''this type of risk'' means the risk that the vessel will suffer hull-fouling because the vessel was inactive at a warm water port for 22 days as a result of a legitimate order as to employment by the charterers and the risk that the owners will suffer expense in hull-cleaning as a consequence. If, as I find, the arbitrators have concluded that ''this type of risk'' was one that was foreseeable and foreseen by both parties at the time the charter-party was concluded, then, given the approach of the Court of Appeal in *The Island Archon*, the arbitrators were entitled to conclude that ''this type of risk'' was one that the owners agreed to accept at the time the charter-party was made. That is, essentially, a finding of mixed fact and law. It is precisely the conclusion that the arbitrators did reach in par. 32 of their award."

62. Charterers in the present case submit that *The Kitsa* is therefore *"authority for the proposition that "particularly" where an order is lawful, the Court should be slow to nonetheless conclude that the Implied Indemnity is engaged in respect of risks that are foreseeable, foreseen and not unusual".* I consider that to overstate the point. At most, Aikens J's statement indicates that if a particular risk was foreseeable and foreseen at the time of the charterparty, then arbitrators may conclude that it was one which the owners agreed to accept. Whether such a conclusion is or is not appropriate, however, will depend on the nature of the risk.

63. In *The "Berge Sund"* [1993] 2 Lloyd's Rep 453, a claim for hire under the implied indemnity would have failed had the vessel had been off-hire. The off-hire clause created an exception for events caused by charterers' fault. That hire clause was held to be "*expressly dealing with the circumstances in which conduct by the charterers will prevent the vessel being off hire. That in my opinion excludes any implied term that the charterers will indemnify the owners against loss of hire under the clause caused by compliance with the charterers' orders, if there has not been charterers' fault*" (p.462 *per* Staughton LJ).

64. Wilford § 19.17 provides the following commentary on this topic, which was cited to me:

> "19.17 The precise scope of this principle is not entirely clear. As formulated above, the indemnity extends to lawful orders that expose the owners or the ship to risks the owners have not consented to bear. Yet Lord Hobhouse said in *The Hill Harmony*,

> at page 160: *"If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it."* It is suggested that Lord Hobhouse's equation is not universally true. But it does reflect a certain instinct that agreeing to run a risk and agreeing to bear the consequences ordinarily go hand in hand. That in turn makes the identification of risks that the owners have agreed to run, but not to bear, a little elusive. The facts of *The Island Archon* itself might be taken to be an example, although on the arbitrator's findings the order seems to have been an order to proceed to a (legally) unsafe port and therefore unlawful all along. A surer example, which the Court of Appeal drew upon to show that the implied indemnity is not limited to unlawful orders, is an order to sign a bill of lading committing the owners to more onerous cargo responsibilities than they have undertaken by the charter ... It is suggested that the basis and scope of the implied indemnity would benefit from definitive consideration by the Supreme Court, but the end result seems right, namely that where it is found that loss, damage, or liability has resulted from following the charterers' orders, the charterers must indemnify the owners unless they prove that the effective cause of the loss, damage or liability was a risk the owners had agreed by the charter to bear. That it is for the charterers to show why they are not liable is sufficient to explain why the claim in *The Island Archon* succeeded, although the owners did not set out to prove an unlawful order, and also to explain the successful indemnity claim by the owners of the Georges Chr. Lemos in *The Athanasia Comninos* …, which proceeded from Mustill, J.'s conclusion that *"on the evidence given at the trial. . . the cause of the explosion is unknown"*."

(d) The Island Archon

65. The nature of the implied indemnity, and identification of the risks which owners had agreed to bear, were central to the Court of Appeal's decision in *The Island Archon*. Charterers had ordered a vessel to Iraq to discharge cargo. At the time, Iraqi ports were in the grip of the 'Iraqi system', a state of affairs in which it was almost inevitable that cargo claims would be made against a ship discharging cargo, alleging short-landing and/or damage, and that those claims would lead to adverse judgments, regardless of the actual state of the cargo. This was a known risk at the time of the charterers' order, but had not been at the time when the charterparty was entered into. The owners were obliged to pay security for an adverse judgment against them and suffered delay as a result. They claimed indemnity from the charterers. The question of principle raised by the appeal was:-

> "whether a promise to indemnify the shipowners against the consequences of complying with an order as to the employment of the ship can be implied when the order was lawfully given; when it was an order which the charterer was entitled to give." (p. 231 *per* Evans LJ)

66. Evans LJ, delivering the lead judgment, concluded that the owners were entitled to an indemnity, since their loss was effectively caused by the charterers' order to discharge cargo in Iraq, and the loss arose from a risk which the owners had not agreed to bear.

67. As part of his reasoning, Evans LJ considered the tripartite relationship between owners, charterers and shippers, noting that:

> "When a bill of lading is issued or is transferred to the owner or person entitled to possession of the cargo, who is not the charterer, then it contains or evidences a separate contract between the shipowner and that other person. If the shipowner's liability under the bill of lading is more onerous than under the charterparty, then the extent to which, if at all, he can recover an indemnity against the excess from the charterer is governed by the charterparty, or it may arise under the general principles of law recognised in *Kruger v Moel Tryvan* as a consequence of the master's compliance with the charterers' request.
>
> The terms of the bill of lading as presented for signature may be different from those 'required' by the charterparty (per Scrutton LJ in *Dawson Line Ltd v Adler [1932] 1 KB at p. 439*) and in such cases a breach of contract is established from the fact of presentment alone, as in *Kruger v Moel Tryvan* itself. Conversely, if the bill of lading is in a form which is required by the charterparty, even though its terms are different from those of the charterparty itself, then it is difficult to imply a promise that the charterer will indemnify the shipowner against the consequences of doing what the charter required him to do. If no promise is implied, the effect is that the shipowner has agreed to the charter terms as between himself and the charterer, and other terms with the holders of the bill of lading; and this was held to be the true construction of the charterparty contract in *The C Joyce* (above).
>
> The intermediate case, which arises for consideration in the light of Mr Glennie's submissions, is where the charterparty permits the charterer to present and to require the master to sign a bill of lading whose terms and conditions of carriage differ from those found in the charterparty itself. In these circumstances, there is no breach of charterparty by the charterer, nor can the charterer's direction or request to the master be said to lie outside the charterparty; it is permitted by the charterparty and he is entitled by contract to act as he has done." (p.232 rhc to p.233 lhc)

68. Evans LJ, with whom Mann LJ (and, in substance, Sir Donald Nicholls V-C) agreed, gave the following answer:-

> "The situation therefore may often arise, where, far from the charterers being in breach by reason of presenting for signature a bill of lading containing different terms and conditions of carriage from the charterparty, the master would place the shipowners in breach of contract if he refused to sign, assuming only that the bill is accurate as to the apparent condition of the cargo loaded and is not in terms which can be said to be outside the scope of any which were contemplated by

> the charterparty. Does the implied right to be indemnified arise in such a case?
>
> In my judgment, there is no reason in principle why it should not do so in accordance with the general rule founded on *Sheffield Corporation v Barclay [1905] AC 392* . If the rule applies when the charterer makes a request outside the terms of the charterparty, as Mr Glennie concedes that it does, then why should it not also apply when the same request has been contemplated by the charter itself? The fact that the request is a direction which the master is under a contractual duty to obey does not mean that the rule cannot operate (see *Nogar Marin* at p. 417). In such circumstances, the correct legal analysis in my judgment is that the right to an indemnity exists under an implied term of the charterparty. Nor is there any reason why the implied term should be limited to the consequences of complying with one kind of direction only, that is, to sign bills of lading in a particular form.
>
> …
>
> … when Mustill J said in *The Athanasia Comninos* in 1979 that this 'has long been established', without suggesting that the right was limited to cases where the charterer's order was given in breach of contract, or was extra-contractual in the sense that the shipowner or master was not under a duty to obey it, he was referring to a long-held general belief among maritime lawyers including, and perhaps especially, maritime arbitrators that no such qualification was necessary. Although not expressly decided in any reported case, the view was supported by leading text-book writers, as it has continued to be. In my judgment, he correctly stated the law."
>
> (p.233rhc, my emphasis)

69. Those passages confirm that the implied indemnity can arise even where the charterer has presented a bill of lading in accordance with the terms of the charterparty, as was the case in the *Island Archon* (see p.229rhc, quoting the arbitrator's description of the owner's case, and p.230lhc). Moreover, it can arise where the owner's loss takes the form of a liability to the holder of the bill of lading. The loss on the facts of the *Island Archon* arose from cargo claims resulting in adverse judgments in the local courts (p.229 rhc), and thus in principle can be regarded as having derived from the bill of lading, even though the foreign court's conclusion was unjustifiable.

