MODERN MARITIME LAW

VOLUME 2: MANAGING RISKS AND LIABILITIES

THIRD EDITION

ALEKA MANDARAKA-SHEPPARD

informa law
from Routledge

MODERN
MARITIME LAW

THIRD EDITION
VOLUME 2: MANAGING RISKS AND LIABILITIES

Aleka Mandaraka-Sheppard

MARITIME AND TRANSPORT LAW LIBRARY

Modern Maritime Law: Volume 1: Jurisdiction and Risks
third edition
by Aleka Mandaraka-Sheppard
(2013)

Modern Maritime Law: Volume 2: Managing Risks and Liabilities
third edition
by Aleka Mandaraka-Sheppard
(2013)

Carriage of Goods by Sea Land and Air: Uni-Modal and Multi-Modal Transport in the 21st Century
edited by Baris Soyer and Andrew Tettenborn
(2013)

Freight Forwarding and Multimodal Transport Contracts
second edition
by David A. Glass
(2012)

The Law of Yachts and Yachting
by Filippo Lorenzon and Richard Coles
(2012)

Marine Insurance Clauses
fifth edition
by N. Geoffrey Hudson, Tim Madge and Keith Sturges
(2012)

Pollution at Sea: Law and Liability
edited by Baris Soyer and Andrew Tettenborn
(2012)

Contracts of Carriage by Air
second edition
by Malcolm Clarke
(2012)

Place of Refuge: International Law and the CMI Draft Convention
by Eric Van Hooydonk
(2010)

Maritime Fraud and Piracy
by Paul Todd
(2010)

The Carriage of Goods by Sea under the Rotterdam Rules
edited by D. Rhidian Thomas
(2010)

International Carriage of Goods by Road: CMR
fifth edition
by Malcolm Clarke
(2009)

Risk and Liability in Air Law
by George Leloudas
(2009)

The Evolving Law and Practice of Voyage Charters
edited by D. Rhidian Thomas
(2009)

The International Law of the Shipmaster
by John A. C. Cartner, Richard P. Fiske and Tara L. Leiter
(2009)

The Modern Law of Marine Insurance
edited by D. Rhidian Thomas
(2009)

The Rotterdam Rules: A Practical Annotation
by Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland and Michael Tsimplis
(2009)

Contracts of Carriage by Land and Air
second edition
by Malcolm Clarke and David Yates
(2008)

Legal Issues Relating to Time Charterparties
edited by D. Rhidian Thomas
(2008)

Bills of Lading and Bankers' Documentary Credits
fourth edition
by Paul Todd
(2007)

Liability Regimes in Contemporary Maritime Law
edited by D. Rhidian Thomas
(2007)

Marine Insurance: The Law in Transition
edited by D. Rhidian Thomas
(2006)

Commencement of Laytime
fourth edition
edited by D. Rhidian Thomas
(2006)

General Average: Law and Practice
second edition
by F. D. Rose
(2005)

War, Terror and Carriage by Sea
by Keith Michel
(2004)

MODERN MARITIME LAW

THIRD EDITION

Volume 2: Managing Risks and Liabilities

ALEKA MANDARAKA-SHEPPARD

informa law
from Routledge

Third edition published 2013
by Informa Law from Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Informa Law from Routledge
711 Third Avenue, New York, NY 10017

Informa Law from Routledge is an imprint of the Taylor & Francis Group, an Informa business

© 2013 Dr Aleka Mandaraka-Sheppard

The right of Dr Aleka Mandaraka-Sheppard to be identified as author of this work has been asserted by her in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

While every effort has been made to ensure that the information contained in this book is correct, neither the author nor Informa Law can accept any responsibility for any errors or omissions or for any consequences arising therefrom.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

First edition published by Cavendish Publishing Limited 2001

Second edition published by Routledge-Cavendish 2007;
reprinted by Informa Law 2009

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
Mandaraka-Sheppard, Alexandra, 1949–
[Modern maritime law and risk management]
Modern maritime law / Aleka Mandaraka-Sheppard, Alan van Praag contributor to Rule B attachment under US Law. – Third edition.
pages cm. – (Maritime and Transport Law Library)
Revision of the author's Modern maritime law and risk management.
Includes bibliographical references.
1. Admiralty–Great Britain. 2. Risk management–Great Britain. I. Title.
KD1833.M36 2013
343.4109'6–dc23
2013011843

ISBN: 978–0–415–83906–8 hbk
ISBN: 978–0–415–84320–1 set
eISBN 978–1–31586–314–6 ebk

Typeset in Plantin
by Florence Production Ltd, Stoodleigh, Devon

Knowing the law is the beginning of a battle;
knowing how to apply it is winning the battle;
and knowing how to practise risk management
is winning the war.

To my son Emmanuel-John Sheppard and to the young
generation of shipping law and practice

This unique title examines in depth issues of jurisdiction, maritime law and practice from a modern perspective and highlights the importance of risk management with a view to avoiding pitfalls in litigation or arbitration and minimising exposure to liabilities.

The third edition has been fully revised and restructured into two self-contained volumes, the first covering jurisdictional issues and risks, and the second exploring the diverse aspects of maritime law, risks and liabilities.

The second volume tackles the substantive maritime law, with a particular emphasis on risk and liabilities, and analyses issues of contract, tort and criminal law, causation and remoteness of damages.

Key features of Volume Two include:

- an analysis of the regulatory regime, new EU and IMO safety at sea legislation, reforming practices for flag States and recognised organisations, vetting, codes of good practice and International Conventions;
- an explanation of the rules of attribution of liability, the impact of the ISM Code upon liabilities, including criminal, corporate manslaughter, and the new directive for ship-source pollution;
- important developments in areas including:
  - ship-managing risks, best endeavours and fiduciary duties;
  - mortgagees risks and economic torts;
  - new BIMCO standard terms of contracts;
  - ship-sale risks – including sale ‘as is’ and ‘as she was’;
  - shipbuilding risks – guarantees and performance bonds;
  - new trends on wrongful acts of employees, collisions and measure of damages, salvage issues, environmental salvage and towage contracts;
  - piracy risks cases and general average;
  - new perspectives on risks and liabilities of port authorities;
  - pollution liabilities, including trends of prosecution of class societies and charterers and new limits of liability under International Conventions.

FOREWORD TO THE FIRST EDITION

The Rt Hon. The Lord Mustill of Pateley Bridge

Anyone with knowledge of the boundless enthusiasm and apparently inexhaustible energy displayed by Dr Aleka Mandaraka-Sheppard in the conception and evolution of the London Shipping Law Centre is unlikely to be surprised at her successful achievement of another daunting goal, namely to publish a new and comprehensive work on shipping law.

There is of course nothing radical in itself about the idea of a modern work in this field. As the author rightly acknowledges, several valuable works on individual aspects of the general topic have been published in recent years, but there has long been the need for a comprehensive work from which both the student (at various levels) and the practitioner can gain a general perspective as well as concrete and detailed information. Perhaps the late Professor Cadwallader, to whom the author pays tribute, could if spared have tackled the task, but his former student has produced a volume of which he would have been proud, the more so given the striking expansion in volume of the law relating to ships and the sea that has occurred since his day. Even a glance at the table of contents will show the extent of the author's grasp of contemporary legal issues, and the thoroughness with which they have been explored.

In addition to the general merits of this book, there is one particular theme that calls for particular mention. That is, the emphasis laid on risk management. In recent years this has become a commonplace of business law and practice in many areas, but with a few notable exceptions it has been an absentee from study and practice in the maritime world. Fortunately this is now changing, and Dr Mandaraka-Sheppard's focus on the subject will, it may be hoped, stimulate interest and promote a wider appreciation of its cardinal importance.

Shelves now groan under the weight of legal textbooks, and inches of shelf-room are at a discount, but place must be made for *Modern Maritime Law*, whose dimensions belie its approachability while evidencing its scope. This is a book for the library, the study and the office. I welcome it, and am sure that readers will do the same.

M.J. Mustill
June 2001

This page intentionally left blank

FOREWORD TO THE SECOND EDITION

The Rt Hon. The Lord Clarke of Stone-cum-Ebony

This is by any standards a magnum opus. Seven years have passed since Michael Mustill wrote the foreword to the first edition of *Modern Maritime Law*. He paid tribute to the boundless enthusiasm and apparently inexhaustible energy displayed by Dr Aleka Mandaraka-Sheppard in the preparation of the first edition.

Both the enthusiasm and the energy are evident again in the preparation of the second edition. I cannot pretend that I have read every word of its 1,000 pages. It would have been impossible to do so in the time available. However, those parts that I have been able to absorb have persuaded me, and I am sure will persuade students and practitioners in maritime law in the future, that this is a vital work for everyone interested in shipping law to have on their shelves. It has a breathtaking range. Try as I might, I have not been able to think of anything like it. Having spent some five years as the Admiralty judge and having before that practised for many years at the Admiralty and Commercial Bar, I am delighted that Aleka has had the time and energy to produce a second edition of her great work.

Like Michael Mustill, I am particularly struck by her focus on risk management, especially in the context of the management of ships and the ISM Code. The importance of risk management was brought home to me when I had the privilege of conducting the Thames Safety Inquiry and then the Formal Investigation into the collision between the *Marchioness* and the *Bowbelle* with its consequent loss of life. I hope that this book will help to underline this aspect of the legal responsibilities of ship-owners, managers and charterers alike.

Finally, I especially appreciate the section on Admiralty Jurisdiction and Procedure, because it brings back many happy days in front of the then Admiralty judge, Mr Justice Brandon, in the 1970s, when the likes of the present Admiralty judge, Mr Justice David Steel, and I were kept on our mettle by the intellectual rigour of the judge.

Future practitioners will have the great benefit of Dr Mandaraka-Sheppard's book with which to educate future Admiralty judges.

Sir Anthony Clarke
August 2007

This page intentionally left blank

FOREWORD TO THE THIRD EDITION

The Rt Hon. Sir Bernard Rix

This splendid work has now reached its third edition in only a dozen years, a considerable compliment in itself to the achievement of Dr Aleka Mandaraka-Sheppard in creating what amounts to a modern, comprehensive treatise on the responsibilities of commercial shipowners. It is a personal pleasure to have been asked to follow in the line of Lord Mustill and Lord Clarke of Stone-cum-Ebony as the writer of the foreword to this latest edition.

The author's insight, which represents the distinctive feature of this work, is her understanding that international conventions, regulations and codes of good practice, working together with the developing principles of the commercial common law of England and the lessons to be learned from the science of business risk management, have in the modern world revolutionised the conduct of shipowning. Her analysis of modern maritime law in the light of techniques of risk management is highlighted in the opening chapter of the second volume of this work, and runs like a *leitmotiv* through both its volumes. She seeks to demonstrate that a responsible shipowner needs to approach his business with a holistic assessment of the risks inherent in it. She enumerates those risks as encompassing the corporate structure, the financial model, the operational performance, the human dimension, the trading, and the potential liabilities of the company, be those liabilities in terms of personal injury, damage to property, commercial losses, or criminal offences, or also the large costs inherent in disputes and their resolution. Thus she correctly observes that shipowners, who necessarily use contracts for the allocation of risks, can by means of better draughtsmanship and more perceptive evaluation of those risks seek to avoid the costs and liabilities involved in litigation.

This, then, is a work that goes much wider than the traditional textbook on carriage of goods by sea exemplified by the law of charterparties and bills of lading. Indeed, there are no chapters which are devoted to those subject-matters. I note, however, that a third volume is indicated, which, as I understand it, would apply the technique of risk management analysis to the formulation of contracts and thus to their interpretation. Such a volume would be eagerly awaited. For the present, however, Dr Mandaraka-Sheppard is here primarily concerned with the basic tools and responsibilities of the shipowner, with the purchase, building or financing of his ships, the ownership structure of his business and its management, with the dangers of the seas found in collisions and like accidents and their consequences by way of salvage,

towage and general average, and with the demands of international conventions and maritime authorities. Moreover the first volume of this work contains a comprehensive review of what might be described as the legal shoals and dangers inherent in shipowning – of the admiralty jurisdiction, maritime claims, the law of arrest, conflict of laws, forum shopping and the anti-suit injunction.

Woven into her treatment of all these topics the author finds time for a careful analysis of leading principles and authorities of English and European law. The reader will find here careful and illuminating discussions of modern cases such as *The Front Comor*, *The Achilleas*, and *OBG v Allan*, to name but a few.

Dr Mandaraka-Sheppard is that rare author who is or has been variously an academic, a practitioner, an arbitrator and mediator, and, in her creation of the London Shipping Law Centre, something of an entrepreneur too. Her energy and enthusiasm, of which previous forewords have spoken, are well known. Michael Mustill described this as a book for the library, the study and the office. Anthony Clarke said that practitioners would use it as a tool to educate future Admiralty judges. All that is true. It is also a work which calls on shipowners and those who advise them to find in the law here so helpfully discussed a challenge to achieve that safe and successful operation of maritime commerce which is so important to the development of international peace and prosperity.

Sir Bernard Rix
September 2013

PREFACE TO THE THIRD EDITION

Thinking about – let alone writing – a new edition of a legal textbook is a great burden for any author and takes a considerable span out of the writer's life for not much reward. Yet the zest and drive of any committed writer remains, and the first question is whether a new edition is necessary. Unless the law has changed to a considerable extent, there would be no point in filling up legal libraries with another volume. However, as the readers of *Modern Maritime Law* will witness, the insurmountable amount of new legislation, EU Directives, Regulations and IMO Conventions that have emerged, coupled with the copious case law, since 2009, has made the new edition an absolute necessity.

Thus, the result is that the book is now in two volumes, owing to the increased amount of the included material and because each volume is self-contained, making it easier for readers to manage them.

Apart from the fact that the book provides a cohesive overall view of aspects of maritime law – with a fairly detailed account of important decisions – and brings together the major 'Bibles' written on individual topics, *Modern Maritime Law* has stimulated a great interest in the subject of risk management and promoted its importance among commercial and legal professionals, as Lord Mustill had predicted in the foreword to the first edition. In the last decade or so, industry organisations, shipping companies, insurers, as well as lawyers and their professional organisations, have focused on legal, regulatory and other risk issues in a more systematic way for corporate strategies, as well as for loss prevention and dispute avoidance. Commercial people take more care to express their intention in contracts as to the allocation of risks between themselves, and the judges often try to decipher the parties' intention in terms of allocation of risks when they interpret contracts in the context of the factual matrix.

It is made clear in this and in the previous editions that the price for failing to recognise and address proactively how to keep up with compliance with regulations and minimise the hazards that can lead to accidents, or disputes, could be high in terms of financial or reputational losses, business disruption and damage to commercial or client relationships.

Thus, the title of this book reflects its modern perspective, and the subtitles of each volume are about, first, the risks of litigation (first volume) and, second, how to manage risks and liabilities (second volume). A third volume will follow in due course to complete the series.

VOLUME 1: 'JURISDICTION AND RISKS'

Since the second edition (2007), considerable case law and significant developments have taken place in jurisdictional matters and conflict of laws, including, but not limited to, the redraft of the Brussels I Regulation, which poses new thinking with regard to choice of forum agreements, arbitration and other issues (applicable from 2015).

The chapters have been substantially overhauled, and a new chapter on freezing injunctions and the US Rule B Attachment has been included (8 chapters in this volume); the Rule B attachment is contributed by Alan Van Praag, a New York lawyer.

Aside from the introductory parts on the jurisdiction of the English courts and the principles of the arrest of ships, there have been new court decisions in the areas of: sovereign immunity, stay of proceedings for breach of jurisdiction or arbitration agreements, *forum non-conveniens*, anti-suit injunctions, anti-arbitration injunctions, damages for breach of arbitration agreements, appeals against arbitration awards, tiered dispute resolution clauses, freezing injunctions and the US Rule B attachment, beneficial ownership and the piercing of the corporate veil, including how the law of associated ship arrest in South Africa has developed. A critical analysis of the law in relation to wrongful arrest of ships is made, and reform of the present law is proposed. Foreign case law is referred to when it is necessary to show how the law develops, in particular areas, in the other common law jurisdictions.

Conflict of jurisdictions under both common law and the EU jurisdiction regime, including an interpretation of the new provisions of the EU recast Regulation 2012 and a forecast about its possible effect from 2015 upon the English jurisdiction and arbitration should be of particular interest to legal practitioners.

VOLUME 2: 'MANAGING RISKS AND LIABILITIES'

The substantive parts of maritime law are dealt with in the second volume, consisting of 16 chapters. It appeared to me necessary to reorganise this volume in order to explain aspects of risk management, with particular emphasis on risks and liabilities in the light of new regulations and codes. All the chapters have been substantially reviewed and include basic principles of the law of contract, tort, economic torts, causation and remoteness of damages.

Part I: 'Overarching Aspects of Risk Management'

A general overview of managing risks in the twenty-first century in the light of new technological developments is given in Chapter 1, which places in context what follows in this volume but also reflects on risks in connection with dispute resolution and jurisdictional aspects, which are dealt with in Volume 1. The risks to which the owners and managers are exposed are highlighted.

The EU's unflagging energy in issuing new directives and regulations for the promotion of quality shipping has created a 'no-escape net' for non-compliant companies. Any non-compliance will be caught up by inspections and audits. So Chapter 2 includes all new safety at sea legislation and codes of good practice affecting ship operators, ports, flag administrations, classification societies and other

stakeholders. Parallel developments at the IMO level follow which include the adoption of new International Conventions. This has resulted in a plethora of enacting regulations in the UK. An analysis of the ship-source pollution Directive, the old and the new, is also included in Chapter 2.

It was felt essential to separate the provisions of the ISM Code, which was amended in 2010, and deal with them in Chapter 3, which is followed by an explanation of the 'Rules of Attribution of Liability' and the effect of the ISM Code upon liabilities in terms of the ship's seaworthiness for the carriage of goods, marine insurance contracts, limitation of liability and criminal liabilities, in Chapter 4 of Part I.

Part II: 'Ownership Aspects and Management of Risks'

In addition, there are new BIMCO standard terms of contracts, such as the new SHIPMAN and CREWMAN, the NEWBUILDCON and the new Sale Form. These are dealt with in this part, which includes new court decisions on: mortgagees' risks, wrongful inducement of breach of contract, ship-management disputes and the meaning of 'best endeavours', fiduciary duties and agency principles, who is the employer of the crew; refund guarantees per se versus performance bonds under shipbuilding contracts, the construction of contracts, comparison between the NEWBUILDCON and the SAJ, risks connected to the expiration of refund guarantees, options, and price escalation; ship sale and purchase (including the meaning of 'as is, where is' or 'as she was'), the effect of total exclusion from liability clauses, good faith issues, caveat emptor, best endeavours to negotiate, new developments with regard to misrepresentation as well as damages for breach of contract and mitigation, and the role of classification societies.

Part III: 'Ship and Port Risks and Liabilities'

This part includes: issues concerning safety at sea regulations to avoid collisions, liability of employers for wrongful acts of employees, apportionment of liability, new trends on the measure of damages and loss of a chance versus loss of profit/earnings; developments in the law of salvage (including the feasibility of 'environmental salvage'), meaning of 'best endeavours' by salvors, and the 'disparity' principle; the new BIMCO TOWCON and TOWHIRE and offshore contracts (including the knock-for-knock allocation of risks); general average issues and piracy risks (including new cases on disobeying charterers' orders to avoid high-risk of piracy); and risks assessment for port authorities, a new perspective on their risks and liabilities, including liability for pilots' negligence.

Part IV: 'Compensation for Liabilities and Limitation under International Conventions'

Finally, this part deals with the actual limits of liability of ship-owners or managers and the new developments in the increase of the limits by the adoption of Protocols to the Conventions or the adoption of new Conventions, including liability and compensation under the Athens Convention and the pollution legislation. New cases on criminal liabilities of classification societies and charterers in connection with pollution damage are included.

RISK MANAGEMENT IN PERSPECTIVE

The undercurrent theme of the book has been to raise awareness of the importance of looking at ship-owning, trading, maritime law and practice in terms of 'risks', with the view to minimising or preventing the risk of liabilities, as well as avoiding pitfalls in litigation or arbitration.

Since the first and second editions of this book, it is pleasing to witness that most shipping companies have implemented risk management systems for the analysis and evaluation of risks in relation to operational safety and regulatory compliance. The pressures upon shipping companies to implement safety management systems – emanating not only from regulators but also commercial partners, insurers and the industry in general – have had an impact on the promotion of a safety culture. It is no coincidence that there have been fewer major accidents, particularly of the kind experienced in the 1980s, 1990s and early 2000s.

The safety and quality systems, coupled with industry best practice and standards, including the new developments by the Code of Safe Working Practices for Merchant Seamen and the revolution in technology, which has led to the forthcoming implementation of ECDIS, provide the benchmark for compliance by shipping operators. One cannot divorce the law from the broader picture of risk management, and that includes the management of risks during the dispute resolution process, choice of jurisdiction and the avoidance of incurrence of wasted legal costs. The risk management era has now filtered through all industries and professions, including law firms, and it is imposed by regulators.

Specific reference to risk management issues is made in some parts in the text, when it appears especially necessary to draw attention to it, whereas, in other parts, it should be obvious what lessons can be learnt from the detailed analysis of decisions.

Risk management, in the context of this book, briefly means focusing the mind of corporate leaders on: corporate decision making, developing the corporate structure in a legitimate way, choosing staff and contracting partners with due diligence, considering risks at the stages of contracting and the drafting of contracts (much litigation arises from ambiguous or clumsy drafting), minimising operational risks, complying with regulation and International Conventions to prevent Port State Control detentions, performing their obligations under contracts and choosing the right legal teams when it comes to dispute resolution process.

'Human element' factors play a great role in all areas of business. It is evident from the numerous court decisions what can go wrong and, in hindsight, what could have been avoided at the stages of corporate decision making through to the performance of contracts and up to, and including, the stage of dispute resolution.

There has been a phenomenal increase in cases of deceit, fraudulent transactions and conspiracy in commercial engagements that have reached the English courts. English judges are commercially aware of the pressures upon decision making in the business world and very astute in detecting sham transactions that would require further investigation by lifting, or piercing, the corporate veil. The law, however, cannot always help those who enter into bad bargains or contract with dubious partners.

Dr Aleka Mandaraka-Sheppard (LLB, LLM, PhD, Dip.IArb) is a dually qualified lawyer (Greece and England) and was a practising solicitor in the City of London, Head of the Shipping Law Unit, University College London and Professor of Maritime Law. She is the Founder and Chairman of the London Shipping Law Centre (LSLC) – Maritime Business Forum and practises as a Maritime Arbitrator and Mediator. Her passion has been in promoting risk management education and 'quality shipping' since 1998 through the LSLC and privately by conducting in-house seminars for shipping companies. This book was inspired by her teaching and practice in maritime law and by her students. Her other writing includes articles in various aspects of shipping law, charter parties, bills of lading, marine insurance, the right of election in contract law, damages, shipbuilding/termination, wrongful arrest of ships/need for reform, case law commentaries, book reviews, and regulation.

In her early years of studies in the UK, apart from her interest in shipping, she carried out research for her PhD into organisational behaviour and published *The Dynamics of Aggression in Women's Prisons* (1986), which gave her insights into causes of conflict, ways of resolving difficult conflict situations and the effect of regulations on deterring or aggravating misbehaviour. Her knowledge in this area has provided the backbone to her practice as a lawyer, educator, writer, risk management advisor, arbitrator and, in particular, as a mediator.

She is a supporting member of the LMAA and a member of the Baltic, the Chartered Institute of Arbitrators and the London Court of International Arbitration. She is promoting mediation and she is an accredited mediator by the ADR Group and the School of Psychotherapy and Counselling of Regent's College London.

ACKNOWLEDGEMENTS

It remains for me to express my thanks to those who have played a role in the third edition of this book. In particular, I am grateful to: my research assistants Karolina Harvey, John Almpanoudis and Serhan Hardani for their assistance and diligence at various stages; the publishers for providing a research fund for this purpose and for the staunch support of the editors, Faye Mousley, and Alexia Sutton; copyeditor, Louise Smith and project manager, James Sowden; Alan Van Praag for his unique contribution to this edition with his authoritative writing about the Rule B Attachment; Måns Jacobsson for his invaluable comments and suggestions made on the chapter on Pollution Damage and Compensation, which I have restructured and rewritten; (for the second edition, the pollution chapter had been written by Elizabeth Blackburn QC, to whom I am still grateful, for she provided the backbone of the chapter); Professor John Hare for confirming my correct understanding of the function of 'associated ship arrest' in the piercing of corporate veil under South African law; Michael Howard QC for his valuable and thoughtful comments on 'wrongful arrest of ships' and on 'environmental salvage'; Nick and George Tsavliris for providing me with material about developments in salvage; and Andrew Mitchell of Global Marine Consultants for his valuable comments on technical matters and the ISM. Of course, it goes without saying that my thanks are due to my family and friends for their patience waiting to see me emerge free from the writing of this edition and, in particular, to my husband Colin for providing me with good nutrition, particularly during the intensive time of writing. Exchanges of views in some areas of the law with him and our son, Emmanuel, were of particular encouragement.

Furthermore, I am particularly grateful to Sir Bernard Rix for his generosity in writing the Foreword to this edition.

Although every effort has been made to avoid mistakes and correct inescapable and irritating typographical errors, responsibility for any, if they exist, and for the views expressed in the text remains with me, but, in this litigious era, I should add that no responsibility is accepted to any person who relies on any statements contained in this book; for their own risk management, they should seek the advice of their lawyers.

The law is intended to be that as it stood on 15 March 2013 with regard to the first volume and on 15 May 2013 with regard to the second volume, but some important decisions published after these dates were considered at the proofs stage and are mentioned as much as space could permit.

Dr Aleka Mandaraka-Sheppard
Practising Maritime Arbitrator and Mediator
London Shipping Law Centre – Maritime Business Forum

CONTENTS

Foreword to the first edition by The Rt Hon. The Lord Mustill of Pateley Bridge vii
Foreword to the second edition by The Rt Hon. The Lord Clarke of Stone-cum-Ebony ix
Foreword to the third edition by The Rt Hon. Sir Bernard Rix xi
Preface to the third edition xiii
Biography xvii
Acknowledgements xviii
Table of Cases xxxix
Table of Statutes lxi
Table of Foreign Statutes lxvii
Table of Statutory Instruments lxviii
Table of European Council Directives and Regulations lxxi
Table of International Conventions lxxv
List of Abbreviations lxxxiii

PART I: OVERARCHING ASPECTS OF RISK MANAGEMENT **1**

CHAPTER 1—MANAGING RISKS IN THE TWENTY-FIRST CENTURY: AN OVERVIEW 3

CHAPTER 2—THE REGULATORY REGIME: EU AND IMO DEVELOPMENTS 27

CHAPTER 3—CONTEXT OF REGULATORY ENFORCEMENT: THE ISM, THE ISPS, VETTING AND DETERRENCE 67

CHAPTER 4—ATTRIBUTION OF LIABILITY: RISK MANAGEMENT IN THE CONTEXT OF THE ISM 97

PART II: OWNERSHIP ASPECTS AND MANAGEMENT OF RISKS **133**

CHAPTER 5—SHIP-OWNERSHIP AND SHIP MANAGERS' RISKS 135

CHAPTER 6—RISKS IN THE MORTGAGE OF SHIPS 169

CHAPTER 7—SHIPBUILDING CONTRACTS AND RISKS 221

CHAPTER 8—RISKS IN SHIP SALE AND PURCHASE 291

PART III: SHIP AND PORT RISKS AND LIABILITIES 385

CHAPTER 9—RISKS AND LIABILITIES ARISING FROM COLLISIONS AT SEA 387

CHAPTER 10—RISKS AND LIABILITIES UNDER SALVAGE 481

CHAPTER 11—RISKS AND LIABILITIES UNDER TOWAGE CONTRACTS 581

CHAPTER 12—LIABILITY AND RISKS IN GENERAL AVERAGE 653

CHAPTER 13—RISK MANAGEMENT BY HARBOUR AUTHORITIES: LIABILITIES RELATING TO PORTS, PILOTS AND WRECK REMOVAL 679

PART IV: COMPENSATION FOR LIABILITIES AND LIMITATION UNDER INTERNATIONAL CONVENTIONS 737

CHAPTER 14—LIMITATION OF LIABILITY FOR MARITIME CLAIMS 739

CHAPTER 15—LIABILITY, LIMITATION AND COMPENSATION FOR PASSENGERS' CLAIMS 791

CHAPTER 16—LIABILITY, LIMITATION AND COMPENSATION FOR MARINE POLLUTION, HNS, AND NUCLEAR, DAMAGE 821

APPENDIX: IMO PROCEDURE OF ADOPTION OF A CONVENTION AND TACIT ACCEPTANCE 875

Index 887

DETAILED TABLE OF CONTENTS

Foreword to the first edition by The Rt Hon. The Lord Mustill of Pateley Bridge vii
Foreword to the second edition by The Rt Hon. The Lord Clarke of Stone-cum-Ebony ix
Foreword to the third edition by The Rt Hon. Sir Bernard Rix xi
Preface to the third edition xiii
Biography xvii
Acknowledgements xviii
Table of Cases xxxix
Table of Statutes lxi
Table of Foreign Statutes lxvii
Table of Statutory Instruments lxviii
Table of European Council Directives and Regulations lxxi
Table of International Conventions lxxv
List of Abbreviations lxxxiii

PART I: OVERARCHING ASPECTS OF RISK MANAGEMENT 1

CHAPTER 1—MANAGING RISKS IN THE TWENTY-FIRST CENTURY: AN OVERVIEW 3
1 Introduction 3
1.1 Risk 5
1.2 Risk assessment and management 6
1.3 Legal risk management 8
1.4 Risk exposure 8
1.5 Risk profile 9
1.6 Risk tolerance 9
1.7 Safety culture 10
1.8 The necessity for the CSWPMS 11
1.9 The importance of ECDIS 11
2 Understanding infrastructures of shipping companies 11
2.1 Internal infrastructures 12
2.2 Relational infrastructures 12
2.3 External infrastructures 14
3 Collective responsibility and commitment 16
3.1 Risk management standards for risk control 16

3.2 The stages of risk management 17
3.3 Enhancing safety culture through collective responsibility 24

CHAPTER 2—THE REGULATORY REGIME: EU AND IMO DEVELOPMENTS 27
1 Introduction 27
2 The Erika measures 28
2.1 The Erika I measures 29
2.2 The Erika II measures 34
2.3 The Erika III measures 39
3 General safety and environmental measures 48
3.1 Bulk carriers 48
3.2 Passenger ships and ro–ro vessels 49
3.3 ECDIS 50
3.4 Other mandatory measures 50
3.5 Ballast water and waste residue 50
3.6 Ship recycling 52
3.7 Crew training and certification 53
3.8 The Maritime Labour Convention 2006 (MLC) 53
4 The criminalisation Directives on ship-source pollution 54
4.1 The background to 2005/35 and 2009/123 Directives 54
4.2 Directive 2005/35/EC 55
4.3 The Council Framework Decision 2005/667/JHA 56
4.4 The treatment of ship-source pollution by International Conventions 57
4.5 The challenge against Directive 2005/35/EC 59
4.6 The amendments to the 2005 Directive by the 2009/123/EC Directive 64
5 Conclusion 65

CHAPTER 3—CONTEXT OF REGULATORY ENFORCEMENT: THE ISM, THE ISPS, VETTING AND DETERRENCE 67
Introduction 67
1 Context of regulatory enforcement 68
1.1 Importance and role of the ship's flag 68
1.2 Flags of convenience 69
1.3 The role of the flag State and PSC in enforcement 70
1.4 The role of classification societies 72
1.5 Industry standards on safety and quality assessment 73
1.6 Other initiatives 74
2 The ISM Code 77
2.1 Origin 77
2.2 The role of the ISM Code in safety 78
2.3 The philosophy of the Code 78
3 The core provisions of the ISM (Part A) 79
3.1 General definitions 79
3.2 The objectives of the Code 80
3.3 The functional requirements for a safety management system 80

3.4 Safety and environmental protection policy 80
3.5 Company responsibilities and authority 81
3.6 The designated person ashore (DPA) 81
3.7 Master's responsibility and authority 81
4 Remaining provisions of Part A 82
4.1 Resources and personnel 82
4.2 Shipboard operations 82
4.3 Emergency preparedness 83
4.4 Non-conformities, accidents and hazardous occurrences 83
4.5 Maintenance of the ship and equipment 83
4.6 Documentation 84
4.7 Company verification, review and evaluation 84
5 Certification and verification under Part B 84
5.1 The required certificates 84
5.2 Certification and verification 85
5.3 Interim Certification 86
6 Effect of the CSWPMS upon the ISM 87
7 Effect of ECDIS upon the ISM 87
8 Consequences of breach of the ISM provisions 88
8.1 No criminal sanctions for non-compliance 88
8.2 Criminal sanctions – the UK Statutory Instrument implementing the ISM 88
9 The deterrent effect of the ISM Code 90
10 The deterrent effect of vetting by oil companies 91
10.1 The vetting practice 91
10.2 The facts of *The Rowan* 92
10.3 The decisions 92
11 The role of the ISPS Code for security measures 94
11.1 Application 94
11.2 Requirements 95
11.3 Extent of control on entry into ports 95
11.4 The role of the master 95
11.5 Ship security alert system 96
11.6 Port facility requirements 96
11.7 Providing information to IMO 96
11.8 EU Commission inspections 96

CHAPTER 4—ATTRIBUTION OF LIABILITY: RISK MANAGEMENT IN THE CONTEXT OF THE ISM 97
1 Corporate personality and rules of attribution 97
1.1 The alter ego or identification doctrine 97
1.2 The vicarious liability doctrine 98
1.3 The *Meridian* rule of attribution 98
2 The concept of the alter ego of a corporation 98
3 The identification doctrine 100
4 The *Meridian* rule of attribution 103
5 Legal implications of the ISM upon liabilities 104

5.1 Effect of the ISM upon liability arising from the contract of carriage of goods 106
5.2 Effect of the ISM upon the insurance contract 109
5.3 Limitation of liability and the role of the ISM Code 113
5.4 Criminal liability and the role of the ISM Code 119
5.5 The implications of the ISM Code on criminal liabilities 131

PART II: OWNERSHIP ASPECTS AND MANAGEMENT OF RISKS **133**

CHAPTER 5—SHIP-OWNERSHIP AND SHIP MANAGERS' RISKS 135
Introduction 135
1 Ownership principles 135
1.1 Acquiring ownership 135
1.2 Co-ownership 136
2 Statutory overview of ownership and registration of British ships 139
2.1 The old law under the MSA 1894 139
2.2 Fundamental changes brought by the MSA 1988 139
2.3 Owning a British ship under the MSA 1988 – the British connection 140
2.4 The irregularity of MSA 1988 on fishing vessels 140
2.5 Eligibility to own a British ship under the MSA 1995 141
2.6 Eligibility to own a British fishing vessel 143
2.7 The effect of the reform upon British ship-ownership 143
2.8 Brief outline of the UK tonnage tax 144
3 Management of ships 145
3.1 General overview 145
3.2 Third-party managers 146
3.3 The ship management agreements 146
3.4 Authority of ship managers 148
3.5 The manager's obligations 152
3.6 Duties of the manager 155
3.7 Breach of contract and contractual protection of the manager and his employees 164
3.8 Insurance and risk management 166

CHAPTER 6—RISKS IN THE MORTGAGE OF SHIPS 169
1 Introduction 169
2 The nature of a ship mortgage 170
2.1 The property transfer theory – origin and deconstruction 170
2.2 The statutory nature of a ship mortgage – prevailing theory 172
2.3 The property subject to the mortgage 173
3 Effect of the statutory scheme of registration 174
4 Unregistered ships and status of an unregistered mortgage 176
5 Comparison of a ship mortgage with other types of security 177
5.1 Charge 177
5.2 Pledge 178
5.3 Common law possessory lien 178
6 Priorities of mortgages 178

6.1 Priorities between mortgages 178
6.2 Further advances 179
6.3 Effect of harbour authority's claims upon the mortgagee's priority 180
7 Conflict of laws 180
7.1 Law governing the mortgage and law of the agreement to grant a mortgage 180
7.2 Priorities between foreign liens and mortgages 181
7.3 Are there prospects for a uniform approach? 185
8 Obligations and rights of the mortgagor 186
8.1 The mortgagor is bound by contractual covenants 186
8.2 The mortgagor's statutory obligations 188
8.3 The mortgagor's right of ownership of the mortgaged ship 189
8.4 The mortgagor's right to redeem the ship – no clog on the equity of redemption 189
9 Mortgagee's rights and obligations 192
9.1 The right to take possession 193
9.2 Mode of exercising his powers 195
9.3 Mortgagee's rights and obligations in possession 196
9.4 Power of sale 198
9.5 Appointment of a receiver 206
9.6 Foreclosure 207
10 Interference with third-party contracts by mortgagee 207
10.1 The issues 207
10.2 *De Mattos v Gibson* – equitable remedy – the knowledge factor 208
10.3 *Collins v Lamport* – statutory basis – the impairment factor 210
10.4 Modern strand of authorities prior to *OBG v Allan* 211
10.5 Reformulation of economic torts: *OBG v Allan* 215
11 Risk management and insurance issues of the mortgagee 218

CHAPTER 7—SHIPBUILDING CONTRACTS AND RISKS 221
1 Introduction 221
2 Nature of shipbuilding contracts 223
2.1 Is it a contract for sale or a contract of construction and sale? 223
2.2 The importance of determining the nature of the contract 224
3 Pre-contract stage 227
3.1 Legal effect of an invitation to tender, letter of intent and bridging contract 227
3.2 Legal significance of representations made during negotiations 228
4 The making of a shipbuilding contract and risk management 229
4.1 What makes a binding contract? 229
4.2 Condition precedent or condition subsequent? 230
4.3 Other essential terms 231
5 Types of contractual terms 232
5.1 General 232
5.2 Implied terms at common law 233
5.3 Implied terms under SOGA 1979 233
5.4 Exclusion clauses and the UCTA 1977 238

6 General framework of shipbuilding contracts 240
6.1 An outline of the SAJ contract 240
6.2 An outline of the NEWBUILDCON 241
6.3 The specification 241
7 Particular aspects of shipbuilding contracts 242
7.1 Option agreements and management of risk in drafting 242
7.2 Description of vessel – class rules and regulations 244
7.3 Price and method of payment 244
7.4 The construction stage 251
7.5 Delivery – title and risk 253
8 Builder's specific obligations 254
8.1 Builder's obligation to provide defects guarantee 254
8.2 Builder's obligation to insure 257
8.3 Builder's obligation to provide a refund guarantee 258
9 Events for termination by the buyer 258
9.1 Specific contractual events for buyer's right to terminate 258
9.2 The occurrence of a terminating event may not lead to termination 259
9.3 The remedy of liquidated damages instead of termination 260
9.4 Occasions for rejection of the vessel by the buyer 260
9.5 Occasions of repudiation of contract 260
10 *Force majeure* and permissible delays 261
10.1 *Force majeure* 261
10.2 Other excusable delays under the SAJ form – modifications 263
10.3 Excusable delays under the NEWBUILDCON 263
10.4 Remedies for delay 264
11 Effect of buyer's termination for builder's default 266
11.1 Discharge from primary obligations 266
11.2 The refund of prepaid instalments 266
11.3 Risk management issues 273
11.4 Completion of the ship by the buyer 275
12 Buyer's default and builder's rights 275
12.1 When is there buyer's default? 276
12.2 Effect of buyer's default 276
12.3 Builder's rights under the performance guarantee for unpaid instalments 277
12.4 Acceleration in payment or liquidated damages: are they penalty clauses? 279
12.5 Effect of termination/rescission by the builder 282
12.6 Rescission by the builder and risk management 284
13 Assignment 284
14 Dispute resolution 285
15 Manufacturer's or builder's liability to third parties 286

CHAPTER 8—RISKS IN SHIP SALE AND PURCHASE 291
1 Introduction 291
Section A: The negotiations and contract stage 293
2 The making of the contract 293

2.1 How English courts view the concept of good faith 293
2.2 The effect of 'using best endeavours' to negotiate in good faith 294
3 Is there an obligation for disclosure by the seller? 296
3.1 What is the effect of *caveat emptor*? 296
3.2 Statements made during negotiations 296
3.3 When a representation inducing a contract amounts to misrepresentation 297
3.4 Inducement and causation 300
3.5 Exception clauses and estoppel 301
3.6 Curtailment of exception clauses by s 3 of the Misrepresentation Act 1967 303
3.7 Remedies under the Misrepresentation Act 305
3.8 Brokers be aware to manage your risks 307
4 On the making of a binding contract and risk management 308
4.1 Express your intention clearly 308
4.2 What do 'subjects' mean? 310
4.3 The effect of non-signing of a formal document upon the validity of the contract 314
4.4 The effect of 'buyer to be nominated' 316
5 Classification of terms 319
5.1 At common law 319
5.2 Under SOGA 1979 320
Section B: Contractual terms under standard forms 322
6 Pre-inspection stage 322
6.1 Payment of the deposit 323
7 Inspections by the buyer 327
8 Inspection by classification society (dry-docking) 328
9 Notice of readiness 329
9.1 When payment of the price is arranged 330
9.2 Deliverable state 331
9.3 Essential documentation for exchange at delivery 334
10 Sellers' obligations under cl 9 335
10.1 Sellers' undertaking 335
10.2 Construction of cl 9 by the courts 336
10.3 Safeguarding against breach of cl 9 338
11 Condition of vessel on delivery 339
11.1 'As is' provision – fair wear and tear excepted 340
11.2 'As is' provision but class free of recommendation 340
11.3 Free of average damage as an additional exception to 'as is' 340
11.4 Class maintained as an additional exemption to 'as is' 341
11.5 All other certificates 341
11.6 Notification to class 341
11.7 *What* matters need to be notified and when 343
11.8 Clause 11 under the 1993 and the 2012 forms 344
11.9 The effect of 'as is' or 'as she was' upon s 14(2) of SOGA 345
12 The closing meeting 349
13 Available options in the event of non-performance by the one party 349
14 Sellers' remedies 351

15 Buyers' remedies 351
15.1 Delay in delivery or non-delivery as per contract 351
15.2 Other breaches by the seller 353
15.3 Breach of statutory terms by the seller 353
16 Risk management issues for buyers 354
16.1 Considerations before exercising the option to reject the ship 354
16.2 Is a freezing injunction a protective measure for the buyer? 354
Section C: Post-delivery and issues of damages 360
17 Post-delivery matters 360
18 Measure of damages 360
18.1 Causation and remoteness 361
18.2 Measure of damages for breach by the seller 367
18.3 Mitigation 368
19 Currency of loss 373
20 Civil liability of classification societies to buyers and other third parties 374
20.1 Is there a duty of care owed to third parties? 375
20.2 A comparison with the regulatory regime applicable to the air industry 380
20.3 Comments 382
20.4 The American approach 382
20.5 Conclusion 383

PART III: SHIP AND PORT RISKS AND LIABILITIES **385**

CHAPTER 9—RISKS AND LIABILITIES ARISING FROM COLLISIONS AT SEA 387
Introduction 387
1 The Collision Regulations and their application 388
1.1 Origins of the Regulations 388
1.2 Statutory presumption of fault and its subsequent abolition 388
1.3 The law and regulations at present 389
1.4 Ships being subject to the Collision Regulations 390
1.5 Definition of vessel and ship 391
1.6 Types of Colregs 391
2 Criminal liability 401
2.1 General 401
2.2 Statutory offences under the MSA 1995 402
2.3 Involuntary manslaughter for breach of duty 408
2.4 New statutory offence 410
3 Civil liability 411
3.1 Introduction 411
3.2 Who may be liable? 412
3.3 Breach of the duty of care 419
3.4 Causation in fact 422
3.5 Causation in law 424
3.6 Defences available to the defendant 425
3.7 The proportionate fault rule 434
3.8 Claims for loss of life and personal injury 445
3.9 Contrast claims in relation to cargo damage 446
3.10 Contribution between joint tortfeasors 449

3.11 Damages and the rule of remoteness of damage 451
3.12 Assessment of damages 463
4 Limitation periods for commencement of claims 477
5 Insurance issues 478

CHAPTER 10—RISKS AND LIABILITIES UNDER SALVAGE 481
1 The concept of salvage under maritime law 482
1.1 Definition 482
1.2 Origin 482
1.3 Foundation of a right for an award 483
2 Salvage under contract 483
3 The Salvage Conventions 484
3.1 Historical development of the revision of salvage law 484
4 Application of the 1989 Salvage Convention 487
4.1 General application 487
4.2 'Relevant waters' 488
4.3 Recognised subject of salvage 488
5 Elements of salvage 492
5.1 Danger – General principles 492
5.2 Voluntary services 497
5.3 Success 507
6 Salvage agreements 510
6.1 Historical development 510
6.2 The role of the Convention and other legislation 511
6.3 Court's intervention 512
7 The master's authority to enter into salvage agreements 516
7.1 Master's authority at common law 516
7.2 Master's authority under the Convention 523
8 Duties and conduct of salvors 524
8.1 Best endeavours 525
8.2 Due care 529
8.3 Negligence occurring before salvage services were rendered 539
9 The position of several salvors 540
9.1 Dispossession of one salvor by another under maritime law salvage 540
9.2 Dismissal of a salvor 541
9.3 The position of several salvors under the Salvage Convention 1989 543
10 Duties of the owner of property in danger 543
10.1 Duty to co-operate under the Convention 543
10.2 Duty to co-operate under common law 544
10.3 Duty to co-operate under contract 544
10.4 Obligation to provide security to salvors 545
11 Assessment of the award and special compensation 546
11.1 The criteria for assessing the salvage award 546
11.2 Criteria for special compensation 549
11.3 Article 14 does not provide for environmental salvage 552
11.4 Some issues for consideration 553
12 Problems arising from the drafting of Art 14 of the Convention 553
12.1 Territorial limits 554
12.2 Substantial physical damage 555

12.3 Threatened damage 555
12.4 Fair rate 555
12.5 The increment 556
12.6 Security for special compensation 556
13 The solution provided by the SCOPIC 556
13.1 The initiative 556
13.2 The sub-clauses 557
14 LOF 2000 and 2011: overview 561
14.1 LOF 2000 561
14.2 Changes made by LOF 2011 562
14.3 Changes to the LSSA clauses 562
15 Apportionment and payment 564
16 Jurisdiction 564
17 Time limits 565
18 Government intervention 566
18.1 The SOSREP 566
18.2 Potential offences by the salvor or harbour master 567
18.3 Places of refuge 568
19 Responder immunity 571
20 Environmental salvage 571
20.1 The background 571
20.2 The reasons for the proposal 572
20.3 The Proposal 572
20.4 Some views by commentators 574
20.5 The writer's views 575
20.6 The present status of the ISU proposal 579

CHAPTER 11—RISKS AND LIABILITIES UNDER TOWAGE CONTRACTS 581
1 Introduction 581
2 Definitions 582
2.1 Old definitions under common law 582
2.2 Definitions under the UKSTC 1986 583
2.3 Under TOWCON/TOWHIRE 583
3 Towage versus salvage 583
3.1 Under the Salvage Convention 1989 584
3.2 Under UKSTC 1986 584
3.3 Under TOWCON/TOWHIRE 584
3.4 Under common law 584
4 The making of a binding contract 587
4.1 Authority of the master 587
4.2 Authority of the master to bind the cargo-owners 589
4.3 Authority of the tugmaster 589
4.4 Pre-contractual duties 592
4.5 Unfair contract terms 594
4.6 Contract for services 595
5 Commencement, duration, interruption, termination 595
5.1 Commencement 595

5.2 Commencement and duration under the UKSTC 595
5.3 Examples at common law 596
5.4 Consequences of interruption of towing 599
5.5 Termination of towing 600
6 Duties of the tug-owner 601
6.1 Fitness of the tug 601
6.2 The position of fitness when a specific tug is requested 608
6.3 To use best endeavours to complete the towage 610
6.4 The duty to exercise proper skill and diligence throughout 612
7 Duties of the tow 613
7.1 Duty to specify what is required and to disclose the condition of the tow 613
7.2 The condition of the tow 613
7.3 Duty to exercise due care and skill during the towage 616
7.4 To pay remuneration to the tug 617
8 Relationship between tug and tow and their liabilities to third parties 617
8.1 Liability between tug and tow under the UKSTC 617
8.2 Tug, tow and third parties 618
9 Exclusion from liability and indemnity clauses 624
9.1 The ambit of the exception clauses 624
9.2 Indemnity clause 627
9.3 Limitations to exclusion and indemnity clauses 629
10 The substitution and Himalaya clause of the UKSTC 634
10.1 Substitution of tugs, authority to subcontract and transfer of benefits 634
10.2 Transfer of contract rights to a third party 635
11 Limitation of liability 638
12 Liabilities under Offshore towage contracts 640
12.1 Introduction 640
12.2 Allocation of liability between tug and tow 640
13 Offshore supplytime charters 650
13.1 Allocation of risks under SUPPLYTIME 89 650
13.2 Allocation of risks under SUPPLYTIME 2005 651

CHAPTER 12—LIABILITY AND RISKS IN GENERAL AVERAGE 653
1 Introduction 653
1.1 Definitions 653
1.2 Basis of the obligation 654
1.3 Who pays for the loss? 655
1.4 Property subject to GA 655
1.5 Examples of GA 655
2 The York–Antwerp Rules 656
2.1 Origin and application 656
2.2 Construction 657
2.3 Authority to act in GA 659
3 Conditions giving rise to GA 660
3.1 Danger or peril to the common adventure 660
3.2 Extraordinary expenditure or sacrifice 663

3.3 Voluntary, or intentional, and reasonable 664
3.4 Preservation property imperilled 665
4 Causation 665
4.1 Direct consequence 665
4.2 Foreseeability and break in the chain of causation 665
5 Effect of fault on GA entitlement 666
5.1 Remedies or defences – the principle 666
5.2 Negligence 667
5.3 No liability to contribute 667
6 Accrual of the cause of action 674
7 Security 675
7.1 Right to a possessory lien 675
7.2 Forms of security 675
7.3 Non-separation agreement 676
7.4 Time limit 677

CHAPTER 13—RISK MANAGEMENT BY HARBOUR AUTHORITIES: LIABILITIES RELATING TO PORTS, PILOTS AND WRECK REMOVAL 679
Introduction 679
Section A: Law and regulations affecting harbours 680
1 Sources of port powers and definitions 680
1.1 Statutes and regulations regarding harbours' powers 680
1.2 Definitions 682
2 Types of harbour authority 683
3 Legislation for the protection of the environment 684
3.1 Oil pollution legislation and powers of the Secretary of State 684
3.2 The role of the port in inspections and enforcement of legislation 686
4 Powers and duties of harbour authorities 687
4.1 General powers 687
4.2 Duties of harbour authorities in a risk management era 687
4.3 Statutory duties and liabilities 690
5 Liability of ship-owners for damage caused to harbours 703
5.1 Statutory cause of action against the registered owner of a ship 703
5.2 Is a defence of contributory negligence sustainable? 709
5.3 Other options for the owner 710
5.4 Recoverable damages by the harbour 711
6 Harbour dues 711
7 Port security 712
Section B: Pilotage and risks 712
1 Introduction 712
1.1 Pilots' function 712
1.2 The Statutes and further developments 713
2 Duties of a competent harbour authority in relation to pilotage 714
2.1 Obligation to provide pilotage services 714
2.2 Authorisation of pilots 716

3 Duties of masters and pilots in a compulsory pilotage area 718
3.1 Rules of engagement 718
3.2 Offence not to have a pilot 718
4 Pilot's authority and relationship between master and pilot 719
4.1 Who is in command? 719
4.2 Respective roles 719
4.3 Exchange of information 719
4.4 Reporting duties 720
4.5 Respective duties under common law 721
5 Liability of a pilot 721
5.1 Criminal liability 721
5.2 Civil liability 722
6 Liability of harbour authorities with respect to pilotage 722
7 Liability of the ship-owner for negligence of the pilot 723
7.1 Statutory provisions 723
7.2 How the courts have dealt with pilots' negligence 724
7.3 Comments 728
8 Charges by the competent harbour authority 730
9 Conclusion 730
Section C: The WRC 2007 731
1 Introduction 731
1.1 Application 731
1.2 Objectives of the Convention 732
2 Fundamental provisions 732
2.1 General principles: proportionality and reasonableness 732
2.2 Obligations under the Convention 733
2.3 What is a hazard? 733
2.4 Liability of the registered owner 734
2.5 Compulsory insurance 734
2.6 The WRC and salvors 735
2.7 The WRC and places of refuge 735
2.8 Coming into force 736

PART IV: COMPENSATION FOR LIABILITIES AND LIMITATION UNDER INTERNATIONAL CONVENTIONS 737

CHAPTER 14—LIMITATION OF LIABILITY FOR MARITIME CLAIMS 739
1 Introduction 739
1.1 Justification of limitation 739
1.2 Modern trends: overview 740
2 Scope of the LLMC 741
2.1 Background to LLMC 1976 and recent developments 741
2.2 Application of the LLMC and limitations 742
3 Persons entitled to limit 744
3.1 Ship owners and others 744
3.2 Salvors 748
3.3 The liability insurer 749

3.4 Harbour authorities 750
4 Claims subject to limitation 750
4.1 The UK treatment of claims by passengers (for loss of life and personal injury) 751
4.2 Are litigation costs claims included? 751
4.3 All claims, whether for damages or for a debt or indemnity (Art 2(1)(2)) 752
4.4 Claims occurring on board or in direct connection with the operation of the ship or with salvage operations (Art 2(1)(a)) 752
4.5 Claims for loss resulting from delay (Art 2(1)(b)) 758
4.6 Claims for rights that have been infringed (Art 2(1)(c)) 758
4.7 Cost incurred for wreck removal (Art 2(1)(d),(e)) 758
4.8 Claims in respect of measures taken in order to avert or minimise loss (Art 2(1)(f)) 761
5 Claims excepted from limitation (Art 3(a)–(e)) 761
5.1 Salvage and contribution in GA claims 762
5.2 Claims for oil pollution (dealt with by special legislation) 762
5.3 Nuclear damage claims 762
5.4 Claims by the master and crew against employers 762
6 Exclusion of total liability 763
6.1 Loss caused by fire on board: old law 763
6.2 Loss by fire on board, or loss of valuables by theft: present law 763
7 Conduct barring limitation or exclusion of liability 764
7.1 Comparison between Convention provisions 764
7.2 The test barring limitation: comparison between Conventions 767
7.3 The mental element of test under the 1976 Convention 774
8 Establishment of the limitation fund 781
8.1 Procedural matters under the Convention 781
8.2 Counterclaims 785
8.3 Procedure in the Admiralty Court in relation to limitation (brief account) 786
9 The 1996 Protocol and recent developments 787
9.1 General provisions 787
9.2 The Limits under the Protocol 787
9.3 The IMO Resolution LEG 5(99) 788
9.4 The EU Directive for compulsory insurance 789

CHAPTER 15—LIABILITY, LIMITATION AND COMPENSATION FOR PASSENGERS' CLAIMS 791
1 Introduction 791
1.1 A shift from fault-based to strict liability 791
1.2 The background 792
1.3 The developments leading to the adoption of the 2002 Protocol 793
2 The PAL 1974 Convention 794
2.1 Application and scope 794
2.2 Exclusion of application 795
2.3 Definitions 795
2.4 Persons liable 797

2.5 Fault-based liability under PAL 1974 797
2.6 Presumed fault under PAL 1974 798
2.7 The relevance of risk assessment 798
2.8 Limits of liability 799
2.9 Carriage of valuables 801
2.10 Contributory negligence 802
2.11 Liability arising through the negligence of the servants or agents of the carrier 802
2.12 Time limit 802
2.13 Jurisdiction 803
2.14 Contracts of carriage through travel agents 803
3 Relationship between PAL 1974, the LLMC 1976 and the LLMC Protocol 1996 804
3.1 PAL 1974 and LLMC 1976 804
3.2 The 1996 Protocol to the 1976 LLMC and PAL 1974 805
4 The 2002 Protocol to the PAL 1974 Convention (PAL 2002) 806
4.1 The status of the PAL 2002 Protocol internationally 806
4.2 Status of the PAL 2002 Protocol at the EU level 807
4.3 Two bases of liability and two-tier limits under the PAL 2002 807
4.4 Period and extent of liability 809
4.5 Right of recourse or of the defence of contributory negligence 810
4.6 Financial security (compulsory insurance and direct action) 810
4.7 The right to limit liability and loss of it 811
4.8 Time limit for claims 812
4.9 Competent jurisdiction and recognition of judgments 813
4.10 Invalidity of contractual provisions 814
5 The IMO Reservation/Guidelines 2006 815
5.1 The background 815
5.2 The broad provisions of the Reservation/Guidelines 816
6 The Passengers Liability Regulation (PLR 2009) 817
6.1 Scope 818
6.2 Application 818
6.3 Additional provisions 818
7 The MS (Carriage of Passengers by Sea) Regulations 2012 819
8 Conclusion on the amounts of potential liability 820

CHAPTER 16—LIABILITY, LIMITATION AND COMPENSATION FOR MARINE POLLUTION, HNS, AND NUCLEAR, DAMAGE 821
Introduction 821
1 Related International Conventions 822
1.1 UNCLOS 822
1.2 MARPOL 824
1.3 SOLAS 824
1.4 The Intervention Convention 825
1.5 OPRC 825
1.6 Convention on Prevention of Marine Pollution by Dumping 826
1.7 Anti-fouling 827
1.8 Ballast water management 827

1.9 Recycling 828
1.10 The Wreck Removal Convention 828
1.11 The Salvage Convention 828
1.12 The system in the United States: OPA 1990 828
2 The international oil pollution compensation regime 829
2.1 Overview 829
3 The three-tier system of compensation 832
3.1 The 1992 CLC: first tier 832
3.2 The 1992 Fund: second tier 832
3.3 The 2003 Supplementary Fund: optional third tier 833
3.4 Limitation of liability 833
3.5 Information on the compensation regime 834
3.6 The relevant UK legislation 834
4 Application of the 1992 CLC and Fund Conventions 834
4.1 Sea-going vessels carrying persistent oil in bulk 834
4.2 What is a 'vessel'? 835
4.3 Geographical application 836
4.4 Pollution damage 837
4.5 Types of Pollution Damage Claim 837
4.6 Admissibility of claims and causation 839
4.7 Claims not covered by the regime 840
4.8 Possible claims by salvors 840
5 Liability, defences and compulsory insurance under the CLC 1992 842
5.1 Strict liability 842
5.2 Defences 842
5.3 Compulsory insurance or other financial security 845
6 Channelling provisions and the ship-owner's rights of recourse 846
6.1 Who are protected by channelling? 846
6.2 Interpretation of, and exception to, channelling 847
6.3 Joint and several liability when two or more ships are involved in an incident 848
7 Constitution of the limitation fund under CLC 849
7.1 The limitation fund 849
7.2 Bar to any other actions against the assets of the owner 849
7.3 Bar under MSA to other proceedings against other liable person 850
7.4 Restriction under MSA on enforcement after establishment of limitation fund 850
8 Jurisdiction and procedural matters 850
8.1 Which court has jurisdiction 850
8.2 Bringing claims for pollution damage under MSA 851
8.3 Time bars 851
8.4 Recognition and enforcement of a CLC judgment 852
9 Differences between the 1969 CLC and 1992 CLC 852
10 The 1992 Fund Convention 852
10.1 Limited redress against the 1992 Fund in respect of pollution damage caused in 1969 CLC States 853
10.2 When the 1992 Fund will meet claims 853

10.3 Fund defences 854
10.4 Rights of subrogation 854
10.5 Time bar 855
10.6 Jurisdiction 855
10.7 Judgments 855
11 The 2003 Supplementary Fund Protocol 856
11.1 Why is it needed? 856
11.2 Applicability 856
11.3 Conditions for the Supplementary Fund liability 857
11.4 When should the Supplementary Fund pay? 857
11.5 The 'membership' fee 858
11.6 Communication obligations and the denial of compensation 858
11.7 Time bar 859
11.8 Rights of subrogation 859
11.9 Jurisdiction 859
11.10 Recognition and enforcement 860
12 STOPIA and TOPIA 860
12.1 Background to further contributions to compensation by ship-owners 860
12.2 STOPIA 861
12.3 TOPIA 861
12.4 General scope of STOPIA and TOPIA 861
13 Common law 861
14 The Bunkers and the HNS Conventions 862
14.1 The Bunkers Convention 862
14.2 The HNS Convention 866
15 Criminal liabilities under the MSA 1995 relevant to oil spills 872
16 Nuclear Damage Conventions 872
16.1 Introduction 872
16.2 Common elements of the Vienna and Paris Conventions 873
16.3 The UK legislation 874
16.4 The 1971 Convention on Civil Liability for Maritime Carriage of Nuclear Material 874

APPENDIX: IMO PROCEDURE OF ADOPTION OF A CONVENTION AND TACIT ACCEPTANCE 875
Adopting a convention 875
Entry into force 876
Signature, ratification, acceptance, approval and accession 877
Accession 878
Amendment 878
Enforcement 879
Relationship between Conventions and interpretation 880
Uniform law and conflict of law rules 880
IMO Conventions 880
Tacit acceptance procedure 881

Index 887

This page intentionally left blank

TABLE OF CASES

A *v.* B [1989] 2 Lloyd's Rep 423 .... 355–6, 357, 359
Abaris, The (1920) 2 LlL Rep 411 616
Aboukir, The (1905) 21 TLR 200 599
Achilleas, The. Transfield Shipping Inc. *v.* Mercator Shipping Inc. (The Achilleas) [2007] 1 Lloyd's Rep 19; [2007] EWCA Civ 901, [2008] 1 All ER (Comm) 685 (CA); [2008] UKHL 48; [2009] 1 AC 61 .... 362, 363, 365, 644
Aconcagua, The. Compania Sud Americana de Vapores SA *v.* Sinochem Tianjin Limited Aconagua [2010] EWCA Civ 1403 .... 673, 674
Action, The [1987] 1 Lloyd's Rep 283 .... 318, 319, 331, 332, 333
Activa DPS Europe Sarl *v.* Pressure Seal Solutions Ltd (t/a Welltec System (UK) [2009] 1 AC 61; [2012] EWCA Civ 943 368
Actor, The. PT Berlian Laju Tanker *v.* Nuse Shipping (The Actor) [2008] EWHC 1330 (Comm) 323, 329, 330
Adam Opel GmbH *v.* Mitras Automotive (UK) Ltd Costs [2007] EWHC 3481 (QB) 251
Adcock *v.* Blue Sky Holidays [1982] CLY 74.u (CivDiv, CA) 804
Adler *v.* Dickson [1955] 1 QB 158 (CA) 636
Admiral Management Services Ltd *v.* Para Protect Europe Ltd [2002] EWHC 233 699
Admiralty Commissioners *v.* Owners of the SS Susquehanna [1926] AC 655 471
Admiralty Commissioners *v.* SS Chekiang [1926] AC 637 (HL) 472
Admiralty Commissioners *v.* SS Volute [1922] 1 AC 129 .... 427, 440, 441
Adyard Abu Dhabi *v.* SD Marine Services [2011] EWHC 848 (Comm) 263
Aegean Sea, The [1997] 2 Lloyd's Rep 507; [1998] 2 Lloyd's Rep 39 .... 753, 754, 755, 757
Afovoc, The [1983] 1 Lloyd's Rep 335 330
Africa Occidental, The [1951] 2 Lloyd's Rep 107 507
Aga, The [1968] 1 Lloyd's Rep 431 672
Air Studios (Lyndhurst) Ltd (t/a Air Entertainment Group) *v.* Lombard North Central plc [2012] EWHC 3162 (QB); [2013] 1 Lloyd's Rep 63 .... 353, 367
Air Transworld *v.* Bombardier [2012] EWHC 243 (Comm); [2012] 1 Lloyd's Rep 349 .... 236, 321, 347
Akerblom *v.* Price, The (1881) 7 QBD 129 500
Aktion, The [1987] 1 Lloyd's Rep 283 232
Al Tawfiq, The. Linett Bay Shipping Co. Ltd *v.* Patraicos Gulf Shipping Co. SA (The Al Tawfiq) [1984] 2 Lloyd's Rep 598 352
Alaskan Trader, The. Clea Shipping Corporation *v.* Bulk Oil International Ltd (The Alaskan Trader) (No 2) [1983] 2 Lloyd's Rep 645 349
Albion, The [1953] 1 Lloyd's Rep 239 .... 390, 400–1
Albion, The (1861) Lush 282 586
Albionic, The [1942] P 81 498
Alcoa Minerals of Jamaica *v.* Broderick (2000) *The Times*, 22 March (PC) 463
Aldora, The [1975] 1 Lloyd's Rep 617; [1975] QB 748 .... 496, 499, 586
Alenquer and Rene, The [1955] 1 Lloyd's Rep 101 .... 510, 530–1, 532
Alfred McAlpine Capital Projects Ltd *v.* Tilebox Ltd [2005] BLR 271 279
Alfred Trigon, The. Piccinini *v.* Partrederiet Trigon II (The Alfred Trigon) [1981] 2 Lloyd's Rep 333 340
Algrete Shipping Co. Inc. (RJ Tilbury and Sons (Devon) Ltd) *v.* IOPC Fund 1971: The Sea Empress [2003] EWCA Civ 65; [2003] 1 Lloyd's Rep 327 .... 834, 835, 840, 854

Aliakmon, The [1986] AC 785 474
Allen *v.* Flood [1898] AC 1 216–17
Allgemeinetreuhand AG *v.* the Arosa Kulm (owners) (The Arosa Kulm) [1959] 1 Lloyd's Rep 212 178
Alpha, The. Corfu Navigation Co. *v.* Mobil Shipping Co. Ltd (The Alpha) [1991] 2 Lloyd's Rep 515 .... 658, 665, 667
Alphacell *v.* Woodward [1972] 2 All ER 475 567
Altair, The. Ministry of Trade of the Republic of Iraq *v.* Tsavliris Salvage (International) Ltd (The Altair) [2008] 2 Lloyd's Rep 90 524
Amer Energy, The. ASM Shipping Ltd of India *v.* TTMI Ltd of England (The Amer Energy) [2009] 1 Lloyd's Rep 293 365
American Cyanamid *v.* Ethicon [1975] AC 396 355
American Farmer, The (1947) 80 LIL Rep 672 .... 504, 540
Amerique, The (1874) LR 6 PC 468 (PC) 547, 548
Amstelslot, The [1963] 2 Lloyd's Rep 223 (HL) 106
Anangel Atlas Compania Naviera *v.* Ishika Heavy Industries Co. Ltd (No 2) [1990] 2 Lloyd's Rep 526 247–8
Anchor Line (Henderson Bros) Ltd *v.* Dundee Harbour Trustees (1922) 38 TLR 299 715
Anderson *v.* Butler's Wharf Co. Ltd (1879) 48 LJ Ch 824 197
Anderson *v.* Ocean Steamship (1884) 10 App Cas 107 589
Andreas P, The. K/S Stamar *v.* Seabow Shipping Ltd (The Andreas P) [1994] 2 Lloyd's Rep 183 340
Andrews *v.* DPP [1937] 2 All ER 552; [1937] AC 576 409
Andrico Unity, The (1987) 3 SALR 794 184
Angel Bell, The. Gillespie Bros & Co. Ltd *v.* Iraqi Ministry of Defence (The Angel Bell) [1979] 2 Lloyd's Rep 491 180
Angelic Spirit, The [1994] 2 Lloyd's Rep 595 398
Angelic Star, The [1988] 1 Lloyd's Rep 122 (CA) 192, 279, 280
Anglo Russian Merchant Traders Ltd *v.* Batt (John) & Co. Ltd [1917] 2 KB 679 525
Anglo-African Merchants *v.* Bayley [1970] 1 QB 311 307
Annapolis, The (1861) Lush 355 585
Anneliese, The [1970] 1 Lloyd's Rep 355 .... 436, 437
Anns *v.* Merton London Borough Council [1978] AC 728 378
Anonity, The [1961] 1 Lloyd's Rep 203 .... 117, 118
Antigoni, The [1991] 1 Lloyd's Rep 209 106
Anton Durbeck GmbH *v.* Den Norske Bank ASA [2003] QB 1160 218
Anton Durbeck GMBH *v.* Den Norske Bank ASA (The Tropical Reefer No 2) [2006] 1 Lloyd's Rep 93 .... 215, 218
APL Sydney, The. Strong Wise Ltd *v.* Esso Australia Resources Ltd (The APL Sydney) [2010] FCA 240 reported [2010] 2 Lloyd's Rep 555 752
Apollon, The [1971] 1 Lloyd's Rep 471 598
Apostolis, The [1996] Lloyd's Rep 475; [1997] 2 Lloyd's Rep 241 (CA) 107
Appollo, The (1880) 1 Hagg 306 137
Aquafaith, The. Isabella Shipowner SA *v.* Shagang Shipping Co. Ltd (The Aquafaith) [2012] 2 Lloyd's Rep 61 .... 349, 350
Arbuthnott *v.* Fagan [1995] CLC 1396 272
Arcos Ltd *v.* Ronnasen [1933] AC 470 (HL) 233
Argentino, The. Owners of the Steamship Gracie *v.* Owners of the Steamship Argentino (The Argentino) (1888) 14 App Cas 519 (HL) 467, 468, 469
Argo Hope, The [1982] 2 Lloyd's Rep 559 397
Arietta, The [1969] 2 Lloyd's Rep 78 436
Arkwright *v.* Newbold (1881) 17 Ch D 301 298
Armitage *v.* Nurse [1997] 2 All ER 705 .... 61, 648
Ashington Piggeries Ltd *v.* Christopher Hill Ltd [1972] AC 441 (HL) 234
Asia Star, The [2010] 2 Lloyd's Rep 121 370
Asiatic Petroleum Company *v.* Lennard's Carrying Co. [1914] 1 KB 419 .... 770, 771
Assicurazioni Generali SpA *v.* Arab Insurance Group [2003] Lloyd's Rep IR 131 .... 298, 299
Assios, The [1979] 1 Lloyd's Rep 331 358
Astra Trust *v.* Adams [1969] 1 Lloyd's Rep 81 314
Athanasia Cominos, The [1990] 1 Lloyd's Rep 277 673
Athel Line Ltd *v.* Liverpoool & London War Risks Insurance Association [1944] KB 87 .... 659, 664
Atheltemplar, The [1944] KB 87 654

The Atlantic and The Wellington (1914) 30 TLR 699 ... 621
Atlantic Baron, The. North Ocean Shipping Co. Ltd *v.* Hyundai Construction Co. Ltd (The Atlantic Baron) [1979] QB 705; [1979] 1 Lloyd's Rep 89 ... 248, 251
Atlantic Emperor, The [1992] 1 Lloyd's Rep 342 ... 564
Atlas, The (1862) Lush 518 ... 530, 532
Attica Sea Carriers Corporation *v.* Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago) [1976] 1 Lloyd's Rep 250 ... 349
Attorney General of Belize *v.* Belize Telecom Ltd [2009] UKPC 10; [2009] 1 WLR 1988 ... 233, 331, 521
Attorney General of the British Virgin Islands *v.* Hartwell [2004] UKPC 12 ... 413
Attorney General's Reference No 2/1999 [2000] EWCA Crim 10 ... 126
Austin Friars Steamship Co. Ltd *v.* Spillers & Bakers Ltd [1915] 1 KB 833 (CA) ... 656
Australian Coastal Shipping Commission *v.* Green [1971] 1 Lloyd's Rep 16; [1971] 1 QB 456 ... 660, 665
The Avon and Thomas Joliffe [1891] P 7 ... 442
Avon Insurance *v.* Swire Fraser [2000] 1 All ER 573 ... 228, 298
Azimut-Benetti *v.* Darrell Marcus Healey [2010] EWHC 2234 (Comm); [2011] 1 Lloyd's Rep 473 ... 281

B Johnson & Co. (Builders) Ltd, In re [1955] Ch 634 ... 201
Babbs *v.* Press [1971] 2 Lloyd's Rep 383 ... 718
Baldry *v.* Marshall [1925] 1 KB 260 ... 347
Ballard *v.* North British Rly Co. [1923] SC (HL) 43 ... 421
Ballyalton, The [1961] 1 WLR 929 ... 700
Balmoral Group Ltd *v.* Borealis [2006] 2 Lloyd's Rep 629 ... 238, 239
Baltic Surveyor and Timbuktu, The [2002] EWCA Civ 89; [2002] 1 Lloyd's Rep 623 ... 466
Baltyk, The [1948] P 1 ... 598
Banco de Portugal *v.* Waterlow & Sons Ltd [1932] AC 452 ... 369
Banco Exterior de Espana SA *v.* Government of Namibia [1999] 2 SA 434 ... 185
Bank of Credit and Commerce International *v.* Ali [2001] 1 AC 251 ... 242
Bankhaus Wolbern & Co, Vision 93 *v.* China Construction Bank Corp., Zhejiang Branch [2012] EWHC 3285 (Comm) ... 267
Banner *v.* Berridge (1881) 18 Ch D 254 ... 199
Banque Keyser Ullman SA *v.* Scandia (UK) Insurance [1988] 2 Lloyd's Rep 514 (CA) ... 289
Barbudev *v.* Eurocom Cable Management Bulgaria EOOD [2012] Civ 548 ... 295
Barclay *v.* Poole [1907] 2 Ch 284 ... 178
Barclays Bank *v.* Poole [1907] 2 Ch 284 ... 172
Barenbels, The [1985] 1 Lloyd's Rep 528 ... 336, 337
Barnett *v.* Chelsea and Kensington HMC [1969] 1 QB 428 ... 422
Basis, The (1950) 84 LIL Rep 306 ... 620, 635
Bay Ridge, The [1999] 2 Lloyd's Rep 227 ... 309, 310
BCCI *v.* Ali [2002] 1 AC 251 ... 309
Bearn, The [1906] P 48 ... 697
Beauchamp *v.* Turrell [1952] 1 Lloyd's Rep 266 ... 752
Beaverford *v.* Kafiristan [1938] AC 136 (HL) ... 539, 540
Becker *v.* Tidewater, Inc. (5th Cir, Aug 2009) 581 F 3rd 256 No 0830183 ... 648
Bede SS *v.* River Wear [1907] 1 KB 310 ... 696, 697
Behn *v.* Burness (1863) 3 B&S 751 ... 234
Behnke *v.* Bede Shipping Ltd [1927] 1 KB 649 ... 227
Bejela, The [1994] 2 Lloyd's Rep 1 (HL) ... 658
Belize, The (2011) 828 LMLN 1, London Arbitration 7/11 ... 331
Bell *v.* Lever Brothers Ltd [1932] AC 161 ... 514, 515
Belle Usk, The [1955] 2 Lloyd's Rep 421 ... 444
Benwell Tower (1895) 8 Asp MLC 13 ... 196
Bernhard Schulte GmbH & Co. KG *v.* Nile Holdings Ltd [2004] 2 Lloyd's Rep 352 ... 294
Bernhard Schulte Shipmanagement (Bermuda) Ltd Partnership *v.* BP Shipping Ltd [2009] EWCA Civ 1407 ... 165
Bernina, The (1888) 13 App Cas 1 (HL) ... 445, 447
Betavier III, The (1925) 42 TLR 8 ... 435
BHP Petroleum Ltd *v.* British Steel plc [1999] 2 Lloyd's Rep 583 ... 643–4
Bijela, The [1993] 1 Lloyd's Rep 411 (CA), reversed [1994] 1 WLR 615 (HL) ... 658, 666
Bineta, The [1966] 3 All ER 1007 ... 135

Birkley *v.* Presgrave (1801) 102 ER 86 ... 654
Birmingham and District Land Co. *v.* London and North Western Railway Co. [1886] 34 Ch D 261 ... 628
Black *v.* Williams (1895) 1 Ch 408 ... 178, 205
Blanche, The (1887) 6 Asp MLC 272 ... 193
Blankenstein, The. Damon Compania Naviera *v.* Hapag-Lloyd Internaational SA (The Blankenstein) [1985] 1 Lloyd's Rep 93 ... 314, 315, 316, 317–18, 324, 325, 326
The Blenheim *v.* The Impetus [1959] 2 All ER 354 ... 599
Blitz, The (1992) 2 Lloyd's Rep 441 ... 180
Blyth Shipbuilding and Drydocking Co, Re [1926] Ch 494 ... 225, 253
BMBF (No 12) Ltd *v.* Harland & Wolff Shipbuilding & Heavy Industries Ltd [2001] 2 Lloyd's Rep 227 ... 275
Bon Ami, The. George *v.* Coastal Marine 2004 Ltd (The Bon Ami) [2009] EWHC 816; [2009] 2 Lloyd's Rep 356 ... 699
Borag, The. Compania Financiera Soleada SA *v.* Hamoor Tanker Corp. Inc. (The Borag) [1980] 1 Lloyd's Rep 111; [1981] 1 WLR 274 ... 156–7
Borealis AB *v.* Geogas Trading SA [2011] 1 Lloyd's Rep 482 ... 369
Borrelli *v.* Ting [2010] UKPC 21 ... 251
Borvigilant and Romina G, The [2002] EWHC 1759; [2003] EWCA Civ 935; [2003] 2 Lloyd's Rep 520 (CA) ... 590, 608, 630, 636
Boston Deep Sea *v.* Deep Sea Fisheries [1951] 2 Lloyd's Rep 489 ... 152
Boston Lincoln, The [1980] 1 Lloyd's Rep 481 ... 507
The Bow Spring *v.* Manzanillo II [2004] 1 Lloyd's Rep 647; [2005] 1 Lloyd's Rep 1 ... 394, 422
Bowbelle, The [1990] 3 All ER 476 ... 767, 783
BP Exploration Operating Co. Ltd *v.* Chevron Transport (Scotland) [2002] 1 Lloyd's Rep 77 ... 299, 300
Brabant, The [1965] 2 Lloyd's Rep 546 ... 630
Bradburn *v.* Great Western Railway Co. (1874) LR 10 Ex J ... 371
Bradshaw *v.* Ewart-James (DC) [1983] QB 671 ... 402
Bramley Moore, The. Alexender Towing *v.* Millet (The Bramley Moore) [1963] 2 Lloyd's Rep 429 (CA); [1964] P 200 ... 639, 739
Breydon Merchant, The [1992] 1 Lloyd's Rep 373 ... 757, 761
Brimnes, The [1973] 1 WLR 386 ... 330
British Sugar *v.* NEI Power Projects [1997–1998] Info TLR 353 ... 644
British Westinghouse Electric *v.* Underground Electric Railways [1912] AC 673 ... 368, 370
Brown *v.* Tanner (1868) LR 3 Ch 597 (CA) ... 196, 215
Buena Trader, The. Compania de Navegacion Pohing SA *v.* Sea Tanker Shipping Pte (The Buena Trader) 2 Lloyd's Rep 325 ... 340, 341, 342
Bugge *v.* Brown (1919) 26 CLR 110 ... 415
The Bulk Atlanta and The Forest Pioneer [2007] EWHC 84 ... 424
Bunga Melati Dua, The. Masefield AG *v.* Amlin Corporate Member Ltd (The Bunga Melati Dua) [2010] EWHC 280 (Comm), approved by the CA [2011] EWCA Civ 24 ... 664
Bunge Corporation *v.* Tradax Export SA [1981] 2 Lloyd's Rep 1 (HL) ... 232, 319, 320
Burton *v.* English (1883) 12 QBD 218 ... 654
Butler, The (1874) LR 4 A&E 178 ... 532
Bywell Castle, The (1879) 4 PD 219 ... 431, 435

Cadogan Petroleum Holdings *v.* Global Process Systems [2013] EWHC 214 (Comm) ... 325
Cairnbahn, The [1914] P 25 ... 435, 449–51
Caja de Ahorros del Mediterraneo *v.* Gold Coast [2002] 1 Lloyd's Rep 617 ... 273
Calliope, The [1970] 1 Lloyd's Rep 84 ... 430, 435
Calvert *v.* William Hill Credit Ltd [2008] EWHC 454 (Ch) ... 287
Cammell Laird & Co. Ltd *v.* The Manganese Bronze and Brass Co. Ltd [1934] AC 402 (HL) ... 237, 347
Campbell Discount Company Ltd *v.* Bridge [1962] AC 600 ... 280
Can-Arc Helicopters Ltd. v. Textron Inc. (1991), 86 D.L.R. (4th) 404 (B.C.S.C.) 38 ... 289
Cap Palos, The. Owners of the Cap Palos *v.* Alder [1921] P 458 ... 600, 624, 647
Caparo Industries plc *v.* Dickman [1990] 1 All ER 568; [1990] 2 AC 605 (HL) ... 287, 375, 376, 411, 412
Capaz Duckling, The [2007] EWHC 1630 (Comm) ... 355
Cape Hatteress, The [1982] 1 Lloyd's Rep 518 ... 264, 281

Cape Packer, The (1848) 3 W Rob 470 .... 530, 532
Capitan San Louis, The [1994] 1 All ER 1016 767
Captain Stefanos, The. Osmium Shipping Corp. *v.* Cargill International SA
(The Captain Stefanos) [2012] 2 Lloyd's Rep 46 669
Cargo ex Capella (1867) LR 1 A&E 356 539
Cargo ex Sarpedon (1877) 3 PD 28 491
Cargo ex Schiller (1877) 2 PD 145 491
Caribbean Sea, The [1980] 1 Lloyd's Rep 338 256
Carillion Construction Ltd *v.* Felix (UK) Ltd [2001] BLR 1 .... 250, 512
Carisbrooke Shipping CV5 *v.* Bird Port Ltd [2005] 2 Lloyd's Rep 626 698–9
Carlton, The [1931] P 186 625
Carrie, The [1917] PDA 224 504
Carslogie Steamship Co. Ltd *v.* Royal Norwegian Government (The Carslogie) [1952]
AC 292; [1951] 2 Lloyd's Rep 441 (HL) 425, 473
Caspian Basin, The. Bouygues Offshore SA *v.* Caspian Shipping Co. (No 4) and Ultisol
Transport Contractors Ltd *v.* Bouygues Offshore SA (No. 4) (The Caspian Basin)
[1997] 2 Lloyd's Rep 507; [1998] 2 Lloyd's Rep 461 (CA) 636, 782
Cathcart, The (1867) LR 1 A&E 314 193
Cavendish, The [1993] 2 Lloyd's Rep 292 .... 722, 727
CEF Holdings Ltd *v.* Mundey [2012] EWHC 1524 (QB) 359
Celtic King, The [1894] P 175 209
Cenargo Ltd *v.* Izar Construcciones Navale SA [2002] EWCA Civ 524 CLC 1151 (CA) 281
Cenk Kaptanoglu, The. Progress Bulk Carriers Ltd *v.* Tube City IMS LLC
(The Cenk Kaptanoglu) [2012] 1 Lloyd's Rep 501 251
Chandris *v.* Argo Insurance Co. Ltd [1963] 2 Lloyd's Rep 65 674
Channel Island Ferries Ltd *v.* Sealink Ltd [1988] 1 Lloyd's Rep 323 (CA) 262
Charlotte, The (1848) 3 W Rob 68 492
Chartbrook Ltd *v.* Persimmon Homes Ltd [2009] UKHL 38; [2009] 1 AC 101 .... 272, 309
Cheerful, The (1855) 11 PD 3 508
Cheldale, The. Morrison *v.* Greystoke Castle (The Cheldale) [1947] AC 265 660
Chevron North America, The [2001] UKHL 50; [2002] 1 Lloyd's Rep 77 709
Chicuma, The [1981] 1 Lloyd's Rep 371 330
China and South Sea Bank Limited *v.* Tan Soon Gin [1990] 1 AC 536 .... 198, 205
Choko Star, The [1990] 1 Lloyd's Rep 516 .... 518, 521, 522, 589
Christiana, The (1850) 13 ER 841 721
City Cruises plc *v.* Transport for London [2012] Lloyds Law Reports 471 422
City of Lincoln, The (1889) 15 PD 15 .... 427, 429, 451, 459
City of Rome, The (1887) 8 Asp 542 468
Clan Colquhoun, The [1936] P 153 596
Clarence, The (1850) 3 W Rob 283 464
Clarke, A [1997] LMCLQ 329 192
Classic Maritime Inc. *v.* Lion Diversified Holdings Berhad [2010] 1 Lloyd's Rep 59 365
Clayton *v.* Albertson [1972] 2 Lloyd's Rep 457 718
Clegg *v.* Andersson Nordic Marine [2003] 2 Lloyd's Rep 32 277
Cleopatra Dream, The [2011] Lloyd's Maritime Newsletter, 25 Nov 2011 505
Clipper Maritime Ltd *v.* Shirlstar Container Transport Ltd (The Anemone) [1987]
1 Lloyd's Rep 546 315
Clyde, The (1856) Swa 23 465
Clydebank Engineering *v.* Don Jose Ramos Yzquierdo Castaneda [1905] AC 6 (HL) 264, 280
CMA CGM SA *v.* Classica Shipping Co. Ltd (The CMA Djakarta) [2004]
1 Lloyd's Rep 249; [2003] EWHC 41 (Comm); [2003] 2 Lloyd's Rep 50;
[2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460 .... 740, 745, 747, 755, 757
CMA CGM *v.* HMD Ltd [2008] EWHC 2791 (Comm) 285
Colchester Borough Council *v.* Smith [1991] Ch 448 302
Collins *v.* Lamport (1864) 11 LT 497; (1864) 4 De GJ&S 500 .... 171, 172, 195, 208, 210–1, 212
Colonial Mutual General Insurance Co. Ltd *v.* ANZ Banking Group (New Zealand)
Ltd [1995] 2 Lloyd's Rep 433 (PC) 186
Colorado, The [1923] P 102 .... 182, 184, 185
Coltman *v.* Chamberlain (1890) 25 QBD 328 173
Columbus, The (1849) 3 W Rob 158 .... 464, 465, 467
Commission *v.* Council (Case C-176/03) [2005] ECR I-7879 56
Commission *v.* Greece (Case C-62/96), judgment 28 November 1997 141

Commissioner of Public Works *v.* Hills [1906] AC 368 280
Commune de Mesquer *v.* Total France SA (Case C-188/07) [2008] 3 CMLR 16, [2009] Env LR 9 51
Compania Sud American Vapores *v.* MS ER Hamburg Schiffahrtsgesellschaft mbH & Co. KG [2006] 2 Lloyd's Rep 66 672
Concordia C [1985] 2 Lloyd's Rep 55 .... 372, 373, 371
Conlon *v.* Simms [2006] EWCA Civ 1749 296
Conoco Arrow, The [1973] 1 Lloyd's Rep 86 634
Coral I, The [1982] 1 Lloyd's Rep 441 .... 393, 400
Corps & Corps *v.* The Queen of the South [1968] 1 Lloyd's Rep 182 711
Cotswold Geotechnical (Holdings) Ltd [2011] EWCA Crim 1337 130
Covington Marine Corp. *v.* Xiamen Shipbuilding Industry Co. Ltd [2006] 1 Lloyd's Rep 745 230–1
CPC Galia, The. CPC Consolidated Pool Carriers GmbH *v.* CTM CIA Transmediterreanea SA (The CPC Gallia) [1994] 1 Lloyd's Rep 68 313
CPC Group *v.* Qatari Diar [2010] EWHC 1535 (Ch) 153, 528, 610
CR Taylor (Wholesale) Ltd *v.* Hepworths Ltd [1977] 1 WLR 659 466
Credit Lyonnais Bank Nederland *v.* Export Credits Guarantee Department [2000] 1 AC 486 (HL) 413
Cremdean Properties Ltd *v.* Nash (1977) 241 EGLR 837; [1977] 2 EGLR 80; (1977) EG 547 303
Crocs Europe BV *v.* Anderson [2012] EWCA Civ 1400 158
Crooks *v.* Allan (1879) 5 QBD 38 675
Croudace *v.* Cawoods [1978] 2 LI Rep 55 644
Crusader, The [1907] P 15 512
Crystal, The [1894] AC 508 693
CS Butler, The (1874) LR 4 A&E 178 530
C.T.N. Cash and Carry Limited *v.* Gallaher Limited [1994] 4 All ER 714 .... 249, 251
Cuckmere Brick Co. Ltd *v.* Mutual Finance Ltd [1971] Ch 949 .... 198, 200, 201
Customs and Excise Commissioners *v.* Barclays Bank plc [2006] UKHL 28; [2007] 1 AC 181 287

Dadourian Group International Inc. *v.* Simms [2006] EWHC 2973 (Ch) 299, 300, 301
Daressa, The [1971] 1 Lloyd's Rep 60 458
Darfur, The [2004] 2 Lloyd's Rep 469 757
Davies *v.* Swan Motor Co. [1949] 2 KB 291 426
Davis *v.* Stena Line Ltd [2005] 2 Lloyd's Rep 13 .... 105, 797, 798
Dawkins *v.* Carnival [2011] EWCA Civ 1237; [2012] 1 Lloyd's Rep 1 .... 105, 797
De Mattos *v.* Gibson (1858) 4 De G&J 276 .... 194, 208, 209, 212, 213, 218
Dee Conservancy Board *v.* McConnell [1928] 2 KB 159 695
Deepak Fertilisers & Petrochemicals Corp. Ltd *v.* Davy McKee (London) Ltd [1999] 1 Lloyd's Rep 387 644
Delphinula, The. Anglo-Saxon Petroleum Co. Ltd *v.* The Admiralty (The Delphinula) [1947] KB 794 (CA); (1947) 80 LIL Rep 459 .... 530, 532–3, 536
Denise, The (2004) 3 December, unreported 782
Derbyshire, The [1987] 3 All ER 1068 417
Derry *v.* Peek (1889) LR 14 App Cas 337 305
Despina R, The, and The Folias [1979] 1 Lloyd's Rep 1 373
Despina R, The. The Owners of the Eleftherotria *v.* Owners of the Despina R (The Despina R and The Folias) [1979] AC 685 (HL) 475, 476
Devonshire, The [1912] AC 634; [1912] P 21 (HL) 441, 616, 619–20
The Devonshire and The St Winifred (Devonshire No 2) [1913] P 13 627–8
Devotion II, The [1979] 1 Lloyd's Rep 509 424
Dhanani *v.* Crasmanski [2011] EWHC 926 (Comm) 295
Di Ferninando *v.* Simon, Smits & Co. Ltd [1920] 3 KB 409 374
Diamond, The [1906] P 28 763
Diana Prosperity, The [1976] 2 Lloyd's Rep 621 (HL); [1976] 1 WLR 989 (HL) 231, 234
Djerada, The [1976] 1 Lloyd's Rep 50 400
Dolphina, The [2012] 1 Lloyd's Rep 304 103
Donoghue *v.* Stevenson [1932] AC 562 .... 286, 378, 411, 412, 455
Douglas, The [1882] 7 PD 151 695
Dover Harbour Board *v.* Owners of the Star Maria [2003] 1 Lloyd's Rep 183 541

Downs *v.* Chappell [1997] 1 WLR 426 299
Downsview *v.* First City Corp. [1993] AC 295 (PC) 172, 200, 201–2, 202, 206
DPP *v.* Kent and Sussex Contractors [1944] KB 146 100
Druid, The (1842) 1 W Rob 391 .... 413, 414
Drumlanrig, The [1911] AC 16 (HL) 446–9
DSND Subsea Ltd *v.* Petroleum Geo-Services ASA [2000] BLR 530 .... 250, 512
Duke of Manchester, The (1846) 2 Wm Rob 470; (1847) 6 Moo PC 91 .... 530, 539
Dundee, The (1823) 1 Hagg 109 .... 173, 412
Dundee Harbour Trustees *v.* Nicol [1915] AC 550 687
Dunlop Pneumatic Tyre Company Ltd *v.* New Garage and Motor Co. Ltd [1915] AC 79 (HL) 279, 280
Dwina, The [1892] P 58 .... 530, 532
Dyer *v.* Munday [1895] 1 QB 742 .... 414, 415
Dynamic, The. Ocean Marine Navigation Ltd *v.* Koch Carbon Inc. (The Dynamic) [2003] 2 Lloyd's Rep 693 349

E A Grimstead & Son Ltd *v.* McGarrigan [1999] EWCA Civ 3029 .... 301, 302
Eagle Star Insurance Co. *v.* Spratt [1971] 2 Lloyd's Rep 116 307
Ease Faith *v.* Leonis Marine Management Ltd [2006] 1 Lloyd's Rep 673 .... 611, 613, 643
East London *v.* Caledonian Shipping [1908] AC 271 697
Economides *v.* Commercial Union Assurance Co. plc [1998] Lloyd's Rep IR 9 296
EDI Central Ltd *v.* National Car Parks Ltd [2012] CSIH 6; 2012 SLT 421 .... 154, 526, 610
The Edison/The Liesbosch [1933] AC 449 (HL) 460–1, 462, 463
Edwin Hill and Partners *v.* First National Finance Corp. plc [1989] 1 WLR 225 214
Egyptian, The [1910] AC 400 .... 430, 460
Elbrus, The. Dalwood Marine Co. *v.* Nordana Line SA (The Elbrus) [2010] 2 Lloyd's Rep 315 371
Elder, Dempster Co. Ltd *v.* Paterson, Zochonis Co. Ltd [1924] AC 522 (HL) 635
Elena D'Amico, The [1980] 1 Lloyd's Rep 75 .... 367, 368
Ellen M, The [1967] 2 Lloyd's Rep 247 442–3
Elliot Steam Tug Co. Ltd *v.* Chester (1922) 12 LIL Rep 331 614–15
Elliot Steam Tug Co. Ltd *v.* New Medway Steam Packet (1937) 59 LIL Rep 35 613
Elsey *v.* JG Collins Insurance Agencies Ltd (1978) 83 DLR, p 15 281
Empress Car Co. *v.* National Rivers Authority [1998] 1 All ER 481 702
England, The (1886) 12 PD 32 138
England, The [1973] 1 Lloyd's Rep 373 773
Englishman, The (1877) 3 PD 18 389
ER Wallonia, The [1987] 2 Lloyd's Rep 485 394
Ercole, The [1977] 1 Lloyd's Rep 516 399–400
Ert Stefanie, The [1989] 1 Lloyd's Rep 349 99
Eschersheim, The [1976] 1 WLR 430; [1976] 2 Lloyd's Rep 1 (HL) 565
Esso Bernicia, The [1989] AC 643; [1988] 2 Lloyd's Rep 8 .... 723, 725, 726
Esso Brussels, The [1972] 1 Lloyd's Rep 286 390
Esso Malaysia, The [1974] 2 Lloyd's Rep 143 446
Estrella, The [1977] 1 Lloyd's Rep 525 .... 398, 423
Eurasian Dream, The [2002] 1 Lloyd's Rep 719 .... 20, 21, 108
Euresthenes, The [1976] 3 Lloyd's Rep 171 739
Europa, The [1908] P 84 106
European Commission *v.* France (Case C 439/02) [2004] All ER (D) 227, 22 June 2004 29
European Enterprise, The [1989] 2 Lloyd's Rep 195 769
Eurostar, The [1993] 1 Lloyd's Rep 106 173
Eurymedon, The. New Zealand Shipping Line *v.* Satterthwaite (The Eurymedon) [1972] 2 Lloyd's Rep 544 (PC); [1975] AC 154 (PC) 166, 591, 636
Eurysthenes, The [1976] 2 Lloyd's Rep 171 (CA) 99, 109, 110, 344, 771
Evje No 2,The [1976] 2 Lloyd's Rep 714 672

Factortame, The [1991] (R *v.* Secretary of State for Transport, ex parte Factortame; ECJ 19-Jun-1990) AC 603 (HL) 140–1
Fanchon, The (1880) 5 PD 173 .... 194, 211
Fardon *v.* Harcourt-Rivington (1932) 146 LT 391 (HL) 456
Farley *v.* Skinner (No 2) [2001] UKHL 49; [2002] 2 AC 732 804
Farrar *v.* Farrars Limited (1888) 40 Ch D 395 .... 199, 200

Fast Ferries *v.* Ferries Australia [2001] 1 Lloyd's Rep 534 .... 229, 230
Father Thames, The [1979] 2 Lloyd's Rep 364 417
The Fedra and The Seafarer I [2002] 1 Lloyd's Rep 453 425
Ferdinand, The [1972] 2 Lloyd's Rep 120 472
Fiona Trust *v.* Privalov [2010] EWHC (Comm) 158
First Commercial Bank *v.* Mandarin Container [2004] Hong Kong (unreported) 280
Five Steel Barges, The (1890) 15 PD 142 483
Fjord Wind, The. Rudolf A. Oetker And Others (The Fjord Wind) [2000]
2 Lloyd's Rep 191 106
Fleece, The [1850] 3 W Rob 278 540
Fletcher & Campbell *v.* City Marine Finance Ltd [1968] 2 Lloyd's Rep 520 .... 190, 192
Florence, The (1852) 16 Jur 572 499
Food Co. UK LLP (t/a Muffin Break) *v.* Henry Boot Developments Ltd [2010]
EWHC 358 (Ch) 304
Foster *v.* Blyth Shipbuilding and Drydocks, Re [1926] Ch 494 224
Fowles *v.* Eastern and Australian Steamship Co. Ltd [1916] 2 AC 556 728
Frankland, The [1901] P 161 449
Frans Maas (UK) Ltd *v.* Samsung Electronics (UK) Ltd [2004] 2 Lloyd's Rep 251 414
Fraser & White Ltd *v.* Vernon [1951] 2 Lloyd's Rep 175 608
Freeman and Lockyer *v.* Buckhurst Park Properties [1964] 2 QB 480 588
Fritz Thyssen [1967] 2 Lloyd's Rep 199; [1968] P 255 .... 428, 430
Fyffes *v.* Templeman [2000] 2 Lloyd's Rep 643 158

Galoo Ltd *v.* Bright Grahame Murray [1994] 1 WLR 1360 378
Gamecock Steam Towing Co. Ltd *v.* Trader Navigation Co. Ltd (1937)
59 LIL Rep 170 614
Garden City, The [1982] 2 Lloyd's Rep 382 .... 114, 117, 118, 740
Gas Float Whitton (No 2), The (1897) AC 337 .... 489, 490
Geerjie K, The [1971] 1 Lloyd's Rep 285 507
Geest plc *v.* Fyffes plc [1999] 1 All ER (Comm) 672 298
Genimar, The [1977] Lloyd's Rep 17 390
Giacinto Motta, The [1977] 2 Lloyd's Rep 221 448
Giannis Sk [1998] AC 605 674
Giovana, The [1999] 1 Lloyd's Rep 867 355
Gladys, The (No 2) [1994] 2 Lloyd's Rep 402 312
The Gladys and The Prome [1911] 1 KB 571 406
Glaisdale, The (1945) 78 LIL Rep 403 587
Glenaffric, The [1948] P 159; [1948] 1 All ER 245 (CA) 597, 598
Glendarroch, The [1894] P 226 106
Glendinning, The (1943) 76 LIL Rep 86 430
Glengaber, The (1872) LR 3 A&E 534 539
The Global Mariner and The Atlantic Crusader [2005] 1 Lloyd's Rep 699 421
Globe Master Management Ltd *v.* Boulus-Gad Ltd [2002] EWCA Civ 313 164
Gold Coast Ltd *v.* Caja de Adhorros del Mediterraneo & Others [2002]
1 Lloyd's Rep 617 .... 266, 277
Gold Coast Ltd *v.* Naval Gijon SA [2006] 2 Lloyd's Rep 400 283
Golden Ocean Group *v.* Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265;
[2012] 1 Lloyd's Rep 542 314–15
Golden Polydinamos, The [1993] 2 Lloyd's Rep 464 392
Golden Victory, The. Golden Strait Corp. *v.* Nipon Yusen Kubishika Kaisha
(The Golden Victory) [2007] UKHL12; [2007] 2 AC 353; [2007]
2 Lloyd's Rep 164 .... 360, 368
Goldman *v.* Thai Airways International [1983] 1 WLR 1186; [1983] 3 All ER 693 .... 115, 776
Good Luck, The [1991] 2 Lloyd's Rep 191 (HL) 187, 232
Goulandris Brothers *v.* B Goldman & Sons [1957] 2 Lloyd's Rep 207 .... 666, 667
Government of Zanzibar *v.* British Aerospace (Lancaster House) Ltd [2000] 1 WLR 2333 304
Granit SA *v.* Benship International Inc. [1994] 1 Lloyd's Rep 526 313
Granville Oil & Chemicals Ltd *v.* Davis Turner & Co. Ltd [2003] 2 Lloyd's Rep 356 239
Gray *v.* Braer Corporation [1999] 2 Lloyd's Rep 541 851
Great Marine, The (No 1) [1990] 2 Lloyd's Rep 245 .... 351, 358, 359
Great Marine, The (No 2) [1990] 2 Lloyd's Rep 250; [1991] 1 Lloyd's Rep
421 (CA) 314, 316, 329, 340, 341, 342, 367

Great Peace, The [2002] 2 Lloyd's Rep 653 (CA) 515, 542
Great Western Railway Co. *v.* Royal Norwegian Government (1945) 78 LIL Rep 152 594
Greenshields, Cowie & Co. *v.* Stephens & Sons [1908] AC 431 673
Gregerso, The [1971] 1 All ER 961 505
Greta Holme, The [1897] AC 596 473
Griffon Shipping LLC *v.* Firodi Shipping Ltd [2013] EWHC 593 (Comm) 323, 325
Grit, The [1924] P 246 698
Guildford, The [1956] 2 Lloyd's Rep 74 428
Gulf Azov *v.* Idisa [2001] 1 Lloyd's Rep 727 248
Gyllenhammar & Partners Int Ltd *v.* Sour Brodogradevna Split [1989] 2 Lloyd's Rep 403 265

Haddington Island Quarry Ltd *v.* Alden Wesley Huson [1911] AC 722 (PC) 199
Hadley *v.* Baxendale (1854) 9 Exch 341 .... 361, 362, 364, 365, 366–7, 454, 644
The Hagieni and Barbarossa [2000] 2 Lloyd's Rep 292 .... 396, 423–4
Hain SS Co. Ltd *v.* Tate & Lyle Ltd (1936) 41 Com Cas 350 669
Halcyon Isle, The [1981] AC 221 (PC) 182, 183, 184, 185
Hamlyn *v.* John Houston & Co. [1903] 1 KB 81 414
Hamlyn *v.* Wood [1891] 2 QB 488 628
The Hamtun and St John [1999] 1 Lloyd's Rep 883 495
Hang Zhou Wan. Afitos Compania Naviera SA *v.* The Ship Hang Zhou Wan [2012] LMLN 1/10/12 323
Hans Hoth, The [1952] 2 Lloyd's Rep 341 719
Hansa Nord, The. Cehave NV *v.* Bremer (The Hansa Nord) [1975] 2 Lloyd's Rep 445 (CA) 232, 234, 236, 320
Happy Ranger, The (No 2) [2006] 1 Lloyd's Rep 649 106
Harcourt, The [1980] 2 Lloyd's Rep 589 406
Harland & Wolff Ltd *v.* Lakeport Navigation Co. Panama SA [1974] 1 Lloyd's Rep 301 262
Harmond *v.* Pearson [1808] 1 Camp 515 695
Harmonides, Teh [1903] P 1 467
Harrison Partners Construction Pty *v.* Jevena Pty Ltd (2005) ALR 369 354
Hassel, The (1959) 2 Lloyd's Rep 82 542
Hassel, The [1962] 2 Lloyd's Rep 139 472
Haugland Tankers *v.* RMK Marine Gemi Yapim Sanayii ve Deniz [2005] 1 Lloyd's Law Rep 573 .... 230, 243
Haversham Grange, The [1905] P 307 472
Hazelmoor, The [1980] 2 Lloyd's Rep 351 (CA) 327
Heather Bell, The [1901] P 272 .... 195, 211
Hebridean Coast, The. Owners of the Lord Citrine *v.* Owners of the Hebridean Coast (The Hebridean Coast) [1961] AC 545 (HL) 471
Hector, The [1955] 2 Lloyd's Rep 218 667
Hedley Byrne & Co. *v.* Heller & Partners [1963] 1 Lloyd's Rep 485 (HL) 286, 287, 306, 307, 376, 378
Helenus, The [1982] 2 Lloyd's Rep 261 493
Hellenic Dolphin, The [1978] 2 Lloyd's Rep 336 .... 106, 107
Hellespont Ardent, The [1997] 2 Lloyd's Rep 547 648
Henderson *v.* Merrett Syndicates Ltd (No. 1) [1995] 2 AC 145 287
Hendrick, The [1964] 1 Lloyd's Rep 371 428
Henry Kendall & Sons *v.* William Lillico & Sons Ltd [1969] 2 AC 31 347
Herald of Free Enterprise (R *v.* HM Coroner for East Kent ex p Spooner and Others (1989) 88 Cr App Rep 10) 125, 126, 405, 409–10
Heranger *v.* Diamond [1939] AC 94 (HL) 419–20
Herdentor, The. Tsavliris *v.* OSA Marine Ltd (The Herdentor) (unreported) 19.01.1996 643
Hereward, The [1895] P 284 137
Heron II, The. Czarnikov Ltd Koufos (The Heron II) [1967] 2 Lloyd's Rep 457; [1969] 1 AC 350 .... 361, 363, 364, 365
Hessa, The (1921) 9 LIL Rep 271 433
Hibbs *v.* Ross (1866) 1 QBD 534 135
Hicks *v.* Palington (1590) Moore's QB R 297 664
Highlander, The (1843) 2 W Rob 109 195

HIH Casualty & General Insurance Ltd *v.* Chase Manhattan Bank [2003] UKHL 6, [2003] 1 All ER (Comm) 349 305
Himalaya, The. Adler *v.* Dickson (The Himalaya) [1954] 2 Lloyd's Rep 267 166
HL Bolton (Engineering) Co. Ltd *v.* TJ Graham & Sons Ltd [1957] 1 QB 159 100
HMS Truculent [1951] 2 Lloyd's Rep 308 390
Homer, The [1973] 1 Lloyd's Rep 501 423
Homewood, The (1928) 31 LlL Rep 336 .... 499, 585
Hone *v.* Going Places [2001] EWCA Civ 947 803
Hong Kong Fir Shipping Co. Ltd *v.* Kawasaki Kisen Kaisha [1961] 2 Lloyd's Rep 478 (CA); [1962] 2 WLR 474 .... 232, 235, 319, 606
Hooper *v.* Oates [2013] EWCA Civ 91 360–1
Hopkinson *v.* Rolt (1861) 9 HLC 514 (HL) 179
Hopper No 66, The [1908] AC 126 745
Horabin *v.* British Overseas Airways Corp. [1952] 2 Lloyd's Rep 450 774
Horlock, The (1877) 2 PD 243 135
Houston Exploration Co. *v.* Halliburton Energy Services, Inc. (5th Cir, 2001) 269 F 3rd 528 648
Howard Marine & Dredging Co. Ltd *v.* Ogden & Son (Excavation) Ltd [1978] 2 WLR 515 (CA); [1978] QB 574 (CA) 228, 305, 513
Hua Lien, The [1991] 1 Lloyd's Rep 309 (PC) 412, 418
Hudson Light, The [1970] 1 Lloyd's Rep 166 500–1
Hughes *v.* Lord Advocate [1963] AC 837 (HL) 457–8
Humber Way, The. Feeryways NV *v.* Associated British Ports (The Humber Way) [2008] EWHC 225 (Comm); [2008] 1 Lloyd's Rep 639 .... 149, 151, 644, 645
Humbergate, The [1952] 1 Lloyd's Rep 168 422
Huntingdon, The [1974] 1 WLR 505 404
Huyton *v.* Cremer [1999] 1 Lloyd's Rep 620 .... 250, 512
Huzzey *v.* Field (1835) 2 CM&R 440 771
Hyundai Shipbuilding Heavy Industries Co. Ltd *v.* Papadopoulos [1980] 2 Lloyd's Rep 1 .... 223, 226, 278, 284, 325
Hyundai Shipbuilding Heavy Industries Co. Ltd *v.* Pournaras [1978] 2 Lloyd's Rep 502 (HL) 226

IBM UK Ltd *v.* Rockware Glass Ltd [1980] FSR 335 .... 525–6, 610
ICL Vikraman, The [2003] EWHC 2320; [2004] 1 Lloyd's Rep 21 .... 783–4, 849
IFE Fund SA *v.* Goldman Sachs International [2007] 1 Lloyd's Rep 264; [2007] EWCA Civ 811, affirmed by CA [2007] 2 Lloyd's Rep 449 .... 297, 299, 306
Ile aux Moines, The [1974] 2 Lloyd's Rep 502 367
Imperial Mercantile Credit Association, Re (1869) LR 9 Eq 223 299
Imvros, The [1999] 1 Lloyd's Rep 848 672
Inchmaree, The [1899] P 111 .... 510, 589
India, The (1842) 1 Wm Rob 406 508
Industry, The (1835) 3 Hagg 203 .... 483, 546
Innisfallen, The (1886) LR 1 A&E 72 138
Interfoto Picture Library Ltd *v.* Stiletto Visual Programmes Ltd [1988] 1 All ER 348; [1989] 1 QB 433 .... 293–4, 592
Investors Compensation Scheme Ltd *v.* West Bromwich Building Society [1998] 1 WLR 896 .... 242, 272, 309
Ioannis Daskalelis, The [1974] 1 Lloyd's Rep 174 184
Iron-Master, The (1859) Swa 441 465
Isla Fernandina [2000] 1 Lloyd's Rep 15 .... 108, 667

J H Ritchie Ltd *v.* Lloyd Ltd [2007] 1 Lloyd's Rep 544 (HL) 277
Jameson and Another *v.* Central Electricity Generating Board [2000] 1 AC 455 (HL) 449
Jarvis *v.* Swans Tours Ltd [1973] QB 233 804
Jascon 5, The. Talbot Underwriting Ltd *v.* Nausch Hogan & Murray Inc. (The Jascon 5) [2006] 2 Lloyd's Rep 195 258
Jet2.com *v.* Blackpool Airport Ltd [2011] EWHC 1529 (Comm); [2012] EWCA Civ 417; [2012] 2 All ER (Comm) 1053 .... 153–4, 527, 528, 610
JH Piggott & Son *v.* Docks and Inland Waterways Executive [1953] 1 QB 338 691
Jones *v.* Morgan [2001] EWCA Civ 995, 1 Lloyd's Rep 323 190

Joseph Watson & Sons Ltd *v.* Fireman's Fund Insurance Co. of San Francisco [1922] 2 KB 355 .... 654, 661
JP Morgan Chase Bank *v.* Springwell Navigation Corporation [2008] Lloyd's Rep Plus 63 ..... 299, 302
Julia, The (1861) 14 Moo PC 210 .... 612, 721
Junior K, The. Star Steamship Society *v.* Beogradska Plovidba (The Junior K) [1988] 2 Lloyd's Rep 583 312

Kafiristan, The [1938] AC 136 503
The Kamal XXIV *v.* Owners of the Ariela [2007] EWHC 2434 422
Karsales (Harrow) Ltd *v.* Wallis [1956] 1 WLR 936 609
Kasmar Voyager, The [2002] 2 Lloyd's Rep 57 672
Kate, The [1899] P 165 465
Keith *v.* Burrows (1876) 1 CPD 722; (1887) 2 App Cas 636 (HL) 170, 171, 176
Kellogg Brown & Root Inc. *v.* Concordia Maritime AG [2006] EWHC 3358; [2006] All ER 349 306
Kendal, The (1948) 81 LlL Rep 217 530
Kennedy *v.* De Trafford [1896] 1 Ch 762 (CA), [1897] AC 180 (HL) 199, 200, 205
Keppel *v.* Wheeler [1927] 1 KB 577 (CA) 232
Key Singapore, The. Owners of the Maridive *v.* Owners and Demise Charterers of the Key Singapore (The Key Singapore) [2005] 1 Lloyd's Rep 91 .... 490, 587, 622
Khedive, The (1882) 7 App Cas 795 (HL) 785
Killeena, The (1881) 6 PD 193 509
Kingalock (K), The (1854) 1 Spinks E&A 265 .... 513–14, 544, 583, 593–4
Kirkness, The [1956] 2 Lloyd's Rep 651 752
Kismet, The [1976] 2 Lloyd's Rep 585 610
Kite, The [1933] P 154 421
Kite and OLL Ltd (1994) unreported, 8 December (Winchester Crown Court); (1994) *The Independent*, 9 December 123
Knightsbridge Estates Trust Ltd *v.* Byrne [1939] Ch 441 189
Kolmar Group AG *v.* Traxpo Enterprises Pvt Ltd [2010] 2 Lloyd's Rep 653 250
Koningin Juliana, The [1974] 2 Lloyd's Rep 353; [1975] 2 Lloyd's Rep 111 (HL) 395–6, 438
Kos, The. ENE 1 Kos Ltd *v.* Petroleo Brasileiro SA Petrobras (The Kos) [2012] UKSC 2 AC 164 519
Koursk, The (1920) 2 LlL Rep 244 (HL) 433
Kriti Palm, The. AIC Limited *v.* ITS Testing Service (UK) Limited (The Kriti Palm) [2005] EWHC 2122 (Comm) 307
Kriti Rex, The [1996] 2 Lloyd's Rep 171 370
Kruger & Co. *v.* Moel Tryvan Ship Co. [1906] 2 KB 792; [1907] AC 272 628

Lady Gwendolen, The [1965] 1 Lloyd's Rep 335 .... 98, 114, 117, 402, 770, 772, 773
Laemthong International *v.* ARTIS [2005] 1 Lloyd's Rep 100 .... 354, 358
Lagden *v.* O'Connor [2004] 1 AC 1067 (HL) 460, 462, 463
Lake Avery, The [1997] 1 Lloyd's Rep 540 564
Laming & Co. *v.* Seater (1889) 16 Ct of Sess Cas (4th ser) 828 194
Landcatch *v.* IOPC [1999] 2 Lloyd's Rep 316 840
Langton *v.* Horton (1842) 66 ER 847 (CP) 174
Lansat Shipping Co. Ltd *v.* Glencore Grain BV [2009] 2 CLC 465 282
Law Guarantee and Trust Society *v.* Russian Bank of Foreign Trade [1905] 1 KB 815 .... 195, 211
Law *v.* Jones [1974] Ch 112 (CA) 232
Lawrence *v.* Minturn (1854) 17 How 100 661
Lee *v.* Griffin (1861) B&S 272 223
Leerort, The; The MSC Rosa M [2000] 1 Lloyd's Rep 399; [2001] 2 Lloyd's Rep 291 .... 115, 117, 779, 781, 833
Lehmann Timber, The. Metall market *v.* Vitorio Shipping Co. Ltd (The Lehmann Timber) [2012] EWHC 844 (Comm) 676
Lemington, The (1874) 2 Asp MC 475 417
Lendoudis Evangelos II, The [2001] 2 Lloyd's Rep 304 667
Lennard's Carrying Co. Ltd *v.* Asiatic Petroleum Co. Ltd [1915] AC 705 .... 98, 100, 769
Leon Blum, The [1915] P 90 585
Lewis *v.* Great Western Railway (1877) 3 QBD 195 62
Lewis *v.* Love [1961] 1 WLR 261 191

Liesbosch, The [1933] AC 449 157
Limnos, The [2008] 2 Lloyd's Rep 166 .... 780, 781
Lion, The [1990] 2 Lloyd's Rep 144 769
Lion Steel Ltd, The, T 2011 7411, 20 July 2012, Manchester Crown Court 130
Lister *v.* Romford Ice and Cold Storage Co. Ltd [1957] AC 555 726
Liverpool Marine Credit Co. *v.* Wilson (1872) LR 7 Ch 507 .... 174, 179, 196–7
Liverpool *v.* Irwin AC 239 521
Lloyd *v.* Grace Smith [1912] AC 716 (HL) 413
LNER *v.* British Trawlers Federation Ltd [1934] AC 279 691
Loch Tulla, The (1950) 84 LlL Rep 62 542
Louis Dreyfus & Co. *v.* Tempus SS Co. [1930] 1 KB 699; [1931] AC 726 .... 672, 763
Lowe *v.* Lombank Ltd [1960] 1 WLR 196 (CA) 302
Lozman *v.* City of Riviera Beach, Florida [2013] 1 Lloyd's Rep 17 390
Lumley *v.* Gye (1853) 2 E&B 216 .... 211, 213, 216, 217, 218

Mabel Vera, The [1933] P 109 173
MacGregor, The [1943] AC 197 (HL) 438
Maclenan *v.* Segar [1917] 2 KB 325 698
Maersk Colombo, The [1999] 2 Lloyd's Rep 491 444–5
Magdalen, The (1861) 31 LJ (Adm) 22 530
Mahkutai, The [1996] AC 650 (PC); [1996] 3 WLR 1 .... 591, 636
Maira, The [1986] 2 Lloyd's Rep 12 155
Makedonia, The [1962] 1 Lloyd's Rep 316 107
Makis, The. Vlassopoulos *v.* British & Foreign Marine Insurance Co. Ltd (The Makis) [1929] 1 KB 187 .... 654, 657, 661
Malik Co. *v.* Central European Trading Agency Ltd [1974] 2 Lloyd's Rep 579 525
Maloja II, The [1993] 1 Lloyd's Rep 48; [1994] 1 Lloyd's Rep 374 .... 392, 424
Mamidoil-Jetoil Greek Petroleum Co. SA *v.* Okta Crude Oil Refinery AD (No.1) [2001] EWCA Civ 406; [2001] 2 Lloyd's Rep 76 295
Mamola Challenger, The. Omak Maritime Ltd *v.* Mamola Challenger Shipping Co. Ltd [2011] 1 Lloyd's Rep 47 372
Manatee Towing Co. Ltd *v.* Oceanbulk Maritime SA (The Bay Ridge) [1999] 2 Lloyd's Rep 227 310
Manchester Courage, The [1973] 1 Lloyd's Rep 386 286
Manifest Shipping Co. Ltd *v.* Uni-Polaris Shipping Co. Ltd (The Star Sea) [2001] 1 Lloyd's Rep 389 (HL) 187
Manor, The [1907] P 339 .... 193, 194, 211
Marachal Suchet, The [1911] P 1 604
Marie, The (1882) 7 PD 203 532
Marion, The [1984] 2 Lloyd's Rep 1 .... 20, 60, 62, 114, 117, 167, 768, 772, 774
Maritime Harmony, The [1982] 2 Lloyd's Rep 406 392
Mark Lane, The (1890) 15 PD 135 512
Marpesia, The (1872) LR 4 PC 212 .... 425, 426
Marriott *v.* The Anchor Reversionary Co. (1861) 2 Giff 457 197
Mars, The (1948) 81 LlL Rep 452 505–6
Martin P, The [2004] 1 Lloyd's Rep 389 167
Marubeni Hong Kong and South China Ltd *v.* Mongolia [2005] 1 WLR 2497 266
Mary Frances Whalen, The (1922) 13 LlL Rep 40 (PC) 608
Mary Nour, The. CTI Group Inc. *v.* Transclear SA (The Mary Nour) [2008] EWCA Civ 856 350
Mason *v.* Uxbridge Boat Centre [1980] 2 Lloyd's Rep 592 744
Matsoukis *v.* Priestman [1915] 1 KB 681 262
Mattis *v.* Pollock (trading as Flamingos Nightclub) [2003] 1 WLR 2158 415
Maule, The [1997] 1 WLR 528 (PC) 191, 192, 193
Maxima, The (1878) 4 Asp MLC 21 194
Mbashi, The [2002] 2 Lloyd's Rep 602 505
McDermid *v.* Nash Dredging & Reclamation Co. Ltd [1987] AC 906 (HL) 744
McDougall *v.* Aeromarine [1958] 2 Lloyd's Rep 345 .... 223, 261
Mcfadden *v.* Blue Star [1905] 1 KB 697 106
McHugh *v.* Union Bank of Canada [1913] AC 299 200

MCI WorldCom International Inc. *v.* Primus Telecommunications plc [2004] EWCA Civ 957 297
Medforth *v.* Blake [2000] Ch 86; [1999] 3 WLR 922 .... 202, 206
Mediana, The. Owners of the Steamship Mediana *v.* Owners of the Lightship Comet [1900] AC 113 .... 466, 473
The Melanie *v.* The San Onofre [1925] AC 246 (HL) 502, 503, 508–9, 539
Merak, The [1976] 2 Lloyd's Rep 250 .... 314, 327
Mercedes Envoy, The [1995] 2 Lloyd's Rep 559 .... 294, 313
Merchant Prince, The [1892] P 179 .... 420–1, 426
Mercini Lady, The. Bominflot Bunkergesellschaft fur Mineraloele mbH & Co. KG *v.* Petroplus Marketing AG (The Mercini Lady) [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 44 [2011] 1 Lloyd's Rep 442 .... 236, 347
Meridian Global Funds Management Asia Ltd *v.* Securities Commission [1995] 3 All ER 918 .... 98, 103, 115, 163, 405
Meritz Fire and Marine Insurance *v.* Jan De Nul NV [2011] 2 Lloyd's Rep 379 267
Merkur Island Shipping Corp. *v.* Laughton, (The Hoegh Apapa) [1983] 2 All ER 189 (HL) 213, 216, 217
Mersey Docks and Harbour Board *v.* Coggins and Griffiths [1947] AC 1 (HL) 620, 621–2
Mersey Docks and Harbour Board *v.* Marpessa [1907] AC 241 470
Mersey Docks Trustees *v.* Gibbs (1866) LR 1 HL 93 .... 419, 696, 698
Messina *v.* POL. Iganzio Messina & Co. *v.* Polskie Linie Oceaniczne [1995] 2 Lloyd's Rep 567 313–14
Metagama, The (1928) 29 LIL Rep 253 (HL); [1928] SC 21 (HL) 431, 459–60
Midas Merchant Bank plc *v.* Bello [2002] EWCA Civ 1496 354
Midland Silcones Ltd *v.* Scruttons Ltd [1962] AC 446 .... 590–1, 635
Milan, The (1861) Lush 388 447
Milan Nigeria Ltd *v.* Angeliki B Maritime Co. [2011] EWHC 892 (Comm) 477
Milburn & Co. *v.* Jamaica Fruit Co. [1900] 2 QB 540 (CA) 672
Miliangos *v.* George Frank (Textiles) Ltd [1976] 1 Lloyd's Rep 201; [1976] AC 443 .... 374, 475
Millar's Machinery *v.* David Way (1934) 40 Com Cas 204 644
Milner *v.* Carnival [2010] EWCA Civ 389 804
Mineral Dampier, The [2000] 1 Lloyd's Rep 282; [2001] 2 Lloyd's Rep 419 .... 392, 398, 424
The Mineral Transporter and The Ibaraki Maru – Candlewood Navigation Corp. *v.* Mitusi Osk Lines [1986] AC 1 .... 412, 474
Minnehaha, The (1861) 15 Moo PC 133 (HL) 584–5, 599, 603, 605, 606, 610
Minnie Sommers (1921) 6 LIL Rep 398 616
Miraflores *v.* Abadesa [1967] AC 826 .... 437, 438
Miraflores *v.* George Livanos [1967] 1 AC 826 442
Moorcock, The (1889) 14 PD 64 .... 233, 628, 698, 699
Moore *v.* Landauer [1921] 2 Lloyd's Rep 519 234
Mora Shipping Inc. *v.* Axa Corporate Solutions Assurance SA [2005] EWCA Civ 1069 676
Morning Watch, The. Mariola Marine Corporation *v.* Lloyd's Register of Shiiping (The Morning Watch) [1990] 1 Lloyd's Rep 547 .... 306, 375–6
Morris *v.* CW Martin & Sons Ltd [1966] 1 QB 716 (CA) 413
Morrison Steamship Co. Ltd *v.* Greystoke Castle [1947] AC 265 464
Morse *v.* Slue (1674) 1 Vent 190 .... 739, 771
Mosconici, The [2001] 2 Lloyd's Rep 313 476
Mostyn, The. Great Western Railway Co. *v.* Owners of SSS Mostyn (The Mostyn) [1928] AC 57 (HL) 426, 706, 707
Moundreas *v.* Navimpex [1985] 2 Lloyd's Rep 515 262
MRI Trading AG *v.* Erdenet Mining Corp. LLC [2012] EWHC 1988 (Comm) 295
MSC Napoli, The. Mervale Ltd *v.* Monsanto International Sarl (The MSC Napoli) [2009] 1 Lloyd's Rep 246 .... 660, 746, 784
MSC Rosa M, The [2000] 2 Lloyd's Rep 399 .... 778, 781, 833
Muller *v.* Trinity House (1924) 20 LIL Rep 56 718
Multiplex Constructions (UK) Ltd *v.* Cleveland Bridge UK Ltd [2006] EWCA 1341 (TCC) 295
Multiplex Constructions (UK) Ltd *v.* Honeywell Control Systems Ltd [2007] All ER (D) 79 263
Muncaster Castle, The [1961] AC 807 (HL); [1961] 1 Lloyd's Rep 57 .... 106, 608, 630, 672, 747
Murad *v.* Al Saraj [2005] EWCA Civ 959 158

Murphy *v.* Brentwood DC [1990] 2 All ER 908; [1991] 1 AC 308 .... 286, 375, 411
Myrto, The [1977] 2 Lloyd's Rep 243 .... 194, 208, 209, 211

Naamlooze *v.* European Shipping Co. Ltd (1926) 25 LIL Rep 210 322
Nagasaki Spirit, The [1996] 1 Lloyd's Rep 449; [1997] 1 Lloyd's Rep 323 (HL) 485, 546, 549, 550–3, 555
Nanjing Tianshun Shipbuilding Co. Ltd *v.* Orchard Tankers Pte Ltd [2011] EWHC 164 (Comm) 285
National Commercial Jamaica Ltd *v.* Olint Corp. Ltd [2009] UKPC 16; [2009] 1 WLR 1405 359
Navarro *v.* Larrinanga [1965] P 80 477
Navarro *v.* Moregrand Ltd [1951] 2 TLR 674 (CA) 414, 415
The Navios Enterprise and The Puritan [1998] 2 Lloyd's Rep 16 435
Naxos, The [1972] 1 Lloyd's Rep 149 471
Nelly Schneider, The (1878) 3 PD 152 137
Neptun, The [1938] P 21 .... 696, 697
Neptune, The (1824) 1 Hagg 227 497
Neptune, The (1842) 1 W Rob 297 530
Neptune Navigation Corp. *v.* Ishikawahima-Harima Heavy Industries Co. Ltd [1987] 1 Lloyd's Rep 24 283
Nesbitt *v.* Lushington (1792) 4 TR 783 661
New York Star, The [1980] 2 Lloyd's Rep 317 (PC); [1981] 1 WLR 138 .... 591, 636
Newcastle P&I *v.* V Ships [1996] 2 Lloyd's Rep 515 167
Nicholas H, The. Marc Rich & Co. AG *v.* Bishop Rock Marine Co. Ltd (The Nicholas H) [1994] 1 WLR 1071; [1995] 2 Lloyd's Rep 299; [1996] AC 211 .... 287, 375, 377, 381, 382, 412
Niedersachsen, The. Ninemia Corporation *v.* Trave (The Niedersachsen) [1983] 2 Lloyd's Rep 660 .... 355, 358, 359
Niobe, The. (1888) 13 PD 55 (HL); [1891] AC 401 619
Niobe, The. Niobe Maritime Corp. *v.* Tradax Ocean Transportation SA (The Niobe) [1994] 1 Lloyd's Rep 487; [1995] 1 Lloyd's Rep 579 .... 343, 344
Nissos Samos, The [1985] 1 Lloyd's Rep 378 313
Nlase, The (formerly Erica Jacob) [2000] 1 Lloyd's Rep 455 433
Noel Bay, The. SIB International Srl *v.* Metallgesellschaft Corp. (The Noel Bay) [1989] 1 Lloyd's Rep 361 372
Nord, The [1916] P 53 719
Nordic Ferry, The [1991] 2 Lloyd's Rep 591 392
Norfolk *v.* My Travel Group plc [2004] 1 Lloyd's Rep 106 804
Norman, The [1960] 1 Lloyd's Rep 1 (HL) 767, 772
North Goodwin (No 16), The [1980] 1 Lloyd's Rep 71 .... 495–6, 498, 586–7
North Ocean Shipping Ltd *v.* Hyundai Construction Co. Ltd [1979] 1 QB 705 512
Northumbria, The (1859) LR 3 A&E 6 465
Northumbrian Shipping Co. *v.* Timm [1939] AC 397 (HL) 605
Norwhale, The [1975] 1 Lloyd's Rep 610 437
Novoship (UK) Ltd *v.* Mikhaylyuk [2012] EWHC 3586 (Comm) 156, 158
Nowy Sacz, The [1976] 2 Lloyd's Rep 682 397
Nugent *v.* Michael Goss Avition [2000] 2 Lloyd's Rep 222 .... 778, 779
Nunthorpe, The [1914] P 25 450

Oak Hill, The [1975] 1 Lloyd's Rep 105 667
OBG Ltd *v.* Allan [2007] UKHL 21; [2008] 1 AC 1 .... 103, 207, 208, 214, 215–18
Occidental Worldwide Investment Corp. *v.* Kibs A/S Avanti [1976] 1 Lloyd's Rep 293 512
Ocean Crown, The [2010] 1 Lloyd's Rep 468 547
Ocean Frost, The. Armagas Ltd *v.* Mundogas SA (The Ocean Frost) [1986] AC 717 .... 307, 414, 415
Ocean Steamship *v.* Anderson, The (1883) 13 QBD 651 588
Oceanic Crest Shipping Co. *v.* Pilbara Harbour Service Ltd (1985) 160 CLR 626 728
Odenfeld, The. Gator Shipping Corporation *v.* Bulk Oil Corporation *v.* Trans-Asiatic Oil Ltd SA (The Odenfeld) [1978] 2 Lloyd's Rep 357 .... 208, 349
Okura & Co. Ltd *v.* Navara Shipping Corp. SA [1982] 2 Lloyd's Rep 537 (CA) 229
Onego Shipping & Chartering BV *v.* JSC Arcadia Shipping [2010] EWHC 777 (Comm) 668–9
Onward, The (1874) LR 4 A&E 38 589

Ore Chief, The [1983] 2 Lloyd's Rep 509 265
Oropesa, The (1943(74 LIL Rep 86; [1943] P 32 (CA) 427, 428, 459
Oteri, The *v.* The Queen [1977] 1 Lloyd's Rep 105 (PC) 68
Overseas Buyers *v.* Granadex [1980] 2 Lloyd's Rep 608 .... 153, 525
Owners of No. 7 Steam Sand Pump Dredger *v.* Owners of Steamship Greta Holme [1897] AC 596 471
Owners of SS Alexander Shukoff *v.* SS Gothland [1921] 1 AC 216 (HL) 719, 721
Owners of the Kumanova *v.* Owners of the Massira [1998] 2 Lloyd's Rep 301 699
Oxbird, The [1937] 58 LIL Rep 346 692

P, The [1992] 1 Lloyd's Rep 470 359
Pa Mar, The [1999] 1 Lloyd's Rep 338 522
Pace Shipping Co. Ltd *v.* Churchgate Nigeria Ltd (The Pace) [2009] EWHC 1975 (Comm) 372
Pacific Champ, The [2013] EWHC 470 (Comm) 310
Pagnan SpA *v.* Feed Products Ltd [1987] 2 Lloyd's Rep 601 .... 295, 309, 311, 331
Paiwan Wisdom, The. Taokas Navigation *v.* Komrowski Bulk Shipping KG (The Paiwan Wisdom) [2012] 2 Lloyd's Rep 416 670
Palk *v.* Mortgage Services Funding plc [1993] Ch 330 203
Paludina, The [1927] AC 16 (HL) 429, 430, 431
Pan Atlantic Insurance Co. Ltd *v.* Pine Top Insurance Co. Ltd [1994] 2 Lloyd's Rep 427 (HL) 187, 301
Pan Oak, The [1992] 2 Lloyd's Rep 36 173
Pantanassa, The [1970] 1 Lloyd's Rep 153 .... 490, 517
The Panther and The Ericbank [1957] P 143 .... 424, 621
Pao On *v.* Lau Yiu Long [1980] AC 614 (PC) 249, 512
Papayianni *v.* Grampian Ltd (1896) 1 Com Cas 448 660
Parabola Investments Ltd *v.* Browallia CAL Ltd [2009] EWHC 901 (Comm) 299
Parbulk AS *v.* Kristen Marine SA, [2011] 1 Lloyd's Law Rep 220 275
Parr *v.* Applebee (1855) 7 De GM&G 585 179
Payzu Ltd *v.* Saunders [1919] 2 KB 581 .... 369, 370
The Pearl and the Jahre Venture [2003] 2 Lloyd's Rep 188 435
Pearl of Jebel Ali and The Pride of Al Salam 95 [2009] 2 Lloyd's Rep 484 434
Peekay Intermark Ltd *v.* Australia and New Zealand Banking Group Ltd [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511 .... 299, 302, 305
Peerless, The (1860) 167 ER 16 721
Pentecost *v.* London District Auditor [1951] 2 KB 759 61–2
Peppy, The. Stewart Chartering Ltd *v.* Owners of the Ship Peppy (The Peppy) [1997] 2 Lloyd's Rep 722 157–8
Perks *v.* Clark [2001] 2 Lloyd's Rep 431 (CA) 490, 743
Perla, The (1857) Swab 230 .... 530, 532
Perrett *v.* Collins [1998] 2 Lloyd's Rep 255 .... 380, 381, 382
Peter Benoit, The (1915) 13 Asp MLC 203 436–7
Petroleo Brasileiro SA (Petrobras) *v.* Petromec Inc. [2013] EWCA Civ 150 241
Petroleum Investment Co. Ltd *v.* Kantupan Holdings Co. Ltd [2002] 1 All ER (Comm) 124 360
Phantom, The [1866] LR 1 A&E 58 492
Philadelphia, The [1917] P 101 (CA) 464, 467
Philcox *v.* Civil Aviation Authority (1995) 139 SJLB 146 (CA) 381
Philips Hong Kong Ltd *v.* Attorney General of Hong Kong (1993) 61 BLR 41 281
Phillips Petroleum Co. UK Ltd *v.* Enron Europe Ltd [1997] CLC 329 .... 154, 295, 528
Pickup *v.* Thames & Mersey Insurance Co. Ltd (1878) 3 QBD 594 (CA) 107
Pips (Leisure Production) Ltd *v.* Walton (1980) 43 P & CT 415 153
Polemis, Re, *v.* Furness Withy & Co. [1921] 3 KB 560 (CA) 451, 452, 453, 454
Polessk, The [1996] 2 Lloyd's Rep 40 107
Polzeath, The [1916] P 241 (CA) 139
Port Line Ltd *v.* Ben Line Ltd [1958] 2 QB 146 208
Port of Caledonia, The [1903] P 184 513
Port Swettenham Authority *v.* T Wu & Co. [1979] AC 580 (PC) 413
Potoi Chau, The. Castle Insurance Co. *v.* Hong Kong Islands Shipping Co. (The Potoi Chau) [1983] 2 Lloyd's Rep 376 (PC) 674–5, 676
Prenn *v.* Simmonds [1971] 1 WLR 1381 242

President Van Buren, The (1924) 19 LIL Rep 185 .... 418, 618
Price *v.* Noble (1811) 4 Taunt 123 660
Princess Alice, The [1849] 3 W Rob 138 582
Prinses Juliana, The [1936] P 139 721
Product Star (No 2), The [1993] 1 Lloyd's Rep 397 671

Queen Elizabeth, The (1949) 82 LIL Rep 803 547
Queen of the South, The [1968] P 449 693
The Queenforth *v.* Royal Fifth (1923) 17 LIL Rep 204 .... 530, 532
Quickstep, The [1912] AC 634 442
Quinn *v.* Leathem [1901] AC 495 217

R (on the application of Humber Oil Terminals Trustee Ltd) *v.* Marine Management Organisation [2012] EWHC 3058 (QB) 681
R [1996] LMCLQ 202 484
R *v.* Adomako [1994] 3 All ER 79; [1995] 1 AC 171 (HL) 63, 124, 125, 126, 408–9
R *v.* Bateman (1925) 19 Cr App R 8 409
R *v.* British Steel plc [1995] 1 WLR 1356 (CA); [1995] ICR 586 .... 102–3, 124, 125
R *v.* Caldwell [1982] AC 341 (HL) 775
R *v.* Coventry CC ex p Phoenix Aviation and Others [1995] 3 All ER 37 691
R *v.* G [2003] UKHL 50, [2003] 3 WLR 1060 .... 62, 63, 776, 777
R *v.* Gateway Foodmarkets [1997] ICR 382 125
R *v.* Kelly, The Winston Churchill [1981] 3 All ER 387 (HL) 401
R *v.* Lawrence [1981] 1 All ER 974; [1982] AC 510 (HL) 409, 775
R *v.* Nelson Group Services Maintenance Ltd [1999] ICR 1004 125
R *v.* P&O European Ferries (Dover) Ltd (1990) 93 Cr App Rep 72 .... 125, 126
R *v.* St Regis Paper Co. Ltd [2011] EWCA Crim 2527 163
Racine, The [1906] P 273 .... 465, 466
Raffles *v.* Wichelhaus (1864) 2 Hurl & C 906 514
Raiffeisen Zentral Bank Osterreich AG (RZB) *v.* RBS [2011] 1 Lloyd's Rep 123 .... 297, 300, 301, 304, 305
Rainy Sky SA *v.* Kookmin Bank [2011] 1 WLR 2900; [2011] 2 CLC 923; [2012] BLR 132; [2012] 1 All ER 1137; [2012] 1 Lloyd's Rep 34; [2011] CILL 3105, 138 Con LR 1; [2012] Bus LR 313; [2011] WLR 2900; [2011] UKSC 50; [2012] 1 All ER (Comm) 1 .... 268–72, 273, 309, 326, 331
Raja *v.* Austin Gray [2002] EWCA Civ 1965 198
Ramsden, The [1943] P 46 598
Ranger, The. San Pedro Compania Armadora SA *v.* Henry Navigation Co. and Pablo Compania Maritima De Desarrollo SA (The Ranger) [1970] 1 Lloyd's Rep 32 326
Rank Enterprises *v.* Gerrard [2000] 1 Lloyd's Rep 403 .... 337, 339
Rasbora, The *v.* JCL Marine [1977] 1 Lloyd's Rep 645 .... 236, 239
Rasu Maritima SA *v.* Pertamina [1977] 2 Lloyd's Rep 397 355
Ratata, The [1898] AC 513 (HL) 606, 612–13
Ravennavi SPA *v.* New Century Shipbuilding Co. Ltd [2006] 2 Lloyd's Rep 280; [2007] EWCA Civ 58; [2007] 2 Lloyd's Rep 24 243
Rebecca Elaine, The. Hamble Fisheries Ltd *v.* L Gardner & Sons Ltd (The Rebecca Elaine) [1999] 2 Lloyd's Rep 1 .... 287, 288, 289
Reborn, The. Mediterranean Salvage & Towage Ltd *v.* Seamar Trading & Commerce Inc. (The Reborn) [2009] EWCA Civ 531; [2009] 2 Lloyd's Rep 639 .... 233, 521
Red Sapphire, The. Heesens Yacht Builders *v.* Cox Syndicate Management Ltd (The Red Sapphire) [2006] Lloyd's Rep IR 103 257
Reed *v.* Dean [1949] 1 KB 188 609
Reeman *v.* DOT and Others [1997] 2 Lloyd's Rep 648 (CA) 379
Reeve *v.* Lisle [1902] AC 461 (HL) 191
Reeves *v.* Cooper (1838) 132 ER 1057 170
Refrigerant, The [1925] P 130 599–600
Regal Hastings *v.* Gulliver [1967] 2 AC 134 158
Reichman *v.* Beveridge [2007] Bus LR 41 (CA) 349
Reid *v.* Macbeth & Gray [1904] AC 223 (HL) 225
Reino De Espana *v.* American Bureau of ABS [2012] 29 August No 10 3518 382–3
Rewa, The. Polestar Maritime Ltd *v.* YHM Shipping Co. Ltd (The Rewa) [2012] EWCA Civ 153:[2012] 1 Lloyd's Rep Plus 28 .... 292, 334, 336

Rewa, The. Polestar Maritime Ltd *v.* YHM Shipping Co. Ltd (The Rewa) [2012] EWCA Civ 153:[2012] 1 Lloyd's Rep Plus 28 352
Rhodia International Holdings Ltd *v.* Huntsman International LLC [2007] EWHC 292 (Comm); [2007] 1 CLC 59 .... 153, 154, 155, 526, 610
Rialto, The [1891] P 175 513
River Rima, The [1987] 2 Lloyd's Rep 106 (CA), aff'd by HL [1988] 2 Lloyd's Rep 193 173
River Wear Commissioners *v.* Adamson (1876) 1 QBD 546; (1877) 2 App Cas 743 (HL) 426, 703–9
Riverman, The [1927] 29 LI Rep 80 629
Robert Whitmore, The [2004] 2 Lloyd's Rep 47 .... 751, 752
Robertson *v.* Amazon Tug and Lighterage Co. (1881) 7 QBD 598 608–9
Robinson *v.* Harman (1848) 1 Ex 850 .... 360, 368, 373
Robophone Facilities Ltd *v.* Blank [1966] 1 WKR 1428 .... 280, 281
Rolls Royce plc *v.* Heavylift-Volga Dnepr Ltd [2000] 1 Lloyd's Rep 653 .... 116, 775, 778
Roseline, The [1981] 2 Lloyd's Rep 410 393
Rowan, The. Transpetrol Maritime Services Limited *v.* SJB (Marine Energy) BV (The Rowan) [2011] 2 Lloyd's Rep 331, reversed by CA [2012] EWCA Civ 198; [2012] 1 Lloyd's Rep 564 91
Royscot Trust *v.* Rogerson [1991] 2 QB 297 (CA) 228, 298, 305
Ruabon, The [1900] AC 6 (HL) 472
Ruapehlu, The [1927] AC 523 (HL) 744, 750
Rushden *v.* Pope (1868) LR Ex 269 196
Ruxley Electronics & Construction Ltd *v.* Forsyth [1996] AC 344 466
RZB *v.* RBS *see* Raiffeisen Zentral Bank Osterreich AG (RZB) *v.* RBS [2011] 1 Lloyd's Rep 123

Saetta, The [1994] 1 All ER 851 173
Safe Carrier, The. Seaboard Offshore *v.* Secretary of State for Transport (The Safe Carrier) [1994] 1 W.L.R. 541; [1994] 1 Lloyd's Rep 75; [1994] 1 Lloyd's Rep 589 (HL) 20, 102, 121, 124, 162, 405
Saint Jaques II and Gudermes [2002] EWHC 2452; [2003] 1 Lloyd's Rep 203 .... 118, 768, 778–9, 833
Saint Line *v.* Richardsons [1940] 2 KB 99 644
Saldanha, The. Cosco Bulk Carrier Co. Ltd *v.* Team-Up Owning Co. Ltd (The Saldanha) [2011] 1 Lloyd's Rep 187 669
Saldanha *v.* Fulton Navigation Inc. (The Omega King) [2011] EWHC 1118 68
Salisbury Railway & Market House, Re [1969] 1 Ch 349 687
Sally Wertheim *v.* Chicoutimi Pulp company [1911] AC 301 370
Salsbury *v.* Woodland [1970] 1 QB 324 747
Salvador, The (1909) 25 TLR 384 610
Salviva, The [1987] 2 Lloyd's Rep 457 .... 616, 632, 634
Samco Europe *v.* MSC Prestige [2011] EWHC 1580 438
Samuel *v.* Dumas [1924] AC 431 (HL) 187
Samuel *v.* Jarrah Timber and Wood-Paving Corp. Ltd [1909] AC 323 (HL) 191
San Demetrio, The (1941) 69 LIL Rep 5 499
Sandefjord, The [1953] 2 Lloyd's Rep 557 499–500
Santa Clara, The. Vitol SA *v.* Norelf Ltd (The Santa Clara) [1996] AC 800 (HL) 277, 319
Santley *v.* Wilde [1899] 2 Ch 474 (CA) 170, 189
Sarpen, The [1916] pp306 504
Sava Star, The [1995] 2 Lloyd's Rep 134 .... 497, 501
Savina Caylyn, The. Dolphin tanker SRL *v.* Westport Petroleum Inc. (The Savina Caylyn) [2011] 1 Lloyd's Rep 550 91
Schloss *v.* Heriot (1863) 14 CB (NS) 59 668
Schuler *v.* Wickham Machine Tools Sales Ltd [1973] 2 Lloyd's Rep 53; [1974] AC 235 (HL) 319
Scottish Coal Co. Ltd *v.* Danish Forestry Co. Ltd [2009] CSOH 171 295
Scruttons Ltd *v.* Midland Silicones Ltd [1962] AC 446 166
Sea Angel, The. Edwinton Commercial Corp. *v.* Tsavliris Russ (Worldwide Salvage & Towage) (The Sea Angel) [2006] 2 CLC 600; [2007] EWCA Comm); [2007] 1 Lloyd's Rep 335; [2007] 2 Lloyd's Rep 517 .... 555, 617

Sea Eagle, The. Musgrave (trading as Ynis Ribs) (The Sea Eagle) [2012] 2 Lloyd's Rep 37 795
Sea Emerald SA *v.* Prominvestbank-Joint Stockpoint Commercial Industrial and Investment Bank [2008] EWHC 1979 (Comm) 245–6
Sea Empress, The [1999] 1 Lloyd's Rep 673 .... 689, 702, 716, 723
Sea Spray, The [1907] P 133 .... 693, 711
Seaflower (No 2), The. BS&N Ltd (BVI) *v.* Micado Shipping Ltd (Malta) (The Seaflower) (No. 2) [2000] 2 Lloyd's Rep 37; on appeal [2001] 1 All ER (Comm) 240; [2001] 1 Lloyd's Rep 341 93
Seath *v.* Moore (1886) 11 App Cas 350 (HL) 224
Seflton *v.* Tophams Ltd [1965] Ch 140 213
The Selat Arjuna *v.* The Contship Success [2000] 1 Lloyd's Rep 627 .... 394, 423, 435
Selene G., The. Portaria Shipping Co. *v.* Gulf Pacific Navigation Co. Ltd (The Selene G) [1981] 2 Lloyd's Rep 180 .... 324, 330
Services Europe Atlantique Sud (Seas) *v.* Stockholms Rederiakteibolag Svea (The Folias) [1979] AC 685 (HL) 475, 476
Seta Maru, The. China Shipbuilding Corp. *v.* Nippon Yusen Kabukishi Kaisha and Galaxy Shipping PTE Ltd (The Seta Maru) [2000] 1 Lloyd's Rep 367 255
Shaker *v.* Vistajet Group Holding SA [2012] 2 Lloyd's Rep 93 295
Sheffield District Railway Co. *v.* Great Central Railway Co. [1911] 27 TLR 451 525
Shizelle, The [1992] 2 Lloyd's Rep 444 .... 176, 178, 338
Siben (No 2), The [1996] 1 Lloyd's Rep 35 306
The Siboeva and Vitastar [2002] 2 Lloyd's Rep 210 394
Sidhu *v.* British Airways plc [1997] 2 Lloyd's Rep 7; [1997] AC 430 804
Silven Properties Ltd *v.* Royal Bank of Scotland plc [2003] EWCA Civ 1409; [2004] 1 WLR 997 .... 198, 202, 206
Simona, The. Fercometal SARL *v.* Mediterranean Shipping Co. SA (The Simona) [1989] 1 AC 788 (HL) 277
Simonds *v.* White (1824) 2 B & C 805 .... 654, 657
Singuasi, The (1880) 5 PD 241 618–19
Siporex Trade SA *v.* Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428 355
Sir James Laing & Sons *v.* Barclay, Curle & Co. Ltd [1908] AC 35 223
Sir Joseph Rawlinson [1973] QB 285 639
Sirius International Insurance Co. *v.* FAI General Insurance Ltd [2004] UKHL 54 309
Siskina, The. Siskina *v.* Distos Compania Naviera SA (The Siskina) [1979] AC 210 357
Sitarem and Spirit, The [2001] 1 Lloyd's Rep 107 .... 396, 435
Sivand, The [1998] 2 Lloyd's Rep 97 (CA) 452, 459, 460, 461, 462
Slater *v.* Finning [1996] 2 Lloyd's Rep 353 .... 237, 238
Smit International (Deutschland) GmbH *v.* Josef Mobius GmbH [2001] CLC 1545 645
Smit *v.* Mobius [2001] CLC 1545 .... 639, 640, 641, 648, 649
Smith New Court Securities *v.* Citibank [1997] AC 254 (HL) 306
Smith *v.* Chadwick (1884) 9 App Cas 187 298
Smith *v.* Kay (1859) 7 HL Cas 750 299
Smith *v.* Leech Brain & Co. Ltd [1962] 2 QB 405 (HL) 460
Smjeli, The [1982] 2 Lloyd's Rep 74 639
Snark, The [1900] P 105 695
Snow Bunting, The [2012] 2 Lloyd's Rep 647 396
Société Nouvelle d'Armement *v.* Spillers & Baker Ltd [1917] 1 KB 865 .... 654, 661
Solholt, The. Sotiros Shipping Inc. *v.* Sameiet Solholt (The Solholt) [1981] 2 Lloyd's Rep 574; [1983] 1 Lloyd's Rep 605 .... 313, 368, 369, 460
Solle *v.* Butcher [1950] KB 671 (CA) 515
Somes *v.* British Empire Shipping Co. (1858) 676
Southport Corp. *v.* Esso Petroleum Ltd [1954] 2 QB 182 433
Span Terza, The [1984] 1 Lloyd's Rep 119 489
Spettabile Consorzio *v.* Northumberland Shipbuilding Co. (1919) 121 LT 628 284
Spirit of the Ocean, The (1865) B&L 336 771
Spread Trustee Co. Ltd *v.* Hutcheson [2011] UKPC 13; [2012] 2 AC 194 61
SS Celia (Owners) *v.* SS Volturno (Owners) (The Volturno) (1921) 8 LiL Rep 449; [1921] 2 AC 544 374
St Just Steam Ship Co. Ltd *v.* Hartlepool Port and Harbour Commissioners [1929] 34 LIL Rep 344 698

Standard Chartered Bank *v.* Walker [1982] 1 WLR 1410 202
Staniforth *v.* Lyall (1830) 7 Bing 169 370
Star Maria, The [2003] 1 Lloyd's Rep 183 506
Star of Kuwait, The [1986] 2 Lloyd's Rep 641 341
Star Sea, The [1995] 1 Lloyd's Rep 651 (1st inst); [1997] 1 Lloyd's Rep 360 (CA); [2001] 1 Lloyd's Rep 389 (HL) 101, 109, 110, 111, 344, 778, 779
Statue of Liberty, The [1971] 2 Lloyd's Rep 277 .... 423, 435, 436
Stedman *v.* Swan's Tours (1951) 95 SJ 727 804
Steel *v.* State Line Steamship Co. (1877) 3 App Cas 72 (HL) 601, 603
Stella Antares, The [1978] 1 Lloyd's Rep 41 423
Steve Irwin, The [2012] 2 Lloyd's Rep 409; [2013] EWCA Civ 544 415–16
Stilk *v.* Myrick [1809] 2 Camp 317 247
Stoczia Gdanska *v.* Latvian Shipping [2002] 2 Lloyd's Rep 436 277
Stocznia Gdynia SA *v.* Gearbulk Holdings Ltd [2009] 1 Lloyd's Rep 461 274
Stocznia Gdynia SA *v.* Latvian Shipping [1995] 2 Lloyd's Rep 592; [1996] 2 Lloyd's Rep 132 (CA); [1998] 1 Lloyd's Rep 609 (HL) 223, 226, 227, 283, 349
Stonedale (No 1), The [1955] 2 Lloyd's Rep 9 .... 751, 759
Strandhill, The [1926] 4 DLR 801 184
Strang Steel *v.* Scott (1889) 14 App Cas 601 .... 655, 668
Strathcona, The. Lord Strathcona Steamship Co. Ltd *v.* Dominion Coal Co. Ltd [1926] AC 108 (PC) 208
Sucarseco, The (1935) 51 LIL Rep 238 (US Sup Ct) 449
Suisse Atlantique Société d'Armement SA *v.* NV Rotterdamsche Kolen Centrale [1967] 1 AC 361 647
Sumi Maru 9001, The. Wiltops (Asia) Ltd *v.* Owners of the Tug Sumi Maru 9001 [1993] 1 SLR 198 .... 604, 605–6, 624–5
Sundancer, The [1994] 1 Lloyd's Rep 183 382
Sunlight Mercantile Ltd *v.* Ever Lucky Shipping Co. Ltd [2004] 2 Lloyd's Rep 174 .... 666, 671
Supershield Ltd *v.* Siemens Building Technologies Ltd [2010] 1 Lloyd's Rep 349 (CA) 365
Supply of Ready Mixed Concrete, The [1995] 1 All ER 135 (HL) 102
Swiss Bank Corp. *v.* Lloyds Bank Ltd [1982] AC 584 (HL) 177, 213
Sykes *v.* Taylor-Rose [2004] 2 P & CR 30 296
Sylvia, The. Sylvia Shipping Co. Ltd *v.* Progress Bulk Carriers Ltd (The Sylvia) [2010] 2 Lloyd's Rep 81 .... 365, 366, 367

Tai Hing Mill *v.* Kamsing Factory [1979] AC 91 (PC) 282
Tajik Aluminium Plant *v.* Ermatoy (No 3) [2006] EQHC 7 158
Talca, The (1880) 5 PD 169 137
Talisman, The. Stephen *v.* Scottish Boatowners Mutual Insurance Association (The Talisman) [1989] 1 Lloyd's Rep 535 .... 527, 610
Targe Towing Ltd *v.* Marine Blast Ltd [2004] 1 Lloyd's Rep 721 (CA) 591
Tasman Pioneer, The [2003] 2 Lloyd's Rep 713 (NZHC) 753, 786
Tatra, The. Arctic Shipping Co. Ltd *v.* Mobilia AB (The Tatra) [1990] 2 Lloyd's Rep 51 308
Taylor *v.* Hamer [2003] 1 P & CR DG 6 296
Telemachus, The [1956] 2 Lloyd's Rep 490 497
Tempus, The [1913] P 166 423
Tennants (Lancashire) Ltd *v.* CS Wilson and Co. Ltd [1917] AC 495 263
Terrel *v.* Mbie Todd & Co. Ltd (1952) 69 PRC 234 153
Terrell *v.* Mabie Todd & Co. [1952] 2 TLR 574 525
Tesaba, The [1982] 1 Lloyd's Rep 397 565
Tesco Supermarkets *v.* Nattrass [1972] AC 153 (HL) 99, 100, 101, 102, 111, 117, 121, 163, 405
Texaco Melbourne, The [1994] 1 Lloyd's Rep 473 (HL) 374
Texada Mines Ltd *v.* The Ship Afovos [1974] 2 Lloyd's Rep 168 711
Theodegmon, The [1990] 1 Lloyd's Rep 52 107
Thetis, The (1869) LR 2 A&E 365 .... 532, 590
Thin & Another *v.* Richards & Co. [1892] 2 QB 141 605
Thomas *v.* Tyne and Wear Steamship Insurance Association (1917) 117 LT 55 109
Thomas Witter Ltd *v.* TBP Industries Ltd [1996] 2 All ER 573 304
Thompson *v.* Masterton [2004] 1 Lloyd's Rep 304 751
Thomson *v.* Deakin [1952] Ch 646 (CA) 214

Thoresen (Bangkok) Ltd *v.* Fathem Marine Co. [2004] 1 Lloyd's Rep 622 .... 229, 311
Thoresen Car Ferries Ltd *v.* Weymouth and Portland BC [1977] 2 Lloyd's Rep 614 691
Thorogood v. Bryan, 8 C. B. 115 .... 447, 448
TMT Co. Ltd *v.* Royal Bank of Scotland plc [2010] EWHC 3680 (Comm) 205
Tojo Maru, The [1969] 2 Lloyd's Rep 193 (CA) 532
Tojo Maru, The [1972] AC 242 (HL); [1971] 1 Lloyd's Rep 341 (HL) 483, 508, 530, 531–7, 748, 753
Toledo, The [1995] 1 Lloyd's Rep 40 107
Toluca, The [1984] 1 Lloyd's Rep 131 395
Tomlin *v.* Luce (1889) 41 Ch D 573; (1989) 43 Ch D 191 200
The Topaz and The Iraqua [2003] EWHC 320 (Admiralty); [2003] 2 Lloyd's Rep 19 .... 398, 435
Torenia, The [1983] 2 Lloyd's Rep 210 106
Torepo, The. Owners of Cargo Lately Laden on Board the Torepo *v.* Owners of the Torepo [2002] 2 Lloyd's Rep 535 .... 108, 667, 721
Torquay Hotel Ltd *v.* Cousins [1969] 2 Ch 106 .... 214, 216
Tower Bridge (TB), The [1936] P 30 .... 503, 509
Towerfield, The. Workington Harbour Dock Board *v.* Towerfield (Owners) [1951] AC 112 .... 709, 710, 711, 722, 724–5
Trade Green, The. Trade Green Shipping Inc. *v.* Securitas Bremer Allgemeine Versicherungs AG (The Trade Green) [2000] 2 Lloyd's Rep 451 .... 658, 662
Tradigrain SA *v.* Intertek [2007] EWCA Civ 154 648
Tramontana, II, The [1969] 2 Lloyd's Rep 94 695
Tramp. The Owners of the Tug Sea Tractor *v.* The Owners of Tramp (Tramp) [2007] 2 Lloyd's Rep 363 .... 493, 495
Transcoceania Francesca and Nicos V [1987] 2 Lloyd's Rep 155 .... 373, 476
Transfield Pty Ltd *v.* Arlo International Ltd (1980) 144 CLR 83 527
Trecarrell, The [1973] 1 Lloyd's Rep 402 458
Tribels, The [1985] 1 Lloyd's Rep 129 545
Trident Turboprop (Dublin) Ltd *v.* First Flight Couriers Ltd [2008] 2 Lloyd's Rep 581; [2009] 1 Lloyd's Rep Law Rep 702; [2009] EWCA Civ 290; [2010] QB 86 .... 228, 302, 305
Triton Lark, The. Pacific Basin IHX Ltd *v.* Bulkhandling Handymax AS (The Triton Lark) [2012] 1 Lloyd's Rep 151 670
Troilus, The [1951] AC 820 .... 494, 495
Troll Park, The [1988] 1 Lloyd's Rep 55, approved by CA [1988] 2 Lloyd's Rep 423 321
Tropical Reefer, The. Den Norske Bank *v.* Acemex Management (The Tropical Reefer) [2003] EWHC 326 (Comm); [2004] 1 Lloyd's Rep 1 .... 199, 202, 205
Tse Kwong Lam *v.* Wong Chit Sen [1983] 1 WLR 1349 .... 198, 199, 203–5
Tubantia, The [1924] P 78 565
Turberville *v.* Stamp (1697) Raym 264 771
Turpin *v.* Bilton (1843) 5 Man & G 455 155
A Turtle Offshore SA *v.* Superior Trading Inc. (The A Turtle) [2009] 1 Lloyd's Rep 177 ...... 646, 649
Two Ellens, The (1872) LR 4 PC 161 173
Tychy, The [1999] 2 Lloyd's Rep 11 (CA) 745
Tychy, The [2001] 2 Lloyd's Rep 403 309

Ultraframe (UK) Ltd *v.* Fielding [2005] EWHC 1638 (Ch) 158
Undaunted, The (1860) Lush 90; (1886) 510
Undaunted, The (1886) 11 PD 46 602
Union Power, The. Dalmare SpA *v.* Union Maritime Limited, Valor Shipping Limited (The Union Power) [2012] EWHC 3537 (Comm) 292, 296, 321, 322, 346
Unique Mariner (No 1), The (N[1978] 1 Lloyd's Rep 438 .... 513, 517, 588, 593
Unique Mariner (No 2), The [1979] 1 Lloyd's Rep 37 .... 541, 542
Universe Tankship Inc. of Monrovia *v.* ITWF [1983] 1 AC 366 (HL) 250, 512
Uranienborg, The [1936] P 21 597
Utopia, The [1893] AC 492 695
Uxbridge Permanent Benefit Building Society *v.* Pickard [1939] 2 KB 248 (CA) 413

Valsesia, The [1927] P 115 616
Vancouver, The (1886) 11 App Cas 573 472
Vanessa Ann, The [1985] 1 Lloyd's Rep 549 137

Veracruz, The. Veracruz Transportation Inc. *v.* VC Shipping Co. Inc. [1992] 1 Lloyd's Rep 353 (CA) 354, 356, 357, 359
Veritas, The [1901] P 304 711
Verity Shipping SA and Another *v.* NV Norexa and Others (The 'Skier Star') [2008] 1 Lloyd's Rep 260 .... 60, 64
Vesta *v.* Butcher [1989] 1 Lloyd's Rep 331 (HL) 307
Viasystems (Tyneside) Ltd *v.* Thermal Transfer (Northern) Ltd [2005] 4 All ER 1181 .... 622, 729
Vicky I, The. Owners of the Front Ace *v.* Owners of the Vicky I (The Vicky I) [2008] 2 Lloyd's Rep 45 469
Victoria Laundry (Windsor) *v.* Newman Industries [1949] 2 KB 528 .... 363, 364, 368
Viking Line ABP *v.* ITF [2006] 1 Lloyd's Rep 303 68
Vindobala, The (1888) 13 PD 42; (1889) 14 PD 50 (CA) 123, 138, 145
Virani Ltd *v.* Manuel Revert Y Cia SA [2003] EWCA Civ 1651; [2004] 2 Lloyd's Rep 14 .... 374, 475
Virgil, The (1843) 2 W Rob 201 425
Viscount, The [1966] 1 Lloyd's Rep 328 507
Volgoneft 139 (2007), IOPC Fund Annual Report 2008, pp 119–122 844
Vortigern, The [1899] P 140 (CA) 605
Voutakos, The [2008] 2 Lloyd's Rep 516 548
Vysotsk, The [1981] 1 Lloyd's Rep 439 431

Wagon Mound (No 1) [1961] AC 388 .... 452, 453–7
Wagon Mound (No 2) (Overseas Tankship (UK) Ltd *v.* The Miller Steamship Co. The Wagon Mound (No 2) [1967] 1 AC 617 (PC) 455
Walford *v.* Miles [1992] 2 AC 128 .... 294, 295, 592, 593
Wallis Son & Wells *v.* Pratt & Haynes [1911] AC 394 347
Walumba, The (Owners) *v.* Australian Coastal Shipping Commission [1965] 1 Lloyd's Rep 121 .... 601, 629
Warren *v.* Scruttons [1962] 1 Lloyd's Rep 497 458
Watford Electronics *v.* Sanderson [2001] EWCA Civ 317 302
Watson, Re, *ex parte* Official Receiver in Bankruptcy (1890) 25 QBD 27 176
Watson *v.* Victor (1934) 22 LIL Rep 77 491
Weddall *v.* Barchester Healthcare Ltd [2012] EWCA Civ 25 414
West Cock, The [1911] P 23 .... 602, 604, 605, 606–7
West of England Ship Owners Mutual P&I *v.* Hellenic Industrial Development Bank [1999] 1 Lloyd's Rep 93 148
West *v.* Williams [1899] 1 Ch 132 (CA) 179
Westbourne, The (1889) 14 PD 132 512
Western Neptune *v.* St Louis Express [2010] 1 Lloyd's Rep 158 439
Western Regent, The [2005] 2 Lloyd's Rep 359 CA 782
Wheeler *v.* London & Rochester Trading Co. Ltd [1957] 1 Lloyd's Rep 69 752
White and Carter (Councils) Ltd *v.* McGregor [1962] AC 413 .... 349, 350
White *v.* Jones [1995] 2 AC 207 (HL) 286
William Beckford, The (1801) 3 C Rob 355 546
Williams *v.* Roffey Bros & Nichols [1991] 1 QB 1 (CA) 247, 248
Williams *v.* The African Steam Ship Co. [1856] H&N 300 764
Wills *v.* Palmer (1860) 141 ER 847 (CP) 174
Wilson Smithest & Cape (Sugar) Ltd *v.* Bangladesh Sugar & Food Industries Corp. [1986] 1 Lloyd's Rep 378 227
Wilson *v.* Dickson (1818) 2 B&A 2 771
Winson, The [1982] 1 Lloyd's Rep 117; [1982] AC 939 (HL) 489, 517, 518, 519, 520, 589, 660
Woodar *v.* Wimpey [1980] 1 WLR 277 (HL) 284
Woodrop Sims (1815) 2 Dod 83 434
Workman Clarke & Co. Ltd *v.* Lloyd Brazileno [1908] 1 KB 968 (CA) 225, 276
World Harmony, The [1965] 2 WLR 1275; [1965] 2 All ER 139 474
World Horizon, The. Taramar Shipping Corp. *v.* Young Navigation Corp. (The World Horizon) [1993] 2 Lloyd's Rep 56 343
Wright *v.* Marwood (1881) 7 QBD 62 654
Wuhan Guoyu Logistics Group CO Ltd *v.* Emporiki Bank of Greece [2012] EWHC 1715 (Comm); [2012] All ER (D) 142 267
Wuhan Ocean Economic *v.* Nantong Huigang Shipbuilding and Schiffahrts-Gesellschaft Hansa Murcia MBH & Co. KG [2012] EWHC 3104 (Comm) 273

Yam Seng *v.* ITC [2013] EWHC 11 (QB) 293, 294, 593
Yamatogawa, The [1990] 2 Lloyd's Rep 39 106
Yan-Yean, The (1883) 8 PD 147 .... 530, 532
Yeoman Credit Ltd *v.* Apps [1962] 2 QB 508 609
Yewbelle Ltd *v.* London Green Developments Ltd [2006] EWHC 3166 (Ch), [2007]
1 EGLR 137; [2007] EWCA Civ 475 .... 153, 526
Yugraneft *v.* Abramovich [2008] EWHC 2613 (Comm) 158

Z Ltd *v.* A-Z [1982] 1 QB 558 359
Zalco Marine Services *v.* Humboldt Shipping [1998] 2 SLR 536 325
Zeeland Navigation Co. Ltd *v.* Banque Worms [2002] EWHC 1307 (Comm) 204
Zegluga Polska SA *v.* T R Shipping Ltd (No 2) [1998] 2 Lloyd's Rep 341 (CA) 332, 333, 353
Zeta, The [1893] AC 468 419
Ziemniak *v.* ETPM Deep Sea Ltd [2003] 2 Lloyd's Rep 214 (CA) 407
The Zinnia, Stag Line Ltd *v.* Tyne Shiprepair Group Ltd [1984] 2 Lloyd's Rep 211 238
Zoorik, The (IRISL Steamship Mutual Indemnity Association) [2011] 1 Lloyd's Rep 195 865
Zucker *v.* Tyndall Holdings plc [1992] 1 WLR 1127 .... 355, 358

TABLE OF STATUTES

1846 Fatal Accidents Act (Lord Campbell's Act (9 & 10 Vict c 93) 445
Steam Navigation Act (SNA) 388
1847 Harbours, Docks and Piers Clauses Act (HDPCA) 680
s. 33 690–691
s. 51 687
s. 52 687
s. 56 .... 693, 759
s. 74 .... 411, 426, 703, 704, 706, 707, 709, 710, 711
s. 77 692
s. 83 681
1851 Steam Navigation Act (SNA) 388
1854 Merchant Shipping Act (MSA) .. 170, 171
s. 70 210
s. 71 210
s. 458 491
s. 459 491
s. 460 491
1862 Merchant Shipping Amendment Act
s. 29 .... 388, 389
1873 Judicature Act (JA)
s. 25(9) 427, 446, 447, 450
Merchant Shipping Act (MSA) 389
1878 Bills of Sale Act 171, 176

1893 Sale of Goods Act (SOGA) 225
1894 Merchant Shipping Act (MSA) 98, 142, 487, 745
s. 1 139
s. 30 138
s. 31 174
s. 33 174
s. 34 .... 173, 174
s. 35 198
s. 56 .... 172, 175
s. 57 175
s. 76 139
s. 220 405
s. 419 402
s. 419(2) 402
s. 419(4) 389, 419
s. 422 .... 403, 502
s. 502 .... 763, 767, 769
s. 502(2) 763
s. 503 .... 99, 533, 639, 742, 744, 748, 767, 768, 770, 773
s. 531 693
s. 544 491
s. 633 724
s. 742 489
1900 Merchant Shipping Act (Liability of Ship-owners and Others) Act (MS(LSO)A)
s. 2 744
1906 Arbitration Act
s. 69 231
Marine Insurance Act (MIA) 167, 187
s. 18(1) 109
s. 18(2) 109
s. 18(3) 109
s. 39(1) 673
s. 39(5) 99, 109–111, 112, 113, 673, 771, 778, 779
s. 41 188
s. 64(1) 662
s. 64(2) 662
s. 66 .... 655, 664
s. 66(1) 665
s. 66(2) 660–661
Merchant Shipping Act (MSA)
s. 51 139
1911 Maritime Conventions Act (MCA) 427, 436, 444, 447, 484
s. 1 .... 389, 434, 435, 448, 450
s. 1(1) 450
s. 2 445
s. 3 445
s. 4 .... 389, 419
s. 6 503
s. 8 .... 433, 445
1913 Pilotage Act (PA) 706, 713
s. 11 718
s. 15 .... 722, 724, 725, 726
s. 15(1) 727
s. 43 718
1925 Law of Property Act (LPA) 1925
s. 85(1) 177
s. 87(1) 177
s. 101 177

