Commodity sales and the compensatory principle

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International commodity sales differ in important respects from other contracts. This article argues that a principled case can be made for exempting them from a strict application of the compensatory principle, that the analytical tools are in place for so doing, and that it is still possible to do so after the Supreme Court decision in Bunge v Nidera.

I. INTRODUCTION

The main actors in the international commodity market are among the world's largest companies,[1] and the overwhelming proportion of tonnage shipped internationally constitutes commodities in one form or another.[2] To the extent that the Supreme Court decision in *Bunge SA v Nidera BV*[3] affects trading in international commodities, it is potentially of immense economic importance. The decision also points up deep-rooted problems of legal analysis, which have their origins in the earlier House of Lords decision in *Gill & Duffus SA v Berger & Co Inc*.[4] The issue considered here is how the compensatory principle applies to international commodity sales: that in awarding damages for breach of contract, the injured party is entitled to such damages as will put him in the same financial position as if the contract had been performed but, crucially, not more than that.

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1. The *Financial Times* cites as "dominant players" Archer Daniels Midland, Bunge, Cargill, Louis Dreyfus Company (the so-called "ABCD companies") and Glencore, for dry commodities: "Archer Daniels Midland hurt by weak grain export", *Financial Times*, 3 May 2016. To that we should add Vitol and Gunvor, principally for wet. Both the latter had profits exceeding $1 billion in 2015: "Oil traders enjoy commodity price rout", *Financial Times*, 27 March 2016.

2. In 2006, over 6 billion tonnes of commodities were shipped, well over 80 per cent of total tonnage, compared with just over a billion of containerised goods, or well under 20 per cent: M Stopford, *Maritime Economics*, 3rd edn (Routledge, Abingdon, 2009), 56 (table 2.3: a breakdown of world tonnages between 1995 and 2006). (In value terms, containerised cargoes may figure higher.)

3. [2015] UKSC 43; [2015] Bus LR 987; [2015] 2 Lloyd's Rep 469, *infra*, fnn 165–180, and text thereto, extending (to the extent applicable) the principles of *Golden Strait Corp v Nippon Yusen Kubisha Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353; [2007] 2 Lloyd's Rep 164, *infra*, fnn 130–159, and text thereto, to apply them to an international commodity sale. On the particular contracts to which the decision applies, see *infra*, text to fnn 177–180.

4. [1984] AC 382; [1984] 1 Lloyd's Rep 227 (HL). See *infra*, text to fnn 50–121.

Gill & Duffus v Berger can be, and has been, explained in narrow terms,[5] but this is to emasculate Lord Diplock's reasoning in the case itself, which was in the broadest of terms.[6] A broad approach is also essential to the smooth operation of international commodity sales, certainly if on CIF terms, as indeed Lord Diplock recognised. However, Lord Diplock's analysis of the assessment of damages is impossible to reconcile with the compensatory principle, as that principle has later been enunciated, in *The Mihalis Angelos*,[7] *The Golden Victory*,[8] *The Glory Wealth*,[9] and most recently in the Supreme Court in *Bunge v Nidera*.[10] On any basis, the damages awarded to the sellers in *Gill & Duffus v Berger* exceeded the loss that had been occasioned to them by the breach.

Though nobody can seriously argue against the operation of the compensatory principle in general, it would be unfortunate were the damages aspect of *Gill & Duffus* not to be regarded as good law. This article argues that an exception should be allowed to the compensatory principle, to cater for the special features of international commodity sales (though not, as has been argued elsewhere, for all one-off sales of goods).[11]

There are a number of stages to the argument. First, international commodity sales differ in significant respects from other contracts for the sale of goods. Secondly, they should be treated differently from other contracts, in order to allow them to operate as the parties may be presumed to have intended. Thirdly, the analytical tools exist which allow this. Fourthly, the authorities do not demand strict application of the compensatory principle to every contract, with no exceptions at all.

The compensatory principle does not work well where the law places restrictions on a remedy available to one party, by requiring a precondition to have occurred before its exercise. If the precondition is ignored, but would have been satisfied eventually, the compensatory principle states that the other party has suffered no loss, and that damages should therefore be zero. The consequence is that the precondition can be ignored with impunity. If the reason for the precondition is sufficiently important, this can justify departure from the compensatory principle, especially if the consequence is, in no meaningful sense, to confer a windfall on the other party. That is essentially the position that exists with international commodity sales.

It may be objected that, if the parties do not care for the application of the compensatory principle, they can draft their contracts so as to avoid it. After all, clauses providing for calculation of damages are frequently found in commodity sale contracts, as indeed in *Bunge v Nidera* itself.[12] This is not a good way to deal with the problem, however, as clauses increasing damages run the risk of falling foul of the law relating to penalties.

5. For a narrow interpretation, see *Flame SA v. Glory Wealth Shipping Pte Ltd (The Glory Wealth)* [2013] EWHC 3153 (Comm); [2013] 2 Lloyd's Rep 653, [62] (Teare J). See fn.164.
6. See *infra*, fnn 61–67, and accompanying text.
7. *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164; [1970] 2 Lloyd's Rep 43 (CA). *The Mihalis Angelos* predated *Gill & Duffus v Berger* but was not cited in the later case. It is central to the reasoning in *The Golden Victory*, *The Glory Wealth* and *Bunge v Nidera*.
8. See fn.3.
9. See fn.5.
10. See fn.3.
11. See fn.154.
12. See fnn 3, 176.

II. FEATURES OF INTERNATIONAL COMMODITY SALES

The most important difference, for present purposes, between international commodity sales and other sales of goods, is that the same cargo is typically sold many times on the voyage. Whether dry or wet, commodities are often subject to long strings (or chains) of sales,[13] ideally on identical terms apart from the price. Only the shipper and eventual receiver deal with the cargo as a genuine physical commodity, the interests of sellers and buyers other than at the start and end of the chain being financial; they hope to sell for more than they purchased.[14]

Sometimes a seller early in the chain will reappear as a buyer later, thereby forming a circle of sales. There will also typically be chains on either side of the circle.[15] Circles are sufficiently common for many of the standard sale forms to provide for them (negating the need to send the documents pointlessly around the circle).[16] The fact that they are routinely provided for suggests that they are not uncommon; and, of course, circles tend to arise only with longer chains.[17] There were circle clauses in the contracts in both *Gill & Duffus v Berger* and *Bunge v Nidera*,[18] though neither case in fact appears to have involved a chain of sales.

Especially where delivery dates are fixed far into the future,[19] prices can change markedly. Naturally, those in whose favour the market has turned (sellers on a falling market, buyers on a rising) will want to enforce the contracts they have made, whereas the other party would prefer to avoid the market loss if he can. This is probably the main reason why parties to commodity contracts repudiate, or purport to repudiate, them.[20]

Actual or potential string

Not all commodity contacts form parts of long strings. There is no suggestion of a string in either *Gill & Duffus v Berger* or *Bunge v Nidera*, and these may have been one-off sales. In both cases the sellers at least appear to have been the original suppliers of the goods, shippers (CIF) in *Gill & Duffus v Berger*, and under an obligation to load

13. The terms "string" and "chain" appear to be used interchangeably.

14. One consequence, especially for oil sales, is that bills of lading have rarely found their way to the ultimate purchaser in time for presentation to take delivery from the ship: eg, *A/S Hansen-Tangens Rederi III v Total Transport Corp (The Sagona)* [1984] 1 Lloyd's Rep 194 (Staughton J); *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)* [1990] 1 Lloyd's Rep 252 (CA).

15. Eg, *Concordia Trading BV v Richco International Ltd* [1991] 1 Lloyd's Rep 475 (Evans J), also FOB, where sellers early in the chain appeared again as buyers later, leading to quite a large circle of sales, followed by a chain. Such a circle would typically be dealt with by a circle clause, but one of the parties in the circle had gone into liquidation.

16. There are many such clauses, eg, cl.26 of GAFTA 41 (CIF), the 2014 edition of which can be found at *www.gafta.com/write/MediaUploads/Contracts/2014/41_2014.pdf*; cl. 19 of GAFTA 49 (FOB), the 2014 edition of which can be found at *www.gafta.com/write/MediaUploads/Contracts/2014/49_2014.pdf*. Earlier versions of these forms were used respectively in *Gill & Duffus v Berger* and *Bunge v Nidera*. Where there is an insolvency, different provisions operate: eg, GAFTA 41, cl.25.

17. Cf, *R Pagnan & Fratelli v NGJ Schouten NV (The Filipinas I)* [1973] 1 Lloyd's Rep 349 (Kerr J), where there was a circle of just two.

18. See fn.16.

19. In *Bunge Corp, New York v Tradax Export SA, Panama* [1981] 1 WLR 711; [1981] 2 Lloyd's Rep 1 (HL), for example, there were three delivery dates, respectively 16, 17, and 18 months after the contract date. The case involved the sale of bulk soya bean meal, and there was no suggestion that there was anything unusual in this.

20. See also fnn 43–49 and text thereto.

(FOB) in *Bunge v Nidera*. Lord Diplock started his speech in *Gill & Duffus v Berger* by observing that "the subject matter of this appeal is a single contract",[21] implying that there was no string. The FOB buyers in *Bunge v Nidera* had nominated the ship,[22] and may have been the eventual receivers in another single sale. But, even if an international commodity transaction begins as a one-off sale, its nature is that the purchaser can easily sell on, if the market turns in his favour, and the seller can often substitute equivalent goods, if it moves the other way.[23] Certainly, in both *Gill & Duffus v Berger* and *Bunge v Nidera*, the purchaser at least could have sold on. Moreover, the contracts in both cases were on standard forms that were adapted to chains and circles.[24] It makes no sense to distinguish between sales which are actually one-off, or actually part of a string, if the transaction can easily become part of a chain, and is on a standard form which is adapted for this purpose.

III. THE LAW AND CHAIN SALES

Suitability of CIF and FOB contracts

This article is about international commodity sales, but in reality it focuses on the two types of contract that form the backbone of the trade: CIF contracts, which are ideally suited for use in long chains, and those varieties of FOB contract which share many of the essential characteristics of CIF, and are also used for this type of transaction.[25] Speed is important in chains, and the same documents will necessarily be used for all the contracts in the chain. The advantage of these contracts is that the buyer needs only to inspect the documents, paying against their tender (unless credit has been granted), and does not need to undertake the slow and expensive task of inspecting the goods themselves.

There are three features of this type of contract that make it particularly appropriate for use in string sales, and it is important for present purposes to note that the courts have developed these features, often citing the needs particularly of international commodity

21. [1984] AC 382, 387.