70. The potential for the implied indemnity to arise in such circumstances is logical, and is in accordance with the statements of principle in §§ 46-48 and 51-54 above. Presentation of an irregular (not in accordance with the charterparty) bill of lading is merely one instance of a charterer's order triggering the implied indemnity and, as Evans LJ said in the *Island Archon*, the irregular bill of lading cases involve no different principles from other cases where an indemnity is claimed (p.230lhc). It does not follow that no indemnity can arise in respect of an owner's liability flowing from a regular bill of lading, if that liability has been caused by some other order by the charterer, such as to load a particular cargo or to visit a particular port. That was,

indeed, the situation in the *Island Archon*. Any other result would be illogical and arbitrary. Suppose, for example, that in addition to the physical damage caused by the explosion, the owners in *The "Ann Stathatos"* or *The "Athanasia Comninos"* had incurred a liability to cargo interests under bills of lading in respect of the lost coal or other cargo which had been damaged by the explosion. It would seem illogical to conclude that those liabilities could not be covered by the implied indemnity on the basis that they flowed from regular bills of lading, despite the loss having been caused by the charterer's order to carry coal.

71. Charterers submit that Evans LJ's reasoning quoted in § 68 above was confined to situations where the terms of the bill of lading differ from those set out in the charterparty. I disagree. First, the words I have underlined in the quotation make clear that the implied indemnity Evans LJ was considering was not limited to liabilities arising from the signing of bills of lading in a particular form. Secondly, Evans LJ's conclusions, as quoted below, were in general terms and not limited to such situations. Thirdly, that was an essential aspect of the Court of Appeal's decision in *The Island Archon*: there was no suggestion in that case either (a) that the bills of lading were issued in terms differing from those in the charterparty or (b) that the liability to cargo interests had arisen by reason of any such difference. The charterer's order giving rise to the indemnity was the order to load a cargo and take it to Basrah.

72. Evans LJ concluded:-

> For these reasons, I would reject Mr Glennie's submission and hold that the shipowners are entitled to rely upon an implied right to be indemnified against the consequences of complying with the time-charterers' order to proceed to Basrah and deliver cargo there, notwithstanding that it was an order which the time-charterers were entitled to give and the shipowners were bound to obey. There is an express finding that the losses claimed were the direct consequence of complying with the order and on this basis the shipowners are entitled to succeed and the appeal should be dismissed." (p.233rhc to p.234 rhc)

That conclusion makes clear that the implied indemnity is not limited to the effects of charterers' orders that are inconsistent with the terms of the charterparty. Nor was it expressed to be dependent on the imposition of liabilities by the Iraqi court being "*extraordinary*" (a suggestion which Charterers in the present case have made).

73. Evans LJ went on to make certain observations about the implications of this conclusion. In the course of doing so, he noted at p.234 rhc that orders as to the employment of the ship that the master is bound by clause 8 of the NYPE form to obey include orders to load a particular cargo from the range of lawful cargoes permitted by the charterparty, and to proceed to a named safe port within the limits provided for. Even if the charterer gave a lawful order, not involving non-contractual or dangerous cargoes or an unsafe port, an implied indemnity in general terms would render the charterers liable whether or not they were in breach of contract. However, the charterers' liability would not be unlimited:-

> "It is clear, however, that even when there is an express indemnity, time-charterers are not liable for all consequences which may result from

> compliance with their order. First, the shipowners may themselves have been at fault: see *The Nogar Marin* [[1988] 1 Lloyd's Rep. 412], at p. 417. This exception, however, may be more apparent than real, because the intervening fault can readily be seen to have broken the chain of consequences flowing from the charterers' order, in accordance with established general principles. Secondly, it has been held that the shipowner remains responsible for the safe navigation of the ship (see *Larrinaga Steamship Co v R (1944) 78 Ll L Rep 167*) and *The Erechthion* [[1987] 2 Lloyd's Rep. 180]…" (p.234rhc to p.235 lhc)

74. In addition, Evans LJ at p.235 rhc approved the following passage from the 3rd edition of Wilford (p.241):-

> "**Ordinary expenses and navigational risks**
>
> Moreover, the owners are not entitled to recover from the charterers under their indemnity the ordinary expenses and losses of trading, despite the fact that in a broad sense these are incurred as a result of their obedience to the orders of the charterers. This was expressed by Lloyd J in *The Aquacharm* in the following words:
>
> > "It is of course well settled that owners can recover under an implied indemnity for the direct consequences of complying with the charterers' orders. But it is not every loss arising in the course of the voyage that can be recovered. For example, the owners cannot recover heavy weather damage merely because had the charterers ordered the vessel on a different voyage, the heavy weather would not have been encountered. The connection is too remote. Similarly, the owners cannot recover the expenses incurred in the course of ordinary navigation, for example, the cost of ballasting, even though in one sense the cost of ballasting is incurred as a consequence of complying with the charterers' orders: see *Weir v Union Steamship Co Ltd* [1900] AC 525. The same considerations apply in the present case. The costs of transshipment were an ordinary expense incurred in the course of navigation.""

Evans LJ added at p.236 lhc that claims under an express indemnity failed in two cases where the vessel suffered a loss resulting, not from the charterer's orders, but from navigational risks to which she was exposed in the course of carrying them out (citing *Larrinaga SS Co v R* (1945) 78 Ll L Rep 167 (HL) and *Stag Line Ltd v Ellerman & Papayanou Lines Ltd* (1949) 82 Ll L Rep 826, 835–837)).

75. By way of summary, Evans LJ said:-

> "The authorities show, therefore, that time-charterers may be held liable under an express indemnity for the consequences of ordering the chartered vessel to load a particular cargo or to proceed to a named port, even though the order is one which the charterer is entitled to give and the master is bound to obey. But the consequences for which the charterer is liable do not include two categories of loss. First, the loss may be regarded as caused in law by some subsequent or intervening

> event. An act of negligence may often, but not invariably, break the chain of causation in this sense: see *Portsmouth Steamship Co Ltd v Liverpool & Glasgow Exchange Association (1929) 34 Ll L Rep 459* (per Roche J) and *The White Rose* , at p. 59. Secondly, the loss although a consequence 'in a broad sense' (Wilford, at p. 241) may have arisen from a risk which the shipowner has agreed to run, hence the exclusion of navigational risks and also the distinction which has been held to exist between time and voyage charterparties (per Devlin J in *The Ann Stathatos* and Mustill J in *The Georges C Lemos (3rd party proceedings) [1991]2 Ll Rep 107*.
>
> This does not mean that a rigid distinction between time and voyage charters must always be made. If the question is whether the shipowner has accepted the risk to which in the event the vessel has been exposed, there could be voyage charters giving the charterer a wide range of options to choose a cargo or port where it would be 'reasonable' for the shipowner to expect the indemnity to apply, and conversely, time charters with a narrow range e.g. charters for the period of a specified voyage or 'trip', where it would not.
>
> …
>
> What risks the shipowner has agreed to bear must depend upon the true construction of the charterparty and therefore upon the situation when the charterparty was entered into."
>
> (p.236)

76. Arising from the latter point, regarding the time when the charterparty was entered into, Evans LJ observed that had the 'Iraqi system' been notorious at the date of the charterparty, there might have been substance in the charterers' contention that the shipowners' had consented to bear the consequences of ordering the vessel to discharge at an Iraqi port, which they could have excluded from the agreed limits if they had sought to do so. Finally, by way of overall conclusion, Evans LJ said:

