No Bill of Lading, No Problem: *Poralu Marine Australia Pty Ltd v MV Dijksgracht* [2022] FCA 1038; [2023] FCAFC 147

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1. Introduction

The judgments for *Poralu Marine Australia Ptd v MV Dijksgracht*[1] present as a series of legal set pieces rather than as a coherent narrative. The Federal Court, both at trial and on appeal, weighed in on diverse areas of law, including offer and acceptance, incorporation of terms, interpretation of terms and compulsory application of the Hague Rules.[2] A tentative list of legal takeaways is at the end of this case note. If anything stands out from the judgments, it is a frustration that, on the eve of the centenary of the Hague Rules, there is still considerable uncertainty regarding their application to a contract for the carriage of goods by sea.

The case concerned whether such a contract could limit a carrier's liability for damaged cargo. The Full Court overturned the trial finding as to when the contract was formed, resulting in different terms being incorporated into the contract. Given these different terms, the knock-on effect meant that nearly every issue had to be reconsidered on appeal. Thus, trial and appeal read like two parallel, but separate, trial judgments.[3] Due to the length of both judgments—278 paragraphs at trial and 225 on appeal—this case note does not deal with every issue and focuses on the appeal. However, I discuss the trial regarding notable findings that were accepted, were unchallenged or were overturned on appeal.

2. Facts

The dispute involved a carrier's ability to limit its liability for damaged cargo. Poralu Marine Australia Pty Ltd ('Poralu'), by its agents, had arranged for the shipment of 23 pontoons and 11 pallets from Cork, Ireland to Geelong, Australia for use at the Royal Geelong Yacht Club. On arrival in Geelong, three pontoons were damaged. Poralu, as consignee, commenced actions in negligence and in bailment, both *in rem* and *in personam*, against what the Full Court conveniently refers to as 'the carrier'.[4] This included the ship (*MV Dijksgracht*), the time charterer (Spliethoff Transport BV) and the shipowner (Rederij Dijksgracht). The primary question at both trial and appeal was whether the contract effectively limited the carrier's liability. Poralu argued that the liability limits of the Hague-Visby Rules applied;[5] the carrier that it could rely on a contractual term limiting liability to £100 GBP per package or unit. Additionally, there was a secondary question of whether the shipowner could rely on the carrier's defences via a Himalaya clause.

2.1 The Contract Formation

The evidence at trial was confined to email communications between Poralu's agent ('Agent') and the carrier. On 7 November 2019, the Agent sent the carrier a 'recap' email (the 'first recap') that began 'confirm having fixed sfoar [sic]'[6] and ended 'pls confirm, thanks sofar'. This email contained extensive terms regarding the proposed shipment, evidencing prior 'detailed discussions'.[7] Ten minutes later the carrier replied (the 'reply'), seeking a

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[1] [2022] FCA 1038 ('Trial'); [2023] FCAFC 147 ('Appeal').

[2] A recurring them in the judgments was how to refer to these different instruments. For this case note, I adopt the following:

- '1924 Rules' refers only to the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, signed 25 August 1924 (entered into force 2 June 1931). The majority judgment refers to these as the 'Hague Rules': Appeal at [1].
- 'Hague-Visby Rules' refers to both the *Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25 August 1924*, signed 23 February 1968, 1412 UNTS 128 (entered into force 23 June 1977) (the '1968 Protocol') and the *Protocol amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, as Amended by the Protocol of 23 February 1968*, signed 21 December 1979, 1412 UNTS 146 (entered into force 14 February 1984) (the '1979 Protocol').
- 'Australian Rules' refers to the amended rules in the *Carriage of Goods by Sea Act 1991* (Cth) sch 1A.
- 'Hague Rules' is an umbrella term and used in a general sense.

[3] Or perhaps two and a half. For the Full Court, Rares and S Derrington JJ wrote a 162-paragraph joint opinion. Justice Feutrill wrote another 63 paragraphs, agreeing on most points, but not all.

[4] Appeal (n 1) [6].

[5] Hague-Visby Rules (n 2) art 4(5) limits liability to 666.67 units of account per package or unit or 2 units of account per kg. Each pontoon weighed 80 to 85 tonnes, therefore liability by weight was effectively unlimited.

[6] 'Fixed so far' according to Stewart J: Trial (n 1) [38].