22. But this is not conclusive, as FOB sub-sales (and hence strings) can be effected by transfer of charter, or by sub-charter: eg, *The Filipinas I, supra*, fn.17 (transfer); *K/S A/S Seateam & Co v Iraq National Oil Co (The Sevonia Team)* [1983] 2 Lloyd's Rep 640 (where there appear to have been successive sub-charters). Also, of course, an FOB buyer can re-sell CIF.

23. This depends on two factors: first, the existence of a ready market in equivalent goods; and, secondly, contracts not being for the sale of specific goods, so that the seller can satisfy his commitments to his purchaser by supplying any goods matching the contractual description. On these factors, see further *infra*, fnn 103–104; fnn 178–180; and associated text.

24. See fn.16. The contracts were respectively GAFTA 41 and 49, both of which include a circle clause.

25. Goods already afloat cannot be sold FOB: *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11; [2008] 1 Lloyd's Rep 462, [35] (Lord Mance), but an FOB contract made prior to shipment can form part of a string: eg, *The Filipinas I*, fn.16; *K/S A/S Seateam & Co v Iraq National Oil Co (The Sevonia Team)*, fn.22; *Concordia Trading BV v Richco International Ltd*, fn.15. In *Bunge v Tradax*, fn.19, the HL assumes the likelihood of an FOB string: *infra*, text to fnn 37–42. But the FOB term encompasses a wide range, in some of which the sellers will not obtain any documentation at all: eg, *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784 (CA). These types are not suitable for the string transactions being discussed here. See further generally, fnn 111–115, and associated text.

traders. First, risk passes on shipment. Secondly, terms are more readily categorised as conditions, rather than innominate or intermediate terms. Thirdly, buyers are normally entitled to reject documents, only in respect of a documentary breach. All these are important, if the transactions are to be performed on the basis of documentary inspections alone, without the need to inspect the goods themselves. This article is concerned with the third of these features, but the approach advocated is no more than an extension of the approach clearly adopted in respect of the first two.

To begin with the passing of risk, under both CIF and FOB contracts, the sellers' obligations regarding the goods generally end on physical delivery to the ship.[26] There is no obligation to deliver to the port of discharge, and risk of loss or damage passes to the buyers on shipment. If the goods have been lost or damaged after shipment, the buyers' recourse is against the carriers or insurers, not the sellers.[27] Hence, the state of the goods once they are at sea, a state which cannot easily be determined, is irrelevant to the buyers' obligation to accept the documents and pay for the goods. What applies to sales applies equally to sub-sales, so intermediate purchasers are safe in paying, without the need to inspect the goods, secure in the knowledge that they will in turn be paid by their sub-purchasers, as long only as the documents conform to contractual requirements. To that extent, then, these are documentary transactions, there being neither a need nor a right for buyers to examine the goods themselves, while they are at sea. The documents provide evidence of their state at shipment; the risk of loss is on the buyers thereafter, but the documents also transfer rights against carriers and insurers,[28] where buyers do not have a direct relationship with them.[29]

The CIF contract forms the backbone of at any rate the dry-cargo trade, having been adopted by the trading parties. For various reasons, FOB remains common in the oil trade.[30] By contrast, there has been no similar adoption in the commodity trade of *ex*-ship (or arrival) contracts, where the sellers are obliged to deliver to the discharge port. This is not surprising; an *ex*-ship contract would require the very examination of goods on the voyage that CIF and FOB contracts can avoid.

It is central to the argument presented here, not only that CIF and FOB contracts have been adopted by the parties in practice, as being suited to this type of transaction, but also that the courts have recognised this, and been prepared to interpret the contracts accordingly. With a string of contracts, the goods may be destroyed after shipment but before an intermediate seller (who has himself therefore purchased the goods) obtains the bill of lading. Consequently, the intermediate seller will obtain a

26. Generally, because there remain negative obligations: fn.90, and associated text.

27. Eg, the description of the CIF scheme in *Bergerco USA v Vegoil Ltd* [1984] 1 Lloyd's Rep 440, 443 (Hobhouse J).

28. Carriage contract rights are typically transferred by the Carriage of Goods by Sea Act 1992, and sellers are typically required to assign the benefit of marine insurance contracts.

29. Cf many FOB contracts, where however sub-sales are often CIF: eg, *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459; [1954] 1 Lloyd's Rep 16 (Devlin J), where the defendant CIF sellers had themselves purchased the (Rongalite) cargo on FOB terms. See further fnn 44–49, and text thereto.

30. Eg, *Scandinavian Trading Co A/B v Zodiac Petroleum SA (The Al Hofuf)* [1981] 1 Lloyd's Rep 81 (Mocatta J); *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (The Luxmar)* [2007] EWCA Civ 494; [2007] 2 Lloyd's Rep 542 (CA). Because in tanker carriage contracts, freight is often payable on delivery, it can make more sense for buyers to be responsible for contracting with the carrier.

bill of lading which is no longer capable of passing property in the goods. In *C Groom Ltd v Barber*,[31] Atkin J held that a CIF intermediate seller, in precisely this situation, was entitled to tender documents representing lost goods, even though the documents could not possibly pass property.[32] He commented that:[33]

> "[if] it were otherwise the shipper of goods in bulk, or of goods intended for several contracts, or the intermediate seller who may be the last of a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms."

This is obviously correct, in the circumstances such as those that had arisen. Here the court can be seen explicitly recognising the likelihood of a string, and interpreting the sellers' duties in the light of that.

Another situation where there has been explicit recognition of the type of transaction in which these contracts are used is in the classification of time terms as conditions. It is essential in chain sales for either all of the contracts in the chain to be enforceable or none. The innominate or intermediate term,[34] allowing the innocent party to repudiate only if the breach goes to the root of the contract,[35] is less suitable for use in chains than the condition/warranty classification, where the right to repudiate depends not on the effect of the breach, but only on the categorisation of the term. Quite apart from the uncertainty to which the root of contract test gives rise, its operation is problematic where there is not one contract, but a long chain (since the effects of breach may differ between each contract). Partly for this reason, the House of Lords in *Bunge Corp, New York v Tradax Export SA, Panama*[36] was reluctant to extend the innominate term concept to a time term in an FOB commodity contract, preferring to treat is as a condition. A major factor was the need for certainty, but both Lords Wilberforce and Lowry took into account that the contract was part of a chain,[37] Lord Lowry observing that:[38]

> "[most] members of the string will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions".

31. [1915] 1 KB 316 (Atkin J). The sellers were themselves purchasers, and were unaware of the name of the ship until some 14 days after she had been captured and sunk. Consequently, they were never in a position to pass property in the 100 bales of Hessian cloth that were the subject matter of the contract, since even contractual appropriation could not have taken place until after the goods were lost.

32. And therefore, under the Bills of Lading Act 1855, s.1, then in force, no contractual rights against the carrier either. In the circumstances, the marine insurance policy did not cover the loss, so the documents were valueless for the buyers.

33. [1915] 1 KB 316, 324. Cf *PST Energy Shipping LLC v OW Bunker Malta Ltd (The Res Cogitans)* [2016] UKSC 23; [2016] AC 1034; [2016] 1 Lloyd's Rep 589 (where the fact that the seller did not expect to obtain property was a ground for the contract's not being one of sale at all). But there the expectation was the destruction of the property before its transfer, whereas that is obviously not the position in *Groom v Barber*.

34. Terms which are used interchangeably: eg, *Bunge v Tradax* [1981] 1 WLR 711, 719 (Lord Lowry). Both terms were used in *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep 398. There appears to be no conventional usage.

35. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; [1961] 2 Lloyd's Rep 478 (CA). In this article the terminology of the Sale of Goods Act 1979, s.11 is used throughout, where the innocent party can elect (or not) to treat the contract as repudiated, for breach of condition or root of contract breach of innominate term.

36. *Supra*, fn.19.

37. [1981] 1 WLR 711, 716 (Lord Wilberforce).

38. [1981] 1 WLR 711, 720 (Lord Lowry).

In *Bunge v Tradax*, the highest court was prepared to take account of the unusual nature of commodity sale contracts, in this case in interpreting a term as a condition, rather than an innominate term.[39] The courts have regard to the particular characteristics of the contract, not merely as to the substantive terms, but also as to the remedies.

The position advocated here is really no more than an extension of these initiatives, that the courts have already been prepared to take. Obviously, special treatment needs to be justified. In *Bunge v Tradax*,[40] Lord Lowry relied on an implied term, based on the business efficacy test from *The Moorcock*.[41] Implied terms have moved on, but certainly not so as to narrow their scope, and there is no suggestion that a term which satisfies *The Moorcock* test will no longer be implied.[42]

IV. CIF CONTRACTS AND REJECTION

Contracts protect expectations, and an expectation of sellers is to obtain the contract price, whatever happens to the market subsequently. If the market falls, the sellers have made a good bargain (which the contract will protect) and the buyers a bad one. If the sellers break the contract, for example by shipping inferior goods, or shipping the goods late, and the buyers sue for damages, the damages will not compensate them for the market fall, partly because it has not (normally at least) been caused by the sellers' breach.[43]

The buyers' interest is to repudiate in these circumstances, in which case they will be able to shift the market fall back, but their repudiation rights are strictly circumscribed. Of importance for the present discussion is that that these rights are narrower than in the general law of contract, both in terms of the grounds upon which, and the time at which, they can be exercised, these restrictions being essential to the proper working of commodity contracts.

In *Kwei Tek Chao v British Traders and Shippers Ltd*,[44] Devlin J described rejection as just a form of repudiation, and that is the way in which it will be treated here. He also observed, in a statement that has been approved many times since, that a CIF buyer has two rights to reject: first, the documents when they are tendered, and secondly, the goods "when they are landed and when after examination they are found not to be in conformity with the contract".[45] While the point in *Kwei Tek Chao* was only that the two

39. Conversely, the innominate term is a more common interpretation in carriage contracts (which do not usually form strings) and in international sale contracts incorporating carriage terms: eg, *ERG Raffinerie Mediterranee SpA v Chevron USA Inc (The Luxmar)*, see fn.30.

40. [1981] 1 WLR 711, 719–720.

41. (1889) 14 PD 64 (CA), 68.

42. In very broad terms, an apparent widening of their scope in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988 was curtailed in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742, where the Supreme Court (albeit with different expressions of views from their Lordships) effectively retreated to the position adopted in *The Moorcock* (1889) 14 PD 64. See also text to fn.78.