1930 Third Parties (Rights against Insurers) Act 479, 811, 846
s. 1(1) 749
1932 Merchant Shipping (Safety and Load Line Convention) Act 504
s. 24 404
1934 Law Reform (Married Persons) Act 446
1935 Law Reform (Married Women and Tortfeasors) Act 1935 449
1943 Law Reform (Frustrated Contracts) Act
s. 1(2) 617
1945 Law Reform (Contributory Negligence) Act (LR(CN)A) 426, 430, 431, 435, 442, 444, 710, 802
1947 Crown Proceedings Act (CPA)
s. 8(2) 504
s. 29 390
Fire Services Act
s. 3 566
s. 3(4) 505
1949 Merchant Shipping (Safety Convention) Act
s. 22 503
s. 22(1) 403
s. 22(2) 403
1957 Occupiers' Liability Act 698
1958 Merchant Shipping Act (Liability of Ship-owners and Others) Act (MS(LSO)A) 742
Merchant Shipping Act (MSA) 639
s. 3(1) 744
1961 Carriage by Air Act 743
1962 Liability of Operators of Nuclear Ships Act 762
1964 Harbours Act (HA) 681, 687, 692
s. 40 691
s. 57(1) 682, 683
Sched 2(1) 680
Merchant Shipping Act (MSA)
s. 16 404
1965 Nuclear Installations Act
s. 7 762
ss. 7–21 874
s. 8 762
s. 9 762
s. 10 762
s. 11 762
s. 14 874
s. 26 874
1966 Docks and Harbours Act 681
1967 Misrepresentation Act (MA) 296, 354, 594, 613
s. 2 228
s. 2(1) 298, 305, 513
s. 2(2) 306
s. 3 .... 302, 303–305
1968 Hovercraft Act
s. 1(1)(h) 391, 491
s. 1(1)(h)(ii) 491
s. 2(2) 491
Trade Descriptions Act (TDA)
s. 20 101
s. 24(1) 100
1969 Employer's Liability (Defective Equipment) Act
s. 1 417
1970 Merchant Shipping Act (MSA)
s. 27 .... 405, 406
s. 55 409
s. 68 403
s. 86 404
1971 Criminal Damage Act (CDA) 401, 407
s. 1 .... 63, 408, 775, 776
s. 1(1) 775, 776
s. 1(2) 775
Harbour Conservancy Act 681
Merchant Shipping (Oil Pollution) Act 1971
s. 1 851
s. 9 851
1972 Local Government Act
s. 237 681
1973 Supply of Goods (Implied Terms) Act
s. 7(2) 235
1974 Health and Safety at Work Act 681
s. 3(1) 103
1976 Fatal Accidents Act (FAA) 446, 477
1977 Unfair Contract Terms Act (UCTA) 228, 236, 238–239, 296, 321
s. 1(2) 511
s. 2(1) 238, 511, 594–595
s. 2(2) 238
ss. 2–7 239
s. 6(2) 239
s. 8 305
s. 11(1) 303
s. 12(1) 594
ss. 16–21 239
s. 26 238
s. 27 238
s. 27(1) 238, 239
s. 27(2) 238
Sched 1(2) 511
1978 Civil Liability (Contribution) Act (CLCA) 443, 449
s. 1 417
s. 1(4) 451
State Immunity Act
s. 14(1) 524
s. 14(2) 524
1979 Merchant Shipping Act (MSA) 713
s. 17 742
s. 18(1)(a) 763
s. 35 .... 762, 764
Sched 6, Pt III 404
Sale of Goods Act (SOGA) 223, 233–238, 238, 296, 320–322
s. 2 321
s. 2(3) 227
s. 2(4) 227
s. 10 320

s. 11(2) 320
s. 11(3) 320
s. 13 .... 233, 235, 239
s. 14 .... 235, 237, 239, 347
s. 14(2) 235, 236, 239, 345–348, 354
s. 14(3) 237
s. 14(6) 235
s. 15 .... 235, 239
s. 15A 235, 236, 237
s. 17(1) 321
s. 17(2) 253
s. 18 253
ss. 38–43 275
s. 41 276
s. 43 276
s. 49(2) 276
s. 51 353
s. 51(1) 347, 351
s. 51(2) 348, 353
s. 51(3) 351, 353
s. 55 .... 239, 347
s. 61(1) 320
s. 61(5) 321
1980 Limitation Act (LA) 433, 477
1981 Nationality Act (NA) 140, 142
Supreme Court Act (SCA) 783
s. 20(2)(e) 565, 851
s. 20(2)(h) 565
s. 20(2)(i) 730
s. 20(2)(j) 492, 511, 565
s. 20(5) 851
s. 20(6) 565
s. 21 195
s. 21(1) 565
s. 21(3) 565
s. 21(4) 565, 851
s. 24(2) 390
Terrorism Act (TA) 683
Transport Act (TA) 681
1982 Administration of Justice Act 446
Civil Aviation Act
s. 87 491
s. 97(6) 391
Criminal Justice Act (CJA)
s. 46(2) 403
Sched 6
Pt III 403
Pt IV(4) 403
Supply of Goods and Services Act (SGSA)
s. 13 .... 511, 595
s. 14 .... 511, 595
s. 15 511
s. 16 511
1983 Energy Act 874
Merchant Shipping Act (MSA) 139
Pilotage Act (PA)
s. 17 723
s. 35 724
1984 Occupiers' Liability Act 698
1985 Companies Act
s. 395 175
Dangerous Vessels Act (DVA) 681
s. 1 405
s. 2 687
1986 Latent Damage Act 433
1987 Consumer Protection Act
s. 2 419
Pilotage Act (PA) 681, 683, 687, 714
s. 1 713
s. 2 .... 702, 714, 727, 728
s. 2(1) 714
s. 2(3) 714
s. 3 716
s. 3(1) 701
s. 3(1)(1A) 701–702
s. 3(2) 702
s. 3(2)(2A) 702
s. 7 714
s. 7(3) 714
s. 9 714
s. 10 730
s. 11 714
s. 15 718
s. 15(2) 718
s. 15(3) 718
s. 16 .... 724, 727, 728, 730
s. 17 .... 719, 730
s. 18 718
s. 21 721
s. 22 418
s. 22(2) 722
s. 22(3) 723
s. 22(8) 716, 723
s. 31(1) 712
1988 Merchant Shipping Act (MSA) 139, 140–141, 174
s. 3 .... 140, 141
s. 5 140
s. 14 140
s. 30 .... 120, 404
s. 31 .... 102, 121, 124, 162, 404, 410
s. 32 405
Sched 5(2) 693
1990 Aviation and Maritime Security Act 681
Contracts (Applicable Law) Act 1990 181
Environmental Protection Act 681
1991 Ports Act 681, 683, 692
Water Resources Act (WRA) 681
s. 85 567
s. 85(1) 702, 716
s. 86 567
s. 87 567
s. 88 567
s. 89 567
s. 90 567
s. 91 567
1992 Transport Works Act 681

1993 Merchant Shipping (Registration, etc.) Act (MS(Reg)A) 140, 141, 174, 489
s. 1 142
s. 7 142
1994 Merchant Shipping (Salvage and Pollution) Act (MS(SP)A) 486
s. 6(3)(b) 491
Sched 2 491
para 2 503
Sale and Supply of Goods Act (SSGA) 238
s. 1 239
s. 1(1) 236
s. 4 .... 235, 236, 320
s. 15A 233
Sale of Goods Act (SOGA) 223
Sale of Goods (Amendment) Act 320
1995 Environment Act 681
Merchant Shipping Act (MSA) 141–142, 191, 387, 402–408, 638, 687
Chapter II 682, 692
Chapter III 692
Pt IX 692
Pt VI 682
Pt VI, Ch 3 .... 862, 863
Pt VIII 688, 692
s. 1(1) 438
s. 4 743
s. 4(1) 854
s. 17 142
s. 21 129
s. 58 .... 406, 407
s. 58(2) 406
s. 58(3) 406
s. 58(4) 406
s. 58(5) 406
s. 58(6) 406
s. 59 407
s. 77 .... 119, 403
s. 85 .... 122, 401
s. 85(3)(k) 390
s. 85(4) 390
s. 90 404
s. 91 404
s. 92 .... 403, 502
s. 92(1)(a) 403
s. 92(1)(b) 403
s. 92(4) 502
s. 93 503
s. 93(1) 403
s. 93(2) 403
s. 93(6) 503
s. 93(7) 503
s. 94 .... 120, 404, 408
s. 95 404
s. 96 404
s. 97 404
s. 98 .... 120, 121, 404, 408
s. 98(4) 404
s. 98(5) 404
s. 98(6) 404
s. 99 .... 404, 405
s. 100 .... 102, 121, 162, 404, 408, 410
s. 101 404
s. 102 404
s. 103 404
s. 104 404
s. 105 404
s. 106 404
s. 107 404
s. 128(1)(d) 487, 826
s. 129(2)(b) 686, 836
s. 131 .... 684, 872
s. 135 872
s. 136 .... 408, 872
s. 137 .... 408, 567, 685, 686, 825, 872
s. 137(4) 825
s. 137(5) 825
s. 138 825
s. 139 .... 408, 567, 825, 872
s. 140 825
s. 141 825
s. 142 872
s. 143 872
s. 144 .... 684, 687, 872
s. 145 872
s. 146 872
s. 147 872
ss. 152–168 862
ss. 152–182 834
s. 153 .... 762, 836, 850, 851
s. 153(1)(b) 837
s. 153(2) 837
s. 153(3) 834
s. 153(4) 834
s. 153(5) 850
s. 153(7) 837
s. 153(8) 842
s. 153A 862, 863, 864
s. 154 863
s. 155 842
s. 156 846
s. 156(1) 846
s. 156(2)(d) 568
s. 156(3) 838
s. 158 850
s. 158(6) 849
s. 158(7) 849
s. 159 .... 849, 850
s. 160 850
s. 161 850
s. 162 851
s. 163 845
s. 163A 864
s. 165 845
s. 165(5) 846
s. 166(2) 846
s. 167(1) 834
s. 168 .... 760, 864
s. 170 .... 842, 862

s. 170(1) 834
s. 170(4) 836
ss. 172–182 852
s. 175 853
s. 175(1) 840
s. 175(2) 855
s. 175(6) 853
s. 175(7) 854
s. 175(8) 854
s. 175(9) 854
s. 175(10) 854
s. 177 .... 855, 856
s. 178 855
s. 179(1) 854
s. 179(2) 855
s. 180 853
s. 183 .... 795, 819
s. 185 .... 742, 743, 759, 850
s. 185(4) 762–763, 764
s. 186 .... 742, 764, 850
s. 186(1) 763–764
s. 186(3) 764
s. 187 .... 412, 435, 440, 441, 442, 445, 447, 451, 742
s. 187(1) 435
s. 187(2) 435
s. 187(4) 435
s. 188 .... 445, 742
s. 189 .... 445, 742
s. 190 .... 433, 477, 742
s. 190(1)(b) 433, 445
s. 190(4) 445, 451, 477
s. 190(5) 434
s. 190(6) 434
s. 191 750
s. 191(2) 702
s. 191(3) 702
s. 191(4) 702
s. 191(5) 702, 750
s. 191(9) 750
s. 192(2) 743
s. 193 688
s. 195 692
s. 197 692
s. 198 692
s. 201 759
s. 219 408
s. 220 408
s. 223 692
s. 224(1) 487
s. 230(1) 504
s. 230(2) 504
s. 230(3) 504
s. 250 506
s. 252 .... 505, 692, 693
s. 253 693
s. 254 .... 692, 693
s. 255 .... 693, 736
s. 255(1) 490
s. 255A–s255U 694
s. 255C(3) 736
s. 255C(4) 736
s. 255C(5) 736
s. 259 872
s. 260 872
s. 277 .... 122, 403, 404, 405
s. 284 402
s. 293 .... 681, 872
s. 306 390
s. 308 390
s. 308(1) 390
s. 309 390
s. 310 391
s. 311 .... 391, 489
s. 313 .... 391, 682
s. 313(1) 489, 719
Sched 1 186
para 1 .... 175, 189
para 6 138
para 7 174
para 8 .... 174, 175, 179
para 8(1) 175
para 8(2) 175
para 9 .... 171, 175, 188, 192, 193, 198, 210
para 9(2) 175, 198
para 10 .... 171, 173, 174, 175, 188, 189, 192, 193, 207, 210
para 11 176
para 12 176
para 13 176
Sched 4 840
Sched 6 .... 795, 806, 819
Pt II 764
Sched 7 806
Chapter II, Art 6 743
Chapter IV 742
Pt I 702, 742, 787
Pt II 736, 742, 750, 759–760, 762, 787
Pt II(2) 743
Pt II(3) 759, 787
Pt II(4)(1) 762
Pt II(5)(1)(2) 750
Pt II(8)(3) 783
Pt II(9) 787
Pt II(10) 784
Pt VII 742
Sched 11 .... 487, 491, 503, 504
Art 6(1) 506
Pt I 487, 491, 504–505
Pt II, para 3 503
Pt II, para 5 491–492
Pt II(2)(1) 488
Sched 13
para 42 743
Sale of Goods (Amendment) Act 320
1996 Criminal Procedure and Investigations Act
s. 40(1)(b) 163
1997 Maritime Security Act 688
Merchant Shipping and Maritime Security Act (MSMSA) 120, 404, 566, 681, 685

s. 2 ...... 686, 825
s. 3 825
s. 6 872
s. 7 ...... 684, 872
1998 Human Rights Act (HRA)
Sched 1 422
1999 Contracts (Rights of Third Parties) Act (C(RTP)A) 1999 ...... 166, 637–638, 746, 747–748
2003 Marine Safety Act 47, 570
Maritime Safety Act 681, 687
Pilotage Act (PA) 681
2004 Planning and Compulsory Purchase Act 681
2006 Merchant Shipping (Pollution) Act 1995 834, 856
s. 178(1) 855
Terrorism Act 681
2007 Corporate Manslaughter and Corporate Homicide Act (CMCH Act) 22, 123
s. 1 127
s. 1(2) 128
s. 1(6) 129
s. 2 128
s. 2(1)(a) 129
s. 2(1)(b) 129
s. 2(2) 128
s. 2(5) 129
s. 2(6) 129
s. 8 129
s. 8(3) 131
s. 8(3)(a) 129
s. 8(3)(b) 129
s. 9 129
s. 10 129
s. 18 128
s. 19 129
s. 20 127
2008 Counter-Terrorism Act 865
2010 Bribery Act 127
Merchant Shipping Act (MSA)
Chapter 6 120
s. 8(10) 119
s. 8(16) 119
s. 9(12) 119
s. 12(5) 119–120
s. 24 120
s. 33 120
s. 40 120
s. 49 120
s. 61 120
s. 62 120
s. 63 120
Third Parties (Rights against Insurers) Act 479, 749, 811
2011 Wreck Removal Convention (WRC) Act 490, 505, 681, 736
s. 255G(5) 759, 760

TABLE OF FOREIGN STATUTES

Hong Kong
Hong Kong (British Nationality) Order 1986 .... 140, 142

United States
Clean Water Act 828
Comprehensive Environmental Response Compensation and Liability Act 828
Federal Water Pollution Control Act 828
Oil Pollution Act (OPA) 1990 828

TABLE OF STATUTORY INSTRUMENTS

Carriage of Passengers and their Luggage by Sea (UK Carriers) Order 1998 (SI 1998/2917) 788
art. 3 .... 801, 806
Civil Procedure Rules (CPR) 1998 783
Pt 59 851
Pt 61 851
r 61.1(2)(f) 565
Control of Major Accident Hazards (COMAH) Regulations 1999 (SI 1999/743) 682
Control of Major Accidents (Amendment) Regulations 2005 (SI 2005/1088) 682
Dangerous Substances in Harbour Areas Regulations (DSHA) Regs 1987 681
Dover Harbour Revision Order 1969 (SI 1969/1578) and 2006 (SI 2006/2167) 691
Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010 (SI 2010/1513) 681, 685
Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/0000)
Reg 12(1) 567
Reg 38(1) 567
Reg 39 567
Reg 40 567–568
Reg 41 567
Financial Restrictions (Iran) Order 2009 (SI 2009/2725) 865
Fire Precautions (Workplace) Regulations 1997 (SI 1997/1840) 682
Harbours, Docks, Piers and Ferries (Poole Harbour Revision Order) 2012 (SI 2012/1777) 692
s. 19 681
s. 21 681
Health and Safety at Work Regulations 1999 (SI 1999/3242) 682, 688
Hovercraft (Application of Enactments) Order 1972 (SI 1972/971)
art. 8 491
Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 (SI 2012/1743) 43, 682, 686, 692
Merchant Shipping (Carriage of Cargoes) Regulations 1999 (SI 1999/336) 682
Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 [SI 2012/3152) 794, 801, 806
Reg 3 819
Reg 4 819
Reg 8 819
Reg 9 819
Reg 14 819
Merchant Shipping (Compulsory Insurance of Ship-owners for Maritime Claims) Regulations 2012 (SI 2012/2267) 44, 741
Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 (SI 1998/1258) 742, 743, 751, 787
art. 2(1)(a) 805
art. 7(e) 805
s. 7(b) 805
Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1990 (SI 1990/2605) 681
Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997 (SI 1997/2367) 681
Merchant Shipping (Flag State Directive) Regulations 2011 (SI 2667/2011) 41
Merchant Shipping (ISMC) Regulations 1998 (SI 1998/1561) 88–89, 119
Reg 3 89
Reg 4 .... 89, 122
Reg 5 .... 89, 122
Reg 6 89
Reg 7 .... 89, 90, 122
Reg 8 .... 89, 122
Reg 8(1) 89

Reg 8(2)(b)(c) 90
Reg 12 122
Reg 15 89
Reg 16 122
Reg 16(1)(b) 90
Reg 16(2) 90
Reg 16(3) 90
Reg 17 122
Merchant Shipping (Light Dues) (Amendment) Regulations 2009 (SI 2009/1371) 682
Merchant Shipping (MS) (Distress Signals and Prevention of Collisions) Regulations 1983 (SI 1983/708) 389
Merchant Shipping (MS) (Distress Signals and Prevention of Collisions) Regulations 1996 (SI 1996/75) 389
Merchant Shipping (MS) (Distress Signals and Prevention of Collisions) Regulations 1991 (SI 1991/768) 389
Merchant Shipping (MS) (Distress Signals and Prevention of Collisions) Regulations 1989 (SI 1989/1798) 389
Merchant Shipping (MS) (Distress Signals and Prevention of Collisions) Regulations 1996 (SI 1996/75)
Reg 2(1) 391
Reg 2(2) 391
Reg 5 402
Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006 (SI 2006/1244) 862
Reg 5 863
Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation) Regulations 1998 (1998/1056) 682
Merchant Shipping (OPRC) Order 1997 (SI 1997/2567) 487
art. 2 684
Merchant Shipping (OPRC) Regulations 1998 (SI 1998/1056) 487, 684
Merchant Shipping (Pilot Transport Arrangements) Regulations 1999 (SI 1999/17) 712
Merchant Shipping (Port Security) Regulations 2009 (SI 2009/2048) 682
Merchant Shipping (Port State Control) Regulations 1995 (SI 1995/3128) 681
Reg 15 720
Merchant Shipping (Port State Control) (Amendment) Regulations 2009 (SI 258/2009) 692
Merchant Shipping (Port State Control) Regulations 2011 (SI 2011/2601) 42
Merchant Shipping (Port Waste Reception Facilities) Regulations 2003 (SI 2003) 682
Merchant Shipping (Prevention of Pollution by Garbage) Regulations 1998 (SI 1998/1377) 682
Merchant Shipping (Prevention of Pollution) (Intervention) (Foreign Ships) Order 1997 (SI 1997/2568) 567
Merchant Shipping (Prevention of Pollution) (Law of the Sea Convention) Order 1996 (SI 1996/282)
art. 2 836
Merchant Shipping (Prevention of Pollution) Limits Regulations 1996 (SI 1996/2128) 681, 684, 836
Merchant Shipping (Registration of Ships) Regulations 1993 (MS (Reg) Regulations) (SI 1993/3138) 174, 186
Part IV 143
Part X 142
Reg 2 142
Reg 7 141
Reg 7(1) 141, 142
Reg 8 142
Reg 9 142
Reg 12 143
Reg 13 143
Reg 14 143
Reg 15 143
Reg 18 142
Reg 19 142
Reg 59 .... 175, 179
Merchant Shipping (Registration of Ships) (Amendment) Regulations 1994 (SI 1994/541) 174, 186
Merchant Shipping (Reporting Requirements for Ships Carrying Dangerous or Polluting Goods) Regulations 1995 (SI 1995/2498) 681
Reg 12 720
Reg 13 720
Reg 14 720
Reg 15 720
Merchant Shipping (Safe Loading and Unloading of Bulk Carrier) Regulations 2003 (SI 2003/2002) 48, 682
Merchant Shipping (Safety of Navigation) Regulations 2002 (SI 2002/1473) 682, 712
Merchant Shipping (Ship Inspection and Survey Organisations) (Revocation) Regulations 2011 (SI 2011/3056) 42
Merchant Shipping (Vessel Traffic Monitoring and Reporting Requirements)

(Amendment) Regulations 2011 (SI 2011/2616) 44
Merchant Shipping (Vessel Traffic Monitoring and Reporting Requirements) Regulations 2004 (SI 2004/2110) 29
Offshore Chemicals (Amendment) Regulations 2011 (SI 2011/982) 685
Offshore Installations (Emergency Pollution Control) Regulations 2002 (SI 2002/1861) 685
Offshore Petroleum Activities (Oil Pollution Prevention and Control) (Amendment) Regulations 2011 (SI 2011/0000) 685
Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005 (OPPC) (SI 2005/2055) 685
Package Travel, Package Holidays and Package Tours Regulations (PTR) 1992 (SI 1992/3288)
Reg 15 803
Pilotage (Recognition of Qualifications and Experience) Regulations 2003 (SI 2003 /1230) 682, 714, 723
Reg 2(2) 701
Reg 2(4) 702
Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000/1973)
Reg 32(1)(b) 163
Reg 32(1)(g) 163, 164
Port Security Regulations 2009 (SI 2009/2048) 96
Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) 320
Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) 594

TABLE OF EUROPEAN COUNCIL DIRECTIVES AND REGULATIONS

Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (Waste Oils Directive) 51
Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) 142
Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours 803
Directive 91/689/EEC of 12 December 1991 on hazardous waste (Hazardous Waste Directive) 51
Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Contracts Directive)
art. 3 594
Directive 93/75/EEC concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods (Hazmat Directive) 34, 35
Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents 43
Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations 29–30, 41, 72
art. 3(1) 30
Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State Control) 29, 33
Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances (Seveso II Directive) 682
Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships 49
art. 4 818
Directive 99/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications 701–702, 714
Decision of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste 51
Directive 2000/59/EC of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues 50
Directive 2001/25/EC of 4 April 2001 on the minimum level of training of seafarers 53
Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) 676, 781, 819
art. 7 786
Directive 2001/96/EC of 4 December 2001 establishing harmonised requirements and procedures for the safe loading and unloading of bulk carriers 48
Directive 2001/105/EC of 19 December 2001, amending Council Directive 94/57/EC, on common rules and standards for ship inspection and survey organisations and for the

relevant activities of maritime administrations 42, 72
art. 6(2) 30
art. 6(2)(b)(i) 30
art. 6(2)(b)(ii) 30
art. 6(2)(b)(iii) 30
Directive 2001/106/EC of 19 December 2001 amending Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State Control) 29
Annex XI 33
Annex XII 33–34
art. 3(1) 33
art. 7b 33
Directive 2002/59/EC of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC 29, 35, 44, 48
Directive 2002/84/EC of 5 November 2002 amending the Directives on maritime safety and the prevention of pollution from ships 38, 48
Regulation (EC) 417/2002 of 18 February 2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, and repealing Council Regulation (EC) 2978/94 31
art. 4(3) 32
Decision 2002/762/EC Decision of 19 September 2002 authorising the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention) 862, 863
Regulation (EC) 1406/2002 of 27 June 2002, establishing a European Maritime Safety Agency 38
art. 5(1) 36
art. 23 36
Regulation (EC) 2099/2002 establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and amending the Regulations on maritime safety and the prevention of pollution from ships 29, 38
Directive 2003/24/EC of 14 April 2003 amending Council Directive 98/18/EC on safety rules and standards for passenger ships 49
Directive 2003/25/EC of 14 April 2003 on specific stability requirements for ro-ro passenger ships 49
Directive 2003/103/EC of 17 November 2003 amending Directive 2001/25/EC on the minimum level of training of seafarers 53
Directive 2003/105/EC of 16 December 2003 amending Council Directive 96/82/EC on the control of major-accident hazards involving dangerous substances 682
Regulation (EC) 1726/2003 of 22 July 2003, amending Regulation (EC) 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hill oil tankers 32
Directive 2004/49/EC of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) 43
Regulation (EC) No 415/2004 of 5 March 2004 amending Regulation (EC) No 2099/2002 of the European Parliament and of the Council establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and amending the regulations on maritime safety and the prevention of pollution from ships 38
Regulation (EC) 724/2004 of 31 March 2004, amending Regulation (EC) 1406/2002, establishing a European Maritime Safety Agency 37
art. 14(1) 38
Regulation (EC) 725/2004 of 31 March 2004 on enhancing ship and port facility security 37, 95, 96, 712
Regulation (EC) 2172/2004 of 17 December 2004, amending Regulation (EC) 417/2002 of 18 February 2002, on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers 32
Directive 2005/12/EC of 18 February 2005 amending Annexes I and II to Directive 2003/25/EC on specific stability requirements for ro-ro passenger ships 49
Directive 2005/35/EC of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements 54–55, 59–64, 122, 872
art. 1(1) 64
art. 3(1) 55
art. 3(1)(c)(d) 56

art. 4 .... 55, 60, 61
art. 5(1) 55, 60
art. 5(2) 55, 60
art. 8 61
Directive 2005/45/EC of 7 September 2005 on the mutual recognition of seafarers' certificates issued by the Member States and amending Directive 2001/25/EC 53
Directive 2005/65/EC of 26 October 2005 on enhancing port security 96, 712
Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution 54–55
Directive 2006/12/EC of 5 April 2006 on waste (Waste Framework Directive) 51
Regulation (EC) 336/2006 of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95 89
Regulation (EC) 1013/2006 of 14 June 2006 on shipments of waste 51
Regulation (EC) 2038/2006 of 18 December 2006 on multiannual funding for the action of the European Maritime Safety Agency in the field of response to pollution caused by ships 37
Regulation (EC) No 93/2007 of 30 January 2007 amending Regulation (EC) No 2099/2002 establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) 38–39
Regulation (EC) 457/2007 of 25 April 2007, amending Regulation (EC) 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers 32
Directive 2008/98/EC of 19 November 2008 on waste and repealing certain Directives (Waste Framework Directive) 51, 52
Directive 2008/106/EC of 3 December 2008 on the minimum level of training of seafarers 38
Regulation (EC) 324/2008 of 9 April 2008 laying down revised procedures for conducting Commission inspections in the field of maritime security 38, 96, 712
Directive 2009/15/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (Recast Directive) 30–31, 41, 72
art. 5(2)(b) 31
Directive 2009/16/EC of 23 April 2009 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State Control) (PSC Directive) 15, 31, 33, 42, 71, 122, 686
Directive 2009/17/EC of 23 April 2009 amending Directive 2002/59/EC, establishing a Community vessel traffic monitoring and information system 35–36, 44, 47, 569
Directive 2009/18/EC of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC 38, 42, 43, 686
Directive 2009/20/EC of 23 April 2009 on the insurance of ship-owners for maritime claims 44, 741, 750
Directive 2009/21/EC of 23 April 2009 on the conformity requirements of flag States 31, 40–41
art. 4(1) 4 0
art. 4(2) 40
art. 5 40
art. 6 40
art. 7 40
art. 8 40
art. 8(2) 40
Regulation (EC) 391/2009 of 23 April 2009 on common rules and standards for ship inspection and survey organisations (Recast) 30–31, 41, 814
Directive 2009/45/EC of 6 May 2009 on safety rules and standards for passenger ships 49
art. 4(1) 819
Directive 2009/123/EC of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements .. 54–55, 872
art. 1(1) 64
art. 2(5) 65
art. 3(1) 65
art. 4 .... 64, 65
art. 5 .... 64, 65
art. 5a 65
art. 5b 65
art. 8 64
art. 8a 64
art. 8b 64
Recital 4 64

Recital 9 64
Recital 11 65
Recital 15 65
Regulation (EC) 392/2009 of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents (Passengers Liability Regulation) 43, 794, 801, 803, 806, 807, 817–819
art. 1 818
art. 2 818
art. 4 818
art. 5 818
art. 6 819
art. 7 819
art. 17 819
art. 17*bis* 819
Regulation (EC) 1163/2009 of 30 November 2009, amending Regulation (EC) 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers 32–33
Directive 2011/15/EU of 23 February 2011 amending Directive 2002/59/EC of the European Parliament and of the Council establishing a Community vessel traffic monitoring and information system 48, 569
Regulation (EC) 651/2011 of 6 July 2011 adopting the rules of procedure of the permanent cooperation framework established by Member States in cooperation with the Commission pursuant to Article 10 of Directive 2009/18/EC 43
Regulation (EC) 1286/2011 of 9 December 2011 adopting a common methodology for investigating marine casualties and incidents developed pursuant to Article 5(4) of Directive 2009/18/EC 38, 43
Decision 2012/22/EU of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 807
Decision 2012/23/EU of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 .... 807, 814
Regulation (EC) 100/2013 of 15 January 2013 amending Regulation (EC) 1406/2002, establishing a European Maritime Safety Agency 38

TABLE OF INTERNATIONAL CONVENTIONS

Anti-fouling Convention (International Convention on the Control of Harmful Anti-fouling Systems on Ships) 2001 827
Arrest Convention 1952 *see* International Convention Relating to the Arrest of Sea-Going Ships (Arrest Convention) 1952
Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) *see* PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea)
Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL) 2002 .... 43, 735, 752, 758, 764, 766, 791, 792, 797, 807
- art. 1(8) 809
- art. 3 809
- art. 3(1) 808
- art. 3(1)(2) 817
- art. 3(2) 809
- art. 3(3) 809
- art. 3(4) 809
- art. 3(4)(d) 807
- art. 3(5)(a) 808
- art. 3(5)(b) 808
- art. 3(5)(c) 808
- art. 3(6) 809
- art. 3(7) 810
- art. 4 .... 809, 817
- art. 4*bis* 810, 813
- art. 4*bis* (10) 8 .... 10, 811
- art. 4*bis* (13) 810
- art. 5 812
- art. 6 .... 808, 810
- art. 7 .... 808, 809, 811, 812, 817
- art. 7(2) 812
- art. 8 .... 811, 812, 817
- art. 8(1) 812
- art. 8(2) 812
- art. 8(3) 812
- art. 8(4) 812
- art. 9 808
- art. 10 .... 807, 817
- art. 10(1) 811, 812
- art. 10(2) 812
- art. 11 807
- art. 12 811
- art. 13 .... 808, 809, 811, 817
- art. 13(1) 811
- art. 14 807
- art. 15 813
- art. 16(1) 812, 813
- art. 16(2) 813
- art. 16(2)(a) 812
- art. 16(2)(b) 813
- art. 16(2)(c) 813
- art. 16(3) 804, 813
- art. 16(4) 813
- art. 17 .... 793, 813, 814
- art. 17(2) 813
- art. 17(3) 813
- art. 17(5) 806
- art. 17*bis* 813, 814
- art. 17*bis*(3) 814
- art. 18 .... 793, 814
- art. 19 793
- art. 20 .... 793, 806
- art. 21 793
- art. 22 793
- art. 23 793
- art. 24 793
- art. 25 793

see also PAL 2002 (2002 Protocol to PAL 1974 Convention)

Ballast Water Management Convention *see* International Maritime Organisation Convention on Ballast Water Management 2004
Brussels Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910 484
- art. 1(4) 565
- art. 6A 786
- art. 8 497
- art. 11 503

Brussels Convention on Collisions *see* Convention for the Unification of

Certain Rules of Law with respect to Collisions between Vessels (Brussels Convention on Collisions) 1910
Brussels Convention on Salvage of Aircraft 1938 484
Brussels Convention on the Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters 1968 .... 24, 676
Brussels Supplementary Convention 1963 (to Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960) 872
Bunkers Convention *see* International Convention on Bunker Civil Liability for Oil Pollution Damage (Bunkers Convention) 2001

CLC Convention *see* International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992
Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels (Brussels Convention on Collisions) 1910 .... 389, 434, 448, 449
Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) 1929, as amended the The Hague Protocol 1955 and the Montreal Protocol 1975 .... 766, 767
- art. 25 .... 114, 765, 769, 776, 777, 778, 779, 780

Convention on Civil Liability for Maritime Carriage of Nuclear Material (NUCLEAR 71) 874
Convention on Limitation of Liability for Maritime Claims (LLMC) Convention 1976 .... 44, 114–115, 116, 417–418, 740, 741, 741–744, 774–781, 800, 804–806, 811, 833, 861, 865
- art. 1 .... 744, 766
- art. 1(1) 745, 748
- art. 1(2) 744, 745, 754, 755, 762
- art. 1(3) 748
- art. 1(4) 746, 747, 749
- art. 1(6) 749
- art. 2 .... 744, 748, 749, 750, 751, 752, 767, 780, 783, 804
  - para 1(d) 744
  - para 1(e) 744
  - para 1(f) 744
- art. 2(1) 748, 752, 754, 756, 767
- art. 2(1)(3) 761
- art. 2(1)(a) 638, 751, 752, 752–758, 760, 787, 864
- art. 2(1)(b) 752, 758, 780
- art. 2(1)(c) 758
- art. 2(1)(d) 736, 758–761, 759, 760, 761, 787
- art. 2(1)(e) 758–761, 759, 787
- art. 2(1)(f) 757, 761
- art. 2(2) 752, 755, 758, 759, 761, 762
- art. 2(a) 757
- art. 2(f) 757
- art. 3 .... 750, 752, 804
- art. 3(a) 762
- art. 3(b) 762
- art. 3(c) 762
- art. 3(d) 762
- art. 3(e) 762
- art. 4 .... 114, 117, 118, 702, 750, 752, 763, 764, 766, 767, 768, 772, 774, 776, 778, 779, 780, 781, 833
- art. 5 785
- art. 6 .... 743, 761, 804
  - para 1(b) 750
- art. 6(1) 752, 785, 787
- art. 6(1)(b) 702, 734
- art. 6(2) 785
- art. 6(3) 785
- art. 7 .... 744, 785
  - para 1 751
- art. 7(1) 787, 804–805
- art. 9 .... 754, 784
- art. 9(1)(a) 754
- art. 9(1)(b) 754
- art. 9(1)(c) 754
- art. 10(2) 734
- art. 11 .... 638, 751, 754, 782, 783
- art. 11(3) 784
- art. 12 .... 638, 784, 785, 787
- art. 12(1) 785, 787
- art. 12(2) 785
- art. 13 .... 638, 783, 784, 849
- art. 13(2) 783, 784, 849
- art. 13(3) 783, 784
- art. 14 .... 638, 784
- art. 15 742
- art. 15(3bis) 751, 787
- art. 15(4) 743
- art. 15(5) 743
- art. 18 .... 759, 787
- art. 22(2) 751
- art. 27 786
- Sched 7
  - Pt II 750
  - Pt II(5(1)(2)) 750

Convention on Maritime Liens and Mortgages 1993 .... 183, 185
Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London Convention) 1972 .... 826–827, 883
- art. 23 826

Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971 876

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
art. 6 ... 422

Fund Convention 1971 *see* International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention 1971)
Fund Convention 1992 *see* International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention 1992)

Geneva Convention on the High Seas 1958 ... 68
art. 5 ... 141

Hague-Visby Rules (HVR) *see* International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague-Visby Rules) 1924, as amended by the Brussels Protocol 1968
Hamburg Rules *see* United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) 1978
HNS Convention *see* International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea Convention 1996, as amended by the 2010 HNS Protocol
Hong Kong Convention *see* International Convention for Recycling of Ships, Hong Kong 2009 (Hong Kong Convention)

International Convention for Recycling of Ships, Hong Kong 2009 (Hong Kong Convention) ... 52, 828
International Convention for Safe Containers 1972 ... 883
art. X ... 884
International Convention for the Prevention of Pollution from Ships (MARPOL) 1973, as amended by the Protocol of 1978 31, 72, 878, 885
Annex I ... 59, 65
Reg 4 ... 58
Reg 4(2) ... 59
Reg 9 ... 55, 58
Reg 10 ... 55, 58
Reg 11 ... 58
Reg 11(a)(c) ... 55
Reg 11(b) ... 55, 58, 60
Reg 15 ... 58
Reg 34 ... 58
Annex II ... 59, 65
Reg 3 ... 58
Reg 5 ... 55, 58
Reg 6 ... 58
Reg 6(a)(c) ... 55
Reg 6(b) ... 55, 60
Reg 13 ... 58
Annex III
Reg 3 ... 58
Annex IV ... 334
Annex VI ... 824
International Convention for the Safety of Life at Sea (SOLAS) 1974 ... 18, 72, 120, 161, 241, 824, 876, 878, 879, 884, 885
Chapter III ... 407
Chapter V ... 34, 682, 712
Chapter VI ... 49
Chapter XI–2 ... 37, 94
Regulation XI–2/2 ... 95
Regulation XI–2/6 ... 96
Regulation XI–2/8 ... 95
Regulation XI–2/9.1.1 ... 95
Regulation XI–2/10 ... 96
Chapter XII ... 48
Regulation 14 ... 86
International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague-Visby Rules) 1924, as amended by the Brussels Protocol 1968 ... 106–107, 741, 767, 769
art. I ... 766
art. I(c) ... 669
art. III
r 1 ... 106, 747
r 2 ... 667
r 6(3) ... 666
art. IV
r (2)(a) ... 667
r 2(a) ... 449
r 3 ... 674
r 5 ... 764
r 5(a) ... 758, 765, 780
r 5(e) ... 63, 765, 780
r 6 ... 674
International Convention on Bunker Civil Liability for Oil Pollution Damage (Bunkers Convention) 2001 ... 44, 47, 487, 571, 580, 734, 740, 760, 810, 821
art. 1(1) ... 862
art. 1(3) ... 862, 863
art. 1(5) ... 863
art. 1(9) ... 863
art. 3 ... 863
art. 3(2) ... 863
art. 3(3) ... 863
art. 3(6) ... 863
art. 4(1) ... 863
art. 4(2) ... 862
art. 5 ... 863
art. 7(1) ... 864
art. 7(10) ... 865
art. 7(12) ... 864
art. 7(13) ... 865

art. 8 862
art. 9 862
art. 10 862
International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969 .... 39, 44, 45, 52, 829
art. V.2 765
International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992 .... 487, 574, 734, 761, 762, 766, 780, 810, 830, 835, 864, 865
art. I 834, 836, 857
art. I(5) 837
art. I(6) 837
art. I(6)(a) 838
art. I(7) 837
art. I(8) 834
art. II 836
art. II(a)(i) 580
art. II(a)(ii) 580
art. III 848
art. III(1) 842
art. III(2) 842
art. III(2)(a) 843, 844
art. III(2)(b) 854
art. III(3) 842
art. III(4) 846
art. III(4)(b) 847, 848
art. III(5) 848
art. IV 848
art. IX 847, 849, 850, 852, 855, 859, 860
art. IX(2) 850
art. IX(3) 850
art. V(1) 853
art. V.2 765
art. V(3) 849
art. V(5) 846
art. V(7) 849
art. V(8) 849
art. VI 849
art. VII 853
art. VII(1) 832, 845
art. VII(8) 832, 845
art. VIII 851
art. X(1) 852
art. X(2) 852
art. XI 834
International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea Convention 1996, as amended by the 2010 HNS Protocol 14, 44, 45, 487, 580, 734, 810, 821, 862, 864
art. 1(1) 866
art. 1(3) 868
art. 1(5) 867
art. 1(5)(b) 867
art. 1(6) 867
art. 1(9) 868
art. 3 868
art. 4(3) 867
art. 4(5) 866
art. 5(1) 866
art. 6 763
art. 7 868
art. 7(1) 867
art. 7(2) 869
art. 7(3) 869
art. 7(5) 868
art. 9(1) 868, 870
art. 9(2) 868, 869
art. 11 870
art. 12 .... 868, 869
art. 14(1) 870
art. 14(3) 871
art. 14(4) 871
art. 14(5) 871
art. 16 866
art. 37(2) 871
art. 37(3) 871
art. 37(4) 871
art. 38(1) 870
art. 38(2) 870
art. 39 871
art. 39(7) 871
International Convention on Maritime Search and Rescue (SAR) 47
International Convention on Oil Pollution, Preparedness, Response and Cooperation 1990 (OPRC) Convention 487, 684, 825–826
International Convention on Salvage (Salvage Convention) 1989 .... 481, 484, 487, 491, 828, 840, 841
art. 1 .... 490, 523
art. 1(a) 488, 490, 510, 552
art. 1(b) 488
art. 1(c) 488, 490
art. 1(d) 486, 497, 553, 555, 573, 580
art. 2 487
art. 3 .... 488, 490
art. 4 .... 488, 490
art. 5 .... 488, 504
art. 5(1) 505
art. 5(3) 505
art. 6 523
art. 6(1) 487
art. 6(2) 482, 516, 523, 524
art. 7 512
art. 8 523
art. 8(1) 529, 542
art. 8(1)(a) 529
art. 8(1)(b) 497, 529, 575, 576
art. 8(1)(c) 541, 543
art. 8(1)(d) 541, 543
art. 8(2) 541, 542
art. 8(2)(a) 543
art. 9 .... 45, 566
art. 10 503

art. 12 .... 510, 543
art. 12(1) 546
art. 12(2) 546
art. 12(3) 540
art. 13 .... 523, 543, 546, 548, 550, 551, 552, 553, 555, 564, 566, 572, 573, 574, 575, 576, 841
art. 13(1) 546, 551
art. 13(1)(b) 486, 497, 546, 573, 575, 576
art. 13(1)(h) 549
art. 13(1)(i) 549
art. 13(1)(j) 549
art. 13(2) 546
art. 14 .... 486, 497, 508, 511, 523, 546, 549, 550, 551, 552, 553, 554, 555, 556, 557, 565, 566, 571, 572, 574, 576, 578, 761, 762, 841
art. 14(1) 549, 550, 552, 553, 555, 573
art. 14(2) 549, 550, 552, 555, 556, 573
art. 14(3) 549, 550, 552, 553, 555, 573
art. 14(4) 550, 573, 577
art. 14(5) 550, 573
art. 14(6) 550, 573
art. 15(1) 564
art. 15(2) 564
art. 16 .... 491, 546
art. 16(1) 491
art. 16(2) 491, 492, 573
art. 17 .... 497, 499
art. 18 .... 418, 529, 533, 539, 543
art. 19 546
art. 20 545
art. 20(1) 565
art. 21 545
art. 21(4) 565
art. 22 564
art. 23(1) 566
art. 23(2) 566
art. 23(3) 566
art. 30 488
art. 30(1)(d) 490

International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention) 1978 .... 12, 17, 18, 19, 21, 53, 85, 113, 120, 151, 165, 387, 880

International Convention on the Control of Harmful Anti-fouling Systems on Ships (Anti-fouling Convention) 2001 827

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention 1992) 39, 487, 578, 829, 830, 831, 832, 835, 853, 858
art. 1(2) 836
art. 2(2) 853
art. 3 836
art. 4(1) 853
art. 4(2) 854
art. 4(3) 854
art. 6 .... 855, 859
art. 7(1) 855, 856
art. 7(3) 855, 856
art. 7(6) 855
art. 8 856
art. 9(1) 854
art. 9(2) 854
art. 9(3) 855
see also Supplementary Protocol 2003 to Fund Convention 1992 (2003 Protocol on the Establishment of a Supplementary Fund for Oil Pollution Damage)

International Convention on the Removal of Wrecks (Wreck Removal Convention) Nairobi 2007 ...... 44, 47, 48, 482, 490, 569, 680, 681, 693, 694, 731–736, 741, 810
art. 1(1) 731
art. 1(2) 732
art. 1(3) 732
art. 1(4) 732
art. 1(5) 733
art. 2 732
art. 3(2) 760
art. 7 .... 734, 760
art. 8 .... 734, 760
art. 9 .... 734, 760
art. 9(3) 760
art. 9(9) 760
art. 10 .... 734, 760
art. 10(2) 734, 759
art. 11 .... 734, 760
art. 12 .... 734, 759, 760
art. 12(2) 760
art. 12(3) 760
art. 13 734
art. 18 736

International Convention on Tonnage Measurement of Ships 1969 876

International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention) 1969 880
art. I 825
art. III 825
art. V 825

International Convention Relating to the Arrest of Sea-Going Ships (Arrest Convention) 1952 745

International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships (1957) 19, 113–114, 741–742, 767, 769–772
art. 1(1)(c) 758
art. 6 744
International Maritime Organisation Convention on Ballast Water Management 2004 .... 51, 827–828
International Maritime Organisation (IMO)
Resolution A.500(XII) 574
Resolution A.647(16) 78
Resolution A.680(17) 78
Resolution A.739 (18) 72
Resolution A.741(18) 78
Resolution A.817(19) 387
Resolution A.924(22) 94
Resolution A.949(23) 46, 568, 735
Resolution A.950(23) 46, 569
Resolution A.960 .... 23, 716, 717–718
Annex 2 .... 719, 720
Annex 2(4) 718
Annex 2(8) 718
Resolution A.960(23) 714
Resolution LEG 5(99) 741, 788–789, 805
Resolution MEPC.173(58) 827
Resolution MSC.179(79) 78
Resolution MSC.216(82) 407
Resolution MSC.273(85) 78
Resolution MSC.317(89) 407
Resolution MSC.320(89) 407
International Regulations for Preventing Collisions at Sea (Colregs) 1910 389
International Regulations for Preventing Collisions at Sea (Colregs) 1948 389
International Regulations for Preventing Collisions at Sea (Colregs) 1960 389
International Regulations for Preventing Collisions at Sea (Colregs) 1972 .... 389, 878, 883, 884
Part B, Section I 392–396
Part B, Section II 396–398
Part B, Section III 398–400
Part C 400–401
Part D 401
Reg 1(b) 391
Reg 1(c) 390
Reg 1(e) 390
Reg 2(b) 433
Reg 3(a) 391
Reg 4 392
Reg 5 392
Reg 6 392–394
Reg 7 394
Reg 8 394
Reg 9 395–396
Reg 10 396
Reg 13 397
Reg 14 397
Reg 15 397
Reg 16 398
Reg 17 398
Reg 18 398
Reg 19 398–400
Reg 20 40
Reg 21 40
Reg 22 40
Reg 23 40
Reg 24 40
Reg 25 40
Reg 26 40
Reg 27 40
Intervention Convention (International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties) 1969 *see* International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention) 1969

Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention 1988 873

Limitation of Liability Convention 1957 *see* International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships 1957
Limitation of Liability Convention 1976 *see* Convention on Limitation of Liability for Maritime Claims (LLMC) Convention 1976
Load Lines Convention 1966 885
London Convention 1972 *see* Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London Convention) 1972

MARPOL Convention *see* International Convention for the Prevention of Pollution from Ships (MARPOL) 1973, as amended by the Protocol of 1978

NUCLEAR 71 (Convention on Civil Liability for Maritime Carriage of Nuclear Material) 874

OPRC Convention *see* International Convention on Oil Pollution, Preparedness, Response and Cooperation 1990 (OPRC) Convention
OSPAR Recommendations 2010/18 on the prevention of acute oil pollution from offshore drilling activities 685

PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) 43, 383, 433, 477, 749, 751, 752, 758, 764, 766, 769, 787, 791–792, 794, 804–806, 811
art. 1(1) 795
art. 1(2) 796
art. 1(3) 795
art. 1(4) 796
art. 1(5) 796
art. 1(6) 796
art. 1(7) 796
art. 1(8) 796–797
art. 2(1) 795
art. 2(2) 795
art. 3 797
art. 3(1) 797
art. 3(2) 797
art. 3(3) 798, 799
art. 4 797
art. 4(1) 797
art. 4(2) 797
art. 4(4) 797
art. 5 801
art. 6 802
art. 7 .... 799, 800, 801
art. 7(1) 800, 805
art. 7(2) 800, 801
art. 8 .... 796, 799, 801
art. 8(3) 802
art. 8(4) 800
art. 9 .... 799, 800
art. 10 799
art. 10(1) 799, 801, 802
art. 11 .... 799, 802
art. 13 .... 764, 780
art. 13(1) 801
art. 13(2) 801
art. 15 802
art. 16 .... 802, 804
art. 17(1) 803
art. 17(2) 803
art. 18 800
PAL 1976 (1976 Protocol to PAL 1974 Convention) 792
PAL 2002 (2002 Protocol to PAL 1974 Convention) 791, 792, 794, 806–814
art. 3(1)(b) 814
art. 10 .... 813, 814
art. 11 .... 813, 814
see also Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL) 2002
Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960 872
Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 805–806
art. 3 789
art. 4 805
art. 6 805
art. 7 805

Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention) 1980 ... 180, 183, 239
art. 3 184
art. 3(1) 181
art. 3(4) 181
art. 4 184
art. 4(1) 181
art. 8(1) 181
art. 9(4) 181
Rotterdam Rules *see* United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) 2009

Salvage Convention *see* International Convention on Salvage (Salvage Convention) 1989
Search and Rescue (SAR) Convention *see* International Convention on Maritime Search and Rescue (SAR) 1979
SOLAS Convention *see* International Convention for the Safety of Life at Sea (SOLAS) 1974
Special Trade Passenger Ships Agreement 1971 876
STCW Convention *see* International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention) 1978
Supplementary Protocol 2003 to Fund Convention 1992 (2003 Protocol on the Establishment of a Supplementary Fund for Oil Pollution Damage) 39, 578, 829, 830–831, 856–860
art. 1(8) 857
art. 3 857
art. 4(1) 857
art. 4(2) 857
art. 5 857
art. 6 859
art. 6(1) 859
art. 6(2) 859
art. 7 859
art. 7(1) 860
art. 7(2) 860
art. 7(3) 860
art. 8 860
art. 8(1) 860
art. 8(2) 860
art. 9(1) 859
art. 9(2) 859
art. 9(3) 859
art. 9(4) 859
art. 10 .... 858, 859
art. 12(2) 858

art. 13 858
art. 13(1) 858, 859
art. 14 858
art. 14(2) 858
art. 15 858
art. 15(1) 858, 859
art. 15(2) 858, 859
art. 15(3) 859
art. 19(3) 856
see also International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention 1992)

Treaty on European Union (TEU) 1992
art. 6 65
art. 47 56

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) 2009 741, 767, 769, 780
art. 60 .... 765, 766
art. 61 .... 765, 766
United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) 1978 .... 449, 741, 767, 780
art. 8 765
United Nations Convention on the Law of the Sea (UNCLOS) 1982 .... 68, 822–824
art. 2 .... 45, 57
art. 17 .... 57, 58, 59
art. 19 58
art. 19(2)(h) 823
art. 45 731
art. 91 141
art. 98 .... 45, 569
art. 192 823
art. 194–9 569
art. 211 .... 45, 57, 59, 569
art. 211(1) 57, 823
art. 211(2) 57, 59, 823
art. 211(4) 57, 59, 823
art. 211(5) 57, 59
art. 218 824
art. 220 824
art. 221 .... 569, 823
art. 225 .... 45, 569
art. 230(1) 57, 59
art. 230(2) 57, 59
art. 235 822
art.s 194–199 45
Pt V 823
Pt XII 57, 822

Vienna Convention on Civil Liability for Nuclear Damage 1963 872
Protocol 1997 873

Vienna Convention on the Law of Treaties 1969
art. 12(1) 877
art. 14(2) 878
art. 15 878
art. 18(a) 877
art. 30 880
art. 31 .... 747, 880
art. 31(2) 835
art. 31(3) 835
art. 32 .... 747, 880
art. 33 880

Warsaw Convention *see* Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) 1929, as amended by The Hague Protocol 1955 and the Montreal Protocol 1975
Wreck Removal Convention *see* International Convention on the Removal of Wrecks (Wreck Convention) Nairobi 2007

York–Antwerp Rules (YAR) 1890 656
York–Antwerp Rules (YAR) 1924 .... 656, 657
Rule X 661
Rule XI 661
Rule XX 661
York–Antwerp Rules (YAR) 1950 656
York–Antwerp Rules (YAR) 1974 .... 656, 657
Rule X 659
Rule X(b) 659
Rule XI(b) 662
Rule XIV 658, 659
York–Antwerp Rules (YAR) 1994 .... 658, 664, 677
York–Antwerp Rules (YAR) 2004 .... 653, 654, 657
Rule I 663
Rule II 663
Rule III 663
Rule V 663
Rule VI 656
Rule VII 663
Rule VIII 663
Rule IX 663
Rule X 660, 662, 663
Rule XI 656, 662, 663
Rule XI(b) 663
Rule XIV 656, 659, 662, 663
Rule XIV(b) 659
Rule XIX 673
Rule XX 656
Rule XXIII 677
Rule A 664
Rule C 665
Rule D 666
Rule E 665
Rule F 663

LIST OF ABBREVIATIONS

ABPH	Associated British Ports Holdings plc
AIS	automatic identification system
ALARP	as low as reasonably practicable
BIMCO	Baltic and International Maritime Council
BMP	Best Management Practice
CA	Court of Appeal
CAA	Civil Aviation Authority
CEA	Central Electricity Authority
CJEU	Court of Justice of the European Union
CLEAR	Consolidated Land, Energy, and Aquatic Resources
CLC	Civil Liability Convention
CLCA	Civil Liability (Contribution) Act
CMCH Act	Corporate Manslaughter and Corporate Homicide Act
CMI	Comité Maritime International
Colregs	International Regulations for Preventing Collisions at Sea
COMAH	Control of Major Accident Hazards
COPE	Compensation for Oil Pollution in European Waters Fund
COSS	Committee on Safe Seas
CPA	Crown Proceedings Act
CPR	Civil Procedure Rules
C(RTP)A	Contracts (Rights of Third Parties) Act
CSWPMS	Code of Safe Working Practices for Merchant Seamen
CTL	constructive total loss
DECC	Department of Energy and Climate Change
DfT	Department for Transport
DOC	Document of Compliance
DOT	Department of Trade
DPA	designated person ashore
DSHA Regs	Dangerous Substances in Harbour Areas Regulations
DVA	Dangerous Vessels Act
DWC	dead weight capacity
ECDIS	Electronic Chart Display and Information System
ECJ	European Court of Justice
EEZ	Exclusive Economic Zone
EMCIP	European Marine Casualty Information Platform
EMSA	European Maritime Safety Agency

FAA	Fatal Accidents Act
FSA	formal safety assessment
FSS Code	Fire Safety System Code
GA	general average
GBI	Grain Board of Iraq
GBS	Goal-Based Standards
H&M	hull and machinery
HA	Harbours Act
HDPCA	Harbours, Docks and Piers Clauses Act
HNS	Hazardous and Noxious Substances
HSWA	Health and Safety at Work Act
HVR	Hague–Visby Rules
IACS	International Association of Classification Societies
IAEA	International Atomic Energy Agency
IBC Code	International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk
IDOC	Interim Document of Compliance
IGP&I	International Group of P&I Clubs
IM	Information Memorandum
IMDG	International Maritime Dangerous Goods
IMO	International Maritime Organization
IMSBC Code	International Maritime Solid Bulk Cargoes Code
IOPC	International Oil Pollution Convention
ISM	International Safety Management
ISO	International Organisation for Standardisation
ISPFS	International Ship and Port Facilities Security
ISPP	International Sewage Pollution Prevention
ISPS	International Ship and Port Facility Security
ISSC	International Ship Security Certificate
ISU	International Salvage Union
ITIC	International Transport Intermediaries Club
IWG	International Working Group
JLTP	Joint Long-term Programme
KPI	Key Performance Indicator
LA	Limitation Act
LC/LP	London Convention and Protocol
LLMC	Limitation of Liability for Maritime Claims
LNG	liquefied natural gas
LOF	Lloyd's Open Form
LOI	Letter of Intent
LOU	Letter of Undertaking
LPA	Law of Property Act
LPG	liquefied petroleum gas
LR(CN)A	Law Reform (Contributory Negligence) Act
LRIT	long-range identification and tracking of ships system
LSA	Life-Saving Appliances
LSSA	Lloyd's Standard Salvage and Arbitration
MA	Misrepresentation Act

MAIB	Marine Accident Investigation Branch
MARPOL	International Convention for the Prevention of Pollution from Ships
MAS	maritime assistance services
MCA	Maritime and Coastguard Agency
MCA	Maritime Conventions Act
MEPC	Marine Environment Protection Committee
MIA	Marine Insurance Act
MII	mortgagee's interest insurance
MOA	Memorandum of Agreement
MOTI	Ministry of Trade of Iraq
MOU	Memorandum of Understanding
MSA	Merchant Shipping Act
MSC	Maritime Safety Committee
MS(LSO)A	Merchant Shipping (Liability of Ship-owners and Others) Act
MSMSA	Merchant Shipping Maritime Security Act
MS (Reg) Regulations	Merchant Shipping (Registration of Ships) Regulations
MS(Reg)A	Merchant Shipping (Registration, etc.) Act
MS(SP)A	Merchant Shipping (Salvage and Pollution) Act
NA	Nationality Act
NIOC	National Iranian Oil Company
NOR	Notice of Readiness
NSF	Norwegian Sale Form
OCIMF	Oil Companies International Marine Forum
OECD	Organisation for Economic Co-operation and Development
OPA	Oil Pollution Act
OPEP	oil pollution emergency plan
OPPC	Oil Pollution Prevention and Control
OPRC	Oil Pollution Preparedness, Response and Co-operation
PA	Pilotage Act
P&I	Protection and indemnity
PLA	Port of London Authority
PLR	Passengers Liability Regulation
PMSC	Port Maritime Safety Code
PSC	Port State Control
PTR	Package Travel Regulations
RDC	running down clause
RNLI	Royal National Lifeboat Institution
RO	Recognised Organisation
SAJ	Shipowners Association of Japan
SAR	Search and Rescue
SCA	Supreme Court Act
SCOPIC	Special Compensation of Protection and Indemnity Clause
SCR	ship-owners' casualty representative
SDR	Special Drawing Rights
SGSA	Supply of Goods and Services Act
SI	Statutory Instrument

SIRE	Ship Inspection Report Exchange
SMC	Safety Management Certificate
SMM	safety management manual
SMS	safety management system
SNA	Steam Navigation Act
SOGA	Sale of Goods Act
SOLAS	International Convention for the Safety of Life at Sea
SOSREP	Secretary of State's representative
SSGA	Sale and Supply of Goods Act
SSO	ship security officer
STCW	Standard of Training Certification and Watchkeeping
STOPIA	Small Tankers Oil Pollution Indemnity Agreement
TA	Transport Act
TDA	Trade Descriptions Act
TMSA	Tanker Management Self-Assessment
TOPIA	Tankers Oil Pollution Indemnity Agreement
UCTA	Unfair Contract Terms Act
UKSTC	United Kingdom Standard Towage Conditions
UNCLOS	United Nations Convention on the Law of the Sea
VDRs	Voyage Data Recorders
VIMSAS	Voluntary IMO Member State Audit Scheme
WRA	Water Resources Act
WRC	Wreck Removal Convention
YAR	York–Antwerp Rules

PART I
OVERARCHING ASPECTS OF RISK MANAGEMENT

This page intentionally left blank

CHAPTER 1

MANAGING RISKS IN THE TWENTY-FIRST CENTURY

AN OVERVIEW

1 Introduction 3

2 Understanding infrastructures of shipping companies 11

3 Collective responsibility and commitment 16

1 INTRODUCTION

There have been, primarily, seven landmark accidents since 1980, which provided the impetus for rigorous enforcement of safety regulations, improvement of ship construction and making risk assessment mandatory upon ship operators, flag States, classification societies, and port authorities: *The Derbyshire* (1980),[1] *The Herald of Free Enterprise* (1987),[2] *The Braer* (1993),[3] *The Sea Empress* (1996),[4] *The Erika* (1999),[5] *The Prestige* (2002)[6] and the *Costa Concordia* (2012).[7]

1 At the second exploration of the wreck, it was established that the cause of the loss was not the failure of the 65th frame, as had originally been thought, but the negligence of the crew in failing to secure the lid to a store hatch on the foredeck. However, at the public inquiry in 2000, this was overturned. The inquiry established that some of the air pipes on the foredeck were damaged by continuous mountainous seas. The sea started crashing onto number 1 hatch cover as the bow dropped lower in the water. As the hatch cover was not designed to withstand such enormous pressures, it eventually gave way, and water flooded number 1 hold, and so the bow went down even more. The same happened to the other hatches, one after the other, until each hold filled with water, and the ship finally sank. A number of significant recommendations to improve ship safety in bulk carriers were made, which are gradually being implemented. (See Merseyside Maritime Museum website.)

2 The immediate cause of the sinking was found to be negligence by the assistant bosun, but the official inquiry placed more blame on his supervisors and a general culture of poor communication in the ferry company. There was pressure to leave port, and the company did not take care to ensure that the crew knew their duties and to check that such duties were performed before the ship left port. Since this disaster, improvements have been made to the design of ro–ro vessels with watertight ramp indicators showing the position of the bow doors and the banning of undivided decks.

3 The reason for the ship's loss was seawater contamination of the diesel oil, due to which her engine lost power. One theory how this happened was that the pipeline on the deck had broken loose, causing a gap to allow sea water to fill the engine. The true story is said to be that the ship was unseaworthy: a vital steam pipe had burst in the engine-room. Owing to contamination of the diesel oil, the engine stopped, causing the ship to become out of control, especially when she was in the middle of a storm. The result of this case was Lord Donaldson's report on 'Safer ships, cleaner seas'.

4 While she was entering Milford Haven, sailing against the outgoing tide and in calm conditions, she was pushed off course by the current and became grounded after hitting rocks in the middle of the channel. In attempts to pull her off the rocks by the port authority tugs, she detached several times from the tugs and grounded repeatedly – each time slicing open new sections of her hull and releasing more oil.

Before proceeding with an analysis of the subject, some general points should be made:

First, risk management is a science, which can be complex in its application because it requires multidisciplinary skills and knowledge. It involves principles applicable to legitimate methods of controlling behaviour by regulations and sanctions imposed for breach of such regulations. Its success depends on the company's internal rules of conduct and their clear communication to the people working in the organisation. How people respond to regulation and rules and the extent to which they comply with them depend on their psychological and cultural make-up, which is a field of psychosociological studies on organisational behaviour.

Second, risk assessment and management systems developed gradually over the years in other industries, such as aviation and rail, for the protection of human life. They are still developing and have been applied to shipping since the 1990s. They are now applied across the board by professional bodies to ensure provision of quality of services.

Third, improvements in technical standards, coupled with demanding survey regimes and rigorous enforcement of regulations, have, undoubtedly, had a very positive influence on safety. But it has also been recognised in recent years that, as people operate ships, the impact of the 'human element' in accidents cannot be ignored.[8] It is, in fact, an overarching aspect in all procedures.

Fourth, the management of risk is central to shipping and to similar industries; the process has been greatly facilitated by new systems, guidelines and codes, as will be seen later in this volume. Although the details of the International Safety Management (ISM) Code are examined in Chapter 3, below, reference to it is made here in relation to the principles of risk assessment that derive from the code. In addition, reference is made to the commercial incentive for best practice issued by the Oil Companies International Marine Forum (OCIMF), the Tanker Management Self-Assessment (TMSA) guidelines, to the Code of Safe Working Practices for Merchant Seamen (CSWPMS)[9] and to the Electronic Chart Display and Information System (ECDIS), which affect the ISM Code.

Fifth, as the safety of ships, crew and cargo has been subjected to increasing piracy attacks since 2007, new measures had to be taken by the industry internationally,

Miscommunication between the pilot and the ship was a significant cause of the incident; it became apparent that there was a need to tighten up regulations with regard to pilots and risk management in ports.

5 The sinking was due to age, maintenance issues and structural stresses on the single hull (see, further, Ch 2).

6 The Spanish, French and Portuguese coastal authorities contributed to the sinking by not offering a place of refuge when the master requested a shelter, once his ship had suffered hull damage caused by severe weather, but the age of the ship, structural stresses and maintenance issues were among the causes of the accident. *The Erika* and *The Prestige* sinking were the reason for the introduction of new safety regulations, as will be seen in Ch 2, below.

7 From the initial casualty investigation, on the basis of which IMO has made preliminary recommendations with regard to safety of cruise ships (MSC 92/6/3, 18 March 2013), the human element, bridge management and operational matters, which played a great part in the accident, demonstrate the need for proper application of the provisions of SOLAS, STCW and the ISM. Construction issues are also considered.

8 IMO Resolution A.947(23) 2004; see also Lloyd's Register: *Human Element: Best Practice for Ship Operators* (BPG) LR 2007.

9 Consolidated edition 2011, issued by the Maritime and Coastguard Agency, published by the Stationary Office (www.tsoshop.co.uk).

and the emphasis on risk assessment by applying the Best Management Practice (BMP4, 2011) has become paramount. Such measures and the revised International Maritime Organization (IMO) guidance (2012) to ship operators, flag States, coastal States and private maritime security companies, for the engagement of privately contracted armed guards, are mentioned later in the chapter.

Sixth, the years of a thriving freight market and a boom in shipbuilding have gone, and shipping is in a downturn cycle at present. However, shipping markets have their rises followed by falls and rises again. An unfortunate consequence during such a cycle, usually, is that some owners, in order to survive in this competitive business, may resort to cutting the budget required for maintaining quality in order to be able to accept lower rates of freight or hire, overlooking that the knock-on effect of such a policy will be an inevitable increase in risk exposure and accidents. However, in the twenty-first-century risk management era, such companies will not last for long, because the claws of safety regulations, Port State Control (PSC), as well as commercial auditing of their ships by traders, will push them out of business eventually; no sound bank, which exercises proper due diligenc, will provide further finance to them. (see Chapters 2 and 3, below).

To appreciate the complexities involved in the application of risk management, it is important to understand the interrelationship between the infrastructures that are within or outside a shipping company and, inevitably, influence how the company is operating and trading. The interrelations between such infrastructures are complex. It is only intended here to present the framework within which risk management can be evaluated.

It is appropriate to deal with definitions first.

1.1 RISK

In common parlance, 'risk' generally means the taking of chances in the hope that everything will turn out to be both safe and profitable, depending on the circumstances of the risk-taking. Risk also carries an additional connotation of a hazard that needs to be covered by insurance.

For the purpose of proper risk management, however, risk has a special meaning. It is understood as the *possibility of harm* or loss associated with an activity, or *the likelihood of an incident happening* that may result in danger to life, property or the environment, or may lead to commercial disputes and litigation.

In most industries, risk is understood as the combination of the probability of occurrence of an identified hazard, measurement of its frequency, and an assessment of its potency, that is, the magnitude of the consequences of its occurrence.

In the CSWPMS, the definitions are simple and easy to remember: 'hazard' is defined as a source of potential harm or damage, or a situation with potential for harm or damage. 'Risk' is seen as having two elements: (a) the likelihood that a hazard may occur; (b) the consequences of the hazardous event (section 1.2).

That being so, identified risks or hazards need to be evaluated in terms of their significance to the business, the probability and frequency of occurrence and the company's tolerance of their consequences.

There are many different methodologies available to shipping companies for risk assessment and evaluation, ranging from basic qualitative assessment to complex formal risk assessment (see further below).

1.2 RISK ASSESSMENT AND MANAGEMENT

The phrase is used in different contexts. To a professional manager of business, the exercise of risk management broadly means a systematic approach to taking safety precautions at all levels of business, perhaps intuitively, including the management of financial and commercial risks, and the obtaining of insurance cover.

To a safety and quality assurance manager, it is the application of a systematic approach to hazards; the process, as derived from the ISM Code, includes: (a) the identification of hazards; (b) the assessment of risks associated with these hazards; (c) the evaluation of their frequency and potency in terms of the magnitude of possible consequences; (d) the application of controls to reduce the eventuality of their occurrence; and (e) the monitoring of the effectiveness of controls. These are simply steps, which may not mean anything until they are applied.

1.2.1 Under the ISM Code

The ISM Code, as amended, set the cornerstone of the risk management process; para 1.2.2 states:

> Safety management objectives of the company should, inter alia: (1) Provide for safe practices in ship operation and safe working environment; (2) Assess all identified risks to its ship, personnel, and the environment, and establish appropriate safeguards; and (3) Continuously improve safety management skills of personnel ashore and aboard ships.

1.2.2 Under the FSA

A formal safety assessment (FSA) was developed by IMO[10] for the main purpose of assessing risks as a tool to help in the evaluation of new regulation for maritime safety and the protection of the marine environment. This is a very good and easy model to understand, as well as to apply. FSA consists of five steps, which can be applied by any business in the assessment of risks:

1. identification of hazards (a list of all relevant accident scenarios with potential causes and outcomes);
2. assessment of risks (evaluation of risk factors, that is, potency and likelihood);
3. risk control options (devising measures to control or reduce the identified risks);
4. cost–benefit assessment (determining cost-effectiveness of each risk control option); and
5. recommendations for decision-making (information about the hazards, their associated risks and the cost effectiveness of alternative risk control options).

In simple terms, these steps can be reduced to:

1. What might go wrong? = identification of hazards (a list of all relevant accident scenarios with potential causes and outcomes);

10 See www.imo.org

2 How bad and how likely? = assessment of risks (evaluation of risk factors);
3 Can matters be improved? = risk control options (devising measures to control and reduce the identified risks);
4 What would it cost, and how much better would it be? = cost–benefit assessment (determining cost–effectiveness of each risk control option);
5 What actions should be taken? = recommendations for decision-making (information about the hazards, their associated risks and the cost-effectiveness of alternative risk control options is provided).

1.2.3 Under the CSWPMS

Under the CSWPMS, a 'risk assessment' is intended to be a careful examination of what could cause harm, depending on the nature of operations, so that decisions can be made as to whether enough precautions have been taken or whether more should be done to prevent harm. The aim is to minimise accidents and ill health on board ship (section 1.3). There are no fixed rules as to how risk assessment should be undertaken, although sections 1.9 and 1.10 give the main elements. The assessment will depend on the type of ship, the nature of the operation and the type and extent of the hazards and risks (section 1.4).

In broad terms, under section 1.9 of this code, the elements of risk assessment are: to classify work activities, identify hazards and risk controls, estimate risk, determine the tolerability of the risks, prepare risk control action plan, review adequacy of the plan and ensure that risk assessment and controls are effective and up to date. Section 1.10 gives a risk assessment pro forma for employers to use in order to record the findings, which covers, for example, an assessment of: each separate activity, the hazards involved in it, controls in place, personnel at risk, likelihood of harm (estimated in a table as to how likely it is for it to occur), severity of harm, risk levels with a risk estimator (low, medium, high), action to be taken following assessment, and administrative details, for example, names of assessor, date and the personnel involved.

All these definitions and elaborations come to the same thing. However, seamen would need specific and practical guidance by training to be able to perform the tasks expected of them. The guidelines set out in the CSWPMS intend to do that, but the code is a thick volume and would need to be simplified in practical terms by the training managers to ensure that the seamen know what to do in each particular situation.

1.2.4 Under the BMP

The BMP for protection against Somalia-based piracy specifies that, prior to transiting the high-risk area (HRA), ship operators and masters should carry out a thorough risk assessment, which should be ship- and voyage-specific, to assess the likelihood and consequences of piracy attacks to the vessel based on the latest available information. The output of this risk assessment should identify measures for prevention, mitigation and recovery, which will mean combining statutory regulations with supplementary measures to combat piracy.

1.3 LEGAL RISK MANAGEMENT

Legal risk management is a somewhat indeterminate term, which in its narrow sense means identifying risks that might arise from the drafting and/or performance of contracts, or risks that need insurance cover. A more inventive risk manager may consider that the concept is broader than that and it should include evaluating the legal consequences of operational risks and the potential liabilities arising therefrom, judging from previous experience and precedents. The term should encompass any risks that may potentially result in legal consequences, and, for this reason, the management of legal risks should be integrated into the broader risk management process.

In the view of the author,[11] effective risk management is a process involving assessing and evaluating any types of risk (not in isolation, but in a holistic way). It should be integrated into all aspects of business of a company as a coherent model by which all possible exposure to risks, from corporate to contractual to operations to training of personnel and communications within and outside the company, should be looked at from a legal point of view to assess their consequences.

Managing risks before liabilities are incurred is part of legal risk management.

1.4 RISK EXPOSURE

Risk exposure is a situation created by not taking prophylactic measures to guard against risks. It results from a neglect or failure to identify potential risks and evaluate their frequency, probability of occurrence or recurrence, and their potential consequences. The consequences may include criminal or civil liabilities resulting in financial losses, loss of reputation and possibly criminal prosecution.

It would be impossible to enumerate all the situations of risk exposure.

Broadly, a company may be exposed to: (a) risks inherent in particular forms of corporate structures; (b) financial risks; (c) risks with regard to the operation of ships; (d) the 'human element' risks; (e) risks of liabilities, for example, for loss of life or personal injury, damage to property or the environment; (f) other liabilities to third parties; and (g) criminal liabilities.

More specifically, risk exposure concerns exposure to risks that, if they are ignored, have potential legal and financial consequences.

However, not all kinds of risk can be identified or assessed. Assessment invariably depends on the subjective perception of its assessors, or a risk may only become apparent with the benefit of hindsight. The way in which the safety management system (SMS) of the ISM Code assists in this respect (see Chapter 3, below) is that it imposes an obligation upon the management of a company: (1) to have a system of recording incidents and the situations in which they have occurred; (2) to undertake conscious observation and graphic analysis of how they occurred; (3) to take action to prevent their recurrence; and (4) to visualise unsuspected exposure.

The ISM Code requirement of teamwork, assisted by external advisers, should ensure that a systematic risk assessment and evaluation are made, so that

11 The author has developed a model for in-house training by which risks are looked at in a holistic way.

the subjective element of risk assessment may be reduced, and risk awareness increased.

The TMSA was the result of a realisation by the oil companies that there were two classes of ship operators: the ones who diligently applied the ISM and went beyond the minimum requirements, and the ones who did the minimum possible just to fill the boxes in the forms.

1.5 RISK PROFILE

Many factors, such as personality traits, experience and knowledge, financial incentives and commercial considerations, determine whether or not a person is prepared to take risks and of what kind. A company's risk profile can be assessed by identifying and evaluating accidents or near 'misses' the company has experienced, or any losses that resulted from claims, or losses that may be incurred; then considering the policy approach of the company to these situations and what actions the company has taken to prevent the same in the future.

Once a company has developed a programme for the identification, assessment, control and monitoring of these risks, an assessment of the company's risk acceptability can be made for the purpose of setting priorities as to which risks need to be monitored or controlled by taking immediate action.

A company with a good risk profile will have the SMS integrated with other quality systems and will have established its objectives and targets in order to take corrective action, communicate progress and develop action plans for the individual responsibilities of its key people and staff.

Failure to comply with international regulations will certainly be caught at the next visit to a PSC, and this will inevitably affect the company's risk profile (see the stricter measures taken in this respect by the amendments to previous Directives by the EU in 2009, Chapter 2, below).

1.6 RISK TOLERANCE

Risk tolerance is the level at which risks may be accepted depending on the nature of risk, its possible consequences and the expense that would be required to eliminate or minimise the risk. It had been thought that the best measure of the level of risk tolerance could be made on the basis of applying the criterion of 'as low as reasonably practicable', represented by the mnemonic ALARP. If a company adopted the ALARP philosophy, its level of risk tolerance in limiting the occurrence of hazards would be acceptable. This criterion is recommended in the code with regard to risk management to be applied by port authorities (see Chapter 13).

In ship operations, this criterion has now been overtaken by further developments, and more specific guidance is to be found in the CSWPMS, providing for measures to be taken by a company for health and safety, and measures applicable to different types of ship and situation, the adoption of which will enable an assessor to measure the risk tolerance of a company.

However, theory is different from practice. A company's first and foremost objective is to engage the ships in profitable markets, which, inevitably, puts the company under

commercial pressures. Freight fluctuations, overcapacity creating more supply than demand, financial commitments to the mortgagee, internal pressures from partners or shareholders, and staffing costs are all factors that affect risk tolerance. The economic downturn may have some unexpected consequences upon the risk tolerance of shipping companies in the near future.

Such considerations may influence the management of a company to be more tolerant of a certain level of risk, and, as a result, the company may economise on the employment of high-quality, trained crew, or on the maintenance of its ships. If a risk is insurable, there may be a tendency to take risks (provided the conduct is not such as to prejudice the insurance contract) and respond to a loss or liability incurred reactively, instead of proactively. It is not surprising that some owners operate without insurance or protection and indemnity (P&I) cover (see some examples in Chapter 16).

Could owners and operators take such risks now, however, with the closing in by the stricter demands imposed on them for compliance by the PSC and all the other regulations that have emanated from the EU since 2009? The need to observe regulations and consider the consequences of non-compliance should be a weighty factor before a company begins to cut corners in safety issues. This should also improve the company's position in terms of obtaining finance.

1.7 SAFETY CULTURE

It should be blindingly obvious that 'safety culture' means that the management of a company adopts the appropriate attitude and values towards safety, and ensures commitment to safety by all in the company. A company with a good safety culture philosophy aims for transparency of management and operational practices, and the minimisation of identified risks that are due to the human element (see Chapters 2–4, Vol 2).[12] Regular audits, risk assessment and evaluation, as well as implementation of plans to control risk exposure, should enhance the safety culture and lead to a company almost free from risk incidents.

In this context, it is interesting to note the philosophy stated by BP Shipping:

> Truly world-class safety performance is about more than lowering headline safety numbers or beating industry benchmarks. For safety performance to really move to a new level, it has to become self-sustaining and therefore sustainable. Day in, day out, the safety message has to be made and remade so that it becomes engrained at every level everywhere, in every action, in every decision and in every way. The entire organisation has to be safety empowered and constantly on the lookout for new hazards.[13]

In the real world, however, there are factors that are not within the control of the ship-owning or managing companies. Part of the challenge for risk managers is the complexities created by the interlocking infrastructures of the company, which require the risk manager to co-ordinate the activities of each department, or subsidiary company, or subcontracted company, in order for them to work in harmony with each other. An examination of the role and relevance of the infrastructures is seen under para 2, below.

12 See also *Alert*, which is a monthly journal reporting on the significance of the human element in maritime accidents, issued under the auspices of the Nautical Institute and sponsored by Lloyd's Register.

13 Dave Williamson, director of fleet operations for BP Shipping in 'BP Shipping: Safe ships'. It was ironic that, after such a statement, the Deepwater Horizon accident occurred.

1.8 THE NECESSITY FOR THE CSWPMS

Although the ISM Code provides the general principles for the implementation of safety systems, there was no detailed guidance as to the development of risk assessment procedures by shipping companies. Classification societies adopted and expanded on the IMO's FSA model to conduct risk assessments, but the CSWPMS provides detailed, step-by-step guidelines of risk assessment for a variety of work situations and types of ship. It is regarded as the best way forward in the implementation of risk management, supplementing the ISM Code. It will be no excuse for ship-owners not to have implemented such systems (see Chapters 3 and 4, below, as to consequences). The CSWPMS must be carried on all UK ships other than fishing vessels and pleasure craft and is addressed to anyone on board a ship, regardless of rank. It is hoped that this code will be adopted worldwide.

1.9 THE IMPORTANCE OF ECDIS

ECDIS stands for Electronic Chart Display and Information System, which was adopted by IMO in 2009 and entered into force on 1 January 2012. The mandatory carriage of ECDIS will be phased in, depending on the type of ship, and it is expected that, by July 2018, all ships will be obliged to carry it on board. It is the latest requirement for mandatory carriage on board ships and will have considerable impact, given the right training, on reduction of accidents occurred due to navigational errors; it will also greatly assist accident investigations. However, it is crucial to get the correct training, because ECDIS is a highly sophisticated system that includes a complex computer-based information system, besides its navigational functions. If the training is not accomplished, it takes little imagination to foresee that it may cause rather than prevent accidents. IMO's objective in making ECDIS mandatory has been to contribute to safe navigation by using the system to continually plot the ship's position and have a reliable updating of the electronic navigational chart portfolio.

It complements the ISM Code and falls within the ISM requirements that the SMS should ensure compliance with mandatory rules and regulations, and shall include instructions and procedures to ensure safe operation in compliance with relevant international and flag State legislation. That being so, it will certainly affect evidential issues of whether or not the ship-owner exercised due diligence to make the ship seaworthy at the commencement of the voyage (under the International Conventions for the carriage of goods by sea – discussed in Chapter 4, below).

2 UNDERSTANDING INFRASTRUCTURES OF SHIPPING COMPANIES

Risk management cannot be understood without understanding how the infrastructures of the business as a whole interrelate. As one writer,[14] on managing risks in shipping, has put it: 'Commercial pressures are ever present and, for every constructive improvement, risks are taken to innovate and exploit opportunities.'

The infrastructures are divided for simplicity into: internal, relational and external.

14 Parker, CJ, *Managing Risks in Shipping: A Practical Guide*, 1999, The Nautical Institute, p 2.

2.1 INTERNAL INFRASTRUCTURES

A company is made up of the aggregate of the personalities of people who are working in it. It is very important that, at the selection and recruitment level, those who hold managerial positions are chosen very carefully to fit in with the culture of the company and to be capable of meeting the objectives set by it. In the future, they may exercise their influence to change the culture of the company's approach to safety matters and risk management. Within the internal infrastructure, a risk manager should look at how the 'directing mind' of the company communicates its objectives and procedures to its staff, and what the company's philosophy with regard to safety or safety culture and risk tolerance is.

People employed at the top, who are the 'mind and will' of the organisation (see Chapter 4, Vol 2), determine the safety culture and the risk tolerance of the company. The staff employed in the technical operations, or in the shore management, or in the navigation of ships, are performing the core business of the company. Proper and clear communication channels between themselves and their superiors are essential for the avoidance of accidents and losses. Without clear communication and training, which have become even more essential for compliance in the last decade and, in particular, are being enforced through the amendments to the ISM Code and the revised Convention on the Standard of Training Certification and Watchkeeping (STCW), the company is at risk. Examples of accidents caused through poor communications are given in Chapters 4, 9, 11 and 13, below).

An effective management is one that implements the following objectives: leadership, clear communication, and the benchmarking of areas in need of improvement; consistency in approach and the reward of excellence; cultivation of co-operation; and the defusing of conflict.

The staff's trust, co-operation, commitment and identification with the company for the fulfilment of its objectives can be gained in various ways that are beyond the scope of this book. To maintain levels of co-operation and efficiency from top management to the deck of the ships[15] is crucial for the image of the company and the results the company aims to achieve, from both financial and risk management perspectives.

2.2 RELATIONAL INFRASTRUCTURES

2.2.1 Corporate interrelations

Ship-owning companies are complex organisations. The simplest form of a corporate structure is the one-ship company. The next stage of complexity is the owner who owns between two and five ships, each registered under one-ship companies. A parent company may control these subsidiaries, and the management of all these ships may be in the hands of the same people operating under a separate management company. Some of these ships may be chartered to a bareboat charterer who charters them, in

15 Cowling, A, Stanworth, M, Bennett, R, Curran, J, and Lyons, P, *Behavioural Science for Managers*, 2nd edn, 1988, Edward Arnold; Armstrong, M, *How to be an Even Better Manager*, 4th edn, 1994, Kogan Page; Mulling, L, *Management and Organisational Behaviour*, 2nd edn, 1989, Pitman.

turn, to different time charterers. The control may, or may not, remain with the parent company. The bareboat charterer may be the one that provides the finance or the required securities for the bank loans.

The next evolution in corporate structures is a complex one and may involve a venture between multinational companies, where it may be difficult to ascertain easily whether there is congruence of opinion in policy and safety matters. Ships may be owned by various subsidiary companies, or owned and controlled by one or two parent companies. The ships may be entered into pools or consortia and may be let – via bareboat charters – to various time charterers, who sub-charter down the line to other charterers.

The distance created from the real owners, through complex corporate structures, is a legitimate method of limiting liability and, thus, controlling risk exposure (see examples of legitimate corporate structures and of very complex structures in Chapter 4, Vol 1). The distance between the various companies formed, however, has caused concerns to regulatory bodies about lack of transparency as to who is behind the corporate veil, particularly with regard to cases of environmental disaster, or those involving security issues or terrorism.

Such distance and the registration of companies in tax haven jurisdictions, which do not permit disclosure of who the beneficial interests behind the veil of the company are, have unfortunately given rise to proliferation of fraud, sham transfers and avoidance of liabilities, as seen in various cases that reached the English courts (see Chapters 3–6, Vol 1).

Inter-corporate relationships are a crucial factor influencing the risk profile of the ship-owning companies. Differences of opinion as regards policy objectives and orientation between the top people in each company, as well as the inevitable reduction of effective communication down the line, may give rise to incidents or accidents, the cause of which may have escaped the notice of the top people, so that an inefficient system of assessment and evaluation of risk may result.[16]

Attributing liability to the company for criminal offences is now easier with new legislation (see Chapters 2 and 4, Vol 2). Pinning responsibility upon the 'directing mind' of the company, for the purpose of breaking the limit of liability under Art 4 of the 1976 Convention, is virtually impossible, particularly in complex corporate structures, but it has not been so difficult if the old system of limitation of liability is still applicable in a State whose courts have jurisdiction on the matter (see Chapters 4 and 14, Vol 2).

2.2.2 Owners and others

There may be a delicate relationship between owners and their bankers, which may have a significant impact upon the company's risk profile. For example, banks, in exercising their own due diligence, particularly as they are obliged to by Basel II and now Basel III Implementation on Banking Supervision (in effect from January 2013), are expected to select reputable owners to whom they lend money.

There is also a delicate relationship between owners and professional managers. Experienced owners may not easily delegate full management to professional

16 See, for example, *The Herald of Free Enterprise* (Ch 4, Vol 2).

managers, as they prefer to control technical and operational matters themselves and, hence, control the cost of maintenance of their ships for the purpose of compliance with regulations (see Chapter 5, Vol 2).

The nationality and experience of owners, and the nationality of the crew employed, do affect the acceptance of their ships by charterers for trading and by insurers.

The relational infrastructure includes, also, the owners' relationships with the ship's flag State, port States, the classification society, shipbuilders or repairers and government representatives, all of which affect the risk profile of a particular company (see Chapters 3 and 4, below).

2.3 EXTERNAL INFRASTRUCTURES

Although external infrastructures seem to overlap with the previous category, to a certain extent, what is outlined under this category is the effect of external pressures upon the risk exposure and risk profile of a ship-owning or management company, and the 'third parties' factors' to it, as can be seen below.

2.3.1 Regulatory

The importance of regulations is stressed throughout this volume. A great deal depends, however, not only on whether or not the owners or managers have a system of compliance in place (SMS), but also on whether the people to whom the continuous implementation and maintenance of the systems are delegated are carrying out their duties conscientiously and efficiently. Here, the importance of continuous training is critical for the company's continuity in business and profitability.

In addition, the role of the auditing organisations that inspect ships to verify compliance with International Conventions is also crucial (see Chapters 2 and 3, below).

It has, in recent years, been recognised that controls should be imposed upon the activities of classification societies and also of flag States in the inspection of ships. Flag States that neglect the enforcement of international regulations will now be more rigorously controlled (see Chapters 2 and 3, below).

2.3.2 Third parties' factors

Shippers, charterers, port authorities, PSC, shipbuilders, classification societies, brokers, insurers, terminal operators, subcontractors and government agencies are all to be regarded as sharing responsibility for the risk exposure of owners and managers, insofar as the external infrastructures are concerned.

Dangerous cargo can do significant harm to a ship and to the environment, and, in recognition of this, the Hazardous and Noxious Substances (HNS) Convention 2010 is adopted (see Chapter 16, Vol 2). Charterers who disregard safety matters, either with respect to the cargo, or in their choice of substandard ships to cut costs, or their choice of unsafe ports, can equally do more harm than is usually perceived (see Chapters 2 and 3, below).

Terminal operators accustomed to unsafe practices do need, nowadays, to exercise risk management to minimise risks to ships and to the environment (see regulations affecting ports in Chapter 2, and port authorities' duties in Chapter 13, Vol 2). Refusal of entry into a place of refuge by port authorities can indirectly have irreparable consequences for the environment.

Port States may not always have been consistent in their policies of inspecting ships, or of penalising those ships with deficiencies, which has inevitably led to confusion and discrimination, but this has now been taken care of by the amendment of the PSC Directive (see Chapter 2, Vol 2).

Defects in the design and construction of ships are not infrequently found to be a predominant cause of a marine disaster. Shipbuilders, who may construct defective hatch covers or weak bulkheads, or ship-repair yards, which may repair defects superficially, cannot be left out of the equation in promoting a culture of safety globally.

It should be noted, however, that, since the previous editions of this book, measures have been taken to harmonise the standards of ship construction (see Chapters 2, 3 and 7, Vol 2). Classification societies have taken on a greater role in the management of risk in the last decade than in the past.

Insurance brokers and the insurers of ships play a great role in promoting a safety culture, if they do their risk assessment properly and do not insure substandard ships (see, further, Chapter 3, Vol 2).

2.3.3 Market forces

What drives the management of a company are the objectives of: enhancing the company's position through profitable engagements of the ships; placing the company in a favourable competitive position by long-term employment plans; ensuring the good reputation of the company externally and with its financiers. In these respects, the management's perspective is interwoven with market forces, demand and supply, market capacity and quality.

When ship-owners provide 'quality services', offering ships that do not cause problems to the contracting parties or to the environment, and the owners/managers have a good reputation in dealing with third parties, there will be a positive correlation between employment and demand. Quality marketing and public relations will strengthen the company's position.

Apart from quality, however, other factors, such as overcapacity of ships of the same type, demand for particular commodities, technological advancements, demands for reducing ship emissions (which incidentally would, practically, require the rebuilding of engines) and the current economic downturn, affect the matrix of correlation between demand and the employment of ships.

As mentioned in the introduction to this chapter, survival in this competitive business, considering the world economic crisis, which affects the freight rates, may lead owners or managers to cut the budget required for maintaining quality performance in order to be able to accept lower rates of freight or hire and, at the same time, overlook the increase in risk exposure that such a policy entails.

In the long run, it should be remembered that due diligence and a systematic approach to risk management will pay dividends. There are several examples of cases,

given in this book, that reached the courts owing to these underlying factors and, not infrequently, owing to bad management practices, as well as lack of knowledge as to how to implement a coherent and systematic approach to risk management.

3 COLLECTIVE RESPONSIBILITY AND COMMITMENT

The objectives of safety of people, property and the environment, as well as prevention of liabilities to third parties, are a matter of collective responsibility and commitment, not only of the company concerned from the top of the hierarchy to the workforce, but also of all players involved in the complex infrastructures.

Congruency in policy and approach to risk management of the owner or manager will enable the company to surpass most problems posed from the outside. In particular, if the framework of procedures, discussed below, becomes part of the company's practices, a reduction in accidents and an increase in risk control will result.

It is recognised, however, that it is not possible to eliminate all marine casualties. In this respect, a Lloyd's underwriter,[17] speaking at a conference on risk management, said:

> Because of the nature of the business in which we operate, accidents and losses will continue to happen in the most safety conscious environments. But we all have a collective responsibility to work together in order to ensure that these losses are reduced to the lowest possible level.

The philosophy of collective responsibility was enshrined, in fact, in the ISM Code, which, as seen in Chapter 3, Vol 2, briefly provides for each company to:

(a) adopt a philosophy of safety culture at all levels; in other words, to commit to a mission for safety, to cultivate the right attitude and motivate its employees;
(b) provide for safe practices by putting procedures in place and recording incidents; ensuring competence and training of the crew and carrying out equipment maintenance within the time required, or recommended;
(c) strive for continuous improvement by monitoring, auditing, evaluating faults and preventing their recurrence; and
(d) prevent accidents and protect the environment, paying particular attention to the human element and man–equipment interface in accidents.

For collective responsibility to be understood, there must be, first, standards for risk control and, second, a systematic approach of application at each stage, as shown below.

3.1 RISK MANAGEMENT STANDARDS FOR RISK CONTROL

Standards derive from policies and policy objectives for SMSs and procedures, supported by guidelines on each individual aspect and stage of risk management. As

17 Redmond, S, 'The apparent cyclical nature of marine insurance and its effect on risk assessment and management', IBC Conference on Maritime Risk Assessment Management and Control, 1997.

seen above, the CSWPMS and the ECDIS provide standards and procedures that affect the ISM implementation and will have to be followed in order to show that the quality and safety systems meet the international requirements.

In addition, new, wide-ranging amendments to the STCW rules, agreed by governments in Manila in 2010, are intended to ensure that STCW standards stay relevant, so that seafarers can continue to develop and maintain their professional skills. In particular, numerous changes are now being introduced to take account of technical developments that require new shipboard competences.

The STCW amendments are applicable from 1 January 2012, when they entered into force. In particular, companies and crew will be required to comply with the new minimum STCW rest hour rules for seafarers.

3.2 THE STAGES OF RISK MANAGEMENT

A company should take a holistic view of risk management on all issues that can, potentially, give rise to liabilities. The stages at which risk management standards should be applied are divided into five categories: (1) risks at the incorporation of the company; (2) risks at the contract drafting stage; (3) risks in ship operations; (4) risks at the performance of voyage stage; and (5) risks at the dispute resolution stage.

3.2.1 Risks at the incorporation stage

At first, there are investment and financial risks involved, depending on the structure of borrowing and mortgaging for the purchase of the ships.

As discussed in Chapter 4, Vol 1, properly constituted corporate structures are a legitimate way of limiting liability, when a legal distance is kept between companies in the same group through the careful formation of one-ship companies. Having said that, however, sham corporations, set up to create a veil for fraudulent deals or in order to avoid liabilities already incurred, will be scrutinised by the courts. Although separate corporate structures provide a shield to the lifting or piercing of the corporate veil under English law, it should be borne in mind that evidence of fraud, or sham transfers, has been held to be a valid reason for the courts to pierce the corporate veil (see Chapter 4, Vol 1).

3.2.2 Risks at the contract drafting stage

As discussed in this book, vagueness in the terms of contracts, or contracts in the form of an agreement to agree, result in uncertainty and unenforceability of the term or the contract. Agreements to agree are generally not enforceable because of uncertainty (see Chapter 8, Vol 2). Examples of badly drafted, or unfavourable, clauses in contracts are looked at in various chapters. Particular problems have arisen with regard to drafting of oil major's approval clauses (see Chapter 3, Vol 2).

Drafting of mortgage covenants presents problems, and careful wording is needed to limit the mortgagee's right of possession to occasions of financial default (Chapter 6, Vol 2); in the area of shipbuilding, the standard terms of contract offered by shipbuilders are more favourable to the yard, save for the Baltic and International

Maritime Council (BIMCO) NEWBUILDCON, which is a more balanced contract; the drafting of guarantees, demand guarantees or performance bonds has given rise to difficult issues of construction, as seen in Chapter 7, Vol 2.

In the sale and purchase of used ships (Chapter 8, Vol 2), there are many examples of cases that ended up in litigation, either because the parties, through their brokers, did not make their intentions clear, or because the standard terms of Norwegian Sale Forms are very much in favour of the seller, or contain ambiguous clauses. Risks under the new BIMCO Sale Form 2012 are looked at in the same chapter. The buyers' attention is drawn to obtaining sufficient security as a back-up to the contractual guarantee and the indemnity under clause 9 of the Norwegian Sale Form (NSF) (covering loss in the event of encumbrances on the ship or claims brought against the ship for liabilities that had incurred before delivery). Once the sale is complete, the seller (usually a one-ship company) may no longer exist when the buyer discovers there was a breach of clause 9, or defects in the ship for which buyers may like to be prepared. Consideration should also be given at the stage of negotiations to include a *force majeure* clause to protect the parties in the event of extreme and unforeseen circumstances, such as, for example, the risk the buyers were faced with between 2008 and 2010, when completion could not take place owing to the financial crisis resulting in inability to draw down the finance for the completion.

In towage and offshore contracts (Chapter 11), there is a need to spell out clearly what the parties' intentions are and what they expect from each other. The allocation of risks between the parties in the BIMCO forms of offshore towage are not without problems in drafting. There are numerous other areas of contracts, such as charterparties, in which risks can be controlled at the drafting stage.

There is also the risk of a disappearing debtor, which must always be borne in mind at the stage of contracting. The law can do very little if a party, appearing to contract for another, disappears, leaving no undisclosed principal behind. Checking the solvency and credibility of a putative contracting party is more important than just succumbing to market forces.

3.2.3 Risks in ship operations

This is the core of the business, for which risk management is paramount. The informed choice of competent personnel and crew, as assisted by proper training, is the beginning of risk management. Compliance with the requirements of the International Convention for the Safety of Life at Sea (SOLAS) and the STCW Conventions, as amended, and the management of the fatigue factor have been the key focus of both IMO and the EU. As mentioned under 3.1, above, the Manila amendments to STCW in 2010 are intended to ensure that STCW standards stay relevant, so that seafarers can continue to develop and maintain their professional skills. In particular, numerous changes are now being introduced to take account of technical developments that require new shipboard competences.

The examples of *The Herald of Free Enterprise* and the *Costa Concordia*, in which lack of training and clear communication were in issue, so that the crew should have appreciated what was expected of it, show that the human element was not under control to prevent the accidents. Therefore, engaging and training competent seamen

are paramount for the company and a great investment for the survival of the company in business.

The importance of communication and language skills has been highlighted in the revised STCW Convention, so that accidents caused by human errors due to miscommunication are avoided. Equally, masters of ships, the designated person and marine superintendent must be fully committed and able to obey instructions, as well as understand the importance of recording and reporting incidents that need the managers' or directors' attention. Again, all these depend on the corporate culture and guidance from the top management.

Incidents of collisions at sea (discussed in Chapter 9, Vol 2), as well as incidents where the company was not able to limit liability under the 1957 Convention (discussed in Chapter 14, Vol 2), are examples of inattention to the navigational rules and good seamanship principle, or failure to follow instructions. If the circumstances of such incidents are systematically plotted and evaluated, followed by an assessment of the liability exposure of the company and by an action plan for their monitoring and control, the company should save money, not only in terms of minimising liabilities to third parties and reducing the management time spent in handling accidents or incidents, but also in terms of insurance premiums and legal costs. When an accident occurs, it has a spiral effect upon the whole of the business structure.

Routine maintenance, fire drills, training facilities and prevention of fatigue[18] at work are essential practices of well-functioning operational systems. Lack of these practices may result in loss of life and criminal liabilities and, perhaps, expose the owners to inability to limit liability or prejudice their insurance cover (see the implications of non-compliance with the ISM Code in Chapter 4, Vol 2).

The importance of integration of risk management procedures in this area into the overall risk management systems cross-departmentally cannot be underestimated.

3.2.4 Risks at the performance stage

Although due diligence should have been exercised at the technical and operational stage, to make the ship seaworthy in all respects before the commencement of a voyage, in order to prevent risks from arising, many other risks can arise at the performance stage. Such risks may either stem from badly drafted clauses in the contract (see above), or may be linked to the inherent dangers of the sea voyage, or may be due to the human element. Although some of them might be minimised, or controlled, complete elimination would be impossible.

This stage concerns the physical handling of the ship by those on board and the directions given by the shore management during a voyage; for example, directions given on how to handle loading or discharging, deal with unexpected situations, shippers, charterers, port authorities, stevedores, or those who have come to assist the ship in an emergency. Several judicial decisions in this book provide examples of such incidents.

Although risks can be considerably reduced by equipping seafarers with the knowledge and skills required, 'seafarers have an innate ability to understand and assess the risks that the job places before them and undertake intuitive risk analysis'.[19]

18 There has been a study on the fatigue effect upon performance of seafarers, The Horizon project, Southampton University.

19 Bailey, T (Captain), 'Managing risk on board ship', in Ch 3. op cit, Parker, fn 14.

However, it is the management of the company itself that must have clear goals and policies about safety, regardless of commercial pressures, so that clear communications and expectations are established, to prevent confusion.

Although most of the situations mentioned below are capable of being controlled and monitored, particularly with the new mandatory requirements provided by the ISM Code (Chapter 3), the STCW, CSWPMS and ECDIS, together with other mandatory requirements as will be seen in Chapter 2, the following (non-exhaustive) areas are of paramount importance as part of the risk management of the company:

3.2.4.1 Voyage planning

Has the company sufficiently assessed the probability of risks that may arise from: non-careful voyage planning; non-up-to-date navigational charts,[20] weather forecast, tidal forecasts, draught restrictions; non-observance of collision regulations;[21] superficial training; fatigue factors in watchkeeping; non-familiarisation of new members of crew;[22] insufficient bunkers for the voyage; or lack of clear guidelines and procedures?

3.2.4.2 Piracy risk assessment and planning

In addition to compliance with the International Ship and Port Facility Security (ISPS) requirements (see Chapter 3, below), the emergence of piracy activities has posed new challenges to shipping and seafarers. Adherence to the BMP, as revised in 2011 (BMP4), which requires risk assessment, company planning, following the reporting procedures, ship protection measures, as well as compliance with the revised IMO Guidance 2012 regarding engaging armed private security companies in high risk areas, are now accepted internationally. The UK government adopted the Guidance (updated June 2012) for UK flagged shipping on the use of armed guards to defend against the threat of piracy in exceptional circumstances.

Authority issues and the relationship between the master and the armed guards are dealt with in section 5, which provides that the ship's master has authority to ultimately decide whether or not armed guards are used in a particular voyage. The agreement with the private security company should include a clearly defined command and control structure that confirms the master's authority over the operation of the ship and the safety and security of its passengers, cargoes and crew. The security team leader and the armed guards must operate in accordance with the command and control structure and standard operating procedure; only if that procedure does not cover specific circumstances should the security team leader and the armed guards act in accordance with their professional judgement but comply with the applicable law.

BIMCO has issued a standard terms contract, 'Guardcon' 2012, and guidelines for use when engaging private security companies. In addition, to help instil confidence in the use of armed guards and ensure safety, efficiency and reliability, the International Organisation for Standardisation (ISO) has issued ISO/PAS 28007/2012, which are

20 *The Marion* [1984] 2 Lloyd's Rep 1, see Chs 4 and 14, Vol 2.

21 See Ch 9, Vol 2.

22 *The Safe Carrier* [1994] 1 Lloyd's Rep 589; *The Eurasian Dream*, see Ch 4, Vol 2.

guidelines for private maritime security companies providing privately contracted armed security personnel on board ships. It is the only international standard dealing with armed guards on ships. It provides specification for SMSs, monitoring and audits, for the supply chain to private maritime security companies, compliance with which can be acknowledged in a certificate ISO 28000.

Apart from performing risk assessment as guided by BMP4, piracy risks may need reconsideration at the time of danger and if, in the reasonable judgement of the master, there will be a real likelihood of being exposed to the danger of piracy, the master may consider changing the route of the voyage without being in breach of charterers' orders under the Conwartime charter (see, further, in Chapter 12, below).

3.2.4.3 Clear instructions/cargo loading

Has the management set clear instructions on what it expects from the master and crew during loading, to have the ship ready to receive the cargo, during stowage and lashing of the cargo, as well as when signing bills of lading? Most ship's masters, of course, know what their duties are, but some may obtain conflicting instructions from the shore, which is, often, owing to no clear lines of communications in the company's systems.

The test of whether or not the cargo has been properly stowed and securely lashed will be when the ship encounters heavy storms, particularly a tropical cyclone. Although a well-maintained and securely loaded ship, with well-trained crew and an experienced master, will be able to withstand ordinary perils of the sea, the unpredictability of sea conditions should not be underestimated, even if meteorological information is of the highest standard. Most reported accidents are due to severe weather conditions, which perhaps hit a less well-maintained or well-prepared ship whereby shifting of the cargo can cause a serious accident.

3.2.4.4 Managing stresses on ship

Bulkhead failures and stresses may depend either on construction, or survey faults, or miscalculation of the stresses on the ship, with a particular cargo on board. Such risks can be prevented; as will be seen in Chapter 2, below, enforcement of new regulations and EU directives should provide deterrence to malpractices.

3.2.4.5 Crew training

Apart from compliance with the new requirements under the STCW, seen under 3.1, above, continuous training of the crew to mitigate the human element factor has been emphasised in recent years, and it has been stressed in the IMO recommendations at the 92nd session of the Maritime Safety Committee (MSC) in the light of the investigation of the casualty of the *Costa Concordia*.

Training and education will ensure that the crew's knowledge is applied properly in bridge and equipment management, in checking the cargo for lashing, temperature, ventilation, or water ingress, any leakage of cargo, or any overheating that may result in combustion or fire in the holds. Fire drills and exercises should ensure that the crew know how to deal with unexpected fire on board (for example, *The Eurasian Dream*, Chapter 4, Vol 2).

3.2.4.6 Stowaways

Stowaways are a frequent and costly risk for owners and their P&I clubs. Although it is not always easy to detect their entry into the ship, extra watch and vigilance should be exercised to look in suspected places and, in case of container ships, to investigate non-sealed containers.

The UK Maritime Guidance Note (MGN 70M) offers useful guidelines to ship-owners, operators, charterers, managers, shipping agents, port authorities, masters and ship's officers on how to deal with stowaways on vessels and provides practical advice on the procedures to be followed if a stowaway is found on board.

3.2.4.7 Navigational risks

Grounding accidents could be prevented if an up-to-date chart and publications about the condition of local waters are always available and are observed. Collisions have been reduced in recent years with technology and training, but there are still issues arising from fatigue. Observance of bridge equipment procedures, familiarisation and training, as well as prevention of fatigue are of the utmost importance. The implementation of the ECDIS system of charts and communication of navigational dangers should, hopefully, reduce such accidents in the future. However, it should not be underestimated that new, complex technology complicates matters and may increase risks rather than provide safety, without proper training and familiarisation.

3.2.4.8 Preventing injuries and loss of life

The possibility of loss of life during the performance of ship operations, caused by serious management faults amounting to gross negligence, may result in the company being liable for corporate manslaughter, depending on where the incident causing death occurred (under the Corporate Manslaughter and Corporate Homicide Act 2007; see Chapter 4, below). The criminalisation legislation, particularly in the area of environmental pollution, is here to stay (see Chapters 2–4 and 16, Vol 2). The P&I clubs provide valuable information to their members about the implementation of International Conventions, or EU directives/regulations, and their possible impact upon the ship-owning business.

3.2.4.9 Risks at the discharge port

The voyage may be completed uneventfully, but there may be problems at the discharge port. The owners' P&I clubs provide extensive guidelines on how to deal with various circumstances, such as obnoxious receivers, or threats of arrest of the ship for alleged shortage of cargo, or demand for delivery without production of, or without the correct, bills of lading, and how to be aware of risks posed at certain ports. Clear communications and instructions from shore to the ship, at this stage, are very important, as is obtaining professional advice to resolve possible disputes in the best way possible. If not, then the next stage of the dispute resolution would inevitably follow.

3.2.4.10 Port risks/communication with pilot

Port restrictions, weather conditions and manoeuvring the ship out of or into port will depend on the knowledge of, and co-operation between, the pilot and crew of the ship. The master and pilot should exchange information regarding navigational procedures, local conditions and rules and the ship's characteristics, which should be a continuous process. Their co-operation and understanding of the circumstances and of each other are crucial in avoiding accidents, such as *The Sea Empress*, for example. IMO Resolution A. 960 provides recommendations on training and certification and operational procedures for maritime pilots, other than deep-sea pilots.

3.2.4.11 Aftermath of an accident – emergency procedures

Although a systematic risk management practice will be capable of reducing risk exposure to a significant extent, it would be naive to believe that everything will be 100 per cent perfect. What is important, however, is whether the company's policy or approach to the eventuality of accidents is proactive, or how the management reacts to such occurrences.

If a serious accident occurs, the company is expected to have emergency procedures in place, which should include prior training of the senior management in media handling. Co-operation with the P&I and hull insurers is paramount.

It is not uncommon, when there is a loss, for people to take more risks in reaction to it. It is human nature to seek an escape, owing to panic or fear of losing the co-operation of insurers, and, sometimes, there may be a tendency to invent a less plausible cause of the accident, particularly when a proactive approach to risks had not been taken.

The insurers, themselves, should also adopt an attitude of collective responsibility, as is stressed in Chapter 3, below. Cases have shown that overzealousness on the part of insurers, or their lawyers, to find ways of non-payment for the claim makes things worse, and the trust between the insurer and the insured is undermined, resulting in protracted litigation.

3.2.5 Risks at the dispute resolution stage

Litigation can, at times, be bedevilled by procedural entanglements, either because procedural rules may have more than one interpretation, or because dispute resolution clauses are unskilfully drafted; there have been a number of cases in the courts challenging arbitration clauses, concerning, particularly, multi-tier dispute resolution agreements. Examples can be found in Vol 1, Chapter 6.

It would be better to avoid reaching the dispute resolution stage by practising a systematic process of risk management in the first place. Litigation risks are costly and prejudice long-term business relationships.

Forum shopping in disregard of an agreement on jurisdiction will not be looked upon favourably by English judges. Neither England, nor another forum, will be an appropriate forum, if the interests of justice and comity to other nations' jurisdiction are not observed. There are a few new and interesting decisions shown in Chapters 6–8 of Vol 1.

The rules applicable under the Brussels I Regulation on jurisdiction and enforcement of judgments have brought significant changes; further changes will be in force from 2015, when the recast Regulation becomes applicable (see Chapters 7 and 8, Vol 1).

Parties to a dispute should consider finding an amicable solution through the assistance of a mediator or conciliator. Mediation of maritime disputes still has a long way to go to convince shipping companies of its advantages, particularly in relation to saving legal costs. Unpredictable results can arise from the disclosure procedures in litigation, as well as the performance of witnesses. The uncertainty involved in litigation should encourage the parties to mediate in appropriate cases.

3.3 ENHANCING SAFETY CULTURE THROUGH COLLECTIVE RESPONSIBILITY

For business productivity and profitability, and for keeping the lending bank happy to invest in a venture, enhancing safety culture is not a matter of a mechanical compliance with regulations or preparing the systems just for the time of external auditing. It is a continuous process, involving collective responsibility, with the ultimate goal of long-term benefits to the company. This may be stating the obvious, but there is no doubt that a great deal still needs to be done within the industry, in terms of education, to achieve the enhancement of a long-term safety culture.

3.3.1 Adopting a systematic process

It derives from the foregoing, and from what other experts in risk management have advocated, that it is imperative for every shipping company to establish a systematic approach to risk management and change the company's philosophy to one of quality and safety. It did not take long for the oil companies to recognise that there was a clear distinction between two categories of shipping operator: the ones who embraced the ISM implementation diligently to help them to achieve incident-free operations, and those whose aim has been to fulfil the minimum requirements.

Therefore, OCIMF issued guidelines requiring tanker owners to show commitment to safety by strictly adhering to the process prescribed in the TMSA 2004, as amended by TMSA (2) 2008, which is a best practice guide for vessel operators, discussed in Chapter 3, Vol 2. The TMSA programme is a tool to help ship operators to assess, measure and improve their management systems. The second edition, 2008, is an update and builds upon the operators' experience with TMSA and feedback received from industry. It includes all tanker vessel operators, including those who manage coastal vessels and barges.[23]

The TMSA,[24] coupled with the revised ISM Code, the STCW and the new code (CSWPMS) on safe working practices for merchant seamen, are having a significant impact on the improvement of safety standards. OCIMF has been in the forefront of driving the implementation of a 'common vessel inspection process' through the introduction of the Ship Inspection Report Exchange (SIRE) system, which promotes

23 See TMSA (2), 2008, purpose and scope, OCIMF.

24 In addition, OCIMF has recently issued the Energy Efficiency and Fuel Management guidelines, which will, in due course, be included in the TMSA.

a uniformly high standard of common inspections. Member companies can then use the results with their own vetting systems.

The programme encourages ship operators to assess their SMSs against listed key performance indicators (KPIs) and provides a best practice guide. It has been the best deterrent for compliance with safety regulations, as far as tanker operators are concerned, because it provides a great commercial incentive for tanker operators if they wish to trade with oil majors, and for this they have to pass the vetting requirements.

Therefore, ship operators have to re-examine, not only their operating practices, but also their philosophy, by taking safety issues seriously. The KPIs include 12 items:

1 management leadership and accountability;
2 recruitment and management of shore-based personnel;
3 recruitment and management of vessel personnel;
4 reliability and maintenance standards;
5 navigational safety;
6 cargo, ballast, mooring operations;
7 management of change;
8 incident investigation and analysis;
9 safety management;
10 environmental management;
11 emergency preparedness and contingency planning;
12 measurement analysis and improvement.

These guidelines form a benchmark of conduct; vetting clauses are inserted into charterparties and are being taken into account by the courts (see, for example, *The Savina Caylyn* and *The Rowan* in Chapter 3, below).

3.3.2 Funding for risk control and training

It is common sense that, if investment is made to manage risks proactively, the cost of prevention or minimisation of risks will be less than the costs of reacting to risks after their occurrence, when, inevitably, liabilities or losses resulting from them have to be met. Although it may seem more time consuming and costly to devote the resources necessary for a systematic audit of the risk exposure of a company, to assess, analyse and control risks, when other priorities are pressing, it is wrong to assume that the result will be less cost efficient overall.

3.3.3 Commitment to collective responsibility

Improving quality in shipping services is a matter of collective responsibility, as is stressed throughout this book. ‘Quality shipping’ is a worthwhile objective, with long-term rewards, and it is a must for all those wishing to stay in the business. It will make the company more competitive, resulting in greater profitability; it may have the effect of lower insurance premiums; it will enhance freight returns; and it will open other opportunities for investment and support by the banks. In the current climate of a downturn in the markets, however, many owners may feel there is no time for risk assessment! However, choices are always available: you either stay in the business, with a good reputation, or get out before damage is done to many others.

This page intentionally left blank

CHAPTER 2

THE REGULATORY REGIME

EU AND IMO DEVELOPMENTS

1 Introduction 27
2 The Erika measures 28
3 General safety and environmental measures 48
4 The criminalisation Directives on ship-source pollution 53
5 Conclusion 65

1 INTRODUCTION

Since the first edition of this book (2001), there has been a raft of innovative developments by both the EU and IMO in legislation to combat substandard ships, insist on the implementation of risk assessment practices and reinforce a culture of safety at sea. Since the second edition, in 2007, the EU has shown a particular determination to implement the Erika III measures. It is pleasing to witness, finally, the EU and IMO working in harmony together in their common goal for safer, cleaner and secure seas, although it seems that the impatience of the Commission has driven the implementation of regulation at a much faster pace.

Following the sinking of *The Erika* (1999) (see Chapter 16), the European Commission, on 21 March 2000,[1] set out a communication for a general strategy on the safety of 'seaborne oil trade' and made proposals (for consideration by the Council and the European Parliament) with a view to tightening up safety measures, so that a recurrence of this type of accident would be prevented in the future. Following *The Prestige* accident (2002), further measures were implemented. The most provocative legislation that came from the EU was the 'Criminalisation Directive' (see para 4, below) which caused a great deal of debate and concern within the industry.

In addition, the unprecedented increase in Somalia piracy since 2007 prompted the international world of shipping to come together[2] and find ways of combating piracy attacks for the safety and security of ships, crews and cargoes. Apart from practical measures taken by the industry (BMP4), the industry support organisations,[3]

1 COM(2000) 142, Brussels, 21 March 2000.

2 Readers are referred to the papers of the conference, 'Piracy, the curse of maritime transport', held in Brussels, 28–29 Mach 2012, organised by the European Commission: http://ec.europa.eu/transport/modes/maritime/e. See also Haywood, R and Spivak, R, *Maritime Piracy*, 2012, Routledge, Global Institutions Series.

3 BIMCO, Cruise Lines International Association (CLIA), International Chamber of Shipping (ICS), IGP&I, International Maritime Bureau (IMB), International Maritime Employer's Committee (IMEC), Intercargo, InterManager, Intertanko, International Shipping Federation (ISF), International Transport

naval/military forces[4] and the latest adoption of IMO interim revised guidelines for the use of armed guards by contracting private security companies (see Chapter 1, above), a series of special measures to enhance maritime security are contained in International Conventions, the SOLAS Ch XI-2 and the ISPS Code. In addition, the EU regulation on enhancing ship and port security transposes Ch XI-2 of SOLAS and the ISPS into EU law, which provide for training of ship security officers and counter-piracy measures.

The purpose of this chapter is to focus on new developments in legislation since 2007 with regard to maritime safety, originating from the EU and aiming to eliminate substandard ships and improve safety regulations. It also considers any parallel steps taken by the IMO.

2 THE ERIKA MEASURES

The infamous sinking of the oil tanker, *The Erika*, which broke in two in December 1999, just 40 miles off the coast in Brittany, France, spilt more than 10,000 tonnes of heavy oil. The public outcry prompted the European Commission to take steps to implement stringent safety measures in order to minimise the risk of further environmental damage occurring in the seas of Member States. The need for such action was further reinforced when *The Prestige* broke in two, in November 2002, and sank off the coast of Spain, spilling a reported 70,000 tonnes of oil, which washed up on the shores of Spain, France and Portugal.

The outcome of the consultations that took place after these disasters resulted in a three-tier action plan. According to the Commission, these measures were designed to bring about a change in mentality with regard to safety at sea. With more powerful dissuasive incentives, it is believed that carriers, charterers, classification societies and other key bodies involved will be persuaded to give higher priority to quality considerations. The measures taken internationally, led by IMO, the EU and the US have, in fact, had a positive impact on improving 'quality-shipping' and provide deterrence to the trading of substandard ships, but their complete elimination will take more time when the enforcement of legislation becomes more rigorous.

Erika I (2000) measures comprised three elements:

1 amendments to the Inspection of Ships Directive;
2 phasing out of single-hull tankers; and
3 amendments to the Port State Control Directive.

Erika II (2002) measures contained three sets of proposals:

1 more effective monitoring and control of ships operating in EU waters;
2 the creation of a European Maritime Safety Agency (EMSA) to provide the Commission and Member States with support in enforcing and monitoring

Workers Federation (ITF), Joint Hull Committee (JHC), Joint War Committee (JWC), Oil Companies International Marine Forum (OCIMF), Society of International Gas Tanker and Terminal Operators (SIGTTO), The Mission of Seafarers, The World Shipping Council (WSC).

4 Combined Marine Forces (CMF), the EU Naval Force (EU NAVFOR), INTERPOL, the US Navy Maritime Liaison Office (MARLO), Maritime Security Centre Horn of Africa (MSCHOA), NATO Shipping Centre (NSC), Operation Ocean Shield, UK Maritime trade Operations (UKMTO).

compliance with Community law; and the establishment of a Committee on Safe Seas (COSS) as well as the prevention of pollution from ships;[5]
3 improvement of the liability and compensation regimes for damage to the environment.

Erika III (2009) measures included seven proposals for:

1 a Directive on the conformity requirements of flag States;
2 an amendment of the Directive on classification societies;
3 an amendment of the Port State Control Directive;
4 a Directive on accident investigation;
5 a regulation on liability and compensation for damage to passengers in ship accidents;
6 a Directive on the extra-contractual liability of ship-owners; and
7 an amendment of the Traffic Monitoring Directive.

In March 2009, the European Parliament adopted the third maritime safety package (Erika III), which were to be transposed into national legislation of EU States between November 2010 and January 2012. These measures are meant to supplement the EU rules concerning maritime safety and improve the efficiency of existing measures.

The three measures and their further amendments by amending directives and regulations that have been implemented since 2009 are outlined below.

2.1 THE ERIKA I MEASURES

The first tier comprised measures that were able to be implemented immediately, consisting mainly of amending existing legislation. Erika I measures entered into force on 22 January 2002, giving Member States until 22 July 2003 to implement the measures into their national laws.[6]

2.1.1 Directive on inspections and surveys of ships by classification societies

2.1.1.1 Directive 94/57/EC[7] (1994)

The adoption of this Council Directive (as amended, see below, and under the Erika III measures) had established a set of common rules and standards concerning the

5 Regulation (EC) 2099/2002.

6 The following actions were taken by the European Commission as a result of Member States' failure to implement part or all of the Erika I measures: 30 March 2004, the Commission reported Finland to the ECJ for failing to implement Directive 2001/106/EC on Port State Control; Belgium, Greece, France, Italy, the Netherlands, Austria, Finland and the UK were reported to the ECJ on 15 December 2004 for failing to notify the Commission of measures taken to implement at national level Directive 2002/59/EC on vessel traffic monitoring and information systems. Such measures should have been reported by 5 February 2004. As a point of reference, the UK adopted the provisions of the Directive under the Merchant Shipping (Vessel Traffic Monitoring and Reporting Requirements) Regulations 2004 (SI 2004/2110), which came into force on 20 September 2004. On 22 June 2004, in Case C-439/02, the ECJ found France guilty of not carrying out sufficient inspections of ships under Directive 95/21/EC.

7 Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (OJ L 319 12/12/1994, pp 20–27).

activities of ship inspection organisations (classification societies) and maritime administrations (flag States). The inspection organisations, which for this purpose are known as 'recognised organisations', are delegated by flag States to verify safety standards on ships and issue certificates of compliance with statutory legislation (see, further, Chapter 3). This Directive provided that Member States are under a duty: 'To ensure that their competent administrations enforce the provisions of the International Conventions, in particular with regard to the inspection and survey of ships and the issue of certificates and exemption certificates.'[8]

The 'recognised organisations' to which such duties are entrusted by the flag States are assessed against criteria listed in an Annex to the Directive. Member States are responsible for authorising such organisations.

The Directive introduced financial liability of recognised organisations in the event of non-performance, negligence or misconduct.

2.1.1.2 Directive 2001/105/EC[9]

This Council Directive amended the 1994 Directive in order to provide closer supervision of the activities of both recognised organisations and flag States. The amending Directive included regular inspections of recognised organisations by the Commission in conjunction with Member States, as opposed to monitoring only, as was the case previously. Further, the 2001 Directive extended the reasons for withdrawal of recognition.

The most significant change to the 1994 Directive by the 2001 Directive was the provision of financial responsibility. It is provided that, if a flag administration is found liable in a court of law of an incident, with the requirement that they compensate the injured parties for any loss, damage, personal injury or death, then they will be able to claim compensation from the recognised organisation to the extent to which that organisation is held by the court to be liable.[10] If such damage is caused by a wilful act or omission, or by gross negligence on the part of the organisation, such liability is unlimited.[11] If such damage is caused by negligence or recklessness, then liability may be limited to at least €4 million for death or personal injury,[12] and at least €2 million for loss of, or damage to, property.[13] However, Member States may opt to set higher limits.

2.1.1.3 The Recast Directive 2009/15/EC

Monitoring of conformity with international standards by flag States and recognised organisations was revisited by the Commission as part of the Erika III measures. Substantial amendments to Directive 94/57/EC were further made, and, because it had been amended several times, all provisions were included, for the interest of clarity, in a recast Directive 2009/15/EC and a Regulation (EC) 391/2009, which were

8 Ibid, Art 3(1).

9 Directive 2001/105/EC of the European Parliament and of the Council of 19 December 2001, amending Council Directive 94/57/EC, on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (OJ L 19 22/01/2002, pp 9–16).

10 Ibid, Art 6(2).

11 Ibid, Art 6(2)(b)(i).

12 Ibid, Art 6(2)(b)(ii).

13 Ibid, Art 6(2)(b)(iii).

brought into effect in 2009; see under Erika III, section 2.3.2, below. The provisions of financial responsibility (above) have been carried forward into the new Directive by Art 5(2)(b).

2.1.1.4 Conformity requirements by flag States

In recognition of the need to enhance the quality of inspections of ships by the flag administrations, the IMO has also implemented a plan involving self-regulation and assessment of each other by flag States themselves. Flag States have to participate in a voluntary audit carried out by each other. This scheme has been endorsed by the new Directive 2009/15/EC; see under Erika III, below.

The European Union has been keen to follow the auditing system applicable to the International Civil Aviation Organisation in the aviation industry. It had suggested that this should be the model in shipping, and the IMO should be given the power to audit flag States by using internationally acknowledged inspectors. The 'blacklisting' system imposed upon flag States by the amended PSC Directive (see below) partially serves this purpose, but only insofar as ships flying the flags of those States visiting European ports. As IMO has not yet brought regulations for inspection of flag States by internationally acknowledged inspectors, the EU has taken this task in hand by a new Directive, 2009/21/EC, on conformity requirements of flag States, which adopts the IMO audit system (Voluntary IMO Member State Audit Scheme (VIMSAS)) and requires flag States to implement a quality management system and provide the Commission with a report of performance; see 2.3.1 under Erika III, below.

2.1.2 Phasing out single-hull tankers

The Commission was determined to speed up the process of banning single-hull oil tankers and phase in double-hull by a regulation. The original proposal of 21 March 2000, which was more ambitious in terms of speeding up the phasing out, was amended to take into account the amendments suggested by the European Parliament on 30 November 2000.[14] It was accepted that it was desirable to adopt a joint approach with the IMO with regard to amending the existing International Convention for the Prevention of Pollution from Ships (MARPOL) Regulations and to agree the dates of implementation. Thus, the initial proposal was watered down in the subsequent legislative process.

As a result, the final Regulation (EC)417/2002[15] reflected largely the stance taken by the IMO at the 46th Plenary Session in April 2001. However, in response to the sinking of *The Prestige* in 2002, there was rethinking at both the EU and IMO levels. Regulation (EC) 417/2002 raised serious issues as to the adequacy of the age limits. The Commission wished to bring back the early dates, originally proposed.

14 Amended proposal COM(2000) 848, 12 December 2000. The Commission accepted the recommended amendment concerning: (a) the phase-out schedule for single-hull tankers, (b) the exclusion of tankers between 600 and 3000 dwt from the phase-out schedule, and (c) withdrawal of its proposal for financial incentives and disincentives.

15 Regulation (EC) 417/2002 of the European Parliament and of the Council of 18 February 2002, on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, and repealing Council Regulation (EC) 2978/94 (OJ L 64, 7/03/2002, pp 1–5), came into force on 27 March 2002, as further amended, see below.

At the 49th Plenary Session of the IMO, 14–18 July 2003, the Marine Environment Protection Committee (MEPC) proposed several amendments to the phase-out timetable of single-hull tankers. These took the form of accelerating the phase-out schedule, which was a direct reaction to the breaking up and sinking of *The Prestige*. The proposed amendments were adopted at the 50th session of the MEPC, on 1–4 December 2003, and entered into force on 5 April 2005. The phasing out was related to three categories of oil tanker, broadly:

- Category 1 (the pre-MARPOL category, constructed before 1982) includes crude-oil tankers of 20,000 dwt or more (carrying crude oil, fuel oil, heavy diesel oil or lubricating oil as cargo), or oil product carriers of more than 30,000 dwt having no segregated ballast tanks in protective locations.
- Category 2 corresponds to MARPOL single-hull tankers (constructed between 1982 and 1996) being of the same size as Category 1, but that are equipped with segregated ballast tanks in protective locations.
- Category 3 corresponds to single-hull oil tankers of more than 5,000 dwt, but below the size limits of Categories 1 and 2.

Thus, Regulation (EC) 417/2002 was amended by Regulation (EC) 1726/2003,[16] which was subsequently amended by Regulation (EC) 2172/2004,[17] to reflect the IMO changes and to add further restrictions. Regulation (EC) 1726/2003 was adopted, not only in order to speed up the phasing-out of single-hull tankers, but also to ban from European ports all single-hull tankers carrying heavy grades of oil.

The amended Regulations provide that there should be compliance with a condition assessment scheme for Categories 2 and 3. Article 5 states that single-hull tankers of 15 years of age or older, which fall within categories 2 and 3 above, would be able to enter and leave ports of Member States, provided they comply with the condition assessment scheme. Basically, the scheme is a system of enhanced surveys, which are designed specifically to detect structural weaknesses in single-hull tankers.

There were further amendments to the phase-out scheme by Regulation (EC) 457/2007,[18] which replaced Art 4(3) of Regulation 417/2002 with the following:

> No oil tanker carrying heavy grades of oil shall be allowed to fly the flag of a Member State unless such tanker is a double-hull tanker. No oil tanker carrying heavy grades of oil, irrespective of its flag, shall be allowed to enter or leave ports or offshore terminals or to anchor in areas under the jurisdiction of a Member State, unless such tanker is a double-hull tanker.

Commission Regulation 1163/2009[19] concerns various definitions. A further proposal for a Regulation 2011 relating to acceleration of the phasing-in of double-hull tankers was put forward. Most phasing out of single-hull tankers has already

16 Regulation (EC) 1726/2003 of the European Parliament and of the Council of 22 July 2003, amending Regulation (EC) 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers (OJ L 249, 01/10/2003, pp 1–4), came in force on 21 October 2003, as further amended, see below.

17 Commission Regulation (EC) 2172/2004 of 17 December 2004, amending Regulation (EC) 417/2002 of the European Parliament and of the Council of 18 February 2002, on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, came into force on 7 January 2005, as further amended, see below.

18 OJ L 113, 30/04/2007, pp 1–2: Regulation (EC) No 457/2007 of the European Parliament and of the Council of 25 April 2007, amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers (text with EEA relevance).

19 OJ L 314, 01/12/2009, pp 13–14: Commission Regulation (EC) No 1163/2009 of 30 November 2009, amending Regulation (EC) No 417/2002 of the European Parliament and of the Council on the

occurred, so there is no need to refer to the schedule. By 2015, there will be a complete ban on single-hull tankers.

2.1.3 Directives amending PSC

PSC is concerned with the inspection of foreign vessles in national ports in order to verify compliance of the ccondition of a vessel, its equipment, manning and operation, with international regulations.

2.1.3.1 Mandatory inspections by PSC

The objective of Directive 2001/106/EC[20] was to make compulsory, rather than discretionary, the system of inspections of certain potentially dangerous ships, and to tighten up measures relating to manifestly substandard ships for the more effective implementation of the original Directive (95/21/EC).[21] The Directive applies to all ships calling at a port of a Member State or at an offshore installation, or anchored off such a port or such an installation.[22]

From a historical perspective, under the previous law, the inspection authorities of Member States had a broad discretion as to whether to select ships for so-called 'expanded inspection'. This led to non-uniformity in Member States' implementation, and so ships falling within Annex V of the Directive became subject to mandatory inspection.

Under Art 7b of the Directive, Member States are also obliged to refuse access altogether into their port, if the ship in question[23] either flies the flag of a State appearing in the blacklist of the Paris Memorandum of Understanding (MOU) and has been detained more than twice within the last 2 years in a port of a signatory State of the MOU; or flies the flag of a State described as 'very high risk' or 'high risk' in the MOU's blacklist and has been detained more than once in the last 3 years in a port of a signatory State of the MOU. Interesting incidents of such detentions of ships can be found at the Paris MOU website.

Further tightening up measures for refusing access have been brought by Directive 2009/16/EC pursuant to the Erika III measures; see below.

2.1.3.2 Introduction of VDRs

Another way in which the Directive provided for additional safety precautions was the introduction of a mandatory programme for the installation of Voyage Data Recorders (VDRs). These systems are equivalent to the 'black boxes' found on aircraft

accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers (text with EEA relevance).

20 European Parliament and Council Directive 2001/106/EC (OJ L 19, 22/01/2002); final date of implementation was 22 July 2003.

21 Council Directive 95/21/EC concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State Control) (OJ L 157, 07/07/1995, p 1). It was amended to take account of amendments to the MARPOL and SOLAS Conventions and resolutions of the IMO and of the Paris MOU, by Council Directive 98/25/EC (OJ L 133, 7/05/98) and by Commission Directives 98/42/EC (OJ L 184, 27/06/98) and 1999/97/EC (OJ L 331, 23/12/99).

22 Article 3(1).

23 Under Annex XI of the Directive, these are gas and chemical tankers, bulk carriers, oil tankers and passenger ships.

and assist in the investigation of accidents that occur. Under Annex XII of the Directive, passenger ships built after 1 July 2002 have to have them installed. For those built earlier, installation became mandatory from 1 July 2004. For passenger ships built before 1 July 2002 that also carry cargo on board, so-called 'ro–ro' passenger ships, it became mandatory to have VDRs installed before the first survey of that ship that occurred on or after 1 July 2002. See further on new regulations about passenger ships under 3.2 and 3.3, below. Other classes of ships of 3,000 dwt or more, constructed after 1 July 2002, must also have a VDR installed.

The above requirements reflected exactly the amendments IMO made to Chapter V of SOLAS 1974, under regulations that were adopted in 2000 and entered into force for IMO members on 1 July 2002.

Annex XII of the Directive provided for the date of installation on cargo ships to be set by IMO. In December 2004, IMO adopted further amendments to Chapter V of SOLAS as follows: for cargo ships of 20,000 dwt and above, a VDR was to be fitted at the first scheduled dry-docking after 1 July 2006, but not later than 1 July 2009. For cargo ships of 3,000 dwt, but less than 20,000, at the first scheduled dry-docking after 1 July 2007, but no later than 1 July 2010. For these classes of ship, the VDRs required could be simplified VDRs. Although not storing the same level of detailed data as VDRs per se, they can store information relating to the position, movement, command and control of a vessel in the period leading up to and after an accident. For further SOLAS amendments regarding automatic identification systems (AISs) and VDRs, see 2.3.7.5, below.

2.2 THE ERIKA II MEASURES

This second set of measures was confirmed at the Biarritz European Council on 14 October 2000. The European Commission issued its 'Erika II Package' of measures on 6 December 2000.[24]

Although the existing international legislation regulating shipping is extensive, the Commission rightly felt that such legislation was failing to deliver the safety imperative, because it was not consistently and rigorously enforced.

2.2.1 Directive for a Community monitoring, control and information system

Reporting requirements for dangerous or polluting goods and bunker fuels on board had already been provided for by Directive 93/75/EEC, which had been in force since 1995 and was known as the Hazmat Directive. Pursuant to this Directive, the masters or operators of a ship carrying dangerous or polluting goods were required to provide information to the competent authorities designated by the Member States. However, this Directive was not so well understood and had limitations.

Two major limitations were identified with regard to this Directive: (a) it was applicable only to ships bound for, or leaving, a Community port and carrying dangerous or polluting goods; (b) there were no proper means of enforcement. The Commission felt that a system of financial penalties would provide the requisite mechanisms necessary for effective enforcement.

24 In COM(2000) 802, 6 December 2000.

2.2.1.1 Directive 2002/59/EC

This Directive extended its provisions to all ships, whether or not they were bound to call at or leave a Community port, and whether or not they were carrying dangerous or polluting goods.

Directive 2002/59/EC[25] entered into force on 5 August 2002. It gave Member States until 5 February 2004 to adopt the necessary regulations within their national laws in order to give effect to the Directive; Directive 93/75/EEC was repealed.

The significance of Directive 2002/59 was that it prescribed novel controls for monitoring the movements of ships by:

(a) improving the identification of ships in areas of high traffic density, requiring them to carry an AIS;
(b) extending the reporting requirements provided for by the previous Directive;
(c) making systematic use of electronic data interchange to simplify and harmonise the transmission of data on dangerous or polluting goods carried on board;
(d) requiring ships calling at Community ports to carry VDRs, in order to facilitate the investigation of accidents;
(e) enhancing the powers of intervention of Member or coastal States where there is an accident risk or threat of pollution off their coasts; and
(f) prohibiting ships from leaving ports in weather conditions where there is a serious threat to safety or the environment.

The monitoring of ships (posing a serious threat to marine safety and environment) and circulation of information among Member States, in order to take any preventive action, is an essential measure in the Directive. The monitoring includes a wider obligation upon ships entering European waters to declare their entry, and will require them to carry on-board AISs.

The Directive also includes the further development of common databases and networking of centres responsible for managing the information received under the Directive, and the enhancement of powers of intervention of the Member States, as coastal States. With the information that is aimed to be gathered by the implementation of this Directive, Member States are able, before accepting high-risk ships into their ports, to ask for additional information in order to check compliance by the ship with International Conventions and, if necessary, to carry out on-board inspections under the Port State Control Directive.

2.2.1.2 Directive 2009/17/EC

A much-debated issue at this time was that there should be a requirement of Member States to receive ships in distress in places of refuge. This has now been implemented by Directive 2009/17/EC (see under Erika III, below), which aims to make it easier to seek a place of refuge in the event of trouble at sea, and also to prevent the risk of accident by prohibiting ships from leaving ports of call in the Community, if particularly bad weather and sea conditions increase the risk of an accident.

25 Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002, establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC.

IMO has also taken a proactive role in this respect, particularly after the incident of the gasoline-carrying vessel, *The Castor*, being in distress outside Spanish waters. This issue went through lengthy consultations, and its present status is nebulous, but progress has been made, as seen later, after the Erika measures.

2.2.2 The European Maritime Safety Agency

The creation of EMSA by Regulation (EC) 1406/2002, June 2002[26] was seen as one of the key initiatives in the enhancement of maritime safety and pollution control following *The Erika* disaster. Largely based on the Aviation Safety Agency, it entered into force on 25 August 2002, and the implementing Regulation gave a 1-year window in which to get EMSA fully operational.[27] From January 2004, EMSA became fully operational. Subsequent amendments to this regulation have refined and enlarged its mandate.

EMSA is a legal body of the Community,[28] and its functions are numerous.

2.2.2.1 General tasks

These are divided, broadly, into four key areas:

1 The Agency assists the Commission in monitoring the implementation of EU legislation.
2 It develops and operates maritime information facilities at EU level, such as:
   (a) the SafeSeaNet (relating to a traffic monitoring system to ensure tracking of vessels and accidents);
   (b) the EU LRIT (Cooperative Data Centre, to ensure identification and tracking of EU flagged ships worldwide); LRIT allows EU countries to comply with their flag reporting obligations at IMO level;
   (c) the THETIS (information system to support the new Port State Control regime).
3 It provides marine pollution preparedness, detection and response capability to Coastal States:
   (a) this includes a European network of stand-by oil spill response vessels; and
   (b) a European satellite oil spill and vessel detection service (CleanSeaNet) contributing to an effective system of protecting EU coasts and waters from pollution by ships;
   (c) the identification and pursuit of ships making unlawful discharges, in accordance with the ship-source pollution Directives (see 4.6 below) is also included.
4 It provides technical and scientific advice to the Commission in the field of maritime safety and prevention of pollution.

26 Regulation (EC) 1406/2002 of the European Parliament and of the Council of 27 June 2002, establishing a European Maritime Safety Agency (OJ L 208, 05/08/2002, pp 1–9). EMSA's website can be accessed at www.emsa.eu

27 Ibid, Art 23.

28 Ibid, Art 5(1).

2.2.2.2 Specific tasks

These include organising training activities, gathering data and exploiting databases on maritime safety, monitoring navigation, ensuring conformity with international regulations by flag States, evaluating and auditing classification societies, carrying out on-the-spot inspections, participating in inquiries following accidents, and protecting shipping and port facilities against threats of intentional unlawful acts by adopting appropriate measures in the field of maritime transport policy, in accordance with Regulation (EC) 725/2004.[29]

2.2.2.3 Monitoring

In its function of monitoring the implementation of EU legislation by Member States, it exercises a supervisory role. This is by means of monitoring the Member States' arrangements, for example, in relation to the implementation of Port State Control and the directives relating to classification societies and the phasing in of double-hull tankers.

2.2.2.4 Role in future developments in maritime safety

EMSA also plays a proactive role in the future development of maritime safety and pollution prevention legislation, assisting the Commission in updating and producing legislation in this area, as well as assisting the Member States and the Commission in technical aspects concerning maritime safety, traffic and pollution fields, including providing training.

2.2.2.5 Role in prevention of pollution

In addition, by Regulation (EC)724/2004,[30] EMSA's remit in relation to the prevention of oil pollution includes the powers to draw up an action plan for the implementation of pollution response initiatives. This Regulation provides that, in the event of a pollution incident, EMSA shall assist the Member State concerned, while the Member State retains the authority for the clean-up operations associated with the pollution incident.

2.2.2.6 Governance

EMSA's Administrative Board is made up of one representative from each of the EU Member States, four Commission representatives and four professionals from the maritime sector. The latter group are appointed by the Commission and do not have the right to vote. There are also mechanisms in the Directive to allow third countries to join the board. Each member of the board, including the executive

29 Regulation (EC) 725/2004 transposed into EU law the amendments to SOLAS Ch XI-2 and the ISPS Code.

30 Regulation 724/2004 of the European Parliament and of the Council of 31/03/2004, amending Regulation (EC) 1406/2002, establishing a European Maritime Safety Agency (OJ L 129, 29/04/2004, pp 1–5) and Regulation (EC) 2038/2006 amending Reg 1406/2002.

director, serves a 5-year term, which is allowed to be renewed once only. Decisions of the Administrative Board are taken by a two-thirds majority.[31]

2.2.2.7 Extension of remit

A further regulation, Regulation (EU) No 100/2013,[32] was adopted recently amending Regulation (EC) No 1406/2002 to clarify the provisions of governance and the extent of the remit of the Agency's powers.

Apart from clarifying the tasks mentioned above, the Regulation includes:

1. clarifying the Agency's involvement in assisting States to combat piracy;
2. laying down procedures with regard to Commission inspections in the field of maritime security pursuant to Commission Regulation (EC)324/2008;
3. carrying out inspection tasks with regard to training and certification of seafarers pursuant to Directive 2008/106/EC;
4. establishing a European Maritime Transport Space without barriers in assisting Member States, upon their request, in matters of responding to pollution incidents;
5. assisting in the investigation of maritime accidents (pursuant to the Directive 2009/18/EC);
6. acting in the interests of the Union even outside the territory of Member States, to provide technical assistance to third countries and promote the Union's maritime safety policy.

2.2.2.8 Analysis of accidents

The revised Founding Regulation also established the Agency's role in the analysis of accident investigation reports. Regulation 1286/2011/EC has created a new methodology for investigating marine casualties, and EMSA shall compile a yearly overview of marine casualties and incidents.

2.2.3 Establishment of COSS

A general Directive 2002/84/EC[33] aims at speeding up and simplifying the incorporation of international rules on maritime safety, prevention of pollution from ships, and shipboard living and working conditions into Community legislation.

This Directive is closely linked to Regulation (EC) 2099/2002,[34] as amended by (EC)Regulation 415/2004. This amending Directive and Commission Regulation (EC) 93/2007 established the COSS to assist in the implementation of legislation in

31 Art 14(1).

32 Regulation (EC) 100/2013 of the European Parliament and of the Council,15 January 2013, OJ L 39, 9.2.2013, pp 30–40.

33 European Parliament and Council Directive 2002/84/EC (OJ L 324 29/11/2002); final date of implementation was 23 November 2003.

34 Regulation (EC) 2099/2002 of the European Parliament and of the Council of 5 November 2002, establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and amending the Regulations on maritime safety and the prevention of pollution from ships (OJ L 324, 29/11/2002, pp 1–5), amended by Commission Regulation (EC) 415/2004 of 5 March 2004 (OJ L 68, 06/03/2004, pp 10–11).

the field of maritime safety, the prevention of pollution from ships, and shipboard living and working conditions.

COSS came into force on 19 December 2003. Its purpose, in essence, has been to streamline the tasks that had been assigned to various different committees in the field of maritime safety.

As well as carrying out such tasks, another important function of COSS has been its role in the conformity checking procedures, which are provided for in the Regulation.[35] Under this procedure, the Commission and Member States co-operate in order to agree a common position internationally to reduce the risks of conflict between Community maritime legislation, on the one hand, and International Conventions relating to maritime law on the other.

2.2.4 Compensation fund for oil pollution damage

Following *The Erika* disaster, it was proposed[36] that the Commission would introduce a regulation to set up what would have become known as the Compensation for Oil Pollution in European Waters Fund (COPE).

In essence, the fund would step in and pay compensation to victims of oil spills in European waters whenever the current schemes embodied in the Civil Liability Convention (CLC) and International Oil Pollution Convention (IOPC) Funds[37] had been exhausted. However, following the adoption by IMO (on 16 May 2003) of the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the 2003 Fund Protocol), the European Council changed its approach. The proposed COPE Fund was abandoned and, in its place, the Council adopted a decision authorising Member States to sign, ratify, or accede to the 2003 Fund Protocol[38] (see Chapter 16, below).

2.3 THE ERIKA III MEASURES

On 23 November 2005, the European Commission published its third maritime safety package, as a line of defence against substandard ships, taking account of the experience acquired in implementing the Erika I and II packages.

This third package concerns the following seven areas:

1 a directive on the conformity requirements of flag States;
2 an amendment of the Directive on classification societies;
3 an amendment of the Port State Control Directive;
4 a directive on accident investigation;

35 Ibid, Art 5.

36 COM(2000) 802 final (OJ C 120 E, 24/04/2001). The proposal was amended in June 2002, before it was submitted to the European Parliament.

37 For a detailed overview of the operation of these two schemes, see Ch 16, below.

38 Council Decision of 2 March 2004, authorising the Member States to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, and authorising Austria and Luxembourg, in the interest of the European Community, to accede to the underlying instruments (OJ L 78, 16/03/2004, pp 22–24).

5 a regulation on liability and compensation for damage to passengers in accidents;
6 a directive on civil liability and financial guarantees for damage done by ships; and
7 an amendment of the Traffic Monitoring Directive.

The Commission felt that, despite the reduction in the number of maritime accidents, the threat relating to failure to comply with safety standards still remained. Therefore, the seven measures intend to supplement the European rules concerning maritime safety and improve the efficiency of existing measures.

On 11 March 2009, these measures were adopted and include two regulations and seven directives transposed into the law of Member States between November 2010 and January 2012.

2.3.1 Directive 2009/21/EC[39] on the conformity requirements of flag States

The Commission believed that improved monitoring by Member States of ships flying their flags was missing from EU maritime legislation.

In October 2008, Member States unanimously adopted a statement by which they recognised the importance of the application of the International Conventions related to flag States' obligations in order to improve maritime safety.

For this purpose, the Directive was adopted, whose aim is:

(a) to ensure that flags of all EU countries have good standing – in particular, none is blacklisted or on the grey list of the Paris MOU;
(b) to incorporate the VIMSAS into EU law and introduce certification of the quality of national maritime authorities.

In particular, prior to a ship being allowed to fly the flag of a Member State, measures shall be taken to ensure that the vessel in question complies with international rules and regulations (Art 4(1)). When another flag State requests information about a ship, that Member State shall promptly provide details of outstanding deficiencies (Art 4(2)). When a ship flying the flag of a Member State is detained by a port State, that Member State shall oversee the ship being brought into compliance with the relevant IMO Conventions (Art 5).

It further provides for an IMO audit to take place at least once every 7 years (Art 7). In addition, it obliges each Member State to develop and implement a quality management system for the operational parts of the flag State-related activities by June 2012 (Art 8). If a flag State appears in the blacklist or, for 2 consecutive years, in the grey list of Paris MOU, it shall provide the Commission with a report of performance no later than 4 months after the publication (Art 8(2)). Furthermore, it requires Member States to ensure that ships flying their flag have information about the Recognised Organisation (RO), dates of surveys, any detentions and outcome of PSC deficiencies ready and accessible (Art 6).

39 OJ L 131, 28/05/2009, pp 131–135.

The MS (Flag State Directive) Regulations 2011 implemented this Directive and have been in force since 10 December 2011 (SI 2011 No 2667).

2.3.2 Amending Directive and Regulation on inspections by classification societies

One of the important aims of the Commission has been to improve the quality of those responsible for inspecting and certifying ships and to introduce common rules and standards for ship inspections and survey organisations.

For this purpose, and because the previous Directive 94/57/EC had been amended several times, it was decided that a further amendment should be a recast, in the interests of clarity. The amendment was brought by Directive 2009/15/EC[40] and Regulation (EC) 391/2009.[41]

The purpose of this approach is:

(a) to make inspection procedures of classification societies more rigorous and to empower the Commission to carry out audits and impose penalties;
(b) to make the Directive more readable than the previous one and provide greater legal certainty.

The overall thrust of the reform is said to be to improve the wok of recognised organisations, irrespective of the flag flown by the ships concerned.

The reform includes the following innovative measures, which are to be commended, because the exercise of controls is aimed to be transparent; therefore, they are bound to have effect on combatting substandard ships:

(a) The recognised organisations themselves are to set up an independent joint body – with highly professional skills and resources – to certify their quality management system; it should be noted that this is a copy of the IMO' s self-audit system for flag States.
(b) The reformed system of penalties for recognised organisations, which do not do their work properly provides for fines and, in more serious cases, withdrawal of recognition.
(c) Transparency and technical co-operation between approved bodies, mutual recognition of classification certificates for equipment etc. are envisaged.

The ultimate aim is to ensure that the independent joint structure certifying quality will prevent recognised organisations from giving way to market pressures and skimping on the quality of inspections. They will no longer be able to be more lenient with ships flying flags of non-EU countries, because they will have to ensure that the files are checked. With the new fines system, the Commission will be in a better position to have operational flaws rectified.

The Directive governs relationships between the administrations of EU countries and recognised classification societies, and the Regulation encompasses the EU

40 Providing Common Rules and Standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (OJ L 131, 28/05/2009, pp 47–56).

41 OJ L 131, 28/05/2009, pp 11–23.

recognition scheme of recognised organisations, including the granting and withdrawing of recognition, recognition criteria, obligations of recognised organisations and a system of penalties for those societies that fail to meet EU requirements.

The Directive, in addition, prescribes financial liabilities of the recognised organisations to compensate the relevant administration in the event it is found liable to third parties for loss of, or damage to, property or personal injury or death, as was provided by Council Directive 2001/105/EC (see 2.1.1 above). The MS (Ship Inspection and Survey Organisations) (Revocation) Regulations 2011, which came into force 23 January 2012, implement this Directive (SI 2011 No 3056).

2.3.3 Amending Directive on PSC

A further amendment to PSC was brought by Directive 2009/16/EC,[42] with the aim:

(a) to target at-risk ships by increasing the frequency of on-board inspections;
(b) to reform the control mechanisms in port States by improving the regime for banning substandard ships;
(c) to improve the quality of PSC administrations by stepping up the requirements for the qualifications and training of inspectors; and
(d) to publish a blacklist of companies operating substandard ships to be added to the blacklist of flags in Paris MOU.

Operators whose ships perform poorly will be inspected more frequently and run greater risk of having their ships definitively banned from European waters. The Directive places emphasis on targeting suspect ships, which depends on risk profile, ship type, age and flag, the company's past performance and the number of times such ships have been detained. High-risk ships will be inspected every 6 months, average ships every 12 months, and low-risk ships every 3 years.

To achieve its aim of targeting suspect ships, it imposes inspections upon all ships calling at EU ports and introduces sanctions. The MS (Port State Control) Regulations 2011[43] implement this Directive and have been in force since 24 November 2011.

Similarly, the Tokyo MOU Secretariat will introduce a new inspection regime from 1 January 2014 by which ships with a high-risk profile will be inspected every 2–4 months, those with a standard risk profile every 5–8 months, and those with a low-risk profile every 9–18 months; these are shorter time internals than the ones proposed under the Paris MOU.

2.3.4 Directive on accident investigation

The Commission felt that there was an absence of rules on conducting maritime accident investigations following accidents. Directive 2009/18/EC[44] (amending

42 OJ L 131, 28/05/2009, pp 57–100.
43 SI 2011 No 2601.
44 Establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council (OJ L 131, 28/05/2009, pp 114–127).

Directive 1999/35/EC) was adopted to provide clear EU guidelines for technical investigations.

The objective of the Directive is to establish a common EU framework within which inquiries following maritime accidents in EU waters are effective, objective and transparent. This Directive incorporates the principles underlying the relevant IMO Code into EU law. The MS (Accident Reporting and Investigation) Regulations 2012[45] implement this Directive and have been in force since 31 July 2012.

The bodies responsible for the investigation must be independent of all parties involved in an accident, including the national maritime authorities. There are already similar EU rules on technical investigations into civil aviation accidents (Directive 94/56/EC) and rail accidents (Directive 2004/49/EC).

This Directive gave rise to two Commission implementing Regulations. The first, Regulation 1286/2011, established a common methodology for investigating marine casualties and incidents. It intends to facilitate harmonisation of practice and to provide better basis for verification of the Directive's implementation. The second, Regulation 651/2011, lays down the rules of procedure for the Permanent Cooperation Framework to enable State investigative bodies and the Commission to establish best modalities for co-operation in accident investigation.

As EMSA is involved in these tasks, it is charged with the project of management and financing of the European Marine Casualty Information Platform (EMCIP), a tool that hosts and stores casualty data and investigation reports notified and submitted by Member States pursuant to Directive 2009/18/EC.

One further significant development in late 2012 was the establishment of close co-operation with IMO by the agreement to transfer information from EMCIP to the IMO Global Integrated Shipping Information System.

2.3.5 Regulation on liability and compensation to passengers

The Commission has taken steps to incorporate the Athens Convention, as amended by the Protocol 2002,[46] into European law. Against this background, Regulation (EC) 392/2009,[47] on the liability of carriers of passengers by sea in the event of accidents, was adopted to implement the Protocol and the IMO Reservation and Guidelines 2006 into EU law.

The new scheme brings the amendments to the Athens Convention by the 2002 Protocol, coupled with the IMO Reservation and Guidelines, into effect at the EU level and in the following respects:

(a) For loss of life or personal injury from shipping accidents (sinking, collision, stranding, shipwreck, explosion, fire, defect in the ship), victims or their dependents will receive an advance payment, followed by automatic compensation (no need to prove fault).
(b) For damages arising from non-shipping incidents (for example, accidental injury, passenger falling on deck), victims will have to prove fault of the carrier.

45 SI 2012 No 1743.
46 See details on this and new developments in Ch 15, below.
47 OJ L 131, 28/05/2009, pp 24–46; See also MS (Carriage of Passengers by Sea) Regulations 2012; details of these and of the IMO Reservation/ Guidelines 2006 are set out in Ch 15, below.

(c) The maximum limit of compensation under the Protocol shall, in no case, be higher than 400,000 special drawing rights (SDR) per passenger.
(d) Under the IMO Reservation and Guidelines, for compulsory insurance for war risks, there is a direction to States to ratify the Protocol with the reservation or declaration to limit up to the lower of the two amounts: 250,000 SDR per passenger or up to 340 million SDR, an overall limit per ship on each distinct occasion; for non-war risks, the absolute minimum insurance cover is 250,000 SDR per passenger.
(e) All carriers must be insured for war and non-war risks, and victims can sue the insurers directly. There will be two types of blue card attesting that insurance is in place, one for war risks and terrorism and one for non-war risks.

Details of these developments are set out in Chapter 15, below.

2.3.6 Directive on civil liability and financial guarantees for damage done by ships

By Resolution A.898(21), IMO invited States to urge ship-owners to be properly insured for maritime claims. The EU Commission, however, took steps to make insurance requirements mandatory and introduced Directive 2009/20/EC.[48] The Directive was adopted, and its objective is to impose a general obligation upon all ship-owners to insure their liabilities for maritime claims (see Chapter 14, below). The new rules fill a legal lacuna in international maritime law, as there has been no general obligation to be insured, other than as is provided by certain International Conventions, such as the CLC 1992, the HNS Convention, the Wreck Removal Convention and the Bunkers Convention (see Chapter 16).

The obligation to have insurance ensures better protection of victims and should help to eliminate substandard ships.

These rules took effect on 1 January 2012, by which time Member States[49] should have committed to ratify the Convention on Limitation of Liability for Maritime Claims (LLMC) 1996.

2.3.7 Amending Directive on traffic monitoring and places of refuge

The adopted Directive 2009/17/EC[50] amends the traffic monitoring Directive 2002/59/EC. Before explaining the ambit of this Directive, it is necessary to place it into the context of the IMO developments regarding places of refuge.

2.3.7.1 The background

Places of refuge are locations to be designated, into which a ship in need of assistance or in distress can be brought, so that its condition can be stabilised, and further damage to the ship can be averted, so that damage to the marine environment is prevented.

48 OJ L 131, 28/05/2009, pp 128–131.
49 See MS (Compulsory Insurance of Ship-owners for Maritime Claims) Regulations 2012.
50 See MS(Vessel Traffic Monitoring and Reporting Requirements) (Amendment) Regulations 2011.

The notion of providing places of refuge for ships in distress was raised at IMO during the late 1980s, when the International Convention on Salvage was considered, but it was not appropriate to deal with an issue of a public law rule in a private law Convention. The issue was seriously raised after *The Erika* accident, and has been discussed since then at IMO by the MSC, particularly after *The Castor* incident, in 2001, and the issue was further highlighted by *The Prestige* sinking in 2002.

Although international law, under Art 2 of the United Nations Convention on the Law of the Sea (UNCLOS Convention), recognises the right of a State to regulate entry into its ports, the right of a foreign ship to enter a port or internal waters of another State in situations of *force majeure* or distress is not regulated by UNCLOS. However, States are not precluded from adopting rules or guidelines complementing the provisions of UNCLOS.[51]

The right of coastal States to take action to protect their coastline from marine pollution is well established in international maritime law (UNCLOS, Arts 194–199, 211, 221, 225, and Salvage Convention, Art 9). On the other hand, the duty to render assistance to vessels and persons in distress, at least from humanitarian perspectives, is also a well-established principle (UNCLOS, Art 98). There is, apparently, a conflict of interests, and the need to strike the right balance between the above right and duty of States has delayed the resolution of this matter.

Assessing the situation in both legal and practical terms, it was identified by the IMO Secretariat that there was no legal barrier to the development of guidelines on the subject of places of refuge. The MSC was greatly assisted by the research carried out by the Comité Maritime International (CMI) and gave serious consideration to issues of liability and compensation arising from a decision by a coastal State to grant access to a ship in distress.

The CMI's view has been that the international regime on liability and compensation was unsatisfactory, because it did not contain clear guidelines identifying the duties and obligations of ship-owners, States and others involved when making a request for a place of refuge. The legislative regime contained in the four principal Conventions dealing with liability arising from pollution damage (namely, the CLC, the Fund Conventions, the HNS and the Bunkers Conventions) did not sufficiently encourage States to grant places of refuge to distressed ships.[52] It submitted its report to the 90th session of the IMO legal committee, held in 2005, which decided that there was no need, at that time, to draft a Convention dedicated to places of refuge and noted that the more urgent priority would be to implement all existing liability Conventions; the CMI submitted to IMO its further report to the 91st session, held in 2006, to which a draft instrument was attached.

51 A lot has been written about the subject, and, apart from numerous articles, there have been three books dealing with various issues of places of refuge, from the perspective of both international and national laws, most notably: Van Hooydonk, E, *Places of Refuge*, 2012,

Informa Law from Routledge; Morrison, A, *Places of Refuge for Ships in Distress – Problems and Methods of Resolution*, 2012, Martinus Nijhoff.

52 Report at the 38th CMI Conference in Vancouver (June 2004) and 'Places of refuge' Work in Progress; see www.cmi.org. See also the study by the Scandinavian Institute of Maritime Law, University of Oslo, 'Liability and compensation with regard to places of refuge', final report, October 2004, by Professor Erik Rosaeg and Henrik Ringbom.

2.3.7.2 The CMI draft instrument

The draft instrument was approved by the CMI Conference held in Athens in 2008.[53] The objectives of the instrument were largely those identified by the IMO legal committee, namely:

(a) to emphasise the position under customary international law of a presumption of a right of access to a place of refuge for a vessel in distress;
(b) to make the presumption rebuttable by the coastal State if it was reasonable to refuse access;
(c) to give more force to the IMO Guidelines, which CMI recognises as playing a significant role in assisting to define the ambit of 'reasonableness';
(d) to clarify the position regarding the issue of letters of guarantee to secure claims of a port of a coastal State that grants access to a ship in distress;
(e) to require coastal States to designate places of refuge in advance, although not necessarily to publish them.

Briefly, the draft instrument states that States have a duty to permit access, unless it is demonstrated objectively, on reasonable grounds, that the condition of the ship is such that it and/or its cargo is likely to cause greater damage if permission is granted. It emphasises there will be no liability of the State, if access is granted, for damage caused to the ship, its cargo or third parties, unless it is established that the State or the competent authority acted unreasonably and the damage was caused by the authority's action. However, a State may be liable if it refuses access unreasonably, which results in damage to another State or to third parties. The instrument permits States to make access conditional upon provision of financial guarantee or security in the event of damage caused to it.

The draft received considerable support at the 91st session of the IMO legal committee from industry organisations, but port authorities' representatives expressed some hesitation. The legal committee of IMO took the decision, as authorised, to attach the instrument to the IMO Resolution A.949(23) to be used as supplementary to the Guidelines, which had already been issued in 2003 and amended in 2004. They seek to establish an international code or framework of the responsibilities and obligations concerning the granting of, or refusal of, access of ships to a place of refuge.

2.3.7.3 The IMO Guidelines

Given this short background, the IMO Guidelines on places of refuge retain a proper and equitable balance between the rights and interests of coastal States and the need to render assistance to ships that are damaged or disabled or in distress at sea.[54] The Guidelines were adopted by the IMO Assembly (Annex Resolution 949(23)) in December 2003. This was followed by Resolution A.950(23), by which it was recommended that coastal States establish maritime assistance services (MAS) to

53 Report submitted to the IMO Legal Committee in April 2009, considered at the 90th session in May 2005; see www.cmi.org

54 IMO Resolution A.949(23): 'Guidelines on places of refuge for ships in need of assistance', 5 March 2004, and Resolution A.950(23), 'Maritime Assistance Services (MAS)'; see www.imo.org

monitor ships' situations and assist in exchange of information in case of salvage and other emergencies; the Assembly adopted the Resolution in 2004.

The Guidelines give guidance to all persons and coastal States, in the legal context of the relevant International Conventions,[55] for action with regard to assessment of risk, contingency planning and the decision-making process. It is made clear in the objectives of the Guidelines that they will apply when a ship is just in need of assistance, but safety of life is not involved. Should safety of life be involved, or there is a need for rescue operations, the Search and Rescue (SAR) Convention will have priority over the Guidelines.

Since the Bunkers Convention 2001 has come into force (see Chapter 16), and it is expected that the Wreck Removal Convention 2007 (see Chapter 13) will come into force soon (both providing for financial guarantees and compulsory insurance), fears held by coastal States that they might not be reimbursed for damage done to their coast, if they accept a ship in need of a place of refuge (which becomes a wreck), should – to some extent – be allayed. In addition, IMO encourages the ratification of the pollution liability Conventions by its Member States. In the meantime, the IMO Legal Committee is keeping the Guidelines on places of refuge under review.

2.3.7.4 Status of places of refuge in the UK

In the UK, the Marine Safety Act 2003 provides for powers of intervention and direction to the Secretary of State's representative, known as SOSREP. The UK has established a system that works with the SOSREP, who oversees all incidents in UK waters where there is significant risk of pollution. He takes responsibility and makes decisions, assisted by the Maritime and Coastguard Agency (MCA), the counter-pollution and response branch and harbour masters. They maintain and use experts in salvage and pollution response. Anywhere on the UK's coast could be a place of refuge. The SOSREP system (see Chapter 10, below) is based on the overriding decision-making power of an independent competent authority. The system is also supported by the UK Government, which gives assurance that the port accepting the ship will be compensated for any damage suffered.

2.3.7.5 Further EU measures on maritime traffic monitoring and places of refuge

In the context of what has been happening at the IMO level, the purpose of Directive 2009/17/EC is to improve knowledge of maritime traffic by improving the collection and sharing of information. It also aims to reduce the risks of collisions between merchant vessels and fishing vessels by providing for all fishing vessels over 15 metres long to be equipped with AISs. It includes a concise legal framework on safe harbours and places of refuge and provides for the further development of a maritime data exchange network (SafeSeaNet), as well as a European long-range identification and tracking of ships system (LRIT).

The amending Directive provides for places of refuge for ships in distress and introduces an independent competent authority that will have a final and overriding

55 SOLAS 1974, MARPOL 1973/78, LLMC 1976, SAR 1979, UNCLOS 1982, OPRC Convention 1990, CLC and Fund Conventions 1992, the HNS Convention 2010 and the Bunkers Convention 2001, Wreck Removal Convention 2007.

decision-making power about the place where a ship in distress shall be accommodated after an assessment of the situation. There will be an inventory of potential places. The IMO Guidelines must be taken into account. Member States shall have to draw up plans for responding to threats presented to ships in need of assistance.

As regards compensation for economic losses incurred by ports harbouring ships in distress, the Commission undertook to make a detailed study and propose options.

Apparently, the position taken at the EU level on places of refuge is more robust, but issues of potential losses that might be caused to the State permitting access to a ship in distress have to be resolved in order to balance the rights of all parties. States must be urged to ratify the Conventions that provide for compulsory insurance. This should be the priority for both IMO and EU Members.

More recently, IMO amended by Resolution MSC 286(86) the carriage requirements concerning AISs and VDRs. Consequently, SOLAS was amended. To keep up with these amendments, Directive 2011/15/EU[56] was introduced (amending Directive 2002/59/EC on traffic monitoring and information systems), which applies to fishing vessels of more than 15 metres, passenger ships undertaking international and non-international voyages, as well as cargo ships.

3 GENERAL SAFETY AND ENVIRONMENTAL MEASURES

3.1 BULK CARRIERS

Directive 2001/96/EC[57] of the European Parliament and Council, as amended by Directive 2002/84/EC,[58] sets out requirements for safe loading and unloading of bulk carriers when calling at terminals in Community ports. The Directive, which was implemented in the UK in 2003,[59] aims to reduce the number of bulk carrier casualties – being due to structural failures – by reducing the stresses and physical damage to the ship's structure during loading or unloading. The objective of the Directive is to provide a Community framework for harmonised implementation of the Blue Code of Practice for the safe loading and unloading of bulk carriers adopted by Resolution A.862(20) of IMO in December 1997.

Following the sinking of *The Derbyshire*, the MSC of IMO initiated a further review of the safety of bulk carriers, involving an FSA to assess what further changes were required. In December 2002, the MSC adopted amendments to SOLAS Ch XII and the 1988 Load Line Protocol. In December 2004, a new text for SOLAS XII incorporated the revisions and the requirements relating to double-side skin of bulk carriers; these entered into force on 1 July 2006.

The most recent safety regulations regarding bulk carriers, the International Maritime Solid Bulk Cargoes Code (IMSBC Code), was adopted by the MSC in 2008, replaced the Code of Safe Practice for Solid Bulk Cargoes (BC Code) and

56 OJ L 49, 24.2.2011, p 33.
57 OJ L 13, 16/1/2002, p 9.
58 OJ L 324, 29.11.2002, p 55.
59 SI 2003 No 2002, the MS (Safe Loading and Unloading of Bulk Carrier) Regulations 2003.

necessitated amendments to SOLAS Ch VI to make the Code mandatory. It came into force 1 January 2013 and aims to facilitate the safe stowage and shipment of solid cargoes. It contains fully updated schedules of solid bulk cargoes and updated information from the 2010 edition of the International Maritime Dangerous Goods (IMDG) Code. It highlights the dangers associated with the shipment of certain bulk cargoes and gives guidance on various procedures that have to be adopted and precautions to be taken to properly distribute such bulk cargoes throughout the ship, so that the ship structure does not become overstressed, and its stability is not affected.

3.2 PASSENGER SHIPS AND RO–RO VESSELS

3.2.1 Developments at the EU level

The Commission has also taken steps to tighten up the safety rules and standards for passenger ships by amending the previous Council Directive 98/18/EC by Directive 2003/24/EC of the European Parliament and the Council[60] and, further, by laying down a uniform level of specific stability requirements for ro–ro passenger ships (Directive 2003/25/EC of the European Parliament and the Council,[61] as amended by Directive 2005/12/EC).[62]

Directive 2009/45/EC concerns safety rules and standards for domestic passenger ships, and has been amended by Commission Directive 2010/36.[63]

This was brought into effect in the UK by MS Regulations 2012 on passenger ships for domestic voyages (SI 2012, No, 2636). A further EU Regulation 1177/2010[64] concerns rights of passengers on passenger ships, amending Regulation (EC) No 2006/2004.

3.2.2 Further developments at the IMO level

As a follow-up on the *Costa Concordia* accident (2012), the MCA initiated an urgent scrutiny of existing regulations and supplementary guidelines. The result of this was a number of recommendations that passenger ship companies are urged to incorporate into their safety procedures. These include carrying additional lifejackets, communication of the emergency instructions to passengers, carrying out muster for passengers prior to departure and carrying out the drills for crews to be prepared for rescue boat disembarkation.

Furthermore, at the MSC 91st session, the Committee noted the progress reports on the ongoing investigation into the loss of *Costa Concordia* presented by the Italian government and concluded that it was not prevented from taking further substantive actions on both the operational and technical issues that arose from the report. It made preliminary recommendations for passenger ships' safety (MSC 92/6/3 (18 March 2013). These include: mitigating the human element factor by education and

60 OJ L 123, 17/05/2003.
61 OJ L 123, 17/5/2003.
62 OJ L 48, 19/02/ 2005 pp 19–27.
63 OJ L 162, 29.6.2010, p 1.
64 OJ L 334/1, 17.12.10, which is going to be implemented in the UK by draft MS Regulations 2012.

training, and improving the standards of construction through modern technology; in particular, action is recommended on stability issues, vital equipment and electrical distribution, emergency power generation, and operational matters with respect to bridge management, minimum safe manning, muster list, evacuation issues and search and rescue. These are subject to further review once the final report on the investigation is published.

3.2.3 Developments on the human element

As the working group on the effect of the human element upon accidents has produced valuable work, it is expected that a revision of the ISM will be continuing. In this respect, the EU regulation (EC) 336/2006 amended the ISM, and EMSA will continue its review. The Horizon Project, a study on crew fatigue, has developed a 'fatigue prediction software model' (MARTHA) for assessing fatigue to be used by ship managers.

3.3 ECDIS

A very important development for safety of navigation is the ECDIS on board ships, which was adopted by IMO in 2009 and entered into force on 1 January 2011. The primary function of ECDIS is to reduce accidents due to unsafe navigation, concerning all types of ship. It enables the master to execute all route planning, monitoring and positioning efficiently and in a timely manner. It facilitates simple and reliable updating of navigational charts and provides appropriate alarms with regard to the information or equipment malfunction. There is a timetable of deadlines within which there will be mandatory application of ECDIS for various types of ship. It supplements the ISM Code and affects its provisions.

3.4 OTHER MANDATORY MEASURES

Furthermore, at its 91st Session in November 2012, the MSC adopted a variety of mandatory requirements, which will come into force on 1 July 2014. Principally, these concern amendments to SOLAS, in particular, with regard to protection of crew from noise on board, fire fighting, procedures for recovery of people from water, the International Code for Fire Safety System (FSS Code) and the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code).

3.5 BALLAST WATER AND WASTE RESIDUE

To ensure compliance with the MARPOL provisions, requiring ports to provide adequate reception facilities for ship-generated waste and cargo residues, Directive 2000/59/EC aims to harmonise the procedures for co-operation between ship and terminals. EMSA is assisting the Commission in monitoring the implementation of this Directive, as well as in co-ordinating the action programme with regard to the

ratification of the IMO Convention on Ballast Water Management 2004.

Further EU legislation on waste is updated:

(a) Waste Framework Directive[65] repealed Directive 2006/12/EC[66] on waste, Hazardous Waste Directive 91/689/EEC and the Waste Oils Directive 75/439/EEC. It provides for a general framework of waste management requirements and sets the basic waste management definitions for the EU.
(b) Decision 2000/532/EC establishes a list of wastes and their classification, including a distinction between hazardous and non-hazardous wastes. It is closely linked to the list of the main characteristics that render waste hazardous contained in Annex III to the Waste Framework Directive above.
(c) Regulation (EC) No 1013/2006[67] on shipments of waste specifies under which conditions waste can be shipped between countries.

The Directive introduces the 'polluter pays principle' and the 'extended producer responsibility'. It incorporates provisions on hazardous waste and waste oils and came into effect from 12 December 2010. It includes two new recycling and recovery targets to be achieved by 2020: The Directive requires that Member States adopt waste management plans and waste prevention programs.

The European Court of Justice (ECJ) decision in ***Commune De Mesquer v Total France SA***[68] was concerned with the interpretation of the previous Directive on wastes (74/442/EEC) and its codified 2006 version. France sued Total France (as the producer/seller of the heavy fuel oil on board the ship) in France after the sinking of *The Erika* for pollution damage caused to the coast of France. This type of claim did not come within the CLC regime, which was a separate claim against the owners of the ship and their insurers (see Chapter 16, below). The action was unsuccessful. Although the Court of Appeal (CA) accepted that the spilled heavy fuel oil, when mixed with water and sand, formed waste coming within the meaning of the Directive, it held that Total companies could not be held liable, as they were not producers or holders of that waste.

On appeal by the government to the *Cour de cassation*, the issue was referred to the ECJ, which held that hydrocarbons accidentally spilled at sea, following a shipwreck, mixed with water and sediments and drifting up the coast, constituted waste within the meaning of the Directive where they were no longer capable of being exploited or marketed without prior processing. The owner of the ship was in possession of the hydrocarbons immediately before they became waste and might thus be regarded as having produced the waste, and was accordingly a 'holder' of the waste within the meaning of the Directive. The national court might consider that the seller of the hydrocarbons and charterer of the ship carrying them had 'produced' waste and accordingly was a 'previous holder' of the waste, if the seller–charterer contributed to the risk of the pollution, caused by the shipwreck, particularly if he failed to take measures to prevent such an incident, such as measures concerning the choice of the ship for chartering.

65 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008.
66 The codified version of Directive 75/442/EEC as amended.
67 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006.
68 Case C -188/07 [2008] 2 Lloyd's Rep 672.

The decision has huge implications with regard to liability of charterers, sellers and producers of this type of pollutant. Therefore, their vetting of ships and owners would be crucial in their choice of a ship.

The amendments of this Directive by the 2008 Directive, as far as this decision is concerned, do not bring substantive differences. The 2008 Directive provides that, in accordance with the polluter pays principle, the cost of recovery and disposal of waste shall be borne by the original waste producer or by the current or previous waste holders; States may decide that such costs are to be borne partly or wholly by the producer of the product from which the waste came, and that the distributors of such product may share these costs.

Potential conflict between the Waste Directive and the 1992 CLC Convention and the other Liability Conventions is discussed by Måns Jacobsson, in his very detailed and scholarly article on the subject of the relationship between the EU legislation and maritime liability Conventions.[69]

3.6 SHIP RECYCLING

The Hong Kong International Convention for Recycling of Ships, 2009 (the Hong Kong Convention), was adopted at a diplomatic conference held in Hong Kong, China, in May 2009. The Convention aims at ensuring that ships, when being recycled after reaching the end of their operational lives, do not pose any unnecessary risks to human health, safety and to the environment.

Regulations in the new Convention cover: the design, construction, operation and preparation of ships so as to facilitate safe and environmentally sound recycling, without compromising the safety and operational efficiency of ships; the operation of ship recycling facilities in a safe and environmentally sound manner; and the establishment of an appropriate enforcement mechanism for ship recycling, incorporating certification and reporting requirements.

Upon entry into force of the Hong Kong Convention, ships to be sent for recycling will be required to carry an inventory of hazardous materials, which will be specific to each ship. An appendix to the Convention provides a list of hazardous materials the installation or use of which is prohibited or restricted in shipyards, ship repair yards and ships of parties to the Convention. Ships will be required to have an initial survey to verify the inventory of hazardous materials, additional surveys during the life of the ship and a final survey prior to recycling.[70]

At the EU level, the Maritime Environment Committee (MEP), in March 2013, revised plans to clean up the scrapping of old ships and ensure the materials are recycled in EU-approved facilities worldwide. The MEP proposes that the scheme be funded by recycling levies imposed on all ships visiting EU ports, in line with the polluter pays principle. This should encourage the steering of ships that trade within the EU into proper ship recycling facilities. Owners of EU ships could also face penalties if they sold them for scrapping on a beach in developing countries.