[7] Appeal (n 1) [20].

minor correction but stating '[o]therwise fine with me'.[8] Poralu's agent quickly replied with an email 'Subject: RE: recap Cork/Geelong' (the 'second recap') which largely mirrored the first recap, but included the minor correction. It began 'sorry for this omission, revised recap asf'.[9] The terms of the second recap were 'otherwise' as per the carrier's booking note and bill of lading, which would specify 'English law and London Arbitration'. These documents were 'to be provided'.

That same day (7 November) the carrier emailed that its booking note ('Booking Note') would be sent 'asap' and attached an example of its bill of lading ('Bill of Lading').[10] Also attached was a 'sea way bill'. On 8 November the carrier sent the blank Booking Note. All three documents were standard forms for the carrier (Spliethoff Transport). Additionally, all three documents provided that the contract would be governed by and construed in accordance with the laws of the Netherlands and Rotterdam jurisdiction.[11] The Agent replied the same day, attaching the completed Booking Note with the details inserted. Those details made no mention of the provisions for English law and a Bill of Lading to be provided (as per the second recap). Importantly, the Booking Note also, by way of a paramount clause, purported to limit liability to £100 GBP per package or unit. This completed Booking Note was never signed by either party at any time.[12]

Some further emails were exchanged in the following week, detailing specifications on the cargo, the intended vessel and its rotation. On 20 November, the carrier emailed that '[t]he booking note is ok'; attached was the completed Booking Note sent on 8 November by the Agent.

Loading commenced in Cork on 6 December and was completed on 11 December. Some further communications were exchanged about the use of a bill of lading versus a sea waybill, the carrier recommending the latter due to the consignee being known. Ultimately a sea waybill was issued, but not until after the *Dijksgracht* had called in at Lisbon, Portugal. The vessel arrived at Geelong on 10 February 2020.

3. The Judgments

3.1 At Trial

Despite the chronology above, neither party used clear language of offer and acceptance in their communications. Poralu contended that the contract was formed with the recap emails; the carrier that it was formed with the acceptance of the Booking Note. Justice Stewart agreed with the carrier.

Against the recap emails constituting the contract, his Honour identified several reasons that stood 'in the way' of there being clear offer and acceptance.[13] This included language such as 'confirm having fixed so far', 'pls confirm' and 'thanks so far' in the first recap and 'revised recap agreed so far'[14] in the second recap. In addition, the performing vessel was unknown and its rotation was 'to be supplied prior to firm fixture'.[15] Justice Stewart also found that, because further documents with as-yet unknown terms (the Booking Note and Bill of Lading) were to be incorporated into the contract, the parties were not *ad idem*.[16]

By contrast with the recap emails, when the completed Booking Note was accepted the performing vessel and its rotation was known.[17] The resulting contract was subject to Dutch law and included the £100 GBP liability limit. The sea waybill did not create a new or altered contract, instead it only served as receipt for the cargo.[18]

[8] Ibid [24].
[9] Justice Stewart took 'as' to mean 'agreed so far': Trial (n 1) [40]. The majority disagreed, taking the meaning 'as follows' to be more likely because elsewhere in the Agent's emails he wrote out 'sfoar' and 'sofar': Appeal (n 1) [64]. Justice Feutrill was agnostic on the point: at [186](5).
[10] Trial (n 1) [42]–[43].
[11] Ibid [43]–[44].
[12] Ibid [50].
[13] Ibid [83].
[14] See above n 9.
[15] Trial (n 1) [86].
[16] Ibid [85].
[17] Ibid [90].
[18] Ibid [99], [102].

Dutch law did not compulsorily apply its version of the Hague Rules (Hague-Visby Rules) to the contract. Ireland, the port of departure and location of the putative Bill of Lading is not a Contracting State.[19] Merely enacting the Hague-Visby Rules into local law was insufficient for arts 10(a)–(b).[20] Article 10(c) was not satisfied as any Bill of Lading issued would have been a receipt only and because the paramount clause of the Bill of Lading referred to the 1924 Hague Rules, not the Hague-Visby Rules that Ireland had enacted locally.[21]

The final point for consideration was whether an Australian court was bound to apply the Australian Rules by reason of the *Carriage of Goods by Sea Act 1991* (Cth) s 10(1)(b)(i). The Booking Note's paramount clause 'very significantly' decreased the liability that would have attached under the 1924 Rules.[22] Therefore, it did not satisfy art 10(2) of the Australian Rules. Despite this finding, the contract was construed as a 'space charterparty'.[23] The sea waybill issued was not a 'sea-carriage document' for the purposes of art 1(1)(g), therefore art 10(6) precluded the Australian Rules from applying. Because no form of the Hague Rules compulsorily attached to the contract, all that remained was the £100 contractual limitation.