43. *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459, 478 (Devlin J), citing *Taylor & Sons Ltd v Bank of Athens* (1922) 27 Com Cas 142. Cf *James Finlay & Co Ltd v NV Kwik Hoo Tong HM* [1929] 1 KB 400; (1928) 32 Ll L Rep 245 (CA) and *Kwei Tek Chao* itself, where the seller's breach *did* cause the buyers to suffer the market fall (the reason for the damages award alluded to below).

44. [1954] 2 QB 459, 480.

45. *Ibid*, 480. Though the case is a CIF authority, it may be supposed that the same rights are available to an FOB buyer, where the contract is performing a similar role: see fnn 111–115, and associated text.

rights are independent of each other (and in particular that "the action of the plaintiff on the second breach cannot affect his right to damages on the first breach"),[46] it is now clear that these are circumscribed rights, and should properly be seen as limiting, rather than extending the buyer's remedies. It is apparent from *Kwei Tek Chao* itself that the second right to reject does not arise at all until the goods are examined after being landed. *Gill & Duffus v Berger* decides that the first right to reject arises only in limited circumstances.[47] No doubt the buyer can shift the market fall back by rejecting, but only in clearly defined circumstances.

Devlin J also observes that the two rights to reject are very different,[48] and there is no doubt that in commercial terms the right to reject the documents is far the more valuable of the two. If the buyer rejects the documents, he does not pay the price. If he accepts the documents and rejects the goods, he may be entitled to reimbursement of the price (and may therefore end up in the same position), but only by bringing an action against a seller, possibly in a foreign jurisdiction.[49]

The main issue in *Kwei Tek Chao* was as to damages, where the sellers had tendered a bill of lading that had been fraudulently altered. The basis upon which damages were awarded, which, like rejection of documents or goods, had the effect of shifting the market loss back on to the sellers, is not relevant to the present discussion. What is relevant is the highly circumscribed nature of the buyer's right to reject.

In summary, then, CIF sellers are protected against market falls, even if they are in breach of contract. There are three methods (the rights to reject and *Kwei Tek Chao* damages) by which CIF buyers can shift the market fall back, but these are the only three, and the circumstances in which they can be exercised are precisely defined, even where the sellers' breach is repudiatory. Buyers must earn their right to shift the market fall back. They must exercise their rejection right at the right time, and for the right reasons.

V. *GILL & DUFFUS V BERGER*

Gill & Duffus SA v Berger & Co Inc[50] is one of three decisions of the highest court examined in this article. It takes account of the special nature of the transaction, and is a logical extension of the principle (necessary in chain sales) that acceptance or rejection of the documents must depend on examination of the documents alone. Examination of the goods themselves should not be a part of the process.

The case is authority, I suggest, for the proposition that a CIF buyer cannot (absent fraud on the part of the seller) reject documents that conform on their face, whatever the situation regarding the underlying goods.[51] As Judge Havelock-Allan QC observed in *The Intan 6*:[52]

46. [1954] 2 QB 459, 482.
47. See fn.51, and associated text.
48. [1954] 2 QB 459, 482.
49. This would have been the position in *Kwei Tek Chao* itself.
50. [1984] AC 382; [1984] 1 Lloyd's Rep 227 (HL). The contract was on the GAFTA 41 form.
51. See text to fnn 61–66. There are a small number of exceptions: see fn.66, and text thereto.
52. *P.T. Putrabali Adyamulia v Societe Est Epices (The Intan 6)* [2003] EWHC 3089 (Comm); [2003] 2 Lloyd's Rep 700, [24].

"In general the buyer is bound to pay for documents if, on their face, they conform to the terms of the contract. Lord Diplock so held in *Gill & Duffus SA v Berger & Co Inc*."

The principal focus in this article is on the damages aspects of the case, where the buyer is in breach.

Reduced to its bare essentials, in *Gill & Duffus v Berger*, CIF sellers of 500 tonnes of Argentine Bolita beans tendered documents which conformed on their face to the contractual requirements.[53] The arbitrators found that the consignment contained 1.8 per cent of non-conforming beans, and the GAFTA Board of Appeal found that the goods did not comply with the contractual description.[54] The market was almost certainly falling, since the buyers claimed the right to reject the documents, their grounds being that the goods were non-contractual.[55] The House of Lords held that they were not entitled to do so, that their purported rejection was wrongful, and that the sellers (who had elected to treat the buyers' breach as bringing the contract to an end) were entitled to damages.

Among the documents tendered was a quality certificate that was final as to the goods matching the sample.[56] This would have precluded the buyers from raising non-conformity of the goods in that regard to justify rejection, not only of the documents, but also of the goods themselves.[57] To justify rejection of the documents, the buyers were therefore forced to argue *both* that the certificate was not conclusive *and* that they were entitled to reject the documents on the grounds that the goods were non-contractual. In the House of Lords the buyers failed on *both* grounds,[58] so Lord Diplock (delivering the only speech of substance) had no need to address the more general rejection issue. It is therefore possible to take a narrow view of the *ratio*, the decision being based on the finality of the quality certificate alone.[59] However, since most of Lord Diplock's speech is devoted to the more general issue,[60] this would be to do a disservice to the judgment.

53. The beans were supposed to be white, but the consignment contained 1.8 per cent of red beans. A quality certificate was to be obtained on discharge, but 55 of the 500 tonnes were overcarried, and a quality certificate obtained, only for the 445 tonnes originally delivered. Lord Diplock commented that "a certificate... as to the quality of the goods at port of discharge under the certification clause in the contract is not, and is indeed incapable of being, included among shipping documents which a seller is required to tender to his buyer in return for payment of the price under a contract of sale in ordinary c.i.f. terms"; the supposed defects as to the quality certificate did not therefore make the tender non-conforming: [1984] AC 382, 389. Nonetheless, the certificate was final as to quality: see fnn 56–57.

54. Though this is not clear from report of the House of Lords' decision. See [1983] 1 Lloyd's Rep 622 (CA), 625 (Sir John Donaldson MR), 628 (Slade LJ), 631 (Robert Goff LJ).

55. The reports do not explicitly state it, but the sellers claimed damages ([1983] 1 Lloyd's Rep 622, 635 (Robert Goff LJ)), which would have been zero on a rising market. Also, Lord Diplock's comments on damages, *infra*, fnn 80–86 and associated text, make no sense unless the market was falling. Professor Treitel observes that the sellers were awarded damages at the first stage of the GAFTA arbitration, and concludes that the market had fallen: GH Treitel, "Rights of rejection under c.i.f. sales" [1984] LMLCQ 565, 566.

56. [1984] AC 382, 393–394.

57. If this is the correct explanation, then none of the problems addressed in this article, of reconciling *Gill & Duffus v Berger* with the compensatory principle, arise: see fn.164.

58. [1984] AC 382, 393–394 (on the quality certificate). The Court of Appeal (by a majority) had held the quality certificate conclusive in respect of the 445 tonnes that it covered, but that the 55 tonnes (that were overcarried, and not covered by the certificate) did not conform, the buyers therefore being entitled to reject the entire consignment: [1983] 1 Lloyd's Rep 622.

59. Eg, text to fn.164.

60. [1984] AC 382, 393–394 (quality certificate), 394–397 (general issue). On the narrow view, see further, fn.164 (Teare J).

The ratio of the case, I therefore suggest, can be stated in general terms, that (absent fraud on the part of the seller), a CIF buyer is not entitled to reject documents which apparently conform, because of any issue regarding the goods. I would also suggest that Lord Diplock would have decided the case in exactly the same way, even had there been no requirement to tender a quality certificate, and had none been tendered. He was concerned that defects, or supposed defects, in the goods, should not allow CIF buyers to reject the documents. Having held that the documents conformed on their face, he went on to say that:[61]

"… it is, in my view, a legal characteristic of a c.i.f. contract so well established in English law as to be beyond the realm of controversy that the refusal by the buyer under such a contract to pay to the seller, or to a banker nominated in the contract if the contract so provides, the purchase price upon presentation … of shipping documents which on their face conform to those called for by the contract, constitutes a fundamental breach of contract …".

Lord Diplock continued:[62]

"That a refusal by the buyer to accept the tender of shipping documents which on the face of them conform to the requirements of a c.i.f. contract and upon such acceptance to pay the contract price amounts to a breach of condition (in the meaning given to that expression in the Sale of Goods Act 1893) has been taken for granted so universally by English courts as not to have attracted any subsequent positive exposition worthy of citation …"

These are general statements of the obligations of a CIF buyer, not dependent on the finality of the quality certificate. The same is even more obviously true of the immediately following discussion of the Australian case of *Henry Dean & Sons (Sydney) Ltd v O'Day Pty Ltd*,[63] where, at least of the (slightly narrower) proposition that

"a c.i.f. buyer is entitled to reject conforming shipping documents, if it should *subsequently* turn out that the actual goods shipped under the conforming documents did not in fact conform to the contract",

Lord Diplock says that this "is not the law of England".[64]

Lord Diplock had (in a passage immediately prior to those cited above)[65] excepted cases of fraud, and cited "Lord Blackburn's well-known aphorism in *Bowes v Shand*:[66] 'If you contract to sell peas, you cannot oblige a party to take beans'." He did not, however, except non-conformity, suspected or actual, of the goods themselves. Non-conformity of the goods is not a ground for the rejection of documents.

Though this article is concerned principally with damages rather than the issue of buyers' liability, it is noteworthy that Lord Diplock felt that the contrary view, "if correct, would destroy the very roots of the system by which international trade, particularly in

61. [1984] AC 382, 390–391. The equation between a CIF seller and a bank under a documentary credit suggests that he is adopting the same test as he had 18 months earlier for tenders under documentary credits, in *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168; [1982] 2 Lloyd's Rep 1 (HL).
62. [1984] AC 382, 391.
63. (1927) 39 CLR 330 (HCA).
64. [1984] AC 382, 391–392. For a wide view of the case, based on "the tenor of Lord Diplock's speech", see also FMB Reynolds, "Rejection of documents" [1984] LMCLQ 191, 192.
65. [1984] AC 382, 390.
66. (1877) 2 App Cas 455, 480

commodities, is enabled to be financed".[67] Despite (curiously) singling out finance,[68] he was prepared to accept that international commodities are different. Had the decision been otherwise, it would have created difficulties for this type of contract (generally, not just in respect of their finance). Buyers on a falling market would have felt compelled to go behind the documents and investigate the state of the goods when loaded, since, if they accepted in ignorance, they would run the risk of their sub-buyers rejecting, if they discovered the truth. *Gill & Duffus v Berger* prevents *anybody* in the chain rejecting the documents on grounds of non-conformity of goods, thereby also rendering inspection of the goods by anyone else in the chain unnecessary. In chain sales, there should be no need to go behind the documents; *Gill & Duffus v Berger* is consistent with this approach.