> "In my judgment, therefore, the award and the judgment in the present case in favour of the shipowners are consistent with the authorities and justified by the relevant principles of law. The right to be indemnified may be implied, but it is subject to the same restrictions as regards consequences as have been held to apply to an express right, and in both cases the right is subject to the shipowners' acceptance of risk, including the risk of liabilities to third parties, as between himself and the charterers on the true construction of the charterparty itself." (p.237 lhc)

77. Nicholls V-C gave a concurring judgment, concluding as follows:-

> "In the present case the charterer's direction gave rise to an unforeseen type of loss, suffered by the shipowner without his fault, arising directly from the delivery of cargo in accordance with the charterer's instructions. In my view this loss is within the scope of the implied indemnity. It arose directly from the charterer's orders. And on a fair

> reading of the charterparty the shipowner cannot be understood to have accepted this risk when he agreed to act on the charterer's instructions.
>
> Indeed the loss suffered by the shipowner here is an example par excellence of the type of loss to which the well-established indemnity implied from complying with charterer's orders applies. I can see no reason for disagreeing with the conclusion of the experienced arbitrator and of the experienced trial judge." (p.238 rhc)

78. Charterers in the present case submitted that the decision in *Island Archon* was based on a change of circumstances between the time of the charterparty and the time of the loss, a factor not applicable in the present case, with the result that no indemnity can be implied. I do not agree. Evans LJ said:-

> "What risks the shipowner has agreed to bear must depend upon the true construction of the charterparty and therefore upon the situation when the charterparty was entered into. If there had been a finding in the present case that the 'Iraqi system' was notorious at the date of the charterparty in March 1979 then there might be substance in the charterers' contention that the shipowners' had consented to bear the consequences of ordering the vessel to discharge at an Iraqi port, which they could have excluded from the agreed limits if they had sought to do so. But the findings are that the Iraqi system was well known only when the vessel was ordered there in June/July 1980, and the Iran/ Iraq war which may have been responsible for the problem did not begin until September 1980. In these circumstances, the shipowners' failure to guard against the difficulties over a year before cannot provide grounds for barring their claim" (pp.236 rhc to 237 lhc)

79. Evans LJ thus indicated merely that, had the Iraqi system been notorious at the time of the charterparty, then there *"might be substance"* in an argument that the owners had implicitly agreed to bear those risks. It does not follow that owners have implicitly agreed to bear all risks that do not arise from an external change of circumstances after the date of the charterparty. In most cases, the only relevant 'change' is a charterer's order given during the course of the charterparty, rather than any external change of circumstances: *Strathlorne Steamship Co., The "Ann Stathatos", The "Athanasia Comninos"* and the irregular bill of lading cases are examples. Moreover, any requirement for an external change of circumstances would be irreconcilable with what Evans LJ referred to as and also "*the distinction which has been held to exist between time and voyage charterparties*" (p.236rhc) and his ensuing observation quoted earlier:-

> "This does not mean that a rigid distinction between time and voyage charters must always be made. If the question is whether the shipowner has accepted the risk to which in the event the vessel has been exposed, there could be voyage charters giving the charterer a wide range of options to choose a cargo or port where it would be 'reasonable' for the shipowner to expect the indemnity to apply, and conversely, time charters with a narrow range e.g. charters for the period of a specified voyage or 'trip', where it would not." (p.236rhc)

The whole premise of the time/voyage charter distinction in this context, and Evans LJ's gloss on it quoted above, is that the owner is not taken necessarily to have implicitly consented to the loading of particular cargos or the visiting of particular ports unless they were sufficiently foreseeable at the time of the charterparty for such consent reasonably to be inferred.

(e) Pre-Island Archon decisions relied on

80. Charterers relied on certain cases predating the *Island Archon*. The first was *The "White Rose"* [1969] 2 Lloyd's Rep 52, where the owners incurred liability to a longshoreman who was involved in loading operations in Duluth, Minnesota. A claim was made for indemnification under clause 9 of the Baltime form. The arbitrator found that the owners were was not at fault, but the indemnity claim failed both in arbitration and on appeal before Donaldson J, who said:-

> "[u]nless it can be said that [Minnesota law] was so unusual as to constitute Duluth a legally unsafe port to which the vessel should not have been ordered…or that the time charterers engaged stevedores who were incompetent by local standards…I do not consider that it can be said that there is the necessary causal connection between the order to load and the loss". (pp. 59-60)

81. As Charterers accept, the *ratio* of *The White Rose* was that the owners had failed to establish effective (as opposed to 'but for') causation, and risk allocation formed no part of Donaldson J's reasoning. However, they submit that, as explained in *The "Island Archon",* Donaldson J's conclusion was also consistent with risk allocation between the parties. They say that charterers do not indemnify owners against the ordinary risks of liabilities being imposed by local courts, even those arising without fault on owners' part, unless it can be said that the local law is "*unusual*" or the charterers are at fault.

82. I do not accept that submission. Evans LJ in *The "Island Archon"* provided a tentative alternative approach (alternative, that is, to the causation point) to the facts of *The White Rose*, based on the point referred to in § 74 above about owners' acceptance of *"Ordinary expenses and navigational risks"*:-

> "Applying the same analysis to the facts of *The White Rose*, the shipowners could be said to have accepted the normal incidents of loading cargo at a US port, including the risk of liability under the local State law to an injured stevedore when the shipowners themselves were not at fault, but this would not bar them from recovering an indemnity from the time charterers if the local law was 'unusual', as contemplated by Donaldson J in the passage quoted above." (p.236 rhc)

Leaving aside the fact that that was an *obiter dictum*, and did not reflect the *ratio* of either *The White Rose* or *The Island Archon*, it is anyway of limited import. The risk of liability for injury to a stevedore is similar to the other types of risk pertaining to the operation of a vessel – navigation, heavy weather damage, ballasting costs, transhipment costs and marine fouling – discussed in see *Larrinaga Steamship Co* (grounding damage)*, The Erechthion* (consequences of following pilotage advice)*, The Aquacharm, Kitsa* and *Kos*.

83. The next three pre-*Island Archon* cases were not cited in the hearing before me. However, the parties relied in their submissions on:-

i) a statement in *Carver on Charterparties* (3rd ed, 2024) that, whereas an indemnity is triggered where the charterer presents bills of lading imposing more onerous terms than those provided for in the charterparty, *"[b]y contrast, where the obligations under the bill of lading are not more onerous than contemplated by the charterparty, no indemnity can be recovered"* (§ 7-290, citing *Gesellschaft Bürgerlichen Rechts v Stockholms Rederiaktiebolag Svea (The Brabant)* [1967] 1 Q.B. 588, 598; *Western Sealanes Corp v Unimarine SA (The Pythia)* [1982] 2 Lloyd's Rep. 160; and *Ben Shipping Co (Pte) Ltd v An-Board Bainne (The C. Joyce)* [1986] 2 All E.R. 177, [1986] 2 Lloyd's Rep. 285); and

ii) a similar statement in the article by Sir Nicholas Hamblen referred to earlier, to the effect that the ordinary risks of time-chartered service which owners assume including *"liabilities arising from signing bills of lading the terms of which are not more onerous than those under or contemplated by the charterparty"* (p. 204, citing *The C Joyce*). For completeness, though, I note that in the same article, Sir Nicholas said:-

> "Handing over the control of the vessel to the charterers necessarily involves risks for the owners. Carrying out the charterers' orders may involve the owners suffering loss or damage, such as damage to the vessel as a result of being ordered to an unsafe port, or incurring liability to third parties, such as to the holders of bill of lading for cargo damage for which the owners are not responsible under the charterparty or for misdelivery.
>
> It has long been recognised that, if owners are to place their vessel and crew at the disposal of the charterer, it is entirely reasonable to seek protection against the adverse consequences of compliance with the charterers' orders by stipulating for an indemnity." (p.201)

84. Following the hearing, I concluded that it would be necessary to consider these cases in more detail, and invited further written submissions on them.

85. In *The "Brabant"*, owners chartered a vessel for one round voyage carrying a cargo of wood pulp. The cargo was damaged by coal dust remaining in the holds from a previous cargo of coke. The charterparty, on the Baltime form, included these provisions:

> (clause 9) "The charterers to indemnify the owners against all consequences or liabilities arising from the master ... signing bills of lading or other documents. ..."
>
> (clause 13) "The owners only to be responsible ... for loss or damage to goods on board, if such ... loss has been caused by want of due diligence on the part of the owners or their manager in making the vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the owners or their manager. The owners not to be responsible in any other case nor for damage ... whatsoever and

> howsoever caused even if caused by the neglect or default of their servants."
>
> (typed clause 28) "The decks and holds and other cargo spaces to be properly cleaned at owners' risk and expense before loading."