Regarding the question of the Himalaya clause, this turned on the third of Lord Reid's four requirements from *Scruttons Ltd v Midlands Silicones Ltd*:[24] whether the carrier had authority from the shipowner to contract as agent such that contractual protections would extend to the shipowner. This question was resolved using the terms of the BIMCO POOLCON pooling agreement and BIMCO GENTIME time charterparty that existed regarding the commercial operation of the vessel.[25] These instruments gave the carrier the requisite authority.[26]

3.2 On Appeal

On appeal, in the Full Court, Justices Rares and S Derrington gave a joint judgment.[27] Their Honours found, contrary to the trial judgment, that the first recap, reply and second recap emails on 7 November amounted to an offer, a counteroffer and an acceptance of the counteroffer respectively.[28] Their Honours dismissed Stewart J's concerns that stood in the way of contract formation, applying the principle from *Masters v Cameron*[29] that permits a binding contract even when some terms remain uncertain. The Booking Note and subsequent emails were not further shots in a battle of the forms, rather they were the 'performance of the contract'.[30] According to the second recap, a booking note and bill of lading was still 'to be provided'. Terms of those documents would be incorporated into the contract as long as they were not inconsistent with the second recap email. Regarding the crucial limit of liability provisions, the Bill of Lading contained a paramount clause that had the effect of incorporating the Hague-Visby Rules into the contract.[31] This satisfied English law (Hague-Visby Rules),[32] even though a bill of lading was never actually provided. Thus, the rules applied compulsorily.

On the question of the Australian Rules, the majority were content to answer it by application of art 10(2). As the Hague-Visby Rules compulsorily applied, this was a 'Convention' that would prohibit the Australia Rules applying.[33]

Justice Feutrill wrote a separate judgment which largely agreed with the majority.[34] His Honour was prepared to hold that the first recap, reply and second recap emails were sufficient to infer that a 'binding agreement had been reached *before* the first recap email'.[35] He was also more circumspect about the prospect of the Hague-Visby

[19] Ibid [126].
[20] Ibid [139]–[140].
[21] Ibid [166]–[167].
[22] Ibid [209].
[23] Ibid [248], adopting the terminology of Prof Bennett in H Bennett (ed), *Carver on Charterparties* (Sweet & Maxwell, 2nd ed, 2020) [1-008].
[24] [1962] AC 446.
[25] Trial (n 1) [267].
[26] Ibid [275].
[27] Subsequent references to the Full Court, the appeal or the majority reference refers to the joint judgment.
[28] Appeal (n 1) [59].
[29] (1954) 91 CLR 353.
[30] Appeal (n 1) [61].
[31] The paramount clause in the Bill of Lading was worded slightly differently to the one in the Booking Note.
[32] Appeal (n 1) [143].
[33] Ibid [145].
[34] Ibid [164].
[35] Ibid [186].

Rules applying compulsorily by way of English law. As those rules were, in any event, incorporated by *agreement* via the Bill of Lading's paramount clause, it was unnecessary to delve too deeply into English law.[36]

All justices agreed with Stewart J's conclusion regarding the Himalaya clause, dismissing the carrier's cross-appeal.[37]

4 Observations

4.1 Contract Conclusion

Both judgments in the appeal cited *Masters v Cameron*, consideration of which was not present in the trial judgment. They determined that the contract fell into the first category[38] from *Masters v Cameron*, which requires that

> the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.[39]

The majority's subsequent analysis largely focused on negativing Stewart J's reasons as to why the second recap was not a contract.[40] However, there was little in the way of positive analysis regarding whether the parties intended 'to be immediately bound to the performance of those terms'. Instead, the majority accepted that this case fell outside the 'traditional offer and acceptance analysis', applying the principle that commercial contracts must be understood in light of their purpose and context.[41] This context leaned in favour of interpreting the recap emails as contract formation. Justice Feutrill wrote that Justice Stewart was focused 'on a search for evidence of offer and acceptance' which, in part, informed the conclusion at trial that the first recap, reply and second recap were insufficient to constitute agreement to the contract.[42] However, Justice Feutrill also provided detailed reasons for his conclusion that a binding agreement had been reached prior to the first recap.[43]