69 Jacobsson, M. 'Perspective of the global compensation regimes: The relationship between EU legislation and Maritime Liability Conventions', in *European Journal of Commercial Contract Law* 2012–4, pp 63–76.

70 See www.imo.org

The draft Regulation aims to reduce the adverse effects of careless scrapping, such as accidents, injuries or damage to human health or the environment.

3.7 CREW TRAINING AND CERTIFICATION

Further, there has been a Directive (2001/25/EC)[71] on reinforcing the minimum level of training for seafarers, having regard to training standards agreed at international level; it determined minimum standards of training, certification and watchkeeping for seafarers serving on board Community ships, and aimed at ensuring that the STCW Convention 1978, as revised, is implemented simultaneously and consistently in all Member States.

The STCW Convention specifies language requirements for seafarers. Such requirements were introduced into Community law to ensure effective communications on board ships and facilitate the free movement of seafarers within the Community. In view of the proliferation of fraudulent certificates obtained without the necessary competences of seafarers, these do not meet the minimum requirements under the Convention. It was felt imperative that Member States should take and enforce specific measures to prevent and penalise fraudulent practices associated with certificates of competence, as well as pursue their efforts within the IMO to achieve strict and enforceable agreements on the worldwide combatting of such practices.

Therefore, further amendments to the 2001 Directive became necessary by Directive 2005/45/EC, concerning the mutual recognition of seafarers' certificates issued by the Member States.[72] With regard to the recognition of mariners' certificates of competency issued outside the EU, Directive 2003/103/EC[73] aims at simplifying procedures.

In the light of further amendments to STCW, and because the 2001 Directive had been amended many times, further amendments were brought by a recast Directive 2008/106/EC for the interests of clarity. This Directive prescribes the minimum level of training of seafarers as agreed at the IMO level. It includes descriptive information on maritime education and training systems in Member States. The STCW was further amended in 2010, and an information system became operational in 2012.

3.8 THE MARITIME LABOUR CONVENTION 2006 (MLC)

Finally, another milestone was reached by the adoption of the MLC in 2006, which was ratified by the 30 Member States required on 20 August 2012. Thus, it came into force on 20 August 2013.

It provides comprehensive rights and protection at work for seafarers. In particular, the Convention sets minimum requirements for seafarers to work on a ship and contains provisions on conditions of employment, hours of work and rest, accommodation, recreational facilities, food and catering, health and safety protection, medical care, welfare and social security protection.

71 In force since 7 June 2001 (OJ L 136, 18/5/01) and as amended by Dir 2005/45/EC, dated 7/09/2005.

72 OJ L 255, 30/09/2005 pp 160–163.

73 In force since 14 February 2003 (OJ L 326, 13/12/03).

Compliance and enforcement are secured through on-board and onshore complaint procedures for seafarers, and through provisions regarding ship owners' and shipmasters' supervision of conditions on their ships, flag States' jurisdiction and control over their ships, and port State inspection of foreign ships. The Convention also provides for a maritime labour certificate, which can be issued to ships once the flag State has verified that labour conditions on board a ship comply with national laws and regulations implementing the Convention.

It has been designed to become a global instrument known as the 'fourth pillar' of the international regulatory regime for quality shipping, complementing the key Conventions of the IMO.

4 THE CRIMINALISATION DIRECTIVES ON SHIP-SOURCE POLLUTION

4.1 THE BACKGROUND TO 2005/35 AND 2009/123 DIRECTIVES

Ship-source pollution, whether caused by an accident involving a ship or deliberately, is dealt with by the International Convention, MARPOL 1973/1978. UNCLOS 1982 provides international rules and standards for Member States to prevent, reduce and control pollution of the marine environment from vessels. It also regulates the sovereign rights and obligations of its Member States in legislation.

After *The Erika* and *The Prestige* incidents, the European Commission considered that the standards set by MARPOL were not uniformly applied by MARPOL Member States, or were being regularly ignored.

Therefore, the Commission proposed to incorporate international standards for ship-source pollution into EU law by a Directive to ensure that persons responsible for discharges of polluting substances became subject to adequate and proportionate penalties, including criminal penalties, in order to improve maritime safety and the protection of the marine environment. This became the objective of the proposed Directive. After considerable deliberations, and despite grave concerns raised from all sides of the industry,[74] the European Parliament and the Council of the European Union were persuaded and Directive 2005/35/EC was adopted providing what would constitute infringements and what conduct would be required to establish criminal liability.

The Directive was supplemented by a Framework Decision 2005/667/JHA,[75] which provided specific criminal penalties, including imprisonment, for infringements. However, the Framework Decision was subsequently annulled by the ECJ (see below), and it became necessary to replace this Directive by the 2009 Directive.

74 For in-depth analysis of the issues involved and the conflict between the Directive and the International Conventions MARPOL and UNCLOS, as well as the industry's concerns, readers are referred to the papers submitted by distinguished panellists to the London Shipping Law Centre series of the Cadwallader debates on 'Criminalisation' held in 2004: 'Criminalisation in shipping – human pawns in legal and political games'; and in 2005: 'Extra territorial jurisdiction in criminalisation cases – Sovereign rights in legislation'. The third series on the subject of the Cadwallader debates covered: 'Law-making and implementation in international shipping – which law do we obey?' in 2008; see www.shippingLBC.com

75 OJ L 255/11/2005 and OJ L 255/164/2005, respectively.

By way of background, it is important to examine first the 2005/35 Directive and the Decision, in order to show why and how the Directive and the Decision were challenged at the ECJ.

4.2 DIRECTIVE 2005/35/EC

4.2.1 Infringement

By Art 3(1), which remains unamended in the 2009 Directive (see 4.6, below), the Directive applies to discharges of polluting substances in: (a) internal waters of a Member State; (b) territorial sea; (c) straits used for international navigation to the extent that a Member State exercises jurisdiction over such straits; (d) the exclusive economic zone (EEZ) or equivalent zone of a Member State; (e) the high seas.

4.2.2 Conduct

Under Art 4 (slightly amended by the 2009 Directive), Member States are required to ensure that ship-source discharges of polluting substances into any of the areas referred to in Art 3(1) are regarded as infringements, if committed with *intent, recklessly, or by serious negligence*. The basis of liability remains the same under the amending Directive.

4.2.3 Defences applicable to all persons involved

Article 5(1) (being the same as in the new Directive) provides exceptions to Art 4 offences when the discharges into high seas, straits, the EEZ and the territorial sea, as prescribed in Art 3(1), satisfied Regs 9, 10 and 11(a)(c) of Annex I and Regs 5, 6(a) (c) of Annex II of MARPOL (operational discharges).

Such permitted exceptions, or defences, to the offence under Art 4, concern discharges for the purpose of:

(a) securing the safety of the ship or saving life at sea; and
(b) combating pollution incidents, provided the discharges are approved by the flag administration involved and the government in whose jurisdiction the discharge will occur.

4.2.4 Additional defence applicable to owner, master and crew

The defence under Reg 11(b) of Annex I and Reg 6(b) of Annex II of MARPOL was granted only to *the owner, master and crew* of the ship under Art 5(2) of the Directive (which remains the same under the new Directive).

The defence is that such discharges shall not be regarded as infringements, if the conditions set out in Reg 11 (b) of Annex I and Reg 6(b) of Annex II are satisfied.

The conditions of these Regulations relate to proof that, after an accident occurs, which causes discharge of polluting substances, the owner, master and crew must show that they took *reasonable precautions to prevent or minimise the effect of the pollution*;

the defence is misapplied when these persons acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result.

However, the defence applies only when the discharges occur in the *straits*, the *EEZ* and *high sea*, as per Art 3(1)(c)(d)(e) of the Directive, and not if they occur in the internal waters or the territorial sea of a Member State.

Thus, it conflicts with MARPOL's provisions (see 4.4.2, below), which protect these persons when an accident occurs in the territorial sea.

These defences remain the same under the new Directive (see, further, under 4.6, below), the only difference being the change of the Regulation numbers of the MARPOL Annexes (as amended) to which it refers.

4.3 THE COUNCIL FRAMEWORK DECISION 2005/667/JHA

The Decision provided that the Member States were to adopt a certain number of criminal-law related measures with a view to attaining the objective of the Directive, namely to ensure a high level of safety and environmental protection in relation to maritime transport. In particular, Art 4 provided that:

> Each Member State shall take the measures necessary to ensure that the offences referred to in Arts 2 and 3 are punishable by effective, proportionate and dissuasive criminal penalties which shall include, at least for serious cases, criminal penalties of a maximum of at least between one and three years of imprisonment.

Severer penalties were envisaged for intentionally committed offences (at least between 5 and 10 years of imprisonment).

At the time of the adoption of this Decision, the Commission made statements to dissociate itself from the double-text approach taken by the Council. It stated that, given the importance of combatting ship-source pollution, the penalties should be determined at the national level.

According to the then applicable 'Three Pillars' of EC competences,[76] the 'third pillar' had been crossed by the Council. Considering that the Framework Decision had not been adopted on the correct legal basis of Community law, the Commission considered the Council Decision was in breach of Art 47 of the EU Treaty and brought an action before the ECJ. The result of this was the decision of the Grand Chamber of the ECJ, in ***Commission v Council***,[77] which held that the provisions of the Framework Decision were encroaching on the competence that Art 80(2) EC attributed to the Community and therefore infringed Art 47 of the EU Treaty. As the Framework Decision was indivisible, it was annulled in its entirety.

76 The 'Third Pillar' was dedicated to police and judicial co-operation in criminal matters on which the Member States had primary jurisdiction. The so-called Three Pillars structure of competences were abolished by the Lisbon Treaty in 2009 and were replaced by a much simpler structure of three competences in legislation. It established the EU exclusive competence, the shared competences, and supporting competences and drew up a non-exhaustive list of the fields concerned in each case.

77 Case C-176/03 [2005] ECR I-7879.

4.4 THE TREATMENT OF SHIP-SOURCE POLLUTION BY INTERNATIONAL CONVENTIONS[78]

All EU Member States are parties to both MARPOL 1973/1978 (as amended) and UNCLOS 1982.

4.4.1 UNCLOS relevant provisions

Part XII includes the following relevant Articles (paraphrased):

- Article 211(1): Member States, through the competent international organisation or diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels.
- Article 211(2): States shall adopt laws and regulations for the prevention of pollution from vessels flying their flag; such laws shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organisation or diplomatic conference.
- Article 211(4): Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention of pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws or regulations shall not hamper innocent passage of foreign vessels.
- Article 211(5): With regard to EEZ, coastal States may adopt laws and regulations for the prevention of pollution from vessels and give effect to generally accepted international rules and standards as established by the competent international organisation, or diplomatic conference.
- Article 230(1): Monetary penalties may be imposed in case of infringements of pollution regulations committed by foreign vessels beyond the territorial sea. The coastal State has no sovereignty to legislate beyond the territorial sea otherwise than is provided by this article.
- Article 230(2): Monetary penalties may be imposed with respect to violations of national laws or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment committed by foreign vessels in the territorial sea, except in the case of a wilful *and* serious act of pollution in the territorial sea. Under this Article, non-monetary penalties may only be imposed for a wilful and serious act of pollution, being a criminal offence that requires *mens rea*.

Although UNCLOS recognises (Art 2) the sovereignty of coastal States over their territorial sea, such sovereignty must be exercised subject to this Convention and the other rules of international law. The Commission's position has been that the Directive is in accordance with Arts 211 and 230(2) of UNCLOS. Conflicts between the Directive and these Articles are explained below, under 4.4.3.

Moreover, under UNCLOS, ships have a right of innocent passage through the territorial sea (Art 17), which means that it is innocent so long as it is not prejudicial

78 See, further, Dr Mensah's paper, transcript, 8th Cadwallader Lecture of the London Shipping Law Centre 2005: 'Extra territorial jurisdiction in criminalisation cases – Sovereign rights in legislation and new risks for the shipping industry'; see www.shippingLBC.com

to the peace, good order or security of the coastal State. A wilful and serious pollution by a foreign ship in the territorial sea will be prejudicial and, hence, by virtue of Art 19, it will be in breach of Art 17.

However, pollution caused accidentally after a marine accident, provided reasonable precautions are taken after the accident to prevent or minimise the discharge of polluting substances in accordance with Annex I, Reg 11(b) of MARPOL (now Reg 4, as amended; see 4.6, below), will not be prejudicial in the sense of Art 17.

4.4.2 MARPOL relevant provisions

The MARPOL 1973/78 Convention, being adopted under the auspices of IMO, aims to regulate pollution from ships and came into force in 1983, after its revision by the 1978 Protocol. The Annexes of MARPOL have been amended, and the relevant ones, in this context, are some Regulations of Annexes I and II; the various amendments came into force from 2007 to 2013.

With regard to operational discharges, Regulations 15 and 34 (previously Regs 9 and 10) of Annex I prohibit discharges of oily mixtures from ships, or from the cargo area of an oil tanker, into special, or outside special, areas of the sea, unless certain conditions are satisfied. Regulation 13 (previously Reg 5) of Annex II prohibits discharges of residues of noxious liquid substances, or ballast water, or mixtures of such substances, unless prescribed procedures and standards are followed.

Exceptions to the provisions of these Regulations are set out in Regulation 4 of Annex I (previously Reg 11) and Reg 3 of Annex II (previously Reg 6). Since the essence of the wording of Reg 4 and Reg 3 is the same, only Reg 4 is quoted below:

Reg 4 of Annex I: Regs 15 and 34 of this Annex shall not apply to:

1 The discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or
2 The discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:
  1 Provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the discharge; and
  2 Except if the owner or the master acted with intent to cause damage, or recklessly and with knowledge that such damage would probably result; or
3 The discharge into the sea of substances containing oil[79] approved by the Administration, when being used for the purpose of combatting specific pollution incidents in order to minimise the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur.

4.4.3 Conflict between the Directive and the Conventions

It is apparent from the brief resumé of the relevant provisions of UNCLOS and MARPOL these Conventions that the 2005 Directive and even its amending Directive 2009 (see 4.6, below) conflict with the provisions of those Conventions, in particular:

79 Or as per Reg 3 of Annex III, 'discharge into the sea of Noxious Liquid Substances or mixtures containing such substances'.

(a) It conflicts with Arts 17 and 211(4) of UNCLOS (innocent passage) because it makes discharges of polluting substances in the *territorial sea after an accident* has occurred a criminal offence on the basis of serious negligence, without permitting the defence under Reg 4(2) of MARPOL, as seen at 4.4.2.
(b) Under Art 211 of UNCLOS, Member States can exercise their sovereign powers within their territorial sea and EEZ (Art 211(4)(5)) to legislate and impose penalties for the prevention of pollution to the extent of vessels flying their flag (Art 211(2)), but *they do not have sovereign powers with respect to all vessels on the high seas*.
(c) It conflicts with Art 230(1) of UNCLOS, which empowers its Member States to impose only monetary penalties for infringements of pollution regulations committed by foreign vessels beyond the territorial sea and only as provided by this Convention.
(d) It conflicts with Art 230(2) of UNCLOS by which Member States may impose monetary penalties for infringements of pollution regulations in the territorial sea. It provides for non-monetary penalties only in cases of '*a wilful and serious act of pollution in the territorial sea*' committed by foreign vessels; the offence requires '*mens sea*' and not of serious negligence.
(e) It conflicts also with Annex I and Annex II of MARPOL, in that it does not apply the exemptions of '*having taken all reasonable precautions for the purpose of preventing or minimising the discharge*', after damage to a ship or equipment, when the discharge has occurred in the territorial sea of a Member State; although the owner, the master and crew (not anyone else) have the benefit of this defence, it would only apply if the discharges occurred in the straits, or the EEZ, or the high seas.

For these main reasons, it has been strongly advocated that the Directive is contrary to international law and places EU Member States in breach of their UNCLOS and MARPOL obligations, and that it will have serious consequences upon seafarers who may be detained on a presumption of criminal negligence. In addition, making a criminal offence on the basis of serious negligence is in conflict with both Conventions, and, in any event, 'Serious negligence is too vague and lacks legal certainty'.[80]

These issues were highlighted at the Seventh and Eighth Cadwallader Lectures of the London Shipping Law Centre in October 2004 and 2005, respectively.[81]

4.5 THE CHALLENGE AGAINST DIRECTIVE 2005/35/EC

4.5.1 The industry action

Intertanko, Intercargo, Lloyd's Register, International Salvage Union (ISU) and the Greek Shipping Cooperation Committee brought an action in the High Court against

80 See, further, transcripts in LSLC archives, op. cit. fn 74.

81 Op. cit. fn 74. Much has been written about the 2005/35 Directive, and most commentators are of the same view that the Directive conflicts with international law; see reference to those views in Jacobsson, M, op. cit. fn 69; see also: 'The EU Ship-Source Pollution Directive and coastal state jurisdiction over ships' by Alan Khee-Jin Tan, LMCLQ (2010) p 469.

the UK Secretary of State for a judicial review of the implementation of the Directive into the UK law; alternatively, they sought a reference to the ECJ to rule on the validity of the Directive. Mr Justice Hodge held that the arguments in support of a reference to the ECJ were well founded and handed down his judgment on 30 June 2006,[82] in favour of referring the matter to the ECJ (pursuant to Art 234 EC) for a preliminary ruling to answer the following questions:

(a) In relation to straits used for international navigation, the Exclusive Economic Zone or equivalent zone of a Member State and the high seas, is Article 5(2) of Directive 2005/35/EC valid insofar as it limits the exceptions in Annex I Regulation 11(b) and in Annex II Regulation 6(b) of MARPOL 73/78 (for the benefit of the owner, master and crew only)?
(b) In relation to the territorial sea of a Member State:
 (i) Is Article 4 of the Directive invalid insofar as it requires Member States to treat serious negligence as a test of liability for discharge of polluting substances; and/or
 (ii) Is Article 5(1) of the Directive invalid insofar as it excludes the application of the exceptions in Annex I regulation 11(b) of MARPOL 73/78 and in Annex II regulation (6)(b) of Marpol 73/78?
 (iii) Does Article 4 of the Directive, requiring Member States to adopt national legislation which includes serious negligence as a standard of liability and which penalises discharges in territorial sea, breach the right of innocent passage recognised in the United Nations Convention on the Law of the Sea, and if so, is Article 4 invalid to that extent?
 (iv) Does the use of the phrase 'serious negligence' in Article 4 of the Directive infringe the principle of legal certainty, and if so, is Article 4 invalid to that extent?

4.5.2 The decision of the CJEU

The claimants submitted that the validity of the Directive may be assessed in the light of UNCLOS and MARPOL. The Court of Justice of the European Union (CJEU)[83] decided that the validity of the Directive could not be assessed on these grounds and based its decision on surprising reasons. It started from the premise that the Court could examine the validity of a Community measure in the light of the rules of international law, provided, first, the Community is bound by those rules, and, second, when the broad logic of these rules does not preclude the Court from doing so. In examining the rule of both MARPOL and UNCLOS, the ECJ held that: (a) since the Community (other than individual Member States) was not a member of MARPOL, thus not bound by the Convention, it was not incumbent upon the Court to review the Directive's validity in the light of this Convention; (b) with regard to UNCLOS, since the claimants were individuals, or non-governmental organisations, thus not themselves parties to the Convention, the nature and broad logic of the Convention prevented the Court from assessing the validity of the Directive.

With regard to the lack of a definition of 'serious negligence', the Court made a very strange ruling:[84]

> . . . [the] various concepts, in particular that of 'serious negligence' referred to by the national court's questions, correspond to tests for the incurring of liability which are to apply to an indeterminate number of situations that it is impossible to envisage in advance and not to specific conduct capable of being set out in detail in a legislative measure, of Community or of national law.

82 [2006] EWHC 1577 (Admin), case no CO/10651/2005.
83 Case C-308/06 [2008] 3 CMLR 9.
84 [2008] 2 Lloyd's Rep 260, at paras 73–79.

> . . . Those concepts are fully integrated into, and used in, the member states' respective legal systems. In particular, all those systems have recourse to the concept of negligence which refers to an unintentional act or omission by which the person responsible breaches his duty of care. Also, as provided by many national legal systems, the concept of 'serious' negligence can only refer to a *patent breach of such a duty of care*. Accordingly, 'serious negligence' within the meaning of Article 4 of Directive 2005/35 must be understood as entailing an unintentional act or omission by which the person responsible commits a *patent breach of duty of care* which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation.

Accordingly, the Court concluded, Art 4 – read in conjunction with Art 8 – does not infringe the general principle of legal certainty insofar as it requires the Member State to punish ship-source discharges of polluting substances committed by 'serious negligence', without giving a Judicial definition of the concept.

4.5.3 Comments

It seems that, first, serious negligence will be judged from the seriousness of the particular situation and not from the conduct of the party involved;[85] second, by equating 'serious negligence' with the breach of duty of care, the tort of negligence is made a criminal offence; third, the use of an additional vague term, such as 'patent' breach of duty of care, adds further to the uncertainty in the interpretation of these terms.

'Patent' comes from the Latin *patene*, meaning to lay open, which in this context would mean the breach was so 'obvious' that it would amount to serious negligence, judged objectively. As Art 4 refers to degrees of wrongful conduct, from 'intent to recklessness to serious negligence', the latter should be understood to mean, in context, the lesser degree than recklessness. But, if 'serious negligence' is understood in civil law systems to mean 'gross', what is the difference between 'recklessness' and 'gross negligence'? If none, why was it felt essential to the draftsman of the Directive to add 'serious negligence'?

The concept of 'gross negligence' is not new to civil law systems that have incorporated concepts from Roman law from which the term derives. Under English law, however (except in cases of gross negligence manslaughter where the term is used – see Chapter 4, below), when a person owes a duty of care, a breach of it may be either innocent, negligent or wilful (see ***Armitage v Nurse***,[86] where the CA said, in the context of breach of duties by a trustee, that there was no distinction between negligence and gross negligence under common law so as to allow gross negligence to be equated with fraud). The Privy Council (Guernsey), in ***Spread Trustee Co Ltd v Hutcheson***,[87] in relation to trustees' exclusion from liability, held that: If a line was to be drawn between negligence and gross negligence, it would have had to be drawn by statute. Under the customary law of Guernsey, the parties could lawfully agree to exclude a trustee's liability for breaches arising from his negligence or gross negligence before the statute forbidding exclusion of liability for gross negligence came into force. In ***Pentecost v London District Auditor***,[88] Lord Goddard LCJ

85 Such have been the fears expressed by the industry during various debates about how the Directive will be applied by the courts.

86 [1997] 2 All ER 705.

87 [2011] UKPC 13; [2012] 2 AC 194.

88 [1951] 2 KB 759. In rejecting a complaint that certain officials of the Council had passed certain defective work done for the Council by contractors who had consequently been paid in full, the district

disapproved of the use of the term 'gross negligence' and held: the word 'negligence' means negligence as used in its ordinary sense, and not 'gross negligence'.[89]

The elusiveness of a definition of gross negligence in contract or in tort was illustrated by Mance J (as he then was) in ***The Hellespont Ardent***,[90] where gross negligence was a term in the contract (being subject to New York law) in relation to an exclusion from liability clause; it shows the different opinions held by the New York judges in various judgments about defining 'gross negligence'.

In particular, in the opinion of the judges (as summarised by Mance J in this case) 'wilful misconduct' was defined as an intentional act of unreasonable character that is performed in disregard of a known or obvious risk that is so great as to make it highly probable that harm will result.[91]

'Reckless misconduct' differed from intentional wrongdoing in a very important particular, namely: although for the act to be 'reckless', it must be intended by the actor, the actor does not intend to cause the harm that results from it. It is enough that he realises or, from acts which he knows, should realise that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. A strong probability is a different thing from substantial certainly (contrasting wilful misconduct).[92]

The distinction between 'reckless' and 'gross' negligence was somewhat blurred because, it was said, both contain 'reckless' conduct. The issue was whether the difference lay in the absence of conscious realisation (the subjective element)[93] from gross negligence, which had not consistently been dealt with in various judgments.

Mance J, having heard expert evidence, tried to reconcile the authorities and came to the conclusion that, under New York law: 'gross negligence' embraced serious negligence amounting to reckless disregard, without any necessary implication of consciousness of the high degree of risk or the likely consequences (as in recklessness) of the conduct on the part of the person acting or omitting to act[94] (emphasis added).

Viewing the matter according to purely English law principles of construction, he said (*obiter*), he would reach the same conclusion if English law applied, in that: gross negligence is intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary

auditor, in his written decision, said that the isolated instances in which defective work had escaped the notice of the officials concerned did not appear to have been of an extent or of such frequent occurrence as to warrant any finding that, but for gross negligence on the part of the officials, they would have been brought to light. The court held: the district auditor had used the wrong phrase when he referred to 'gross negligence'; although he said there was no evidence of gross negligence, his actual findings amounted to a finding of no negligence on the part of either the officials of the council or the council.

89 It is interesting to note that commercial parties use 'gross negligence' in their contracts, but they define it in exclusion of liability clauses, e.g. in offshore contracts (see Ch 11 para 12).

90 *Red Sea Tankers Ltd v Papachristidis (The Hellespont Ardent)* [1997] 2 Lloyd's Rep 547.

91 Ibid, paraphrased from pp 581–584; under English law also, 'misconduct' involves the 'will' of a party, as opposed to accident or negligence; the person of the misconduct, which is wilful, knows, or should know, that a mischief will result from it: *Lewis v great Western Railway* (1877) 3 QBD 195, at 206 (CA).

92 See also Ch 14, below (how recklessness is defined in the context of International Conventions dealing with the test of breaking the right of limitation of liability).

93 See how recklessness was defined by the House of Lords in the context of criminal damage under s 1 of the CDA 1971, in *R v G* [2003] UKHL 50, [2003] 3 WLR 1060: The accepted meaning of recklessness involved foresight of consequences. The shift is towards adopting a subjective approach by looking at the matter in the light of how it would have appeared to the defendant; see Ch 14, below.

94 Op. cit. fn 90, at p 586, 2nd col.

language, he said, the concept of gross negligence is capable of embracing not only conduct undertaken with actual appreciation of the risk involved, but also serious disregard of, or indifference to, an obvious risk (subjective element). He further commented that, in the criminal field, gross negligence features in the law of manslaughter, where a breach of duty of care will amount to manslaughter, if its seriousness, in all the circumstances, is such that a jury considers that it should be characterised as crime.[95]

Mance J was referred to civil law cases in which there is no subjective element in gross negligence. Finally, which is interesting in this context, the judge said that all the circumstances must be weighted and balanced when considering whether the acts or omissions causing damage resulted from negligence meriting the description of 'gross' negligence.[96]

By contrast, recklessness is a well-known term in English law; it was defined by the House of Lords in the context of criminal damage under s 1 of the CDA 1971, in ***R v G***,[97] in which it was held that, in order to convict of an offence under s 1, it had to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance, if he was aware of a risk that did or would exist or if he was aware of a risk that it would occur and it was, in the circumstances known to him, unreasonable to take the risk. The accepted meaning of recklessness involved foresight of consequences.

In the context of the interpretation of 'serious negligence' in the Directive, EU national courts, when they are seised with jurisdiction in a case in which the Directive has to be interpreted, will be dealing with the above issues. It is very likely that 'serious negligence' will be equated to 'gross negligence', that is, no less than the conduct described above but without the subjective element. If it is applied uniformly, there may be no problems of uncertainty, or of inconsistent decisions.

However, it is unfortunate that the CJEU missed the opportunity to create certainty in EU law by defining the term, giving it the status of an EU autonomous concept rather than leaving the interpretation of it to the national courts, which may apply different definitions. For example, there are cases in which the courts of Germany, France, Italy and Greece interpret the phrase 'act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that such damage would probably result', under Art IV.5(e) of the Hague–Visby Rules (HVR) in the context of limitation of liability, differently.[98]

Considering that there will still be uncertainty as to the definition of 'serious negligence', by national courts, the following statement of the Court contradicts the way in which it dealt with an attempt to define the concept; it stated that:

> The principle of the legality of criminal offences and penalties implies that Community rules must define clearly offences and the penalties which they attract. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with

95 Ibid, and *R v Adomako* [1995] 1 AC 171; see also Ch 4, below.

96 Although applying the test of 'gross negligence' to the conduct of individuals may not be difficult, applying it to corporate bodies will be met with the same difficulties as those discussed with regard to gross negligence manslaughter; see Ch 4, below.

97 [2003] UKHL 50, [2003] 3 WLR 1060.

98 See review of the systems in 'Ocean carrier's loss of liability limitation' by Katsivela, M, JIML 2012, Vol 18, pp 21–38.

the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.[99]

In conclusion, this decision, overall, perplexes the mind and can only be characterised as an '*evasive tactic*' of the CJEU to deal with the issues before it. But, perhaps, with the amended Directive (see below) and considering the above analysis that 'serious negligence' may be interpreted as gross negligence objectively judged, without the subjective element, the overinflated balloon of the previous Directive seems to have burst.

4.6 THE AMENDMENTS TO THE 2005 DIRECTIVE BY THE 2009/123/EC DIRECTIVE[100]

Being encouraged by the ECJ's judgment in the annulment of the Framework Decision (seen under 4.3, above), the Commission modified the 2005 Directive, and the 2009 Directive was adopted to fill the vacuum created by the annulment of the Framework Decision.

Article 1(1) of this Directive states its purpose and replaced Art 1(1) of the previous Directive with new wording:

> The purpose of this Directive is to incorporate international standards for ship-source pollution into Community law and to ensure that persons responsible for discharges of polluting substances are subject to adequate penalties, including criminal penalties, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.

Instead of setting down minimum or maximum penalties, the 2009 Directive deals with penalties by requiring each Member State (Art 8) to take the necessary measure to ensure that infringements within the meaning of the new Arts 4 and 5 are punishable by effective, proportionate and dissuasive penalties; this is what the Commission wanted to do originally, that is, to leave the matter of penalties to Member States. By Art 8a, such penalties shall be imposed to natural persons, and, by Art 8b, the liability of legal persons (legal entities) is also stated. The reason for including the 'legal person' or legal entity is stated in Recital 6, namely that ship-source pollution offences are, frequently, committed in the interest of legal persons or for their benefit.

There are certain improvements in this Directive, in terms of clarification; in Recitals 4 and 9, reference is made to illicit discharges (that is, clandestine, forbidden discharges). In particular, Recital 9 states:

> Under this Directive, illicit ship-source discharges of polluting substances should be regarded as a criminal offence as long as they have been committed with intent, recklessness, or with serious negligence and result in deterioration in the quality of water. Less serious cases of illicit ship-source discharge of polluting substances that do not cause deterioration in the quality of water need not be regarded as criminal offences. Under this Directive such discharges should be referred to as minor cases.

Thus, under this Directive, for the discharges to be criminal offences they must be:

99 [2008] 2 Lloyd's Rep 260, at para 71.
100 Directive 2009/123/EC, OJ L No 280, 27.10.2009, p 52.

(a) illicit;
(b) committed with intent, or recklessness, or serious negligence; and
(c) result in deterioration of water.

Article 3(1), as seen under para 4.2, above, remains the same; Arts 4 and 5 have been amended to the extent necessary in view of the annulment of the Framework Decision, the amendments to the Regulation numbers of Annex I and II of MARPOL (seen under para 4.4, above) and the exclusion of minor cases.

Article 5a (Criminal offences) is new, providing:

1 Member States shall ensure that infringements within the meaning of Arts 4 and 5 are regarded as criminal offences.
2 Para 1 shall not apply to minor cases, where the act committed does not cause deterioration in the quality of water.
3 Reported minor cases that do not individually but in conjunction result in deterioration in the quality of water shall be regarded as a criminal offence, if committed with intent, recklessly or with serious negligence.

Article 5b lists inciting, aiding and abetting as a new offence, if it is committed with intent.

The intention of the new Directive is said to be to avoid conflict with international law, as stated in Recital 11, that: 'This Directive is without prejudice to other liability systems for damage caused by ship-source pollution under Community, national, or international law'.

Furthermore, Recital 15 provides that: 'This Directive respects fundamental rights and complies with the principles recognised by Art 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union.'

Legal and natural persons exposed to liability include: ship-owner, master, crew, charterer, classification societies, cargo-owners, or any other person involved, such as salvors. The new Directive exempts public bodies and port authorities, exercising State authority, or public international organisations, from criminal liability (Art 2.5).

It entered into force on 16 November 2009 and obliged Member States to implement the Directive by 16 November 2010 by providing in their national legislation for criminal penalties in respect of these discharges of polluting substances.

5 CONCLUSION

The EU's approach is more robust and directs its Members to transpose the EU law into their domestic law within a certain period, failing which sanctions will follow.[101] However, the EU, as compared with IMO, has an easier task, as it has only 27 members, who have a common European purpose to protect their waters from pollution, whereas IMO has to achieve consensus among 160 members who have diverse interests. In this connection, it should be noted that the adoption of the 'tacit

101 See Jacobsson, M, op. cit. fn 69 about conflict between EU and International Liability Conventions; also, about EU and international law, see Ringbom, H, *The EU Maritime Safety Policy and International Law*, 2008, Martinus Nijhoff Publishers.

acceptance' method by IMO (applied for amending Conventions) speeds up the process of bringing international law in line with modern developments and with the EU initiatives, to a certain extent.[102]

102 See www.imo.org; see, further, an interesting book in this area: Kachel, M, *Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas*, 2008, Springer.

CHAPTER 3

CONTEXT OF REGULATORY ENFORCEMENT

THE ISM, THE ISPS, VETTING AND DETERRENCE

Introduction 67

1 Context of regulatory enforcement 68

2 The ISM Code 77

3 The core provisions of the ISM (Part A) 79

4 Remaining provisions of Part A 82

5 Certification and verification under Part B 84

6 Effect of the CSWPMS upon the ISM 87

7 Effect of ECDIS upon the ISM 87

8 Consequences of breach of the ISM provisions 88

9 The deterrent effect of the ISM Code 90

10 The deterrent effect of vetting by oil companies 91

11 The role of the ISPS Code for security measures 94

INTRODUCTION

This chapter deals with the wider context of enforcement of safety regulations in safety and security issues. The broader picture of how ship safety has been promoted, the role of the flag and port States, the role of classification societies, as well as the role of key maritime organisations and other stakeholders, are explained.

Then, it focuses on the provisions of the ISM Code, as amended in 2010, the effect of CSWPMS and of ECDIS upon it, and consequences for breach. It considers the sanctions and penalties for non-compliance with the ISM Code as imposed by the UK Merchant Shipping Regulations, by which the Code is implemented into English law. The broader legal implications of non-compliance with the Code are examined in detail in Chapter 4, below. This chapter concludes with a brief account of the ISPS Code.

1 CONTEXT OF REGULATORY ENFORCEMENT

1.1 IMPORTANCE AND ROLE OF THE SHIP'S FLAG[1]

Ships must possess a national character to be allowed to use the high seas freely. They have the nationality of the State whose flag they are entitled to fly, which is the symbol of the ship's nationality. Individual States fix the conditions for the entry of ships in their registries. Connecting factors between a ship and a State, such as the incorporation of the owning company of the ship in that State, or the registration of the ship in the particular State's registry, provide a test for the ship's nationality. Some States may not require the ship to be registered in the records of the State when the owning company is registered.

The registration of a ship in the public records of a State attributes the national character of that State to the ship, and the documents issued to the ship by the competent authority of that State are evidence of the ship's nationality, which enables the ship to engage in trade, enter ports and deal with authorities. The ship will be subject to the laws and regulations of the State under whose flag it is registered. Jurisdiction over vessels on the high seas, including for offences committed on the high seas,[2] will reside with that State. Questions frequently arise with regard to which law should apply in the territorial waters of other States through which all ships will normally be entitled to have the right of innocent passage. In ***Saldanha v Fulton Navigation Inc (The Omega King)***,[3] it was held that the general rule in a situation where a tort was committed entirely on board a foreign vessel, while in the waters of another State, is that it is the law of that State that applies, not the law of the flag State.

International law lays down rules regulating how the freedom to sail on the high seas should be used. The Geneva Convention on the High Seas 1958 and the United Nations Convention 1982 on the Law of the Sea require States to exercise effective control over ships flying their flag. When a ship enters the port of another State, it will be subject to the PSC of that State, and both the flag State and the PSC State should co-operate in matters of enforcement of the international treaties and regulations.[4]

With the opening of European Union membership, reflagging of ships from one European register to another for cheaper labour may attract industrial action by the International Transport Workers' Federation and the national seamen's union in order to ensure payment to seamen at the higher rates. Threatened industrial action may be lawful in one Member State and unlawful in another. To determine whether or not an injunction to restrain threatened industrial action could be granted was a matter for the ECJ in ***Viking Line ABP v ITF***.[5]

There are various factors that influence ship-owners to choose a flag of a particular State. The most important factors are economic considerations and operating costs.

1 Coles, R, Ready, N (editors), *Ship Registration: Law and Practice*, 2002, LLP. The editors deal with the subject from a comparative perspective, as between British and other well-known registers.
2 *The Oteri v The Queen* [1977] 1 Lloyd's Rep 105 (PC).
3 [2011] EWHC 1118.
4 See Ch 2, above.
5 [2006] 1 Lloyd's Rep 303.

1.2 FLAGS OF CONVENIENCE

Maritime nations, historically, required a 'genuine link' between a vessel and the State in which the ship was registered. Market forces and attractions offered by 'open registries' known as 'flags of convenience' have brought a significant decline in the traditional ship registries since the 1950s.

Subject to international law, States have had freedom to set their own regulations for ships carrying their flag. Some States have been very liberal in the regulations for entry of foreign ships in their ship registers, making it very convenient and opportune for ship-owners to register their ships with them. This gave rise to the proliferation of open registers or flag of convenience States, which provided attractive advantages.[6] The most important of such advantages have been: the confidentiality of who is the actual beneficial owner of the ship,[7] the allowance of ownership and control of the ship by non-citizens of that State, no income tax (only a registration fee and annual fees) and the freedom of manning of those ships by non-nationals. The tax advantages and the freedom of manning have been the greatest stimuli for ship-owners to register under a flag of convenience. In addition, open registries enable the ship-owners to distance themselves from the political and economic situation of their country.

The origin of the flag of convenience has its roots in the ingenuity of British merchants in the sixteenth century, who used the Spanish flag to avoid Spanish monopoly restrictions on trade with the West Indies, and later that of British fishermen in the seventeenth to nineteenth centuries, who tried to avoid fishing restrictions imposed by Great Britain by using either the French or the Norwegian flags. In the early twentieth century, the USA's prohibition laws preventing the sale of liquor signalled the beginning of the use of open registries. This resulted in the transfer of ships to the Panamanian flag, which at the time had a liberal maritime law to attract foreign tonnage. Another factor contributing to the boost of the Panamanian flag was the worsening of the political situation in Europe in the 1930s and the outbreak of war in 1939. The dissatisfaction with the Panamanian flag, however, was first shown after the Second World War, owing to political instability in Panama, and this gave rise to other flags of convenience, such as the Liberian flag.[8] Other nations raised such flags of convenience,[9] some of which have been criticised for being lax in preserving high standards in terms of enforcing safety regulations.

However, safety aspects of substandard ships linked to flags of convenience and substandard labour conditions on board have led to a campaign against those flags for many years. Moreover, in recent years, the fact that incidents of casualties of ships under flags of convenience outnumbered the casualties of ships under other flags alerted the international shipping community to take action. The safety aspects have had a lot to do with the age of ships, as well as construction and lack of a rigorous system of maintenance by regular surveys and repairs. The ISM Code (see below)

6 Op. cit. fn 1, Coles and Ready, Ch 2.

7 However, with the implementation of the ISM Code and legislation in the USA, transparency of ownership is required by the identification of the entities responsible for the operation and management of the ship, as will be seen later, but this may not necessarily reveal the beneficial ownership.

8 Op. cit. Cole and Ready fn 1, pp 18–19.

9 Algeria, Barbados, Belize, Bulgaria, China, Cuba, Croatia, Cyprus, Egypt, Estonia, Honduras, Iran, Lebanon, Liberia, Lithuania, Malta, Panama, Portugal, Romania, St Vincent and Grenadines, Syria, Vanuatu and Ukraine.

has brought great improvements to safety of ship operations and has reduced accidents. Many other safety regulations, as shown in Chapter 2, above, have had a significant impact on reducing accidents at sea. Classification societies (see below) are delegated by the flag States to police the implementation of safety regulations and play a great role in their enforcement.

1.3 THE ROLE OF THE FLAG STATE AND PSC IN ENFORCEMENT

The obligations of flag States and port States have been explored in Chapter 2 while considering the EU legislation.

1.3.1 Compliance with international safety measures

UNCLOS 1982 and MARPOL 1973/1978 oblige each of their contracting States to take such measures for ships flying their flag as are necessary to ensure safety at sea and the protection of the marine environment. Further duties are imposed upon flag States by SOLAS and the STCW Conventions, as amended. These duties relate to construction, equipment safety, manning and training, and are carried out by regular surveys of ships. The surveys are delegated to classification societies who issue certificates of compliance (see 1.4, below). Although the major flag States carry out their responsibilities admirably well, others do not, or they are not even signatories to the International Conventions.

To counterbalance these deficiencies, the PSC[10] first emerged in Europe as a second line of defence. Coastal States have had to harmonise their approach to PSC by membership of the Paris MOU[11] 1982, which ensures that ships calling in the ports of a port State are inspected and, if they have not complied with international safety standards, may be detained. The MOU established uniformity of PSC on regional bases. The success of the MOU in Europe led to the establishment of other regional MOU, for example, the Latin America MOU 1992, the Tokyo MOU 1993 covering the Asia–Pacific region, and the MOU 1996 covering the Caribbean region.

Prior to the implementation of the ISM Code, the Achilles' heel of the PSC was the lack of risk analysis, as the late Lord Donaldson had observed:

> If ship owners and ship operators undertook a serious risk analysis to prevent detention by the Port State Control, the problem would go away, but, it is a fact of life, that some owners do not.[12]

10 For details of the evolution of the Port State Control system, see Kasoulides, G, *Port State Control and Jurisdiction*, 1993, Kluwer, and further developments in Ozcayir, ZO, *Port State Control*, 2nd edn, 2004.

11 Membership of the Paris MOU (Memorandum of Understanding) 1982 included the UK, Belgium, Denmark, Finland, France, Germany, Greece, the Republic of Ireland, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (in Europe) and Canada. The original countries increased to 25.

12 See the late Lord Donaldson's paper, 'The ISM Code: the road to discovery?' [1998] LMCLQ 526, delivered in March 1998 at the Cadwallader inaugural memorial lecture of the London Shipping Law Centre.

His recommendations, made after the public inquiry into *The Braer* disaster, which he chaired, are contained in the report 'Safer Ships, Cleaner Seas'. The scope of this, he said:

> . . . covered every aspect of manning, operation, maintenance, classification and insurance of vessels. It covered Flag State and Port State Controls, surveillance, tracking and identification of vessels. It covered pollution protection and clean-up. It did so in the context of domestic and international law, as well as on a practical, day to day basis. . .
>
> Insofar as there is a regulatory regime, it is to be found in International Conventions evolved through the International Maritime Organization, a United Nations agency. Primary responsibility for enforcement lies with the States whose flags the vessels fly – Flag State Control. However, coastal States at which vessels call are entitled to take measures to protect themselves from substandard shipping – Port State Control. The principal measure consists of detaining ships, which do not come up to the internationally agreed standard . . . But Port and Flag States are not the only players in this battle to raise standards. Classification societies have a major part to play.[13]

The Paris MOU, the principle of which has spread worldwide, has taken a proactive approach to monitoring compliance, and it works, particularly, because the measures include the publication of data and trends of ships that are deficient, as well as the banning of these ships from the region (see, further, Chapter 2, above).

The combined effect of implementing the SOLAS, MARPOL, STCW and the ISM has immensely improved safety at sea and pollution prevention. At least, they provide a uniform international solution. However, it was felt by IMO that some flag States needed assistance as to how to comply with their obligations to comply with and enforce these treaties.

1.3.2 Need for closer co-operation between flag and port States

Despite implementation of the ISM, which obliges ship operators to perform systematic risk assessment, it has been noted through the PSC that not all ship operators have adopted a culture of self-imposed regulation. Therefore, the need for close co-operation between flag and port States has been paramount. It has been recognised that, with more rigorous enforcement of regulations by flag States, the problem of substandard ships might go away. In response to this, various measures have been taken by the EU, one of which has been the system of blacklisting substandard ships by the PSC and ensuring that more powers are given to PSC by the new Directive (see, further, Chapter 2, above). In addition, the IMO commenced a system for flag State voluntary self-assessment, or audit by each other. The purpose of this scheme has been to encourage co-operation between flag States and give assistance to those States where needed, in terms of ensuring that the international regulations are properly enforced, as well as to address the issue of accountability among Member States of IMO with respect to their treaty(ies)[14] obligations (see, further, Chapter 2, above).

13 See Lord Donaldson, 'Safer ships; cleaner seas – full speed ahead or dead slow?', the Donald O'May (annual memorial) lecture at the Institute of Maritime Law, University of Southampton, 12 November 1997 (published in [1998] LMCLQ 170, pp 171, 172).

14 IMMARBE of Belize has made considerable improvements in its PSC detention records since 2001 and is committed to attaining the White Lists of all MOUs on Port State Control; non-compliant vessels have been deregistered .

1.4 THE ROLE OF CLASSIFICATION SOCIETIES

Classification societies have three functions: first, they carry out structural surveys on ships that are entered with them and issue certificates that the ships are complying with the rules and regulations of the particular class; they also advise shipbuilding yards on the proper construction of ships. The certificates of class are required by the SOLAS Convention and are very important for the trading of ships, but are not certificates of seaworthiness.

Second, classification societies carry out statutory surveys on behalf of flag States to verify that the ships entered with them comply with the international mandatory requirements of the SOLAS and MARPOL Conventions. For example, certificates required by SOLAS to be issued by the flag administrations are: international tonnage certificate, passenger ship safety certificate, cargo ship safety certificate, load line certificates etc.

Third, they are also authorised by flag States to carry out formal audits of ships and operating companies, and to issue certificates of compliance with the particular requirements of the ISM and ISPS Codes. They are appointed under IMO Resolution A.739 (18) 1993 to act as the ROs of flag States for the above purpose, and are subject to further regulations (regarding recognition and responsibilities) emanating from the EU (see Chapter 2, above).

In the past, some classification societies showed weaknesses in the performance of their duties regarding structural surveys, and this, occasionally, may still be the case today in respect of some flag States.

In the view of Lord Donaldson,[15] this particular weakness was, to some extent, cured by the creation of the International Association of Classification Societies (IACS), which imposes and polices the quality of its members' work and prevents owners transferring from one member society to another, simply in order to avoid having to take remedial action required by the first society. However, not all classification societies are members of IACS, although IACS members classify 90 per cent of the world's shipping.

The European Commission took the initiative to tackle these problems by the implementation of a Directive 94/57/EC on inspection of ships by classification societies, as amended by Directive 2001/105/EC and the further Directive 2009/15/EC for ROs, so that more control is imposed upon the activities of classification societies for corporate responsibility and accountability (see Chapter 2, above). Financial liabilities are imposed upon classification societies, but only if a classification society is sued by the relevant flag State for an indemnity, and if it is proved and decided by a competent court that the failure of the classification society was the cause of the loss for which the flag State was made liable (see further developments in Chapter 2, above). Otherwise, classification societies enjoy immunity from liability because classification is part of their public function of certifying ships. (See, further, Chapter 7 (shipbuilding), Chapter 8 (sale and purchase) and Chapter 16, para 6.2, with regard to decisions on immunity of class societies and channelling of liability.)

15 Op. cit. Lord Donaldson, fn 12.

The issue of liability of classification societies under English law for negligence to third parties, who suffer economic loss owing to unseaworthiness of a ship emanating from defects in the ship that the classification society had certified as being in the class required according to its rules, is discussed in the context of sale of ships, in Chapter 8, below. Briefly, for policy reasons, the classification society does not owe a duty of care to third parties who suffer loss in such circumstances, basically because they perform a public function when they certify ships, and the certificate is not a certificate guaranteeing the ship's seaworthiness.

In relation to new buildings, IACS developed the Common Structural Rules, which apply to tankers and bulk carriers and are in line with the initiative taken by the IMO to implement the Goal-Based Standards (GBS), aiming to achieve uniformity in shipbuilding standards, as explained in the context of shipbuilding, Chapter 7, below.

1.5 INDUSTRY STANDARDS ON SAFETY AND QUALITY ASSESSMENT

The ISM Code marked, formally, the beginning of a safety culture. Following the ISM, further measures have been taken by international and industry organisations that aim to reinforce safety and the objectives of the Code in a parallel way. Such measures include:

(a) the initiative by oil majors to require tanker owners to adopt the TMSA programme, as amended by TMSA 2, in order to obtain approvals if they wish to trade with the oil majors;
(b) the guidelines for best industry practice issued by the International Chamber of Shipping and supported by the industry organisations, such as Intertanko, Intercargo, BIMCO and the International Group of P&I (IGP&I) Clubs;
(c) the international quality management systems established by the ISO: the ISO 9000 series covers the requirements for a quality management system; the 9001:2000 is the internationally recognised quality management standard for all types of organisation and focuses on the management of processes within an organisation. It is the most important quality management standard in use today. It requires the adoption of eight quality management principles, which are very similar to those of the ISM Code; these relate to leadership, customer, involvement of people, documented processes, integrated systems, continuous improvement, factual approach to decision-making and mutually beneficial customer relationship. Implementation of those principles aims to control risks. Formal auditing and certification are required;
(d) the ISO 14001:2004, which relates to management systems that control the impact of a company on the environment; it provides for international environmental management standards. These standards require auditing and certification, in the same way as any other system of organisational quality;
(e) the OHSAS 18001, providing for a health and safety management standard, which has been developed for international use; it is based on the ISO 9001:2000 standard. It enables an organisation to control its health and safety risks and improve its performance; and

(f) the ISO 28001, addressing the subject of supply chain security, an integral part of which is carriage by sea through the world's ports. The standard is based on the risk management principles enshrined in ISO 14001 and recognises the mandatory nature of the ISPS Code as applied to ships and port facilities. Implementation of the standard by each component part of the supply chain, including the shipping company, will significantly reduce the vulnerability of that supply chain to external threats.

Further measures are being taken for the purpose of tackling substandard ships, harmonising levels of inspection and co-ordinating information about the performance of vessels of particular flags, which is monitored and kept in electronic databases. A similar scheme, known as the Early Warning System for the Baltic Sea, was concluded in 1999. The database information operates through the Internet: it is known as the European Quality Shipping Information System,[16] established by the Paris MOU, in which the names of failing flags and classification societies are recorded. It gives users a wide range of safety-related information; it is a tool aimed at reducing substandard shipping and facilitating better selection of ships for trading. A database of inspections that have led to detention for serious deficiencies is kept for future targeting (see, further, Chapter 2).

Parallel to these are the Green Flag Award and the US Coast Guard's 'Qualship 21', which aim to drive standards higher.

1.6 OTHER INITIATIVES

The legal implications of non-compliance with the ISM are examined in Chapter 4, below. Since the first edition of this book in 2001, serious ship operators have given due consideration to the implications of non-compliance with the ISM. It has also been observed that, since the latter part of the last decade, due attention has been given by underwriters and P&I clubs to risk assessment of the owners they insure.

The question that was explored in the previous editions was: 'what could go wrong if the implementation of the Code was complied with diligently by ship-owners and operators'? Lord Donaldson had postulated the probable answer to this, thus:

> On the face of it, full compliance [with the code] would at a stroke eliminate all shipping accidents and pollution, save only those brought on by unforeseen perils of the seas and unforeseen defects in safety management policies. Sadly, the answer is that quite a lot can and will go wrong. We live in a wicked world and the greater the financial pressure, the wickeder some of us will become. Shipowners are not more wicked than others, but overcapacity (which hopefully the ISMC will help to eliminate), the international nature of competition within the industry and low or negative margins of profit will lead many shipowners into temptation. A few, it has to be said, need no temptation. It just comes naturally. In practical terms, some Flag States will undoubtedly ignore their responsibilities and will be prepared to certify compliance in the teeth of the evidence or in spite of it . . . Accepting, as I do, that until some form of discipline can be introduced in relation to Flag States by, for example, an International Maritime Organization (IMO) resolution withdrawing the right of offenders to issue internationally accepted certificates, the real burden of making this system work will fall upon

16 See further: www.equasis.org and Chr 2, above.

Port State Control. However, I hope that classification societies, underwriters, charterers and shippers will provide powerful assistance in their own interests, by withdrawing class, by loading premiums or declining to insure and, in the case of shippers and charterers, by becoming much more selective in the shipping which they use.[17]

Furthermore, in 2000, the London Shipping Law Centre examined the issue of what 'the missing link in regulations'[18] is, and it was noted that it was the lack of transparency within the industry, as well as lack of consistency and effective implementation of International Conventions by flag States.[19]

Since that time, a systematic approach by the EU has been adopted to monitor and verify compliance of both the flag States and classification societies by audits and to apply sanctions for non-compliance, as has been seen in Chapter 2.

Moreover, if classification societies fail to apply the rules of quality standards, the sanction is now disqualification from IACS membership. If the classification society is not a member of IACS and fails to observe the standards, such a society will become obsolete, because the EU has now imposed sanctions of blacklisting of flag States, as well as withdrawing certificates of recognition from classification societies (see Chapter 2).

In addition to the industry standards seen under 1.5 above, IMO and the EU are able now to control the activities of both the flag States and classification societies. The IMO, through the flag State implementation sub-committee, implemented the voluntary system of self-audit of flag State performance. The EU has implemented the proposals made by the Commission to make classification societies accountable for negligence, or misconduct committed during the performance of their duties in carrying out structural surveys, as well as to audit and monitor the performance of ROs by a Commission representative (on which, see Chapter 2, above).

It had also been recognised through the Quality Shipping Campaign that the role of the shippers/cargo-owners is important, and that the successful eradication of substandard operations and practices in shipping depends on the co-operation of all links in the responsibility chain.[20] However, the role of the shippers had been looked at only with regard to whether or not a mechanism could be created by which sanctions can be imposed on them if they engage substandard ships. Any monitoring, however, in this direction was rejected on the basis that it would be impracticable and expensive.[21] The questions that had not been asked by the Quality Shipping Campaign were these: (a) to what extent do the shippers/cargo-owners and charterers contribute to making ships unsafe, thereby causing pollution at sea?; and (b) how can they be targeted so that sanctions can be imposed upon them for the consequences of rendering ships unsafe?

17 Op. cit. fn 12.

18 The seminar was set as a challenging question to the shipping industry and it was chaired by Lord Donaldson on 18 January 2000; papers are available at the Centre's Office, www.shippingLBC.com.

19 By Cubbin, A, Director of Policy and Standards, Maritime and Coastguard Agency (ibid).

20 Lisbon Conference on Quality Shipping, 4 June 1998.

21 British Maritime Law Association (BMLA) study: On 'the role of cargo-owners/shippers and marine insurers in the Quality Shipping Campaign'.

A partial answer to this was given by the ECJ in the case against *Total* (see Chapter 2, at 3.4), in which it was held that the charterer/shipper could be held liable for pollution damage by waste, if it contributed to the risk of pollution by failing to take measures to prevent such risk when it selected the ship for trading.

Further initiatives took place through the OCIMF towards safeguarding safety by adopting a system of vetting tanker ships and their owners (TMSA, mentioned earlier). Those tanker owners who wish to trade with the oil majors must file the necessary documentation regarding their operations, for the oil majors to be able to evaluate the safety of the tankers. TMSA, being considerably improved by TMSA 2 (see Chapter 1, above), provides a tangible commercial incentive for tanker owners to commit to safety. It is regarded as the most effective deterrent to non-compliance, and cases are now reaching the English courts (see examples at the end of this chapter).

For the purpose of furthering the aims of the Quality Shipping Campaign, a study was completed by Terence Coghlin, commissioned by the Organisation for Economic Co-operation and Development (OECD),[22] in which the author – having competently reviewed the available systems of policing substandard ships – includes in his recommendations that P&I clubs should take serious measures against substandard ship-owners and, if they do not do so, perhaps such P&I clubs should be targeted and penalised by the IGP&I to encourage risk selection. P&I clubs are structurally in a better position than the general insurance market to police the quality of operators who enter with them. Some clubs, however, may be sheltered from the full financial effects of their slack risk selection by the comfortable blanket provided by the International Group. The author of the report referred to above admits, however, that there is no 'single instant cure available to us to remove the blot of these remaining substandard operators from our seascape'. During the latter part of the last decade, however, P&I clubs and other insurers were indeed focusing on policing the quality of the operators they insure.

As regards better quality in building of ships in terms of safety, there has been another concerted effort made by the IMO to formulate the GBS (Goal Based Standards) for ship construction and safety. IACS has supported the scheme with the development of its Common Structural Rules.

The Equasis information system has been expanded, and the EU has implemented new Directives on monitoring the movements of ships visiting EU ports (see Chapter 2, above).

Undoubtedly, the collective efforts that have taken place internationally since the advent of the ISM Code have had an impact upon ship operators, and accidents have been reduced. Since the previous editions of this book, there has been considerable work done on the effect of the human element in accidents and accident reporting.[23]

In the writer's view, however, there is more to be done, particularly on the part of insurers, who could impose upon their assureds a requirement to have implemented a systematic risk management policy as a condition to payment of insurance claims.

22 The Removal of Insurance from Substandard Shipping (OECD, 2004), see paper delivered at the Donald O'May Lecture organised by the Institute of Maritime Law, University of Southampton, on 17 November 2004; published version 'Tightening the screw on substandard shipping' [2005] LMCLQ 316.

23 The effect of the human element upon accidents was undertaken as a research project by the Nautical Institute, sponsored by Lloyd's Register. For further sources look at 'The Alert' issued by the Nautical Institute. See also the Horizon project, a study concerning the effect of crew fatigue upon ship operations. (the project was presented at a seminar of the London Shipping Law Centre on 24 July 2013: www.shippingLBC.com).

Some may argue that this is achieved by the requirement in the insurance policy of compliance with the ISM Code. More sceptical observers, such as the present author, doubt this assumption. However, the culture has gradually been changing, and this is owing to collective efforts by educational bodies, such as the London Shipping Law Centre, which carried out a series of seminars on risk management issues, by writing on the subject and in-house seminars, and by industry organisations. It has, gradually, been realised, through the implementation of industry standards, the ISM and vetting procedures, that this century can be marked as a risk management era in shipping. The response to these issues by the EU, as seen in Chapter 2, is driving towards the elimination of substandard ships.

2 THE ISM CODE[24]

2.1 ORIGIN

The Code's origin goes back to the late 1980s, when there was concern about poor management standards in shipping. The SOLAS Convention 1974, prior to its amendment to incorporate in Chapter IX the regulations dealing with the management for the safe operation of ships, had been concerned with safe design, safe construction and maintenance, but not with safe operations of vessels and human error. The human element has been taken into account by the amendments to the development of STCW 1978, substantially amended in 1995, and by the Manila amendments in 2010 (see Chapter 1, 3.1 and 3.2.3), to emphasise important aspects of the human element, such as crew competences, training, certificates and watchkeeping.

The catalyst for the IMO to proceed with the development of guidelines for shipboard operating procedures to ensure safety was the sinking of the *Herald of Free Enterprise* off the Belgian port of Zeebrugge in March 1987. As the official inquiry into this accident revealed major defects in the ship management, which the judge described – 'the company was infected with the disease of sloppiness at all levels' – the UK government requested IMO to investigate measures designed to improve the safety of ro–ro ferries. Broad guidelines were developed for use by officers and crew aboard vessels in the management of safety and pollution prevention.

The IMO Assembly unanimously accepted Resolution A.596(15), which called upon the MSC to develop guidelines concerning shipboard and shore-based management to ensure the safe operation of ro–ro passenger ferries. It was pointed out in the resolution that a great majority of accidents are due to human error and fallibility, and that the safety of ships will be greatly enhanced by the establishment of improved operating practices.

The ISM Code evolved through the development of the guidelines on management of the safe operation of ships (not only ro–ro vessels) and for pollution prevention.

24 It was implemented under a new Chapter IX of the SOLAS Convention 1974 and has had the force of law in SOLAS States with regard to passenger ships, oil, chemical tankers, gas and bulk carriers and high-speed crafts (all of 500 GRT and over) since 1 July 1998. With regard to ro–ro passenger vessels operating on regular service to and from ports of EU Member States, it has been applied since 1 July 1996. It became enforceable on other cargo ships and mobile offshore drilling units (of 500 GRT plus) on 1 July 2002, when it was amended. It was further amended in 2010.

The IMO Assembly adopted Resolution A.647(16) in 1989 to apply to all ships, and the revised Guidelines were adopted two years later as Resolution A.680(17). The review process continued, and, in 1993, Resolution A.741(18), which included the ISM Code in Annex, was adopted by the Assembly. The ISM was originally intended as a recommendation, but it soon became apparent that it should become mandatory. The first stage of implementation was on 1 July 1998, and the Code applied to passenger ships, high-speed craft, oil tankers, chemical tankers, gas carriers and bulk carriers. The Code was amended in 2000 to apply to other cargo ships and offshore drilling units, and these amendments (the second stage) entered into force on 1 July 2002. It was further amended in 2004 by Resolution MSC.179(79), and these amendments entered into force on 1 July 2006. Further amendments in 2005 entered into force in 2009, and the most recent amendment of 2008 (Resolution MSC.273(85) was adopted on 1 January 2010 and entered into force on 1 July 2010.[25]

2.2 THE ROLE OF THE ISM CODE IN SAFETY

The preamble of the Code sets out its purpose, which is to provide an international standard for the safe management and operation of ships and for pollution prevention. Regulation 3 makes the safety management requirements mandatory.

The Code superimposed a safety case regime by which risk analysis by owners has, unwittingly, become compulsory. Although the requirement of risk analysis was implicit in the original Code, it became an express requirement by the amendment of the Code in 2010.

A new approach to ship operations and management, which is a radical change from the traditional approaches, is enshrined in the Code by requiring the ship-owners and managers to establish an SMS through which the company's philosophy on safety is supposed to become transparent. However, the Code is not prescriptive but only provides the framework for owners and managers to ensure compliance with its provisions. In that sense there is flexibility in determining compliance.

It obliges both flag and port States to enforce the Code and has had a significant effect on reducing the number of substandard ships.

2.3 THE PHILOSOPHY OF THE CODE

It is further stated in the preamble of the Code that the cornerstone of good safety management is commitment from the top. In matters of safety and pollution prevention, it is the commitment, competence, attitudes and motivation of individuals at all levels that determine the end result. Its philosophy, in effect, is to cultivate a culture of self-regulation, and its goal is to minimise or prevent human error in the whole spectrum of ship operations through training, communication and accountability.

The Code is based on general principles and objectives and is expressed in broad terms so that it can have a widespread application. Its stated purpose is to establish minimum standards for safety management and operation of ships and for pollution

25 Foreword to the ISM Code – IMO publication.

prevention. Clearly, different levels of management, whether shore-based or at sea, will require varying levels of knowledge and awareness of the items outlined.

3 THE CORE PROVISIONS OF THE ISM (PART A)[26]

All underlined provisions (below) show the amendments to the Code by the 2010 version.

3.1 GENERAL DEFINITIONS

The following definitions apply to parts A and B of the Code:

- 'Company' means the owner of the ship or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the ship-owner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code (para 1.1.2).
- 'Safety management system' means a structured and documented system enabling company personnel to implement effectively the company safety and environmental protection policy (para 1.1.4).
- 'Document of Compliance' (DOC) means a document issued to a company that complies with the requirements of this Code (para 1.1.5).
- 'Safety Management Certificate' (SMC) means a document issued to a ship that signifies that the Company and its shipboard management operate in accordance with the approved SMS (para 1.1.6).
- 'Objective evidence' means quantitative or qualitative information, records or statements of fact pertaining to safety or to the existence and implementation of an SMS element, which is based on observation, measurement or test and which can be verified (para 1.1.7).
- 'Observation' means a statement of fact made during a safety management audit and substantiated by objective evidence (para 1.1.8).
- 'Non-conformity' means an observed situation where objective evidence indicates the non-fulfilment of a specified requirement (para 1.1.9).
- 'Major non-conformity' means an identifiable deviation that poses a serious threat to the safety of personnel or the ship or a serious risk to the environment that requires immediate corrective action and includes the lack of effective and systematic implementation of a requirement of this Code (para 1.1.10).

Either a threat to the safety of personnel or to the ship, or a serious risk to environment, will qualify as a major non-conformity, unlike in the previous version, in which the conjunctive 'and', instead of the disjunctive 'or', was used in the definition of major non-conformity, thus making it more difficult to show that a major non-conformity existed.

26 Reproduced with permission from the IMO. The original material may be subsequently amended; see www.imo.org/ourwork/humanelement/safetymanagement/pages/ismcode.aspx

3.2 THE OBJECTIVES OF THE CODE

They are set out in paragraph 1.2, in the following sub-paragraphs:

1 To ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular to the marine environment and to property.
2 The safety management objectives of the company should, inter alia:
   (1) provide for safe practices in ship operation and a safe working environment;
   (2) assess all identified risks to its ships, personnel and the environment and establish appropriate safeguards; and
   (3) continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.
3 The SMS should ensure:
   (1) compliance with mandatory rules and regulations; and
   (2) that applicable codes, guidelines and standards recommended by the organisation, administrations, classification societies and maritime industry organisations are taken into account.

It is important to note that the new wording in 1.2.2.2 assumes that the identification of risks will have been made as a matter of standard procedure, so there is now a direct requirement to assess such identified risks.

3.3 THE FUNCTIONAL REQUIREMENTS FOR A SAFETY MANAGEMENT SYSTEM

Under para 1.4, every company should develop, implement and maintain an SMS that includes the following functional requirements:

1 a safety and environmental protection policy;
2 instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;
3 defined levels of authority and lines of communication between, and among, shore and shipboard personnel;
4 procedures for reporting accidents and non-conformities with the provisions of this Code;
5 procedures to prepare for and respond to emergency situations; and
6 procedures for internal audits and management reviews.

3.4 SAFETY AND ENVIRONMENTAL PROTECTION POLICY

Paragraph 2:

1 The company should establish a safety and environmental protection policy that describes how the objectives given in para 1.2 will be achieved.

2 The company should ensure that the policy is implemented and maintained at all levels of the organisation, both ship-based and shore-based.

3.5 COMPANY RESPONSIBILITIES AND AUTHORITY

Paragraph 3:

1 If the entity who is responsible for the operation of the ship is other than the owner, the owner must report the full name and details of such entity to the administration.
2 The company should define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention.
3 The company is responsible for ensuring that adequate resources and shore-based support are provided to enable the designated person or persons to carry out their functions.

3.6 THE DESIGNATED PERSON ASHORE (DPA)

Paragraph 4: To ensure the safe operation of each ship and to provide a link between the company and those on board, every company, as appropriate, should designate a person or persons ashore having direct access to the highest level of management. The responsibility and authority of the designated person or persons should include monitoring the safety and pollution prevention aspects of the operation of each ship and ensuring that adequate resources and shore-based support are applied, as required.

The DPA is the central person for providing the link to pass on information to the management, but, as is seen below, the master's role is not overridden. The implications with regard to attributing liability to the company for matters that are known to the DPA are discussed in Chapter 4, below.

3.7 MASTER'S RESPONSIBILITY AND AUTHORITY

Paragraph 5:

5.1 The Company should clearly define and document the master's responsibility with regard to:
1 implementing the safety and environmental protection policy of the company;
2 motivating the crew in the observation of that policy;
3 issuing appropriate orders and instructions in a clear and simple manner;
4 verifying that specified requirements are observed; and
5 <u>periodically</u> reviewing the SMS and reporting its deficiencies to the shore-based management.
5.2 The company should ensure that the SMS operating on board the ship contains a clear statement emphasising the master's authority. The company should establish in the SMS that the master has the overriding authority and the

responsibility to make decisions with respect to safety and pollution prevention and to request the company's assistance as may be necessary.

4 REMAINING PROVISIONS OF PART A

The remaining provisions of Part A deal with resources and personnel (para 6), shipboard operations (para 7), emergency preparedness (para 8), reports and analysis of non-conformities, accidents and hazardous occurrences (para 9), maintenance of the ship and equipment (para 10), documentation (para 11) and company verification, review and evaluation (para 12).

4.1 RESOURCES AND PERSONNEL

Paragraph 6:

1 The company should ensure that the master is:
   (1) properly qualified for command;
   (2) fully conversant with the company's SMS; and
   (3) given the necessary support so that the master's duties can be safely performed.
2 The company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements.
3 The company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarisation with their duties. Instructions that are essential to be provided prior to sailing should be identified, documented and given.
4 The company should ensure that all personnel involved in the company's SMS have an adequate understanding of relevant rules, regulations, codes and guidelines.
5 The company should establish and maintain procedures for identifying any training that may be required in support of the SMS and ensure that such training is provided for all personnel concerned.
6 The company should establish procedures by which the ship's personnel receive relevant information on the SMS in a working language or languages understood by them.
7 The company should ensure that the ship's personnel are able to communicate effectively in the execution of their duties related to the SMS.

4.2 SHIPBOARD OPERATIONS

Paragraph 7: The Company should establish procedures, plans and instructions, including checklists as appropriate, for key shipboard operations concerning the safety

of the ship and the prevention of pollution. The various tasks involved should be defined and assigned to qualified personnel.

4.3 EMERGENCY PREPAREDNESS

Paragraph 8:

1 The company should identify potential emergency shipboard situations and establish procedures to respond to them.
2 The company should establish programmes for drills and exercises to prepare for emergency actions.
3 The SMS should provide for measures ensuring that the Company's organisation can respond at any time to hazards, accidents and emergency situations involving its ships.

4.4 NON-CONFORMITIES, ACCIDENTS AND HAZARDOUS OCCURRENCES

Paragraph 9:

1 The SMS should include procedures ensuring that non-conformities, accidents and hazardous situations are reported to the company, investigated and analysed with the objective of improving safety and pollution prevention.
2 The company should establish procedures for the implementation of corrective action, including measures intended to prevent recurrence.

4.5 MAINTENANCE OF THE SHIP AND EQUIPMENT

Paragraph 10:

1 The company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements that may be established by the company.
2 In meeting these requirements the company should ensure that:
   (1) inspections are held at appropriate intervals;
   (2) any non-conformity is reported, with its possible cause, if known;
   (3) appropriate corrective action is taken; and
   (4) records of these activities are maintained.
3 The company should identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The SMS should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use.
4 The inspections mentioned in 10.2 as well as the measures referred to in 10.3 should be integrated into the ship's operational maintenance routine.

4.6 DOCUMENTATION

Paragraph 11:

1 The company should establish and maintain procedures to control all documents and data that are relevant to the SMS.
2 The company should ensure that:
(1) valid documents are available at all relevant locations;
(2) changes to documents are reviewed and approved by authorised personnel; and
(3) obsolete documents are promptly removed.
3 The documents used to describe and implement the SMS may be referred to as the Safety Management Manual. Documentation should be kept in a form that the company considers most effective. Each ship should carry on board all documentation relevant to that ship.

4.7 COMPANY VERIFICATION, REVIEW AND EVALUATION

Paragraph 12:

1 The company should carry out internal safety audits <u>on board and ashore at intervals not exceeding 12 months</u> to verify whether safety and pollution prevention activities comply with the SMS. <u>In exceptional circumstances, this interval may be exceeded by not more than 3 months</u>.
2 The company should periodically evaluate the <u>effectiveness of the SMS</u> in accordance with procedures established by the company.
3 The audits and possible corrective actions should be carried out in accordance with documented procedures.
4 Personnel carrying out audits should be independent of the areas being audited, unless this is impracticable owing to the size and the nature of the company.
5 The results of the audits and reviews should be brought to the attention of all personnel having responsibility in the area involved.
6 The management personnel responsible for the area involved should take timely corrective action on deficiencies found.

As is seen in the underlined amendments to the Code by the 2010 version, the wording is much clearer and more direct, which resolves doubts that had arisen with respect to internal audits.

5 CERTIFICATION AND VERIFICATION UNDER PART B

5.1 THE REQUIRED CERTIFICATES

Certificates of compliance with the requirements of such a system are granted by the flag State and delegated authorities, which audit whether the system with regard to

the company and each of its ships is in place and fully operative. If compliance is in order, the company is issued with a DOC and each of its ships is issued with the SMC. Classification societies, or other bodies, are delegated by the flag States to carry out formal audits to ensure compliance. The underlying purpose of this Code, together with its counterpart, the STCW Convention 1978, as amended in 1995 and 2010, is to reduce accidents in which the 'human element' plays a great part.

5.2 CERTIFICATION AND VERIFICATION

Paragraph 13:

1 The ship should be operated by a company that has been issued with a DOC or with an Interim DOC (IDOC) in accordance with para 14.1, relevant to that ship.
2 The DOC should be issued by the administration, by an organisation recognised by the administration or, at the request of the administration, by another contracting government to the Convention to any company complying with the requirements of this Code for a period specified by the administration, which should not exceed 5 years. Such a document should be accepted as evidence that the company is capable of complying with the requirements of this Code.
3 The DOC is only valid for the ship types explicitly indicated in the document. Such indication should be based on the types of ship on which the initial verification was based. Other ship types should only be added after verification of the company's capability to comply with the requirements of this Code applicable to such ship types. In this context, ship types are those referred to in regulation IX/1 of the Convention.
4 The validity of a DOC should be subject to annual verification by the administration or by an organisation recognised by the administration or, at the request of the administration, by another contracting government within 3 months before or after the anniversary date.
5 The DOC should be withdrawn by the administration or, at its request, by the contracting government that issued the DOC when the annual verification required in para 13.4 is not requested or if there is evidence of major non-conformities with this Code.
–All associated SMCs and/or Interim SMCs should also be withdrawn if the DOC is withdrawn.
6 A copy of the DOC should be placed on board in order that the master of the ship, if so requested, may produce it for verification by the administration or by an organisation recognised by the administration or for the purposes of the control referred to in Regulation IX/6.2 of the Convention. The copy of the DOC is not required to be authenticated or certified.
7 The SMC should be issued to a ship for a period that should not exceed 5 years by the administration or an organisation recognised by the administration or, at the request of the administration, by another contracting government. The SMC should be issued after verification that the company and its shipboard management operate in accordance with the approved SMS. Such a certificate should be accepted as evidence that the ship is complying with the requirements of this Code.

8 The validity of the SMC should be subject to at least one intermediate verification by the administration or an organisation recognised by the administration or, at the request of the administration, by another contracting government. If only one intermediate verification is to be carried out and the period of validity of the SMC is 5 years, it should take place between the second and third anniversary dates of the SMC.

9 In addition to the requirements of para 13.5.1, the SMC should be withdrawn by the administration or, at the request of the administration, by the contracting government that has issued it when the intermediate verification required in para 13.8 is not requested or if there is evidence of major non-conformity with this Code.

10 Notwithstanding the requirements of paras 13.2 and 13.7, when the renewal verification is completed within 3 months before the expiry date of the existing DOC or SMC, the new DOC or the new SMC should be valid from the date of completion of the renewal verification for a period not exceeding 5 years from the date of expiry of the existing DOC or SMC.

11 When the renewal verification is completed more than 3 months before the expiry date of the existing DOC or SMC, the new DOC or the new SMC should be valid from the date of completion of the renewal verification for a period not exceeding 5 years from the date of completion of the renewal verification.

There are three new subparas (12), (13) and (14) dealing with renewal, extension and verification of the certificates. These amendments mirror the provisions of Regulation 14 of SOLAS, which applies to other SOLAS certificates.

5.3 INTERIM CERTIFICATION

Paragraph 14:

1 An IDOC may be issued to facilitate initial implementation of this Code when:
(1) a company is newly established; or
(2) new ship types are to be added to an existing DOC, following verification that the company has an SMS that meets the objectives of para 1.2.3 of this Code, provided the company demonstrates plans to implement an SMS meeting the full requirements of this Code within the period of validity of the IDOC. Such an IDOC should be issued for a period not exceeding 12 months by the administration or by an organisation recognised by the administration or, at the request of the administration, by another contracting government. A copy of the IDOC should be placed on board in order that the master of the ship, if so requested, may produce it for verification by the administration or by an organisation recognised by the administration or for the purposes of the control referred to in Regulation IX/6.2 of the Convention. The copy of the IDOC is not required to be authenticated or certified.

2 An Interim SMC may be issued:
(1) to new ships on delivery;
(2) when a company takes on responsibility for the operation of a ship that is new to the company; or

(3) when a ship changes flag.
Such an Interim SMC should be issued for a period not exceeding 6 months by the administration or an organisation recognised by the administration or, at the request of the administration, by another contracting government.

Further detailed provisions of interim certificates and verification can be found in paras 14, 15 and 16 of the Code. Paragraph 14.4.3 adds a new provision in relation to interim certificates that the company has planned the internal audit of the ship within 3 months.

6 EFFECT OF THE CSWPMS UPON THE ISM

As mentioned in Chapter 1, above, the CSWPMS provides a significant supplement to the ISM Code, particularly because it gives specific guidance as to how to conduct risk assessment, step by step and per ship type.

In broad terms, under s 1.9 of this Code, the elements of risk assessment are: to classify work activities, identify hazards and risk controls, estimate risk, determine the tolerability of the risks, prepare a risk control action plan, review adequacy of the plan, and ensure risk assessment and controls are effective and up to date. Section 1.10 gives a risk assessment pro forma for employers to use in order to record the findings of an assessment, covering, for example: each separate activity, the hazards involved in it, controls in place, personnel at risk, likelihood of harm (estimated in a table as to how likely it is to occur), severity of harm, risk levels with a risk estimator (low, medium, high), action to be taken following assessment and administrative details, for example name of assessor, date and the personnel involved.

The Code further contains advice for seamen on how to handle situations according to types of ship. It will have a great impact on the proper implementation of the ISM requirements.

7 EFFECT OF ECDIS UPON THE ISM

It should be noted that, when ECDIS (see Chapter 2, above) is mandatorily enforceable, at the latest by 2018 as regards all ships, it will affect many of the provisions of the Code.[27]

In particular: the company's policy statement should be reviewed to record that it was assessed with respect to the implementation of ECDIS. This will indicate to an auditor that a holistic approach has been taken with regard to the ISM. In addition, as part of the responsibilities of the company under the ISM, a clearly documented plan should be drawn up for the implementation of ECDIS across the fleet, identifying who will be responsible for the implementation programme and the resources for each vessel.

As ECDIS is a key shipboard operation, risk assessments will be required (as mandated by some flag States), and the bridge as well as the navigation procedures

27 See ECDIS manual and commentary: HIS Fairplay's ECDIS series No 4 – Safety, April 2011.

will have to be revised by a competent person. An individual may be allocated to lead the project to ensure, as part of risk assessment, how ECDIS affects the workload and whether safety will suffer as a result. Checklists for pre-departure, pre-arrival and equipment performance will need to be amended. In addition, competency matrices should be considered and need to be consistent with the training requirements.

The DPA must be involved during and after the implementation of ECDIS and must consider the impact, timing and mitigation of risks. As regards resources and personnel, the DPA should consider the standard of training required and how training is verified.

The master of the ship will have yet again extra duties to consider, including on-board procedures, watchkeepers' instructions, standing orders, night orders etc. He will also have to verify whether the ECDIS requirements are observed on board and, in his periodical review of the SMS, he should specifically include an evaluation that the ECDIS requirements are adequately covered; he should state any defects in procedures, instructions, training or operation of the system.

Many other procedures as provided by the ISM are affected by ECDIS. For example, apart from ship operations, the duties of individuals, resources and training, mentioned above, emergency preparedness, drills, reports and analysis of non-conformities or accidents, maintenance of the ship and equipment, are affected. Thus the company, in effect will have to rewrite its SMS under the ISM to take into account ECDIS requirements.

It should be noted that this extra work and the extra individuals that, inevitably, will have to supervise implementation and application of the system, will have an impact upon the wider implications of the ISM with regard to ship-owners' and managers' potential liabilities, if accidents happen.

8 CONSEQUENCES OF BREACH OF THE ISM PROVISIONS

Breaches of the Code will result in the non-certification of the company or the particular non-compliant ship, which will have commercial consequences upon the trading of the vessel and the insurance cover of the owner and manager.

8.1 NO CRIMINAL SANCTIONS FOR NON-COMPLIANCE

As explained earlier, the philosophy of the Code is to promote self-regulation. It does not itself impose criminal penalties in the event of breaches of its provisions. SOLAS States that implement the Code into domestic legislation do impose penalties, or criminal sanctions, for non-compliance. The legal implications of non-compliance are extensively discussed in Chapter 4, below.

8.2 CRIMINAL SANCTIONS – THE UK STATUTORY INSTRUMENT IMPLEMENTING THE ISM

The Merchant Shipping (ISMC) Regulations 1998 (SI 1998/1561) implemented the Code into the UK legislation. At the time of writing, a new draft Statutory Instrument

(SI) 20xx intending to implement new Merchant Shipping Regulations 20xx to bring into effect the 2010 amendments to the ISM Code[28] and the EU Regulation No 336/2006 on the implementation of the ISM Code within the Community was still in draft form.[29] The SI 1998 and the draft SI 20xx provide for offences and penalties in the event of breach of the obligations stated therein.

Space does not permit inclusion of all of the provisions, but they replicate the provisions of the ISM Code. Therefore, the regulations that are relevant to the offences and penalties are referred to below.

8.2.1 Application (Reg 3)

The Regulations apply to all ships and every company as provided by the Code; in particular to:

(a) United Kingdom ships wherever they may be; and
(b) other ships while they are within United Kingdom waters.

8.2.2 Duties

The duty of the company for general compliance with the Code is to be found in Regs 4 and 5: A company must not allow a ship (a) to put to sea; or (b) if it is at sea, to remain at sea, unless the provisions of the Code (as implemented by the EU Regulation or the UK Regulations) are complied with.

The duty to hold certificates is found in Reg 6, the duty of the master is found in Reg 7, and that of the designated person in Reg 8.

8.2.3 Detentions (Reg 15)

Where an inspector has clear grounds for believing that, in relation to a ship to which these Regulations apply, there has been a failure to comply with Reg 4, 5, 8 or 9 or a breach of any term of an exemption granted under Reg 12 or a derogation granted under the ISM Code, the ship is liable to be detained.

8.2.4 Offences and penalties (Reg 16)

1 Any contravention of
 (a) Reg 4; or
 (b) Reg 5, or 8(1),
 is an offence by the company punishable on summary conviction by a fine not exceeding the statutory maximum, or on conviction on indictment by imprisonment for a term not exceeding 2 years, or a fine, or both.

28 On 4 December 2008, the IMO/MSC adopted amendments to the ISM Code by Resolution 273(85) – amendments entered into force on 1 July 2010.

29 A Merchant Shipping Notice, MSN 1826(M), to all owners, operators, managers, masters and surveyors was issued by the MCA to be read with the ISM Code, providing the amended provisions of the Code.

2 Any contravention of Reg 7 or 8(2)(b)(c) is an offence,[30] punishable on summary conviction by a fine not exceeding the statutory maximum, or on conviction on indictment by imprisonment for a term not exceeding 2 years, or a fine, or both.
3 Any breach of a term of an exception granted under Reg 12 or a derogation granted under the ISM Code is an offence by the company, punishable on summary conviction by a fine not exceeding the statutory maximum, or on conviction on indictment by imprisonment for a term not exceeding 2 years, or a fine, or both (this is a new offence being subject to clearance by the Ministry of Justice).

8.2.5 Defence

It is a defence for a person charged with an offence under Reg 16(1)(b), (2) or (3) to show that they took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

9 THE DETERRENT EFFECT OF THE ISM CODE

The Code undoubtedly provides a yardstick of conduct against which the performance of ship-owners or managers in the operation of ships can be measured. Their performance is assessed from the extensive documentation reporting all incidents and near misses, the internal and external audits, as well as from the communications between the designated person and senior management of the respective companies, which are required by the Code.

What is reported in the SMS may, sometimes, carry adverse consequences for those owners or managers who fail to comply with the recommendations made by external auditors, or to follow up the results of their internal audit. Equally, a deficient system with gaps in reporting will give cause for serious questions to be asked.

The core principles derived from the ISM Code are clear for owners and managers:

First, it is a foremost obligation of good corporate governance that they must adopt a philosophy of safety culture at all levels; they must set their mission and have the right attitude to safety and commitment, from the top of the hierarchical ladder to the bottom.

Second, they must provide for safe practices through procedures and proper record keeping and ensure competence of the crew by training, both in the handling of equipment and in the understanding of procedures for risk prevention and protection of the environment.

Third, they must strive for continuous improvement by monitoring safety, conducting internal audits and taking corrective actions to prevent recurrence of faults. Particular attention must be given to the human element in accidents and the man–equipment interface. There must be communication of risks that recur, in particular, when there is repetition of familiar tasks and there is lack of perception of the risk involved, even despite a warning sign posted in relation to the particular danger.

30 Meaning by any relevant person; in the previous regulations, it was spelt out that it was an offence by the master or the designated person.

An investigation of the causes of accidents reported in the safety bulletins issued by Marine Accident Investigation Branch (MAIB) reveals that such accidents still happen owing to no systematic observance of any of the above core principles of the Code.

There are several areas where risk management and the proper implementation of SMSs, as required by the ISM Code, can be relevant in litigation.

These are examined in the next chapter.

10 THE DETERRENT EFFECT OF VETTING BY OIL COMPANIES

It has been shown in practice that the most effective deterrent to non-compliance with regulations, International Conventions, EU Directives and industry best practice standards is either fear that commercial partners will not approve a ship for trading after vetting pursuant to the TMSA procedures (seen earlier), or fear that the insurer will not pay a claim.

In this respect, there are a couple of interesting reported decisions concerning vetting by oil majors and the consequences upon the marketing of vessels for business, or the liability of the owner under the charterparty contract in the event of no approval.

In ***The Savina Caylyn***,[31] the comment made by the judge encapsulates what should be borne in mind by owners. He held that the tradability of the vessel would be affected by the good or poor report from any of the six oil majors mentioned in the relevant clause of the charterparty. It was common ground, as the tribunal in the arbitration had found, that oil majors look at the history of SIRE inspection reports as part of the vetting process in order to identify positive or negative trends.

Simon J held that the tribunal had made no error of law in concluding that charterers had been entitled to cancel the charter where the vessel hired had failed a number of consecutive 'vetting reviews/inspections' by 'oil majors'. Furthermore, the tribunal had rightly found that 'oil major' referred to the six recognised major oil companies (BP, Shell, ExxonMobil, Chevtex, Total Fina Elf and ConocoPhillips), and that the vessel could be assessed by any of them if nominated to do so by the charterers.

The Rowan[32] concerned an oil tanker voyage charterparty that contained provisions about 'approvals' given by some major oil companies, the purpose of which was to give some comfort to the charterer about the quality of the vessel it was chartering.

The relevant clause of the charter (cl 18 of the Vitol charter) provided: *'Owner warrants that the Vessel is approved by the following companies and will remain so throughout the duration of this charter party'* (see further below).

10.1 THE VETTING PRACTICE

Before *The Rowan* case is explained, it is useful to refer to the development of the practice of approvals, helpfully referred to by the judge (at paras 3 and 4):

31 *Dolphin tanker SRL v Westport Petroleum Inc (The Savina Caylyn)* [2011] 1 Lloyd's Rep 550.

32 *Transpetrol Maritime Services Limited v SJB (Marine Energy) BV (The Rowan)* [2011] 2 Lloyd's Rep 331, reversed by CA [2012] EWCA Civ 198; [2012] 1 Lloyd's Rep 564.

In and before 1999 it seems that some major oil companies were happy to inspect oil tankers and record the results of that inspection on a database, available to subscribers, called SIRE. If an owner wanted to comment on any such inspection report, he was entitled to do so and those comments would also be available on SIRE for all subscribers to see. The relevant oil company would if satisfied then issue an approval of the vessel. The approvals would be dated and would often be expressed to be valid for a particular period of time and thus have an expiry date which an owner could then write in to any contract as envisaged by the Vitol Terms of 1999.

This practice began to change as a result of pollution incidents involving the vessels 'ERIKA and PRESTIGE' in 2002 because statements that those vessels had been 'approved' by oil majors led to damaging publicity for the oil majors concerned. Reports continued to be posted on SIRE and letters reflecting 'approval' were given, but they were in more guarded terms often stating that blanket approval had not been granted and should not be assumed.

10.2 THE FACTS OF *THE ROWAN*

The vessel was engaged to carry fuel oil and/or vacuum gas oil from the Black Sea to the US Gulf. No formal document was drawn up, but the parties had agreed that the terms of the charter were to be found in the recap email of 6 July 2007 under the heading 'VESSEL INFO', containing the following abbreviated term: 'TBOOK WOG VSL IS APPROVED BY . . .' The abbreviations stand for: 'to the best of Owners' knowledge, without Owners' guarantee, vessel is approved by the oil companies (as identified, via the SIRE database)').

Under the heading 'TERMS' it was stated: 'VITOL VOY CHARTERING TERMS – AMENDED . . .'.

Opposite the number 18 in the recap, it was stated: 'TBOOK VESSEL APPROVED BY . . .'. The 'WOG' had been dropped.

She set sail from the Black Sea, and the charterer decided to discharge at Antwerp and reload there. During the annual survey at Antwerp, some defects necessitated repairs, and the owners invited Shell to inspect, because Shell's approval would be a valuable asset in the marketing of the vessel in the USA. Shell filed a SIRE report with 33 adverse comments, to which the owners responded – none of the comments related to the defect in the sea-chest valve that had just been repaired. The charterer, who was about to load the next cargo on the ship (pursuant to a sale contract with Shell), reported to the owners that Shell rejected the ship and decided not to purchase the cargo. Therefore, the charterer had to sell to another company and claimed the difference in the sale price by way of damages from the owners, on the basis that the vessel was not in a fit state to be approved by any oil company and, in particular, by the companies identified in the recap email.

10.3 THE DECISIONS

At first instance in *The Rowan*, the judge held that cl 18 in the Vitol charter, that 'the vessel is approved by the oil majors and will remain approved throughout the duration of the charter', was a warranty by the owner to the charterer, and the loss of approval due to subsequent events was a breach of that warranty entitling the charterers to claim damages for their loss suffered.

Longmore LJ, in the CA, reversed the judgment; the fixture recap was interpreted differently, and the owners were held not liable. The central issue for construction was whether the provision numbered 18 in the recap email was to be read together with the printed version of cl 18 of the Vitol charter or in substitution. Unlike the judge, at first instance, who preferred the first interpretation, Longmore LJ (at para 17) preferred the second one, as proposed by the owners' counsel, which meant that, whereas the Vitol cl 18 was a continuing warranty of approval for the duration of the charter, cl 18 of the recap did not have such express continuing warranty. 'On its true construction the clause [in the recap with the qualification TBOOK] is confined to a promise at the time when it was made [the time of the charter].'

The confusion that arises from this practice of approvals by the oil majors, which changed in 2002, became apparent in this case. The meaning of the word 'approval' refers to the 'acceptability letters', which means that the vessel will be subject to further approval; the word 'approval' does not mean 'approved by' in a sense that no further approval will be needed. In addition, there was no evidence that the owners knew, at the date of the charter, that there was anything about the vessel that would cause the oil companies to disapprove the vessel or alter the terms of the 'acceptability letters'. Therefore, there was no breach, and their appeal was allowed.

It was further argued by the owners in the court below, which the CA in the light of its conclusion (above) did not have to decide, that warranties as to approval letters such as cl 18 of the Vitol charter should be treated in the same way as warranties about class, which are not really warranties in the strict sense. As such, they are concerned with documentation not with the condition, or the state, of the ship. Longmore LJ (*obiter*) was prepared to accept this view because, were the unamended cl 18 to be a warranty, he said, it would have far-reaching and unintended consequences by cutting across the warranty of seaworthiness in the Asbatankvoy Form.

Although oil majors' approvals provide a good deterrent to non-compliance by owners with obligations for ship-safety or obligations under contracts, problems with such clauses became apparent as soon as they were invented.

In ***The Seaflower (No 2)***,[33] the charterer claimed damages alleging repudiatory breach by the owner by reason of his failure to obtain Exxon's approvals about the vessel's fitness to transport its cargo, or, alternatively, that the charter was induced by a misrepresentation that the owner would obtain Exxon's approval. The owner counterclaimed for wrongful termination of the charter by the charterer. The court, at first instance, held that, (1) the failure by the owner to obtain approval of the vessel did not amount to a repudiatory breach, but merely limited the flexibility for voyage chartering, which was reflected in a price reduction; (2) there was no misrepresentation, because the owner had honestly intended to secure Exxon's approval; and (3) the damages awarded to the owner for wrongful termination of contract should allow for the fact that the charter would have come to an early end by reason of the inevitable withdrawal of Mobil's approval of the vessel's fitness.

On appeal,[34] the charterers took the point that had been decided by Aikens J – before the case went to court for a proper hearing (above) – as a preliminary issue. He had held that the clause in the charter requiring an oil major's approval was not

33 *BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower) (No. 2)* [2000] 2 Lloyd's Rep 37.
34 [2001] 1 All ER (Comm) 240; [2001] 1 Lloyd's Rep 341.

a condition but an intermediate term. This meant that it was not giving an automatic right to the charterer to terminate.

The clause contained inconsistencies in drafting. Both Aikens and the CA had difficulty in finding a consistent flow in the clause and what the parties meant. After laborious analysis, Waller LJ said (at para 52) that one thing was clear: 'The draftsman did not use precise language to convey the terms of the agreement between the parties . . .!'

However, Rix LJ thought, as did the judge, that the parties must have regarded the procurement and maintenance of these approvals as having particular significance. Vessels that do not have an approval simply cannot carry products of that oil major.

The CA decided that the approvals clause was a condition because of the provision of the 60-days limit imposed upon the owner to rectify the position, if the approval was not obtained earlier, and the use of the words 'the owners guarantee'. The charterers' appeal was allowed.

As to the status of oil major approvals, Rix LJ said (at para 64), which is important in this context, that:

> An oil company's approval may reflect the vessel's condition, but it is a matter of status rather than condition. Similarly, a vessel's class is a matter of status – although that status may be affected in many different ways: at one extreme a vessel may be completely out of class, which is a most serious matter, because such a vessel cannot trade, but at another extreme there may be only a recommendation or even a mere notation of class that something relatively minor be attended to within a certain date. In the case of oil major's approval, however, the vessel either has it or it does not. In that respect it is like a term as to the vessel's class at the time of contract: if the vessel is out of class, the condition as to her class is broken.

11 THE ROLE OF THE ISPS CODE FOR SECURITY MEASURES

The implementation of the ISPS Code was triggered after 9/11 and by concerns that piracy activities are funding terrorism.

The IMO, by Resolution A.924(22), reviewed measures to prevent acts of terrorism and a brand new Chapter XI–2 (special measures to enhance maritime security) was added to SOLAS, which was implemented on 1 July 2004.

11.1 APPLICATION

This chapter applies to passenger ships and cargo ships of 500 gross tonnage and upwards, including high-speed craft, mobile offshore drilling units and port facilities serving such ships engaged on international voyages.

Both ships and ports are required to comply with this chapter. Its application was expanded to shipping companies through the ISM and ISPS Codes, and to ports through the International Ship and Port Facilities Security (ISPFS) Code.

Regulation XI–2/2 of the chapter enshrines the ISPFS Code. Part A of this Code is mandatory, and Part B contains guidance on how best to comply with the mandatory requirements.

It was implemented also through the EU Regulation 725/2004 on enhancing ship and port facility; this Regulation makes some parts of Part B of the ISPS Code mandatory.

11.2 REQUIREMENTS

The SOLAS XI–2/2 Regulation requires flag administrations to set security levels and ensure the provision of security level information to ships entitled to fly their flag. Prior to entering a port, or while in a port, within the territory of a contracting State, a ship shall comply with the requirements for the security level set by that contracting government, if that security level is higher than the security level set by the administration for that ship.

SOLAS Regulation XI–2/9.1.1 provides that every ship to which the ISPS Code applies is subject to control, when in a port of another contracting State, by Delegated Ashore Officers (DAOs), who may be the same as those carrying out the functions of PSC.

11.3 EXTENT OF CONTROL ON ENTRY INTO PORTS

Such control shall be limited to verifying that there is on board a valid International Ship Security Certificate (ISSC) or a valid Interim ISSC, which, if valid, shall be accepted, unless there are clear grounds for believing that the ship is not in compliance with the requirements of Chapter XI–2 or Part A of the ISPS Code. The clear grounds will be determined by inspection of general and specific security aspects.

Before entry to a port, ships will be required to supply information, including details of their ISSC, current security level, the names of the last 10 ports visited, their interactions with other ships and ports, along with other practical security-related information. Based on this information, the contracting government will identify any deficiencies. Where deficiencies exist, the ship may be denied entry if it is considered it presents a serious security threat.

Where no *clear grounds* are established before the ship enters port, the ship may still be subject to control measures. These may be carried out in conjunction with established PSC inspections. Where control measures are implemented, these will be reported to the flag administration and copied to the Recognised Security Organisation (RSO).

11.4 THE ROLE OF THE MASTER

Regulation XI–2/8 confirms the role of the master in exercising his professional judgment over decisions necessary to maintain the security of the ship. It says he shall not be constrained by the company, the charterer or any other person in this respect. However, safety issues should not be compromised over security issues, which sometimes causes problems in USA ports, where there is a tendency for the authorities to overreact where security issues are concerned.

11.5 SHIP SECURITY ALERT SYSTEM

Regulation XI–2/6 required all ships to be provided with a ship security alert system by 2006. When activated, the ship security alert system shall initiate and transmit a ship-to-shore security alert to a competent authority designated by the administration, identifying the ship and its location and indicating that the security of the ship is under threat or it has been compromised. The system will not raise any alarm on board the ship. The ship security alert system shall be capable of being activated from the navigation bridge and in at least one other location.

11.6 PORT FACILITY REQUIREMENTS

Regulation XI–2/10 covers requirements for port facilities, providing among other things for contracting governments to ensure that port facility security assessments are carried out and that port facility security plans are developed, implemented and reviewed in accordance with the ISPFS Code.

In the UK, the MCA is responsible to the Department for Transport (DfT) to:

- implement the ISPS Code for all UK-registered ships;
- undertake security aspects of PSC inspections of foreign vessels in UK ports, including passenger ships;
- receive and handle ship security alerts in line with agreed standard operating procedures;
- approve and audit training providers for ship security officer (SSO) and company security officer (CSO) courses.

The DfT also has responsibility for policies to counter piracy (measures to counter piracy are contained in Marine Guidance Note 420).

11.7 PROVIDING INFORMATION TO IMO

Other regulations in this chapter cover the provision of information to IMO, the control of ships in port (including measures such as delay, detention, restriction of operations including movement within the port, or expulsion of a ship from port).[35]

11.8 EU COMMISSION INSPECTIONS

At the EU level, Commission Regulation (EC) No 324/2008[36] laid down revised procedures for conducting Commission inspections in a transparent, effective and consistent way in order to monitor the application of Regulation 725/2004, which was complemented by Directive 2005/65/EC on enhancing port security. The UK Port Security Regulations 2009, which came into force on 1 September 2009, implemented Regulation (EC) No 725/2004 by SI 2009 No 2048, Merchant Shipping Maritime Security for UK.

35 See, further: www.imo.org.
36 OJ I 98/5, 10.4.2008.

CHAPTER 4

ATTRIBUTION OF LIABILITY

RISK MANAGEMENT IN THE CONTEXT OF THE ISM

1 Corporate personality and rules of attribution 97

2 The concept of the alter ego of a corporation 98

3 The identification doctrine 100

4 The *Meridian* rule of attribution 103

5 Legal implications of the ISM upon liabilities 104

Before any discussion of the legal implications of the ISM can be explored, due consideration must be given to how liability for acts or omissions of employees or officers of a company is attributed to the company, which has a separate personality. Whereas, in the previous editions, the issues arising from the rules of attribution of liability were discussed under the relevant chapters, in this edition they are concentrated in this chapter.

1 CORPORATE PERSONALITY AND RULES OF ATTRIBUTION

In law, a personality is attributed to a corporation by a fiction. As a corporation is not a living person with mind and hands to carry out its intentions, rules of attribution of liability have developed, which are examined below.

1.1 THE ALTER EGO OR IDENTIFICATION DOCTRINE

The first rule of attribution is commonly known as the *alter ego* of the company (meaning, in Latin, 'a second self, a trusted friend'), which is understood to include the persons who are the 'directing mind' of the company. This alter ego concept has also been referred to as the '*identification*' doctrine, because, in trying to find who is the directing mind of a company, the aim is to identify the persons in the company who make the decisions and are commonly described as the 'brains and nerve centre' of the company. The court decisions regarding the development of this doctrine are seen under para 2, below.

1.2 THE VICARIOUS LIABILITY DOCTRINE

This is the second rule of attribution of liability to a company, by which liability can be attributed to it through the acts or omissions of its servants or agents who carry out activities on behalf of the company during the course of their employment, but are not the directing mind of the corporation, such as directors.

1.3 THE *MERIDIAN* RULE OF ATTRIBUTION

This was developed by the Privy Council in the *Meridian*[1] decision. It was thought that, in certain circumstances, neither the alter ego/identification doctrine nor the vicarious liability doctrine can give satisfactory answers to all questions of attributing liability to a company.

Under the *Meridian* approach, in all cases where the question is how to attribute liability to a company, the court has to interpret the substantive rule of law under which liability is sought. If, by applying the canons of construction, it finds that the policy or the intention of the substantive rule requires the court to attribute liability to the company in question for the acts or omissions of persons being lower in the hierarchy than the directors of the company, then the court will apply the so-called 'special rule of attribution' (see, further, para 4, below).

2 THE CONCEPT OF THE ALTER EGO OF A CORPORATION

This concept was first developed by English judges to ascribe a mind to a corporation. In 1915, the issue arose in relation to the 'fault or privity' of the owner, under s 502 of the MSA 1894, in ***Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd***.[2] Viscount Haldane LC stated:

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company. My Lords, . . . Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard . . . was registered as the person designated for this purpose in the ship's register.[3]

In the well-known decision of ***The Lady Gwendolen***,[4] the CA in 1965 was prepared to attribute actual fault to the company, for the purpose of no limitation of

1 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918.
2 [1915] AC 705.
3 Ibid, p 713.
4 [1965] 1 Lloyd's Rep 335.

liability under s 503 of MSA 1894, through the fault of a person below the board of directors.[5] That person was head of the traffic department and the manager of the ship. The court, however, did not have to decide the issue, because it found that, in the circumstances of the case, all concerned, from the board of directors downwards, were guilty of actual fault for failures in the management of their ship.

The CA held (Willmer LJ):[6]

> It is necessary to look closely at the organisation of the company in order to see of what individual it can fairly be said that his act or omission is that of the company itself. The decision in Lennard's case, of course, affords valuable guidance in the conduct of this inquiry. . . .
>
> But neither in the Court of Appeal nor in the House of Lords was said that a person whose actual fault would be the company's actual fault must necessarily be a director. Where, as in the present case, a company has a separate traffic department, which assumes responsibility for running the company's ships, I see no good reason why the head of that department, even though not himself a director, should not be regarded as someone whose action is the very action of the company itself, so far as concerns anything to do with the company's ships[7]. In the present case Mr Boucher was not only the head of the traffic department, but he was also the registered ships' manager.

In 1976, Lord Denning MR, in ***The Eurysthenes***,[8] unravelled the meaning of 'privity', which is found in s 39(5) of the Marine Insurance Act 1906, in relation to the alter ego, and said: 'The knowledge must . . . be the knowledge of the ship-owner personally, or his alter ego, or, in the case of a company, its head men or whoever may be considered their alter ego'.

In 1989, Mustill LJ (as he then was) in ***The Ert Stefanie***,[9] did not wish to draw a general rule restricting alter ego to the board of directors. In particular, he said:

> The board of directors of a corporation may not always comprise the whole of the group of people who together constitute the governing mind and will of the corporation, for the cases show clearly that the fault of a senior manager below board level may on occasion be included in the group. Nevertheless, it seems to me that any director must necessarily be a member of the group unless formally dis-seised of responsibility in the manner just described. Thus, I would prefer to steer clear of generalisations about the constituent elements of the alter ego. Each case must turn on its own facts.[10]

The concept of the alter ego, as distinguished from the ego of a company, was more clearly explained by Lord Reid in the *Tesco* case (see below), in which it was preferred to refer to the alter ego as the 'identification doctrine', because it requires an exercise of identifying the relevant people in the company's structure who would be responsible.

5 However, the dicta of the CA were disapproved of by Lord Diplock in *Tesco Supermarkets v Nattrass* [1972] AC 153 (HL), p 200.

6 Op.cit. fn 4, at pp 344, 345.

7 His words echoed what was later decided in *The Meridian*, that it may be necessary, in some cases, to apply a special rule of attribution by which liability is attributed to the company for acts or omissions of a person who is not necessarily a director.

8 [1976] 2 Lloyd's Rep 171, p 179.

9 [1989] 1 Lloyd's Rep 349.

10 Ibid, p 352.

3 THE IDENTIFICATION DOCTRINE

In 1944, three justices of the Divisional Court, in ***DPP v Kent and Sussex Contractors***,[11] overruled the court below in a criminal case, in which the court was of the opinion that the company could not, in law, be guilty of the offences charged. It was explained by Viscount Caldecote CJ that:

The offences created by the regulation are those of doing something with intent to deceive or of making a statement known to be false in a material particular. There was ample evidence, on the facts as stated in the special case, that the company, by the only people who could act or speak or think for it had done both these things.[12]

In 1957, the concept of identification of the relevant persons in a company hierarchy was clearly defined, when Denning LJ, **in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd***,[13] approved the approach of the court in the above case, and stated that the same principle should apply in both civil and criminal cases:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what if does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that, in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*. So, also, in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty.[14]

In 1972, the identification doctrine was adopted by the House of Lords, in ***Tesco Supermarkets v Nattrass***,[15] in the context of offences under the Trade Descriptions Act (TDA) 1968, and in which the concept of the alter ego was, for the first time, questioned and was thought by Lord Reid to be misleading, because the person who speaks and acts as the company is not *alter*. He is identified with the company. Although Lord Pearson agreed that, in theory, there is a distinction between the ego and the *alter* ego of a company, in practical terms, he said, it may be difficult and, in most cases for practical purposes, unnecessary to draw the distinction between the company's ego and its alter ego.

The defendants, a body corporate owning supermarket stores, were charged with an offence, under the TDA 1968, for failing to display the correct prices on goods at a branch. They sought to raise a defence under s 24(1) on the grounds that the commission of the offence was due to the act or default of another person, namely,

11 [1944] KB 146.

12 Ibid, p 156.

13 [1957] 1 QB 159, p 172, relating to the intention of a limited company owning property and managed by its directors.

14 Denning LJ did in fact interpret the substantive rule of law in order to attribute liability to a company in the same way as was done by Lord Hoffmann in *The Meridian*. The Denning approach had not been realised, in practice, until the rule was developed and clarified in *The Meridian* decision.

15 [1972] AC 153 (HL).

the manager of the store at which the offence was committed, and that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of such an offence. The shop manager was not a person, within s 20, carrying out functions as a director, manager, secretary or other similar.

Lord Reid said:

I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person, in doing particular things, is to be regarded as the company, or merely as the company's servant or agent. In that case, any liability of the company can only be a statutory or vicarious liability . . .

Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management, giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place, so that within the scope of the delegation he can act as the company.[16]

In some cases, the phrase alter ego has been used. I think it is misleading. When dealing with a company the word alter is I think misleading. The person who speaks and acts as the company is not alter. He is identified with the company. And when dealing with an individual, no other individual can be his alter ego. The other individual can be a servant, agent, delegate or representative, but I know of neither principle nor authority which warrants the confusion (in the literal or original sense) of two separate individuals . . .

I have said that a board of directors can delegate part of their functions of management so as to make their delegate an embodiment of the company within the sphere of the delegation. But here, the board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself.[17]

Viscount Dilhorne and Lord Pearson suggested that one has to determine who are in actual control of a company, which may vary from one company to another.[18] Viscount Dilhorne said, in particular:

If, when Denning LJ referred to directors and managers representing the directing mind and will of the company, he meant, as I think he did, those who constitute the directing mind and will, I agree with his approach. These passages, I think, clearly indicate that one has, in relation to a company, to determine who is or who are, for it may be more than one, in actual control of the operations of the company, and the answer to be given to that question may vary from company to company depending on its organisation.[19]

16 Ibid, pp 170–172.
17 Ibid, pp 174–175.
18 This approach is similar to that followed by the CA in *The Star Sea* [1997] 1 Lloyd's Rep 360.
19 *Tesco v Nattrass* [1972] AC 153 (HL), p 187.

Similarly, Lord Pearson said:[20]

> In the case of a company, the ego is located in several persons . . . in similar position of direction or general management. A company may have an alter ego, if those persons who are or have its ego delegate to some other person the control and management, with full discretionary powers, of some section of the company's business. In the case of a company, it may be difficult, and in most cases for practical purposes unnecessary, to draw the distinction between its ego and its alter ego, but theoretically there is that distinction.

This decision has made an important clarification of the concept known as alter ego. If the persons in control, the directors of a company, delegate control by giving full discretionary power to the delegate to perform certain tasks, his acts will be acts of the company (the alter ego). Supervision of details of a function by a manager is not making him the alter ego in that sense.

Lord Diplock emphasised that no extension of the class of people identified with a company should be made beyond those who are entrusted with the control of the company by the articles of association.[21]

In 1994, ***The Safe Carrier***[22] concerned the duty of ship-owners, charterers and managers to take reasonable steps to ensure the safe operation of their ships. Breach of this duty is a criminal offence by statute, s 31 of the MSA 1988 and now s 100 of the MSA 1995.

The House of Lords held that there would be a breach of duty if there was a failure to take steps that, by an objective standard, were held to be reasonable steps to take in the interests of the safe operation of a ship; the duty that the section placed on the owners, charterers or managers was a personal one. The owner, charterer or manager would be criminally liable if he failed personally in the duty, but would not be criminally liable for the acts or omissions of his subordinate employees, if he himself had taken all such reasonable steps. The identification doctrine was applied, as was clarified in the *Tesco* case (see some thoughts about this case in Chapter 5, at 6.3.5.4).

It is clear from these decisions that, as a general rule, the embodiment of a company is its directors, who have control of its affairs. Depending on the policy of a company, a person below the level of directors may be given control and full discretionary power to perform certain tasks, whereupon he may, for those particular tasks only, be regarded as the alter ego of the company. In such a case, his acts or omissions will be those of the company for the purpose of attributing liability to the company in relation to the actions or omissions of that person.

However, the identification doctrine could not satisfactorily apply to statutory offences in all cases. When a duty is imposed upon a company by statute, the question of law is whether or not that duty is personal to the company. Upon construction of the particular statute, it may transpire that the intention of the legislation has been that acts of the management could be attributed to the company, and it would not matter at what level in the hierarchy of employees the system of management broke down.[23]

20 Ibid, p 193.

21 Ibid, p 200.

22 [1994] 1 Lloyd's Rep 589 (HL).

23 In *Re Supply of Ready Mixed Concrete* [1995] 1 All ER 135 (HL), the company was held guilty of contempt of court for breach of an injunction due to the act of junior management, despite specific instructions having been given by senior management not to act in the manner it did; in *Regina v British*

What is important is to look at the overall scheme and purpose of the statute or the Convention, or the rule of law that is the subject matter for interpretation; thus, the particular rule of attribution should serve the purpose of the substantive law. Such an approach was followed by the courts in the mid 1990s and was formulated by the Privy Council in the *Meridian* case; hence, the name of the rule, as explained below.

4 THE *MERIDIAN* RULE OF ATTRIBUTION

In 1995, the Privy Council considered, in ***Meridian Global Funds Management Asia Ltd v Securities Commission***,[24] the principle of the identification doctrine and introduced flexibility in the approach as to what acts or omissions can be attributed to a corporation. It was emphasised that it was not merely a question of identifying the relevant person in the company hierarchy, but the rule of attribution was a matter of interpretation or construction of the relevant substantive rule of law in each case. Thus, the starting point is to look at the purpose of the relevant substantive rule of law in order to ascertain which rule of attribution will not defeat its purpose. The rule was defined by Lord Hoffmann as follows:

> . . . [When] the court considers that the law was intended to apply to companies, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would, in practice, defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge or state of mind) was for this purpose intended to count as the act, etc., of the company? One finds the answer to this question by applying the canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.[25]

The issue is one of choice of the appropriate attribution rule for corporate liability. In the case of a tort committed by employees of a company in the course of their employment, the choice of the attribution rule will be the general rule of vicarious liability, based upon agency principles. In cases where a particular law (or otherwise the substantive rule of law with which the court is dealing) imposes liability to a company on the basis of a personal fault, or a kind of conduct that is either wilful misconduct or more than just mere negligence, requiring a mental element of intention or a personal knowledge of the facts that would be likely to result in the harm inflicted, the choice of the attribution rule will be the identification doctrine.[26] The articles of

Steel plc [1995] 1 WLR 1356 (CA), the senior management was held criminally liable for the death caused at work by negligence of their employees upon construction of the relevant statute, the Health and Safety at Work Act 1974. It was said, p 1363:

> He will only be exposed to the risk if the system (if any) designed to ensure his safety has broken down and it does not matter for the purposes of s 3(1) at what level in the hierarchy of employees that breakdown has taken place.

For this reason, the Tesco case was distinguished.

24 [1995] 3 All ER 918 (PC).

25 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918, p 924.

26 See a recent decision of the Singaporean court in *The Dolphina* [2012] 1 Lloyd's Rep 304, concerning the tort of conspiracy by using unlawful means in discharging the cargo without production of the original bills of lading with intention to harm the claimants; for this tort, the necessary requirements set out in *OBG Ltd v Allan* [2008] 1 AC 1 were met (see further about *OBG V Allan* in Ch 6 Vol 2, relating to mortgages).

association, or board decisions, of the company will assist in finding the person who is the directing mind of the company. If, however, the purpose behind the substantive rule of law, as derived from the language used in the statute or Convention under which liability is sought to be imposed, requires one to look at persons other than the directors of the company, the court will fashion a special rule to be applied to the particular substantive rule of law.

The *Meridian* approach suggests that the choice of the attribution rule depends on the purpose behind the rule of substantive liability.[27] The purpose will vary from one substantive rule of law to another. When statutory criminal offences are considered, the conduct of persons in managerial as opposed to directorial positions might be taken into account with regard to the liability of the company for the offence committed, if that intention was derived from the policy behind the statute, or was expressly provided in the statute. When the substantive rule of law is, for example, an International Convention, the court would have to look at the overall purpose of the Convention as may be found in the *travaux préparatoires*, so that there is a uniform application of the Convention.

For example, the interpretation of the provision as regards limitation of liability under the 1957 Convention will be differently construed from Art 4 of the 1976 Convention. The decisions in which the intention behind the 1957 Convention was construed show that faults of servants, agents or managers of the ship owner were imputed to the owner because, as it was stated, it was up to him to ensure the efficient management of his ships. If he failed to do so, it has been decided that the fault of the delegated persons constituted, as a matter of law, actual fault of the owner personally. The words used in this Convention are the 'act or omission of any person, whether on board the ship or not, acting in the navigation or management of the ship' etc., and not just the 'personal act or omission' of the person claiming limitation, as is stated in Art 4 of the 1976 Convention; the test under the latter is further tightened by the requirement of intent or recklessness (and with knowledge that such loss would probably result) of the person who seeks to limit liability (see, further, Chapter 14, below).

Having explored the rules that the courts have developed and applied to attribute liability to a corporation, the application of such rules is considered, below, in the context of the legal implications of the ISM Code upon liabilities of the ship-owner or manager.

5 LEGAL IMPLICATIONS OF THE ISM UPON LIABILITIES

As seen in Chapter 3, above, the requirements of compliance by the 'company' with the provisions of the Code is a matter of collective effort on the part of the directors and managers of the company, the DPA and the master of the ship. The amended version of the Code (2010) makes risk assessment mandatory. Even before 2010, the requirement of risk assessment under the Code, coupled with industry standards, was the norm and expected.

27 See, further, Armour, J, 'Corporate personality and assumption of responsibility' [1999] LMCLQ 246.

For example, in ***Davis v Stena***[28] (see Chapter 15, below), it is interesting to note what the court said in 2005 about the cruise operator: Stena had not carried out any appropriate risk assessment of an emergency. Even if Stena's shortcomings were representative of the standards of the industry at the time, that did not excuse them.

In this connection, various questions have been raised over the years, such as: what liability, if any, does non-compliance with the Code give rise to? Whose acts or omissions in the event of non-compliance with the Code would be attributed to the company? What is the role of the DPA in the attribution of liability, and could his acts or omissions be imputed to the company?

It has already been seen in Chapter 3, above, that the Code does not impose sanctions for non-compliance other than the withdrawal, or the non-issue, of certificates. The enactment of the Code by the flag States, however, imposes criminal sanctions or penalties for breach of certain provisions of the particular statutory instrument that enacts the Code into the law of the particular country.

The comprehensive documentation of procedures, or the lack of it, and the recording of accidents or the outcomes of the internal audits required by the Code create traceable evidence from which inferences can be drawn, should a case for negligence on the part of the crew, or unseaworthiness of the ship, or for a claim under the insurance policy, or for limitation of liability, or for criminal liability, go to court.

Equally, the lack of evidence will be detrimental, as was found in a case of negligence against a cruise operator by a passenger who slipped on a wet floor in the ship's restaurant, ***Dawkins v Carnival***,[29] in which the CA held:

> There was evidence of the existence of a safety system, including inspection and observation, but there was no evidence from those with the duty to implement the system at or around the time of the accident. There was no evidence as to how long the liquid had been on the floor. The absence of evidence from one or more of the many members of staff claimed to be present in the restaurant at the material time was remarkable. In the absence of evidence from members of staff claimed to be implementing the system, the judge was not entitled to infer from the existence of a system that the spillage which led to J's fall occurred only a very short time before the accident.

In the following paragraphs, some areas of liability upon which the ISM Code will have an impact, evidentially, under English law are examined: (1) the contract of carriage – due diligence under the HVR; (2) the insurance contract; (3) limitation of liability; (4) Merchant Shipping Act (MSA) offences; (5) offences under the MS (ISM) Regulations; (6) gross negligence manslaughter and corporate manslaughter.

Apart from the recent decision in ***The Nancy*** [2013] EWHC 2116 (Comm) concerning an insurance claim (published at the proofs stage), there are no other court decisions specifically concerning the effect of the ISM Code upon liabilities after its full implementation. Thus, the facts of old decisions are used to highlight how such cases would be decided today in the light of the Code. The ISM may have different implications upon liability that is subject to the law of other jurisdictions.

28 *Davis v Stena Line Ltd* [2005] 2 Lloyd's Rep 13.

29 [2012] 1 Lloyd's Rep 1, at paras 23, 26–30 (see Ch 15, below).

5.1 EFFECT OF THE ISM UPON LIABILITY ARISING FROM THE CONTRACT OF CARRIAGE OF GOODS

5.1.1 The due diligence provision under the HVR

The HVR provide, in Art III, r 1, that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) make the ship seaworthy;
(b) properly man, equip and supply the ship; and
(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

The standard to be applied, as established by common law,[30] is that the vessel must be fit to encounter the ordinary perils of the voyage, and must have that degree of fitness that an ordinary and careful owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it.

The courts have further held that the due diligence provision is not delegable but personal.[31] This means that there would be no defence to a cargo claim by the owner if the ship was negligently repaired by independent contractors, or if the classification society inspected the ship before sailing, but still the ship was unseaworthy, unless it is shown that no other professional could have detected the defect.[32] The obligation imposed on the ship-owner is one of due diligence in the work of repair by whomsoever it might be done, even when the work is delegated to the independent contractor for his technical or special knowledge or experience and the negligence is not apparent to the ship-owner. If competent professionals conducted repairs, the owner may be able to discharge the burden of proof that he exercised due diligence, provided there is no doubt in the evidence heard by the court.[33]

A cargo-owner who claims damages against the carrier for loss of or damage to his cargo has the burden to prove[34] (a) the contract with the carrier and that the goods were on board the ship; (b) non-delivery, or damage, by the breach of the carrier; (c) the cause – usually unseaworthiness is alleged, which he must prove,[35]

30 See, for example, *Mcfadden v Blue Star* [1905] 1 KB 697.

31 *The Muncaster Castle* [1961] AC 807 (HL), p 836, per Viscount Simonds; see further: *The Antigoni* [1991] 1 Lloyd's Rep 209 (no proof of latent defect in engine; owner not able to discharge burden); *The Apostolis* [1997] 2 Lloyd's Rep 241 (holds not intrinsically unsafe); *The Fjord Wind* [2000] 2 Lloyd's Rep 191(latent defect, but there was no clear evidence to indicate other than lack of due diligence by delegated agents); *The Happy Ranger (No 2)* [2006] 1 Lloyd's Rep 649.

32 *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 339–344 (seawater entered hold through leaking seam; undetected defect during surveys by classification society; owner able to discharge burden); cf. *The Toledo* [1995] 1 Lloyd's Rep 40 (no proper system of maintenance; classification society did not warn).

33 *The Amstelslot* [1963] 2 Lloyd's Rep 223, 233–235 (HL) (fatigue cracks not detected by reasonable diligence; professionals had inspected ship; no negligence found).

34 *The Glendarroch* [1894] P 226 (each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is, 'Yes; but the case was brought within the exception', which he must prove, and so on).

35 *The Europa* [1908] P 84; *The Yamatogawa* [1990] 2 Lloyd's Rep 39 (there was a design defect but no extent of visual examination of the reduction gear would have disclosed the defect which caused the casualty); *The Torenia* [1983] 2 Lloyd's Rep 210 (most probable cause was un-seaworthiness, corrosion;

unless unseaworthiness can be inferred from the facts.[36] The burden then shifts to the ship-owner to show that he exercised due diligence before and at the beginning of the voyage to make the ship seaworthy, as is required by the HVR,[37] or that the cause of the loss was an excepted peril.

Since liability under the HVR for damage or loss caused by unseaworthiness is based on a personal and non-delegable duty of the owner of the ship, the next questions are: what is the relevance of the ISM Code, and how may the role of the designated person affect the position?

5.1.2 The relevance of the ISM Code and of the DPA

Applying the *Meridian* approach to finding the appropriate rule of attribution of liability to the company, the substantive rule of law in this instance is clear and it does not need further interpretation. It is apparent that the policy behind the HVR is not to ask whose fault it was if the ship is found unseaworthy. The law assumes that the responsibility is upon the owner personally (the ego of the company) to ensure that due diligence was exercised in whatever was necessary to be done to make the ship seaworthy. The carrier's obligation is a personal duty, therefore, the identification doctrine applies to attribute liability to the company. It would not be relevant to ask whether or not the acts or omissions of the DPA contributed to the ship's unseaworthiness unless he was part of the directing mind of the company. The Code is relevant to the discharge of the burden of proof by the owner that he exercised due diligence.

The documentation that is required for compliance with the Code will have evidential use by claimants, and it will assist in establishing whether or not the ship was unseaworthy; on the other hand, if the SMS is in order, the owner will be able to rely on it to establish that he exercised the required due diligence. Any failings of the system of operations, selection of crew,[38] lack of training or failure to take a corrective action after audits, which render the ship unseaworthy, will be more apparent from the safety management manual (SMM). Equally, any equipment failure will be apparent from the documentation, if it has been properly kept as required by the ISM Code. This will supply ammunition to cargo claimants to show a causative link between the cargo damage and the unseaworthiness, just as it will make the position of the carrier more difficult in discharging his burden of proof.

Incidents that occur on the ship that are likely to render her unseaworthy are required by the Code to be reported. Thus, the examples of cases such as ***The Apostolis***[39] (in which there were no contemporaneous documents showing when the welding to the ship, which was alleged to have been the cause of the fire, took place) and ***The Toledo***[40] (failure to have proper systems in place for inspecting and maintaining the vessel) ought to be borne in mind. If the system is not transparent enough, the owner will be taking a gamble, because he will not be able to explain

the sinking of the ship raised inference of un-seaworthiness); *The Theodegmon* [1990] 1 Lloyd's Rep 52 (failure of steering gear caused the stranding of the ship, not pilot failure); *The Toledo* [1995] 1 Lloyd's Rep 40 (no proper system of maintenance).

36 *Pickup v Thames & Mersey Insurance Co Ltd* (1878) 3 QBD 594, at 597(CA).

37 See Arts III r 1, IV, r 1; *The Hellenic Dolphin*, op. cit. fn 32; *The Polessk* [1996] 2 Lloyd's Rep 40.

38 *The Makedonia* [1962] 1 Lloyd's Rep 316 (inefficient chief engineer rendered the ship unseaworthy).

39 [1996] 1 Lloyd's Rep 475 and [1997] 2 Lloyd's Rep 241 (CA).

40 [1995] 1 Lloyd's Rep 40.

why the documents are not kept and a gap in the evidence will count against him in arbitration or in court. It will be no excuse to say that he had delegated the tasks of monitoring deficiencies for the purpose of the ISM Code to the designated person (who is supposed to inform the senior management) or that the company responsible for the ISM requirements was the third-party ship manager.

Some examples below demonstrate the use of the ISM Code to cargo claimants in appropriate cases, although there have not, as yet, been cases in which the ISM Code was directly in issue.

The Eurasian Dream[41] was not a case to which the ISM Code applied mandatorily at the time, but the facts and comments by the judge are very important for future reference.

The ship and its cargo of cars on board caught fire, owing to jumpstarting by stevedores while there was refuelling side by side. The fire spread on the ship; it could not be contained by the crew and caused damage to the cargo. The alleged unseaworthiness concerned defective equipment, incompetence of the crew and inefficiency of the master. The fire drill training was deficient, and the master was not properly qualified for command of his ship, nor was he familiar with the obligations under the SMS. The owners were sloppy and not supportive. There was voluminous documentation without clear instructions. Viewed from the perspective of the owners' obligations under the ISM Code, the system had been taken off the shelf, and it was confusing. All these deficiencies were held to have a cumulative effect on the unseaworthiness, and the owner could not discharge the burden of proof that he exercised due diligence.

By contrast, in ***The Torepo***,[42] the ISM Code evidence assisted the owners in proving that they had exercised due diligence. They were able to show that they had proper manuals, procedures and standing orders and instructions that had been read by the crew. In addition, the master kept records of his meetings with his navigation officers to communicate and brief them.

In ***Isla Fernandina***,[43] although the ISM Code was not at that time relevant to the case, the facts should be borne in mind for risk management purposes should a similar case reach the scrutiny of the court in the future, whereupon the ISM Code will be relevant. The third officer was inexperienced in radar plotting and put the vessel aground. The master was not on the bridge to supervise him when entering port and had not made a passage plan. There was a lack of procedures for ongoing navigational training and with regard to watchkeeping. The court held that the grounding was due to navigational error.

The owner today would have to show evidence of training and compliance with the ISM Code and the STCW, as amended, as well as that best practice was followed, in order to discharge his burden of proving that he exercised due diligence when unseaworthiness is proved to have been the cause of the loss (see, further, Chapters 1–3, above).

41 [2002] 1 Lloyd's Rep 719.
42 [2002] 2 Lloyd's Rep 535.
43 [2000] 1 Lloyd's Rep 15.

5.2 EFFECT OF THE ISM UPON THE INSURANCE CONTRACT

5.2.1 The duty to disclose material facts

Under section 18(1) of the Marine Insurance Act (MIA) 1906, '. . . the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured . . . if he fails to make such disclosure, the insurer may avoid the contract.'

Section 18(2) provides that: 'Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.'

In the absence of inquiriy any circumstance need not be disclosed by s 18(3), if it is known or presumed to be known to the insurer; the insurer is presumed to know matters of common notoriety or knowledge, and matters that an insurer in the ordinary course of his business, as such, ought to know.

For example, detentions by the PSC are in public record (on-line, or Equasis database), and so the insurer should be able to find out and make further inquiries on any detentions before he accepts to insure a ship (see also *The Nancy* [2013/7/17])[44]. But any withdrawals of the ISM certificate will be a material fact to be disclosed by the assured.

In addition, it is usually a condition precedent to the insurance cover under the policy that the assured complies with the ISM requirements. Non-disclosure of a material fact relating to previous denial of cover by reason of ISM breaches will be a material fact. Such breaches may have been corrected, but the law requires a fair presentation of the risk to the insurer.

5.2.2 Privity of the assured under s 39(5) of the MIA 1906

In a claim by the assured under an insurance policy contract against the underwriters for an indemnity in respect of a loss or damage to the ship (hull and machinery (H&M) insurers), or liability to third parties (P&I insurance), the insurers may raise the defence of s 39(5). The burden of proof is on the insurer to show that: (a) the ship was unseaworthy when she was sent to sea; (b) the assured had positive knowledge of her unseaworthiness or had turned a 'blind eye'[45] to the facts that rendered her unseaworthy; and (c) the loss was attributable to that unseaworthiness of which the assured was privy[46] (causation).

Privity is concerned with the assured's state of mind. In a case of a company, the identification[47] of the natural persons who had the relevant state of mind in relation

44 [2013] EWHC 2116 (Comm) – unfortunately, as this case was published at the stage of checking the proofs of the book, there is no space to refer to it in detail.

45 E.g., if a man is suspicious of the truth and turns a blind eye to it, and refrains from inquiry so that he should not know it for certain: see *The Eurysthenes* [1976] 2 Lloyd's Rep 171, p 179, per Lord Denning MR. In addition, the House of Lords held, in *The Star Sea* [2001] 1 Lloyd's Rep 389, that 'blind eye knowledge . . . requires a conscious reason for blinding the eye. There must be at least a suspicion of a truth about which you do not want to know and which you refuse to investigate', per Lord Clyde.

46 *The Eurysthenes* [1976] 2 Lloyd's Rep 171; *Thomas v Tyne and Wear Steamship Insurance Association* (1917) 117 LT 55.

47 The 'identification' theory.

to unseaworthiness is necessary. It is the state of mind of the head man, or the directors (who are considered to be the ego of the company), or the person who was delegated by the directors to have full discretion and deal with the particular issues of the ship's seaworthiness and maintenance[48] (the alter ego of the company, as explained in the *Tesco* case above). Constructive knowledge of the condition of the ship on the part of the directors of the owning or managing company is not sufficient, as was shown in ***The Star Sea***,[49] below.

The ship had some history of deficiencies. In 1990, the Belgian port authority surveyor found, inter alia, that the emergency fire pump was not working. The master was instructed to rectify this and other deficiencies before departure. The chief engineer tried to repair the pump, but failed. In the course of his efforts to do so, he cut the suction pipe passing through the forepeak ballast tank to a non-return valve in the ship's side. The emergency fire pump was, in due course, repaired, but the cut pipe was never repaired. The ship sailed for her next voyage fully loaded. As she approached the Panama Canal, a fire started in the engine room that spread to other parts and was not finally put out for several days, by which time the vessel had become a constructive total loss (CTL). Two other vessels in the same ownership, the *Centaurus* and the *Kastora*, had previously become CTL by fire in similar circumstances. When the owners claimed under the insurance policy, the insurers denied liability, relying on breach of the duty of utmost good faith and on s 39(5). The grounds of the s 39(5) defence were the following: (a) by reason of the cut pipe, the emergency fire pump was useless when the vessel was laden; (b) there was ineffective sealing of the engine room; and (c) the master was incompetent in that he was unaware of the need to use the CO_2 system as soon as he realised that the fire could not be fought by any other means, and that he did not know how to use it.

Tuckey J (as he then was) held that the ship was unseaworthy by reason of the cut pipe and the fact that the master was incompetent in not knowing how to use the CO_2 system, which was the most potent weapon in fire-fighting. On the issue of privity of the assured under this section, the judge held that the directors of the company, had a 'blind eye' knowledge of the relevant facts of the ship's unseaworthiness. In particular, he said that:

> With the message staring them in the face that the CO_2 system on *Centaurus* and *Kastora* had not been used so as to prevent those ships from becoming constructive total losses, the assured took no effective steps to ensure that this would not happen again. The incompetence of the master and the state of the safety equipment for sealing the engine room, essential to the effectiveness of the CO_2 system on *Star Sea* show only too clearly how ineffective those steps were and how inadequately equipped she was to fight a fire effectively. The assured did not want to know about the competence of the master to use the CO_2 system effectively.[50]

On appeal, although the CA held that the relevant directors of the management company of the assured were involved in the decision-making process required for sending the ship to sea, Leggatt LJ drew a distinction between an allegation that 'they ought to have known' (as the judge thought) and an allegation that 'they suspected or realised but did not make further enquiries'. The former indicates constructive knowledge, whereas the latter would amount to 'blind eye' privity. He stated:

48 *The Eurysthenes* [1976] 2 Lloyd's Rep 171, p 179, per Lord Denning MR.

49 *The Star Sea* [1995] 1 Lloyd's Rep 651 (1st inst), [1997] 1 Lloyd's Rep 360 (CA), [2001] 1 Lloyd's Rep 389 (HL).

50 *The Star Sea* [1995] 1 Lloyd's Rep 651, p 664.

> However negligent it may have been not to learn lessons from the previous fires on *Centaurus* or *Kastora*, or to fail to give proper instructions in fire-fighting or whatever, what the defendant underwriters had to establish was a suspicion or realisation in the mind of at least one of the relevant individuals that *Star Sea* was unseaworthy in one of the relevant aspects, and a decision not to check whether that was so for fear of having certain knowledge about it. Thus, on this aspect, and to be precise, to succeed the underwriters would have to establish that one or other of the individuals . . . suspected that the master was incompetent in lacking the knowledge as to how to use CO_2 and that that rendered *Star Sea* unseaworthy, but that he decided not to check for fear of having certain knowledge and allowed the ship to go to sea anyway. The judge made no such finding. Indeed his finding in this area comes down simply to a finding of negligence, albeit negligence in a high degree.[51]

On further appeal, the House of Lords[52] affirmed the decision of the CA. Lord Scott explained 'blind eye' knowledge by giving a vivid example: 'Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he could see if he placed it to his good eye.' Lord Scott continued:

> It is, I think common ground – and if it is not, it should be – that an imputation of blind eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence.

5.2.3 The role of the ISM Code

So, how might the ISM Code help the position of the underwriters in discharging the burden of proof under s 39(5)? The House of Lords has now confirmed that the knowledge of the owner with regard to unseaworthiness of the ship must be actual and not constructive. As the test of privity is subjective, the knowledge of other people in the company who are not classed in the category of the ego or the alter ego[53] of the company will not amount to privity of the assured; nor would it be sufficient if the facts shown ought to have been known to the owner.

The Star Sea is a very significant decision with respect to the application of the duties of the owners and managers under the ISM Code. At the time of the casualty, the Code was not yet in existence. The factual position of this case is the very situation that the Code intends to prevent. The directors of the managing company, or the owners, have to make sure that the master is competent in using any equipment on the ship, as well as to ensure that previous incidents in any of the group's ships do not recur. Documenting, monitoring and making a risk analysis of all previous incidents, which must be recorded in the company's SMM, can achieve this objective. Such information will be of assistance to the insurers in future cases, to the extent that the SMS and SMM may lead to information by which the insurer may be able to show actual or blind eye knowledge of the assured insofar as the unseaworthiness of the ship is concerned (e.g., by a searching cross-examination of the assured as to his reaction to the incidents revealed in the SMS and SMM). In this connecion, an interesting recent decision, ***The DC Merwestone*** [2013] 2 Lloyds Rep 131, shows how the court dealt with the evidence regarding the SMS.

51 [1997] 1 Lloyd's Rep 360 (CA), p 377.
52 [2001] 1 Lloyd's Rep 389.
53 See *Tesco v Nattrass*, above, for the analysis of the 'identification' doctrine.

5.2.4 The role of third-party ship manager

Would the owner be able to hide behind the third-party manager, if the duties under the ISM Code were delegated to him? Would he be able to say: 'I did not have any knowledge of the situation, as the third party manager was the "company" for the purpose of the ISM Code'? The owner could argue that he did not have actual knowledge of the relevant facts, but such argument would not take him very far because the owner is not absolved from responsibilities under the Code when he delegates the technical management to a third-party manager. It should be remembered that para 3.2 of the Code provides that: 'The company should define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention.'

There should, therefore, be interaction between the personnel of both manager and owner while monitoring safety matters, and the relevant directors of the owning company would not be able to hide behind the managers and claim that they were not privy to the information.

If the owner and manager are co-assureds for H&M or for P&I risks, as they should be, they will stand or fall together when they make a claim under the insurance policy.

5.2.5 The role of the DPA

The next question is: what is the role of the DPA? Pursuant to para 4 of the Code, the DPA has a duty to report to the highest management. It is frequently asked whether, for the purpose of s 39(5), the knowledge of the DPA of deficiencies in the SMS, which he might have failed to report to the senior management, could be attributed to the company.[54]

Although this may be a 'Catch-22' situation for the owners, in that a failure by the DPA to report could, in some circumstances, be a failure of the SMS of the company, it is submitted that, for the purpose of s 39(5) above, knowledge of the DPA could not be imputed to the company, unless the DPA is made a member of the board of directors or is delegated to have absolute discretion, which is unlikely, in matters of the ISM.

On the basis of the *Meridian* rule of attribution, an interpretation of the substantive rule of law, namely s 39(5), would not require the court to apply a special rule of attribution, but the primary rule of attribution of liability based on the identification doctrine, as explained earlier. Therefore, the court will ask the question: whose act, or knowledge, or state of mind, was for this purpose intended to count as the act, or the state of knowledge, of the company?

As was seen in the *Star Sea*, for the purpose of s 39(5), it is not what the directors ought to have known, but what they suspected or consciously realised by the reported events, but did not make further enquiries. The point in law made by Leggatt LJ and the House of Lords in this case is that, if the insurers could show only constructive knowledge by the directors of the company of the relevant facts, it would not be sufficient for the discharge of the burden of proof under s 39(5).

However, the directors of the company are, by reason of the ISM, under an increased obligation to enquire, for example why corrective action has not been taken after an internal audit, and, if the system of communications works well, they should make it

54 For relevant questions raised when the ISM Code was first published, see Mandaraka-Sheppard, A, 'The ISMC in perspective' (1996) 10 *P&I International Journal*, LLP (the name of this journal has changed to *Maritime Risk Management International*, published by Informa).

clear what reports they expect from the DPA. The ISM and the STCW, as seen in Chapters 1 and 3, above, set the standard for crew training, and the effect of these is that the situation of the *Star Sea* should not happen today without taking responsibility for the consequences. Had the case been decided today, the outcome might have been different.

5.2.6 Other provisions under the insurance contract

If the insurer fails to discharge the burden under s 39(5), there is an alternative way in which he may be discharged from liability. The Institute Clauses for Hull Insurance (ICHI) contain a special contractual classification warranty. A pure Class warranty has been construed as requiring documentary compliance alone. If, however, the warranty requires strict compliance by the assured with matters of class and maintenance of seaworthiness during the duration of the policy, the insurer will be discharged from liability as from the date of the breach regardless of causation. The documentation under the ISM Code has the effect of making owners and managers more vigilant about management practices and incidents affecting seaworthiness must be reported to Class.

Similarly, the Inchmaree clause in the ICHI 1995 makes the insured risks under this clause (including crew negligence) subject to the exercise of due diligence, not only by the owners and managers, but also by the superintendent and the assured's shore management. (The latter is not required by the ICHI 2003.) If, for example, a loss is caused owing to the negligence of the master or crew, this will be a covered peril, provided due diligence had been exercised by the persons mentioned in the clause, not only in the selection procedures of the ship's personnel, but also in their supervision and training. The documentation required under the Code may enable the insurers to support their defence to a claim made by the assured under the policy.

Another provision of the H&M insurance is a clause expressly requiring the assured to comply with the provisions of the Code. For example, ***The Nancy*** (see fn 44), the words used were 'Vessels ISM Compliant' and was held that this warranty required only documentary compliance. Blair J (at para 232) said:

> Whilst it may be difficult to prove non-compliance unless this has happened, if it can be proved that a qualified and experienced ISM Code auditor *would* have raised a major non-conformity and recommended suspension/withdrawal at the material time, I see no reason why it should not follow that a breach of the Code has been proved.

Similarly, P&I clubs include an ISM compliance clause in their rules in the nature of a condition that the owner shall not be entitled to any recovery under the policy in respect of claims arising during the period when the assured was not fulfilling the requirements of certification under the Code. The latter condition relates only to breaches of the Code that result in non-certification.

5.3 LIMITATION OF LIABILITY AND THE ROLE OF THE ISM CODE

5.3.1 Limitation under the 1957 Limitation of Liability Convention

Limitation of liability is examined in Chapter 14. Only brief reference will be made here to general principles, for the purpose of considering the likely effect of the ISM Code on the right of the owner or manager to limit liability.

Under the Limitation Convention 1957, which is still applicable in some States, the ship-owning company can limit its liability, if there is no 'actual fault or privity' on the part of the owner. The burden of proof is upon the owner seeking to limit liability. 'Breaking' limitation under English law, when this Convention applied, was relatively easy. English law now applies the 1976 Limitation Convention.

To make a brief contrast between the two Conventions, it suffices to mention that, under the 1957 Convention, the owner, even if he had delegated matters to a professional manager, could not limit his liability if the 'actual fault' of the managing director of the managing company was the cause of the casualty. Such fault was imputed to the owner. So, it was held by the House of Lords in ***The Marion***,[55] in which the managing director of the managing company had failed to give proper instructions to his subordinates during his absence and had failed to ensure that adequate supervision was exercised over the master of the ship (see, further, Chapter 14).

In ***The Lady Gwendolen***,[56] the owners were unable to limit liability because the fault of a superintendent was traced upwards to the board of directors for a series of faults in the operating manuals and for not having adequately supervised the operation. In ***The Garden City***,[57] again, the owners could not limit liability under the 1957 Convention, as they failed to discharge the burden of proof that the accident was without their fault or privity. The top management of the owning company had failed to ensure that a senior superintendent should be responsible for supervising the quality of navigation, and that the vessels in the fleet should be regularly inspected making available checklists and written reports.

The facts of these cases echo the philosophy behind the ISM Code. Where the 1957 Convention still applies, any failures by the owner or manager in the safety systems will provide the evidence of fault or privity, but, even prior to the implementation of the Code, it was not that difficult under this Convention for the right to limit to be broken.

5.3.2 Limitation under the 1976 Convention

By contrast, the 1976 Limitation Convention provides a rigid test for the right of limitation to be broken. First, the burden of proof is upon the claimant who seeks to break limitation, instead of upon the owner, as it was under the old law. The claimant needs to prove: (a) that the loss claimed resulted from a personal act or omission of the legal persona of the ship-owner; and (b) that it was committed, either with intent to cause such loss, or recklessly and with knowledge that such loss would probably result (Art 4 of the Convention).

In other words, the legal persona of the company must have anticipated the likelihood or probability of the loss or damage, but, nevertheless, acted or failed to act regardless of that probability. So, it is not a question of simple fault, nor is it sufficient for the act or omission to be that of servants or agents,[58] but it is required

55 [1984] 2 Lloyd's Rep 1 (see, further, Ch 14).

56 [1965] 1 Lloyd's Rep 335 (see case summary in Ch 14).

57 [1982] 2 Lloyd's Rep 382.

58 Unlike Art 4 of the 1976 Convention, Art 25 of the Warsaw Convention, as amended, providing a bar to limitation of liability of airlines, includes acts or omissions of 'servants or agents' (see, further, Ch 14).

to be the personal act or omission of the person who seeks to limit. The loss must be the very loss actually anticipated.[59]

Following the *Meridian* approach to interpretation of the substantive rule of law, the philosophy of, and purpose behind, the 1976 Convention does not require a special rule of attribution. The identification doctrine, as explained in the *Tesco* case, sufficiently satisfies the purpose of this Convention in identifying the relevant persons through whom liability to the company can be attributed, if the right to limit is broken by meeting the requirements of the above test.

If, however, the evidence shows that the highest level of management ignored certain facts reported to them by the DPA in relation to deficiencies of the system leading to non-conformity with the Code and to the loss or damage claimed, then such evidence would be likely to point strongly to recklessness of the legal persona of the company. A person acts recklessly when he acts in a manner that indicates a decision to run the risk or a mental attitude of indifference to its existence.[60] However, in the context of the Convention, for the purpose of breaking limitation, the claimant must also prove that the legal persona of the company seeking limitation acted with knowledge that such loss would probably result[61] from such non-conformity with the Code.

This would involve proof of either (a) a high degree of subjective realisation (actual knowledge) that damage would probably result from non-conformities with the Code, or (b) a deliberate shutting of the eyes to a means of knowledge derived from the SMS, which, if used, would have produced the same realisation (an amalgam of suspicion that certain facts exist and a decision to refrain from taking any steps to confirm their existence).[62] Falling short of that test, constructive knowledge of the directors of the company, in a sense that they ought to have known that damage would probably result from what the DPA knew about non-conformities with the Code, would not be in line with the policy behind the respective statutes dealing with limitation of liability having regard to the wording analysed above.

In the light of the Code, the person seeking limitation will be questioned as to why he did not make enquiries to ensure that all procedures relating to identified risks were followed. Were it to be shown that he made a decision to run the risk and shut his eyes to a means of knowledge staring him in the face, by virtue of the information documented in compliance with the ISM Code, which, if used, would have produced a conscious realisation that such loss would probably result, the test of Art 4 would be met.

5.3.3 The role of the DPA

It follows that the delegation of supervision of safety matters to the designated person, appointed pursuant to the Code, will not make the designated person a person whose acts or omissions will be those of the company, unless he is a director, or he is delegated with full discretionary powers and control for the ISM tasks.

59 *The Leerort*; *The MSC Rosa M*: see Ch 14.

60 *Goldman v Thai Airways International* [1983] 1 WLR 1186, p 1194, per Eveleigh LJ.

61 These words were construed by the CA, in *Goldman* (ibid and [1983] 3 All ER 693), as requiring a higher standard than mere recklessness.

62 Per Lord Scott in *The Star Sea*, op. cit. fn 49.

The direct access of the designated person to the senior management and his duties of reporting to them, as provided by the Code, will undoubtedly expose the senior management and their system of management practices, if action is not taken to rectify matters, or if approval and finances are not given to the DPA to carry out what is necessary to be done in order to prevent risks from materialising. If that is the case, then questions will be raised in court or arbitration as to how and why the particular incident causing liability could not have been prevented.

In this connection, it is relevant to refer to an important decision of the English court, ***Rolls-Royce plc v Heavylift-Volga Dnepr Ltd***,[63] concerning limitation of liability, under Art 25 of the Warsaw Convention. The liability arose in relation to damage caused by the negligence of Servisair's employees to a Rolls-Royce engine being unloaded from Rolls-Royce's lorry with a 10-tonne forklift truck at East Midlands Airport. Similar provisions of safety regulations apply to cargo-handling operators in airports to those applicable to onshore management of ships. Breach of those regulations, in particular with regard to monitoring and providing a co-ordinated system of safety, as well as negligence, was found on the part of the company's safety and security manager, on the part of the designated 'competent' person and on the part of the employee involved in the unloading. The right hand was apparently unaware of what the left hand was doing, and the designated person had failed to ensure that all his staff were aware of all risks that they might encounter. It was pointed out that someone responsible for the company's safety systems should have picked up his failures. It was even commented by the court that any competent management would have foreseen the need to make sure that its staff did not operate this vehicle if it was not in proper condition. Nevertheless, the court held that:

> For the finding of wilful misconduct the court must find on a balance of probabilities that the acts (or omissions) alleged to constitute the misconduct must not only fall below the standards to be expected of persons acting reasonably, but be sufficiently below such standards as to be capable of being regarded as 'misconduct', and not just as careless, or very, or grossly careless. Second, the person must know that he is misconducting himself when he does (or fails to do) the acts complained of and does them intentionally or recklessly as to the consequences.
>
> Overall, Servisair were guilty of negligence. What might have avoided the accident would have been proper training on the heavier forklift truck. The company's failure to have a proper system of work which would have ensured that only properly trained and qualified people operated such vehicles was causative of the accident. However, neither separately nor in the aggregate did the failures of the various persons identified as being at fault amount to misconduct or to recklessness with knowledge under the Convention.[64]

Thus, limitation was allowed.

This decision may be borne in mind in limitation cases under the 1976 Convention, when similar failures in the system of safe operation of ships may arise under the ISM Code, and, as this case shows, although negligence on the part of the company will not be difficult to establish, it will still be difficult for the claimant to break limitation.

It is interesting to note the chain of responsibility in this case, as it may be relevant in cases where similar duties are delegated to a designated person under the ISM Code.[65] That does not mean to say, however, that the delegation will necessarily extend

63 [2000] 1 Lloyd's Rep 653.

64 Ibid, p 659.

65 See the reference to delegation by Lord Reid in *Tesco v Nattrass* [1972] AC 153 (HL).

the class of persons (whose acts are to be regarded in law as the personal acts of the company itself) beyond those who, by the articles of association, are entitled to exercise the powers of the company.[66]

5.3.4 Risk management issues

In the broad scheme of things the ISM intends to make the management of operations of ships transparent, and this would provide the diligent owners or managers with proof of good corporate conduct. Conversely, an inefficient SMS will reveal the gaps and provide ammunition to any claimants.

The owner or manager who seeks to limit liability or defend a claim ought to be reminded that the factual situations of *The Lady Gwendolen*,[67] *The Marion*,[68] *The Garden City*,[69] *The Anonity*[70] and several other incidents of cases reported by the MAIB, which have not made the law reports, are situations to be avoided at all costs.

Were these cases to be decided today, questions would be raised as to how and why the directing mind of the company was not able to ensure that a proper safety system was in operation. This inquiry will certainly lead to a train of inquiries, which may reveal that the directing mind of the company was reckless in not attending to the deficiencies. However, that alone will not be sufficient for the test of Art 4 of the 1976 Convention to be met. It must further be shown that the directing mind had actual knowledge that a loss of the same kind as the loss sustained would probably result (*The MSC Rosa M* and *The Leerort*[71]) and, despite such knowledge, did nothing to correct the deficiencies that caused the loss claimed.

The information contained in the ISM documentation may point to the required knowledge. It has been suggested, but not decided, that the test of Art 4 may be met if the relevant person consciously suspected defects and deliberately chose not to check, so as to avoid turning suspicion into awareness.[72]

To put matters into perspective for risk management purposes, it is worth summarising the salient features of the aforesaid cases and making observations with regard to their relevance to compliance with the ISM.

In ***The Lady Gwendolen***, the evidence disclosed a serious failure in the management of the ships, which contributed to the collision. It was noted, at first instance, on the facts that: 'If the marine superintendent is put upon inquiry for an obvious disregard of the regulations, he should take steps about it, and if his steps fail, he must go higher until something is done about it.' This may be relevant under the ISM Code, to the extent of showing how far the questioning of the practices of the directors in the management of the ships might go.

In ***The Marion***, there were two types of fault noted here, which may be relevant to the questioning of directors of ship-owners or managers by virtue of the ISM Code:

66 As Lord Diplock said in *Tesco v Nattrass*, ibid.

67 *The Lady Gwendolen* [1965] 1 Lloyd's Rep 335 (defective radar lookout, coupled with excessive speed in fog).

68 [1984] 2 Lloyd's Rep 1.

69 [1982] 2 Lloyd's Rep 382.

70 [1961] 1 Lloyd's Rep 203 (galley fire lit while bunkering, and no 'arresting notice' prohibiting this was displayed).

71 See, further, Ch 14.

72 *The MSC Rosa M* [2000] 1 Lloyd's Rep 399, p 402, per Steel J.

first, failure of the managing director to have a proper system of supervision; and, second, failure to give instructions on what matters he would like to be kept informed about. Although such failures alone, without more in the conduct of directors, will not break the limit under Art 4 of the 1976 Convention, as it did under the 1957 Convention, they are, however, worth keeping in mind, particularly because the DPA has direct access to the senior management, who should give clear instructions about what matters they would require to be informed about.

In ***The Garden City***, Staughton J (as he then was) said that the top management of every ship-owning company ought to institute a system for the supervision of navigation and detection of faults. Although there was a system here providing for two officers to be on the bridge when the vessel was navigating in fog, the master did not implement the system. In this case, however, no fault of the director was found. Under the ISM Code, today, the director would be questioned as to why such a habit of the master had not been detected, but, to break the limitation under Art 4, there must be evidence of a conscious realisation (drawn from previous collision incidents that might have been caused by the master's same disregard of instructions) that the loss suffered was anticipated as very likely to happen and, nevertheless, recklessly, no preventive measures were taken. The more recent example of the factual situation, in *Saint Jacques* (see Chapter 14), is to be borne carefully in mind.

In ***The Anonity***, the issue on the facts was whether adequate instructions were given by the ship-owners to their servants as to the extinguishing of galley fires when the ship was lying alongside an oil jetty. The sparks that escaped set fire to the jetty, which was destroyed. On the evidence, circular instructions about galley fires had been sent by the marine superintendent to the master. The alter ego of the company, Mr Everard, was very strict about compliance by the crew in all matters, but the master, who had been in the employ of Mr Everard for 16 years, was disobedient and perhaps sloppy. He filed the circular instructions in his desk and forgot about them, after a brief discussion with the chief and second officers. Under the old system of limitation, the owners could not limit liability, because the circular was not enough; there ought to have been instructions from the owners exhibited by a notice next to the galley fire prohibiting its use at oil berths.

In each case, it will be a question of fact with regard to the extent and degree of faults in the SMS of the relevant company, and whether a non-corrective approach to those faults amounted to recklessness, with knowledge that the kind of loss claimed would probably result.

Any mistakes or personal inattention of the DPA will be caught, if the owner or manager is rigorous in the enforcement of the Code. The Code is capable of reversing the fallibility of human beings. It has been realised in the industry that the human element is the core factor in accidents, and the Code was conceptualised to safeguard against human errors, from the top of the company's hierarchy to the crew. To a great extent, it is correct to say that a Catch-22 situation has been created by the Code for owners and managers, but the writer is still sceptical about the extent to which, in reality, all will become transparent through the SMS.

There is no doubt, however, that during cross-examination of witnesses in court or arbitration, many relevant deficiencies in the implementation of the Code will be revealed.

In the light of what was shown in the previous paragraphs about the possible effect of the ISM Code upon an owner's ability to discharge the burden of proof regarding

due diligence in cases of unseaworthiness, and the role of the Code and of the DPA in insurance claims and in limitation of liability, owners, managers and all people in the chain of responsibility should ensure that the Code is properly implemented.

The significance of the Code in raising awareness of all in the industry about the paramount importance of risk assessment and analysis cannot be doubted.

5.4 CRIMINAL LIABILITY AND THE ROLE OF THE ISM CODE

As seen in Chapter 3, withdrawal, or no issue, of ISM certificates is the sanction for non-compliance with the Code, which, inevitably, will have serious consequences upon the trading of the vessel and the insurance cover of the owner and ship manager. Although the Code does not itself impose criminal liability for breaches of its provisions, the States that enact the Code into domestic legislation do impose criminal liabilities for breaches committed by the owner, or manager, or officers delegated with ISM Code responsibilities. The SI 1998/1561, which originally implemented the Code into English law (recently amended to be in tandem with the 2010 version of the ISM), provides for criminal sanctions for breaches of certain obligations under the Code. The offences are clearly defined (see para 5.4.2, below).

This matter, together with other statutory offences under the MSA 1995, is looked upon from the point of view of English law. At the end of this chapter, corporate manslaughter is examined, and how the ISM documentation will be relevant to this offence.

5.4.1 Statutory offences under the MSAs

The MSA 1995 contains various statutory offences, some of which are relevant here. In addition, the MSA 2010 provides for more offences.

5.4.1.1 Offences relating to ship's logbook

By s 77 of MSA 1995, every British ship must keep an official logbook on board (that is an obligation of any ship of any nationality). Destruction of, or obliteration of, entries in the logbook by anyone is a criminal offence punishable with a fine on summary conviction. Section 8(10) of MSA 2010 provides that, if the master fails to cause an entry in the logbook particulars relating to radio installation, or any person, including the owner, contravenes any rules prescribing the duties of radio personnel, including the duty to keep a radio logbook, he commits an offence and shall liable to pay a fine.

5.4.1.2 Offences relating to notices

In addition, under s 8(16) of the MSA 2010, when a notice has been given requiring the owner or master to remedy any deficiency with regard to radio installation, he shall be guilty of an offence and liable to pay a fine. The same applies with regard to notices in relation to deficiencies with regard to navigation and tracking rules (s 9 (12)). Further, s 12(5) provides for an offence in relation to contravention of cargo

ship construction and survey rules. Section 24 deals with contravention of notices, or non-compliance, by the owner and the master in relation to chemical tankers rules.

5.4.1.3 Offences related to rules of special ships

The MSA 2010 provides for offences of non-compliance by the owner or master with safety rules and required safety certificates in relation to chemical tankers, liquefied gas cargo and nuclear carriage ships, high-speed craft, ss 24, 33, 40 and 49, respectively.

5.4.1.4 Offences related to safe manning Regulations

Chapter 6 of MSA 2010 deals with safe manning regulations pursuant to the amendments to the STCW Convention and the SOLAS 1974 Convention. The duties of the owner and master are set out (ss 61–62). Various offences are prescribed for breaches of watchkeeping, hours of work or rest, safety management, certification of seafarers, training of seafarers, occupational health and crew accommodation (s 63).

5.4.1.5 Offences in relation to safety measures for life-saving

Chapter 6 of the MSA 2010 provides detailed regulations with regard to life-saving appliances and arrangements. It is the duty of the owner and the master of a ship to ensure that the requirements are complied with, failing which they will be committing an offence and be liable to pay fines.

5.4.1.6 Offences in relation to a dangerously unsafe ship

Section 98 of MSA 1995, which replaced s 30 of MSA 1988, makes the owner and master of a dangerously unsafe ship, or any other person who has assumed the responsibility for safety matters (under a demise charter or a management agreement), guilty of an offence liable on summary conviction to a fine up to £50,000, or, on conviction on indictment, to imprisonment for up to 2 years.

'Dangerously unsafe' is defined in s 94, as amended by the Merchant Shipping and Maritime Security Act 1997:[73]

> A ship in port is dangerously unsafe if it is unfit to go to sea without serious danger to human life. A ship at sea is dangerously unsafe, if, having regard to the nature of the service for which it is being used, or intended, the ship is, by reason of the matters mentioned in sub-s (2), either unfit to remain at sea without serious danger to human life, or unfit to go on a voyage without serious danger to human life.

Incidents of unsafe condition include the unsuitability of machinery or equipment, under-manning, overloading or unsafe loading.

The only defence under this provision is proof by the accused that, at the time of the offence, arrangements had been made to ensure the ship's fitness before she was sent to sea.

73 See Sched 1, para 1.

5.4.1.7 Offences related to unsafe operation of ships

Section 100, which replaced s 31 of the MSA 1988, imposes a duty upon the owner, demise charterer or manager of a ship to take all reasonable steps to ensure that the ship is operated in a safe manner, failing which it shall be a criminal offence punishable on summary conviction or on indictment. By contrast to s 98, this section does not extend the liability to the master.

The first decision on unsafe operation of a ship under the predecessor to s 100 was (the somewhat inappropriately named) ***The Safe Carrier***,[74] which is worth mentioning in some detail to see the extent to which the SMS of the ISM Code is likely to prevent the same, or similar, incidents from happening, and, if they do, whether the SMM will provide the evidence required for conviction of the owner or manager under this section.

The ship managers were charged with an offence for failing to ensure that the vessel was operated in a safe manner, particularly by allowing the chief engineer less than 3 hours to familiarise himself with the ship before sailing. Usually, he would need 3 days for a newly converted ship. During the next 24 hours, the engines broke down, leaving the ship in total black-out drifting at sea. The service tanks had run dry because the fuel purifier throughput was inadequate to meet the engine demand. The justices for the city of Newcastle upon Tyne convicted the managers, but stated a case for the opinion of the Divisional Court of the High Court, which quashed the conviction. The Secretary of State for Transport appealed to the House of Lords.

The issues were these: (a) whether the principle of the *Tesco v Nattrass* case (that the corporation was criminally liable only for the conduct of those representing its directing mind and will) applied; (b) whether s 31 provided for strict liability; and (c) whether there was vicarious liability under the section on the part of the manager, if any of his employees failed to comply with the requirements of the section, or whether there was a crime only if the manager himself, or someone whose omission was to be attributed to the company, failed to comply.

It was held by the House of Lords that, to secure a conviction under s 31, the prosecution must prove beyond reasonable doubt that the accused owner, charterer or manager of a ship had failed to take all reasonable steps to secure that the ship was operated in a safe manner. The fault of an employee other than senior management in putting the ship to sea with an engineer insufficiently familiar with the ship could not be attributed to the company (the Tesco principle applied). There was no evidence as to how it came about that the engineer was only allowed very little time to become familiar with the ship. It further held that it was not helpful to categorise the offence as being or not being one of strict liability. The section provides simply for failure to take steps that, by an objective standard, must be reasonable. It is a personal duty, and the owner, charterer or manager will not be criminally liable for the acts or omissions of his subordinate employees if he has himself taken all such steps that were 'reasonable to him'.

Undoubtedly, in future cases, there should be evidence in the ISM Code documentation to show how the engineer of *The Safe Carrier* was allowed only such a short time to become familiar with the ship, and who ordered the ship to sail. In any event, if the company is complying with both the ISM Code and the

74 [1994] 1 Lloyd's Rep 589 (HL).

STCW Convention, which specifically require that sufficient familiarisation of new personnel on the ship should be given, a casualty such as *The Safe Carrier* should not occur again.

5.4.1.8 Other offences

There are also other statutory offences under the MSA 1995 for breach of the collision regulations, which are referred to in Chapter 9, below, and for breach of the statutory provisions in relation to pollution damage, examined in Chapter 16. The EU Criminalisation Directive, as amended, is examined in Chapter 2, above. The ISM documentation or non-documentation will provide the evidence required to prove serious negligence, which is one aspect of the conduct required under the Directive.

In connection with criminal liabilities arising under the MSA 1995, s 277 refers to offences by officers of corporations. It makes a director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in such a capacity, as well as the body corporate, guilty of the relevant offence punished accordingly, if it is proved that the offence was committed with the consent or connivance of, or attributable to any neglect on the part of, any of them. This will be relevant also in the interpretation of offences under the Regulations that enact the ISM Code, below.

5.4.2 Criminal liability under the Merchant Shipping (ISMC) Regulations[75]

The statutory instrument (outlined in Chapter 3, above) was issued under the powers given to the Secretary of State by s 85 of the MSA 1995. Its provisions apply to UK ships, wherever they may be, and to other ships while they are within UK waters.

Regulation 16 of the amended Regulations sets out offences that may be committed by the company, or the master of the ship, or the DPA, or any other person authorised to implement the ISM provisions, when there is an infringement of the duties provided by Regulations 4 and 5 (relating to putting to sea without ISM certification), 7 (specifying the master's duties), 8 (specifying duties in relation to the DPA) and 12 (relating to breach of exceptions granted). It also provides penalties for breach (see Chapter 3, above).

The Regulations do not specify how liability is to be attributed to the company, but it is presumed that the officers who will be relevant for attributing liability to the company through their acts or omissions will be the senior officers of the company, as stated in s 277 of the MSA 1995, above.

In particular, the liability of directors, managers (of a high managerial position) or company secretary, or of persons authorised to act in such capacity, will be attributed to the company. The persons who commit the specified offences will also be liable to pay a fine or to be imprisoned, if their guilt is proved.

It should be borne in mind that the aforesaid offences will apply to foreign ships when they are in UK waters. The legal implications of the ISM Code are made clear and, subject to the defence provided under Regulation 17, which requires the person

75 SI 1998/1561; this SI will be replaced by a new SI once the new Regulations drafted to implement the 2010 amendments to the Code are implemented.

charged with the offence to show that he took all reasonable precautions and exercised due diligence to avoid the commission of the offence, there will be penalties for the specified breaches of the Code.

5.4.3 Criminal liability of a company prior to the Corporate Manslaughter Act 2007

This area of the law affects all corporations operating in the UK. If a shipping company is not a UK company, or it does not operate in the UK but death occurs on board its ship when the ship is within UK waters, the English court will have jurisdiction over the matter.[76]

The problems of applying the common law offence of involuntary or gross negligence manslaughter, which is applicable to individuals but inappropriate to corporations, were solved by the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH Act) (see below). However, to understand why the Act was needed, the issues posed by the common law offence are explained in the following paragraphs.

5.4.3.1 The offence of involuntary or gross negligence manslaughter[77]

Interest in the subject of corporate manslaughter arose, generally, since the occurrence of serious train disasters, such as Clapham Junction, Southall, Paddington and Hatfield, just to mention a few that gave rise to a public outcry. In 1987, there was the King's Cross fire, in which 31 people died. The cause was the failure of the various groups and individuals within the overall corporate structure to identify their respective areas of responsibility. Also in 1987, there was a shipping disaster, the sinking of the ferry, *The Herald of Free Enterprise*, killing 192 people. The official inquiry, chaired by Sheen J, found that 'from the top to bottom the body corporate was infected with the disease of sloppiness'. The failure on the part of shore management to give proper and clear directions was a contributory cause of the disaster. In 1988, there was the *Piper Alpha* oilrig explosion, killing 167 people. The alleged causes were 'mundane design faults', human error and unsafe working conditions. In 1989, the *Bowbelle–Marchioness* collision on the Thames caused the deaths of 51 people on the pleasure boat. The only successful prosecution for gross negligence manslaughter involved a company owned by one man, who was jailed for 3 years and paid a fine following the Lyme Bay canoeing tragedy in 1993, in which four teenagers died[78].

The central question is how to hold a corporation criminally liable for loss of human life? Under common law, for a company to be found guilty of manslaughter, two conditions had to be met: (a) an individual of the company had to be found guilty of gross negligence manslaughter; (b) that individual had to be identified as the controlling mind of the company.

76 Whether the directors of the foreign-based company could be extradited to be tried in the English court would depend on whether there was an extradition treaty between the UK and the country in which the company is incorporated or has its principal place of business.

77 For a historical analysis of the problems involved in this area, see the Law Commission's Report No 237, 1996.

78 The first conviction of a company for involuntary manslaughter by the English court was with regard to a one-man company and, therefore, the principle of identification was easy to apply: *Kite and OLL Ltd* unreported, 8 December (Winchester Crown Court), (1994) *The Independent*, 9 December, '. . . the company, with the only managing director, stood or fell together', as the trial judge said. See also *Roy Bowles Transport Ltd* (1999) *The Times*, 11 December.

5.4.3.2 The test for gross negligence manslaughter against individuals

The test was laid down by the House of Lords in ***R v Adomako***:[79]

> . . . that in cases of manslaughter by criminal negligence involving a breach of duty the ordinary principles of the law of negligence applied to ascertain whether the defendant had been in breach of a duty of care towards the victim; that on the establishment of such breach of duty the next question was whether it caused the death of the victim, and if so, whether it should be characterised as gross negligence and therefore a crime; and that it was eminently a jury question to decide whether, having regard to the risk of death involved, the defendant's conduct was so bad in all the circumstances as to amount to a criminal act or omission.

Thus, it must first be proved that a duty of care was owed to the victim. Duty of care applies in cases of the tort of negligence. In civil cases, when damages are claimed for pecuniary loss caused to the relatives of a deceased, the claimant must prove that A owed a duty to B to take care, that there was a breach of that duty, and that the breach caused the death. If it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. In criminal cases, on the contrary, the amount and degree of negligence are the determining factors.[80]

The jury may find gross negligence on proof of: (a) indifference to an obvious risk of injury to health; (b) or actual foresight of the risk, coupled either with a determination to run the risk, or with an intention to avoid it, but involving a high degree of negligence in the attempt to avoid it; or (c) inattention, or failure to advert to a serious risk, going beyond mere inadvertence in respect of an obvious and important matter of the defendant's duty demanded of him.[81]

5.4.3.3 Attributing liability for gross negligence manslaughter to a company

A dual system of liability developed by which a corporation could be liable for criminal offences either vicariously or directly.

Vicarious liability generally depends on the relevant offence being construed as one of strict liability, but is not always clear. The doctrine usually applies in relation to statutory offences when that is the intention of the particular statute.[82] For example, in *The Safe Carrier*, it was elaborated by both the Divisional Court[83] and the House of Lords that it was not the intention behind s 31 of the MSA 1988 (which was enacted to prevent the recurrence of situations such as *The Herald of Free Enterprise* case, see below) to make the company criminally liable for breach of duty of an employee, below the board of directors, as that was not intended by Parliament, regardless of whether or not the section imposed strict liability.

79 [1995] 1 AC 171 (HL).
80 Ibid, p 184, per Lord Mackay.
81 The House of Lords agreed with the definition of gross negligence given by the CA in this case.
82 HSWA 1974; *British Steel plc* [1995] 1 CR 586.
83 [1994] 1 Lloyd's Rep 75, pp 80–82.

Direct liability applies to traditional *mens rea* offences and will render a company liable, only when a director or senior officer of the company, the controlling mind, commits all the elements of the offence[84] (the identification doctrine[85]).

Corporations have been held liable for regulatory statutory offences without difficulty. For example, the statutory offences under the MSA 1995 and the offences relating to breaches of the ISM Code provided by the Merchant Shipping Regulations, discussed earlier, define expressly the types of offence and the punishment without requiring *mens rea*. The same applies to the regulatory crimes provided by the Health and Safety at Work Act (HSWA) 1974 for infringement of safety regulations.[86] The crime is simply the failure by specified people in a company to maintain safety standards or to take reasonable precautions, as defined by the relevant Acts.

To convict a company for gross negligence manslaughter, the prosecution had to satisfy the test of gross negligence, which applies in the case of individuals.[87] Thus, the common law corporate manslaughter had been parasitical upon the offence that applies to individuals, and the guilt or innocence of the company was entirely dependent on the guilt or innocence of the individual. The additional hurdle had been the fact that the company's management tends to delegate operational responsibility down the management chain, and complex management structures enabled corporations to escape liability because of the difficulty in identifying the person in the senior management who might have been responsible.

The Herald of Free Enterprise[88] provides the immediate and much-debated example. Briefly, what caused the disaster were these facts:

(a) the assistant bosun failed to close the bow doors of the ferry before it sailed;
(b) the chief officer failed to check that the bow doors were shut;
(c) the master, who set off at a maximum speed in an overcrowded boat, was responsible for the safety of the ship, but he had followed the system approved by the senior management;
(d) the senior management failed to oversee what practices were followed by different members of the crew on board and to enforce the instructions that had been issued. In addition, the management had not acted upon reports of previous open door incidents;
(e) the board of directors did not appreciate their responsibilities for the safe management of their ships and did not apply their mind to safety issues.

84 See, e.g., Lacey, N and Wells, C, *Reconstructing Criminal Law*, 2nd edn, 1998, Butterworths, p 515.

85 Another approach is known as the aggregation doctrine: this approach is known in the US as the *collective knowledge doctrine* and aggregates all the acts and mental elements of various company employees and finds the offence if all the elements of manslaughter are made out, though not necessarily within a single controlling mind. It was rejected in *The Herald of Free Enterprise* case.

86 *R v British Steel* [1995] ICR 586; *R v Gateway Foodmarkets* [1997] ICR 382; *R v Nelson Group Services Maintenance Ltd* [1999] ICR 1004.

87 *The Adomako* [1995] 1 AC 171 (HL).

88 *R v HM Coroner for East Kent ex p Spooner and Others* (1989) 88 Cr App Rep 10 and *R v P&O European Ferries (Dover) Ltd* (1990) 93 Cr App Rep 72.

In ***R v HM Coroner for East Kent ex p Spooner***,[89] Bingham LJ noted that:

> A company may be vicariously liable for the negligent acts and omissions of its servants and agents, but for a company to be criminally liable for manslaughter . . . it is required that [culpability for] manslaughter should be established not against those who acted for, or in the name of the company but against those who were to be identified as the embodiment of the company itself.

The identification doctrine became the established route to the imposition of corporate criminal liability. In *The Herald*, it could not be proved that the risk of open-door sailing was obvious to any of the crew and to others who testified, nor to any of the senior managers.[90] Accordingly, no *mens rea* could be attributed to the company, and it was not acceptable to the court to aggregate the faults of each of those liable. Turner J acquitted P&O[91] in the criminal proceeding brought against the company, although Sheen J, who chaired the public inquiry, was considerably critical about the conduct of everyone in the company.