86. The failure to remove coal dust from the holds was not due to any personal act, omission, default or negligence of the owners or managers, but was caused by inadequate cleaning due to the negligence of the owners' servants or agents (pp. 592-593). The owners claimed indemnity under clause 9 on the basis that, had the cargo belonged to the charterers, they would not have been liable by reason of clause 13, which they said prevailed over clause 28 on the facts of the case. The charterers argued that clause 28 prevailed, alternatively that the vessel was unseaworthy. They added that as the owners were liable under the Hague Rues, which the bills of lading incorporated, no indemnity should arise. McNair J said:-

> "Accordingly, the vital point here is whether on the facts of this case and on the true construction of the documents the bills of lading did impose more onerous terms on the owners than the charterparty. Or, to put the question the other way round, would the owners have become liable to the charterers if the goods had been shipped by the charterers themselves on their own account under the terms of the charterparty and no bills of lading had been issued conferring rights according to their terms on third parties, holders or indorsees of the bills of lading?" (p.498)

McNair J concluded that clause 28 prevailed (p.602), with the result that the charterers succeeded.

87. Charterers in the present case submit that the premise of the claim and the outcome was that the indemnity would respond only if the obligations under the bills of lading were more onerous than those contemplated by the charter. That may be so, but that was because on the facts of *The "Brabant"* (unlike in *The "Island Archon"* and other cases discussed above) there was no other charterers' order that could realistically be said to have caused the loss. To the contrary, the effective cause of the loss was the negligence of the owners' servants or agents. On no view does *The "Brabant"* stand for the proposition that no implied indemnity can ever arise for liabilities to cargo interests where the bill of lading terms do not differ from those in the charterparty.

88. Similar considerations apply to *The "Pythia"*. A ship on time charter was involved in a collision, and the cargo had to be discharged at anchorage into barges for onward carriage to port. The owners claimed an indemnity against the charterers for the discharge expenses they incurred, based on the assertion that the bill of lading contracts imposed on the owners a heavier duty than that imposed upon them under the charterparty. Robert Goff J found that not to be the case: *"Under both the bills and the charter, the owners' fundamental obligation…was to carry the goods to the contractual destination by any reasonable means…"* (p. 166 col. 1). The owners could be taken to have assumed the risk of transhipment costs that were necessary to enable them to carry the cargo to the port of destination in accordance with their obligations under both the bills of lading and the charterparty. *The "Pythia"* is thus simply another example of a case where the only putative basis for the alleged indemnity was that the bill of lading

imposed greater obligations than the charterparty, but where that was found not to be the position.

89. *The "C Joyce"* was essentially similar. A vessel was voyage chartered to carry a cargo of bagged milk powder to South Africa. On discharge, cargo claims were made alleging damage to the cargo and short delivery. There was no finding that any such damage or shortfall had resulted from charterers' orders. The owners' allegation before the arbitrators (on which no findings were made) was that the cargo damage was caused by penetration of sea water through cargo doors during heavy weather in the Bay of Biscay, penetration of sea water caused by the working of the vessel and one of its hatch covers during that heavy weather, and the hygroscopic quality of milk powder. The arbitrators were asked to assume that the owners were liable to cargo owners under the bills of lading, but would not have been liable if liability had been determined by reference only to the terms of the charterparty (to which the Hague Rules did not apply). The charterparty contained a Clause Paramount stipulating that bills of lading would be issued in terms incorporating the Hague Rules.

90. The claim for an indemnity in *The "C Joyce"* was not based on any charterer's order other than the mere presentation of bills of lading which, the judge concluded, were in accordance with the terms of the charterparty. Bingham J said:

> "Is it necessary to be implied from these terms that, if the shipowners should become liable to a bill of lading holder on grounds which would not make them liable to the charterers under cl 2, they should be entitled to be indemnified by the charterers against that liability? I do not think so. It was clearly stipulated that all bills of lading signed under the charterparty should include the clause paramount. This stipulation necessarily exposed the shipowners to Hague Rules liability to an indorsee of the bills.
>
> …
>
> It is undoubtedly anomalous that the charterers' voluntary act of negotiating the bills should have the effect of exposing the shipowners to a liability the owners could not have been under to the charterers, but that is what the contract provides and I do not think it can be said to be unworkable."

Bingham J went on to consider the irregular bill of lading cases *Kruger, Elder Dempster* and *Dawson Line*, noting that it was critical to both grounds of decision in *Dawson Line* that there was a disparity between the bills the charterers were entitled to present and the bills they did present, adding:

> "The contrast with the present case is stark. The charterers were not in breach of contract in tendering for signature bills containing a clause paramount. They would strictly have been in breach had they issued bills in any other form. By the same token the charterers did not request the shipowners to do anything which the shipowners had not expressly bound themselves to do. …"

91. The last sentence quoted above cannot be regarded as indicating that no indemnity can ever be implied in respect of an action the shipowner was obliged to carry out. Its context was an indemnity claim based on the presentation of bills of lading. To extend it beyond that context would be inconsistent with the case law as a whole, including the *Island Archon, The Ann Stathatos* and *The Athanasia Comninos,* which makes clear that the indemnity can arise from orders that charterers were entitled to give under the charterparty (such as orders to load specific cargos and visit particular ports). Evans LJ in *The "Island Archon"* referred to *The "C Joyce"* as illustrating that if the bill of lading is in a form which is required by the charterparty, *"then it is difficult to imply a promise that the charterer will indemnify the shipowner against the consequences of doing what the charter required him to do"*. Again, the context of that discussion was claims for an indemnity founded on the presentation of bills of lading in a particular form, as opposed to claims based on some other charterer's order.

92. Nothing in *The "C Joyce"*, any more than in *The "Brabant"* or *The "Pythia"*, justifies any broader conclusion than this: where the claim for an indemnity is based solely on charterers' presentation of a bill of lading, the charterer will not be liable unless the bill was in terms which the charterer was not entitled or required to present under the terms of the charterparty.

93. Another pre-*Island Archon* case cited was a statement by Mustill LJ in *The "Nogar Marin"* [1988] 1 Lloyd's Rep 412, 421 rhc, when considering whether or not a term could be implied into a voyage charter to the effect that goods would correspond to their description in a bill of lading, as follows:

> "Moreover, from a strictly practical point of view, we cannot see the point of the suggested term. Two situations may be envisaged. First, the defects in the goods are not such as to be apparent on a reasonable examination at the point of shipment. It is a common place that in such a situation the signature of the bill of lading without qualification does not preclude the owners from establishing the true condition of the goods. There is thus no enhanced exposure, beyond that which existed under the charter, and no need for an implied term to protect the owners against it. …"

94. That dictum merely makes the 'practical' point that signing a clean bill of lading does not prevent the owner from showing that the goods were in fact defective, and therefore in principle does not increase the owner's exposure. An owner would not ordinarily expect to be liable in respect of inherent vice. Mustill LJ's statement does not address the question of whether the implied indemnity applies in situations where, unusually, the owner does incur a liability as a result of a charterer's order to load a particular cargo that turns out to have inherent vice.

(f) Later cases and awards

95. Moving to subsequent cases and awards, in *London Arbitration 4/00* a system whereby shortage claims were upheld by local courts in Hodeidah, Yemen and other ports in the region was held by the arbitrators to be notorious as at the date of the charterparty, leading them to reject a claim under the implied indemnity.