Comment
One should not make too much of this disagreement, particularly as the facts are so unique and open to interpretation. Perhaps all that can be concluded is that courts will lean towards finding an intention to be bound when the parties show significant agreement as to terms. Certainly, the use of the word 'recap' in the email subject titles was of significance in inferring agreement.[44]

4.2 Terms of the Contract

Near the end of the first and second recap emails was the following:

> -Otherwise as per Carrier's WWBN[45] including rider clauses / BL including
> English law and London Arbitration => to be provided[46]

Because the majority determined that the contract was formed with the second booking note, it was necessary to examine if, and to what extent, the Booking Note ('WWBN) and Bill of Lading ('BL') incorporated additional

[36] Ibid [223].
[37] Ibid [155]–[156], [224].
[38] Ibid [60], [183].
[39] *Masters v Cameron* (1954) 91 CLR 353, 360 (Dixon CJ, McTiernan and Kitto JJ).
[40] Appeal (n 1) [63]–[68]. These reasons were (1) that the second recap opened 'revised recap [agreed so far]'; (2) the Booking Note and Bill of Lading were still to be provided; (3) the intended rotation of the vessel was 'to be suppled prior firm fixture'; and (4) the second recap concludes 'pls confirm' and 'thanks sofar': Trial (n 1) [81]–[88].
[41] Appeal (n 1) [50]–[56]. The majority also cite Lord Justice Toulson in *Papas Olio JSC v Grains & Fourrages SA* [2009] EWCA Civ 1401, [28]; [2010] 2 Lloyd's Rep 152, 156–7 [28] describing the 'typical formation of contracts in markets, such as shipping, where parties rely on standard form contracts': Appeal (n 1) at [56]. That case concerned the international sale of sunflower seeds. Also, there was no suggestion that the second recap was a standard form.
[42] Appeal (n 1) [185].
[43] Ibid [186].
[44] Ibid [56], [186](1).
[45] Taken to refer to 'worldwide booking note': ibid [38].
[46] Ibid [23], [38].

contractual terms. The majority interpreted this clause to mean three things.[47] First, terms not addressed in the second recap would be governed by the Booking Note and Bill of Lading. Secondly, that the express choice of 'English law and London Arbitration' would displace any later contradicting terms in those documents. Thirdly, that a Bill of Lading was 'to be provided'.[48] As discussed above, the Booking Note and Bill of Lading contained inconsistent paramount clauses. The former would apply the Hague-Visby Rules; the latter a modified version of the 1924 Rules, limiting liability to £100 per package or unit. The majority determined that the Bill of Lading's paramount clause should take priority over the Booking Note's.[49]

Any terms of these documents that were inconsistent with the second recap were excluded. These included the choice of Dutch law and Rotterdam jurisdiction.[50] Also excluded was an 'override clause' in the Booking Note which purported to prevail over 'any previous arrangements' including 'any Bill of Lading … issued hereunder'.[51] It was not problematic that the terms and rider clauses contained in these documents had not been seen by the Agent at the time of contract conclusion.[52] By contrast, in Stewart J's construction of the contract, formed with the Booking Note, the override clause was included and justified excluding the terms of the Bill of Lading or the 'sea way bill'.[53]

Comment
The majority interpreted the quoted term as not only saying that a Bill of Lading would be provided, but that it 'would evidence the contract of carriage'.[54] However, this term may also be seen as simply an attempt to incorporate standard terms by reference. The carrier was agreeing to provide the Booking Note and Bill of Lading because they contained terms to be included in the contract, not for any other function they might have. Arguably this reading can also be supported by the term earlier in the email that the majority used to support this conclusion:

> can you pls provide agency details both ends?
> pls also provide your BN, riders and BL[55]

'Provide' might be being used in the sense of *providing* information contained in the documents, as opposed to *issuing* the documents (particularly for the Bill of Lading). The takeaway from the majority reasoning is that, where this kind of ambiguity exists, weight will be given to the more usual functions of bills of lading.