Despite this decision, the Crown, in the trial of Great Western Trains over the Southall train disaster in 1998, tried to argue that the identification doctrine should no longer apply, and that it was possible to consider the conduct of the 'company' as a whole, rather than the conduct of an individual being the 'controlling mind' of the company. The trial judge, however, rejected this argument.

Accordingly, he concluded that the doctrine of identification, which was both clear, certain and established, was the relevant doctrine by which a corporation may be fixed with liability for manslaughter by gross negligence. Following this ruling, the Attorney General asked the CA for clarification of the law on this point. In ***Attorney General's Reference No 2/1999***,[92] the court held that the trial judge was correct and confirmed that: '. . . the identification principle remains the only basis in common law for corporate liability for gross negligence manslaughter'.

However, the identification doctrine proved to be unworkable insofar as the conviction of a company was concerned.

5.4.4 Corporate manslaughter under the CMCH Act 2007

5.4.4.1 The Law Commission proposal

In view of the above difficulties, the Law Commission, in 1996,[93] proposed reform in corporate killing and set out in its recommendations three separate offences:

(a) Corporate killing, when there is management failure (as opposed to operational negligence of employees), in circumstances in which the conduct of the corporation falls significantly below what might reasonably be expected. Such

89 (1989) 88 Cr App R 10.

90 At the time of the prosecution, the courts were still applying the recklessness test of criminal liability, i.e. failure to appreciate an obvious and serious risk of injury, as derived from *The Lawrence* [1982] AC 152, prior to the test of gross negligence of *The Adomako* [1995] 1 AC 171.

91 In *R v P&O European Ferries (Dover) Ltd* (1990) 93 Cr App Rep 72.

92 [2000] EWCA Crim 10.

93 Law Commission Report No 237 (*Involuntary Manslaughter*, 1996).

management failure must have caused the death. There is no requirement to show that the risk was obvious, or that the company was capable of appreciating the risk.

(b) Reckless killing.

(c) Killing by gross negligence, which does not require proof that a duty of care was owed to the victim, and it would apply to prosecution of directors and officers of companies personally.

All three offences were proposed as a replacement for the common law crime of gross negligence manslaughter for breach of duty of care. They were considered by the Government, which published its first consultation document in 2000. It took some years before the Bill went through the various stages, and there were many amendments to the original proposal. However, rail crash victims put pressure upon the Government to carry out its promise made in 1997 to introduce a corporate manslaughter offence. The period of consultation finished in June 2005. It was believed that merely making additions to the regulatory framework for health and safety would not be good enough.

A Bill entitled The Corporate Manslaughter and Corporate Homicide Bill[94] was issued in October 2006, and it was made an Act (the CMCH) in 2007. It is called the Corporate Manslaughter Act for England and Wales and Corporate Homicide for Scotland. It came into force on 6 April 2008.[95]

The Act has no retrospective effect. Where any of the conduct or events alleged to constitute the offence occurred before 6 April 2008, the pre-existing common law, as shown above, will apply. Otherwise, corporate liability for manslaughter at common law is abolished (s 20).

5.4.4.2 The reason for the offence under the CMCH

The offence was introduced to provide means of accountability for very serious management failings across the organisation; it is much wider in scope than simply overcoming the problems, explained above, about proving gross negligence on the part of the corporation. Both this Act and the Bribery Act 2010, which came into force on 1 July 2011, place corporate criminal liability on the basis of management failings and do not require a directing mind to be guilty of an offence. They focus on the management practices and procedures of the organisation. The CMCH is intended to be used in conjunction with other forms of accountability, such as gross negligence manslaughter for individuals and other health and safety legislation.

5.4.4.3 Elements of the offence (s 1)

- The organisation must owe a 'relevant duty of care' to the victim.
- It must be in breach of that duty of care as a result of the way in which the activities of the organisation were managed or organised.

94 'Corporate manslaughter' will be an offence under the law of England and Wales, and 'corporate homicide' will be an offence under the law of Scotland.

95 The provisions of the Act relating to deaths in custody were brought into force on 1 September 2011.

- The way in which the organisation's activities were managed or organised by the senior management is a substantial element in the breach (causation).
- The management failure must amount to a gross breach of the duty of care, in that:
  – the conduct that constitutes the breach falls far below what could reasonably have been expected from the organisation in the circumstances.
- 'Senior management' in relation to the organisation means the person who plays significant roles in:
  – the making of the decision about how the whole or substantial part of its activities is to be managed or organised, or
  – the actual managing or organising of the whole or a substantial part of those activities.

5.4.4.4 Who are the organisations (s 1(2))?

The organisations to which the section applies are:

(a) corporations;
(b) partnerships, provided that they are employers;
(c) government departments and other public bodies;
(d) police forces;
(e) trade unions or employers' associations.

An individual cannot be guilty of aiding and abetting or procuring the commission of an offence of corporate manslaughter (s 18). The common law offence applies to individual people of the organisation.

5.4.4.5 Meaning of the 'relevant duty of care' (s 2)

The Act describes the situation in which the relevant duty of care is owed, so that the problems that existed in connection to finding whether a duty of care was owed under common law negligence is overcome.

A 'relevant duty of care' in relation to an organisation means any of the following duties owed by it under the law of negligence:

(a) a duty owned to its employees or to other persons working for the organisation or performing services for it;
(b) a duty owed as occupier of premises;
(c) a duty owed in connection with:
  (i) the supply by the organisation of goods or services (whether for consideration or not);
  (ii) the carrying on by the organisation of any construction or maintenance operations;
  (iii) the carrying on by the organisation of any other activity on a commercial basis; or
  (iv) the use or keeping by the organisation of any plant, vehicle or other thing;
(d) a duty owed to a person who, by reason of being a person within sub-s (2) (persons in custody), is someone for whose safety the organisation is responsible.

Any duty of care owed in respect of action taken pursuant to the MSA 1995 (s 21) (safety directions) is not a relevant duty of care unless it falls within s 2(1)(a) or (b), above.

5.4.4.6 Question of law and question of fact

Whether a particular organisation owes a duty of care to a particular individual is a question of law (s 2(5)).

Once it is established that an organisation owed a relevant duty of care, it falls to the jury to decide whether there was a gross breach of that duty. Section 8 of the Act sets out certain factors that a jury must take into account when deciding whether there was gross breach of the duty, such as:

- whether the organisation failed to comply with any health and safety legislation;
- how serious that failure was;
- how much of a risk of death it posed.

The jury may also consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned above, or to have produced tolerance of it. It is also to have regard to any health and safety guidance that relates to the alleged breach (s 8(3)(a)(b)).

Health and safety guidance means any code, manuals or similar publications that are concerned with safety matters and are issued by an authority responsible for the enforcement of any health and safety legislation.

Where, in the same proceedings, there is a charge for corporate manslaughter under this Act and under the health and safety legislation, the jury may, if the interests of justice so require, be invited to return a verdict on each charge (s 19).

5.4.4.7 Excluding common law rules concerning duty of care

Any rule of common law that has the effect of preventing a duty of care from being owed by a person to another by reason of the fact that they are jointly engaged in unlawful conduct, or the victim had accepted the risk of harm, is to be disregarded (s 2(6)).

5.4.4.8 Penalties

An organisation that is guilty of corporate manslaughter is liable on conviction on indictment to a fine (s 1(6)).

In addition, the court has power to order:

(a) remedial action to be taken by the organisation for the breach (s 9), in particular to remedy the management failure that caused the death;
(b) the conviction to be published (s 10).

Whether the court can order compensation to the victim's family is not expressly provided, but it may be implicit from the court's wider discretion under s 9.

The organisation that fails to comply with either the remedial or the publicity order is guilty of an offence and liable on conviction on indictment to a fine.

Although payment of fines may not be regarded as a sufficient deterrent in some cases, the court has discretion as to the amount and, under the Sentencing Guidelines 2010, it will consider the seriousness of the matter, financial matters, as well as mitigating factors. It can order between 2.5 and 10 per cent of the average annual turnover over the previous 3 years. The court will, however, be mindful about the consequences of a high level of fine in order to avoid causing the bankruptcy of the company.

The power of the court to order publication of the conviction would be of value in terms of deterrence, because losing reputation costs more to an organisation than the fine it will have to pay.

When the Act was published, the Ministry of Justice stated that this is an opportunity for employers to think again about how risks are managed. The offence does not require organisations to comply with new regulatory standards, but to ensure they are taking proper steps to meet current legal duties. The Act will mean that those who disregard the safety of others at work, with fatal consequences, are more vulnerable to very serious criminal charges.

5.4.4.9 Prosecutions under the Act

There have been two prosecutions under the new Act: ***Cotswold Geotechnical (Holdings) Ltd***,[96] in which the senior management, Mr Eaton, the sole director and major shareholder in the company, was charged with manslaughter for the death of an employee and was ordered to pay a £385,000 fine. However, this case concerned a single directing mind of the company, and it would not have been difficult even under the old law to find the company guilty.

The second one, in 2011, is ***The Lion Steel Ltd***,[97] in which the company, a manufacturer of steel storage cabinets, was fined £480,000 for corporate manslaughter under the CMCH Act 2007 for the death of an employee who fell through a fragile roof panel at the factory. The court ordered payment in four annual instalments, of which £84,000 was the prosecution's fees. There was no guilty verdict for the charges against two directors for gross negligence manslaughter, and the prosecution agreed to drop the charge against the third director in return for a guilty plea by the company for corporate manslaughter.

While the effect of the Act is undoubtedly a deterrent, giving the opportunity to companies to seriously consider risk management practices, it may be used as a tool by the prosecution by using plea bargaining to collect fines for the government. Consideration should be given to put such funds in a trust specially designated to assist the families of the deceased.

96 [2011] EWCA Crim 1337.
97 T 2011 7411, 20 July 2012, Manchester Crown Court.

5.5 THE IMPLICATIONS OF THE ISM CODE ON CRIMINAL LIABILITIES

Information about management practices will be found in the SMS of an organisation, and, in this respect, the SMS of the ISM Code will provide the evidence as far as shipping organisations are concerned.

Of course, it will be necessary to establish that the death was caused by the way the activities were managed, or organised, by the senior management, which is defined in the Act as the persons who play significant roles in decision-making, or are involved in the actual managing or organising of the whole or a substantial part of the organisation's activities.

Although, in the context of the ISM, what senior management includes for the purpose of the offence remains to be seen, it is implicit from this wording and the spirit of the Act that it would not just be the activities of a few individuals of the senior management, but the management practices as a whole that will be examined.

The activities of those involved in the SMS system will reflect the ethos of the company and how its activities were managed or organised, for the purpose of finding whether there was a breach of the relevant duty of care owed to the victim under the Act.

In this connection, s 8(3) of the Act is in tandem with the philosophy of the Code, and it is worth repeating here:

> The jury may also consider the extent to which the evidence shows that there were attitudes, policies, systems, or accepted practices, within the organisation that were likely to have encouraged any such failure as is mentioned under s 8(2), or to have produced tolerance of it.

It has been commented by some in the shipping industry that this Act may prevent the reporting of accidents, which so far is encouraged for the purpose of learning what went wrong in order to take corrective action. However, this is doubted, because if no reporting is done in breach of the Code's provisions, or if no records are kept about accidents, or near misses, for the purpose of both the internal and external audits, there will be inference of management failure.

It should be borne in mind that the Act is not meant to be the policeman for prosecutions but, in the same way as the ISM Code, it should be regarded as setting in stone the yardstick for employers' conduct, giving them an opportunity to think again about how risks are to be managed.

This page intentionally left blank

PART II
OWNERSHIP ASPECTS AND MANAGEMENT OF RISKS

This page intentionally left blank

CHAPTER 5

SHIP-OWNERSHIP AND SHIP MANAGERS' RISKS

Introduction 135
1 Ownership principles 135
2 Statutory overview of ownership and registration of British ships 139
3 Management of ships 145

INTRODUCTION

This chapter begins with ownership principles and registration of British ships under the Merchant Shipping Acts, including an outline of the tonnage tax. The majority of ships are, however, registered in foreign registries. Readers interested in the registration rules of a particular State should look at books specialising in this subject.

This chapter focuses more on the management of ships under the latest BIMCO management agreements, SHIPMAN and CREWMAN 2009, and on the law concerning the managers' obligations, duties and potential liabilities.

1 OWNERSHIP PRINCIPLES

1.1 ACQUIRING OWNERSHIP

Evidence of ownership rests in the documents of registration of a ship, to be found in the relevant ship's registry. However, registration provides only prima facie evidence of the registered owner being the true owner and it is not conclusive evidence of ownership. The burden of proof shifts to the person alleging to be the owner. The court has jurisdiction to make a declaration as to which party would be entitled to be registered as the legal owner of a ship.[1] In the absence of fraud, execution and registration of the bill of sale would give good title.[2] The legal person registered to be the owner would be liable for the negligence of those employed in the ship,[3] unless the ship has been chartered to a charterer by demise.

The common and voluntary methods of acquiring ownership are discussed in Chapter 7 (regarding new buildings) and Chapter 8 (regarding the commercial

1 *The Bineta* [1966] 3 All ER 1007.
2 *The Horlock* (1877) 2 PD 243.
3 *Hibbs v Ross* (1866) 1 QBD 534.

purchase of second-hand ships). Ownership can also be acquired involuntarily, either by inheritance or bankruptcy, which is known as transmission. It may be acquired by capture of an enemy ship in times of war, or by judicial sale (see Volume 1 of this book).

1.2 CO-OWNERSHIP

Under English law, the principles applicable to ownership of chattels[4] apply to ownership of ships. When two or more people own a ship jointly, they own it either as 'joint tenants' or as 'tenants in common'. These phrases bear the meaning attributed to them at common law.

1.2.1 Joint tenants

There can be joint owners of shares in the ship who have a single joint right to possession of the whole chattel. In the absence of any words to the contrary, when a chattel is transferred to two or more people, they will hold the chattel as 'joint tenants' with a unity of title. Joint tenants do not have an exclusive right to possession as against their co-owners. When one of them dies his interest in the ship will automatically accrue to the other.

If a joint tenant disposes of his 'interest' in the ship by a lifetime gift or assignment, the effect of it will be the severance of the joint tenancy, and the third party will become a tenant in common with the other co-owners.

The ownership in the 'whole ship' owned jointly could only be transferred to a third person by the agreement of all co-owners. If one of them purports to sell the absolute interest in the ship without the authority of his co-owners, he cannot pass greater title than he actually has, *nemo dat quod non habet*. So the purchaser will acquire the seller's interest in the ship and become a tenant in common with the other joint owners.

1.2.2 Tenants in common

Tenants in common own separate shares in the ship, with an undivided interest in the whole of their shares and, therefore, they have several rights to possession in the ship, unless it is otherwise agreed between them. There must be an express intention of the co-owners, in such a case, that they should have separate shares in the ship for them to be tenants in common, otherwise they will be joint tenants. Indications of their being tenants in common will be inferred either from the words used in their agreement, for example, 'they are to have separate interests in the ship in equal shares', or when the joint owners have contributed to the purchase price in unequal proportions. When one of them dies his or her interest in the ship passes to his/her estate or pursuant to the terms of his/her will.

A tenant in common can dispose of his 'interest' in the ship, and the assignee or buyer of it will step into his position becoming a tenant in common with the others.

4 Palmer, N and McKendrick, E (eds), *Interests in Goods*, 2nd edn, 1998, LLP, Ch 10.

1.2.3 The relationship between co-owners

The relationship between co-owners is normally regulated by express agreement. In the absence of an agreement, the rights and remedies between co-owners are governed by common law. For example, if one co-owner wrongfully takes possession of the chattel, or wrongfully disposes of it, or refuses to give it back when demanded, he or she will commit the tort of conversion.

When the co-owners disagree about the employment of the ship, the principle in English law is that the will of the majority must prevail, provided that the interest of the dissenting minority can be protected. The court's power of sale may be exercised, even on the application of a minority, if it is for the interest of all parties.[5]

All part-owners must consent to a voyage, but when the minority shareholders dissent, they will be excluded from any profits or losses of the voyage. The right of a part-owner holding a minority of shares in a vessel to institute an action of restraint and arrest the vessel is undoubted. Upon sufficient proof being adduced by the minority shareholder that he/she objects to the manner in which the vessel is being employed, the court is bound to order security to be provided by the remaining part-owners for the safe return of the vessel and in the amount of the plaintiff's interest in the vessel.[6] If the court makes the order for security, the minority, though not liable for the expenses of the voyage on which the vessel is engaged, will not be entitled to any share of the profits of the adventure. The right of the minority to arrest the vessel is in no way affected by the fact that the ship's husband, who negotiated the charterparty to which the minority objects, was appointed by the whole body of the co-owners without objection on the part of the objecting part-owner.[7]

The foregoing principles derive from nineteenth-century cases and have been applied by the court up to the present day, except where there is an agreement to the contrary.

The case of ***The Vanessa Ann***,[8] a fishing vessel, involved three part-owners. The ship had not been registered because of defects of the registration of previous owners. It had been agreed between them that the vessel would be converted to a topsail schooner for use as a pleasure cruiser. In the meantime, one of the part-owners signed a charterparty for the vessel for day cruises from Antigua at $10,000 per week, providing for cancellation of the contract upon 28 days' notice. The length of the charterparty was later varied to last for 12 months. The plaintiff, who had already proposed to the other owners to sell his share to them, opposed the length of the charter and arrested the ship, thus obstructing the commencement of the charter. He applied to court for sale of the vessel *pendente lite*. The main dispute at this hearing was the employment of the vessel.

Staughton J, taking the interests of all parties into account, exercised his discretion and ordered the defendants: (a) to execute an equitable mortgage of the vessel or of their interest therein containing the usual covenants to secure the plaintiff's claims

5 *The Hereward* [1895] P 284: The minority shareholders applied to the court for 'restraint' of the majority and the sale of the ship. The judge held that, when there appears to be no way of preventing the sacrifice of the property except by a sale, the court ought to direct a sale, as the majority of the co-owners had no right to change the character of the ownership without the consent of all parties. He applied *The Nelly Schneider* (1878) 3 PD 152.

6 *The Appollo* (1880) 1 Hagg 306.

7 *The Talca* (1880) 5 PD 169.

8 [1985] 1 Lloyd's Rep 549.

in a form satisfactory to the plaintiff; (b) to undertake to the court that they would procure the execution and registration of a statutory mortgage as soon as possible; and (c) to undertake to the court that they would perform all the covenants. An equitable mortgage, he said, was the best that could be achieved, for the time being, until the registration of the vessel in the names of the parties had been perfected, bearing also in mind that the plaintiff wished to get out of the partnership.

Even if there is a management agreement signed by all co-owners, by which a third party is authorised to carry out the management of the ship, the minority shareholders can still object (subject to any contrary term) to the way the ship is managed. By an action of restraint,[9] they will be entitled to bail in the value of their shares, but they will obtain no profits nor incur any liabilities concerning a particular voyage.[10] An action of restraint may not be sustained if the part-owner is also the mortgagee of the ship, who arrests the ship while she is performing a charterparty.[11] Similarly, a purchaser of shares in a ship, which at the time of the sale is on a voyage, will not be entitled to arrest the ship on the ground of objection to the charterparty having already been concluded by the appointed managing owner. The purchaser will be liable for the expenses of the voyage and will be entitled to a share of the freight, but, on the facts of ***The Vindobala***,[12] he had no right to arrest the ship and was liable for any damages resulting from his wrongful act.

1.2.4 Co-ownership in modern times

The relationship between co-owners of ships in modern times is primarily governed by agreements, which contain extensive clauses of every aspect of their rights and obligations. The company structures of ownership are complex, and they will either be in a form of various limited companies, parent and subsidiaries, each owning one ship, or in the form of public companies, depending on their financial arrangements. One company, for example, in the ownership venture may provide management and operation services, and another may charter the ship on a long bareboat charter and engage chartering brokers for the ship's employment. A different company may deal with the employment of crew, their competence and training, as well as their welfare. As will be shown below, managing companies of a ship or a fleet can be exposed to liabilities and, with the advent of the ISM Code, they would have an obligation to establish the operation of an SMS, if they agreed to take over the obligations under the ISM and signed up as 'the company' under the ISM provisions. Breach of statutory provisions with regard to safe operation of ships will expose them, in addition to the owners, to criminal liabilities.

9 Under the MSA 1995, Sched 1, para 6 (previously MSA 1894, s 30), upon an application of any interested person in the ship (who has a proprietary right), the court has power to grant an injunction to prevent, for a specified time, any dealing with a registered ship or a share in it.

10 *The England* (1886) 12 PD 32.

11 *The Innisfallen* (1886) LR 1 A&E 72; however, see new developments in the law of wrongful interference with contracts in Ch 6 of this volume.

12 *The Vindobala* (1888) 13 PD 42: part owners who do not dissent with regard to the employment of a ship, and are aware that other part owners have dissented, are liable to bear the expenses, and are entitled to receive the profits of the ship in the proportion that their shares bear to the number of shares in the ship, after the deduction of the shares of the dissentient part owners.

2 STATUTORY OVERVIEW OF OWNERSHIP AND REGISTRATION OF BRITISH SHIPS

2.1 THE OLD LAW UNDER THE MSA 1894

Under s 1 of the previous Merchant Shipping Act (MSA) of 1894, only British subjects (by birth or naturalisation) could own all 64 shares in a British ship. If the owner was a corporation, it should have been registered and have had its principal place of business in Her Majesty's dominion. Although this mechanism permitted foreign capital investment to a certain extent, it was in a way prohibiting because of the requirement that the company should be established under the laws of some part of Her Majesty's dominions and have its principal place of business there. From a taxation point of view, this was discouraging to investment. Moreover, breach of the statutory provisions would result in forfeiture of the ship to the Crown.[13]

2.2 FUNDAMENTAL CHANGES BROUGHT BY THE MSA 1988

In 1988, the British Government launched a new system of ownership and registration of British ships, aiming to encourage foreign investment into British shipping. It was felt that English law, unlike the law of other countries, was too restrictive to allow foreign capital.

The MSA 1988 brought fundamental changes.[14] First, a new UK shipping register of ships was created, which replaced the old British Empire register. The new register stopped the imposition of UK maritime law on old dependent territories.

Second, the 1988 Act introduced, for the first time, the registration of ships in the British Registry as an entitlement, instead of as an obligation. Consequently, the new system of registration permitted the 'flagging out' of ships to foreign registries. Therefore, the definition of a British ship changed from one based on ownership to one based on registration under the provisions of the MSA.

Third, the Act introduced flexibility in ownership, in that only the majority interest in a ship of 24 metres,[15] or more, in length (instead of all 64 shares in it) had to be British owned. Furthermore, if these persons were not UK residents, then a representative person, being a UK resident, should be appointed providing the British connection.

13 *The Polzeath* [1916] P 241 (CA): a ship registered as British was owned by a company registered as British under the Companies Acts. Doubts having arisen as to the title of the ship to be registered as a British ship, the Commissioners of Customs and Excise, pursuant to the provisions of s 51 of the MSA 1906, directed the plaintiff, the registrar of shipping at the ship's port of registry, to require evidence to be given to his satisfaction that the ship was entitled to be so registered. The evidence adduced established that the affairs of the company, from the time the ship was bought and put upon the register, were directed from Hamburg by the chairman of the board of directors, a naturalised British subject of German origin, who held the majority of the shares and resided at Hamburg, both before and after the outbreak of war between Great Britain and Germany. Accordingly, proceedings for forfeiture were instituted in accordance with the provisions of s 76 of the MSA 1894 – as the principal place of business of the company was not within His Majesty's dominions, the ship, therefore, was forfeit to the Crown.

14 See Gaskell, N, 'The Merchant Shipping Act 1988' [1989] LMCLQ 133.

15 Ships below 24 m were dealt with for registration purposes by the MSA 1983, which provided for a small ships register.

2.3 OWNING A BRITISH SHIP UNDER THE MSA 1988 – THE BRITISH CONNECTION

As defined by s 3 of the MSA 1988, persons qualified to own a British ship were: (a) British citizens; (b) British Crown dependent territories' citizens; (c) British citizens overseas;[16] (d) companies incorporated in the UK, or in any of the relevant overseas territories,[17] and having their principal place of business in the UK, or in any such territory; (e) persons who were British subjects under the Nationality Act (NA) 1981; (f) persons who, under the Hong Kong (British Nationality) Order 1986, were British nationals (overseas); (g) and citizens of the Republic of Ireland.

Section 5 of this Act encouraged the registration of a ship owned by a foreign company registered in any relevant overseas territory to be registered as British, provided there was a representative in the UK.

2.4 THE IRREGULARITY OF MSA 1988 ON FISHING VESSELS

The Act invented a rigid system for fishing vessels by setting up a separate British fishing register to prevent fishing 'quota hopping' by non-British ships changing to the British Registry. Under s 14, the legal ownership, management and control of fishing vessels were required to be British. This resulted in great controversy with European fishing competitors, which ended up in the ECJ in *The Factortame*. A change to the statute became necessary later by the Merchant Shipping (Registration, etc.) Act (MS(Reg)A) 1993.

Since this case establishes a general principle with regard to resolving a conflict between European law and national law, it is important to refer to it in a short summary.

The Factortame[18]

Spanish nationals, who owned between them 95 deep-sea fishing vessels, were registered as British under the 1894 Act. In the light of the change of the statutory regime of registration by the 1988 Act, vessels registered as British under the previous Act were required to be re-registered. The 95 vessels in question failed to satisfy the conditions for registration under s 14 of the 1988 Act by reason of being managed and controlled from Spain and by Spanish nationals; also, by reason of having the majority of the beneficial ownership of the shares in companies held by Spanish nationals.

They applied for (a) a judicial review seeking to challenge the legality of these provisions of the Act, on the ground that they contravened the provisions of the EEC Treaty by depriving the applicants of Community law rights; and (b) an interim relief from the application of the 1988 Act until such time as final judgment was given on their application for judicial review. The judge stayed the proceedings until the matter

16 Such as in Hong Kong.
17 The Isle of Man and any of the Channel Islands (included colonies, but that is now out of date).
18 [1991] AC 603 (HL).

of Community law was decided at a preliminary ruling by the ECJ and, pending judgment, ordered that the application of that part of the 1988 Act be disapplied by way of an interim relief granted to the applicants.

However, on appeal, both the CA and the House of Lords held that, under English law, English courts had no jurisdiction to suspend the application of Acts of Parliament by way of interim relief in advance of any decision by the ECJ. The House of Lords referred the matter of interim relief to the European Court, which held that, in a case concerning Community law, if a national court considered that the only obstacle to granting such a relief was a rule of national law, it had to set that rule aside.

Therefore, on reference back to the Lords, it was held that, in considering whether an interim relief should be granted, the court had to consider first whether there was an adequate remedy in damages and then, if no such remedy existed, the court had to take into account the interests of the public to whom the authority enforcing the law owed a duty. The court had discretion and was not obliged to restrain the public authority from enforcing the law, unless it was satisfied that the challenge to its validity was sufficiently and firmly based to justify such an exceptional course being taken. The applicants' challenge to the compatibility of the 1988 Act with Community law was prima facie a strong one in the light of ECJ cases. As the substantial detriment to public interest was not sufficient to outweigh the obvious and immediate damage that would continue to be caused to the applicants, if interim relief was not granted, interim relief was granted.

In a subsequent case,[19] ***Commission v Greece***, the ECJ struck down Greek legislation with regard to the registration of ships as being contrary to EC law. It held that Member States should not discriminate on grounds of nationality when exercising their powers to define the conditions on which they would grant nationality to vessels, but should ensure that there is a genuine link[20] between the particular State and the ship.

2.5 ELIGIBILITY TO OWN A BRITISH SHIP UNDER THE MSA 1995

2.5.1 British citizens and nationals under the EU Treaty

The provisions of the 1988 Act as to who would be a qualified person to own a British ship were carried forward in the MS(Reg)A 1993, which was accompanied by the Merchant Shipping (Registration of Ships) Regulations 1993 (MS (Reg) Regulations). By Reg 7, the categories of qualified persons outlined in s 3 of the 1988 Act were amalgamated into eight broad categories. The qualifications were extended to EU nationals. Regulation 7(1) as amended by the 1998 Regs provided that qualified persons are:

(a) British citizens;
(b) non-UK nationals exercising their right of freedom of movement of workers or right of establishment under the EU Treaty;

19 *Commission v Greece* (Case C-62/96), judgment 28 November 1997.
20 High Seas Geneva Convention 1958, Art 5, and UNCLOS 1982, Art 91.

(c) British dependent territories' citizens;
(d) British overseas citizens;
(e) persons who under the British NA 1981 are British subjects;
(f) persons who under the Hong Kong (British Nationality) Order 1986 are British nationals (overseas);
(g) bodies corporate incorporated in a European Economic Interest State, or in any relevant British possession, and having their principal place of business in the UK or in any such possession;
(h) European Economic Interest Groupings, being groupings formed in pursuance of Art 1 of Council Regulation (EEC) 2137/85 and registered in the UK.

2.5.2 British connection and majority interest

A person who is not qualified under para 1 of Reg 7 to be the owner of a British ship may nevertheless be one of the owners of such a ship, if:

(a) a majority interest in the ship (within the meaning of Reg 8) is owned by persons who are qualified to be the owners of British ships; and
(b) the ship is registered on Pt I of the Register, which covers ships owned by 'qualified persons', excluding fishing vessels (Pt II) and those registered as small ships (Pt III).

The British connection and majority interest are provided by Reg 8. A representative person in the UK for service of documents and notices is an essential requirement preserved by the Regulations (Regs 8, 9, 18, 19). Thus, subject to having a British connection either by residence, or by a representative in the UK, it became possible for a foreign company incorporated in any of the EU States to own a British ship for the first time.

Upon consolidation of all MSAs by the 1995 Act, which came into force on 1 January 1996, Sched 1 to the MS(Reg)A 1993, concerning British ships their registration and mortgages, was transferred in the new Act, under Pt I and Pt II and Schedule 1. The 1993 MS(Reg) Regulations issued under the previous Act, as amended in 1994 and 1998, are still applicable. The Secretary of State can review and issue new regulations empowered by s 10 of MSA 1995.

Thus, the MS(Reg) Regulations 1993 (Reg 2) created a new Central Register of British ships[21] available for public inspection, divided into four parts: (a) the large ships register for ships of 24 metres in length and more (Pt I); (b) the register of fishing vessels (Pt II); (c) the small ships register (Pt III); and (d) the bareboat register (Pt IV).

For the first time, by s 7 of the 1993 Act, now s 17 of the 1995 Act, British bareboat charterers became entitled to register a foreign chartered vessel under the British flag under Pt IV of the Registry.[22]

21 The register of ships maintained under the 1894 Act, the small ships register maintained under the 1983 Act and the register of fishing vessels under the 1988 Act were closed by s 1 of the 1993 Act.

22 The formalities of registration are dealt with in Pt X of the 1993 MS(Reg) Regulations.

2.6 ELIGIBILITY TO OWN A BRITISH FISHING VESSEL

British citizens or nationals of other EU States (resident and domiciled in an EU State) must wholly own the legal and beneficial title of a fishing vessel (Regs 12, 13) Pt IV of MS(Reg) Regulations 1993. If the above requirements are not met, but the person has been resident in the UK for a long time, there may be a dispensation of the provisions by the Secretary of State who may determine eligibility (Reg 15). In case the owner is a body corporate in any of the EU States, there must be a British connection (Reg 14).

2.7 THE EFFECT OF THE REFORM UPON BRITISH SHIP-OWNERSHIP

The flexibility of registration introduced by the 1988 Act was a noble attempt to encourage the growth of British shipping by lifting the restriction of the criteria for British ownership and making registration in the British Registry optional. However, by making registration in the UK optional, the Act permitted flagging out indirectly. Foreign, cost-effective registers with a flexible taxation system became an attraction.

The unintended effect of the legislation does not, however, give a full answer to the question of why British shipping has declined. In the 1850s, the British controlled 82 per cent of the world shipping tonnage, legislation and colonialism having played a great part in this boom.[23] Until early in the twentieth century, British shipping was still dynamic, including shipbuilding and systems of ship operations, as well as the training of young seamen to be part of a proud merchant navy. Unfortunately, the highlight of British shipping gradually began to decline owing to, by and large, the dilapidating effect of union strikes and the rising costs to maintain British seamen and to fly the British flag, compared with the lures offered by foreign registries. British citizens became reluctant to invest in shipping, considering the risks and the costs inherent in shipping business, when there were more attractive business opportunities on land. Young people no longer saw a career in shipping as attractive.

The British Government has offered some reasons for the decline of British shipping, such as unequal competition for the UK shipping industry from flags that offer lower labour costs when ships are crewed with officers from South East Asia and Russia; the additional costs of operating UK ships and the changing patterns in seaborne trade have shifted the focus of growth to the Far East. The Government accepts that such reasons have caused a steeper decline to UK shipping than to other traditional maritime nations.[24] The answer to explaining the decline certainly lies in a combination of factors, which are beyond the scope of this book, and deserve a different type of study.[25]

23 Davies, M, *Belief in the Sea, State Encouragement of British Merchant Shipping and Shipbuilding*, 1992, LLP.

24 See Department for Trade, *British Shipping – Charting a New Course*, 16 December 1998, www.dft.gov.uk

25 Harlafis, G, *Greek Shipowners and Greece 1945–1975*, 1993, Athlone, explains from a historical point of view how familial bonds and kinship greatly assisted the development of a close network in Greek shipping and contributed to the success of a strong shipping enterprise: see also Harlafis, G, *A History of Greek-Owned Shipping*, 1996, London: Routledge.

Two obvious factors for lack of growth of British shipping are pointed out here, which have been addressed recently by the British Government: (a) the lack of attractions for young people to choose the sea as the area of their profession; and (b) the lack of Government encouragement to cost-effective investment in shipping business. The first has been attended to by the initiative Sea Vision, undertaken by the Chamber of Shipping and supported by the shipping industry. The initiative includes further training of seafarers, raising awareness among the public about the need for promoting seafaring careers, and encouragement of young people to take up a career on board ships, coupled with support for a follow-up career on shore. The second factor, which is linked to the first, has partly been addressed by the Government with the introduction of the UK tonnage tax.

It remains to be seen whether or not an interest by British entrepreneurs in investing in shipping may be reactivated and, considering the present economic climate and high unemployment on land, young people may have few other options but to consider that a career at sea may be inevitable or a necessity.

2.8 BRIEF OUTLINE OF THE UK TONNAGE TAX

Following extensive consultation, the tonnage tax – an optional regime for shipping companies – was introduced into the UK tax system as part of the Finance Act 2000. The provisions implementing the regime form part of the Government's wider policy to bring about a reversal in the decline of the UK fleet and have been widely welcomed by the shipping industry.[26] This new legislation of corporate taxation of shipping companies is based on the net tonnage of vessels operated in the UK. Its aim has been to provide incentives for investment in shipping and boost UK shipping by encouraging ship-owners to relocate to the UK, because their services are very important to the British economy.

A UK-resident ship-owning company may either elect for tonnage tax, or be taxed under the normal corporation tax rules. Since the introduction of the 2000 Act, there have been further developments within the EU for EU flagging requirements and with regard to companies' obligation to train a number of seafarers.[27]

The UK tonnage tax regime provides an alternative of calculating taxable profits of '*qualifying companies*' operating '*qualifying ships*' that are '*strategically and commercially managed*' in the UK. In addition, companies must commit to a minimum training of UK seafarers as a precondition of electing into the tonnage tax regime.

'Qualifying companies' are those operating qualifying ships, and a group qualifies if it includes one or more qualifying companies.

A company is regarded as 'operating' if it operates any ship owned by, or chartered to, the company, unless the ship is chartered out on bareboat charter terms other than to a member of the same group.

26 Visit www.hmrc.gov.uk/international/tonnage.htm; to accompany the legislation, and in order to clarify how the regime works, the Inland Revenue has issued a comprehensive *Statement of Practice*, and the Inland Revenue's *Tonnage Tax Manual* (*TTM*) is available online. Further information can be obtained from the British Chamber of Shipping.

27 Moore Stephens, Greiner, R, 'Off-shore and UK shipping structures, tonnage tax, advantages and disadvantages', delivered in the series of Risk Management Papers, the London Shipping Law Centre, 18 October and 22 November 2000. Since then there have been further developments as outlined in the text above; due acknowledgment is given to Moore Stephens for their regular updates.

'Qualifying ships' are seagoing ships of over 100 gross tonnage used for carriage by sea of passengers, cargo, towage, salvage or other marine assistance. The appropriate authorities must have issued a certificate that allows the ship to lawfully operate at sea, in addition to a valid International Tonnage Certificate (1969) or other valid certificate recording its tonnage.

Vessels specifically excluded are: fishing vessels, factory ships, pleasure craft, harbour or river ferries, offshore installations, tankers dedicated to a particular oilfield, dredgers (unless a qualifying one, which would need to be EU flagged within 3 months of the company starting to operate the ship).

'Strategically' means that a high level of decision-making is taking place in the UK. The 'commercial' management test considers the normal operations and technical management.

A limit of 75 per cent on chartering in tonnage is imposed. As tonnage tax is a low-tax regime, activities falling within the regime are 'ring fenced' from the rest of the corporation tax system.

The EU flagging rules have affected the UK tonnage tax and, naturally, other European tonnage tax systems. Ships that are operated within the UK tonnage tax will be excluded from the regime unless they are registered under an EU flag. This apparently aims to curtail the use of registries with 'flags of convenience'.

Where a tonnage tax company or group starts to operate a new vessel, the vessel must be flagged under the EU flag if, inter alia, less than 60 per cent of the tonnage tax company or group's fleet is flagged under the EU flag. This means that, if the EU flagging requirement applies, the vessel needs to be re-registered under an EU flag within 3 months of first starting to be operated by the company. Alternatively, the company can substitute another ship.

3 MANAGEMENT OF SHIPS

3.1 GENERAL OVERVIEW

In the past, the manager of the ship was known as the ship's husband under English law and was expressly appointed by an agreement to manage the vessel or vessels of a company for its owners, and he was not a part-owner. The ship's husband was distinct from a managing owner, who could be one of the co-owners.[28]

'Shipbrokers and agents' is a term used to represent the owners' managing agents, which are usually incorporated offshore with a representative office in the UK. It may be a subsidiary or a sister company of the owning company, another offshore company. The 'shipbroking company' is delegated with various tasks of management and it may have an equitable interest in the ships owned by the registered owners. The shipbrokers or agents sign contracts on behalf of the owners as agents only.

28 *The Vindobala* (1888) 13 PD 42; (1889) 14 PD 50 (CA).

3.2 THIRD-PARTY MANAGERS

During the last four decades, in particular, since the 1970s, shipping has seen fast developments; the advancement in technology, increase of regulation and the building of more sophisticated ships have led to management of ships by independent professionals, third-party managers, who may manage their own ships, as well as those of others, or may provide management services for others only. The growth of third-party ship management has been essential to financial performance, quality assurance and implementation of new legislation, in particular since the implementation of the ISM and the ISPS Codes.

Traditional and experienced owners may still prefer to keep all management aspects under their control, by setting up their own management company and engaging the necessary expertise in-house or engaging a professional manager as a consultant.

A broad range of activities are undertaken by third-party managers, if the whole management is delegated to them. For example, they supply all the necessary services on board, engage the crew, carry out shore supervision, look after the employment of the ship, arrange for a chain of charterparties and even provide finance for the payment of certain debts. Commercial management has traditionally included marketing and chartering, whereas the technical operation and manning of ships may be kept separately. Some managers provide only crewing management under special agreements.

3.3 THE SHIP MANAGEMENT AGREEMENTS

Although most of the agreements are tailor-made, BIMCO has drafted a simple and straightforward ship management form (SHIPMAN), which is all-embracing on the basic aspects of management. It was first issued in 1988 and was updated in 1998 to reflect the changes brought by the ISM Code and contemporary ship management practices. It has further been amended and reissued as SHIPMAN 2009 to meet further market and legislative changes. The parties to the contract can agree further details to suit their requirements. There are also two BIMCO standard crew management agreements: CREWMAN A, by which the manager engages the crew as an agent for the owner and he is paid a fee plus costs, and CREWMAN B, by which the manager engages the crew as principal (undertaking contractual responsibilities for which he is reimbursed by the owner) and he is paid a lump sum fee.

The objective of the SHIPMAN agreement and the reason for its revision in 1998 were highlighted by BIMCO[29] to be :

- the absence of national or international background law covering third-party ship management, which makes the contract clauses increasingly important;
- the need to deliver a document that provided clear contractual provisions, striking a fair balance between the rights and obligations of the owners and the managers;
- the increasing regulatory burden upon owners and managers demonstrated by the entry into force of the ISM Code.

29 Visit www.bimco.org for the full text of SHIPMAN.

The further revision of SHIPMAN in 2009, which replaced the previous version, was necessary in order to update the standard agreement to reflect current commercial ship management practice and any relevant changes in the law. Much more has been learnt about the interplay between the owners and managers in respect of the ISM Code in the intervening years since 1998. The basic principles and structure of the agreement are maintained, but the layout has been improved, including clarification of the provisions.

SHIPMAN and CREWMAN A and B, which have undergone the most notable changes, have been simultaneously revised so that harmonisation is achieved.

3.3.1 Broad terms of ship management

The standard management agreement broadly includes the following tasks to be performed by the manager:

(a) To engage competent and qualified master and crew for the ship on behalf of the owners (Crew Management).
(b) To provide technical and operational information and management (Technical Management):
  (i) to buy stores and lubricants;
  (ii) to engage and arrange dry-docking and surveys for the vessels;
  (iii) to maintain the ships in class and comply with requirements of class, safety regulations, the ISM and ISPS Codes;
  (iv) to supervise sales and purchases.
(c) To provide employment of the ship and other commercial services (Commercial Management):
  (i) to provide voyage estimates and accounting;
  (ii) to arrange insurance;
  (iii) to subcontract and appoint agents;
  (iv) to provide budgeting and keep true accounts.

The standard ship management agreement responds to a need for uniformity. SHIPMAN has a widespread usage, providing a self-contained document that is used as a pro forma for third-party management. It contains clear contractual provisions, aiming to strike a fair balance between owners and managers.

3.3.2 SHIPMAN 2009

With the parallel revision of all three agreements, consistency has been ensured. As Grant Hunter of the BIMCO documentary committee explains, the revised SHIPMAN can be used as a one-shop stop in respect of most ship management services.

Recognising the importance of both the ISM and ISPS Codes, the definition of and reference to the 'company' on the front of the form is one of the cornerstones of the revised document.

The agreement has been divided into five clear sections:

1 Basis of the agreement;
2 Services;

3 Obligations;
4 Insurance, budgets, income, expenses and fees;
5 Legal, general and duration of the agreement.

The 2009 revision is an extended document with clear headings and definitions of terms. The three different types of management are delineated and provided under separate clauses.

Unlike the previous version of SHIPMAN, the 2009 version puts emphasis under technical management (cl 4) on compliance with the regulations. The manager, if he agrees to undertake the technical management, shall ensure the vessel complies with the ISM and ISPS Codes and with the requirements of the law of the flag State.

Under crew management (cl 5) and CREWMAN A and B, emphasis is placed on the importance of obtaining medical certificates for the crew issued in accordance with the flag requirements, and on ensuring that the crew has common working language and a command of the English language.

Commercial management (cl 6) deals with the employment of the ship and related services, as previously.

Other important clauses are: the insurance arrangements, if agreed, which are provided under cl 7; income collected on behalf of the owners (cl 11); management fee and expenses (cl 12); budgets and management of funds (cl 13); responsibilities (cl 17); termination (cl 22); dispute resolution (cl 23); and third-party rights (cl 26).

3.4 AUTHORITY OF SHIP MANAGERS

In the new form, SHIPMAN 2009, the authority of the manager is provided separately in cl 3, whereas it was previously provided in the 1998 form under 'basis of the agreement'.

3.4.1 Actual or implied authority

Clause 3 provides expressly that:

> subject to the terms and conditions herein provided, during the period of this Agreement the Managers shall carry out the management services in respect of the vessel as agents for and on behalf of the Owners.

In accordance with agency principles, the manager shall bind the owner to contracts with third parties. It is common practice that the manager signs contracts on behalf of his principals, always as agent only.

The manager must act always within the authority granted to him by the owners in accordance with the management agreement or, as the case may be, additional express authority. When the contract is silent about a specific matter, implied authority will arise only if that matter is reasonably incidental to the execution of the manager's express authority.[30]

Clause 3 further provides that:

> The Manager shall have authority to take such actions as they may from time to time in their absolute discretion consider to be necessary to enable them to perform the Management Services

30 *West of England Ship Owners Mutual P&I v Hellenic Industrial Development Bank* [1999] 1 Lloyd's Rep 93.

in accordance with sound ship management practice, including but not limited to compliance with all relevant rules and regulations.

3.4.2 The owner as an undisclosed principal

Difficulties have arisen, particularly when the standard form is not used, if a third party is not aware of the owner's existence. This is particularly so because the owner of the ship, that is, the registered owner, is never in the front line. The shipbroking company or agent, which is separate from the registered owner, will usually contract on the owners' behalf, who may or may not be named in the contract with the third party. In cases in which the agent is made a party to the contract, he may sue on it. The question then arises as to what damages he can recover. The manager must prove his own loss.[31]

When the owner is disclosed and named, he can enforce the contract against the third party. When he is not named, that is, undisclosed, the intention of the third party becomes important. If, for example, the third party wanted to contract with the manager and no one else, then he is not bound to accept performance by the owner, or, even worse for the owner, he may refuse to pay for the performance. Complex questions frequently arise in this respect as to whether the third party has repudiated the contract, if his intention to contract with the agent, instead of the owner, is not sufficiently shown.

In this connection, it is important to note the relevant general principles of undisclosed principals:[32]

(a) Where an agent enters into a contract, oral or written, in his own name, evidence is admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract.
(b) An undisclosed principal may sue or may be sued on any contract made on his behalf, or in respect of money paid or received on his behalf by his agent acting within the scope of his actual authority.
(c) An undisclosed principal may also be sued on any contract made on his behalf by his agent, acting within the authority usually confided to an agent of that character, notwithstanding limitations put upon that authority as between the principal and the agent.
(d) Subject to the intervention of the principal, the agent can sue on a contract made with a third party when the principal is undisclosed; he is personally liable and entitled to the benefit of it, provided he can prove his loss.

An interesting case, ***Ferryways NV v Associated British Ports, (The Humber Way)***,[33] clarifies the position of crew managers and their role in terms of who is the employer of the crew. The issue of undisclosed principal arose in the context of who was the employer of the deceased engineer, who was killed owing to the negligence of a stevedore (employed by the defendant, a terminal operator). The claimant was the demise charterer of the ship on which the engineer was working, who sought to

31 On the basis of the principles established by *The Albazero* [1977] AC 774.
32 See *Bowstead and Reynolds on Agency*, 19th edn, 2010, Sweet & Maxwell, Ch 8, Art 76.
33 [2008] 1 Lloyd's Rep 639.

recover from the defendant (terminal operator) the money paid by its P&I club to the deceased's family. The defendant argued that the contract of employment of the engineer was with the managing company of the ship-owner and not with the claimant (demise charterer), and it was not open to the claimant to content that the manager was the agent acting for the claimant (the undisclosed principal).

Teare J held that although the management agreement envisaged that the agent would engage crew on behalf of the claimant, whether or not it did so was dependent upon the wording of the employment contract. The question was whether the terms of that contract were inconsistent with the intervention of the claimant as principal; in particular, whether there were words in the contract that designated the agent as the only person who was to have the rights and obligations arising from the contract. Having regard to that contract, the deceased had indicated a willingness to treat the ship-owner or operator as a party to the contract on whose behalf the agent was authorised to contract. Furthermore, the description of the agent as 'the employer' did not amount to a term of the contract that only the agent might have the rights and obligations of the employer, and the contract did not exclude the claimant from being an undisclosed principal. Therefore, the claimant was entitled to intervene as the employer of the deceased.

3.4.3 Issuing proceedings in the name of the principal

Particular attention must be paid when proceedings are about to be issued for a breach of contract signed by the agent, on behalf of the owners. The proceedings must be issued in the name of the registered owner, the contracting party. If they are issued in the name of the agent (who normally gives the instructions to lawyers), there may be a professional negligence claim against the lawyer by his client owner for the loss suffered by not being able to claim his loss against the defendant, unless the owner takes part in the proceedings later (provided the claim is not yet time barred) and the claim form is amended accordingly.

3.4.4 Extent of managers' authority to bind the owner

As quoted under 3.3.1, above, cl 3 of SHIPMAN provides that the managers shall have authority to take such actions as they may from time to time in their *absolute discretion* consider to be necessary to enable them to perform this agreement in accordance with sound ship management practice.

Whether or not the agent has authority is a question of fact in each case. If the manager exceeds his authority, he will not bind the owner to contracts with third parties, unless the owner later ratifies the contract, and he will be at risk of being sued by the third party for breach of warranty of authority.

In some circumstances, the conduct of the principal may be such as to have held the agent out as having such authority; this would give rise to an agency by estoppel, or apparent authority, in that the principal could be estopped from denying that the agent had authority to bind him to the contract.

The professional manager must make it clear to the third party that he is acting for his principal, the owner. He will not be liable to the third party, if the third party knew that the manager was acting with authority of his principal.

3.4.5 Engagement of the crew

It is common practice for the managers to act as agents for the owners, except in certain circumstances when managers act as principals for the engagement of the crew under CREWMAN B. However, for navigational matters, and insofar as third parties are concerned, the crew are the employees of the owner or the demise charterer, as the case may be (as seen in *The Humber Way*, above).

3.4.6 Authority and obligation of managers in technical matters

Technical management is provided in cl 4 of SHIPMAN 2009. If the manager agrees to undertake it, he will have the following authority and obligations:

- To ensure that the vessel complies with the requirement of the flag State and with the ISM and ISPS Codes, and provide competent personnel to supervise the maintenance and general efficiency of the vessel. This is a very important development in the light of the international regulations imposed upon owners and managers to provide a transparent system of safety and security.
- If so agreed with the owners, they shall insert their name as the 'company'[34] for the purpose of the ISM Code. Clause 8(b) provides that 'where the managers are providing technical management, they shall procure that the requirements of the Flag State are satisfied and they shall agree to be appointed as the "Company" assuming the responsibility for the operation of the vessel and taking over the duties and responsibilities imposed by the ISM Code and the ISPS Code'.
- In such a case, they shall assume responsibility for the operation of the vessel and take over the duties and responsibilities imposed by the Code, generally, and, in particular, in respect of the ships' surveys and repairs and whatever is required for their proper maintenance. All incidents must be recorded in the manuals and monitored for the purpose of risk analysis and prevention of accidents.
- They should also ensure that the crew is competent and well trained in order to comply with the International Convention on Standards Training Certification and Watchkeeping for Seafarers (STCW) 1995, which is part of the ISM Code requirements. (See, further, Chapters 2–4, above).

The two aspects of management, crewing and technical, are the cornerstone of the requirements of the Code for an SMS. It should be noted, however, that the fulfilment of the obligations under the Code is a joint operation between the owner and the manager under the agreement, and depends on what is delegated to the manager. The owners themselves have the obligation to provide a clear line of communication with the manager and define the extent of responsibilities and authority delegated to others.

Where the managers are not providing technical management, the owners shall procure that the requirements of the law of the flag of the vessel are satisfied, and

34 ISMC, para 1.1.2, provides that:

Company means the owner or any other organisation or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the shipowner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the code.

that they, or such other entity as may be appointed by them and identified to the managers, shall be deemed to be the 'company' as defined by the Code having the responsibilities for the operation, etc.

See further on owners' and managers' obligations and liabilities under the ISM Code in Chapter 4, above.

The managers will further have the authority:

- to arrange and supervise dry-docking, repairs, alterations and upkeep of the vessel, provided that he shall be entitled to incur the necessary expenditure to ensure that the vessel will comply with the law of the flag and the recommendations of the classification society;
- to arrange the supply of stores, spares and lubricating oil; also for the sampling and testing of bunkers and arrange for the supply of provisions unless provided by the owners;
- to appoint surveyors and technical consultants as it may be necessary.

3.4.7 Authority and exceptional repairs

Unless the management agreement provides that the manager has authority to engage repairers for exceptional repairs needed on the ship, or a specific authority is given in this respect, the manager is only authorised to debit the credit of the owner for ordinary running repairs.

In ***Boston Deep Sea v Deep Sea Fisheries***,[35] it was held that the management agreement did not of itself cover authority to carry out exceptional repairs, and the agreement would normally only cover ordinary running repairs. However, on the facts, there was special and express authority from the defendants to do this work and to pay for it. There was no question that the work was not necessary and that the cost was not reasonable. Even in the absence of special authority, on the facts the defendants had ratified what had been done.

Normally, the management agreement will provide the particular way in which the parties wish to regulate their affairs. Confidentiality clauses and provisions for close co-operation between the owners and managers are commonly found in modern ship management agreements.

3.5 THE MANAGER'S OBLIGATIONS

As in the 1998 version, the manager's obligation under cl 8(a) of the 2009 agreement is:

> to use his *best endeavours* to provide the management services as agents for and on behalf of the owners, in accordance with sound ship management practice, and to protect and promote the interests of the owners in all matters relating to the provision of the services.
>
> Provided, however, that, in the performance of their management responsibilities under this agreement, the managers shall be entitled to have regard to their overall responsibility in relation to all vessels as may from time to time be entrusted to their management and, in particular, but without prejudice to the generality of the foregoing, the managers shall be entitled to allocate

35 [1951] 2 Lloyd's Rep 489.

available supplies, manpower and services in such manner as in the prevailing circumstances the managers in their absolute discretion consider to be fair and reasonable.

This is a very broad provision, allowing the managers to exercise their discretion in order to fulfil their duties, which is likely to give rise to disputes as to the extent of their discretion. However, the yardstick for such a discretion is that their actions should be judged objectively to assess whether or not they satisfy the test of 'fair and reasonable' in the context of the whole agreement.

3.5.1 Best endeavours

The '*best endeavours*' and '*reasonable endeavours*' clauses, although frequently used in many contracts, have caused debate over their meaning and as to whether or not there is any real difference between them. In the 1980s, the courts showed reluctance to draw a firm distinction between the two.[36] However, '*best endeavours*' is generally understood to mean that a party who is obliged to exercise best endeavours is required to take every reasonable course of action that a prudent obligor, acting in its own interests, would take to bring the desired result. In other words, it must do all that a reasonable person could reasonably do in the circumstances.[37] However, that would not include actions that would lead to its financial ruin.[38]

There have been recent decisions about these phrases holding that '*best endeavours*' is more onerous than '*reasonable endeavours*'; the latter requires the party to take a reasonable course of action, but nothing contrary to its own commercial interest.[39]

However, where the clause requires certain steps to be taken to fulfil the obligation, Flaux J held, in the context of ***Rhodia International Holding***,[40] that those steps would need to be taken, even if they involved the obligor sacrificing its own commercial interest. The judge also made it clear that 'best' and 'reasonable' placed different levels of obligation. The requirement to use 'reasonable endeavours' to achieve something is probably requiring the party to take one reasonable course, whereas the use of 'best' is requiring it to take all the reasonable courses to meet the contractual obligation.

The English CA recently held (by majority), in ***Jet2.com v Blackpool Airport Ltd***,[41] that the content of a contractual obligation to use 'best endeavours to promote' another person's business was not so uncertain as to be incapable of giving rise to a

36 *Overseas Buyers v Granadex* [1980] 2 Lloyd's Rep 608, Mustill J.

37 *Pips (Leisure Production) Ltd v Walton* (1980) 43 P & CT 415.

38 *Terrel v Mbie Todd & Co Ltd* (1952) 69 PRC 234.

39 *CPC Group v Qatari Diar* [2010] EWHC 1535 (Ch): the wording 'all reasonable but commercially prudent endeavours' did not equate to a 'best endeavours' obligation. It does not always require the obligor to sacrifice his commercial interests.

40 *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm): Flaux J held the obligor to have breached its obligation under a sale and purchase agreement to use its reasonable endeavours to obtain the consent of an energy supplier to the novation of a contract, as it had failed to provide a parent company guarantee, and it was clear from the wording of the agreement that it was under an obligation to provide one if so required; cf. *Yewbelle Ltd v London Green Developments Ltd* [2006] EWHC 3166 (Ch), [2007] 1 EGLR 137, per Lewison J: 'the obligation to use reasonable endeavours requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted'; it is to be noted that the judge in this case blurred the meaning of 'best' with 'reasonable'.

41 [2012] EWCA Civ 417; [2012] 2 All ER (Comm) 1053.

legally binding obligation, provided that the object of the endeavours could be ascertained with sufficient certainty, although it might be difficult to determine whether there had been a breach of it. In the instant case, an airport was in breach of contract in refusing to accept departures or arrivals of a low cost airline's aircraft outside its normal hours.

The court further held that the obligation to use best endeavours to promote J's business obliged B to do all that it reasonably could to enable that business to succeed and grow. The promotion of J's business extended to keeping the airport open to accommodate flights outside normal hours, subject to any right B might have to protect its own financial interests. The judge had been right to find that whether, and to what extent, a person who had undertaken to use his best endeavours could have regard to his own financial interests would depend very much on the nature and terms of the contract. B's submission that it was entitled to refuse to accept aircraft movements outside normal hours, if that caused it to incur a loss, had to be approached with caution, given the judge's finding that the ability to schedule aircraft movements outside normal hours was essential to J's business and, therefore, fundamental to the agreement.[42]

Further, the Court of Session of Scotland (Inner House) interpreted the meaning of 'all reasonable endeavours' in ***EDI Central Ltd v National Car Parks Ltd***.[43] It held that a contractual obligation to use 'all reasonable endeavours' or 'reasonable endeavours' did not require the obligor to disregard its own commercial interests; the balance fell to be struck depending on the wording of the relevant obligation and in considering what steps would be reasonable. The court also had to consider whether any further steps would have been successful. If an obligor could show that it would have been useless to have taken a particular step because it would not have been sufficient to achieve success, that would provide an answer to any claim that he had acted in breach of contract; equally, if there was an insuperable obstacle, it was irrelevant that there might have been other obstacles that could have been overcome, or at any rate in respect of which the obligor had not yet done all that could reasonably be expected of it to try to overcome. (See also Chapters 8 and 10, below.)

3.5.2 Risk management in drafting best endeavour clauses

These recent decisions establish that there is a distinction between 'best' and 'reasonable' endeavours. However, care should be taken when the phrase 'all reasonable endeavours' is used in contracts. The parties should be advised that 'all reasonable' would not mean the same as 'reasonable'. Depending on the context, it would be likely to be closer to 'best endeavours'.

In drafting such clauses, it would be prudent to define what exactly the obligor would be required to do, so that the obligation is not uncertain. There must be criteria clearly stating what the parties must do in order to meet the reasonable endeavours obligation. Without such criteria, the clause would be unenforceable for uncertainty.[44]

42 Ibid, paras 18–33; *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm) [2007] 2 All ER (Comm) 577.

43 [2012] CSIH 6; 2012 SLT 421.

44 *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] CLC 329.

On the other hand, a precise prescription may limit the obligation, and so phrases such as 'including but not limited to' would assist in extending the parameters of the obligation in the particular context. Attention should also be given to whether particular activities are excluded from the obligation.

Care should also be taken when a party has to take particular steps that may require him to sacrifice his commercial interests. Although, generally, the court will approach the issue of the respective interests of the parties by retaining a balance between them, the caveat derived from the *Rhodia* case (above) is that, if the contract specifies that certain steps will have to be taken as part of the exercise of reasonable endeavours, those steps will have to be taken even if it that involves the sacrifice of the obligor's commercial interests. What costs should be incurred in the course of taking the reasonable steps is an issue requiring consideration too.

Parties should also bear in mind that these phrases reduce an absolute contractual obligation to an obligation to take reasonable steps to achieve the result and, therefore, they should consider carefully whether or not it would be wise to convert an absolute obligation of the other party to a lesser obligation of 'best or reasonable endeavours'.

For example, in cl 8 of SHIPMAN, the first part is an obligation of 'best endeavours' as defined above, whereas the second part of cl 8, regarding the managers' obligation to comply with the ISM Code, is an absolute obligation.

3.6 DUTIES OF THE MANAGER

3.6.1 Reasonable care and best endeavours

Generally, an agent is under a contractual duty to perform his particular duties under the contract with reasonable care and in accordance with sound management practice.

The obligation of best endeavours to provide the service in the context of ship management, where there is emphasis on applying sound ship management practice, does not lessen the duty to exercise due care in the performance of his duties. The manager must act in accordance with the skill that he professes to possess. His performance is measured against the standard of a reasonable manager possessing the same skill and experience. The yardstick is 'sound management practice', which is an objective standard and does not refer to the manager's personal view of what is sound.

For example, if the manager was instructed to insure the ship and he failed to do so, thus causing loss to his principal, he will be in breach of his duty and liable in damages.[45] The underinsurance of the ship by the ship manager, which causes loss to the principal if the ship becomes total loss, will be a breach of the manager's duty, as it was in *The Maira*.[46] However, if he exercised his best endeavours to find an insurer for the ship and no insurer was willing to insure the particular risk, the manager would not be in breach of his duty.

Under cl 17(b) of SHIPMAN 2009 (Liability to owners), the manager shall be under no liability whatsoever to the owner for any loss or damage etc., unless same

45 *Turpin v Bilton* (1843) 5 Man & G 455.
46 [1986] 2 Lloyd's Rep 12.

is proved to have resulted solely from the negligence, gross negligence or wilful default of the managers or their employees or agents, or subcontractors etc. In other words, the loss or damage must be the direct result of the manager's negligence, which must be the sole and not a contributing cause of the loss or damage.

3.6.2 Fiduciary duty – general principles

The manager also owes a fiduciary duty to his principal owners. A fiduciary is someone who has undertaken, or is obliged, to act for or on behalf of another in a particular matter in circumstances that give rise to a relationship of trust and confidence. The distinguishing obligation of the fiduciary is one of loyalty to his principal, who is entitled to the fiduciary's single-minded loyalty. This core obligation encompasses a duty (a) to act in good faith; (b) not to make a secret profit out of his trust; (c) not to place himself in a position where his duty and his interest may conflict; and (d) not, in relation to his principal's affairs, to act for the benefit of himself or a third party without the informed consent of his principal.[47]

There will be a breach of the fiduciary's duty in respect of a transaction, if the fiduciary's duty and interest conflict, or if there is a realistic possibility that they might.[48] In order to avoid being in breach, the fiduciary must show that he gave full and proper disclosure of the nature and extent of his interest, and that, thereafter, his principal gave his fully informed consent. It is not sufficient simply to disclose the existence of some interest or to say something that would put his principal on inquiry. Nor is it enough to establish that, if permission had been sought, it would have been given.[49]

3.6.3 Breach of the fiduciary duty by the ship manager

It follows from the above general principles that the duty of the ship manager is not to take advantage of his position or his principal's property in order to acquire benefit for himself, and not to act inconsistently with the interests of the owners.

An illustration of such a duty was aptly given in ***The Borag***,[50] a ship management case, in which the issues were: (a) whether the manager's relationship with the owner was one of trustee and beneficiary or a fiduciary, and (b) whether the owners could recover the cost of putting up a bank guarantee for the release of the ship from arrest by the managers.

Under a technical and commercial management agreement, the managers were entrusted with the entire and exclusive management of *The Borag*. They undertook to perform the task with the same zeal and energy as if the vessel were their own, watching over the owners' interests in the spirit of close co-operation. In the course of dealings between the parties, the owners paid the managers US$55,000 to cover the vessel's monthly operating expenses, and any balance in favour of the managers would be settled by the owners on receipt of the managers' monthly statement of

47 *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) at para 82; see also per Millett LJ at page 18A to C; *Bowstead & Reynolds on Agency*, 19th edn, at paras 6–033 and 6–038.

48 Ibid, at para 83, and per Jacob LJ at para 6–8.

49 Ibid, at para 83, and See *Bowstead & Reynolds on Agency*, 19th edn, para 6–055; at paras 137 and 179–180.

50 *Compania Financiera Soleada SA v Hamoor Tanker Corp Inc (The Borag)* [1980] 1 Lloyd's Rep 111.

accounts and vouchers. Disputes arose between the parties as regards funds for the dry-docking of the vessel and the managers claimed unpaid balances for 1 month and advance payments. On the managers' orders, but without the knowledge of the owners, the vessel was secretly sailed into South African territorial waters, where she was arrested by the managers for the sums allegedly owed to them by the owners. The owners released the vessel from arrest 2 weeks later, after obtaining a bank guarantee.

Taking the second issue first, in the arbitration proceedings, the owners claimed to recover interest charges incurred in obtaining the guarantee. The umpire held that they were not entitled to do so; Mustill J held that they were so entitled as the charges were by way of mitigation of damages caused by the wrongful arrest. On appeal,[51] it was held, allowing the appeal, that the expenditure to release the ship was damages, not mitigation of damages; but was too remote and too unforeseeable to be recoverable. The CA applied the *Liesbosch*[52] case, which has now been overturned by another House of Lords decision (see Chapter 9, at 3.11.5, below). Thus, it should be inferred that the decision of the CA in *The Borag* does not represent the law on this issue, and the decision of Mustill J should be taken as the correct approach.

On the first issue, regarding the relationship between the owners and managers and the duty of the latter, Mustill J held that the managers had been in breach of their obligations:

> In my view, its purpose was to prescribe the spirit as well as the letter of the managers' functions. The owners were dependent on the managers' expertise in carrying out the day to day running of the vessel, which had been placed entirely within their control. They were entitled to have confidence in the managers to provide not merely a technically competent performance of their functions, but one which was furnished in a spirit of undivided loyalty to the best interests of the owners. The facts stated in the award make it clear that this confidence was abused. The managers did not, as the contract required, 'watch over' the owners' interests in a 'dedicated' manner. Instead, they watched over their own.[53]

It was also held that the managers could not have been trustees of the vessel in the strict sense, because they had no proprietary interest in the vessel. Although the parties clearly intended to create a fiduciary relationship between them, such a relationship was not identical with that of a trustee and beneficiary. In the light of breach of contract by the managers, the owners would be entitled to claim damages resulting from the provision of the guarantee and wasted running costs and expenses by reason of the vessel's wrongful detention.

This case, and the case below, should warn ship managers of the consequences of actions taken in breach of their fiduciary duties.

A similar case arose in the late 1990s with regard to breach of the fiduciary duty by the manager in ***The Peppy***,[54] which was arrested by the manager for alleged outstanding balance of account. It was held, inter alia, that the conduct of the director of the managing company, who was obtaining bogus commissions, was dishonest and in breach of the agreement. His company was the exclusive chartering manager, and he was required to fix the vessel at the most favourable terms, to collect the freight

51 [1981] 1 WLR 274.
52 [1933] AC 449.
53 Ibid, at p 122.
54 *Stewart Chartering Ltd v Owners of the Ship Peppy (The Peppy)* [1997] 2 Lloyd's Rep 722.

and account for it to the owner. It was found on the facts that there was no outstanding balance of account at the time of the arrest because there was a variation of the agreement to defer payments until the vessel was sold; thus, the arrest of the vessel was wrongful and a repudiatory breach by the manager. The owners suffered recoverable loss by reason of the arrest, and the manager was liable to pay damages and obliged to reimburse the amount of the commissions to the owner.

The ambit of the fiduciary duty and the effect of breach were examined by the CA in ***Crocs Europe BV v Anderson***,[55] where it was held that not all breaches of the fiduciary duty can be classed as repudiation of the contract; some breaches are capable of other consequences and remedies depending on the circumstances of the breach and the parties' intentions in relation to the contract.

3.6.4 'No conflict' rule and 'account of profits'

In ***Novoship (UK) Ltd v Mikhaylyuk***,[56] the court explained the consequences of breach of the 'no conflict' rule by the agents and said:

> The 'no conflict rule' is neither compensatory nor restitutionary: rather it is designed to strip the fiduciary of the unauthorised profits he has made whilst he is in a position of conflict.[57]

A fiduciary is liable to account for any profits made within the scope and ambit of a fiduciary duty that conflicts or may conflict with his personal interest. Such liability does not depend on whether the person to whom the duty was owed could or would himself have made the profit or suffered any loss.[58] Liability does not depend on fraud or lack of good faith, although the existence of fraud may be relevant to the question of whether any allowances should be made in the taking of an account for the fiduciary's skill and labour.[59]

The judge (Sir Christopher Clarke) further held that recent authority establishes that the principal is entitled to an account of profits, not only against the fiduciary, but also against the dishonest assister, as an alternative to equitable compensation.[60]

He further held (at para 94), in taking the account against a fiduciary, the court adopts a broad approach and is not limited to profits that directly result from the transaction, so as to exclude profits that can be said to be the result of another event, such as the movement of the market. This is because the court does not enter into an investigation as to what would have happened if the fiduciary had complied with his obligations.[61]

55 [2012] EWCA Civ 1400.

56 [2012] EWHC 3586 (Comm), at paras 87, 93–94.

57 Ibid, at para 87.

58 *Murad v Al-Saraj* [2005] EWCA Civ 958 at [80]: 'The liability arises from the mere fact of a profit having, in the stated circumstances [i.e. by use of a fiduciary position], been made'); Lord Russell of Killowen in *Regal Hastings v Gulliver* [1967] 2 AC 134, 144G–145A.

59 Novoship, op. cit. fn 56, at para 87.

60 *Fyffes v Templeman* [2000] 2 Lloyd's Rep 643, at 668 per Toulson J; *Murad v Al-Saraj* [2005] EWCA Civ 958 at para 69, per Arden LJ, and at paras 118–120, per Jonathan Parker LJ; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1589–1601]; *Tajik Aluminium Plant v Ermatoy* (No 3) [2006] EQHC 7 [23]; *Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at para 392, per Christopher Clarke J; *Fiona Trust v Privalov* [2010] EWHC (Comm) at paras 62–66, per Andrew Smith J.

61 See *Murad v Al-Saraj* [2005] EWCA Civ 958 at para 76, per Arden LJ; *Fiona Trust v Privalov* [2010] EWHC (Comm) at para 67, per Andrew Smith J.

3.6.5 Statutory duties

The manager, in addition, has statutory duties, as provided by the MSA 1995 and international regulations.

Certain duties are imposed by the ISM Code as incorporated in the management agreement, if the manager is the 'company' that has undertaken the duties prescribed by the Code.

3.6.5.1 General obligations under the ISM Code

As seen in Chapters 3 and 4, above, the ISM Code has had a significant impact on the obligations of both owners and managers, as well as on their contractual relationship. The Code's provisions, as amended in 2010, are set out in Chapter 3, but a summary is provided here to highlight the changes (as underlined) and their impact on managers' obligations.

The Code, as amended, provides international standards for the safe management and operation of ships and for pollution prevention.The cornerstone of good safety management is commitment from the top to bottom of both the ship-owning and the managing companies.

'Company', under para 1.1.2 of the Code, means the owner of the ship or any other organisation or person, such as the manager or bareboat charterer, who has assumed the responsibility for the operation of the ship from the ship-owner and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code.

The safety management *objectives* of the company under the Code are generally described in para 1.2:

(a) to ensure safety at sea, prevention of loss of life or human injury, protection of the environment;
(b) to improve safety management skills of personnel ashore and aboard ships; to establish safeguards against identified risks and to provide safe practices in ship operation; and
(c) to ensure compliance with mandatory rules and regulations and that guidelines and standards recommended by the flag State, classification societies and the marine industry organisations are taken into account.

For the first time, the amended Code introduces a formal requirement for risk assessment by expressly providing what was implicit in the original version of para 1.2.2.2, namely: 'to assess all risks to its ships, personnel, and the environment and establish appropriate safeguards', instead of the previous wording 'to establish all safeguards against all identifiable risks'.

Major non-conformity is now redefined in para 1.1.10 as meaning:

> an identifiable deviation that poses a serious threat to the safety or personnel or the ship or a serious risk to the environment that requires immediate corrective action, or the lack of effective and systematic implementation of a requirement of this Code.

The amendment makes it clear that major non-conformity may be either deviation posing serious threat to safety or serious risk to the environment, or lack of effective and *systematic* implementation of the Code.

3.6.5.2 The duties of the company under the Code and effect of the 2010 amendments

The Company's duties and responsibilities are prescribed in various articles of the Code; in particular:

(a) To establish an SMS and policy and ensure that the policy is implemented and maintained at all levels of the organisation, ship-based and shore-based (para 2).
(b) To define levels of authority and lines of communication between shore and shipboard personnel, as well as to establish procedures for reporting accidents and non-conformities with the provisions of the code (para 1.4).
(c) To designate a person or persons ashore having direct access to the highest level of management, who should have authority and responsibility to monitor all aspects of safe operation of each ship (para 4).
(d) To define clearly the master's responsibility and issue instructions and orders in a clear and simple manner (para 5) and ensure that the ship's personnel are able to communicate effectively in the execution of their duties under the Code (para 6.7).
The Master's responsibility and authority are extended by the 2010 version; he is required, as provided in para 5.1.5, to: 'periodically review the SMS and report deficiencies to the shore-based management'.
The question here is what is meant by 'periodically', but what the auditors should be looking for is whether the master is being made continually aware of the effectiveness or the weakness of the system on board through a range of activities; examples of such activities are: organising inspections, debrief meetings after drills, safety committee meetings; reporting non-conformities, accidents and hazardous occurrences; as well as noting suggestions and complaints from the crew etc.
(e) To establish procedures, plans and instructions: The rewording of para 7 removes uncertainty and is more direct and specific as to what the company has to do: 'the Company should establish procedures, plans and instructions, including checking as appropriate, for key shipboard operations concerning the safety of the personnel, ship and protection of the environment, the various task should be defined and assigned to qualified personnel'.
(f) 'To identify potential emergency shipboard situations and establish procedures to respond to them' (amended para 8.1). Again, the provision of this paragraph is direct, and emphasis is put on the identification of risk situations rather than requiring a mechanical approach to writing procedures.
(g) To take corrective action and measures to prevent recurrence. In the amended para 9.2, emphasis is placed on taking corrective action not only to rectify the immediate problem, but to prevent the recurrence of accidents, non-conformities and hazardous occurrences.
(h) To establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and that inspections are held at appropriate intervals; any non-conformity and its possible cause, if known, is reported; corrective action is taken and records of these activities are maintained (paras 10.1, 10.2).
(i) To identify equipment and technical systems operational failure, which may result in hazardous situations (10.3). This amended provision (like the amendments to paras 7 and 8.1) goes a step further than its predecessor, in that it is concerned

with the identification of danger in equipment and not just that the Company has procedures to describe how this should be done.

(j) To establish and maintain procedures to control all documents and data that are relevant to the SMS (para 11).

(k) To carry out internal audits on board and ashore at intervals not exceeding 12 months to verify whether safety and pollution prevention activities comply with the SMS. In exceptional circumstances, this interval may be exceeded by not more than 3 months (para 12.1).

(l) To evaluate the effectiveness (not the efficiency, as it was previously) of the SMS.

(m) To ensure that the ship should be operated by a company that has been issued a DOC and that every ship is issued with an SMC in compliance with the Code (para 13). New paragraphs 13.12–13.14 have been introduced in the 2010 version to bring the ISM certificates in line with the provisions in SOLAS relating to the extension of other statutory certificates, (see, further, Chapter 3, above).

If a manager is appointed, the owner must report full details to the flag State administration and document the authority and responsibility of all personnel who manage (para 3, which should be read together with paras 1.1.2 and 12.6: the management personnel should take timely corrective action on deficiencies found).

3.6.5.3 Effect upon the manager's duties

It has already been noted that, when the manager undertakes the technical management of the ship, his company will be considered to be the 'company' under the Code, having the duties prescribed by it. The company's details should be inserted in Box 5 of the agreement, together with the IMO unique identification number, place of registered office and place of principal business.

On the other hand, if the owner does not delegate the technical management to the manager, the contract places the obligation on the owner to procure whatever is necessary for this purpose, and, accordingly, his company will be the 'company' as defined by the Code.

The implementation of the Code has brought enormous changes in management practices, attitude and the interrelations between managers and owners. It has, indeed, enhanced a safety culture within most serious shipping companies, and its objectives are applied by all respectable ship operators who wish to remain in business.

The documentation that is required to be maintained by both owners and managers under the Code will provide evidence of compliance or not, and will be required to be made available under the court's disclosure rules in litigation. Thus, claims in relation to carriage of goods by sea, or claims by the owner or manager under the insurance contract, or for limitation of liability, may be affected, depending on the particular circumstances. Such issues are explored under the legal implications of the Code in Chapter 4, above.

3.6.5.4 Criminal liability

In the light of the ISM Code and the regulatory regime, both owners and managers have to be more vigilant not to be in breach of statutory provisions and the provisions of the STCW Convention, particularly with issues of crew fatigue and training, as seen in Chapters 2–4, above.

Non-strict liability offences

The judgment of the House of Lords in ***Seaboard Offshore Ltd v Secretary of State for Transport (The Safe Carrier)***[62] (seen in Chapter 4) was decided before the current safety regulations were in force. Today, the court's investigation of the facts of a similar case will be more vigorous. There will be scrutiny and examination of the safety procedures of both the owners and managers, in order to establish whether they met the requirements of the ISM, as shown above, which will provide the evidence required to judge whether or not the offence under s 100 of the MSA was committed.

The question in this case was whether a manager could be criminally liable for acts or omissions of the crew for breach of s 31 of the MSA 1988, which applied in this case (presently s 100 of the MSA 1995). The section requires the owner, or manager, or charterer, to take all reasonable steps to ensure the safe operation of the ship. It is a personal duty.

The managers of the ship could not explain why the engineer was not given sufficient familiarisation with the ship before sailing. There were no findings as to how the company was managed, or who was responsible for the failure to operate the ship in a safe manner and, therefore, liability on the part of the company (managers) could not be established.

It was held that, on the interpretation of the wording of s 31, it did not impose strict liability but a personal duty on the ship-owner, manager or charterer. That personal duty involved taking all reasonable steps to ensure that the ship was operated in a safe manner, but it did not make them vicariously liable for the omissions of all their employees; where the company in question is a limited company, that duty has to be performed by those who manage the company's business.

The unwelcomed implications of this House of Lords decision are that managers or owners could hide behind low-status employees and say: 'I delegated my personal duty to my employees and I am not criminally liable for their faults in respect of this offence'. However, as the duty is personal, it should be non-delegable, in a sense that, even if it is delegated, the owner or manager should still remain liable by ensuring that all reasonable steps were taken.

As seen under 3.6.3.2 above, it would be difficult today not to find from the company's safety records and procedures that someone in the position of the directing mind of the company must have been responsible for important matters, such as the crew training and familiarisation. If such procedures, or the records, are deficient, the company will be failing to meet its statutory obligations.

Mens rea offences

With regard to offences that require proof of *mens rea* to convict the owner or manager of a ship, a dishonest act of employees below the status of a director or of a person with a senior managerial position would not be attributed to the company. The application of the rules of attributing liability to a company (owner or manager) are examined in Chapter 4.

62 [1994] 1 Lloyd's Rep 589.

In this connection it is important to mention the ***R v St Regis Paper Co Ltd***[63] decision, which concerned breach of statutory provisions regarding the protection of the environment.

The appellant company (R) appealed against convictions for dishonestly making false entries in a record required for environmental pollution control. R owned five paper mills; the technical manager (S) at one of its plants was required to produce daily environmental report sheets in respect of suspended solids in the outflow from the plant into a nearby river. False readings were recorded and misleading reports were returned to the Environment Agency. S was convicted of offences contrary to the Pollution Prevention and Control (England and Wales) Regulations 2000 Reg 32. R pleaded guilty to a number of strict liability offences contrary to Reg 32(1)(b), but it denied liability for offences under Reg 32(1)(g), which required proof of *mens rea*.

In a ruling pursuant to the Criminal Procedure and Investigations Act 1996 s 40(1)(b), a judge found that, as S had been entrusted with managing the disposal of R's waste products, his mind could be identified as the controlling mind and will of R, and that the intentional actions of S could therefore be attributed to R. In reaching that decision, the judge referred to and concluded that Reg 32(1)(g) permitted a departure from the conventional approach to attributing criminal liability to a corporate body derived from the intention of its directors or superior officers. The trial judge directed the jury on the basis of that ruling, and R was convicted. It fell to be determined whether the ruling was correct, or whether the trial judge had been wrong to permit the jury to conclude that S's guilty intention could be attributed to R with the result that R was guilty of an offence that required proof of *mens rea*.

The CA overruled the judge's decision and held that the conventional approach to attributing criminal liability to a corporate body for offences that required proof of *mens rea* was that liability arose where the guilty intention was that of the board of directors, the managing director and, perhaps, other superior officers who carried out the company's functions and management and spoke and acted as the company.[64]

The CA recognised that there are cases in which the law is intended to apply to companies, so that insistence on the primary rules of attribution would in practice defeat that intention, and, in such a case, the court had, as a matter of statutory interpretation, to fashion a special rule of attribution for the particular substantive rule on the basis of *Meridian Global*. However, it held that, in the instant case, as a matter of statutory construction, it was impossible to impose criminal liability for a breach of Reg 32(1)(g) to R in circumstances other than those where an intention to make a false entry could be attributed by operation of the rule in *Tesco Supermarkets*. A contrast could be drawn between offences of strict liability, such as Reg 32(1)(b), and those that required proof of *mens rea*, such as Reg 32(1)(g). In those circumstances, there was no basis for suggesting that the Regulations, designed as they were to protect the environment and prevent pollution, could not function without imposing liability on a company in respect of one who was not the directing will and mind of the company. Parliament had chosen to protect the environment against pollution in circumstances to which the Regulations applied by imposing strict

63 [2011] EWCA Crim 2527.
64 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 followed.

liability in some cases but requiring *mens rea* in others. In the circumstances, it was not open to the jury to conclude that S fell within the category of one whose state of mind could be attributed to R. The judge giving the ruling under the 1996 Act had been wrong to find that S's intention to make a false entry could be attributed to R, and the trial judge had been wrong to leave it open to the jury to reach that conclusion. There was no basis in law for attributing S's dishonest intention to R, and its convictions under Reg 32(1)(g) had to be quashed (see paras 5, 9, 12, 14, 16, 30 of judgment).

It would be very strange with the advancement of current legislation for the protection of the environment emanating from the EU (and also legislation applicable in the USA) – see Chapters 2 and 16 – that such a ruling would stand today for illicit waste disposal and for false readings and dishonest reports to the authorities. Such matters are of great importance, and the legislation would be defeated if the *Meridian* rule of attribution was not applied to attribute liability to the company, as the judge did at first instance.

3.7 BREACH OF CONTRACT AND CONTRACTUAL PROTECTION OF THE MANAGER AND HIS EMPLOYEES

If the manager fails to perform his obligations under the contract, in accordance with sound ship management practice, he will be exposed to liability, not only towards his principal, but also towards third parties for negligence.

3.7.1 Exclusion of liability

Clause 17(a) of the SHIPMAN 2009 exempts both parties from liability for any loss, or damage, or delay due to any of the *force majeure* events prescribed in the clause, such as act of God, Government requisition etc., war, riots, strikes or industrial action (unless limited to the employees), fire, explosion, accident (except if caused by the negligence of the party seeking to invoke *force majeure*) and any other similar cause (*ejusdem generis*), provided that the party seeking to rely on this clause made all reasonable efforts to avoid, minimise or prevent the effect of such events and/or conditions.

A very interesting case, ***Globe Master Management Ltd v Boulus–Gad Ltd***,[65] concerned terrorist activities in Israel that affected eastern Mediterranean cruises. The management agreement contained a *force majeure* clause and a termination clause. The cruise and, hence, the management agreement, had to be terminated by the owners because of warlike hostilities and alleged dangerous security complications. The managers sought to recover their fees and repatriation crew expenses provided under the agreement. The owners sought to rely on the *force majeure* clause and on frustration of contract. Both the court and the CA decided against the alleged frustrating event, and the managers succeeded in their claim.

65 [2002] EWCA Civ 313

3.7.2 Liability and limitation

Under cl 17(b), the manager will be liable to the owner for any loss, damage or delay or expense of whatsoever nature, caused owing to his negligence, gross negligence or wilful default, or that of his employees, or agents, or subcontractors employed by him in connection with the vessel.

Save where loss, damage, delay or expense has resulted from the manager's personal act or omission committed with the intent to cause same or recklessly and with knowledge that such loss, damage, delay or expense would probably result, the manager can limit his liability. The liability shall not exceed the total of 10 times the annual management fee payable under the agreement.

Although such a limitation sum is low, it takes into consideration the manager's annual income per ship. The thinking behind this limitation provision is that the managers should be able to limit their liability, so that they can insure it, except in particularly culpable situations. The limit of liability has been related to the level of the annual management fee in order to strike a reasonable balance between the funds received by the managers on the one hand, and their exposure for insurance purposes (the level of insurance premiums) on the other.

If the manager is engaged for crew management, he has two option: first, to engage the crew as the principal and not as agent of the owner, under BIMCO's form CREWMAN B, cl 6. He is paid a lump sum for his services by the owner that includes all payments made to the crew under the contracts of employment (cl 9 of form B).[66] The manager will be liable to the owner for acts of neglect or default of the crew only to the extent that they are shown to have resulted from a failure by the crew manager to discharge his obligations under cl 6, in which case he can limit his liability as provided under cl 13, which would be in total six times the lump sum fee payable.

The second option is to engage the crew as an agent for the owner under CREWMAN A, in which case he is paid a fee and expenses. In case he is liable for failure to meet his obligations under cl 6, for example, if he supplied non-certificated crew, or failed to ensure that the crew had passed a medical examination, or training, in compliance with STCW 1995 and flag requirements, he can limit his liability to a total sum of 10 times the annual crew management fee, as per cl 14.

3.7.3 Indemnity and 'Himalaya' clauses

An indemnity from the owner with regard to liability to third parties incurred by the manager, his employees, agents or subcontractors in the course of the performance of the agreement is also granted to the manager by cl 17(c). Such indemnity refers to liability that might be incurred by the manager to third parties and not to the owner.

The protection of exclusion and limitation of liability of the manager under his contract with the owner is extended to his employees, agents and subcontractors by the Himalaya clause (17(d)), which is designed to afford a wide protection of the managers' employees, agents and subcontractors.

66 Upon termination of the crew agreement, the manager was entitled to half his annual management fee: *Bernhard Schulte Shipmanagement (Bermuda) Ltd Partnership v BP Shipping Ltd* [2009] EWCA Civ 1407.

Before the Contracts (Rights of Third Parties) Act 1999, the doctrine of privity of contract prevented third parties to a contract from taking the benefit or protection of exclusion or limitation of liability clauses. Common law invented a way round this situation by the 'Himalaya' clause, by which the protection of exclusion or limitation of liability afforded to one contracting party would be extended to his employees or agents.[67] Otherwise, the employees, whose negligence invariably causes loss to the other contracting party, could be sued in tort to circumvent the contractual exclusion or limitation of liability. The 'Himalaya' clause took the name of the ship in the case in which this issue first arose.[68]

The need and reasons for change in the light of the problems that had been created by the privity of contract doctrine, which was seen as undermining commercial contracts, are explained in other publications.[69]

3.8 INSURANCE AND RISK MANAGEMENT

The manager has a separate insurable interest, and, in a legal sense, his interest is not a joint interest with that of the owners or disponent owners. He stands in a legal relationship to the ship that he is contracted to manage and he might benefit by its safety or might be prejudiced by its loss.

3.8.1 Insurance for the protection of the manager and his employees

Potential exposure of the ship manager, for liability to the owners of the vessel managed and to third parties for loss caused owing to his or his employees' negligence, is covered by insurance. For example, with regard to liabilities to contracting parties of the owner under the contract of carriage, which is governed by the HVR (see Chapter 4, above), the duty of the owner to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage is non-delegable. If a professional manager, in exercising his duties having undertaken full management, has been negligent, and the ship is rendered unseaworthy causing loss to cargo interests, the owner will be liable to his contracting party, if he cannot discharge the burden of proof that he exercised due diligence to make the ship seaworthy. The manager will be responsible under the management agreement to indemnify the owner for the liability incurred to third parties owing to such unseaworthiness. He may be sued in tort by the third party.

67 *New Zealand Shipping Line v Satterthwaite (The Eurymedon)* [1972] 2 Lloyd's Rep 544 (PC); however, it was clarified by the Privy Council, in *The Mahkutai* [1996] 3 All ER 502, that an exclusive jurisdiction clause did not fall within any of the terms in the bill of lading, which purported to confer the benefit of exception or limitation of liability to every servant, agent and subcontractor.

68 *Adler v Dickson (The Himalaya)* [1954] 2 Lloyd's Rep 267: a passenger of a cruise ship suffered injuries, which were allegedly due to the master's negligence. The contract for the cruise excluded all liability of the shipping company and its employees. The claimant commenced proceedings in tort against the master, who sought to rely upon the exclusion clause in the contract to which he was not a party. The defendant could not rely on the clause. Similarly, in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 (HL), the House of Lords held that the stevedores, by whose negligence the cargo on board the ship was damaged during discharge, were unable to rely upon a contract between the carrier and the consignees by which they had been given immunity from suit at the instance of the consignees.

69 Recommendations for reform by the Law Commission (Report No 242) which resulted in the passing of the Contracts (Rights of Third Parties) Act 1999; and comments on that report: Burrows, A, 'Reforming privity of contract (Law Commission Report No 242)' [1996] LMCLQ 467. See, also, Merkin, R (ed), *Privity of Contract*, 2000, LLP.

He needs professional indemnity insurance and protection for such potential liabilities and those arising under statute. The insurance must cover the manager's and his subcontractors' negligence, breach of warranty of authority and fraud by his employees. The International Transport Intermediaries Club (ITIC) provides professional indemnity insurance of ship agents and shipbrokers. It also covers risks for claims by third parties against the manager when the owner's indemnity is inoperative or the owner has gone into liquidation. It also covers legal costs in defending claims or in pursuing claims against others.

3.8.2 Insurance for manager as a co-assured with the owner

The manager can also be insured as a co-assured with the owner, under the so-called 'umbrella of a member's entry', whereupon there is an extension of the benefit of the cover afforded to the owner member of a P&I club. In such a case, his cover is of a dependent character and exists only as an extension of the cover to the owner (see the construction of the cover in ***Newcastle P&I v V Ships***).[70] The managers will not be held liable for outstanding calls owed by the owners.

The current ship and crew management endorsement on the insurance cover offered by ITIC makes it a condition of insurance with ITIC that the manager shall be named as a co-assured in all insurances taken out in respect of any ship under his management. This is recommended because of economics. The fees of managers are not enough to obtain separate P&I and H&M covers.

The risk of such a cover, however, is that the protection of the manager stands or falls together with that of the owner's protection, and the manager can be vulnerable in cases in which the owner is guilty, for example, of wilful misconduct, or is in breach of other statutory provisions of the Marine Insurance Act (MIA) 1906, or the rules of the club. Such cover will only respond once, whether to the owners or to the co-assured managers.[71] Accordingly, the managers will only recover from the club to the extent that the owners themselves would have been entitled to recover. If the owners can limit their liability and the managers cannot, the managers may find themselves uninsured for the amount of the claim beyond the owners' limit.

The manager needs also to be co-assured with the owner in the owners' insurance for H&M of the ship, because of the nature of the duties he undertakes under the management agreement. If the potential risks that might arise from the performance of his duties were insured separately, the premium would exceed the management fee.

It is advisable to be insured as a co-assured under the owners' policies and separately with regard to his liabilities to third parties for greater protection. SHIPMAN 2009 provides in cl 10 (c) that the owners' insurances name the managers as joint assureds with full cover.

Co-assurance avoids the extra legal costs if the manager has to pursue indemnity claims against the owner.

70 [1996] 2 Lloyd's Rep 515; see also issues involving managers, their insurable interest, their authority to insure (on behalf of the owners) and for themselves as co-assured, in *The Martin P* [2004] 1 Lloyd's Rep 389.

71 See, e.g., *The Marion* [1984] 2 Lloyd's Rep 2 (HL), where the actual fault and privity of the managers deprived their principal, the owner, of the right to limit liability under the Limitation of Liability Convention 1957, as contained in the MSA 1958. As both the managers and owner were co-assured in the same P&I club, no indemnity was pursued.

This page intentionally left blank

CHAPTER 6

RISKS IN THE MORTGAGE OF SHIPS

1 Introduction 169
2 The nature of a ship mortgage 170
3 Effect of the statutory scheme of registration 174
4 Unregistered ships and status of an unregistered mortgage 176
5 Comparison of a ship mortgage with other types of security 177
6 Priorities of mortgages 178
7 Conflict of laws 180
8 Obligations and rights of the mortgagor 186
9 Mortgagee's rights and obligations 192
10 Interference with third-party contracts by mortgagee 207
11 Risk management and insurance issues of the mortgagee 218

1 INTRODUCTION

Ship mortgages are today distinctive contractual transactions with voluminous documentation. The sophistication of their development has reached a level that requires special expertise in financial markets.

Unlike the security of lenders for the purchase of land, the inherent risks involved in ships, being floating objects of security, have given rise over the years to the development of additional forms of security, apart from the mortgage, to protect mortgagees who finance the purchase of ships.

The loan agreement contains covenants regulating the conduct of the borrower; the mortgage creates a preferential security interest of the lender on the ship; insurance to protect the interest of the mortgagee on the ship is obtained, in addition to the borrower's insurance against perils of the sea; assignment of the insurance proceeds of the ship, in the event of loss, is provided, as well as assignment of the earnings of the ship. Mortgagees are also protected by law in the enforcement of their security on the ship and are given priority over other maritime creditors, save for those who claim maritime liens. Given this limitation to their security, mortgagees seek to obtain personal and corporate guarantees, a general charge over the company's assets, or a pledge on the company's shares. The flag State in which the ship is registered is very important to the mortgagee. Most financiers will insist on a flag that has a good reputation in the enforcement of international regulations of safety. They will also consider the law of the flag State, which will govern the validity of the mortgage.

With regard to the finance of newly constructed ships, a 'project finance' transaction is usually designed by which the assets are the new buildings, and the source of

repayment of the loan is the cash flow generated by the assets. The construction may be financed through a tax-based scheme (offshore) or through the capital markets; the ships are chartered in advance to a reputable charterer of substance, and the charter will commence from delivery. The main concern of the financier is to balance the risks involved in the trading of the ships with the expected return on capital.

The development of ship mortgages, therefore, is based on the unique characteristics of the nature of the subject matter and the business in which it is used.

This chapter examines the legal nature of a ship mortgage, the rights and obligations of the mortgagor and mortgagee, the methods of protection of the mortgagee's rights in enforcing his security under statute and common law, conflict of laws in relation to enforcement, the mortgagees duties to the mortgagor, and potential liability of mortgagees to third parties who are in a contractual relationship with the mortgagor.

2 THE NATURE OF A SHIP MORTGAGE

There have been two theories about the nature of a ship mortgage, which are worth mentioning briefly.

2.1 THE PROPERTY TRANSFER THEORY – ORIGIN AND DECONSTRUCTION

Prior to the Merchant Shipping Act (MSA) 1854, which introduced the form of a statutory charge on a ship for the protection of the mortgagee, the law of land mortgages applied also to mortgages of chattels, as the ship is a chattel.[1] This meant that a mortgage on a chattel involved a transfer of its legal title to the mortgagee effected by delivery. Thus, traditionally, at common law, the chattel mortgage was regarded as a property transfer by way of security,[2] whereby legal ownership was transferred to the mortgagee and, upon payment of the loan amount with interest, was re-transferred to the mortgagor.

The British ship mortgage originated as a property transfer security and was executed by a bill of sale, which was registered and was subject to a covenant for re-transfer of the ship back to the mortgagor upon the payment of the loan. The mortgagee took steps to register his ownership interest in the ship under the statutes for the Registration of British Vessels 1823–5.

According to this traditional property transfer analysis, derived from the *obiter dicta* of Lindley J in ***Keith v Burrows***,[3] the first ship mortgagee acquired legal title regardless of whether or not the mortgage was registered. The registered owner of the ship retained an equitable right of redemption during the duration of the mortgage. All other subsequent mortgages were necessarily equitable, because the ship-owner

1 *Reeves v Capper* (1838) 132 ER 1057.
2 *Santley v Wilde* [1899] 2 Ch 474 (CA).
3 (1876) 1 CPD 722, pp 731–733; the decision was heavily criticised and overruled on other grounds: (1887) 2 App Cas 636 (HL): no comment was made on this issue by the House of Lords, which decided the rights of a mortgagee in possession of the ship. However, what Lord Cairns said on the rights of a mortgagee before possession (pp 645, 646) seems to impinge upon the very foundation of the judge's view of the nature of a mortgage.

did not have legal ownership to pass to another lender. Once the first mortgage was discharged, the second in line of creation would become legal.

However, the dicta, below, of Lord Cairns, in ***Keith v Burrows***,[4] are in sharp contrast to the property transfer theory advanced by the judge in the same case, whose decision was overturned on other grounds. Lord Cairns comments were also *obiter*:

> The question arises with regard to the rights of the mortgagee of the ship taking possession, both generally and also under the circumstances of this case. My Lords, with regard to the general rights as between mortgagor and mortgagee of a ship there cannot, I think, at this time of day be any real controversy. The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own for his own benefit . . . All these acts would be the ordinary incidents of the ownership of the mortgagor, who remains the dominus of the ship with regard to everything connected with its employment, until the moment arrives when the mortgagee takes possession. If the mortgagee is dissatisfied with the amount of authority which the mortgagor possesses by law, it is for him to put an end to the opportunity of exercising that authority by taking the control of the ship out of the hands of the mortgagor.

The property transfer theory[5] was effectively repealed by the MSA 1854 and the subsequent Bills of Sale Act 1878, which regulated the mortgages on chattels, other than ships. Ships were excluded from the 1878 Act.

The MSA 1854 provided that the mortgagee shall not by reason of his mortgage be deemed to be the owner of the mortgaged ship, nor shall the mortgagor be deemed to have ceased to be the owner, except insofar as may be necessary for making the ship available as a security for the mortgage debt.[6]

Applying this provision in ***Collins v Lambort***,[7] the Lord Chancellor held that the statute was intended to reverse the result of earlier statutes whereby the mortgagee became, upon registration, the owner of the property, and the owner being treated as his quasi agent. Under the new statute, the owner/mortgagor was to be deemed to be the owner, unless the mortgagee's security was impaired, whereupon the mortgagor's authority ceased. Lord Westbury described the position under the statute as follows:

> In my judgment, under the statute, so long as the mortgagee of a ship does not take possession, the mortgagor, as the registered owner, subject to the mortgage, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided that his dealings do not materially impair the mortgagee's security.[8]

Were the owner not to have retained his powers and rights of ownership, he would be acting as an agent for the mortgagee on the basis of the property transfer theory. Lord Westbury, in the same case, continued:

4 (1887) 2 App Cas 636, p 645.

5 Clarke, A, 'Ship mortgages', in Palmer, N and McKendrick, E (eds), *Interests in Goods*, 2nd edn, 1998, LLP, Ch 26; the author provides a most comprehensive study and a critique of the traditional view of the nature of ship mortgages.

6 Very similar provisions are to be found in the present MSA 1995, Sched 1, paras 9 and 10, referred to later.

7 (1864) 11 LT 497; see, further, under para 10 below, when the mortgagee interferes with a charterparty preceding the mortgage.

8 (1864) 4 De GJ&S 500.

Under earlier statutes the mortgagee, upon the making and registration of the mortgage, became in the eye of the law the owner of the property, the mortgagor being treated as his quasi agent. The result was, that the mortgagee frequently found himself bound either by the contracts of the mortgagor, or, at all events, by the necessary expenditure and outgoings of the vessel, a result seriously injurious and inconvenient to mortgagees, and one which interposed considerable difficulty in the way of persons desirous of raising money upon this species of security.[9]

He summed up the mortgagor's rights to enter into contracts in relation to his ship in the light of the statutory provisions, thus:

Every contract, therefore, entered into by the mortgagor remaining in possession, is a contract which derives validity from the declaration of his continuing to be the owner, but at the same time, every such contract is a contract into the benefit of which the mortgagee may at any time enter by giving notice to the person who under that contract is to pay to the mortgagor, that he requires the payment to be made to him, the mortgagee.[10]

The nature of a ship mortgage under general English law was re-examined 20 years ago in ***Downsview v First City Corp***,[11] in which Lord Templeman said:

A mortgage, whether legal or equitable, is security for repayment of a debt. The security may be constituted by a conveyance, assignment or demise or by a charge on any interest in real or personal property. An equitable mortgage is a contract which creates a charge on property, but does not pass a legal estate to the creditor. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court. All this is well settled law and is to be found in more detail in the textbooks on the subject and, also, in Halsbury's *Laws of England* (4th edn, 1980, Vol 32, p 187, paras 401ff).

The owner of property entering into a mortgage does not by entering into that mortgage, cease to be the owner of that property any further than is necessary to give effect to the security he has created. The mortgagor can mortgage the property again and again. A second or subsequent mortgage is a complete security on the mortgagor's interests subject only to the rights of prior encumbrances.

2.2 THE STATUTORY NATURE OF A SHIP MORTGAGE – PREVAILING THEORY

The modern and prevailing view of the nature of a ship mortgage is that registration under the MSAs has created a *sui generis* statutory security perfectible by registration. There are authorities supporting this view.[12] The point made by these authorities was that registration of a mortgage according to statutory provisions created a legal mortgage as opposed to an unregistered one, which is regarded as an equitable mortgage under English law. This should not be confused with the unregistered mortgage of an unregistered ship, which is discussed under para 4, below.

9 (1864) 4 De GJ&S 500, p 503.

10 Ibid, p 504.

11 [1993] AC 295 (PC), p 311.

12 E.g. *Barclays Bank v Poole* [1907] 2 Ch 284, in which it was held that s 56 of the MSA 1894 had given the registered owner absolute power, not only to dispose of his interest in the ship in a manner provided by the Act, but also to give effectual receipts for the purchase money and direct how the money should be used. Therefore, the purchasers had acquired a valid title to the shares, being a registered interest, and their contractual right had priority over the previous unregistered mortgage.

A ship mortgage, therefore, is a form of security created by a contract that confers a property interest, not a property transfer, to the mortgagee and it comes to an end upon the performance of agreed obligations by the mortgagor. Ownership still remains with the mortgagor, as is reflected in MSA 1995 (Sched 1, para 10, being formerly s 34 of the MSA 1894).

The transformation of a modern ship mortgage into a statutory form of security came with the passing of the MSA 1854, which introduced a statutory scheme of registration of a mortgage form. The bill of sale was no longer used. The position was maintained by the MSA 1894 and was re-enacted by the present MSA 1995.

The purpose of the registered mortgage is to give the mortgagee an interest in, or a right against, the property of the debtor, so he is not left only with a personal remedy against him. The effect of the mortgage is that the mortgagee, when he needs to enforce his security, can exercise owner-type rights on the mortgaged property, subject to rights of previous registered mortgages, or maritime liens, to meet the debt, and such rights are given by statute and contract.

Owner-type rights of a ship-registered mortgagee stay dormant until it becomes necessary for him to take possession and exercise his powers given under statute and contract. These rights are not exercised if the debt is paid as agreed.

The MSA 1995 allows the registration of second and subsequent mortgages and gives them the same legal consequences as a first registered mortgage, being subject to priorities between themselves in accordance with the date of their respective registration.

2.3 THE PROPERTY SUBJECT TO THE MORTGAGE

The ship and all articles necessary for the navigation are included. The word 'appurtenances' is used in the mortgage documents and the prescribed form. The word means, broadly, a thing belonging to another and, in the case of mortgages, it indicates that anything on board the ship, being necessary for the voyage and the adventure, is included as belonging to the owner and is, thus, part of the security.[13]

Whether or not particular equipment has become an appurtenance to the ship is a question of fact.[14] For example, containers are not part of the ship, as they are not necessary for its operation.[15] Bunkers on board the ship are not always part of the security. Fuel is not part of the ship, but it could be included in the mortgage by a collateral agreement if fuel is the property of the owner. Normally, charterparties provide for the charterer to pay for all bunkers on board the ship,[16] and it is common practice for the fuel to be the property of the time charterers.[17]

In *The Two Ellens* (1872) LR 4 PC 161, the Privy Council, affirming the judgment of the court below, held that the assignee of the mortgagee was not liable to the ship-repairer for the necessaries supplied to the ship, because the master, who instructed the ship-repairer, was not acting as his agent, but as the agent of the mortgagor, who remained the owner of the vessel under the MSA 1854.

13 *The Dundee* (1823) 1 Hagg 109; *Coltman v Chamberlain* (1890) 25 QBD 328.

14 *The Mabel Vera* [1933] P 109.

15 *The River Rima* [1987] 2 Lloyd's Rep 106 (CA), aff'd by HL [1988] 2 Lloyd's Rep 193; see also Ch 2, above.

16 *The Saetta* [1994] 1 All ER 851.

17 *The Eurostar* [1993] 1 Lloyd's Rep 106, p 111; *The Pan Oak* [1992] 2 Lloyd's Rep 36; see, further, cases in Ch 2, above.

The cargo on board the ship is not part of the security, unless the mortgagor has an interest in it, and the mortgage provides that it attaches to that interest.[18] With regard to freight earned by the ship, the mortgagee does not have a right to earn freight until he enters into possession to realise his security.[19] The freight is not part of the security, unless there is a special assignment of earnings to the mortgagee by a separate agreement.[20]

3 EFFECT OF THE STATUTORY SCHEME OF REGISTRATION

Since the MSA 1854, a special mortgage form, as prescribed by the statute, created the security on the ship and was the instrument to be produced for registration of the mortgage. The subsequent statute, MSA 1894, followed the same statutory scheme and, in particular, s 31 provided:

(1) A registered ship or a share therein may be made as a security for a loan or other valuable consideration, and the instrument creating the security (in this Act called a mortgage) shall be in the form marked B in the First Schedule to this Act . . . and on the production of such instrument the registrar of the ship's port registry shall record it in the register book.

(2) Mortgages shall be recorded by the registrar in the order in time on which they are produced to him for that purpose, and the registrar shall by memorandum under his hand notify on each mortgage that it has been recorded by him, stating the day and the hour of that record.

A slightly amended version of this wording, made only for linguistic purposes – leaving the substance unchanged – was carried forward in the MSA 1988 and later in the Merchant Shipping (Registration etc) Act (MS(Reg)A) 1993, which was supplemented by the Merchant Shipping (Registration of Ships) Regulations 1993,[21] as amended in 1994 and 1998.[22] These Regulations have modernised the registration system and apply only to British ships registered under the Acts.[23]

The MSA 1995[24] (the consolidating Act), Sched 1 (Private Law Provisions for Registered Ships), provides by para 7:

(1) A registered ship, or share in a registered ship, may be made a security for the repayment of a loan or the discharge of any other obligation.

(2) The instrument creating any such security (referred to in the following provisions of this Schedule as a 'mortgage') shall be in the form prescribed by or approved under registration regulations.

18 *Langton v Horton* (1842) 66 ER 847(CP).

19 *Liverpool Marine Credit Co v Wilson* (1872) LR 7 Ch 507, p 511.

20 *Wills v Palmer* (1860) 141 ER 847 (CP).

21 SI 1993/3138.

22 Merchant Shipping (Registration of Ships) (Amendment) Regulations 1994, SI 1994/541 and Regulations 1998, SI 1998/2976.

23 See Ch 5 on the registration of British ships, para 2.

24 The Act is supplemented by the 1993 Registration Regulations issued pursuant to the MS(Reg)A 1993, the provisions of which have been consolidated by the 1995 Act. These provisions have substantially re-enacted the mortgage provisions of the MSA 1894. They enable proprietary interests on ships to be recorded on the Register. MSA 1995, Sched 1, paras 7, 8 and 10 have replaced ss 31, 33 and 34, respectively, of the MSA 1894.

(3) Where a mortgage executed in accordance with sub-para (2) above is produced to the registrar, he shall register the mortgage in the prescribed manner.
(4) Mortgages shall be registered in the order in which they are produced to the registrar for the purpose of registration.

A mortgage of a British ship owned by a company registered in England and Wales also requires registration under s 395 of the Companies Act 1985.

Paragraph 8(1) of Sched 1 (MSA 1995) deals with priorities of registered mortgages. Their respective priority is determined by the order in which the mortgages were registered (and not by reference to any other matter). Paragraph 8(2) permits the intending mortgagee to give a priority notice to the registrar in the form prescribed by Reg 59 of the 1993 Regulations. The purpose of the priority notice is to record and thus protect the interest of an intending mortgagee on the Register for the interim period until proper registration takes place. The notice is valid for 30 days and the protection lapses at the end of the period, unless the notice is renewed for a further 30 days at the end of each period. The effect of the notice would be to give priority to the intended mortgagee in accordance with para 8 of Sched 1 from the date of the notification, as if the mortgage had been registered at the time when the relevant entry was made.

Paragraph 9 deals with the mortgagee's power of sale when the money falls due:

(1) Subject to subparagraph (2) below, every registered mortgagee shall have power, if the mortgage money or any part of it is due, to sell the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money.
(2) Where two or more mortgagees are registered in respect of the same ship or share, a subsequent mortgagee shall not, except under an order of a court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee.

Paragraph 10, entitled 'Protection of registered mortgagees', is important in the scheme of the statutory provisions and provides:

Where a ship or share is subject to a registered mortgage then (a) except so far as may be necessary for making the ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be treated as owner of the ship or share; and (b) the mortgagor shall be treated as not having ceased to be owner of the ship or share.

This paragraph clarifies that the mortgagee, by reason of the exercise of his statutory powers, which give him owner-type rights for the limited purpose of realising his security, shall not be treated as owner. The heading indicates that the mortgagee is protected from being exposed to owner-type liabilities during his possession of the ship.

It is also relevant to refer at this point to para 1 of Sched 1,[25] which affirms the most fundamental rights of the registered owner of the ship:

(1) Subject to any rights and powers appearing from the register to be vested in any other person, the registered owner of a ship or of a share in a ship shall have power absolutely to dispose of it provided the disposal is made in accordance with this Schedule and registration regulations . . .
(3) The registered owner of a ship or of a share in a ship shall have power to give effectual receipts for any money paid or advanced by way of consideration on any disposal of the ship or share.

25 It has replaced ss 56 and 57 of the MSA 1894.

Such rights will, of course, be subject to the terms of the mortgage.

Paragraphs 11 and 12 deal with transfer and transmission of the registered mortgage, respectively. Paragraph 13 provides for the de-registration of a mortgage upon its discharge:

> Where a registered mortgage has been discharged, the registrar shall, on production of the mortgage deed and such evidence of the discharge of the mortgage as may be prescribed, cause an entry to be made in the register to the effect that the mortgage has been discharged.

4 UNREGISTERED SHIPS AND STATUS OF AN UNREGISTERED MORTGAGE

The prescribed form of a ship mortgage applies only to mortgages granted on registered ships. There is no prescribed form for a mortgage of an unregistered ship, which does not come within the provisions of the MSA. Therefore, the common law on chattel mortgage will be relevant to determine the status of such a mortgage. As discussed earlier, the nature of the common law mortgage[26] is simply a transfer of the mortgagor's interest in the chattel mortgaged by way of security and is subject to redemption on payment of the debt. However, the mortgage is not an outright disposition but only by way of security. The words used in the transaction will be relevant in construing whether it has been intended to be a security transaction. The courts will examine, by allowing extrinsic evidence, the true nature and not the form of the transaction.[27]

Unregistered ships are not common nowadays, but ***The Shizelle***[28] is an example of the risk to an innocent purchaser who buys an unregistered ship, which may be subject to an unregistered mortgage, because there is no public register for it.

The mortgagee in this case had acquired by the mortgage the whole of the mortgagor's interest in the ship by way of security. This was a legal mortgage of an unregistered ship. On the question of the effect on a bona fide purchaser without notice of the mortgage, it was held that a legal mortgage at common law was enforceable against such a purchaser; an equitable mortgage would not be. The judge stated that: 'I therefore cannot find anything in the 1894 Act, which affects a common law mortgage of an unregistered ship.'[29]

It should be noted that only the first mortgage against an unregistered ship can be a legal one in the sense of a common law mortgage. Any subsequent mortgages will be equitable and will be secured on the mortgagor's equity of redemption and not on the legal title to the ship.

As the MSA has not made any provisions regarding mortgages of unregistered ships, such mortgages cannot be statutory. This lacuna in the law ought to be rectified for the protection of innocent purchasers of unregistered ships,[30] although such a situation is not very common.

26 (1876) 1 CPD 722, p 731.

27 Re Watson, *ex parte* Official Receiver in Bankruptcy (1890) 25 QBD 27.

28 [1992] 2 Lloyd's Rep 444.

29 Ibid, p 449.

30 The lacuna arises from the fact that all ships were excluded from the scope of the Bill of Sale Act 1878. Although the Act makes provision for registration of certain agreements, ship mortgages fall outside its scope. So, there is no means of discovering an unregistered mortgage of an unregistered ship, which does not come within the statutory provisions of the MSA 1995.

5 COMPARISON OF A SHIP MORTGAGE WITH OTHER TYPES OF SECURITY

5.1 CHARGE

A mortgage under the MSA 1995 is different from a charge on a property; the latter is recognised in equity as an appropriation of property as security for a debt. The chargee can realise his security by judicial process, either by appointment of a receiver or court sale. Being equitable, it ranks below legal registered interests (i.e. a registered mortgage), and the chargee, unlike the mortgagee, does not have a right to take possession. A charge may be fixed on a specific asset of the debtor, which cannot be disposed of without the permission of the chargee or payment of the debt. Alternatively, it may be floating on stocks-in-trade, which are changeable. When a default occurs, a floating charge crystallises; in other words, it becomes fixed. A charge is always equitable.

A charge on a ship is not registrable, as it does not come within the statutory scheme of the MSA 1995.

A distinction between a mortgage under general law and a charge in equity was made by Buckley LJ, in ***Swiss Bank Corp v Lloyds Bank Ltd***:[31]

> The essence of any transaction by way of mortgage is that a debtor confers upon his creditor a proprietary interest in property of the debtor, or undertakes in a binding manner to do so, by the realisation or appropriation of which the creditor can procure the discharge of the debtor's liability to him, and that the proprietary interest is redeemable, or the obligation to create it is defeasible, in the event of the debtor discharging his liability. If there has been no legal transfer of a proprietary interest but merely a binding undertaking to confer such an interest, that obligation, if specifically enforceable, will confer a proprietary interest in the subject matter in equity. The obligation will be specifically enforceable if it is an obligation for the breach of which damages would be an inadequate remedy. A contract to mortgage property, real or personal, will, normally at least, be specifically enforceable, for a mere claim to damages or repayment is obviously less valuable than a security in the event of the debtor's insolvency. If it is specifically enforceable, the obligation to confer the proprietary interest will give rise to an equitable charge upon the subject matter by way of mortgage.

Under the Law of Property Act (LPA) 1925, which deals with mortgages on land, the phrase 'charge by way of legal mortgage' is used in ss 85(1) and 87(1). A legal mortgage on land is created by a deed expressed to be by way of a legal mortgage. The charge is registrable, and the chargee will enjoy the protection of the Act and have the statutory powers of sale and appointment of a receiver, as provided by s 101 of this Act. The charge under the LPA 1925 is different from a charge in equity.

A charge under English law should not be confused with the charge under civil law, which is known as *hypotheque* and is registrable.[32] A hypothecation under civil law gives the mortgagee the same rights as the statutory English mortgage exercisable when a default event occurs, but excludes the power of the mortgagee to sell the ship,

31 [1982] AC 584 (HL), p 595: in which the House of Lords approved the judgment.

32 For example, under Greek law, there is, in addition, another type of ship mortgage, the 'preferred ship mortgage' perfected by registration, which is founded by a special statutory instrument (SI 1958/3899) issued pursuant to the Code of Private Maritime Law. This gives the mortgagee practically the same powers as the English ship mortgage under the statutory provisions of the MSA 1995.

otherwise than by a court sale. A hypothecation under English maritime law was effected in the past by way of a bottomry bond (charge on the ship) or respondentia (charge on the cargo). Both are, however, now obsolete.

5.2 PLEDGE

A pledge is the oldest and most fundamental form of chattel security. It arises whenever a person (the pledgor) transfers the possession of goods actually, or constructively by an atttornment or by transferring the means of control, or symbolically by the delivery of documents of title, to another person as security for a debt.[33] It is to be distinguished from the other three forms of security relating to chattels, namely the mortgage, the charge and the lien.

By contrast to a mortgage, possession is essential to a pledgee for the creation of the right, whereas a mortgagee may enter into possession when his security is impaired.

Examples of a pledge as an additional security for a mortgagee of a ship are a pledge or charge over the shares in the shipping company, which is common with a single-ship company (shares security). When the shares are bearer shares, however, this effectively means that whoever has the bearer shares owns the company and, thus, the ship.

5.3 COMMON LAW POSSESSORY LIEN

This resembles the pledge, in that it depends on possession until the debt is satisfied. But the lien holder does not have a right of sale in the event of default, and he will lose his security right if he delivers the chattel, whereas the pledgee may redeliver the chattel to the pledgor temporarily without losing his security.

6 PRIORITIES OF MORTGAGES

The importance of priorities between various maritime claimants and mortgagees has been discussed in Chapter 5 of Vol 1 of this book and will also be seen in the context of conflict of laws in para 7, below.

6.1 PRIORITIES BETWEEN MORTGAGES

A mortgage is valid from the date of its creation and not from the date of registration, but priorities of mortgages are determined by the date of registration.

A registered mortgage takes priority over an earlier unregistered interest, even if the registered mortgage had notice of the unregistered interest.[34] Registration is essential to priority.[35]

33 Palmer, N and Hudson A, 'Pledge', in Palmer and McKendrick, op. cit. fn 5, Ch 24.

34 *Black v Williams* (1895) 1 Ch 408. See also *Allgemeinetreuhand AG v the Arosa Kulm (owners) (The Arosa Kulm)* [1959] 1 Lloyd's Rep 212.

35 *Barclay v Poole* [1907] 2 Ch 284, cf. *The Shizelle*, under para 4 above.

The MSA 1995, Sched 1, para 8 states:

(1) Where two or more mortgages are registered in respect of the same ship or share, the priority of the mortgages between themselves shall, subject to sub-para (2) below, be determined by the order in which the mortgages were registered (and not by reference to any other matter).
(2) Registration regulations may provide for the giving to the register by intending mortgagees of 'priority notices' in a form prescribed by or approved under the regulations which, when recorded in the register, determine the priority of the interest to which the notice relates.

A scheme of priority notices is provided by Reg 59 of the Merchant Shipping (Registration of Ships) Regulations 1993. By this regulation a mortgagee may register his intention to register a mortgage and, if he subsequently does register such a mortgage within 30 days (which may be renewed for a further period) of the priority notice, his mortgage is deemed to have been registered at the date of entry of the priority notice.

If no registration takes place within the notice period, and, in the meantime, another mortgagee registers his mortgage granted subsequently to the first, the mortgage that is registered first takes priority. Registered mortgages, of course, take priority over unregistered ones but, as between unregistered mortgages (otherwise equitable ones), priorities are determined by equitable principles, that is, by the date of creation.

6.2 FURTHER ADVANCES

As a general rule, known as the ***Hopkinson v Rolt***[36] rule, advances made by the first mortgagee, whose mortgage is taken to secure future advances, cannot take priority over a second mortgagee, when such advances were made after he had notice of the second mortgage. Lord Chelmsford stated this rule succinctly, thus:

> As the first mortgagee is not bound to make the stipulated further advances, and with notice of a subsequent mortgage he can always protect himself by inquiries as to the state of the accounts with the second mortgagee, if he chooses to run the risk of advancing his money with the knowledge, or the means of knowledge, of his position, what reason can there be for allowing him any priority? . . . But, on the other hand, if it be held that he is always to be secured of his priority, a perpetual curb is imposed on the mortgagor's right to encumber his equity of redemption.

It follows that, if the first registered mortgagor does not have knowledge of the second mortgage, the priority of his further advances is not affected.[37] However, it is understood from an earlier decision[38] that the advances must have been made under the registered mortgage and not under a separate unregistered instrument.

In a non-shipping case, the CA subsequently held that the doctrine of *Hopkinson v Rolt* applies to further advances made to the mortgagor in pursuance of an obligation undertaken, or covenant entered into, at the time of the first mortgage.[39]

36 (1861) 9 HLC 514 (HL); concerning a shipbuilder who granted a mortgage to a bank and, subsequently, to the plaintiff. The bank made the further advances with knowledge of the plaintiff's mortgage.

37 *Liverpool Marine Credit Co v Wilson* (1872) 7 Ch App 507, p 512.

38 *Parr v Applebee* (1855) 7 De GM&G 585.

39 *West v Williams* [1899] 1 Ch 132 (CA).

6.3 EFFECT OF HARBOUR AUTHORITY'S CLAIMS UPON THE MORTGAGEE'S PRIORITY

A mortgagee may find himself bound to take his security subject to a harbour authority's right of detention and sale. The harbour authority, in exercising its statutory right, may sell the ship and can pass a title to a purchaser of the vessel free of the mortgage, even though the mortgage had been registered[40] (see Chapter 5, Vol 1, of this book). The mortgagee, however, may prevent a sale by the harbour authority from happening by stepping in to pay off the authority's claim, assuming that the value of the ship is sufficient to cover his security and the additional advance.

7 CONFLICT OF LAWS

There are two major issues on the question of conflict of laws: (a) what law determines the validity of the mortgage; and (b) priorities between foreign liens and mortgages.

7.1 LAW GOVERNING THE MORTGAGE AND LAW OF THE AGREEMENT TO GRANT A MORTGAGE

Prior to the Rome Convention 1980, the proper law of the ship mortgage was the law of the place of registration of the ship or the law of the flag,[41] unless another law had been expressly stated in the mortgage deed.

Mortgages of foreign land or ships would, prima facie, be governed by the law of the *situs* or the flag of the ship, in the absence of contrary evidence or choice of law (express or implied), by the parties.

The Angel Bell[42] (decided prior to the Rome Convention) is a good example of which law governed the mortgage. Here there was a conflict between the law of the country in which the mortgage was supposed to be registered and the law of the country in which the agreement to grant the mortgage was reached.

M, a bank, agreed with S, a Panamanian company, to provide a loan for the purchase of certain ships by S. M was granted a mortgage for payment of the loan and assignment of the marine policies. The mortgage was provisionally registered under Panamanian law, which fixed all questions of priority by reference to the date of the registration, provided that there was a definite registration within 6 months. Time expired without final registration of the mortgage. The *Angel Bell* sank, with her cargo on board. The owners of the cargo sued S in England and obtained a Mareva injunction (now known as a 'freezing order') against the insurance proceeds restraining

40 *The Blitz* (1992) 2 Lloyd's Rep 441.

41 The law of the flag is unsuitable, as a rule, today because of flags of convenience, which render the flag a questionable contact in terms of conflict of laws. It can only be one indicator of contact, among many, in determining the law of the contract: see Tetley, W, *International Conflict of Laws (Common, Civil and Maritime)*, 1994, International Shipping, p 224.

42 *Gillespie Bros & Co Ltd v Iraqi Ministry of Defence (The Angel Bell)* [1979] 2 Lloyd's Rep 491: with regard to M's claim as assignees of the policy or the insurance moneys under the provisions of the mortgage, this was not made out as, although S was under an obligation under the mortgage to assign the policies, the mortgage had not been registered, and Panamanian law probably did not permit M to jump the gap between having a right to assignment and being an assignee.

S from dealing with his assets within the jurisdiction. M intervened in the action on the basis that it was: (a) the original assured under one set of insurance policies; (b) designated as loss payee; (c) assignee under the notices of assignment endorsed on the policies. The issues were: (a) what was the proper law of the mortgage; and (b) whether M's claim was secured on the proceeds of the insurance policies.

It was held by Donaldson J that, although it was possible to have an English contract for a mortgage of foreign land that would result in the mortgage being governed by English law, prima facie, mortgages either of foreign land or ships would be governed by the law of their *situs* or flag – in this case, Panamanian law. There was no contrary evidence to displace that presumption. The failure of M to register the mortgage under Panamanian law reduced its effectiveness, in that it conferred no *in rem* rights but only rights *in personam* against the borrower. Panamanian law does not have the concept of equitable mortgages.

However, with regard to M's claim as original assured under the policies, the loan agreement was governed by English law and constituted M equitable mortgagee of the vessel, although it never became legal mortgagee, and M could rely on the 'loss payable' clause as confirmation of the capacity in which the insurers were acting. With regard to M's claim as assignee of the policies pursuant to an oral agreement to assign, this was made out. The agreement was that all policies should be assigned to M, unless and until the loan was repaid, and this had never been revoked. M was, therefore, creditor of S and was secured on the proceeds of the policies.

Since this case, the Rome Convention on the Law Applicable to Contractual Obligations 1980 clarified and settled the conflict of laws rules. The Convention was implemented in the UK by the Contracts (Applicable Law) Act 1990 and applies to English contracts entered into after 1 April 1991. The Convention provides that its rules shall apply to contractual obligations in any situation involving a choice between the laws of different countries, whether or not it is the law of a contracting State. Essentially, the rules of the Convention will apply to all cases brought in UK courts, provided the dispute falls within the scope of the Convention, save for certain exceptions provided by it. Priority is given to the law chosen by the parties to a contract, who can select the law applicable to the whole, or part of it, when the contract is severable (Art 3(1)). The validity of the law chosen is to be determined by the law so chosen (Arts 3(4), 8(1), 9(4)). In the absence of choice, Art 4(1) provides that, to the extent that the parties have not chosen a law to govern the contract, the law of the country with which the contract is most closely connected shall govern the contract. This is to be determined by reference to presumptions contained in the article, such as characteristic performance, habitual residence, central administration, and principal place of business.

7.2 PRIORITIES BETWEEN FOREIGN LIENS AND MORTGAGES

The issue of recognition and enforcement of foreign maritime liens involves conflict of laws. The question is whether recognition is a matter of substance or procedure. For the adjudication of the existence of such claims, different laws may apply, and this depends on the underlying contracts.

There is a universally admitted rule that matters of procedure are governed by the *lex fori*, which is the domestic law of the country where legal proceedings are taken. On the other hand, matters of substance are governed by the law to which the court is directed by its choice of law rule. The distinction between procedure and substance is by no means clear-cut. There is, as yet, no uniform international approach to the problem of recognition and enforcement of maritime liens granted by foreign law and attached to a vessel before it leaves the jurisdiction of the law where such liens were created. Therefore, different jurisdictions may attach different legal consequences to the same type of claim in terms of recognition and enforcement. This has been an acute problem when determining priorities in the distribution of the ship's fund to the various creditors.

The principle that the priorities between claimants are governed by the *lex fori* was established by the Privy Council in ***The Halcyon Isle***,[43] but it is not a universal one.

The problem was aptly summarised by Lord Diplock:

> . . . claims may have arisen as a result of events that occurred, not only on the high seas, but also within the territorial jurisdictions of a number of different foreign States. So the *lex causae* of one claim may differ from the *lex causae* of another, even though the events which gave rise to the claim in each of those foreign States are similar in all respects, except their geographical location; the *leges causarum* of various claims, of which, under English conflict rules, the 'proper law' is that of different States, may assign different legal consequences to similar events. So, the court distributing the limited fund may be faced, as in the instant case, with the problem of classifying the foreign claims arising under differing foreign systems of law in order to assign each of them to the appropriate class in the order of priorities under the *lex fori* of the distributing court.

There was no English authority directly relating to maritime liens and mortgages at the time. There were only cases in which similar incidents had arisen involving other foreign rights.[44]

The facts of *The Halcyon Isle* concerned a conflict in terms of priority between the claims of a British bank, the registered mortgagee, and American ship-repairers who had carried out repairs to the vessel in New York. Under US law, they were entitled to a maritime lien for the repairs done. The vessel sailed from New York and was later arrested and sold by the order of the High Court of Singapore. When the proceeds from the sale were insufficient to satisfy all claims, the question was whether the claim of the mortgagee should take priority over the claim of the ship-repairers. The practice and procedure of the Singaporean court, in the exercise of its Admiralty jurisdiction, applies English law, and the ship-repairers' claim does not give rise to a maritime lien if the event had occurred in England. The court had two options: (1) to accord the claim the legal consequence that would have attached to that event, if it had occurred in England, or in Singapore (the *lex fori*); or (2) to accord the claim the legal consequence that would be accorded to it under the *lex causae* (USA).

The case reached the Privy Council. English choice of law rules provide that, for a substantive right, the *lex loci contractus* governs the transaction, whereas for a procedural right, the *lex fori* would govern. It was concluded that the legal nature of the maritime lien was procedural or remedial under both English and Singaporean

43 [1981] AC 221 (PC), p 230.

44 See *The Colorado* [1923] P 102 (discussed in Ch 5, Vol 1).

law, and therefore the claim would be classified according to the *lex fori*. It is, respectfully, submitted that the majority of the Privy Council for policy reasons conflated the substance with the procedural consequence of maritime liens. Lord Diplock stated:

> . . . in principle, the question as to the right to proceed *in rem* against a ship, as well as priorities in the distribution between competing claimants of the proceeds of her sale in an action *in rem* in the High Court of Singapore, falls to be determined by the *lex fori*, as if the events that gave rise to the claim had occurred in Singapore.[45]

This meant that the mortgagee's claim took priority over that of the ship-repairers. The court was not ready to extend the classes of claims recognised in English law as giving rise to maritime liens.[46] Lord Diplock further held that:

> As a matter of policy, such a claim might not unreasonably be given priority over claims by holders of prior mortgages, the value of whose security had thereby been enhanced. If this is to be done, however, it will, in their Lordships' view, have to be done by the legislature.[47]

The dissenting minority, Lords Salmon and Scarman, held that:

> The question is: does English law, in circumstances such as these, recognise the maritime lien created by the law of the USA, that is, the *lex loci contractus*, where no such lien exists by its own internal law? In our view, the balance of authorities, the comity of nations, private international law and natural justice, all answer this question in the affirmative. If this be correct, then English law (the *lex fori*) gives the maritime lien created by the *lex loci contractus* precedence over the mortgagee's mortgage. If it were otherwise, injustice would prevail. The ship-repairers would be deprived of their maritime lien, valid as it appeared to be throughout the world, and without which they would obviously never have allowed the ship to sail away without paying a dollar for the important repairs upon which the ship-repairers had spent a great deal of time and money and from which the mortgagees obtained substantial advantages.[48]

And they continued, comparing a maritime lien with a mortgage as security rights:

> A maritime lien is a right of property given by way of security for a maritime claim. If the Admiralty Court has, as in the present case, jurisdiction to entertain the claim, it will not disregard the lien. A maritime lien validly conferred by the *lex loci* is as much part of the claim as is a mortgage similarly valid by the *lex loci*. Each is a limited right of property securing the claim. The lien travels with the claim, as does the mortgage; and the claim travels with the ship. It would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law.[49]

The decision of the majority has been criticised by academic writers[50] because it offends principles of private international law.[51] It should be noted, however, that, as the Rome Convention 1980 is binding upon the UK since 1991, if a ship were arrested today in the UK in the circumstances of *The Halcyon Isle*, the result might

45 [1981] AC 221, p 235.

46 The International Convention 1993 relating to maritime liens and mortgages has not been ratified. For its contents and scope, see Berlingieri, F, 'The 1993 Convention on Maritime Liens and Mortgages' [1995] LMCLQ 57.

47 [1981] AC 221, p 242.

48 [1981] AC 221, pp 246–47.

49 Ibid, p 250; see, also, Ch 5, Vol 1 of this book.

50 See Ch 5, ibid.

51 As Lords Salmon and Scarman said at fn 48.

be different, in that the UK court would be obliged by the Rome Convention to apply USA law. This is because of Arts 3 and 4 of the Convention (mentioned under 7.1, above). Thus, 'much of the air has been taken out of *The Halcyon Isle* balloon', as Professor Tetley[52] has put it.

By contrast, ***The Ioannis Daskalelis***[53] is consistent with private international law rules.

The Canadian Supreme Court was faced with a similar kind of situation as that in *The Halcyon Isle*. It was held that, although in Canada a claim for necessary repairs did not give rise to a maritime lien, it did so in New York, and such lien was enforceable in Canada, and under Canadian law had priority over the mortgage. Ritchie J summarised the law of England (applicable law in Canada) and quoted a passage from *Cheshire's Private International Law* (8th edn, p 676):

> The validity and nature of the right must be distinguished from the order in which it ranks in relation to other claims. Before it can determine the order of payment, the court must examine the proper law of the transaction upon which the claimant relies in order to verify the validity of the right and to establish its precise nature.

The court followed *The Strandhill*,[54] in which the principle that a maritime lien acquired under the law of a foreign State would be recognised and enforced in Canada, had been established. On the question of priorities, the court followed *The Colorado*,[55] which was taken as authority for the contention that, where a right in the nature of a maritime lien exists under foreign law, which is the proper law of the contract, the English courts will recognise it and accord it the priority that a right of that nature would be given under English procedure (see further Chapter 5, Vol 1, about the confusion in this case). It was held in *The Ioannis Daskalelis* that the ship-repairer's lien took priority over the mortgagee's claim.

However, in ***The Andrico Unity***,[56] the South African court followed *The Halcyon Isle*.[57]

The South African court had to consider similar circumstances in a case involving the supply of bunkers to a vessel in Argentina. In a bid to justify the arrest of the vessel, the supplier contended that a 'privileged credit' in the nature of a maritime lien attached to his claim under Argentinean law, and he was therefore entitled to enforce it by an action *in rem* against the vessel. The South African court was required by its law to apply the law of England. Following *The Halcyon Isle*, the court held that a notional High Court of England would have declined to recognise the Argentinean lien. Marais J discussed the difference between the nature of a maritime lien and a mortgage as follows:

> . . . when, therefore, a court dealing with competing claims to priority in the distribution of a limited fund is asked to recognise a foreign maritime lien which would not arise under the court's own system of law, it is being asked to supplant its own law in that regard by a foreign

52 Tetley, W. *International Conflict of Laws (Common, Civil and Maritime)*, 1994, International Shipping, Ch XVII, pp 580–581.

53 [1974] 1 Lloyd's Rep 174.

54 [1926] 4 DLR 801.

55 [1923] P 102.

56 (1987) 3 SALR 794.

57 *The Halcyon Isle* has also been followed in Cyprus, Singapore, Malaysia, Australia; see further authorities in op. cit., Tetley, fn 52, Ch XVII.

law. When a court is asked to recognise a foreign mortgage, it is not being asked to go as far. It is merely being asked to enforce a contract of mortgage, which the parties have entered into in a foreign jurisdiction.[58]

Marais J saw no conflict between *The Halcyon Isle* and the prior English authority (*The Colorado*). *The Halcyon Isle* was described, simply, as a decision based on readily understandable considerations of policy. In a subsequent decision, the South African court followed *The Halcyon Isle* again.[59]

The lack of uniformity in the law of liens between maritime nations still continues.

7.3 ARE THERE PROSPECTS FOR A UNIFORM APPROACH?

Unless the Rome Convention applies, matters relating to the creation and perfection of a mortgage will usually be governed by the law of the State of registration, as the legally attributed *situs* of the ship. Matters relating to enforcement will be controlled by the law of the State of enforcement. Priorities under the conflict rules of some countries are treated as substantive and, therefore, are governed by the law of the place of registration, or the place where the contract was made, whereas in other jurisdictions they will be regarded as procedural and be determined by the *lex fori*.[60]

Could there be a solution to conflicting judicial decisions from different jurisdictions in this area by the ratification of the 1993 Convention on Maritime Liens and Mortgages? This would ensure certainty and uniformity in the law and prevent forum shopping.

The same questions have been asked since the drafting of the very first Convention for unification of the law in this area in 1926, which was ratified by non-common law jurisdictions, and later by the subsequent Convention in 1967. The 1993 Convention, which is an improvement of the previous two, remains the thorny issue between ship-repairers and mortgagees. It is unlikely to come into force, because its authors (against strong advice) did not take into account consideration of special legislative rights of various nations. As Tetley proposes, the world needs a proper Convention of international maritime liens and mortgages, as well as a proper International Convention on conflict of laws.[61] The problem can only be solved by the legislators, as Lord Diplock pointed out in *The Halcyon Isle*.

As nothing has changed in the area of ratification of the 1993 Convention on Maritime Liens and Mortgages, the protection of foreign maritime lien holders would still depend on their taking the necessary steps to enforce the remedies available to them under the law of their contract without delay. Thus, ship-repairers, for example, whose interests would be likely to be affected adversely by the arrest of the ship in an unfavourable jurisdiction, should be well advised to exercise their possessory lien before the ship leaves the shipyard. A mortgagee may be able to control the jurisdiction to which the ship may proceed, in order to enforce its security there, whereas the ship-repairer will lose his possessory lien rights once the ship leaves his yard.

58 Ibid, p 812.

59 *Banco Exterior de Espana SA v Government of Namibia* [1999] 2 SA 434.

60 Goode, R (Sir), 'Battening down your security interests: how the shipping industry can benefit from the UNIDROIT Convention on International Interests in Mobile Equipment', [2000] LMCLQ 161.

61 Tetley W, *Maritime Liens and Claims*, 2nd edn, 1998, Blais, p 214.

8 OBLIGATIONS AND RIGHTS OF THE MORTGAGOR

8.1 THE MORTGAGOR IS BOUND BY CONTRACTUAL COVENANTS

The rights and obligations of the parties are largely governed by the terms of their contract, which are contained in the deed of covenants. There is usually a long list of covenants stipulating the mortgagor's obligations.

In practice, ship mortgages have developed into a sophisticated system of extensive contractual terms to cover every aspect of the parties' legal relationship, so as to avoid the uncertainties created by common law principles. When there is no deed of covenants, which is unlikely nowadays, the parties' relationship will be governed by the provisions of Sched 1 to the MSA 1995 and the 1993 Regulations (as amended by the 1998 Amendment Regulations). Where there are gaps in the statutory provisions, common law and equity step in.

Broadly, the covenants include the following provisions.

8.1.1 An obligation to insure

H&M insurance against the physical loss of, or damage to, the mortgaged ship, third-party liability for collision, general average contributions and other losses caused by insured perils must be procured by the mortgagor. Separate war risks cover may be obtained in circumstances where the ship is likely to enter a war zone. The mortgagor must also ensure that third-party liabilities are insured with a P&I club. He is required to pay all premiums and comply with insurance warranties. The mortgagee's interest must be noted in the insurance policies as an assignee, a co-assured or a loss payee. The mortgagor must obtain a letter of undertaking from the insurers confirming the status of the insurance and that the mortgagee will be informed in the event the insurance is suspended or terminated for breaches of the insurance contract by the mortgagor.

Lord Hoffmann, in ***Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd***, illustrated the legal effect of the insurance covenant, thus:[62]

> The purpose of a covenant for insurance is to ensure that, if the value of the security should be depreciated by the occurrence of a fire or other insurable risk, the proceeds of the policy will provide a fund to make up the shortfall. This purpose can be achieved only if the covenant gives the mortgagee an interest by way of charge, and no more than an interest by way of charge, in the proceeds. Standard insurance covenants contain various provisions designed to ensure that the mortgagee will be able to retain control of the insurance policy and its proceeds. Insisting that the mortgagee has the right to approve or nominate the insurer, take custody of the insurance policy, be shown receipts for premiums . . . are some of the cumulative techniques used for this purpose. So is the requirement that the insurance be effected in the name of the mortgagee. But all these provisions are, in their Lordships' view, intended to protect the

62 [1995] 2 Lloyd's Rep 433 (PC), p 436.

mortgagee's interest by way of charge over the proceeds of the policy rather than to create it. That such an interest exists is a fundamental assumption of the covenant. It cannot be destroyed by the mortgagor's failure to comply with one or other of the protective terms.

The insurance covenant is paramount, but it has its limitations. If the assured mortgagor is in breach of the insurance contract (that is of the duty of 'utmost good faith' under the Marine Insurance Act (MIA) 1906,[63] which will entitle the insurer to avoid the contract *ab initio*, or in breach of a warranty,[64] which will discharge the insurer of liability from the date of the breach), the mortgagee will not be able to recover the assigned insurance proceeds. The mortgagor may be guilty of wilful misconduct, whereupon it may be proved that the loss of the ship was not proximately caused by a peril insured against.[65]

8.1.2 An obligation to maintain the ship in good condition and repair

Obviously, the mortgagee is concerned not only that its security is not devalued by the deterioration of the ship, but also that accidents are prevented by maintaining the ship in good condition. In addition, this covenant protects the mortgagee from the risk of the ship being detained in a port for breaches of the ISM Code, which may result in the impairment of his security and prejudice the insurance cover. Connected with this covenant is the covenant to maintain the ship registered and in class. Keeping the vessel always in class by following class recommendations for repairs and complying with the international requirements for the safety of ships and safe management (the ISM Code compliance) are also paramount obligations for insurance purposes as well. Were the assured, however, unable to recover for the loss of the ship under the H&M insurance, the mortgagee, as assignee, would not be able to recover either.

In practice, the mortgagee takes out a separate insurance, the mortgagee's interest insurance, to cover himself for any of these eventualities. The law of mortgages is, thus, very much linked to marine insurance law, and the reader is referred to specialist books on the subject.

8.1.3 An obligation to notify the mortgagee

Notification to the mortgagee with regard to the movements of the ship is required, in case the ship sails in either war or piracy zones, where the security will be exposed to a higher risk or loss, or in jurisdictions in which the law may be unfavourable to the priority enjoyed by the mortgage over other maritime claims, which are not recognised as maritime liens under the law of the mortgage.

Giving information to the mortgagee about any accidents the ship has experienced, which may affect the security, are also included in the covenants as obligations of the mortgagor.

63 See *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427 (HL); *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] 1 Lloyd's Rep 389 (HL).

64 See *The Good Luck* [1991] 2 Lloyd's Rep 191 (HL).

65 *Samuel v Dumas* [1924] AC 431 (HL).

8.1.4 An obligation to discharge claims or liens

In parallel with the previous covenant, the mortgagor has an obligation to discharge all debts and liabilities that may encumber the ship and can be enforced against the security by arrest, as discussed in Chapter 2, Vol 1. If the ship is arrested, the mortgagor has an obligation to provide security and procure its release.

To pay dues to port authorities and any debts, which may affect the priority of the mortgagee's security, also forms part of the covenants.

8.1.5 An obligation not to sell or grant a charge on the ship

During the duration of the mortgage, the mortgagor covenants not to sell, or grant a mortgage or charge to any person, without first discharging the debt to the mortgagee.

8.1.6 An obligation of legal trading

Illegal trading will prejudice the insurance policy for breach of the implied warranty of legality under s 41 of the MIA 1906. Furthermore, it will result in detention or confiscation of the ship.

8.1.7 A covenant as to charterparties

Although a long-time charter agreed on favourable terms will be a source of revenue for discharging the debt to the mortgagee, the mortgagor is required to inform the mortgagee prior to engaging the ship for a long term, in case the terms of the charterparty prevent the mortgagee from exercising his rights in the event of default by the mortgagor. This is also very relevant to the issue of whether the mortgagee might find itself in a situation where the charter is breached by the mortgagor, if the mortgagee interferes with the performance of the obligations of the mortgagor under the charter, and the question then might be whether the charterer would have any rights of action against the mortgagee (see further under para 10, below).

The mortgagor must employ the ship in a prudent manner so that the earnings will provide income for payment of the instalments. Assignment of earnings is a collateral security.

8.2 THE MORTGAGOR'S STATUTORY OBLIGATIONS

It is implicit in the statute (paras 9 and 10 of Sched 1 to the MSA 1995) that, unless the mortgagor repays the loan, as agreed, or if he is in breach of the loan contract, so as to impair the security, the mortgagee may take steps, as empowered by the statute, to make the ship available as a security. The statute does not provide for any other obligations, leaving the parties to agree the details in their contract, by the deed of covenants.

8.3 THE MORTGAGOR'S RIGHT OF OWNERSHIP OF THE MORTGAGED SHIP

Under paras 1 and 10 of Sched 1 to the Act (see above), the ownership rights of the mortgagor are confirmed.

The mortgagor's rights of ownership are restricted only when the mortgagee takes possession for the purpose of making the ship available to satisfy the mortgaged debt. The mortgagor has all the ordinary incidents of ownership while he is in possession, including the payment of expenses, provision of insurance, entitlement to freight and the right to enter into contracts that do not materially impair the mortgagee's security. The manner in which he wishes to employ his asset, subject, of course, to his obligations to the mortgagee under the deed of covenants, is up to him.

8.4 THE MORTGAGOR'S RIGHT TO REDEEM THE SHIP – NO CLOG ON THE EQUITY OF REDEMPTION

The equitable right of the mortgagor to redeem his property upon payment of the loan is central to the essence of a ship mortgage. There is, therefore, prohibition to contract out of the right of redemption, known as a 'clog' or 'fetter' on the mortgagor's right, which means that any term impeding the right will be repugnant to the right of redemption.[66]

The right exists from the time of the inception of the mortgage, irrespective of default, and it does not depend on a contractual term to confer it. Moreover, the court has inherent equitable jurisdiction to interfere in all ship mortgages in which the terms are unconscionable, or constitute a 'clog or fetter' on the mortgagor's right of redemption.

The CA defined the extent of the court's intervention in ***Knightsbridge Estates Trust Ltd v Byrne***[67] concerning a mortgage of real property, in which Sir Wilfred Greene MR said:

> . . . equity may give relief against contractual terms in a mortgage transaction, if they are oppressive or unconscionable, and in deciding whether or not a particular transaction falls within this category the length of time for which the contractual right to redeem is postponed may well be an important consideration . . .
>
> But equity does not reform mortgage transactions because they are unreasonable. It is concerned to see two things – one that the essential requirements of a mortgage transaction are observed and, the other, that oppressive or unconscionable terms are not enforced. Subject to this, it does not, in our opinion, interfere . . .[68]
>
> . . . In our opinion the proposition that a postponement of the contractual right of redemption is only permissible for a 'reasonable' time is not well-founded. Such a postponement is not properly described as a clog on the equity of redemption, since it is concerned with the contractual right to redeem. It is indisputable that any provision which hampers redemption after the contractual date for redemption has passed will not be permitted. Further, it is undoubtedly true to say that a right of redemption is a necessary element in a mortgage transaction and, consequently that, where the contractual right of redemption is illusory, equity will grant relief by allowing redemption.[69]

66 *Santley v Wilde* [1899] 2 Ch 474 (CA).
67 [1939] Ch 441.
68 Ibid, p 457.
69 [1939] Ch 441, p 456.

If the mortgagee refuses the mortgage money offered, the court will protect the mortgagor's equity of redemption. An agreement subsequent to the mortgage whereby a half share or interest in the property would be transferred to the lender was found to be inconsistent with the right to redeem and, therefore, invalid as a clog on the equity of redemption.[70]

An action in damages against the mortgagee would lie, if it were no longer possible for the mortgagor to redeem the mortgaged property.

In ***Fletcher & Campbell v City Marine Finance Ltd***,[71] the defendants were the mortgagees of the ship for a loan granted to the first plaintiffs (the mortgagor). The deed of covenants provided for repayment of the loan in monthly instalments. There was default in payment, and the mortgagees wanted to take possession, refusing to accept payment from the second plaintiffs, who were the beneficial owners of the ship, and insisting that the mortgagor should pay on unconditional terms. Although an offer was made by the second plaintiffs for payment by the mortgagor, the mortgagees sold the vessel a few days thereafter depriving the mortgagor of his right to redeem. It was held that the tender of the sum due was a proper tender, and the defendants had acted unreasonably by refusing to accept it. The mortgagor was entitled to recover damages because his right to redeem was prevented by the wrongful action of the mortgagee. Roskill J quoted from p 16 of Benjamin and stated:

> It should be explained that an essential characteristic of a mortgage is the right of the mortgagor to redeem his property at any time after the date named in the mortgage as the date for repayment of the mortgage debt until the mortgage is foreclosed, or the property is sold, and a term, whether in the mortgage itself or in an independent agreement, which impedes or prevents the mortgagor in the exercise of this right may be a clog on the equity of redemption, and therefore invalid and unenforceable.[72]

The judge further commented that the courts would not, however, intervene in every case of interference with a due exercise of a mortgagor's right to redeem and concluded:

> Accordingly, in my judgment, there is, as a matter of English law, a right in the mortgagor of a ship to recover damages against his mortgagee, if his right to redeem is prevented by the wrongful act of the mortgagee. I do not think it matters whether one makes the necessary implication into the collateral deed as a matter of law, or whether one makes the implication therein as arising from the other express terms of the deed or whether one arrives at the same result by the application of basic principles of equity.[73]

An option to purchase part of the mortgaged property, unless it is given by a separate transaction, would be void as a clog on the equity of redemption for, if it was exercised, it would prevent the mortgagor from recovering the part of the property to which it applied. The court looks at the substance of the matter and not the form

70 *Jones v Morgan* [2001] EWCA Civ 995; 1 Lloyd's Rep Bank 323; see also JBL, 2002, July, 335–357: 'Clogs on the equity of redemption – or chaining an unruly dog'; and JBL 2002, Sep, 539–552: 'A pack of unruly dogs: unconscionable bargains, lawful act (economic) duress and clogs on the equity of redemption'.

71 [1968] 2 Lloyd's Rep 520.

72 Ibid, pp 535, 536.

73 Ibid, p 538.

in which the bargain was carried out, and inquires into the object and purpose with which the documents were executed.[74]

If the mortgagee has a right under the contract to accelerate his power of sale without notice, even if there is no financial default, such a clause, normally, would be a clog on the right to redemption, if the mortgagee exploited his bargaining strength at the time of the agreement. Although there is freedom of contract permitting the parties to agree their terms and how to deal with specific events, a power of sale without notice may, in certain circumstances, violate the right of the mortgagor to redeem his property.[75]

In exceptional circumstances, however, the courts may adopt a non-interventionist approach if, upon true construction of the relevant clause in the deed of covenants, the parties had expressly agreed that the mortgagee should have power to sell the vessel in the event of a non-financial default, even though no sum of money had become due under the loan agreement. The mere possibility that the power of sale could be exercised in an unlawful manner, without notice, so as to defeat the mortgagor's right of redemption, did not invalidate the power of sale conferred in ***The Maule***.[76] This decision of the Privy Council, as a matter of principle, seems to be in sharp contrast to the right of redemption, and it is instructive to see whether there were any special circumstances in the contract and on the facts.

The plaintiffs lent money to the defendants. As security for the performance of their obligations under the loan agreement, the defendants granted to the plaintiffs a mortgage over their vessel, which was registered in Cyprus. The deed of covenants provided that, upon the occurrence of any of the events of default specified in the loan agreement, the plaintiffs would be entitled, forthwith, to exercise all the powers possessed by them as mortgagees of the vessel. One such power was to sell the ship, with or without prior notice to the owners, and the sale would be deemed to be within the mortgagees' power. Among the events of default in the loan agreement was the failure by the mortgagor to sell a vessel belonging to the group, *The Foresight Driller II*, within 60 days after notice by the mortgagees had been given, in the event that no employment could be found for her. The ship was not sold within the required time limit. Although no instalment was outstanding, the *Maule* was arrested in Hong Kong. *The Foresight Driller II* was eventually sold, and its proceeds were used to reduce the indebtedness of the owners in the group to the mortgagee.

The judge held that a power of sale under a mortgage could only be exercised when money was due. The CA of Hong Kong dismissed an appeal by the mortgagees, who appealed to the Privy Council, and the issue was whether they were entitled to arrest *The Maule* in the circumstances. If they were not, the ship-owners were claiming damages for wrongful arrest. As the ship was registered in Cyprus, the applicable statute was the same, in all material respects, as the MSA 1995.

The Privy Council, allowing the appeal, held that the rights and duties of the parties to the mortgage of a ship were primarily governed by the contract. On true construction of the relevant clause in the deed of covenants, the mortgagees were not

74 *Lewis v Love* [1961] 1 WLR 261; *Reeve v Lisle* [1902] AC 461 (HL); *Samuel v Jarrah Timber and Wood-Paving Corp Ltd* [1909] AC 323 (HL).

75 *The Maule* [1997] 1 WLR 528 (PC).

76 Ibid.

obliged to give notice accelerating repayment of the loan before exercising their power of sale. Therefore, they were entitled to arrest the vessel pursuant to their power of sale conferred by the contract.

While the Privy Council confirmed the principle derived from the previous cases,[77] that any sale without notice would be unlawful and give rise to a claim in damages, it distinguished that position from the facts of the case in question. In this case, the borrowers were aware of the proposed sale and they could seek assistance from the contract under which they could give 7 days notice to repay and thereby redeem the ship.[78]

Fortunately, the decision will have a limited application because of the particular clause in the contract. While it reinforces the rule of freedom of contract in the loan agreement, borrowers should be cautious before they agree terms that would extend the mortgagee's power of sale beyond the classic events of default known in practice and in law. Skilful drafting would have prevented the borrowers from finding themselves in such an unfavourable situation, unless the bargaining power weighed heavily on the side of the mortgagee.

9 MORTGAGEE'S RIGHTS AND OBLIGATIONS

The mortgagee's rights derive from the contract, the statute and common law. Unless it is otherwise specified in the contract, normally a default in payment will trigger the right of the mortgagee to enforce his security. He should first give immediate notice of the default to the mortgagor, requiring remedy of the default, depending on what the contract provides. He may demand payment of the whole debt, or acceleration of the debt, but he must specify a reasonable time for the mortgagor to do so.

The acceleration of the debt is not a penalty, so as to be void, if it provides for payment of the unpaid principal amount secured by the mortgage and not for future interest that would have been payable.[79] If the default is minor, the mortgagee may decide to waive it, or give time to the mortgagor to rectify the default. In the event the mortgagor does not pay the amount due, the mortgagee can seek enforcement of his security, either by taking possession and then exercising his power of sale, or by arresting the ship and proceeding for a judicial sale.

Once the mortgagee enters into possession of the ship for the realisation of his security, he has owner-type rights conferred on him by statute or contract, but only such rights as are necessary for the enforcement of his security. They are exercisable only to the extent that it is necessary for that purpose. The rights and remedies of a registered mortgagee are conferred by statute, essentially by paras 9 and 10 of Sched 1 to the MSA 1995. Paragraph 10 not only does it define the mortgagee's rights but also regulates their exercise.

77 E.g. *Fletcher & Campbell v City Marine Finance Ltd* [1968] 2 Lloyd's Rep 520.

78 See, also, commentary on this case, Clarke, A [1997] LMCLQ 329, p 337, where she concluded that: 'Any uncertainties about the power of sale left unresolved by *The Maule* can be avoided by competent drafting'.

79 *The Angelic Star* [1988] 1 Lloyd's Rep 122 (CA).

9.1 THE RIGHT TO TAKE POSSESSION

The statute does not expressly confer to the mortgagee a right to take possession; there is no express reference in Sched 1 to the MSA 1995 that the mortgagee has such power. But such right is conferred by common law independently of express provisions in the contract. Express provisions in the deed of covenants will specify when the mortgagee can enter into possession. At common law, the mortgagee can enter into possession when there is default in payment of capital or interest, or a threat to his security.

The power can be implied from the statute. Paragraph 9 of Sched 1 to the MSA 1995 provides for when the mortgagee could sell the ship and, by implication, he may enter in possession before sale. Para 10 of Sched 1 to the 1995 Act seems also to imply a right of possession, in that it protects the registered mortgagee only insofar as it is necessary for making the ship or share available as a security for the mortgage debt. It permits the mortgagee to exercise ownership rights. In pursuance of such rights, the mortgagee can interfere with the mortgagor's possession, control and operation and, insofar as it is necessary to make the ship available as a security, he may be treated as owner. Ownership rights include possession.

The mortgagee has no right to take possession of the ship unless there has been default in payment or a threat to his security in a sense that the security would be impaired. If the mortgagee enters into possession in the absence of either of these circumstances, or express contractual provisions, he may be liable to the mortgagor for costs and substantial damages.[80] The modern deed of covenants in ship mortgages provides extensively for the circumstances in which the mortgagee can enter into possession.[81]

9.1.1 What would amount to default?

Default in payment of instalments of the capital and interest will entitle the mortgagee to take possession, but the totality of the circumstances will be looked at in the context of the contract. Paragraph 9 of Sched 1 to the MSA 1995 provides for when the mortgagee can sell the ship. Before such power can be exercised, para 9 puts a condition that there must be money or any part of it due. In the absence of a variation in the contract, once the date of payment has passed, technically, the mortgagee will be able to exercise his statutory power. The statute does not specify any other default or the extent of default, but gives only a general event of money being due, leaving the parties to agree other reasons of default and any maximum or minimum non-payment.

In ***The Cathcart***,[82] for example, although the date for payment had passed, the parties had agreed to postpone repayment until freight had been paid. When the mortgagee arrested the ship for non-payment, despite the fact that he had full knowledge that the vessel was about to commence a profitable charterparty, the court held him liable in damages.

80 *The Cathcart* (1867) LR 1 A&E 314, per Dr Lushington; *The Blanche* (1887) 6 Asp MLC 272; *The Manor* [1907] P 339.
81 See, e.g., *The Maule* [1997] 1 WLR 528.
82 (1867) LR 1 A&E 314.

9.1.2 When would the security be impaired?

Other than default in payment of instalments by the due date, there may be various events that indicate that, at the end of the day, the ship's value may be diminished to an extent that it will not be sufficient for the mortgagee to cover his security, and thus a threat to the security may be imminent.

It is a question of fact as to when the mortgagee's security is being endangered, or is likely to be impaired, and depends on the circumstances of each case.[83] The courts usually consider a certain number of factors before coming to the conclusion that the mortgagee was justified in taking possession, if his security was indeed impaired, or likely to be impaired, in the absence of default of payment. Examples of some of these circumstances have been an impecunious mortgagor[84] and the prospect of the vessel remaining burdened with maritime liens coupled with financial difficulties of the mortgagor. (This may mean that the vessel remains unrepaired for a long time, or uninsured.[85]) An unprofitable charterparty with onerous terms and provisions, which may greatly affect the mortgagee's right to recover his security, may amount to impairment.[86] Sometimes, the mere presence of one of these factors may not be sufficient to entitle the mortgagee to enter into possession, but a combination of them will.[87] Some examples given below illustrate these circumstances.

The Manor[88]

The borrower was in breach of a covenant to pay premium with respect to insurance. (It had been agreed that the mortgagees would pay part of the premium.) In addition, the borrower had incurred debts, such as unpaid wages to the crew and master, canal dues, dues for coal. A lot of money was needed for the repair of the vessel. The liabilities would exceed the amount expected to be earned from freight out of a 9-month voyage. Time for the repayment of the mortgage amount was imminent, and the mortgagee took possession of the ship. The issue for the court was whether the mortgagee's security would be materially impaired if the ship were left under the control of the mortgagor. The judge came to the conclusion that, on the facts, there was not sufficient impairing of the security to justify the mortgagee in taking possession. The CA held that a set of circumstances existed that did, in fact, impair the security, and the mortgagee was entitled to take possession. In particular, Fletcher Moulton LJ said:

> It may well be that to allow a ship to become subject to a maritime lien may not be an infringement of the rights of the mortgagee, even though that maritime lien ranks above claims of the mortgagee . . . But, there is an obvious difference between allowing a ship to become burthened with a maritime lien, and allowing her to remain burthened with such a lien, without the power to discharge it, for, to that extent, you have, as in this case, substantially diminished, that is to say, impaired the value of the mortgage security.[89]

83 *The Myrto* [1977] 2 Lloyd's Rep 243.
84 *De Mattos v Gibson* (1858) 4 De G&J 276.
85 *Laming & Co v Seater* (1889) 16 Ct of Sess Cas (4th ser) 828.
86 See *The Myrto* [1977] 2 Lloyd's Rep 243; cf. *The Maxima* (1878) 4 Asp MLC 21; *The Fanchon* (1880) 5 PD 173.
87 *The Manor* [1907] P 339, per Moulton LJ; *The Myrto* [1977] 2 Lloyd's Rep 243, per Brandon J.
88 [1907] P 339.
89 Ibid, pp 361–362.

The facts in ***Law Guarantee and Trust Society v Russian Bank of Foreign Trade***[90] are interesting.

The plaintiffs were trustees of a debenture trust deed. The deed was entered into by the defendants, British ship-owners, to secure the holders of debentures of the ship-owning company. By an undertaking of the company, all its property was assigned to the plaintiffs as a security for the payment of the debentures. Three steamships of the company were the mortgaged property, and the mortgages on the steamers were executed in the statutory form and were registered. The trust deed provided that the trustees might enter into possession upon the happening of certain events. In 1904, when Russia was at war with Japan, the defendants entered into charterparties for carriage of cargoes of coal from Barry to Vladivostock in Russia in their three steamers. However, they signed fictitious documents, with the knowledge of the charterers, purporting to carry the goods to the neutral ports of Manilla and Shanghai because there was great risk of the vessels being captured, as Russian ports were blockaded by the Japanese. It was not disputed that the Russian Government was interested in the coal. Insurance premiums against war risks for vessels going to Russian ports were very high at the time, so to insure them for war risks would have left little or no profit on the charterparties. Lord Alverstone CJ, agreeing with the judge, stated that the mortgagor was not justified to enter into these charterparties, which were, in themselves, such as to imperil the security of the mortgagee, and, therefore, the latter was not bound by the charterparties. The rule in *Collins v Lamport* was applied (see under para 10, below).

Making reference to his previous judgment in *The Heather Bell*,[91] he clarified the issue of whether or not there would be an impairment of the security if there was no proper insurance in place for ordinary perils of the sea, and said:

> . . . I did not mean to say [in that case] that non-insurance was not a matter to be considered in connection with such cases, but merely that, if the charterparty was otherwise binding on the mortgagee, the fact that the ship was not properly insured against ordinary perils of the sea might not of itself be sufficient to prevent the charterparty from being binding upon him.[92]

Whether or not the security would be impaired if the ship sailed to a jurisdiction where the mortgagee would find it difficult to enforce his security, he referred to a previous case and said: 'The mere fact that the ship is about to sail in a jurisdiction in which it may be more difficult for the mortgagee to enforce his security is not a factor in itself to allow the mortgagee to take possession.'[93]

9.2 MODE OF EXERCISING HIS POWERS

The mortgagee may recover his debt, either by instituting an action *in rem* under s 21 of the Supreme Court Act 1981, or by taking actual or constructive possession of the vessel. He may take actual possession by putting his own representative on board the vessel, and constructive possession by simply giving notice to the mortgagor and

90 [1905] 1 KB 815.
91 [1901] P 272.
92 [1905] 1 KB 815, pp 825 and 826.
93 *The Highlander* (1843) 2 W Rob 109.

all interested parties, such as insurers, charterers and bill of lading holders.[94] When he takes possession, he must take sufficient steps to indicate his intention to enter into possession, which must be clear and unambiguous to the interested parties.[95]

9.3 MORTGAGEE'S RIGHTS AND OBLIGATIONS IN POSSESSION

When the mortgagee takes possession of the vessel, he becomes responsible for the mortgagor's contractual obligations under pre-existing binding contracts. Thus, he will be liable to pay the expenses, but he will also enjoy the benefits of such contracts. Once he has taken possession of the vessel, he is entitled to the freight which is being earned.

9.3.1 Right to freight

A mortgagee of the ship, having taken possession of her before any freight had become payable from the charterers to the owners, is entitled to the freight. He takes it in priority to an assignee of freight, who took an assignment with knowledge of the mortgage.[96]

Liverpool Marine Credit Co v Wilson[97]

The owners of the ship executed and registered a mortgage in favour of the plaintiffs, the first mortgagee. Two days later, a second mortgage was executed in favour of the defendants, the second mortgagee, and it was later registered. The owners then gave a lien on the accruing freight to a third party, to which the first mortgagee signed a written consent that this advance would have priority over their own mortgage. As additional security to the second mortgagee, the owners granted them a lien on accruing freight. The first mortgagee, with no notice of the second mortgagee's lien on the freight, made further advances to the owners on the security of another mortgage, including all freight already earned, or to be earned under any charterparty entered into during the continuance of the mortgage. The first mortgagee's second mortgage was unregistered. All parties who were given a lien on the freight subsequently gave notice of their charge to the charterers. The first mortgagee (plaintiffs) took possession of the vessel and claimed priority over the second mortgagee to the net proceeds of the sale and to the freight (subject to the sum payable to the third party) for the satisfaction of their second mortgage. The second mortgagee contended that the first mortgagee was not entitled to the freight as a separate fund in the discharge of their first mortgage. It was held that the first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain not only what is due on his first mortgage, but also the amount of any subsequent charge that he may have acquired

94 *Rushden v Pope* (1868) LR Ex 269.
95 *Benwell Tower* (1895) 8 Asp MLC 13.
96 *Brown v Tanner* (1868) LR 3 Ch 597 (CA).
97 (1872) LR 7 Ch 507.

on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight.

On the right of the mortgagee to the freight, Sir WM James LJ stated:

> It is to be observed that the MSA nowhere deals with charges on freight. They were long before the passing of the Act securities well known in the shipping world, and of ordinary occurrence. And the right of a mortgagee in respect of freight had also been long settled and well recognised. But it was not thought fit to provide by that Act either with respect to the priorities of charges on freight, or with respect to the rights of mortgagees to freight. These were left to be dealt with according to the ordinary principles of law and equity, and the rules and doctrines established by the decisions of the courts. Now, the right of the mortgagee in respect of freight was well established and clear, but somewhat peculiar. He had no absolute right to the freight as an incident to his mortgage; he could not intercept the freight by giving notice to the charterer before payment; but, if he took actual possession . . . [even] if he took constructive possession of the ship before the freight was actually earned, he, thus, became entitled to the freight as an incident of his legal possessory right, just as a mortgagee of land taking actual possession of the land before severance of the growing crops would have the right to sever and take the crops.[98]

His position was like that of the legal mortgagee of any other kind of property who made further advances on the property itself without notice of any intervening equitable interests.

If, however, the mortgagee takes possession before the freight has become payable and at the time of the possession still remains unpaid, he will not be entitled to the freight.[99]

9.3.2 Obligation during operation and management

Although the statute does not specifically stipulate this, it should be implicit that, when a mortgagee exercises his owner-type rights by taking possession, he may like to continue the operation of the ship and earn the profits to satisfy his security, particularly if there is a profitable charterparty ongoing. He is not obliged to exercise his power of sale once he enters into possession. As the mortgagee does not, usually, have the expertise to operate or manage ships, he will appoint a professional manager. The operation of a ship will entail liabilities, and, in practice, it is rarely the case that a mortgagee would wish to get involved in such an exposure, unless the circumstances warrant profitable returns.

Should he decide to trade her, he must use her as a prudent man would use her. Lord Campbell, in ***Marriott v The Anchor Reversionary Co***,[100] stated that there is no unlimited right of the mortgagee to use the ship in the same way as the owner might do; but if the mortgagee does take possession, he can lawfully use the ship as a prudent man would use her, if she were his own property.

A mortgagee has an equitable duty to manage the ship with due diligence, so that he trades her profitably (see para 9.5, below).

98 Ibid, p 511.
99 *Anderson v Butler's Wharf Co Ltd* (1879) 48 LJ Ch 824.
100 (1861) 2 Giff 457.

9.4 POWER OF SALE

9.4.1 Source of power

As already mentioned, para 9 of Sched 1 to the MSA 1995 is the key to this statutory power. As compared with its predecessor, s 35 of the MSA 1894, the power in para 9 is slightly varied, in that it specifically requires that there must have been some default in payment. A second or subsequent registered mortgagee cannot exercise the power of sale without the concurrence of every prior mortgagee, except when the order is made by a court of competent jurisdiction (Sched 1, para 9(2)).

An additional source of the mortgagee's power of sale is the contract. Whether or not he takes possession of the ship, he can exercise this power by having the ship arrested and sold by the court.

9.4.2 Role of the mortgagee in the sale of the ship and extent of his power

In exercising his power of sale, the mortgagee is not a trustee of the power of sale for the mortgagor. Salmon LJ restated the principle of the mortgagee's role in the sale of the ship in ***Cuckmere Brick Co Ltd v Mutual Finance Ltd***:[101]

> It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.[102]

A mortgagee is at all times free to consult his own interests alone as to whether or not to exercise his power of sale.[103]

The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor.[104]

It does not matter that the time may be unpropitious and that, by waiting, a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price.[105]

The mortgagee is entitled to sell the mortgaged property as it is. He is under no obligation to improve it or increase its value. There is no obligation to take any such pre-marketing steps to increase the value of the property.[106]

101 [1971] Ch 949.
102 Ibid, p 965.
103 *Raja v Austin Gray* [2002] EWCA Civ 1965, para 95, per Peter Gibson LJ.
104 *China and South Sea Bank Limited v Tan Soon Gin* [1990] 1 AC 536.
105 *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, p 1355B.
106 *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409.

With regard to any surplus of value fetched by the sale after satisfaction of the debt to him, he will hold the sum as a constructive trustee[107] for any subsequent mortgagees and for the mortgagor.[108]

9.4.3 Nature of duty of the mortgagee in the exercise of his power of sale

The question that has frequently arisen, particularly in land property cases, is whether the mortgagee in the exercise of his power of sale owes a duty of care to the mortgagor, in the same way as the duty owed by a trustee of a power of sale to the beneficiary of the property,[109] or whether he just has an obligation to act in good faith. If he owes a duty of care and he is in breach of it, he will be made liable in damages suffered by the mortgagor owing to such negligence, whereas if he is only required to act in good faith, he will be liable in damages only if he acted dishonestly, recklessly or fraudulently. Furthermore, if the duty is just a duty in equity, and not in tort, he will only have to account to the mortgagor and to others interested in the equity of redemption, not just for what he actually received, but for what he should have received.[110]

When the sale is tainted by fraud, provided relief is sought promptly, the court may, depending on the circumstances of the particular case, set aside the sale.[111] However, the court will also consider the position of the purchaser; if the purchaser had notice of the breach, setting aside the sale may be an appropriate order,[112] but, if the purchaser was innocent, damages to the mortgagor (instead of setting aside the sale) may be an alternative remedy.

The following decisions illustrate how the courts have approached the issue of what type of duty is owed by the mortgagee to the mortgagor and to subsequent mortgagees when he exercises the power of sale.

In ***Farrar v Farrars Limited***,[113] the CA held that the mortgagee must act bona fide for the purposes of realising his security and must take reasonable precautions to secure a proper price.

There were three mortgagees involved. One of them was a solicitor and acted for the other mortgagees. He negotiated a sale in principle and agreed a price with intended purchasers. He subsequently took shares in a company formed by the purchasers to carry the sale into effect. The plaintiffs contended that the sale was by the mortgagee to himself and others, under the guise of a sale to a limited company. On the nature of a mortgagee's power of sale, Lindley LJ stated:

A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own, which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realise his security and to find a

107 *Banner v Berridge* (1881) 18 Ch D 254.

108 *Den Norske Bank v Acemex Management (The Tropical Reefer)* [2004] 1 Lloyd's Rep 1. In case of a surplus in the price after payment of the loan to himself, he is in a fiduciary relationship to hold the surplus in trust for the mortgagor.

109 See *Kennedy v De Trafford* [1896] 1 Ch 762 (CA), p 772, [1897] AC 180 (HL), p 185.

110 *The Tropical Reefer* [2004] 1 Lloyd's Rep 1.

111 *Haddington Island Quarry Co Ltd v Alden Wesley Huson* [1911] AC 722 (PC).

112 *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349.

113 (1888) 40 Ch D 395.

purchaser if he can, and, if in exercise of his power, he acts bona fide and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even though more might have been obtained for the property if the sale had been postponed.[114]

There was no impropriety in this case, and the mortgagee's solicitor did his best to get the best price.

However, other decisions have not been consistent on the issue. The CA, in the ***Cuckmere***[115] case, mentioned above, summarised the conflicting authorities, and Cairns LJ was in favour of the view that there was a duty owed by the mortgagee to take reasonable care to obtain a proper price:

I find it impossible satisfactorily to reconcile the authorities, but I think the balance of authority is in favour of a duty of care. That there is such a duty was certainly the view of Kekewich J and of the Court of Appeal in *Tomlin v Luce* (1889) 41 Ch D 573; (1889) 43 Ch D 191; also, of the Judicial Committee in *McHugh v Union Bank of Canada* [1913] AC 299. It also appears to have been the view of Lindley LJ at the time of his judgment in *Farrar v Farrars Ltd* (1888) 40 Ch D 395. That judgment was so interpreted by the judge of first instance in *Kennedy v de Trafford*, but, on the appeal, in that case, Lindley LJ said ([1896] 1 Ch 762, p 772) that, when he had referred in Farrar's case to a mortgagee's duty to take reasonable precautions, he had meant merely that the mortgagee must not act fraudulently or wilfully or recklessly; and, in the House of Lords, [1897] AC 180, p 185, Lord Herschell said that he thought it would be unreasonable to require the mortgagee to do more than act in good faith, that is, not wilfully or recklessly to sacrifice the interests of the mortgagor. These expressions of opinion in the Court of Appeal and in the House of Lords were, however, not necessary to the decision. Lindley LJ said, [1896] 1 Ch 762, p 772, that the mortgagees 'acted from first to last in an honourable and businesslike manner, without in the least sacrificing the interests of the mortgagor'.