96. *Global Maritime Investments v Stx Pan Ocean (The "Dimitris L" (No 2))* [2012] 2 Lloyd's Rep 354 concerned the recoverability of US Gross Transportation Tax under a chain of time charters. The claim was primarily put on the basis of a bespoke clause, clause 112. That argument failed on the proper construction of the clause. An alternative claim under the implied indemnity also failed. Christopher Clarke J agreed with the majority of the arbitrators that there was no scope for the implied indemnity to operate given clause 112, which was (as the majority arbitrators found) *"a complete code dealing with the USGTT which allocated the burden of the tax as between the owner and the immediate charterer but no further …"* (§ 52). He also rejected a claim under clause 8 of the NYPE form:-

> "55. As to clause 8, in a broad sense the tax was incurred in consequence of the order to proceed to the US. But owners are not entitled to recover from charterers under the implied indemnity the ordinary expenses and losses of trading or those of which the owner has accepted the risk: The Island Archon, page 235; Antiparos ENE v SK Shipping Co Ltd (The Antiparos) [2008] 2 Lloyd's Rep 237, page 243. In the case of voyages to or from the USA USGTT is, as it seems to me, an ordinary expense of trading and not an unusual feature. In any event the risk of incurring or being liable for this very tax has been dealt with by clause 112 and, to the extent that the owners are not entitled to recover under that clause, the risk of having to bear the cost of the tax is one which they must be taken to have accepted."

97. In *London Arbitration 10/22* (Lloyd's Maritime Law Newsletter, 3 March 2022), a court in China held owners liable under a cargo claim in respect of a cargo which the arbitrators concluded had inherent vice. The arbitrators held the charterers liable as to 50%, under the apportionment stipulated in the Inter-Club Agreement incorporated in the charterparty. The charterparty also contained a clause paramount providing for the Hague Rules to be incorporated into the charterparty and bills of lading issued under it. In the course of applying the Inter-Club Agreement (not the implied indemnity), the arbitrators made the observation that *"damage to cargo resulting from inherent vice was not something for which the owners had accepted responsibility for under the charterparty. Rather, it was something for which the owners' liability was expressly excluded by virtue of article 4 rule 2 of The Hague Rules as incorporated in the charterparty by clause 58 [the clause paramount]"*.

(3) Incorporation of the Inter-Club Agreement into charterparties

98. Where the ICA apportionment applies, it overrides other rights and liabilities under a charterparty: see *Ben Line Steamers Ltd v Pacific Steam Navigation Co (The "Benlawers")* [1989] 2 Lloyd's Rep. 51, 62). Hobhouse J in that case held that the implied indemnity was not applicable, as the parties had agreed under the charterparty that liability for the subject cargo claims was to be apportioned under the ICA.

99. As to cases where the ICA does not apply, Hobhouse J said:-

> "Insofar as any cargo claim might fall outside the scope of the Inter-Club Agreement the question of indemnity would have to

> be dealt with under the ordinary law and the other provisions of the charter-party if applicable". (p.57 rhc)

100. Wilford states at §20.69:-

> "Clause 4(b)(ii) [of the ICA] deals specifically with another very common amendment, providing that if "cargo claims" is added to the second sentence of Clause 26 of the form then apportionment under the Agreement shall not apply. The 1984 Agreement went on to state that in that case, *"Owners shall bear all cargo claims subject to Charterers' contribution under the Berth Standard of Average Clause/Charterers' Contribution Clause (1971), if applicable"*. By contrast, the 1996 Agreement appears merely to disapply apportionment under the Agreement, leaving liability to be dealt with independently of it. Although, then Clause 26 will render the owners *"responsible for … cargo claims"*, it is suggested that this will not prevent them from making a claim against the charterers in respect of a cargo claim brought against the owners if, independently of the Agreement, the owners had some such claim, for example because a breach by the charterers of some provision of the time charter gave rise to the cargo claim".

By way of brief explanation, the 1984 version of the ICA contained provisions detailed whether, and if so how, the ICA would apply depending on whether amendments had been made to clauses 8 and/or 26 making liability for cargo claims clear as between owners and charterers.

(G) APPLICATION

(1) The Tribunal's reasoning and conclusion

101. As set out in section (C)(2) above, the Tribunal's essential findings were that:

i) Charterers' orders to load the Montevideo cargo (with its particular characteristics) and to carry it to the PRC caused the loss;

ii) Owners' liability to Cargo Interests in respect of the damaged Montevideo Cargo was not an ordinary cost or risk associated with the performance of the chartered service, or one of the broad range of physical and commercial hazards which are normally incidental to the chartered service, or one which Owners had expressly or impliedly agreed in the Charterparty to bear; and

iii) the loss accordingly fell within the implied indemnity.

102. Those findings at least *prima facie* indicate that the Tribunal addressed itself to the correct legal questions, and made findings of fact which logically led to the overall conclusion that the implied indemnity applied.

(2) Grounds on which leave was given

103. As set out in section (D) above, Andrew Baker J highlighted two particular points when granting leave.

104. The first was that the Tribunal's Reasons may have been contradictory, in that it appeared to accept (or proceed on the basis) that the cargo was lawful and permitted, but also said that it was "*outside the limits of the Charterparty*".

105. In my view, reading Reasons § 137 as a whole, there is in reality no contradiction. The gist of the Tribunal's conclusion, applying the test set out in *The "Island Archon"* and the other cases summarised in section (F)(2) above, was that the risks of loss arising from carrying a cargo with inherent vice were not risks which Owners had expressly or impliedly agreed to bear. The Tribunal did not find, and did not need to find, that the cargo was unlawful or not permitted under the Charterparty. The case law makes clear that the implied indemnity can arise – indeed, it is most likely to be relevant – in situations where the cargo is lawful and permitted yet nonetheless gives rise to a loss (see, e.g., *The "Ann Stathatos"* and *The "Island Archon"* itself).

106. Secondly, the judge felt that the Tribunal might have misunderstood *The "Island Archon"*, which (he said) turned on the fact that the existence of the Iraqi system was not notorious at the time of the charterparty, whereas the result might otherwise have been different. As set out in §§ 76-79 above, *The "Island Archon"* turned on that point only in the sense that, had the Iraqi system been notorious when the charterparty was fixed, it might have been regarded as a risk the owners had impliedly agreed to assume. In any event, the point the Tribunal was addressing in Reasons § 139 was Charterers' submission, recorded at § 136, to the effect that *"the risk of there being an adverse judgment from the Chinese Courts was one [Owners' must be taken to have know[n] about when the Charterparty was fixed"*, citing *The "Island Archon"*. Thus, Charterers were arguing that the present case was like the hypothetical situation envisaged by Evans LJ, in the *dictum* to which Andrew Baker J referred, where a risk is notorious at the time of the charterparty, which might in turn have justified the inference that Owners had taken the risk. I read the Tribunal's use of the words *"almost inevitable"* simply as a way of denoting a notorious risk. However, on the Tribunal's findings, that was not the position here: there was no such notorious risk at the time of the Charterparty, just as there was not on the facts of *The "Island Archon"*. I do not consider that the Tribunal misunderstood *The "Island Archon"*.

(3) Effect of the express terms of the Charterparty

107. Charterers cite the statement in *The "Kos"* that the scope of the implied indemnity "*has to be read in the context of the owners' obligations under the charterparty as a whole…[w]hat risks or costs the owners have agreed to bear may depend on the construction of other relevant provisions of the contract"* ([11]). Charterers draw attention to the clauses of the Charterparty listed below, along with their commentary:-

i) Clause 6 of the Recap identified its subject matter as one trip for the carriage of "*HARMLESS LAWFUL CARGOES*" from the East Coast of South America to the Far East. The carriage of a dangerous or unlawful cargo would have been a breach of the Charterparty. This Cargo was both harmless and lawful.

ii) Clause 12 of the Recap identified certain "*trading exclusions*", which were destinations to which the Vessel could not be ordered to trade because of the perceived physical or legal risks associated with going there. The PRC was not listed. Since the trip was to the Far East, the parties must have contemplated the PRC as a likely destination.

iii) Clause 12 also required trading to be *"VIA SAFE PORT(S), SAFE BERTH(S), SAFE ANCHORAGE(S)"*. A port can be 'legally unsafe' where there are political or similar risks, such as where there is the risk of unjustified confiscation (*The "Greek Fighter"* [2006] CLC 497 at [317]). It was not alleged that the PRC was a 'legally unsafe' place.

iv) Clause 45 of the Pro Forma section of the Charterparty expressly allocated to Charterers all risks associated with the importation of genetically modified grain cargo into the PRC.

v) Clause 82 of the Pro Forma set out a lengthy list of cargo exclusions, identifying cargoes that Charterers were either not entitled to ship, or where Owners enjoyed additional protections (such as in relation to salt/sulphur and petcoke/cement/clinker). The Cargo did not engage any of those exclusions or protections.

vi) Clause 43 of the Pro Forma provided that *"[l]iabilities for cargo claims shall be borne by the Owners and the Charterers in accordance with the NYPE Inter-Club Agreement 1996 or latest updated version"*. It was designed to "*provide a simple mechanism for apportioning cargo claims as between owners and charterers*". It was therefore intended precisely to regulate the kind of risk that led to the PRC Proceedings.