4.3 Compulsory Application of Hague-Visby Rules

The trial and appeal judgments considered the compulsory application of the Hague Rules under the law of the contract, Dutch law for the trial judgment and English law for the appeal. Although the subsequent analyses concerned the Hague Rules as part of foreign domestic law, some observations may still be made. The Netherlands and England are Contracting States to the Hague-Visby Rules. Therefore, compulsory application required satisfaction of article 10 of those rules.

> Article 10
> The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if:
>
> (a) the Bill of Lading is issued in a Contracting State, or
> (b) the carriage is from a port in a Contracting State, or
> (c) the contract contained in or evidenced by the Bill of Lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract
>
> whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person…[56]

[47] Ibid [38].
[48] This was also supported by an earlier line in the email: 'pls also provide your BN, riders and BL': ibid [27], [38]. See also [94]–[98], [100]
[49] Ibid [113]–[123].
[50] Ibid [114].
[51] Ibid [115].
[52] Ibid [66].
[53] Trial (n 1) [101].
[54] Appeal (n 1) [84].
[55] Ibid [27].
[56] Hague-Visby Rules (n 2) art 10.

The preliminary difficulty comes from the chapeau to art 10 which provides that 'the provisions of this Convention shall apply to every Bill of Lading'. Although the contract required this to be 'provided', no bill of lading was ever issued. After discussing *Kyokuyo Co Ltd v AP Møller-Maersk A/S* ('*The Maersk Tangier*'),[57] an English case where, relevantly, no bill of lading was ever issued, both judgments accepted that 'Bill of Lading' in the chapeau extended to contracts of carriage covered by a bill of lading, even when none is issued.[58] Of course, only the Full Court found that this contract was, in fact, covered by a bill of lading.

As the Full Court ultimately determined that art 10(c) was satisfied, it did not analyse arts 10(a)–(b). Regarding art 10(c), the majority reasoned that *The Maersk Tangier* required reading 'Bill of Lading' in art 10(c) the same way as in the chapeau. Namely, that it could apply even where no bill is issued. This is because 'it would be absurd to suppose that the parties intend the terms of the contract to be changed when the bill of lading is issued'.[59]

Articles 10(a)–(b) were considered at trial; they require a 'Contracting State'. Ireland was the country of departure and, putting aside the fiction of determining where a Bill of Lading was issued when it was never issued, Ireland, being the country of shipment, was the 'most obvious and usual place'.[60] Although Ireland had given force of law to the Hague-Visby Rules[61] and had signed both Visby and SDR Protocols they had not formally ratified them. Justice Stewart found that this meant that Ireland could not be considered a Contracting State for the purposes of art 10.[62] The issue was not agitated on appeal.[63]

A point of interest was Stewart J's finding that art 10(a) could not be satisfied when no Bill of Lading was issued. This conclusion rested, in part, on the specific use of the word 'issued' following 'Bill of Lading' in art 10(a). For the expanded definition of Bill of Lading to make sense in art 10(a) would also require substituting 'issued' with 'concluded'.[64] However, this conclusion also drew from the slightly different Dutch domestic statute.[65] This was not discussed in the appeal judgment.[66]

4.4 Interpretation of Paramount Clauses

The relevant paramount clause in the Bill of Lading read:[67]

> Except in the case of US Trade, the Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels, 25th August 1924, as enacted in the country of shipment, shall apply to this Bill of Lading. If no such enactment is in force in the country of shipment, the articles I-VIII inclusive of the said Convention shall apply. In trades where the International Brussels Convention 1924 as amended by the Protocols signed at Brussels on 23 February 1968 and 21 December 1979 (the Hague- Visby Rules) apply compulsorily, the provisions of the Hague-Visby Rules shall be considered incorporated in this Bill of Lading… If the Hague Rules are applicable otherwise than by national law, in determining the liability of the Carrier, the liability shall in no event exceed £100 (GBP) sterling lawful money of the United Kingdom per package or unit.