Lord Herschell said, *in Kennedy v de Trafford* (at p 185):

My Lords, it is not necessary in this case to give an exhaustive definition of the duties of a mortgagee to a mortgagor, because it appears to me that, if you were to accept the definition of them for which the appellant contends, namely, that the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, as well as to act in good faith, still in this case he did take reasonable precautions.

I, therefore, consider that *Tomlin v Luce* (1889) 43 Ch D 191 is the stronger authority and I would hold that the present defendants had a duty to take reasonable care to obtain a proper price for the land in the interest of the mortgagors.

Salmon LJ, in *Cuckmere*, dissented only to the extent that it was necessary to establish a yardstick with regard to the value to be obtained on sale; he preferred to use the phrase 'the true market value' instead of 'proper price':

. . . both on principle and authority, the mortgagee, in exercising his power of sale, does owe a duty to take reasonable precautions to obtain the true market value of the property at the date on which he decides to sell it.[116]

In 1993, the Privy Council held, in the *Downsview Nominees* (below), that the duty to take reasonable precautions was limited to obtaining a proper price for the mortgaged property, and that the *Cuckmere* decision was not an authority for any wider proposition. This was the correct interpretation of the case.

114 (1888) 40 Ch D 395, pp 410–411.
115 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, pp 977–978.
116 Ibid, p 968.

Downsview Nominees v First City Corp[117]

The nature and extent of the duties owed by a mortgagee and his receiver or manager to subsequent encumbrancers and the mortgagor was examined in this case. The first debenture holder (also the first defendant) appointed the second defendant as receiver for the sole purpose of disrupting the receivership under the second debenture belonging to the first plaintiff. The first plaintiff offered to buy the first debenture from the first defendant at a price equivalent to the amounts outstanding and secured under the debenture, but the first defendant refused. There was subsequently gross mismanagement on the part of the defendant's receiver, resulting in considerable losses. The question was whether the first debenture holder and his receiver owed any duty to subsequent encumbrancers (the plaintiff) and to the company. The judgment of the Privy Council was delivered by Lord Templeman, who said, with regard to the duty, that it is primarily an equitable duty:

> If a first mortgagee commits a breach of his duties to the mortgagor, the damage inflicted by that breach of duty will be suffered by the second mortgagee, subsequent encumbrancers and the mortgagor, depending on the extent of the damage and the amount of each security . . .
>
> . . . when a receiver and manager exercises the powers of sale and management conferred on him by the mortgage, he is dealing with the security; he is not merely selling or dealing with the interests of the mortgagor. He is exercising the power of selling or dealing with the mortgaged property for the purpose of obtaining repayment of the debt owing to his mortgagee. The receiver and manager owes these duties to the mortgagor and to all subsequent encumbrancers in whose favour the mortgaged property has been charged . . .[118]
>
> The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts, applying equitable principles, have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of wilful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor, even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 is a Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price, but is no authority for any wider proposition. A receiver exercising his power of sale also owes the same specific duties as the mortgagee. But that apart, the general duty of a receiver and manager appointed by a debenture holder, as defined by Jenkins LJ in *In re B Johnson & Co (Builders) Ltd* [1955] Ch 634, p 661, leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company. The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there existed a general duty in negligence to take reasonable care in the exercise of powers and to take reasonable care in dealing with the assets of the mortgagor company.[119]

The receivership of the second defendant was inspired by improper purposes and carried on in bad faith, verging on fraud. Lord Templeman continued:

> A mortgagee owes a general duty to subsequent encumbrancers and to the mortgagor to use his powers for the sole purpose of securing repayments of the moneys owing under his mortgage

117 [1993] AC 295.
118 Ibid, pp 311–312.
119 Ibid, p 315.

and a duty to act in good faith. He also owes the specific duties which equity has imposed on him in the exercise of his powers to go into possession and his powers of sale. It may well be that a mortgagee who appoints a receiver and manager, knowing that the receiver and manager intends to exercise his powers for the purpose of frustrating the activities of the second mortgagee or for some other improper purpose or who fails to revoke the appointment of a receiver and manager when the mortgagee knows that the receiver and manager is abusing his powers, may himself be guilty of bad faith, but in the present case this possibility need not be explored.[120]

Such duty in equity was further confirmed by the CA in the following case.

The Tropical Reefer[121]

A loan facility agreement for US$6 million was reached between the bank, Den Norske, and three companies, the borrowers, for the purchase of three vessels, one of which was *The Tropical Reefer*. The security for the loan included mortgages on the three vessels and was subject to the law of Cyprus. A personal guarantee was also given by the defendants in this case, the guarantors, as a further security, which was subject to English law. There were various events of default under the mortgage agreement, and *The Tropical Reefer*, which was laden with a cargo of perishable bananas, was arrested by the mortgagee in Panama. The vessel's P&I cover had been withdrawn owing to non-payment of premiums. The bank demanded payment of the outstanding indebtedness from the guarantors in the English courts. The defendants resisted the claim on the ground of breach by the bank, which was, allegedly, committed by the arrest of the vessel while laden with perishable cargo, which deteriorated owing to the arrest of the ship. Hence, costs of disposing of the cargo were incurred, which diminished the sale proceeds of the ship. The proceeds were also encumbered by a lien for the damage to cargo. In those circumstances, it was argued that the bank was unable to proceed against the defendants under the guarantee.

Teare J held in favour of the bank and he said in particular: when deciding whether and when to exercise its power of arrest, a ship mortgagee did not owe the mortgagor or surety a general duty in negligence or in equity to take reasonable care in dealing with the vessel, notwithstanding the damaging effect on the interests of the mortgagor and surety.[122] The mortgagee, when deciding whether to enforce his security by arresting the vessel for the purpose of obtaining repayment of the loan, was merely required to act in good faith.[123]

The CA in, approving the judge's decision, relied on its previous decision in *Silven Properties and Chart Enterprises Ltd v Royal Bank of Scotland plc*[124] and held that a mortgagee had an unfettered discretion to sell when he liked to achieve repayment

120 Ibid, p 317.

121 *Den Norske Bank ASA v Acemex Management Co Ltd (The Tropical Reefer)* [2003] EWHC 326 (Comm); [2004] 1 Lloyd's Rep 1, CA.

122 *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295 applied.

123 *Medforth v Blake* [2000] Ch 86 applied.

124 [2003] EWCA Civ 1409, [2004] 1 WLR 997 (the court distinguished the duty of the mortgagee from the duty of the receiver; the receiver has no right to remain passive if that course would damage the interests of the mortgagor or mortgagee); *Standard Chartered Bank v Walker* [1982] 1 WLR 1410, p 1416B (Lord Denning MR accepted that, although the mortgagee can choose his time for sale, he added that these dicta from previous cases did not mean that the mortgagee could sell at the worst possible time, and that, in choosing his time, he must exercise a reasonable degree of care).

of the debt which he was owed, and his decision was not constrained by reason of the fact that the exercise or non-exercise of the power would occasion loss or damage to the mortgagor; or he was entitled to sell the mortgaged property as it was, and was under no obligation to improve it or increase its value. When and if the mortgagee did exercise the power of sale, he came under a duty in equity (and not in tort) to the mortgagor and all others interested in the equity of redemption to take reasonable precautions to obtain a 'fair' or 'the true market' value of, or the 'proper price' for, the mortgaged property at the date of the sale, and not at the date of the decision to sell; he had to take proper care to obtain the best price reasonably obtainable at the date of sale. The remedy for breach of that equitable duty was not common law damages, but an order that the mortgagee accounts to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received. A mortgagee was entitled to sell the property in the condition in which it stood, without investing money or time in increasing its likely sale value.

The CA decided against the defendants and stated that the defendants' argument that if, in the course of carrying out the sale of a mortgaged ship, the mortgagee impaired the value of the ship, he was in breach of his duty to obtain the best reasonably obtainable price for the ship, would be rejected on the facts of the present case for the following reasons: first, the submission fell foul of the many statements that the mortgagee was entitled to decide the time at which he sold, without regard to the interests of the mortgagor; second, the bank was in any event entitled to take the view that releasing the vessel from arrest and permitting her to continue her voyage to Germany with her cargo on board was fraught with risk.

However, the mortgagee is not entitled to act in a way that unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off his debt. He should not act in an arbitrary manner.[125]

There is no fixed rule that a mortgagee exercising his power of sale might not sell the mortgaged property to a company in which he is interested, but he must show that he had made the sale in good faith and had taken reasonable precautions to obtain the best price reasonably obtainable at the time. But he must not sell to himself as an individual.

Tse Kwong Lam v Wong Chit Sen[126]

The mortgagee, in exercise of his power of sale under a charge, arranged for the property to be sold by public auction. The auction was advertised, and, at the auction, the mortgagee instructed the auctioneer that the reserve price was to be $1.2 million. Meanwhile, the mortgagee and his wife were directors of a company of which his children were the shareholders. It had been agreed at a directors' meeting of this company that the wife would bid for the property, on behalf of the company, up to $1.2 million. His wife was the only bidder at the auction and, at a bid of $1.2 million, the property was sold to the company. The borrower/mortgagor applied to have the sale set aside. The court held that, because of the close relationship between the

125 *Palk v Mortgage Services Funding plc* [1993] Ch 330; there are numerous other cases in property law (which go beyond the scope of this book) emphasising the same principle.

126 [1983] 1 WLR 1349.

mortgagee and the company, a heavy onus lay on the mortgagee to show that, in all respects, he had acted fairly to the borrower and used his best endeavours to obtain the best price reasonably obtainable for the mortgaged property.

The Judicial Committee of the Privy Council stated, thus:

> In the result, their Lordships consider that in the present case the company was not debarred from purchasing the mortgaged property but, in view of the close relationship between the company and the mortgagee and in view in particular of the conflict of duty and interest to which the mortgagee was subject, the sale to the company for $1.2 million can only be supported if the mortgagee proves that he took reasonable precautions to obtain the best price reasonably obtainable at the time of sale.[127]

In this case, the mortgagee had made no effort to discharge this burden, and there was insufficient evidence to show that this particular auction produced the true market value of the property. However, the sale was not set aside, in view of the borrower's delay in pursuing his claim.

In a very interesting case, ***Zeeland Navigation Co Ltd v Banque Worms***,[128] which would seem to indicate to a layperson, at least, that the mortgagee might have been in breach of his duty to act in good faith and to exercise reasonable precautions to obtain a proper market value, the judge held otherwise.

Briefly, the mortgagor (Z) sought damages or an account of profits arising out of the forced sale of its ship by the defendant bank (B). Z had bought the vessel with the aid of a loan and associated mortgage from B. In 1994, B exercised its power of sale under the mortgage agreement, and the vessel was sold for US$4 million to a company to be nominated by a ship-owner (L), who was an existing and valued customer of B. B entered into a project finance agreement with L, whereby B acquired an interest in the vessel's profits. In 1997, the vessel was sold for US$33.75 million. Z argued that B had, in 1994, (1) breached its obligation to take reasonable care to obtain for the vessel a price reflecting its true market value; (2) breached its duty to Z to act in good faith and to use its power to sell the vessel for the sole purpose of securing repayment of the monies owing under the mortgage; (3) had acted for the improper purposes of deriving for itself a financial benefit from the sale of the vessel, and of facilitating the purchase of the vessel by a valued customer at a price below its true market value; (4) was obliged to appoint competent brokers and to allow them a reasonable time during which to identify a prospective purchaser.

Tomlison J, refusing the application, held on examination of the evidence that (1) Z had failed to establish that B had been in breach of its obligation to take reasonable care to obtain for the vessel a price reflecting its true market value; (2) the allegation that B had acted in bad faith was wholly without foundation. B had acted in complete good faith in its dealings with Z, up to and including the sale of the vessel to L. Although the notice had been served by B with a view to transferring the vessel into the proposed joint venture with L, that had not been a fixed and immutable intention. B thought that Z would have been preparing its own fallback position, and the proposed joint venture provided a back up for what B, genuinely, regarded a good price in the prevailing market; (3) an obligation to appoint brokers and allow them a reasonable time to identify prospective purchasers was inconsistent with the express

127 [1983] 1 WLR 1349, p 1356.

128 [2002] EWHC 1307 (Comm).

terms of the mortgage and loan documentation. Although a mortgagee was obliged to take reasonable care to obtain a proper price, he was not obliged to delay the exercise of his power of sale and could accept the best price in a disadvantageous market, provided that none of the adverse factors was due to fault on his part.

The mortgagee can sell to the mortgagor, as there is no fiduciary relation between them during the sale. The mortgagee stands in a fiduciary position only when he holds a surplus of the value after the sale. If there is a single mortgagor, he can simply redeem his property by paying the principal sum, interest and costs. Where there are several mortgagors, and one of them agrees to buy from the mortgagee, there is nothing to prevent him. The mortgagors are tenants in common, and the mortgagee is at liberty, under his power of sale, to sell to any one of the mortgagors for his own benefit, without any notice to, or consent of, the co-mortgagors, provided the sale is made under a proper and bona fide exercise of the power of sale.[129]

9.4.4 Conclusion

In conclusion, as is shown in recent authorities, the duty of the mortgagee to the mortgagor and other mortgagees during the exercise of his power of sale is to act in good faith when he deals with the asset of the mortgaged property.[130] The duty lies in equity and not in the tort of negligence.[131] Therefore, he does not have a duty to achieve the best price on sale, but he should use his best endeavours to obtain the market price.[132] If he does not seek to obtain the market price, the remedy for the mortgagor may be to obtain an injunction from the court to prevent the sale at a low value.

Beatson J held in ***TMT Co Ltd v Royal Bank of Scotland plc***[133] that an injunction could be obtained to restrain the mortgagee from enforcing his security, until the main issue of the mortgagor's losses was decided. An application had been made for interim relief to restrain the security holder from enforcing its security, which had been given in the form of a pledge of shares. The judge held that, as a result of a wrongful sale by the security-holder, the effect of any fall in the value of the shares was an unquantified and uncompensatable loss. Accordingly, damages would not be adequate compensation for the losses that would arise from such a sale in the event that the security-holder was unsuccessful at trial.

The sale may be set aside only in case of fraud of which the purchaser had notice.

9.4.5 Effect of sale by the mortgagee

A purchaser of the ship from the mortgagee will obtain good title. However, a private sale will have the effect of extinguishing only such encumbrances on the ship that arose after the mortgage, including mortgages taken with notice of the prior mortgage.[134] Sale by the mortgagee privately does not extinguish maritime liens created at any time. In the light of this disadvantage, which would make it difficult for the

129 *Kennedy v De Trafford* [1896] 1 Ch 762.
130 See, also, *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536 (PC).
131 *Den Norske Bank v Acemex Management (The Tropical Reefer)* [2004] 1 Lloyd's Rep 1.
132 *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349.
133 [2010] EWHC 3680 (Comm).
134 *Black v Williams* [1895] 1 Ch 408.

mortgagee to find a buyer willing to take such risk, the mortgagee seeks the assistance of the Admiralty Court by arresting the ship, so that the sale can be made by a court order, the effect of which is to extinguish all encumbrances.

9.5 APPOINTMENT OF A RECEIVER

There may be occasions when the mortgagee does not wish to undertake the liabilities that would be inherent from his position in possession of the ship or from the exercise of his power of sale. The deed of covenants normally contains an express provision for an appointment of a receiver by the mortgagee who will be deemed to be the agent of the mortgagor.[135] If the deed of covenants does not provide for appointment of a receiver, the mortgagee can apply to court for such an appointment where the mortgagor is in default or the mortgagee's security is threatened. Where a prior mortgagee has already taken possession of the ship, a subsequent mortgagee may apply to court for the appointment of a receiver subject to the right of the first mortgagee. The court may appoint a receiver in cases where there has been gross mismanagement on the part of the first mortgagee in possession. The function of the receiver is to collect the earnings of the mortgaged property (freight or hire) and pay the necessary expenses, until the realisation of the security or an order from the court.

The nature of the duty (as derived from non-shipping cases and applied by analogy to ship mortgages) owed by a receiver is to act bona fide. The Privy Council, in ***Downsview Nominees v First City Corp*** (see above), where a receiver and manager was appointed by a debenture holder, summarised the principles. In a later decision of the CA, ***Medforth v Blake***,[136] it was clarified that the extent and scope of any duty of the receiver or manager additional to that of good faith depended on the facts and circumstances of the particular case. Although his primary duty in the exercise of his powers of management was to try to bring about a situation in which interest on the secured debt could be paid and the debt itself repaid, the receiver owed a duty to manage the property with due diligence.

Furthermore, in ***Silven*** (or ***Selven) Properties v Royal Bank of Scotland***,[137] the duties of the receiver were compared with those of the mortgagee, and it was held that the duties in respect of the exercise of the power of sale by mortgagees and receivers were not the same. The relationship between mortgagee and receiver did not conform to ordinary agency principles, and, whereas a mortgagee had freedom to act entirely in accordance with its own interests, a receiver owed an equitable duty, both to the mortgagee and to all other parties interested in the equity of redemption. Neither a mortgagee nor a receiver was required to incur expense in the improvement of security in order to sell it at a higher price, and there was a freedom to investigate how such potential could be realised without any corresponding obligation to pursue those enquiries. A receiver, however, carried wider management duties than a mortgagee and had no right to remain passive if such conduct would be damaging

135 *Gaskell v Gosling* [1896] 1 QB 669 (CA), p 679, per Lord Esher MR, concerning appointment of a receiver by a trustee. The receiver negligently bought goods from the plaintiff after a winding-up order of the company. The receiver acted as agent of the company and was not liable himself to the plaintiff.

136 [1999] 3 WLR 922.

137 [2003] EWCA Civ 1409; [2004] 1 WLR 997.

to either the mortgagee or the mortgagor. A receiver was under no liability to a mortgagor other than to take reasonable steps to obtain a proper price for the property at the relevant time and not to act in bad faith. The fact that the receivers were agents of the mortgagor did not affect their fiduciary duty to other parties, nor the primacy of their obligation to the mortgagee to secure repayment of the debt.

9.6 FORECLOSURE

Foreclosure under the general law means the taking over of the property by the mortgagee, who becomes absolute owner of it in consideration of the mortgage debt. It extinguishes the equitable right of redemption of the mortgagor and, therefore, it is contradictory to that right protected by equity. For this reason, only the court can order it.

With regard to ship mortgages, the MSAs have not envisaged such a right, and it is doubtful whether the right exists with regard to registered mortgages of registered ships, because it would be inconsistent with the statutory nature of the ship mortgage. It has been argued that foreclosure is, essentially, a remedy suitable to a property transfer mortgage. Therefore, it ought not to be available on the statutory security analysis. The MSAs, by virtue of which the mortgagee has been a registered mortgagee and not a registered owner, do not provide for it.

10 INTERFERENCE WITH THIRD-PARTY CONTRACTS BY MORTGAGEE

10.1 THE ISSUES

This is an area concerning economic torts and the tension that exists between the tort and the extent to which commercial people can enjoy the freedom to deal with their commercial interests. It is an extremely complex area of the law but, since the second edition of this book, the House of Lords, in its landmark decision, ***OBG v Allan***,[138] examined the principles developed by the English courts during the nineteenth and twentieth centuries and clearly set out the types of economic tort that concern us here. Inevitably, there has been an overhaul of previous prevailing views or theories (hence, an overhaul of this part of the chapter too). It is important, therefore, to (a) set out what these theories are about, (b) summarise *OBG v Allan*, and (c) examine whether or not the old decisions can still stand in relation to potential liability of the mortgagee to contracting parties of the mortgagor.

It has been stated in the authorities discussed earlier in this chapter that the mortgagor, as owner in possession, is free to employ his vessel in any way in which he wishes, provided that his acts do not impair the mortgagee's security, which will necessitate the mortgagee to take possession. This derives from the statute, para 10 of Sched 1 to the MSA 1995, as discussed earlier. The mortgagor enters into

138 [2007] UKHL 21; [2008] AC 1.

charterparty contracts, and such contracts will be binding on the mortgagee, provided they do not materially impair his security.

The crucial issue here, which has been dealt with by various authorities over many years, is whether a third party who has contracted with the mortgagor can have a cause of action, and on what legal basis, against the mortgagee in the event of him having suffered loss by the fact that the mortgagee might interfere with the contract in the course of the exercise of his powers under the mortgage, or otherwise. In particular, has the charterer of the ship, or a cargo-owner whose goods are on the ship, or a putative purchaser of the ship, any rights to restrain the mortgagee from interfering with the performance of the contract, or any right to claim damages, if he suffers loss?

Various theories had been advanced based upon either equitable principles, or statute, or common law. Two main strands of authorities have been known as: the *De Mattos v Gibson* strand (based on equitable principles) on the one hand, and the *Collins v Lamport* strand (based on interpretation of statute, the MSA) on the other hand; although a third strand has been canvassed on the basis of constructive trust (*The Strathcona*[139]), it has not been well developed; a modern strand has been based on the rule of *The Myrto*, which in fact expanded the principle, as enunciated in *Collins v Lamport*, and, perhaps unwittingly, conflated it with the *De Mattos* strand.

The Myrto has been unquestionably applied in subsequent cases, but doubts of its status as an authority in this area have been voiced. Although the claim by the charterers in *The Myrto* was based on the tort of wrongful interference with their contract by the mortgagee, there was no analysis of the concept. Later decisions did not produce the desired clarity of principles, which are clearly expounded by Lord Hoffmann in *OBG v Allan*.

10.2 *DE MATTOS V GIBSON* – EQUITABLE REMEDY – THE KNOWLEDGE FACTOR

The principle pronounced by the Lord Chancellor in this case, which has been described as the counterpart in equity of the tort of wrongful interference with a contract at common law, is briefly this: a mortgagee, who took his mortgage in full knowledge of the charter, must abstain from any act that would have the immediate effect of preventing its performance.

In essence, this means that, if there was a pre-mortgage charterparty, the mortgagee would, normally, take his security with full knowledge of the terms of the charter. It would follow that he could not later turn round and say to the mortgagor or to the charterer, 'I do not like the terms of this charterparty now because it impairs my security', unless the circumstances in relation to the performance of the charter have changed, or important side letters between the owner and the charterer varying the terms of the charter had not been disclosed to the mortgagee.[140]

139 *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108 (PC), doubted by Diplock J on the constructive trusteeship issue in *Port Line Ltd v Ben Line Ltd* [1958] 2 QB 146; these decisions were discussed in the second edition of this book.

140 *The Odenfeld* [1978] 2 Lloyd's Rep 357.

If the mortgagee, having full knowledge of the charter's terms, attempts to terminate the charter,[141] the charterer would have an equitable remedy, an injunction against the mortgagee. Evidence of actual knowledge of the terms of the charter would be sufficient ground for the injunction to be granted. It seems that the risk is placed on the mortgagee, when he enters into the loan transaction with knowledge of the circumstances, unless cumulative factors of the mortgagor's inability to perform would justify an order for sale of the ship by the court, as was decided in *The Myrto* (see later).

On the facts of the ***De Mattos v Gibson***,[142] the plaintiff (charterer) had chartered a ship from its owner, Curry, who subsequently charged the ship to Gibson. Gibson had actual notice of the charterparty and its terms. Curry got into financial difficulties and was unable to continue the voyage. Gibson sought to enforce his security by taking possession of the ship and diverted her to another port to sell her. The charterer sought an injunction against Gibson restraining him from interfering with the charterparty. The judge refused to grant it. Lord Justices Knight Bruce and Turner granted an interim injunction on appeal, but, on full hearing, Lord Chelmsford LC affirmed the judge's decision that the injunction ought to be refused, but only because the owner was unable to perform the charter.

It was held that the mortgagee had not, in any way, interfered with the performance of the charterparty, until it was evident that Curry was wholly unable to perform it. It was clear that, if the vessel had remained in the possession of the owner (Curry), no repairs would have been effected, and, without them, the vessel could not put to sea. The actual performance of the contract, as between the plaintiff and Curry, was virtually at an end when Gibson took possession of the vessel and repaired her, Curry being utterly unable to perform the contract.

The much-quoted statement of Lord Justice Knight Bruce established a general principle of law applicable even outside the context of ship mortgages:

> Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the person, in opposition to the contract and inconsistently with it, use and employ property in a manner not allowable to the giver or seller. This rule, applicable in general, as I conceive, to moveable and immoveable property, and adopted, as I apprehend, by English law, may, like other general rules, be liable to exceptions arising from special circumstances.[143]

In circumstances of cases such as this, if the mortgagee satisfies his security from the sale proceeds of the ship of a one-ship company, as he would be entitled to, the charterer will be left without any material recourse against a bankrupt owner. However, that is a risk to be borne by the charterer.[144]

141 In theory, the mortgagor may be able to rely on an equitable estoppel by way of a defence, if the mortgagee, having taken the mortgage with knowledge of the charterparty, interferes with the performance of the contract by arresting the ship.

142 (1859) 4 De G & J 276.

143 Ibid, p 282.

144 Cf. *The Celtic King* [1894] P 175, where the first mortgagee did not have knowledge of the pre-dated charterparty, and it was held that he was entitled to sell the ship to the second mortgagee, who had knowledge of the charter, free from the contract. This was an unusual case in which the owner of the ship died and the mortgagees' rights were impaired, because no repayments of the loans could be made.

10.3 *COLLINS V LAMPORT*[145] – STATUTORY BASIS – THE IMPAIRMENT FACTOR

It was seen earlier, under covenants, that the mortgagor is obliged to inform the mortgagee of any contracts, or charterparties, he intends to enter into, so the mortgagee can have the opportunity to object, if such contract would be likely to impair his security.

Under the ***Collins v Lamport*** strand of thought, the mortgagee is bound by the contracts entered into by the mortgagor after the mortgage has been granted, unless the mortgagee shows that his security is impaired.

Lamport was one of the several mortgagees of the vessel whose owner chartered it to Collins and contracted to sell it to W. Collins was W's nominee. The mortgagee also contracted to sell the vessel to another buyer free from the charterparty. An application for an injunction to restrain Lamport from interfering with the charterparty was made by Collins. The question for the court was whether ss 70 and 71 of MSA 1854 (being equivalent to Sched 1 paras 9 and 10 of the MSA 1995) empowered the mortgagees:

> at their own good will and at any time to arrest everything which had been done by the mortgagor and to take possession of the ship, stripping her entirely of any contract or engagement to which she had been previously subjected by the mortgagor.

The Lord Chancellor, Lord Westbury, stated that the 1854 Act reversed the result of the earlier statutes whereby the mortgagee would become the owner of the property upon registration. Under the new statute, the mortgagor was to be deemed to be the owner, with the exception 'in so far as may be necessary for making such ship . . . available as a security', which meant that, if the security was impaired, the owner/ mortgagor's authority ceased:

> As long therefore as the dealings of the mortgagor with the ship are consistent with, and do not materially prejudice and detract from or impair the sufficiency of the mortgagee's security, the mortgagor has Parliamentary authority to act in all respects as owner of the vessel, and therefore to enter into all contracts touching the disposition of her necessary to assure to him the full value and benefit of his property. But, whenever a mortgagee can show that the act of the mortgagor prejudices or injures his security, he ceases to be bound by the Parliamentary declaration as to the ownership of the mortgagor, and can claim the full benefit of and exercise the rights given to him by his mortgage. Every contract, therefore, entered into by the mortgagor remaining in possession is a contract which derives validity from the declaration of his continuing to be owner, but, at the same time, every such contract is a contract into the benefit of which the mortgagee may at any time enter by giving notice to the person who under that contract is to pay to the mortgagor that he requires payment to him, the mortgagee . . .
>
> Such being as well a reasonable interpretation of the statute – as making the law, with regard to this description of property, in a great measure analogous to the law as it exists with regard to mortgages of real estate – as also according to my present impression, the true interpretation of the statute, I cannot . . . allow the mortgagees here, in the absence of everything to shew that this charter-party, if permitted to be carried into execution, will at all prejudicially affect the sufficiency of the security . . . but shall grant an injunction restraining them, and also the purchaser from them, from dealing with the ship in any way inconsistent with, or which may interfere with or prevent, the execution of the charter-party.[146]

145 (1864) 4 De GJ&S 500.

146 Ibid, p 504.

An injunction was granted to restrain the mortgagees from interfering with the performance of the charterparty, as it was not shown that it would prejudicially affect the sufficiency of their security.[147]

The effect of the decision, which remained unchallenged for a century and a half, has been that a mortgagee can interfere with a contract between the mortgagor and a third party if his security is impaired.[148] The principle aims to protect mortgagees' security. In such cases, the third party should look to his contracting party, the shipowner, to claim remedies for breach of contract.

10.4 MODERN STRAND OF AUTHORITIES PRIOR TO *OBG V ALLAN*

The decision of Brandon J in ***The Myrto***[149] set down broad principles of the circumstances in which the mortgagee could exercise his rights without being bound by the charterparty, and it has been followed for many years.

Her owners let the vessel on a voyage charterparty after a mortgage had been granted and granted a second mortgage for further advances. Default of payments under both mortgages occurred, and the mortgagees arrested the vessel and applied for her appraisement and sale. The owners contested the arrest on various grounds relating to the substance of the bank's claims and the validity of the mortgages, which raised arguable defences and were left to be decided in the main action. The charterers' amended application for the release of the ship from arrest was based on the ground that such arrest was an unlawful interference by the bank with their contractual rights in relation to the ship.

That application was approached by the judge on the hypothesis, agreed by counsel for the charterers, that, apart from the question of unlawful interference with the contractual rights of the charterers, the bank had a good claim against the owners on the two mortgages concerned. The classical old decision on the tort of wrongful interference with contractual rights, *Lumley v Gye*,[150] was not cited, and there was no analysis in this respect.

The judge looked at all the relevant authorities of the two strands mentioned above, *De Mattos v Gibson* and *Collins v Lamport*, and examined the principles of law

147 Also in *The Heather Bell* [1901] P 272, the CA applied *Collins v Lamport* and held that the contractual arrangements with a third party were binding on the mortgagee, because the mortgagor's dealings did not impair his security; cf. in *Law Guarantee & Trust Society v Russian Bank for Foreign Trade* [1905] 1 KB 815, the CA applied *Collins* again. The three vessels chartered to carry coal to Russia during the course of the war between Russia and Japan were at risk of capture by the Japanese and they were not insured. The mortgagee was not bound by the charter on the ground of impairment of his security; in *The Manor* [1907] P 339, the CA, applying *Collins*, held that a mortgagee, even in absence of default by the mortgagor, could enter into possession if the mortgagor dealt with the ship in such a way as to impair the security; impairment was shown by the fact that the ship had become burdened with maritime liens that the owner had no means of discharging as he was insolvent, and thus a 9-month voyage would create further debts.

148 Where a profitable charterparty has been entered into by the mortgagor, the mortgagee cannot object to the charterparty being carried out simply upon the ground that the effect of it would be to remove her out of the jurisdiction of the court and to render it difficult for him to enforce his security: *The Fanchon* (1880) 5 PD 173.

149 [1977] 2 Lloyd's Rep 243.

150 (1853) 2 E&B 216.

applicable in a case of this kind. The principles that the authorities establish, the judge said, where the owner of a ship, having mortgaged her to a mortgagee to secure a loan, remains in possession of her, can be summarised as follows:

(a) The owner is entitled, subject to one exception, to deal with the ship as he would be entitled to do if the ship were not mortgaged, and that includes employing her under contracts with third parties (derived from *Collins*).
(b) The one exception is that the owner is not entitled to deal with the ship in such a way as to impair the security of the mortgagee (derived from *Collins*). The question whether the contract is such as to impair the mortgagee's security is a question of fact.
(c) When a contract with a third party is not such as to impair the security of the mortgagee and the owner is both able and willing to perform the contract, the mortgagee is not entitled to interfere with its performance (derived from *De Mattos*).
(d) The mortgagee is, however, entitled to exercise his rights under the mortgage without regard to any such contract where:
  - the contract is of such a kind and/or the performance of that contract would result in the impairment of the mortgagee's security (*Collins*), or
  - where the owner is unwilling and/or unable to perform the contract (*De Mattos*).
(e) Where the mortgagee exercises his rights in circumstances other than these, he commits a tort, or actionable wrong, in the nature of interfering with the contractual rights of a third party. In such cases, the remedies available to the third party – depending on the mortgagee's actions – include:
  (i) an injunction restraining the mortgagee from selling the ship; or
  (ii) an order for the release of the ship, if he has arrested it in an action *in rem*;
  (iii) further, or alternatively to (i) or (ii), damages.
(f) It is open to a court as a matter of law to find as a fact that a particular contract is such as to impair the mortgagee's security, if evidence shows that the owner is impecunious and that he can only perform the voyage to which the contract relates, if at all, on credit, and that the ship is already subject to pressing liabilities and charges.

Upon finding that the owners had dealt with the vessel in such a manner as to impair the mortgagee's security, the judge rejected the charterers' application for the release of the ship for the following reasons: (a) the charterparty contract was speculative and improvident; (b) the mortgagors were impecunious, and there was every possibility that the expenses of completing the voyage would exceed the funds expected from the freight; (c) the vessel had already been under arrest for 3 weeks at the suit of a creditor in respect of a substantial debt; and (d) the mortgagors had numerous other accrued debts and liabilities, the most important being a large debt to the crew, whose claim of a maritime lien would have priority over the mortgages.

No analysis of the tort of wrongful interference was made, as there was no need to do so, considering the judge's conclusion on the facts.

Thirty years later, in ***Swiss Bank v Lloyds Bank***,[151] Browne-Wilkinson J,[152] having examined previous authorities, summarised the principles regarding the existence of the court's jurisdiction to grant an injunction, on the basis of the tort of interference with a pre-existing contract, and said:

1 The principle stated by Knight Bruce LJ in *De Mattos v Gibson*, is good law and represents the counterpart in equity of the tort of knowing interference with contractual rights.
2 A person proposing to deal with property in such a way as to cause a breach of a contract affecting that property will be restrained by injunction from so doing, if when he acquired that property he had actual knowledge of that contract.
3 A plaintiff is entitled to such an injunction, even if he has no proprietary interest in the property: his right to have his contract performed is a sufficient interest.
4 There is no case in which such an injunction has been granted against a defendant who acquired the property with only constructive, as opposed to actual, notice of the contract. In my judgment, constructive notice is not sufficient, since actual knowledge of the contract is a requisite element in the tort.[153]

It had already been recognised at common law, in *Lumley v Gye*,[154] that it was a legal wrong or tort for someone to interfere with the contractual rights of others. It was subsequently established, the judge said, that equity would intervene to restrain such a tort, and such jurisdiction has frequently been exercised in recent times.[155] It follows that, if at the date of the Lloyds charge, Lloyds had had actual notice of the plaintiff's (Swiss Bank) rights in relation to the FIBI securities, the plaintiff could, in my judgment, have obtained an injunction restraining Lloyds from taking the charge, as, by so doing, they would have been committing the tort.[156]

On the facts, however, the judge did not find that Lloyds had actual knowledge, which is an essential ingredient of the tort and, therefore, committed no legal wrong.

A few years later, in a non-mortgage decision of the House of Lords, ***Merkur Island Shipping Corp v Laughton*, (*The Hoegh Apapa*)**,[157] there was a boycott of the ship by ITF in pursuit of their campaign for better terms of employment for seamen. The ship was under a time charter, which provided that payment of hire should cease upon any boycott of the ship, and that the charterers would have the option to cancel, should the boycott last for more than 10 days. The terms of the charter were known to ITF officials, who also knew that agents of the charterers had a contract for the services of tugmen at Liverpool. The tugmen were persuaded to stop their services to move the ship when the ship was ready to leave Liverpool, and lock-keepers also refused to open the gate to allow the ship out.

151 [1982] AC 584 (HL); the appeal to the House of Lords was concerned with competing claims to a fund of approximately £800,000 held on deposit by Lloyds Bank (Lloyds). It represented proceeds of sale of securities issued by a company incorporated in Israel, FIBI Holdings Ltd, to the respondent, Israel Financial Trust (IFT). There were three issues in the appeal: (1) whether the appellants, Swiss Bank, had a charge over or a proprietary interest in the FIBI securities, and, if so, what the nature of that charge or interest was; (2) whether a charge created by IFT over the FIBI securities in favour of Lloyds was valid; and (3) (depending on the answers to (1) and (2)) whether the interest of the Swiss Bank had priority over the charge to Lloyds.

152 [1979] 3 WLR 201.

153 Ibid, p 226.

154 (1853) 2 E&B 216.

155 *Sefton v Tophams Ltd* [1965] Ch 140.

156 *Swiss Bank v Lloyds Bank* [1979] 3 WLR 201, p 223, per Browne-Wilkinson J.

157 [1983] 2 All ER 189 (HL).

The owners claimed damages against ITF officials under two heads for deliberate interference with and/or threat to (a) the performance of the time charter by unlawful means, and (b) their trade and business by unlawful means. Under each head, it was stated to be wrongfully procuring and/or inducing lock-keepers, tugmen and others to refuse to permit the free passage of the ship at Liverpool. An injunction was also sought to restrain the unlawful means. The contract interfered with was the charterparty and, in turn, the series of charters in the chain. The form of interference was the immobilisation of the ship in port (Liverpool). The judge granted the injunction requiring ITF to lift the blacking of the ship. His decision was approved by both the CA and the House of Lords.

Lord Diplock, dismissing the appeal of ITF, held that: The tort of unlawful interference with a contract by unlawful means extended to any prevention of the due performance of a primary obligation in the contract, even if by reason of a *force majeure* clause the claimant was not obliged to make monetary compensation by way of damages. ITF, knowing of the charter and its terms and with intent to interfere with its performance, procured the tugmen and lock-men to break their contracts with the result that the ship was immobilised, and the ship-owners were prevented from complying with their primary obligations under the charter and they had a cause of action under head (b) of their claim.

In his decision, Lord Diplock summarised the development and extension of this tort, applied the dicta of Jenkins LJ in *Thomson v Deakin*[158] and approved the statement of principle, as had been enunciated by Lord Denning MR, previously, at the CA in 1969, in *Torquay Hotel Ltd v Cousins*:[159]

> . . . there must be interference in the execution of a contract. The interference is not confined to the procurement of a breach of contract. It extends to a case where a third person prevents or hinders one party from performing his contract, even though it be not a breach.

This statement of principle, Lord Diplock said, resolved pre-existing doubts, if any, in this matter. Although he regarded this statement as resolving any doubts in the matter, it will be seen, shortly, that the House of Lords, in ***OBG v Allan***, has effectively overruled its previous decision, partially, to the extent that it conflated two different torts, namely the tort of wrongful interference with contracts and the tort of using unlawful means to inflict damage.

A different but related question arose in a decision of the CA, ***Edwin Hill and Partners v First National Finance Corp plc***,[160] which is of importance in this context. It concerned a legal charge on a freehold property as security for the indebtedness of a developer to the bank. The developer was unable to repay the loan or raise further finance to complete the development, for which the plaintiffs had been appointed as architects. The bank agreed to provide the necessary finance, on condition that the architects were replaced by other architects. So, the developer dismissed them. The architects sued the bank, claiming damages against it for procuring breach of contract. Both the judge and the CA decided against them on the ground that the bank's interference with the contract was justified as being in

158 [1952] Ch 646, 697 (CA).
159 [1969] 2 Ch 106, p 138.
160 [1989] 1 WLR 225.

defence and protection of an equal or superior right of the bank, under the legal charge to be repaid.

In the context of ship mortgages, a different view was taken by the court in ***The Tropical Reefer (No 2)***,[161] with regard to whether or not the mortgagee has a superior title over another contractual party.

The mortgagee had arrested the ship with perishable cargo on board, and the cargo became a constructive total loss. This action was brought by the cargo interests against the bank, claiming damages for financial loss suffered owing to the arrest and detention of the ship carrying its cargo, which deteriorated and was lost. The ground of the claim was wrongful interference with the performance of the bill of lading contract. It was held by Christopher Clarke J, expressly *obiter*, as he decided that Panamanian law applied to the mortgage, that, under Panamanian law, following expert advice, a bill of lading holder whose cargo was damaged or lost on account of a valid arrest of the ship had a right to sue the arresting party, if the arrest was carried out in bad faith. Bad faith had not been alleged here, and there was no evidence that the bank intended to harm the claimant. If the applicable law was English, the court held *obiter*, applying the principles as derived from previous authorities, a mortgagee was not to be regarded as enjoying a right equal or superior to that of a bill of lading holder so as to interfere with the bill of lading contract, provided his security was not impaired. On the facts of this case, there was a long history of default, and there was no realistic sign of immediate payment to the bank or restoration of the P&I cover. The bank's security would have been impaired if the vessel had been allowed to sail without P&I club cover to the discharge port, Hamburg. The court further distinguished mortgages of ships from mortgages of land, following *Brown v Tanner*,[162] namely that a ship-owner can bind the mortgagee by a charterparty being to that extent in a different position from the mortgagor of real property, who cannot bind his mortgagee by a lease.

In the light of the decision of the House of Lords in *OBG v Allan*, reformulating economic torts, which is examined below, the question will be how many of these decisions are affected or overturned.

10.5 REFORMULATION OF ECONOMIC TORTS: *OBG V ALLAN*[163]

This landmark decision tackled three appeals together in ***OBG v Allan*, *Douglas v Hello! Ltd* and *Mainstream Properties Ltd v Young***, concerning economic torts, and is of immense importance as, at least, it reformulates and clarifies an area that has been developing for more than a century. Space does not permit all three to be mentioned here, but the appeals relied upon five different alleged wrongs, as Lord Hoffmann put it, which the claimants said provided them with causes of action for economic loss, namely: (a) inducing breach of contract (*Mainstream* case), (b) causing

161 *Anton Durbeck GMBH v Den Norske Bank ASA (The Tropical Reefer No 2)* [2006] 1 Lloyd's Rep 93 (see summary of fact in the action by the bank against the owner under 9.4.3, above).

162 (1868) 3 Ch App 597.

163 [2007] UKHL 21.

loss by unlawful means (*Hello!* case), (c) interference with contractual relations (*OBG*), (d) breach of confidence (*Hello!*) and (e) conversion (*OBG*).

The defendants in *OGB v Allan* were receivers purportedly appointed under a floating charge, which was admitted to have been invalid. Acting in good faith, they took control of the assets and undertaking of the claimant's company. The latter argued that not only was this trespass to its land and a conversion of its chattels, but also the defendants committed the tort of unlawful interference with its contractual relations, and claimed damages.

Lord Hoffmann delivered the leading judgment and made the following general observations. He thought that the confusion in this area had been caused by the unification of two separate torts: the one concerning wrongful inducement of breach of contract, and the other the use of unlawful means to cause loss. In his view, it was about time for the unnatural union between the *Lumley v Gye* tort and the use of unlawful means tort to be dissolved because they have different elements.

10.5.1 Inducing breach of contract – elements of the tort

Liability for this tort was established in ***Lumley v Gye***[164] and was based on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. Liability depended upon the contracting party having committed an actionable wrong. Lord Hoffmann summarised the elements of the so called *Lumley v Gye* tort, as being: (a) knowledge – the inducer must know he is inducing a breach of contract and he actually realises that his inducement has that effect; (b) the inducer intends to induce breach of contract to achieve a further end, that is securing an economic advantage for himself; (c) there must actually be a breach of contract by the contracting party.

The requirement that there should be an actual breach is the point on which he differed from Lord Denning, who said, in *Torquay Hotel*,[165] that:

> there could be liability for preventing or hindering performance of the contract on the same principle as liability for procuring a breach.

This dictum had been approved by Lord Diplock in *Mercur Island*,[166] Lord Hoffmann said (para 44), and he continued:

> These remarks were made in the context of the unified theory which treated procuring a breach as part of the same tort as causing loss by unlawful means. If the torts are to be separated, then I think that one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability. Cases in which interference with contractual relations has been treated as coming within the *Lumley v Gye* tort . . . are really cases of causing loss by unlawful means.

10.5.2 Causing loss by unlawful means – elements of the tort

The authority for this tort was ***Allen v Flood***,[167] in which Lord Watson described the tort succinctly, thus:

164 (1853) 2 E & B 216.
165 [1969] 2 Ch 106, 138.
166 [1983] 2 AC 570, 607–608.
167 [1898] AC 1, 96.

When the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case . . . the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party.

Thus, the elements of this tort, as derived from the dicta of Lord Lindley in ***Quinn v Leathem***,[168] seem to be: (a) unlawful means (the concern here is what should count as unlawful means); (b) such means affect the freedom of the third party to deal with the claimant; (c) loss is caused to the claimant.

The essence of this tort, Lord Hoffmann said (in *OBG v Allan*, paras 47–51), appears to be (a) a wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant. Cases usually concern wrongful threats or actions against employers with the intention of causing loss to an employee or another employer. In principle, the cases establish that intentionally causing someone loss by interfering with the liberty of action of a third party in breach of a contract with him is unlawful. Acts should count as unlawful means only if they are actionable by that third party, unless of course he has suffered no loss. Acts that may be unlawful against a third party but that do not affect his freedom to deal with the claimant, should not, in the opinion of Lord Hoffmann, be included in 'unlawful means'. Lord Hoffman did not think, considering academic writings,[169] that the concept of 'unlawful means' can be counteracted by insisting upon a highly specific intention, which 'targets' the claimant. That would place too much of a strain on the concept of intention (para 60).

10.5.3 Impact of *OBG v Allan* upon mortgagees and previous authorities

The House of Lords held[170] that the unified theory that treated causing loss by unlawful means as an extension of the tort of inducing a breach of contract was confusing and misleading and should be abandoned (thus not following its previous decision in *Mercur*, at 10.4 above); and that, accordingly, inducing breach of contract and causing loss by unlawful means were two separate torts, each with its own conditions for liability.

The remark, below, by Lord Hoffmann (para 62) about the distinction of the two torts, apart from being commendable for its succinctness, is of great significance in terms of its implications and impact upon the position of mortgagees:

Finally there is the question of intention. In the *Lumley v Gye* tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different . . . one may intend to procure

168 [1901] AC 495, 534–535.

169 Op. cit. fn 163. Lord Hoffmann (para 59) disagreed with the very wide view of what can count as unlawful means expressed by Philip Sales and Daniel Stilitz in 'International infliction of harm by unlawful means' (1999) 115 LQR 411–437, arguing that any action that involves a civil wrong against another person or breach of a criminal statute should be sufficient; the authors had advanced the theory that a specific intention to 'target' the claimant should keep the tort within reasonable bounds. Tony Weir, in the Clarendon Law Lectures, 'Economic torts', had taken similar view. Lord Hoffman preferred the view of Roderick Bagshaw (in his review of Weir in 'Can the economic torts be unified' (1998) 18 Oxford JLS 729–739, at 732), where he states that it would be arbitrary and illogical to make liability depend upon whether the defendant has done something that is wrongful for reasons that have nothing to do with the damage inflicted on the claimant.

170 Ibid, at paras 33, 38, 188–189, 264, 303, 306, 319.

a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions.

He concluded that there are only two possible causes of action: procuring a breach of contract in a way that creates accessory liability under *Lumley v Gye*, or causing loss by unlawful means. On the facts of *OBG v Allan*, he held, it was plain and obvious that the requirements for liability under neither of these torts were satisfied. There was no breach, nor non-performance of any contract, and therefore no wrong to which accessory liability could attach. And the receivers neither employed unlawful means nor intended to cause OBG any loss.

The effect of this decision upon the position of mortgagees is that it would be very difficult indeed for a charterer or other third party, who has a contract with the mortgagor, to prove that the mortgagee either intended to cause a breach of contract, or that he employed unlawful means to cause loss when he, rightfully, interfered[171] with the contract to enforce his security.

It transpires, since *OBG v Allan*, that the weakness of the old authorities is their lack of prescription of the requirements for an actionable tort. For example, the knowledge factor in *De Mattos* would not today be sufficient, in itself, for it to be regarded even as the counterpart in equity of the tort, as was applied prior to *OBG*.

As regards *Collins*, if the mortgagee interferes with a third-party contract without impairment of his security, there would be a wrong committed by the mortgagee. But, since the *OBG* case, that is not enough. It must also be proved that he intended to procure breach of contract, or to cause loss by unlawful means.

The courts today will insist upon the claimant satisfying the three respective requirements, as stated by Lord Hoffmann, under each tort. Bad motive as a ground for liability is not acceptable by English courts, assuming they have jurisdiction to determine a tort action.[172]

In practice, ship mortgagees take a view on existing charters of which they would, no doubt, have notice and they would like to be informed of any changes in the trading of the ship. They regulate the position as provided by the covenants.

11 RISK MANAGEMENT AND INSURANCE ISSUES OF THE MORTGAGEE

There are an infinite variety of risks that attach to the mortgagee's interest in the ship that he has financed. The risks are inherent to the mobility of the mortgaged property and, hence, its exposure, not only to perils that it may encounter on the sea, but also to being exposed to the law and jurisdiction of other nations, which may apply a wide range of maritime liens, or submit the ship to political or war risks, or cause the detention of the ship for any reason. Many such risks have been discussed in this

171 There are dangers of a broad reading of Lord Macnaghten's reference to 'interference' in *Lumley v Gye*, which should be avoided, Lord Hoffmann stressed in *OBG v Allan*.

172 See *Anton Durbeck* [2006] 1 Lloyd's Rep 93; *Anton Durbeck* [2003] QB 1160.

chapter. The mortgagee will be concerned to balance his risks by taking into account the charterparty commitments of the vessel, the reputation of the owners and managers and their respective compliance with the ISM Code and other international regulations, the value and condition of the ship, the experience and nationality of the crew and their relations with the owners.

In order to manage or minimise such risks, the mortgagee will seek a combination of contractual, insurance and security mechanisms. He will arrange to obtain as much protection as possible contractually in the deed of covenants.

He will obtain sufficient insurance, both as a co-assured with the owner by way of assignment and separately by taking a mortgagee's interest insurance (MII), which is designed to protect the mortgagee from the mortgagor's breaches under the insurance contract of which the mortgagee is an assignee or loss payee. However, the MII has its limitations based on its wording and exclusions from liability. The Institute Mortgagee's Interest Clauses enumerate the perils insured that relate to conduct of the mortgagor for which the underwriters of the H&M or the P&I policies would decline to pay. Indemnity under the MII would not be recoverable, however, if the mortgagee were privy to that conduct of the mortgagor. Similarly, the MII would not cover the event of termination of the hull or P&I insurance for non-payment of premium.

A mortgagee's additional perils policy can be obtained to cover exposure of mortgagees to pollution risks, particularly in jurisdictions such as the USA, where the tort law enables third parties to acquire a priority lien over a vessel for liabilities incurred from oil pollution exceeding the International Convention limits. Pre-existing liens on the ship can also be covered by insurance.

With the recent escalation of piracy risks, special insurance of war risks includes cover for damage to, or loss of, the ship, or risks that are likely to prejudice the interest of the mortgagee in the ship owing to piracy.

This page intentionally left blank

CHAPTER 7

SHIPBUILDING CONTRACTS AND RISKS

1 Introduction 221
2 Nature of shipbuilding contracts 223
3 Pre-contract stage 227
4 The making of a shipbuilding contract and risk management 229
5 Types of contractual terms 232
6 General framework of shipbuilding contracts 240
7 Particular aspects of shipbuilding contracts 242
8 Builder's specific obligations 254
9 Events for termination by the buyer 258
10 *Force majeure* and permissible delays 261
11 Effect of buyer's termination for builder's default 266
12 Buyer's default and builder's rights 275
13 Assignment 284
14 Dispute resolution 285
15 Manufacturer's or builder's liability to third parties 286

1 INTRODUCTION

In the last decade, owing to high rates in freight and hire and the ban on single-hull tankers, the shipbuilding market boomed. The shipbuilding yards, especially those of Korea and China, were flooded with new orders for the construction, in particular, of major container ships, chemical tankers and double-hull tankers. Overcapacity, and the sudden emergence of the world economic crisis in 2008, caused a disturbance in trade, a sharp drop in freight rates and, consequently, the cancellation of contracts. Disputes resulting in court or arbitration proceedings were inevitable.

Remarkable developments have also been witnessed in the last decade in relation to the quality of new shipbuilding. In 2002, at the 89th session of the IMO Council, Bahamas and Greece suggested that IMO should play a larger role in determining the standards to which new ships are built, this being traditionally the responsibility of classification societies and shipyards. The idea was that ship construction standards should permit innovation in design but, at the same time, ensure that ships are constructed in such a manner that, if properly maintained, they could remain safe for their economic life.

After extensive discussions in the Maritime Safety Committee, the Council and the IMO Assembly, the strategic plan for the GBS for ship construction became a long-term work of the MSC for six years until 2010. Unlike the prescriptive approach,

'goal-based regulation' does not specify the means of achieving compliance, but sets goals that allow alternative ways of achieving it.[1]

These standards, which are now known as the International Goal-based Ship Construction Standards for Bulk Carriers and Oil Tankers, have been developed on the basis of a five-tier system, consisting of (1) goals (Tier I), (2) functional requirements (Tier II), (3) verification of conformity (Tier III), (4) rules and regulations for ship design and construction (Tier IV) and(5) industry practices and standards (Tier V).

It is understood that the first three tiers constitute the GBS, developed by IMO, which set the parameters of what has to be achieved, leaving the experts in ship design to decide on how best to employ their professional skills to meet the required standards. Tiers IV and V contain provisions and rules to be developed by the classification societies, other recognised organisations and industry organisations. The MSC of IMO formally adopted the GBS on 20 May 2010 along with amendments to SOLAS Chapter II-1, making their application mandatory, with an entry into force on 1 July 2012.

At the same period the classification societies, through IACS, were working on the Common Structural Rules for the building of new double-hull tankers and bulk carriers, which were adopted in 2006. There has also been a tripartite dialogue between ship-owners, shipbuilders and classification societies, through IACS, to discuss their mutual interest relating to shipbuilding standards, contractual relationships and yard capacity and to ensure that ships are fit for purpose.

Usually shipbuilding contracts provide for English law and jurisdiction. The contracts are on standard terms, for example: the contract of the Association of West Europe Shipbuilders, the contract of the Shipowners Association of Japan (SAJ), the contract of the Maritime Subsidy Board of the US Department of Maritime Administration and the contract of the Association of Norwegian Marine Yards.

Recognising that existing standard form contracts are not serving the interests of both parties equally, BIMCO launched a new Standard Newbuilding Contract, NEWBUILDCON, in 2008, to be used across the industry and help in facilitating the business process by encouraging the use of standard wording. The objective of developing this contract was to provide builders and buyers with an alternative contract to those mainly in use. The BIMCO contract offers the parties a modern, clearly worded, balanced and comprehensive shipbuilding contract, so that the parties can easily identify their rights and obligations and reduce the risk of disputes on matters of interpretation of contractual terms. The contract is divided into six sections, set out conceptually and providing a solid structural basis for negotiations. The liabilities are equally apportioned between the parties. It also deals in detail with many difficult aspects of shipbuilding and fills the gaps in certain areas where there had been a lacuna or ambiguity in the terms of the old standard terms of contracts.

In this chapter, the basic principles of English law pertaining to shipbuilding contracts are explained, with focus mainly on the most commonly used form, the SAJ, and with examples of leading cases; it also makes comparison of some provisions with the provisions of the NEWBUILDCON.

1 H Hoppe: Goal-based standards – a new approach to the international regulation of ship construction; www.\Papers and Articles by IMO Staff\Goal.doc

2 NATURE OF SHIPBUILDING CONTRACTS

2.1 IS IT A CONTRACT FOR SALE OR A CONTRACT OF CONSTRUCTION AND SALE?

Historically, English law treated the shipbuilding contract as one for the sale of goods. For example, in ***Lee v Griffin***,[2] it was held that:

. . . if the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered.

Diplock J, in ***McDougall v Aeromarine***,[3] followed the same view and said:

. . . it seems well settled by authority that, although a shipbuilding contract is, in form, a contract for the construction of the vessel, it is in law a contract for the sale of goods.

Naturally, the intention of the parties to the contract is always relevant, and the result may vary from contract to contract. In ***Sir James Laing & Sons v Barclay, Curle & Co Ltd***,[4] the issue was whether the property in a ship under construction, for which payment was by instalments, passed to the buyer bit by bit, at each period of construction and as soon as the work had been inspected by the buyer. The House of Lords considered this question and held:

Where it appears to be the intention of the parties to a contract for the building of a ship that the vessel is not to be delivered and finally accepted until after an official trial and until after conditions of the contract have been fulfilled as to speed, consumption of coal, capacity, etc., the property in the ship does not pass to the purchaser while the vessel remains uncompleted, although the contract contains stipulations for the price to be paid by instalments at certain periods of construction.

The two House of Lords' decisions, in ***Hyundai v Papadopoulos***[5] and ***Stocznia v Latvian Shipping***,[6] have settled the issue of the nature of the shipbuilding contract as being a hybrid contract of construction and sale of a ship (see para 2.2.3, below).

The preamble to the standard form of the SAJ contract states that the builder shall 'build, launch, equip and complete' the vessel and, thereafter, 'sell and deliver' her to the buyer. It is a special agreement to sell a ship by description after construction, which is regulated by the specific terms of the contract and the Sale of Goods Act (SOGA) 1979, as amended by the Sale and Supply of Goods Act (SSGA) 1994.

2 (1861) B&S 272.

3 [1958] 2 Lloyd's Rep 345, p 355: concerning the issue whether the buyer could reject the ship when she was tendered for delivery on the ground of unmerchantable quality. The question whether the ship had become the property of the buyer after payment of an instalment was relevant to the issue of rejection. As the buyer had not yet become the owner of the ship, his rejection right was not affected.

4 [1908] AC 35.

5 [1980] 2 Lloyd's Rep 1, at p 5.

6 [1995] 2 Lloyd's Rep 592; [1996] 2 Lloyd's Rep 132 (CA); [1998] 1 Lloyd's Rep 609 (HL).

2.2 THE IMPORTANCE OF DETERMINING THE NATURE OF THE CONTRACT

The answer to the question of whether the contract is one for sale of goods or a contract for construction and sale has significant implications on the determination of the parties' accrued rights. There are three issues of importance:

(a) whether the buyer has a property right over the partly constructed hull (this would be relevant if a third party, that is, a claimant of the buyer, or a receiver appointed to arrange the affairs of the shipbuilder, arrested the semi-constructed ship);
(b) whether a buyer could claim a property right on the materials (approved by him but not yet fixed to the hull), if the contract does not expressly provide about the time of the passing of property of the materials on to the buyer;
(c) what is to happen to accrued rights of the parties upon cancellation of the contract? (Invariably, however, shipbuilding contracts provide for the parties' rights after cancellation of the contract.)

The above issues are discussed in the authorities that follow in the next paragraphs.

2.2.1 Buyer's property right to the partly constructed hull

This was dealt with by the House of Lords (Sc) in ***Seath v Moore***,[7] in which, although Scottish law applied to the shipbuilding contract , Lord Blackburn approached the issue involved by comparing English with Scottish law; thus:

The law of England does differ from the civil law and those laws founded on it, including the Scotch law, as to what is sufficient to pass the property in a moveable chattel. . . . It is essential that the article should be specific and ascertained in a manner binding on both parties, for unless that be so it cannot be construed as a contract to pass the property in that article. In general, if there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, the contract will not be construed to be one to pass the property till those things are done.

But it is competent to parties to agree for valuable consideration that a specific article shall be sold, and become the property of the purchaser as soon as it has attained a certain stage: though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong prima facie presumption against its being the intention of the parties that the property should then pass . . . It is, I think, a question of the construction of the contract in each case, at what stage the property shall pass; and a question of fact, in each case whether that stage has been reached.

As I understand the civil law, the property is not transferred without delivery, and, consequently, unless there was an actual, or perhaps a constructive delivery, the property remained the property of the seller, and his creditors might seize it.

Lord Watson added:[8]

The English decisions to which I have referred appear to me to establish the principle that, where it appears to be the intention, or in other words the agreement, of the parties to a contract

7 (1886) 11 App Cas 350 (HL), p 370; see, also, *Re Foster v Blyth Shipbuilding and Drydocks* [1926] Ch 494.

8 (1886) 11 App Cas 350, p 380.

for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, *accessione*, become his property. It also appears to me to be the result of these decisions that such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser, or someone on his behalf.

Although this case was decided prior to the SOGA 1893, it was made sufficiently clear that, under English law, it is the intention of the parties to the contract of sale of ascertained goods that determines, upon construction of the contract, when the property passes to the purchaser. The parties can agree in their contract whether property can pass as soon as it has attained a certain stage. In a shipbuilding contract, the agreement may provide whether property in the ship being under construction can pass before completion.

2.2.2 Property in the materials before completion

Whether property can pass to the buyer before completion requires clear and unambiguous words in the contract, specifically stating the stages and the requirements of appropriation.[9]

For example, a clause in a shipbuilding contract purporting to pass the property in the material to the purchaser as the construction of the vessel proceeded was construed by the House of Lords, **in *Reid v Macbeth & Gray***,[10] against the purchaser, because the parties had failed to express a clear intention to that effect. As the material had not been affixed to the ship at the time of the bankruptcy of the builder, it could not be regarded as appropriated to the contract.

In ***Re Blyth Shipbuilding and Drydocking Co***,[11] Romer J held, on the facts of this case, that, although a receiver and manager of the shipbuilder's estate had no right to retain the partly constructed hull, he could retain both the unworked and worked material intended for the vessel. On appeal, the CA approved the judge's decision and affirmed that certain worked materials, lying on the yard ready to be incorporated into the hull of the vessel and approved by the purchaser's surveyor, had not been 'appropriated to her' so as to become the property of the purchaser. Thus, in relation to the issue of appropriation of property, although the ship had not been completed, the property in the uncompleted ship, excluding the non-affixed material, was the property of the purchaser.

9 Such a clause can be found in *Workman, Clarke & Co Ltd v Lloyd Brazileno* [1908] 1 KB 968, in which it had been agreed that the property in the material was to pass to the purchaser from payment of the first instalment.

10 [1904] AC 223 (HL).

11 [1926] Ch 494.

2.2.3 What is to happen to the parties' accrued rights upon cancellation of the contract?

This issue arose in the *Hyundai* cases.[12] The House of Lords declined to apply a rule that there were no accrued rights to be enforced after termination of the contract. There would be no accrued rights if the contract were solely one of sale. The buyer in ***Hyundai v Papadopoulos*** defaulted in the second instalment, and the builder exercised his right under the contract to terminate it. The issue was whether the second instalment was payable by the guarantor under the buyer's performance guarantee. It was held by all courts that it was. Viscount Dilhorne commented that:

> . . . in this case the contract was not just for the sale of goods . . . It was a contract to 'build, launch, equip and complete' a vessel and 'to deliver and sell' her. The contract price included 'all costs and expenses for designing and supplying all necessary drawings for the vessel . . .'. It was a contract which was not simply one of sale but which, so far as the construction of the vessel was concerned, the contract resembled a building contract.[13]

Particular rights of the parties to the contract will be determined, depending on the circumstances of a case, and the issue in question will be addressed by applying either sale or construction principles as may be appropriate, upon proper construction of a particular agreement. A large part of a shipbuilding contract is directed towards the regulation of a substantial and complex construction project in which each party assumes long-term obligations to the other and bears significant commercial risks.

In ***Stocznia Gdanska SA v Latvian Shipping Co***,[14] Clarke J said that the shipbuilding contract in question was for the construction and sale of the hull. In the same case, the House of Lords, affirming the decision of the judge and reversing the CA's decision, answered the question of whether or not an accrued instalment was payable to the yard after termination of the contract:

> The present case cannot, therefore, be approached by asking the simple question whether the property in the vessel or any part of it has passed to the buyers. That test would be apposite if the contract in question was a contract for the sale of goods (or, indeed, a contract for the sale of land) *simpliciter*, under which the consideration for the price would be the passing of the property in the goods (or land). However, before that test can be regarded as appropriate, the anterior question has to be asked: is the contract in question simply a contract for the sale of a ship or is it rather a contract under which the design and construction of the vessel formed part of the yard's contractual duties, as well as the duty to transfer the finished object to the buyers? If it is the latter, the design and construction of the vessel form part of the consideration for which the price is to be paid, and the fact that the contract has been brought to an end before the property in the vessel or any part of it has passed to the buyers does not prevent the yard from asserting that there has been no total failure of consideration in respect of an instalment of the price which has been paid before the contract was terminated, or that an instalment which has then been accrued due could not, if paid, be recoverable on that ground.
>
> I am satisfied that the present case falls into the latter category. This was what the contracts provided in their terms. Moreover, consistently with those terms, payment of instalments of the price was geared to progress in the construction of the vessel. That this should be so is scarcely surprising in the case of a shipbuilding contract, under which the yard enters into

12 *Hyundai Shipbuilding Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 (HL) and *Hyundai v Papadopoulos* [1980] 2 Lloyd's Rep 1 (HL).

13 *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 Lloyd's Rep 1, p 5, per Viscount Dilhorne (HL).

14 [1995] 2 Lloyd's Rep 592; [1996] 2 Lloyd's Rep 132 (CA); [1998] 1 Lloyd's Rep 609 (HL).

major financial commitments at an early stage, in the placing of orders for machinery and materials, and in reserving and then occupying a berth for the construction of the vessel.[15]

2.2.4 The nature of the contract under the SOGA 1979

Under the SOGA 1979, contracts for sale are divided into 'sales' outright, in which property in the goods passes to the buyer from the time of the conclusion of the contract (s 2(3)), and 'agreements to sell' (which usually concern future goods). Under an agreement to sell, the property passes to the buyer at a future time or when a condition has been fulfilled (s 2(4)). It is undisputed that shipbuilding contracts relate to the sale of future, rather than existing, goods.[16]

3 PRE-CONTRACT STAGE

3.1 LEGAL EFFECT OF AN INVITATION TO TENDER, LETTER OF INTENT AND BRIDGING CONTRACT

This stage is particularly important to both parties and it can be time consuming and expensive, because careful negotiations are needed before an agreement can be reached about the form, the substance of the contract and the ship's specification. Expertise in commercial, technical and legal terms is needed for there to be successful negotiations before agreement can be reached for the project.

Shipbrokers and naval architects may be instructed to approach various shipbuilding yards to obtain information about pricing, timing and specific designs. The shipbuilder may be able to supply a readymade specification, known as principal particulars. In other cases, the buyer may already know what he wants and submit to various shipbuilders his own specification and summary of proposed contract terms to obtain competitive bids. This is known as 'an invitation to tender'.

If the builder's specification is acceptable as a starting point, the next stage of negotiations will be less time consuming. On the other hand, if the buyer proposes his specification, the builder will need some time to prepare the technical requirements of the tender.

Once these have been completed, the parties will execute a 'letter of intent',[17] which is not usually intended to be legally binding unless such an intention is derived from it. It is useful in order to set out the parties' mutual understanding of the proposed project and it imposes a moral rather than a legal obligation. The letter of intent is an agreement to negotiate in good faith and it is usually made subject to the terms of the shipbuilding contract.

At this stage, whether or not the parties will proceed to contract will depend on the ability of the buyer to obtain appropriate finance for the project. Assuming that a willing bank becomes interested in financing the project, an interim or 'bridging'

15 [1998] 1 Lloyd's Rep 609, pp 619, 620, per Lord Goff.

16 *Behnke v Bede Shipping Ltd* [1927] 1 KB 649.

17 For the effect of letters of intent see: *Wilson Smithest & Cape (Sugar) Ltd v Bangladesh Sugar & Food Industries Corp* [1986] 1 Lloyd's Rep 378, concerning sale of goods c&f (cost and freight) terms.

contract may be concluded, so that the builder is assured that the buyer is serious before he engages in substantial work. By the bridging contract, the builder agrees to provide design and technical services for the development of the project, in return for a fee.

After the design is submitted, final negotiations take place about the details of the contract and specification. There are standard forms of contract reflecting the strength of the particular shipbuilding yard. The SAJ form 1974 is widely used; it has formed the basis of other standard contracts used by other yards, such as South Korea, Taiwan and China.

An improvement to the wording of the standard terms contracts has been made by the BIMCO NEWBUILDCON 2008. It provides a clear balance between the parties' rights and obligations and a mechanism to prevent deadlock in completion. It also attends to issues with regard to validity and expiration of the refund guarantee (which can be provided for each instalment), so that it does not expire prior to the completion of construction, should its date be extended.

3.2 LEGAL SIGNIFICANCE OF REPRESENTATIONS MADE DURING NEGOTIATIONS

It is naturally common for commercial people to use legitimate means and persuasive skills during negotiations to make the other party accept the deal offered. What is not allowed, however, is to make representations, which the party making them knows are not true, and by making them he induces the other party to enter into the contract. This is distinguished from mere puffs or expressions of opinion.

Statutory control of what negotiating parties state during negotiations leading up to a contract is provided by the Misrepresentation Act (MA) 1967, which imposes an absolute duty on the negotiating parties not to state facts that the representor could not later show that he had reasonable ground for believing.

Section 2 of the MA 1967 states:

(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

Breach of the provisions of this Act may entitle the other party to damages, which will be assessed as if the misrepresentation were fraudulent.[18] The consequences of negligent misstatements are discussed in Chapter 11 in the context of the sale and purchase of second-hand ships, which will equally apply in this context as well.

It should be noted at this juncture that exclusion of liability for misrepresentation is not caught by the Unfair Contract Terms Act 1977, which excludes international supply of goods contracts from statutory control.[19]

18 *Howard Marine & Dredging Co Ltd v Ogden & Son (Excavations) Ltd* [1978] 2 WLR 515 (CA); *Royscot Trust v Rogerson* [1991] 2 QB 297 (CA); *Avon Insurance v Swire Fraser* [2000] 1 All ER 573.

19 *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] 1 Lloyd's Law Rep 702.

4 THE MAKING OF A SHIPBUILDING CONTRACT AND RISK MANAGEMENT

Shipbuilding contracts are most challenging for lawyers, both in the drafting and in trying to make sense of what others have drafted when the matter has reached litigation. It cannot be stressed too strongly that this is an area that requires skilful legal risk management at the stage of negotiations and drafting and at the stage of performance of the contract when it is necessary to renegotiate the terms.

4.1 WHAT MAKES A BINDING CONTRACT?

Like any other contract, there must be a binding agreement – an offer and an unconditional acceptance, intention to create a legal relationship, and consideration. Consideration under English law requires that each party has given something of value in return for the other party's promise. There must also be certainty of terms, which define clearly the extent of the duties of each party, particularly as shipbuilding contracts are complex and contain many clauses of technical jargon. For a contract to be binding, there must be no inconsistent or uncertain terms and matters of substance must not be left to be agreed at a later stage.[20] See further in Chapter 8.

This is illustrated in ***Okura & Co Ltd v Navara Shipping Corp SA***,[21] the facts of which deserve attention. The original contract for shipbuilding was between Okura (Japanese contractors) and Navara. Okura subcontracted Ujina dockyard to build the ship. Navara paid nearly half of the price of the ship as she was being built. The timeframe was 12 months, but it could be extended if *force majeure* events occurred. Navara could cancel if the delivery was delayed by more than the permissible delay (150 days after the agreed delivery date). Okura ran into financial difficulties. Many items were unfinished, and the first trials revealed serious defects in the engines. Navara gave notice of cancellation. New negotiations commenced for a new contract on a tripartite basis, between the head shipbuilder (Ujina), the Japanese contractors (Okura) and Navara. The proposal was that Navara would take the ship as it was and do remedial work on the defects in the engines. The shipbuilders should make good the listed unfinished items. Navara would not to be bound by the contract until after the sea trials. A written contract (Memorandum of Agreement (MOA)) would be drawn up and signed after recording the telephone negotiations by telex. The telex referred to 'all other terms and conditions as contained in the previous shipbuilding contract to apply in full' and 'the contract shall become effective as from the date of fulfilment and realisation of all conditions'. The buyer's solicitors drafted the MOA reflecting the telex, but included a new clause: 'The parties hereto agree that there shall be no extension of time for delivery of the vessel due to *force majeure* . . .' This was, however, inconsistent with the telex.

The buyers insisted on absolute compliance with the delivery date, whereas the builders wanted an extension of time for *force majeure*. As the parties could not reach

20 *Fast Ferries v Ferries Australia* [2001] 1 Lloyd's Rep 534; see also *Thoresen (Bangkok) Ltd v Fathom Marine Co* [2004] 1 Lloyd's Rep 622: recap email provided 'otherwise basis Saleform 93 sub-details suitably amended to reflect also the above terms'; held: no binding contract.

21 [1982] 2 Lloyd's Rep 537 (CA).

agreement about this, Navara gave an ultimatum that it would withdraw from the contract demanding the return of all money held by the builders. The builders did not accept the clause, and so no MOA was signed; the advance money was refunded to Navara. The builders sold the vessel elsewhere, but that was not the end of the matter. Navara claimed there was a binding contract which was repudiated by the builders. The builders issued proceedings seeking a declaration that there was no contract, which the buyers contested.

The issue of construction for the court was whether the contents of the telex resulted in a binding contract or were merely the basis for a future agreement.

The judge held that there was a binding contract. The CA unanimously reversed it. Lord Denning MR held that, upon construction of the documents, the agreement was provisional; the parties were not to be bound unless and until they signed the contract. In addition, the parties did not treat the telex as a binding agreement because all sorts of matters had to be arranged.

4.2 CONDITION PRECEDENT OR CONDITION SUBSEQUENT?

The contract may be subject to conditions to be fulfilled by either party before the commencement of the construction. The effect of conditions on the contract depends on the type of condition. If a condition is to the effect that one party has to do something before the commencement of the contract (condition precedent), as in ***Haugland Tankers v RMK Marine***,[22] there will be no contract until that condition is met. Here the option agreement required payment of the commitment fee simultaneously with the declaration of the option, which was not done.

If the condition requires one party to the contract to do something within a certain time after the commencement of the contract (condition subsequent; see *Covington Marine*, below), the non-fulfilment of that condition will operate to discharge the parties from an existing contract. If the condition suspends the operation of the contract until a subsequent agreement on the details or upon the buyer obtaining finance, there is a contract, but its operation is suspended until the condition is met (see *Fast Ferries*,[23] in which it was held that the parties proceeded on the assumption that approval of finance was a formality; the parties were agreeing in the exchanges to treat the contract as effective, but subject to termination if the assumption was unjustified).

In ***Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd***,[24] the contract was made subject to certain conditions to be fulfilled within a certain time after execution of the contract, failing which the contract would be automatically rescinded, unless the party to whom performance was due agreed otherwise. Such conditions referred to in the contract were: agreement about the supplier of the engine; receipt by the buyer of the letter of guarantee; receipt by the buyer of evidence of the validity of the contract; specifications and all government licences; and receipt by the

22 [2005] 1 Lloyd's Law Rep 573, see 7.1, below.

23 For the construction of such a condition in the context of the parties' exchanges, see *Fast Ferries One SA v Ferries Australia Ltd* [2000] 1 Lloyd's Rep 534.

24 [2006] 1 Lloyd's Rep 745.

builder of the first instalment. Three weeks after entering into this contract, the builders signed contracts to build three of the same vessels for another buyer and refused to perform this contract. The buyers accepted such conduct as repudiation and claimed damages. The dispute was referred to arbitration.

The builders alleged that there was no binding contract and challenged the jurisdiction of the arbitrators. The arbitrators decided that the binding effect of the contract depended on the parties being able and willing to reach an agreement as to the supplier of the engine and the other conditions within the prescribed time. As the parties were not able to agree the supplier of the engine, there was no binding contract.

The buyers appealed to the court under s 69 of the Arbitration Act 1906. The issue turned on whether or not the exchanges between the parties constituted a firm offer and acceptance, which should be viewed objectively to determine whether the parties intended to be bound.

The court held that the alleged offer and acceptance in the exchanges had to be viewed objectively, but in their commercial context. On that basis, the first letter sent on behalf of X made alternative offers open to acceptance, and the second letter on behalf of C was phrased in terms of acceptance and not further negotiation in respect of the main engine. An objective reader would readily conclude that there was agreement on the main engine supplier. The arbitrators were wrong to conclude that there was no agreement on the main engine. Their conclusions and their reasoning were wrong in law. The court's view (*obiter*, as it did not have to decide the issue considering its conclusion) was that the provision relating to the main engine supplier was an agreement to agree. Although the contracts were effective from the date of execution, their contractual effect was provisional because of the conditions subsequent.

As the conclusion was that there was a binding contract, the builders repudiated it and were liable to pay damages.

4.3 OTHER ESSENTIAL TERMS

For a shipbuilding contract to be complete, it should contain the following essential terms:

(a) ship's description and dimensions with dead weight capacity (DWC); the ship is given a hull number during construction, which is not, however, regarded as an essential part of her description;[25] the class must also be specified; details of description and class may be inserted later;
(b) speed and fuel consumption;
(c) price and method of payment;
(d) inspection of work in progress;
(e) modification of agreed description;
(f) nature and conditions of trials;
(g) time and place of delivery;

25 *The Diana Prosperity* [1976] 2 Lloyd's Rep 621 (HL).

(h) transfer of title and risk with insurance arrangements; and
(i) rectification of defects.

The parties agree that the details of other terms may be filled in later.

If the parties need more time to consider their position, they can agree provisionally on a draft that is made 'subject to contract',[26] which is understood to mean that there is no binding contract until a formal written contract is drawn up or this condition is withdrawn or waived (see, further, Chapter 8).

The contract will state that the vessel is to be built according to a specification, which is an integral part of the making of the contract. Invariably, the parties may alter the specification, and the question that arises is whether the alteration only affects the subsequent obligations of the parties or it creates a new contract. Moreover, issues of delay in completion, prevention from completion and cancellation of contract may arise owing to modifications of specification, which will be seen later.

5 TYPES OF CONTRACTUAL TERMS

5.1 GENERAL

Some terms may be conditions, the breach of which under English law will entitle the other party to treat the contract as at an end, whereas others may have been agreed to be warranties, the breach of which will sound in damages only, but will not entitle the other party to treat the breach as terminating the contract.[27]

Other terms may be neither conditions nor warranties, but intermediate, known as innominate terms. The effect of breach of such a term depends on the nature and consequences of the breach; for example, if the breach goes to the root of the contract, the other party will be entitled to treat himself as discharged.[28]

Whether a term is a condition or a warranty or an innominate term does not depend on the use of those words in the contract, but on the construction of the contract as a whole. In the absence of clear words, a term will not be interpreted as a condition, if the result of doing so would be unreasonable.[29]

The term 'shipped in good condition' in a sale of goods contract was held by Lord Denning MR, in ***The Hansa Nord***,[30] to be not a condition but an intermediate term. Unless there was a serious and substantial breach of this term, the buyer would not be able to treat the breach as terminating the contract.

26 This phrase has been explained in cases concerning conveyance of land: see *Keppel v Wheeler* [1927] 1 KB 577 (CA); *Law v Jones* [1974] Ch 112 (CA).

27 Contrast 'warranties' under insurance contracts, breach of which discharges the insurer of liability as from the date of the breach (*The Good Luck* [1991] 2 Lloyd's Rep 191 (HL)).

28 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1961] 2 Lloyd's Rep 478 (CA); *Bunge Corporation v Tradax Export SA* [1981] 2 Lloyd's Rep 1 (HL), p 7, per Lord Scarman; *The Aktion* [1987] 1 Lloyd's Rep 283, concerning sale of a ship; see Ch 11.

29 *The Hansa Nord* [1975] 2 Lloyd's Rep 445 (CA): read Roskill LJ, p 457.

30 Ibid, p 451.

5.2 IMPLIED TERMS AT COMMON LAW

The court may imply a term, for example, if it is necessary to give business efficacy to the contract and if it seems from the terms of the contract and its surrounding circumstances that the parties could reasonably have intended such a term, although they had not expressly provided for it in the contract.[31]

An implication of a term is part of the construction of the contract. The requirements (as commonly known[32]) for implying a term into a contract were best regarded, not as a series of independent tests that had each to be surmounted, but rather as a collection of different ways in which judges had tried to express the central idea that the proposed implied term had to spell out what the contract actually meant, or in which they had explained why they did not think that it did so.[33] The need for an implied term, not infrequently, arises when the draftsman of a complicated instrument has omitted to make express provision for some event, because he has not fully thought through the contingencies that might arise, even though it is obvious – after a careful consideration of the express terms and the background – that only one answer would be consistent with the rest of the instrument.[34]

5.3 IMPLIED TERMS UNDER SOGA 1979

5.3.1 Compliance with description (the law before 3 January 1995)

Some important terms are implied by statute. Section 13 of the SOGA 1979 (prior to its amendment by s 15A of the SSGA 1994, see below) provided that, where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description. Under this section, English law treated the term of description strictly, even for trivial non-conformity of the goods to description.

This was emphasised by the decision of the House of Lords in ***Arcos Ltd v Ronnasen***,[35] which – approving the decision of the courts below – held that the buyers were entitled to demand goods answering the description in the contract and were not bound to accept them merely because they were merchantable.

It concerned the sale of staves of Russian timber for making cement barrels. The thickness of the staves was specified in the contract to be of half an inch. Upon arrival, the buyer rejected the timber on the ground that it did not conform to this description. On the facts it was shown that a large proportion of it was over half an inch, but no more than an inch. The umpire found that the staves were fit for making cement

31 *The Moorcock* (1889) 14 PD 64, 68.

32 E.g. (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

33 Per Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988, at para 26.

34 Ibid, at para 25; see, further, *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531; [2009] 2 Lloyd's Rep 639.

35 [1933] AC 470 (HL).

barrels and merchantable under the contract specification. The finding as to measurement, however, showed that the goods were not those contracted for, so the court held that it was the goods as described in the contract that the buyers were entitled to demand, and not their commercial equivalent.

5.3.2 Common law developments

This strict approach to the construction of description clauses by old authorities was questioned by the House of Lords in the 1970s, when Lord Diplock adopted a more flexible approach in ***Ashington Piggeries Ltd v Christopher Hill Ltd:***[36]

It is open to the parties to use a description as broad or narrow as they choose. But ultimately the test is where the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them different goods from those he had agreed to buy.

The trend since then has been that the shortcoming of the goods must have been a substantial ingredient of the description of the goods, so that a reasonable person would regard the goods as distinct from those he contracted to buy. The description must also be seen in the context and purpose of the particular contract.

For example, the House of Lords, in ***The Diane Prosperity***,[37] did not regard the number of the hull of the ship delivered under a long-term charterparty as a matter entitling the charterers to reject the newly constructed ship when it was delivered to them for chartering services. The purpose of the hull number in the context of this contract did not have a significant meaning, other than to identify the vessel under construction. Lord Wilberforce said that he was not prepared to accept that the authorities as to 'description' in the sale of goods cases should be extended or apply to the contract in question. He rather thought they ought to be re-examined:[38] 'Some of these cases, either in themselves, for example, *Moore v Landauer*,[39] or as they have been interpreted, for example, *Behn v Burness*,[40] I find excessively technical and due for fresh examination in this House.'[41]

In his view, what was important was whether a particular item in a description of goods – whether in sale of goods, or in other contracts – constituted a substantial ingredient of the 'identity' of the thing, and, only if it did, was he prepared to treat it as a condition. He absolutely agreed with what Roskill LJ said in ***The Hansa Nord***:[42]

In principle it is not easy to see why the law relating to contracts for the sale of goods should be different from the law relating to the performance of other contractual obligations, whether charterparties or other types of contract. Sale of goods law is but one branch of the general law of contract. It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principle should not apply to different branches of that law.

36 [1972] AC 441, pp 503–04 (HL).
37 [1976] 1 WLR 989 (HL).
38 [1976] 1 WLR 989 (HL), p 998.
39 [1921] 2 Lloyd's Rep 519.
40 (1863) 3 B&S 751.
41 Following the same lines of argument, Lord Glaisdale and Lord Kilbrandon commented that the cases on the sale of goods may call for reconsideration.
42 [1975] 2 Lloyd's Rep 445, p 458.

Lord Wilberforce further stressed that the general law of contract had developed along much more rational lines and, in particular, after the *Hong Kong Fir* case,[43] it has no longer been necessary to adhere to rigid categories of breach that do or do not automatically give right to rescind. It is rather a question of attending to the nature and gravity of a breach. However, he said, it might have been a different matter if the parties to a construction contract had intended that a particular yard, and no other, should build the ship.

5.3.3 Statutory developments

As seen from the examples given above, it was recognised that extreme consequences would result from the rejection of the goods if the breach was slight. It was thought appropriate in 1994 to amend the 1979 Act. By s 4 of the SSGA 1994, s 15A was inserted in the 1979 Act. It concerns modification of remedies for breach of a condition in non-consumer contracts and provides:

(1) Where in the case of a contract of sale
  (a) the buyer would, apart from this sub-section, have the right to reject goods by reason of a breach on the part of the seller of a term implied by ss 13, 14 and 15 . . . but
  (b) the breach is so slight that it would be unreasonable for him to reject them,
  . . . then, if the buyer does not deal as a consumer, the breach is not to be treated as a breach of condition but be treated as a breach of warranty.

This section applies unless a contrary intention appears in, or is implied from, the contract; the burden of showing that a breach fell within the above sub-section is upon the seller. The test is that of a reasonable purchaser. The usual provision in shipbuilding contracts of terms of acceptance or rejection of the ship after the sea trials gives details of circumstances in which the buyer can reject the ship and demand conformity to the specification, failing which the buyer has a right to reject the ship.

The SSGA 1994 came into force on 3 January 1995, and so only contracts entered into after that date are affected by it.

5.3.4 The demise of 'merchantable quality'

5.3.4.1 The law until 3 January 1995

Section 14(2) of the SOGA 1979 provided that, where the seller sold goods in the course of a business, there was an implied condition that the goods supplied under the contract were of merchantable quality, except that there was no such condition as regards defects specifically drawn to the attention of the buyer.

Goods of any kind would be of merchantable quality within the meaning of this Act,[44] if they were as fit for the purpose or purposes for which goods of that kind were commonly bought, as was reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances (s 14(6)).

43 *Hong Kong Fir Shipping & Co Ltd v Kawasaki Kisen Kaisha* [1961] 2 Lloyd's Rep 478.
44 The definition was adopted from the Supply of Goods (Implied Terms) Act 1973, s 7(2).

The implied condition would be broken, if the defect was so serious that a commercial man would have thought that the purchaser was entitled to reject them. Thus, 'merchantable' quality was then regarded to be synonymous with 'fitness for purpose', and other aspects of quality were left ambiguous.

5.3.4.2 The law after 3 January 1995

As mentioned under 5.2.3, s 4 of the SSGA 1994 modified the effect of the consequences of breach of implied terms under the SOGA 1979, and, by the insertion of s 15A in the SOGA 1979, a non-consumer buyer will not have the right of rejection if the breach is slight.

Also, in recognition of the difficulties created in the interpretation of the term 'merchantable quality', s 1(1) of the SSGA 1994 introduced the term 'satisfactory quality' and substituted s 14(2) of the SOGA 1979 with the following:

> Where the seller sells goods in the course of his business, there is an implied term that the goods supplied under the contract are of satisfactory quality. For the purpose of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking into account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
>
> For the purpose of this Act, the quality of the goods includes their state and condition and the following (among others) are, in appropriate cases, aspects of the quality of the goods:
>
> - the fitness for all the purposes for which goods of the kind in question are commonly supplied;
> - appearance and finish;
> - freedom from defects;
> - safety and durability.

All other references to 'merchantable quality' in the SOGA 1979 have been substituted, accordingly, by the term 'satisfactory' or 'unsatisfactory', as the case may be.

Contracting parties cannot exclude the terms implied by the SOGA 1979 unless very clear language is used.[45] Although it may not be an express reference to an exclusion of conditions, it may be clear from the contract that the obligations of the seller are to be found only in the contract.[46] The Unfair Contract Terms Act (UCTA) 1977 does not apply to international supply contracts (see 5.4, below).

If the goods are sold second hand, then the buyer must judge what is satisfactory for him considering the price he pays, unless there is something radically wrong with them.[47] Whether a defect renders a vessel unsafe or unable to operate in the market for which she was built will be judged in the view of a commercial man. Defective electrical wiring has been considered by the court to be a serious defect affecting the vessel's quality (*The Raspora*, see later).

45 *The Mercini Lady* [2011] 1 Lloyd's Rep 442, concerning sale of goods.
46 *Air Transworld v Bombardier* [2012] 1 Lloyd's Rep 349.
47 *The Hansa Nord* [1975] 2 Lloyd's Rep 445 (CA), p 452.

5.3.5 Fitness for purpose

As much as the description and the quality of the goods, the purpose for which the goods are bought is equally important to the commercial man's decision to purchase the particular goods. Again, when the breach of this implied term is slight, there will be no right of rejection by the buyer, by virtue of s 15A of the SOGA 1979, as mentioned earlier.

Section 14(3) of the SOGA 1979 provides that:

> . . . where a seller sells goods in the course of a business and the buyer, expressly or by implication, makes known . . . any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller.

5.3.5.1 Reliance on the skill and judgment of the seller

Although, in modern shipbuilding, the buyer appoints his experts of naval architects and his representatives from the class society to supervise the shipbuilding, the extent to which reliance is placed upon the skill and judgment of the builder/seller was in issue in the old case, ***Cammell Laird & Co Ltd v The Manganese Bronze and Brass Co Ltd***,[48] in which it was decided by the House of Lords that, for the purpose of s 14 of the SOGA 1893, it would not be necessary that the buyer relied totally and exclusively on the skill and judgment of the seller for every detail in the production. The implied condition would arise when the buyer made the purpose for which the goods were required clear to the seller.

5.3.5.2 Idiosyncrasy of the subject matter

There will be no breach of the implied condition of fitness when the failure of the goods to meet the intended purpose arises from an abnormal feature or idiosyncrasy not made known to the seller. ***Slater v Finning***[49] is a House of Lords' decision on this issue.

The defendants were dealers in marine engines, and the plaintiffs were owners of a fishing vessel, *Aquarius 11*, which functioned on a caterpillar diesel engine and presented some problems. They called the defendants to replace a new camshaft to the engine of *Aquarius 11*, but the first replacement was not a success. Subsequently, two other camshafts were fitted to the engine, none of them was a success, and the engine continued to have problems. Therefore, the plaintiffs sold the engine and installed a new engine with a different design.

They sued the engine dealers for breach of the implied condition under s 14(3) of the 1979 Act, contending that the camshafts that were bought for *Aquarius 11* were not reasonably fit for the purpose of her engine, and the defendants had known that the camshafts were to be fitted into *Aquarius 11*.

48 3 [1934] AC 402 (HL).
49 [1996] 2 Lloyd's Rep 353.

The House of Lords rejected the plaintiffs' argument and held that there was no breach of the implied condition. It had been found that *Aquarius 11* had an unknown and unusual characteristic, a tendency to create excessive torsional resonance in camshafts. The particular purpose for which the camshafts were required was that of being fitted in the engine of a vessel that suffered from a particular abnormality or idiosyncrasy. The defendants, not being aware of that tendency, were not in a position to exercise skill and judgment for the purpose of dealing with it. Lord Keith stated:

> As a matter of principle, therefore, it may be said that where a buyer purchases goods from a seller who deals in goods of that description there is no breach of the implied condition of fitness where the failure of the goods to meet the intended purpose arises from an abnormal feature or idiosyncrasy, not made known to the seller, in the buyer or in the circumstances of the use by the buyer. That is the case whether or not the buyer is himself aware of the abnormal feature or idiosyncrasy.[50]

The old engine, after an extensive overhaul, worked well for a long period of time, when fitted into another ship, without any problems.

In the context of a shipbuilding contract, whether or not there has been a breach of the implied term of 'fitness for purpose' will depend on the particular circumstances of the contract. A breach of fitness may be an aspect of quality, and, thus, it will fall within the previous sub-paragraph. In any event, contracts entered into after 3 January 1995 will be subject to the amendment of the SOGA 1979 Act by the SSGA 1994, by which the breach must not be so slight as to be unreasonable for the buyer to reject the ship.

5.4 EXCLUSION CLAUSES AND THE UCTA 1977

The UCTA does not apply to international supply contracts as defined by s 26 of the Act. S 27(1) limits the operation of the controls provided in the Act if the law applicable to the contract is English law by choice of the parties and, apart from that choice, the contract would be governed by the law of another country. This limitation on the controls of the UCTA applies on the assumption, or proof, that the foreign law, which otherwise would apply to the contract, is different from the UK law of choice.[51] On the other hand, the Act does not permit a party to a contract to impose a term providing for the application of foreign law whose main purpose, as it appears to the court or arbitrator, is to evade the operation of the Act (s 27(2)).

Where UCTA applies, it provides a statutory prohibition of exclusion or limitation of liability clauses for death or personal injury resulting from negligence. Otherwise, it does not prohibit exclusion or limitation of liability clauses[52] relating to other forms of loss or damage, provided they satisfy the test of reasonableness (s 2(1), (2)).

50 [1996] 2 Lloyd's Rep 353, p 358.

51 For the application of ss 26 and 27 of UCTA, see *Balmoral Group Ltd v Borealis* [2006] 2 Lloyd's Rep 629.

52 *The Zinnia, Stag Line Ltd v Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep 211.

Insofar as consumer contracts of sale of goods are concerned, s 6(2) prohibits exclusion or limitation of liability for breach of the statutory conditions implied by ss 13, 14 and 15 of the SOGA 1979 and s 1 of the SSGA 1994 (referring to description, quality and fitness for purpose). Insofar as non-consumer contracts are concerned, s 6(3) makes such exclusion or limitation subject to the requirement of reasonableness.

The UCTA obviously plays a very important role in protecting vulnerable consumers from the effects of draconian contract terms. However, it does not interfere with contracts between parties of equal bargaining strength, who would generally be considered capable of being able to make contracts of their choosing, allocate the risks between themselves and expect to be bound by their terms. Nevertheless, a blanket exclusion of any liability whatever would, prima facie, be unreasonable.[53]

In ***The Rasbora v JCL Marine***,[54] the building of a powerboat was classed as a consumer contract; it did not fall within the category of an international supply of goods.

The contract was for the building and sale of a powerboat and included a clause excluding the application of any implied condition or warranty, and liability 'for any loss, damage, expense or injury howsoever arising' except as accepted under the terms of the warranty certificate. Although the builders agreed to build the boat for a private buyer in England (A), the contemplated purchaser was a company registered in Jersey, which was wholly owned by A – this was to avoid paying UK tax. After the sale was completed, the vessel caught fire during a cruise, and the plaintiffs, who had now been substituted for the original buyers, claimed damages from the sellers for breach of the implied condition under s 14(2) of the SOGA 1979, that the boat was not of merchantable quality. They contended that the fire was caused by defective electrical installations on the boat. The sellers sought to rely on the exclusion clause.

It was held that by novation the company, as plaintiff, was party to the contract originally made between A and the defendants. The substitution was amply supported by consideration. By s 55 of the SOGA 1979, contracting out of the implied term of merchantability was prohibited except in the case of international sales of goods, and in the case of non-consumer sales where the test of reasonableness would be applicable. This was clearly a consumer sale and did not involve an international sale of goods. Therefore, the implied condition could not be excluded when the boat was not of a merchantable quality. It was further held that the sellers could not rely on the exclusion clause in the contract, because the seller's breach and the consequences of the breach were fundamental in character.

The majority of shipbuilding contracts are undertaken outside the UK with which the contract may not have any connection. Being characterised as international contracts, the UCTA 1977, ss 2–7 and 16–21, will have no application, even if the parties choose English law as the law of the contract (s 27(1)). In the absence of express or implied choice of law by the parties, the Rome Convention 1980 will apply the law of the country with which there is closest connection.

53 Tuckey LJ, in *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] 2 Lloyd's Rep 356, p 362; in *Balmoral v Borealis*, fn 46, Borealis did not satisfy the court that their conditions of sale, which excluded the statutory implied terms of satisfactory quality and fitness for purpose, and liability for any loss or damage arising from any defect in the goods, satisfied the test of reasonableness.

54 [1977] 1 Lloyd's Rep 645.

6 GENERAL FRAMEWORK OF SHIPBUILDING CONTRACTS

6.1 AN OUTLINE OF THE SAJ CONTRACT

The basic express terms of the SAJ shipbuilding contract, which is more widely used, are divided into 21 articles and include the following broad provisions:

- Article I: description, dimensions, characteristics, classification (rules and regulations), subcontracting and registration.
- Article II: contract price, currency, terms and method of payment.
- Article III: delivery, speed, fuel consumption, dead weight.
- Article IV: approval of plans and drawings, appointment of buyer's representative, inspection by him, liability of builder and responsibility of the buyer.
- Article V: modification of specification, change in class, substitution of materials.
- Article VI: trials and notice, weather conditions, method of trials; method of acceptance or rejection, effect of acceptance.
- Article VII: time and place of delivery, when the buyer has fulfilled his obligations, documents to be delivered to the buyer, tender of the vessel, title and risk.
- Article VIII: delays and extension of time, notice of delay, defining what is permissible delay, right to rescind for excessive delay.
- Article IX: warranty of quality, notice of defects, remedy of defects, extent of builder's responsibility.
- Article X: rescission by the buyer, notice, refunds by builder, discharge of obligations.
- Article XI: buyer's default, what is default, interest and charges, effect of default, sale of vessel.
- Article XII: builder's obligation to insure and extent of coverage, recoverable losses.
- Article XIII: dispute and arbitration (the printed form stipulates for arbitration in Tokyo, but it is usually the case that parties agree London as the seat of arbitration; hence, the relevance of English law).[55]
- Article XIV: deals with prohibition of assignment of the contract unless prior consent of the other party and approval from the Japanese government are obtained.
- Articles XV and XVI: deal with taxes and duties in Japan, patents, trademarks, copyright, etc.
- Article XVII: regulates supplies by the buyer and his responsibility for them.

The remaining four articles deal with address of notices, effective date of contract, law and interpretation of the contract, and the guarantee in the event of default by the buyer.

55 The printed form of NSF 1993 provides for English law and arbitration.

6.2 AN OUTLINE OF THE NEWBUILDCON

By way comparison, the NEWBUILDCON contains six sections, conceptually arranged, and 48 clauses:

- Section 1 deals with the parties' basic obligations and the essentials for the ship description, compliance with regulations and class rules;
- Section 2 is about the parties' financial obligations;
- Section 3 is about the production stage, approvals, inspections, modifications, sea trials and method of acceptance or rejection;
- Section 4 deals with the delivery, payment of final instalment, passing of title and risk, possession and removal of the vessel from the yard;
- Section 5 is concerned with the legal aspects surrounding shipbuilding, such as permissible delays, guarantees, responsibilities and exclusion clauses, insurance, suspension and termination and dispute resolution;
- Section 6 includes sundry items such as notices, assignments, options, third-party rights.

6.3 THE SPECIFICATION

A significant part of the contract is the specification, which comprises the second part (the first being the terms of the contract). It covers the details of how the ship is to be constructed and includes the following general items:

(a) a detailed description of the type of ship, her hull and equipment, including the builder's scale plan and drawings;
(b) the materials to be used, depending on the wish of the buyer and the cost he is prepared to pay;
(c) the way in which the ship is to be constructed, configuration of engine and fittings, details of officers' cabins, details of the piping system, method of welding etc.;
(d) the specification must meet mandatory regulations of the country of the ship's intended registration, as well as international regulations of safety imposed by conventions (for example, the International Convention for Safety of Life at Sea (SOLAS) 1974) and the regulations of the ship's intended classification society; and
(e) sea trials and how they will be carried out.

The specification is of equal significance to the main contract but, in the event of a conflict between the two, in the absence of express agreement, the contract will prevail.

An interesting question of construction with regard to modifications of the specification arose in ***Petroleo Brasileiro SA (Petrobras) v Petromec Inc***,[56] in which an oil platform was to be bareboat chartered by Petromec (the contractor) to Petrobras (the employer). Following extensive negotiations, modifications to the agreed General Technical Specification were noted by engineers in a document

56 [2013] EWCA Civ 150.

entitled Annex X. In the course of the negotiations, the oil platform was also redesignated for a different oilfield, which required a revision of the upgraded specifications. The issues before the court were as to what upgrades, precisely, had been agreed to the compressors and the risers. There was an issue as to how to regard the data in Annex X, namely, whether they were part of the factual background (for example, the matrix of the contract, as per *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and *Bank of Credit and Commerce International v Ali* [2001] 1 AC 251), or as part of the negotiations and therefore inadmissible (as per *Prenn v Simmonds* [1971] 1 WLR 1381).

The CA held that Annex X was not intended to be a nominal or fantasy design and, whatever the material date for assessment of the factual matrix, the General Technical Specifications and Annex X were attached to the agreement when it was reduced to writing. The thoughts of one party as to switching the oil platform to another field at the time the specifications were made were immaterial. It made commercial sense that the modifications should be the responsibility of the contractor and owner of the platform, not the employer.

7 PARTICULAR ASPECTS OF SHIPBUILDING CONTRACTS

The relationship between the buyer and the builder is governed by the terms of the contract provided for in the standard form contract. The seller has agreed to build a ship for a fixed price, made to specification, to perform trials and to deliver on time. The buyer has agreed to pay the contract price by instalments during the process of building, the full agreed price being payable upon satisfactory completion in accordance with the specification, and to accept delivery of the ship on time.

All standard terms contracts make detailed provisions of payment of the instalments, which are paid as advances not as deposits. From these basic obligations of the buyer, interlocking rights arise that are explained under the heading ‘Builder’s obligations’ under para 8 below.

Invariably, the contract becomes even more complex by the so-called ‘option agreements’.

7.1 OPTION AGREEMENTS AND MANAGEMENT OF RISK IN DRAFTING

Option agreements are an interesting development in relation to orders of new buildings, which deserve to be noted. Usually, an option agreement is attached to the main contract to the effect that the buyer may exercise his option to buy a new ship, or more ships, or to sell the ship himself immediately after the building. This became fashionable owing to the boom of the freight rates, particularly of tankerships, from 2003 until the emergence of the world economic crisis in 2008. Although new buildings became a very profitable trade for many new buyers during that period, an example of a trap for the buyer in exercising such an option is shown in the following cases.

In ***Haugland Tankers AS v RMK Marine Gemi Yapim Sanayii ve Deniz***,[57] a buyer of a newly built oil tanker sought declarations from the court against the shipbuilder that he had validly exercised an option under an option agreement, which gave him an option to buy an identical vessel on substantially the same terms as the main shipbuilding contract. The option could only be 'declared' by the buyer in the 6-month period following payment of the first instalment of the price for the tanker. The builder was obliged under the option agreement to enter into the contract to build the second vessel upon the exercise of the option by the buyer and the payment of a 'commitment fee' of 1 per cent of the price 'simultaneously' with the declaration of the option. The buyer exercised his option within the 6-month period, but he did not pay the commitment fee.

Giving judgment for the builder, the court held that: (1) the only possible construction of the option agreement was that notice declaring the option and payment of the commitment fee had to be done simultaneously; (2) the option could not be exercised without payment of the commitment fee at the same time; the payment obligation was expressed in a separate sentence, but simultaneous payment was a condition precedent to, or a requirement for, the proper exercise of the option; and (3) if the payment of the commitment fee was not a condition precedent, breach of the simultaneous payment requirement would not have been a failure that would have entitled the builder, without more, to terminate the contract.

The contract in ***Ravennavi SPA v New Century Shipbulding Co Ltd***[58] is an example of alerting buyers to the risk of possible incompatibility between an option agreement clause and the 'entire agreement' clause in a shipbuilding contract, if the drafting is not clear.

There was a preliminary issue in this case as to the interpretation of an option agreement, which gave the buyer an option to require the yard to build two vessels, and also provided by cl 4(ii) that, if the yard could do so, it would grant the buyer 'the earlier delivery position for the optional vessel(s)'. The buyer exercised the option, and two shipbuilding contracts were entered into between the yard and the buyer. The shipbuilding contracts contained an entire agreement clause. The buyer claimed damages on the basis that the yard was in breach of cl 4(ii) of the option agreement, because it had contracted with third parties to deliver other tankers on dates falling earlier than the dates for delivery of the buyer's two vessels.

Referring to the entire agreement clause of the contract and to a couple of previous cases concerning this subject, Gloster J held that the effect of the entire agreement clause, read together with the express provisions of the contract relating to delivery and payment dates, was to replace the provisions of the option agreement once the option was exercised. She also held that the effect of the entire agreement clause in the shipbuilding contracts was to exclude any obligation on the part of the yard to accelerate the delivery dates, once the final agreements had been entered into. There was business justification for the option agreement to lapse under the entire agreement.

The CA,[59] approving the decision, held that: a shipyard's obligation under an option agreement to make available an earlier delivery date for a vessel, should one become

57 [2005] 1 Lloyd's Rep 573.
58 [2006] 2 Lloyd's Rep 280.
59 [2007] EWCA Civ 58; [2007] 2 Lloyd's Law Rep 24.

available, was not intended to be a continuing obligation but only obliged the shipyard to offer the purchaser any earlier date for delivery that might become available prior to the exercise of the option.

It should be noted that, in the NEWBUILDCON form, the drafting of the option clause seems to be much clearer and compatible with the entire agreement.

7.2 DESCRIPTION OF VESSEL – CLASS RULES AND REGULATIONS

Article I of SAJ provides for dimensions, the class rules that shall apply and that the vessel shall be constructed, equipped and completed in accordance with the contract and the specification.

The NEWBUILDCON, being a modern contract, emphasises the requirement for compliance with recent IMO international regulations and developments in accordance with IACS Common Structural Rules.

Section 1 of NEWBUILDCON provides more details of the description for the parties to fill in, as well as compliance with the IMO regulations about hazardous and dangerous material and protective coatings.

The builder guarantees certain standards of performance relating to the vessel's speed, deadweight and fuel consumption. The contract will usually provide that a breach of the guaranteed standards will entitle the buyer to claim liquidated damages, or reduction in the price, or to reject the ship in extreme cases.

7.3 PRICE AND METHOD OF PAYMENT

Article II of SAJ provides for the terms of payment, currency (Japanese yen) and method of payment. Article III of SAJ provides for adjustment of the contract price for deficiencies such as in speed, fuel consumption, deadweight, cubic capacity and late delivery beyond permissible delays.

Section 2 of the NEWBUILDCON, which deals with the parties' financial arrangements, provides for reduction to the agreed price in case of various deficiencies in speed, fuel consumption, deadweight, and cubic capacity, in the first place, but gives the right to the buyer to reject the ship if the necessitated reduction exceeds a certain level provided by the contract.

There may be other financial arrangements between the parties whereby the builder agrees to defer payment of part of the contract price for a certain period after delivery (the builder's credit), or a loan facility is provided to the buyer permitting him to pay the contract price in full before accepting delivery (the buyer's credit). Such facilities, naturally, are backed up by a first preferred mortgage on the vessel, an insurance policy that incorporates a loss payable clause to protect the builder in the event of default under the mortgage and an assignment in a specified form of all hire or freight due under charterparties in which the vessel is engaged in her future employment until payment of the debt. The relevant charterer, under a separate agreement, must confirm that, subject to any rights of set-off or lawful deductions, all monies due under the charterparty will be paid to the builder or his assignees.

7.3.1 The buyer's performance guarantee

In order to secure the buyer's obligation to pay the instalments of the contract price prior to delivery, Clause 14(a) of Section 2 of the NEWBUILDCON caters for the protection of the builder. It requires the buyer to provide – within certain days from signing the contract – an irrevocable and unconditional performance guarantee to be issued by a bank or a person agreed in the contract, failing which the builder shall have the option to terminate the contract.

This protects the builder much earlier than the equivalent provision, Art II (4)(b) of SAJ, which requires the issue of the guarantee at a later date, namely prior to payment of the fourth instalment.

7.3.2 The builder's refund guarantee

The buyer's obligation to pay by instalments is backed up by his right to demand a refund from the builder in case of breach by the builder in specified circumstances; this is coupled by a refund guarantee provided by a third party in case the builder fails to refund the instalments.

To secure the builder's obligation to refund the buyer's pre-delivery instalments, cl 14(b) of the NEWBUILDCON provides that the builder shall, within a number of days (stated in the contract) after the signing of the contract and before the date for payment of the first instalment, provide the buyer with a refund guarantee issued by a bank or party named in the contract, substantially in the form and substance set out in Annex A (Refund Guarantee). Failing to do so, the buyer shall have the option to terminate the contract in accordance with cl 39(a)(ix).

By contrast, the SAJ standard form of contract does not impose, in the body of the contract, an obligation on the builder to provide a refund guarantee, but reference to it is made in Art X, which provides for the occasions of rescission by the buyer. It is usual in practice, however, for the parties to agree at the outset of the contract that the builder shall procure a satisfactory refund guarantee, that is an undertaking of a bank or other surety acceptable to the buyer that the guarantor will make the payments of the pre-delivery instalments on the builder's behalf, should the builder fail for any reason to refund them to the buyer. The refund guarantee issued by a third party is a separate document attached to the contract.

Issues as to the validity of the guarantee have arisen in cases in which delays in the construction of the vessel have occurred and the delivery date is delayed beyond the dead-date of the guarantee, as will be seen under para 9 below. It should also be noted that the wording of the guarantee describing the triggering events of the demand under the guarantee should be the same as those provided for under the shipbuilding contract, as will also be seen later under para 9.

Ship-owners should also be careful to ensure that the guarantee given by the bank is signed by an authorised person. In ***Sea Emerald SA v Prominvestbank – Joint Stockpoint Commercial Industrial and Investment Bank***,[60] the owners fell into a trap by believing that the employee had authority to sign the guarantee; it was held that the shipping company was unable to claim under a refund guarantee signed by the bank's employee in respect of a ship construction contract between a shipyard,

60 [2008] EWHC 1979 (Comm).

which was the bank's client, and the shipping company, as the bank had not given the employee either actual or ostensible authority to give the refund guarantee and had not ratified the employee's issue of the guarantee.

7.3.3 Cost fluctuations and increase in the price

Invariably, the process of production becomes complicated by market forces; for example, there may be fluctuations in the freight market affecting the buyer's perspective. There may be an increase in the cost of production, such as the recent increase in steel prices, and fluctuations in exchange rates affecting the builder's cash flow and his prospect of making profit. The contract must address the risk of price fluctuation in costs of labour and materials.

A cost escalation clause may be included in the contract, where extra costs incurred by the builder with respect to fluctuation in prices for labour and materials may make it necessary for the builder to pass on such costs to the buyer. Such clauses are otherwise known as 'contract price adjustment clauses' or 'fluctuation clauses'. Careful drafting of such clauses is needed. The builder will require as wide a clause as possible, whereas the buyer must be cautious and restrict the width of such a clause with clear words for a cut-off point. At the end, it will depend on market forces, inflation and the parties' respective bargaining powers.

7.3.4 Price escalation issues – builder's delay in delivery

An interesting question in this context arose in a dispute between the builders and the buyer, which was resolved by arbitration.[61] It concerned whether or not the price escalation clause could be rendered inoperative, if the builder was in breach of the delivery provision.

The buyer alleged that, as the builder was in breach and delivered the ship late, he could not benefit from his own wrongdoing and claim the escalation of the price shown in Clarkson's Clean Indexes for the period. The arbitrators decided that the yard could not be said to be seeking to benefit from its wrongdoing unless it was shown that the benefit of the price increase was in fact brought about by its own wrongful acts or omissions. The yard had no influence of or control over the factors dictating market movements. The price escalation and the delay in delivery were separate incidents. The remedy for the delay was liquidated damages, which the builders had to pay.

If there is no escalation clause in the contract and the builder unilaterally attempts to increase the price in the course of the building, exercising pressure upon the buyer and threatening to discontinue performance unless the extra price is agreed, he will be faced with the risk of the agreement being unenforceable for lack of consideration, or be set aside for economic duress. Each of these situations is briefly explained below for the purpose of raising awareness in the management of risks, whether the relevant parties are advised by lawyers or not.

61 London Arbitration 21/6/2006, LMLN 3, 27/12/2006, 707.

7.3.5 Price escalation issues – lack of consideration

In the event of a unilateral increase in the price, and if the builder undertook to perform nothing more than that which he was obliged to perform under the existing agreement, the agreement may be legally unenforceable for lack of consideration. By analogous application of the principle as derived from ***Stilk v Myrick***,[62] it could be said that the performance of a pre-existing obligation under a building contract could not be held to constitute good consideration, so as to justify increase of the contract price.

In this case, two members of the crew deserted the ship before the return voyage commenced. The captain, in his effort to ensure that the rest of the crew remained on board, promised to reward them with extra wages, if they sailed the vessel safely home. The issue for the court was whether the crew were entitled to that reward. It was held that the deserting two members of the crew made no difference to the duties required of the remaining crew. The latter were performing their obligations under the pre-existing contract of employment, being members of the ship's crew, and had done no extra work to have earned any extra pay. Although the captain had made a promise of extra pay, on which the crew had relied, the court was reluctant to support what was implicitly a form of blackmail or extortion.

The principle of *Stilk v Myrick* – having stood for almost 200 years – underwent a radical development in 1990, as is shown in ***Williams v Roffey Bros & Nichols***.[63]

The defendant (head builder) subcontracted with the plaintiff (the subcontracted builder) to carry out carpentry work in a block of 27 flats, for an agreed price of £20,000. The subcontracted builder got into financial difficulty, because the agreed price was too low for him to operate satisfactorily and at a profit. The main building contract contained a time penalty clause, and the head builder worried in case the subcontractor did not complete the carpentry work on time. He, therefore, agreed orally with the subcontractor that he would pay an additional sum of £10,300, at the rate of £575 for each flat for the completion of the work on time. Approximately 7 weeks later, when the subcontractor had substantially completed eight more flats, the head builder made only one further payment of £1,500, whereupon the subcontractor ceased work on the flats and sued the head builder for the additional sum promised. The judge held that the agreement for payment of the additional sum was enforceable and did not fail for lack of consideration, because the defendant received a commercial advantage. He gave judgment for the plaintiff.

The CA affirmed the judgment and held that, where a party to a contract promised to make an additional payment in return for the other party's promise to perform his existing contractual obligations and, as a result, secured a benefit or avoided a detriment, the advantage secured by the promise to make the additional payment was capable of constituting consideration thereof, provided that it was not secured by economic duress or fraud. The consideration was avoidance of the detriment of delivering the flats late, which would result in having to pay penalties to the purchasers of the flats, or to buy further building materials and employ labour for the flats to be completed on time.

The refinement and limitation of the principle in *Stilk v Myrick* gained acceptance in subsequent cases. It is worth mentioning **Anangel Atlas Compania Naviera v**

62 1809] 2 Camp 317.
63 [1991] 1 QB 1 (CA).

Ishika Heavy Industries Co Ltd (No 2),[64] an unusual shipbuilding case, which can be of practical use to both buyers and shipbuilders.

The Angelicoussis group was a long-standing customer of a Japanese shipbuilding yard and ordered some new buildings through their agent, a naval architect. During the shipping slump in 1984–5, customers of the yard obtained substantial price reductions for their buildings. Mr Angelicoussis, being a loyal customer, obtained a variation of the original contract and letters were exchanged in which it was stated that the group would be entitled to 'most favoured customer treatment'. The group agreed to take early delivery of the new building, although it did not have to, which would encourage other reluctant customers of the yard to follow suit. However, it was later found out that a friend of Mr Angelicoussis, Mr Goumas, another customer of the yard, had obtained a better reduction in the price from the yard than the reduction granted to the Angelicoussis group. Mr Angelicoussis sued the yard for price differential or damages. The issue was whether the aforesaid letters constituted a binding contract. Hirst J held, on the consideration issue, applying *Williams v Roffey*, that whoever provides the services, where there is a practical conferment of benefit or a practical avoidance of detriment for the promisee, there is good consideration and it is no answer to say that the promisor was already bound. The yard got a clear benefit, or avoided a detriment, as their best customers accepted an early delivery, so that the other customers followed suit.

Similarly, in ***The Atlantic Baron***,[65] Mocatta J (see facts below) had held – 11 years earlier – that the parallel increase in the letter of credit (refund guarantee provided by the builder to the buyer as security), being equivalent to the demanded increase of the contract price to counterbalance the devaluation of the dollar, was not merely fulfilling a pre-existing contractual obligation but was an 'increased detriment' constituting good consideration.

7.3.6 Price escalation issues – economic duress

The principle derived from the aforesaid trilogy of cases, however, will not suffice to save the contract if the agreement is entered into by reason of economic duress or fraud, in which case it may be vitiated by the buyer at his option. In the event that the builder exercises undue pressure on the buyer to pay the extra price, his conduct may amount to economic duress, and the agreement may be held by the court to be voidable.[66]

In ***The Atlantic Baron*** (above), Hyundai shipbuilding (the builder) agreed with the buyer to build a tanker for a fixed price in US dollars, payment to be made in five instalments. He also agreed to open a letter of credit to provide security to the buyer for repayment of paid instalments in the event of the builder's default in the performance of the contract. After the payment of the first instalment, the US dollar was devalued by 10 per cent, upon which the builder put forward to the buyer a claim for an increase of 10 per cent in the remaining instalments. The buyer, asserting that there was no legal ground on which the claim could be made, paid the second and

64 [1990] 2 Lloyd's Rep 526.

65 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705; [1979] 1 Lloyd's Rep 89.

66 Contrast duress of the person: *Gulf Azov v Idisi* [2001] 1 Lloyd's Rep 727.

third instalments without the additional 10 per cent, but the builder returned both instalments. The buyer proposed that the parties should commence arbitration to resolve this dispute, but the builder declined to do so and requested that the buyer gave a final and decisive reply to the demand for an increase by a certain date, failing which he would terminate the contract. The buyer, who at that time was negotiating a very lucrative contract for the charter of the tanker, replied that, although he was under no obligation to make additional payments, he would do so 'without prejudice' to his rights and requested that the builder arrange for corresponding increases in the letter of credit. The builder agreed to do so, and the buyer remitted the remaining instalments including the 10 per cent increase without protest. After 8 months, the buyer commenced arbitration, claiming the return of the overpayments on two grounds: lack of consideration and economic duress. The arbitrators stated a special case for the opinion of the court.

Mocatta J gave a judgment in favour of the builder on the consideration point and in favour of the buyer with respect to economic duress, except that the buyer was late to bring the claim. In particular, he held that the builder's threat to break the contract without any legal justification unless the owners increased their payments by 10 per cent did amount to duress in the form of economic pressure, and accordingly the agreement for extra payments was a voidable contract that the owners could either affirm or avoid. However, as there was no likelihood that the builder would build the tanker at the time she was due for delivery, the owners, by making the final payments without protest and by their delay to bring the claim (from November 1974 until July 1975), had so conducted themselves as to affirm the contract; accordingly, their claim failed.

Mere commercial pressure and use of bargaining power by one party to the contract negotiated at arm's length will not suffice for the court to declare the contract voidable for economic duress. The Privy Council, in ***Pao v Lau Yiu Long***,[67] held that: although the defendants had been subjected to commercial pressure, the facts disclosed that they had not been coerced into the contract of guarantee and, therefore, the contract was not voidable on the ground of duress. In the absence of duress, public policy did not require a contract negotiated at arm's length to be invalidated because a party had either threatened to repudiate an existing contractual obligation, or had unfairly used his dominant bargaining position in negotiating the agreement.

Subsequently, the court had to consider whether or not there can be a category of lawful act duress in ***C.T.N. Cash and Carry Limited v Gallaher Limited***.[68] A merchant of cigarettes paid a sum of money to his supplier, when the sum of money was in truth not owed. He paid it as a result of the supplier's threat to stop his credit facilities in their future dealings if the sum was not paid. The supplier acted in the bona fide belief that the sum was owing. The question for the court was whether the doctrine of economic duress enabled the buyer to recover the payment. The judge and the CA answered the question in the negative, holding that there is no extension of the categories of economic duress to create 'lawful act duress' in a commercial context, and commercial parties are free to vary their contracting terms and to withdraw credit facilities without this constituting duress.

67 [1980] AC 614 (PC).
68 [1994] 4 All ER 714.

Lord Justice Steyn held:

> We are being asked to extend the categories of duress of which the law will take cognizance. That is not necessarily objectionable, but it seems to me that an extension capable of covering the present case, involving 'lawful-act duress' in a commercial context in pursuit of a bona fide claim, would be a radical one with far-reaching implications. It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover, it will often enable bona fide settled accounts to be re-opened when parties to commercial dealings fall out. The aim of our commercial law ought to be to encourage fair dealing between parties. But it is a mistake for the law to set its sights too highly when the critical enquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable. That is the enquiry in which we are engaged. In my view there are policy considerations which militate against ruling that the defendants obtained payment of the disputed invoice by duress.[69]

Economic duress was revisited in ***Huyton v Cremer***,[70] and Mance J (as he then was) held that there were two ingredients of economic duress, illegitimate pressure and deflection, rather than coercion of the will of the innocent party. He rejected the argument advanced that there was a third essential ingredient of economic duress: that is, 'no practical or alternative course open to the innocent party'. Relief must depend on the court's assessment of the qualitative impact of the illegitimate pressure objectively assessed, and it may not be appropriate if the innocent party decides, as a matter of choice, not to pursue an alternative remedy, which some other reasonable persons in his circumstances would possibly have pursued.

Dyson J, in ***DSND Subsea Ltd v Petroleum Geo-Services ASA***,[71] approached the matter by considering the nature of pressure and its effect upon the victim for the defence of economic duress to succeed. He held that the pressure must be illegitimate; the practical effect of pressure is that there is no alternative open to a party alleging duress; and that such pressure is the cause in inducing the victim to enter into the agreement.[72]

Dyson J applied the principle in a construction case, ***Carillion Construction Ltd v Felix (UK) Ltd***,[73] and held that duress required illegitimate pressure to be applied that compelled the victim's agreement to enter into a contract. F's threat in this case to withhold deliveries until settlement of its final account was a threat to breach the contract, when he was already guilty of culpable delay. The pressure exerted by F in threatening to withhold deliveries was illegitimate and gave C no real choice but to enter into the settlement agreement.

The element of illegitimacy of pressure has raised issues as to whether or not the term requires that the victim should be subjected to pressure by unlawful action. This

69 Ibid, the Lord Chancellor observed (*obiter*, because the only issue before the court was whether or not there was duress) that prima facie it would be unconscionable for the defendant company to insist on retaining the money. It demanded the money when under a mistaken belief as to its legal entitlement to be paid. It only made the demand because of its belief that it was entitled to be paid. The money was then paid to it by a plaintiff who, in practical terms, had no other option. In broad terms, in the end result the defendant may be said to have been unjustly enriched. Whether a new claim for restitution now, on the facts as they have since emerged, would succeed was not put before the court.

70 [1999] 1 Lloyd's Rep 620.

71 [2000] BLR 530; see also *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] 2 Lloyd's Rep 653.

72 See, also, the pressure exerted upon the ship-owner by ITF in *Universe Tankship Inc of Monrovia v ITF* [1983] 1 AC 366 (HL).

73 [2001] BLR 1.

was clarified in a recent decision, ***The Cenk Kaptanoglu***,[74] concerning a charterparty repudiation by the ship-owner (S). The charter did not give any right to substitute the vessel, but S fixed the vessel to another charterer without informing the original charterer (C). C did not accept that breach as terminating the contract; S conceded that it had made a mistake and promised to find an alternative vessel and to compensate C for all damages resulting from its failure to provide the contracted vessel. C accepted a substitute vessel with a discount on the freight rate, but sought to reserve its rights in respect of all claims for damage arising out of breach of the charter. C's sale contract was amended with a reduced price for the cargo and a later shipment date. S then made a 'take it or leave it' offer requiring acceptance of the vessel with the reduction of the freight rate but with C's agreement to waive all claims for loss and damage. C accepted under protest. The arbitrators found that C had not failed to mitigate by not going into the market to find another vessel, and that its agreement to waive its claims was procured by economic duress. The issue on appeal was whether S's conduct amounted to the illegitimate pressure required to establish duress. S submitted that economic duress only operated if the victim was subjected to pressure by unlawful action. Cooke J, applying *C.T.N. Cash and Carry Limited v Gallaher Limited* (see above), held that: The exertion of pressure by lawful means did not prevent the operation of the doctrine of economic duress.[75] The question was not whether the conduct was lawful, but whether it was morally or socially acceptable. In determining whether there had been illegitimate pressure, a range of factors had to be taken into account, including: whether there had been an actual or threatened breach of contract; whether the person allegedly exerting the pressure had acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. Illegitimate pressure had to be distinguished from the rough and tumble of the pressures of normal commercial bargaining. The arbitrators were right to find that a settlement agreement between S and C was voidable for duress, and that S's conduct amounted to the 'illegitimate pressure' required to establish duress in law.

Examples of factors that may lead the court to find economic duress in shipbuilding contracts could be evidence of the builder's knowledge about a charterparty that the buyer has fixed to commence on the date of delivery, or other circumstances by which the buyer would have no option but to agree to a sudden price increase (for example, such as in *The Atlantic Baron*, above).

7.4 THE CONSTRUCTION STAGE

There is considerable technical risk involved at this stage, which should be balanced with skilful commercial risk management. Buyers need efficient ships to be built and

74 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] 1 Lloyd's Rep 501; see, further, settlements reached under duress: *Borrelli v Ting* [2010] UKPC 21; *Adam Opel GmbH v Mitras Automotive (UK) Ltd Costs* [2007] EWHC 3481 (QB).

75 'When pressure turns to duress', Cons Law 2012, 23(5), 20–22; 'Economic duress and illegitimate pressure' Build LM 2012, Mar, 8–10; 'Voyage charter – repudiatory breach – settlement – voidable – economic duress', JIML 2012, 18(2), 113–114.

they need them promptly, at a reasonable price! Builders, however, aim for standardisation to reduce costs and build them within budget.

The builder may employ a subcontractor, as set out in the specification, but he is not allowed to engage subcontractors without the buyer's approval, which should not be unreasonably withheld (cl 19 s 3 of the NEWBUILDCON).

7.4.1 Approvals

After the signing of the contract and within an agreed period, the builder shall provide the buyer with proposed details of the building plan for comments and approvals. Extensive details of the arrangements for the approval of the plans and drawings, and the role of experts and of the classification society, are provided in cl 20 of the NEWBUILDCON; less detailed provisions are set out in Art IV of the SAJ.

7.4.2 Modifications of specification

In the light of frequent disputes that have arisen with regard to modifications of the original construction plan, cl 24 of s 3 of the NEWBUILDCON provides details of the buyer's right to request modifications and the steps that should be taken afterwards by each party.

In addition, it provides for the builder's right to make minor modifications (cl 25), provided they comply with the requirements of the class society and the regulatory authorities. It also provides, by cl 26, for modifications that become necessary by reason of changes in regulations. Less clarity is provided by Art V of SAJ with regard to modifications of specification.

7.4.3 Supplies by the buyer

There is a more stringent approach with regard to buyers' supplies in Art XVII of SAJ favouring the builder than the approach followed by the NEWBUILDCON in cl 21, which is clear, detailed and balanced.

7.4.4 Delays

Article III of SAJ provides for permissible delays in delivery (other than the *force majeure* events as provided by Art VIII) and sets out the right of election of the buyer either to exercise the right to rescind or to consent to accept the vessel at a future agreed date, upon service of a notice by the builder, in the event that the buyer has not yet exercised his right to rescind as provided by Art X of SAJ.

By contrast, cl 34 of NEWBUILDCON enlists all possible events of permissible delays and sets out a clear procedure of the builder's obligation to give notice to the buyer.

7.4.5 Sea trials – acceptance or rejection

Sea trials are an important part of the contractual terms. Their purpose is to test whether the performance and condition of the ship are satisfactory and in accordance

with the contract. They are conducted – at the expense of the builder – in the presence of representatives of the buyer, the classification society and regulatory authorities.

Trials give the opportunity to the buyer to verify whether the builder has complied with the specification. The standard forms of contract oblige the buyer either to accept that the ship complies with the specification and requirements of the contract, or to reject her within a specified period of time after the trial results are notified to him by the builder. If the sea trial results demonstrate that the vessel or any equipment does not conform to the requirements of the contract, the builder shall take all the necessary steps to rectify such non-conformity.

Clause 27 of the NEWBUILDCON gives sufficient and clear details of what is to happen prior to and during the sea trials and should be read together with cl 39, dealing with suspension or termination of the contract. Similar provision can be found in Art VI of SAJ, save that the days of notice within which the buyer is obliged to give his rejection or acceptance are only 2 or 3 days after receipt of the trial results, but this is usually amended in the contract. However, as the SAJ contract is outdated, it generally lacks the clarity expected from modern draftsmen.

7.5 DELIVERY – TITLE AND RISK

Acceptance of the vessel after the sea trials is final and binding so far as the conformity of the vessel to the contract and the specification is concerned, and the effect of it is that it precludes the buyer from refusing to take delivery, if the builder complies with all other procedural requirements provided in the contract. The SAJ contract provides for the details of delivery in Art VII, and the NEWBUILDCON does so in cll 28–32.

7.5.1 Passing of property and risk by statute

In the absence of express or clear provision in the contract with regard to transfer of title, the usual contract rule in English law concerning specific goods is that the property in them is transferred at such a time as the parties to the contract intend it to be transferred. By s 17(2) of the SOGA 1979, the intention of the parties is ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case.

The rules for ascertaining intention are specified in s 18 of the SOGA 1979. Where there is a contract for the sale of future goods by description, as is the case in the construction and sale of a ship, the property does not pass until the goods are in a deliverable state and are appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller (s 18 r 5).

However, bearing in mind the hybrid nature of a shipbuilding contract, even if the ship is uncompleted, the property in it (but not in the materials that have not been appropriated to her) may, in some circumstances, pass to the buyer, if the parties have clearly stipulated it in their contract.[76]

76 See *Re Blyth Shipbuilding and Drydocks Co Ltd* [1926] Ch 494.

7.5.2 Passing of property and risk by contract

Assuming that the completion of the construction and the sea trial go smoothly, the contract provides when property and risk shall pass to the buyer. Article VII.5 of the SAJ form stipulates that the title and risk for loss of the vessel shall pass to the buyer only upon delivery and acceptance thereof, having been completed, as stated in the contract. Until such time, it is expressly stated that title to the vessel and risk for her loss or her equipment shall be in the builder, excepting risks of war, earthquake and tidal waves.

The NEWBUILDCON, by cl 31, makes it clear that:

> Title and risk of loss or damage to the vessel shall rest with the builder until exchange of the Protocol of Delivery and Acceptance is effected, immediately upon which title and risk shall pass to the buyer. At the time of delivery the vessel shall be free of all liens, claims, charges, mortgages and other encumbrances.

8 BUILDER'S SPECIFIC OBLIGATIONS

8.1 BUILDER'S OBLIGATION TO PROVIDE DEFECTS GUARANTEE

The builder's guarantee that certain characteristics and condition of the ship will be met on delivery is very important. Failure by the builder to meet the minimum guaranteed characteristics might cause delay in delivery resulting in loss of profit to both parties.

Under Art IX of SAJ, the builder's defects guarantee is called 'warranty of quality' in terms of material and workmanship.

By contrast, the title in cl 35 of the NEWBUILDCON is 'Builder's guarantee' for defects; these are defined as defects in the design, construction, material and/or workmanship on the part of the builder or its subcontractors.

8.1.1 The guarantee period and conditions of cover

Article IX.1 of SAJ provides that:

> . . . the Builder for a period of 12 months following acceptance by the buyer of the vessel, guarantees the vessel, her hull and machinery . . . which are manufactured, furnished or supplied by the builder . . . against all defects in material and/or workmanship on the part of the builder . . .

Whereas the time limit, or the guarantee period, under the SAJ contract is 12 months, under the NEWBUILDCON there is a blank in the box for the parties to agree the time limit.

The meaning of the time limit is that the defects must have been discovered within 12 months, or other time agreed, from the delivery of the vessel. The builder shall not be liable if any defects are discovered after the guarantee period.

The buyer must give appropriate notice, as provided in the contract, as soon as the defects are discovered, the latest within 30 days from the expiry of the guarantee period.

The delivery must have taken place as provided in the contract.

8.1.2 Remedy for guarantee defects

The builder shall remedy, at its expense, any defects against which the vessel is guaranteed by making all necessary repairs or replacements at the shipyard, unless it is impracticable to bring the vessel to the shipyard and the buyer proposes to have the necessary repairs done at another suitable shipyard (Art IX(3) SAJ).

Clause 35(b) of the NEWBUILDCON makes it clear that the builder must rectify at its shipyard the guarantee defects or damage to the vessel caused as a direct and immediate consequence of such guarantee defects at the builder's cost and expense.

It also makes it clear in cl 35(c) that the buyer has the right to arrange for such repairs to be done at another shipyard if it is impractical to bring the vessel to the builder's shipyard, or if the builder cannot supply the necessary replacement parts and materials without impairing or delaying the operation or working of the vessel.

If the repairs are proposed to take place at another suitable yard, the builder, after being given appropriate notice by the buyer, has the right to inspect the nature and extent of the guarantee defects; he shall promptly advise the buyer in writing of its acceptance or rejection of such guarantee defects as ones that are covered by the guarantee.

In the event that the parties agree that the repairs are carried out at another yard, the builder shall pay to the buyer the reasonable cost and expenses incurred for such repairs or replacements.

8.1.3 Exclusions from the guarantee

Under the SAJ form, Art IX.3 (extent of builder's liability):

> The Builder shall have no obligation under the guarantee for any defect discovered after the expiration of the guarantee period specified herein and for any defects whatsoever in the Vessel other than the defects specified in section 1 of this Article . . .

Any other indirect, consequential or special losses, damages or expenses are also excluded.

The Seta Maru[77] is an example of the construction of the guarantee provision under the SAJ form:

Three ships were built by China Shipbuilding and were delivered to the buyer. After the expiration of the guarantee period, two of them appeared defective in the erection welding, as a result of which they suffered a casualty involving ingress of water through the shell plating. Following the discovery of these defects, the third vessel was inspected within the guarantee period and the same defects were discovered and corrected by the builder. With regard to the defects in the other two ships, the

77 *China Shipbuilding Corp v Nippon Yusen Kabukishi Kaisha and Galaxy Shipping PTE Ltd (The Seta Maru)* [2000] 1 Lloyd's Rep 367.

buyer commenced arbitration, claiming from the builder the costs of repairs and depreciation in value as damages. On a preliminary issue of whether or not the builder was liable, the arbitrators decided in favour of the buyer; the builder appealed to the court.

Thomas J held that the terms of Art IX.1 provided a guarantee for defects for a period of 12 months discovered after the buyer accepted delivery of the vessel. Acceptance of delivery under this article meant acceptance of the vessel by the buyer on delivery by the builder accompanied by the protocol of delivery and acceptance. Article IX.2 provided for the giving of notice of defects falling under the guarantee; Art IX.4 dealt with the remedying of defects under the guarantee.

Article IX.3 was a comprehensive provision forming part of what was a complete code for dealing with defects discovered after the delivery of the vessel. Article IX.3(b) and (c) excluded liability arising from express terms of the contract such as liability for defects or damage caused by enumerated events beyond the liability expressly assumed under the guarantee terms. Article IX.3(d) excluded liabilities arising otherwise than under the express terms of the contract.

Article IX. 3(a) (first part of the sentence) excluded liability under the guarantee for defects that were not discovered during the 12-month period; the second part of the first sentence excluded liability under the contract for any defects other than those specified in Art IX.1. The remainder of this article excluded liability for indirect, consequential or special losses. He remitted the case to the arbitrators.

By comparison, the way in which the NEWBUILDCON deals with the builder's guarantee and the exclusions from responsibility, cll 35 (above) and 37, sets out clearly what is included, and what is not, under the guarantee cover.

Clause 37(b) provides expressly that, except to the extent expressly provided in cl 35 (builder's guarantee), the builder shall have no liability in contract, tort (including negligence), breach of statutory duty or otherwise for any defect discoverable after the delivery of the vessel, or any loss, damage or expenses caused as a consequence of such defect (which shall include, but is not limited to, loss of time, loss of profit or earnings or demurrage directly or indirectly incurred by the buyer).

8.1.4 Risk minimisation

In the light of the risk that defects do frequently appear after the 12-month guarantee period, the buyer could perhaps protect his position by seeking to obtain a longer guarantee period, as is allowed in the NEWBUILDCON contract. If this cannot be achieved at the stage of negotiations, particularly if the builder is in a stronger bargaining position, the buyer ought to inspect the vessel during the guarantee period for any defects that might exist in the vessel, which could be remedied by the builder under the guarantee, as was done in this case with respect to the third ship.

Ordinary insurance cover may not always protect the buyer to indemnify him for his loss. It will depend on the type of loss and the construction of the insurance contract,[78] unless the buyer obtains special cover for building defects.

The builder also obtains insurance for guarantee risks, but he must ensure that the period of insurance adequately covers the 12-month period of the guarantee, which

78 See *The Caribbean Sea* [1980] 1 Lloyd's Rep 338.

sometimes may be overlooked if an attachment for cover of such risks is made to the main policy covering construction risks.[79]

8.1.5 Other exclusions under the builder's guarantee

Liability for third-party replacement or repairs is naturally excluded when the repairs have been done after delivery by any contractor, other than the builder or its subcontractors; or for defects that have been caused by omission or improper use or maintenance of the vessel on the part of the buyer, or by ordinary wear and tear (cl 37(c) NEWBUILDCON).

The guarantee contained in cl 35 of NEWBUILDCON and Art IX replaces and excludes any other liability guarantee, warranty, and/or condition and/or innominate term imposed or implied by the law, customary, statutory or otherwise, by reason of the construction and sale of the vessel by the builder.

8.2 BUILDER'S OBLIGATION TO INSURE

Article XII of SAJ and cl 38 of the NEWBUILDCON provide the details with regard to the builder's obligation to insure for the construction risks and the buyer's supplies. The builder has a duty under the contract to insure.[80]

In particular, cl 38(a) of the NEWBUILDCON provides:

> From the time of the first steel cutting or equivalent (or delivery of the buyer's supplies, whichever is the earlier) until the vessel is completed, delivered to and accepted by the buyer, the builder shall (in joint names (as assureds) of builder and buyer) effect and maintain at no cost to the buyer, the Builder's Risk insurance for the vessel and the Buyer's Supplies.

Unless otherwise agreed in the contract, the builder retains property and risk in the ship until delivery (cl 31). Even if property is agreed to pass to the buyer gradually during the stages of construction, the risk of total loss of the ship in the yard remains with the builder. Therefore, the builder has an insurable interest to insure the ship for all risks of damage or loss during construction, under a shipbulders' all risks policy on the vessel, either as owner or as bailee, as the case may be.

Clause 38(a)(i) provides that the insurer should be acceptable to the buyer, and cl 38(a)(ii) provides for the builder's risk insurance to be on terms no less wide than Institute Clauses for Builder's Risk terms (1 June 1988), including Institute War and Strikes Clauses. The risks covered should not be just for physical loss or damage but also for financial loss or damage to the insured vessel.

The buyer will be a co-assured and should be named as an additional assured in the policy. Clause 21(b)(ii) of the NEWBUILDCON provides that the buyer's supplies shall be at all times the property of the buyer, but shall be at the builder's risk from the time of their delivery to the shipyard until the time of their redelivery to the buyer, whether or not as part of the vessel.

79 *Heesens Yacht Builders v Cox Syndicate Management Ltd (The Red Sapphire)* [2006] Lloyd's Rep IR 103.

80 There are special policies for building risks, such as ICBRisks and MARCAR.

Care must be taken by the insurance brokers not to omit the additional assured from the policy, as has been demonstrated in ***The Jascon 5***[81] case, in which the broker failed to arrange insurance in the names of both the builder and the buyer.

The buyer can also insure separately for other risks in the event of rescission of the contract and consequential losses, which he will be unable to recover from the builder, and for risks that may not be covered by the builder's risks policy. Most importantly, the buyer should obtain cover for any latent defects in the ship that may be discovered after the guarantee period and that will be excluded from the obligation of the builder under his guarantee to correct them, as was shown earlier in *The Seta Maru*.

8.3 BUILDER'S OBLIGATION TO PROVIDE A REFUND GUARANTEE

This has been explained under para 7.3.2 above and 11.2 and 11.3 below.

9 EVENTS FOR TERMINATION BY THE BUYER

Specific events of default by the builder entitle the buyer to rescind the contract and seek remedies from the builder for breach of contract. Such events are set out in cl 39 of the NEWBUILDCON (see 9.1 below).

Article X of SAJ does not set out the events, but it provides that:

> In the event that the buyer shall exercise its right of rescission of this contract under and pursuant to any of the provisions of this contract specifically permitting the buyer to do so, then the buyer shall notify the builder in writing . . . and such rescission shall be effective as of the date notice thereof is received by the builder.

Then it sets out the consequences of the buyer's rescission, which is the refund by the builder. The buyer's rights and remedies are supported by statutory rights and rights at common law. He may reject the ship, or reject and demand remedial work and/or damages, or claim specific performance.

9.1 SPECIFIC CONTRACTUAL EVENTS FOR BUYER'S RIGHT TO TERMINATE

Clause 39 of the NEWBUILDCON, unlike other standard terms of shipbuilding contracts, offers an all-inclusive provision of the buyer's right to terminate. For the benefit of readers of this chapter, the clause is broken down into logical parts, as shown below.

The buyer shall have the right to terminate this contract forthwith upon giving notice in the event of:

81 *Talbot Underwriting Ltd v Nausch Hogan & Murray Inc (The Jascon 5)* [2006] 2 Lloyd's Rep 195.

1 The deemed insolvency of the guarantor who provides the refund guarantee on behalf of the builder; deemed insolvency is defined in cl 39(d), unless:
   (a) the builder provides a replacement refund guarantee acceptable to the buyer within 30 days of the buyer's notice requiring a replacement guarantee,
   (b) (during which period no further payments shall be made to the builder by the buyer), and provided:
   (c) the notice of termination is given before an acceptable replacement refund guarantee is received by the buyer.
2 The builder's failure to perform any work of construction for a period of at least a number of days running, stated in the contract, excluding permissible delays, provided:
   (a) the buyer gives the builder written notice of his intention to terminate (the number of days for the notice is specified in the contract), and
   (b) the builder fails to remedy its breach within that period, and
   (c) the notice of termination is given before the builder has remedied its breach.
3 The delivery of the vessel is delayed by:
   (a) more than 180 days by virtue of events that fall within permissible delays – *force majeure* events (per cl 34(a)(i);
   (b) more than 180 days by virtue of events that do not fall within permissible delays set out in cl 34(i) and (ii); or
   (c) the aggregate of the above delays to the delivery of the vessel is more than 270 days.
4 The buyer's rejection of the main engine for excessive fuel consumption, unless he elects, instead of termination as per cl 39(a)(v), to require the builder to rectify the deficiency or replace the main engine with one that conforms to the requirements of the contract (cl 9(ii)).
5 Reduction in speed, which would entitle the buyer to a reduction of the contract price greater than the maximum amount stated in the contract (cll 8(c) and 39(a)(iv)).
6 Deadweight or cubic capacity deficiencies would entitle the buyer to a reduction in the contract price greater than the amount stated in the contract (cll 10 (c), 11 (c) and 39(a)(vi)(vii)).
7 Other deficiencies as agreed by the parties and inserted in the blank cl 12 of the standard form (clause 39(a)(viii)).
8 The builder's breach of the guarantee provision under cl 14(b) is an event for termination by the buyer pursuant to cl 39(a)(ix).

9.2 THE OCCURRENCE OF A TERMINATING EVENT MAY NOT LEAD TO TERMINATION

Clause 39(iii) further provides that the builder may, at any time after the right of termination has occurred, give notice requesting that the buyer either agrees to a new delivery date, which shall be a reasonable estimate by the builder of the date when the vessel will be ready for delivery, or terminates the contract.

Then, the buyer has 15 days or the builder's request within which to notify the builder of its decision to terminate or to accept the new date. If he does not terminate,

then the new delivery date shall be deemed to be the delivery date, provided it does not occur later than 30 days prior to the expiry of the refund guarantee.

The limitation imposed upon the new delivery date (that is not to be later than 30 days prior to the expiry of the refund guarantee) is very important and novel, considering the problems that had arisen in many shipbuilding contracts, where the buyer found himself to be outside the refund guarantee period by agreeing the new delivery date, which was not in the end met. This provision, at least, alerts the buyer to check the terminal date of the refund guarantee.

9.3 THE REMEDY OF LIQUIDATED DAMAGES INSTEAD OF TERMINATION

The buyer is given the right to claim liquidated damages for defects in speed, fuel consumption, cargo capacity and deadweight deficiencies, or other deficiencies, and delay, by way of reduction in the purchase price. The remedy protects the buyer from the uncertainty of recovery in the event of termination but, if he exercises the right to terminate, he loses the right to claim liquidated damages.

9.4 OCCASIONS FOR REJECTION OF THE VESSEL BY THE BUYER

There are, broadly, four occasions in which the buyer may reject the vessel:

1 After the sea trials, pursuant to cl 27 of the NEWBUILDCON, when there are delivery defects and the buyer gives notice of rejection stating the delivery defects. The builder then shall take all necessary steps to rectify such non-conformity within the time agreed by the parties. Whether or not the buyer could still reject the vessel will depend on evidence about the conformity or not by the builder. He could still reject in the following occasions:
2 if the permissible delays and *force majeure* events under cl 34 are caused by the error, neglect, act or omission of the builder or its sub-contractors (cl 34(a)(iii);
3 if the builder fails to notify the buyer within the time specified in the contract of the occurrence of a permissible delay event for an extension of time to the delivery date (cl 34(b)), unless the buyer waives the builder's failure to notify within the time limit;
4 in the event of the occurrence of the specific contractual breaches committed by the builder, as stated under para 9.1 above.

9.5 OCCASIONS OF REPUDIATION OF CONTRACT

A breach by the builder does not necessarily mean that the breach amounts to repudiation of the contract by him. It will depend on the magnitude of the defect

and its consequences. In ***McDougall v Aeromarine***,[82] it was held that, if the defect was one that could be remedied within a time, which would still permit the builder to deliver within the period of delivery permitted by the contract, the buyer would not be entitled to treat the contract as repudiated. The buyer could recover damages for delay in the delivery. The standard contract forms provide for liquidated damages as a remedy for delay.

Under English law, repudiation of a shipbuilding contract may arise in the following situations:

(a) If the time to rectify the defects is longer than the permissible delay, as stated in the contract. Unless the parties agree otherwise, the breach may amount to a repudiatory breach entitling the buyer to terminate the contract. (That is the effect of cl 39(a)(iii) of the NEWBUILDCON.)
(b) Where there has been a serious breach of the contract by the builder. In such a situation, the buyer may accept the conduct of the seller/builder as repudiation and sue in damages.

10 *FORCE MAJEURE* AND PERMISSIBLE DELAYS

10.1 *FORCE MAJEURE*

Events beyond the builder's control frequently occur during the construction of the contract and become a cause of delay in delivery. The builder needs protection, and, although it is possible to manage such risks by insurance, a clause in the contract usually provides for a range of *force majeure* events excluding him from liability.

Article VIII of the SAJ form enumerates specific events, mainly natural disasters, or strikes and similar events that are beyond the builder's control, which cause the delay of construction or completion of the work.

Such events include act of God, fire, flood, hurricanes, storms or other weather conditions not included in normal planning, earthquakes, intervention of government authorities, war, blockade, strikes, lockouts, labour shortage, explosions, shortage of materials, defects in materials, machinery, equipment (which could reasonably be expected by the builder to be delivered), delays in transportation and delays in the builder's other commitments. There is a sweeping-up provision at the end of Art VIII, providing:

> . . . or due to other causes or accidents beyond the control of the builder, its sub-contractors or supplier of the nature whether or not indicated by the foregoing words, irrespective of whether or not these events could be foreseen at the day of signing this contract.

Upon the occurrence of any such events, the clause provides that the time for the delivery is extended for certain days, not exceeding the total accumulated time of all such delays, after the builder has given notice to the buyer of any *force majeure* event.

82 [1958] 2 Lloyd's Rep 345.

The burden of proof is upon the builder to show that such an event has occurred and it is within the clause.

Paragraph 4 of Art VIII of the SAJ form provides that the buyer may or may not elect to cancel the contract if the delay exceeds a certain period.[83]

10.1.1 *Force majeure* events causing frequent disputes

10.1.1.1 Labour strikes

Industrial action during the building of a ship is the most common incident of delay. However, as the builder may sometimes be able to control the occurrence of strikes and labour disturbances, this incident may become the cause of a dispute between the builder and the buyer, if the latter considers that the event does not come within the protection of the *force majeure* clause. For example, if the builder acted unreasonably in dealing with the workforce and, therefore, failed to prevent the strike or mitigate its consequences, it will not be regarded as being beyond his control.[84]

The builder may engineer the labour strike, causing a lock out, and, hence, claiming *force majeure* when he needs to buy time, such as to negotiate with his bank[85].

10.1.1.2 General strikes – knock on effect

Invariably, a *force majeure* event has a knock-on effect, so that delay of completion of one vessel caused by *force majeure* may affect completion of other vessels.

In ***Matsoukis v Priestman***,[86] as a result of a general coal strike in 1912, the works from which the defendants obtained their materials for other ships they were building got behind. The ship in turn to be built, before the plaintiff's ship, occupied the berth much longer than otherwise she would have done. The same berth was intended to be occupied by the plaintiff's ship. Consequently, the plaintiff's steamer was late in being laid down. When the steamer was delivered after the contract date, the plaintiff claimed damages.

The court held that the general dislocation of the business of the defendants and of those from whom they obtained materials, operating indirectly on the completion of the plaintiff's steamer by preventing the completion of the vessel prior in turn, constituted a case of *force majeure* within the meaning of the exceptions clause and, therefore, excused the defendants in respect of the delay so caused. It further held that, apart from delay due to bad weather, the delay due to breakdown of machinery was covered by the exception of *force majeure*.

10.1.1.3 Shortage of materials or equipment

This permissible delay is strictly construed; the protection of the builder is restricted to circumstances in which the builder at the time of ordering could reasonably expect their delivery. If the builder relied upon a certain supplier, expecting timely delivery,

83 *Harland & Wolff Ltd v Lakeport Navigation Co Panama SA* [1974] 1 Lloyd's Rep 301.
84 *Channel Island Ferries Ltd v Sealink Ltd* [1988] 1 Lloyd's Rep 323 (CA).
85 *Moundreas v Navimpex* [1985] 2 Lloyd's Law Rep 515.
86 [1915] 1 KB 681.

but the supplier failed to deliver on time, the question is whether the builder would be obliged to buy in from other sources, even if it would be more expensive to do so.

The House of Lords has held, in a non-shipping case,[87] that, provided a shortage of supply has been proved, the defendants were entitled to rely on the *force majeure* clause, notwithstanding the existence of an alternative source of supply. However, a mere increase in price would not be sufficient to establish a shortage in supply.

10.2 OTHER EXCUSABLE DELAYS UNDER THE SAJ FORM – MODIFICATIONS

Article V of SAJ provides for reasonable adjustment as to the date of delivery, when delay is caused by any modifications to the specification, whether these are compulsory, such as required by the classification society or the regulatory authorities, or not. The article includes a provision for notice and an express causal requirement.

In ***Adyard Abu Dhabi v SD Marine Services***,[88] the dispute between the parties was whether or not the buyer was entitled to rescind two shipbuilding contracts.

It was common ground that the vessels were not ready for the sea trials by the agreed dates. The contracts were on the SAJ form. The buyer purported to rescind. The yard argued that the progress of the construction was delayed by the various new design items imposed by the UK MCA, which amounted to variations to the contracts. It relied upon the 'prevention principle' as an excusable delay. The rationale of the principle is that it is unfair for a party to insist on performance of an obligation that he has prevented the other party from performing.[89]

Upon examination of the evidence, it was found that the MCA items were not variations. The court held – having analysed the authorities on the prevention principle – that the principle did not apply, and the yard was liable to the buyer in damages. The project was already in irretrievable critical delay.

Even if the yard had succeeded on the variation point, the prevention principle would not have applied, as the contract contained provisions for extension of time.

10.3 EXCUSABLE DELAYS UNDER THE NEWBUILDCON

Clause 34(a)(i) of the NEWBUILDCON (permissible delays/*force majeure*) includes the same events as the SAJ form, but it is modern in that it includes the risk of terrorism and clearly enumerates the clusters of events the occurrence of which shall have the

87 *Tennants (Lancashire) Ltd v CS Wilson and Co Ltd* [1917] AC 495.

88 [2011] EWHC 848 (Comm).

89 For application of the principle, see: *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] All ER (D) 79: In the field of construction law, one consequence of the prevention principle was that the employer could not hold the contractor to a specified completion date, if the employer had by act or omission prevented the contractor from completing by that date. Instead, time became at large and the obligation to complete by the specified date was replaced by an implied obligation to complete within a reasonable time. The same principle applied as between main contractor and subcontractor. It was in order to avoid the operation of the prevention principle that many construction contracts and subcontracts contained provisions for extensions of time for the protection of both parties.

effect of extending the delivery date, provided the builder gives written notice of such an event within 10 days from the time he becomes aware of it (34(b)). In addition, cl 34(a)(ii) includes other events, such as:

(a) delay in delivery due to defective buyer's supplies;
(b) delay due to modifications and changes in accordance with cl 24(b) or (e) of the contract;
(c) delays due to changes in rules and regulations in accordance with cl 26;
(d) actual or constructive total loss of the vessel;

(e) suspension of work pursuant to cl 39(c), referring to buyer's failure to pay any instalments.

Clause 34 of the NEWBUILDCON expressly provides that permissible delays shall extend the time of delivery, provided:

(a) such events were not caused by the fault of the builder or its subcontractors;[90]
(b) such events were not, or could not have reasonably been, foreseen by the builder at the date of the contract.
(c) the builder shall have complied with the required notice under cl 34(b); and
(d) the builder shall have made all reasonable efforts to avoid and minimise the effects such events have on the delivery of the vessel.

10.4 REMEDIES FOR DELAY

10.4.1 Liquidated damages

The usual remedy is agreed in the contract, that being liquidated damages. The fact that a precise pre-estimate is almost impossible will not prevent the sum being liquidated damages.[91] If the delay has been caused partly by the buyer, he will not be entitled to recover damages. The principle that no liquidated damages for delay can be claimed, if completion was in part delayed by the conduct of the buyer, would be applicable.[92]

10.4.2 Could specific performance be ordered as a remedy?

Specific performance is a discretionary remedy under English law when a party to a contract does not wish to bring the contract to an end by exercising his option to rescind the contract for breach by the other party. He may seek, therefore, to obtain a remedy of specific performance ordered by the court or tribunal, particularly when

90 Even though the SAJ form does not expressly provide the same, the principle under English common law has been that 'no man may take advantage of his own wrong'.

91 *Clydebank Engineering v Don Jose Ramos Yzquierdo Castaneda* [1905] AC 6 (HL).

92 *The Cape Hatteress* [1982] 1 Lloyd's Rep 518, p 526.

an award in damages would not be an adequate remedy to compensate the victim of the breach.[93]

Such remedy is available under s 52 of the SOGA 1979 and applies to sale of ascertained goods. The ship under construction, although not yet completed, is ascertainable insofar as the agreement provides for the end product. It concerns the sale of a future ship, and the order of specific performance would be relevant only to the extent that it would be possible for it to be completed for delivery to take place. In this context, therefore, an order for specific performance obtained by the buyer may be useless, if the builder has been unable to complete for financial reasons, and his company is in liquidation. Even if he is not in liquidation, there may be problems of enforcing such a court order, if the building is taking place in a foreign yard.

Usually, an order for specific performance would not be granted where the remedy required detailed supervision by the courts.

In ***Gyllenhammar & Partners Int Ltd v Sour Brodogradevna Split***,[94] the defendants (builders) entered into a shipbuilding contract with the plaintiffs (buyers) that was subject, inter alia, to the defendants declaring by telex to the buyer that all necessary permissions and approvals had been obtained. The approvals were to be obtained within 30 days of signing the contract, without which the contract would be null and void unless otherwise agreed by both parties. On failing to obtain the necessary approvals, the defendants notified the plaintiffs asserting that the contract had become null and void. The plaintiffs sued them arguing that the defendants were debarred from relying on this clause because, in their view, the necessary approvals were not obtained by reason of (a) the defendants' non-compliance with this clause, and (b) the defendants' failure to use their best endeavours to obtain the necessary permission. They claimed specific performance of the contract, or damages in lieu.

Holding that the defendants were entitled to rely on the clause, the court went on to examine the plaintiff's request for specific performance (merely for academic purposes). Hirst J said:

> Here, I need say no more than that the voluminous specification shows that this is a very complex contract requiring extensive co-operation between the parties on a number of matters, in particular modifications, optional variations, and, perhaps most important of all, matters of detail (some by no means unimportant) left undefined in the specification. In my judgment, these factors, coupled with the consideration that the work would take place in a foreign yard outside the court's jurisdiction, would tell strongly against an order for specific performance being in principle appropriate in the present case.[95]

10.4.3 Termination

It was shown earlier, under 9.3, that the buyer has the contractual right to terminate, or rescind, the contract for non-permissible delays. If the delay is such as to go to the root of the contract, the buyer would be entitled under common law to accept the builder's conduct as repudiation of contract.

93 *The Ore Chief* [1983] 2 Lloyd's Rep 509.
94 [1989] 2 Lloyd's Rep 403.
95 [1989] 2 Lloyd's Rep 403, p 422.

11 EFFECT OF BUYER'S TERMINATION FOR BUILDER'S DEFAULT

11.1 DISCHARGE FROM PRIMARY OBLIGATIONS

The effect of the buyer's rescission is to terminate the parties' further primary obligations under the contract. If the buyer has provided supplies, they remain the property of the buyer and are therefore returnable, unless the contract stipulates otherwise.

In the event that title in the vessel has passed to the buyer, if the contract provided that it would pass in stages during the building after payment of the first instalment, the buyer has two options: (a) either to revest the title in the builder upon reimbursement of the prepaid instalments; or (b) to remove the ship from the yard and terminate the builder's contractual entitlement to continue the completion of the ship. If the builder is in liquidation, however, this issue will have to be decided in accordance with the *lex situs*.

11.2 THE REFUND OF PREPAID INSTALMENTS

The buyer is entitled, under the refund guarantee or performance bond, to the return of all prepaid instalments with interest, plus the cost of his supplies, if they cannot be returned. Such refund must be paid promptly. In this connection, it is important to distinguish between guarantees per se and performance bonds, an issue that came before the English court recently.

11.2.1 Guarantee per se versus performance bond

The refund guarantee is construed as a first demand guarantee, or a performance bond, and the obligation is expressed in a leading CA decision, ***Gold Coast Ltd v Caja de Ahorros del Mediterraneo & others***, to be an irrevocable and unconditional undertaking.[96] The buyer had declared the builder in default for delay in delivery under the terms of the contract and claimed under the refund guarantee. The issue before the court concerned whether the guarantees were 'on demand' guarantees, which were independent of the shipbuilding contract, or true guarantees, dependent upon the liability of the principal debtor. It was held that refund guarantees relating to a shipbuilding contract were on demand guarantees.

The CA had further opportunity to grapple with this issue in ***Marubeni Hong Kong and South China Ltd v Mongolia***,[97] in which it was held that a 'demand bond' (or similar instrument) was a specialised form of irrevocable instrument developed by the banking world for its commercial customers. If the security of a demand bond was needed, a party seeking its protection should have insisted on appropriate language to describe it in the instrument. Upon proper construction, the document contained an unconditional pledge and required a simple demand, but

96 [2002] 1 Lloyd's Rep 617.
97 [2005] 1 WLR 2497.

that wording was qualified by words which indicated that the obligation to pay only arose if the amounts payable under the agreement were not paid when they became due. That wording was appropriate to a secondary obligation only, conditional on default by the buyer. In a transaction outside the banking context, there was no reason to give those words other than their normal meaning. The letter in this case was not a demand bond or its equivalent.[98]

In ***Meritz Fire and Marine Insurance v Jan De Nul NV***,[99] the CA held that, if the refund guarantee is on demand, payment by the guarantor is to be made against documents (whether certificates, or awards, or other documents). If the documents are in order, the guarantor must pay.

In this case, the builder had transferred his rights and obligations under the shipbuilding contract to a third party and was then dissolved. Upon demand by the buyer under the guarantee for payment, the guarantor argued that he was not liable to pay, as the builder had transferred the contract to a third party without the guarantor's consent and, as the original builder was not the party liable, the guarantor was not either. Longmore LJ held that the guarantee was intended to operate on the basis that no refund had taken place and not on the basis that the builder had failed to make the refunds when it was obliged to do so.

A clear distinction between guarantees (properly so called) and demand bonds or performance bonds was made by Clarke J, in ***Wuhan Guoyu Logistics Group CO Ltd v Emporiki Bank of Greece***,[100] albeit that, on the facts of the case, he was overruled by the CA. Nevertheless, the distinction made by Clarke J is important to refer to; he said:

> The commercial purpose of a guarantee is to ensure that the creditor is paid the debt owed to him by the debtor who is being guaranteed. The essential characteristic of a guarantee is that the liability of the guarantor is a secondary one. It is the debtor who is primarily liable to pay. If the debtor had no liability, the guarantor had none either and he might avail himself of all the defences available to the debtor in respect of the payment sought. The payment guarantees on the other hand are instruments – often called demand bonds or performance bonds – by which a bank or similar institution promised to pay an instalment due against a written demand, or written demand accompanied by certain documents. The presentation of such documents being the only condition of payment. Upon presentation, the bank is obliged to pay unless there is fraud.

The claimants (sellers in this case) were a Chinese shipyard (W). The dispute arose in relation to shipping contracts with prospective buyers. The buyers' bank, Emporiki (E) financed the buyer for the purchase of the vessel and issued a payment guarantee in respect of the second instalment. One of the contracts provided that payment of the second instalment was conditional upon receipt by the buyer of a refund guarantee issued by the sellers' bank and a certificate of cutting of the first plate of the vessel would be required. The second instalment was not paid. There was a dispute as to whether it was due. The buyers contended that no steel had been cut, the condition of approval by the buyer of such cutting had not been met, and the seller had not

98 See another example: *Bankhaus Wolbern & Co, Vision 93 v China Construction Bank Corp., Zhejiang Branch* [2012] EWHC 3285 (Comm) on the wording of the relevant clause of the guarantee, albeit that the case concerned jurisdictional issues.

99 [2011] 2 Lloyd's Law Rep 379.

100 [2012] EWHC 1715 (Comm); [2012] All ER (D) 142.

provided a refund guarantee in the required form. The dispute was referred to arbitration. Both the buyers and W claimed that they had cancelled or rescinded the contract for the other party's repudiatory breach.

In the meantime, W demanded payment under the payment guarantee against E and sought summary judgment on the basis that the payment guarantee was in the nature of a demand or performance bond. E's case, which the judge accepted, was that the instrument was a guarantee properly so called, liability under which depended on whether the second instalment was due, which remained to be decided.

On appeal, the CA, unlike the judge, held it was a demand guarantee; referring to Paget's Law of Banking it was held that every bond had to be construed in accordance with its terms but there was a presumption that where an instrument (a) related to an underlying transaction between the parties in different jurisdictions, (b) was issued by a bank, (c) contained an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and (d) did not contain clauses excluding or limiting the defences available to a guarantor, it would almost always be construed as a demand guarantee or on-demand bond.

These decisions clearly show that problems of interpretation of such documents could be solved if care was taken at the time of drafting of the guarantee or demand bond, which should be looked at, not in isolation, but parallel to the obligations of the debtor under the main contract.

11.2.2 Issues of construction

The issue of the effect of the shipbuilder's insolvency upon the buyer's rights against the guarantor was considered, for the first time, by the Supreme Court in ***Rainy Sky SA v Kookmin Bank***.[101] The decision is significant because it confirms the principle of a purposive interpretation of contracts, particularly when there is a poorly drafted contract, and emphasises the importance of reaching a commercially sensible outcome by considering all the surrounding circumstances and what a reasonable person with knowledge of such circumstances would understand the contract to mean.

11.2.2.1 Brief facts

The case was concerned with the construction of the words used in the refund guarantees issued by the financier of the Korean shipyard pursuant to six shipbuilding contracts. Under the contracts, the builder agreed, in 2007, to build and sell one vessel to each of the six buyers. The price of each vessel was US$33,300,000, payable in five equal instalments of US$6,660,000, which were due at specified points of time, with the final instalment payable on delivery.

As is the usual practice in shipbuilding contracts, it was a condition precedent to payment of the first instalment by the buyers that the builder would deliver refund guarantees relating to the first and subsequent instalments in a form acceptable to the buyers' financiers. The builder's bank did issue six materially identical advance payment bonds ('the bonds') relating to the six shipbuilding contracts.

The buyers paid the first two instalments in relation to each of the six ships, but the builder experienced financial difficulties and, in January 2009, entered into a debt

101 [2011] UKSC 50; [2012] 1 Lloyd's Rep 34.

workout procedure under Korean corporate restructuring law. Consequently, the buyers demanded immediate repayment of the instalments as provided by the contract, and the builder refused (this matter was referred to arbitration).

The buyers then demanded repayment under the bonds from the bank guarantor, who refused to pay alleging that the bonds, on their true construction, did not cover refund for the occasion of the builder's insolvency.

The bank's argument was rejected by the judge. The majority of the CA[102] decided in favour of the bank. The Supreme Court overruled the majority decision of the CA.

11.2.2.2 The bonds' relevant clauses

The bonds referred to the shipbuilding contracts pursuant to which they were issued. The following provisions are relevant to the issues of the case:

Paragraph 2

'Pursuant to the terms of the contract, you are entitled, upon your rejection of the vessel in accordance with the terms of the contract, your termination, cancellation or rescission of the contract or upon a total loss of the vessel, to repayment of the pre-delivery instalments of the contract price paid by you prior to such termination or a total loss of the vessel (as the case may be) and the value of the Buyer's Supplies delivered to the Shipyard (if any) together with interest thereon . . .'

Paragraph 3

'In consideration of your agreement to make the pre-delivery instalments under the contract . . . we hereby, as primary obligor, irrevocably and unconditionally undertake to pay to you, your successors and assigns, on your first written demand, *all such sums due to you under the Contract* (or such sums which would have been due to you but for any irregularity, illegality, invalidity or unenforceability in whole or in part of the Contract) PROVIDED THAT the total amount recoverable by you under this Bond shall not exceed . . . plus interest thereon at the rate of . . . (7 per cent) pa . . .'

Paragraph 4

'Payment by us under this Bond shall be made without any deductions or withholding, and promptly on receipt by us of a written demand . . . stating that the builder has failed to fulfil the terms and conditions of the Contract and as a result of such failure, the amount claimed is due to you . . .'

Paragraph 5

'Our liability under this Bond shall not be affected by . . . (v) any insolvency, re-organisation or dissolution of the builder . . .'

The bonds were assignable and governed by English law; any disputes arising out of them were to be determined by the English commercial court.

11.2.2.3 The relevant provisions of the shipbuilding contracts

With regard to the construction of the bonds, the shipbuilding contract was the immediate context. The following articles are relevant:

102 [2010] EWCA Civ 582; [2011] 1 Lloyd's Rep 233.

Article X(5):

The payments made by the buyer to the builder prior to delivery of the vessel shall constitute advances to the builder. If the vessel is rejected by the buyer in accordance with the terms of this contract, or if the buyer terminates, cancels or rescinds this contract pursuant to any of the provisions of this contract specifically permitting the buyer to do so, the builder shall forthwith refund to the buyer the full amount of total sums paid by the buyer to the builder on advance of delivery together with interest thereon . . .

Article X(8), Refund guarantee:

The builder shall as a condition precedent to payment by the buyer of the first instalment deliver to the buyer an assignable letter of guarantee issued by a first class Korean Bank . . . builder shall also deliver to the buyer an assignable letter of guarantee issued by a first class Korean Bank . . . for the refund of the respective instalments. . . . The refund guarantees . . . shall be indicated pre-delivery instalments plus interest . . . under or pursuant to paragraph 5 above . . .

Article XII(3), Builder's default:

If the builder shall apply for or consent to the appointment of a receiver, trustee or liquidator, shall be adjudicated insolvent, shall apply to the courts for protection from its creditors, file petition in bankruptcy or take advantage of any insolvency law . . . the buyer may by notice in writing to the builder require the builder to refund immediately to the buyer the full amount of all sums paid by the buyer to the builder on account of the vessel and interest thereon . . .

11.2.2.4 The issue

There was ambiguity in the terms of the bonds. The insolvency event, as a trigger for repayment of the instalments, was only mentioned in Art XII.3 of the shipbuilding contract and not expressly in the bonds. However, the bonds referred to the terms of the shipbuilding contract. The critical question was whether the bonds guaranteed repayment in all the circumstances specified in the shipbuilding contracts, or were limited to their own words, namely repayments due upon rejection of the vessel or total loss, or termination, cancellation or rescission of the contract. The resolution of the issue depended on the true construction of para 3 of the bonds (see above) and, in particular, what was meant by the words '*all such sums due to you under the contract*'.

11.2.2.5 The parties' arguments

The buyers argued that the above words ('all such sums') in para 3 referred back to the '*pre-delivery instalments*' in the first line of para 3 of the bonds; para 3 was broader than para 2 and its purpose was to guarantee the refund of the pre-delivery instalments in any event (the judge, at first instance, and Tuckey LJ (minority at the CA) agreed).

The bank argued that '*such sums*' referred back to the sums in para 2 of the bonds, which were limited by the reference to repayment of pre-delivery instalments in the happening of certain events. Such events did not include the event of insolvency of the builder. The bank further argued that, on the buyers' construction, para 2 would be stripped of any purpose (Patten and Thorpe LJJ (majority at the CA) agreed).

11.2.2.6 The court at first instance

Simon J held that the words 'such sums' referred to the pre-delivery instalments, regardless of the circumstances in which they came to be repayable.

The judge described the bank's construction of the bonds as having the surprising and uncommercial result that the claimants would not be able to call on the bonds on the happening of the event, namely the insolvency of the builder, which would be the most likely event to require the first-class security.

11.2.2.7 The ratio of the majority of the CA

It was common ground that the word 'such' referred to the pre-delivery instalments. The CA adopted a restricted, literal approach and held that, as the word 'insolvency' was not in the bonds, the parties to that contract must have had reasons for its omission.

Although Patten LJ, representing the majority, referred to the leading authorities on interpretation of contracts, he preferred the bank's construction and stated (at para 42):

> Unless the most natural meaning of the words used produces a result which is so extreme as to suggest that it was unintended, the Court has no alternative but to give effect to its terms. To do otherwise would be to risk imposing obligations on one or other party which they were never willing to assume and in circumstances which amount to no more than guesswork on the part of the Court.

11.2.2.8 The dissenting view

Tuckey LJ, agreed with the judge, Simon J, and held that: The court must first look at the words which the parties have used in the bond itself. The shipbuilding contract is of course the context and cause for the bond but it is, nevertheless, a separate contract between different parties. If the language of the bond leads clearly to a conclusion that one or the other of the constructions contended for is the correct one, the court must give effect to it, however surprising or unreasonable the result might be. But if there are two possible constructions, the court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business common sense.

11.2.2.9 The Supreme Court

Lord Clarke delivered the main judgment. The court unanimously agreed with Tuckey LJ and the judge. It gave judgment in favour of the buyers, who were entitled to payment of the pre-delivery instalments.

Lord Clarke recognised that on the buyers' construction it was not easy to see why para 2 of the bonds was included in them at all, and that the bank's construction was arguable. However, the S.C. Justices held unanimously that, as the language of para 3 of the bonds was capable of two meanings, it was appropriate for the court to have regard to considerations of commercial common sense in resolving the question what a reasonable person, knowing the same facts and circumstances, would have understood the parties to have meant. The court would, if necessary, go so far as to say that the omission of the obligation to make such repayments from the bonds in

case of the insolvency of the builder would flout common sense, but it was not necessary to go so far.

Of the two arguable constructions of para 3 of the bonds, the S.C. Justices agreed, the buyers' construction was to be preferred, because it was consistent with the natural and ordinary purpose of the bonds, whereas the bank's construction was not. The existence of para 2 did not affect this analysis because it did not identify the scope of the bank's obligation under para 3. Furthermore, no significant importance should be given to the fact that the bonds did not specifically refer to Art XII.3 of the shipbuilding contracts (which contained the word insolvency), because other articles of the contracts were not specifically referred to in the bonds. The bonds were expressly subject to the terms of the shipbuilding contracts pursuant to which they had been issued.