108. Charterers submit that the Charterparty therefore contained detailed and negotiated provisions concerning:

i) the risks of carrying particular cargoes, both in relation to dangerous or unlawful cargoes, and more specifically by reference to identified cargoes in clauses 45 and 82;

ii) the risks of trading to particular countries, both by requiring the Vessel to be traded to "safe ports", and more specifically by defining trading limits; and

iii) the allocation of risks for cargo claims through the incorporation of the ICA.

None of those provisions made carriage of the Cargo a breach of the Charterparty or otherwise sought to impose liability on Charterers. That is so even though the parties might have adopted any number of terms that would have had the effect of imposing such liability on the facts of this case, such as by excluding soya beans (either generally, or at least those with a propensity to self-heat), or by excluding the PRC, or by providing for all soya bean cargo claims made in the PRC to be for Charterers' account. Whether or not any such clauses would have been agreed would be a matter of negotiation and commercial bargain.

109. Charterers submit that these provisions are an unpromising start for Owners' indemnity claim, citing *The "Berge Sund"* and Wilford § 19.17 (see §§ 62-64 above), and that it would be unusual for owners to be able to deploy the implied indemnity to cut through sophisticated contractual terms designed to address precisely the risks that arose here.

110. I do not accept those submissions. The justification for the implied indemnity is the freedom granted to the charterer to give directions as to the employment of the ship, as recognised in the passages from *The Georges Christos Lemos (third party proceedings)* and *The "Island Archon"* quoted in § 48 above. As Devlin J recognised in the statement at p.234 lhc quoted in § 52 above, clauses making express provision for particular ports or cargoes may be used, but are realistically unlikely to be comprehensive. On the facts of any given case, it is not difficult with the benefit of hindsight to envisage express clauses that might have addressed the situation. However, that has never been regarded as a reason for excluding the implied indemnity, any more than it has been regarded as cutting down the effect of the express indemnity contained in the Baltime form which the implied indemnity is commonly regarded as mirroring. As Wilford notes, implied indemnities do not have to be limited to matters outside the scope of other charter clauses, and in this context an overlap to subject-matter does not necessarily involve inconsistency: see the passage quoted in § 52 above. An example is that the fact that the charterer is permitted to give a particular instruction does not prevent reliance on an express or implied indemnity: see the passages from *The "Island Archon"* quoted in § 66 above.

111. So far as the ICA is concerned, Charterers submit that it provides a 'complete code' for the imposition of liability in respect of cargo claims, in the same way that clause 112 did in *The "Dimitris L (No 2)*, with the result that no claim can lie under the implied indemnity. The arbitrators concluded that the ICA did not apply to the circumstances of the present case, because (in their view) ICA § 4(c) has the effect that the ICA applies only where a cargo claim is settled, not where it results in a court judgment. Accordingly, Charterers submit, the parties must be taken to have agreed that no indemnity claim may lie at all in such circumstances.

112. I see no merit in that contention. The effect of ICA § 4(c) is that apportionment under the ICA shall be applied only to cargo claims within the scope of the clause. That does not imply that the parties have agreed that no liability can arise, independently of the ICA, in respect of cargo claims falling outside the clause. Such a reading would, moreover, have arbitrary results. It would mean, for example, that a settled cargo claim could result in a 100% apportionment against charterers, yet a judgment in respect of the same claim would result in zero liability. Presumably the same would apply too under a charterparty containing an express indemnity, such as the Baltime form, if it also incorporated the ICA.

113. The correct position in my view is that, as Hobhouse J indicated in *The Benlawers*, the other provisions of the charterparty, if applicable, and the ordinary law apply. Those provisions include the implied indemnity. That view is also consistent with the third sentence Wilford §20.69, quoted in § 100 above, indicating that the 1996 ICA appears merely to disapply apportionment under the Agreement, leaving liability to be dealt with independently of it. The situation is not analogous to that in *The "Dimitris (No. 2)"*, where the limitation on the right of recovery imposed by the words *"under this charterparty"* was held to be a sensible provision for the distribution of the burden of

USGTT (see § 29 (quoted § 32) and § 53). The ICA cannot realistically be regarded as a provision for the distribution of the burden of cargo claims falling outside its scope.

114. Conversely, I do not accept Owners' contention that the incorporation by the Clause Paramount of the USCOGSA, which excludes liability for inherent vice, necessarily establishes the allocation of risk as between owners and charterers. As noted in § 55, Mustill LJ in *The "Athanasia Comninos"* referred to the difficulty in working out the effect of incorporating into a charterparty contractual terms designed primarily to govern the relationship between owner and the shipper/consignee. Particular risks may be allocated differently in the various limbs of the tripartite relationship of owner, charterer and bill of lading holder. For example, proper stowage is classically a responsibility undertaken by the owner vis a vis the shipper (as reflected in Article III.2 of the Hague Rules) but the charterparty will often impose responsibility for stowage on the charterer as between owner and charterer. Equally, as Charterers point out, negligent navigation is an excluded peril under Article IV.2(a) of the Hague Rules, but as between owner and charterer is a responsibility assumed by owners (see, e.g., *The "Aquacharm"*). Probably the most that can be said, in my view, is that if (as in the present case) the stipulated form of bill of lading excludes owners' liability for a particular risk, such as inherent vice, then charterers cannot rely on the fact that the Clause Paramount requires that form of bill of lading to be signed in support of an argument that owners have assumed the risk in question.

(4) Effect of *The "Island Archon"* and other case law

115. I have largely addressed Charterers' submissions on *The "Island Archon"* in section (F)(2) above. They suggest that the key to *The "Island Archon"* was not merely the absence of fault by the owners, but the change in the risk associated with trading to Iraq after the charterparty was entered into, with the consequence that the parties had no opportunity to address those risks before contracting. The irregular and unforeseen system of bogus cargo claims that took *The "Island Archon"* outside the run of ordinary cargo claims only arose post-charter. Ordinary cargo claims would be more akin to the example of the injured stevedore that Evans LJ explained would not fall within the scope of the implied indemnity, even if liability were to be imposed when the owner was not at fault. Charterers cited a case note by Professor Simon Baughen, "*Shipowners' Implied Indemnity for Cargo Claims"* [1996] LMCLQ 15, at p. 17, suggesting that it was only because the 'Iraqi system' was "*sufficiently unusual*" that the implied indemnity was engaged. The corollary, Charterers submit, is that the risk of an ordinary cargo claim is to be treated differently. Had it been enough for the owner to demonstrate that the cargo claim arose out of the shipment of the cargo *simpliciter*, Evans LJ would not have expressed himself in the terms set out above, and such an approach would also have run counter to the point he made that a "*straightforward test of causation*" was not sufficient.

116. I do not accept those submissions.

117. First, Lord Sumption in *The "Kos"* stated that the question of what risk or costs the owners have agreed to bear "*may depend on the construction of other relevant provisions of the contract, or on an informed judgment of the broad range of physical and commercial hazards which are normally incidental to the chartered service, or on some combination of the two*". Aikens J in *The "Kitsa"* regarded it as a question of

mixed fact and law (see § 61 above). I recognise that Evans LJ in *The "Island Archon"* stated that the answer *"must depend on the true construction of the charterparty"* (p.236 rhc), and that passages in Wilford and Carver speak in similar terms. However, as Lord Sumption's statement indicates, it is a question which (whether strictly one of law or of mixed fact and law) may require an informed judgment about essentially commercial matters. In circumstances such as the present case where there are no specific provisions of the charterparty making clear that owners assumed the relevant risk, it is an issue on which deference should be accorded to the conclusion reached by the arbitrators. An experienced Tribunal in the present case unequivocally concluded that Owners' liability to Cargo Interests in respect of the damaged Montevideo Cargo was not an ordinary cost or risk associated with the performance of the chartered service, that it was not one of the broad range of physical and commercial hazards which are normally incidental to the chartered service, and that it was a loss arising from a cost or risk which it had not expressly or impliedly agreed in the Charterparty to bear.