In interpreting this clause, the majority spent little time on the importance of Ireland not being a Contracting State, accepting that 'enacted' was satisfied by Ireland having given the Hague-Visby Rules the force of law.[68] The difficulty was whether the reference in the first sentence to 'the Hague Rules' meant the 1924 Rules exclusively—which Ireland had not 'enacted'—or could be read as including later versions. The majority analysed two competing English precedents[69] that involved similar clauses before following Lord Justice Longmore's reasoning

[57] [2018] EWCA Civ 778; [2018] 2 Lloyd's Rep 59.
[58] Trial (n 1) [119]; Appeal (n 1) [83].
[59] Appeal (n 1) [89], quoting *The Maersk Tangier* (n 57) [49] (Flaux LJ). Flaux LJ was himself quoting Justice Devlin in *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 419–20.
[60] Trial (n 1) [153].
[61] Ibid [126]; *Merchant Shipping (Liability of Shipowners and Others) Act 1996* (IRE).
[62] Trial (n 1) [140].
[63] Appeal (n 1) [200].
[64] Trial (n 1) [148].
[65] Ibid [149].
[66] Appeal (n 1) [80].
[67] Ibid [41] (emphasis added in judgment).
[68] Ibid [126].
[69] *Parsons Corp v CV Scheepvaartonderneming* [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep 357 ('*The Happy Ranger*'); *Yemgas FZCO v Superior Pescadores SA* [2016] EWCA Civ 101; [2016] 1 Lloyd's Rep 561 ('*The Superior Pescadores*').

in *Yemgas FZCO v Superior Pescadores SA* (‘*The Superior Pescadores*’)[70] that the broader interpretation be taken. Such a view reflects ‘commercial common sense’; the words ‘as enacted in the country of shipment’ would do little work if they referred only to the 1924 Rules.[71]

Justice Stewart also examined this clause (in the alternative) and reached the opposite conclusion despite examining the same authorities. His Honour reasoned that, reading the clause as a whole, the later references to the 1968 and 1979 Protocols implied that the initial use of ‘the Hague Rules’ should be limited to the 1924 Rules.[72] Additionally, the later £100 reference refers to the limitations of the 1924 Rules, not the later Protocols. The reasoning from *The Superior Pescadores* was therefore distinguishable; the first sentence of the paramount clause in that case was nearly identical, but the rest contained no separate mention of the Protocols.[73] These arguments were not addressed in the majority judgment, but were addressed by Justice Feutrill.[74]

Comment
The majority’s judgment begins by remarking on the lack of international uniformity in the Hague Rules.[75] In fact, its opening paragraph refers to the 1924 Rules as the ‘*International Convention for the Unification of Certain Rules of Law relation to Bills of Lading*’. It then describes the 1968 and 1979 Protocols separately. These careful distinctions between the various Conventions made in the majority’s opening paragraph show a similarity with the paramount clause. The one was considered sufficient to refer to the 1924 Rules only, but the other insufficient. One might justify this different interpretation because the former is a court judgment and the latter a commercial contract. However, given the majority’s interpretation, one wonders how commercial parties might word such a clause so as to refer to the 1924 Rules only.

4.5 Compulsory Application of Australian Rules

Article 10 of the Australian Rules differs significantly from the Hague-Visby Rules. Article 10(2) provides:

> *Subject to paragraph 6* [the charterparty exception]*, these Rules apply to the carriage of goods by sea from ports outside Australia to ports in Australia, unless one of the Conventions mentioned in paragraph 3 (or a modification of such a Convention by the law of a contracting State) applies, by agreement or by law, to the carriage, or otherwise has effect in relation to the carriage.*

Paragraph 3 goes on to list the ‘Brussels Convention’, ‘the Brussels Convention as amended by either the Visby Protocol or the SDR Protocol or both’ and ‘the Hamburg Convention’.

As the Full Court had concluded that the Hague-Visby Rules compulsorily applied, the contract fit into one of the paragraph 3 exceptions. Therefore, the Australian Rules did not apply.[76] However, Justice Stewart was considering a different contract, which purported to include only the first eight articles of the 1924 Rules.[77]

His Honour canvassed the legislative history of the Australian Rules,[78] including the ‘mischief’[79] that they sought to avoid. Part of this mischief was contractual terms that seek to lessen the carrier’s liability from the various Conventions.[80] The Booking Note’s paramount clause did exactly this. It sought to oust any possible inference that the £100 limit in art 4(5) of the 1924 Rules could be interpreted as its gold value in 1924.[81] Justice Stewart’s ‘rough estimate’ of the latter was £38,167, making the proposed £100 limit ‘considerably more favourable’.[82] Although his Honour was prepared to accept that a ‘minor or insignificant modification’ of a Convention incorporated into a contract might be sufficient to satisfy arts 10(2)–(3), this was not so when the term ‘very