11.2.2.10 Conclusion

The principles of construction, as settled by quite a number of previous leading cases to which the court referred, are fairly clear. Difficulties may arise in their application. As derived from the leading authorities[103] on interpretation of contracts, referred to in the judgment of Lord Clarke, the principles to be applied when the courts deal with poor drafting of contracts can be summarised as follows:

(a) Not too literal a construction – ask a reasonable commercial man
Construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive.[104] Words ought to be interpreted in a way in which a reasonable commercial person would construe them, having knowledge of the factual matrix. Such a person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.

(b) Look at the commercial purpose of the contract
Commercial or business common sense plays a significant role in the construction of ambiguous contractual terms in order for the court to determine what the parties must have meant.

(c) Balance the language used with a probable businesslike intention of the parties
Poor drafting provides no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language that they have used, interpreted in the light of the relevant factual situation in which the contract was made. The poorer the quality of drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention.

(d) Ascertain whether there are competing interpretations of ambiguous terms
If a clause was capable of two meanings, it was quite possible that neither meaning would flout common sense. In such circumstances, it was appropriate to adopt the more, rather than the less, commercial construction. When construing a document, a court should have an eye to the consequences of a particular construction.

103 Such as *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1988] 1 WLR 896; *Chartbrook ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

104 Per Sir Thomas Bingham MR, in *Arbuthnott v Fagan* [1995] CLC 1396, 1400.

11.3 RISK MANAGEMENT ISSUES

Caution in drafting and in negotiations must be exercised by the buyer to prevent instances, at least, of the following risks.

11.3.1 Expiration of the refund guarantee

There have been cases in practice where an extension of time has been obtained for the delivery date, but the date of the expiration of the refund guarantee is not brought into line with the new date in the shipbuilding contract. If the builder is in breach of the new delivery date, the refund guarantee will have expired when the buyer exercises his right to rescind the contract; by that time, the guarantee will have become spent.[105] Thus, any new date of delivery of the vessel agreed should be followed with an appropriate extension of the expiration of the guarantee date.

The NEWBUILDCON takes care of this issue. Clause 14 (c)(iii) provides that the guarantee shall remain in force until: either (1) a date of at least 300 days after the contractual date of delivery stated in the contract, or 30 days after the final resolution of any dispute under cl 42, whichever is the later; or (2) delivery of the vessel to, and acceptance of the vessel by, the buyer, whichever is the sooner.

Some guarantees contain a special clause providing for an automatic extension of the guarantee upon commencement of arbitration prior to the delivery of the ship, in which case the guarantee period is extended by certain days after the final award is issued.

Such a clause was interpreted in ***Wuhan Ocean Economic v Nantong Huigang Shipbuilding and Schiffahrts-Gesellschaft Hansa Murcia MBH & Co KG***.[106] Cooke J held that, where parties to a contract imposed a unilateral obligation without specifying the time in which it was to be done, there had to be some implication regarding time. In the instant case, where the seller (S) of a ship had undertaken to obtain an extension of a refund guarantee provided to the buyer (B), the arbitrators were correct to imply a term that the extension should be obtained within a reasonable time. He further held it would be uncommercial to make the buyer wait until the initial guarantee had expired before knowing whether an extension had been obtained. But as the guarantee would have automatically been extended upon the commencement of arbitration proceedings just before, or at the expiry date of the initial guarantee, as B did in this case, it could not be said that S's failure to extend the guarantee within a reasonable time had truly imperilled B's security, and the arbitrators were wrong to find that S's conduct amounted to repudiation of the contract.

11.3.2 The risk of *Rainy Sky*

The drafting of the refund guarantee must be considered in tandem with the relevant terms of the shipbuilding contract to prevent the problems of ambiguity that arose in *Rainy Sky* (above).

105 E.g. *Caja de Ahorros del Mediterraneo v Gold Coast* [2002] 1 Lloyd's Rep 617.
106 [2012] EWHC 3104 (Comm).

11.3.3 The risk of contractual limits of the right to claim damages

Under the SAJ contract, Art X (buyer's rescission) and Art XI (builder's rescission), there is an imbalance of contractual remedies between the buyer and the builder. Upon rescission by the buyer for builder's default, the buyer is only entitled to a refund of all instalments paid in advance plus interest. There is an express exclusion of any claim in damages for losses incurred. On the other hand, if the buyer defaults, the builder has a contractual right to claim damages for loss of profit, or damages that he would have had at common law.

The issue whether or not a buyer can claim damages in case of a repudiatory breach by the builder came before the CA in ***Stocznia Gdynia SA v Gearbulk Holdings Ltd***.[107]

Gearbulk put an order to a yard to build three bulk carriers on identical contractual terms; the buyer had the right to terminate the contract for delay in delivery by the yard beyond a certain date. The usual contractual remedies for termination by reason of delay were provided, namely the refund of prepaid instalments plus interest, secured by a refund guarantee. The contract also contained the usual exclusion clauses found in the SAJ form. It provided that the yard should not be liable for any other compensation for damages sustained by reason of, inter alia, delay. As the yard got into financial difficulties, it failed to deliver the vessel by the due date. Gearbulk terminated the contracts and claimed against the guarantor the refund of the instalments. It also claimed damages against the yard for repudiatory breach of contract. The yard contended that the termination provisions constituted a code that excluded all other rights under the general common law, or that the exclusion provision excluded any claim for damages for repudiatory breach, or that the buyer had terminated the contract solely in reliance on the contractual provisions and not on general law of accepted repudiation.

The arbitrators found in favour of the buyer, the judge held in favour of the yard, and the CA in favour of the buyer.

It was held that the contractual termination provisions did not displace the buyer's rights to treat the contract as repudiated. There came a time at which the delay was so serious that it should be treated as going to the root of the contract, at which point the buyer should have the right to treat the contract as repudiated with the usual consequences. If a party intended to abandon valuable rights arising by the operation of law, the terms of the contract had to make it sufficiently clear that that was intended.

On the argument by the yard that, as the buyer elected the contractual termination, he was not allowed to rely on common law remedies for repudiation, the court held (in summary):

> The exercise by Gearbulk of the right to treat the contract as terminated under the contract was intended to discharge the contract with the same consequences as if it had been discharged by repudiation in accordance with the general law. The principle of election did not apply, because there was no inconsistency in Gearbulk's claim to recover instalments of the price under the terms of the contract and its claim to recover damages for loss of bargain at common law. The contractual entitlement to recover instalments of the price was intended to be an additional remedy to those that would ordinarily be available to Gearbulk on termination of contract.

107 [2009] 1 Lloyd's Rep 461.

The NEWBUILDCON form offers remedies that are more balanced. Clause 37(e) expressly deals with mutual exclusions and the parties' liability after termination. In particular, it states that:

> In the event of termination in accordance with the provisions of clause 39, neither party shall have any liability to the other whatsoever or howsoever arising, except as expressly provided in that clause. In the event, however, that a party fails to perform the contract, or unequivocally indicates its intention not to perform it, in a way which thereby permits the other party to treat the contract as at an end other than under the terms of the contract, any such claim that the other party may have shall not be limited or excluded by the terms of this contract.

Clause 39(e), which deals with the effect of the buyer's termination, although it expressly provides only for the refund by the builder of all payments made by the buyer under the contract plus interest and the return of the buyer's supplies by the builder, or payment of the equivalent costs for the supplies, it does not (unlike the other standard terms contracts) exclude any other remedy.

Some contracts contain express provisions for recovery of other expenses incurred by reason of the buyer's cancellation for breach by the builder.[108]

11.4 COMPLETION OF THE SHIP BY THE BUYER

In some contracts, it may be provided that the buyer has the right to complete the building work at his own risk and expense. Such a clause usually provides that the buyer has the option, by giving notice to the builder, to take possession of the vessel in its unfinished state and complete the vessel in accordance with the contract and the specification, whether at the builder's yard or elsewhere, at the owner's option.

If such option is exercised, the instalments that have accrued under the contract remain due, but are subject to the right of the owner to set off liquidated damages already accrued; they are also subject to the builder being liable to pay, on demand, the excess of the costs of completion over the amounts of the outstanding instalments.

So it was held by the CA in ***BMBF (No 12) Ltd v Harland & Wolff Shipbuilding & Heavy Industries Ltd***.[109] The court further held that the entitlement of the owner under such a clause is linked to a positive obligation to complete the ship in accordance with the contract. Thus, the owner was liable to pay the instalments due, if the cost of completing the ship was less than the outstanding instalments, including the delivery instalment.

12 BUYER'S DEFAULT AND BUILDER'S RIGHTS

The ship is the builder's ultimate security. In the event that English law applies to the contract, if the builder is unpaid his rights are protected by statute, ss 38–43 of the SOGA 1979, as well as by contract, as is shown below.

108 *Parbulk AS v Kristen Marine SA*, [2011] 1 Lloyd's Law Rep 220, on the issue of recovery of costs and expenses, and whether or not the costs incurred by the buyer should be reasonably foreseeable and reasonable.

109 [2001] 2 Lloyd's Rep 227.

He can exercise his statutory lien, provided by s 41, before he gives up possession. Delivery of the ship before being fully paid and without reserving the right of disposal will cause the termination of the lien (s 43). Failure by the buyer to pay an instalment will give rise to a claim in debt (s 49(2)).[110]

12.1 WHEN IS THERE BUYER'S DEFAULT?

Default by the buyer can occur in three occasions under Art XI of SAJ: (a) if the buyer fails to pay the first, second and third instalments within 3 days after such instalment becomes due and payable under Art II of the contract; (b) if the buyer fails to pay the fourth instalment concurrently with the delivery of the vessel by the builder, as provided in Art II of the contract; or (c) if the buyer fails to take delivery of the vessel, when the vessel is duly tendered for delivery by the builder under Art VII of the contract.

NEWBUILDCON provides, by cl 39(b), which is titled 'Builder's termination', a more comprehensive provision of the following events of default by the buyer; the clause gives a more generous time limit for payment than the SAJ form, after the expiration of which the builder can exercise his rights.

There will be a default by the buyer in the event that:

(i) the guarantor providing the instalment guarantee or performance guarantee on behalf of the buyer is deemed insolvent pursuant to sub-cl 39(d), unless the buyer can provide a replacement performance guarantee within 30 days and provided the notice of termination is given before an acceptable buyer's instalment or performance guarantee is received by the builder; or
(ii) the buyer fails to pay any sums due under the contract for a period of 21 banking days, provided that the builder thereafter gives the buyer at least 5 banking days notice of its intention to terminate under this clause, and within that period the buyer fails to remedy the breach and provided the notice of termination is given before the buyer pays the outstanding sums due, or
(iii) the buyer fails to take delivery tendered in accordance with this contract;
(iv) the buyer is in breach of cl 14 guarantee.

12.2 EFFECT OF BUYER'S DEFAULT

Under the contract, default in payment by the buyer will not excuse the builder from his obligation to continue construction, but it will postpone delivery unless the default by the buyer constitutes repudiation of the contract (for example, when the buyer evinces an intention not to fulfil his obligations under the contract), whereupon the builder has an option whether or not to accept the same as terminating the parties'

110 *Workman Clarke & Co Ltd v Lloyd Brazileno* [1908] 1 KB 968 (CA).

primary obligations.[111] It has now been settled that acceptance of repudiation can be made by conduct (The *Santa Clara*[112]).

Under the SAJ contract, the effect of default is provided by Art XI:

(a) If any default by the buyer occurs as provided herein before, the delivery date shall be postponed automatically for a period of continuance of such default by the buyer.
(b) If any default by the buyer continues for a period of 15 days, the builder may, at its option, rescind the contract by giving notice of such effect to the buyer by cable in writing.

The effect of default under NEWBUILDCON cl 39(c)(b) is:

(a) suspension of work if the buyer fails to pay any instalment due for a period of 15 days until payment of such outstanding sums;
(b) termination of the contract by the builder if the buyer fails to pay any sums due for a period of 21 days, provided the builder gives the buyer at least 5 days notice of its intention to terminate.

It is obvious that the SAJ contract contains stricter time limits than the NEWBUILDCON.

A clause of the contract, as seen above, can make payment of an instalment within 21 days a condition of the contract or a breach consensually regarded as a repudiatory breach.

In ***Stoczia Gdanska v Latvian Shipping***,[113] the CA held that non-payment of the keel instalment, leading to a notice of rescission under the contract, was a breach of a condition of the contract, thus amounting to an actual repudiatory breach entitling the builder to claim damages.

12.3 BUILDER'S RIGHTS UNDER THE PERFORMANCE GUARANTEE FOR UNPAID INSTALMENTS

The contract contains a cancellation clause when there is default by the buyer. This is normally linked to a contractual guarantee given to the builder, either by the buyer or by a third party, to recoup unpaid instalments from the guarantor,[114] if the cancellation clause becomes operative.

111 *Fercometal SARL v Mediterranean Shipping Co SA (The Simona)* [1989] 1 AC 788 (HL); concerning a charterparty cancellation clause and non-readiness of the ship.

112 *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 (HL): where a buyer rejected cargo before loading commenced, and neither party took further steps to perform the contract; non-performance of further obligations by the aggrieved party was capable of signifying to the repudiating party an election by the aggrieved party to treat the contract as at an end. See, also, relevant decisions relating to the right of election of a buyer to reject goods, *Clegg v Andersson Nordic Marine* [2003] 2 Lloyd's Rep 32; *J H Ritchie Ltd v Lloyd Ltd* [2007] 1 Lloyd's Rep 544 (HL); see, also, the author's article: 'The right of election in contract law', JBL, June 2007 at 442–470.

113 [2002] 2 Lloyd's Rep 436, p 450.

114 See, on construction of guarantee, *Gold Coast Ltd v Caja* [2002] 1 Lloyd's Rep 617.

The guarantor guarantees irrevocably and unconditionally due and faithful performance by the buyer of all its liabilities and responsibilities under the contract and any subsequent amendment, change or modification made, including, but not limited to, due and prompt payment of the contract price by the buyer (see Art XXI of the SAJ form and cl 14 of the NEWBUILDCON).

The issue as to the builder's accrued rights of payment that arose prior to cancellation of the contract came before the House of Lords in the following case, which concerned the liability of the guarantor.

Hyundai Heavy Industries Co v Papadopoulos[115]

The shipbuilding contract provided: if an instalment remained unpaid for more than three days after the due date and, after notification by the builders, the default continued for 7 days, the builders would have the right to rescind in addition to any other rights, powers and remedies that the builders might have under the contract, or in law, or equity. There was a guarantee provided in respect of all sums due under the contract in default of payment by the buyers. The contract did not state what was to happen with regard to rights that had accrued prior to cancellation. When the buyers defaulted in payment, the builders rescinded the contract and claimed under the guarantee. The guarantors contended that, by the builders' exercise of the right to rescind before the writ was issued against them, liability to pay instalments that had become due ceased, and the liability was replaced by a claim, not in debt, but in damages. The cancellation deprived the builders of their right to payment of the unpaid instalment and, therefore, they could not claim it either from the buyers or from the guarantors.

The House of Lords (and the courts below) held unanimously that it was difficult to believe that commercial men could have intended that the guarantors were to be released from their liability for payments already due and in default, just because the builders had used their remedy of cancelling the shipbuilding contract for the future. The default of the buyers was the very event that gave rise to the liability of the guarantors under the letter of guarantee. The guarantors' promise that they would forthwith make the payment in default of the buyers showed that the obligation arose immediately upon the default, and was not merely an obligation to pay any deficiency brought about in the final accounting. The buyers could not be released from their liability for payments already due, just because the builders exercised their rights of cancellation under the contract. It was also held that the cancellation by the builders did not release the buyers of their liability under the second instalment. The builders could rely on their remedies at common law.

Viscount Dilhorne, who stressed that the shipbuilding contract is not just a contract for sale, said – distinguishing cases of sale of land or goods, or in which there is total failure of consideration – that the law has been that cancellation or rescission of a contract in consequence of repudiation did not affect accrued rights for the payment of instalments of the contract price, unless the contract provided that it was to do so.

115 [1980] 2 Lloyd's Rep 1.

12.4 ACCELERATION IN PAYMENT OR LIQUIDATED DAMAGES: ARE THEY PENALTY CLAUSES?

In some circumstances, the builder may demand that the payment under the contract is accelerated, or the contract may provide for liquidated damages in favour of the builder in the event of the buyer's default. The issue that frequently arises is whether or not the acceleration or the liquidated damages are a penalty, which the court would refuse to sanction as a matter of public policy.[116] The determination of the issue depends on the construction of the contract.

12.4.1 Acceleration in payment

The Angelic Star[117] is an example of acceleration in payment that was construed not to be a penalty.

The plaintiffs, Swedish shipbuilders, agreed to build, sell and deliver the ship to Angelicos Company. The payment of 20 per cent of the contract price was payable in advance, and the remaining 80 per cent on delivery by a 'delivery credit', which was to be repaid over 8 years by 16 semi-annual instalments, and it bore a fixed rate of interest at 8.5 per cent. Upon delivery of the vessel, the buyer was to deliver to the builder 31 bills of exchange covering the capital and interest. By way of security to the builder, the buyer was required to execute a mortgage of the vessel. For this purpose, the shipbuilding contract included complex loan conditions; the relevant condition in this context was the event of default in payment of the loan. This clause provided that:

> The loan together with all other monies due to the lenders by the owners shall immediately become payable and the lender shall forthwith be put in funds to cover all existing and future liabilities under the bills of exchange drawn in connection with the loan, and the security for the loan and such monies shall become enforceable . . . if . . . (a) the owners fail to make payments of capital or interest . . . on due dates.

The buyer failed to make payments of capital and interest, and the issue was whether the above clause was enforceable or whether it amounted to a penalty clause.

The CA, following the decision of the House of Lords in *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Co Ltd*,[118] held:

> Clearly, a clause which provided that, in the event of any breach of contract a long term loan would immediately become repayable and that interest thereon for the full term would not only be still payable but would be payable at once, would constitute a penalty as being 'a payment of money stipulated as *in terrorem* of the offending party' . . . But I do not so read condition 13. 'The loan' is the capital sum. 'All other monies due to the lenders by the owners' cannot be construed as 'all other monies which would otherwise become due by the owners in the future'. It means 'all other monies due at the time of the happening of an event of default'. The mere fact that the capital sum becomes immediately repayable upon a failure to

116 Commercial sophisticated parties who are of equal strength ought to be free to agree their terms that are commercially acceptable to them in construction contracts. But, as was observed by Jackson J in *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] BLR 271 at para 35, 'it is an anomalous feature of the law of contract that the court will strike down penalty clauses'.

117 [1988] 1 Lloyd's Rep 122.

118 [1915] AC 79 (HL).

comply with the conditions upon which credit was extended cannot constitute a penalty. The provision that the lenders shall forthwith be put in funds to cover all existing and future liability under any outstanding bills drawn in connection with the loan is intended to safeguard the shipbuilders against their potential liability as drawers, should the bills have been negotiated and the purchaser, as acceptor, fail to honour the bills upon maturity . . . This again is not a penalty provision.[119]

With regard to the justification of non-sanctioning a penalty clause, Gibson LJ said:[120]

. . . it seemed clear to me that there was no basis for holding that the provision for acceleration of capital must be regarded as unenforceable or as excluded from the contract. The doctrine relating to penalties is not a rule of illegality: it is a rule by which the court refuses to sanction legal proceedings for recovery of a penalty sum, a rule which the court had produced and maintained for purposes of public policy: see per Lord Radcliffe, *Campbell Discount Company Ltd v Bridge* [1962] AC 600, p 622. The rule is, in my judgment, not designed to strike down any more of a lawful contract than is necessary to give effect to the court's purpose of applying public policy; and, moreover, the rule should be applied so as to interfere as little as possible with the proper enforcement of a lawful contract according to its terms. Parties to a contract are free expressly to stipulate not only the primary obligations and rights under the contract but also the secondary rights and obligations, that is, those which arise upon non-performance of any primary obligation by one of the parties to the contract.[121]

12.4.2 Liquidated damages

The level of such damages must not amount to a penalty clause.[122] The rule of public policy is that the court will not enforce a penalty clause so as to permit a party to a contract to recover a sum greater than the measure of damages entitled at common law. Liquidated damages agreed in favour of either party to the contract must be a genuine pre-estimate of damages. For agreed liquidated damages to amount to a penalty, there must be unconscionable, oppressive or extravagant conduct by the party seeking to enforce the provision.[123]

The principles enunciated by Lord Dunedin in ***Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd***[124] are that:

the question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as of at the time of making the contract, not as at the time of the breach.

119 [1988] 1 Lloyd's Rep 122 at p 125, per Lord Donaldson MR.

120 Ibid, pp 126–127.

121 Referring to Diplock LJ in *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, p 1446B.

122 Whether increase in default interest amounted to penalty so as to be an invalid reason for taking possession, see *First Commercial Bank v Mandarin Container* [2004] Hong Kong (unreported); see a summary at www.dmconline.co.uk

123 Ibid; and *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos* [1905] AC 6 (HL); *Commissioner of Public Works v Hills* [1906] AC 368 at 375–376. The principle stated is that:

an enormous disparity of the sum to any conceivable loss will point one way (i.e. penalty) while the fact of the payment being in terms proportionate to the loss will point to the other (i.e. a genuine pre-estimate – liquidated damages). But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made.

124 [1915] AC 79, p 86.

Whether a clause is a liquidated damages provision or a penalty was explained in ***Philips Hong Kong Ltd v Attorney General of Hong Kong***.[125] Lord Woolf, giving the advice of the Privy Council, cited with approval what was said by Dickson J in the Supreme Court of Canada in *Elsey v JG Collins Insurance Agencies Ltd*:[126]

It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and it is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

Lord Woolf went on to observe that such views are in accord with those expressed by Diplock LJ in *Robophone Facilities Ltd v Blank*:[127]

the court should not be astute to descry a penalty clause in every provision of a contract which stipulates a sum to be payable in the event of breach.

Lord Woolf concluded (at p 59):

Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of the contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non compliance with a contract is not extravagant, having regarded to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision.

A liquidated damages clause is not meant to apply to trifling breaches or losses; if it is held to apply, there is a danger that the whole clause might be struck down as a penalty clause.[128] Furthermore, if the contract provides for liquated damages in the event of delay, such damages will not be awarded if the delay is due to the conduct of the party claiming the damages.[129]

In a recent decision of the English court, ***Azimut-Benetti v Darrell Marcus Healey***,[130] concerning termination by the builder of a contract for the building of a luxury yacht for non-payment by the buyer in accordance with the terms of payment, the issue was whether the liquidated damage clause was a penalty.

The clause provided that:

upon lawful termination of this contract by the builder, the builder will be entitled to retain out of the payments made by the buyer an amount equal to 20 per cent of the contract price by way of liquidated damages as compensation for its estimated losses (including agreed loss of profit) and, subject to that retention, the builder will promptly return the balance of sums received from the buyer, together with the buyer's supplies, if not yet installed in the yacht.

The buyer argued that the 20 per cent of the price provision was not a genuine pre-estimate of the loss that the builder would suffer upon termination, but it represented a penalty.

125 (1993) 61 BLR 41 at 59 (PC).
126 (1978) 83 DLR, p 15.
127 [1966] 1 WLR 1428, p 1447.
128 *Cenargo Ltd v Izar Construcciones Navale SA* [2002] EWCA Civ 524 CLC 1151 (CA).
129 *The Cape Hatteras* [1982] 1 Lloyd's Rep 518.
130 [2010] EWHC 2234 (Comm); [2011] 1 Lloyd's Rep 473.

The court (Blair J) held that, at least in connection with commercial contracts, great caution should be exercised before striking down a clause as penal, although the circumspection that the courts show before striking down a clause when the parties are of equal bargaining power does not displace the rule that the clause must be a genuine pre-estimate of damage (following *Lansat Shipping Co Ltd v Glencore Grain BV* [2009] 2 CLC 465 at [33], Lord Clarke MR[131]).

The judge further held that the clause in the shipbuilding contract, which was for the construction of an expensive yacht, aptly described in the evidence as a 'super yacht', was not a penalty. The evidence clearly showed that the clause was not a deterrent, and that it was commercially justifiable as providing a balance between the parties upon lawful termination by the builder.

12.5 EFFECT OF TERMINATION/RESCISSION BY THE BUILDER

12.5.1 Contract null and void – builder's entitlements and powers

In the event of rescission, Art XI of the SAJ form provides that:

> Upon receipt of the builder's notice of rescission by the buyer, the contract shall forthwith become null and void and any of the buyer's supplies shall become the sole property of the builder;
> The builder shall be entitled to retain any instalments theretofore paid by the buyer to the builder on account of the contract; and
> The builder shall have full right and power either to complete or not to complete the vessel as it deems fit, and to sell the vessel at a public or private sale[132] on such terms and conditions as the builder thinks fit without being answerable for any loss or damage.

Under the NEWBUILDCON, the effects of rescission by the builder are the same as above, but for the provision that, in the event of the sale of the vessel by the builder, the builder shall sell at the best price reasonably obtainable on reasonable terms and conditions (by contrast to the autocratic terms under the SAJ form seen above).

Damages, if any, will be assessed with reference to the date of acceptance of the repudiation of the contract.[133] (For the principles on assessment of damages and mitigation, see Chapter 8, below.)

12.5.2 Application of the sale proceeds

By Art XI.4 of the SAJ form and cl 39(f) of the NEWBUILDCON, the builder would be entitled either to sell the ship uncompleted or to sell it after completion. He should

131 A clause providing 'the charter hire will be adjusted to reflect the prevailing market level from the 30th day prior to the maximum period date until actual redelivery of the vessel to the Owners', in case of late redelivery of the vessel by the time charterer, was a penalty and not a genuine pre-estimate of damages resulting from a breach of contract. Its primary purpose was to deter the charterers from breaching their obligation to redeliver the vessel in time.

132 An injunction obtained by the buyer to restrain the builder from selling the ship for non-payment of instalments, pending the outcome of the arbitration, was later lifted because it was regarded as an inappropriate remedy; damages were an appropriate remedy for the buyer, the court held in *Stellar Shipping Co Ltd v Cosco (Dalian) Shipyard Co Ltd* [2011] EWHC 1278.

133 *Tai Hing Mill v Kamsing Factory* [1979] AC 91 (PC).

be careful not to sell the ship at an undervalue,[134] and shall apply the proceeds to cover first, his expenses incurred attending such sale and, second, to payment of all unpaid contractual instalments plus interest. Any surplus of the proceeds shall be paid to the original buyer, provided that such payment does not exceed the total amount of the instalments paid by him and the costs of the buyer's supplies, if any.

If the proceeds are not sufficient to pay the expenses and costs of the building, the buyer shall promptly pay the shortfall to the builder. Sub-clause 4c of Art XI provides for reimbursement of the builder with respect to his cost of construction up to the incomplete state of the vessel, less the instalments already retained and any compensation to the builder for loss of profit due to the rescission of the contract.[135]

12.5.3 Effect on builder's accrued rights

The issue of what is the effect of the contractual rescission upon the builder's accrued rights came before the House of Lords in ***Stocznia v Latvian Shipping Co***.[136]

Contracts were agreed for the construction and purchase of six refrigerated vessels. Under the contracts, payment was structured into four instalments so that: (a) 5 per cent of the contract price was to be paid 7 banking days after receipt by the buyer of the bank guarantee to be furnished by the builder; (b) 20 per cent was to be paid within 5 banking days after the yard had given notice to the buyer of keel laying; (c) 25 per cent was to be paid within 5 banking days after the builder had given notice of the successful launching of the vessel; and (d) the balance of the contract price (50 per cent) was to be paid upon delivery of the vessel. The first instalment was paid for all six vessels. Thereafter, the buyers began to have financial problems because of downturn in the reefer market and proposed to the builder a 20 per cent reduction in the price for each vessel, together with a 5-year deferral of payment of the reduced price and delayed delivery. The buyers informed the builder during these negotiations that, although they wanted the vessels, if these terms were not accepted, taking delivery would be impossible. From the yard's point of view, however, the proposals would disrupt the yard's cash flow and work programme.

The yard did not treat the buyers' conduct (in view of the proposals) as repudiation, but completed the keel laying of the first vessel and served notice claiming the second instalment. The money was not paid, and the yard gave notice that it was treating the contract as repudiated. The same thing happened with the second vessel. The keel was laid, the second instalment was demanded, but remained unpaid, and the builder served notice treating the contract as being repudiated. Later, the builder brought an action claiming instalments with respect to the remaining four vessels on the basis of repudiation by the buyer. The buyers argued that any instalment paid was an advance and would be repayable for total failure of consideration.

The case reached the House of Lords, which considered the following issues: (1) whether the yard had acquired accrued rights to the second instalments of the contract price in respect of vessels 3–6; (2) what was the effect of the yard's election to rescind the contracts upon its right to recover the second instalments of the price;

134 *Gold Coast Ltd v Naval Gijon SA* [2006] 2 Lloyd's Rep 400, in which the arbitrators in the case found that the buyer had cancelled prematurely for delay in delivery.

135 In this connection, see *Neptune Navigation Corp v Ishikawahima-Harima Heavy Industries Co Ltd* [1987] 1 Lloyd's Rep 24.

136 [1998] 1 Lloyd's Rep 609.

and (3) whether the yard's claim for the second instalments of the price should fail because, were they to be paid, they would have to be paid back immediately on the ground of total failure of consideration with regard to vessels 3 to 6.

With regard to the first and second issues, it was held that, by exercising the right of rescission under the contract, the yard did not evince an intention to abandon its right at common law to recover, as a debt, unpaid instalments that had already accrued and were due. This right at common law was not inconsistent with the contractual terms, and the yard was entitled to recover accrued and unpaid instalments.[137]

As regards the third issue, the fact that the contracts were brought to an end before the property in the vessels or any part of them was passed to the buyers, did not prevent the yard from asserting that there had been no total failure of consideration. An instalment that had accrued could not, if paid, be be paid back on that ground. (*Hyundai Heavy Industries Co v Papadopoulos* was applied.) The true position was that the keels had been laid in respect of vessles 3–6 also.

It was further held that the yard did not have any rights under the contract with respect to non-accrued instalments. The yard was entitled to make an alternative claim in damages for anticipatory repudiation.

12.6 RESCISSION BY THE BUILDER AND RISK MANAGEMENT

The builder has to be cautious before deciding to discontinue performance on the basis of the buyer's default, because he may be in repudiation of the contract himself, if the contract contains a specific warranty by the builder that the construction of the vessel shall continue until delivery,[138] unless there is a suspension clause for non-payment, as seen above.

A point that would need clarification, in terms of risk management, is that the mere commencement of proceedings, or arbitration, by the one party to determine his rights does not necessarily mean that he repudiates the performance of the contract in any event. He may submit to perform it if the court or the tribunal comes to the conclusion that he is bound to perform it.[139] It should also be noted that wrongful exercise of the contractual right of rescission is not to be treated as a repudiatory breach, provided there is no manifestation by conduct of an ulterior intention to abandon the contract.[140]

13 ASSIGNMENT

Clause 45 of the NEWBUILDCON provides for limited circumstances of assignment, and this is subject to the other party's consent, unless it is required for financing purposes, whereupon each, the builder and the buyer, has the right to assign to his respective financiers.

137 The decision of the CA was reversed on both points.
138 *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 Lloyd's Rep 1.
139 *Spettabile Consorzio v Northumberland Shipbuilding Co* (1919) 121 LT 628.
140 *Woodar v Wimpey* [1980] 1 WLR 277 (HL).

In the event of an assignment by the buyer, the builder must arrange for the refund guarantee to be assigned to the new buyer.

The SAJ contract, Art XIV, permits assignment only with the consent of the other party. It does not expressly allow assignment to parties' respective financiers, but does not expressly prohibit such assignment either. Therefore, whether or not such assignment will be allowed and the legal requirements for it will be determined by the law governing the shipbuilding contract.

14 DISPUTE RESOLUTION

Article XIII of the SAJ contract provides for three arbitrators on the panel. The seat of arbitration provided is Tokyo, Japan, but the parties are free to agree another seat, and they usually agree London as a seat.

The builder may lose his right to contest the buyer's cancellation of contract if he does not commence arbitration within the time limit (30 days) provided by Art X(2) and pursuant to Art XIII(3). The court in ***Nanjing Tianshun Shipbuilding Co Ltd v Orchard Tankers Pte Ltd***[141] confirmed that the builder had lost the right to challenge the buyer's cancellation and rejected the builder's argument that the provision barred only the right to arbitrate.

Clause 42 of the NEWBUILDCON divides the dispute resolution provision into five parts, and it is quite complex; only a short summary is given here.

> Any dispute concerning the vessel's compliance or not with rules, regulations and requirements of the class shall be referred to the classification society or other regulatory authority whose decision shall be final and binding upon the parties.
> Unless sub-clauses (a), or (c) to (e) apply, in the event that a dispute arises under the contract either party may require by written notice to the other party that such dispute be referred to an independent third party (an expert) as the parties jointly nominate in writing. [The clause sets out the procedure.]
> Sub-clauses (c) and (d) set out the arbitration agreement and the procedure for commencement of arbitration. Sub-clause (d) provides for mediation as a modus for the resolution of a dispute, if the parties so wish.

Parties should be aware that they will be bound by the arbitration agreement in the contract in the event of novation of the shipbuilding contract, as was held in ***CMA CGM v HMD Ltd***:[142] Once a third party became party to the shipbuilding contracts, it had to arbitrate a dispute that had arisen after the date of the shipbuilding contracts, albeit that it did not come under that obligation until after the date of the novation. On a proper construction of the shipbuilding contracts as novated, the novated party came under an obligation to arbitrate an arbitrable dispute, once it owed obligations under those contracts; on or after the transfer date, it was obliged to arbitrate such dispute, not to litigate it, refraining from any fresh, and terminating any existing, proceedings.

141 [2011] EWHC 164 (Comm).
142 [2008] EWHC 2791 (Comm).

15 MANUFACTURER'S OR BUILDER'S LIABILITY TO THIRD PARTIES

English law is well settled with regard to liability of a manufacturer in tort for physical injury on the one hand, and for pure economic loss to remote owners of chattels on the other hand. With regard to loss resulting from physical damage to property caused by construction defects in a ship, the manufacturer or shipyard will be joined as a third party in proceedings brought against the owner of the ship for an indemnity with regard to the loss or damages caused to the property of a third party.[143] There is a duty of care owed by a manufacturer or builder to third parties for a reasonably foreseeable physical injury to a person or property caused by a dangerous defect in a chattel.

With regard to pure economic loss, as a general rule, there is no such duty on the part of the manufacturer, unless there is a special relationship of proximity imposing a duty on the manufacturer to safeguard a third party from economic loss. A special relationship of proximity would exist if the defendant had voluntarily assumed a responsibility to act in the matter by involving himself in the claimant's affairs, or by choosing to speak.[144] For example, in the celebrated case of ***Hedley Byrne***,[145] the defendant was taken to have assumed responsibility because he chose to speak. Reliance by the claimant on the defendant's act or advice would be relevant in determining whether there was an assumption of responsibility and causation.

Such principles were reaffirmed by the House of Lords in ***Murphy v Brentwood DC***,[146] in which it was held that remote purchasers of a defective building had no claim in tort for economic loss against the Council (the local authority), which had approved the building plans and was negligent.

Lord Bridge stated the principle thus:[147]

> If a manufacturer negligently puts into circulation a chattel containing a latent defect which renders it dangerous to persons or property, the manufacturer, on the well-known principles established by *Donoghue v Stevenson* [1932] AC 562, will be liable in tort for injury to persons or damage to property which the chattel causes. But, if a manufacturer produces and sells a chattel which is merely defective in quality, even to the extent that it is valueless for the purpose for which it is intended, the manufacturer's liability at common law arises only under and, by reference to the terms of any contract to which he is a party in relation to the chattel, the common law does not impose on him any liability in tort to persons to whom he owes no duty in contract but who, having acquired the chattel, suffer economic loss because the chattel is defective in quality. If a dangerous defect in a chattel is discovered before it causes any personal injury or damage to property, because the danger is now known and the chattel cannot safely be used unless the defect is repaired, the defect becomes merely a defect in quality. The chattel is either capable of repair at economic cost, or it is worthless and must be scrapped. In either case, the loss sustained by the owner or hirer of the chattel is purely economic. It is recoverable against any party who owes the loser a relevant contractual duty. But, it is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss. There is no such special relationship between the manufacturer of a chattel and a remote owner or hirer.

143 See, for example, *The Manchester Courage* [1973] 1 Lloyd's Rep 386.
144 *White v Jones* [1995] 2 AC 207 (HL).
145 *Hedley Byrne & Co v Heller & Partners* [1963] 1 Lloyd's Rep 485 (HL).
146 [1991] 1 AC 398.
147 Ibid, p 475.

The question of liability for pure economic loss has occupied the courts in many other areas of the law. The House of Lords reviewed the test of voluntary assumption of responsibility in ***Customs and Excise Commissioners v Barclays Bank plc***,[148] holding that the presence or absence of a voluntary assumption of responsibility did not necessarily provide the answer in all cases, although it might be decisive in many situations.[149] In the absence of any single touchstone of liability, and where a court was faced with a novel situation, the court had to apply the threefold test, as stated in *Caparo Industries plc v Dickman*.[150] The voluntary assumption test would be most influential where the parties' relationship had the indicia of contract save for consideration. The test is objective; something is no less voluntary because it has been done pursuant to a perceived statutory duty or code of conduct; and there does not need to be an assumption of legal responsibility.[151]

The House of Lords had already held, a few years earlier, **in *The Nicolas H***, that, whatever the nature of the harm suffered by the plaintiff, it was necessary to consider the matter not only by inquiring about foreseeability but also by considering the nature of the relationship between the parties, and to be satisfied in all the circumstances that it was fair, just and reasonable to impose a duty of care[152]. (See further Chapter 8, below.)

How can these principles apply in the context of shipbuilding? There is no doubt that, if a dangerously defective part, such as an engine of a new building (whether it be a ship or an aircraft), causes explosion resulting in death, or physical damage to property, it will give rise to tortious liability of the shipbuilder. If the ship is not new, however, it will be a matter of evidence and a question of causation whether an accident was caused by a defective part, or a latent defect, or was due to bad maintenance of the ship by its owner.

Insofar as pure economic loss is concerned, the application of the principles is best explained by the decision of the CA in ***The Rebecca Elaine***.[153]

The claimants owned a number of fishing vessels and contracted with boatbuilders to build what became *The Rebecca Elaine*. Because of their good experience with Gardner engines, they decided that the new vessel should be fitted with such an engine. The manufacturers did not sell engines directly, and there was a chain of contracts between them and the boatbuilders. The new vessel was commissioned, and her new Gardner engine was accompanied by a 1-year manufacturer's warranty against defects in workmanship or material and a manual that stated that its 'pistons would run for 20,000 hours or more without dismantling and before replacement is necessary'.

148 [2006] UKHL 28, [2007] 1 AC 181.

149 Such as in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Henderson v Merrett Syndicates Ltd (No. 1)* [1995] 2 AC 145.

150 [1990] 2 AC 605.

151 See further *Calvert v William Hill Credit Ltd* [2008] EWHC 454 (Ch).

152 *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] AC 211: it was further held that, although there was a sufficient degree of proximity in this case to fulfil that requirement for the existence of a duty of care, it would be unfair, unjust and unreasonable to impose a duty of care on NKK as against the ship-owners who would ultimately have to bear the consequence of holding classification societies liable, such consequences being at variance with the bargain between ship-owners and cargo-owners based on an internationally agreed contractual structure, and it would also be unjust, unfair and unreasonable towards classification societies because they act for the collective welfare and would not have the benefit of any limitation provisions (for the facts and analysis, see Ch 8).

153 *Hamble Fisheries Ltd v L Gardner & Sons Ltd (The Rebecca Elaine)* [1999] 2 Lloyd's Rep 1.

By way of background, the manufacturers of the engine sold their business to the defendants in this action. The sale was of the entire undertaking, property and assets of the business as a going concern, together with the buyers' right to represent that they were carrying on the business in continuation of, and in succession to, the manufacturers. Two years after the building of the boat, the defendants began to receive reports that pistons in Gardner engines had broken or cracked before they should have done. The pistons concerned had all been manufactured by an independent contractor, Wellworthy Ltd. These pistons, as the judge found, were liable to fail after only about one-third of the running time stated in the manual. On the judge's unchallenged finding, the defendants were on notice of a very real problem affecting the Wellworthy pistons, which they realised might cause major engine failure, or worse. However, despite this knowledge, the defendants chose not to warn those with engines fitted with such pistons, which, the judge held, they could have done by contacting known customers, authorised distributors and service agents, or by advertising in trade journals.

The pistons in *Rebecca Elaine* failed prematurely, and the engine seized. Fortunately, the vessel was towed to safety, and the only loss was the damage to the engine itself, which cost £25,972 to repair, and loss of earnings, which the judge assessed at £21,344.

The claimants' case could not be made in contract, as the manufacturer's warranty had expired; any claim against the boatbuilders would have been successfully met by: (i) an exclusion clause in the boatbuilding contract and/or (ii) the fact that the claimants had not relied on the boatbuilders' skill or judgment in the supply of the engine. The case against the defendants was put solely in negligence. The essence of the claimants' complaint was that, knowing there was a problem with the Wellworthy pistons, the defendants did nothing to warn operators/owners to carry out inspections more frequently, so as to confine any damage to the pistons themselves and avoid major engine failure of the kind suffered by *The Rebecca Elaine*.

The judge found that, if the defendants were under a duty to warn, they would be in breach of such duty, and that this would be the cause of the claimants' loss because, had they been given a warning, they would have acted on it.

After a full review of the authorities, the court concluded that, for the claimants to establish a duty of care owed to them by the defendants, they had to show a special relationship of proximity, which involved both an assumption of responsibility by the defendants and reliance upon it by the claimants. The judge held that the defendants had not assumed any responsibility to safeguard the claimants against suffering economic loss, although they might have assumed responsibility to avoid physical damage to persons or property.

The CA approved the first instance decision and considered further whether in such cases there is duty to warn.

Tuckey LJ held:[154]

Under English law I do not think that there is any basis for putting failure to warn of a known danger into a category of its own . . . My review of the authorities shows that the general rule is that a manufacturer in the position of the respondents owes no duty of care to avoid economic loss. Exceptionally, he may be under such a duty if he assumes responsibility to his customers

154 [1999] 2 Lloyd's Rep 1, pp 6, 7.

in a situation, which is akin to contract. That duty may include a duty to warn, but it would be much more difficult to infer in the case of mere silence than in the case of misrepresentation.[155] Reliance by the customer is relevant to whether there has been an assumption of responsibility and essential as to causation.[156]

The next chapter deals with the sale of second-hand ships. Although the core principles of sale of goods, as seen in this chapter, apply, there are, inevitably, different obligations upon the seller of an already-used ship.

155 *Banque Keyser Ullman SA v Scandia (UK) Insurance* [1988] 2 Lloyd's Rep 514 (CA): the court had to consider whether the underwriter of the defendant (insurers), who knew that a broker had issued a false cover note to the plaintiff bank, owed a duty of care to warn the bank, which lent large sums of money on the security of the cover. Slade LJ, giving the judgment of the court, said, at p 559:

Can a mere failure to speak ever give rise to liability in negligence under Hedley Byrne principles? In our view it can, but subject to the all-important proviso that there has been, on the facts, a voluntary assumption of responsibility in the relevant sense and reliance on that assumption. These features may be much more difficult to infer in the case of mere silence than in the case of misrepresentation.

156 In a Canadian case, *Can-Arc Helicopters v Textron*, cited by Tuckey LJ in *The Rebecca Elaine* [1995] 2 Lloyd's Rep 1, the British Columbia Supreme Court found the manufacturers liable for economic loss for a failure to give adequate warning of a defect in a service bulletin, which they knew their customers relied on.

This page intentionally left blank

CHAPTER 8

RISKS IN SHIP SALE AND PURCHASE

1 Introduction 291

Section A: The negotiations and contract stage 293

2 The making of the contract 293

3 Is there an obligation for disclosure by the seller? 296

4 On the making of a binding contract and risk management 308

5 Classification of terms 319

Section B: Contractual terms under standard forms 322

6 Pre-inspection stage 322

7 Inspections by the buyer 327

8 Inspection by classification society (dry-docking) 328

9 Notice of readiness 329

10 Sellers' obligations under cl 9 335

11 Condition of vessel on delivery 339

12 The closing meeting 349

13 Available options in the event of non-performance by the one party 349

14 Sellers' remedies 351

15 Buyers' remedies 351

16 Risk management issues for buyers 354

Section C: Post-delivery and issues of damages 360

17 Post-delivery matters 360

18 Measure of damages 360

19 Currency of loss 373

20 Civil liability of classification societies to buyers and other third parties 374

1 INTRODUCTION

The sale and purchase of second-hand ships involve three main stages of preparation and require care during each stage until the completion of sale is reached. These main stages are the negotiations and contract stage, the inspections stage and the completion stage.

At the negotiation stage, which is usually carried out by brokers appointed by the respective parties (buyer and seller), there will be telex exchanges with the seller's brokers making an invitation to offer. The buyer is mainly concerned initially with the price, the particulars of the ship and lay-days before he can decide whether or not the transaction is worthwhile. Price bargaining and negotiations of the main terms of the contract usually follow this initial approach, which may be prolonged or may

involve quick-fire exchanges between professional brokers who have commercial knowledge of the trade. If the parties agree on the basic terms, which may involve numerous back-and-forth communications, a recap email recapitulating the terms discussed is exchanged. These terms are made subject to details to be agreed later. A large number of negotiations are usually split into negotiation and agreement of the main terms, followed by a similar process regarding details. The question often arises, as will be seen later, whether or not there is a contract at the time of the recap email. In this respect, the role and experience of the brokers engaged are crucial.

Provided the details are agreed, a formal contract for the sale of the ship is later drawn up. This is known as the Memorandum of Agreement (MOA), which usually incorporates a standard form contract such as the Norwegian Sale Form, otherwise known as the NSF. Sometimes, the final agreement of the parties may be made conditional upon the drawing or the incorporation of the sale form. Invariably, the contract may still be subject to certain details, such as obtaining approvals from directors or shareholders, or licences, or the contract may be subject to satisfactory inspection. It will be seen later in more detail that these 'subjects' indicate that the parties intend to have a conditional contract.

The MOA specifies the procedures necessary for the closing meeting. The necessary documents are prepared. Such documents include: the closing memo, minutes of a meeting of the seller's directors and shareholders, a certificate of good standing, power of attorney, the bill of sale, certificate of class, any consents or licences required by government authority, and a certificate by the registrar of the ship's registry permitting the sale.

A deposit, usually of 10 per cent of the agreed price, is paid by the buyer to commit him to the contract; the deposit may be held in the joint names of the parties, or as otherwise the parties agree. It will be seen that the new NSF 2012 provides for a 'deposit holder', who is a third party.

The two inspections stages involve: first, the inspection of documents, such as the ship's class records, certificates of compliance with regulations etc.; and second, the physical inspection of the ship afloat, as provided for in the contract, by the buyer or his representative surveyor. The physical inspection is usually a superficial one of the ship and its logbook unless the parties have agreed otherwise. After this inspection, the buyer may confirm his commitment to buy by accepting the ship 'as is' at the time of the inspection (known as an 'as is sale'),[1] or he may refuse her. For the meaning of 'as is' or 'as she was' and whether these phrases affect the application of the implied terms under the Sale of Goods Act (SOGA) 1979, see *The Union Power*[2] (see at para 11, below).

When the seller is ready he serves an advance notice of delivery, Notice of Readiness (NOR), on the buyer. The notice may involve a series of notices until the final notice before delivery can be arranged.

1 See *Polestar Maritime Ltd v YHM Shipping Co Ltd (The Rewa)* [2012] EWCA Civ 153: an agreement for the sale of a vessel on an amended Norwegian Saleform 1993 was an 'as was' agreement and, on the correct interpretation of cl 11, only required the seller to deliver at closing the national and international trading certificates that the vessel had at the time of the inspection.

2 [2012] EWHC 3537 (Comm).

The third stage, known as the completion stage, involves pre-delivery matters, including inspection of underwater parts by the surveyor of the classification society[3] in dry dock at the port of delivery. The surveyor checks the ship's bottom and underwater parts, so that a clean certificate of class can be given. Sometimes, in lieu of a dry-dock inspection, the buyer may appoint a diver, approved by the classification society, to carry out the underwater inspection while the ship is afloat. The surveyor may recommend some repairs to be effected at the seller's expense before delivery. In such cases, the seller has to serve a new NOR once the recommended repairs have been carried out.

If the ship is, indeed, ready, the buyer arranges for payment of bunkers and stores on board, as has been agreed, and instructs his bank or financial institution to make arrangements for payment on the actual delivery date.

On the delivery day, delivery of documents and the physical delivery of the ship upon payment of the balance of the contract price take place. Documents and physical delivery may occur at different places depending on where the ship is.

There are also post-delivery matters to be taken care of at this stage. The seller should have arranged for the deletion of his name from the registry and the deletion of the ship from her existing flag, if the buyer wishes to change flag. He also cancels the insurance cover, pays off the mortgage and other debts and arranges for the repatriation of his crew from the vessel. The buyer, having arranged for a ship company to be set up, registers the ship in the name of that company.

SECTION A: THE NEGOTIATIONS AND CONTRACT STAGE

2 THE MAKING OF THE CONTRACT

2.1 HOW ENGLISH COURTS VIEW THE CONCEPT OF GOOD FAITH

Unlike non-common law systems, which recognise and enforce an overriding principle of good faith both in the making and during the performance of contracts, there is no such principle under English law.[4] Bingham LJ (as he then was), in ***Interfoto***

3 The role of the classification societies is to ensure that the ship inspected complies with the structural rules of the society and will not be a danger to life or property at sea. Regular surveys of ships entered with a society aim to enhance safety by making recommendations for repairs. Rules and technical standards vary from society to society, but societies that are members of the IACS apply, by and large, similar practices. It is seen in Chs 2 and 3, above, that, through IACS and IMO regulations, these rules are becoming more uniform.

4 However, see new development in *Yam Seng v ITC* [2013] EWHC 11 (QB), in which Leggatt J considered the importance of recognising the doctrine of good faith and fair dealing in all contractual relationships, especially those involving a longer-term relationship, such as joint venture agreements, franchise agreements and long-term distribution agreements. This decision shows that the English courts may be now prepared to adopt, in appropriate cases, this concept, which derives from civil law systems.

Picture Library Ltd v Stiletto Visual Programmes Ltd (concerning the validity of a power granted under a purported power of attorney),[5] contrasted the two systems, thus:

In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that, in making and carrying out contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair and open dealing . . . English law has, characteristically, committed itself to no such overriding principle, but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus, equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire purchase agreements. The common law has also made its contribution by holding that certain classes of contract require the utmost good faith, by treating as revocable what purports to be agreed estimates of damage but are, in truth, a disguised penalty for breach, and in many other ways.

Any attempt to imply a term of good faith into the contract would not succeed, because it would be inconsistent with the express terms.[6]

In ***Walford v Miles***,[7] the House of Lords confirmed that good faith during the negotiation stage of a contract is not compatible with the adversarial position of the parties:

. . . the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations, and to advance those interests they must be entitled, if they think it appropriate, to threaten to withdraw from further negotiations, or to withdraw in fact, in the hope that the opposite party might seek to reopen the negotiations by offering improved terms.

2.2 THE EFFECT OF 'USING BEST ENDEAVOURS' TO NEGOTIATE IN GOOD FAITH

If one party has undertaken to use his best, or reasonable, endeavours to negotiate an agreement[8] with the other party in good faith, it is possible to infer a collateral contract. Then, the good faith aspect will have a legal effect representing an undertaking.[9] If the party who undertook to negotiate in good faith withdraws, his withdrawal may amount to a breach of that collateral contract, and – subject to issues of causation – he may be liable to the other party in damages.

5 [1988] 1 All ER 348, pp 352–353.

6 See further *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] 2 Lloyd's Rep 352: N's counterclaim that B was in breach of a duty of good faith raised arguable points of law that could not be determined on summary judgment, although there was no general duty to act in good faith, *Walford v Miles* [1992] 2 AC 128 applied; however, a new trend may soon be followed by the English courts, as seen in *Yam Seng v ITC*, op. cit. fn 4.

7 [1992] 2 AC 128, p 138.

8 This is distinguishable from a contract where a clause provides purely for each party to 'use its reasonable endeavours' to do what is necessary and to carry out the intent and effect of the agreement (see Ch 10).

9 *The Mercedes Envoy* [1995] 2 Lloyd's Rep 559, p 565.

Questions of interpretation of contract arise to ascertain whether or not the agreement was merely an 'agreement to agree', which may be unenforceable for lack of certainty of terms. In ***Walford v Miles***, the agreement was not enforceable because it amounted to an agreement to negotiate for an unspecified period; so the vendor was not obliged to conclude the contract because he would not know when he was entitled to withdraw from negotiations.

Applying this decision in ***Shaker v Vistajet Group Holding SA***,[10] concerning a Letter of Intent (LOI) to purchase an aircraft, Teare J held that on the assumption that the obligation to proceed in good faith and to use reasonable endeavours to agree the transaction documents was a condition precedent, the obligation was unenforceable for the following reasons. First, the non-binding clause expressly stated that the LOI did not constitute a binding agreement to enter into the transaction documents. Second, an agreement to negotiate or agree further agreements was unenforceable in law. Third, the agreement to reach agreement with the financial party was unenforceable for the same reason. The judge, referring also to other authorities in this area, explained (at para 7) that the reason for such unenforceability is that there are no objective criteria by which the court can decide whether a party has acted unreasonably, and that a duty to negotiate in good faith is unworkable because it is inherently inconsistent with the position of a negotiating party.

A good example of an enforceable agreement is the recent decision in ***MRI Trading AG v Erdenet Mining Corp LLC***,[11] in which a settlement agreement provided for the performance of three future contracts, in one of which it was stated that certain terms 'shall be agreed'. It was held that the fact that the contract left certain terms to be agreed between the parties did not render it legally unenforceable for lack of certainty. Whether uncertainty rendered an agreement unenforceable was not to be approached as a set of strict rules that were to be applied mechanistically to the facts. Each case had to be decided on its own facts (*Mamidoil-Jetoil Greek Petroleum* applied).[12] The particular circumstances in which the contract came to be signed were a very powerful factor for the court to bear in mind to strive to uphold the parties' agreement, and it was a factor that the tribunal did not properly take into account. The language of the settlement agreement and the contract plainly showed that the parties intended the contract to be legally binding. The fact that the charges

10 [2012] 2 Lloyd's Rep 93; see, further, related authorities to which the judge referred: *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] CLC 329; *Multiplex Construction UK Ltd v Cleveland Bridge UK Ltd* [2006] EWCA 1341 (TCC); *Dhanani v Crasnianski* [2011] EWHC 926 (Comm); *Barbudev v Eurocom Cable Management Bulgaria* EOOD [2012] EWCA Civ 548; *Scottish Coal Co Ltd v Danish Forestry Co Ltd* [2009] CSOH 171.

11 [2012] EWHC 1988 (Comm): For the purposes of interpreting a contract that had arisen pursuant to the terms of a settlement agreement, it was appropriate to consider the settlement agreement and other contracts that had arisen under it, as well as the particular contract, because they formed part of the relevant factual matrix.

12 *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD (No.1)* [2001] EWCA Civ 406; [2001] 2 Lloyd's Rep 76: the relevant contract term did not amount to an 'agreement to agree'. Given the commercial history of the parties, the presence of an arbitration clause and the fact that the contract had continued with successive agreements over a considerable period of time, it was appropriate to view the contract as for a fixed period of not less than 10 years, with an implied term that, if no agreement was reached as to reasonable fees, they should be determined from the specified date; see, further, *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, where it was held (CA) that it was perfectly possible in law for parties to make an interim agreement by which further negotiations were required to iron out the less important details of the transaction.

and shipping schedule were to be agreed was not of itself fatal to the existence of a binding contract. On the contrary, the mandatory language that the terms 'shall be agreed' was strongly indicative of an intention that there should be performance of the contract and that, as a matter of construction, a failure to agree should not detract from that; (see, further, para 4.4, below, on the related issue of a term 'subject to contract').

3 IS THERE AN OBLIGATION FOR DISCLOSURE BY THE SELLER?

3.1 WHAT IS THE EFFECT OF *CAVEAT EMPTOR*?

There is no general duty of disclosure and the parties are free to make their own investigations about each other's position and the ship intended to be purchased. The *caveat emptor*[13] principle, meaning 'let the buyer beware' applies – to a certain extent – before a buyer enters into a transaction of purchasing property. But *caveat emptor* will not protect a seller if he has performed a dishonest act before the exchange of contracts for sale of property.[14] There are statutory controls limiting the effect of *caveat emptor*: the Misrepresentation Act 1967 prevents the seller from inducing the buyer to enter into the contract by making material representations that he knows are not true; the Unfair Contracts Terms Act 1977 protects the buyer from unreasonable terms; the SOGA 1979 (as amended) provides for implied terms of satisfactory quality and fitness for purpose protecting the buyer, unless such implied terms are expressly excluded (see the recent decision of Flaux J in *The Union Power*[15] (discussed in para 11). Under the old doctrine of *caveat emptor*, the buyer could not recover from the seller for defects in the property. The only exception was if the seller actively concealed defects that were not obvious.

3.2 STATEMENTS MADE DURING NEGOTIATIONS

Under English contract law, statements or assurances made during negotiations leading to a contract may be either 'terms', which form the express terms of the contract, or 'statements', which are not intended to be part of the contract, but may help to make the buyer enter into the contract. If the statements are untrue, they are misrepresentations. Mere 'puffs', for example, when the broker makes a comment that: 'if I had money I would buy that ship', would be so vague as to be without effect.

13 The principle of *caveat emptor* does not apply to the making of a partnership agreement, and each party has a duty to disclose all material facts of which he has knowledge and of which the other negotiating parties might not be aware: *Conlon v Simms* [2006] EWCA Civ 1749; *caveat emptor* does not apply to insurance contracts, which are contracts of *uberrima fides*; but, as to opinions or honest belief, see *Economides v Commercial Union Assurance Co plc* [1998] Lloyd's Rep IR 9: an honest representation of belief in an insurance context must have some basis, but there is no implied representation that there exist reasonable grounds for making it. If insurers wish their clients to obtain independent valuations of their goods, then that must be made a term of the contract.

14 *Taylor v Hamer* [2003] 1 P & CR DG 6, distinguished in *Sykes v Taylor-Rose* [2004] 2 P & CR 30.

15 [2012] EWHC 3537 (Comm).

Different remedies are available to the innocent party and this depends on whether an untrue statement became a contractual term, or whether it was only intended to induce the innocent party to enter into the contract, and it did so (see below).

If an untrue statement is made an express term of the contract, it will result in a breach of contract. Depending on the breach, the innocent party may rescind the contract and/or claim damages. Unlike the situation of a misrepresentation, which is not part of the contract (see below), the claim for damages on the ground of an untrue statement – forming an express term of the contract – does not depend on fraud or negligence. If the term is fundamental, or the seriousness of its consequences goes to the root of the contract, the innocent party may treat the contract as repudiated by the other party and elect to terminate it, as well as claim damages, or waive the breach and affirm the contract.

3.3 WHEN A REPRESENTATION INDUCING A CONTRACT AMOUNTS TO MISREPRESENTATION

For a representation to amount to a misrepresentation, it has to meet certain requirements. An overview of such requirements can be found in the recent decision of Clarke J, ***Raiffeisen Zentral Bank Osterreich AG (RZB) v RBS***:[16] an action was brought by RZB against RBS, to recover loans made to Enron as part of a syndicated loan arranged by RBS, which proved to be irrecoverable following Enron's collapse. RZB claimed to have been induced to lend the money by several misrepresentations made by RBS. The judge summarised the principles[17] as derived from previous authorities. In particular, he stated that the requirements must be:

(a) A statement of fact upon which the other party relied/was entitled to rely, judged objectively by the court according to the impact the statement might be expected to have upon a reasonable representee in the position and with the known characteristics of the actual representee[18]. The court would regard a sophisticated commercial party quite differently than it would a consumer.
(b) With regard to an express statement, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used.
(c) In the case of implied statements, the court has to perform a similar task and, in particular, to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context.[19]
(d) Silence by itself cannot found a claim in misrepresentation (fraudulent or otherwise).
    (i) However, an express statement may impliedly represent something not said. A possible implication of a statement may be that what has been expressly stated is complete, that is, it covers everything material or relevant on a

16 [2011] 1 Lloyd's Rep 123.

17 Ibid, at paras 81–87.

18 Applied *MCI WorldCom International Inc v Primus Telecommunications plc* [2004] EWCA Civ 957.

19 Applied *IFE Fund SA v Goldman Sachs International* [2007] 1 Lloyd's Rep 264 (per Toulson J), affirmed by the CA [2007] 2 Lloyd's Rep 449.

particular matter, such that something, which has not been referred to, does not exist.

(ii) It is, however, necessary to distinguish between what a document does not say and what it impliedly represents. The test for, and answer to, this depends on whether a reasonable representee would, naturally, have assumed that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it.[20]

(iii) But misrepresentation should not be found too easily, given the measure of damages under s 2(1) of the Misrepresentation Act 1967.[21]

(e) It is also necessary for the statement relied on to have the character of a statement upon which the representee was intended, and was entitled, to rely. In some cases the statement in question may have been accompanied by other statements by way of qualification or explanation, which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement, or was saying that no reliance can be placed upon it. Thus, the representor may qualify what might, otherwise, have been an outright statement of fact by saying that: 'this is only a statement of belief, which may not be accurate', or 'I have not verified its accuracy or completeness', or 'this is not to be relied on'.

(f) The claimant must show that he in fact understood the statement in the sense (so far as material) that the court ascribes to it: *Arkwright v Newbold*;[22] *Smith v Chadwick*;[23] and that, having that understanding, he relied on it. This may be of particular significance in the case of implied statements.

(g) As regards causation, any misrepresentation would have to be an effective or a **real and substantial cause** of the decision to enter into the contract.[24]

20 *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672, at p 683 (per Colman J).

21 *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 (CA): the measure of damages recoverable for innocent misrepresentation under s 2(1) of the 1967 Act was the measure for fraudulent misrepresentation rather than for negligence; *Avon Insurance plc v Swire Fraser Ltd*, at para 200 (per Rix J): A representation could be true even if it was not entirely correct, so long as the difference between what was represented and what was correct was not, alone, responsible for inducing the claimant to enter into the contract. In this case, failure in respect of an isolated aspect of the risk assessment was not likely to have influenced Avon, especially, as the ultimate significance of the criteria was to achieve a well-spread book of business, and that result had been achieved. The law provided that damages assessed upon the fraud basis were to be awarded where a misrepresentation had induced a contract, *Royscot* applied. It, therefore, followed that the court should take care in finding that a misrepresentation had occurred.

22 (1881) 17 Ch D 301.

23 (1884) 9 App Cas 187.

24 *Assicurazioni Generali SpA v Arab Insurance Group* [2003] Lloyd's Rep IR 131, paras 59 and 62, Clarke LJ:

. . . in this context, at least, causation cannot exist when even the 'but for' test is not satisfied . . . In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an effective cause of his entering into the contract on the terms on which he did. He must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so.

Ward LJ, slightly dissenting, said, at para 215:

. . . I take the law to be this: if it is established that the representee did not allow the representation to affect his judgment in any way then he could not make it a ground for relief. If on the other hand the representee relied on the misrepresentation, then the representor cannot defeat his claim to relief by showing that there were other more weighty causes which contributed to his decision to enter into the contract. In this field the court does not allow an examination into the relative importance of contributory causes. In other words, it is sufficient if the representation is a cause even if it is not the cause operating on the mind of the representee when he enters into the contract . . .

Applying these principles in this case, the judge stated that, for RZB to succeed it had to show that: (a) RBS made representations to it; (b) it understood that those representations were being made; (c) such representations were false; (d) that it was induced by those representations, or one or more of them, to subscribe to the Syndication Agreement and thus to lend RBSFT £10 million; (e) RBS intended that such representations should induce RZB to enter into the contract. It was held that RZB failed to show that any of the alleged representations had been made.

Whether any representations were made, it had to be decided by reference to the provisions of the Information Memorandum (IM) and the Confidentiality Agreement; whatever their contractual efficacy, these formed an important part of the context[25] in which the representations were said to have been made and, thus, were relevant to any inquiry as to what representation a reasonable reader of the IM would regard as having been made.

The judge summarised the principles set down by leading authorities on various issues of misrepresentation, including causation, the meaning of the 'but for' test, inducement, contractual exception to claiming inducement[26] and estoppel (see at 3.5, below).

In many cases, the judge said, the truth is nothing more than the flip side of the misrepresentation, but this is not always so. He added (at paras 181, 182 and 184) that the question (which is habitually asked by counsel defending claims for misrepresentation), 'what would the claimant have done, if he had been told the truth?', is not the right approach.[27] At any rate, where fraud is shown, the question – 'what

and, at paras 218 and 219, he continued:

I am happy to express my agreement with the analysis of the law conducted by Clarke LJ subject to this reservation. I am not entirely sure that it is necessary to require the misrepresentation to be an effective cause of a party's entering into the contract on the terms on which he did. If by that qualification my Lord means no more than that it did actually play upon his mind and influence his decision then I have no argument. In other words I readily accept it must have some causative effect. I would be concerned if the insistence on an effective cause were to lead to an evaluation of the weight placed by the representee upon the various matters which in combination lead to the agreement. We must be careful not to be led back into the error that the cause has to be a decisive cause.

See, further, *BP Exploration Operating Co Ltd v Chevron Transport (Scotland)* [2002] 1 Lloyd's Rep 77, per Lord Millett:

As a matter of English law, a representee must always be prepared to prove that the representation had an effect on his mind. But it is sufficient for him to prove that the representation was an inducing cause which led him to act as he did; he need not prove that it was the inducing cause [emphasis added].

25 *IFE Fund SA v Goldman Sachs International* [2007] 1 Lloyd's Rep 264, pp 273, 274, per Toulson J, para 70, and [2007] 2 Lloyd's Rep 449, p 461, per Gage LJ, para 67; *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] Lloyd's Rep Plus 63, per Gloster J, paras 669, 670, 674 and 675.

26 The judge (at para 239) referred to *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511, and other authorities (see under 3.5).

27 Smith v Kay *(1859) 7 HL Cas 750, p 759: Lord Chelmsford:*

Can it be permitted to a party who has procured a deception with a view to a particular end which has been attained by it to speculate on what might have been the result if there had been full communication of the facts?

Downs v Chappell [1997] 1 WLR 426, p 433C : 'The judge was wrong to ask how [the plaintiffs] would have acted if they had been told the truth' – Hobhouse LJ; *Re Imperial Mercantile Credit Association* (1869) LR 9 Eq 223n, p 226n: 'I do not think a Court of Equity is in the habit of considering that a falsehood is not to be looked at because, if the truth had been told, the same thing might have resulted.'

See, further, *Assicurazioni Generali v Arab Insurance* at fn 24; *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch), para 546; and *Parabola Investments Ltd v Browallia CAL Ltd* [2009] EWHC 901 (Comm), paras 104–107. In the latter case, Flaux J observed that Hobhouse LJ's dictum in *Downs v Chappell* did not mean that, if the claimant demonstrated that he would not have acted as he did if he had known the true position (namely that the profits were not as stated), he could not have relied on that as evidence of inducement. In *Dadourian*, Warren J described such a question as, 'strictly irrelevant although it may be of some assistance in testing whether there was inducement or not'.

would you have done, if you had been told the truth?' – is not the relevant (or possibly even a permitted) question. It is not, therefore, necessary for the representee to establish that he would have acted differently if he had known the truth. If it were necessary, a claimant who gave no thought to any representation, or did not understand it to have been made, might be entitled to recover[28] (at para 187).

However, the judge accepted an important distinction between contracts of insurance and non-insurance, as counsel for the defendant submitted, namely: In contracts of insurance, the insured has a duty of disclosure of all material facts and, when non-disclosure is relied on, no reliance on any statement has to be proved. In that context, the question 'what would you have done, if you had been told the truth?' is directly relevant, and the 'truth' constitutes everything that it is material for the insurer to know. However, in a non-insurance context, liability arises because of the falsity of the statement. The relevant test is 'what would have been done in the absence of the statement?', and a relevant question is, 'what would the representee have done, had he been given sufficient information, to dispel its inaccuracy?'.

3.4 INDUCEMENT AND CAUSATION

The authorities[29] have established that:

(a) A claimant who seeks to claim damages for misrepresentation must show that the representation in question played a 'real and substantial part' in inducing him to enter into the contract in question.
(b) However, it is not necessary for him to show that the representation was the sole inducement to his decision. It is sufficient for him to prove that the representation was <u>an</u> inducing cause that led him to act as he did; he need not prove that it was <u>the</u> inducing cause,[30] or that it played a decisive part.
(c) However, it would not be sufficient for him to show merely that he was supported or encouraged in reaching his decision by the representation in question.

There is a potential ambiguity in the expressions 'real and substantial part' (which is sufficient) and 'a decisive part' (which is unnecessary), in that the word 'part' does not of itself make clear whether: (a) it is necessary that the representation should have been a cause of the making of the relevant contract in the sense that, without it, the relevant contract would not have been made; or (b) it is sufficient that the representation was one of the several matters that led to the making of the decision

28 *BP Exploration Operating Co Ltd v Chevron Transport (Scotland)* [2002] 1 Lloyd's Rep 77, per Lord Millett:

A representee can say why he acted as he did. He can say that it was, inter alia, because of the representation. But he can only speculate on what he would have done if the representation had not been made. As a matter of English law, a representee must always be prepared to prove that the representation had an effect on his mind. But it is sufficient for him to prove that the representation was an inducing cause which led him to act as he did; he need not prove that it was the inducing cause.

29 As the judge in *RZB v RBS* explained (at paras 153, 160–163, 171, 174) referring to *Dadourian Group International Inc v Simms* [2009] 1 Lloyd's Rep 601, at paras 99 and 100, and the authorities cited in the preceding fns 24–28, above.

30 *BP Exploration Operating Co Ltd v Chevron Transport (Scotland)* [2002] 1 Lloyd's Rep 77, per Lord Millett.

to contract.[31] The difference between the two formulations may be critical when X enters into a contract in the light of several factors whose importance, or relative importance, to him is debatable. A similar ambiguity appears in relation to the expression that the representation must have been 'actively present' in the mind of the representee – which on its own would cover a spectrum from encouraging to sole cause of the representee entering into the contract.[32]

In this context, the judge in *RZB v RBS* said, it is important to remember, as the authorities show, that the representation must play a causative part in *inducing* the contract and that involves a 'but for' test. 'But for' means that unless the alleged cause (X) had come about the alleged result (Y) would not have occurred. The authorities show that inducement is, in essence, a question of causation, and that the misrepresentation must be an effective cause of the representee entering into the contract.[33] Thus, a defendant will be innocent of misrepresentation in two circumstances: (a) when what he represents is true, and (b) when he does not make any representation at all. So, the relevant question is not, 'what would a representee have done, if he had been told the truth', but, 'what would he have done, if no representation had been made to him at all'.

3.5 EXCEPTION CLAUSES AND ESTOPPEL

Commercial people invariably use in their contracts acknowledgments that no reliance will be made on representations made, or they use wider exemption clauses.

The CA, in ***E A Grimstead & Son Ltd v McGarrigan***,[34] held that there are, at least, two good reasons why the courts should not refuse to give effect to an acknowledgement of non-reliance in a commercial contract between experienced parties of equal bargaining power – *a fortiori*, where those parties have the benefit of professional advice.

First, it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs on the basis that the bargain between them can be found within the document that they have signed. They want to avoid the uncertainty of litigation based on allegations as to the content of oral discussions at pre-contractual meetings.

Second, it is reasonable to assume that the price to be paid reflects the commercial risk that each party – or, more usually, the purchaser – is willing to accept.

Chadwick LJ said (at para 29) that:

> In my view an acknowledgement of non-reliance, in the form which appears in clauses 2.5 and 8.1 in the present agreement, is capable of operating as an evidential estoppel. It is apt to prevent the party who has given the acknowledgement from asserting in subsequent litigation against the party to whom it has been given that it is not true. That seems to me to be a proper use of an acknowledgement of this nature, which, as Mr Justice Jacob pointed out in the *Thomas Witter* case, has become a common feature of professionally drawn commercial contracts.

31 See Warren J in *Dadourian*, ibid, paras 544–546.

32 *RZB v RBS*, op. cit. fn 29.

33 The conclusion is consistent with the decision of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501.

34 [1999] EWCA Civ 3029.

In ***Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd***,[35] it was held again by the CA that:

It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith* [1991] Ch 448, affirmed on appeal [1992] Ch 421 . . . A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation, if the necessary elements can be established.[36]

In ***Watford Electronics v Sanderson***,[37] a contract for the supply of certain equipment contained the following term: Clause 14. Entire Agreement:

The parties agree that these terms and conditions (together with any other terms and conditions expressly incorporated in the Contract) represent the entire agreement between the parties relating to the sale and purchase of the Equipment and that no statement or representations made by either party have been relied upon by the other in agreeing to enter into the Contract.

The issue before the CA was whether two other provisions, one excluding liability for consequential losses and the other limiting liability to the price, were unreasonable. For that purpose, it was necessary to decide what types of claim the two provisions related to. Chadwick LJ held that the second half of the clause could operate as an evidential estoppel, provided it satisfied the conditions laid down by the CA in *Lowe v Lombank*,[38] and that it was not 'in substance an exclusion clause to which section 3 of the Misrepresentation Act is applicable', as the judge had wrongly held.

It should be noted, in this connection, that, with regard to sale and purchase of ships, the new NSF 2012 (as will be seen under para 11, below) contains an 'Entire Agreement' clause (18) in which it is stated:

The written terms of this Agreement comprise the entire agreement between the Buyers and the Sellers in relation to the sale and purchase of the Vessel and supersede all previous agreements whether oral or written between the Parties in relation thereto.

Each of the parties acknowledges that in entering into this Agreement it has not relied on and shall have no right or remedy in respect of any statement, representation, assurance or warranty (whether or not made negligently) other than as is expressly set out in this Agreement.

35 [2006] 2 Lloyd's Rep 511, at para 57.

36 See *E A Grimstead & Son Ltd v McGarrigan* [1999] EWCA Civ 3029. See further *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] 2 Lloyd's Rep 581, at para 36, Aikens J held that parties who agree such a clause are agreeing that no representations were made by the claimant or, if any representations were made, then it was 'deemed' that they were not, affirmed by the CA [2009] 1 Lloyd's Rep 702.

37 [2001] EWCA Civ 317; see also *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] Lloyd's Rep Plus 63.

38 E.g. *Lowe v Lombank Ltd* [1960] 1 WLR 196 (CA): concerning a hire purchase of a car by a consumer, in which the court held it must be shown that: (a) the statement is clear and unambiguous; (b) the hirer meant it to be acted upon by the owners or, at any rate, so conducted himself that a reasonable man in the position of the owners would take the representation to be true and believe that it was meant that he should act upon it; (c) the owners in fact believed it to be true and were induced by such belief to act upon it.

Any terms implied into this Agreement by any applicable statute or law are hereby excluded to the extent that such exclusion can legally be made. Nothing in this Clause shall limit or exclude any liability for fraud.

The second sentence of this clause will operate as an evidential estoppel, as explained in *Watford*, above.

3.6 CURTAILMENT OF EXCEPTION CLAUSES BY S 3 OF THE MISREPRESENTATION ACT 1967

Section 3: Avoidance of provision excluding liability for misrepresentation.

If a contract contains a term which would exclude or restrict:

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.

For the interpretation of s 3, it is worth noting ***Cremdean Properties Ltd v Nash***,[39] where certain tender documents were alleged to contain representations in reliance on which the claimant submitted an offer as required by the tender. He sued the defendant for damages relying on misrepresentation in the tender documents. The defendant relied on a notice on the final page of the special conditions of sale that provided: (a) 'the particulars given were believed to be correct but their accuracy was not guaranteed and any error should not annul the sale or be grounds for compensation' and (b) that 'any intending purchaser must satisfy himself by inspection or otherwise as to the correctness of each of the statements contained in those particulars'.

Fox J (as he then was) held that, if there was a misrepresentation, a provision that sought to exclude or restrict liabilities or remedies arising from that misrepresentation was within the mischief of s 3, which would prohibit reliance on the notice. On appeal[40] by the defendant, Bridge LJ held that the clause under paragraph (b) did not amount even to a purported annulment of the existence of any representation embodied in the earlier parts of the document. Having done so, he said that he would:

. . . go further and say that if the ingenuity of the draftsman could devise language which would have that effect, I am extremely doubtful whether the court would allow it to operate so as to defeat section 3. Supposing the vendor included a clause which the purchaser was required, and did, agree to in some terms as 'notwithstanding any statement of fact included in these particulars the vendor shall be conclusively determined to have made no representation within the meaning of the Misrepresentation Act 1967', I should have thought that that was only a form of words, the intended and actual effect of which was to exclude or restrict liability, and I should not have thought that the courts would have been ready to allow such ingenuity in the form of language to defeat the plain purpose at which section 3 is aimed.

39 (1977) 241 EGLR 837.
40 [1977] 2 EGLR 80; (1977) 244 EG 547.

Scarman LJ agreed and added:

> . . . the case for the appellant does have an audacity and a simple logic which I confess I find attractive. It runs thus: 'a statement is not a representation unless it is also a statement that what is stated is true. If in context a statement contains no assertion express or implied that its content is accurate there is no representation . . . the Misrepresentation Act 1967 cannot apply to it'. Humpty Dumpty would have fallen for this argument. If we were to fall for it, the Misrepresentation Act would be dashed to pieces, which not all the King's lawyers could put together again.

He held that the notice, fairly construed, was:

> *[A] warning to the would-be purchaser to check the facts; that is to say, not to rely on [the representation]. It is because the statement contains the representation that the warning is given. Since the statement was false, there was a false representation; the Act therefore applies.*

In ***Thomas Witter Ltd v TBP Industries Ltd***,[41] Jacob J had to construe a clause by which a party acknowledged that he had not been induced to enter the agreement by any representation except those contained or referred to in a schedule. The judge held that the representation relied on was within the schedule, and that, even if the clause had exclusionary effect, it was neither fair nor reasonable.

In ***Government of Zanzibar v British Aerospace (Lancaster House) Ltd***,[42] a clause in a contract for the sale of a jet aircraft provided, inter alia, that the parties agree that all liabilities for and remedies in respect of any representations made are excluded save insofar as provided in this contract. Furthermore that the parties further agree that neither party has placed any reliance whatsoever on any representations, agreements, statements or understandings, whether oral or in writing, made prior to the date of this contract, other than those expressly incorporated or recited in this contract. The court construed the term that negates a reliance, which in fact existed, as a term excluding liability to which the representor would, otherwise, be subject by reason of the misrepresentation. If that were wrong, it would mean that s 3 could always be defeated by including an appropriate non-reliance clause in the contract, however unreasonable that might be.

Sir Christopher Clarke, in ***RZB V RBS***, stated (at paras 310 and 311) that:

> Everything must depend on the facts. In some cases the effect of the clause will be to show that what might otherwise have been a representation of fact to be relied on is no more than a statement of belief, or of opinion, or a statement of what the maker has been told, or a statement of a very limited character.

Such clauses cannot limit or exclude liability for fraud. In ***Food Co UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd***,[43] it was held that: What statements were covered by a non-reliance clause was a question of construction of the clause. That was subject to the important principles that, as a matter of public policy, a contracting party could not exclude liability for his own fraud; and if he wished to exclude liability for the fraud of his agent he must do so in clear and

41 [1996] 2 All ER 573.
42 [2000] 1 WLR 2333.
43 [2010] EWHC 358 (Ch).

unmistakable terms on the face of the contract.[44] A non-reliance clause could give rise to both an evidential estoppel and also an estoppel by contract.[45] The effect of the non-reliance clause was that T were precluded from raising any claim for non-fraudulent misrepresentation, except insofar as the claim arose out of written replies given by H's solicitors to T's solicitors. The clause fell within the UCTA 1977 s 8 and as such had to satisfy the test of reasonableness.[46]

In ***Derry v Peek***,[47] the clause satisfied the test of reasonableness, and there was no substantial imbalance of bargaining power between the parties. The subjective state of mind of the representor was crucial in deciding whether a representation was fraudulently made. It was not enough that, objectively viewed, a prediction would be understood by the representee as implicitly representing that the maker of the prediction had reasonable grounds for making the prediction. It was also necessary to show that the representor understood the representation in that sense. It was not enough to establish lack of reasonable grounds for a belief in order to prove the necessary ingredient of dishonesty.

3.7 REMEDIES UNDER THE MISREPRESENTATION ACT

By s 2(1), where a person has entered into a contract after a misrepresentation has been made to him by the other party and as a result he has suffered loss, the person making the misrepresentation would be liable in damages, as if the misrepresentation were made fraudulently, unless he proves that he had reasonable ground[48] for believing, and did believe up to the time the contract was made, that the facts represented were true. Where there is room for exercise of judgment by the other party, a misrepresentation ought not to be too easily found. The test is whether the representation was substantially correct. For a representation to have induced the contract, there must be material contribution to the decision made by the other party, not just mere support or encouragement[49] (as seen under para 3.4, above).

In order for the defence under s 2(1) to apply, the representor's belief must relate to the truth of the facts that the court decides were being represented, not to what the representor thought he was saying. That principle may, on occasion, give rise to difficulties of application, given that some statements of fact ('the music was very loud'), may reasonably be believed to be true or false by different persons presented with the same circumstances ('that is not what I would call very loud').[50]

44 *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349.

45 *Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511.

46 *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290, [2010] QB 86.

47 (1889) LR 14 App Cas 337.

48 The absolute obligation, imposed under the Act, not to state facts the truth of which the representor could not show he had reasonable grounds for believing in was stressed in *Howard Marine & Dredging Co Ltd v Ogden & Sons (Excavations) Ltd* [1978] 2 WLR 515. The capacity of barges was misrepresented by the barge-owner before a charterparty was concluded. The charterer had a right in damages under the Act.

49 *Royscot Trust v Rogerson* [1991] 2 QB 297 (CA); *Avon Insurance v Swire Fraser* [2000] 1 All ER 573; see, further, fns 20, 21, 23–25, above.

50 Per Clarke J in *RZB v RBS* [2011] 1 Lloyd's Rep 123, para 330.

In the context of sale of ships, for example, an issue may arise concerning the effect of a representation made by the seller's agent that the vessel is in class. Would that be a representation as to the condition of the vessel? It was held by Phillips J, in ***The Morning Watch***,[51] that such a representation amounted to no more than a statement of the classification status of the vessel and did not constitute any implicit representation by the maker as to the actual condition of the vessel. (The class records are inspected by the buyer anyway at the inspection stage.)

Under s 2(2) of the Misrepresentation Act (MA) 1967, the innocent party would have a right to rescission in lieu of damages, if he entered into the contract in reliance upon an innocent or negligent misrepresentation. The right to rescission may be lost if the innocent party, upon learning of the misrepresentation, declares to perform the contract, or actually performs some act from which such an intention can be inferred, or where he fails to rescind for a considerable time after discovering the falsity.

Apart from cases of fraudulent misrepresentation, the court is given power by s 2(2) to grant damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused if the contract were upheld, as well as to the loss that rescission would cause to the other party. Where the misrepresentation was fraudulent and, as a result of it, the innocent party entered into the contract, the remedy would be both damages and rescission. The principle of measure of damages in such a case is that the claimant must be put in the same position he would have been in, had the tort not been committed. In other words, had the fraudulent misrepresentation not been made, the particular contract would not have been entered into, as was held on the facts of ***The Siben (No 2)***.[52] The recoverable loss is the loss directly caused by the misrepresentation, whether it was foreseeable or not (being subject to mitigation).[53]

In the event that someone other than the contracting party or his agent makes the misrepresentation the innocent party will not be able to rely on the statutory protection afforded by the above MA 1967. His remedy, however, will lie at common law in damages, if he can establish that the person who made the misrepresentation owed a duty of care to him by reason of a special relationship that existed between them. For a special relationship to exist, in accordance with the negligent misstatement principle, under ***Hedley Byrne v Heller & Partners***,[54] three requirements must be fulfilled: (a) that the innocent party relied on the skill and judgment of the representor that he would make careful inquiries; (b) that the representor knew, or ought reasonably to have known, that the innocent party was relying on his advice or representation; and (c) that it was reasonable in the circumstances for the innocent party to rely on the representor.

51 [1990] 1 Lloyd's Rep 547; *Kellogg Brown & Root Inc v Concordia Maritime AG* [2006] EWHC 3358, [2006] All ER 349 concerned whether a guarantor was liable for statements made by the seller of two old ships (25 years old) sold for conversion to the buyer under the NSF, and one of the issues was what the meaning of 'original plate thickness' was in the Petrobras specifications.

52 *The Siben (No 2)* [1996] 1 Lloyd's Rep 35.

53 *Smith New Court Securities v Citibank* [1997] AC 254 (HL).

54 [1963] 1 Lloyd's Rep 485 (HL); see further *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811; [2007] 2 Lloyd's Rep 449: A claim in misrepresentation and negligence by an investment fund against the arranger of a syndicated investment failed because the arranger did not make the implied representations or owe the duty of care alleged, and because the claim was barred by the terms of a subsequent bondholders' agreement.

Alternatively, he may sue the other party on the ground of the tort of deceit. In ***The Kriti Palm***,[55] the judge held, at first instance, that the representation 'the "fuel specification certificate was and remained a good and valid certificate" was a false representation made by Mr Lucas who was reckless as to its truth'. But he was overruled by the CA, which distinguished deceit from mere fallibility and held that there was no deceit, but more muddle and fallibility than fraud.

3.8 BROKERS BE AWARE TO MANAGE YOUR RISKS

Brokers play a significant role in the negotiations and will use their skills and persuasion to conclude a contract on best terms for their principals. They must be aware, however, of their potential exposure to liability for misrepresentation (as seen above), if they overstep the mark in their excitement to conclude the contract and induce the other party by false statements. A broker owes a duty of care to his principal. Unless a special relationship of the *Hedley Byrne* type exists between the broker and the third party, the broker does not owe a duty of care to the latter. However, in the event that the buyer is induced to enter into the contract, having relied on a misrepresentation made by the seller's broker about the ship, the broker's principal will suffer loss if the buyer chooses to rescind the contract or claim damages. The principal could claim damages against his broker to recover his loss, if the latter, without the authority of his principal, gave untrue information about the ship in order to induce the contract.

If the broker is a sole broker for both seller and buyer, he will be in a precarious situation of conflict of interest, as he will owe a duty of care to both principals. In such circumstances, the principles applicable to insurance brokers would apply.[56] It is beyond the scope of this book to unravel these issues here.

Another issue that is of importance to brokers' liability is liability arising from a broker having exceeded the limits of his authority. Agency principles have been examined elsewhere in this book,[57] but it is important to note, in this context, the parameters of authority as set out by Lord Goff in ***The Ocean Frost***.[58]

Briefly, the buyers (the plaintiffs) had appointed a broker to negotiate the purchase of *The Ocean Frost* from the sellers, the defendants, on the basis that the ship was to be chartered back to the defendants. The chartering manager of the sellers accepted a bribe from the broker and told him that he had authority to complete the agreement for the sale with a 3-year charter. The sale was completed and the sellers became the charterers. Believing that they had a 12-month charter, they redelivered the ship at the end of the period. The plaintiffs (owners) claimed breach of contract for early redelivery.

55 *AIC Limited v ITS Testing Service (UK) Limited (The Kriti Palm)* [2005] EWHC 2122 (Comm), Cresswel J; [2007] 1 Lloyd's Rep 555 (CA).

56 The court has condemned a broker for acting in a dual capacity in a manner contrary to the interests of his principal, in this case the assured: *Vesta v Butcher* [1989] 1 Lloyd's Rep 331 (HL); see, also, *Anglo-African Merchants v Bayley* [1970] 1 QB 311 and *Eagle Star Insurance Co v Spratt* [1971] 2 Lloyd's Rep 116.

57 See Ch 5, above.

58 *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717; see, further, Ch 12, 'Employers' liability for wrongful acts of employees'.

It was held that the chartering manager exceeded his authority; he did not have any general authority to enter into a 3-year charterparty and he could not, in the absence of any representation by the defendants as to his authority, reasonably believe he had specific authority to notify the other contracting party that the defendants' consent had been obtained and thereafter to complete the agreement. Accordingly, the defendants were not vicariously liable for the chartering manager's deceit.

The peculiar fact in this case was that the chartering manager of the seller had a senior position, vice-president, in the seller's company. However, it was the buyer's broker who offered the bribe, which made the court decide against the buyer (owner).

In ***The Tatra***,[59] Norwegian shipbrokers acted as agents for and on behalf of S, who owned the vessel and entered into a contract by telex and telephone for the sale of the vessel. The contract was made with a firm of Swedish shipbrokers who purported to act on behalf of D1 as purchasers and D2 as guarantor. S claimed a declaration that both D1 and D2 were bound by the contract. D1 argued that no binding contract was concluded, and that the Swedish brokers had no authority to contract on their behalf. S replied that D1 had ratified, or were estopped from denying, the Swedish brokers' authority to contract on their behalf.

The court held that no actual express authority was given by D1 to the Swedish brokers. The directors and shareholders of the company of D1 did not intend to enter into a contract to purchase the vessel, nor did they even consider ratifying the Swedish brokers' unauthorised acts. D1 were not estopped from denying the brokers' authority. No estoppel by silence arose in circumstances where D1 did not know that the brokers were purporting to act on their behalf in contractual negotiations.

The Swedish shipbrokers would, presumably, be liable directly to S in the tort of deceit.

4 ON THE MAKING OF A BINDING CONTRACT AND RISK MANAGEMENT

4.1 EXPRESS YOUR INTENTION CLEARLY

The negotiations stage is the stage during which the parties must exercise care and prevent possible risks, either of not having a firm agreement, or of being found bound to an agreement to which they did not yet wish to be bound.

Generally, in all contractual transactions, the court looks for a firm offer and an unconditional acceptance in determining whether or not a binding contract exists between the parties. It examines the intention of the parties from what they said and the surrounding circumstances.

The striking feature of sale and purchase transactions is that sometimes the brokers may have expressed themselves as if there was a final agreement but, upon true construction of their exchanges, it may transpire that either one or both parties did not objectively have such an intention. For example, they may not have completed

59 *Arctic Shipping Co Ltd v Mobilia AB (The Tatra)* [1990] 2 Lloyd's Rep 51.

the agreement because they have not agreed some details, or the terms may not have been sufficiently certain. If parts of the agreement, which are considered important by the parties, are left for further negotiations, or are so ambiguous that the ambiguity cannot be resolved by reference to the rest of the contract, the court or arbitrator will not complete an incomplete bargain by adding what might be considered reasonable. Conversely, if both parties believe that there is an agreement, for example when they have had previous dealings and have left out what would be considered by them as familiar gaps, the court will not destroy a commercial bargain.

The general principles to be applied in deciding whether there has been a concluded contract, as derived mainly from the judgments of Bingham and Lloyd LJJ in ***Pagnan SPA v Feed Products Ltd***,[60] were summarised by Cresswell J, in ***The Bay Ridge***:[61]

(i) The court's task is to review what the parties said and did and from that material to infer whether the parties' objective intentions, as expressed to each other, were to enter into a mutually binding contract. The court is not concerned with what the parties may subjectively have intended.
(ii) There will be some cases, where continued negotiations after a contract has, allegedly, been made will lead to the inference that the parties never in truth intended to bind themselves.
(iii) Where the parties have not reached agreement on terms, which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms.
(iv) The parties may by their words and conduct make it clear that they do intend to be bound, even though there are other terms yet to be agreed, even terms which may often, or usually, be agreed before a binding contract is made. The parties are to be regarded as masters of their contractual fate. It is their intentions which matter and to which the court must strive to give effect.
(v) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.

The courts recognise that business terminology and practices may differ from one market to the next and also the efficacy of the maritime variant of the well-known 'subject to contract'. The expression 'subject to details' enables owners and charterers to know where they are in negotiations and to regulate their business accordingly. The assumption of those in the shipping trade that there is no binding agreement, at that stage, ought to be respected.

60 [1987] 2 Lloyd's Rep 601 (CA), pp 610, 611, 619. With regard to relevant principles of the modern approach to interpretation of contracts, see further leading decisions: *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, per Lord Hoffmann; *The Tychy* [2001] 2 Lloyd's Rep 403, per Lord Phillips MR; *BCCI v Ali* [2002] 1 AC 251, per Lords Hoffmann and Bingham; *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] UKHL 54, per Lord Steyn; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, per Lord Hoffmann; *The Rainy Sky* [2011] UKSC 50; [2012] 1 Lloyd's Rep 34, per Lord Clarke. There has been a shift from a literal method of interpretation towards a purposive approach taking into account the whole contractual matrix.

61 [1999] 2 Lloyd's Rep 227, p 240, see the facts under para 4.4, below. This case is very important from the point of view of risk management, in terms of choosing an experienced broker for the negotiations and a good solicitor for the litigation, if things have gone wrong. The judge's comments in this respect are very interesting.

4.2 WHAT DO 'SUBJECTS' MEAN?

Where the main terms have been agreed, but there are subsequent details to be discussed, there may be a non-legally binding agreement until those details, if they are important details, have been agreed upon. It would, at best, be a conditional agreement.[62]

The phrase, commonly used, 'otherwise NSF to be mutually agreed and to incorporate agreed terms/conditions', was construed in the context of ***The Bay Ridge***.[63] The buyer's opening offer was expressed to be a firm offer in a sense that it was based on main terms, but subject to agreement of further terms and conditions.

The words for construction were a combination of 'approvals' and 'subjects'. Briefly, the sellers and the buyers negotiated the sale of this ship through their respective brokers. The exchanges and telephone communications culminated in the recap telex. The buyers alleged that one of the 'subjects' was 'sellers warrant vessel approved by all major oil companies', which the sellers disputed.

There were also two further 'subjects': 'buyers' inspection and approval of classification records' and 'buyers' inspection and approval of on-board condition survey'. In addition, there was a statement in the recap concerning 'buyers' right to place two representatives on board *after conclusion/confirmation of sale by telex/fax*'.

The first issue was whether there was a binding agreement (another issue was whether the sellers' brokers had authority).

Cresswell J concluded that there was no binding agreement, on the following grounds:[64]

> There was a good commercial sense in seeking to agree main terms first. If main terms could not be agreed there was no point in going further. If main terms were agreed the parties would, thereafter, proceed to seek to agree further terms and conditions (by way of amendments, additions and deletions to NSF-87). There would be no concluded agreement until all further terms and conditions had been agreed . . .
>
> The recap at the end of the day recorded what had been agreed to date as to certain main terms. There was good commercial sense in recording the position reached at the end of the day, but the objective intentions of the parties were that negotiations would continue until all further terms and conditions had been agreed . . .
>
> The words in the recap fax 'otherwise per NSF-87 mutually agreed . . .' meant in context 'otherwise per NSF-87 to be mutually agreed . . .'
>
> The words, 'We are pleased to confirm the sale of the above vessel as follows: . . .' must be construed in context. Amendments, additions and deletions to NSF-87 remained to be agreed. The fact that there was no concluded contract of sale at the end of the day . . . is confirmed by the words . . . of the recap, 'after conclusion/confirmation of sale by telex/fax' . . .
>
> The common understanding was that this would take place after 28 June. All oral exchanges between the brokers on 28 June proceeded on the basis that main terms would be agreed first (and embodied in a recap to the extent that the same were agreed) and that negotiations would follow as to appropriate amendments, additions and deletions to NSF-87. Thus, the position reflected in para 8 of Oceanbulk's opening offer ('Otherwise NSF-87 to be mutually agreed

62 An email recapping the terms of an agreement to charter a vessel had not contained or evidenced a binding contract or arbitration agreement, because there had been no consensus between the parties when the email was sent. Eder J set the arbitrators' award aside in *The Pacific Champ* [2013] EWHC 470 (Comm) and held that the fixture for the sub-charter was subject to review of the bareboat charterparty to ensure that the cargo and route were permitted, which had been communicated to the other party during the fixing negotiations.

63 *Manatee Towing Co Ltd v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 Lloyd's Rep 227.

64 Ibid, at pp 242–243.

and to incorporate agreed term/conditions') continued throughout. At no stage did these inexperienced brokers consider the detailed provisions of NSF-87. This was to be left to a later stage . . .

On June 28 the parties sought to establish agreement on main terms. There was no intention to create legal relations at the time of the recap. The question of oil majors' approval (which had been accorded the status of a main term by Oceanbulk) was still being negotiated at the end of the day. The mutual agreement of amendments, additions and deletions to NSF-87 had yet to take place.

He further held that:

. . . without agreement of the details, the right of buyers to place divers for the underwater inspection would be unworkable. Since the first issue was decided in favour of the sellers, there was no need to consider the remaining issues about the brokers' authority and the possibility of breach of warranty of authority.

If the recap telex is made 'subject to contract', it is clearly understood that there is no binding agreement, yet. Frequently, however, the parties use the expression 'subject details' or 'subrecon' and other similar expressions with which both chartering and sale/purchase brokers are familiar. The question that has arisen in quite a number of chartering and sale of ship cases is whether or not the parties have made their intention to be bound to the contract clear to each other.

The general principle was stated in ***Pagnan SPA v Feed Products Ltd***,[65] in which Lloyd LJ (as he then was) said:

It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge, 'the masters of their contractual fate'. Of course, the more important the term is, the less likely it is that the parties will have left it for the future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later.[66]

He added that the distinction between essential and non-essential terms was misleading.

Bingham J (as he then was) had held, at first instance (endorsed on appeal), that the court's task is to review what the parties said and did and, from that material, to infer whether the parties' objective intentions, as expressed to each other, were to enter into a mutually binding contract. The court was not concerned with what the parties subjectively had intended.

Later, Langley J held, in ***Thoresen & Co (Bangkok) Ltd v Fathom Marine Co Ltd***,[67] that the words 'subject details' had a recognised meaning when used in the context of the sale of ships: there was no binding agreement until all the details or the proposed formal agreement had been agreed.

The factual circumstances of the following examples illustrate how the principle has been applied by the courts. More importantly, the cases illustrate how careful the parties and their brokers must be at the negotiation stage of either the sale or the chartering of a ship in recording their agreement precisely and in expressing in clear terms whether or not they wish, at that stage, to be bound by a final contract.

65 [1987] 2 Lloyd's Rep 601 (CA), p 610.

66 Ibid, p 619.

67 [2004] 1 Lloyd's Rep 622: Recap email provided: 'otherwise basis Saleform 93 sub-details suitably amended to reflect also the above terms'.

In ***The Gladys (No 2)***,[68] the buyer's broker, acting on behalf of the Indian Government, indicated acceptance of a firm offer for the purchase of this vessel for scrap. The understanding was that the broker would be supplied with an MOA on the NSF, blank as to details of the vessel, the price and other conditions requiring completion, and, without additional clauses added, such blanks and clauses were left for the broker to draft before final agreement and signature. The buyers later withdrew. The sellers claimed that there was a binding contract and, by appointing an arbitrator as provided by the contract, claimed a declaration to that effect and damages for breach, while the buyers disputed the existence of an agreement and, consequently, of the validity of the arbitration agreement. The issue for the court was the construction of the contemporary documents and correspondence between the parties. The court came to the conclusion – having examined the parties' previous dealings – that, on this occasion, no final agreement had been reached. It further held that it was clear from the facts that an oral agreement had been reached only in terms that plainly contemplated that there were further terms to be agreed, albeit only matters of detail, before a binding contract was made.

An important point to bear in mind, which arose during the negotiations in this case, was that, on the basis of previous dealings between the Indian Government (which was determining what vessels to buy through a committee) and the owners (sellers) of the vessels, some deals were indicated by the committee to be 'subject of a firm offer' and others 'subrecon'. With respect to this particular vessel, there was an exchange of telexes from which the court inferred that the parties had not come to a firm agreement about the price, date of delivery or whether the terms would be on the basis of the sale of previous ships. Thus, the deal was on the basis of 'subrecon', despite the brokers' failure to spell this out in the telex. Just before the final agreement was communicated to the committee, the latter withdrew because, in the meantime, the committee had found out that the ship was a reefer, and reefers were not within the purchasing policy of the Indian Government. Although this might have been a matter of detail, particularly with regard to the purchase of a ship for scrap, the buyer was entitled to make its inquiries to check whether the information previously supplied proved to be significantly in error.[69]

In ***The Junior K***,[70] which concerned negotiations to fix a charterparty, these were concluded by the despatch and receipt of the recap telex in which it was stated that the fixture was 'sub details'. The terms agreed were set out ending with the words 'sub dets Gencon CP', meaning subject to the details of a Gencon charterparty standard form, the details and alternative provisions of which require exercise of choice by the parties.

The principal issue was whether there was a binding contract. It was held that no contract had been concluded in this case at that stage, as the parties had not made a positive selection of the desired alternative provisions of the form and no discussion had taken place about these options. Against this background, it was clear that the words used conveyed that there was a fixture conditional upon agreement being reached about the details of the Gencon form. Steyn J stated:

68 [1994] 2 Lloyd's Rep 402.

69 Ibid, p 409.

70 *Star Steamship Society v Beogradska Plovidba (The Junior K)* [1988] 2 Lloyd's Rep 583.

The expression 'subject to details' enables owners and charterers to know where they are in negotiations and to regulate their business accordingly. It is a device which tends to avoid disputes and the assumption of those in the shipping trade, that it is effective to make clear that there is no binding agreement at that stage, ought to be respected.[71]

In the following decisions, the term 'subject to details' was construed in the same way.

In ***The CPC Galia***,[72] it was also held that the expression 'subject to details' is a well-known term and, until the subsidiary terms and the details had been agreed, no contract existed. The intention was that a formal contract was to be drawn up on the Conline booking note form, and there was to be no concluded contract until agreement had been reached on the detailed provisions of the form. The additional words 'logical amendments' were intended to be illustrative and/or supplemental to 'subject details' and not restrictive of them. In order for the parties to restrict the expression, as interpreted in *Junior K*, any words of limitation had to be clear in their content and context.[73]

In ***Granit SA v Benship International Inc***,[74] the dispute concerned the fixing of a charterparty between C and S.

C sent a telex proposing terms including 'otherwise Synacomex terms'. There was a telephone conversation whose terms were disputed. S, who withdrew from the fixture, claimed to have agreed only 'subject details', but C denied that there had been any such qualification and argued that it was S's responsibility to have the vessel accepted by the receivers.

It was held that there was a binding contract, as there was no express mention of the words 'subject details' in the telephone conversation; the words concerning S's responsibility were consistent with the expectations of the parties at the time and were expressly agreed; although there were blanks in the Synacomex form, which needed to be filled in, and a number of clauses in which specific choices would have to be made, it was not suggested that these would have presented any difficulty. The court would be slow not to uphold what was intended to be a binding bargain just because there were minor matters, which would involve no difficulty at all to iron them out once the formal charterparty was drawn up.

Different words were used in ***Messina v POL***:[75] Messina (the claimants) were saying that they made a conditional agreement with POL under which POL agreed to sell to Messina four Polish ro–ro vessels, and that the deal was subject to two

71 Ibid, p 588: the judge referred to previous authorities: *The Solholt* [1981] 2 Lloyd's Rep 574 and *The Nissos Samos* [1985] 1 Lloyd's Rep 378, in which there had been some observations, albeit that they did not form part of the *ratio decidendi*, about the meaning of this expression to the effect that there was no contract until the subsidiary terms were agreed. In the USA, however, the judge commented, the details were regarded as unimportant, if the parties can go back to the printed form. However, it was observed that there has been no uniform approach by the judiciary and arbitrators there.

72 *CPC Consolidated Pool Carriers GmbH v CTM CIA Transmediterreanea SA (The CPC Gallia)* [1994] 1 Lloyd's Rep 68, p 74 see also *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605.

73 Cf. *The Mercedes Envoy* [1995] 2 Lloyd's Rep 559; where the fixture telex contained 'subject to logical alterations', and there were other 'subjects' that had been lifted, these words did not prevent a binding contract from being formed.

74 [1994] 1 Lloyd's Rep 526.

75 *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep 567, and, in particular, pp 578–581.

suspensory conditions, namely: 'subject to approval of directors of the Polish shipping company' and 'subject sellers obtaining export licence with 30 days after signing'. The sales did not take place, and Messina claimed damages for breach of contract.

The agreement was subject to other 'subjects'. Clarke J (as he then was) held:

> The expression 'outright and definite sale for all the ships subject Italian import licence only' did not imply there were no other subjects including subjects on the seller's side. The natural conclusion from examination of the various exchanges was that a binding agreement would be drawn up at the stage of the MOA and not earlier. All the objective indications were that there was not to be a binding agreement until 'appropriate amendments' to the NSF were agreed, as the deal was subject to that.

This was supported by the fact that the NSF contained 15 printed clauses, many of which have gaps that had to be filled in. In particular, he stated:[76]

> These negotiations were approached in the usual way. There were exchanges between the brokers during which different terms were agreed in principle at different times. Once all the terms were agreed, it was contemplated that the board [of the sellers] would give approval and that an MOA would be drawn up setting out all of the agreed terms. I would not expect the parties to have intended that there be a legally binding agreement until then. That conclusion seems to me to be borne out by the terms of the NSF condition, namely that the terms were to be subject to 'appropriate amendments to be mutually agreed'.

Thus, in this case, the facts that determined that there was no binding agreement were that the NSF was subject to 'appropriate amendments', and not the fact that the form had not been signed, which in itself would not be a reason to hold that there was no agreement.[77]

The case history in this area demonstrates that the words 'subject to' can mean different things in different contexts; they may incorporate a term of the contract, or may prevent a contract arising. For example, the words 'subject to superficial inspection' were held, in ***The Merak***,[78] not to negative contractual intent; and 'subject to satisfactory survey' was commented on by Lord Denning MR in the same case to mean that there was an implied obligation on the seller to permit a survey and on the buyer to make it; the buyer would only be excused if the surveyor's report was unsatisfactory.[79]

4.3 THE EFFECT OF NON-SIGNING OF A FORMAL DOCUMENT UPON THE VALIDITY OF THE CONTRACT

Sometimes, an agreement may not be binding until a formal contract has been drawn up, but this is dependent on the interpretation of the various exchanges between the parties with regard to negotiating the terms of the contract, whether this be a charterparty or a sale and purchase. In ***Golden Ocean Group Ltd v Salgaocar***

76 Ibid, pp 578, 579.

77 See *The Blankenstein* [1985] 1 Lloyd's Rep 93 and *The Great Marine (No 2)* [1991] 1 Lloyd's Rep 421 (CA), above.

78 [1976] 2 Lloyd's Rep 250.

79 He doubted the correctness of the decision in *Astra Trust v Adams* [1969] 1 Lloyd's Rep 81, where it had been held that there was no binding contract.

Mining Industries Pvt Ltd,[80] the CA (Rix and Tomlinson LJJ and Sir Mark Waller) held: Subject to the requirement of signature, there was no objection in principle to a reference to a sequence of negotiating emails or other documents of the sort that was commonplace in ship chartering and ship sale and purchase, in order to identify a contract of guarantee. If there was said to have been an agreement in writing, the court was entitled to look at the documents that were said to constitute the agreement, however many there might be.[81] Although the parties contemplated that the charterparty and guarantee would be incorporated in a formal written document, their terms became binding without execution of that document.[82] The situation was distinguishable from the well-understood position that obtained when negotiations were made subject to contract.[83] No one would suggest that the charterparty did not become binding when the details of the MOA were finally agreed. To hold that the owners and charterers were not bound until the execution of a formal charterparty would frustrate their expectations.

The CA further held (approving the conclusion of the judge) that it would be a serious blot on English commercial law if a party could avoid liability because its obligation was to be found written in two documents rather than one. If the parties do not intend to have a binding contract, it is important to use phrases such as 'subject to contract', to make it clear to the court and each other that they did not intend to be bound by a firm contract at that stage.

There was also an issue about the effect of a name signing the relevant email. The court held that there was no indication that the name of the broker on the email was not intended as a signature authenticating the document; it was a sufficient authentication. The signature was not just the signature of a communication but was known and intended to be effective to bring into being the charterparty and guarantee, although the email, in itself, was not the contract of guarantee.

In ***The Blankenstein***,[84] Goff LJ (as he then was) had held:

> . . . the court has to decide on the construction of the relevant documents, considered in the light of the surrounding circumstances, whether it was the intention of the parties that the negotiations were not to have contractual force until a formal document was signed.

In this case the buyer's brokers entered into negotiations with the sellers for the purchase of three vessels, after which a contract was concluded containing all terms of the sale including the price of the vessels. The only detail that was left for a later stage was the name of the purchasing company, which was to be nominated in due course.

An MOA was drawn up on the NSF for and on behalf of the buyer yet to be nominated. The buyer was required to pay a deposit at 10 per cent of the contract price. By cl 13 of the agreement, the sellers had a right to cancel the contract and to keep the deposit if the purchase did not go through. The MOA was not signed. When

80 [2012] EWCA Civ 265; [2012] 1 Lloyd's Rep 542.
81 Ibid, at paras 21–22, 29.
82 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 Lloyd's Rep 546.
83 See para 4.2.
84 [1985] 1 Lloyd's Rep 93 at 104 (CA).

the buyer's company was nominated, a new MOA was drawn up. By the cancelling date the agreement was still not signed and no deposit had been paid. The sellers elected to treat the contract as repudiated by the buyers, claimed damages and retained the deposit.

It was held that there was a binding contract between the parties, irrespective of the fact that the MOA had not been signed. Fox LJ said:

> I see nothing in the present case to lead me to the conclusion that the parties contemplated the execution of the MOA as a prerequisite to the conclusion of a contract. That they contemplated and indeed agreed upon the execution of a written memorandum I accept. But that, of itself, is not conclusive. It is open to parties to agree to execute a formal document incorporating terms, which they have previously agreed. That is a binding contract. In the present case, on 8 July all the terms of the sale were agreed. And, it seems to me that all the indications are that they were not intended to be subject to the execution of the memorandum.[85]

Similarly, in ***The Great Marine (No 2)***,[86] the sale was confirmed by a recap telex, which was not made subject to signing of the MOA. The price was agreed and the contract was to incorporate the terms of the standard form NSF 1987 in the MOA. The vessel was to be delivered on completion of her then voyage, but was delivered outside the agreed period. The buyers claimed damages for breach of contract. One of the issues for the judge was whether a binding agreement had been reached upon the exchange of telexes.

It was held that at the time of the recap telex the parties were *ad idem* and, having manifested an intention to create binding legal relations, an oral agreement had been reached. The fact that the terms of the standard form of agreement were to be incorporated into the contract did not prevent a binding agreement being reached. The signing of the form was not a condition precedent to the contract. The buyers were entitled to insist on delivery of the vessel at the requisite time.

It is interesting to note that the new NSF 2012, under cl 2, provides that the deposit shall be lodged by the buyer within 3 banking days from signature and exchange of the MOA. This may give rise to problems in practice, in terms of the timing of such arrangements, but co-operation between the parties is expected by the draftsman of the form.

4.4 THE EFFECT OF 'BUYER TO BE NOMINATED'

Usually, a buyer has to form the corporate vehicle by which the ship can be bought. A company may already exist for this purpose, but often, when an opportunity arises for the purchase of a ship, a buyer may not yet be certain about the outcome of negotiations. Thus, the buying interests may not wish to incur the expense of incorporating a company until agreement has been reached. In such circumstances, the contract will permit the subsequent nomination of the buyer, whereupon the contract between the original parties will be novated. The nominated company will enter the contract in substitution for the original buyer. By the method of novation,

85 [1985] 1 Lloyd's Rep 93, p 97.
86 [1990] 2 Lloyd's Rep 250 (1st inst).

all contractual rights and obligations of the original buyer are transferred to the nominated one, and the original buyer is discharged. Novation, however, requires formal consents to be obtained by the sellers and the novated company. The sellers, in addition, may require a specific time by which the nomination can be made and a guarantee to be given by the original buyer that the substituted buyer will perform. The following two cases highlight problems that can arise with novation.

The Blankenstein[87]

The sellers entrusted the task of selling their three vessels, *The Blankenstein*, *The Bartenstein* and *The Birkenstein*, to their broker Mr Nebelsiek, while the broker of intending buyers was Mr Panas. Following negotiations between the brokers, a telex was sent on 4 July 1977, containing what was described as an official firm offer for all three vessels at $2 million. The offer was made on behalf of Messrs Raftopoulos and/or for company or companies to be nominated by them in due course.

On 8 July 1977, a concluded contract was reached in which all the terms and conditions of the sale and the price of $2,365,000 were agreed, save for the name of the purchasing company or companies, which had yet to be disclosed.

There was a further exchange of telexes between the brokers and, on 13 July 1977, an MOA was drawn up between the sellers and the buyers, Raftopoulos, for and on behalf of companies still to be nominated. The memorandum was on the NSF and provided that the buyers were to pay a deposit of 10 per cent of the purchase money on signing the contract. By cl 13, it was provided, inter alia, that: 'Should the purchase money not be paid . . . the sellers have the right to cancel this contract in which the amount deposited shall be forfeited to the sellers.' The memorandum was not signed by the Raftopoulos brothers or by any company or other person nominated by them.

On 1 August 1977, Mr Panas sent another telex to Mr Nebelsiek in which he stated that the buyers nominated as purchasing company Damon Compania Naviera SA, and requested a new MOA to be issued in which the buyers would be Damon. However, at that time, the Raftopoulos brothers had not acquired the shares in Damon, and it was not until after the nomination that this occurred. The new MOA, recording Damon as buyers, was sent to the buyer's broker but the agreement was not signed nor was the deposit paid by the time required. The sellers withdrew from the contract, reserving all their rights, and claimed damages against Damon, which the arbitrator awarded stating a special case for the court. Damon challenged the award on the ground that the purported novation was never ratified and was ineffectual.

The lower court and the CA decided that there was an agreement of which payment of the deposit was a fundamental term. Although the Raftopoulos brothers became directors of the company after the nomination, it was highly likely that, at the time of the nomination, they had authority to make the nomination. It was always understood, Fox LJ said, that the Raftopoulos brothers were not buying the ships in their own name, but that they would eventually nominate a company. However, the contract could not be forced on Damon without its agreement. The issue was whether

87 *Damon Compania Naviera v Hapag-Lloyd International SA (The Blankenstein)* [1985] 1 Lloyd's Rep 93.

Damon accepted such nomination between the time of the nomination and the repudiation of contract. The Lord Justices accepted that, on the evidence, there was acceptance of the nomination by Damon on the footing that the nomination was ratified by two subsequent telexes sent by one of the brothers (with full power to do so) on behalf of Damon. In any event, on the facts, either the original nomination was authorised, or it was ratified afterwards.

By contrast, in the following case the nomination was ineffectual and the original buyers failed to show that the nomination was validly accepted by the nominated company.

The Action[88]

Briefly, by an MOA on the NSF, Action Maritime, as sellers, and Kasmas, as buyers, agreed on the sale of *The Action*. The MOA described the buyers to be nominated by Kasmas, and later a purported nomination of Lagonissi was made. The deposit was duly paid by Kasmas. At the time of signature of the MOA, the ship was on the high seas. She proceeded to Lisbon and, shortly thereafter, the sellers served notice of readiness of the vessel to the buyers. After inspection by the buyers defects were found in the vessel which were notified to the sellers. The latter, in the spirit of good co-operation, were willing to put them right, although they regarded such defects of minor significance.

The buyers still insisted that the defects had not been put right and refused to take delivery. After many exchanges between the parties, the buyers cancelled the contract. The sellers accepted buyers' conduct as repudiation claiming damages and the forfeiture of the deposit: against Kasmas as the original party; against Lagonissi as the substituted party; and against the three Kasmas brothers individually as being the company's undisclosed principals at the time of signing the MOA. Kasmas alleged, inter alia, that after the nomination of Lagonissi the latter became the sole contracting party, and Kasmas was absolved of any further obligations under the contract and was also retrospectively relieved of its former obligation, so that it was entitled to be repaid the deposit.

It was held that the original buyers remained the contracting party.

The truth of the matter was that the buyers wanted to get out of this contract because of the falling market, but they ended up being themselves in a repudiatory breach.

The facts of *The Blankenstein* were distinguished. The court rejected the submission of the defendants that novation takes place at the moment of the nomination, whatever the nature and the circumstances of the contract. The terms of the contract in this case undermined any possibility of novation prior to the transfer of the vessel. Also, a strong factor against Kasmas was that all the telex exchanges, including the cancellation one, were despatched by Kasmas. As the transfer of the vessel was forestalled by the buyer's cancellation, the Kasmas company remained the contracting party, and novation of Lagonissi never in fact occurred.[89]

The buyers could well have been better off had they not cancelled the contract. They thought that, by cancelling the contract, they would obtain the advantage of

88 [1987] 1 Lloyd's Rep 283.
89 Ibid, at p 310.

the falling market. The result of having to pay damages (the difference in market value) to the sellers and legal costs to defend the case, as well as the costs of the winning party, must have cost them more than the amount they thought they would have saved by getting out of this contract.

This is a good example to bear in mind for the purpose of managing legal risks.

5 CLASSIFICATION OF TERMS

5.1 AT COMMON LAW

The terms of a contract were explained in the shipbuilding chapter (Chapter 7), but a summary is also given in the context of ship sale and purchase to highlight that, under English common law, there is a special meaning of terms used in a contract not found in non-common law jurisdictions. The terms are classified into conditions, warranties and innominate or intermediate terms, and their difference is signified by the entitlement the innocent party will have in law upon a breach of such terms by the other party. Breach of a condition (otherwise known as an 'important' or 'fundamental' term) will amount to repudiation of contract, entitling the innocent party to elect:[90] either to terminate the contract and claim damages, or to waive the breach, affirm the contract and claim damages. A breach of a warranty (except in insurance contracts, in which the insurer is automatically discharged from liability from the date of the breach) does not entitle the innocent party to terminate the contract, but only to claim damages. The entitlement of the innocent party in the event of breach by the other party of an intermediate or innominate term (which lies in between condition and warranty)[91] depends on the nature and seriousness of the breach.[92]

Even if the parties describe a term as a condition, it does not always mean that it is a condition; it will depend on the construction of the term in the context of the whole contract.[93]

An apt example, in this context, is the term that was in dispute in ***The Action***.[94] The usual term was included in the MOA (cl 18) that the ship was 'to be delivered with her class fully maintained, free of recommendation and average damage affecting class . . . in the same basic condition as when inspected fair/wear/tear excepted . . . machinery . . . to be in normal working condition at the time of delivery'. The buyers alleged that there were defects when notice was given to them for delivery. Although the sellers agreed to make repairs, the buyers cancelled the contract before the sellers completed the repairs. The court construed cl 18 as an innominate term and not as a condition precedent. It held (p 295):

90 *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 (HL) (clarifying the right of election of the innocent party and what would or would not constitute affirmation of contract in the event of repudiation); as to the right of election generally under English Law, see the author's article 'Demystifying the right of election in contract law', JBL, 2007, at 442.

91 *Bunge Corporation v Tradax Export SA* [1981] 2 Lloyd's Rep 1 (HL).

92 *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* [1961] 2 Lloyd's Rep 478 (CA).

93 *Schuler v Wickham Machine Tools Sales Ltd* [1973] 2 Lloyd's Rep 53, [1974] AC 235 (HL).

94 [1987] 1 Lloyd's Rep 283.

. . . by reason of the widely variable gravity of potential breaches the more reasonable result would be to interpret the last two sentences as innominate terms.' If the parties wanted to make it a condition, they should expressly set out in the contract the right to cancel in the event of a breach of a term.

There was judgment for the sellers.

In principle, contracts are made to be performed and not to be avoided, for example, by the whims of market fluctuations; where there is a free choice between two constructions, the court should tend to prefer the construction which will ensure performance and will not encourage avoidance of contractual obligations.[95]

5.2 UNDER SOGA 1979[96]

Similarly, SOGA 1979 provides, in s 11(2), that, where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of a warranty and not as a ground for treating the contract as repudiated.

In s 61(1), the Act defines a warranty as a term the breach of which gives rise to a claim for damages and not to a right to reject the goods and treat the contract as repudiated. Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract; a stipulation may be a condition, though called a warranty in the contract (s 11(3)).

The SOGA 1979, by s 10, does not regard a stipulation as to time of payment as a term of essence of a contract of sale, unless a different intention appears from the terms of the contract. Whether any other stipulation as to time is or is not of essence of the contract depends on the terms of the contract.[97]

5.2.1 Sale by description

It has already been seen in the shipbuilding chapter (Chapter 7) that the strict rule under the SOGA 1979, concerning the implied terms that goods sold by description should comply with that description, has been amended by s 4 of the Sale and Supply of Goods Act (SSGA) 1994. The effect of the amendment is that, where goods have been sold commercially, that is not to a consumer, a breach of description, or quality, or fitness for purpose will not be treated as a breach of a condition, but as a breach of a warranty, if the breach is so slight that it would be unreasonable for the buyer to reject the goods (ship).

In addition, the SSGA 1994 has replaced the term 'merchantable quality' with the new implied condition of 'satisfactory quality'.

95 *Cehave NV v Bremer (The Hansa Nord)* [1975] 2 Lloyd's Rep 445 (CA), p 457, per Roskill LJ.

96 The Act was amended by the Sale of Goods (Amendment) Act 1994, the Sales of Goods (Amendment) Act 1995 and by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045), implemented in 2003.

97 *Bunge Corporation v Tradax Export SA* [1981] 2 Lloyd's Rep 1: the House of Lords, held, that, in general, time was of the essence in a mercantile contract; in such a contract, where a term had to be performed by one party as a condition precedent to the ability of the other party to perform another term, especially an essential term such as the nomination of a single loading port, the term as to time for performance of the former obligation would in general fall to be treated as a condition.

Whether or not the statutory implied terms can effectively be excluded in a contract for the sale of second-hand ships, there have been new developments, and the judgment of Flaux J in *The Union Power*[98] is seen later under para 11. The 2012 NSF, by cl 18, provides for a wide exception, the effect of which is discussed together with this case later.[99]

The preamble to the sale form contains the classification of the ship, the year in which she was built, the builder, flag, call sign, register number, place of registration and register tonnage. The 2012 NSF adds the requirement to insert in the contract the ship's *class notation*, which is considered, nowadays, to be important.

There will not be a misdescription of the ship's year of building or registration if it falls within the *de minimis* rule, and the certificate of registry, as well as the builder's certificate, provides prima facie evidence of the year in which the ship was built.[100]

5.2.2 The passing of property

By s 17(1) of the SOGA 1979, where there is a contract for the sale of specific or ascertained goods, the property on them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 17(2) provides that, for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

By s 18, unless a different intention appears, the intention of the parties as to the time at which the property in the goods is to pass to the buyer is ascertained in accordance with five rules, depending on the circumstances of the case. Two of these rules are mentioned below, by way of a contrast, the second of which is relevant to the sale of second-hand ships.[101]

- Rule 1: where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed. [This rule is relevant to the first category of sale contracts made by s 2 of the SOGA 1979, namely, the sale contract and not the agreement to sell. Section 61(5) defines a 'deliverable state' as being such a state that a buyer would be bound to take delivery under the contract.]
- Rule 2: where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done. [This rule refers to an agreement to sell, the second category under s 2 of the Act, where the property passes at a future date.]

98 *Dalmare SpA v Union Maritime Limited, Valor Shipping Limited (The Union Power)* [2012] EWHC 3537 (Comm).

99 For an effective exclusion of the statutory implied terms in international supply contracts, see, e.g., *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm): the provisions of an aircraft purchase agreement excluded the implied conditions under the Sale of Goods Act 1979 and substituted for them a warranty set out in the agreement. The agreement and an assignment agreement were 'international supply contracts' for the purposes of the Unfair Contract Terms Act 1977.

100 *The Troll Park* [1988] 1 Lloyd's Rep 55, approved by CA [1988] 2 Lloyd's Rep 423.

101 The second rule is also relevant to shipbuilding contracts (see Ch 7).

The sale of second-hand ships is normally an agreement to sell, in which the parties provide in the sale form that, in the event of deficiencies found at the inspection stage, the seller will be obliged to carry out repairs and put the ship in a deliverable state. Before notice of delivery is given, the ship is not yet in a deliverable state, and the parties' intention is that property shall pass upon payment on the day of delivery.

Property cannot pass when the contract is made, unless the intention of the parties is made clear in the agreement; for example, a provision in the NSF for a sale 'as is where is',[102] seems to be understood by the market that the buyer has chosen an 'outright' sale, if he had already inspected her before the contract was concluded. In such a case, the seller would not normally – subject to the specific provisions of the contract – be required to carry out repairs on the ship after the conclusion of the contract but, even in this situation, property shall pass when the parties intended it to pass.

For example, in ***Naamlooze v European Shipping Co Ltd***,[103] there was an agreement for the sale of five second-hand ships, provided that the buyers were to 'buy now'. Before any part of the purchase price had been paid, one of the vessels sunk by a collision and the insurers paid the seller on the policy. The buyer claimed that property had passed to him and he was, therefore, entitled to the benefit of the insurance policy.

The House of Lords, affirming the decision of the CA, held that the words 'buy now' did not mean an immediate transfer of property. This was an agreement to sell and not a sale. Viscount Dunedin remarked that:

> . . . using the phraseology of the [SOGA 1979], I look on this contract as a 'contract to sell' and not a 'sale'. The appellants greatly rely on the word 'now' but even as regards the words they are not 'now sell' but they are 'now to sell' and further indication, which is pointed out by the [SOGA] as having great force in determining whether a contract is a sale or an agreement to sell, is to see whether there remains something to be done. Now, here there was certainly something to be done. There was the creation of a mortgage.[104]

SECTION B: CONTRACTUAL TERMS UNDER STANDARD FORMS

6 PRE-INSPECTION STAGE

There have been various NSF contracts: 1966, 1983, 1987, 1993 and now 2012. In recent years, the 1993 form has been most commonly used. The parties must specify at the outset which form is going to be used. Another sale contract of second-hand ships is the Nipponsale 1993, which is used by Japanese sellers. These types of form concern an absolute sale,[105] which comprises transfer of possession and of property at the same time in exchange for payment of the contract price. It is not within the scope of this book to examine all contracts and all their clauses. Clauses that have presented problems are examined, and comparisons between certain clauses of the

102 For discussion of terms such as this, see *The Union Power*, at para 11, below.

103 (1926) 25 LlL Rep 210.

104 (1926) 25 LlL Rep 210, p 212.

105 Other types of sale are by instalments, or by credit, which may involve a mortgage on the ship granted to the seller as security, or by hire purchase, or judicial sale.

1987 and 1993 forms are made where a situation warrants drawing a comparison. Changes made by the equivalent clauses of the NSF 2012 are highlighted.

6.1 PAYMENT OF THE DEPOSIT

The deposit does not form part of the purchase price (*The Actor*; see at 9.1, below), and non-payment of it is considered to be an accrued debt (*Griffon*; see at para 6.1.2, below).

6.1.1 When is it payable and how?

As stated earlier, the buyer is required to pay a deposit of 10 per cent as security for the due performance of the contract. Clause 2 of both NSF forms (1987 and 1993) provides for the payment of deposit as follows:

> As a security for the correct fulfilment of this contract, the buyers shall pay a deposit of 10% of the purchase money within . . . banking days from the date of this agreement. This amount shall be deposited with [a bank] and held by them in a joint account for the sellers and the buyers. Interest, if any, to be credited to the buyers. Any fee charge for holding said deposit shall be borne equally by the sellers and the buyers.

For the protection of the buyer in the event that the seller reneges on the contract and sells the ship to another party after the deposit has been paid, as happened in ***Hang Zhou Wan***,[106] the deposit is usually placed in an escrow account.

The equivalent clause, cl 2, of NSF 2012 is a very different provision. It provides that the deposit shall be lodged by the buyer in an interest-bearing account for the parties with a 'deposit holder' within 3 banking days from the signing and exchanging of the agreement and when the deposit holder has confirmed in writing to the parties that the account has been opened. The parties shall provide to the deposit holder all necessary documentation to open the account 'without delay', meaning as quickly as possible but, if there is delay, the seller will give notice.

BIMCO explains that a deposit holder (who may be a solicitor or broker) is provided because experience has shown that there have been problems and delays due to due diligence provisions with the setting-up of joint accounts.

Some practical difficulties may arise with this provision, but it will be tested in practice in due course.

There is no fixed amount of deposit payable, leaving parties free to agree the amount (10 per cent is a default in the event of no other agreement). Furthermore, the clause provides that the deposit shall be released in accordance with the joint written instructions of the parties. Interest, if any, shall be credited to the buyers. Any fees charged for holding and releasing the deposit shall be borne equally by the parties. Considering the international character of the transactions, the currency is not stipulated leaving the parties free to agree it. The definition of a 'banking day' will

106 *Afitos Compania Naviera SA v The Ship Hang Zhou Wan* [2012] LMLN 1/10/12, where the ship was arrested in New Zealand by the first buyer, who claimed that he had paid US$2,650,000 to the seller who defaulted and sold the ship to a third party; as the claimant did not have enough funds to pay the court's cost to keep the vessel under arrest, the ship was released.

depend on the hours banks are open, both in the country of the currency stipulated for the purchase price and in the place of closing.

The payment of the deposit is linked to the right of the buyer, as provided by cl 15 of the 1993 and the 2012 NSFs, to place two representatives on board the ship for familiarisation purposes and as observers, but without interfering with the operation of the vessel.

6.1.2 Consequences of non-payment of the deposit

Payment of the deposit is a fundamental term (a condition) of the contract, breach of which would entitle the seller to cancel the contract and recover his loss as damages (***The Selene G***).[107] The question then is this: what is the measure of damages for loss, payment of the deposit or compensation?

In ***The Blankenstein***,[108] a sale on the NSF 1966, cl 2 provided for payment of the deposit 'on signing' the contract. The buyer did not pay the deposit. Being sued by the seller, the buyer contended that the deposit never became payable because the contract was never signed. Fox LJ held: the situation that existed in this case was that a binding contract had already been entered into, the consequence being that:

(a) the parties became bound to sign the MOA incorporating the agreed terms within a reasonable time; and
(b) the purchaser became bound, upon signing the memorandum, to pay the deposit.

As to the measure of damages for breach, the CA held by majority (Goff LJ dissenting) that, upon breach by the buyer, the seller was entitled to recover the amount of the deposit by way of damages for breach of contract, because the seller had acquired a vested right and was entitled to be placed in the same position as if the obligation had been fulfilled.

It should be noted that cl 13 of the NSF 1966 did not (like the same clause of the 1993 form) provide for what was to happen when the deposit was not paid, but only provided for the consequences of non-payment of the purchase price, namely that the deposit 'shall be forfeited' and, if it is not enough to cover the seller's loss, the seller would be entitled to further compensation.

In view of this lacuna in cl 13 of the 1966 form, Goff LJ differed from the majority in *The Blankenstein* and held that the seller was entitled to damages for his loss of bargain, namely the difference between the contract and market price of the ship. However, he also said that, if the deposit had fallen due before the contract was terminated, the seller would be entitled to claim the deposit as a debt.

Clause 13 was amended (prior to the decision of the CA above) in the NSF 1983 to include a provision for damages for non-payment of the deposit, and this was repeated in the 1987 and the 1993 forms; cl 13 reads:

> should the deposit not be paid as aforesaid, the sellers shall have the right to cancel this contract and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest at the rate of 12% pa.

107 *Portaria Shipping Co v Gulf Pacific Navigation Co Ltd (The Selene G)* [1981] 2 Lloyd's Rep 180.
108 *Damon Compania Naviera SA v Hapag-Lloyd International SA (The Blankenstein)* [1985] 1 Lloyd's Rep 93.

The decision of the CA of Singapore, in ***Zalco Marine Services v Humboldt Shipping***,[109] was concerned with non-payment of the deposit due under the NSF 1987. The court held that the seller's only remedy was compensation pursuant to the first limb of cl 13, above, and *The Blankenstein* was distinguished.

In a recent case, ***Griffon Shipping LLC v Firodi Shipping Ltd***,[110] in which the buyer failed to pay the deposit, and the seller terminated the contract on the basis of the buyer's repudiation, the sellers argued that they were entitled to claim the deposit either as a debt or as damages for breach of contract. Clause 13 of the NSF 1993, which is essentially the same as cl 13 of the 1987 form, applied. The buyer argued that, on the true construction of cl 13, the sellers were only entitled to claim 'compensation for losses' and not the deposit. The arbitrators preferred the buyer's construction and distinguished *The Blankestein* case, as the Singaporean CA did in the above case. The tribunal awarded the seller damages, the sum of which was lower than the amount of the deposit. The issue was controversial because of the history of cl 13 in the various successive NSF contracts seen above.

On appeal to the court, Teare J distinguished the situation when the deposit has been paid (followed by repudiation) from the case when the deposit has not been paid, as a result of which the seller terminates the contract by reason of the buyer's repudiation.[111]

He held that, upon a true construction of cll 2 and13 of the MOA in the NSF 1993, cl 2 makes provision for the payment of a deposit as security for the correct fulfilment of the MOA. It follows that, in the event the deposit is paid and the buyer subsequently repudiates the contract, the deposit will be forfeited, or released to the seller, even if the seller's loss is less than the amount of the deposit. A deposit, which is paid as an earnest of performance, is different from part payment of the price. The latter, he said, in a sale contract can be an example of a payment made conditionally upon completion of the contract (unless there is an express term in the contract that part payment remains payable).[112]

The present case concerned, the judge held, non-payment of the deposit when the right of payment had accrued before termination of the contract. So the situation was different from the above, and the question was, therefore, whether payment of the deposit could be enforced by the seller, notwithstanding the termination of the contract. Accrued rights are not lost by termination.[113] It follows that, had cl 2 stood alone, the seller would be able to recover the deposit as a debt.

The question raised in this appeal was whether cl 13 had the effect of depriving the seller of the right to claim the deposit, which had fallen due, so that it could be said, on the true construction of the MOA, that the deposit did not fall due

109 [1998] 2 SLR 536.

110 [2013] EWHC 593 (Comm) at paras 13–15, 17–20, 23, 26.

111 The judge mentioned that there are two conflicting arbitrators' awards on the interpretation of cl 2 and 13 of NSF 1993. In this case, the arbitrators concluded that the effect of cl 13 was to provide a fundamentally different approach to a breach of cl 2 (failure to pay the deposit) from that applicable to a breach of cl 3 (failure to pay the purchase price), namely: the latter breach would result in the forfeiture of the deposit, whereas there was nothing in cl 13 that suggested that, in the event of a breach of payment of the deposit, the seller could recover the amount of the deposit. The tribunal agreed with the approach of the Singaporean CA, above.

112 E.g. *Cadogan Petroleum Holdings v Global Process Systems* [2013] EWHC 214 (Comm).

113 See *Hyundai v Papadopoulos* [1980] 1 WLR 1129 (Ch 7, above).

unconditionally. The arbitrators in this case had decided that cl 13 had that effect. The judge held, despite the buyer's argument that cl 2 does not provide an express or implied agreement of forfeiture of the deposit, that clear words would be needed to exclude the right of the seller, to claim the deposit and cl 13 did not expressly, nor impliedly, deprive the seller of the right of payment of the deposit where it has accrued.

The decision, which was subject to appeal at the time of writing, ignores the express words used in the first limb of cl 13, (which provide for compensation for loss, plus expenses plus interest) and the combine effect of clauses 2 and 13 of the NSF 1993. The judge held, at para 26:

> If, contrary to my view, the construction of cl 13 of the MOA is ambiguous such that there are two possible constructions of it, one which excludes the right of the seller to payment of the deposit pursuant to cl 2 and one which does not but gives additional rights then the latter is the construction more consistent with business common sense.

It would seem, however, that cl 13 is not ambiguous, so as to call for a purposive approach construction (see, for its proper application, the *Rainy Sky*,[114] per Lord Clarke).

Being doubtful, the judge offered (at para 28) an alternative solution:

> Finally, it was submitted that even if the correct construction of cl 13 were that it excludes the right to payment of the deposit and provides in its place the remedy provided by the first limb of cl 13, namely, the right to claim compensation then, just as the common law remedy of damages entitles the seller to recover the amount of the deposit as damages for breach (for the reason explained by the majority in *The Blankestein*), so the express contractual remedy to claim compensation would entitle the seller to recover the amount of the deposit as damages for breach.

In practical terms, either solution may not provide the right result, as it will depend on what loss the seller has suffered, in a particular case, and that is the purpose of the first limb of cl 13.

6.1.3 Payment of the deposit in successive sales

Where there is a sale and a sub-sale, the head buyer may use the sub-sale deposit to pay the seller, but the sale and sub-sale must be back to back. Problems may arise if there is an omission to reconcile the delivery date under both contracts, as is illustrated by ***The Ranger***.[115]

P sold the steamship *The Ranger* to D1 by a contract of sale, which provided, inter alia, for payment by D1 of a deposit of 10 per cent into the joint account of P's agent and D1. D1 subsequently sold the vessel to D2 on similar terms, and D2 paid 10 per cent of the purchase price to D1, who, with D2's knowledge, transferred it into a joint account in the names of P and D2. D2 cancelled the contract with D1 on the ground that the vessel had not been delivered before the delivery date, and D1 then

114 [2011] 1 WLR 2900.

115 *San Pedro Compania Armadora SA v Henry Navigation Co and Pablo Compania Maritima De Desarrollo SA (The Ranger)* [1970] 1 Lloyd's Rep 32.

wrongfully repudiated their contract with P. P claimed release of the deposit. On the question whether D2 were stakeholders, it was held that, in ratifying the use of their name as one of the two joint account holders, they were ratifying its use as that of agents for D1; because, as between P and D1, P were entitled to the deposit, D2 had no claim to it as against P.

7 INSPECTIONS BY THE BUYER

At this stage, it will be determined whether or not the purchase will become definite, unless there are still other 'subjects' to be confirmed.

Clause 4 of the 1987, 1993 and 2012 sale forms provides for two types of inspection: (a) inspection of the vessel's classification records (within a certain time agreed) and (b) physical inspection.[116]

The inspection of the records will reveal the history of the ship's maintenance and compliance with the requirements of class. It gives an unfettered discretion to the buyer whether or not to accept the ship. He has an opportunity to refuse the ship and recover the deposit, for example, if he realises that he made a bad bargain, or to renegotiate the price.[117]

As regards the physical inspection of the ship, the 1987 form provides for inspection afloat, whereas the 1993 form gives the option for inspection in dry dock; the 2012 form leaves it open, but all forms provide that such inspection should be undertaken by the buyers without undue delay and without cost to the seller. Should the buyers cause such delay, they shall compensate the sellers for the losses thereby incurred. During this inspection, the vessel's logbooks for engine and deck shall be made available for the buyers' examination.

If the vessel is accepted after such inspection, the purchase shall become definite (and outright under the 2012 form), subject only to the terms and conditions of the agreement. Notice should be given to the seller within 48 hours under the 1987 form and up to 72 hours under the 1993 and 2012 forms, after completion of such inspection.

Should notice of acceptance of the vessel's classification records and/or of the vessel not be received by the sellers as aforesaid, the deposit shall immediately be released, and the contract shall be considered null and void. Under the 1993 and 2012 forms, the deposit with interest is released to the seller.

An additional clause, cl 4(a), is included in both the 1993 and 2012 forms, which is a confirmation that the ship has already been inspected, if she had been, before the contract was concluded. One clause or the other should be deleted, depending on whether or not the inspection had taken place. This optional clause reflects market practice. The effect of choosing this alternative cl 4(a) is an outright sale to the buyer, without the need to give notice of the vessel's acceptance to the seller.

116 *The Merak* [1976] 2 Lloyd's Rep 250: the sellers have an obligation to provide the vessel for inspection; otherwise, they will be in breach of contract.

117 The buyer may like to renegotiate the price if the market has fallen, or to find other ways of performing his obligation to accept delivery. If the seller misinterprets the buyer's intention and treats such conduct as an anticipatory repudiation, he may be found guilty of repudiation himself by re-offering the ship for sale too soon: *The Hazelmoor* [1980] 2 Lloyd's Rep 351 (CA).

8 INSPECTION BY CLASSIFICATION SOCIETY (DRY-DOCKING)

This stage leads up to physical and document delivery. At this time, the classification society will perform the pre-delivery inspection in dry dock at the port of delivery. The next phases will be pre-delivery, actual delivery and post-delivery.

Clause 6 is known as the dry-docking clause. A surveyor of the classification society with which the ship is entered carries out an inspection under this clause. This inspection is very different from the inspection under cl 4, which is carried out by the buyer.

Clause 6 of the 1987 form provides:

> In connection with the delivery the sellers shall place the vessel in drydock at the port of delivery for inspection by the classification society of the bottom and other underwater parts below the summer load line. If the rudder, propeller, bottom and other underwater parts . . . be found broken, damaged or defective, so as to affect the vessel's clean certificate of class, such defects shall be made good at the seller's expense to satisfaction without qualification on such underwater parts.

The clause also provides that the tail-end shaft may be inspected, if it is so required by the buyer or the classification surveyor, and if it is found defective, so as to affect the issuing of a clean class certificate, it shall be renewed or made good at the seller's expense at the satisfaction of class. The expense of drawing and replacing of the tail-end shaft is to be borne by the buyer, unless the classification society recommends its renewal, in which event the seller is to bear these expenses.

The expenses of dry-docking dues, putting the vessel in and taking her out, as well as the classification surveyor's fees, shall be paid by the sellers if the underwater parts are defective; otherwise they shall be paid by the buyer.

During the inspection, the buyer's representative shall have the right to be present, but without interfering with the class surveyor's decisions. The vessel shall be brought to the dry dock and then to the place of delivery at the seller's expense.

Clause 6 of the 1993 form provides for an alternative to reflect market practice. The first part provides for inspection by the classification society's surveyor, to be done at the seller's expense, and the second alternative provides that the vessel shall be delivered without dry-docking. However, a diver appointed by the buyers, upon the approval of class, may carry out the underwater inspection at the buyer's expense. The extent and conditions under which this inspection is performed shall be to the satisfaction of class. If the diver discovers any damage that cannot be repaired afloat, the sellers must arrange for the ship to be dry-docked at their own expense. This new clause is very long and detailed.

Clause 6 of the 2012 form is also long and detailed and has been amended:

Clause 6(a)(i) gives option to the buyers to arrange for an underwater inspection by a diver, approved by class prior to delivery, at their own cost and expense. The buyer must exercise his option, the latest, 9 days prior to the vessel's intended date of readiness for delivery, so that the seller can make the necessary arrangements. The seller, at his own cost and expense, shall make the vessel available for such inspection.

The class surveyor shall be present, arranged by the seller and paid for by the buyer. The buyer's representative shall have the right to be present as an observer and without interfering with the work or decisions of the class surveyor. The seller may not tender notice of readiness prior to the completion of the underwater inspection.

Clause 6(a)(ii) deals with what has to happen when repairs of the underwater parts are needed and required by class. This clause introduces an unusual but, perhaps, practical alternative that, if the class does not require defects to be rectified before the next dry-docking, the seller is entitled to deliver the ship with those defects against reduction from the purchase price to be estimated on the basis of direct cost of labour and materials for the repairs. It also provides a mechanism for calculating the deduction by obtaining quotes. Undoubtedly, this would need negotiations to obtain prices from two reputable independent shipyards in the vicinity of the port of delivery. NOR cannot be tendered until the quotes have been obtained, and this is bound to delay delivery, but it is very important for both parties in order to reach the appropriate reduction from the price.

The clause requires careful reading by buyers and their lawyers, and it is not commendable for its drafting.

Under cl 6 of all forms, if the classification society surveyor decides that the ship is in an acceptable condition, the buyer will be bound by that decision. The role of the class surveyor is very delicate here because his decision is very important. Disputes under this provision will be unavoidable.

If the classification society makes recommendations for repairs, the seller must make repairs at his own expense; if he does not, he cannot tender the vessel for delivery and could be held in repudiatory breach of contract. The seller's obligation, in such circumstances, is to make such repairs to the satisfaction of the classification society. Parties can agree additional provisions,[118] but great care must be taken in drafting.

9 NOTICE OF READINESS

The NOR is linked to arrangements being made for payment of the balance of the contract price. Therefore, the seller is anxious to give NOR as soon as he considers that the ship might be ready by the end of the notice period. Sometimes it may not be ready pursuant to the contract and problems usually arise. Completion of the sale of the vessel may well involve activities in several different jurisdictions. For example, the vessel may be physically ready in one jurisdiction, the documents may be delivered in another, and payment may be effected in a third.[119]

118 *The Great Marine (No 2)* [1991] 1 Lloyd's Rep 421 (CA).
119 *PT Berlian Laju Tanker v Nuse Shipping (The Actor)* [2008] EWHC] 1330 (Comm).

9.1 WHEN PAYMENT OF THE PRICE IS ARRANGED

Clause 3 of the NSF 1987 provides:

The said purchase money shall be paid free of bank charges to . . . on delivery of the vessel, but not later than three banking days after the vessel is ready for delivery and written or telexed notice thereof has been given to the buyers by the sellers.

The notice period for payment expires at midnight of the third day. Banking day is taken to be the business working day for both the principal financial centre in the country of the currency in which the money is payable and the place where the financial closing of the sale is to take place.[120]

The clause is essentially dealing with the buyer's obligation to pay the purchase money within a time limit after the seller has given notice that the ship is ready for delivery.

In ***The Selene G***,[121] it was held by Goff J (as he then was) that:

The purchase money is paid, in normal circumstances, by the payment of 90% of the price plus the release of the 10% deposit from the deposit account on the authority of the buyers. Alternatively it could, in theory (and may sometimes in fact), be paid by payment of 100% of the purchase price followed by a release of the deposit to the buyers by the sellers. But whichever way is paid, in my judgment, the deposit of the 10% of the price in no way constitutes a payment of purchase money or of part of the purchase money.

It should be noted that cl 3 of the 2012 form has effectively made the deposit part of the price by expressly providing that, on delivery, the deposit shall be released and the balance of the price shall be paid.

An unusual question, which gave rise to wasted litigation, arose in ***PT Berlian Laju Tanker v Nuse Shipping (The Actor)***[122] (on appeal from arbitrators' award). The question was whether the 90 per cent of the purchase price (under cl 3 of the NSF 1993) could be paid at a different bank from the one in which the 10 per cent deposit had been paid. The sellers claimed to be entitled to require payment of the full purchase price in their nominated bank in Greece on the day of delivery. The deposit had been paid in Singapore, and the buyers claimed to be entitled to pay the purchase price in Singapore with 10 per cent of it being produced by the release of the deposit. As a concession, the buyers agreed to pay the 90 per cent in Piraeus, but they maintained they were not required to pay the 10 per cent of the price there, since they had paid the 10 per cent deposit in Singapore. Clarke J, approving the arbitrators' award on this point,[123] held (at paras 22 and 70) that:

There is no need to hold (whether by way of construction or implication) that the sellers' nominated bank for payment of the purchase price under clause 3 must be the same as sellers' nominated bank in Singapore for payment of the deposit under clause 2. Deposit and price

120 This is also the position of payment of hire under a time charterparty: whether or not payment has occurred will depend on whether funds have been transferred by any commercially recognised method of transferring funds, the result of which is to give the transferee the unconditional right to immediate use of the funds transferred (*The Brimnes* [1973] 1 WLR 386; *The Chicuma* [1981] 1 Lloyd's Rep 371); the time when payment may be regarded as made may depend on the practice of bankers at the time when the question arises: *The Afovos* [1983] 1 Lloyd's Rep 335.

121 [1981] 2 Lloyd's Rep 180, at 184.

122 [2008] EWHC] 1330 (Comm).

123 The other point was on rectification, on which the judge disagreed with the arbitrators.

are two different things. Payment of the deposit does not constitute part payment. [emphasis added]

The arbitrators decided that paying 10% of the price by the release of the deposit in Singapore could not be said to satisfy the obligation that the purchase price 'be paid in full free of bank charges to sellers' nominated bank'; that payment . . . somewhere other than at the contractual place meant that the contractual obligation [to make payment] had not been satisfied . . . that the obligation to pay 100% of the purchase price at the [sellers'] nominated bank in Piraeus was a condition of the contract; and that paying 10% of that price by releasing the deposit in Singapore would constitute a breach of that condition . . .

I agree. In short, the buyers' obligation was to make payment in accordance with the contract. This, they indicated, they were not prepared to do.

Thus, it was held that the obligation to tender payment in accordance with the provisions of the contract, which specified how payment was to be made, was a condition, and the buyers had been in anticipatory repudiatory breach by maintaining that they were not required to pay the remaining 10 per cent of the purchase price at the seller's nominated bank in Greece. This is a rather strange decision and contrary to the understanding in the market that the release of the deposit to the sellers from whatever account in which it was held was sufficient for the buyer to meet his obligation.

In an interesting arbitration case,[124] when the seller's broker caused a spelling error of the buyer's name to be in the documents, the tribunal held that the sellers were not ready to deliver, as the delivery documents were not in correct order. On the method of payment, which was not specified in cl 3, the majority construed cl 3 of the MOA, applying the principles of *The Belize*,[125] *Pagnan* and *Rainy Sky*,[126] and following expert advice, to mean that reasonable commercial men in the position of the parties would have understood cl 3 as requiring the sellers to nominate a bank account at a bank that would enable payment to be made by an 'advance deposit' mechanism, as opposed to a TT method. By the 'advance deposit', which, as was found, was used in transfers of money to the Far East, the sellers' bank had to agree to open an account in the buyers' name or to their order, thus protecting the buyer in the event that delivery did not take place, or the ship was lost in the meantime. The sellers here failed to nominate such a bank and they, instead of the buyers, who could not pay the price, were in repudiation of the contract.

9.2 DELIVERABLE STATE

Whether the cl 3 notice of the 1987 form requires the seller to give notice only when the ship is in an actual deliverable state at the time of the notice, or whether prospective readiness would be sufficient, came before the court first in ***The Action***.[127]

Hirst J held: as a matter of construction of the contract, there was no prerequisite to the validity of the NOR that the vessel was actually in a deliverable state on the date it was given. In particular, he further commented that:

124 (2011) 828 LMLN 1, London Arbitration 7/11.
125 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10.
126 See both op. cit. at fn 60.
127 [1987] 1 Lloyd's Rep 283.

> The suggestion that it is necessary for the vessel to be in a fully deliverable state at the time of the notice, as contrasted with the time of delivery, has an air of marked commercial unreality, seeing that it is of no consequence whatsoever to the buyers whether or not the vessel is in a deliverable state at the earlier date, so long as it is at the latter.[128]

Contrary to what the judge thought in this case, it would be of legal and practical consequence to the buyer, who has the right to expect that the ship is in a deliverable state on the date of the notice before he can instruct his bank to make arrangements for the payment. In commercial reality, were the ship not to be ready in a physical sense, there would be little or no time to correct any outstanding matters of the ship's condition in 3 days unless such matters were trivial. The buyer would be exposed to risks by releasing his money when the ship might not, practically, be ready by the end of the notice period. Bearing in mind that this is the most important part of completion of the parties' respective obligations under the contract, cl 3 of the 1987 form has not been free from ambiguity. The notice obligation of the seller should precede the buyer's obligation to pay the money, or should be in a separate clause.

In ***Zegluga Polska SA v T R Shipping Ltd (No 2)***,[129] cl 3 of the NSF 1987 was given a different construction from that given in *The Action*. As the contract concerned a new building of a bulk carrier, in addition to the printed NOR in cl 3 there was added another clause for notices to be given by the sellers to suit the requirements of this contract.

Clause 5 provided: 'The sellers shall give the buyers three months and one month approximate notice and a seven days definite notice of readiness for delivery of the vessel.'

The sellers did comply with these notices, but the buyers refused to accept the 7 days definite NOR, contending that the grabs, which formed part of the specification of the vessel, were not in accordance with the specification. They refused to pay the balance of the contract price and obtained an *ex parte* injunction restraining the sellers (who had already given notice of cancellation of the contract) from disposing of the vessel. Colman J ordered specific performance and maintained the injunction until then. On appeal by the sellers to the CA, the issue was: 'when did the buyers become obliged to make payment?'

It was held that, on a natural reading of cl 3, the 3 days' notice must be of actual readiness for delivery, when the notice was given, not of any prospective readiness. The notices required under the other clauses were prospective notices. Under cl 5, in particular, it was not required that the vessel should be actually ready for delivery when the 7 days' definite notice was given; all that the notice appeared to require was a notice by the sellers that the vessel definitely would be ready for delivery after 7 days.

The giving of actual NOR, if properly given, acted as a trigger and left no room for doubt when the 3 days began and ended, and could not begin to run from any date earlier than the expiry of the 7 days' notice. The buyers, therefore, were entitled to insist on the vessel being ready.

128 Ibid, at p 295.
129 [1998] 2 Lloyd's Rep 341 (CA).

It should be noted that the CA commented on the construction of cl 3, given by Hirst J in *The Action*, that any support of the view held by the judge would be profoundly uncommercial.[130]

In the light of the problems created by the drafting of the notice provisions in the NSF 1987, which became apparent from the decision in *The Action*, the notice provision in the NSF 1993 form was amended.

The obligation of the buyer to arrange for the purchase money after notice has been given, and the obligation of the seller to give notice when the ship is ready, are provided in two separate clauses in the 1993 NSF. Clause 3 provides:

> The said purchase price shall be paid in full free of bank charges to . . . on delivery of the vessel, but not later than three banking days after the vessel is in every respect physically ready for delivery in accordance with the terms and conditions of this agreement and notice of readiness has been given in accordance with cl 5.
>
> (emphasis added)

Clause 5 provides:

> When the vessel is at the place of delivery and in every respect physically ready for delivery in accordance with this agreement, the sellers shall give the buyers a written notice of readiness for delivery.
>
> (emphasis added)

The separation of each party's obligations at delivery is achieved by these two clauses, in which it is expressly provided that physical readiness in every respect should be expected on the date of the NOR. This triggers the buyer's obligation to instruct his bank for payment. There is no room for construction that there can be prospective readiness. In addition, the consequences of the seller's failure to comply with this obligation are spelt out in cl 14 of the NSF 1993 (see at para 15, below).

Clause 5 of NSF 2012 changes the 1993 form by replacing the prerequisite of the NOR from '*in every respect physically ready for delivery*' to just '*physically ready*' in cl 5, and it does not refer to physical readiness at all in cl 3 (the payment clause). Such an omission, whether deliberate or accidental, is unfortunate but it may be ameliorated by the new wording in cl 5(c); see below. What the new cl 5 does is to require no notice to be given before the cancelling date referring to cll 5(c), 6(a)(i)(iii) and 14, and it is expanded to cater for other difficulties that had arisen under the previous forms.

For example, cl 5(b) provides that the seller shall keep the buyers informed of the vessel's itinerary and shall provide the buyers with 20, 10, 5 and 3 days' notice of the date the sellers intend to tender NOR and of the intended date of delivery.

It would seem, following ***Zegluga Polska*** (above), that these notices do not serve as notices of actual physical readiness but only of prospective readiness because the notices relate to the seller's intention to tender NOR, and the clause further provides that, when the vessel is at the place of delivery and physically ready for delivery, in accordance with the agreement, the seller shall give the buyer the final written NOR. That additional provision should ensure certainty about the vessel's actual physical readiness.

130 Ibid, at pp 344–345.

In addition, under cl 5(c), if the sellers anticipate that, notwithstanding the exercise of due diligence by them (a requirement not found in previous forms), the vessel will not be ready for delivery by the cancelling date, they may notify the buyers in writing stating the date when they anticipate that the vessel will be ready for delivery and proposing a new cancelling date. This provision, coupled with the buyers' option to cancel, see below, is useful in order to limit disputes between the parties.

The buyers shall have the option of either cancelling the agreement in accordance with cl 14 within 3 banking days of receipt of the notice, or accepting the new date as the new cancelling date. However, acceptance of the new date by the buyer shall not prejudice his rights to claim damages (cl 5(d)). The provision in cl 5(e) also provides for the return of the deposit in case the vessel becomes a total loss or CTL before delivery.

9.3 ESSENTIAL DOCUMENTATION FOR EXCHANGE AT DELIVERY

In exchange for payment of the purchase money, cl 8 of the 1987 and 1993 sale forms specifies the necessary delivery documents, such as a legal bill of sale, declaration of class, certificate of deletion of the vessel from the vessel's registry etc.to be handed over in exchange for payment of the balance of the price. Clause 8 of the 2012 form gives an extensive, but not exhaustive, list of the required documents.

The obligation of the seller is to furnish a bill of sale of the said ship in a form determined by the ship's flag State, free from all encumbrances, which is linked with the sellers' warranty provided by cl 9 (see at para 10), and the documents/certificates required to enable the ship to trade.

This clause should be read together with cl 14, providing for 3 banking days maximum from the date of the NOR for the seller to make arrangements for the preparation of documents, which unfortunately has been omitted from cl 14 of the 2012 form (see para 15, below).

The obligation of the buyers under this clause is to release the deposit to the seller (if that was kept in an escrow account), to pay the balance and to pay for bunkers, lubricants and other items on board (as provided by cl 7).

An interesting question about the required documents arose, recently, in ***The Rewa***.[131]

Under NSF 1993, the buyers had inspected the vessel and had been aware before they agreed to buy *The Rewa* that the vessel did not have an International Sewage Pollution Prevention (ISPP) certificate, as was required under Annex IV of MARPOL, nor did she have the required modifications to her sewage plant, so as to be able to comply with the Convention. The expected date of delivery was between 20 August and 30 September 2008, which was the cancelling date at the buyers' option. The compliance date with the Convention was 1 October 2008. The parties expected the ship to be delivered on 27 September, so that the buyer would have time to carry out the modifications with regard to the sewage plant for compliance with MARPOL. Delays necessitated the seller revising the date of delivery to 2 days after the MARPOL

131 *Polestar Maritime Ltd v YHM Shipping Co Ltd (The Rewa)* [2012] EWCA Civ 153; [2012] 1 Lloyd's Law Rep Plus 28.

Annex IV came into force, and dispensation was requested from the vessel's flag State, which was granted but not received until after 1 October 2008. In the meantime, the ship arrived at the Hong Kong anchorage on 30 September, the last day of delivery within the MOA, and she was detained by the Hong Kong port authorities owing to lack of the ISPP certificate.

Clause 11 of the contract dealt with conditions on delivery and provided, inter alia: '. . . the vessel shall be delivered . . . with her National/International trading certificates, as well as all other certificates the vessel had at the time of inspection, valid and un-extended at the time of delivery . . .'

Clause 8 provided that, at the time of closing, the sellers were to deliver to the buyers all agreed documents reasonably required by the buyers for the transfer of ownership, registration of the vessel and change of flag to the buyers' choice. The 'delivery documents' were listed by the agreement of the parties in an appendix.

Clause 14 of the MOA, 'seller's default', provided that, 'the seller shall be granted a maximum of 3 banking days after Notice of Readiness has been given to make arrangements for the documentations as per clause 8 . . .'

On 1 October, the buyers gave notice of cancellation under cl 14 of the MOA, on the grounds that (a) the vessel had no ISPP certificate and (b) she had been detained, which was a breach of the covenant in the bill of sale that she would be free of detentions. Once the dispensation letter from the flag State was received, the ship was released. In the arbitration, the arbitrators found in favour of the buyers because of the lack of the ISPP certificate and the consequent detention, which entitled the buyers to cancel. The judge and the CA found for the sellers.

The CA rejected the arbitrators' construction of cl 11 that the vessel's national and international trading certificates meant that the vessel needed to trade internationally at the time of the completion. It held that cl 11 dealt with the conditions of the vessel on delivery, and the basic agreement was that the vessel was to be delivered 'as she was at the time of inspection'. As the contract was an 'as was' sale, the seller was obliged on delivery to have the vessel in a condition that was such that she would have on board the original national and international certificates and any other certificates that the vessel had at the time of her inspection. In the absence of any wording that imposed any duty on the seller to provide further certificates that the vessel did not have at the time of her inspection by the buyer, no obligation to provide such further certificates could be eked out of the actual wording of cl 11. This construction provided much greater certainty than the construction of the buyers.

10 SELLERS' OBLIGATIONS UNDER CL 9

10.1 SELLERS' UNDERTAKING

Clause 9 of the NSF 1987 stipulates:

> The sellers warrant that the vessel, at the time of delivery, is free from all encumbrances and maritime liens or any other debts whatsoever. Should any claims, which have been incurred prior to the time of delivery be made against the vessel, the sellers hereby undertake to indemnify the buyers against all consequences of such claims.

Clause 9 of the NSF 1993 extends the warranty and clarifies what is included, apart from the word encumbrances:

> The sellers warrant that the vessel, at the time of delivery, is free from all charters, encumbrances, mortgages and maritime liens or any other debts whatsoever. The sellers hereby undertake to indemnify the buyers against all consequences of claims made against the vessel which have been incurred prior to the time of delivery.

This amended clause is, in effect, the same as under the 1987 NSF, but for the addition in the first sentence of the words 'charters' and 'mortgages'. The second sentence is effectively reversed. However, the difficulties in the construction of cl 9, which will become apparent upon careful reading, and which arose in cases to be discussed below, were not removed by the amendment.

Clause 9 of NSF 2012 introduces an important addition to cl 9 of the 1993 form by providing that the seller warrants the vessel is not 'subject to Port State or other administrative detentions'.

The addition of this phrase is a welcomed amendment to clarify the extent of the first limb of the clause. For example, the detention of the ship by the port State in Hong Kong due to lack of the ISPP in the ***Rewa***[132] (see above – although the seller, in this case, was not liable) should – in a sale under the 2012 form – come within this provision.

10.2 CONSTRUCTION OF CL 9 BY THE COURTS

As seen above, the clause provides for two separate remedies for the buyer under each sentence. Liability for damages will arise in the event of breach of the warranty provided in the first sentence regarding incidents of encumbrances and similar proprietary rights attached on the ship, including now under the 2012 form PSC or other administrative detentions. A liability to indemnify the buyer will arise when the buyer incurs losses by reason of claims, which had arisen prior to delivery, and all consequences of such claims brought against the ship after delivery.

The phrase 'any other debts whatsoever' in the first sentence was construed by the court in ***The Barenbels***,[133] in which it was held that the sellers' debt to their agents in Qatar at the time of delivery did not constitute an encumbrance, so as to come within the guarantee provision, but entitled the buyer to an indemnity.

The ship was sold under the NSF 1966, in which cl 9 was broadly similar to cl 9 of the 1987 form, except that the word 'guarantee' was used instead of 'warranty' in the first sentence. Prior to delivery, the sellers owed large sums of money to their agents in Qatar in respects of debts. After delivery of the ship to the buyer, the agents arrested the ship in Qatar. The buyers, having failed to persuade the sellers to provide security or to settle the claim, provided security in the form of a guarantee furnished by their P&I club for the release of the vessel. Then they claimed damages against the sellers for breach of the guarantee under the first sentence of cl 9, or alternatively

132 *Polestar Maritime Ltd v YHM Shipping Co Ltd (The Rewa)* [2012] EWCA Civ 153; [2012] 1 Lloyd's Law Rep Plus 28.

133 [1985] 1 Lloyd's Rep 528.

an indemnity against the consequences of the arrest under the second sentence of the clause.

The arbitrators rejected the buyers' claim for damages on the ground that the claim did not fall within encumbrances and maritime liens; they construed 'any other debts', in the same sentence, as inappropriate to embrace indebtedness arising otherwise than in relation to the vessel. With regard to the indemnity claim, they held that the language in the second sentence of the clause was insufficiently clear to embrace a conservatory arrest ordered by the court in Qatar, and the buyers could not show that the claim was a claim against the vessel. The buyers appealed. Sheen J disagreed with the arbitrators and held in favour of the buyers.

10.2.1 The guarantee provision – encumbrances or debts at time of delivery

On appeal by the sellers in ***The Barenbels***, the CA (Goff LJ delivering judgment) held that the two sentences of the clause contained separate obligations. In particular:

> The first sentence is concerned with a guarantee relating to the vessel at the time of delivery, whereas the second sentence is concerned with an indemnity in respect of claims made against the vessel which are plainly intended to refer to claims so made after the delivery of the vessel though incurred prior to the time of delivery.[134]

In the first sentence, he said, 'encumbrances' referred to proprietary and, possibly, possessory rights over the ship. The sellers' debt to their agents in Qatar at the time of delivery did not constitute an encumbrance.

On construction of the phrase 'free from . . . any other debts whatsoever', in the context of the first sentence, he held that:

> . . . this should be read as relating to any other debts, which at the time of delivery had given rise to actual existing rights affecting the property in, or the use of, the ship.[135]

10.2.2 The indemnity provision – liabilities incurred prior to delivery

These words, above, Goff LJ held in the *Barenbels* case, were not wide enough to include debts that would be capable of rendering the ship liable to be arrested in the future, because this was intended to be covered by the second sentence.

On this construction, the debt owed by the sellers to their Qatar agent was not within the guarantee provision under the first limb, but it was a claim in respect of liabilities that had been incurred prior to the time of delivery, and the claim was indeed against the ship.

The indemnity provision of cl 9 of the 1993 NSF became the subject of a dispute and was determined by the CA in ***Rank Enterprises v Gerrard***.[136]

The issues were whether the indemnity covers actual or contingent liabilities and costs and expenses incurred by spurious claims brought by third parties.

134 Ibid, at p 532.
135 Ibid, at p 533.
136 [2000] 1 Lloyd's Rep 403.

The buyers had been able to obtain a company guarantee as a security for breach of cl 9 by the seller. After the delivery of the ship, claims were made against the vessel which the seller denied on the ground that they were invalid and spurious. The issue was the construction of the words, 'should any claims which have been incurred prior to the time of delivery be made', and the meaning of 'claims against the vessel' in both cl 9 and the company guarantee.

At first instance, the judge construed these words as meaning claims in respect of any liability incurred (actual or contingent) prior to delivery, which resulted in a later claim against the vessel.

On appeal by the buyers and a cross-appeal by the sellers, the issue was whether the second sentence of cl 9 referred only to claims in respect of which the sellers were actually liable.

In the judgment of Mance LJ, liabilities in respect of any claim or demand under the expanded version of the sentence may embrace 'liabilities actual or alleged'. It did not have to be actual or contingent liabilities. By paraphrasing the clause, he said, the sentence applied to 'any claims' exposure, which was incurred prior to delivery and was made against the vessel after delivery'.[137]

It was common ground that the clause intended to protect the buyer against adverse consequences, for example, costs and expense of valid claims, but the question was whether it covered such costs and expense resulting from spurious claims.

The answer to this was that, if cl 9 was read as covering the adverse consequences of claims, good or bad, generated by pre-delivery events, the buyers would be assured of indemnity, provided they acted in a reasonable and businesslike way in dealing with such claims. The buyers, in reality, as a matter of elementary self-protection and prudence, usually inform the sellers on receipt of any claims and try to co-operate, seeking information and assistance from the sellers, although the clause does not contain any such provision. In conclusion, Mance LJ said:

> . . . the judge took too limited a view of the scope of the second sentence of cl 9. The sentence, in my judgment, addresses claims made, the exposure to which stems from pre-delivery events, whether the liability asserted by such claims may prove to exist or not.

The buyers' appeal was allowed, and the cross-appeal was dismissed.

10.3 SAFEGUARDING AGAINST BREACH OF CL 9

Clause 9 would be more protective to the buyer if the obligation under the first limb of the clause, instead of being a warranty, was made a condition entitling the buyer to terminate the contract, if he became aware of the breach up to and on the day of delivery. In some contracts, the parties amend the clause to that effect.

Although the buyer can find out from the ship's registry whether a registered ship is subject to a registered mortgage,[138] there is no public record for maritime liens.

To protect himself against such a risk, the buyer could examine the accident history of the ship from the logbook to find out whether she had caused damage by collision,

137 Ibid, p 409.

138 By contrast, there is no means of registering a mortgage of an unregistered ship (see, e.g., *The Shizelle* [1992] 2 Lloyd's Rep 444, Ch 6, above).

or received salvage services, or there was any other incident, which would have given rise to a maritime lien. From the history of the seller's management, it could be found out if there were members of crew who had not been paid. An ownership or possessory right on the ship could be discoverable from the ship's registry.

Depending on the buyer's bargaining power during the negotiations, he could seek security to be provided in the event of breach of cl 9 by the seller. A company guarantee had been obtained in *Rank v Gerrard* (above). An unconditional and irrevocable guarantee, backed up by a bank guarantee, could be obtained by which the seller, or the guarantor in default of the seller, would guarantee to pay the buyer on demand for any loss or damages and expenses incurred by him in consequence of a breach of cl 9.[139]

A provision for the non-release of the deposit to the seller at the delivery stage, in the event of a breach of cl 9, would be the minimum safeguard for the buyer by way of a self-help remedy, provided the deposit is placed in an escrow account held in the names of the respective solicitors of the parties, or the 'deposit holder', as provided in cl 2 of the 2012 form.

In the event of a claim for indemnity under the second sentence, the buyer will only be able to claim his loss after he has defended the claim made by the third party against the ship for liability incurred by the seller prior to delivery. By that time, however, the risk the buyer runs is that the seller may no longer be in existence. He may negotiate to amend this part of the clause, either by obtaining the seller's agreement to take over the claim brought by any third party against the ship after delivery, or by seeking security for such a claim from the seller at the time of the contract by way of a company guarantee, backed up by a bank guarantee, to be activated if and when a claim by a third party is brought.

However, such security may be difficult to obtain, considering that the seller will incur bank interest charges, but a carefully drafted clause could provide for a reasonable time limit for the validity of the guarantee to cover claims by third parties brought in any jurisdiction.

This is essential for the buyer's management of risk, particularly because there is no means of knowing whether there are outstanding claims for debts or liabilities of the seller for which the ship might be arrested, unless *in rem* proceedings have been issued in England, which are registered in the Admiralty book in court. If after delivery of the vessel the buyer is put in a position to have to defend a claim against a third party, the possibility of losing the opportunity of enforcing an indemnity against a dissolved one-ship company of the seller would not be a light risk to take.

11 CONDITION OF VESSEL ON DELIVERY

Clause 11 of the 1987 NSF provides:

> The vessel with everything belonging to her shall be at the Sellers' risk and expense until she is delivered to the Buyers, but subject to the conditions of this contract, she shall be delivered and taken over as she is at the time of inspection, fair wear and tear excepted.

139 This was achieved in *Rank Enterprises v Gerrard* [2000] 1 Lloyd's Rep 403.

However, the vessel shall be delivered with present class free of recommendations. The Sellers shall notify the Classification Society of any matters coming to their knowledge prior to delivery which upon being reported to the Classification Society would lead to the withdrawal of the vessel's class or to the imposition of a recommendation relating to her class.

11.1 'AS IS' PROVISION – FAIR WEAR AND TEAR EXCEPTED

The first obligation under the first sentence of cl 11 of the 1987 form is to deliver the ship in the same condition 'as she is' at the time of inspection, meaning the buyer's afloat inspection if there was one. Obviously, for the buyers' risk management, great care must be taken at the time of the inspection, as he will have to prove that items found at delivery were not present at the time of the inspection.

Fair wear and tear (but not normal maintenance) are excluded, and there is no implied term that the seller should notify class of any items of wear and tear that might affect class (per Lord Denning MR in ***The Buena Trader***;[140] see under 11.5, below).

The amended cl 11 under the 1993 and 2012 forms will be shown later.

11.2 'AS IS' PROVISION BUT CLASS FREE OF RECOMMENDATION

Under the second sentence of cl 11 of the 1987 form is a documentary requirement that the class of the ship will not have made recommendations on the certificate about any outstanding items of repairs (***The Buena Trader***).[141] There must be a clean certificate of class. In the event that a class surveyor required an inspection to be carried out and repairs to be effected, as found necessary, the vessel would not be with 'class free of recommendation' (***The Andreas P***).[142] The seller is required to carry out repairs to the satisfaction of the ship's classification society without qualification (***The Great Marine** No 2*; see 11.5, later).

11.3 FREE OF AVERAGE DAMAGE AS AN ADDITIONAL EXCEPTION TO 'AS IS'

If cl 11 is amended, as is usual, by the addition of the words 'free of average damage affecting class', such a phrase is relevant to the condition of the ship not just to the condition of the documentation, as was held in ***The Alfred Trigon***.[143] It was further held that 'average damage affecting class' was not just any damage affecting class, but damage affecting class of a certain kind, and meant damage occasioned by a peril ordinarily covered by insurance, as opposed to defects through wear and tear or general

140 *Compania de Navegacion Pohing SA v Sea Tanker Shipping Pte (The Buena Trader)* [1978] 2 Lloyd's Rep 325.