Special treatment for this type of sale

International commodity sales must also be assumed to be deserving of special treatment, since Lord Diplock's approach is irreconcilable with general principles of contract law. The quality certificate being irrelevant to this part of his speech, the buyers were disentitled from using the sellers' breach of condition, in shipping non-conforming goods, as grounds for treating the contract as repudiated, this being the effect of rejection of the documents.[69] Not only is this contrary to normal contractual principles,[70] but it ought not even to be necessary for the buyers to rely on this ground at the time of their repudiation, as long as they can justify their position in the light of the facts as they become known.[71] Lord Diplock's view accords special treatment to the CIF contract, in restricting the buyers' remedies. It may be objected that merely to ship non-conforming goods could not amount to a breach of condition, since the sellers were entitled to tender relating to any 500 tonnes of "Argentine Bolita beans—1974 crop", as long as it matched the sample,[72] but tendering the documents surely appropriated the beans to the contract, whether or not they had been appropriated earlier.[73] Were normal contractual principles to have applied, therefore, the buyers could have repudiated (ie, rejected the documents) at this stage.

Professor Treitel justifies according special treatment to CIF (and perhaps applicable FOB) contracts,[74] saying that it "follows from the commercial risks taken by the parties to such a contract", and is justified on the basis of the presumed intention of the parties

67. [1984] AC 382, 392, referring again to the supposed ratio of *Henry Dean & Sons (Sydney) Ltd v O'Day Pty Ltd*, *supra*, fn.63.

68. Perhaps suggesting again an analogy with the essentially similar view he had taken, of a confirming bank's right to reject documents, in *United City Merchants v Royal Bank of Canada (The American Accord)*, *supra*, fn.61.

69. See fn.44.

70. See Reynolds [1984] LMCLQ 191.

71. Eg, *British & Beningtons Ltd v. North Western Cachar Tea Co Ltd* [1923] AC 48, 71–72 (Lord Sumner). In *The Mihalis Angelos*, fnn 122–129 and associated text, charterers who used an incorrect ground (*force majeure*) were not precluded from later justifying their repudiation on a proper ground (breach of expected readiness clause): [1971] 1 QB 164, 193 (Lord Denning MR, citing *British & Beningtons*). Even the view based on *Henry Dean & Sons (Sydney) Ltd v O'Day Pty Ltd* (1927) 39 CLR 330 (HCA) would be justified on the application of normal contractual principles, a view strongly disapproved for CIF contracts by Lord Diplock: see fn.64.

72. [1984] AC 382, 388–389, where the contract is set out.

73. Appropriation here being contractual appropriation, to ascertain the goods under Sale of Goods Act 1979, s.16, not necessarily the unconditional appropriation needed to pass property.

74. See fnn 111–115.

to a CIF contract, by the special nature of the contract, and the risks assumed by the commercial parties.[75] Professor Reynolds would justify a departure from the normal rules, "presumably based on the importance of quick handling of documents".[76]

As to the mechanism, one possibility would be to construe the buyers' repudiatory breach as a waiver of further performance by the sellers, a possible explanation of *Braithwaite v Foreign Hardwood Co*.[77] As already observed, the implied term is another appropriate device, even on the narrow business efficacy test from *The Moorcock*.[78] There is no reason why an implied term should not extend to the adjustment of remedies, in *Gill & Duffus v Berger* itself to a restriction of the remedies available to the buyers. Whatever device is used, however, it is being applied only to the particular type of contract.

What matters, for present purposes, is that Lord Diplock accords these contracts special treatment, and that the analytical tools exist for so doing.[79] The central argument of this article is that a similar approach should be adopted in respect of the compensatory principle, and that the same analytical tools could be used.

Damages

The decision in *Gill & Duffus v Berger* would have been of little value, had the sellers not been held entitled to substantial damages, since otherwise buyers CIF (and FOB, where the documents play the same role) would have been able to reject documents with impunity, knowing that no consequences would follow, even were the rejection wrongful.

Lord Diplock took the view that substantial damages could in principle be awarded:[80]

> "*Prima facie* the measure of such damages would be the difference between the contract price of the 500 tonnes of beans that were the subject matter of the contract and the price obtainable on the market for the documents representing the goods at date of the acceptance of the repudiation."

This is uncontroversial for a contract for the sale of goods, where there has been a market fall, and assuming an available market. It is in accordance with the principles in *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory*,[81] where there is an accepted repudiation. It is indeed a central contention of this article that this is the appropriate basis for damages in the type of case under discussion.

75. [1984] LMCLQ 565, 570. His own justification (citing *Pordage v Cole* (1669) 1 Wms Saund 319; *Huntoon Co v Kolynos Inc* [1930] 1 Ch 528) was in terms of independent covenants.

76. Reynolds [1984] LMCLQ 191, 192.

77. [1905] 2 KB 543 (CA), as explained in *British & Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48, 71 (Lord Sumner), with the observation that the earlier "decision is not quite easy to understand"; F Dawson, "Waiver of Conditions Precedent on a Repudiation" (1980) 96 LQR 239, cited D McLauchlan, "Repudiatory breach, prospective inability, and *The Golden Victory*" [2015] JBL 530, 539.

78. (1889) 14 PD 64 (CA) (see fn.42).

79. There are other difficulties with *Gill & Duffus*, beyond the scope of this article, in particular how far it extends. See further, eg, PN Todd, "Non-genuine shipping documents and nullities" [2008] LMCLQ 547, 568–571.

80. [1984] AC 382, 392.

81. [1979] AC 91 (PC), albeit a buyer rather than seller repudiation (and hence an application of s. 51, rather than s.50 of the Sale of Goods Act 1979), and an anticipatory rather than actual breach—but neither difference affects the principles to be applied.

It is now clear, however, that *Tai Hing* determines only the date on which the market price is to be determined for the purpose of assessing damages. It does not deal with a second question: "in what if any circumstances will it be relevant to take account of contingencies (other than a change in the market price) if subsequent events show that they would have reduced the value of performance, perhaps to nothing, even without the defaulter's renunciation?"[82] The second question itself sub-divides: are subsequent events to be taken into account; and, if so, at what point should the determination as to their likelihood be made?[83] (Both are discussed in this article, but only the first was an issue in *Gill & Duffus v Berger* itself.)

On whether subsequent events should be taken into account, the buyers argued that, because they would in any event have rejected the goods, on examination after taking delivery,[84] the sellers had suffered no loss from their unlawful rejection of the documents. Therefore, no damages should be awarded. Had this argument been accepted, not only would it have thrown any market consequences back on to the sellers,[85] but it would also have negated the decision on liability; if damages in such a case were to be reduced to zero, CIF buyers would be able to reject the documents with impunity, whether lawfully or not. Necessarily then, given his position on liability, Lord Diplock emphatically rejected this argument. Had he not done so, the whole basis for string sales of commodities would have been undermined. Conversely, however, the buyers' unsuccessful argument is no more than a statement of the compensatory principle, at least as stated in the later cases,[86] with which the decision in *Gill & Duffus* does not therefore sit well.

Irreconcilable with compensatory principle

Lord Diplock's view was that, the sellers having validly repudiated the contract, their primary obligation to perform thereupon came to an end, so that they were no longer under any obligation to deliver the goods at all. The buyers would never get the second opportunity to reject, and were precluded from basing any argument upon it. As a statement of the effect of repudiation on the sellers' obligations, this view is entirely uncontroversial, according as it does with Lord Diplock's own analysis of primary and secondary obligations, in *Photo Production Ltd v Securicor Transport Ltd*.[87]

The proposition that the right to reject the goods depended on continued performance by the sellers requires examination. Surely the buyers could have argued that a CIF sellers'

82. *Bunge v Nidera* [2015] UKSC 43, [16] (Lord Sumption).

83. *Ibid*, for a clear statement of the "two potential questions which are not always sufficiently distinguished in the case law".

84. Continuing on the assumption that they were not precluded from rejecting by the quality certificate. The argument is based on there being two rights to reject in a CIF contract (see fnn 44–49, and text thereto): [1984] AC 382, 395. Usually the second right to reject arises only some time later, but in *Gill & Duffus v Berger*, most of the goods (445 tonnes of 500) had arrived before the relevant tender of documents: see fn.88.

85. A later damages action might do that anyway, as in (eg) *Kwei Tek Chao v British Traders* (*supra*, fn.44), if the bill of lading did not correctly describe the goods, but there was no suggestion in *Gill & Duffus v Berger* of an actual untruth in the bill of lading, and hence no possibility of *Kwei Tek Chao* damages.

86. See fnn 7–10.

87. [1980] AC 827, 848–849 (Lord Diplock); also 844–845 (Lord Wilberforce); [1980] 1 Lloyd's Rep 545, citing *Heyman v Darwins Ltd* [1942] AC 356; (1942) 72 Ll L Rep 65; consistent with *Braithwaite v Foreign Hardwood Co* (*supra*, fn.74), as explained in *Fercometal SARL v Meditteranean Shipping Co SA (The Simona)* [1989] AC 788, 801–805 (Lord Ackner); [1988] 2 Lloyd's Rep 199.

performance is complete on shipment of the goods and tender of documents; they are not required to deliver the goods?[88] Certainly, it is fundamental to CIF contracts that the sellers are not under an obligation to deliver goods.[89] However, they are under a negative obligation, as long as the sale contract remains in force, not to impede delivery, and in particular under the Sale of Goods Act 1979, s.12(2) to allow the buyer to enjoy quiet possession of the goods.[90] By electing to bring the contract to an end, the sellers freed themselves of this obligation, and became fully entitled, for example, to sell the goods elsewhere. Lord Diplock also observed that:[91]

> "[delivery] of the goods themselves, even for the purpose of examination, to a buyer who is not the holder of the bill of lading would seem to require some agreed amendment to the c.i.f. contract of sale."