118. Secondly, and in any event, the decision in *The "Island Archon"* did not turn on the change of circumstances (or known circumstances) between the time of the charterparty and the time of the voyage, save in the limited sense identified in § 79 above, and the suggestion that no implied indemnity arises absent such a change is incorrect in law for the reasons I give there.

119. Thirdly, the implied indemnity is not limited to 'unusual' circumstances, and nor is there any rule of law or general principle that owners should be taken necessarily to have assumed the risks arising from 'ordinary' cargo claims (whatever that may mean). The starting point is that the implied indemnity is of general application, and is justified by the considerations referred to in the case law quoted in §§ 46, 48 and 52 above. Many cargo claims cannot realistically be ascribed to charterers' orders, for example because they clearly arose from failures for which owners are responsible, or simply because there is no charterer's order which was an effective cause of the loss. Others can be ascribed to charterers' orders of one sort or another. That was the case in *The "Island Archon"* and, on the Tribunal's unchallenged findings as to causation, in the present case. Further, there is no difference in principle between the mechanism by which loss occurred in *The Island Archon* (local courts wrongly making adverse findings of shortage or damage) and the present case (local court wrongly making adverse finding as the cause of the cargo being defective on outturn).

120. Nor is there any rule that a restrictive approach must be taken where the loss takes the form of a cargo claim: see §§ 68-71 above. Evans LJ in *The "Island Archon"* envisaged that there might be a range of circumstances where owners could reasonably be expected to be indemnified as a result of charterers' orders to visit particulars ports or carry particular cargos (see e.g. the passage quoted in § 79 above): and it is to be expected that the resulting loss will sometimes manifest itself in the form of a cargo claim. There is no reason why the indemnity should be regarded as inapplicable in such circumstances by reason of an *a priori* assumption that owners necessarily assume the risk of 'ordinary' cargo claims.

121. I have also addressed in section (F)(2) above the propositions which Charterers seek to derive from other authorities. For the reasons given in §§ 80-82 above, I do not consider *The "White Rose"* to support the view that no indemnity can arise in respect of liabilities imposed by local courts unless the local law is unusual or charterers are at

fault. *The "Kitsa"* is simply an example of the kind of ordinary navigation-type risks which, adopting Lord Sumption's phrase in *The "Kos"* are, on an informed judgment, among the broad range of physical and commercial hazards which are normally incidental to the chartered service. *The "Dimitris L (No. 2)* merely holds a particular type of tax liability to be among the ordinary risks which owners are taken to have accepted. The reference to the tax not being an "*unusual feature*" provides no broader indication as to the types of risk which owners can be assumed to have agreed to bear.

122. As Owners point out, the risk of a microbiologically unstable cargo resulting in cargo damage and liability arises directly out of the orders of charterers, who have discretion over the particular cargo selected for shipment and the selection of the ports of loading and discharge. Over those matters, the owners have no right of control (beyond the confines of the charterparty). There is no proper basis on which to fault the Tribunal's conclusion that the risk of loss in fact caused by the shipment of a cargo such as the Montevideo Cargo, with particular (self-heating) characteristics, is not one ordinarily accepted by owners.

(5) Other commercial considerations

123. Charterers refer to a number of further commercial and practical reasons as to why the risk of cargo claims being made against Owners in these circumstances should be borne by them, absent express provision or breach by Charterers.

124. First, they submit that for Charterers to be held liable would be inconsistent with the principles established as to when an owner might be entitled to indemnification from a charterer for bill of lading liabilities absent breach. One of the risks for which owners are compensated by the payment of hire is the assumption of liabilities to cargo interests under bills of lading or other contracts of carriage, to the extent that they were required to assume those liabilities under the Charterparty. Thus, by clause 8 of the Pro Forma, the Master is required to sign such bills "*as presented*" if required by Charterers, the effect of which is that owners take on the risk of cargo claims. That is part and parcel of the commercial bargain struck in a time charter, except where the bills issued expose owners to liabilities more onerous than those undertaken under the charterparty. The corollary, Charterers submit, is that there is no indemnity when the bills of lading do not impose more onerous obligations than envisaged by the charterparty (citing the passages from *Carver on Charterparties* and *The "Nogar Marin"* quoted in §§ 83.i) and 93 above). Further, Charterers were not imposing on Owners the contractual risk of damage for inherent vice. Owners were liable only because the PRC courts got their decision "wrong" by reference to the facts as they stood in the London arbitration. But that could happen on any cargo claim, by reference to any number of matters which ought to be a defence to a cargo claim, such as insufficiency of packing.

125. I do not accept those submissions. Charterers' assertion that liabilities under bills of lading are simply part and parcel of the bargain owners make simply begs the question of which particular types of risk owners can be assumed to accept. Whilst owners of course are expected to assume liabilities to cargo interests – subject to exceptions commonly specified (often including inherent vice) – there is in my view no proper basis on which to make any blanket assumption about the allocation of responsibility for the corresponding risks as between owners and charterers. Indeed, the frequent incorporation of the ICA might be regarded as an indication that there are a number of

types of cargo claim which owners can not simply be assumed to accept as part of the bargain (and it would, again, be question-begging to assert that the need to incorporate the ICA shows that, in its absence, the owners accept all the risks of cargo claims).

126. Further, as I have explained in section (F)(2) above, the fact that the cases uphold implied indemnity claims where bills of lading impose more onerous obligations than envisaged by the charterparty does not mean that the converse is true. The 'corollary', in truth, is merely that if the bill complies with the charterparty, then the terms of the bill will not themselves found a right to indemnity. If, however, the loss was caused by some other order by charterers, then liability may arise. Equally, the fact that, on a proper approach to the bills of lading here, Owners ought not to have been held liable for the cargo claim does not mean no indemnity should lie. The fact is that a liability did arise, and on the Tribunal's findings that was a result of Charterers' orders to load and carry this particular cargo.

127. More broadly, I also see some force in Owners' point that the terms of the Charterparty reflects a broad general division of responsibilities, whereby (1) Charterers were responsible for risks arising due to the cargo carried and; (2) Owners were responsible for the Vessel and her crew (as is often the case in time charterparties).

    i) The charterparty terms which address specific risks/costs associated with the cargoes carried allocate that risk to Charterers. See, e.g. (a) clause 2 of the NYPE form, which allocates (*inter alia*) the cost of fumigation arising due to the cargoes or ports visited on Charterers; (b) clause 8 of the NYPE form, which allocates the costs and risks of cargo operations on Charterers; (c) clause 30, which allocates the cost of cargo separation on Charterers and provides that Owners are not responsible for risks arising from mixing cargoes; (d) clause 41, which allocates the risk of stevedore damage to Charterers; (e) clause 45, which allocates the costs/risks of non-compliance of PRC cargo regulations to Charterers; and (f) cargo exclusion/protection clauses at clause 82.

    ii) By contrast, Owners accepted responsibility for the Vessel, her crew and equipment. See, by way of example: (a) clause 1 of the NYPE form; (b) clause 22 of the NYPE form and clause 40, which required Owners to maintain the Vessel's equipment and ensure that it was certified; (c) clause 71, which provided that Owners were responsible to ensure that the hatch covers were watertight, and (d) Owners' seaworthiness obligation in the USCOGSA §3(1).

128. That broad division is in line with the distinction between navigation and employment risks summarised by Lord Hobhouse in *The Hill Harmony* [2001] 1 Lloyd's Rep 147 at p.149 *("'Employment' embraces the economic aspect – the exploitation of the earning potential of the vessel. 'Navigation' embraces matters of seamanship"*), and considered "*entirely familiar*" by Rix LJ in *The "Doric Pride"* [2006] Lloyd's Rep. 175, who referred to *"those matters which lie upon the owners' side of responsibility, essentially the vessel and crew… and those matters relating to the charterers' employment of the vessel and crew"*. In the present case, on the Tribunal's findings, the loss was caused by charterers' economic use of the Vessel, rather than for example anything connected with the Vessel's condition, navigation or crew, and (taking a broad commercial view) it is not unnatural to regard it as falling on the Charterers' side of the line (contrast, for example, the loss in *The C Joyce*).