141 Ibid, at p 329.

142 *K/S Stamar v Seabow Shipping Ltd (The Andreas P)* [1994] 2 Lloyd's Rep 183.

143 *Piccinini v Partrederiet Trigon II (The Alfred Trigon)* [1981] 2 Lloyd's Rep 333.

old age;[144] and the words 'affecting class' meant damage of such a character as to prevent the vessel being in class, or damage, if detected, that would require some qualification on class by way of recommendation.[145]

The risk of loss or damage until delivery is still on the seller, whose insurance will cover damage or loss caused by an insured peril. The seller's insurance is cancelled immediately post-delivery.

11.4 CLASS MAINTAINED AS AN ADDITIONAL EXEMPTION TO 'AS IS'

Further amendment to the second obligation under cl 11 may be: to deliver the ship with her 'present class maintained, free of recommendation'. The words 'class maintained' mean that the vessel had to be in class. The seller satisfies this condition by delivering an original class status certificate to the buyers, issued within a few days prior to delivery.

11.5 ALL OTHER CERTIFICATES

As seen earlier, 'and all other certificates . . . without condition or recommendation' means the certificates that the buyer inspected on the first inspection, as required under cl 4 (***The Rewa***, seen earlier).

11.6 NOTIFICATION TO CLASS

Under the third limb (third sentence) of the 1987 form, there is a specific express requirement, not found in the 1993 or the 2012 forms (see later), which obliges the seller to notify the classification society of 'any matters coming to their knowledge, prior to delivery, which may lead to a recommendation against class'. This obligation was introduced in the 1983 revision of the NSF as a direct consequence of the gap in the wording, which was considered in ***The Buena Trader***:[146] Negotiations for the sale of a vessel were concluded in accordance with the provisions of the NSF 1966. It provided that, '. . . the vessel shall be delivered charter free, class maintained free of recommendation, free of average damage affecting class with all trading certificates clean and valid at the time of delivery': also that, '. . . the vessel is to be delivered with continuous machinery survey cycle up to date at time of delivery'.

The buyers refused to accept delivery of the vessel on the ground that, among other matters, the continuous machinery survey was not up to date, and that the vessel had suffered wear and tear damage (known to the sellers) affecting the maintenance of the vessel's class. They contended that the sellers were, therefore, under an implied obligation to notify the classification society of this fact, and their

144 Ibid, p 338; see, also, *The Star of Kuwait* [1986] 2 Lloyd's Rep 641, and *The Great Marine (No 2)* [1990] 2 Lloyd's Rep 250.

145 Ibid, p 336.

146 [1978] 2 Lloyd's Rep 325.

breach of this implied obligation entitled the buyers to refuse to accept delivery of the vessel. The dispute was referred to arbitration.

The arbitrator decided in favour of the sellers and found that 'up to date' meant only that each item would have been examined sometime within the last 5 years.

The judge came to the opposite view and held that, pursuant to the rules of the class, 20 per cent of the items ought to be examined each year, so that the cycle was evenly spread. Seeing that far fewer were examined, and that the cycle was not up to date, he held in favour of the buyers. The sellers appealed.

Lord Denning MR agreed with the arbitrator insofar as the interpretation of the rules of the classification society were concerned and, further, considered whether there was an implied term in the contract that the sellers ought to notify the class about wear and tear items. He held that they did not.[147] There was no obligation upon the sellers to do anything other than do the repairs, which were recommended and outstanding. The ship was delivered as she lay at the time of delivery.

It was recognised that the 1966 form had a serious deficiency. Even if the sellers were aware of defects or damage affecting the ship's class, which arose after the buyer's inspection, they were not obliged to report them to the classification society, or to make them known to the buyer. The latter had to rely on the statutory protection if he could prove breach of merchantable quality (as was under the unamended SOGA at the time) or fitness for purpose.

To avoid the problems of *The Buena Trader*, the notification obligation was introduced in 1983 and was repeated in the 1987 form.

It is interesting to note, however, how this clause was interpreted by the CA (majority) in ***The Great Marine (No 2)***[148] and what problems arise in practice as between sellers, buyers and class.

Clause 11 provided that the ship would be delivered and taken over, 'as she is at the time of inspection fair wear and tear excepted . . . with present class free of recommendations'. The same clause obliged the sellers to notify ABS (the classification society) of any matters coming to their knowledge prior to delivery that would lead to the withdrawal of the ship's class or to imposition of recommendations relating to her class. In addition, cl 18 provided that the sellers should deliver the ship free of average damage affecting class.

When the underwater inspection was carried out, the diver discovered that the propeller was seriously damaged. The buyers attempted unsuccessfully to persuade the sellers to report the damage to the classification society, but the sellers contended that the damage did not affect the class of the ship. The buyer's attempt to inform the society of the damage also failed, as the society claimed that prior to delivery it kept contact with the seller only. However, the buyers took delivery, repaired the propeller themselves and claimed damages against the sellers.

The court gave judgment for the buyers, holding the sellers in breach of their obligation under cll 11 and 18 to notify the classification society and deliver the vessel free of any average damage affecting class. Recoverable damages were the costs incurred by the buyer to make the propeller's damage good by the heating and fairing method. Although the sellers accepted they were in breach of their obligation, they

147 [1978] 2 Lloyd's Rep 325, pp 329–330.
148 [1990] 2 Lloyd's Rep 250.

disagreed on the method of repairs and, hence, the amount of damages claimed. They appealed.

The CA held that the sellers' obligation was to deliver the ship with clean certificate from the classification society. The buyers were to be put in the same position as if the sellers had performed their obligations; cl 6 required the seller to carry out repairs to the satisfaction of the ship's classification society, without qualification. The standard of repair required was that which would preserve a clean certificate of class; by cropping and grinding in a workshop, the sellers would have done what was required of them under the contract, irrespective of whether or not a loss of efficiency of the propeller resulted.

The sellers won on the issue of measure of damages by majority of 2:1, and so the buyers could not recover their heating and fairing expenses; Lloyd LJ, however, agreed with the judge. There was no further appeal.

11.7 *WHAT* MATTERS NEED TO BE NOTIFIED AND WHEN

These questions gave rise to disputes after the amendment of the clause; for example, in ***The World Horizon***,[149] the 1983 form, cl 11, provided that 'the sellers shall notify the classification society of <u>any matters</u> coming to their knowledge prior to delivery which upon discovery would lead to the withdrawal of the vessel's class or the imposition of a recommendation'. When the vessel was delivered, it was contended that the sellers were in breach of this provision because they had failed to notify the classification society of two matters: (i) the spare main engine piston rod was not yet on board the vessel, and (ii) the clamps and supports for the deck piping were in need of repair.

The issues before the court were: (a) what would be the position with regard to matters that already existed at the time of the buyer's afloat inspection, and (b) what would be the earliest date when the existence of these matters should be reported.

It was found that both these matters existed at the time of the inspection by the buyers and by the classification society, and the society made no recommendations on them. The CA held that the obligation under cl 11 related to matters coming to the knowledge of the sellers from the date of the last survey by the classification society or the last inspection by the buyers.

The same issues came before the House of Lords in ***The Niobe***.[150] The CA had held that the obligation referred to matters coming to the sellers' knowledge from the <u>date of the contract</u>. The word 'coming' looks to the future from the date of the contract. It reversed the decision of Gatehouse J, who had held that the obligation arose from the date of the last survey by the classification society done prior to the contract.

However, the House of Lords[151] chose a more flexible approach than the two earlier CA decisions. The question put to their Lordships was whether the sellers were under an obligation to notify Class of matters that affected the class of the ship and came to their knowledge as from (1) the date of the contract, or (2) the date of

149 *Taramar Shipping Corp v Young Navigation Corp (The World Horizon)* [1993] 2 Lloyd's Rep 56, p 57.
150 *Niobe Maritime Corp v Tradax Ocean Transportation SA (The Niobe)* [1994] 1 Lloyd's Rep 487.
151 [1995] 1 Lloyd's Rep 579.

the last survey of the equipment in question, or (3) from some other date and, if so, what date.

It was, unanimously, held that the obligation covered all matters affecting class, whenever such matters might have come to the sellers' knowledge, before or after the contract, and it did not only refer to the future. According to Lord Mackay:

> Grammatically, the phrase 'coming to their knowledge' is an adjectival present principle governing the word 'matters' . . . Of course, the phrase may take colour from its context, and in some contexts point only to the future . . . But in the present context the adjectival phrase is as apt to cover knowledge acquired before the contract as after. 'Within their knowledge', means matters known to the sellers: neither more nor less. It follows that there is no *terminus a quo*, and the sellers are obliged under the contract to inform the classification society before delivery of all matters affecting class whenever such matters may have come to their knowledge. In practice, however, it will not usually be necessary to go back beyond the last relevant survey.[152]

From a risk management point of view, the protection afforded to buyers by cl 11 of the 1987 form should not be, lightly, bargained away.

Sellers' knowledge does not include constructive knowledge, for example, that possessed by the sellers' agents, but it ought to include 'turning a blind eye knowledge', when a person, suspicious of the truth, deliberately refrains from inquiring and turns a blind eye to the truth.[153]

There are, however, still difficulties in practice as to how the buyer can prove that the sellers knew about defects, as there is no duty of good faith. Presumably, the standard of a reasonable seller would apply depending on the particular case, i.e. what a reasonable person in the position of a seller would have suspected, or believed, to be the situation.[154]

11.8 CLAUSE 11 UNDER THE 1993 AND THE 2012 FORMS

Clause 11 of the 1993 NSF has significantly been amended to clarify matters and include the various amendments to the clause, as seen in the preceding paragraphs; it provides:

> The Vessel with everything belonging to her shall be at Sellers' risk and expense until she is delivered to the Buyers, but subject to the terms and conditions of this Agreement she shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted.
>
> However, the Vessel shall be delivered with her class maintained without condition/recommendation free of average damage affecting the Vessel's class, and with her classification certificate and national certificates, as well as all other certificates the Vessel had at the time of inspection, valid and un-extended without condition/recommendation by Class or the relevant authorities at the time of delivery.
>
> 'Inspection', in this Clause 11, shall mean the Buyers' inspection according to Clause 4(a) or 4(b), if applicable, or the Buyers' inspection prior to the signing of this Agreement. If the vessel is taken over without inspection, the date of this Agreement shall be the relevant date.

152 [1995] 1 Lloyd's Rep 579, p 583.

153 *The Eurysthenes* [1976] 2 Lloyd's Rep 171 (CA), in the context of s 39(5) of the Marine Insurance Act 1906.

154 This test derives from what the CA said, in *The Star Sea* [1997] 1 Lloyd's Rep 360, about privity of the owners or managers in relation to the unseaworthiness of a ship.

Clause 11 of the 2012 NSF provides the same as above and, in addition, that: 'However, the vessel shall be delivered free of cargo and free of stowaways with her class maintained . . .'

Under both forms, the exceptions of (a) 'class maintained', (b) 'without condition/ recommendation' and (c) 'free of average damage affecting class', as seen in the preceding paragraphs, are included, and the ship shall be delivered and taken over 'as she was' at the time of inspection; (about the meaning of 'as she was', see para 11.9, below).

11.8.1 The additional exceptions under the 2012 form

The 2012 form includes the above two additional exceptions to the 'as she was' provision.

'Free of cargo' is bound to give cause to disputes, in particular, as to whether residues of cargo found in the ship's holds will be in breach of this provision. The answer to this will depend upon the particular cargo and ship, as well as the extent of the residues.

The provision to be 'free of stowaways' is intended to ensure that the seller and his P&I club will deal with and pay for repatriation of stowaways, which is a frequent problem in ships.

11.8.2 The omission in cl 11 of the 1993 and 2012 forms

The remaining clause is the same as cl 11 of the 1993 form. It should be noted, however, that the important requirement (under cl 11 of the 1987 form) of notification to class by the sellers of any matters coming to their knowledge prior to delivery etc. is not found in either the 1993 or the 2012 forms. This poses great disadvantage to the buyer; it seems, however, that the draftsman has attempted to balance this disadvantage with the protection given to the buyer in the remaining clause, which did not exist in the unamended cl 11 of the 1987 form. The protection relates to a requirement that the seller not only delivers the vessel 'free of Class recommendation in the documents' but also 'free from average damage affecting the vessel's Class'; in other words, it concerns the physical condition of the vessel.

However, 'any matters affecting Class' for which notification is required under the 1987 form is much wider than average damage[155] (which refers only to casualty damage), but 'any matters' require, as seen earlier, that the seller knows about them. If the 1993 or the 2012 forms are used, then an appropriate reinstatement of the reporting requirement should be negotiated, but the achievement of this would, naturally, depend on the respective strength of bargaining positions.

11.9 THE EFFECT OF 'AS IS' OR 'AS SHE WAS' UPON S 14(2) OF SOGA

There has been a significant development in the law with regard to the meaning and implications of the provision 'as is' or 'as she was' in cl 11, which took the market

155 See also Goldrein, on *Ship Sale and Purchase*, 6th edn, 2012, at p 201.

by surprise, particularly because it had been thought that such provisions have had a special meaning in the market; that is: second-hand ships are bought and sold to a class standard, not to a standard of reasonable quality; it had been thought, prior to the case below, that the use of these phrases had the effect of excluding the implied condition of satisfactory quality as required by s 14(2) of SOGA.

In ***The Union Power***,[156] from which there is no appeal, Flaux J held that (a) 'as she was' in cl 11 of the NSF 1993 merely records an obligation by the seller to deliver the vessel in the same condition as she was at the time of inspection by the buyer; it is a temporal obligation that arose because there would usually be a period of time of weeks or even months between inspection and delivery; however, these words did not say anything about what the seller's obligations were, either on inspection or delivery, as regards the quality of the vessel; (b) a sale contract, which provided that the vessel was to be delivered and taken over 'as she was' at the time of inspection, fair wear and tear excepted, did not exclude the implied term of satisfactory quality in the SOGA 1979 s 14(2).

Briefly, the background was that the vessel was classed by RINA, and the buyers knew that she was due for her third special survey. They carried out an underwater survey before delivery, which revealed no bottom damage affecting class. Through their agents, the buyers also inspected the class records and found nothing of significance. There was a minor note about damage to number 1 crankpin, but it was not noticed. After delivery, she was immediately dry-docked, repairs were carried out, and the special survey was undertaken by ABS (the new class society). They opened the crankpin bearings of numbers 2 and 4 units, which were found satisfactory, and so ABS credited all the crankpin bearings for the purpose of the special survey. On her ballast voyage, a month after delivery, the main engine broke down because of a defective crankpin in her engine. On opening the crankcase, it was found that number 1 crankpin had failed; it was significantly undersized and oval.

The buyers commenced arbitration against the seller, claiming breach of the implied term of satisfactory quality under s 14(2) of SOGA 1979, which was part of the conditions in the MOA. The sellers argued that the provision in cl 11 of the 1993 NSF 'as she was' excluded the application of the statutory implied terms.

The arbitrators decided that the term 'as she was' in the 1993 NSF was different from 'as is, where is', which phrase meant that the vessel must be as it is and where it is on delivery, if some other meaning is not imputed to it. 'As she was' in cl 11 of the 1993 form records that the buyer is entitled to receive the vessel, save for fair wear and tear, in the same state as when inspected. Upon the evidence before them, the arbitrators found that the engine had been likely to fail within a short period of normal operation after delivery, and that there was a breach of the implied term as to satisfactory quality; therefore, the buyers were entitled to damages. There was no evidence before the tribunal about market practice, or custom, with regard to the usage, or the meaning in the market of the phrases 'as is' or 'as she was'.

The question for the judge, on appeal, was whether a term as to satisfactory quality is implied into the MOA contract by s 14(2) of SOGA 1979 in a sale 'as she was'.

This question had not previously been dealt with directly by the court, and the judge approached the analysis of the question, as the buyers suggested, in two stages:

156 *Dalmare SpA v Union Maritime Ltd (The Union Power)* [2012] EWHC 3537 (Comm).

first, to determine whether the MOA under the 1993 form was an 'as is' or 'as is, where is' contract (the narrow issue); and, second, if it was, whether 'as is, where is' is sufficient to exclude the implied term under s 14(2) (the wider issue).

11.9.1 The narrow issue

On the narrow issue question, the judge agreed with the tribunal. Flaux J further said (at para 67) that the words 'as she was', in the context of the first sentence of cl 11 of the 1993 form, are incapable of bearing the same meaning as the free-standing words 'as is, where is' in a sale contract assuming, for the purpose of argument, that those words do exclude the statutory implied terms.

The correct starting point, the judge said, was that the s 14 implied terms would apply to the sale contract, as to any other English law contract, unless the parties had contracted out of s 14. Second-hand ships were 'goods' within the Act like any other piece of machinery or equipment; if commercial parties did not want to be subject to the statutory implied terms, they could contract out of them. In this respect, s 55 of the Act was relevant, which provides:

(1) Where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the UCTA 1977) be negative or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.
(2) An express term does not negative a term implied by this Act unless it is inconsistent with it.

Referring to two relevant authorities on the issue of exclusion of statutory implied terms, *The Mercini Lady*[157] and *Air Trasworld*,[158] the judge concluded that s 55(1) above requires the parties to use clear language showing their intention to exclude the statutory implied terms. The phrase 'as she was' in the first sentence of cl 11 of the MOA is only recording the seller's obligation to deliver the ship as she was at the time of the inspection. Without a uniform view in the market and proof that the phrase 'as she was' is meant to have the effect of excluding the implied term of satisfactory

157 *KG Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v Petroplus Marketing AG (The Mercini Lady)* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep 442: under an FOB contract for the sale of gasoil, cl 18, headed 'Other Conditions', contained, among other terms, an exclusion clause that provided that there were no guarantees, warranties or representations, express or implied, of merchantability, fitness or suitability of the oil for any particular purpose or otherwise that extended beyond the description of the oil set forth in the agreement. On the question whether such a clause excluded the statutory implied term as to satisfactory quality, the CA held: a principle had been established, on the highest authority, that the implied conditions of SOGA could not be excluded by reference to guarantees or warranties and required clearer language extending to 'conditions' themselves, *Wallis Son & Wells v Pratt & Haynes* [1911] AC 394, *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd* [1934] AC 402, *Baldry v Marshall* [1925] 1 KB 260 and *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 followed. It was not open to the court to depart from that long-established consensus (paras 59–62).

158 *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm); [2012] 1 Lloyd's Rep 349: there was an aircraft purchase agreement (APA) including a wide exception clause; the issue was whether such clause was capable of excluding the implied terms of the SOGA 1979 as to quality; Cooke J held: the provisions of the APA were sufficiently clear to exclude the Sale of Goods Act implied conditions and to substitute for them the warranty set out in the APA. Although, on the authorities, the use of the word 'warranty' would not be sufficient to exclude the statutory implied conditions, the latter part of Art 4 was only illustrative of the all-embracing provision found in the first part.

quality, the phrase was not inconsistent with the implied term of s 14(2) for s 51(2) above to apply.

11.9.2 The wider issue

Having decided as he did on the first issue with regard to 'as she was' of the 1993 NSF, Flaux J did not have to decide the wider issue, that is, whether 'as is' is inconsistent with the SOGA implied terms; noting that there were no other authorities on the issue, he said (*obiter*) that if he had to decide, he would conclude that: the provision excludes the buyer's right to reject the vessel for defects being apparent at the time of inspection, but leaves the right to claim damages for breach of the statutory implied term unaffected.

However, he qualified his view by saying that this is not definitive conclusion on this wider question; in future cases of what might be called a 'pure as is' situation, the parties might wish to call evidence as to custom or market meaning of the phrase, which might impact on the interpretation the court would place on such an 'as is' provision (at para 84).

It is surprising that there was no evidence before the arbitrators or the judge regarding custom or market meaning, but the reason for lack of such evidence must have been the fact that there is no uniform view in the market; it has just been assumed, but never tested in court, that the market's understanding has been to exclude the implied statutory terms by using the phrase 'as is, where is' or 'as she was'.

11.9.3 The express wording of cl 18 – 2012 NSF

In the light of the above landmark decision of Flaux J, buyers should not lightly waive the benefits derived from it by agreeing cl 18 of the 2012 NSF, which is an entire agreement, intending to exclude the statutory implied terms; it provides:

> The written terms of this Agreement comprise the entire agreement between the Buyers and the Sellers in relation to the sale and purchase of the Vessel and supersede all previous agreements whether oral or written between the parties in relation thereto.
>
> Each of the parties acknowledge that in entering into this Agreement it has not relied on and shall have no right to remedy in respect of any statement, representation, assurance or warranty (whether or not made negligently) other than as is expressly set out in this Agreement.
>
> Any terms implied into this Agreement by any applicable statute or law are hereby excluded to the extent that such exclusion can legally be made. Nothing in this Clause shall limit or exclude any liability for fraud.

This clause ensures that this agreement is the entire contract, regardless of whether or not anything else was agreed previously (first limb).

The second limb protects both parties from liability for pre-contract misrepresentations (see court decision about the effect of such clauses and estoppel in para 3.5 above).

The third limb intends to exclude implied terms by statute or law, which would otherwise be applicable pursuant to the law governing the contract. In BIMCO'S view, the use of the word 'terms' instead of the word 'conditions' on the first line of the third sentence was preferred because of different meaning that might be given to the word 'conditions' if a law other than English law applies to the contract. At the time of drafting, the word 'terms' was considered to be all-embracing. Undoubtedly, this will be tested in the English courts in future cases!

12 THE CLOSING MEETING

It has already been mentioned that all documents need to be ready for exchange at this meeting, which invariably takes place at a different location from the place of the physical delivery, but simultaneously. Representatives of the buyer and seller on board the ship will communicate with the lawyers of the parties at the place of the financial closing, once the pre-delivery inspection is completed and the buyer's representative is satisfied with the condition of the ship. This is the time when either matters go smoothly, and the buyer's bank is instructed to release the balance of the money, or heated arguments may ensue if the seller has failed to comply with his obligations discussed previously.

From a risk management aspect, the timing is very important. If the money has already been released, and the buyer's representative communicates that the ship should not be accepted, the buyer's lawyers should be on the alert to obtain a freezing injunction against the sellers to restrain them from removing the money out of the jurisdiction. At what point in time this can be done will be seen under para 16, below.

If the closing proceeds smoothly, the next step is for the seller to communicate with the registrar of the ship's registry to discharge the mortgage and deliver to the buyer the ship's certificates and other documents. An executed discharge of the mortgage would have been lodged with the ship's registry in advance. Upon payment of the money, the seller will transfer title in the ship to the buyer. The buyer will register the ship under the new flag, and the buyer's mortgagee will instruct the registrar to register the new mortgage.

The seller must also deliver additional documents, such as minutes of the directors' and shareholders' meeting approving the sale, the company's constitutional documents and an original certificate of the seller's good standing. An original power of attorney, an original certificate of the ship's classification society, an original certificate of the ship's registry stating that the ship is free from all registered encumbrances and any governmental approvals or consents that might be needed must also be delivered. A protocol of delivery, with a commercial invoice and an original inventory of the ship's parts, together with the ship's manuals and plans, forms part of the essential documents for delivery at this stage.

13 AVAILABLE OPTIONS IN THE EVENT OF NON-PERFORMANCE BY THE ONE PARTY

The rule in ***White and Carter (Councils) Ltd v McGregor***[159] (and a series of authorities following on from that decision[160]) in essence is this: If one party to a contract makes it clear to the other that he refuses or will refuse to carry out his obligations under the contract, the innocent party has two options: either (a) to accept

159 [1962] AC 413.

160 *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep 250; *Gator Shipping Corporation v Trans-Asiatic Oil Ltd SA (The Odenfeld)* [1978] 2 Lloyd's Rep 357; *Clea Shipping Corporation v Bulk Oil International Ltd (The Alaskan Trader) (No 2)* [1983] 2 Lloyd's Rep 645; *Stocznia Gdanska SA v Latvian Shipping Co* [1995] 2 Lloyd's Rep 592; and the CA [1995] 2 Lloyd's Rep 592; *Ocean Marine Navigation Ltd v Koch Carbon Inc (The Dynamic)* [2003] 2 Lloyd's Rep 693; *Reichman v Beveridge* [2007] Bus LR 41 (CA); *The Aquafaith* [2012] 2 Lloyd's Rep 61.

such conduct as a repudiation and sue for damages, or (b) to insist that the other party performs the contract, if it is reasonable to keep the contract alive and he has a legitimate interest in maintaining the contract. Whether or not the innocent party can insist on performance was revisited in ***The Aquafaith***,[161] which concerned early redelivery of a vessel under a charterparty. The application of the *White and Carter* rule was examined.

However, unlike service or construction contracts, it is not envisaged that the second option of the *White and Carter* rule would be likely to be opted for in cases of sale and purchase of second-hand ships, save for exceptional circumstances in which, for example, the buyer may have a legitimate interest to insist on performance by the seller, if he has committed the ship to a charterparty contract.

On the other hand, if the buyer is in default, the seller would most likely opt for cancellation and claim damages.

In this connection, it should be noted that, during the economic downturn between 2008 and 2010, when the financial restrictions imposed by banks had not been foreseeable, buyers were placed in an invidious position whereby the purchase money they were able to draw down (if at all) was insufficient to enable them to perform their obligation under the contract, and alternative finance was simply unavailable. Consequently, delivery could not take place. In the absence of a *force majeure* clause, or any other express terms excusing performance on the happening of such an event, the courts have no power to modify contracts in the light of supervening events. The doctrine of frustration does not apply lightly. Applying the principles of frustration, particularly with regard to impossibility of performance (see ***The Mary Nour***[162]), not every supervening event that prevents performance of the contract would result in its being frustrated, because it might be apparent from the general nature of the contract, its particular terms and the context in which it was made, that it was intended to be performed. A contract would not be frustrated simply because performance had become financially impossible.

It could be said that lack of finance to complete the sale of ships at the time of the economic downturn was a risk undertaken by the buyer. Thus, the seller had the contractual right to accept the conduct of the buyer as repudiation and claim damages, with vast and unfair financial consequences to the buyer. In some cases, in the writer's experience, the parties were prepared to agree to postpone the delivery date until the buyer was able to obtain the finance required. In other cases, the seller had an opportunity to demand the release of the deposit as damages for breach, and, in most cases at that time, 10 per cent of the price was a large sum.

Unless the parties to a contract put their mind at the time of contracting to allocate the risk in such situations or to agree to be mutually discharged from their obligations,

161 *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] 2 Lloyd's Rep 61; the arbitrator had applied the wrong test when he considered whether or not the owners had a legitimate interest in maintaining the charter for the balance of 94 days and claiming hire. He never asked himself, as he should have done, whether it would be wholly unreasonable to keep the contract alive. With only 94 days left of a 5-year time charter in a difficult market, where a substitute time charter was impossible, and trading on the spot market very difficult, it would be impossible to characterise the owners' stance in wishing to maintain the charter as unreasonable, let alone wholly unreasonable. This was not an extreme or unusual case, and the exception to the *White and Carter* principle did not apply. The award would be varied to declare that: (a) the owners were entitled to refuse the purported redelivery by the charterers and were entitled to hire in accordance with the terms of the charterparty; and (b) the charterers were not entitled to insist on redelivery (see paras 42 and 54–57).

162 *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856; see, further, Treitel, *The Law of Contract*, Ch 19; *Chitty on Contracts*, Ch 23.

the general law does not help a party who is not intentionally refusing to perform his obligation.

The MOA regulates the respective obligations and rights of the parties and what is to happen in the event of breach. The standard sale forms do not contain a *force majeure* provision, and perhaps this should be considered by BIMCO and the parties when they negotiate their contracts.

14 SELLERS' REMEDIES

In the event the buyer fails to pay the purchase price, or refuses to take delivery, and there are no reasonable grounds for doing so, the seller can exercise his right to cancel the contract and claim damages. His election to cancel must be exercised within a reasonable time. What is a reasonable time will depend on the circumstances of a case, but in the *Great Marine (No 1)*[163] the sellers delayed for over a week and that was held to have been too long.

The seller's contractual remedies are usually provided for in the contract. If the parties use either the 1987, or the 1993, or the 2012 NSF, cl 13 stipulates that the deposit plus interest shall be released to the sellers, and, if the deposit does not cover their loss, they shall be entitled to further compensation and all expenses incurred together with interest. In this connection, the measure of damages, remoteness and mitigation issues are examined under para 18, below.

If the parties have not dealt with damages expressly in the contract, which is not common, the seller can rely on statutory remedies under s 51(1) of SOGA 1979, which provides that, 'where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance'. Sub-section (2) states the general rule that, 'the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract'. The yardstick is the market price, and sub-s (3) provides that,

> 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.

15 BUYERS' REMEDIES

15.1 DELAY IN DELIVERY OR NON-DELIVERY AS PER CONTRACT

Clause 14 of the 1987 NSF deals with default of the seller and provides:

> If the sellers fail to execute a legal transfer or to deliver the ship with everything belonging to her in the manner and within the time specified in line 38, the buyers shall have the right

163 [1990] 2 Lloyd's Rep 245.

to cancel this contract in which case the deposit in full shall be returned to the buyers together with interest at the rate of 12% per annum. The sellers shall make due compensation for the losses caused to the buyers by failure to execute a legal transfer or to deliver the ship in the manner and within the time specified in line 38, if such are due to the proven negligence[164] of the sellers.

The effect of cl 14 is twofold:

(a) the buyer has a right to elect to cancel and claim the deposit back with a fixed rate of interest, if the ship is not delivered as provided by the contract, irrespective of negligence by the seller (no fault provision);
(b) in addition, the buyer has a right to claim compensation if it is proved that the seller's failure to deliver the ship according to the contract and within the contractual date was due to his negligence, which caused losses to the buyer (proven negligence provision).

Clause 14 of the amended NSF 1993 was made clearer and provides:

Should the sellers fail to give Notice of Readiness in accordance with cl 5 or fail to be ready to validly complete a legal transfer by the date stipulated in line 61 the buyers shall have the option of cancelling this agreement provided always that the sellers shall be granted a maximum of three banking days after Notice of Readiness has been given to make arrangements for the documentation set out in cl 8. If after Notice of Readiness has been given but before the buyers have taken delivery, the vessel ceases to be physically ready for delivery and is not made physically ready again in every respect by the date stipulated in line 61 and new Notice of Readiness given, the buyers shall retain their option to cancel. In the event that the buyers elect to cancel this agreement the deposit together with interest earned shall be released to them immediately.

Should the sellers fail to give Notice of Readiness by the date stipulated in line 61 or fail to be ready to validly complete a legal transfer as aforesaid they shall make due compensation to the buyers for their loss and for all expenses together with interest if their failure is due to proven negligence and whether or not the buyers cancel this agreement.

Clause 14 of the 2012 form provides the same as the 1993 form and it is neater, but the express reference to 3 banking days' notice after the tender of NOR 'to make arrangements for the documentation, as required by cl 8' has been omitted.

This is an unfortunate omission by the draftsman and a disadvantage to sellers, particularly, in the light of ***The Rewa***, in which the CA said (at paras 32–34) in relation to cl 14:

The words 'make arrangements for' contemplated the seller taking such steps as would enable it to provide documentation for the valid legal transfer of the vessel in such a way that the seller would conform with its covenants set out in the transfer documentation and so, also, under the MOA. Thus the seller had three banking days to lift the detention and deliver the bill of sale in which it covenanted that the vessel would be free of detentions.

It could be argued that a reasonable time for the seller to make arrangements for the documents, so that he can make a legal transfer, may be implied, but even with the application of the purposive approach to the implication of terms, the court may

164 *Linett Bay Shipping Co Ltd v Patraicos Gulf Shipping Co SA (The Al Tawfiq)* [1984] 2 Lloyd's Rep 598.

conclude that the parties should have expressly provided for such a 'time provision'. Their omission may indicate that the parties intended to exclude it.

Otherwise, cl 14 of both the 1993 and 2012 NSFs enhances the notice provision and has considerably expanded the same provision of the 1987 NSF. It should be read together with cll 5 and 3, the former providing for the seller's obligation to give notice of readiness, and the latter for the buyer's obligation to arrange for payment of the balance of the purchase money.

The clause also caters for the eventuality that the ship may cease to be physically ready after notice has been given and before delivery, in which case the seller is obliged to make her physically ready by the new date stipulated in the contract. Failing to do so, the buyer shall retain his option to cancel. The intention is to place the control with the buyer, who may decide to give extra time to the seller, if he wishes, instead of exercising his option to cancel.

The interest rate is not fixed in cl 14 of either the 1993 or 2012 forms. In addition, under both the 1993 and the 2012 forms, the buyer shall be compensated, not only for loss, but for all expenses as well, which is not found in the 1987 form.

15.2 OTHER BREACHES BY THE SELLER

As regards other breaches, the damages for which are not specifically dealt with in the contract, the buyer will be entitled to rely on remedies as provided under the general contract law, including the measure of damages under s 51 of SOGA 1979.[165] If there is a breach of a condition, the buyer has the right to elect either to cancel the contract and claim damages for repudiation, or to affirm the contract and claim damages caused by the breach. If it is a breach of a warranty, his remedy will be in damages only, and, if it is a breach of an innominate term, his remedy will depend on the seriousness of the breach.

Breach of cl 9 of the NSF is dealt with under para 10, above.

In addition, if the ship is not in a deliverable state, and the buyer objects to taking delivery, in which case the seller may cancel, the buyer can obtain an injunction to restrain the seller from disposing of the ship, and the court may also order specific performance by the seller, as was seen in *Zegluga Polska*, under 9.2, above.

15.3 BREACH OF STATUTORY TERMS BY THE SELLER

Generally, and if the contract does not otherwise provide, the buyer would have protection under common law and the provisions of the SOGA 1979 and the SSGA 1994, as discussed in the beginning of this chapter and in Chapter 7. Such protection is afforded for a total or partial failure by the seller to perform, and, as seen under

165 If there is no market within the meaning of s 51(3) for the ship the buyer wanted in order to replace her, damages will be measured by reference to s 51(2). If the buyer does not purchase a replacement, it will not mean that he did not suffer loss. The principle of *Air Studios (Lyndhurst) Ltd (t/a Air Entertainment Group) v Lombard North Central plc* [2012] EWHC 3162 (QB); [2013] 1 Lloyd's Rep 63, will apply by analogy, and damages should be assessed by reference to the cost of procuring the nearest equivalent ship.

para 11 above, unless clear terms are used in the contract to exclude the implied term of satisfactory condition under s 14(2) of SOGA 1979, the provision 'as she was' under NSF does not exclude this implied term. Should there be a misrepresentation by the seller during the negotiations, on which the buyer relied and was induced to enter into the contract, unless the parties mutually agreed not to rely on pre-contractual representations (for example, cl 18 of the 2012 form), the remedies under the Misrepresentation Act 1967 will apply, as discussed under para 3.7, above).

16 RISK MANAGEMENT ISSUES FOR BUYERS

16.1 CONSIDERATIONS BEFORE EXERCISING THE OPTION TO REJECT THE SHIP

Buyers should take legal advice from their lawyers to consider whether a breach by the sellers amounts to failure to perform, and whether the contract or statute gives them the right to cancel the contract, or whether the sellers' failure is capable of being remedied; if it is, whether the seller is willing to rectify the breach within a reasonable time. Other legal and commercial considerations also come into play, such as the market rate for the type of ship at that time, whether the buyers have been committed to perform a charterparty, and what effect the time required for the repairs may have upon that charterparty. Would the sellers be likely to be in existence for an enforcement of an arbitration award in the event the buyers seek damages for their consequential losses from the sellers? Would protective measures, such as a freezing injunction or a Rule B attachment (seen in Chapter 3 of Vol 1), be available to the buyers?

16.2 IS A FREEZING INJUNCTION A PROTECTIVE MEASURE FOR THE BUYER?

The nature of a freezing injunction and what it purports to achieve have already been discussed in Chapter 3, Vol 1, of this book.

To recapitulate in this context, the general requirements for obtaining a freezing order are: (a) existence of a legal or equitable right in support of which the injunction is sought; (b) a good arguable case for an accrued – not a future – cause of action;[166] (c) the seller has assets within or outside the jurisdiction; (d) there is a real risk[167] that the seller will dissipate the assets or remove them from the jurisdiction;[168] (e) the buyer must make a full and frank disclosure of all material facts in his statement

166 *Veracruz Transportation Inc v VC Shipping Co Inc* [1992] 1 Lloyd's Rep 353 (CA), a cause of action based on an anticipatory breach is not sufficient.

167 *Midas Merchant Bank plc v Bello* [2002] EWCA Civ 1496: an inference of an intention to dissipate assets, from the fact that the defendant is short of money, would not be enough, unless there is proof of dishonesty.

168 The test for risk of dissipation is objective: *Harrison Partners Construction Pty v Jevena Pty Ltd* (2005) ALR 369; and solid evidence of risk of dissipation must be shown: *Laemthong International v ARTIS* [2005] 1 Lloyd's Rep 100.

of truth;[169](f) it must be just and convenient[170] that the order should be granted; and (g) the buyer must provide cross- undertakings to court:

(i) to pay damages to the seller for loss suffered by reason of the order, and
(ii) to indemnify third parties in respect of liabilities and costs reasonably incurred by them in complying with the order.

The difficulty for buyers of second-hand ships in relation to obtaining a freezing injunction lies in the fact that suspected defects in the ship will not be discovered until delivery, when the balance of the money is passed on to the seller, who is usually one-ship company, and the ship would be its only asset. Once the money is in the bank of the seller, it would most probably be moved to a jurisdiction beyond the reach of the buyer.

Steel J held, in ***The Capaz Duckling***,[171] that such factors would constitute a risk of dissipation of assets with regard to one-ship companies. Therefore, buyers are faced with a dilemma whether or not to part with their money when, before delivery of the ship, they believe there may be some defects that they will only be able to prove when delivery is made. Before that time, there would be no actionable breach, but only anticipatory.[172]

16.2.1 Limits to granting the injunction

The buyers cannot obtain the freezing order on the basis of an anticipatory breach by the seller, but only for an existing cause of action.[173] It must be an actual or threatened invasion of rights or breach.[174] For example, he cannot apply to the court in advance of the delivery of the ship in anticipation that the seller will be in breach of contract. He must make out an arguable case of breach by the seller when he makes the ex parte application. Until the ship is delivered, unless there is already a late delivery and therefore a breach, the buyer does not have an accrued cause of action for damages in case the ship is delivered in a defective condition.

16.2.1.1 Saville J's conditional injunction

Considering these difficulties, Saville J, in the ***A v B***,[175] was in favour of a conditional injunction. The buyers, having paid the deposit in an joint account held in the names of the sellers and themselves, suspected, subsequently, that, on delivery, the vessel

169 See *The Giovana* [1999] 1 Lloyd's Rep 867: non-full and fair disclosure disbarred the cargo interests from obtaining the injunction against the owners of the ship.

170 *Rasu Maritima SA v Pertamina* [1977] 2 Lloyd's Rep 397, per Lord Denning MR, applying the principle laid down by the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396; *The Niedersachsen* [1983] 2 Lloyd's Rep 660.

171 *The Capaz Duckling* [2007] EWHC 1630 (Comm).

172 *The Veracruz* op. cit. fn 166; *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428: the Mareva injunction was discharged because, when it had been obtained, there was no legal or equitable right to such a relief; the only cause of action was for a declaration.

173 This is the third and still prevailing rule derived from *The Siskina* [1979] AC 210 (HL): the rule establishes that the injunction has an ancillary nature to a substantive cause of action. The other two *Siskina* rules that there should be a triable matter in the English courts and that the applicant should be able to obtain leave to serve out of the jurisdiction according to the court rules were abolished, as is explained in Ch 3, Vol 1.

174 *Zucker v Tyndall Holdings plc* [1992] 1 WLR 1127.

175 *A v B* [1989] 2 Lloyd's Rep 423.

might not be in the order and condition stipulated in the contract. The sellers had no assets within the jurisdiction, and the buyers applied for a Mareva relief to freeze the sums in the joint account. They intended to commence arbitration proceedings against the sellers, but, at the time of this application, they did not have an accrued cause of action.

It was held that, if the material produced to the court satisfied the court that it would be appropriate to grant a Mareva relief when the cause of action arose, there was no good reason why the court should not grant relief in advance, provided nothing in the order came into effect until the moment of delivery. Thus, a conditional injunction was granted.

Although the English courts recognised that a freezing injunction against the seller might be appropriate and just in some cases, they have since this case imposed restrictions on the granting of this discretionary relief. First, there must be an accrued cause of action and, second, the buyer must notify the seller of the application, if the court has attached such a requirement in the order.

16.2.1.2 The first limit – the Veracruz I/Siskina barrier

The CA in ***The Verecruz***[176] rejected the notion of a conditional injunction for suspected defects, where there is not cause of action at the time of the application, but approved the injunction for late delivery.

The ship bought by the plaintiff was under a bareboat charter. Repairs were necessary in the amount of $3 million, and a dispute arose between the owners (sellers) and charterers as to who would pay this sum; that dispute was referred to arbitration in Norway. The ship was not ready for delivery to the buyers on the agreed date. They referred this dispute to arbitration in London.

As the buyers were concerned that the purchase price, which would be paid to the sellers in London, would be their only asset within the jurisdiction, the buyers applied, *ex parte*, for a Mareva injunction to restrain the sellers from dealing with the purchase money when it was paid over, which was granted. The injunction was not to come into effect until after delivery and payment.

The buyers' claim was for damages for late delivery and for damages in respect of defects, as they believed that the repairs had not been fully carried out. On handing over the purchase money, the buyers advised the sellers that it was subject to the injunction.

On appeal inter parties, Hobhouse J held that, although the buyers had no accrued cause of action for damages for defects in the vessel at the time of the *ex parte* application, they had an accrued cause of action for damages for delay in delivery; and, to the extent that they could show an arguable claim for defects that would be present on delivery, the court had jurisdiction to grant an anticipatory Mareva injunction. He also held that, despite the buyers' misrepresentation of the factual position pertaining to communications between the charterers, the owners and the classification society, when applying for the *ex parte* injunction, which was culpable, this did not, in the circumstances, justify a total discharge of the injunction, but a reduction of the sum over which the injunction was originally granted.

176 *Veracruz Transportation v VC Shipping Co Inc (The Veracruz)* [1992] 1 Lloyd's Rep 353.

On further appeal, although the CA agreed with the judge that the order should not be discharged completely, it felt bound by the decision of the House of Lords in *The Siskina* that the right to obtain an interlocutory injunction was not a cause of action in itself, but ancillary to a pre-existing cause of action.

Thus, on the issue of the feared defects, the CA held that the learned judge was wrong to grant so much of the relief as related to the buyers' claim to damages for defects that they feared would be present when the vessel was delivered; the buyers could not, before delivery, by means of a Mareva injunction, secure a retention, in whole or in part, of the purchase price against feared defects; on this issue, the sellers' appeal was allowed. As regards delayed delivery, the CA confirmed the continuation of the injunction.

Beldam LJ rejected the approach of Saville J in the *A v B* case and said:

> Though it may be convenient to the applicant to obtain an order which anticipates his cause of action, the court has to balance any such convenience against the obvious inconvenience to the other party. The defendant seller, obliged by the terms of the contract to carry out repairs to put the ship in a deliverable state, may depend upon the assurance of receiving the purchase price to secure finance to carry out the repairs. The prospect that they may be deprived of the whole or a substantial part of the price by a surreptitious application to the court could impede or prevent them obtaining the means to do so.[177]

16.2.1.3 Should there be an exception to the last Siskina barrier?

Prior to the *Veracruz* decision, commercial court judges were following the approach of Saville J, because it was expedient to grant the injunction in cases such as the sale of second-hand ships, where the accrual of the cause of action was both imminent and, in practical terms, inevitable. The approach by Saville J was a common-sense approach, in the interests of justice. Thus, in special cases, judges were prepared to introduce an exception to the general *Siskina* rule applicable to injunctions, if, in reality, there was a high probability that the seller had committed a breach, which would, inevitably, be effective on the day of delivery.

This problem was recognised by Sir John Megaw in *The Veracruz*, but, in agreement with Nourse LJ, he said that the court's difficulty was that it was not free to deal with the question of jurisdiction without the constraint of binding authority (*The Siskina*). He, nevertheless, regarded the approach of Saville J in *A v B* as being a sensible and desirable approach in commercial cases. He saw no valid reason, in logic or practical convenience in the interests of justice, why jurisdiction should not exist in such cases, provided the court order was made on the condition, which Saville J applied, that the injunction should not operate unless and until the anticipated cause of action arose. In the end, he felt precluded by authority from so deciding on the question of technical jurisdiction.[178]

Perhaps the Supreme Court, or legislation, may, in due course, vary the third rule of *The Siskina* (the other two having been abolished; see Chapter 3, Vol 1) and make a distinction between the general rule applicable to the granting of injunctions and a possible exception to the rule that ought to apply in the cases of sale of ships for the interest of justice.

177 Ibid, p 358.
178 *The Veracruz* [1992] 1 Lloyd's Rep 353, p 361.

16.2.1.4 What is inferred from authorities for buyers to bear in mind?

If a buyer were able to show a threatened breach the day before the delivery of the ship by providing solid evidence of existing defects in the ship, such evidence should substantiate a potential action. The order could be granted to take effect on the day of delivery.[179]

For example, in ***The Assios***,[180] the buyers knew from the dry-dock inspection that the ship's bottom had a good deal of indentation that would require repairs; although the injunction was granted at the time, it was discharged later for want of disclosure.[181]

Potentially, buyers could have the freezing injunction application ready and apply to the court on the same day as the day of the planned delivery of the vessel, provided they can show that the anticipated breach has indeed become actionable on that day.

In ***Ninemia Corp v Trave (The Niedersachsen)***,[182] the buyer alleged defects in the boiler tubing and other defects on evidence from a surveyor. However, as the application for the injunction was made before delivery of the ship, and there was no cause of action yet, the application for an injunction was refused. However, immediately after the delivery of the ship and payment of the price, the buyer was not deterred and applied again. In view of the change of the circumstances, the injunction was granted. However, on the seller's application, inter-parties, to discharge the injunction, the injunction was discharged, because there was no evidence of a real risk that the seller would dispose of his assets before an arbitration award could be enforced.

16.2.1.5 The second limit – notification of the application

The courts have also been uneasy, from the early days of such jurisdiction, about making the order *ex parte*, particularly, in cases of ship sales. Mr Justice Leggatt said, in ***The Great Marine (No 1)***:[183]

> The sellers . . . have an understandable sense of disappointment if not of grievance, that having been led to expect that they would receive an unfettered right to deal with the whole of the purchase monies as they saw fit, they found themselves deprived of the right to deal with . . . it . . . Provided that the court is told the facts, it can then decide whether to grant an injunction subject to an undertaking that notice of the intention to serve it will be given to the sellers before completion of the sale so that they may consider, before there are assets of theirs within the jurisdiction to which the injunction can apply, whether there are grounds open to them for not completing the sale.
>
> Although such an order may be appropriate in some cases, in others it may seem more just to allow the trap to be laid so that a one-ship foreign company is not enabled to divest itself not only of the ship but also of the proceeds of sale before a bona fide claim advanced against it can be satisfied.[184]

179 Support for this proposition is derived from *Zucker v Tyndall Holdings plc* [1992] 1 WLR 1127.

180 [1979] 1 Lloyd's Rep 331.

181 See, also, *Laemthong International v Artis and Others*, [2005] 1 Lloyd's Rep 100: three freezing injunctions were discharged on grounds of failure to show a good arguable case, failure to prove risk of dissipation of assets, and failure to comply with the obligation of full and frank disclosure, respectively.

182 [1983] 2 Lloyd's Rep 600.

183 [1990] 2 Lloyd's Rep 245.

184 Ibid, p 250.

The buyer's failure to make full and frank disclosure in the statement of truth, or failure to comply with his undertaking given to the court to notify the seller in advance, will result in the discharge of the injunction. In ***The P***,[185] the plaintiffs were not justified in making the application *ex parte*; having taken it upon themselves to make the application without notice to the defendants, the plaintiffs undertook a heavy duty of disclosure, which should be stringently enforced.

In ***The Assios***, the injunction was discharged on the ground that the buyer had not made proper disclosure to the court that the injunction was intended as a trap for the seller to be presented with it at the closing meeting, particularly bearing in mind that the seller had, in any event, undertaken not to remove the deposit out of the jurisdiction, except upon giving the buyer 2 clear days' notice. Lord Denning MR thought that the defendants would be entitled, in such a case, at least to delay delivery to some extent, but he urged caution in the granting of an injunction in such circumstances.

In ***The P***,[186] Evans J said that, if the seller was not entitled to delay delivery, then the buyer had nothing to lose by giving advance notice.

The courts will object to granting such an injunction if the judge is not told of the plan to serve the order until after the closing. However, in ***Z Ltd v A-Z***,[187] Kerr LJ regarded the plan to serve the injunction once the sum is paid over to the seller as an abuse of the practice. In ***The Niedersachen***,[188] although the planned trap was revealed to the court, Mustill J found the plan unattractive. In ***The Great Marine No 1***,[189] Leggatt J said that, provided the court is told of the facts, it can then decide whether to grant an injunction, subject to an undertaking that notice of the intention to serve it will be given to sellers before delivery, but he was concerned about one-ship companies, and he said that, perhaps in such cases, it may be appropriate to allow the trap to be laid. In ***A v B***, Saville J required the buyers to give the sellers notice of the injunction immediately, and the buyers did give an advance notice.

It was recently held, in ***CEF Holdings Ltd v Mundey***,[190] that without-notice applications should only be granted in very limited circumstances, where to give notice would enable the defendant to take steps to defeat the purpose of the injunction, or where there was some exceptional urgency, which meant there was literally no time to give notice. An application for an injunction sought without any or proper notice had to include a statement supported by facts, explaining fully and honestly to the court why proper notice could not have been given.

Commercial judges are realistic about the risk involved for the buyer when notice of the injunction is given to the seller in advance of delivery, particularly with regard to one-ship companies. The notice, simply, will enable the seller to take steps to defeat the purpose of the injunction. The court has wide discretion as to whether or not to order the buyer to notify the seller in advance, which depends on the circumstances of a case.[191]

185 *The P* [1992] 1 Lloyd's Rep 470: in any event, the injunction was discharged for want of an accrued cause of action; Evans J was bound by *The Veracruz* [1992] 1 Lloyd's Rep 353.

186 [1992] Lloyd's Rep 470.

187 [1982] 1 QB 558.

188 [1983] 2 Lloyd's Rep 600.

189 [1990] 2 Lloyd's Rep 245.

190 [2012] EWHC 1524 (QB); *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16, [2009] 1 WLR 1405.

191 See, further, *Petroleum Investment Co Ltd v Kantupan Holdings Co Ltd* [2002] 1 All ER (Comm) 124.

Buyers may negotiate with the seller to obtain an undertaking that the money will not be removed from the jurisdiction without prior notice to the buyer, as was done in *The Assios*. To a great extent, however, such co-operation will depend on the reputation of the seller. The court will exercise its discretion in accordance with the circumstances of a particular case.

SECTION C: POST-DELIVERY AND ISSUES OF DAMAGES

17 POST-DELIVERY MATTERS

If all goes smoothly at the closing meeting, the remaining matters for completion to be finalised are: the cancellation of insurance by the seller and the issue of a new insurance policy in the name of the buyer; the delivery to the buyer of the certificate of permanent deletion from the ship's registry; the issue of a new class certificate by the classification society, which may have changed; and the registration of the ship, or the conversion of a preliminary registration to a permanent one by the buyer. Finally, the new crew boards the ship.

18 MEASURE OF DAMAGES

In the event that disputes arise between the parties, the basic principles of measure of damages is explained here.

The victim of the breach should be placed, so far as damages can do it, in the position he would have been in had the contract been performed.[192] The fundamental principle governing the assessment of damages for breach of contract is that damages should compensate the victim of the breach for the loss of his contractual bargain.[193]

As a general rule in the law of damages under English law, damages for breach of contract are to be assessed as at the date of the breach. However, the rule, as the House of Lords decided in ***The Golden Victory***,[194] is subject to many exceptions and is not to be mechanistically applied in circumstances where assessment at another date might more accurately reflect the overriding compensatory rule.

In a recent purchase of property case, ***Hooper v Oates***,[195] the CA decided: Where a buyer had failed to complete the purchase of a property and had been ordered to pay damages, the correct valuation basis on which to assess the damages was the date

192 *Robinson v Harman* (1848) 1 Ex 850.

193 *The Golden Victory* [2007] UKHL 12; [2007] 2 AC 353; [2007] 2 Lloyd's Rep 164 and cases cited.

194 *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* ibid: if the contract would have terminated early on the occurrence of a particular event, the chance of that happening had to be taken into account in the assessment of the damages. If it was certain that the event would happen, the damages had to be assessed on that footing.

The majority of the Law Lords – taking into account the event of the second Gulf War and that the charterer could have cancelled the charter under the war clause – did not assess damages as at the date of the breach. Lords Walker and Bingham, dissenting, expressed the view that the majority's decision undermines the quality of certainty, which is a traditional strength and major selling point of English commercial law, and involves an unfortunate departure from principle (at para 1).

195 [2013] EWCA Civ 91.

on which the sellers took the property back for their own use and not the date of the breach of contract. The decline of the property market between those two dates was part of the loss for which the seller was entitled to be compensated.

It was further explained that the general rule did not require the court to disregard matters occurring after the breach of contract or after the commencement of the action, or even after a decision on liability, if those matters would enable the court to fix the loss more accurately. The availability of a market was highly relevant in relation to the assessment of damages where a buyer failed to complete a purchase of land. It was hardly ever the case that there was a readily available market for the sale or purchase of land, in the sense of a new purchaser being found and being able to proceed to contract immediately. The breach date was, therefore, appropriate for assessment of damages only where there was an immediately available market for the sale of the relevant asset or, conversely, for the purchase of an equivalent asset.

Similarly, the availability of a market with regard to sale and purchase of ships is highly relevant to the assessment of damages, and the above case may provide a useful guide to litigants.

The general principles of the law with regard to causation and remoteness will apply to assess the damages that should adequately compensate the victim of the breach.

18.1 CAUSATION AND REMOTENESS

The general principle applicable to causation and remoteness of damages for breach of contract derives from ***Hadley v Baxendale***:[196]

> . . . Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the claimants to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under this special circumstance so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

The rule was refined by the House of Lords in in ***Heron II***,[197] in which Lord Reid clarified the law on the degree of likelihood required for a particular type of loss, and it is known as the 'Reid test':

> . . . the question for decision is whether a plaintiff can recover as damages for breach of contract a loss of a kind which the defendant, when he made the contract, ought to have realised was

196 (1854) 9 Exch 341, at pp 354–355.

197 *Czarnikov Ltd Koufos (The Heron II)* [1967] 2 Lloyd's Rep 457 or [1969] 1 AC 350, at pp 382G, 383A, 384C, 385B, F.

not unlikely to result from the breach of contract causing delay in delivery. I use the words 'not unlikely' as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.

For over a century everyone has agreed that remoteness of damage in contract must be determined by applying the rule . . . laid down . . . in *Handley v Baxendale*. But many different interpretations of that rule have been adopted by judges at different times . . .

[The judge] was not distinguishing between results which were foreseeable or unforeseeable, but between results which were likely because they would happen in the great majority of cases, and results which were unlikely because they would only happen in a small minority of cases . . .

I do not think that there were to be two rules or that two different standards or tests were to be applied. . . . The line of reasoning [in Handley] is that because in the great majority of cases loss of profit would not in all probability have occurred, it followed that this could not reasonably be considered as having been fairly and reasonably contemplated by both parties, for it would not have flowed from the breach in the great majority of cases . . .

. . . It is not enough that in fact the . . . loss was directly caused by the defendant's breach of contract . . . the crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach to make it proper to hold that the loss flowed naturally from the breach, or that loss of that kind should have been within his contemplation.

The House of Lords, in ***The Achilleas***,[198] reaffirmed this standard rule of remoteness and held: when assessing damages for the late redelivery of a chartered vessel, the court should in the usual case restrict the charterer's liability to the difference between the market rate and the charter rate for the overrun period. Lord Hoffman and Lord Hope explored also a broader test, namely the test of 'assumption of responsibility' by the defendant, to be applicable to unusual cases. Although Lord Rodger was broadly in agreement, he did not, as he said, have to explore 'assumption of responsibility', but Baroness Hale doubted the appropriateness of the concept in contract cases (see below).

The owners (M) had let out their ship to T for a period of 5–7 months, to end no later than midnight on 2 May 2004. T notified M that the ship would be back no later than then. On this understanding, M, therefore, contracted to let the ship for the subsequent fixture to new charterers for a period of about 4–6 months, promising that it would be delivered no later than 8 May 2004. The agreed price of hire was US$39,500 a day. The ship was delayed on its last voyage, and M did not get it back until 11 May 2004. M negotiated with the new charterers, who agreed not to cancel the charter but to take the ship at a reduced daily rate of US$31,500, because the market rate had fallen sharply.

The issue on the assessment of damages before the arbitrators was whether T was liable to pay to M as damages the hire for the number of days that the ship was late, at the market rate prevailing during those days, or, as M argued, the difference between US$39,500 and US$31,500 for the period of the new charter, which would be what M would have got from the new charter had the ship been returned in time.

The arbitrators, by a majority, adopted the latter approach. They concluded that the loss on the new fixture fell within the first rule of *Hadley*, namely, it flowed 'naturally, i.e. according to the usual course of things, from such breach of contract itself'.

198 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] 1 AC 61.

In particular, they held that it fell within that rule because it was damage 'of a kind which the [charterer], when he made the contract, ought to have realised that was not unlikely to result from a breach of contract [by delay in redelivery]' and 'the type of loss was readily identifiable'.

The dissenting arbitrator did not deny that T would have known that M would be very likely to enter into a following fixture during the course of the charter and that late redelivery might cause that fixture to be lost. However, he concluded that a reasonable man in T's position would not have understood that he was assuming liability for the risk of the type of loss in question. He stated that the general understanding in the shipping market was that liability was restricted to the difference between the market rate and the charter rate for the overrun period, and that 'any departure from this rule [is] likely to give rise to a real risk of serious commercial uncertainty which the industry as a whole would regard as undesirable'.

On appeal to the court, Clarke J approved the majority's award and, on further appeal, the CA[199] (with Rix LJ delivering the judgment) agreed and held that the majority arbitrators applied the doctrine of remoteness correctly; a charterer of a time-chartered vessel knew that a new fixture was very likely to be entered into by the owner of his chartered vessel so as to follow as closely as possible the redelivery of the vessel. The chartering market was the charterer's own business; he should have been cautious about the danger of late delivery, given his background knowledge, which arose out of the ordinary nature of things. There was no fixed rule and no binding authority that damages for late redelivery of a time-chartered vessel were limited to the overrun period measure. In order to accommodate the damages for loss of a fixture awarded by the majority arbitrators, the law would not have to change but merely to develop, and that development would be entirely in accordance with principle. The instant case was not one in which the argument in favour of certainty militated against the claim.

The House of Lords[200] overruled the decision. It held (it seems by majority) that: in *The Heron II*, their Lordships had had well in mind that it was not simply a question of probability but also of what the contracting parties had to be taken to have had in mind, having regard to the nature and object of their business transaction. What mattered was whether the common intention of reasonable parties to a charterparty of this sort would have been that, in the event of a relatively short delay in redelivery, an extraordinary loss, measured over the whole term of the renewed fixture, was, in the words of Lord Reid in *The Heron II*, 'sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within [the defaulting party's] contemplation'.

That would not have been the common intention of reasonable contracting parties. It was contrary to the principle stated in *Victoria Laundry (Windsor) v Newman Industries*,[201] and reaffirmed in *The Heron II*, to suppose that the parties were contracting on the basis that the charterer would be liable for any loss, however large, occasioned by a delay in redelivery, in circumstances where it had no knowledge of,

199 [2007] EWCA Civ 901, [2007] 2 Lloyd's Rep 5 (CA); [2007] 1 Lloyd's Rep 19 (first instance).
200 [2008] UKHL 48; [2009] 1 AC 61.
201 [1949] 2 KB 528.

or control over, the new fixture entered into by M (*Hadley v Baxendale*, *The Heron II* and *Victoria Laundry* applied).

Lord Hoffmann (at para 23) stated:

> If . . . one considers what these parties, contracting against the background of market expectations found by the arbitrators, would reasonably have considered the extent of the liability they were undertaking, I think it is clear that they would have considered losses arising from the loss of the following fixture a type or kind of loss for which the charterer was not assuming responsibility [emphasis added]. Such a risk would be completely unquantifiable, because although the parties would regard it as likely that the owners would at some time during the currency of the charter enter into a forward fixture, they would have no idea when that would be done or what its length or other terms would be.

Lord Hope, who followed Lord Hoffmann's view on the 'assumption of responsibility' test, stated (at para 34) that:

> . . . In the ordinary course of things rates in the market will fluctuate. So it can be presumed that the party in breach has assumed responsibility for any loss caused by delay which can be measured by comparing the charter rate with the market rate during that period. There can be no such presumption where the loss claimed is not the product of the market itself, which can be contemplated, but results from arrangements entered into between the owners and the new charterers, which cannot.

Lord Rodger, who did not find it necessary to explore the issues concerning assumption of responsibility but was 'otherwise' in substantial agreement with the reasons given by Lord Hoffmann, said (at para 60) that the relevant question is whether at the time of the contract the parties would reasonably have contemplated that an overrun of 9 days would '*in the ordinary course of things*' cause the owners the kind of loss claimed, and he concluded that they would not have done.

He gave a couple of useful examples (at paras 58–60):

> . . . it may be that, at least in some cases, when concluding a charter party, a charterer could reasonably contemplate that late delivery of a vessel of that particular type, in a certain area of the world, at a certain season of the year would mean that the market for its services would be poor. In these circumstances, the owners might have a claim for some general sum for loss of business, somewhat along the line of the damages for the loss of business envisaged by the Court of Appeal in *Victoria Laundry*. . . . But, even if such loss of business could have been reasonably contemplated . . . this would not mean that the owners' particular loss of profit [in this case] as a result of re-negotiation of the Cargill fixture should be recoverable. To hold otherwise would risk undermining the first limb of *Handley v Baxendale*, which limits the charterers' liability to 'the amount of injury' that would arise 'ordinarily' or 'generally'.
>
> . . . the position on damages might also be different, if, for example – when a charter party was entered into – the owners drew the charterers' attention to the existence of a forward charter of many months' duration for which the vessel had to be delivered on a particular date. The charterers would know that a failure to redeliver the vessel in time to allow the owners to deliver it under the charter would be liable to result in the loss of that fixture. Then the second rule or limb in *Handley v Baxendale* might well come into play. But the point does not arise in this case.
>
> . . . the loss . . . occurred in this case only because of the extremely volatile market conditions which produced both the owners' initial (particularly lucrative) transaction, with a third party, and the subsequent pressure on the owners to accept a lower rate for that fixture.

Baroness Hale made it clear that she was not deciding the case on the basis of assumption of responsibility, and that she had considerable doubts about its appropriateness in a contractual context.

Lord Walker made interesting observations of the traditional remoteness test (at paras 67–69, 86):

The recognition of the rule as a single principle accords with the reality that even under the first limb, the defendant often needs some particular knowledge . . . The degree of knowledge assumed under the first limb depends on the nature of the business relationship between the contracting parties . . .

Another consequence of the . . . assimilation of the two limbs is to raise doubt as to whether the notion of assumption of responsibility (as a precondition for liability for a larger measure of damages) is necessarily confined to second limb cases . . .

Businessmen who are entering into a commercial contract generally know a fair amount about each other's business. They have a shared understanding (differing in precision from case to case) as to what each can expect from the contract, whether or not it is duly performed without breach on either side. No doubt they usually expect the contract to be performed without breach, but they are conscious of the possibility of breach . . .

The decision has caused confusion by the introduction of the 'assumption of responsibility' test, which was clarified in subsequent cases and, in particular, by Hamblen J in ***The Sylvia***.[202]

He held that *The Achilleas* did not involve any new, generally applicable legal test of remoteness in damages. *Handley v Baxendale* (as refined by *The Heron II*) remained the standard rule, and it was only in relatively unusual cases where a consideration of assumption of responsibility might be required. In particular, he stated (at paras 40–41, 49):

In my judgment, the decision in *The Achilleas* results in an amalgam of the orthodox and the broader approach. The orthodox approach remains the general test of remoteness applicable in the great majority of cases. However, there may be 'unusual' cases, such as *The Achilleas* itself, in which the context, surrounding circumstances or general understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations.

In the great majority of cases it will not be necessary specifically to address the issue of assumption of responsibility. Usually the fact that the type of loss arises in the ordinary course of things or out of special known circumstances will carry with it the necessary assumption of responsibility . . .

In my judgment, it is important that it be made clear that there is no new generally applicable legal test of remoteness in damages. It appears that in a number of cases this is being argued and that decisions are being challenged for failing to recognise or apply the assumption of responsibility test. This results in confusion and uncertainty.

He further commented on the individual reasons given by each of their Lordships in *The Achilleas* by saying that:

Two of their Lordships . . . decided the case on the orthodox approach, and two of them did so on the broader approach. Lord Walker gave a judgment which contained elements of the

202 *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)* [2010] 2 Lloyd's Rep 81, referring also to the comment stated in *Chitty on Contracts*, paras 26–100G: 'it is . . . to be hoped that the approach adopted by the majority in *The Achilleas* will be applied by the courts only in exceptional circumstances, such as those emphasised by Lord Hoffmann in that case'. See, further, *ASM Shipping Ltd of India v TTMI Ltd of England (The Amer Energy)* [2009] 1 Lloyd's Rep 293, per Flaux J; *Classic Maritime Inc v Lion Diversified Holdings Berhad* [2010] 1 Lloyd's Rep 59, per Cooke J; *Supershield Ltd v Siemens Building Technologies Ltd* [2010] 1 Lloyd's Rep 349 (CA), all following the same view about the effect of *The Achilleas*.

reasoning of both approaches and concluded that he was agreeing with the further reasons given by not only Lord Hoffmann and Lord Hope but also by Lord Rodger. Given the disparity between the two approaches this has understandably led to some confusion as to what is the *ratio decidendi* of the House of Lords' decision.[203]

Considering the aforesaid, it may be that Lord Hoffmann might have used the phrase 'assumption of responsibility' (as the dissenting arbitrator did) to interpret the Reid test in *The Heron II* and was not intending to add a broader test. In the light of the dicta of Lord Walker (that the two limbs of the traditional test of remoteness are assimilated, at least partially) and the dicta of Lord Rodger and Baroness Hale, the *ratio decidendi* of the decision may be that it applied the traditional remoteness test. However, this is not clear,[204] and it is upon judges, in subsequent cases, to interpret the case, if it is applicable, on a case-by-case basis, as, for example, Hamblen J did in *The Sylvia*.

In this connection, and for risk management purposes in drafting, the dicta of Baroness Hale, who regarded the issues before the court as an examination question, are extremely important for future cases (at paras 90–93):

. . . It was conceded before the arbitrators that the missing date for a subsequent fixture was a 'not unlikely' result of late redelivery. Both parties would have been well aware of that at the time when the contact was made. They would also have been aware that a new charter was likely to commit that particular ship rather than to allow the ship-owner to go into the market and find a substitute. . . . If the parties wish to exclude liability for consequential loss of this kind, then it will be very simple to insert such a clause into future charter parties. . . . To rule out a whole class of loss, simply because the parties had not previously thought about it, risks as much uncertainty and injustice as letting it in.

. . . We are looking here at the general principles which limit a contract breaker's liability when the contract itself does not do so. . . . It is one thing to say, as the majority arbitrators, that missing dates for a subsequent fixture was within the parties' contemplation as 'not unlikely'. It is another thing to say that the 'extremely volatile' conditions which brought about this particular loss were 'not unlikely'.

Another answer to the question, given as I understand it by my noble and learned friends, Lord Hoffmann and Lord Hope, is that one must ask, not only whether the parties must be taken to have had this type of loss within their contemplation when the contract was made, but also whether they must be taken to have had liability for this type of loss within their contemplation then. In other words, is the charterer to be taken to have undertaken legal responsibility for this type of loss? [the assumption of responsibility point] . . .

. . . I hope I have understood this point correctly, for it seems to me that it adds an interesting but novel dimension to the way in which the question of remoteness of damages in contact is to be answered, a dimension which does not clearly emerge from the classic authorities . . . To incorporate it generally would be to introduce into ordinary contractual liability the principle adopted in the context of liability for professional negligence. . . . In an examination, this might well make the difference between a congratulatory and an ordinary first class answer to the question. . . .

The rule in *Handley v Baxendale* asks what the parties must be taken to have had in their contemplation, rather than what they actually had in their contemplation. Questions of assumption of risk depend upon a wider range of factors and value judgments . . . although its result in this case may be to bring about certainty and clarity in this particular market, such

203 *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)*, ibid, at para 36.

204 See, further, *McGregor on Damages*, 18th edn, at paras 6–173, which state that the test of assumption of responsibility did not command a clear majority; contrast *Chitty on Contracts*, vol 1, 30th edn, at paras 26–110A and 26–100G, which support that the assumption of responsibility is an additional and probably separate requirement of the remoteness rule, and it is the approach adopted by the majority.

an imposed limit on liability could easily be at the expense of justice in some future case. Therefore, if this appeal is to be allowed, as to which I continue to have doubts, I would prefer it to be allowed on the narrower ground identified by Lord Rodger, leaving the wider ground to be fully explored in another case . . .

A careful reading of the reasoning of each of their Lordships' opinions reveals that only Lord Hoffmann and Lord Hope (minority) expressly adopted the 'assumption of responsibility' concept, about which Lord Hope made a paradoxical comment that the concept 'forms the basis of the law of remoteness of damages in contract' (at para 31). Such a concept, even if it was intended to be part of the rule in remoteness of damages in contract law, would need further elaboration, as Baroness Hale put it in very strong terms.

18.2 MEASURE OF DAMAGES FOR BREACH BY THE SELLER

Does the judgment in *The Achilleas* make any difference to the issue of damages in this context?

In the event of non-delivery by the seller, the buyers are to be put in the same financial position as if the sellers had performed the particular obligation in question.[205] Under the SOGA 1979, and under common law,[206] if there is an available market for the particular ship, the measure of damages for non-delivery of, or failure to transfer the title in, the vessel is, prima facie, the difference between the contract price and the market price, or the current price of the ship at the time when it ought to have been delivered (s 51(3)). If there is no market for this type of vessel, the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract (s 51(2)).

In the event of loss of profit[207] by reason of not having the use of the ship for employment in the meantime, until a substitute is found, in the ordinary cases such loss of profit would be awarded applying the standard test on remoteness in damages.[208] The seller, on the information available when the contract was made, should, or the reasonable man in his position would, have realised that such loss would be sufficiently likely to result from the breach to make it proper to hold that the loss flowed naturally from the breach.

In unusual cases, it would have to be shown that the loss of the kind claimed should have been within the seller's reasonable contemplation, namely that the seller had

205 *The Great Marine (No 2)* [1990] 2 Lloyd's Rep 250.

206 *The Elena D'Amico* [1980] 1 Lloyd's Rep 75, per Goff J (as he then was); *Air Studios (Lyndhurst) Ltd (t/a Air Entertainment Group) v Lombard North Central plc* [2012] EWHC 3162 (QB).

207 *The Ile aux Moines* [1974] 2 Lloyd's Rep 502: upon failure of delivery of the ship by the seller, the buyers claimed damages on the basis of s 51(3) of SOGA 1979. The arbitrators awarded the buyers the difference between the contract price and the price of the subsequent ship bought, and the buyers were paid, but referred the case to the court, as a special case, on the point whether the buyer could claim, in addition to the damages awarded, damages for loss of use suffered; the answer was in the affirmative, but, as the buyers had been paid on the basis of the award, it was too late to remit the award to the arbitrators.

208 In *The Sylvia* [2010] 2 Lloyd's Rep 81: Hamblen J held, applying the standard test, that the arbitrators were correct to hold in their award that the owners who were in breach of their maintenance obligation of the vessel, as a result of which the charterers lost a sub-charter fixture, were liable to pay as damages the difference between the daily rate of the substitute fixture and the daily rate of the lost fixture.

knowledge of the circumstances at the time of the contract. Loss of a lucrative charter cannot be claimed, unless the seller was aware of the intended use of the particular ship.[209]

18.3 MITIGATION

The victim of breach owes no duty to the contract breaker to mitigate his loss, but fairness requires that he should not ordinarily be permitted to rely on his own unreasonable and uncommercial conduct to increase the loss.[210] Thus, the principle of mitigation means that the victim should take reasonable steps to mitigate his loss. Although the principle has been firmly settled by old authorities, there is a tendency by lawyers to argue in cases that the victim owes a duty, and perhaps this has arisen from a misinterpretation of what Viscount Haldane LC said in ***British Westinghouse Electric v Underground Electric Railways***:[211]

> . . . I think that there are certain broad principles which are quite well settled. The first is that as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.[212] The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on him the duty to take all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.[213]

It seems that 'the duty' (if any) is that the innocent party takes reasonable steps for his own benefit. If he does not take reasonable steps to mitigate his loss, and the loss increases, the result would be that he would not recover the part of his loss that is caused by his neglect and not by the defendant's breach, and so it would be an issue of causation and not an issue of a breach by the innocent party of a duty to mitigate owed to the defendant.

Lord Donaldson MR clarified the principle in ***The Solholt***[214] and said, with respect to mitigation:

209 *Victoria Laundry (Windsor) v Newman Industries* [1949] 2 KB 52 8 (CA), leading authority on remoteness and measure of damages for breach of contract: the defendants, an engineering company, with knowledge of the nature of the plaintiffs' business, having promised delivery by a particular date of a large and expensive plant, could not reasonably contend that they could not foresee that loss of business profit would be liable to result to the purchaser from a long delay in delivery; that, although the defendants had no knowledge of the dyeing contracts that the plaintiffs had in prospect, it did not follow that the plaintiffs were precluded from recovering some general, and perhaps conjectural, sum for loss of business in respect of contracts reasonably to be expected.

210 *The Golden Victory* [2007] 2 Lloyd's Rep 164, per Lord Bingham; *The Elena D'Amico* [1980] 1 Lloyd's Rep 75.

211 [1912] AC 673.

212 Derived from *Robinson v Harman* (1848) 1 Exch 850.

213 Op. cit. fn 211, at p 689; see, further, *Activa DPS Europe Sarl v Pressure Seal Solutions Ltd (t/a Welltec System (UK)* [2012] EWCA Civ 943: there was an obvious difference between taking the steps that were available to reduce the loss under the contract caused by the breach and, in effect, reversing the transaction (*Strutt v Whitnell* [1975] 1 W.L.R. 870 applied). The recorder's decision in relation to mitigation that the duty to mitigate did not extend to requiring the party who had suffered damage to undo the transaction, which had caused it loss, was correct (paras 34–35).

214 *Sotiros Shipping Inc v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605 (CA).

A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendant's breach of duty.[215]

18.3.1 Reasonable conduct – a question of fact

Whether a loss is avoidable by reasonable action on the part of the innocent party is a question of fact not law,[216] and the burden of proof is upon the defendant.[217] The conduct of the innocent party should not be judged too severely by the defendant, as Lord Macmillan put it in ***Banco de Portugal v Waterlow & Sons Ltd***:[218]

The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

18.3.2 Unreasonable conduct and break in the chain of causation

The next question in mitigation cases is whether the conduct of the innocent party, if it was unreasonable, broke the chain of causation. A finding of mere unreasonable conduct would not necessarily break the chain of causation if, for example, the defendant's breach remained an effective cause of the loss, albeit in combination with the claimant's failure to take reasonable precautions in its own interest. Reckless conduct by the claimant would ordinarily break the chain of causation. However, the claimant's state of knowledge at the time of, and following, the defendant's breach of contract is likely to be a factor of great significance.[219]

Mitigation of loss in a sale of a ship arose in ***The Solholt***.[220]

The contract for sale was on the NSF, and cl 14 provided for the buyer's right of cancellation and compensation in the event of default by the sellers in delivery – the price was US$5 million.

The date of delivery was 'not later than 31 August 1979'. Fearing late delivery, as the vessel had to complete a charterparty at the time, the sellers sought an extension of time from the buyers, but the latter refused. The vessel arrived at the port for inspection, and she was late by only 2 days. The buyers cancelled the contract. It was agreed that they were entitled to cancel and to recover their full deposit (US$500,000). The question was whether they were, in addition, entitled to damages, and whether they had mitigated their loss. The difference between the contract and market rate was US$500,000.

The judge and the CA held that the direct loss to the buyer from the sellers' breach was US$500,000. However, on the evidence, the sellers were prepared to sell the

215 Ibid, p 608.
216 *Payzu Ltd v Saunders* [1919] 2 KB 581.
217 *McGregor on Damages*, 18th edn, at 7–019.
218 [1932] AC 452 at 506.
219 *Borealis AB v Geogas Trading SA* [2011] 1 Lloyd's Rep 482, per Gross LJ.
220 [1983] 1 Lloyd's Rep 605 (CA)

ship at the original price, which the buyers refused. Thus, their loss, although it was directly attributable to the seller's breach, could have been avoided by some reasonable action.[221] The buyers had failed to take reasonable steps to mitigate their loss by accepting the ship back at the original price.

The Singaporean CA, in ***The Asia Star***,[222] applied the principles as derived from English authorities, and it is relevant to mention the case here. The court held: where a contract for the carriage of goods by sea was breached owing to the ship owner's failure to provide the charterer with the promised vessel, the usual mitigation measures involved the charterer either engaging an alternative vessel to carry the same goods or obtaining substitute goods at the intended place of delivery. The charterer need only act reasonably in deciding which of such alternative measures to adopt, although it would usually be bound to adopt the least costly option. Ordinarily, if a substitute vessel was available on reasonable terms, the charterer ought to mitigate its loss by engaging that vessel. If the charterer could not get a ship of the same size as that which it originally chartered, it was entitled to take the next best reasonable option that was available, which might include chartering a larger vessel, if a failure to do so would cause greater loss to the defaulting party. However, the charterer must not act in an impudent or extravagant manner.

The charterer in this case did not act reasonably to mitigate its loss.

18.3.3 Benefit derived by the mitigating party

The principle that derives from an old decision, ***Staniforth v Lyall***,[223] is often misused by litigants. It was held in this case that the plaintiff was entitled to recover all the damages he suffered but he was bound to bring into account, in ascertaining the damages arising from the breach, the advantages that had accrued to him because of the course that he had chosen to adopt.

At the Privy Council in ***British Westinghouse Electric v Underground Electric Railways Co of London Ltd***,[224] mentioned earlier, Viscount Haldane LC referring to the above decision, commented on the mitigation benefit:

> I think that this decision illustrates a principle which has been recognised in other cases, that, provided the course taken by the plaintiff to protect himself in such an action was one which a reasonable prudent person might in the ordinary conduct of business properly have taken, and in fact did take, whether bound or not . . . an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damages.[225]

At about the same time, the Privy Council, in ***Sally Wertheim v Chicoutimi Pulp Company***,[226] stated on the issue: the general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position as he would have been in if the contract had been performed. In the case of

221 *Payzu Ltd v Sounders* [1919] 2 KB 581, considered and applied.

222 [2010] 2 Lloyd's Rep 121, at para 33; see also *The Kriti Rex* [1996] 2 Lloyd's Rep 171.

223 (1830) 7 Bing 169.

224 [1912] AC 678, at 689: the respondents claimed the cost of purchase and installation of the Parsons turbine engines, which, in mitigation of loss following breach of contract by the appellants, they incurred as a necessary cost and expense to substitute the defective engines of the appellant.

225 Ibid at 690.

226 [1911] AC 301.

late delivery, the measure thereof in order to indemnify the purchaser is the difference between the market price at the respective dates of due and actual delivery of the goods purchased; but, if the purchaser has resold them at a price in excess of that prevailing at the date of delivery, he must, in estimating his damages, give credit therefor.

The principle is that, in calculating damages, the court or arbitrator must ensure that the claimant is not put in a better position than he would have been in had the contract been performed. In the event that benefits are obtained from the substitute contract, they might be brought into account when calculating damages.[227]

In a London arbitration,[228] the tribunal agreed with the buyers of a ship, who repudiated the contract, that the question was what was the sellers' loss. It held that any answer to it had to recognise and take into account the fact that the sellers' termination of the contract, as a result of the buyers' repudiation, left them with a vessel worth approximately twice the contract price. It would flout the compensatory principle and common sense to fail to bring that benefit into account. However, it is submitted, this seems to confuse the issue of benefit derived by reason of taking mitigating steps and the issue, as it would seem to be here, that the sellers suffered no loss in this case.

It should be noted that, if the innocent party has done his best to mitigate his loss, he should not be obliged to give back a benefit derived that is unrelated to the breach.[229] Applying causation principles, he would not get damages caused by his own negligence by failing to take the obvious reasonable steps that a reasonable and prudent person would have taken to mitigate his loss.

In theory, the principle is easy to state, but it is not so easy to apply in certain cases and arbitrators have a perplexing task (as Bingham J said in *The Concordia*[230]) in trying to give appropriate effect to a substitute charter.

For example, in ***The Elbrus***,[231] it was found by the arbitrators that the substitute voyage (secured by the owner in mitigation of his loss after the repudiation of the charter by charterers) conferred benefits upon the owner that he would not have got but for the repudiation of the previous charter. Such benefits were the earning of a high charter rate under the new fixture, earned at a much earlier time than he would have earned had the original charter been performed. However, the tribunal took into account the actual and notional earnings after the date when the contractual redelivery of the repudiated charter at Houston would have taken place.

The judge, on appeal, held that this calculation departed from the prima facie measure of damages. However, authorities recognised that, where the substitute voyage conferred a benefit upon the owner that he would not have had but for the

227 See, further: comments by Bingham J (as he then was) in *Concordia C* [1985] 2 Lloyd's Rep 55, at p 58: had the arbitrators concluded that the substitute charter conferred benefits on the owners that they would not have obtained had the original charter been performed, that would go to depress the owners' damages.

228 3/11, (2011) 825 LMLN 2.

229 For example, when the innocent party receives a sum from a policy of insurance that he had obtained for such a loss, such benefit could not be taken into account in reduction of damages: *Bradburn v Great Western Ry Co* (1874) LR 10 Ex 1.

230 The *Concordia C* [1985] 2 Lloyd's Rep 55.

231 *Dalwood Marine Co v Nordana Line SA (The Elbrus)* [2010] 2 Lloyd's Rep 315.

repudiation of the charter party, account may be taken of that benefit when assessing damages.[232]

He held that the contractual right lost by the owner was a right to the payment of hire from 4 April (termination) to 13 May (notional redelivery). Prima facie, the measure of damages for the loss of such right was the hire that would have been earned during that period, less the hire that was in fact earned during that period from alternative employment.

However, there was no reason in principle (the judge further held) to limit the type of benefit that might be taken into account. Depending upon the nature of the benefits, it might be necessary to calculate their financial value by reference to earnings after the notional date on which redelivery would have taken place under the original charterparty. Thus, where the vessel was better placed for future employment at the end of the substitute charterparty than at the end of the original charterparty, that benefit could be calculated by reference to earnings at a period later than notional redelivery under the original charter.

In the instant case, the judge said, reading the tribunal's award in a fair and reasonable way without trying to pick holes or inconsistencies or faults, there was effectively a finding that D had secured a benefit from its action to mitigate its loss, in addition to the earning of hire for the period of 7 days.[233] Whether a particular benefit had been established on the evidence was a matter for the tribunal to determine as a fact. Similarly, the assessment of the monetary value of that benefit was a matter for the tribunal to determine as a fact. In the circumstances, the tribunal had not erred in law by taking into account the actual and notional earnings of the vessel after the notional date of redelivery at Houston.

The end result in this case was that the owner, in fact, did not suffer any loss by reason of the repudiation having taken into account the benefits obtained in mitigation.

However, the question is, where can the line be drawn in considering the benefits obtained? If one considers benefits after the notional date of the end of the original charter, the exercise may produce arbitrary results because such benefits may be too remote and accidental. In some cases, the principle may be stretched too far.

It was applied in ***The Mamola Challenger***,[234] when expenditure was incurred to prepare for the contract which was later repudiated, and the incurred expense was wasted in that it had no residual value to, or benefit for, the claimant. The owners, although they did not suffer loss in obtaining a subsequent charter (because the hire rate was higher than the rate of the repudiated fixture), claimed the wasted expenditure as damages, and the arbitrators awarded such damages, as they regarded them to be separate from the profit made through mitigation.

On appeal from the arbitrators' award, the judge held that the tribunal had erred in law in regarding a claim for wasted expenses and a claim for loss of profit as two

232 Relied on the dicta of Bingham J in *The Concordia*, op. cit. fn 191 and on *SIB International Srl v Metallgesellschaft Corp (The Noel Bay)* [1989] 1 Lloyd's Rep 361, where, on a failure by the charterer to nominate a loading port, Staughton LJ held: the solution to such difficult problems will be to give credit only for the substitute earnings received during the notional period of the original charter. For example, although O in this case would have earned demurrage had the voyage been performed and, as it was not, the relevant period fell to be considered on the basis that O was entitled to damages for delay. O would have to give credit for substitute earnings that extinguished this loss.

233 *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The Pace)* [2009] EWHC 1975 (Comm), [2010] 1 Lloyd's Rep 183 applied.

234 *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2011] 1 Lloyd's Rep 47.

separate and independent claims that could not be mixed. The tribunal should have made a comparison between the claimant's position and what it would have been, had the contract been performed. When steps had been taken to mitigate the loss that would otherwise have been caused by the breach of contract, the benefits obtained by mitigation had to be set against the loss that would otherwise have been sustained.

To fail to do so (he further held) would put the claimant in a better position than he would have been in had the contract been performed. The wasted expense (which was pleaded as a 'reliance loss') was not recoverable, because the claimant did not make a net loss by reason of having taken reasonable steps to mitigate his loss. The judge merged damages based on the concept of 'reliance loss' (that is, expenses incurred in reliance on a contract) and those based on the concept of 'expectation loss' (that is, loss of profit expected to be made), because it was said that both belong to the same species of damages.

Although it is right to look at the situation as a whole when calculating damages for breach (per Bingham J in *The Concordia C*, above), it would seem to be inappropriate to conflate wasted expenditure incurred prior to the breach in reliance on the contract with the benefit derived from the substitute fixture after the breach.[235] There was no claim for loss of profit, because there was none. It was accepted that there was no precedent to follow in such a case.

The court will look at how the parties allocated this risk in the contract. Therefore, the parties should take care, at the drafting stage, to make their intention clear as to who is to bear the risk of expenditure incurred in preparation for the contract, which may be wasted in the event of cancellation.

19 CURRENCY OF LOSS

The currency in which the loss is claimed may make a significant difference. However, the currency must appropriately reflect the recoverable loss. For the purpose of assessing the currency of loss for breach of the contract, it would not matter if the proper law of the contract were English law. If neither of the parties to the contract, nor the contract itself, nor the claim, had any connection with the UK currency, it would be a prima facie case for giving judgment in a foreign currency. There are principles for the judge or arbitrator as to how to arrive at the appropriate currency in a particular case.

Lord Wilberforce said, in ***The Despina R and The Folias*** (a collision case, but the principle is broadly the same in breach of contract cases):[236]

235 The judge did not follow the view of Professor Treitel (referred to in the judgment). He suggests (as put by counsel for the owner) that an award of reliance damages appears to be inconsistent with the principle in *Robinson v Harman*, and there are in reality two different principles, which are recognised by English law. First, an award of damages on an expectancy basis is designed to put the claimant in the position he would have been in had the contract been performed, and, second, an award of damages on a reliance basis is designed to put the claimant in the position he would have been in had the contract not been made. These two principles cannot be welded into one.

236 [1979] 1 Lloyd's Rep 1 p 4; see, also, *Transoceanic Francesca and Nicos V* [1987] 2 Lloyd's Rep 155.

My Lords, in *Miliangos v George Frank (Textiles) Ltd* [1976] 1 Lloyd's Rep 201; [1976] AC 443, this House decided that a plaintiff suing for a debt payable in Swiss francs under a contract governed by Swiss law could claim and recover judgment in this country in Swiss francs. Whether the same, or a similar, rule could be applied to cases where (i) a plaintiff sues for damages in tort, or (ii) a plaintiff sues for damages for breach of contract, were questions expressly left open for later decision. These questions were regulated before Miliangos as to tort by *SS Celia (Owners) v SS Volturno (Owners) (The Volturno)* (1921) 8 LlL Rep 449; [1921] 2 AC 544 and as to contract by *Di Ferdinando v Simon, Smits & Co Ltd* [1920] 3 KB 409, which decided that judgment in an English court could only be given in sterling converted from any foreign currency as at the date of the wrong. Now these questions are directly raised in the present appeals.

In the first appeal, the issue of the currency in which damages were payable arose when the plaintiff sued in tort for collision damage. The award made for the repairs was held to be in the currency in which the loss was sustained. In the second appeal, the same issue arose from breach of contract. This time, the charterers sued the owners of the ship to recover their loss for money paid in French francs to the cargo-receivers. Lord Wilberforce observed:

A decision in what currency the loss was borne or felt can be expressed as equivalent to finding which currency sum appropriately or justly reflects the recoverable loss. This is essentially a matter for arbitrators to determine. A rule that arbitrators may make their award in the currency best suited to achieve an appropriate and just result should be a flexible rule in which account must be taken of the circumstances in which the loss arose, in which the loss was converted into a money sum, and in which it was felt by the plaintiff. In some cases the 'immediate loss' currency may be appropriate, in others the currency in which it was borne by the plaintiff. There will be still others in which the appropriate currency is the currency of the contract.[237]

The CA stated, in 2004, in a case involving breach of contract, ***Virani Ltd v Manuel Revert Y Cia SA***,[238] that the proper approach was to enquire which currency most truly expressed the claimant's loss. The relevant test was to ascertain which currency would as nearly as possible compensate the claimant, in accordance with principles of restitution, and whether the parties must be taken reasonably to have had that in contemplation.

20 CIVIL LIABILITY OF CLASSIFICATION SOCIETIES TO BUYERS AND OTHER THIRD PARTIES

The role of classification societies was looked at in Chapters 2 and 3 of this volume, in connection with their functions in structural and statutory surveys, as provided by the rules of classification societies and International Conventions. It was also seen how their performance and possible liability to flag States are regulated by EU law. The importance of their broader function in the enforcement of safety regulations and their role in quality shipping was also examined. Issues of immunity from liability with regard to pollution damage are discussed in Chapter 16, below.

237 Ibid, p 9.

238 [2004] 2 Lloyd's Rep 14; see also *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473 (HL) and Ch 9, below.

In this part, the law in relation to possible civil liability of class societies to third parties in the tort of negligence is briefly looked at in connection with their role in surveying ships prior to sale. It should be noted that the class society does not have a contract with the buyer, as the society is acting for the seller in conducting the survey.

20.1 IS THERE A DUTY OF CARE OWED TO THIRD PARTIES?

If one starts from the premise that a ship's class certificate is required by many parties, such as hull insurers and P&I clubs, traders, charterers, banks, buyers, passengers, crew and enforcement authorities, one would logically expect that these people would rely on the skills and professionalism of class societies in the performance of their duties. Taking this assumption further, any of these parties would expect that it would be implicit from a clean class certificate that the ship was in good condition, or seaworthy; therefore, they could argue that, upon reliance on the statements made on the certificate that the ship is Class A or B and/or that the certificate is free from conditions of class, they placed their goods or lives on board her, or they decided to invest in her, or to take the risks of insuring her, or to take the risk of liabilities to third parties.

Were this assumption to be correct, it would follow that a duty of care not to be negligent could arise by virtue of the issuing of the class certificate. Therefore, a legal framework for such a duty owed to third parties in tort could, arguably, exist in law.

However, mostly for policy reasons, the above premise of reliance, in this context, is misleading, as was explained by the House of Lords in ***The Nicholas H***,[239] in which it was held that: it would not be fair, just or reasonable to impose a duty of care on classification societies so that they would have unlimited liability in negligence to ship-owners and cargo-owners (see further below).

Starting from basic legal principles, the English courts have since 1990,[240] applied a three-stage incremental approach to the question of whether a duty of care exists in various situations. This is comprised of three ingredients: (a) foreseeability of damage; (b) a relationship of proximity between the parties; and (c) that in all circumstances it is fair, just and reasonable to impose a duty of care upon the defendant.

How could this principle be applied to ascertain whether or not classification societies owe a duty to third parties, so that they can be liable in damages for financial loss caused to them, in the event of breach?

In ***The Morning Watch***,[241] the classification society carried out a special survey on a yacht, at the request of her owner, who intended to sell her to a prospective buyer, and issued an interim certificate. She was classed 100A1. The listed items for repairs were duly effected by her owners. The yacht was later purchased by the plaintiffs who contended that she had various serious defects, which rendered her

239 *Marc Rich and Co AG v Bishop Rock Marine Co (The Nicholas H)* [1995] 2 Lloyd's Rep 299, [1996] AC 211 (HL).

240 *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL); *Murphy v Brentwood DC* [1991] 1 AC 398 (HL).

241 *Mariola Marine Corp v Lloyd's Register of Shipping (The Morning Watch)* [1990] 1 Lloyd's Rep 547.

unseaworthy, and that these defects should have been discovered by the defendant's surveyor. They claimed damages against the classification society (Lloyd's Register) for economic loss suffered as a consequence of relying on the statements made negligently by the society's surveyor on the certificate.

The court, applying the principles set out above, held: a duty of care would only arise where: (1) it was reasonably foreseeable to the defendant that the plaintiff would rely upon his statement; (2) there was the necessary proximity between the plaintiff and the defendant; and (3) it was fair, just and reasonable in all circumstances to impose a duty of care on the part of the defendant to the plaintiff. On the facts, as Lloyd's Register had been informed that the plaintiff would be interested in buying the vessel after the survey was carried out, the first requirement was established.

However, the court was not prepared to accept the general proposition that Lloyd's Register owed a duty of care to those who would be likely to suffer economic loss in consequence of reliance on the negligent classification of a vessel. To accept such a proposition would be to make a substantial further advance in the law of negligence. Therefore, the plaintiffs had failed to show that the defendants owed them a duty of care, either when the special survey was carried out or on the issue of the interim certificate.

Although Phillips J (as he then was) accepted the plaintiff's submission that Lloyd's Register deliberately maintained a system of classification whereby parties other than the owners of classified vessels were likely to rely on the fact that a vessel was maintained in class, and that this system provided an assurance that the vessel was maintained in good condition, he made the following observation:[242]

(i) The primary purpose of the classification system is, as Lloyd's [sic] rules make plain, to enhance the safety of life and property at sea, rather than to protect the economic interests of those involved, in one role or another, in shipping.
(ii) Insofar as negligence in relation to classification is likely to harm economic interests, I can see no general ground for distinguishing between the economic interests of the charterer, the mortgagee and the purchaser. It would be reasonably foreseeable that all would rely upon the class status of the vessel – often to the extent of making the maintenance of class a contractual obligation – and all are at risk of being caused economic loss, if classification surveys are not carried out with proper skill and care.

Referring to *Caparo v Dickman*, he considered the relationship between the classification society and purchasers of ships, and stated:

The relationship does not reflect any statutory scheme to protect purchasers . . . There is no relationship akin to contract. There is no voluntary assumption of responsibility to potential purchasers of shares . . . There is no greater proximity between Lloyd's [sic] and a potential purchaser than between Lloyd's and the bank that may advance the purchase price on the security of a mortgage on the vessel . . .[243]

Applying the three-stage approach, he said the second and third requirements of the *Caparo* were not satisfied in the circumstances. In effect, the third requirement that it must be fair, just and reasonable in all circumstances has restricted the law of negligence, unless the principle to be applied is clearly that of assumption of responsibility.[244]

242 Ibid, p 559.
243 Ibid, p 560.
244 As developed by *Hedley Byrne v Heller* [1964] AC 465.

The three-stage approach is now to be applied universally in cases concerned with the recovery of damages for either economic loss or physical damage, for example, whatever the nature of the harm sustained by a plaintiff. It is an overarching formula within which can be found all cases of a recognised duty of care.[245] Recognition is given to some categories in which it is obvious that, as a matter of common sense and justice, a duty should be imposed. The difference between categories lies in the fact that it may be more difficult to satisfy the three-stage test in cases of pure economic loss than in straightforward cases of physical damage.

However, despite the physical damage of the cargo on board ***The Nicholas H***,[246] from which financial loss resulted, the duty of care was not imposed by the majority of the House of Lords upon the classification society. Policy considerations prevailed on the basis of the third requirement of the three-stage approach seen above.

The vessel was loaded with the plaintiffs' cargo of lead and zinc for a voyage from Chile to Italy and the USSR. She had to deviate from her voyage to Europe, because a crack was found in her hull and anchored at Puerto Rico. Further cracks later developed. A surveyor from the vessel's classification society (N.K.K.) boarded her and recommended permanent repairs at the nearest port that had such facilities. The owners, however, persuaded the surveyor that temporary repairs should be carried out at anchor, because permanent repairs would have involved dry-docking and unloading of the cargo. The surveyor then reversed his initial recommendation, allowing temporary repairs, and the vessel proceeded to the discharge port, where the repairs would be further examined after discharge. The next day, while on the voyage, the welding of the temporary repairs cracked. Six days later, the vessel sank with the loss of all cargo. The cargo claim was settled between the cargo interests and the ship-owner at the limitation amount in accordance with the HVR, which were applicable to the contract of carriage. The cargo interests claimed the balance of their claim against the classification society on the ground of breach of duty of care owed to them, which caused the loss to their cargo.

The case reached the House of Lords on a preliminary point: assuming there was negligence of the surveyor (which the classification society denied), did a classification society owe a duty of care to a third party – the owners of the cargo laden on the vessel – for the careless performance of a survey resulting in the vessel being allowed to sail and subsequently sink with her cargo? Counsel for the cargo-owners contended that, as the case involved physical damage to property in which the plaintiff had a proprietary or possessory interest, the only requirement was proof of reasonable foreseeability, and, therefore, the additional requirements of proximity and considerations of whether it was fair, just and reasonable to impose a duty of care were inapplicable.

The House of Lords rejected this argument by a majority. It was held that the elements of foreseeability, proximity, fairness, justice and reasonableness were relevant to all types of harm sustained by the plaintiff. The majority of their Lordships considered that there was a sufficient degree of proximity to fulfil the requirement for the existence of a duty of care. However, it was held that the recognition of a duty would be unfair, unjust and unreasonable based on considerations of policy. Lord Steyn stated:

245 *The Nicholas H* [1995] 2 Lloyd's Rep 299 (below).

246 *Marc Rich and Co AG v Bishop Rock Marine Co (The Nicholas H)* [1995] 2 Lloyd's Rep 299, [1996] AC 211 (HL).

I conclude that the recognition of a duty would be unfair, unjust and unreasonable as against the ship-owners who would ultimately have to bear the cost of holding classification societies liable, such consequence being at variance with the bargain between ship-owners and cargo-owners based on an internationally agreed contractual structure. It would also be unfair, unjust and unreasonable towards classification societies, notable because they act for the collective welfare and, unlike ship-owners, they would not have the benefit of limitation provisions. Looking at the matter from the point of view of cargo-owners, the existing system provides them with the protection of the Hague Rules or Hague-Visby Rules. But that protection is limited under such rules and by tonnage limitation provisions. Under the existing system any shortfall is readily insurable. In my judgment, the lesser injustice is done by not recognising a duty of care.[247]

Unlike the judge at first instance, who did not think that there were any considerations of policy that would justify the application of the criterion of 'fair, just and reasonable', both the CA and the House of Lords dismissed the claim on application of this criterion. However, Lord Lloyd (dissenting) agreed with the judge and said:

We are not here asked to extend the law of negligence into a new field. We are not even asked to make an incremental advance. All that is required is a straightforward application of *Donoghue v Stevenson* . . .

In physical damage cases, proximity very often goes without saying. Where the facts cry out for the imposition of a duty of care between the parties, as they do here, it would require an exceptional case to refuse to impose a duty on the ground that it would not be fair, just and reasonable. Otherwise, there is a risk that the law of negligence will disintegrate into a series of isolated decisions without any coherent principles at all, and the retreat from *Anns v Merton* will turn into a rout.[248]

However, the majority were influenced by four important factors: (a) the assumed negligence of the class surveyor had not involved the direct infliction of the physical damage on the cargo; (b) the class played a subsidiary role in matters of seaworthiness as compared with the ship-owner, who has a non-delegable duty to provide a seaworthy vessel; (c) a recognition of a duty would cause an imbalance with the HVR; (d) class societies have important public duties to perform and they should not become the insurers of the vessels they survey. It would be a different situation if the classification society assumed a responsibility towards a third party, for example, to a buyer of a ship, by giving advice on which the buyer relied, and the society knew, or ought reasonably to have known, that the buyer would rely on their advice before he/she decided to buy the ship (on the basis of the *Hedley Byrne v Heller* principle).[249]

247 [1995] 2 Lloyd's Rep 299, pp 316–317.

248 Ibid, p 309.

249 Further, in a case involving duty owed by auditors of a company to third parties, *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, the CA held that, although mere foreseeability that a potential bidder for shares in, or lender to, a company might rely on the company's audited accounts did not impose on the auditor a duty of care to the bidder or lender, such a duty would arise if the auditor were expressly made aware that a particular bidder or lender might rely on them or other statements approved by the auditor without independent inquiry and intended that he should so rely; that, as it was not alleged that the defendants knew or intended that the third plaintiff would rely on their accounts for the purpose of making loans, or for the purpose of calculating the purchase price under the supplemental share purchase agreement, the pleaded facts disclosed no cause of action against the defendants on those issues.

The trilogy of English decisions in this area is completed by ***Reeman v DOT and Others***.[250]

It concerned the certification of a fishing vessel by a surveyor of the Department of Trade (DOT) performing regulatory functions under the Merchant Shipping Acts (MSAs). The DOT was sued by a buyer of a fishing vessel claiming economic loss.

Statutory certification of fishing vessels was required by the Safety Provisions Act 1970 and the Regulations 1975 designed to ensure their seaworthiness. The vessel was inspected by a surveyor appointed by the DOT, and a certificate was issued, the validity of which was extended twice every 4 years. No British-registered fishing vessel could put to sea unless she carried a certificate issued by the DOT.

When the claimants bought the fishing vessel, she carried such a certificate, but it was based on an erroneous stability calculation made by the DOT's surveyor, which was discovered after the purchase. The certificate was then withdrawn, as the expenditure required to be incurred by the purchasers to rectify the faults, improve her stability and satisfy the minimum statutory requirements, was beyond their means. They sued the DOT for breach of the common law duty of care alleged to be owed to them and claimed damages for the economic loss suffered. The issue was whether the DOT owed a duty of care to purchasers of fishing vessels when issuing certificates of compliance.

The judge held that the requisite degree of proximity between the plaintiffs and the DOT was established, taking into consideration the following factors:

(a) there was a virtual certainty that the certificate would be communicated to prospective purchasers such as the plaintiffs;
(b) there was an extreme likelihood that such a prospective purchaser would rely on the certificate in deciding whether to purchase;
(c) there was overwhelming probability that the purchaser would do so without independent verification; and
(d) these facts were all facts known actually or inferentially by the DOT.

In addition, the plaintiffs did not appear to have a remedy against anyone other than the DOT; applying the criteria of fairness, justice and reasonableness, it was possible to set an acceptable limit or control mechanism that substantially avoided the mischief in question; this would be to confine the duty to persons who actually purchased the relevant vessel during the currency of the certificate. The DOT appealed.

The CA reversed this decision, because it thought that the judge had made a significant extension to the ambit of the tort of negligence. With regard to the relationship of proximity, the CA held that, when a British fishing vessel's certificate was issued, those who might in the future place reliance on that certificate (when deciding whether to purchase the vessel) did not form part of a class that was capable of definition and delimitation by identifiable characteristics; not only did potential future purchasers not form an identifiable class when the certificate was issued, but the certificate was not issued for the purposes of providing information to assist them in deciding whether or not to purchase the vessel; and foreseeability that the information might, or probably would, be relied on by others than those for whom

250 [1997] 2 Lloyd's Rep 648 (CA).

it was provided did not suffice to constitute such persons part of a class in a proximate relationship with those providing the information.

It would always be open to a party entering into a commercial transaction in relation to a certificated vessel to take steps such as surveying the vessel, or stipulating for contractual warranties, that would provide protection against the risk that the certificate did not reflect the true condition of the vessel.

With regard to the third characteristic of the test whether a duty of care should be imposed, the CA said that the statutory framework was one designed to promote safety at sea. The protection of those whose commercial interests might foreseeably be affected by unseaworthiness of vessels formed no part of the purpose of the legislation and no part of the purpose for which the fishing vessel certificates were issued. It would not be fair, just and reasonable, the CA held, to impose a duty of care on a body such as the DOT, charged with the duty of certifying with a view to promoting safety at sea; the DOT, when performing its regulatory functions under the MSAs, performed a similar role to that of classification societies, that is, it existed for the purpose of further safety at sea, rather than for the protection of commercial interests; and the learned judge erred in finding that the DOT had owed a duty of care to the purchasers. The appeal was allowed.

20.2 A COMPARISON WITH THE REGULATORY REGIME APPLICABLE TO THE AIR INDUSTRY

Had there been loss of life upon the sinking of a ship, caused by violation of the SOLAS regulations by the classification society, would different considerations have applied? There is not, as yet, a court decision on this point with regard to ships' class. The question under English law would have been whether a duty of care ought to be imposed upon the class society in such a case.

It is instructive to see whether any parallel can be drawn with a case, ***Perrett v Collins***,[251] in which the court imposed a duty of care owed by an inspector of an aircraft and the authority that issued the certificate of fitness to fly in relation to the aircraft. It should be noted that the regulatory regime applied to the air industry is different from the regulatory regime that applies to classification societies.

The case concerned physical injury suffered by a passenger of a small aircraft, Mr Perrett.

The aircraft, which had been inspected by the relevant authority and had been issued a certificate of fitness to fly by the inspector, was taken by Mr Collins on a test flight, with the plaintiff as a passenger. The first flight was very short; on the second flight, the aircraft was taken up to 150 feet and, as it was descending, it went out of control and hit the ground, with the result that Mr Perrett was injured. He sued the issuing authority, the inspector and Mr Collins, claiming personal injuries. The preliminary issue for decision was whether the issuing authority, having been approved by the Civil Aviation Authority (the CAA) as qualified to furnish reports to the Authority in connection with flying permits, and the inspector, owed a duty of care in tort to Mr Perrett.

251 [1998] 2 Lloyd's Rep 255.

Both the judge and the CA decided in favour of the plaintiff.

As this was a personal injury case, there was no doubt that, as a matter of common sense and justice, as well as because of a statutory duty, a duty of care was imposed. The balance of justice came down firmly on the side of imposing a duty, so that members of the public would expect to be protected from injury and to be compensated. Hobhouse LJ (as he then was) said, in refusing to apply *The Nicholas H* to this case:

> What the second and third defendants seek to achieve in this case is to extend decisions upon 'economic' loss to cases of personal injuries. It represents a fundamental attack upon the principle of tortious liability for negligent conduct which had caused foreseeable personal injury to others.[252]

Swinton Thomas LJ focused on the distinction between this case and *The Nicholas H* when he said:

> The regulatory framework recognises the dangers that are inherent in flying. That is the very purpose lying behind the prohibition on taking airplanes into the air without a certificate of airworthiness and a permit to fly, and the appointment of the CAA or those authorised by them to issue such certificates.
>
> The whole purpose is one of air safety. In my judgment, any reasonably well informed member of the public, although not in possession of the detailed framework, would expect there to be such a regulatory system in force to ensure his safety when flying and would rely upon it. Furthermore, a member of the public would expect that a person who is appointed to carry out these functions of inspecting aircraft and issuing permits would exercise reasonable care in doing so. The third defendants, and those appointed to act on their behalf, are experts in their field; the first defendant is an amateur and inevitably will rely on the second defendant as an expert. The amateur who builds his own aircraft is unlikely to rely on any expertise other than that provided by the PFA.
>
> In relation to a ship, as in the *Marc Rich* case, the owners are likely to employ their own experts to ensure that the ship is seaworthy. In the case of a small private airplane, the only expertise which is supplied is that of the inspector, the second defendant. Until the certificate of fitness is granted, the aircraft cannot fly.
>
> That is in contradistinction to the position in the *Marc Rich* case where there was no such inhibition on the ship-owners. The surveyor acting on behalf of NKK did not issue a permit to sail allowing the ship to go to sea in contradistinction to the second defendant, in this case, who did issue such a permit enabling the aircraft to fly.
>
> The primary purpose, as I see it, of the intervention of the CAA or its appointees is the safety of persons who fly in the aircraft which has been granted the certificate. Moreover, the primary purpose is to prevent physical injury as opposed to damage to property.[253]

The distinction between the certification of an aircraft and the certification of a ship was made clear, in that the former is a certificate of fitness for flying, whereas the latter is not a permit to sail. However, in another aviation decision, ***Philcox v Civil Aviation Authority***,[254] which concerned whether the aviation authority owes a duty of care to the aircraft owner, the CA made it clear that the Aviation authority had the responsibility of supervising aircraft owners, not in their own interest, but in the interests of the general public. It could not, therefore, owe the aircraft owner a

252 [1998] 2 Lloyd's Rep 255, pp 257, 258.

253 [1998] 2 Lloyd's Rep 255, p 272.

254 *Philcox v Civil Aviation Authority* (1995) 139 SJLB 146 (CA).

duty of care to inspect their aircraft thoroughly, because to maintain the planes in a safe condition was primarily the owner's responsibility. They could not call on the supervisory authority to protect them from their own mistakes.

20.3 COMMENTS

Given the reasoning in *Perrett* and the comparison with *The Nicholas H*, made by the court, could it be argued that, as far as personal injuries are concerned as opposed to property damage, a classification society would owe a duty of care to third parties suffering personal injuries on a ship by reason of the negligence on behalf of the class society to take care in the survey or inspection of the ship? Were this to be the case, would there not be two distinct rules in tort in such cases – one for personal injury and a different rule for physical damage to property? Would this matter, and should there not be special policy reasons to distinguish property from personal injury cases? A further question would be how to overcome causation issues. These questions have not yet been dealt with by the courts.

Whether a new rule can be inferred from the *Perrett* case, that such a duty ought to be extended to certificates of Class, is far from clear, particularly because the distinction between the airworthiness and the classification certificates is well known and it was highlighted. There is not yet equivalent legislation, or a statutory body with regard to certification of vessels in the shipping industry, comparable to the system applicable to the aircraft industry. Most importantly, there would be difficulties in implementing such legislation, considering that many other factors will have to be taken into account in determining why a ship becomes unseaworthy, apart from the role the class plays in this respect.

However, nothing is impossible, and, when there is a public outcry, litigants and the courts can be inventive, as was shown in the cases of *The Erika* and *The Prestige*, discussed in Chapter 16.

20.4 THE AMERICAN APPROACH

The American approach to liability of a classification society towards third parties for economic loss is similar to the English approach. In ***The Sundancer***,[255] a claim in damages against ABS was made by the owner of a ferry that was converted into a cruise ship and was approved by ABS (the classification society) appointed by the flag State in accordance with the SOLAS 1974. The issue here was whether the classification certificate was a guarantee to the owner of the ship that the ship had been safely constructed. The court held the certificate was not a guarantee, and, moreover, the responsibility for the maintenance and seaworthiness of the ship remains with the owner, who has a non-delegable duty in this respect.

In ***Reino De Espana v American Bureau of ABS***,[256] in which ABS was brought before the US CA in relation to the sinking of *The Prestige* off the coast of Spain in 2002, causing pollution, Spain alleged that ABS, by virtue of the surveys it conducts,

255 [1994] 1 Lloyd's Rep 183.
256 [2012] 29 August No 10–3518 cf. USA CA 2nd Circuit.

owed a duty in tort to perform its classification surveys with due care not simply to the vessel's owner, who contracted for the survey (or to the vessel's insurers and cargo), but to third-party coastal nations generally. Spain further argued that an exception for classification societies from the general rule of negligent liability should not extend to reckless conduct; it was further argued that because ABS was not simply negligent in this case but reckless in its actions, which led to the sinking of *The Prestige*, ABS should not be shielded from liability to third parties, such as Spain, who suffered harm as a result of those actions. The district court had decided against Spain, and the appeal court confirmed the judgment but on other grounds, namely that Spain failed to adduce sufficient evidence to create a genuine dispute of material fact as to whether ABS recklessly breached that duty.

20.5 CONCLUSION

On the basis of these principles, established by both the English and the American courts, it would be very unlikely that a buyer of a ship who suffers loss by reason of the negligence of the class society in performing its duties of survey would succeed in suing for economic loss arising from property damage; but it may not be so unlikely for a case to be made out of a duty owed to persons who board a ship, by analogy to the *Perrett* case, if it could be shown that a defective ship was approved by Class to be in class despite the fact of the ship having structural defects. Factually, however, cases in which causation can clearly be established against Class may be rare and would require clear evidence of recklessness on the part of the surveyor acting on behalf of the society, and that such reccklessness in failing to note the defects caused the loss.

This page intentionally left blank

PART III
SHIP AND PORT RISKS AND LIABILITIES

This page intentionally left blank

CHAPTER 9

RISKS AND LIABILITIES ARISING FROM COLLISIONS AT SEA

Introduction 387

1 The Collision Regulations and their application 388

2 Criminal liability 401

3 Civil liability 411

4 Limitation periods for commencement of claims 477

5 Insurance issues 478

INTRODUCTION

This chapter deals with safety regulations in navigation and liabilities arising from breach of the collision regulations and the statutory provisions of the Merchant Shipping Act (MSA) 1995. Both criminal and civil liabilities of owners, managers, officers and crew are examined, after an outline of the Collision Regulations.

The examples given in this part illuminate circumstances in which negligence in seamanship resulted in detrimental legal consequences. At the same time, the circumstances shown in these examples, in which collisions happened, may seem to seamen of the present time as being part of history, in the light of the sophistication of the technology and navigational equipment of modern ships and the ever-increasing regulation requiring risk assessment and continuous training of seamen. Evidently, such developments have been a significant factor in the decrease in collision accidents and, hence, the lack of frequent court cases concerning collisions at sea, unlike in the past.

In this connection, it should be borne in mind that the amended International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW) requires a rigorous system of training of the officers and crew. The obligations under the STCW, together with the International Safety Management Code (ISMC), as amended in 2010, should provide a system of transparency of the company's practices and will provide evidence in court as to whether the master and crew had been sufficiently trained and qualified in accordance with international standards (see Chapters 3 and 4). The new IMO Resolution A.817(19), providing the performance standards for implementation and training with regard to the ECDIS will provide an additional tool for the avoidance of collisions. Therefore, risk assessment and learning from previous examples of accidents have, or should, become day-to-day activities of shipping companies.

This chapter is divided into three sections: Section 1 deals with the Collision Regulations and their application (details of the regulations governing conduct at sea can be found in other notable works).[1] Section 2 deals with criminal liability arising

1 See *Marsden on Collisions at Sea*, 13th edn, 2003, Sweet & Maxwell; the 14th edn is expected by the end of 2013.

from breach of statutory provisions and liability for gross negligence manslaughter at common law.

Section 3 forms the greatest part of this chapter and deals with civil liability, which includes: who may be liable, new law on employers' vicarious liability for wrongful acts of employees, causation in fact and in law, defences, damages, remoteness, mitigation of loss and assessment of damages.

The chapter provides a cohesive overall view of issues relating to collisions at sea, examples of how collisions happen, their consequences, and gives a fairly detailed account of important decisions.

1 THE COLLISION REGULATIONS AND THEIR APPLICATION

1.1 ORIGINS OF THE REGULATIONS

The rules regulating prevention of collisions at sea, developed from the practice and custom of seamen, are applied by the Admiralty Court. Gradually, these practices and customs formed part of maritime law and are the foundation of the rules in force today. In 1840, there was a landmark development. For the first time, the London Trinity House set out the existing practice and custom in the form of regulations, adding two rules for steamships: first, the crossing position of steamships being on a different course; and, second, the passage of two steamships in a narrow channel. In either situation, each vessel would put to port, so as always to pass on the starboard side of each other. Notwithstanding the non-statutory force of these regulations, they were enforced by the Admiralty Court as an authoritative yardstick of seamen's conduct in navigation. Later, the Trinity House rules of steamship were enacted by the Steam Navigation Act (SNA) 1846, giving them a statutory force for the first time and imposing penalties upon masters of ships for disobeying them.

Although this Act was short-lived, being repealed by the SNA 1851, the MSA 1854 replaced and expanded these rules, conferring power to make regulations with respect to steam and sailing ships regarding lights and signals. Infringement of the rules, as enacted by these Acts, that caused a collision would, contrary to the old Admiralty rule of division of loss, prevent the owner of the ship that infringed the rules from recovering any recompense for any damage sustained, even if the other ship was also to blame for the collision. Thus, if one ship infringed any regulations and the other did not, but still contributed to the collision by its own fault, there would be no division of loss.

1.2 STATUTORY PRESUMPTION OF FAULT AND ITS SUBSEQUENT ABOLITION

All the existing regulations were repealed, and a complete code was created by the Merchant Shipping Amendment Act 1862. The old Admiralty rule of equal division of loss, where both ships were to blame, was restored by s 29 of this Act. A deeming provision of presumption of fault was made statutory, if it was proved that the collision

was caused by non-observance of any of the collision regulations, unless the guilty party proved that the circumstances made departure from the rules necessary. This was reaffirmed by the MSA 1873, and was re-enacted with some significant amendments by s 419(4) of the MSA 1894.

The 1894 Act amended the rule again by not requiring proof that the collision was caused by the infringement of the relevant regulation, which s 29 of the 1862 Act had required. The effect of the amendment was to enable the court to adjudicate fault in collision cases, without the necessity of determining whether or not the infringement of the collision regulation did, in fact, contribute to the collision. The statute shifted the burden of proof upon the vessel that had infringed the regulation in question to show that the infringement could not possibly have contributed to the collision.

Such a rule of presumption of fault without proof of causative negligence[2] was arbitrary. Thus, 17 years later, by s 4 of the Maritime Conventions Act (MCA) 1911, the presumption of fault rule was abolished. Since then, a causative link between non-compliance with a collision regulation and the collision must be established. In addition, s 1 of the MCA 1911 established the division of loss rule in proportion to the degree to which each vessel was at fault, instead of 50/50, as was the position previously in every case of joint fault. The MCA 1911 was passed to implement the Brussels Convention on Collisions, in 1910, relating to collisions and salvage, and survived the passage of time until the enactment of the MSA 1995.

1.3 THE LAW AND REGULATIONS AT PRESENT

Section 4 of the MCA 1911 made a significant amendment by abolishing the arbitrary rule of presumption of fault contained in s 419(4) of the 1894 Act.

In the middle and latter part of the twentieth century, with continuous advancements in technology affecting ships and specialist craft, there were three sequential amendments to the Collision Regulations. The 1910 regulations were superseded by the 1948 regulations, then by the 1960 regulations and, finally, by the 1972 regulations.

The International Regulations for Preventing Collisions at Sea (Colregs) 1972 – adopted under the auspices of IMO – revised the 1960 Collision Regulations. Since 1977, the 1972 Regulations have had the force of law in the UK. These regulations were subsequently amended in 1983, 1989 and 1991. The amendments were necessary owing to an increased number of accidents, particularly with regard to breaches of the Traffic Separation Schemes. The current Merchant Shipping (MS) (Distress Signals and Prevention of Collisions) Regulations 1996 revoked and replaced the MS (Distress Signals and Prevention of Collisions) Regulations of 1983, 1989 and 1991. They are subject to the MSAs, which have been consolidated by the MSA 1995. The Regulations were further amended in November 2003 to make it clear that an action by ships to avoid a collision must follow the steering and sailing rules.

2 For example, see *The Englishman* (1877) 3 PD 18: the trawler, which was not carrying sidelights and, therefore, was not seen by the other colliding ship, was held not at fault, whereas the other ship was held alone to blame for the collision on the ground of no lookout.

The amendment also deals with low-flying aircraft, 'wing in ground', carrying heavier loads than normal and flying only a few feet above the ground.

By s 306 of the MSA 1995, the Secretary of State has power to make regulations, orders or rules exercisable by statutory instrument, and such instrument shall be subject to annulment pursuant to a resolution of either House of Parliament. With regard to collisions, he/she may make regulations as to the steps to be taken to prevent any collision involving a ship (s 85(3)(k)), or a collision between seaplanes on the surface of water and between ships and seaplanes (s 85(4)).

1.4 SHIPS BEING SUBJECT TO THE COLLISION REGULATIONS

The Colregs apply to all British ships, wherever they may be, and to all foreign ships within UK waters. Her Majesty's ships are exempt from the provisions of the MSA 1995 to which the Colregs are subject (s 308(1)), but obedience to Colregs by the Royal Navy is provided by the Queen's Regulations, which are broadly the same as the Colregs and are published to the world at large, not being only a matter of departmental discipline.[3] In old cases, war ships did not have to carry lights, but these are now dealt with by special rules requiring ships of war to display lights and signals.

The current regulations, by Reg 1(c), now allow the government of any State to make special rules regarding signal lights, shapes or whistle signals for ships of war and vessels proceeding under convoy, so that these lights, shapes or signals cannot be mistaken for any others authorised under the rules. Also, by Reg 1(e), compliance with the Colregs is excused, if a government so determines for special construction vessels for which other provisions can be made so as to provide for the closest possible compliance by them with the rules.

Non-naval Government ships are not subject to the regulations, but power is given by s 308 of the MSA 1995 for such ships and any ships held for the benefit of the Crown, that they might, by Order in Council, be registered as British ships, so that the Act will apply. Hence, the Colregs being subject to it will also apply, with exceptions and modifications, as the Order in Council may provide. Section 309 extends the application of such Order in Council to ships in the service of the Government by a demise charter to the Crown. No orders have yet been made under these provisions. Nevertheless, the prevailing view is that, as a matter of good seamanship, such ships, which are not obliged by statute to comply with the regulations, will conform to them.

As has been seen in Vol 1 of this book, no action *in rem* may be brought against Crown vessels (s 29 of the Crown Proceedings Act 1947), but only an action *in personam* against the relevant Government department, as is provided by s 24(2) of the Supreme Court Act 1981.

3 *HMS Truculent* [1951] 2 Lloyd's Rep 308, and, also, *The Albion* [1953] 1 Lloyd's Rep 239.

1.5 DEFINITION OF VESSEL AND SHIP

The rules define a vessel as including every description of water craft, including non-displacement craft and seaplanes,[4] used or capable of being used as a means of transportation on water (Reg 3(a)). Regulation 2(2) of the MS (Distress Signals and Prevention of Collisions) Regulations 1996 provides that 'ship' includes hovercraft; Reg 2(1) applies the Colregs to seaplanes registered in the UK and on the surface of water anywhere, and to other seaplanes on UK waters. Special provisions are made for lights and shapes to be exhibited by seaplanes.

Section 313 of the MSA 1995 defines a ship as including every description of vessel used in navigation. Section 310 makes the Act applicable to hovercraft.[5] By s 311 of the MSA 1995, the Secretary of State has power to declare anything designed or adapted for use at sea to be a ship for any purpose of the MSAs. This power is yet to be exercised.

There is no definition under the MSA 1995 of the words 'used in navigation'. Reference must be made to the definition given in decided cases, for which see Chapter 1 of Vol 1 of this book. It is interesting to mention, in this context, a decision of the US Supreme Court, ***Lozman v City of Riviera Beach, Florida***,[6] in which the issue was whether a 'houseboat' was a ship for the purpose of a collision. The court held that it was not, because, on the facts of this case, the houseboat was not intended for navigation to transport people or goods.

The reason why it is important to know what is a ship, as explained in Chapter 1, Vol 1, is that, if a structure is a ship, then the Colregs will apply, together with the special rules of division of loss rather than the rules of general common law.

1.6 TYPES OF COLREGS

1.6.1 General

The Colregs 1972, as amended, have international application and constitute the authoritative measurement of conduct of ships in navigation. They are, however, subject to variations by local rules relating to harbours, rivers and inland waters[7] of the States giving effect to them. For example, it is stated in Reg 1(b) that, '. . . such special rules shall conform as closely as possible to these rules'.[8]

There are 38 rules and four annexes. The rules are divided into five parts, A–E, and they are a code of good practice rather than a code of law.

4 'Seaplane' includes a flying boat and any other aircraft designed to manoeuvre on the water (Civil Aviation Act 1982, s 97(6)).

5 The enactment and instrument with respect to which provision may be made by Order in Council under s 1(1)(h) of the Hovercraft Act 1968 shall include this Act and any instrument made thereunder. See, also, the Hovercraft (Civil Liability) Order 1986 (SI 1986/1305) as amended.

6 [2013] 1 Lloyd's Rep 17.

7 In *The Esso Brussels* [1972] 1 Lloyd's Rep 286, it was held that the Colregs and unwritten rules of good seamanship were only applicable insofar as the law of the place of the collision made them so.

8 In *The Genimar* [1977] 2 Lloyd's Rep 17, the principle of good seamanship applied, despite the fact that the Traffic Separation Scheme had not been given effect in Liberian law.

In Part A, the rules deal with general matters such as application, responsibility for non-compliance and definitions. Part B deals with steering and sailing rules, and Part C with lights and shapes. It is these two latter parts that are discussed below with reference to decided cases.

The rules adopt a common-sense approach and provide that regard shall be had to all dangers and special circumstances, which may allow departure from the rules necessary to avoid immediate danger.

1.6.2 Steering and sailing rules (Part B, Section I)

It is stressed, by Reg 4, that the rules 5–10 pursuant to Section I of this part must be complied with in any condition of visibility.

1.6.2.1 Regulation 5 (as amended): proper lookout

Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

A faulty lookout has contributed to, or has been the sole cause of, many collisions. Whether or not it has been faulty is judged objectively. It involves an appreciation of what is taking place, and it is not just the responsibility of one officer.[9]

In ***The Maritime Harmony***[10](MH), the collision between her and *The Anna Bibolini* (AB) occurred in waters connected with the high seas and, accordingly, the Colregs 1972 were applicable. At the time of the collision, AB was on her way to Antwerp, loaded with cargo, but with only one of her two radar sets working. MH was outbound from Antwerp, also loaded with cargo, but with two operational radar sets. There was a heavy tide, and the tidal stream was quite forceful. Visibility was also reduced, owing to fog. Although MH was on the correct side, she was not maintaining a proper or efficient radar watch, and the pilot was only making intermittent use of the radar. It was found that her lack of a proper watch could not justify the speed at which she was moving, and that AB did not maintain a proper radar watch either, or else the collision would have been prevented. As she had crossed into wrong waters and remained there until the collision, she was found 75 per cent at fault.

The marking of successive radar plots of an approaching ship on the radar display gives the relative track of an approaching ship.[11] It may sometimes be necessary to use information from a shore-based radar facility.[12] A proper lookout will depend at all times upon all circumstances.[13]

1.6.2.2 Regulation 6: safe speed

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

9 *The Golden Polydinamos* [1993] 2 Lloyd's Rep 464.
10 [1982] 2 Lloyd's Rep 406.
11 *The Maloja II* [1993] 1 Lloyd's Rep 48, p 55, per Sheen J.
12 *The Nordic Ferry* [1991] 2 Lloyd's Rep 591.
13 See, also, *The Mineral Dampier* [2001] 2 Lloyd's Rep 419.

In determining a safe speed, the rule further provides that all vessels should take the following factors into account:

(a) the state of visibility;
(b) traffic density;
(c) the manoeuvrability of the vessel, with special reference to stopping distance and turning ability in the prevailing conditions;
(d) at night, the presence of background light such as from shores, etc.;
(e) the state of the wind, sea and current, and the proximity of navigational hazards; and
(f) the draught in relation to the available depth of water.

Further, vessels with operational radar shall take into account the following:

(a) the characteristics, efficiency and limitations of the radar equipment;
(b) any constraints imposed by the radar range scale in use;
(c) the effect on radar detection of the sea state, weather and other sources of interference;
(d) the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range;
(e) the number, location and movement of vessels detected by radar; and
(f) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.

In the pre-1972 rules, the requirement was for a 'moderate speed' that had to be maintained in conditions of restricted visibility. A 'safe speed' requirement is adopted under the 1972 rules. An unsafe speed involves a speed that is slow, as well as one that is excessive, depending on the circumstances. Safe speed is a matter of good seamanship and is a relative term, requiring various factors to be taken into account in any given case.

In ***The Roseline***,[14] which collided with *Eleni V* in dense fog and poor visibility, they were both equipped with two operating radar sets. They became aware of the presence of each other when they were at least 6 miles apart, but neither of them reduced their speed. When only a few miles apart, *Eleni V* put hard-a-port, bringing her across the track of *The Roseline*, and a collision occurred. *The Roseline* struck *Eleni V* in a way that severed *Eleni V* into two parts, thus resulting in the loss of a substantial quantity of her cargo of fuel oil.

It was held that the two ships were at fault, as they were obviously not being navigated in accordance with the Colregs 1972, or in accordance with seaman-like prudence. Among the faults attributed to both vessels was unsafe speed; in the prevailing circumstances and conditions, the speed should have been 6 knots for *Eleni V* (instead of 13) and 8 knots for *The Roseline* (instead of the 14 she was doing).

There are numerous examples of collisions cases that have occurred owing to unsafe speed. For example, in ***The Coral I***,[15] a collision occurred on a clear night with an anchored vessel, owing to the high speed of the proceeding vessel, in a crowded

14 [1981] 2 Lloyd's Rep 410.
15 [1982] 1 Lloyd's Rep 441.

anchorage area with lack of a straight passage. The judge found that half manoeuvring speed ought to have been maintained in those circumstances. In ***The ER Wallonia***,[16] the fault of the colliding vessels lay in their respective failure to reduce speed when visibility began to be restricted.

1.6.2.3 Regulation 7: risk of collision

(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt, such risk shall be deemed to exist.
(b) Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting of equivalent systematic observation of detected objects.
(c) Assumptions shall not be made on the basis of scanty information, especially scanty radar information.

This rule suggests a sensible approach to determining the risk of collision that might exist. The second part of the rule is new. What is a proper use of radar was explained in *The Roseline* (above). In determining if risk of collision exists, para (d) of the rule gives guidelines to be considered: if the compass bearing of an approaching vessel does not appreciably change, and even if an appreciable bearing change is evident, a risk may exist when approaching a very large vessel or a tow or when approaching a vessel at close range.

A remarkable situation arose in a collision between ***Selat Arjuna*** and ***Contship Success***,[17] in which the latter performed a major and wholly unexpected alteration to starboard when the vessels were starboard-to-starboard passing. Her master thought that he saw an echo on the radar on his port bow, which was in fact false. By altering to starboard, he placed the other vessel ahead and, becoming more confused, proceeded to alter more and more to starboard, whereupon he collided with and sank the other ship. *Contship Success* was found wholly to blame.

A situation of danger is illustrated in ***The Bow Spring v Manzanillo II***,[18] a collision between a chemical tanker and a hopper dredger, in which the hopper dredger left the tanker in doubt as to her intentions in the channel. The tanker overreacted and grounded, resulting in significant consequences in damages.

Situations of danger commonly arise when a vessel fails to make an effective turn around the bends of a narrow channel.[19]

1.6.2.4 Regulation 8: action to avoid collision

The gist of the six paragraphs of this rule is that any action to avoid a collision shall be positive, made in ample time and with due regard to observance of good seamanship, and the provisions of Regs 5 and 6 shall be observed in avoiding collision.

16 [1987] 2 Lloyd's Rep 485.
17 [2000] 1 Lloyd's Rep 627.
18 [2004] 1 Lloyd's Rep 647.
19 *The Siboeva and Vitastar* [2002] 2 Lloyd's Rep 210.

1.6.2.5 Regulation 9: narrow channels

(a) A vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable.

The remaining six paragraphs of this rule give guidelines on safe crossing in narrow channels or fairways, limit the scope of overtaking unless necessary to permit safe passage with appropriate sounding signals, stress the need of particular alertness and caution when navigating near a bend, and prohibit anchoring in a narrow channel.

A few examples illustrate this rule.

In ***The Toluca***,[20]a channel about 18 km long had been dredged through the mud in order to enable vessels to get to the city of Bangkok by river, situated about 25 miles above the mouth of Mae Chao. No local rules relating to the navigation of the channel had been passed, and, therefore, for every vessel navigating the channel, reliance had to be placed on the Colregs, the 1960 version. Regulation 25 of those rules provided that:

In a narrow channel every power driven vessel when proceeding along the course of the channel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

The Visahakit 1, loaded with petroleum products, was heading for Bangkok, and *The Toluca* was leaving Bangkok laden with cargo. *The Toluca* was 3 ft longer than the longest ship normally permitted to enter the port of Bangkok, so that she had to obtain special permission to enter. At night, in excellent visibility, a collision occurred between the vessels, resulting in slight damage to *The Toluca*, but heavier damage to *The Visahakit 1*. It was found that the collision took place in the middle of the eastern half of the main channel, and, therefore, both vessels were bound to comply with Reg 25 governing navigation of vessels in narrow channels. It was held that, on the balance of probabilities, *The Toluca* was hampered by the limits of the channel and the effect of her speed. There was no fault on the part of *Visahakit 1*, even in starboarding at the last minute, as that was a decision made in the 'agony of the moment' in an attempt to avoid the collision, for which the master could not be blamed. The CA affirmed the decision and added:

Toluca was not entitled to expect *Visahakit 1* to wait for her to come round the bend; *Toluca* was negligent in respect of her speed in approaching the bend and in her reduction of speed at the bend. The accident could have been avoided if *Toluca* had kept on her own side of the channel as *Visahakit 1* had done . . .

Therefore, *The Toluca* was solely to blame for the damage caused.

In ***The Koningin Juliana***,[21] the collision with *The Thurokini* occurred in Harwich harbour, when the former was outward bound and the latter inward bound. The pilot of *The Koningin*, having misunderstood that *The Thurokini* was not moving, created a crossing situation. The issue was whether *The Thurokini* was in the correct position on the dividing line to starboard, and this depended on the meaning of mid-channel;

20 [1984] 1 Lloyd's Rep 131.

21 [1974] 2 Lloyd's Rep 353, and [1975] 2 Lloyd's Rep 111 (HL).

did it mean the centre line of the whole navigable channel or of the dredged channel? The answer – confirmed by the CA – was that 'narrow channel' meant the whole width of the navigable water and that, in Harwich harbour, the line to starboard of which each vessel shall keep is the centre of the dredged channel. Both ships were at fault.

In ***The Sitarem and Spirit***,[22] less emphasis was placed upon the definition of 'narrow channel'. Instead, Steel J placed reliance upon the rule that 'dictates good seamanship', which requires vessels to observe the regulations at all times. There was a significant breach of the traffic regulations, total absence of any lookout and the resultant failure to give way.

An interesting example of a collision in a narrow channel, in non-tidal waters of the river Thames, is ***The Snow Bunting***,[23] which collided with a sculling boat. The byelaws 1993 applied, but the 1976 Colregs could not be completely ignored, the Admiralty registrar held.

1.6.2.6 Regulation 10: traffic separation schemes[24]

This rule regulates opposing streams of traffic and vessels passing along the entire length of the scheme by establishing traffic lanes. The rule is new and has been amended by the latest amendments to the Colregs. The improvements have been based on examination of collision incidents and, indeed, have reduced the number of these incidents, particularly in the Dover Straits.

In ***The Hagieni and Barbarossa***,[25] in breach of Reg 10, B collided with H (a bulk carrier proceeding southward) in Bosporus. B (a chemical tanker, proceeding northward) was largely at fault, failing to keep her position in her own, northbound lane. In addition, she increased her speed and caused confusion to the other vessel, and her lookout was defective. The collision occurred at an angle of 80°, where the bow of B struck the starboard side of H.

It was held that H failed to cope with the embarrassment of B's approach. Her alteration to port was, however, an imprudent and unannounced close-range option. However, the overriding consideration in this case was that B was at all material times persisting in navigating in the southbound lane or separation zone. She created a situation of danger and inevitably instilled the maximum of confusion as to her intentions. Therefore, she was 80 per cent to blame.

1.6.3 Conduct of vessels in sight of each other (Part B, Section II)

Whereas Section I Regs 4–10 apply in any condition of visibility, Regs 11–18 of Section II deal with conduct of vessel in sight of one another, and Reg 19 of Section III applies to conditions of restricted visibility. In particular, Reg 12 refers to sailing vessels when they are approaching one another and which of them should keep out of the way to avoid a risk of collision. For example, the vessel that has the wind on the port side shall keep out of the way of the other.

22 [2001] 1 Lloyd's Rep 107.
23 [2012] 2 Lloyd's Rep 647.
24 For full details and interpretation of the individual paragraphs of this scheme, the reader is referred to Marsden, op. cit. fn 1, paras 6–257–6–305.
25 *The Hagieni and Barbarossa* [2000] 2 Lloyd's Rep 292.

Regulation 13 deals with overtaking situations, stressing that any vessel overtaking any other shall keep out of the way of the vessel being overtaken.

Regulation 14 gives guidelines when vessels are in a head-on situation, whereupon each shall alter her course to starboard, so that each shall pass on the port side of the other.

The rule provides, in particular, that:

When two power driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision each shall alter her course to starboard so that each shall pass on the port side of the other.

Such a situation shall be deemed to exist when a vessel sees the other ahead or nearly ahead and by night she could see the masthead lights of the other in a line or nearly in a line and/or both sidelights and by day she observes the corresponding aspect of the other vessel.

When a vessel is in any doubt as to whether such a situation exists she shall assume that it does exist and act accordingly.

The Argo Hope,[26] while she was outward bound, navigated by a pilot along the Manchester Ship Canal, collided with *The Bebington*, port to port, at a 30° angle. The vessels were in a head-on situation and would have passed side by side if they had kept their correct headings. It was found that *The Argo Hope* was not navigated with caution, the immediate cause of the collision being that she suddenly changed her heading to port. She was found 85 per cent to blame. The master of *The Bebington* was also at fault for having misjudged the speed of *The Argo Hope* and did not keep well on the starboard side.

1.6.3.1 Regulation 15: crossing situation

When two vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.

The Nowy Sacz[27]

The Olympian and *The Nowy Sacz* were both proceeding northwards, parallel to each other, in the Atlantic Ocean, when a collision occurred between them at night, in fine weather and good visibility. The vessels had been in sight of each other for a considerable period of time before the collision occurred. The owners of *The Olympian* contended that the crossing rules applied, and it was the duty of *The Nowy Sacz*, having *The Olympian* on her starboard side, to keep out of the way. The owners of *The Nowy Sacz* said it was the duty of *The Olympian*, as the overtaking ship, to keep out of the way of *The Nowy Sacz*.

The judge held the ships were in a crossing situation and not an overtaking one. Therefore, it was the duty of *The Nowy Sacz* to keep out of the way of *The Olympian*, and the duty of *The Olympian* to keep her course and speed. Also, *The Nowy Sacz* was at fault in failing to take early and positive action to keep out of the way of *The Olympian*, and in failing to reduce her speed in good time so as to allow *The Olympian* to pass ahead of her.

26 [1982] 2 Lloyd's Rep 559.
27 [1976] 2 Lloyd's Rep 682.

1.6.3.2 Regulation 16: action by give-way vessel

Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.

In a collision between ***The Mineral Dampier and Hanjin Madras***,[28] the latter failed to take correct avoiding action as a give-way vessel in a crossing situation, as soon as the vessels came into sight of one another. She should have altered her course to starboard. When it appeared clear to *The Mineral Dampier* that she did not turn to starboard, *The Mineral Dampier* turned to port in desperation, and the bow of *Hanjin Madras* struck her aft starboard side at an angle of 50° leading aft on *The Mineral Dampier*. The apportionment of blame was 80 per cent and 20 per cent, respectively.

1.6.3.3 Regulation 17: action by stand-on vessel

Whether one of two vessels is to keep out of the way, the other shall keep her course and speed.
The latter vessel may however take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules.[29]

The mutual obligations imposed upon both the give-way vessel and the stand-on vessel under this regulation provide a good illustration of the way in which the courts apportion liability. In a collision between ***The Topaz and Irapua***,[30] the former failed to take correct avoiding action when it became apparent that the give-way vessel was not taking any action. It was found that the officer on watch had been observing the latter vessel for some time, but had made the decision to take avoiding action under this regulation too late. The action subsequently taken was also incorrect, with the alteration in course too little in the circumstances. As a result, although *Irapua* was to blame for breaches of Regs 5, 7, 8 and 15 of Colregs, the breach of *The Topaz* in not altering her course sooner under Reg 17(a)(ii) led to an apportionment of 80 per cent and 20 per cent in favour of *Topaz*.

1.6.3.4 Regulation 18: specifies responsibilities between vessels

For example, a power-driven vessel shall keep out of the way of a vessel not under command, or restricted in her ability to manoeuvre, or engaged in fishing or sailing; see *The Snow Bunting* (mentioned earlier).

1.6.4 Conduct of vessels in restricted visibility (Part B, Section III)

Regulation 19

(a) The rule applies to vessels not in sight of one another when navigation in or near an area of restricted visibility.[31]

28 [2001] 2 Lloyd's Rep 419.
29 See *The Estrella* [1977] 1 Lloyd's Rep 525 and *The Angelic Spirit* [1994] 2 Lloyd's Rep 595.
30 [2003] EWHC 320 (Admiralty), [2003] 2 Lloyd's Rep 19.
31 This paragraph extends the rules applicable to vessels navigating in restricted visibility to vessels navigating near an area of restricted visibility too (see op. cit., Marsden, fn 1, para 6–390).

(b) Every vessel shall proceed at a safe speed adapted to the prevailing circumstances and conditions of restricted visibility. A power driven vessel shall have her engines ready for immediate manoeuvre.
(c) Every vessel shall have due regard to the prevailing circumstances and conditions of restricted visibility when complying with the rules of s I of this part.
(d) A vessel which detects by radar alone the presence of another vessel shall determine if a close quarters situation is developing and/or risk of collision exists. If so, she shall take avoiding action in ample time, provided that when such action consists of an alteration of course, so far as possible the following shall be avoided: (i) an alteration of course to port for a vessel forward of the beam, other than for a vessel being overtaken; (ii) an alteration of course towards a vessel abeam or abaft the beam.
(e) Except where it has been determined that a risk of collision does not exist, every vessel which hears apparently forward of her beam the fog signal of another vessel, or which cannot avoid a close quarters situation with another vessel forward of her beam, shall reduce her speed to the minimum at which she can be kept on her course. She shall if necessary take all her way off and on any event navigate with extreme caution until the danger of collision is over.

The Ercole[32]

A collision occurred between *The Embiricos* and *The Ercole*. The ships were approaching each other in opposite directions. Each ship was observed by the other on the radar during the approach period. *The Ercole* was steering 230° and substantially making good that course at 13 knots. *The Embiricos* was on a course of 40° doing about 15 knots. The visibility was restricted. The second officer on watch on *The Embiricos* first saw *The Ercole* at 18 miles, some 2–3° on the starboard bow. *The Ercole* then changed slowly to 6° at 8 miles and to 8° at 5 miles, when she ceased to be visible because of rain. The second officer estimated that, if the two ships maintained their courses, they would pass each other on parallel courses at about 1 mile and switched from automatic to manual steering. Meanwhile, the master of *The Ercole* first saw *The Embiricos* on radar on the 24-mile range, bearing 6° at 20 miles on her port bow. As she approached, he changed to the 12-mile range and, when *The Embiricos* was some 3 miles distant, her echo disappeared into the clutter round the centre of the radar screen, and he formed the view that the two ships would pass port to port at 1–2 miles. He altered course 10° to starboard when some 3 miles distant. He next saw a group of white lights from *The Embiricos*, but, before seeing her side lights, he put *The Ercole* hard to starboard. *The Embiricos'* wheel was put hard to port, and the collision then took place.

It was held that both ships were at fault.

On the above findings, *The Embiricos* was at fault in two respects: first, as regards defective appreciation of the situation on the radar; and, second, for not reducing her speed substantially when the visibility lessened. *The Ercole* was at fault in four respects: first, as regards defective appreciation of the situation on the radar; second, for not stopping her engines and then navigating with caution when she lost the echo of *The Embiricos* in the clutter; third, for altering course 10° to starboard at an improper time; and, fourth, for going hard to starboard at the last, instead of putting her engines full astern. All these faults on either side were causative.

32 [1977] 1 Lloyd's Rep 516.

Brandon J commented on the situation:

> If plotting is necessary in order to enable a navigator to ascertain correctly the course of an approaching ship, then either he should make a plot, or he should not draw conclusions about the course of that ship which are unwarranted without one.

It should be noted that these are the situations that the implementation of the ECDIS system aims to avoid and contribute to safe navigation; it is capable of continually plotting the ship's position.

1.6.5 Lights and shapes (Part C)

1.6.5.1 Regulations 20–27

- Regulation 20: applies to all weather conditions between sunset and sunrise and in restricted visibility and in addition when the use could reasonably be considered necessary.[33]
- Regulation 21: defines each type of light.
- Regulation 22: explains a new rule about visibility of lights.
- Regulation 23: specifies the types of light to be exhibited by power-driven vessels underway.
- Regulation 24: covers the situation of lights during towing.
- Regulations 25 and 26: provide the requirements for sailing vessels, vessels under oars and fishing vessels.
- Regulation 27: covers lights for ships not under command.

In ***The Djerada***,[34] the judge said, in relation to these rules:

> First, as to lookout. I find that the lookout on *The Djerada* was extremely bad, as a result of which the lights of *The Ziemia* were not properly observed, nor her course and speed properly appreciated, during the period of 45 minutes leading up to the collision.
>
> Second and third, as to lights. I find that *The Djerada* was not justified in carrying not under command lights and should in any case not have carried a white masthead light as well as such lights. I find that she was in both these respects in breach of reg 1(b) of the Collision Regulations, which forbids the exhibition of lights other than those prescribed by such rules.

The Albion[35]

A collision between *The Maystone* and an uncompleted aircraft carrier, *The Albion*, occurred in a southerly gale, at night, in the North Sea. *The Albion*, with skeleton crew on board, was being towed northwards by three tugs, and *The Maystone* was southward bound. Although the tugs of *The Albion* safely passed by *The Maystone* port to port, there was an impact between the stern of *The Maystone* and port side aft of *The Albion*, at approximately a right angle. *The Maystone* sank after unsuccessful manoeuvres to clear *The Albion*. An action was brought by the owners of the sunk ship against the Admiralty, as owners of *The Albion*, and against SH (shipbuilders),

33 See *The Coral* [1982] 1 Lloyd's Rep 441.
34 [1976] 1 Lloyd's Rep 50.
35 [1953] 1 Lloyd's Rep 239.

who, until acceptance by the Admiralty, were responsible for the care and efficient protection of the vessel, and against FF (tugowners), who had contracted with SH to be responsible for the tow.

It was held:

> . . . that the port light of *Albion* was defective and that no blame attached to *Maystone* for failing to see *Albion* lying across her course; that the number and disposition of the tugs, the failure to obtain a long range weather forecast, and the absence of warnings issued by *Albion* to shipping in the vicinity, together constituted a negligent failure to conduct the towage in a seamanlike manner; in addition, *The Albion* had suffered an accident and she was not in command, therefore she should display the 'non-under command lights'.

Regulations 28–31 specify the types of light to be shown by vessels constrained by their draught, pilot vessels, anchored vessels and vessels aground, as well as seaplanes, respectively.

1.6.6 Sound and signals (Part D)

Regulation 34 deals with manoeuvring and warning signals, Reg 35 with signals for restricted visibility, Reg 36 with signals to attract attention, and Reg 37 with distress signals. Part E exempts vessels under construction from displaying certain lights.

2 CRIMINAL LIABILITY

2.1 GENERAL

Maritime offences have been dealt with by the MSAs and are now to be found in the MSA 1995, as well as in regulations. By s 85, the Secretary of State has power to make regulations relating to safety and health on ships, which may provide that a contravention of those regulations shall be an offence punishable on summary conviction by a fine or on indictment by imprisonment for a term not exceeding 2 years and a fine.

Intentional or reckless damage to property of another, without lawful excuse, is covered by the Criminal Damage Act (CDA) 1971, which also includes endangering or threatening the life of another. Where a collision between ships or between a ship and a fixed or floating object is caused deliberately or recklessly, this criminal behaviour will now fall to be dealt with under the offences applicable generally to wilful damage of property.[36]

Apart from specific offences created by statute, the general principles of criminal law would apply in cases of loss of life by criminal gross negligence. A brief account of statutory offences under the MSA 1995 is given below. Then, criminal liability for involuntary manslaughter is briefly looked at, but the reader is also referred to Chapter 4.

36 See op. cit., Marsden, fn 1, p 723; as to an offence of criminal damage committed by a British subject on a foreign ship on the high seas, see *R v Kelly, The Winston Churchill* [1981] 3 All ER 387 (HL).

2.2 STATUTORY OFFENCES UNDER THE MSA 1995

2.2.1 Disobeying the Colregs

Failure to comply with the Colregs, whether the breach causes a collision or not, has been made a criminal offence under the MSAs.

Section 419 of the MSA 1894 was the first statutory provision that made the infringement of a collision regulation a criminal offence, if the infringement was caused by the wilful default of the master or owner of the ship. The effect of s 419(2) was that the offence was not absolute,[37] and so the prosecution had to prove wilful default. If any damage occurred from non-observance, there was a deeming provision that the damage was caused by the wilful default of the person in charge of the deck of the ship at the time, unless it was shown that a departure from the regulation was made necessary by the circumstances. This offence was amended by the amendments to the Colregs in 1983, 1989 and 1991.

The current MS (Distress Signals and Prevention of Collisions) Regulations 1996, provide as follows:

2.2.1.1 Regulation 5

(1) Where any of these regulations is contravened, the owner or the vessel, the master and any person for the time being responsible for the conduct of the vessel shall each be guilty of an offence, punishable on conviction on indictment by imprisonment for a term not exceeding two years and a fine, or on summary conviction:
  (a) in the case of any infringement of Reg 10(b)(i) (duty to proceed with traffic flow in lanes of separation schemes) of the international regulations and by a fine not exceeding £50,000; and
  (b) in any other case by a fine not exceeding the statutory maximum.

(2) It shall be a defence for any person charged under these regulations to show that they took all reasonable precautions to avoid the commission of the offence.

In addition, the vessel may be detained by any commissioned naval or military officer, any officer of the Department of Transport, any Customs and Excise Officer or any British Consular Officer, under s 284 of the MSA 1995.

It is no longer required that the prosecution prove wilful default (as it was under the old statute) of the master or owner of the ship.

In addition, the current provision includes any other person responsible for the conduct of the vessel, at the time, who can be prosecuted, and also that the master and the owner of the ship will not be exonerated from being prosecuted for that offence, even if the task of the watch on the bridge is delegated to another person, who commits the breach. For the owner to avoid conviction, he must show that he took all reasonable precautions to choose a competent master, and that there was a system to supervise the master and ensure that he knew the regulations.[38]

As ship-owners are corporate bodies, the corporation as well as the director, manager, secretary or similar officer may be found guilty of an offence, if it is proved that the offence has been committed with the consent or connivance of, or is

37 *Bradshaw v Ewart-James (DC)* [1983] QB 671.
38 *The Lady Gwendolen* [1965] 2 All ER 283.

attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate or any person purporting to act in such a capacity (s 277 of the MSA 1995).

2.2.2 Not giving assistance to vessels after collision or to vessels or persons in distress

Section 92 of the MSA 1995 (which replaced s 422 of the 1894 Act) provides that:

(1) In every case of collision between two ships, it shall be the duty of the master of each ship, if and so far as he can do so without danger to his own ship, crew and passengers (if any):
   (a) to render to the other ship, its master, crew and passengers (if any) such assistance as may be practicable and necessary to save them from danger caused by the collision, and to stay by the other ship until he has ascertained that it has no need of further assistance.
   (b) to give to the master of the other ship the name of his own ship and the names of the ports from which it comes and to which he is bound.

Although failure to do so does not raise any presumption of law that the collision was caused by his wrongful act, neglect or default, such failure is a criminal offence, which applies to masters of British ships and to masters of foreign ships when in UK waters. In case of failure to comply with sub-s (1)(a), without reasonable excuse, he is liable (1) on summary conviction, to a fine not exceeding £50,000 or imprisonment for a term not exceeding 6 months, or both; or (2) on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years, or both. In case of failure to comply with sub-s (1)(b), he is liable to a fine. In either case, his certificate may be cancelled or suspended upon inquiry on his conduct.

By s 93(1), (2) of the MSA 1995 (which derived from s 22(1), (2) of the MS (Safety Convention) Act 1949), the master of a ship has a duty – upon receiving a signal of distress at sea or information from any other source that a ship or aircraft is in distress – to proceed at all speed to the assistance of the persons in distress, unless he is unable, or, in special circumstances of the case, considers it unreasonable or unnecessary to do so, or unless he is released from this duty in case of requisition as provided by sub-ss (4) and (5). Failure to do so is a criminal offence, punishable on summary conviction to a term not exceeding 6 months or to a fine (not exceeding the statutory maximum), or both; on conviction on indictment, up to 2 years' imprisonment or to a fine, or both. Compliance by the master with these provisions shall not affect his right or the rights of others to salvage.

2.2.3 Breach of documentation and reporting duties

Section 77 of the MSA 1995[39] provides that, except as required by regulations under this section, an official logbook shall be kept in every UK ship. Regulations made under this section may prescribe the particulars to be entered in the official logbooks and may require the production or delivery of official logbooks in circumstances as may be specified. They may also provide for exceptions of some ships from such

39 Section 77 derives from the MSA 1970, s 68 and the Criminal Justice Act 1982, Sched 6, Pts III, IV, para 4 and s 46(2).

requirements. Regulations under this section may make a contravention of any provision of this section an offence punishable with a fine. If a person intentionally destroys or mutilates or renders illegible any entry in an official logbook, they shall be liable on summary conviction to a fine.

Section 90[40] requires charts and other information to be carried on board when a ship goes to sea, as may be required by rules made by the Secretary of State under this section. If a ship goes to sea or attempts to go to sea without copies of charts, directions or information, which it is required to carry by rules under this section, the master or the owner shall be liable on summary conviction to a fine.[41] From 2018, all ships will be required to carry ECDIS on board.

Section 91[42] requires the master of any UK ship to report dangers to navigation to ships in the vicinity and to authorities on shore, otherwise he shall be liable to a fine.

2.2.4 Dangerously unsafe ships and unsafe operation of ships

The MSA 1995 regulates the consequences of operating dangerous or unsafe ships in ss 94–107. Section 94 (which derived from s 30 of the MSA 1988, as amended by the Merchant Shipping Maritime Security Act 1997) defines when a ship is ‘dangerously unsafe’ (see Chapter 4, above).

Section 95 gives power to the inspecting officer of a UK port to detain such a ship, whether she is British or foreign.

The provisions that are relevant to the prevention of collisions are contained in ss 98 and 100. Under s 98 (which derived from s 30 of the MSA 1988), both the master and the owner of a dangerously unsafe ship (or any other person who has assumed responsibility for safety matters, such as charterers and managers) shall be guilty of an offence.[43] A defence to such an offence is specified under s 98(4), (5), (6), which states broadly that the accused must prove that, at the time of the offence, arrangements had been made to ensure the ship’s fitness to go to sea as required.

Under s 100 (being equivalent to s 31 of the MSA 1988), a duty is imposed upon the owner of any UK ship, or any ship registered under the laws of any other country that is within the UK waters, to take all reasonable steps to ensure that the ship is operated in a safe manner. If the owner of such a ship fails to discharge such a duty, he shall be liable on summary conviction to a fine (up to £50,000) and on conviction on indictment to imprisonment for a term up to 2 years or a fine, or both. In the event that the ship is chartered by demise or is managed, either wholly or in part, by any person other than the owner, the same duty is imposed on such a person, as the case may be.

By contrast to s 98, this offence does not extend to the master of the ship.

With regard to officers of corporate bodies, reference should be made again to s 277 of the Act.

40 Section 90 derives from the MSA 1970, s 86, and the MSA 1979, Sched 6, Pt III.

41 *The Huntingdon* [1974] 1 WLR 505.

42 This section derives from the Merchant Shipping (Safety and Load Line Convention) Act 1932, s 24, which was enacted after concerns caused by *The Titanic* disaster; the MSA 1964, s 16, added the information that has to be sent.

43 The details of this long section should be read from the Act.

The first case that was decided on the application of the former equivalent to this section was ***The Safe Carrier***.[44] The ship managers were charged with an offence for failing to secure that the vessel was operated in a safe manner, when the chief engineer was given less than 3 hours to familiarise himself with the machinery. Within the next 24 hours, the engine broke down, and the vessel drifted at sea, requiring the assistance of towage, but no damage occurred. Although the CA held that the section has created a strict liability offence, and no criminal state of mind was required, the House of Lords held that it was not helpful to categorise the offence as either one of strict liability or not. The prosecution must prove that the accused owner, manager or demise charterer had failed to take all reasonable steps (which must be reasonable to him (sub-s (4)(iii)) to ensure that the ship was operated in a safe manner. Although the test is objective, it has a subjective element. The fault of the employee below the senior management level was not to be taken into account for attributing liability to the corporation. The act or omission must have been of the directing mind and will of the relevant corporate owner or manager, following the direction in the *Tesco v Nattrass* case.[45] The duty imposed is personal to the owner or charterer or manager.[46]

The senior manager who has failed to operate a safe system will also be charged with the offence, in accordance with s 277. Under the requirements of the ISMC, it will be easier to show that the senior management failed to operate a safe system, particularly as it requires that new personnel should be given sufficient time to familiarise themselves with the ship.[47]

The defective condition of hull or equipment, or the improper loading or undermanning of a lighter or a barge that is used or is permitted to be used in navigation by any person, endangering human life by its unsafety, is made an offence by s 99 of the MSA 1995. Equally, the Act contains provisions for the manning, qualification of officers and seamen, equipment and management of vessels, the infringement of which carries penalties.

Relevant to danger to, or safety of, ships is the Dangerous Vessels Act 1985, which, by s 1, authorises the harbour master to direct the removal from the harbour of any vessel, where its condition or the nature/condition of anything it contains might involve, in his opinion, a grave and imminent danger to the safety of any person or property; or it might involve a grave and imminent risk of preventing or seriously limiting the use of the harbour by its sinking or foundering.

2.2.5 Conduct endangering ships, structures or individuals

This offence was originally created by s 220 of the MSA 1894, as amended by s 27 of the MSA 1970, and was substituted by s 32 of the MSA 1988. The amendments by s 32 became necessary after the sinking of *The Herald of Free Enterprise* (see later).

44 [1994] 1 Lloyd's Rep 589 (HL).

45 The identification theory; see, further, in Ch 4, above.

46 If the duty is personal, as it was in this case, it could be argued that it should also be non-delegable, so that the manager or owner should be liable if he did not ensure, personally, that all reasonable steps had been taken by whoever was delegated with the relevant tasks. It should be noted that, with regard to some statutory offences, the special rule of attribution, as applied in *Meridian Global Funds Management Asia v Securities Commission* [1995] 3 All ER 918 (PC), may apply to attribute liability to the company when an employee, below the senior management, is found guilty of the offence, if that is the intention of the statute; see, further, Ch 4.

47 See Ch 4.

It now appears in s 58 of the MSA 1995. It refers to the master or any seaman of a UK ship, or a foreign ship being within UK waters.

Section 58(2) provides that, if such a person is on board the ship or in its immediate vicinity and does any act that causes or is likely to cause loss or destruction of or serious damage to his ship, machinery, navigational or safety equipment, or to any other ship, or the death of or serious injury to any person, he shall be guilty of an offence. The act must have been deliberate or have amounted to a breach or neglect of duty; or the master or seaman was under the influence of drink, or drugs at the time (sub-s (3)).

The same applies to an omission by such a person to preserve his ship etc. from being lost, destroyed or seriously damaged; or to preserve any person on board from death or serious injury; or to prevent his ship from causing loss or destruction or serious damage to any other ship or any structure, or the death of or serious injury to any person not on board his ship.

The offence extends, by sub-s (4), to a situation in which the person performs his duties in relation to operation of his ship in such a manner as to cause, or to be likely to cause, any such loss, destruction, death or injury as mentioned above; also, when he fails to discharge any of his duties, or to perform any such function, properly to such an extent as to cause, or to be likely to cause, any of those things.

The offence is punishable on summary conviction by a fine, or on conviction on indictment by imprisonment (2 years' maximum) (sub-s (5)).

There is a defence available to the accused as provided by sub-s (6) that he took all reasonable steps to discharge the duty imposed by sub-s (2), or that he was under the influence of drugs medically prescribed and he had no reason to believe that the drug might have the influence it had. In the case of an offence under sub-s (4), proof of reasonable precautions taken and exercise of due diligence to avoid committing the offence will excuse the accused.

Although there is no defence when the act or omission was deliberate, there is a further defence under both sub-sections if the avoidance of the offence would involve disobeying a lawful command, or that, in all the circumstances, the loss, damage, death or injury in question could not reasonably have been foreseen or avoided by the accused.

It should be noted that, under the original provision, there was no defence, and the court had to consider the gravity of the conduct in order to determine whether or not the offence had been committed. However, the words of the previous statutory provision did not include neglect of duty, for example, want of proper care in the discharge of the master's or seaman's duty.

So, in the collision between ***The Gladys and The Prome***,[48] which resulted in the sinking of *The Prome* with her crew, poor lookout due to simple negligence of the master did not amount to a criminal offence. After this case, there were no further criminal prosecutions until 1980, when the court in ***The Harcourt***[49] reached a decision (confirmed on appeal) that widened the scope of s 27 of the MSA 1970.

48 [1911] 1 KB 571.

49 [1980] 2 Lloyd's Rep 589. Under similar legislation, the Hong Kong Court of Final Appeal held, in *Kulemesin Yuriy v HKSAR* - *The Neftegaz67* (26.06.2013, LMLN), that the master was guilty of the offence of endangering the safety of others, as he had unreasonably believed that the channel in question was not narrow and had failed to notice alerts raised by the oncoming ship in the opposite direction.

The master was ill in bed, but had left an experienced mate with instructions to keep watch during the night. While his vessel was anchored off the main navigational channel in the Hull West Roads, the mate left an experienced deckhand on watch after sunset, who omitted to turn on the forward anchor light, creating a potentially dangerous situation. The mate noticed this when he returned for watch before midnight. The master was made aware of the event by police officers when they boarded the vessel a few days later. Having accepted responsibility, he was found guilty.

It seems from this decision that the master' duty is non-delegable. He will only discharge his responsibilities under the statute if he checks personally whether or not those delegated by him carried out their responsibilities properly, and the same will apply under the present statute, s 58. In addition, it follows from this decision that actual loss need not occur by reason of breach of the provisions of the statutory offence.

A further offence is provided by s 59 of the MSA 1995 in relation to disobedience of lawful commands and neglect of duty by seamen.

2.2.6 Breach of statutory duty with regard to life-saving regulations

There is a statutory duty to ensure the safety of ships and persons on them and protect their health under the MS (Life-Saving Appliances) Regulations, reviewed from time to time. There were two sets of the 1999 Regulations, applying to different categories of ship and also relevant to shipbuilders. Amendments to SOLAS Chapter III by IMO Resolution MSC 216(82) came into force 1 July 2008. They require operational readiness, weekly and monthly inspections, maintenance and periodic servicing of various parts. There is also the Life-Saving Appliances (LSA) Code, giving guidelines of use of the appliances.

On 20 May 2011, MSC, at the 89th Session approved guidelines for evaluation and replacement of lifeboat release and retrieval systems and further guidelines for periodic servicing and maintenance of lifeboats, launching appliances and on-load gear, as well as guidelines on safety during abandon-ship drills using lifeboats in order to prevent accidents with lifeboats. By Resolution 317(89), a further amendment to SOLAS Chapter III was made by adding a paragraph requiring ships not complying with guidelines for evaluating the lifeboat on-load release mechanism to replace the equipment. By Resolution 320(89), an amendment was made to the LSA Code in May 2011 to meet the requirements adopted at the 89th Session, above.

The duty under these Regulations and guidelines as enacted is absolute. In ***Ziemniak v ETPM Deep Sea Ltd***,[50] a ship engineer was seriously injured while taking part in a drill. The cause of the accident was the failure of a link caused by stress corrosion cracking when a suspension chain, holding a lifeboat, failed. He succeeded in his claim against the defendant, who was responsible for the vessel, for breach of statutory duty under the Act.

2.2.7 Offence in relation to lighthouses, buoys or beacons

In addition to the general criminal law offences for damage to property provided by the CDA 1971, the MSA 1995 includes specific offences in relation to criminal

50 *Ziemniak v ETPM Deep Sea Ltd* [2003] 2 Lloyd's Rep 214 (CA).

damage to lighthouses. Section 219 of MSA 95 is worded in similar language to s 1 of the CDA 1971 and makes it an offence when a person, without lawful authority, intentionally or recklessly damages any lighthouse, or its lights or buoy or beacon, or removes, casts adrift or sinks, conceals or obscures any of the same. A person who is guilty of such an offence shall, in addition to being liable for the expenses of making good any damage so occasioned, be liable, on summary conviction, to a fine. Further, s 220 gives power to the lighthouse authority to issue and serve 'a prevention notice' upon any person who exhibits a light on a place in such a manner as to be liable to be mistaken for a light proceeding from a lighthouse. If the person who is served with such a notice fails, without reasonable excuse, to comply with the directions contained in the notice, he shall be liable, on summary conviction, to a fine.

2.2.8 Breach of duty to give directions after shipping casualties

Under the MSA 1995, criminal sanctions attach also to oil pollution incidents that extend beyond pollution incidents arising out of collisions. Section 136 imposes a duty upon the owner or master of a ship to report the occurrence of discharge of oil mixture from a ship into a harbour in UK waters, or escape of oil from a ship into any UK waters, to the harbour master or authority. Failure to comply with such a duty shall be punishable, on summary conviction, by a fine.

In addition, by s 137, the Secretary of State has wide powers to issue directions when an accident occurs to or in a ship and, in the opinion or the Secretary of State, oil from the ship will or may cause pollution on a large scale in UK waters. His representative, the SOSREP, performs this function.

It will be an offence if a person to whom a direction is duly given under s 137 contravenes, or fails to comply with, any requirement of the direction (s 139) (see, further, Chapter 16, below).

2.3 INVOLUNTARY MANSLAUGHTER FOR BREACH OF DUTY

A breach of the Colregs, or of the provisions of the MSA 1995 relating to dangerously unsafe ships (ss 94, 98) and unsafe operation of ships (s 100 (seen earlier)), which might result in loss of life, will give rise to a prosecution for manslaughter by criminal negligence involving a breach of duty, if the elements of the offence, as stated at common law, exist. The principles of criminal negligence were re-examined in the following case (see also Chapter 4, above).

R v Adomako[51]

The appellant was the anaesthetist in charge during an eye operation at Mayday Hospital. During the operation, the supply of oxygen to the patient had been disconnected, but the appellant did not notice until the patient had a cardiac arrest a few minutes later and died. It was admitted that the appellant had been negligent, but the question was whether his actions were criminal. A jury convicted him of

51 [1994] 3 All ER 79.

manslaughter after the death of the patient. The CA (Criminal Division) dismissed his appeal, and the same question was referred to the House of Lords. The question was stated as follows: in cases of manslaughter by criminal negligence not involving driving but involving a breach of duty, is it sufficient direction to the jury to adopt the gross negligence test, without reference to the test of recklessness, as defined in *R v Lawrence*, or as adapted to the circumstances of the case? The House of Lords considered the authorities on the point, and Lord Mackay, delivering the judgment, said:

> In my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.[52]

Therefore, in reply to the question posed to the House, he stated:

> In cases of manslaughter by criminal negligence involving a breach of duty, it is sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following *R v Bateman* (1925) 19 Cr App R 8 and *Andrews v DPP* [1937] 2 All ER 552, [1937] AC 576 and it is not necessary to refer to the definition of recklessness in *R v Lawrence* [1981] 1 All ER 974 . . . although it is perfectly open to the trial judge to use the word 'reckless' in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case.[53]

In the case of corporations, however (as discussed in Chapter 4), it has been difficult to convict the corporation itself for criminal negligence, unless it is found that the individuals who can be identified as the 'directing mind and will' of the corporation are themselves guilty of gross negligence, as was shown in *The Herald of Free Enterprise* case, below.

Herald of Free Enterprise (R v East Kent Coroner ex p Spooner and Others)[54]

The vehicle ferry ship, *The Herald of Free Enterprise*, capsized outside Zeebrugge harbour, resulting in loss of life of a large number of passengers. A formal investigation carried out, pursuant to s 55 of the MSA 1970, by Sheen J, confirmed that the immediate cause of the vessel's loss was that she sailed with her bow doors open and trimmed by the head. In addition, it was found that the capsize was caused by the negligence of the assistant bosun, the chief officer, the master, the superintendent and the directors of the company, who did not appreciate their responsibilities for the safe management of the ship (the company, from top to bottom, was criticised for sloppiness).

52 Ibid, pp 86–87.
53 Ibid, p 88.
54 (1989) 88 Cr App R 10.

The incident was subsequently considered by a coroner, Turner J, who directed the jury that, as a matter of law, there was insufficient evidence to convict the individuals. As regards the company, he said that, as a matter of law, a corporate body could not be guilty of manslaughter, unless one of the individual defendants who could be identified with the company could have been guilty of manslaughter. He ruled against the adoption of the principle of aggregation of the faults of the individuals involved in order to convict the company. He said that, where the acts or omissions of employees or managers of a corporate body were not sufficient to render them guilty of manslaughter, those acts or omissions could not be aggregated so as to render the corporate body guilty.

On an application for judicial review of the decision, Bingham LJ in the Queen's Bench (Divisional Court) held that: '. . . on appropriate facts the *mens rea* required for manslaughter can be established against the corporation. I see no reason in principle why such a charge should not be established'.[55]

He further stated that:

> Whether the defendant is a corporation or a personal defendant, the ingredients of manslaughter must be established by proving the necessary *mens rea* and *actus reus* of manslaughter against it or him by evidence properly relied on against it or him. A case against a personal defendant cannot be fortified by evidence against another defendant. The case against a corporation can only be made by evidence properly addressed to showing guilt on the part of the corporation as such. On the main substance of his ruling I am not persuaded that the coroner erred.[56]

2.4 NEW STATUTORY OFFENCE

After *The Herald of Free Enterprise*, a new statutory offence was created by s 31 of the MSA 1988, making the owner, demise charterer or the ship manager of a ship (upon whom responsibility for her safe operation lies at a particular time) criminally liable for unsafe operation, punishable upon summary conviction with a fine up to £50,000 or, on indictment, with 2 years' imprisonment. This offence is now repeated in s 100 of the MSA 1995, mentioned previously.

This section applies also to non-UK ships that are within UK territorial waters, to take reasonable steps to ensure that the ship is operated in a safe manner, but it is not applicable to non-UK ships if they only came within UK territorial waters for shelter owing to bad weather or unavoidable circumstances.

As regards developments with regard to corporate manslaughter, see Chapter 4, above.

55 (1989) 88 Cr App R 10, p 16.
56 Ibid.

3 CIVIL LIABILITY

3.1 INTRODUCTION

It was explained in Section 1, above, that there is no longer a presumption of fault by the mere breach of the Colregs. To establish civil liability resulting from a collision between ships or between a ship and another object, the burden of proof is on the claimant to prove the facts that have given rise to liability incurred owing to negligence or want of good seamanship. Breach of the Colregs will be part of the evidence to be adduced by the claimant for the court to make an assessment of the blameworthiness of the defendant and evaluate the causative potency of the fault.

The principles of the law of negligence will be applicable (apart from one instance where no proof of negligence is required, under s 74 of the Harbours, Docks and Piers Clauses Act (HDPCA) 1847, which creates strict liability for damage to a harbour's property by a vessel; see Chapter 13, below). In all other instances, the claimant must establish that there was a duty of care, there was a breach of that duty by the defendant, which caused the collision, and also that the breach caused the damage claimed, which is subject to the remoteness rule.