At the time of repudiation (because the buyers had rejected the documents) the sellers still had the bill of lading. The buyers could not therefore take delivery of the goods, without the sellers at the very least making a re-tender. In this respect also, therefore, the right to reject the goods depended on the sellers' continued performance of primary obligations.[92]

This is not itself an answer to an argument on damages, where the issue is not what the sellers' continuing obligations were, but what they had lost as the result of the buyers' breach. Had the buyers committed no breach, they would therefore have accepted the documents, and have been in a position to take delivery of the goods, without the need for further performance by the sellers. They would of course have rejected the goods anyway, after examination,[93] and would have been entitled to reimbursement of the price paid. The sellers would have been deprived of their good bargain (assuming the market to have fallen), by the later (lawful) rejection by the buyers, so it is hard to see how this loss, at any rate, would have been caused by the buyers' breach. The argument, that the sellers' being relieved of their obligation to perform resulted from their own election to repudiate, would be met with the objection that the election was itself a consequence of the buyers' breach; therefore, they would not have been relieved of the obligation, had there been no breach.[94]

In short, damages are based not on surviving obligations, but on a hypothesis.[95] The hypothesis can only be that, had there been no breach by the buyers, the sellers would have

88. Moreover, by the time the sellers elected to treat the contract as repudiated, 445 tonnes had in any event already been discharged, the remaining 55 tonnes arriving on the following day: [1984] AC 382, 389, 390.

89. Eg, *Groom v Barber* (see fn.31). The second right to reject in *Kwei Tek Chao v British Traders* is only a remedy, imposing of itself no additional obligation on the seller: see fnn 44–49 and text thereto.

90. Eg, *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 1 Lloyd's Rep 171 (CA); *Gatoil International Inc v Tradax Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd's Rep 350 (Bingham J). Also Treitel, fn.55, 571.

91. [1984] AC 382, 395 (albeit only as a passing observation).

92. Unlike *The Golden Victory*, *Bunge v Nidera* and (to the extent that if the owners did nothing, cancellation was certain) *The Mihalis Angelos*, all of which are considered further, text to fnn 122–180.

93. On the assumptions upon which this part of the case is based, that they were not precluded by the quality certificate.

94. Such an argument might conceivably work where a CIF buyer commits two *independent* repudiatory breaches; the seller repudiates in respect of one and sues in respect of the other. This is not, however, even remotely similar to the situation in *Gill & Duffus v Berger*.

95. Eg, *The Glory Wealth* [2013] 2 Lloyd's Rep 653, [85] (Teare J), cited McLauchlan [2015] JBL 530, 534.

been required to perform, in which case there would have been a rejection by the buyers of the goods. That the buyers' wrongful rejection, accepted by the sellers as repudiating the contract, relieved the sellers of that performance is surely irrelevant.[96] It also follows that for damages purposes, whether a later rejection (or, for that matter, other cancellation) depends on the continued performance of the innocent party is also irrelevant. It is difficult, then, consistently with the compensation principle, to justify the damages award, at any rate on the basis stated in *Gill & Duffus v Berger*.

Other ways to reconcile with compensatory principle?

It may be that the sellers' loss can be analysed in other ways, avoiding the problem. How the compensatory principle applies depends on what loss is being compensated. If it is performance of the contract, the sellers lost nothing, because the buyers would lawfully have rejected anyway.

Suppose a value is placed, not on the contractual performance (which the sellers had not lost), but on the contract itself. A CIF contract itself has a value (assuming the market has fallen), which would normally be the contract price less the current (lower) market value of the goods. The contract is worth that directly to the sellers, if (not already having goods) they buy goods at the current market price and (contractually) appropriate them to the contract, thereby obtaining for them the higher contract price. Even if they already have the goods (in which case they can make no profit from buying additional goods), they will sell them at the CIF, rather than the new (lower) market, price, and are better off by the difference than they would have been, without the CIF contract. On the face of it, that is what the sellers have lost as a result of the wrongful rejection. They can make a new contract to resell the goods, but of course it will only be at the current market price, and so the new contract will be worth less than the contract broken.

What should be valued for compensation purposes was one of the issues in *The Golden Victory*,[97] a later decision of the House of Lords on the compensatory principle. Briefly, time charterers there wrongfully redelivered (or purported to redeliver) early,[98] and the shipowners claimed damages based on loss of hire and other profits for the remainder of the charterparty term. The complication, and the reason for its relevance in the present context, was that had there been no early redelivery, the charterers would have lawfully cancelled, on the basis of a war clause, before the natural expiry of the term. The main issue was whether the later cancellation should be taken into account in reducing the shipowners' damages, given that the outbreak of war had occurred by the time of the arbitral award, but was no more than a possibility at the time of the shipowner's acceptance of the early redelivery, as bringing the contract to an end. If the value was placed on lost performance, the owners had lost nothing after the outbreak of the war.

96. This is essentially the argument that was accepted by Teare J in *The Glory Wealth* [2013] 2 Lloyd's Rep 653, and described at [21]. See further, fnn 160–164, and associated text.

97. See fn.3; fnn 130–159, and text thereto.

98. "Purported to" because redelivery itself involves no act, such as transferring possession. Consequently, there would not have been an actual breach until there was a "failure to pay the next instalment of hire": M Mustill, "*The Golden Victory*—some reflections" (2008) 124 LQR 569, 570–571.

If, however, the charterparty itself were valued, they could have sold the ship, with a four-year charter, at the time of repudiation.

To compensate for the loss of the contract itself was the approach preferred by the minority. As Lord Bingham of Cornhill observed in his dissent, "on the date it was lost … it could not be doubted that what the owners lost … was a charterparty with slightly less than four years to run".[99] They should therefore (in his view) be compensated for this, less of course what they could reasonably (or did in fact) obtain in the new market conditions. The majority refused to take this approach, valuing instead the performance lost (which would not have continued beyond the outbreak of war), but partly because the charterparty was not realistically marketable on this basis. It is arguable that valuation of the contract itself remains an acceptable approach in an international commodity sale, where the capitalised value of the contract can much more easily be realised.[100]

Even if the courts are prepared to take this approach, it does not justify the assessment in *Gill & Duffus v Berger*. Even the minority in *The Golden Victory* accepted that, to the extent that the likelihood of war was known at the time of repudiation, it should be factored in, reducing the value of the charterparty that could, in principle, be traded.[101] (The charterparty lost included the war clause; and, if at the time of repudiation war had been more than a mere possibility, its value would have been discounted by the chance of its occurring.) In *Gill & Duffus v Berger*, rejection of the goods was inevitable (assuming the buyers would be entitled to substantiate their claim, in respect of the non-conformity of the goods), and this would have been known at the time of repudiation. This would have reduced the value of the contract to zero as well. The goods that had been tendered were hardly going to change before delivery (especially given that most of the cargo had already been landed).[102]

It is true that the sale contract was for a consignment of beans by description, the particular beans not being identified,[103] but the argument does not work that the sellers could tender alternative (conforming) goods, thereby preventing the second rejection right arising.[104] Had the buyers not broken the contract by rejecting the documents, the goods that would have been delivered would be those covered by the documents (which would now be in the buyers' possession), and the buyers would have rejected these. On this basis, the buyers would certainly have been entitled to reject the goods. Even on the minority basis in *The Golden Victory*, the damages award in *Gill & Duffus v Berger* cannot be justified.

99. [2007] UKHL 12, [22].

100. See also *Bunge v Nidera* [2015] UKSC 43, [21] (Lord Sumption), where the two approaches are fully described. Lord Toulson, ibid, [87], would have been prepared to contemplate this approach, only where there was a market in substitute *contracts*. See further, fnn 154–158, fnn 178–180, and text thereto.

101. [2007] UKHL 12, [74–77], [76] (Lord Brown of Eaton-under-Heywood), where however differences may be seen as to precisely how. The difference between the minority and majority was as to whether later events, known by the time of proceedings but not at the time of repudiation, could also be taken into account.

102. See fn.88.

103. See fn.72.

104. Another explanation of *Braithwaite v Foreign Hardwood* in *British & Beningtons v North Western Cachar Tea Co Ltd*, fn.71 (though open to the same objection in a damages context as the argument considered here).

Sale of Goods Act crystallisation

The Sale of Goods Act 1979 prima facie bases damages on a market price determined at a particular date, by implication ignoring subsequent events, or anticipated events, even if known by the time of the assessment. Thus, s.50(3) provides:[105]

> "Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

The advantages of applying a rule such as that in s.50(3) is not only that it provides relatively easy calculation, but that it encourages the seller immediately to put the goods back on the market; nothing that happens subsequently will be relevant, and there is no point in delaying. The problem is that s.50(3) provides only a prima facie rule, and is "to be treated as satisfying the general [compensatory] principle expressed in subsection (2)".[106] It does not provide a statutory exception to the compensatory principle. But, as already suggested, the courts have the tools to create their own exceptions, should they be persuaded by the arguments (which would include those which justify the rule in s.50(3)).

Valuing the right to reject the documents

Finally, it has been observed that the right to reject documents is of itself of value to the buyers, being worth more to them than the right to reject the goods alone.[107] Conversely, therefore, acceptance and payment by the buyers is of value to the sellers, even if the buyers are likely later to reject the goods. The buyers cannot therefore claim that, because they would have rejected the goods, the sellers have lost nothing of value. The buyers have improved their position by not taking up the documents, and the sellers have commensurately lost. The relative strengths of the parties have been altered.

While this could, in principle, form the basis of compensation, it could not justify the damages awarded in *Gill & Duffus v Berger*, since the value of the right to reject documents was almost certainly lower than the entirety of the difference between contract and market prices of the goods. In any case, the courts would probably look askance at awarding a seller damages, on the basis that he has been deprived of the opportunity to improve his position, by resisting legitimate claims by a buyer for reimbursement of the price, this being, after all, the reason why the sellers' position is improved by buyers' acceptance of documents.

Even after examining all possible bases for awarding compensation, the reasoning in *Gill & Duffus v Berger* is nonetheless incompatible with the compensatory principle, as later stated. The sellers were allowed a windfall, but only in the sense that they were

105. This applies where the buyer is in breach. Section 51 is the equivalent for seller's non-delivery, and was the section considered in *Bunge v Nidera* [2015] UKSC 43, eg, [15–17] (Lord Sumption). The sections are mirror images of each other. In *Gill & Duffus v Berger* itself, the time of valuation was brought forward to the acceptance of repudiation, which was prior to the time when the goods ought to have been accepted. See *supra*, fn.80.

106. *Bunge v Nidera* [2015] UKSC 43, [16], on the similarly (but not identically) worded s.51.