129. Secondly, Charterers make the point that the claims made in the PRC Proceedings were against Owners (and the Vessel's head owners). Owners had control over the defence of those proceedings, including whether to defend them on the merits in the PRC (as distinct from taking action in London such as by seeking negative declaratory relief from a tribunal, or seeking anti-suit relief from this Court) and, if so, on what grounds. The Tribunal rejected an argument by Charterers that the defence of those proceedings was unreasonable (Reasons, § 123), but in considering the allocation of risk between the parties, Charterers submit that it is highly relevant that Charterers had no real opportunity to influence the conduct of cargo claims against Owners.

130. In my view this point carries little force. Owners had no influence over the commencement of the PRC Proceedings. Had Owners not defended the proceedings properly once commenced, the Tribunal's conclusion on causation might have been different. It is not unusual for one party to have the task of defending proceedings in circumstances where another party may have ultimate responsibility for them. This factor provides no real pointer to the allocation of risks.

131. Thirdly, Charterers submit that cargo claims such as those made in the proceedings in China in the present case will ordinarily be covered by Owners' P&I insurance. Males LJ said in *The "Eternal Bliss"* [2022] 1 Lloyd's Rep 12 at [56] that *"…the cost of insurance is one of the normal running expenses which the shipowner has to bear. A standard expense for a shipowner is the cost of P&I cover which is intended to protect it against precisely the loss suffered in this case, that is to say liability to cargo claims, whether justified or not".*

132. Whether it follows from the fact that owners' insurance covers liability for cargo claims that owners can be taken to have accepted all such risks, as between themselves and charterers, is another matter. Males LJ's comment was made in the context of considering whether owners could recover from charterers for damages, in addition to demurrage, arising from delays in cargo operations, rather than in the context of the scope of the implied indemnity. Males LJ considered that the demurrage clause, as a liquidated damages clause, was intended to protect charterers from being liable for unrestricted losses. In that context, the owners' P&I insurance tended to support the view that the owners had assumed the risk of losses in excess of demurrage.

133. By contrast, the implied indemnity is intended to confer a right of recovery in respect of liabilities or loss which owners do *prima facie* incur, and there is no inconsistency between holding P&I cover for such exposure and also having a right of indemnity vis a vis charterers. Moreover, the typical existence of P&I insurance, covering risks arising in a wide range of circumstances, is of limited assistance in construing a charterparty or the scope of the implied indemnity. Moreover, it appears from the arbitrators' Reasons in the present case that both Charterers and Owners had P&I cover (§ 29).

134. Fourthly, Charterers submit that 'ordinary' cargo claims such as those made in the PRC Proceedings are both foreseeable and foreseen (as demonstrated by *inter alia* the fact that the parties incorporated the ICA into the Charterparty). Risks that are both foreseeable and foreseen are, they say, less likely to be caught by the implied indemnity: see *The "Island Archon"* and *The "Kitsa"*. Charterers refer to Sir Nicholas Hamblen's observation in the talk referred to earlier that "*[t]he decision in The Island Archon*

makes clear the importance of foreseeability to the question whether the risk or expense is one which the owners have agreed to bear. Foreseeability is also linked to the question of ordinary expenses of the time-chartered service. The more foreseeable they are, the more likely they are to be ordinary expenses; conversely, the less foreseeable and the more unexpected they are, the less likely that is". Charterers also cite a suggestion by Professor Baughen says, at pp. 16-17 of his article cited earlier, that absent a breach of charter, an owner will have to prove a third party intervention "*of a type not contemplated by the parties at the conclusion of the charterparty*" before the implied indemnity will be engaged.

135. However, as Aikens J noted in *The "Kitsa"*, foreseeability is no more than a relevant factor. In a broad sense, almost any type of loss that might result from charterers' orders could be regarded as foreseeable, but that fact cannot preclude reliance on the implied indemnity. Further, the Tribunal in the present case made no finding that the risk of incurring liability in the PRC due to cargo damage caused by inherent vice was foreseeable or foreseen when the Charterparty was entered into, and it seems unlikely that it was. To the contrary, in Reasons §§ [136]-[137] the Tribunal rejected Charterers' submission regarding foreseeability on the facts of the present case. It was not self-evidently foreseeable that inherent vice would fail to provide a defence in the PRC Proceedings.

136. The incorporation of the ICA does not in my view assist Charterers either. At a very general level, it might be regarded as showing that the parties foresaw in principle that losses might arise due to default by owners or charterers of various kind, or for other reasons. It would not, however, be logical to conclude that owners therefore assumed the risk of all similar losses (however caused, and even if resulting from charterers' orders) in cases where the ICA did not apply. The statement relied on by Professor Baughen in my view proposes a restriction on the implied indemnity that is not supported by logic or by authority.

(6) A special rule for inherent vice?

137. Charterers submit that Owners in substance contend for a special rule for inherent vice, but that no such rule is justifiable. Charterers say that:-

i) Inherent vice usually provides a defence to a carrier, and should have done in the present case (since the bills of lading correctly included the relevant exclusion of liability): there is *"no indemnity against the risk of a foreign court getting a case "wrong" on the facts"*.

ii) The claims in *The Ann Stathatos* and *The Athanasia Comninos* (a) do not appear to have involved inherent vice and (b) succeeded because physical damage caused by a cargo is a qualitatively different type of risk from a cargo claim.

iii) The risk that a cargo might become damaged by inherent vice is one that will be both foreseeable and foreseen. Inherent vice is an identified defence under the Hague or Hague-Visby Rules and a common cause of cargo damage. The question of inherent vice often cannot be separated from the question as to whether or not the carrier has properly and carefully carried the cargo: see *Volcafe Ltd v Compania Sud Americana de Vapores SA* [2019] 1 Lloyd's Rep 21 at [34]. The rights and liabilities of owners and time charterers *inter se* where

cargo claims arise out of inherent vice has been addressed since the 1996 version of the ICA. These are issues the industry has been alive to for a long time.

iv) The risk that a court or tribunal might get the answer "wrong", finding that the carrier was at fault when the cargo was actually damaged by inherent vice, was both foreseen and foreseeable. There was no finding that the decisions of the PRC courts were bogus or improper, unlike the "Iraqi system" in *The "Island Archon"*. To the contrary, the Tribunal found that cargo claims "were not almost inevitable" and "were only brought in respect of damaged cargo" (Reasons § 139).

138. In my view Owners do not seek, and the Tribunal did not apply, any kind of special rule for inherent vice. The Tribunal applied established principles to a case whose particular facts involved the employment of a vessel to carry a cargo with inherent vice. I also do not consider that the points summarised above assist Charterers.

i) Point (i) above is essentially a causation point, as to which there is no appeal. Insofar as it might be presented as concerning risk allocation, there is no logical reason why (assuming no break in the chain of causation) owners should be taken to have assumed the risk of liability incorrectly being imposed by a foreign court for a loss caused by charterers' orders.

ii) There is, in my view, no principled reason to treat physical damage and cargo claims differently, once one overcomes the incorrect blanket assumption that owners should be taken to have assumed the risk of 'ordinary' cargo claims as between themselves and Charterers.

iii) The foreseeability in theory of cargo claims arising in the event that a cargo with inherent risk is carried does not mean that owners accept such risks and does not preclude the implied indemnity: see § 135 above.

iv) The fact that cargo claims in PRC Courts, unlike the courts in *The "Island Archon",* were not almost inevitable and were only brought in respect of damaged cargo detracts from, rather than supports, Charterers' contention that the risks in the present case were foreseen and foreseeable at the time of the Charterparty.

(H) CONCLUSION

139. For all these reasons, the arbitrators made no error of law. The appeal must be dismissed. I am very grateful to all counsel for their persuasive and cogent written and oral submissions.