[70] [2016] EWCA Civ 101, [37]–[38]; [2016] 1 Lloyd’s Rep 561, 567–8 [37]–[38].
[71] Appeal (n 1) [137].
[72] Trial (n 1) [166].
[73] Ibid [171].
[74] Appeal (n 1) [203].
[75] Ibid [1]–[4].
[76] Ibid [145]–[146].
[77] Trial (n 1) [105].
[78] Ibid [185]–[196].
[79] Ibid [205].
[80] Ibid [208].
[81] See also 1924 Rules (n 2) art 9.
[82] Trial (n 1) [200].

significantly lessens the liability of the carrier'.[83] Consequently, this truncated form of the 1924 Rules was did not satisfy art 10(2) of the Australian Rules.

One final issue concerned art 10(6) of the Australian Rules, which provides an exception to art 10(2) when the carriage is 'under a charterparty unless a sea carriage document is issued for the carriage'. The Full Court, having already decided that the Australian Rules would not apply, did not consider the charterparty question.[84]

After a lengthy discussion of charterparties,[85] Justice Stewart concluded that the Booking Note contract was a 'space charterparty'[86]. The 'sea way bill' that was issued[87] fell outside the art 1(1)(g) definition of 'sea carriage document' as it neither contained nor evidenced a contract of carriage.[88] Instead it 'was merely a receipt for the cargo'.[89] Therefore, at trial, the art 10(6) exception applied, preventing the application of the Australian Rules.

Comment
The art 10(2) trial finding has potential implications for inbound carriage from countries whose local laws do not neatly fit into one of the Conventions in art 10(3). China, for example, has a 'hybrid regime' drawing from all three sets of rules listed in art 10(3).[90] If the significance of a modification is seen mostly in terms of whether it purports to decrease liability, China's law, whose limits are based on the Hague-Visby Rules (including the SDR Protocol),[91] would not fall afoul. Consequently, a contract purporting to incorporate the Chinese rules would not be overridden by the Australian Rules. This reasoning also suggests the answer to the solipsistic question: would the Australian Rules satisfy art 10(2) of the Australian Rules?

5 Summary

As so much of the reasoning in this case depended on unique facts and foreign law, it is difficult to confidently assert that it supports any particular legal propositions. With that proviso, I offer the following:

- Where a 'recap' email exists outlining agreed terms in a commercial maritime context, contractual agreement may be inferred. (Appeal)
- Contractual agreement can still exist where non-key terms are left undecided or are not known to both parties. (Appeal)
- Where a commercial maritime contract states that a bill of lading would be provided, the word 'provided' will be interpreted as 'issued'. (Appeal)
- Where a contract is covered by a bill of lading, but the bill is never issued, it will still satisfy art 10(c) of the Hague-Visby Rules. (Appeal)
    - This might not be the case for art 10(a) due to its different wording. (Trial)
- A country that merely enacts the Hague-Visby Rules, but does not formally ratify them, is not a 'Contracting State' for the purposes of arts 10(a)–(b) of the Hague-Visby Rules. (Trial)
- Where a paramount clause purports to incorporate the Hague Rules as enacted in the country of shipment, 'Hague Rules' is likely to be given a broad interpretation regarding the different iterations of the Convention. (Appeal)
- Where a contract incorporates a version of the Hague Rules or Hamburg Rules, 'minor or insignificant' modifications will not preclude it from satisfying art 10(2) of the Australian Rules. However, modifications that lessen liability under one of those conventions are unlikely to be minor or insignificant. (Trial)

[83] Trial (n 1) [209].
[84] Appeal (n 1) [147].
[85] Trial (n 1) [223]–[251].
[86] See above n 23.
[87] On Justice Stewart's construction of the contract, there was no requirement for a bill of lading to be issued.
[88] Australian Rules (n 2) art 1(1)(g)(iv). The 'override clause' in the Booking Note prevented the sea waybill from having these functions: Trial (n 1) [101].
[89] Trial (n 1) [251].
[90] James Zhengliang Hu and Siqi Sun, 'A Study on the Updating of the Law of Carriage of Goods by Sea in China' (2016) 30 *Australian and New Zealand Maritime Law Journal* 114, 114.
[91] Ibid.