107. See fnn 48–49, and associated text.

entitled to keep the market position which the contract ought to protect. A better way to explain *Gill & Duffus v Berger* is to treat it as deciding when a buyer can deprive the sellers of that expectation. As explained above, there are three situations, but they depend on the buyers satisfying certain conditions.[108] One of the three is the damages award in *Kwei Tek Chao*, which is irrelevant to the present discussion. The others are the right to reject documents and goods. Here the buyers had not satisfied the condition for rejecting documents, and had, through their own choice, lost the chance later to reject the goods.[109] The outcome was a consequence of the buyers not falling within any of the grounds entitling them to shift the market loss back to the sellers. The decision on damages was necessary, if that on liability was to have any teeth, and the decision on liability was necessary if transfers in chain sales are to be on the basis of documents alone. *Gill & Duffus v Berger* also promotes the certainty required for documentary sales, and encourages wronged sellers to go back into the market immediately, to re-sell the goods, in the knowledge that they will still be compensated for any market fall.

Thus, the departure from the normal contractual position can be justified. It is a justification that is specific to the situation. In other contexts, there is less of a case for discouraging early (and hence wrongful) rejection. For example, if a charterer is certain to invoke a cancelling clause when the vessel does not arrive, it is in the interests of both parties that he do so early, so that he can make an alternative fixture, and the shipowner can avoid a wasted ballast voyage.[110] If the charterer does so, there is little justification for awarding damages against him; his behaviour should be positively encouraged. By contrast, CIF buyers should be discouraged from rejecting documents because of a breach regarding the goods. If they do, the sellers should be encouraged to re-enter the market promptly, secure in the knowledge that their market position will be protected, whatever happens subsequently. *Gill & Duffus v Berger* adopts principles, in respect of damages, that are not normally adopted, because the policy being pursued is different.

The more general point can also be made, that, where it is good policy to enforce procedural constraints, particularly as to the timing of remedies, that policy will always be thwarted by the application of a rule, which allows the constraints to be ignored with impunity.

FOB contracts

Gill & Duffus v Berger and *Kwei Tek Chao v British Traders* lay down principles for CIF contracts,[111] and nothing in either case applies explicitly beyond the CIF contract. But FOB contracts are often used in string sales for bulk commodities.[112] There is a good argument that the same principles would apply to FOB as to CIF contracts, where the documents perform the same function.

108. See fnn 44–49, and associated text.

109. This is very similar to the waiver explanation of *Braithwaite v Foreign Hardwood Co*, fn.77, and associated text.

110. Indeed, many charterparties explicitly provide for this: eg, Shellvoy 5, cl.11 (by no means a form which generally favours owners); also *The Mihalis Angelos* [1971] 1 QB 164, 195 (Lord Denning MR), on a commonly-used Gencon dry-cargo standard form. On *The Mihalis Angelos*, see fnn 122–129, and associated text.

111. See fnn 44–49, and associated text.

112. See fn.25.

There are no explicit statements, though, in a different context, Evans J equated CIF and FOB sellers' documentary duties in *Concordia Trading BV v Richco International Ltd*,[113] an FOB case involving a string commodity sale. He observed that, in the case before him, the seller was required to obtain the documents, and the buyer to pay against their tender. There would have been a right of disposal, and so the delivery of documents also transferred property, and brought about a statutory assignment of contractual rights against the shipowner, under the Bills of Lading Act 1855, s.1, the provision then in force. The bill of lading also enabled the buyer to take possession of the goods. In all these respects, the documents were performing exactly the same role as in a CIF contract, and Evans J was prepared to apply CIF principles from *Sanders v Maclean*[114] (as to when documents were required to be forwarded) to an FOB sale, adopting the same test, not directly, but on the basis that it was "mercantilely reasonable" to adopt the same position for both types of contract.[115] Though the point is not precisely the same as here, all the arguments for applying *Gill & Duffus* principles to CIF contracts can apply equally to FOB contracts, where the documents are performing the same role, and the contracts form part of a string. It is surely "mercantilely reasonable" to adopt the same rule.

Set-off for past breaches

On normal contractual principles, if the sellers had been in breach prior to the repudiation, the buyers would have been entitled to use the consequences of that breach to reduce their damages. Thus, Lord Diplock would have allowed that:[116]

> "the buyer, if he could prove that the seller would not have been able to deliver goods under those shipping documents that conformed with the contract of sale, would be able to displace the *prima facie* measure of damages by an amount by which the value of the goods was reduced below the contract price by that disconformity".

The principle that sellers are accountable for past breaches seems quite uncontroversial.[117] A consequence is that, if the loss in value due to the disconformity exceeds that caused by the market drop, then the sellers get nothing.[118] Such a situation perhaps occurred in *The Intan 6*,[119] where the sellers' breach, in shipping the goods on an unpowered barge, a non-conforming ship which sank, might (depending on the facts eventually found) have led to their total destruction.[120] If so, damages in respect of the

113. [1991] 1 Lloyd's Rep 475.
114. (1883) 11 QBD 327.
115. [1991] 1 Lloyd's Rep 475, 478–479, applying *Sanders v Maclean* (1883) 11 QBD 327, 337 (Sir Baliol Brett MR).
116. *Gill & Duffus v Berger* [1984] AC 382, 396.
117. It is in line with *Photo Production v Securicor* [1980] AC 827; [1980] 1 Lloyd's Rep 545 (fn.87). The words "contract price" in the last line must be a mistake, however. Surely the buyers' loss would be referable to the current market, not the contract price.
118. Treitel [1984] LMLCQ 565, 573–574.
119. [2003] EWHC 3089 (Comm); [2003] 2 Lloyd's Rep 700 (*supra*, fn.52) (Judge Havelock QC). *Gill & Duffus v Berger* was applied on the rejection issue.
120. [2003] EWHC 3089 (Comm); [2003] 2 Lloyd's Rep 700, [30].

buyers' wrongful rejection of documents would have been zero.[121] (In *Gill & Duffus v Berger* itself, presumably the loss from the claimed disconformity was lower than the market fall.)

VI. *THE MIHALIS ANGELOS*

In *The Mihalis Angelos*,[122] the Court of Appeal had previously taken a very different view, on the quantum of damages, from that taken by Lord Diplock in *Gill & Duffus v Berger*. *The Mihalis Angelos* has been the starting point for discussion, in the recent cases on the compensatory principle.

For present purposes, the Court of Appeal worked on the assumption that voyage charterers had wrongfully purported to cancel early, but that they would have cancelled a few days later, when the cancelling date passed. The entirety of the discussion here proceeds on the basis of that assumption (which the court did not in fact accept).[123]

On this assumption, the shipowners had elected to treat the charterers' breach as bringing the contract as at an end. The charterers' position is therefore similar to that of the buyers in *Gill & Duffus v Berger*, whereas that of the shipowners is similar to that of the sellers in the later case. In each case, the assumption is made that, had the contract remained alive, there would eventually have been a termination, by cancellation in the earlier, and by repudiation in the later, case. But in *The Mihalis Angelos* the opposite conclusion was reached to that in *Gill & Duffus v Berger*, the damages being reduced to zero, because the charterers would have lawfully cancelled just three days later; hence, the owners had suffered no loss.

The Mihalis Angelos was not cited in *Gill & Duffus v Berger*, but the difficulties of reconciling the two cases have been subsequently appreciated.[124] *The Mihalis Angelos*, it is said, involved an early cancellation rather than an early rejection, and the charterers' right to invoke the cancelling clause would have depended only on the non-arrival of the ship by the due date, whatever the reason for the non-arrival. This could occur without any breach by the shipowners.

The contrast between a cancelling clause and a repudiation for breach was adopted by Professor Treitel as a valid basis for distinction.[125] In *The Simona*,[126] there are suggestions in the House of Lords that a cancelling clause does not survive repudiation, any more than the second right to reject (or the sellers' obligations triggering it) survived the

121. The case was sent back to the arbitrators on the issue *whether* the breach caused the loss of the goods: *ibid*, [31].

122. [1971] 1 QB 164 (fn.7).

123. The shipowners were in breach of the expected readiness to load condition, which actually justified the charterers' repudiation.

124. In particular in *The Glory Wealth* [2013] 2 Lloyd's Rep 653, [48–62] (Teare J). See further, fnn 163–164.

125. GH Treitel, "Assessment of damages for wrongful repudiation" (2007) 123 LQR 9, 12. Also *The Glory Wealth* [2013] 2 Lloyd's Rep 653, [12], [15], where this distinction was rejected; McLauchlan [2015] JBL 530, 530–531.

126. *Fercometal SARL v Mediterranean Shipping Co SA (The Simona)* [1989] AC 788 (fn.87), eg, 802–805 (Lord Ackner); [1988] 2 Lloyd's Rep 199, using this as the basis for distinguishing *Braithwaite v Foreign Hardwood* (fn.77), unless the earlier case was wrong: [1989] AC 788, 802; Treitel (2007) 123 LQR 9, 12. This depends on the charterparty being repudiated. In the case itself, it was kept alive by the shipowners, and the cancelling clause survived.

repudiation in *Gill & Duffus v Berger*. On the face of it, this casts doubt on Professor Treitel's position; but, even if a cancelling clause does not survive repudiation, this does not prevent charterers *defending a damages action* for wrongful cancellation, even if the shipowners elect to repudiate, on the basis that, had they not broken the contract by cancelling early, they would have lawfully cancelled anyway, a few days later.[127] The breach has therefore occasioned no loss. So, in a damages context at least, *The Simona* does nothing to refute Professor Treitel's distinction.

Despite this, the argument that the second rejection right in *Gill & Duffus v Berger* depended on the sellers' being under a continued obligation to perform is unconvincing in the context of damages, for the reasons already rehearsed.[128] If damages are based on the hypothesis of what would have happened had there been no breach, there is no basis for distinguishing between a cancellation that would have occurred, or a repudiation that would have occurred.

Incidentally, while the charterers' right to cancel in *The Mihalis Angelos* would have arisen whether or not the owners were *in breach*, the operation of the clause was not independent of the shipowners' *performance*. The cancelling clause required not only that the vessel arrive but also that she be "ready to load …" by the due date. To put the vessel into this condition would surely have required action by the shipowners. The shipowners could therefore (in principle at least) have prevented the clause operating;[129] but, if they did nothing, it would operate. By contrast, in *Gill & Duffus v Berger*, had the sellers done nothing more, the buyers' second right to reject would never have arisen.

This is also an unconvincing ground for distinguishing between the two cases, in a damages context. A better distinction, surely, is that *The Mihalis Angelos* involves a voyage charterparty, to which none of the problems of chains apply, whereas *Gill & Duffus v Berger* involves an international commodity sale, to which they do. The policy considerations are also completely different, in that early cancellation should be encouraged in the former case, whereas early rejection should definitely be discouraged in the latter. There are no good grounds for departing from the compensatory principle in *The Mihalis Angelos*, whereas there are in *Gill & Duffus v Berger*. This is, of course, the main thrust of this article.

VII. *THE GOLDEN VICTORY*

The Golden Victory[130] is regarded as the leading authority on the compensatory principle, the issue in later cases being whether its principles applied in different situations.[131] In reality, the compensatory principle was accepted by all their Lordships (whether in the majority or minority) in *The Golden Victory*, Lord Bingham (who delivered one of two

127. Indeed, this is precisely what *The Mihalis Angelos* decided.
128. See fnn 93–96 and associated text.
129. Not in practice, of course; the ship was much too far away: see fn.137.
130. *Golden Strait Corp v Nippon Yusen Kubisha Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353; [2007] 2 Lloyd's Rep 164; noted C Nicoll, "The 'available market' rule and period charters" [2008] JBL 91.
131. Eg *Bunge v Nidera* [2015] UKSC 43, [64–74] (Lord Toulson) on whether they applied to the international commodity sale contract before him.

dissenting speeches) stating of it that it has "has long been recognised as the governing principle in contract".[132] Moreover, all their Lordships approved the reasoning in *The Mihalis Angelos*, that events that would occur after repudiation, affecting the amount of the loss, should be taken into account, albeit taking differing views as to precisely how.[133] To that extent, therefore, *The Golden Victory* poses difficulties for Lord Diplock's reasoning in *Gill & Duffus v Berger*. It is important for the present debate, to the extent that it entrenches *The Mihalis Angelos*.[134]

The main issue, which split majority and minority views in *The Golden Victory*, was the time at which the assessment is made. Are such events to be taken into account, when they are known by the time of proceedings, but not at the time of repudiation? The majority held that they were, the minority not.[135] Though the timing issue could also be a problem in international commodity sales, it was not in *Gill & Duffus v Berger* itself, where (assuming the sellers had indeed committed the claimed breach) it was clear at the time of rejection that the buyers would be entitled to reject the goods.

Nor had the time at which the assessment was made been an issue in *The Mihalis Angelos*. Though Lord Denning MR said that you "must take into account all contingencies which might have reduced or extinguished the loss",[136] Megaw LJ observed, in a passage that since *The Golden Victory* has been much cited, that the vessel was "predestined" to arrive late at the port of delivery[137] and it would, in reality, have been physically impossible for the vessel to arrive on time. In *The Golden Victory*, Lord Walker of Gestingthorpe observed of the earlier case, that "the vessel was still unloading in Hong Kong on [the date of acceptance of repudiation] and on that date it was simply impossible that she should be in Haiphong, ready to load, three days later".[138] This judgment in *The Mihalis Angelos*, that the vessel would not arrive by the cancelling date, could have been made with certainty at the time of the repudiation, and anything that occurred later would have shed no further light. It follows that, at the time of repudiation, the voyage charter in the shipowners' hands was worth nothing. As Lord Mustill, who had been counsel for the charterers in *The Mihalis Angelos*, wrote extrajudicially:[139]

> "It called for no deep analysis of the facts or distinctions between levels of unlikelihood, since all concerned took it as obvious that the charter would never be performed. The only issue was whether it should be treated as if it had a value, when in truth it had none."

In *The Golden Victory*, by contrast, the situation became clear only later.

The Golden Victory has already been briefly described.[140] It concerned wrongful early termination of a charterparty by time charterers. They purported to redeliver the vessel in 2001, the earliest allowable date nominally being not until 2005. The owners accepted

132. [2007] 2 AC 353, [9].
133. See fnn 99–101.
134. Unlike *The Mihalis Angelos*, the cancelling clause in *The Golden Victory* was in no way connected with future performance.
135. For the academic criticisms, see *The Glory Wealth* [2013] 2 Lloyd's Rep 653, [11–16] (Teare J), and citations therein.
136. [1971] 1 QB 164, 196.
137. [1971] 1 QB 164, 209–210, cited *Bunge v Nidera* [2015] UKSC 43, [19].
138. [2007] 2 AC 353, [40]. See also *ibid*, [61] (Lord Carswell), [74], [76] (Lord Brown).
139. Mustill (2008) 124 LQR 569, 582.
140. See fnn 97–100, and accompanying text.

that breach as terminating the charter, and claimed damages based on losses projected for the remainder of the natural charterparty term.[141] The arbitration proceedings were not concluded swiftly, arguably due to the tardiness of the charterers,[142] and by the time of the award it was clear that they would have been entitled lawfully to terminate it in 2003, by virtue of the war clause, which was triggered on the outbreak of war in Iraq.[143] It was also clear, by then, that they would have done so,[144] but the arbitrator also judged that a reasonably well-informed person, at the date of the repudiation in 2001, would have considered war or large-scale hostilities triggering the clause to be not inevitable or even probable, but merely a possibility.[145] The majority took the view that damages should be assessed on the basis of the information known at the time of the award, whether or not that information was available at the date of repudiation. The owners were therefore held entitled to damages only up to outbreak of war in 2003, and not for the remainder of the term of the charter.[146]

The main part of *The Golden Victory*, based as it is on the timing of the assessment, is not directly relevant to the discussion of *Gill & Duffus v Berger*, because in the earlier case it was inevitable at the time of repudiation that the CIF buyers would reject the goods on examination. Nor is *The Golden Victory* ever likely to be relevant in a *Gill & Duffus v Berger* situation, since the sellers should not be allowed to take advantage of the fact that the buyers might for commercial reasons decide not to reject, because of difficulties in getting payment of the price back from them (the sellers).[147] *The Golden Victory* can apply where a sale contract, like the charterparty in *The Golden Victory*, has a cancelling provision that applies in circumstances that are unknown at the time of the acceptance of repudiation,[148] a situation that is entirely plausible, but not central to the present discussion.

Another aspect of *The Golden Victory* is directly relevant, however. Basing themselves on a dictum of Megaw LJ in *The Mihalos Angelos* already set out,[149] the owners argued, not only that the assessment should have been made at acceptance of repudiation, but that, looking forward from then, only events that were "predestined" should be taken into

141. This was not a straightforward case of hire on a falling market. The charterparty also had a profit-sharing clause, and shipowners also claimed loss of projected profit: eg, [2005] EWCA Civ 1190; [2006] 1 WLR 533; [2005] 2 Lloyd's Rep 747, [3] (Lord Mance), and generally [2003] EWHC 16 (Comm); [2003] 2 Lloyd's Rep 592 (Morison J). Lord Toulson's remarks in *Bunge v Nidera* [2015] UKSC 43, [73] make sense only if there had not been the normal market fall. The charterers, it seems, "were fundamentally disenchanted with the charter": [2005] 2 Lloyd's Rep 747, [6] (Lord Mance).

142. [2007] 2 AC 353, [22] (Lord Bingham).

143. The clause (33) did not cover only Iraq, but a war between any two of a range of countries, including the UK, USA and Iraq, and allowed either party to cancel. This also explains the word "nominally" as to the duration of the charter: [2007] 2 AC 353, [69] (Lord Brown).

144. [2005] 2 Lloyd's Rep 747, [6], [8] (Lord Mance, noting that in any event they were "entitled to the benefit of a presumption that they would in that event have cancelled the charter").

145. [2007] 2 AC 353, [7] (Lord Bingham), [28] (Lord Scott of Foscote), [45] (Lord Walker), [54] (Lord Carswell), [73] (Lord Brown); [2006] 1 WLR 533, [4] (Lord Mance).

146. There is, of course, an element of fortuity about this. Had the arbitration award been before 2003, then obviously the 2003 events could not have been taken into account, and the outcome would have been different.

147. See fnn 48–49, 107, and text thereto.

148. A provision, indeed, such as that in *Bunge v Nidera*, though the events in that later case were probably predictable at the time of repudiation: see fnn 172–174.

149. See fn.137.

account.[150] Their Lordships did not accept this; the chance of war, even if low, should be factored in, in any event.[151] In *Gill & Duffus v Berger*, the second rejection was, in any event, predestined, so even the owners' argument in *The Golden Victory* does not justify the assessment of damages in the earlier case.

The Golden Victory may not be of general application. First, what was at issue in *The Golden Victory* was not the market rate as such, but the duration of the remainder of the charter.[152] This was inherently uncertain, given the war clause.[153] By contrast, there was no similar uncertainty as to the market price of Bolita beans at acceptance of repudiation in *Gill & Duffus v Berger*. Secondly, there are statements in the case that the principles might not apply to one-off sale contracts.[154] There are differences, one of which is that it is simpler to realise the value of a sale contract than it is a charterparty.[155] Lord Scott of Foscote (in the majority in *The Golden Victory*) observed that "It was accepted in argument before your Lordships that the owners' charterparty rights would not, in practice, have been marketable for a capital sum".[156] Conversely, international sellers can buy in alternative goods,[157] at current market rates, thereby directly realising the value of their contract.[158] So sale contracts and charterparties may well be different.

Yet, though there are therefore two reasons why *The Golden Victory* might not apply to the situation in *Gill & Duffus v Berger*, in respect of each of these argued exceptions the language suggests that they apply only as to the timing of assessment, not to the more general compensatory principle that the probability of future events should be factored in. In any event, the argument that sale contracts can be accorded special treatment is more difficult after *Bunge v Nidera* (though the later case may itself not apply to all international sale contracts).[159]

The argument advanced in this article is that the principles of neither *The Golden Victory* nor *The Mihalis Angelos* should apply to the *Gill & Duffus v Berger* situation.

VIII. *THE GLORY WEALTH*

The Glory Wealth[160] is a decision at first instance, but has an important role in the narrative. After an exhaustive review of the authorities, Teare J rejected the distinction drawn by Professor Treitel between cancellation and repudiation, and applied the compensatory

150. Eg, [2007] 2 AC 353, [58] (Lord Carswell).
151. [2006] 1 WLR 533, [23] (Lord Mance); [2007] 2 AC 353, [64], [66] (Lord Carswell), [74] (Lord Brown). See also *Bunge v Nidera* [2015] UKSC 43, [21] (Lord Sumption), [85] (Lord Toulson).
152. Eg, [2007] 2 AC 353, [59] (Lord Carswell); [2006] 1 WLR 533, [24] (Lord Mance).
153. A similar degree of uncertainty attended the loss of profits claim (*supra*, fn.141, the profit-sharing clause being an unusual feature of *The Golden Victory*); also [2006] 1 WLR 533, [13], [25] (Lord Mance); [2007] 2 AC 353, [81] (Lord Brown). On the uncertainty caused by the war clause in *The Golden Victory*, see also *Bunge v Nidera* [2015] UKSC 43, [22] (Lord Sumption),
154. [2007] 2 AC 353, [34] (Lord Scott), [79–80] (Lord Brown); see fn.176, and text thereto.
155. See fn.100.
156. [2007] 2 AC 353, [37].
157. Also fn.100, and text thereto.
158. This is impossible with a charterparty, where the ship will be stipulated in the contract.
159. See fn.177.
160. [2013] EWHC 3153 (Comm); [2013] 2 Lloyd's Rep 653; noted McLauchlan [2015] JBL 530.

principle, as stated in *The Mihalis Angelos* and *The Golden Victory*, to a later (hypothetical) repudiation.[161] The case is also important in appreciating, for the first time, the conflict between *Gill & Duffus v. Berger* and the compensatory principle, and in taking a very narrow view of *Gill & Duffus*.

The Glory Wealth concerned a contract of affreightment, which was terminated by the owners in response to the charterers' repudiatory breach of it, by refusing to declare laycans. The charterers claimed that, had the contract not been terminated, the owners would later have been unable, because of financial problems, to perform it. Teare J thought that had the charterers' claim been factually made out,[162] it would have accordingly reduced the damages payable to the shipowners. The case is an application of the "principle, illustrated by *The Mihalis Angelos* and *The Golden Victory*",[163] though the timing issue from *The Golden Victory* did not in fact arise. Unlike the earlier cases, however, the charterers were not claiming that they would be entitled later to cancel, rather that the shipowners would be unable to perform, that they would therefore themselves be in future repudiatory breach. In this respect the case resembles *Gill & Duffus v Berger* and potentially is brought directly into conflict with it. Teare J realised this. He saw the issue as being whether he should apply *The Golden Victory* or *Gill & Duffus v. Berger*, and preferred *The Golden Victory*. He explained *Gill & Duffus* as depending on the quality certificate, precluding the buyers from lawfully rejecting the goods, so that it[164] "was not a case where the award of damages placed the sellers in a better position than they would have been in had there been no repudiatory breach by the buyers …". In other words, he took the narrowest possible view of the earlier case, thereby downplaying the substance of the greater part of Lord Diplock's speech. For the reasons already rehearsed, I would argue that this is an unacceptable basis for distinguishing between the two cases.

Given that damages are based on hypothetical events, and not at the survival of contractual obligations as such, the extension of *The Mihalis Angelos* and *The Golden Victory* to repudiation seems convincing, whereas to distinguish between cancellation and repudiation does not. The real problem, I have suggested, is that international sale contracts—or at least those which are adapted for use in a string—are simply different; that would, I suggest, have been a better way to distinguish *Gill & Duffus v Berger*. A distinction on this basis would have been possible prior to *Bunge v Nidera*. The Supreme Court decision has made such a distinction more difficult, but still not impossible.

161. [2013] 2 Lloyd's Rep 653, [77–78], [81]. See also fn.124.
162. It was not, Teare J finding no reason for interfering with the arbitrators' finding that the owners would have been able to perform the contract of affreightment if the charterers had called upon them to do so: [2013] 2 Lloyd's Rep 653, [99].
163. [2013] 2 Lloyd's Rep 653, [81].
164. [2013] 2 Lloyd's Rep 653, [62]; commented on McLauchlan [2015] JBL 530, 536.

IX. *BUNGE V NIDERA*

In *Bunge SA v Nidera BV*,[165] Lord Toulson began his speech by observing that the appeal raised questions about the applicability and correctness of the decision of the majority of the House of Lords in *The Golden Victory*.[166] In reality, the main issue that split the House in the earlier case was hardly a factor in *Bunge v Nidera*, since the events that occurred were expected at acceptance of repudiation. The real issue in *Bunge v Nidera* was whether the compensatory principle applied to a sale rather than a period contract.

FOB sellers, on a GAFTA 49 form, terminated the contract prematurely, on the announcement of an export ban, imposed by the Russian Government on the sale of Russian milling wheat. This had been held in the lower courts to amount to an anticipatory breach,[167] on the grounds that the GAFTA 49 prohibition clause, which was relied upon, required export actually to be restricted before providing for automatic cancellation, whereas at the time of the sellers' purported cancellation the embargo had not even come into force, and the delivery date was still some time in the future.[168] The FOB buyers accepted the anticipatory breach as bringing the contract to an end.[169] The sellers immediately offered to reinstate the contract on the same terms, but the buyers would not agree, instead claiming over US$3 million in damages.[170] The embargo was not lifted;[171] so, had the contract remained on foot, the sellers would have been entitled to cancel a few weeks later. Lord Toulson observed that both parties "no doubt" expected the ban to remain in place,[172] and that "the bargain was subject to a high risk of cancellation", this assessment presumably being at acceptance of repudiation.[173] The willingness of the sellers to reinstate the contract, including both the prohibition clause and the original contract price, is consistent with this.[174] Consequently, the main issue in *The Golden Victory* was scarcely a factor in *Bunge v Nidera*, where the issue was whether the later (very likely) cancellation should reduce the damages. The market had risen sharply since the contract was made (apparently because of drought in Russia),[175] so the buyers were faced with purchasing a replacement cargo at a much higher price.

165. [2015] UKSC 43; noted JW Carter and G Tolhurst, "Contract damages following discharge for repudiation—revisiting later events" (2016) 132 LQR 1; F Dawson, "Damages for anticipatory breach" [2016] LMCLQ 6.

166. [2015] UKSC 43, [37].

167. Renunciation: [2015] 2 Lloyd's Rep 469, [12] (Lord Sumption).

168. *Bunge v Nidera* [2014] 1 Lloyd's Rep 404 (CA), this aspect of the case not being appealed to the Supreme Court.

169. Under a clause in the GAFTA 49 contract. The sellers relied on an embargo, that was never in fact lifted.

170. A mitigation point decided against the sellers at first instance was not challenged on appeal: [2015] 2 Lloyd's Rep 469, [56] (Lord Toulson); also [76], where he thought that the offer to reinstate "on the fundamental compensatory principle... provides a full answer to the claim".

171. Indeed, it was extended: [2015] 2 Lloyd's Rep 469, [44] (Lord Toulson).

172. *Ibid*, [46] (Lord Toulson).

173. *Ibid*, [85] (Lord Toulson).

174. On the link between time of assessment and mitigation, see A Dyson and A Kramer, "There is no 'breach date rule': mitigation, difference in value and date of assessment" (2014) 130 LQR 259.

175. The price had risen from US$160 per mt to what was accepted as US$282.50: [2015] 2 Lloyd's Rep 469, [48] (Lord Toulson). On the effect of drought, see, eg, "Wheat prices soar on Russian drought", *Financial Times*, 2 August 2010. Suggesting that it cannot have been the market in *Russian* milling wheat, see Dawson [2016] LMCLQ 6, 13.

The Supreme Court held that, at common law, the buyers were entitled to nominal damages only; the continuation of the embargo eliminated the damages, even though this was an international commodity sale. The exception that had been argued, in *The Golden Victory*, for one-off sale contracts was not accepted.[176] The case is an application of the compensatory principle to the sale of a single cargo, as opposed to a contract for delivery by instalments. To win in *Bunge v Nidera*, the buyers would have had to argue, consistently with *Gill & Duffus v Berger*, that subsequent events should in principle be disregarded.

The case makes it more difficult to argue that there is something special about international commodity sales as such, justifying their own rules. Even in *Bunge v Nidera*, however, it was accepted that some contracts might be exempted from the compensatory principle. Lord Toulson thought that, where

> "the contract is reasonably replaceable by a substitute contract at a readily ascertainable market price, in [that] case it will ordinarily be right to measure the innocent party's loss by reference to the substitute contract".[177]

This harks back to the idea of trading charterparties, as suggested by Lord Bingham in *The Golden Victory*.[178]

The recognition that some contracts might be exempted is to be welcomed. Not all international sale contracts are the same. What makes commodity sales different is that the goods are traded in chains. The transaction needs to be essentially documentary. It is this that justifies, indeed demands, their special treatment.[179] By contrast, there was no reason at all for discouraging the sellers from cancelling early in *Bunge v Nidera*; indeed, quite the contrary, to allow the buyers quickly to go back into the market to purchase a replacement cargo. There was therefore no good argument *there* for departing from the compensatory principle.

Though *Bunge v Nidera* recognises that not all sales are the same, it is hard to see why Lord Toulson placed such importance on a market in substitute contracts being necessary, when the parties can realise the capital value of their bargains, simply by trading in goods.[180] I would suggest that Lord Toulson's is therefore the wrong distinction. Nonetheless, *Bunge v Nidera* does not close the door to allowing an exception, in an appropriate case.

X. WHAT IS THE SOLUTION?

The *Gill & Duffus v Berger* position on liability for rejection of documents is essential to speed and certainty needed for international commodity sales. It is therefore also essential to the proper operation of CIF, and many FOB contracts. But a liability regime is of little

176. See fn.154. The court also held that the GAFTA default clause in the contract was not drafted in such a way as to displace the common law position.
177. [2015] 2 Lloyd's Rep 469, [87]. See also [21] (Lord Sumption).
178. See fn.100, and associated text.
179. See fnn 13–20, and associated text.
180. See discussion generally prior to fn.97.

use unless it is backed up by effective damages. This justifies departing from normal contractual rules, including rules as to remedies, and indeed damages.[181] Conversely, it is hard to see that departure from the compensatory principle occasioned any real injustice in *Gill & Duffus v. Berger*. All that is really happening, in such a case, is that the sellers are being allowed to retain their market position, because the buyers have failed to use a correct method of shifting it back. The sellers are surely obtaining a windfall only in a very technical sense.

The law is sufficiently flexible to recognise the justification, and the analytical tools are in place to do so.[182] Whether it will do so is another matter. There remains a strong likelihood that *Gill & Duffus v Berger* will be restricted to being an authority on quality certificates,[183] or that departure from the compensatory principle will be restricted to the narrowest of situations.[184] This is taking the idea of conformity to doctrine too far. There should be room to give very different contracts the separate treatment they deserve.

It is suggested that *Gill & Duffus* damages are appropriate in cases of wrongful rejection of documents, for contracts which are likely to form parts of chains, even if this involves departure from the compensatory principle, as restated in *Bunge v Nidera*.

181. See fnn 25–42, and accompanying text.
182. See fnn 77–79, and accompanying text.
183. See fn.164.
184. See fn.177.