For the court to identify whether there is a duty of care in negligence cases, a three-stage test was developed in 1990.[57] These are: reasonable foreseeability of damage; a relationship of proximity between the parties; and that in all circumstances it was fair, just and reasonable to impose a duty of care upon the defendant. Although the three-stage test applies universally to all cases, whether the claim is for physical damage or economic loss, the proximity requirement of the test varies according to the circumstances and the type of damage claimed.

In straightforward cases of direct infliction of physical injury by the act of the defendant, the three-stage test is easily satisfied. There may be no need to look beyond the foreseeability test in order to establish that the defendant had been in a 'proximate' relationship with the claimant.[58] In most claims in respect of physical damage to property or to a person, the question of the existence of a duty of care does not give rise to any problems, because it is self-evident that such a duty exists, and the contrary

57 *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605 (HL). *Donoghue v Stevenson* [1932] AC 562 had laid down the groundwork for subsequent developments, and, from the words of Lord Atkin's speech, he referred to: first, the concept of reasonable foreseeability of harm; second, the claimant and the defendant being in a relationship of proximity; and third, and more loosely, it being fair, just and reasonable to impose liability on the defendant for his careless actions. This three step scheme however, did not crystallise until the case of *Caparo Industries plc v Dickman*, which involved a company, called Caparo, which took over another company by buying up a majority of its shares. It did this because it sneakily obtained information from a company audit that the target was financially sound. The audit was prepared by a group of accountants (Dickman) and was intended for shareholders, not outsiders. Once Caparo owned the company, it found that the finances were in fact pretty poor, and so it sued the accountants for being negligent in their audit preparation. The House of Lords found against Caparo and established the current threefold test. Although it was 'reasonably foreseeable' that outsiders might learn of the carelessly prepared information, it was not the case that Caparo and Dickman were in a relationship of 'proximity'. The court took into account concerns that to allow a claim such as this might open the floodgates of litigation. The third element, whether liability would be 'fair, just and reasonable' was an extra hurdle added, as a catch-all discretionary measure for the judiciary to block further claims.

58 *Murphy v Brentwood DC* [1990] 2 All ER 908, [1991] AC 398 (HL), pp 486–487.

view is unarguable.[59] This is applicable to collision cases in which it is self-evident that a duty of care exists by a vessel towards other vessels navigating the same seas.[60] The same applies to consequential financial or economic loss resulting from the inflicted physical damage.

The duty owed to other vessels at sea is based on the principles of the tort of negligence, and, as early as 1823, Lord Stowell, in ***The Dundee***,[61] stated the essential elements of actionable negligence in collision cases:

> Want of that attention and vigilance which is due to the security of other vessels that are navigating the same sea, and which, if so far neglected as to become, however unintentionally, the cause of damage of any extent to such other vessels, the maritime law considers as a dereliction of bounden duty, entitling the suffered to reparation in damages.[62]

When a claim is for pure economic loss, it is more difficult to satisfy the second- and particularly the third-stage tests of the *Caparo* decision. This aspect is examined in the context of damages, and it relates, in particular, to claims for financial loss by time or voyage charterers of the one ship colliding with the other, which in such a case is pure economic loss.[63]

Since a duty of care exists in determining civil liability of a defendant in collision cases for physical and consequential financial loss, the other elements of the burden of proof are examined under para 3.3, below.

There are special rules for division of loss in collisions at sea, which became statutory by the MCA 1911. These are now consolidated in the MSA 1995, s 187 (see para 3.7).

3.2 WHO MAY BE LIABLE?

3.2.1 The employer of the wrongdoer

The employers of those on board whose negligent act caused the collision will be vicariously liable for the collision. The employer may be either the owner of the ship or the charterer by demise, who takes possession and control of the ship and employs the crew. A charterer under a time or voyage charter does not normally employ the crew. The act, or omission, giving rise to negligence must be that of the servant acting within the scope of his employment. In collision cases, it will be the negligent act in navigation.

59 *The Hua Lien* [1991] 1 Lloyd's Rep 309 (PC); contrast *The Nicholas H* [1994] 1 WLR 1071 (HL), in which proof of foresight and proximity were not enough in a physical damage case where the claim was for economic loss, for policy reasons. Instead, the third stage test, namely whether it would be fair, just and reasonable to impose such a duty, restricted the possibility of recovery by cargo-owners who sued the classification society of the ship, which was allowed to sail before permanent repairs to some defects had been carried out. The cargo on board the ship was lost when the ship sank due to unseaworthiness, but class societies are not in the business of issuing seaworthiness certificates, and the duty to provide a seaworthy ship is a personal duty of her owner (see, further, the analysis of decisions in this area at the end of Ch 8, above).

60 As developed originally by the landmark decision of *Donoghue v Stevenson* [1932] AC 562 (HL).

61 [1823] 1 Hagg Ad 109.

62 Ibid, p 120.

63 See *The Mineral Transporter* [1986] AC 1 (PC).

An interesting question arising in the context of vicarious liability is whether an employer or principal can be held vicariously liable to an innocent party when damage is caused owing to a malicious, or criminal, act of the employee, or agent. In an old decision, ***The Druid***,[64] the master of the ship deliberately rammed another vessel and caused damage to it when the master of the other ship refused to engage the *Druid* into a towage contract. The judge held the employer not liable for the criminal act of his employee, because the act was not within the scope of the master's employment. The authors of *Marsden* argue that the decision in the *Druid* may not be good law today.[65] It is instructive to explore how the law has developed since then.

In subsequent, non- Admiralty cases concerning a fraudulent act of an agent,[66] or a theft of goods held under bailment by an employee of the bailee,[67] it was held that the agent, or the employee, acted in the course of his agency or his employment, and, therefore, the principal or employer was liable. On the facts of these cases, however, it was the duty of the principal or the employer to exercise due care to see that no fraud or theft was committed.

Similarly, in the context of the duty owed to the public by police authorities, the Privy Council held, in ***Attorney General of the British Virgin Islands v Hartwell***,[68] that: When entrusting a police officer with a gun the police authorities owed to the public at large a duty to take reasonable care to see the officer was a suitable person to be entrusted with such a dangerous weapon, in case by any misuse of it he inflicted personal injury, whether accidentally or intentionally, on other persons; that, therefore, a duty of care was owed to the claimant; and that, in view of the relaxed and surprisingly casual response of senior officers to the two earlier incidents involving the officer, there had been a sufficient breach of that duty to found liability in negligence.

Such cases, in which a fiduciary duty is owed to another, or there is a duty owed to the public, differ from other cases because it is within the terms of bailment, or the fiduciary relationship, that due care should be exercised to employ honest servants, or to safeguard against the wrong. The same would be expected from ship-owners when they select their captains and crew who are entrusted with the care of cargo on board ship.

In a decision of the House of Lords, ***Credit Lyonnais Bank Nederland v Expert Credits***,[69] it was held that, before there can be vicarious liability, all the features of the wrong that are necessary to make the employee liable have to have occurred in the course of the employment, but the employer will not be liable for acts of an employee committed in the course of his employment that were not in themselves tortious and only became so when linked to other acts outside the course of his employment. What is meant by the words 'occurred in the course of employment' is that the employee or agent had authority to do certain things on behalf of his employer or principal.

64 (1842) 1 W Rob 391.

65 See, op. cit., Marsden, fn 1, para 12–04.

66 *Lloyd v Grace Smith* [1912] AC 716 (HL); *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248 (CA).

67 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 (CA); *Port Swettenham Authority v T Wu & Co* [1979] AC 580 (PC).

68 [2004] UKPC 12.

69 *Credit Lyonnais Bank Nederland v Export Credits Guarantee Department* [2000] 1 AC 486 (HL).

The law seems clearer in recent years than in the past, but not absolutely; the answer will depend on the facts of individual cases. As a general rule, it is well established that an employer could be held vicariously liable for an employee's deliberate wrongdoing, but vicarious liability cannot be established simply because the 'guilty' servant did have, by reason of his employment, the opportunity to commit the wrongdoing in question. More than a mere opportunity to commit the wrong has to exist. There has to be a close connection[70] between the work the servant has been employed to do and the wrongdoing.

In cases in which the servant is entrusted with the safety of premises, as in ***Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd***,[71] the answer will not be difficult, but in other cases the question of connection between employment and the wrongdoing may be more difficult to answer.

For example, in ***Navarro v Moregrand Ltd***,[72] it was held that a master or principal is 'responsible in tort for all wrongs done by the servant or agent in the course of his employment, whether within his actual or ostensible authority or not'. Furthermore, there is authority that, where a servant is authorised to do a certain act and while doing that act he assaults the plaintiff, he may be held to have committed the assault in the course of his employment if it is an improper mode of carrying out that which he was employed to do;[73] and there is also authority that, where an agent bribes the clerk of the plaintiff in order to obtain information concerning the plaintiff, which he was employed to obtain by legitimate means, the action of the agent in bribing the clerk may likewise be held to be committed within the course of his employment.[74]

In the light of these authorities, considering the facts of *The Druid* (above), the malicious act of the master, committed in a fit of temper and in reaction to a refusal to be engaged in towage (for which he was employed), could not be said to be within the scope of his employment per se, but it was, arguably, closely connected with it. However, though connected, it may be observed that the malicious act of the master was not just an improper mode of carrying out what he was employed to do (as seen in *Navarro* above); it was an act that, after the refusal to be towed, was arguably disconnected from his employment and the authority the master had from his employer. Had the act of violence been carried out during the negotiation for the towage with the master of the other ship in order to enforce upon him the engagement, it would, arguably, have been an act closely connected with the employment, and, as per *Navarro* above and the comments of Lord Goff in *The Ocean Frost* below, it would have been an improper mode of carrying out what he was supposed to do. Thus, if this were the case, or if use of violence was expected from his employer (see, below, *Mattis*), the employer would be vicariously liable for such an act. Obviously, there is a very thin line to be drawn, and it will all depend on the facts of individual cases.

70 See a recent example in *Weddall v Barchester Healthcare Ltd* [2012] EWCA Civ 25, where the employer was held vicariously liable for the assault of a junior employee upon a senior employee when reacting to instructions; there had been a sufficiently close connection for the purpose of his employment.

71 [2004] 2 Lloyd's Rep 251.

72 [1951] 2 TLR 674, p 680 (CA).

73 See *Dyer v Munday* [1895] 1 QB 742.

74 See *Hamlyn v John Houston & Co* [1903] 1 KB 81.

Support for such a proposition can be derived from the decision ***Mattis v Pollock (trading as Flamingos Nightclub)***,[75] involving violence used by the club's doorman. The CA defined the scope of employment in terms of what the employer expects of his employee, and held:

The established test for vicarious liability, including where an employer/employee relationship was under consideration, required a broad approach to the determination of the question whether the employee's action was so closely connected with what the employer authorised or expected of him in the performance of his employment that it would be fair and just to conclude that the employer was vicariously liable for the damage sustained by the claimant as a result of the employee's act; that, where the employee was expected to use violence while carrying out his duties, the likelihood of establishing that an act of violence fell within the broad scope of his employment was greater than it would be if he were not.

The House of Lords, in ***The Ocean Frost***,[76] distinguished cases that involve reliance by the claimant on a representation made by the servant of the defendant from cases involving intentional or negligent physical act by the servant. It held that the chartering manager of the owner of the ship did not have ostensible authority to deceive the agent of the buyer of the ship into believing that he had authority to enter into a 3-year charter party. What he was purporting to do was not within the class of acts that an employee in his position was usually authorised to do, and the employer had done nothing to represent that he was authorised to do it. In particular, Lord Goff said:

For where the servant's wrong consists of a misrepresentation upon which the plaintiff relies, if that misrepresentation is not within the ostensible authority of the servant, the plaintiff is placing reliance on a statement by the servant which, as I have already indicated, either does not fall within the class of acts which a person in his position is usually authorised to perform, or is a statement made in circumstances where the plaintiff has notice that his authority is limited. In either case, in my judgment, the plaintiff is placing his reliance exclusively upon the servant; and it is understandable that it should be the policy of the law in those circumstances, not merely that the unauthorised act should not be imputed to the master, but also that the master should not be vicariously liable for the servant's wrong.

On this basis, those torts which involve reliance by the plaintiff upon a representation by the servant should be distinguished from other wrongs, for example those which involve intentional or negligent physical acts by the servant. In the latter class of case, the ostensible authority of the servant does not provide the criterion of the master's vicarious liability: see, in particular, *Bugge v Brown* (1919) 26 CLR 110, 116, per Isaacs J and, at p 132, per Higgins J. So where a servant is authorised to carry on a certain dealing or transaction with the plaintiff and reinforces his approach to the plaintiff with an (unauthorised) physical assault upon him, his master may be vicariously liable for the assault: see *Dyer v Munday* [1895] 1 QB 742; but where the servant induces the plaintiff to enter into an authorised transaction by means of a fraudulent misrepresentation which is not within his ostensible authority, the master will not be vicariously liable for the fraud. It also follows that there are acts of a servant for which a master may be vicariously liable, although they are not within the servant's ostensible authority; so that the conclusion which I have reached on the authorities is not inconsistent with the dictum of Denning LJ in *Navarro v Moregrand* . . .

In this connection, an interesting recent case, ***The Steve Irwin***,[77] was concerned with which of the two corporate bodies, the registered owner of the ship, or her

75 [2003] 1 WLR 2158.
76 [1986] AC 717.
77 [2012] 2 Lloyd's Rep 409.

operator and beneficial owner, was the employer of the master who committed the tort of trespass, or conversion, dispossessing a fish farmer from his catch of bluefin tuna during a campaign to protect marine wildlife. The companies concerned were SSCS, a charity based in the USA, and the registered owner of the ship, SSUK. In 2010, SSCS launched a campaign aimed at preventing fishing of Atlantic bluefin tuna, contrary to Council Regulation (EC) No 302/2009, under which there was a limited time each year when fishing was permitted. The fish farmer (F) claimed damages in tort against Mr Watson (W), the captain of the ship (who was also director of SSUK), and both companies.

The preliminary issue to be determined by Hamblen J was whether the incident was directed and/or authorised and/or carried out by SSUK, its servants or agents and, accordingly, whether it was liable, directly or vicariously, for any alleged damage to the tuna fish cage and/or the release of the fish. F submitted that W directed the campaign and the vessel on behalf of both SSUK and SSCS, and that they were both responsible for his actions in relation to the attack on F's boats and cages and the release of the fish, and that there was a common design between the defendants to commit such acts.

Hamblen J held on the preliminary issue:

1 Although there was a close connection between SSUK and SSCS, they were separate legal bodies and, although SSUK was the legal owner of the vessel, the beneficial owner, operator and controller of the vessel's activities was SSCS. This provided strong support for SSUK's case that the master and crew on board were acting on behalf of SSCS and the campaign was conducted by SSCS; W was acting as its agent although he was also a director of SSUK.
2 In relation to the issue of common design, it had not been established that SSUK was involved in the commission of the tort, as to make the infringing act its own, and it was, therefore, not a joint tortfeasor.

The CA[78] recently overruled the decision: It held that the conservation charity was liable as a joint tortfeasor for an attack on a bluefin tuna farm, during which fish cages were damaged and fish were released. There was evidence of a common design between the charity and the other defendants, and the charity had made itself party to that purpose and undertaken acts in furtherance of the common design. The parties had combined to secure the doing of acts that, in the event, proved to be tortious.

3.2.2 Persons responsible for the management and operation of the ship

Liability of a ship-owner, or charterer by demise, or manager of the ship, for collision damage may arise from negligent management and operation of the ship and it is distinct from vicarious liability. Failure in ensuring that the ship is in a condition that she may be navigated safely by being properly equipped, manned and maintained, by reason of which the collision occurs, is negligence for which the persons responsible for the management will be answerable.

78 [2013] EWCA Civ 544.

If the ship is properly maintained by the ship-owner, or demise charterer, or the manager, but, owing to defective repairs, for example, in the steering gear, a collision occurs causing damage to a third party, the relevant person (ship-owner, charterer by demise or manager) will have to show in detailed particulars that: (a) he exercised due care to appoint competent repairers; (b) due attention had been given to any signs of possible malfunctioning of the steering gear, or defective equipment; and (c) no reasonable care and skill could have discovered the defect. In such circumstances, the repairer or supplier of the defective equipment will be joined as a second defendant, or as a third party to the proceedings under s 1 of the Civil Liability (Contribution) Act (CLCA) 1978 for contribution to liability, which may be a complete indemnity.[79]

The employer, ship-owner or demise charterer, will be liable to their own employees who may be injured on board the ship owing to defective equipment. Under s 1 of the Employer's Liability (Defective Equipment) Act 1969, the employer is liable to any employee who suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer, even if the defect is attributable to the fault of a third party, whether identified or not. A ship for this purpose is 'equipment'.[80] The Act provides for a right of contribution against the third party, who is really at fault. The third party, however, may not exist or may not be worth suing, and so this is another policy reason behind the statutory liability of the employer, that is, for the protection of employees. In practice, liability insurers will indemnify the relevant assured under the respective insurance policy for liability incurred by the collision to third parties.

3.2.3 Liability attaches to the ship

Leaving personal liability aside, liability *in rem* attaches to the ship for the damage caused by the collision, as damage caused by the ship is a maritime lien. This is irrespective of the fact that her owner may not be the employer of the master and crew at the time of the negligence, if the ship is under a demise charter. It is the voluntary entrusting of the possession of the vessel to the demise charterer for a temporary period that has been held not to relieve the ship from being arrested as security by the claimant, even though her owner would not be, in such a case, vicariously liable for the negligence of those employed by the demise charterer.[81]

3.2.4 Master, crew, pilot

The wrongdoer by whose negligence the collision occurred will also be liable. This includes any person in control of navigation, the master, pilot, seaman on watch and the helmsman, who might have directed a wrong course, resulting in the collision. The master is not vicariously liable for the wrongdoing of the crew, without fault of his own, but he may be liable if he gave negligent instructions to a helmsman, or if he allowed the pilot, who was under the influence of drink, to take charge of the ship. The master and crew can, under the 1976 Limitation of Liability Convention, limit

79 See para 3.11, below.

80 *The Derbyshire* [1987] 3 All ER 1068; see, also, discussion of the case in Ch 2, Vol 1.

81 *The Lemington* (1874) 2 Asp MC 475, and *The Father Thames* [1979] 2 Lloyd's Rep 364.

their liability, being included in the persons who can limit (see Chapter 14). The pilot, who may be negligent during navigation of the ship, could limit his liability either under the 1976 Convention, because he is treated as the employee of the owner or manager and operator *pro tempora*, or under s 22 of the Pilotage Act (PA) 1987 (see Chapter 13).

3.2.5 Tug or tow

Under a UKST towage[82] contract, it is common to have an express term that the master and crew of the tug are deemed to be the servants of the hirer of the tug. Although the effect of this clause is to impose vicarious liability on the hirer for negligent acts or omissions of the tug, such a provision regulates only the liabilities of the parties to the contract.[83] Different terms apply to offshore towage contracts (see Chapter 11).

3.2.6 Salvors

Salvors are independent contractors and invariably take full control of navigation, depending on the state of the vessel to be salved. They owe a duty of care, not only to the salved property, but to third parties as well. Breach of such a duty during the salvage operation, resulting in damage, will expose them to liability. They can limit such liability under the provisions of the Limitation Convention 1976, as enacted by the MSA 1995.[84] As regards liability towards the salved property, an award of damages for negligence may be offset against the salvage award earned, or the award may be reduced pursuant to Art 18 of the Salvage Convention 1989.[85]

3.2.7 Port authority

A port authority may incur liability to ships using its facilities if it has been careless in providing navigational safety, in breach of its statutory duties. There is also a common law duty of care to make the port safe for users. Obstructions may cause ships to collide or strike an unlit object. When a ship sinks and becomes a wreck, there are statutory obligations imposed by the MSA 1995, local Acts and by-laws upon the authority to take certain steps in order to ensure the prevention of accidents.[86]

Sufficient mooring at a port or harbour for vessels using it is within the province of the authority, and proper typhoon precautions must be taken.[87] If damage is sustained or done by a vessel by going adrift owing to insufficiency or parting of the moorings, the authority would be in breach of its duty of care in this respect and, hence, wholly or partially liable.

A port, harbour or dock authority may also be vulnerable to potential liability if their servants are negligent in navigation when a harbour or dock master directs the

82 For definition and nature of a towage contract, see Ch 11, below.

83 See, e.g., *The President Van Buren* (1924) 19 LlL Rep 185 and other authorities referred to in Ch 11, below.

84 See Ch 10, below.

85 See Ch 10, below.

86 See Chapter 13, below.

87 *The Hua Lien* [1991] 1 Lloyd's Rep 309 (PC).

movements of a ship in the harbour or dock, as empowered to do so by statute.[88] They may be found wholly or partially liable for damage done to or by the ship.[89]

3.2.8 Shipbuilders and ship-repairers

As mentioned earlier, defects in the building of, or repairs to, a ship, or defective equipment, by reason of which a collision or death or personal injury occurs, will amount to liability for negligence under common law, or by statute (under s 2 of the Consumer Protection Act 1987, covering liability of manufacturers and repairers for defective products).

3.3 BREACH OF THE DUTY OF CARE

As there is no absolute presumption of fault by mere breach of the Colregs, since s 4 of the MCA 1911, which repealed the deeming provision of fault of s 419(4) of the MSA 1894, and has now been replaced by s 187(4) of the MSA 1995, a breach of the Colregs is only one factor to be taken into account in determining fault, and no civil liability will arise by a mere breach, unless the infringement was causative of the collision. The question to be asked in each case is essentially this: did the failure to observe the particular regulation set in motion or contribute to a chain of circumstances that resulted in the collision, or was there an intervening factor that broke this chain, and that factor was in fact the real cause of the collision incident? The onus of proof[90] is on the party alleging negligence to discharge three elements of the burden, in order to establish liability of the defendant, namely:

(a) breach of duty of care;
(b) that the breach caused or contributed to the collision (causation in fact); and
(c) it caused the damage claimed, which must not be too remote (causation in law and remoteness of damage).

These elements are examined in the following paragraphs.

3.3.1 Breach of duty – standard of care and burden of proof

A defendant would have fulfilled his duty of care if he behaved in accordance with the standard expected of a reasonable and careful person. It is an objective standard and disregards the idiosyncrasies or the opinion of the defendant. If there is a breach of that duty, it will be the servants of a ship-owner, or demise charterer, who ought reasonably to have foreseen that carelessness on their part would be likely to cause harm to those navigating the same seas.

The leading authority is ***The Heranger v Diamond***.[91]

88 See Ch 13.
89 See *The Zeta* [1893] AC 468; and *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93.
90 *Heranger v Diamond* [1939] AC 94 (HL), per Lord Wright.
91 [1939] AC 94.

In an action arising out of a collision in the Thames between *The Diamond* and *The Heranger*, Bucknill J and the CA (Scott LJ dissenting) held that *The Diamond* was the more seriously to blame, but that *The Heranger* was also to blame by failing to take effective action earlier by reducing her speed and was, therefore, liable in the proportion of one-third. *The Diamond* was a small steamship in ballast and failed to comply with the Port of London river by-laws. *The Heranger* was a twin-screw motor vessel, partly laden, and bound down the river in charge of a Trinity House pilot. The collision occurred at night at a point where the width of the river was about half a mile. *The Diamond* was expected to show her red light around the bend, but she did not do so and, thus, confused *The Heranger*, which did not take action sufficiently early to avoid the collision.

On appeal to the House of Lords by the owners of *The Heranger*, the defendant, it was argued that *The Diamond* was solely to blame.

The court held that *The Heranger* left it too late to reverse her engines and, thus, reduce her speed and was, therefore, in part liable for the collision. Two important issues were resolved by the House of Lords (per Lord Wright): (a) that the question whether a vessel is justified in maintaining her speed and relying on another vessel taking action to avoid the possibility of collision is a question of fact and not of law; and (b) that, whatever the Admiralty law on the matter was before the MCA 1911, it is now clear that the onus is on the party setting up a case of negligence to prove both the breach of duty and the damage. This, the ordinary rule in common law cases is equally the rule in Admiralty.[92] The decision of the courts below was affirmed.

Thus, the same rule of common law pertains also in Admiralty, that the claimant has to make out, by adducing evidence, a prima facie case of negligence by the defendant.

There are some situations, however, in which the burden of proof will shift to the defendant, when the facts speak for themselves and there is a prima facie evidence of negligence (as is shown below).

3.3.2 *Res ipsa loquitur*

Sometimes, the claimant may not have difficulty in discharging the burden of proof that there was a breach of duty, because it may be obvious from the facts that there was a breach. In these situations, the facts provide a prima facie evidence of negligence, and the rule of *res ipsa loquitur* ensures that the burden of proof shifts to the defendant. It is then upon the latter to rebut that presumption of fault by adducing strong evidence that no amount of reasonable care and skill would have prevented the collision. Nothing short of the defence of inevitable accident will suffice to relieve him from liability. The test is that of reasonable explanation.

This was emphasised in ***The Merchant Prince***.[93]

In broad daylight, the plaintiff's steamer was lying at anchor in the Mersey, when *The Merchant Prince*, belonging to the defendants, which was coming down the river, struck the plaintiff's steamer a heavy blow, doing considerable damage to her. According to the defendants, the collision and damage were caused by a latent defect in the steering gear, leading to the jamming of the wheel, so that the collision could

92 Ibid, p 104.
93 [1892] P 179.

not be avoided. In the CA, the Master of the Rolls, Lord Esher, stated the plain rule laid down by the courts after long experience:

> Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor . . . the only way for a man to get rid of that which circumstances prove against him as negligence is to shew that it occurred by an accident which was inevitable by him – that is, an accident the cause of which was such that he could not by any act of his have avoided its result. He can only get rid of that proof against him by shewing inevitable accident that is by shewing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid.[94]

It was found that a probable cause of the accident was that the chain that goes around the leading wheel had stretched and become too loose. Therefore, the chain failed to respond and resulted in the wheel jamming. The CA held that the defendants had not discharged the burden to support the defence of inevitable accident.[95] The stretching of the chain was something that they could have foreseen. They had not shown that they took measures to prevent the accident by making provision for the immediate use of hand, instead of steam, steering gear. To discharge the burden of proof of inevitable accident, the defendants must show all the possible causes of the effect produced and, further, with regard to every one of these possible causes, that the result could not have been avoided. Inevitable accident means that which cannot be avoided by the exercise of ordinary care and caution and maritime skill. Therefore, the cause of this accident was one that could have been avoided.

In a later case, ***The Kite***,[96] it was explained by Langton J that the defendant must give a reasonable explanation of the cause of the accident, which, if it were accepted, would be an explanation showing that the accident happened without his negligence. He did not even need to go so far as that, because, if the reasonable explanation was equally consistent with the accident happening without his negligence as with his negligence, the burden of proof would shift back to the plaintiff to show that it was the negligence of the defendant that caused the accident.[97]

The plaintiffs' goods, while on board one of the lighterers' barges, which with others was in tow of a tug, were damaged through the barge colliding with one of the abutments of Cannon Street Railway Bridge. The plaintiffs brought an action against the tug-owners, framing it entirely in tort. There being a prima facie case of negligence against the tug, the plaintiffs called no evidence on this point, and the defendants called one witness only, the master in charge of the tug, who did not see the actual contact but heard the blow and saw the barge 'flared out', owing, in his opinion, to the breast rope not having been properly made fast by the lighterers' servants and not the tug's servants.

It was held that there was no greater probability that the accident happened through negligence on the part of the tug-owners' servants than on the part of the lighterers' servants; the court followed the dicta of Lord Dunedin in *Ballard v North British Rly Co* 1923 SC (HL) 43, p 54, where he had said that: '. . . if the defenders can show a way in which the accident may have occurred without negligence . . . the pursuer is left as he began, namely, that he has to show negligence'.

94 Ibid, pp 187–188.
95 See para 3.7.1, below.
96 [1933] P 154.
97 Ibid, p 170.

The plaintiffs failed.

In a collision between ***The Global Mariner and The Atlantic Crusader***,[98] while the latter was at anchor, the former was found solely to blame, although the anchored ship was at fault in failing to control her yaw and sway by anchoring to an open moor and by the use of helm, but it was found on evidence that such failure was not causative.

Where a moving object comes into collision with one that is stationary, there is a general, but rebuttable, presumption that the responsibility lay with those in charge of the moving object. This was shown in the recent case of ***City Cruises plc v Transport for London***.[99] The case involved a collision between a passenger catamaran, the *Millennium City*, and Westminster Bridge. The claimants, the owners of the vessel, were bringing an action against the owners of Westminster Bridge, Transport for London, for damage to their vessel. The submission was that the collision was caused by failures of Transport for London to maintain and/or mark the bridge properly. On the evidence, this submission was unsuccessful, and, therefore, the claimant failed to rebut the presumption that the responsibility for the collision lay with them, as owners of the moving object.

The discussion on this topic is, inevitably, linked to causation and to what defences the defendant can raise, of which there are more examples below.

3.4 CAUSATION IN FACT

Once the claimant proves breach of duty of care by the defendant, he must also prove that the breach caused the collision. In other words, the collision would not have happened but for the defendant's breach.[100] Nautical assessors, who explain technical evidence, assist the judge in matters of navigation.[101]

The leading authority remains ***The Humbergate***.[102]

In the middle of the river, just above the Ocean Lock, were situated two sunken wrecks, substantially blocking the navigable channel. In accordance with the Notice to Mariners issued by the Conservation Authority, the dock master gave a light signal that signified that the plaintiff's vessel, *The Haskerland*, was leaving the Ocean Lock and entering the tideway. In such circumstances, no other vessel was allowed to pass into a certain prescribed area. The defendant's vessel, *The Humbergate*, in spite of the unlocking signal, had entered and was proceeding through the prescribed area,

98 [2005] 1 Lloyd's Rep 699; an important development shown in this case, following the CA guidance in *Bow Spring* and *Manzanillo II* [2005] 1 Lloyd's Rep 1, was that the expert evidence offered by the nautical assessors to the court in navigational matters (being independent, in that they are not appointed by the parties) must be made open for the parties to have the opportunity to comment. Such practice is necessary in order to be compatible with Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sched 1 to the Human Rights Act 1998). See, also, *The Kamal XXIV v Owners of the Ariela* [2007] EWHC 2434: in a collision between a ship and a dredger, the latter was found not at fault.

99 [2012] Lloyds Law Reports 471.

100 The principle is most aptly explained under the general law in *Barnett v Chelsea and Kensington HMC* [1969] 1 QB 428: the hospital was held not liable, although the doctor employed by it had breached his duty of care to the plaintiff's husband by having failed to examine him, but the breach was not causative of his death, as he would have died by arsenic poisoning even if the doctor had examined him.

101 CPR, r 61.13.

102 [1952] 1 Lloyd's Rep 168.

rapidly getting closer to *The Haskerland*, as the latter was making her way. A wreck-marking vessel (a barge) restricted the navigable channel, and *The Humbergate* attempted to pass through between *The Haskerland* and the wreck-marking vessel. A collision resulted at that point between the two vessels. It was held that, although the Notices to Mariners did not have any apparent statutory effect, they should nevertheless be taken into account when considering the dictates of good seamanship. On the facts, the breach of duty by *The Humbergate* was causative of the collision, and she was to blame for not holding back. But for her negligence, the collision would not have happened. No negligence was found against *The Haskerland*.

The House of Lords, in ***The Statue of Liberty***,[103] distinguished causative from non-causative faults. A collision occurred at about 2 am between *The Statue of Liberty* and *The Andulo*, some miles off Cape St Vincent, while both vessels were on crossing courses. There were breaches of duty on the part of both vessels. It was the duty of *The Andulo* to maintain her course and speed when she saw *The Statue of Liberty* some miles away on her port bow. *The Statue of Liberty* was guilty of gross negligence for, among other things, not giving way to *The Andulo*.

It was held, on the facts of this case, that *The Andulo* was at fault in not taking more accurate observations at an earlier stage, but that fault had no causative effect and should be left out of account in the assessment of blame. However, *The Andulo* could not be totally absolved from blame, because, according to the assessors, it was bad seamanship on her part to change her course to port, the way she did, after she had seen the green light of *The Statue of Liberty*.

There are many other cases exemplifying the point that the breach must have caused the collision; for example, in ***The Estrella***,[104] the fact that one vessel was travelling the wrong way in the traffic separation zone was left out of account, as it was not causative of the collision. Similarly, in ***The Tempus***,[105] failure by the defendant's vessel to blast a sound signal on turning her helm to port at the last minute, to avoid collision, was held to be non-causative, as the collision would have happened even if the signal had been given.

In ***The Homer***,[106] the negligence of the pilot of the other ship to take a swift action to avoid a collision danger in a crossing situation was found to be non-causative to the collision. *The Homer* was solely to blame.

In ***Selat Arjuna v Contship Success***,[107] in which the latter made an unexpected turn to starboard when the ships were passing starboard to starboard, sinking the former, she was found solely to blame. Although *Selat Arjuna* might have gone hard to port, failure to do so was not characterised as negligent or in breach of duty of care. Her master could not have known what *Contship Success* would or might do, and, although he should have appreciated earlier than he did that *Contship* was altering to starboard, even if he had, he would not be blamed for standing on.

Similarly, in ***The Hagieni and Barbarossa***,[108] the fault of *The Hagieni* ordering half-ahead had minimal causative significance. She failed to cope with the

103 [1971] 2 Lloyd's Rep 277.
104 [1977] 1 Lloyd's Rep 525.
105 [1913] P 166; see, also, *The Stella Antares* [1978] 1 Lloyd's Rep 41.
106 [1973] 1 Lloyd's Rep 501.
107 [2000] 1 Lloyd's Rep 627.
108 [2000] 2 Lloyd's Rep 292.

embarrassment of *Barbarossa*'s approach, which created a situation of danger and instilled confusion as to her intentions.

Even if a claimant establishes that the defendant was negligent, it is rarely the case in a collision between two or more ships that the collision occurred just by the fault of one ship. The court, therefore, will evaluate the blameworthiness of the fault of each vessel and deduce their causative potency.

In ***The Devotion II***,[109] the Scottish Court of Session held that the collision was caused by the failure of both skippers to keep even a minimal lookout, and liability was equally apportioned.

On causative potency, the CA will not normally disturb the judge's finding. Although altering course to port at a distance of about 9 miles was wrong, the CA said, in ***The Maloja II***,[110] such fault would only have added a small percentage to her share of the blame, and the judge's assessment should not be disturbed.

An illustration of evaluating blameworthiness and apportioning fault can be found in ***The Mineral Dampier***[111] (which sank with all her crew after a collision and was only 20 per cent to blame) and in ***The Bulk Atlanta and The Forest Pioneer***[112] (if the lookout had been sharper and there had been a more vigorous alteration to starboard, the collision would have been avoided and the damage reduced).

Although irrelevant factual causes are eliminated with the 'but for' test, this test does not apply where there are several successive causes of the accident, to which other rules apply. Invariably, in collision cases, the claimant himself, or a third party, may have contributed to the collision, or there may have been an intervening cause that broke the chain of causation of the defendant's negligence. When there are multiple successive causes, the view taken by the courts is to look at which of these was the most probable cause, either solely or in operation with other causes.

3.5 CAUSATION IN LAW

After the elimination of irrelevant factual causes, the court has then to ascertain which of the relevant causes is to be regarded as the cause in law for the loss or the damage suffered. In other words, it has to answer the question whether the defendant is legally liable. For example, in ***The Panther and The Ericbank***,[113] *The Ericbank* failed to signal to her tug that they were passing another vessel, *The Trishna*, and the tug, without orders from the tow, made a manoeuvre resulting in a collision with *The Trishna*. The tug's propeller, which was improperly left revolving, struck *The Trishna* repeatedly, after which *The Trishna* sank. It was found that the damage done to both vessels by the actual collision was minimal, but the cause of the eventual damage to *The Trishna* was the continuous revolving of the tug's propeller.

Furthermore, when subsequent, or successive, damage occurs after the first incident of collision by another cause, which is not related to the previous negligence, the defendant, whose fault caused the collision, may be able to escape liability, if the

109 [1979] 1 Lloyd's Rep 509.
110 [1994] 1 Lloyd's Rep 374.
111 [2000] 1 Lloyd's Rep 282.
112 [2007] EWHC 84, 26 Jan 2007.
113 [1957] P 143.

damage caused by his fault is subsumed by the subsequent damage. This rule was laid down in ***The Carslogie***[114] by the House of Lords, although the case is more relevant to measure of damages (see later).

In ***The Fedra and The Seafarer I***,[115] the owners of the ship failed to prove that the ingress of water into the ship's hold and the resulting damage to the ship and its cargo had been caused by the collision with another vessel, rather than by the pre-existing corrosion of a bottom plate.

There can be cases in which the subsequent damage would not have occurred had it not been for the first accident, the effect of which continued for some time (see, for example, *The Calliope* later).

Various scenarios of causation (both factual and legal) are examined below while considering the defences that may be available to the defendant. Principles of remoteness of damage are examined under para 3.12.

3.6 DEFENCES AVAILABLE TO THE DEFENDANT

The defences are inextricably linked to questions of causation both in fact and in law.

3.6.1 The defence of inevitable accident

An inevitable accident is one that the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution and maritime skill.[116]

The claimant must first make out a prima facie case of negligence or of want of good seamanship, and then the burden shifts to the defendant.[117]

The defendant pleading inevitable accident must show that the proximate cause of the accident was some external event, which was totally unavoidable. The question is not whether all that could be done was done as soon as the danger of the collision arose, but whether sufficient precautions had been taken much earlier. Any negligence at any time will override the defence of inevitable accident. The burden of proof for this defence is heavy and has been successful only in a few cases.

In ***The Marpesia***,[118] a collision took place between her and *The America* in the morning, but in such dense fog that the vessels could only discern each other at a very short distance. One vessel was proceeding up the Irish Channel and the other down the Irish Channel. Only about a minute elapsed between the vessels' sighting of each other and the collision. It was found that *The Marpesia* had failed to execute the proper manoeuvre that, after sighting *The America*, it was competent for her to have executed. The defence relied on by the appellants was that the collision was the result of inevitable accident.

The judge (Sir Robert Phillimore) held that *The Marpesia* was solely to blame, as she ought to have hauled aft her head sheets and let go all the lee braces, and he pronounced *The Marpesia* to blame for the collision.

114 [1952] AC 292; see also under para 4.3.4, below.
115 [2002] 1 Lloyd's Rep 453.
116 *The Virgil* (1843) 2 W Rob 201.
117 *The Marpesia* (1872) LR 4 PC 212.
118 Ibid.

The appeal from this decree was to the Judicial Committee, which reversed the decision, after considering the facts and the circumstances of the case. It was stated that:

Here, we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be . . . Considering the admitted time which elapsed after the two vessels had sighted each other to have been not more than a minute, and the state in which *The Marpesia* was, in attempting to go about, (we) have failed to come to the conclusion that the Captain was to blame for having omitted to do that which the judgment seems to find that he might have done. It is a question entirely of navigation . . . the nautical assessors confirmed . . . that the time was so short that the omission to do that which has been said ought to have been done with the rigging and the sails cannot be imputed as negligence, or anything approaching to negligence, in the master of *The Marpesia*.[119]

The defence succeeded.

After a prima facie case of negligence is made out, Fry LJ said, in ***The Merchant Prince***,[120] that:

The defendants had failed to sustain the plea of inevitable accident, as it was necessary for them either to shew what was the cause of the accident, and that though exercising ordinary care, caution, and maritime skill, the result of that cause was unavoidable, or to enumerate all the possible causes, one or other of which might have produced the effect, and shew with regard to every one, that the result was unavoidable.

The defendants knew of the tendency of a new chain to stretch, and, therefore, that an accumulation of links at the leading wheels might possibly cause jamming, and, considering the crowded condition of the river where the accident occurred, the use – or readiness for immediate use – of hand, instead of steam, steering gear was a means by which the result could have been avoided.

The defendant in such cases will have a difficult task in discharging the burden of proof to succeed in the defence of inevitable accident.

Inevitable accident – which implies no negligence – will not work as a defence in the event of damage to a harbour's property, being caught by the statutory strict liability provision of s 74 of the HDPCA 1847. Even an act of God would be irrelevant to such liability, unless the ship was not under the control of human agency.[121]

3.6.2 The defence of contributory negligence

At common law, in non-Admiralty cases, there was a rule until 1945 that the defence of contributory negligence on the part of the claimant disallowed recovery of damages from the defendant. The Law Reform (Contributory Negligence) Act (LR(CN)A) 1945 changed this common law rule, and, since then, contributory negligence has been taken into account in the assessment of damages.[122]

119 (1872) LR 4 PC 212, p 220.

120 [1892] P 179.

121 See Ch 13, below; *The Mostyn* [1928] AC 57 (HL); and *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 (HL).

122 This Act intended to bring the common law rules regarding contributory negligence broadly in line with the admiralty rules: *Davies v Swan Motor Co* [1949] 2 KB 291, p 319, per Evershed LJ.

By contrast, in Admiralty cases concerning collisions, the defence of contributory negligence was taken into account and, when two or more ships were found at fault, the Court of Admiralty applied the rule of equal division of loss by s 25(9) of the Judicature Act 1873. The equal division of loss was changed by the MCA 1911 to division of loss in proportion to the fault of each ship (known as the proportionate fault rule, which is linked to this defence; see under para 3.7, below).

The statement of principle of the rule of contributory negligence in Admiralty was expounded by Viscount Birkenhead LC in the ***Admiralty Commissioners v SS Volute***:[123]

> I think that the question of contributory negligence must be dealt with somewhat broadly and upon common sense principles . . . And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame . . . might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution. And the MCA with its provisions for qualifications as to the quantum of blame and the proportions in which contribution is to be made may be taken as to some extent declaratory of the Admiralty rule in this respect.

Cases regarding this defence involve general issues of causation, and it is inextricably linked to the defences examined below.

3.6.3 The defence of *actus novus interveniens*

When the claimant's servants act reasonably in response to an accident for which the defendant was at fault, any negligence of the former in trying to mitigate the loss will not break the chain of causation. With the development of sophisticated ships and technology, the facts of the old cases may now belong to history, but it is still worth looking at them to understand the development of the principles.

In ***The City of Lincoln***,[124] a collision took place between a steamer and a barge, the steamer being alone to blame. The steering compass, charts, log and log glass of the barge were lost through the collision. Her captain made for a port of safety, navigating his ship by a compass that he found on board. The barge, while on her way, without any negligence on the part of the captain or crew, and owing to the loss of the requisites for navigation, grounded and was necessarily abandoned. The CA held that the grounding of the barge, without any intervening independent moving cause, was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damages caused thereby.

What is a reasonable act by the master and crew, whose vessel suffers damage from a collision accident, is a question of fact depending on the circumstances of a case; for example, in ***The Oropesa***,[125] which collided with *The MR*, the latter was badly damaged. Her master, thinking that she could be salved, sent five of his crew in lifeboats to *The Oropesa*, and he embarked with 16 of his remaining crew in another lifeboat. The weather was rough and getting worse, and, before the boat could reach *The Oropesa*, it capsized. Nine of his men were drowned. *The MR* subsequently sank.

123 [1922] 1 AC 129, at 144 (HL).
124 (1889) 15 PD 15.
125 [1943] P 32 (CA).

The owners of *The MR* and the parents of the deceased sixth engineer sued the owners of *The Oropesa*. It was argued that the master of *The MR* was negligent, and his negligence broke the chain of causation. The CA, affirming the decision of Langton J below, held (a) that the master had acted reasonably in the emergency, and (b) that the death was not the result of his action, but it was caused by the collision.

On appeal to the House of Lords, Lord Wright stated the law:[126]

> To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic.

Similarly, in ***The Hendrick***,[127] when a trawler sank after a collision, there were criticisms by the defendant that her crew were inactive in seeking to preserve the trawler, which was flooded with water due to the collision damage. Hewson J stated what was reasonable in the circumstances:

> Placed suddenly in the situation in which they found themselves, the French crew must not be too harshly judged, and they must certainly not be judged in the light of theories, but in the light of the conditions and circumstances at the time. In reflecting upon that I must have in mind their lack of training in damage control and the absence of effective damage control gear on board their vessel. It may well be that a trained salvage crew, provided with all the necessary equipment ready at hand, would have prevented the inflow of water and probably saved the vessel; but this French crew, or any trawler crew, must not be judged by that standard. They must not be too critically examined from an armchair.

In a further example, ***The Guildford***,[128] the decision of the master to await tugs for assistance after a collision, instead of accepting assistance from the colliding vessel, was on the facts of this case (but it would not be in other cases; see below) justified, because there was no change for the worse in the situation of *The Guildford* during the waiting time. Accordingly, the sinking of *The Guildford* was a consequence of the collision, in respect of which she was entitled to recover her loss caused by the proportionate fault of the other vessel.

By contrast, this defence was successful in ***Fritz Thyssen***.[129]

Mitera Marigo (MM), which was fully loaded with cargo, collided with *Fritz Thyssen* off the north-west coast of France. The collision was quite severe, and MM suffered serious damage. Immediately after the collision, water was entering in her two double-bottom tanks. Pumps were used continuously to pump water out. A salvage tug was called from Falmouth to assist MM, by which time the water had reached about four or five feet in the No 1 hold. Her master, however, refused the assistance of the tug, merely engaging the tug as an escort. The vessel safely arrived at Falmouth harbour, but a few hours later began to sink. The master called for the assistance of the tug, which had been standing by, but it was too late, and MM sank in deep water. In an action brought against the owners of *Fritz Thyssen*, the defendants alleged that the loss of MM was wholly due to the negligence of her own master. The trial judge held that it was for the defendants to prove that the sinking was due to a *novus actus interveniens*. That involved proving, first, that MM omitted some precaution

126 (1943) 74 Ll L Rep 86, p 91.
127 [1964] 1 Lloyd's Rep 371, p 379.
128 [1956] 2 Lloyd's Rep 74.
129 [1967] 2 Lloyd's Rep 199.

required by good seamanship, and, second, that, if that precaution had been taken, the loss of the ship would probably have been averted.

The Lords Justices in the CA agreed with the judge's conclusions that the negligence of the master had broken the chain of causation. Willmer LJ emphasised the need not to judge the situation on the basis of hindsight in the light of what was now known, but to view the situation as it would have appeared to the master of MM himself in the emergency with which he was faced. It was held that the master's omission to accept salvage assistance was a reckless gamble, putting at risk a vessel and cargo worth about £800,000, the loss of which was attributable to that negligence.

Not infrequently are there situations where there is a further collision, taking place at a different time or place, involving a third ship, which may or may not be a consequence of the first incident. The claimant's subsequent negligence may or may not break the chain of causation.

The House of Lords, in ***The Paludina***,[130] held (by majority of 3:2) that the claimant's subsequent negligence broke the chain of causation. The claimant's negligence was not even considered to amount to contributory negligence.

The Paludina (P), *The Singleton Abbey* (SA) and *The Sara* (S) were moored by their sterns to the quay in Valletta Harbour, Malta. There was a strong wind blowing, and there was a swell in the harbour. P dragged her anchors, and the fore part of the vessel fell down upon SA. In endeavouring to get free from her, she broke away from her moorings and struck SA further, causing the parting of her moorings. In turn, SA fell down upon S and cast her adrift. SA and S then manoeuvred in the harbour under their own steam to keep away from the shore. Twenty minutes later, S got under the starboard quarter of SA, when the revolving propeller of SA struck S, with the result that the latter sank. P was clear of both ships at the time. In an action by SA against P, the latter was found liable for the earlier collision. The only question at issue was whether she was also liable for the final collision between SA and S. The President, acting on the advice of two of the Elder Brethren of Trinity House, found that the final collision was directly caused by the negligence of P, but his decision was reversed on appeal.

On further appeal, Lord Sumner, Lord Carson and Lord Blanesburgh (Viscount Dunedin and Lord Phillimore dissenting) held that the final collision was not directly caused by the negligence of P, but that the action of S constituted a *novus actus interveniens*. At the point in time of the second collision, the ships that had broken away were free agents and, having not being in the 'agony of the moment', they could have taken reasonable steps to avoid the collision. The majority distinguished the facts of this case from those in *The City of Lincoln*[131] with regard to the actions of her captain, in which, it was said: 'The hand of the original wrongdoer was still heavy on his ship and his own navigation was not the sole human agency determining her fortune'.

The majority did not find that *The Paludina*'s negligence was still operating.

130 [1927] AC 16 (HL).

131 In *The City of Lincoln* [1890] P 15, the defendant's vessel negligently collided with and caused damage to the plaintiff's vessel, whose master attempted to reach port in safety. However, the vessel grounded accidentally before the master did so and was lost. In the absence of negligence by the master, the defendants were liable not merely for the collision damage, but for the subsequent loss.

The dissenting minority thought that there was no break in the chain of causation from the original negligence of *The Paludina*, which obliged the other ships to adopt the alternative of a dangerous leap, or to remain at certain peril.[132]

Such are the uncertainties of litigation and the risks involved in litigating that litigants take!

3.6.3.1 Successive causes

Invariably, difficult questions arise when further damage occurs by a separate and successive cause of damage, following an earlier incident of collision. The courts consider whether either the strength of the subsequent event or lapse of time has interrupted the connection between the original collision and the subsequent damage, as is shown in ***The Calliope***,[133] in which Brandon J found that the issues that arose in this case and his decision would have wider implications in the law of tort generally; in his reasoning, he considered the influence that the LR(CN)A 1945 and the rule of remoteness of damages had had on the correctness of the previous decisions of the House of Lords, such as *The Paludina*, above.

The Calliope collided with *The Carlsholm* in the river Seine, ran aground and was damaged. In view of the damage caused by the collision and the time lost, the master of *The Calliope* decided to proceed up river to Villequier and to lie there over the ebb tide. Next day, while executing a turning manoeuvre in the river, she grounded twice, at different times, and collided with a tug that was assisting her, sustaining further damage. In the liability action between the parties, *The Carlsholm* was found 45 per cent at fault, and *The Calliope* 55 per cent for the collision; the damage sustained by *The Calliope* as a result of the first grounding was a direct consequence of the collision.

The question of law was whether the damage caused by the subsequent grounding was too remote, or whether it was caused by both the original collision and the subsequent negligence; if that was so, could the court make further sub-apportionment of liability in respect of that head of damage?

Brandon J observed that the question was interesting and difficult, but at the same time it was of some general importance in the law of tort, not only in maritime cases. It involved the interrelationship between the doctrines of contributory negligence and remoteness of damage.'[134] He held that:

(a) It was open to the court as a matter of law to find that the alleged consequential damage was caused partly by the original casualty and partly by the claimants' own intervening negligence and to make a further apportionment or sub-apportionment of liability accordingly.

132 Op. cit. fn 130.

133 [1970] 1 Lloyd's Rep 84.

134 Ibid, p 96. Of particular interest was the judge's reference to older cases that were conflicting on the issue of whether subsequent damage was recoverable without sub-apportionment. In all but 3 of the 13 cases he mentioned, the court had found that there was no causative intervening negligence. It followed that the claim for consequential damage succeeded wholly, and there was no question of apportionment. The three cases in which there was causative intervening negligence were: *The Glendinning* (1943) 76 LlL Rep 86 (concerning subsequent grounding); *The Egyptian* [1910] AC 400; and *The Fritz Thyssen* [1968] P 255 (where the ship later sank). In these cases, the claim for consequential damage failed.

(b) On the facts, the two later groundings were not caused solely by the negligence of *The Calliope* in executing the turning manoeuvre, but partly by such negligence and partly by the joint negligence of that vessel and *The Carlsholm*, which led to the collision the effect of which was still continuing when the two later groundings took place.
(c) The question in a situation such as this was not whether the negligence, which caused the collision, was continuing, but whether the effect of the collision – which such negligence caused – was continuing.

The effect of the collision was obviously continuing in one sense in that, but for the collision, *The Calliope* would never have been at Villequier at all. But that is not, of course, enough. It is necessary to consider whether it was continuing in the further sense, that, at the time when the chief officer was negligent, the hand of the negligent navigator on board *The Carlsholm* was still heavy on *The Calliope*; or that those on board *The Calliope* were not, by reason of the hard necessities imposed on them by the collision, free agents; or that those on board *The Calliope* were still in the grip of the collision.

> Approaching the questions of causation which arise in this case from that point of view, I have reached the conclusion that the groundings were not caused solely by the negligence of *The Calliope* in executing the turning manoeuvre, but partly by such negligence and partly by the joint negligence of the plaintiffs and the defendants, which led to the collision and the effect of which was still continuing when the groundings took place.[135]

How can the judgment of Brandon J, who adopted an intermediate approach, be reconciled with two previous House of Lords' decisions, *The Paludina* and *The Metagama*, in which it had opted for the all or nothing approach?[136] Brandon J treated the matter as not being expressly decided previously, as a matter of law. The reasons for this, he said, were, in his view: (a) that the development of the concept of multiple causes of damage, and the elimination of the last opportunity rule, had been part of an historical process, which extended over many years. The process was greatly accelerated by the passing of the LR(CN)A 1945; and (ii) that in certain cases, the facts pointed towards the 'no recovery option' when there was an *actus novus interveniens*. Thus, where there is a substantial time interval between a casualty and alleged consequential damage, and intervening events occur that include further causative negligence of the party making the damage claimed, the case for finding on the facts that such further negligence was the sole cause of the damage tends to be very strong.

In a later decision, ***The Vysotsk***,[137] Sheen J held that the negligence of the vessel, which largely caused the first collision, set in motion a chain of events that led to the second collision with a third vessel. As this chain had not been broken by an intervening negligence, the parties would be liable for the damage caused by the second collision in the same proportion as for the first.

135 Ibid, p 102.
136 *The Paludina* [1927] AC 16 (albeit not a unanimous decision) and *The Metagama* (1928) 29 LlL Rep 253 (HL).
137 [1981] 1 Lloyd's Rep 439.

3.6.4 The defence of alternative danger or 'agony of the moment'

Such a defence may arise when the claimant's master has acted under the stress of circumstances forced upon him by the defendant's servants, whereupon he may do some act that brings about the collision. It would then be open to the party pleading 'alternative danger' or 'agony of the moment', as a counter-defence to contributory negligence, to show how the danger arose. The alternative danger plea is also available where the actions of the claimant's master or crew force the defendant to act in the agony of the moment to avert a peril resulting from the negligence of the claimant's servants.

For example, where one ship has, by wrong manoeuvres, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manoeuvred with perfect skill and presence of mind.

In such cases, the sound rule is, as the CA stated in ***The Bywell Castle***,[138] that: a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency caused by the default or negligence of another vessel, he does something that he might, under the circumstances as known to him, reasonably think proper; although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course that he adopted was not in fact the best.

Brett LJ put the reasoning behind this rule as follows:

> I am of the opinion that when one ship by her wrongful act suddenly puts another ship into the position of difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. The captains of ships are bound to show such skill, as persons of their position with ordinary nerve ought to show under the circumstances. But any court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the court ought not, in fairness and justice to him, require perfect nerve and presence of mind enabling him to do the best thing possible.[139]

On the facts of the case, *The Princess Alice*, a paddle-wheel steamer, had come up the river and was struck on the starboard bow by *The Bywell Castle*, in consequence of a sudden turn to port by the latter. *The Princess Alice* soon afterwards sank. More than 500 of her passengers and many of the crew, including the captain, were drowned.

It was found on the facts at the lower court that *The Princess Alice* was navigated in a careless and reckless manner, without due observance of the regulations with respect to lookout and speed, and that *The Bywell Castle* appeared to have been navigated with due care and skill until very shortly before the collision. The evidence certainly established that, having seen the green light of *The Princess Alice*, *The Bywell Castle* put hard to port. There was no doubt that this was not only obviously a wrong manoeuvre, but the worst that she could have executed. The only defence offered for it was that it was executed in so very short a time before the collision.

It was held at first instance that, although *The Princess Alice* was to blame for the collision, *The Bywell Castle* made a wrong manoeuvre for which she would carry some blame. Had the wrong manoeuvre not been made by *The Bywell Castle*, *The Princess*

138 *The Bywell Castle* (1879) 4 PD 219, p 228, per Cotton LJ.
139 Ibid, pp 226, 227.

Alice would still have received some injury, but would not have sunk and would not have lost so many lives. The CA overruled the decision that *The Bywell Castle* was to blame at all. It held that: (a) *The Princess Alice* was solely to blame; (b) a ship has no right by its own misconduct to put another ship into a situation of extreme peril and, then, charge that other ship with misconduct. James LJ stated:

> My opinion is that if, in that moment of extreme peril and difficulty, such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected.[140]

3.6.5 The defence of necessity

This may avail the defendant to escape liability in circumstances in which an action, that would otherwise have amounted to actionable negligence, might have been justified because of necessity to choose between two perilous situations, either in the interest of its own ship or in the interest of third parties.[141] This defence sounds similar to the defence of the agony of the moment, but there are differences between the two. The Colregs, by Reg 2(b), provide for departure from them in cases of necessity. However, the defendant cannot avail himself of this defence if the necessity was brought about by his own fault.[142]

3.6.6 Time bar defence[143]

Section 190 of the MSA 1995 provides for a period of 2 years within which any claim or lien can be enforced against a ship or her owners. It covers all claims for property damage or loss caused by the fault of that ship to another ship, its freight or any property on board. It also covers claims for damages for loss of life or personal injury caused by the fault of that ship to any person on board another ship.

The section, which derives from s 8 of the MCA 1911, does not apply when the collision is not between ships, but between a ship and another object.[144] In the latter case, the normal 6-year time limit provided under the Limitation Act (LA) 1980 applies to property damage claims. In this connection, the importance of defining a ship becomes apparent.[145]

As regards claims for personal injury or loss of life of persons on board the carrying ship, such claims are not covered by s 190 (which refers in sub-s (1)(b) to claims by persons on board another ship – the non-carrying ship). These are subject to the normal 3-year time limit, as provided under the LA 1980, as amended by the Latent Damage Act 1986; or, if the Athens Convention applies, a 2-year time limit is provided by Art 16.

140 Ibid, p 223.

141 See *The Koursk* (1920) 2 LlL Rep 244 (HL): the defence that a reversing action would be fatal and, hence, the thrust to port helm saved the ship, succeeded; in *The Hessa* (1921) 9 LlL Rep 271, the defence succeeded: what is demanded of a man who has to choose between two perils is to exercise judgment as a prudent seaman.

142 *Southport Corp v Esso Petroleum Ltd* [1954] 2 QB 182.

143 This is a procedural type of defence; the time may be extended by agreement. For other procedural defences, such as *res judicata* or issue estoppel, see, op. cit., Marsden, fn 1, pp 458–463.

144 See *The Nlase (formerly Erica Jacob)* [2000] 1 Lloyd's Rep 455.

145 As was discussed in Ch 1, Vol 1.

The time commences from the date of the incident (that is, when the damage or loss was caused or the loss of life or injury was suffered) and stops running from the date of the issue of the claim form.

In sub-ss (5) and (6) of s 190, it is provided that any court having jurisdiction may, in accordance with rules of court, extend the period allowed for bringing proceedings to such extent and on such conditions as it thinks fit. In addition, if any such court is satisfied that there has not been – during the period allowed for bringing proceedings – any reasonable opportunity of arresting the ship within the jurisdiction of the court, or the territorial sea of the country to which the plaintiff's ship belongs, or in which the plaintiff resides or has his principal place of business, it shall extend the period allowed for bringing proceedings to an extent sufficient to give a reasonable opportunity of so arresting the ship. It should be noted that, when the claim form has been issued, the time limit is interrupted, but, because the validity of the *in rem* claim form lasts for 1 year,[146] it will need to be extended if the ship does not come within the jurisdiction within the year to be arrested. So, the provision under s 190(6) is useful with regard to renewal of the *in rem* claim form.

Counterclaims have been held to come within the meaning of s190 and, therefore, are subject to the 2-year time bar.[147]

3.7 THE PROPORTIONATE FAULT RULE

Lord Stowell stated, in ***Woodrop Sims***,[148] that there are four possibilities in which a collision may occur:

(a) without the blame being imputable to any party to it, that is, by a storm or without human error – in such a case the loss is borne by the party upon whom it happens to fall;
(b) both parties are to blame for want of due diligence and skill, whereupon the loss will be apportioned in accordance to the proportion of fault;
(c) misconduct of the suffering party only, who must bear his own loss;
(d) fault of the ship that ran the other down – the innocent party is entitled to recover compensation.

The second category concerns us here. The MCA 1911 enacted the Brussels Convention on Collisions 1910 and, by s 1, the equal division of loss rule was altered to proportionate fault, meaning that blame was attributed according to the degree of each ship's fault, even in cases where a vessel was to blame in a small proportion.

146 CPR, r 61.3(5)(b), modifying rr 7.5 and 7.6 (general provision of extension of time by the court).

147 The *Pearl of Jebel Ali* and the *Pride of Al Salam 95* [2009] 2 Lloyd's Rep 484. This case considered a submission by *Pearl of Jebel Ali* that counterclaims were not within the scope of s 190. The court rejected this argument and found the counterclaim should be time barred. However, the court exercised its discretion (under s 190(5) of the Merchant Shipping Act 1995) and extended the time limit to allow the counterclaim. Teare J justified the extension by saying:

> I consider that in such circumstances it would be unjust and unfair if the applicants were deprived of their ability to counterclaim for the damage sustained by them in the collision which forms the subject matter of the claim which has now been brought against them.

148 (1815) 2 Dod 83, p 85.

Now, the applicable statute enshrining this rule is s 187 of the MSA 1995 (which replaced s 1 of the MCA 1911). Section 187(1)(a) states:

> Where, by the fault of two or more ships, damage or loss is caused to one or more of those ships, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.

3.7.1 When and how does the rule apply?

(a) The apportionment of loss pursuant to this rule applies only to damage or loss caused by the fault of two or more ships. When there is a collision between a ship and a non-ship, s 187 does not apply; instead, the rule of contributory negligence under the Law Reform (Contributory Negligence) Act 1945 will apply.

(b) The ships at fault do not have to be in actual collision with each other. It will suffice if, by the fault of ships A and B, for example, a collision occurs between B and C.[149] If C sues B, the latter will join A in the proceedings, and the faults of all will be apportioned by assessing the faults of each, so that B can recover from A the adjudged proportion of what she has to pay C, as well as her own damage.

(c) No liability will be attached to a ship whose fault has not contributed to the loss or damage at all (sub-s (4)).

In apportioning liability, there are no strict rules, but there exist some guidelines for the court to take into account. For example, the court will look at the nature and quality of faults rather than their number; it will also look at the seriousness and extent to which such faults contributed to the collision and damage. Furthermore, the court will distinguish a fault-creating danger from a fault that was a reaction to danger. Ships embarking on a deliberate action bear a greater degree of fault.[150] The courts tend to deal with apportionment in a fairly broad way, and the most usual division of blame has been 60/40, 70/30 or 75/25,[151] or 80/20,[152] or sometimes 50/50,[153] and very rarely 100 per cent.[154] Further apportionment or sub-apportionment for a subsequent head of damage may be made in appropriate cases, which may be adjudged on a 50/50 basis of the original apportionment.[155]

Section 187(2) allows an equal division of loss only in cases where it is not possible to establish different degrees of fault. However, the effect of sub-s (1) is mandatory. The judge should not decide too readily that the vessels are equally to blame, as is seen below, merely because it is difficult to assess the degree of blame of each ship. Only when it is not possible to establish different degrees of fault, having regard to the circumstances of the case, will the liability be apportioned equally.

149 *The Cairnbahn* [1914] P 25; *The Betavier III* (1925) 42 TLR 8.

150 *The Bywell Castle* (1879) 4 PD 219.

151 *The Sitarem and The Spirit* [2001] 2 Lloyd's Rep 107.

152 *The Topaz and The Iraqua* [2003] 2 Lloyd's Rep 19; in *The Statue of Liberty*, the trial judge had apportioned 70 per cent of the blame to *The Statue of Liberty* and 30 per cent to *The Andulo*. The CA varied the proportions to 85 per cent and 15 per cent, respectively.

153 *The Pearl and The Jahre Venture* [2003] 2 Lloyd's Rep 188.

154 *The Contship Success* [2000] 1 Lloyd's Rep 627; *The Navios Enterprise and The Puritan* [1998] 2 Lloyd's Rep 16.

155 See *The Calliope* [1970] 1 Lloyd's Rep 84.

3.7.2 Causative potency and blameworthiness

Other than the cases referred to in the footnotes, a few distinct cases are mentioned here as examples: to find the defendant legally liable, Lord Reid said, in ***The Statue of Liberty***:

> One must consider both the 'causative potency' and the blameworthiness of the faults. I must confess that I find some difficulty in assessing causative potency in terms of percentages. But it is sufficient here to adopt the view of Brandon J at first instance that the failure by *The Statue of Liberty* to give way early was, to my mind, by far the most causative fault on either side . . .[156]

The Anneliese,[157] which involved a collision in the English Channel, in daylight, between *The Arietta S Livanos* (*The Arietta*) and *The Anneliese*, shows the significant impact that even minor alterations of course can have upon a subsequent collision.

The Arietta was on a course of 050° with engines at stand-by. *The Anneliese* was on a course of 235° with engines at full ahead (15 knots) when *The Arietta* was sighted (visually and by radar) bearing ahead distant about 6 miles. *The Arietta* was, thereafter, watched visually and by radar. Four minutes later, *The Anneliese* altered course to 239°, bringing *The Arietta* fine on port bow, distant about 4 miles. Three minutes later, visibility deteriorated, and *The Anneliese* altered course to 250° to increase passing distance between vessels. Half a minute later, *The Arietta* disappeared from view, and *The Anneliese* commenced fog signals. Two minutes later, *The Anneliese* altered to starboard over a period of about 2 minutes until on a course of 267° and, during this time, realising from her radar that *The Arietta* was altering to port, stopped her engines and, seeing *The Arietta* visually distant half to a quarter of a mile and bearing 45° on the port bow, put her wheel hard-a-port and ordered engines emergency full astern, sounding a two-short-blast signal and then a three-short-blast signal.

The Arietta's case was that visibility was restricted by fog to about three-quarters to one mile, and she was sounding regulation signals. Her relative motion radar was on 8-mile range, and the echo of *The Anneliese* was seen distant about 8 miles, bearing 5° on the starboard bow. A little later, when *The Arietta* saw that *The Anneliese* had altered to starboard, her wheel was turned hard-a-port and she saw *The Anneliese* visually at a distance of a quarter to one half of a mile, bearing 60° on starboard bow, and sounded two-short-blast signals. *The Arietta*'s wheel was ordered hard-a-starboard, but the collision occurred between the stern of *The Anneliese* and starboard quarter of *The Arietta* at an angle of about 59° leading forward on *The Arietta*.

Both vessels were criticised for not keeping a proper lookout and for using excessive speed in those conditions. Brandon J, at first instance, found it difficult to apportion different degrees of fault and ordered that the liability should be apportioned equally. He expressed his approach to the MCA 1911 thus: '. . . on the whole, I have come to the conclusion that with such serious faults on both sides, it is impossible to say that there is any clear preponderance of blame on *The Arietta* . . .[158]

The expression 'clear preponderance of blame' was derived from Lord Atkinson in *The Peter Benoit*,[159] where he had said that a clear preponderance of culpability

156 [1971] 2 Lloyd's Rep 277, p 282.
157 [1970] 1 Lloyd's Rep 355.
158 [1969] 2 Lloyd's Rep 78, p 93.
159 (1915) 13 Asp MLC 203, p 207.

must be proved. Since then, the courts had used that approach. However, Davies LJ in his judgment in *The Anneliese* (on appeal) stated, thus:

> With the greatest respect to the learned Lord, the section does not say that there must be proved a clear preponderance of culpability. What it says is: . . . the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault, subject of course to the proviso that if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally . . . Now that section, as I read it, is mandatory. It does not say that the liability shall be apportioned equally unless different degrees of fault are shown. It is the other way round. It says that the court must apportion the liability in proportion to the degree in which each vessel was at fault unless it is impossible so to do. Of course, the different degrees of fault must be proved, like anything else in a court of law.[160]

It was held that it was possible to distinguish between the degrees to which each vessel was at fault. *The Anneliese* was not at fault in making a succession of alterations to starboard, nor was she at fault in failing to react more promptly to *The Arietta*'s turn to port. Thus, *The Arietta* was two-thirds to blame, and *The Anneliese* one-third.

The Appeal Court will not normally interfere with the actual apportionment of blame fixed by the trial judge, who will have made his judgment having heard all the evidence and assisted by nautical assessors and the Elder Brethren, unless there is mistake in law.

As mentioned earlier, for the assessment of fault, it is not necessary for there to be a physical impact between two vessels, nor navigational fault.[161] In the event that one vessel responds foolishly to a deliberate action of another, the latter vessel may bear a greater degree of fault than the one that responded foolishly. This is illustrated in ***Miraflores v Abadesa***,[162] which is also the authority abolishing the unit approach to the apportionment of fault:

The George Livanos was proceeding up the river Scheldt behind *The Miraflores*. *The Abadesa* was proceeding down the river at the same time. When the vessels reached the narrows on the river, *The Abadesa* negligently failed to hold back to give way to *The Miraflores*. As a result, *The Miraflores* could not deal properly with the difficulties she met owing to a cross-current present at the time. She reacted foolishly, steering first to starboard and then to port and continued to port until she was hit by *The Abadesa*. Both vessels, blocking the channel at the time, caught fire owing to the leakage of burning oil. *The George Livanos*, being behind *The Miraflores*, acted rather in a confused way and did not take immediate action to avoid danger; she ran aground and sustained damage. The owners of *The Miraflores* brought an action against the owners of *The Abadesa* in respect of the collision, and the owners of *The George Livanos* brought a separate action against the owners of both *The Miraflores* and *The Abadesa* in respect of her grounding. The actions were heard together by Hewson J, who held, in respect of the collision action, that *The Miraflores* had been one-third and *The Abadesa* two-thirds to blame for the collision. In respect of the grounding action, he held that *The George Livanos* had herself been negligent. He treated the negligence that led to the collision as 'one unit', and the negligence of *The George Livanos* in respect of the grounding as the other unit. He found it impossible to distinguish

160 [1970] 1 Lloyd's Rep 355, p 363.
161 *The Norwhale* [1975] 1 Lloyd's Rep 610.
162 [1967] AC 826.

between the degrees of fault of the two units and, therefore, held that *The George Livanos* was 50 per cent to blame for the grounding and entitled to recover the remaining 50 per cent from *The Abadesa* and *The Miraflores* in the proportions of two-thirds and one-third, respectively. The CA varied the apportionment of liability, attributing 45 per cent to *The Abadesa*, 30 per cent to *The Miraflores* and 25 per cent to *The George Livanos*.

On appeal to the House of Lords, Lord Wilberforce held that, in investigating 'fault' under s 1(1) of the Act, the 'unit approach'[163] was wrong, as it might be misleading to substitute, for a measurement of the individual fault of each contributor to the accident, a measurement of the fault of one against the joint fault of the other two.

It was further held that, on the evidence, the same proportions of fault as between *The Miraflores* and *The Abadesa* fixed by the judge in respect of the collision should be adhered to in respect of the grounding, but the proportion of fault attributable to *The George Livanos* should be altered, and the final proportions being assessed were at two-fifths to *The Abadesa*, two-fifths to *The George Livanos* and one-fifth to *The Miraflores*. Furthermore, their Lordships emphasised the principle of judging the ship that reacts foolishly to a dangerous situation in which she is put by the other vessel more leniently and stated that:

> A person who embarks on a deliberate act of negligence should, in general, bear a greater degree of fault than one who fails to cope adequately with the resulting crisis thus thrust upon him; and further:
>
> . . . the driver who deliberately goes round a corner on the wrong side should, as a rule, find himself more harshly judged than the negligent driver who fails to react promptly enough to the unexpected problem thereby created. For all humans can refrain from deliberately breaking well known safety rules; but it is not in mortals to command the perfect reaction to a crisis; and many fall short at times of that degree which reasonable care demands.[164]

The alteration of apportionment of loss from the finding of the trial judge was made with great caution and it was stressed, repeating the rule of *The MacGregor* case,[165] that, in matters of apportionment, even more than as regards finding of fact generally, the decision of the trial judge should be interfered with only where some clear error of law or principle can be shown to have influenced his decision.

In ***Samco Europe v MSC Prestige***,[166] a collision situation had been brought about by the fault of both vessels, but, in the circumstances, the fault of the give-way vessel was greater both in terms of causative potency and of blameworthiness, and it should bear 60 per cent responsibility for the collision. The main factor in this case was that the *MSC Prestige* failed to keep a good radar and visual lookout and failed to take early and substantial action to avoid a collision. *The Samco Europe* was also partly at fault for failing to have a good lookout when it was realised that the *MSC Prestige* was altering course to starboard.

163 The 'unit approach' did not require assessment of the degree in which each vessel was at fault. Such an approach was disapproved by the House of Lords again in *The Koningin Juliana* [1975] 2 Lloyd's Rep 111, in which a mathematical 'composite faults' approach was rejected.

164 [1967] AC 826, p 848, per Lord Pearce.

165 [1943] AC 197 (HL).

166 [2011] EWHC 1580.

It is interesting to note ***Western Neptune v St Louis Express***,[167] in which, for the first time, the court had to decide whether an array of streamers being towed by a vessel was to be treated as part of the vessel for the purposes of the International Regulations for Preventing Collisions at Sea. Steel J held that, in the context of Rule 7(d)(ii) of the Regulations, it appeared that a tow was to be considered as being similar to a very large vessel in the context of the Regulation, and to that extent the array was to be treated as part of the *Western Neptune* (W). He further commented that, from a practical point of view, the tow always had to be treated as a part of the towing vessel, as it was unable to take any form of unilateral action. He decided that both vessels were at fault.

The claimant ship-owners claimed for losses arising from the collision between their ship (W) and vessel S owned by the defendants. W was a seismic survey vessel and was towing an array of 10 streamers that extended some 4 miles astern of it at a depth of 12 metres. It was in convoy with two other vessels towing arrays and a smaller boat that guarded the convoy by contacting approaching vessels. W was exhibiting normal navigation lights and a towing light, and each of the streamers had a buoy fitted with a blue strobe light at the aft and forward end; there were no other lights between W and the ends of the streamers. A notice had been sent warning mariners to keep clear of W and the array.

S approached the convoy at night. Having received a message from the guard boat, it initially changed course to avoid the array, but then changed course again to avoid another vessel (E). It later entered the safety zone around W and collided with the streamers, damaging almost all of them. S admitted that it was primarily to blame for the collision in that it had failed to heed the requirement not to enter the safety zone, had improperly altered course so as to cross the array and had failed to see or appreciate the significance of the strobe lights on the buoys. S alleged contributory negligence on the part of W, in that W failed to inform it of the presence of flashing lights on the buoys; failed to confirm with it the need to avoid entering the safety zone after S's agreement to come starboard to avoid E and failed to communicate with S when it altered course to enter the safety zone; and failed to dive the streamers to such a depth that S could safely pass over them.

With regard to lighting, the judge said, as it was not possible to light the length of the array at no more than 100 metres, the vast unlit space astern of W presented a considerable hazard. The impracticality of adequate lighting emphasised the high standard of care required to indicate the presence of the array by other means. However, any defect in the lights was not causative.

With regard to communicating its position to other vessels, the guard boat's broadcasts to other vessels were the first line of defence in preventing a collision. The boat had only made contact with individual vessels; it was desirable that W should have made regular broadcasts detailing the necessary safety zone; however, that was also not causative, in that S had received and understood the boat's message in time to take effective action. In the judge's view, the following actions or omissions were causative:

Following S's alteration to avoid E, W should have contacted S again, reminding it of the safety zone and requiring acknowledgment that it would pass outside it,

167 [2010] 1 Lloyd's Rep 158.

because the earlier agreement for S's course was no longer valid. Thereafter and in any event, S's progress should have been monitored, and warnings should have been given. As a measure of last resort, efforts to dive the streamers should have been undertaken to avoid or limit the damage. W had failed to act with reasonable care in that it had failed to contact S following its change of course; failed to draw S's attention to the presence and significance of the buoys; failed thereafter to keep a good look out as to S's course; and failed at the last to dive the streamers. However, those faults were substantially less blameworthy or causative than those of S. Liability was apportioned one-third to W and two-thirds to S.

3.7.3 Exceptions to the proportionate fault rule

The rule will not apply in the following circumstances.

3.7.3.1 The rule does not apply when the defence of 'agony of the moment' succeeds

As seen earlier, such a defence will be taken into account when the claimant's master has acted under the stress of circumstances, forced upon him by the defendant's servants, to avoid a further danger, whereupon he may do some act that brings about the collision. His ship may not be held to blame. In the agony of that moment, it cannot be expected from masters of ships to show the same amount of skill as should be expected under other circumstances, as Brett LJ put it in ***The Bywell Castle***:[168]

> The captains of ships are bound to show such skill, as persons of their position with ordinary nerve ought to show under the circumstances. But any court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the court ought not, in fairness and justice to him, require perfect nerve and presence of mind enabling him to do the best thing possible.[169]

It must, however, be shown how the danger arose.

3.7.3.2 The rule does not apply when a clear line can be drawn between two negligent acts

Section 187 of the MSA 1995 provides that nothing in the section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed.

For example, if it is the act of the claimant, unprotected by the alternative danger plea, that is the direct/proximate cause of loss, the defendant may escape liability. Most times, however, it is difficult to establish a clear line rule as to when the second negligent act was sufficiently removed from the first to enable the party first at fault to escape liability, as was shown in *The SS Volute*. The courts consider whether the negligence of both parties is contemporaneous, or whether the act of the claimant was in fact much later in time. A usual consideration is whether there is sufficient separation of time, place or circumstance between one negligent act and the next. However, strong evidence is required to show this separation.

168 Ibid.
169 Ibid, pp 226, 227.

In ***Admiralty Commissioners v SS Volute***,[170] V was the leader of a convoy under the charge of two destroyers, R and another. She had instructions when to alter her course and, being responsible for the alteration, she was to sound the necessary short-blast helm signals when altering course. She was directed to alter course to port a little before midnight, and she starboarded her helm and blew the appropriate signal of two blasts, which was answered as intended by the other vessels of the convoy, and the course was altered without mishap. On this altered course, the vessels then proceeded till a particular bearing, when it would be right for the course to be altered about seven points to starboard. While doing so, V ought to have signified this very striking alteration by the blowing of a short blast of her whistle. Whether she did so was a serious matter in dispute at the trial. The night was dark, and no lights were being carried except that each vessel in the convoy carried a shaded stern light. R, whose officer and crew said that they heard no whistle, did not alter course when V ported her helm, and the result was that a position of danger arose. Only the master of those on board V was examined, and he, though awake and in the chart room, was not on the bridge until the last moment. On discovering V's change of course to starboard, R went hard-a-port, but her helm jammed, and she then increased her speed from 8 to 18 knots, with the result that a collision occurred, notwithstanding that V stopped and reversed her engines. In the opinion of the House of Lords on the evidence (reversing the finding of the trial judge), V did not sound the appropriate helm signal before porting.

It was held that the collision was caused partly by V's omission to signal and partly by R's going full speed ahead after the position of danger brought about by V's negligence, and that both vessels were to blame. The decision of the CA holding R alone to blame was reversed.

3.7.3.3 The rule does not apply in cases of loss of life or personal injury

The common law rule of joint and several liability also applied to Admiralty claims for personal injury or loss of life (see at 3.8, below).

3.7.3.4 The rule does not apply when an innocent third ship claims against one of the tortfeasors

Section 187 of the MSA 1995 is applicable to a situation when two or more ships involved in a collision are at fault. When an innocent third ship is involved in a collision that is caused by the fault of two other ships, it can proceed to recover its damage from one of the tortfeasors.

The common law rule will apply, and the innocent party can claim the whole of his damage from either or both joint tortfeasors.

By way of background, the question put to the House of Lords in ***The Devonshire***[171] was whether the Admiralty law rule as to division of loss was applicable to cases involving two tortfeasors and an innocent third party.

The owners of *The Devonshire* contended that they could only be held liable for half of the loss according to the Admiralty rule, and the other half should be borne

170 [1922] 1 AC 129 (HL).
171 See *The Devonshire* [1912] AC 634.

by the tug, which was also at fault. The submission was that the owners of the barge, *The Leslie* (the innocent ship), should be precluded from recovering more than half of its damage from the owners of the one delinquent ship (*The Devonshire*). Lord Atkinson analysed the issue, referring to some relevant previous authorities and explained, thus:

> [In *The Niobe*] the contest in the Court of Admiralty was as to whether *The Niobe* was to blame. The tug admitted her liability, but the significance of the decision in relation to the general principle contended for in the present case is that full damages were awarded against tug and tow jointly, and the rule as to the limitation of damages applicable in Admiralty cases where the ship of the plaintiff collides with the ship of the defendant, and both are to blame, was not applied. The two tortfeasors were held liable for all the damage caused as they would have been in a court of common law.[172]
>
> In the following year, 1891, the case of *The Avon and Thomas Joliffe*[173] came up for decision. In that case, *The Avon*, while in tow of tug, came into collision with another vessel named *The Thomas Joliffe*. The crews of both the tug and tow were held to have been to blame, and the crew of *The Thomas Joliffe* was held to have been blameless. Sir Charles Butt was pressed to divide the damages between the two wrongdoers . . . He refused to do so on the distinct ground that the rule of limitation of damages only applies in Admiralty law to cases where the ships of the plaintiff and the defendant have been in collision and have both been found to blame.
>
> In the several cases subsequent in date to 1891 referred to in the judgment of the learned President in the present case, the same principle appears to have been acted upon, and no instance has been found where it was departed from in this country. . . .
>
> Now, in the present case, the President has on the authority of *The Quickstep* found that the owners of the barge were neither actually nor constructively to blame; in other words, that the tug was in sole control of the navigation, and that her crew were not in the position of servants to the owners of the barge . . . In my view the appellants have wholly failed to shew that there ever was any general principle of law administered in the Court of Admiralty, according to which the owners of the vessels in default were, in such circumstances, not treated in the same way as joint tortfeasors are treated at common law, and each made liable for all the damage he helps to inflict.[174]

The House of Lords stressed that this type of case was different from cases in which two or more ships collide and all are found to be at fault. Only in those cases would the Admiralty law rule of division of loss apply. A couple of years later, the Admiralty law rule was enacted in the MCA 1911.

3.7.3.5 The rule does not apply when the collision is between a ship and a non-ship

Whereas contributory negligence and the rule of apportionment in a collision between ships are governed by s 187 of the MSA 1995, by which their respective faults are apportioned, contributory negligence in the event of collision between a ship and another object is governed by the Law Reform (Contributory Negligence) Act 1945. The purpose of this Act has been to bring the rules of common law more or less in line with those of Admiralty.

However, unlike the Admiralty rule, where there is an individual assessment of each fault of each ship for damage caused to each other or to a third ship,[175] the 1945

172 That was the result of applying the unit theory in that the tow and tug were one unit and, hence, the tow was found to blame for the negligence of the tug – see Ch 11, below.

173 [1891] P 7.

174 [1912] AC 634, pp 653–657.

175 As opposed to a 'unit approach' assessment: *Miraflores v George Livanos* [1967] 1 AC 826.

Act does not require individual assessment when there are multiple faults. The claimant's conduct is contrasted with the totality of the defendants' conduct (the 'unit approach') in the liability proceedings, in which the claimant's contributory negligence is taken into account. Then, apportionment of contribution between the defendants *inter se* is determined in the contribution action under s 2 of the CLCA 1978, which may be joined with the main liability action or be determined in separate proceedings.

Apportionment of blame when a ship collides with a bridge

In ***The Ellen M***,[176] the bridge master of the Haven Bridge had verbally informed the master of *The Ellen M* that the bridge would be opened for those vessels at 07.35 hours.

All aft moorings of *The Ellen M* were cast off, and a blue flag was exhibited, indicating that the bridge was about to be opened to allow vessels to proceed northward. A strong gust struck *The Ellen M*, catching her port bow and turning her to starboard, whereupon her rudder was put hard-a-port, and her engines were worked variously ahead and astern in an attempt to straighten her on to an up-river heading. Despite those manoeuvres, *The Ellen M*, under the influence of wind and tide, was carried across the river angled to starboard. Very shortly afterwards, as a result of her port quarter being in contact with another vessel, she straightened up to an up-river heading, from which position she could have been safely manoeuvred up river and through the open bridge.

However, when she was about to proceed towards and through the bridge, the bridge was seen to begin to close to river traffic. The starboard anchor of *The Ellen M* was let go, and three short blasts were sounded on her whistle in accordance with local practice to indicate to those operating the bridge that the bridge should be kept open. The arms of the bridge stopped at an angle of about 45° from the upright, apparently indicating that the bridge was going to reopen, whereupon the engines of *The Ellen M* were put full ahead. However, the arms of the bridge again began to lower, closing the bridge, whereupon the starboard anchor chain of *The Ellen M* was again veered, her engines were stopped, and her wheel was put hard-a-starboard in an attempt to turn her round to starboard. Her engines were worked variously ahead and astern in an attempt to keep her stern clear of a coaster moored up river and her bows clear of craft moored at Town Hall Quay.

Nothing further was or could be done to prevent *The Ellen M* from colliding in quick succession with the offside of a motor cruiser moored alongside and other craft at Town Hall Quay, closer to the bridge.

In proceedings by the owners of *The Ellen M* against the owners of the bridge, it was alleged that the collision was caused by the defendant's negligent operation of the bridge. The defendants alleged that the collision was caused by *The Ellen M* allowing herself to get out of control.

It was held by Brandon J: (1) that the bridge master was negligent in closing the bridge; (2) that *The Ellen M* was negligent in reversing her turning manoeuvre and attempting to pass through the bridge in belief that it was opening again; and (3) that the negligence of *The Ellen M* was an immediate cause of casualty; that, although the

176 [1967] 2 Lloyd's Rep 247.

bridge master's negligence would not have caused the casualty without the subsequent negligence of *The Ellen M*, no clear line could be drawn between earlier negligence of the bridge master and later negligence of *The Ellen M*. Accordingly, both acts of negligence were causative, and both parties were equally to blame. Brandon J explained (at p 258):

> It seems to me that the second act of negligence was so close to the first and so mixed up with the state of things brought about by the first that both acts of negligence should be regarded as causative, and I so hold.
>
> That leaves me with the task of apportioning the blame between the two sides. Apportionment of blame in a case of this sort is governed by the LR(CN)A 1945. Under that Act, the same principles are to be applied as under the MCA 1911, that is to say, the court is to take account of both culpability and causative potency. I do not find this an easy case in which to apportion the blame. The original trouble was due to the negligence of the bridge master; the subsequent negligence of the master of *The Ellen M* was committed in the situation of difficulty caused by that original negligence and allowances must obviously be made for that. But, after making all allowances for that, I consider that the master's decision to reverse his turning manoeuvre in order to make for the bridge again was a rash decision. It was the duty of the master of *The Ellen M* to put the safety of his ship first in a crisis of that kind and not to 'chance his arm', as I think he did. On the whole I have come to the conclusion that the fair apportionment in this case is to hold both sides equally to blame.

See also *City Cruises plc v Transport for London* under 3.3.2, above

Avoidance action causing damage to objects

There may be occasions when a ship strikes an object, that is, a pier, as a consequence of taking an evasive action to avoid a collision with another ship, which is at fault. If they are both at fault, s 187 of the MSA 1995 will apply between the two ships for apportionment of fault, even if there had been no actual physical contact between them.

In ***The Belle Usk***,[177] *The Brittania*, a passenger ship, was in collision with a pier in her manoeuvre to avoid a collision with *The Belle Usk*. The latter had been lying at the passenger pontoon to which *The Brittania* was bound. She was, however, required to move out from the pontoon. As *The Brittania* approached her berth, *The Belle Usk* was seen to be moving out. Both vessels seemed to be safely clear of each other. However, *The Belle Usk* suddenly came ahead across the path of *The Brittania*, causing her, in an attempt to avoid a collision, to stop her engines, suddenly, and put full speed astern, her wheel being turned to starboard. In an attempt to regain her position, so that she could still make it into the berth, *The Brittania* got caught by the westerly wind and a slight set of tide and was carried against bullnoses, causing damage both to herself and the pier. It was held that the damage was due to the bad seamanship of *The Belle Usk* in crossing ahead of *The Brittania*, rendering collision with the pier inevitable. Therefore, *The Belle Usk* was alone to blame and had to recompense *The Brittania* for the damages paid to the pier owner.

The risk of contact between arriving or departing vessels and shore cranes is a matter of notoriety, particularly when ships berth in close proximity to each other and under the influence of a cross wind.

The Maersk Colombo[178] came into contact with a shore crane by the overhang of her bow while berthing and caused the crane to topple over and collapse. The

177 [1955] 2 Lloyd's Rep 421.
178 [1999] 2 Lloyd's Rep 491.

Admiralty judge found that, although *The Maersk Colombo* created a situation of danger by trying to berth in a cross wind, without yet having the tug made fast forward, the crane manager and the berth master were negligent also. In accordance with regulations, cranes should be positioned close to midships for a vessel manoeuvring on and off a berth. In this case, however, there was not enough time to move the crane when *The Maersk Colombo* arrived. Bearing in mind also the negligence of the berth master, the contributory negligence of the crane owners amounted to 15 per cent.

3.8 CLAIMS FOR LOSS OF LIFE AND PERSONAL INJURY

The rule of division of loss in s 187 of the 1995 MSA does not apply to cases of liability for death or personal injury. Sections 188 and 189 of the Act deal with such liability.[179] In particular, s 188 provides:

> Where loss of life or personal injuries are suffered by any person on board a ship owing to the fault of that ship and of any other ship or ships, the liability of the owners of the ships shall be joint and several.

That means that the claimant may claim his full damages from any one of the tortfeasors.

The origin of this rule lies at common law. In ***The Bernina***,[180] there was a collision with *The Burshire*, and a crew member and a passenger of the latter were drowned. The collision was due to the fault of the masters of both ships.

The representatives of the deceased brought actions *in personam* against the *The Bernina*'s owners for negligence under Lord Campbell's Act (9 & 10 Vict c 93). It was held that, as the deceased persons had nothing to do with the navigation of *The Burshire*, their representatives could maintain the actions and could recover the whole of their damages. The Admiralty rule as to half damages was not applicable.

If one of the joint tortfeasors bears all the loss, he has a right to contribution against the other for the excess of the proportion in which the ship was in fault, as provided under s 189. Nothing in this section authorises the recovery of any amount that could not, by reason of any statutory or contractual limitation of, or exemption from, liability, or which could not for any other reason have been recovered in the first instance as damages by the persons entitled to sue (sub-para (3)).

A claim to enforce any contribution under ss 187–9 may be brought by way of an action *in rem* and must be brought within 1 year from the date of payment to the claimant (s 190(4)).[181]

When the claimant for personal injury or loss of life sues the non-carrying vessel, the action must be commenced within 2 years of the incident. This derives from s 190(1)(b). The time may be extended. The court has a discretion to grant the extension, which may be exercised depending on the length of the delay, or on whether the delay was excusable and beyond the party's control, or on whether justice would

179 MSA 1995, ss 188, 189 have substantially reproduced the MCA 1911, ss 2 and 3.
180 (1888) 13 App Cas 1 (HL).
181 Previously, the MCA 1911, s 8.

be done if the extension was granted. The time limit to bring an action for this type of claim against the carrying ship is 3 years.[182]

Where persons are killed, their estates have an action against the vessel at fault and her owners under the Law Reform (Married Persons) Act 1934, and their dependants have an action under the Fatal Accidents Act (FAA) 1976,[183] as amended by the Administration of Justice Act 1982.

3.9 CONTRAST CLAIMS IN RELATION TO CARGO DAMAGE

At common law today, the position for recovery of loss or damage suffered by an innocent third party owing to the fault of two joint tortfeasors is that he can recover the whole of his loss against either tortfeasor. This common law rule applies, as seen earlier, to an innocent third ship involved in a collision and to claims for personal injury or loss of life.

By contrast, the Admiralty law rule of division of loss applies to all property claims, including the claims of the innocent cargo-owner, whose cargo is damaged or lost on board the carrying ship owing to a collision between this ship and another, for which both ships are at fault. Students of shipping law, usually and quite rightly, question this rule, because the cargo-owner should be regarded also as an innocent third party. An explanation as to the justification of the rule can be found in the following case.

The Drumlanrig[184]

Ship T, laden with cargo, collided with D, and it was not disputed that both vessels were to blame. The cargo-owners claimed against the owners of D for the whole of the damage to their goods sustained by the collision. The question for the court as to damages was whether the plaintiffs could recover the whole of their loss from the owners of D, or only 50 per cent of it (at the time, the rule in Admiralty was about equal division of loss between the two guilty ships).

Sir Samuel Evans (President) held that they were entitled to a moiety only of the limitation fund lodged in court by the defendants. This decision was affirmed by the CA. On further appeal, the House of Lords affirmed the decisions of the lower courts. The following extracts from the judgment help to understand the development and justification of the rule.

Lord Loreburn LC:[185]

Under the JA of 1873, s 25, sub-s 9: 'In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail.'

In order to apply this statutory direction, let me first see what the rule at common law is. In 1873, when the Act was passed, the supposed rule was that the owner of goods in such a

182 The limitation period provided for by the LA 1980 applies to this type of claim.
183 See *The Esso Malaysia* [1974] 2 Lloyd's Rep 143.
184 [1911] AC 16 (HL).
185 Ibid, pp 18, 19.

case could recover nothing at all, because he was imagined to be identified with the ship in which his goods were stowed, and, she being in fault, he also was disabled by her disability. There was really nothing to say either in principle or good sense for this metaphysical view, and it was finally exploded by the decision of this House in *The Bernina*,[186] which decided that so far from recovering nothing the owner of cargo could recover the full amount of his loss.

The law of Admiralty was different. In Admiralty, the rule had been for a long time that, in case of collision between two ships where both were to blame, each ship-owner could recover from the other one half his loss. In 1861, in *The Milan*,[187] Dr Lushington directly decided that the owner of cargo in one of the ships could in like manner recover only one half of the loss from the other ship. And he expressly repudiated the supposed doctrine of common law, relying upon the uniform practice in Admiralty. How old that practice may have been in regard to cargo is not quite certain . . . That practice as to the cargo-owner only receiving one half his loss may have been based upon the similar and long settled practice as to ship-owners. Perhaps the analogy was a false one and the practice not really fair. Indeed . . . I should be very glad if I could award to these plaintiffs the full amount of their claim. But we must obey the Act of Parliament, and when once it is made good that the rule as to recovering one half only was in 1873 'hitherto in force', we have no choice. If this state of the law is to be remedied, the remedy must be provided by the legislature.[188] It is no valid argument to say it ought not to have been ever established.

Lord Atkinson:[189]

My Lords, the sole question for decision in this case is this: whether the rule of law in force in the Courts of Admiralty in this country in the year 1873, to the effect that when two ships collide, each being found to blame, the innocent owner of the cargo carried by one of them is only entitled to recover half the damages he has sustained from each ship in default, is still in force. This again depends upon two considerations – first, whether this rule is in reality based on the principle that the cargo carried is identified with the ship which carries it, according to the principle laid down in the case of *Thorogood v Bryan*, and second, whether, even if this be so, the rule is stereotyped and continued in force by the provision of s 25, sub-s 9 of the JA 1873. Your Lordships, in the case of *The Bernina*, undoubtedly held that the case of *Thorogood v Bryan* was wrongly decided, and that the principle laid down in it was erroneous in law, and Sir Robert Finlay . . . contends that because of this the rule of law based upon the principle so held to be erroneous must, in the construction of the above-mentioned provision of the JA, be treated as non-existent . . .

I shall presently consider whether Sir Robert Finlay's contention as to the foundation of this rule be sound or not; but, even assuming that it is sound, I do not think that the rule, however erroneous, can be thus got rid of. The words of the sub-section are: 'The rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail.' . . . The words 'so far as they have been' . . . point apparently to the past, and it certainly would appear to me that both these phrases have been introduced in order to stereotype and perpetuate the rules of law in force in the Court of Admiralty.

The question remains, is this rule in reality based upon the principle of *Thorogood v Bryan*? . . . Well, in the first place the cargo is not completely identified with the ship that carries it, for its owner, though he, like the owner of that ship, is only entitled to recover half the damage sustained from the owner of the other ship, is entitled to recover the other half from the owner of the carrying ship. Again, Dr Lushington in *The Milan* case discusses this rule, first, from the point of view of its abstract justice, and, secondly, from that of the principles on which the Admiralty practice is founded. As to the first, he says: 'The only inference I can draw from this view of the matter is that beyond all doubt an action would be maintainable by the owners

186 (1888) 13 App Cas 1 (HL), concerning loss of life on board a ship.

187 (1861) Lush 388.

188 The subsequent MCA 1911 and the present statute, MSA 1995, s 187, however, have perpetuated this rule.

189 [1911] AC 16, pp 21–25.

of cargo against the owners of either vessel, but to what extent damages should be recoverable against one party only is left an open question.'

He then proceeds to deal with the rule of the Admiralty Courts, and, after pointing out that *Hay v Le Neve* decided that the owner of the cargo is only entitled to recover half the damages from the ship which does not carry it, he says: 'Abstract justice might give a remedy to the owner of the cargo against the owner of each vessel in proportion to the culpability of each . . .' He then proceeds to repudiate in most explicit terms the authority of *Thorogood v Bryan* and refuses to be bound by it. He says: 'It is difficult to conceive how it can be contended that he, that is, the owner of the cargo, is *particeps criminis* when he is not so either as principal or agent. It is argued that he shall be so considered, and deprived of his remedy because he himself or his agent selected the ship by which his goods were carried. But there is, in my judgment, in the mere selection of the ship for the conveyance of his cargo, none of the ingredients which constitute any kind of responsibility for a collision, for I cannot conceive a responsibility for an act done where the individual has not, either by himself or his agent, any power of interference or control.'

This would appear to me to be the precise line of reasoning that led the CA and your Lordships' House in the case of *The Bernina* to decide that *Thorogood v Bryan* was wrongly decided, and to overrule it . . .

It would appear to me, therefore, that the rule applied in *The Milan* case is not based upon the principle of *Thorogood v Bryan* at all, and was not so regarded, but that it is based rather on some supposed principle of equity and justice to the effect that, as the innocent owner of the cargo suffered by the negligence of each of the ships found to blame, each should compensate him for a portion of his loss.[190]

Lord Shaw:[191]

Dr Lushington lays down, and I think he rightly lays down, that it has become the Admiralty practice. He suggests a very plausible reason for it . . . that the Court of Admiralty looked upon the two ships as two tortfeasors, and divided the responsibility equally between them so that the owner of cargo recovered one half from one ship, and the other half from the other ship . . . I do not think that the rule started with the judgment of Dr Lushington in *The Milan* case. It was affirmed in *Hay v Le Neve*,[192] decided in 1824, and applicable not to ship alone, but also to cargo.

As explained in this decision, the rule of division of loss proportionately to the fault of each ship with regard also to the cargo carried on board each ship has been a uniform practice in the Admiralty Court since 1789, and it has been incorporated in the legislation of the twentieth century for practical reasons. The purpose of this rule was to establish several (not joint) liability for the proportion of the damage to, or loss of, cargo carried on board any of the ships at fault.[193] Most maritime nations that have ratified the Brussels Collision Convention 1910 apply this rule. The way of recovering is by suing each ship for the proportion of the loss caused by the fault of each. In seeking to recover from the carrying ship, however, the cargo-owner will be subject to the contractual provisions of the contract of carriage, which include exception from liability.[194] The respective liabilities of both ships, as well as exceptions from liability, will be adjusted during the apportionment of damages to each other in order to give effect to the 1910 Convention.

190 The equal division of loss was made by the MCA 1911, s 1, as an alternative option only if assessment of proportionate faults cannot be established.

191 [1911] AC 16, pp 28, 29.

192 (1824) 2 Shaw's Scotch Appeals 395.

193 See *The Giacinto Motta* [1977] 2 Lloyd's Rep 221, in which the purpose of the 1911 Act was explained.

194 *The Giacinto Motta* [1977] 2 Lloyd's Rep 221.

By contrast, in the USA, where the Brussels Collision Convention 1910 has not been ratified, the rule is joint and several liability, and the cargo-owners can recover in full from the non-carrying ship in US courts. Then, the non-carrying ship may recover from the carrying ship the amount that is proportionate to the latter's degree of fault.[195] This circumvents the right of the carrying ship to rely on the exceptions from liability against the cargo claimant under the contract for errors in navigation.[196]

To rectify this anomaly created by US law, a clause known as a 'both to blame' collision clause is inserted in charterparties and bills of lading. The effect of this clause is that, if the carrying ship has paid to the non-carrying ship the proportionate amount of the loss in respect of the cargo carried on board the latter, it can claim back that amount from the cargo-owners. The cargo underwriters, who usually agree to indemnify their assured under a 'both to blame' collision clause, which is also inserted in the insurance contract, will refund its assured the amount paid to the ship-owner, provided they are given the opportunity to defend their assured against a claim under such clause. This is a more complex and roundabout approach than the English Admiralty rule to apportionment of loss.

3.10 CONTRIBUTION BETWEEN JOINT TORTFEASORS

3.10.1 The common law rule

Under common law, in non-Admiralty cases, the liability of joint concurrent tortfeasors is joint and several. Payment by one in full and final settlement bars the claimant from making a claim against the other tortfeasors. The cause of action for damages is extinguished against all of them.[197] Contribution between joint tortfeasors was not permitted until the Law Reform (Married Women and Tortfeasors) Act 1935, which was subsequently superseded by the CLCA 1978. This right of contribution existed at common law for Admiralty claims only.[198] The CLCA provides that, if one tortfeasor had paid damages in full, or more than the damages caused by his fault, to the injured party, he could later claim (in a separate action) contribution from the other guilty party.

3.10.2 Contribution between joint tortfeasors by statute in Admiralty

The Cairnbahn[199]

This case was concerned with an action between two tortfeasors for contribution. A collision took place between an innocent barge in tow of a tug and a steamship (*The Cairnbahn*). The steamship and the barge were damaged. The collision was due to the fault of the tug (*The Nunthorpe*) and the steamship (*The Cairnbahn*). The barge recovered the whole of her damage against the steamship. The owners of the steamship sought to recover half of the damage from the tugowners. The question was whether

195 *The Sucarseco* (1935) 51 LlL Rep 238 (US Sup Ct).
196 Hague-Visby Rules, Art IV, r 2(a), but not under the Hamburg Rules.
197 *Jameson and Another v Central Electricity Generating Board* [2000] 1 AC 455 (HL).
198 *The Frankland* [1901] P 161.
199 [1914] P 25.

the Admiralty rule as to division of loss applied between the two vessels at fault. It was contended on behalf of the owners of the steamship that the tug, *The Nunthorpe*, would have to bear half the loss sustained by the owners of the steamship, including half the amount of damage sustained by the owners of the barge, which had been paid by the owners of the steamship. The owners of *The Nunthorpe* contended that, as both the steamship and the tug were at fault, the owners of the steamship were not entitled to call upon the owners of the tug to bear any share of the loss, because the two vessels were in the position of joint tortfeasors. Therefore, they argued, the common law principle, that there could be no contribution between joint tortfeasors, governed the case. The President, Sir Samuel Evans, held that:

> The wording of s 1(1) of the 1911 Act is quite different from that of the repealed sub-section. Its language appears to me to be quite plain. Reading the words of the section which are applicable to the circumstances of this case, it enacts that, where by the fault of two vessels damage or loss is caused to one or to both of those vessels, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault (subject, of course, to the proviso). There is nothing in the section about the two vessels in fault being themselves in collision with each other. Translate the words into the facts of this case, then the enactment would read thus: 'Where by the fault of the tug *Nunthorpe* and the steamship *Cairnbahn* damage or loss was caused to *The Cairnbahn*, the liability to make good such damage or loss shall be in proportion to the degree in which the tug *Nunthorpe* and the steamship *Cairnbahn* were in fault, namely, in equal degree.' As has been said, the damage or loss caused to *The Cairnbahn* was admitted to include the sum which *The Cairnbahn* was adjudged to pay to the innocent barge, as well as the damage caused to the steamship herself.[200]

On appeal, the CA upheld the view that s 1 of the MCA 1911[201] applies, even where the damage to be apportioned does not arise from a collision between the vessels at fault. Affirming the decision of the President (Sir Samuel Evans), it held that the case was not governed by the common law rule as to no contribution between joint tortfeasors, and, therefore, applying the principles laid down by s 1 of the MCA 1911, the owners of the steamship were entitled, as against the owners of the tug, to half the amount of the damage sustained by the steamship, including half the amount of the damage sustained by the barge.

Lord Parker of Waddington said:

> Before the passing of the Act there was at common law no liability on the part of anyone to make good the damage caused to *The Cairnbahn*, both she and *The Nunthorpe* being to blame, and, according to the Admiralty rule referred to in s 25, sub-s 9, of the JA 1873 (if such rule were applicable), the only liability to make good this damage lay on *The Nunthorpe*, but to the extent only of a moiety thereof. Having regard to the strange results which would otherwise follow, I think that the section must be construed not as apportioning any existing liability, but as providing that the whole of the damage or loss referred to is to be borne in proportion to the degree in which each vessel is in fault, and if it be impossible to establish different degrees of fault, then equally . . .[202]

It was made clear that the MCA 1911 dealt with the question from the point of view of the guilty parties only. The rights of the innocent party were not in issue in this case, as they were in *The Devonshire*, because this case was for contribution between the tortfeasors in a separate action.

200 Ibid, p 29.
201 Now, s 187 of the MSA 1995.
202 [1914] P 25, pp 30–31.

Now, s 187 of the MSA 1995 applies for contribution and apportionment as between the joint tortfeasors.

In some cases, the 1978 Act may be beneficial to the party entitled to claim contribution from the other, in two respects: First, the time limit to claim contribution is 2 years, commencing from when the claimant either is held liable, or he agrees to pay the innocent party, whereas the time limit under s 190(4) of the MSA 1995 is 1 year. Second, the 1978 Act, s 1(4), prevents the defendant in the contribution proceedings from challenging the issue of the plaintiff's liability to the original claimant.[203]

3.11 DAMAGES AND THE RULE OF REMOTENESS OF DAMAGE

Even if the claimant discharges the burden of proof that the negligence of the defendant caused the collision (causation in fact; see para 3.5 above) and also that that negligence was the cause, or one of the causes, of the damage (causation in law; see para 3.6 above), the claimant must also prove his damages, which must not be too remote.

3.11.1 The background of developments

The first and earliest rule of the common law was that the defendant was liable for damages that 'in the ordinary course of things would flow from' his wrongful act.[204]

In 1921, the CA decided, in ***Re Polemis***,[205] that the defendant would be responsible for the direct consequences resulting from his negligence, whether or not the actual damage sustained was reasonably foreseeable.

Under a time charterparty contract between the ship-owner and the charterer, damage caused by fire, either to cargo on board or to the ship, was exempted.

The charterers loaded a quantity of benzene and/or petrol in tins in cases. During the voyage, the tins leaked, and, in consequence, there was a considerable quantity of petrol vapour in the hold. When the ship called at a port, it became necessary to shift some of the cases of benzene. Stevedores, employed by the charterers, placed a number of heavy planks at the forward end of the hatchway, which they used as a platform for transferring the cases from the lower hold to the 'tween deck. Owing to the negligence of the stevedores, when the sling containing the cases of benzene was being hoisted up, it knocked a plank into the hold. The fall was immediately followed by a rush of flames, the result being the total destruction of the ship.

The ship-owners claimed the value of the ship as damages from the charterers. The charterers disputed liability, and the dispute was referred to arbitration under a clause in the charterparty. The arbitrators found that: the ship was lost by fire; the fire arose from a spark igniting the petrol vapour in the hold; the spark was caused by the falling board coming into contact with some substance in the hold; and the causing of the spark could not reasonably have been anticipated from the falling of

203 See, also, op. cit., Marsden, fn 1, paras 14–33, 14–34.

204 *The City of Lincoln* [1890] P 15, p 18, per Lindley LJ.

205 *Re Polemis v Furness Withy & Co* [1921] 3 KB 560 (CA).

the board, though some damage to the ship from the falling of the board might reasonably have been anticipated. The arbitrators decided that the owners were entitled to recover from the charterers a sum assessed by the arbitrators.

On appeal to the court, the judge affirmed the award, and the charterers appealed to the CA.

The charterers contended: (1) that they were protected from liability by the exception of 'fire' in the charterparty; and (2) that the damages were too remote, as it could not reasonably have been anticipated that the falling of the board would have caused a spark.

It was held, (1) that the exception clause did not protect the charterers against loss by fire caused by the negligence of their servants, there being no express stipulation to that effect; and (2) that, as the fall of the board was due to the negligence of the charterers' servants, the charterers were liable for all the direct consequences of the negligent act, even though those consequences could not reasonably have been anticipated; and they were, therefore, liable for the loss of the ship by fire.

Referring to previous authorities, the principle applicable was summarised by Scrutton LJ as follows:

> To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But, if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is, in fact, directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial.[206]

It should be noted that the claim in the *Re Polemis* case was made for breach of contract based on negligence committed in the performance of contractual obligations, namely the negligence of the servants of the charterers, the stevedores. The case was, in particular, concerned with the construction of the exemption clause in the charterparty contract.[207] The conduct of the stevedores in the course of their employment was in question in determining whether their principals, the charterers, should be held liable for the actual damage caused.

It was further held by Warrington LJ that it was clear that the act causing the plank to fall was, in law, a negligent act, because some damage to the ship might reasonably be anticipated. If this was so, then the charterers were liable for the actual loss, that being the direct result of the falling board on the arbitrators' finding.[208]

206 [1921] 3 KB 560 (CA), p 577.

207 The distinction of *Re Polemis* case was carefully been pointed out by the appellants' counsel (Ashton Roskill QC) in *The Wagon Mound (No 1)*, who said:

> The first submission on *Polemis* is that the issue was one of contract, namely, the construction of the exceptions clause in a time charter party . . . If that be so, it is difficult to regard the case as a satisfactory authority on the tort of negligence or on what constitutes a cause of action in negligence. That submission may be elaborated under three heads. First, negligence is read by implication into the exceptions clause: it does not, in the context of the exceptions clause, mean the same as the tort of negligence. The exceptions clause means that the charterers were not responsible for the fire unless caused by their carelessness. It is doubtfully correct to say, as Warrington LJ said, that the claim was based on the tort of negligence . . . (p 393)

208 Aspects of causation and remoteness in contract, in claims for indemnity and in the tort of negligence were contrasted by Evans LJ in *The Sivand* [1998] 2 Lloyd's Rep 97 (CA), p 105 (see para 3.11.5, below):

3.11.2 Present law – general principle

Since 1960, the general rule about 'remoteness' of damages, when a claim is in tort, is that the defendant would only be liable if he could reasonably have foreseen the kind of damage suffered by the claimant. The claimant must prove, therefore, that the breach of duty by the defendant caused the kind of damage claimed, which must not be too remote. The breakthrough for the establishment of this rule started with *The Wagon Mound (No 1)* (decision of the Privy Council).

As it had been thought that the decision of the CA in *Re Polemis* (although the case concerned negligence in the performance of contract) might have, potentially, stated a general principle to the effect that a defendant (being sued in the tort of negligence) might be held liable for all the consequences, whether reasonably foreseeable or not, the Privy Council disapproved of it in *The Wagon Mound (No 1)*. The events of this case are seen below.

The Wagon Mound (No 1)[209]

The plaintiffs were ship-repairers and owned the Sheerlegs Wharf in Sydney for their business. The defendants were demise charterers of the vessel *The Wagon Mound*, an oil-burning vessel that was moored 600 ft from Sheerlegs Wharf and was taking in bunkering oil in Sydney harbour. A large quantity of the oil was, through the carelessness of the defendants' servants, allowed to spill into the harbour. During that and the following day, the escaped furnace oil was carried by wind and tide beneath the wharf owned by the plaintiffs, at which was lying a vessel that they were refitting, and for which purpose their employees were using electric and oxyacetylene welding equipment. Some cotton waste or rag on a piece of debris floating on the oil underneath the wharf was set on fire by molten metal falling from the wharf. The flames from the cotton waste or rag set the floating oil afire, either directly, or by first setting fire to a wooden pile coated with oil. Thereafter, a conflagration developed that seriously damaged the wharf and equipment on it.

In an action by the shipbuilders to recover compensation from the defendants for the damage by fire, it was found by the trial judge, on the evidence, that the defendants

These two situations [breach of contract and indemnity] have in common what a claim in tort does not, namely, a pre-existing legal relationship, almost invariably contractual, between the parties. It must follow, therefore, that the legal aspects of causation and remoteness must depend upon that legal relationship also. For example, the basic rule that the wrongdoer is liable for the 'direct and natural' consequences of his act is applied by reference to a person situated as the contracting parties were when the contract was made, rather than to a reasonable man at the time of the wrongdoing. The same considerations arise, in my judgment, in relation to the questions whether the liability of the wrongdoer is affected by negligence of the other party, or of a third party. In the indemnity cases, such negligence, far from breaking the 'chain of causation', may be the very event against which the promise to indemnify was given . . . The present case resting solely in tort, it is unnecessary for present purposes to consider these questions further.

Also interesting to note *Total Transport Corporation v Arcadia Petroleum Ltd (The Eurus)* [1998] 1 Lloyd's Rep 351 (CA), where Staughton LJ contrasted issues of causation and remoteness in claims for breach of contract, claims for indemnity and in tort:

It was common to refer to a chain of causation between the wrongful act and the plaintiff's loss, and to an intervening act which might or might not break the chain. But the chain metaphor was not always appropriate for causation in contract. It was better to ask whether in common sense the wrongful act was a cause of the plaintiff's loss, or whether something else was. Common sense was not fettered by rules of law.

209 [1961] AC 388.

'did not know and could not reasonably be expected to have known that the furnace oil was capable of being set afire when spread on water'. Apart from the fire damage, the plaintiffs had also suffered some damage from the fact that the oil had congealed upon and interfered with the use of their slipways.

The judge concluded, however, that, on the basis of the decision in *Re Polemis*, the defendants were liable for all damage suffered, because it was the direct consequence of their negligence. On the defendants' appeal to the Full Court of the Supreme Court of New South Wales, the main heads of appeal were, first, that *Re Polemis* was wrongly decided, and, second, that, if it was right, the damage by fire was not the direct consequence of the defendants spilling the oil. The judgment of the Full Court contained a critical analysis of the decision in *Re Polemis*, but it was concluded that it would not be proper to regard that decision otherwise than as binding on the court.

Manning J, however, giving the judgment of the court, said that it would be a gross understatement to say that he was able to apply that decision with any degree of confidence, and he expressed the hope that the House of Lords, or the Judicial Committee of the Privy Council, would pronounce on it, in the near future.

The Supreme Court of New South Wales allowed an appeal by the defendants (the appellants) to the Privy Council. Their Lordships were concerned about the proposition that 'unforeseeability is irrelevant if damage is direct'. Viscount Simond commented on the *Re Polemis* case thus:[210]

> Before turning to the cases that succeeded it, it is right to glance at yet another aspect of the decision in *Polemis*. Their Lordships, as they have said, assume that the court purported to propound the law in regard to tort. But up to that date, it had been universally accepted that the law in regard to damages for breach of contract and for tort was, generally speaking, and particularly in regard to the tort of negligence, the same. Yet *Hadley v Baxendale* was not cited in argument nor referred to in the judgments in *Polemis*. This is the more surprising when it is remembered that in that case, as in many another case, the claim was laid alternatively in breach of contract and in negligence. If the claim for breach of contract had been pursued, the charterers could not have been held liable for consequences not reasonably foreseeable . . . Their Lordships refer to this aspect of the matter not because they wish to assert that in all respects today the measure of damages is in all cases the same in tort and in breach of contract, but because it emphasises how far *Polemis* was out of the current of contemporary thought. The acceptance of the rule in *Polemis* as applicable to all cases of tort directly would conflict with the view theretofore generally held.

Examining all relevant authorities, their Lordships came to the conclusion that the *Polemis* case should not be applied, and the test of foreseeability was reinstated.

It was held that, on the footing that the damage was the direct result of the escape of the oil, and applying the test of foreseeability, the defendants (appellants), who could not reasonably be expected to have known that the oil would catch fire, were not liable for the damage.

In particular, Viscount Simonds stated:

> There is not one criterion for determining culpability (or liability) and another for determining compensation; unforeseeability of damage is relevant to liability or compensation – there can be no liability until the damage has been done; it is not the act but the consequences on which tortious liability is founded . . .[211]

210 [1961] AC 388 (PC), p 419.
211 Ibid, p 425.

> . . . the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view, thus, stated by Lord Atkin in *Donoghue v Stevenson* . . .[212]
>
> It is a departure from this sovereign principle, if liability is made to depend solely on the damage being the 'direct' or 'natural' consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was 'direct' or 'natural', equally, it would be wrong that he should escape liability, however 'indirect' the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done . . . thus, foreseeability becomes the effective test – the 'direct' consequence test leads to nowhere but the never-ending and insoluble problems of causation.[213]

The defendant escaped liability for the fire damage caused to the wharf in Sydney harbour, because, on the judge's finding of facts, the fire damage was not reasonably foreseeable, although it was a direct damage from the defendant's negligence. The damage that was foreseeable was the fouling of the harbour by the escaped oil.

In the sequel to this decision, ***The Wagon Mound (No 2)***,[214] the Privy Council explained in great detail the application of the foreseeability test and applied the same to both cases of nuisance and negligence claims.

In this case, the claimants were the owners of the two vessels undergoing repairs at the wharf in Sydney harbour. They sued the demise charterers of *The Wagon Mound* for damages, on the basis of negligence and nuisance.

Walsh J, in the Supreme Court of New South Wales, accepted that the most probable explanation of the fire was that a hot piece of metal fell on some object supporting a piece of inflammable material in the oil-covered water, which was ignited. He found that the damage to the claimants' vessels was 'not reasonably foreseeable by those for whose acts the defendants were responsible.' Further findings were that reasonable people in the position of officers of *The Wagon Mound* would regard furnace oil as very difficult to ignite upon water, and that, if they had given attention to the risk of fire from the spillage, they would have regarded it 'as a possibility, but one which could become an actuality only in very exceptional circumstances'. Having made these findings, Walsh J held that liability in nuisance did not depend on forseeability, and that the defendants were liable in nuisance but not in negligence. Judgment was accordingly given for the claimants on the claim based upon nuisance and for the defendants on the claim based on negligence. The defendants appealed against the judgment ruling on nuisance, and the claimants cross-appealed, on the issue of negligence.

It was held by the Privy Council that:

1 creating a danger to persons or property in navigable waters (equivalent to a highway) fell in the class of nuisance in which foreseeability was an essential element in determining liability, and it was not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance, if that injury was, in the relevant sense, unforeseeable; and
2 on the facts, a reasonable man having the knowledge and experience to be expected of the appellants' chief engineer would have known that there was a

212 Ibid, p 426.

213 [1961] AC 388 (PC), p 426.

214 *Overseas Tankship (UK) Ltd v The Miller Steamship Co The Wagon Mound (No 2)* [1967] 1 AC 617 (PC).

real risk of the oil on the water catching fire, and the fact that the risk was small did not, in the circumstances, justify no steps being taken to eliminate it. Accordingly, both the appeal on the claim based on nuisance and the cross-appeal upon the claim based on negligence would be allowed.

Lord Reid, who delivered the judgment, distinguished *The Wagon Mound (No 1)* from the findings in this case by saying:[215]

In *The Wagon Mound (No 1)* the finding on which the board proceeded was that of the trial judge: 'the defendant did not know and could not reasonably be expected to have known that [the oil] was capable of being set afire when spread on water.' In the present case, the evidence led was substantially different from the evidence led in *The Wagon Mound (No 1)* and the findings of Walsh J are significantly different. That is not due to there having been any failure by the plaintiffs in *The Wagon Mound (No 1)* in preparing and presenting their case. The plaintiffs there were no doubt embarrassed by a difficulty which does not affect the present plaintiffs. The outbreak of the fire was consequent on the act of the manager of the plaintiffs in *The Wagon Mound (No 1)* in resuming oxyacetylene welding and cutting while the wharf was surrounded by this oil. So, if the plaintiffs in the former case had set out to prove that it was foreseeable by the engineers of *The Wagon Mound* that this oil could be set alight, they might have had difficulty in parrying the reply that this must also have been foreseeable by their manager. Then there would have been contributory negligence and at that time contributory negligence was a complete defence in New South Wales.

The vital parts of the findings of fact (in the present case) which have already been set out in full are (1) that the officers of *The Wagon Mound* 'would regard furnace oil as very difficult to ignite upon water' – not that they would regard this as impossible; (2) that their experience would probably have been 'that this had very rarely happened' – not that they would never have heard of a case where it had happened; and (3) that they would have regarded it as a 'possibility, but one which could become an actuality only in very exceptional circumstances' – not, as in *The Wagon Mound (No 1)*, that they could not reasonably be expected to have known that this oil was capable of being set afire when spread on water. The question which must now be determined is whether these differences between the findings in the two cases do or do not lead to different results in law.

Further extracts from his judgment illuminate the issues involved in defining the words 'reasonably foreseeable', by comparison with facts of other cases:

In *The Wagon Mound (No 1)* the board were not concerned with degrees of foreseeability because the finding was that the fire was not foreseeable at all. So Lord Simonds had no cause to amplify the statement that the 'essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen'. But here the findings show that some risk of fire would have been present to the mind of a reasonable man in the shoes of the ship's chief engineer. So, the first question must be: what is the precise meaning to be attached in this context to the words 'foreseeable' and 'reasonably foreseeable'?

Before *Bolton v Stone*,[216] the cases had fallen into two classes: (1) those where, before the event, the risk of its happening would have been regarded as unreal either because the event would have been thought to be physically impossible or because the possibility of its happening would have been regarded as so fantastic or farfetched that no reasonable man would have paid any attention to it – 'a mere possibility which would never occur to the mind of a reasonable man' (per Lord Dunedin in *Fardon v Harcourt-Rivington*)[217] – or (2) those where there was a real and substantial risk or chance that something like the event which happens might occur, and then the reasonable man would have taken the steps necessary to eliminate the risk.

215 [1967] 1 AC 617, pp 640–644.
216 [1951] AC 850 (HL).
217 (1932) 146 LT 391 (HL).

In *Bolton v Stone*, a member of a visiting team drove a cricket ball out of the ground onto an unfrequented adjacent public road and it struck and severely injured a lady who happened to be standing in the road. That it might happen that a ball would be driven onto this road could not have been said to be a fantastic or farfetched possibility: according to the evidence it had happened about six times in 28 years. And it could not have been said to be a farfetched or fantastic possibility that such a ball would strike someone in the road: people did pass along the road from time to time. So, it could not have been said that, on any ordinary meaning of the words, the fact that a ball might strike a person in the road was not foreseeable or reasonably foreseeable – it was plainly foreseeable. But the chance of its happening in the foreseeable future was infinitesimal. The House of Lords held in *Bolton v Stone* that the risk was so small that, in the circumstances, a reasonable man would have been justified in disregarding it and taking no steps to eliminate it.

But, it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, for example, that it would involve considerable expense to eliminate the risk.

In the present case, there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view, it was both his duty and his interest to stop the discharge immediately.

It follows that in their Lordships' view the only question is whether a reasonable man having the knowledge and experience to be expected of the chief engineer of *The Wagon Mound* would have known that there was a real risk of the oil on the water catching fire in some way: if it did, serious damage to ships or other property was not only foreseeable but very likely. . . .

A properly qualified and alert chief engineer would have realised there was a real risk here and they do not understand Walsh J to deny that. But he appears to have held that if a real risk can properly be described as remote it must then be held to be not reasonably foreseeable. That is a possible interpretation of some of the authorities. But this is still an open question and, on principle, their Lordships cannot accept this view. If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as farfetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.

In the present case, the evidence shows that the discharge of so much oil onto the water must have taken a considerable time, and a vigilant ship's engineer would have noticed the discharge at an early stage. The findings show that he ought to have known that it is possible to ignite this kind of oil on water, and that the ship's engineer probably ought to have known that this had in fact happened before. The most that can be said to justify inaction is that he would have known that this could only happen in very exceptional circumstances. But that does not mean that a reasonable man would dismiss such a risk from his mind and do nothing when it was so easy to prevent it. If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellant is liable in damages. The learned judge found this a difficult case: he says that this matter is 'one upon which different minds would come to different conclusions'. Taking a rather different view of the law from that of the judge, their Lordships must hold that the respondents (claimants) are entitled to succeed on this issue.[218]

3.11.3 The kind of damage

In later decisions that adopted the principle of *The Wagon Mound*, foreseeability is said to be relevant to the kind of damage and not to the exact way in which it occurred. Lord Pearce, in the well-known case of the House of Lords, ***Hughes v Lord***

218 Op. cit. fn 215.

Advocate,[219] put it succinctly that, to demand great precision on the test of foreseeability would be unfair to the pursuer, as the facts of misadventure are innumerable. The defendants are, therefore, liable for all the foreseeable consequences of their neglect. When the result is of a different type or kind from anything that a defendant could have foreseen, he should not be liable for it.

The Trecarrell[220] shipping case is a good example showing that the exact way in which the damage could occur is irrelevant to the test of foreseeability.

The Trecarrell was undergoing specialist repairs at a ship-repairers' yard, and the work involved coating her deep tank with vinyl lacquer. This work was to be carried out by specialist contractors. While the contractors' employees were transferring drums of the highly inflammable vinyl lacquer from the drydock to the ship, one of them dropped a drum, which fell on and cut a temporary electric cable. As a result, the drum broke, and the lacquer escaped and was ignited by sparks, caused by a short circuit. Both the ship and the yard were damaged by the fire.

The ship-owners sued the contractors, who joined the ship-repairers as a third party. Brandon J held that the employee of the contractors could reasonably have foreseen that dropping the drum would create a fire hazard, even if he could not reasonably have foreseen the particular source of ignition; that, therefore, in a situation where a high degree of care was needed, the employee was negligent, and that negligence caused the fire. Judgment was given for the ship-owners and the repair yard in the third-party proceedings.

Foreseeability depends on the facts of each case. In ***The Daressa***,[221] the kind of damage suffered was in question. Brandon J said:

> I accept that a question of reasonable foreseeability is a question of fact, but it does not follow that a court always needs evidence to decide it. If the question arises in a field of common human experience, such as crossing a road or driving a motor car, a court can plainly decide it without evidence. If, on the other hand, the question arises in a technical field, as in *The Wagon Mound* cases, evidence is equally plainly needed. In between these two extremes there are intermediate cases where, although evidence might well assist a court by supplementing its own knowledge and experience, it is not essential to enable the court to reach a conclusion.
>
> The master of *The Daressa* could reasonably have foreseen that any ship with which he collided might be operating with the assistance of a Government operating subsidy and that such operating subsidy might be lost during detention of the vessel for repairs.

3.11.4 Extent of damage

It does not matter if the extent of the damage resulting from the negligent act is greater than expected, provided the consequences were foreseeable. This, however, may lead to extreme results, but it is a matter of common sense and experience of the courts as to the extent to which damages may be awarded.[222] For example, the defendant

219 [1963] AC 837 (HL), p 857.

220 [1973] 1 Lloyd's Rep 402.

221 *The Daressa* [1971] 1 Lloyd's Rep 60, pp 63, 64.

222 It may appear, from the decision in *Warren v Scruttons* [1962] 1 Lloyd's Rep 497, that the extent of the damage awarded was rather remarkable, namely for the eye infection of the claimant, which resulted from blood poisoning after his finger was pricked by a poisonous wire due to defendant's negligence. It was said by Paull J, p 499, that:

> It is sufficient to say that one of the consequences of getting his finger poisoned was that he got a further ulcer in his eye, and the result of having that further ulcer in his eye is that the eye has become far more misty . . .

may not be found liable for all damage if there was contributory negligence on the part of the claimant, or not liable at all if the chain of causation was broken by a *novus actus interveniens*.

In ***The City of Lincoln***,[223] the defendant's vessel negligently collided with and caused damage to the plaintiff's vessel, whose master attempted to reach a port for safety, but the vessel grounded accidentally before he did so and was lost. In the absence of negligence by the master, the defendants were liable, not merely for the collision damage, but for the subsequent loss.

In ***The Metagama***,[224] the House of Lords approved and adopted the same approach as Lindley LJ in *The City of Lincoln*. The defenders admitted liability for a collision in which the pursuers' vessel was damaged, but they alleged that the damage was increased by the improper handling of the vessel by those in charge of her after the collision had taken place. It was held by the majority that those responsible for the damaged vessel were not guilty of negligence, and it followed that the defenders were liable for the whole of the damages claimed.

In ***The Oropesa***,[225] the CA, presided over by Lord Wright, adopted the same approach. Two vessels came into collision. The master of one of them launched a lifeboat so that he and some others could go across to the other vessel to confer with her master, despite the rough weather conditions. The lifeboat capsized, and some of the crew members were drowned, including the sixth engineer, whose parents claimed damages from the owners of the other vessel, which was partly responsible for the collision. The owners of the other vessel alleged that the master's act was *novus actus interveniens*. This was rejected. The master's actions were reasonable. Lord Wright said: '. . . the hand of the casualty lay heavily on [his vessel] and the conduct of the master and of the deceased was directly caused by and flowed from it.'[226]

In ***The Sivand***[227] (see para 3.11.6, below), the physical condition of the soil in a seabed (having been damaged by the colliding tanker) caused, subsequently, the capsizing of a barge (belonging to contractors who were repairing the harbour works). Evans LJ said:

> . . . 'reasonable foreseeability' does not limit the extent of damages when the kind or type of damage could be reasonably foreseen. This is, in effect, for the purposes of legal analysis a 'thin skull' type of case. The factor which increased the cost of repairs and therefore the amount of damages cannot be regarded as an independent, supervening cause. It follows that the reasonable cost is recoverable in full.[228]

3.11.5 Mitigation of loss or damage

It was commonly being expressed by lawyers and judges, in old judgments, that there was a duty upon a claimant to mitigate his loss. The expression caused misconceptions of the rule, which, sometimes, was put forward as being an obligation of the claimant to mitigate. Perhaps the misconception might have derived from misinterpreting the statement of Viscount Dunedin in ***The Metagama***,[229] who had stated:

223 [1890] P 15.
224 (1928) 29 LlL Rep 253; [1928] SC 21 (HL).
225 (1943) 74 LlL Rep 86; [1943] P 32.
226 Ibid, pp 92, 37.
227 [1998] 2 Lloyd's Rep 97 (CA).
228 Ibid, p 106.
229 (1928) 29 LlL Rep 253 (HL), p 256.

But it is always the duty of the person who is damaged to do his best to minimise his loss. This is really the same thing as to say that, if he might reasonably have avoided any part of the damage he has suffered, to that extent the damage is not such as arises directly from the act complained of. In many cases, the question is stated as to whether, after the original fault which started matters, there has been a *novus actus interveniens* which was the direct cause of the final damage.

What the rule, in fact, means is that the owner, or the master and crew, of an injured ship must take reasonable steps to minimise the damage[230] and preserve the ship, cargo or passengers on board from further loss. The test is how a prudent uninsured would have acted following the collision. If no reasonable steps are taken, and the ship suffers further damage, which would not have been suffered, had reasonable steps been taken, the claimant should not expect the defendant to pay for the further damage. There are many cases on this issue, some of which have already been discussed earlier in the issues of causation. Other cases are linked to the assessment of damages (see later).

Clarification of the principle of mitigation of loss in cases of damage suffered by a claimant owing to breach of duty of care by a defendant was made by the CA in *The Sivand* (see 3.11.6, below) and, in cases of breach of contract, in *The Solholt* (see Chapter 8, above). In these cases, it is explained that the claimant does not have a duty to mitigate his loss, as long as he takes reasonable steps to minimise the damage suffered by the defendant's breach. The burden of proof is on the defendant to show that the claimant is not entitled to all the damage claimed because he failed to take reasonable steps to mitigate his loss.

3.11.6 The idiosyncrasy of the claimant, remoteness and mitigation of damages

Under common law, the defendant must take his victim as he finds him (the 'thin skull' rule).[231] The principle applies, in particular, to personal injury cases, in which the claimant's physical characteristics at the time of the injury may have the effect of increasing the scale or extent of physical damage caused to him by the defendant's negligence.[232] In collision cases, however, the principle was not applied in the context of *The Edison/The Liesbosch*, but the House of Lords, in *Lagden v O'Connor*,[233] reaffirmed the principle and found the opportunity to overrule its decision in *The Edison*. Lord Wright had held, in ***The Edison/The Liesbosch***:[234]

The appellants' financial disability was not to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage

230 *The Egyptian* [1910] P 38.

231 *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405 (HL), where Lord Parker, CJ, re-asserted the common law rule that the defendant takes the plaintiff 'as he finds him'. This is exemplified by 'thin skull' cases.

232 A feature of 'thin skull' cases is that the plaintiff's physical characteristics are already in existence when the negligence occurs. The defendant cannot seek to reduce the damages on the ground that the extent of the claimant's injury was unforeseeable.

233 [2004] 1 AC 1067 (HL).

234 [1933] AC 449 (HL).

and the latter consideration goes to interference with profit-earning capacity; whereas the appellants' want of means was, as already stated, extrinsic.[235]

On the facts, *The Edison* fouled the moorings of a dredger, *The Liesbosch*, which was carried out to sea, and, thereafter, she sank. The owners of *The Edison* were solely liable for the loss. The dredger had been engaged in construction work with the Patras Harbour Commissioners. There was evidence that one or more dredgers were available in the Netherlands for purchase by the appellants to replace the lost one, but they did not have the money, as most of their liquid resources were engaged in the contract of dredging. As a consequence of the loss of *The Liesbosch*, the Patras harbour authorities threatened to cancel the contract and forfeit the deposit, unless it was replaced within a certain time. It was, therefore, necessary for the appellants to hire one, and they did hire *The Adria* from Italy. The rate of hire was very high, because she was somewhat larger than *The Liesbosch* and more expensive to work. Along with her, and owing to her size, the appellants were compelled to hire a tug and two hopper barges.

The appellants claimed all their losses from the owners of *The Edison*. Both the registrar and the judge awarded all damages, but the CA disagreed and reversed the judgment.

On appeal to the House of Lords, Lord Wright, affirming the CA decision, held:

The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss insofar as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes', or consequences of consequences.[236]

It took over 60 years for another similar shipping case to come before the courts. The CA in ***The Sivand***,[237] had difficulty in reconciling the principle of *The Edison* and, as it was bound by it, it found a way of distinguishing it from the facts of the case before it. The case is relevant to both causation and remoteness of damages, including mitigation.

Evans LJ, in *The Sivand*, restated the principles, thus:

The defendant to a claim in tort was liable for what the law regarded as the consequence of his wrongful act, identifying its consequences on a common sense basis and distinguishing in particular between what had caused rather than provided the occasion of the plaintiffs' loss, subject to reasonable foreseeability of the particular kind of loss and subject also to loss which resulted from negligence of the plaintiff or those to whom he was responsible in breach of his duty to mitigate his loss; when it was alleged that the loss had been caused by the intervening act of a third party, or other *novus actus interveniens*, then the inquiry was whether there was such an independent cause, not limited to whether the third party's act was negligent or not.[238]

235 Ibid, p 461.
236 Ibid, p 460.
237 *The Sivand* [1998] 2 Lloyd's Rep 97 (CA).
238 Ibid at p 105.

On the facts of this case, the defendants' vessel damaged the harbour installations belonging to the plaintiffs. The latter engaged contractors to carry out repairs. While carrying out the work of reconstructing one of the dolphins, the contractors encountered unforeseen conditions in the soil strata of the seabed; this caused the legs of the jack-up barge, which was at the time being used as a platform from which to transfer a concrete soffit onto one of the dolphins, to sink into the seabed and capsize the barge. The condition of the seabed was unforeseen and could not reasonably have been foreseen by an experienced contractor. There had been no intervening negligence on the part of the contractors.

Under cl 12 of the standard form contract conditions in the contract between the plaintiffs and the contractors, the contractors were entitled to, and recovered, extra payment from the plaintiffs for unforeseen physical conditions. The plaintiffs, in turn, sought to recover the amount they had paid to the contractors from the defendants. The other costs for repairs were paid, but there arose a dispute concerning this extra payment.

The defendants contended that the extra payment was the result of extra loss caused by an unforeseen event, the nature of the soil, and that, therefore, the capsize of the contractors' barge did not constitute foreseeable damage resulting from their own initial negligence. They alleged that there was in law an intervening event (a *novus actus*), which broke the chain of causation.

On the issue of causation, Evans LJ distinguished *The Edison* (*Liesbosch Dredger*) on the ground that, in that case, there was an extraneous cause.[239] The repair costs arising out of the contract here were not an extraneous cause.

In my judgment . . . the answer to the submission is that causation is established in the present case . . . and that 'reasonable foreseeability' does not limit the extent of damages when the kind or type of damage could be reasonably foreseen. This is, in effect, for the purposes of legal analysis, a 'thin skull' type of case. The factor which increased the cost of repairs and therefore the amount of damages cannot be regarded as an independent, supervening cause. It follows that the reasonable cost is recoverable in full.[240]

On the issue of mitigation and remoteness of damages, he stated:

Where the plaintiff acted in mitigation of his loss the sole relevant criterion was the reasonableness of the steps which he took in mitigation; provided he had acted reasonably he was entitled to recover the cost of mitigation as the correct measure of his loss; the defendants owed the plaintiffs a duty of care not to damage their property and it was at all times reasonably foreseeable that if they did so, the damage might need to be repaired and that contractors might be engaged to do the necessary work on an ICE form of contract; and the learned judge was right to find that it was foreseeable that the cost of repair might include the payment of remuneration which covered the risk of the relevant contractor encountering unforeseen physical conditions which added to the cost of the work and that all this was within the risk created by the defendants' negligence.

Hobhouse LJ, in *The Sivand*, treated the issue as an issue of mitigation only, rather than causation, and said:

This is a claim for damages for the negligent damaging of the plaintiffs' property. Once the causation of physical damage to the plaintiffs' property is complete, the only remaining question

239 In the light of the House of Lords' decision in *Lagden v O'Connor*, this statement in relation to the Edison is now irrelevant.

240 Ibid, p 106.

is the assessment of that damage in monetary terms, prima facie the difference between the value of the undamaged property and the value of the damaged property quantified as the cost of repair or reinstatement. Where the plaintiff acts in mitigation of his loss the sole relevant criterion is the reasonableness of the steps which he took in mitigation. Provided he has acted reasonably, he is entitled to recover the cost of that mitigation (even if unsuccessful) as the correct measure of his loss. Questions of foreseeability are not relevant, save so far as they may enter into the question of the reasonableness of what the plaintiff did in mitigation . . . The defendants cannot, and do not, deny that they owed the plaintiffs a duty of care not to damage their property. It was, further, at all times reasonably foreseeable that if they did so the damage might need to be repaired and that contractors might be engaged to do the necessary work on an ICE form of contract.[241]

The Edison had caused uneasiness and uncertainty in legal circles, but it could not be overruled otherwise than by the House of Lords itself. It is interesting to note that the Privy Council, in ***Alcoa Minerals of Jamaica v Broderick***,[242] disapproved of the result in *The Edison* but could not overrule it. This concerned a house that was damaged by nuisance for which the defendant was liable, and the claimant could not repair it until the damages were paid. It was held that the claimant acted reasonably.

Finally, the House of Lords restated the principle of the 'thin skull rule', even in cases of impecuniosity of the claimant, in ***Lagden v O'Connor***,[243]thus:

In approaching the question of damages payable to an injured party whose expenditure in mitigation had been augmented by his impecuniosity, the court was not precluded from considering the injured party's lack of means as being a factor too remote to be taken into account, but would apply the principle that a wrongdoer had to take his victim as he found him and had to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages.

An amount equivalent to the spot hire rate of hiring an alternative vehicle would normally be recoverable by the claimant who, deprived of the use of his car by the negligence of the defendant, had used the services of a credit hire company, if it was shown that the claimant's impecuniosity was such that he would have been unable to obtain a replacement car had he not used a credit hire company; and it was reasonably foreseeable that there would be some car owners who would be unable to obtain a replacement car.

3.12 ASSESSMENT OF DAMAGES

This part considers what is recoverable when there is a total or a partial loss of a ship due to a collision and how the losses are ascertained. The Admiralty registrar determines the assessment of damages, after the court has determined the issues on liability.

3.12.1 General principle: *restitutio in integrum*

The principles for recovering damages in collision cases are based on the general principles of damages under common law. The party who has sustained damage by

241 *The Sivand* [1998] 2 Lloyd's Rep 97 (CA), p 108.
242 (2000) *The Times*, 22 March (PC).
243 [2004] 1 AC 1067.

collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered.[244]

The objective is to have *restitutio in integrum*, which expresses the right to a full and complete indemnity. In 1849, Dr Lushington examined this principle while considering assessment of damages when a ship (which was performing a profitable charter) was lost owing to a collision, in ***The Columbus***,[245] in which he stated:

> It has been argued . . . that the principle upon which this court proceeds in all matters of this kind is a *restitutio in integrum*; in other words, the principle of replacing the party who has received the damage in the same position in which he would have been, provided the collision had not occurred. As a general proposition, undoubtedly, the principle in question is correctly stated; and not only in this court, but in all other courts, I apprehend the general rule of law is, that where an injury is committed by one individual to another, either by himself or his servant, for whose acts the law makes him responsible, the party receiving the injury is entitled to an indemnity for the same. But although this is the general principle of law, all courts have found it necessary to adopt certain rules for the application of it; and it is utterly impossible, in all the various cases that may arise, that the remedy which the law may give should always be to the precise amount of the loss or injury sustained. In many cases it will, of necessity, exceed, in others fall short of the precise amount.

Apart from the above observation, in practice, the principle of *restitutio in integrum* is further affected, in Admiralty cases, in the following ways: first, the right of the defendant to limit his liability by establishing a limitation fund[246] will inevitably affect the amount recoverable by various claimants. All claimants will take from the fund *pari passu*, or in the priority the court determines, and their recovery will depend on the amount of the fund. Second, exception from liability for negligent navigation provided in the contract of carriage affects full recovery by the cargo-owner, whose cargo was damaged or lost on board the carrying ship. Under English law, he can only recover from the other ship at fault in proportion to the degree of its fault. Third, the apportionment of liability on the basis of each ship's fault as between two or more ships at fault affects the right to a full and complete compensation.

One method of ascertaining the damages in an action in tort is to ask what loss a reasonable man would anticipate as a result of a wrongful act.[247]

3.12.2 Total loss of a ship – calculation of damages

The general principle to which the court strives to give effect is *restitutio in integrum*, subject to the limitation that the damages must not be too remote in law. This means that the owner of the lost ship is entitled to be placed in the same position, so far as money can place him, as if the collision had not taken place (***The Philadelphia***).[248]

3.12.2.1 Yardstick applicable to ascertain loss sustained

It had been thought that a conflict existed between the authorities as to whether the value of the ship was to be assessed on the basis of her market value at the time of

244 The principle was laid down by Dr Lushington in *The Clarence* (1850) 3 W Rob 283, p 285.
245 (1849) 3 W Rob 158, at 162, 163.
246 See Ch 14, below.
247 Per Lord Porter in *Morrison Steamship Co Ltd v Greystoke Castle* [1947] AC 265, p 295 (HL).
248 *The Philadelphia* [1917] P 101 (CA).

the collision, enhanced by the value of an existing charter (*The Columbus*,[249] *The Clyde*,[250] and *The Iron-Master*,[251] per Dr Lushington), or her value that she would have had at the end of the voyage as enhanced by the loss of earnings, or interest, as an additional compensation (*The Northumbria*,[252] per Sir Robert Phillimore).

However, as was noted by Sir Jeune in ***The Kate***,[253] the conflict seemed to be more apparent than real, and the result of the two calculations in figures should practically be identical. He further said that: unless in one or the other of these ways the owner gets the benefit of the profitable engagement of his ship, he obviously fails to realise a *restiutio in integrum*.

The question in this case was whether the value of the lost vessel was to be fixed at the time of the collision as if she were a free vessel, without reference to the benefit that might accrue under her then existing contractual obligations, or whether the profits that might be the result of the performance of her existing charter were to be taken into account as an element in her value. The decision was that the latter was the correct rule of assessment.

Sir Jeune expressed the view that nothing said in the decisions of Dr Lushington would exclude 'a fact such as the existence of a profitable charter from being allowed to enhance the value of the vessel at that time'. In order to remove the claims as far as possible from the region of speculation, the calculation would be made as at the end of the voyage.

Sir Samuel Evans, in ***The Philadelphia*** (at first instance), supported the analysis of Sir Jeune and concluded that, in a case of a total loss of a vessel under charter, the measure of damages is to value the ship at the time of her destruction or loss, and to add the proper sum for freight or profits at the end of the voyages fixed by her existing charters, subject to proper deductions for contingencies and wear and tear.

The decision of the CA in ***The Racine***[254] (approving *The Kate)* did not differ in principle. It only extended the application of the rule to a succession of existing charter parties. Fletcher Moulton LJ explained the reason and method of calculation of damages, by saying:

> By adopting this plan there is no change in what you are calculating – you are calculating the pecuniary difference made to the plaintiff by the collision – but you calculate it by considering the position of the plaintiff at a date at which you can get the requisite data more easily, and you allow interest from that date only. The date taken is the conclusion of the voyage. Setting aside other risks, the plaintiff, but for the collision, would at the end of the voyage have been in possession of his ship (diminished in value by the wear and tear of that voyage), and would have been in possession of the freight. Neither of these things, however, were certainties. There was the risk of loss during the subsequent part of the voyage, and these two sums must be discounted according to that risk. This is an easy task inasmuch as such risks are the ordinary subject of insurance, and having allowed for these other risks, you get a sum of money the possession of which would be the equivalent of the plaintiff's position had the collision not taken place.

249 (1849) 3 W Rob 158.
250 (1856) Swa 23.
251 (1859) Swa 441.
252 (1869) LR 3 A&E 6.
253 [1899] P 165, pp 168, 174.
254 [1906] P 273, p 280.

At the appeal of the case in ***The Philadelphia***,[255] it was argued by the appellants that, on the application of *The Racine* (which was misinterpreted), the ship ought to be valued as on the probable date on which she would have arrived at her port of destination and there the market or probable market value of the vessel at that date should be taken into account.

Swinfen Eady LJ said that there is no authority whatever for that contention. The general rule is that, where a ship is under a contractual engagement, the ship-owner is entitled to say: 'what I have lost is the value of my ship with her engagements'. If the engagement is profitable, it will enhance the value of the ship; if, on the other hand, it is an unprofitable engagement, possibly it might diminish her value. Under these circumstances, he said (at p 111):

> I am of opinion that the judgment of the learned President below was right when he said that the right rule for arriving at the damages in the case of the total loss of a vessel under charter was to value the ship at the time of its destruction or loss, and to add to this the proper sum for freight or profits at the end of the voyages fixed by her existing charters, subject to proper deductions for contingencies and wear and tear. It is in that way that the value of the thing lost to the ship-owner is arrived at; it is the value of the ship with her engagement which has to be valued; and that, I think, is really the view of the various judges before whom the question has previously come.

In a more recent case, ***The Baltic Surveyor and Timbuktu***,[256] the owner of the BS and the pontoon, Ms V, appealed against the amount of damages awarded to her in relation to the sinking and loss of her vessel and pontoon as a result of the negligent mooring of T, owned by C.

V contended that the court had erred (1) in its assessment of the value of BS, because it had been misinformed as to the details of another similar yacht, which was treated as the closest comparable for the purpose of valuing BS; (2) by not valuing the loss of the pontoon at its replacement cost; and (3) by not compensating her for loss of personal use of her vessel.

Allowing the appeal on the first issue, the CA took as a yardstick of the valuation, not the comparable vessel, but the selling price of BS.

As to the valuation of the pontoon, the correct approach was to consider V's actual loss in relation to it and then calculate a financial figure for the loss.[257] The test of reasonableness ought to be applied to the damages awarded.[258] The loss in the instant case was the value of the old pontoon, and a replacement value would have been unfair and unreasonable.

As to loss of use, the value of the loss of the vessel was not affected by the amount of personal use.[259] Interest awarded had compensated V in full for her loss of use.

3.12.2.2 What is the value of the ship if there is no market?

If there is no market value, he will be entitled to the value of the ship to her owner as a going concern, that is, what the ship was worth from a business point of view.

255 Op. cit. fn 248, p 108.
256 [2002] EWCA Civ 89; [2002] 1 Lloyd's Rep 623.
257 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 applied.
258 *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 1 WLR 659 approved.
259 *Owners of the Steamship Mediana v Owners of the Lightship Comet* [1900] AC 113 applied.

In ***The Harmonides***,[260] the court overruled the measure of damages awarded to the owners of a sunken ship by the registrar. The factors to be taken into account were explained by Barnes J, who stated that:

> The best evidence is that of those who know the ship, and the next best evidence that of those who have experience of the market, but who do not know the vessel except from the shipping records. There are other criteria, such as the amount of capital invested, the amount of depreciation, the amount of profits, and so forth. All these matters have to be considered, to my mind, where it is impossible to say that there is a real market test of the value of such a vessel as this. If one goes to the root of the matter, it is obvious that what the ship-owners lose if a vessel like this is run into and sunk is what it would cost to put them in the position they were in before the accident. But where a ship like this has gone to the bottom you cannot, speaking from a business point of view, put them in the position they were in before, because you cannot replace the vessel which is at the bottom of the sea; you cannot buy another like her in the market; you cannot get another made immediately, and if you bought another ship she would be new, and consequently more valuable, because she would start as a new ship from that day, and, therefore, you would have to discount her value down. So that the real test, where there is no market, is, as counsel on both sides agree, what is the value to the owners, as a going concern, at the time the vessel was sunk? You cannot get at this with any great certainty, for you cannot get at it from the market value. Possibly, for such a ship at such a time there would be no buyers and she would have to be sold for old iron. You cannot deal with it like an ordinary commodity being sold every day. You must look at it and see what is the loss to the owners. It has been pointed out that you may look at the original cost, plus the money expended on her, and so forth. That is of assistance, but it is not complete assistance, because it is a rough and ready method. You may look and see also how the ship is paying. That, however, is not a complete test, because you cannot be sure that the way she has been paying will continue. But one thing is absolutely certain – you cannot say the test is her market value.[261]

3.12.2.3 Loss on basis of actual not speculative charter

The owner of the ship is entitled to recover the value of the charter, but there must be an employment contracted for, not uncertain or speculative profits (***The Philadelphia***, above). It is not disputed that a proper measure of damages to satisfy, as closely as possible, *restitutio in integrum* should include a net sum of loss of earnings.

This is subject to the proviso that such sums are proved and are not speculative (***The Argentino***),[262] in which the House of Lords confirmed the method of calculating damages as shown above, and, in particular, it held that the damages claimed, in this case – see also below – were not too remote but flowed directly and naturally from the collision, and that such damages should be allowed as they would represent the loss of ordinary and fair earnings of such a ship, having regard to the fact that the contract had been entered into.

In ***The Columbus***,[263] the difficulty of the Admiralty judge was that the claims seemed to be speculative. The owner of the lost 'smack' claimed not only the value of his vessel but further sums, first, for wages, which it was said he would have earned as master of the smack, and, second, for profits that it was supposed the smack would have made after the time of the collision.

260 [1903] P 1.
261 Ibid, p 6.
262 *The Argentino* (1888) 14 App Cas 519 (HL).
263 (1849) 3 W Rob 158.

In ***The City of Rome***,[264] Lord Hannen refused to allow a claim for the value of the fish that it was alleged would have been taken. An attempt was made there to introduce an uncertain and speculative profit. Where, on the other hand, there is a definite contract for the employment of the vessel, the charter is to be taken into account, whether there is one or more consecutive charters.

3.12.3 Partial loss of the ship and incidental losses

3.12.3.1 Cost of repairs

The owner is entitled to such costs of repairs as to put his vessel in substantially the same state as she was in before the damage occurred. He must act as a prudent uninsured and mitigate his losses.

There is no subtraction from the sum awarded on the basis of new for old, and this is something the wrongdoer must accept. The repairs must be carried out at a reasonable expense and must be satisfactory. Permanent, as opposed to temporary, repairs would be reasonable.

3.12.3.2 Loss of fixture – loss of use during repairs

The House of Lords, in ***The Argentino***,[265]conclusively held that the loss of earnings in an employment contracted for is not too remote to constitute an element to be considered in the assessment of damages in the case of a partial loss. If the claimant obtains as damages the loss that he has sustained owing to the loss of the employment he had secured, he is put in the same position as if there had been no detention for the repairs; on such reasoning, he cannot recover, in addition to that, demurrage in respect of the detention period.

Lord Herschell said, on the assessment of damages, at pp 523–4:

> . . . I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the Court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appear to me to be the direct and natural consequence of the collision. I observe that no mention was made in the judgments of the learned judges in the Courts below of the claim for demurrage and the allowance of the registrar in respect of it. The matter was pointedly brought before your Lordships in the arguments at the bar on behalf of the appellants, and it was urged that if the judgment of the Court below were affirmed the respondents would get the damages twice over. I think it right, therefore, to state how this matter ought in my opinion to be dealt with.

264 (1887) 8 Asp 542.

265 *Owners of the Steamship Gracie v Owners of the Steamship Argentino (The Argentino)* (1888) 14 App Cas 519 (HL).

Where no claim is made in respect of loss arising from the owner having been deprived of the earnings of a voyage which was in contemplation, and the engagement for which had been secured, it would be right, and is no doubt the usual course, to award damages under the name of demurrage in respect of the loss of earnings which it must reasonably have been anticipated would ensue during the time of detention. But where such a claim is made as in the present case, the owner cannot, I think, be allowed in addition, as a separate item, demurrage in respect of the time the vessel was under repair. If he obtains as damages the loss which he has sustained owing to the loss of the employment he had secured he is put in the same position as if there had been no detention.

There would of course have to be taken into account, however, that if the ship-owner lost the contemplated voyage, he had the use of the vessel as soon as the repairs were completed for any other purpose, and what he earned, or rather what he could have earned upon any other adventure during the time he would otherwise have been engaged upon the contemplated voyage, must be set against the sum allowed him in respect of the loss of that voyage. It must be borne in mind of course that the set-off or deduction ought only to be in respect of what might have been earned in that part of the time covered by the lost voyage during which the owner had the use of his ship. It is, I think, only in this way that in a case like the present the length of time during which the ship was laid up for repairs can be taken into account. It is one of the circumstances to be considered in assessing the damages.

Interesting issues arose with regard to the calculation of damages in ***The Vicky 1***.[266] The collision between V and *Front Ace* (F), in Indonesia, caused significant damage to F. The owner of V having admitted liability, the question for the registrar was the assessment of damages.

After the collision, the vessel discharged part of her cargo at Balikpapan and then proceeded to another Indonesian port, where she discharged the remaining cargo before she sailed to a port for permanent repairs, which were necessary for her to be able to perform the Chevron fixture. However, prior to arriving at the repair port, the master deviated, without explanation, for 12 hours and then returned to the same point the ship was before the deviation. As it happened, Chevron lawfully cancelled the fixture, and a new charterparty with Vitol was entered into at a reduced rate. Her owners claimed damages on the basis that had it not been for the collision, the Chevron fixture would not have been lost.

There was an issue of causation as to whether the collision, or the deviation (as the defendants alleged), was the cause of the loss of the fixture. However, as F did arrive at the port in accordance with the ETA arrangements for the Chevron fixture, the registrar, with whom the CA agreed, determined that the deviation was not the effective cause of the loss of the fixture.

The next question was: what would be the correct approach to quantum. Lord Clarke MR, delivering judgment at the CA, distinguished *The Argentino* and held that:

1 *The Argentino* was not binding authority for the proposition that the ballast/laden or loss of use/loss of profit basis was the appropriate methodology to be adopted in all cases where a claimant lost a fixture as a result of a collision. The House of Lords in that case was not saying that, as a matter of principle, that was the only method of assessing loss of profit. It was simply considering whether the loss advanced by the claimants was recoverable. The question for decision in every such case was simply what, if any, loss of profit was incurred as a result of

266 *Owners of the Front Ace v Owners of the Vicky 1 (The Vicky 1)* [2008] 2 Lloyd's Rep 45.

the collision. How the loss of profit was to be calculated would depend upon the facts of the particular case. In all the circumstances the registrar had been entitled to prefer the claimants' methodology to that of the defendants'.

2 F could show that, but for the collision, they would have performed the fixture. It followed that they were entitled to recover the loss flowing from the loss of the fixture, unless there was a break in the chain of causation (it was found that there was not).
3 The ballast/laden method was unsuitable for very large crude carriers – which had one major loading area – because it did not reflect the commercial importance to an owner of discharging as closely as possible to that area, nor did it take account of different voyage lengths.[267] By contrast, the 'time equalisation method' did take account of the overall position until the end of the substitute charterparty, which had been entered into as a direct result of the collision. The parties' experts agreed that the 'time equalisation method' was a valid methodology, and the registrar had been entitled to adopt it.
4 The instant case was not one in which F's loss depended upon a chance of making a particular contract.

The claimants proved, on balance of probability, that they would have employed the vessel profitably in the 57-day period. Thus, the method adopted by the experts for calculating damages was on the basis of the 'time equalisation method'.[268]

3.12.3.3 Detention damages – mitigation issues

The basis of detention damages (see ***Mersey Docks and Harbour Board v Marpessa***)[269] is that the plaintiffs are only entitled to recover damages (by way of demurrage) in respect of such money as the court was reasonably satisfied had been lost.

This was a case of collision in which the steamship *Marpessa* ran down the sand pump dredger *G. B. Crow* and disabled her for 9 days. This dredger was used by the Mersey Docks and Harbour Board in the necessary work of dredging the bar outside Liverpool. She earned nothing in money, and the cost for maintaining her was great, but she did indispensable service in clearing away the sand. The claim in damages was for demurrage for 9 days' detention at 104l. per day.

Lord Loreburn LC, commenting on damages, generally, said:

> . . . Until the case of [1897] AC 596, the view appears to have prevailed that no damages beyond the actual loss in repairs, loss of wages and so forth, could be recovered where an injured vessel made no money for its owners and merely rendered services in dredging. That case corrected the error, and decided that in such a case general damages might be recovered as well as the cost of procuring another vessel to do the work; but it did not, and could not, lay down a rule of universal application for the ascertainment of the damages in each particular case. For the damages depend upon the facts and upon the actual loss sustained by the owner, which will vary in different cases.

267 Lord Clarke MR also commented that the ballast/laden method may be appropriate in a particular case, but it may not, and all will depend on the circumstances, approving the reasoning of the registrar.

268 This method was based upon the earnings that the vessel could expect to have made in the 57 days between 20/1/2003, which was the projected end of the Chevron fixture, and 18/5/2003, which was the actual end of the Vitol fixture.

269 [1907] AC 241, at 244–245.

It seems to me that the loss sustained in the present case under the claim of demurrage is the value of the work which would have been done by the dredger during those days had she not been disabled. So many tons of sand would have been removed, which it is the duty and the interest of the plaintiffs to remove, and which by reason of the defendants' negligence were not removed. If the plaintiffs had hired another vessel to do this work they could have recovered the cost of doing it. They have not done so, no other vessel being available at so short a notice, and, perhaps, not being available at all . . .

In fact, the plaintiffs put in a mixed claim, made up mainly on the basis of what the dredger's services cost them; but they added an item for owner's profit, which was appropriate enough if they had paid it to the owner of a vessel which they hired, but had no place in a claim based on the cost to themselves of the services rendered by the dredger . . .

In ***The Naxos***,[270] P's vessel A was damaged in a collision at sea with D's vessel, for which D was wholly responsible. The next day, a surveyor advised that permanent repairs to A could be deferred, and she continued her charter and performed four more charters before permanent repairs were carried out. These repairs took 5 days, and, as a result, A was delivered late under a charterparty, and P claimed against D in respect of, inter alia, a trading loss of 5 days' profit under the charterparty.

Brandon J held that: (1) the mitigation point was a question of fact and, in the circumstances, the plaintiffs had not acted unreasonably; (2) the rate of profit under that charter was the basis of calculation for damages for detention, but that, if the rate was unusually low or high and therefore not reasonably representative, the court should seek other evidence of the ship's earning capacity, such as averaging over a number of voyages; (3) it would be unfair to the defendants if only the higher figure of the charterparty, subsequent to the detention, was taken into account.

In ***The Hebridean Coast***[271] (HC), which collided with the LC, the owners of HC admitted liability. The LC belonged to the Central Electricity Authority (CEA) and was one of the vessels used to bring coal to London from various ports. CEA claimed loss of the use of the vessel for coal carriage due to detention for the period when the vessel was undergoing repairs. During the detention period, none of CEA's ships was idle. A number of chartered ships were used, at the time, but no specific ship could be said to have taken the place of LC.

The case reached the House of Lords on appeal, which held that, where it cannot be proved that any special loss has been sustained by the detention of a ship, the measure of damages should be based on interest on the depreciated value of the ship, and not on a calculation of the cost of chartering tonnage to replace the detained ship.

It was not proved that the loss of use of the ship resulted in CEA having to use chartered tonnage. The finding that none of CEA's ships was idle did not exclude the possibility that they were not being used to their full capacity and so were able to carry the very small proportion of the total coal carried during the remainder of the relevant period, which LC would have carried during the detention period. Thus, CEA could recover only general damages, based on interest at 7 per cent on the depreciated value of their ship.[272]

270 [1972] 1 Lloyd's Rep 149.

271 *Owners of the Lord Citrine v Owners of the Hebridean Coast (The Hebridean Coast)* [1961] AC 545 (HL).

272 *Owners of No. 7 Steam Sand Pump Dredger v Owners of Steamship Greta Holme* [1897] AC 596 and *Admiralty Commissioners v Owners of the SS Susquehanna* [1926] AC 655 applied.

3.12.3.4 Routine repairs during collision damage repairs

If the claimant has his routine repairs carried out at the same time as the collision repairs, he is only entitled to recover loss of use and dock charges for the time of detention needed to repair the collision damage. Loss of use caused owing to detention in the shipyard to carry out owner's repairs should be deducted.[273] If the routine repairs are not necessary but are just brought forward, the wrongdoer will not be entitled to any credit for this, in the sense that the claimant would have lost the use of the ship sometime later, provided the routine repairs do not take up extra time.[274]

In ***The Admiralty Commissioners v SS Chekiang***,[275] the House of Lords held that the fact that the opportunity was taken to do the refitment repairs, which had not become necessary at the time of the collision, was not a ground for reducing the liability of the respondents to make good the damage caused by the collision, and that the registrar had rightly allowed damages as for the total deprivation of the use of the vessel for the 20 days.

Per Viscount Dunedin and Lord Sumner: In awarding damages in a collision action, there is no absolute rule that the damages for the detention of a warship, or other non-profit-earning ship, are to be calculated on the basis of a percentage of the capital value of the ship at the time of the collision. Regard must be had to the character of the ship and the duties to be performed by her in relation to capital value.

Further, per Lord Sumner: 'The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject.'[276]

3.12.3.5 Apportioning detention loss and expenses

In ***The Haversham Grange***,[277] the defendants, owners of the other wrongdoing vessel in the second collision, objected to paying any portion of the dock dues on the ground that the repair required for the damage caused by their vessel occupied a shorter time than what was required for the repair of the damage sustained in the first collision, so that the plaintiffs had not been put to any additional expense.

The CA (reversing first instance) held that the principle as to apportionment of expenses between owner and underwriter in respect of dry-docking for simultaneous work on the vessel[278]applied. Therefore, the defendants were liable for a proportion of the dry-docking and incidental expenses, but not for demurrage, that is, detention damages. (The distinction between detention damages and liability for dock dues was disapproved of by the House of Lords; see below.)

273 *The Hassel* [1962] 2 Lloyd's Rep 139.
274 *The Ferdinand* [1972] 2 Lloyd's Rep 120.
275 [1926] AC 637 (HL).
276 [1926] AC 637 (HL), pp 643, 645.
277 [1905] P 307.
278 That principle had been laid down in *The Vancouver* (1886) 11 App Cas 573, and explained in *The Ruabon* [1900] AC 6 (HL): *The Ruabon* concerned a claim under a marine policy where the vessel had been damaged by a peril insured against and was therefore put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due, but the owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have the survey made, and her classification was renewed. It was held that the expenses of getting the vessel into and out of the dock, as well as those incurred in the use of the dock, fell upon the underwriters alone, and could not be apportioned between them and the owners.

In ***The Carslogie***,[279] the ship was damaged in a collision through the fault of another ship; she received temporary repairs that rendered her seaworthy, but, on the way to a port where permanent repairs were to be effected, she encountered heavy weather and suffered damage rendering her unseaworthy, requiring immediate repair. Both sets of repairs were effected concurrently, the work occupying 30 days. Ten days would have been required for the collision damage if executed separately.

It was held that the owners of the ship at fault in the collision were not liable for damages in respect of the 10 days' detention, as the heavy weather damage was not a consequence of the collision, and the owners of the damaged ship sustained no loss of profitable time by reason of the fact that, for 10 out of the 30 days occupied in repairing that damage, she was also undergoing repairs necessitated by the collision.

The *Haversham Grange* was explained; although the method of calculating damages for detention by the court in that case was approved, the distinction between detention damages and liability for dock dues/expenses was not necessary and was disapproved.

3.12.3.6 Out-of-pocket expenses and other consequential losses

The ship-owner or demise charterer can recover, not only the immediate costs of repairs, but any other loss foreseeably resulting from the collision, which is incidental or consequential to the collision, including financial loss. Financial loss includes loss of profit, survey costs, the cost of dry-docking and out-of-pocket expenses, such as payment for salvage services, towage services, dock dues.

When a substitute vessel is hired to perform an existing contract until repairs are completed, the damages include cost of hire paid for the substituted ship, which is consequential financial loss of the owner or demise charterer. The claimant is entitled to recover from the defendant, not only the out-of-pocket expenses caused by the collision, but also substantial damages for the loss of the services that the damaged ship would have performed during the time her place was taken by the substituted ship (***The Mediana***[280]).

Out-of-pocket expenses or consequential financial loss do not include pure economic loss (see below).[281]

The owner or demise charterer of the damaged ship can recover the type of financial loss that results from the damage to their property in which they have proprietary or possessory rights. This is not pure economic loss in the sense discussed below.

3.12.3.7 Pure economic loss

Whereas the out-of-pocket expenses and consequential financial loss are part of recoverable damages, the courts generally will not give redress to any party claiming loss of income, wasted expenditure or loss of profits, when such loss is purely economic loss. It will be purely economic loss when the loss derives from loss of

279 *Carslogie Steamship Co Ltd v Royal Norwegian Government (The Carslogie)* [1952] AC 292; [1951] 2 Lloyd's Rep 441 (HL), pp 445, 448.

280 *The Owners of the Steamship Mediana v The Owners, Master and Crew of the Lightship Comet* [1900] AC 113; *The Greta Holme* [1897] AC 596.

281 The principles applicable to recovery for pure economic loss have been explained in Ch 8, under liability of classification societies.

contractual rights, as opposed to proprietary rights or possessory rights.[282] Proprietary rights are held by owners of a property or a person entitled to possession of a property (for example, a demise charterer of a ship). A voyage or time charterer does not possess proprietary rights, but only contractual rights. The issue of non-recoverable pure economic loss arises when a time, or voyage, charterer claims loss of profit by the non-use of the ship, or incidental expenses, after the collision damage.

Hewson J held, in ***The World Harmony***: 'There is no reported case, so far as I am aware, in the long history of chartering where a time charterer has recovered damages for pecuniary loss because of damage by a third party to the chartered vessel.'[283]

The same issue arose in ***The Mineral Transporter***,[284] which is worth noting, particularly because the time charterer was, in fact, the owner of the ship that suffered damage by collision, but he was claiming loss of profit (financial loss) in his capacity as a time charterer of the ship.

The Supreme Court of New South Wales held that the time charterer was entitled to recover the amount of hire paid while the vessel was not operational and the profits it lost during that period, and that the bareboat charterer was entitled to recover the total cost of repairs and the amount by which the hire had been reduced, and, in quantifying the damages, the days lost by reason of the union ban should be included.

On appeal to the Privy Council, it was held, allowing the appeal, that it was a principle of common law that, if a wrong was done to a chattel, a person who merely had a contractual right in relation to the chattel and not a proprietary or possessory right could not bring an action against the wrongdoer for injury to his contractual right, and that principle had been applied so that it had become well established that a time charterer could not recover damages for pecuniary loss caused by damage to the chartered vessel by a third party. Therefore, the first plaintiff, suing as time charterer, and not as owner of the damaged vessel, to recover wasted hire paid during the time the repairs to the injured ship were carried out, was not entitled to recover from the defendant the hire that had been paid to the bareboat charterer, nor the loss of profits while the vessel was not operational.[285]

This principle would also apply to other parties, such as sub-charterers, stevedores, surveyors or agents of the damaged ship, claiming economic loss for loss of income or wasted expenditure.

In the context of pollution damage caused to a sea resort by colliding ships, see Chapter 16, below.

282 *The Aliakmon* [1986] AC 785; it should be noted, however, that the cargo-owners in *The Nicholas H* lost against the classification society, despite their proprietary interest in the lost cargo. They claimed economic loss for damage to their cargo carried on the ship at the time of its loss, contending that the classification society owed them a duty of care when its surveyor negligently allowed the ship to sail without permanent repairs being carried out first. The main reason of the House of Lords for not recognising a duty of care in such a case was that, upon the application of the third ingredient of the test in negligence, it would not be fair, just and reasonable to impose such a duty to classification societies, particularly because the cargo interests have redress against the owners of the ship, whose duty to make the ship seaworthy is non-delegable.

283 [1965] 2 WLR 1275, [1965] 2 All ER 139, p 155.

284 *The Mineral Transporter and The Ibaraki Maru – Candlewood Navigation Corp v Mitsui Osk Lines* [1986] AC 1.

285 Ibid, pp 15, 24, 25.

3.12.4 Damages in foreign currency

In 1976, the House of Lords changed the old rule that the court did not have power to award damages other than in sterling and held, in *Miliangos v George Frank (Textiles) Ltd*,[286] that the court has such power.

The principle was confirmed again by the House of Lords in 1979, in a collision case, ***The Despina R***,[287] where it was held that, if the claimant incurs expenses for the repairs to the ship after a collision, in a number of currencies, the currency in which he normally conducts his business will be taken into account. After the collision between D and E, the owners of D agreed to pay the owners of E 85 per cent of the damage, the expense of which had arisen in several currencies, bought in the currency of the plaintiffs' business.

In 1994, the House of Lords, in ***The Texaco Melbourne***,[288] followed its previous decision, *The Despina R*, and held: If the contract disclosed no intention as to the currency in which damages for breach were to be payable, they should be calculated in the currency in which the plaintiff incurred the loss. In the instant case, as the plaintiff was Ghanaian and normally did business in Ghanaian cedis, damages should be calculated in that currency. Their Lordships rejected the argument that damages should be calculated in the currency used in the closest market to the plaintiff where the lost cargo could be replaced. In the instant case, the nearest market was Italy, and the currency used was US dollars, but, to obtain dollars from the bank, the plaintiff had to pay cedis.

Following these leading authorities, the CA expanded on this principle and stated, in ***Virani Limited v Manuel Revert Y Cia SA***,[289] a case involving breach of contract:

> The contract failed to provide a decisive interpretation regarding the applicable currency. . .
> The proper approach was to enquire which currency most truly expressed the claimant's loss; the relevant test was to ask what was the currency, payment in which would as nearly as possible compensate the claimant in accordance with the principle of restitution, and whether the parties must be taken reasonably to have had that in contemplation.

Thus, the claimant is entitled to damages measured, not in the currencies immediately involved, but in the currency in which (he can prove) it was reasonably foreseeable he would have to incur the expenditure for repairs, or feel the loss. The yardstick is the currency in which he normally conducts his trading operations.

This is not always easy, because, in international shipping and trade, parties deal in more than one currency. For example, in ***The Folias***,[290] which was decided on appeal to the House of Lords, together with *The Despina R*, above, cargo had been shipped to Brazil by charterers on board a Swedish-owned motor vessel. The cargo was damaged on arrival owing to defective ship refrigeration. A claim for damages by the cargo receivers was settled by the charterers, with the owners' agreement, and payment was made in Brazilian cruzeiros. To obtain the cruzeiros, the charterers,

286 [1976] AC 443 (HL) (relating to damages for breach of contract).
287 *Owners of the Eleftherotria v Owners of the Despina R (The Despina R and The Folias)* [1979] AC 685 (HL); also known as *Services Europe Atlantique Sud (Seas) v Stockholms Rederiaktiebolag Svea (The Folias)*.
288 *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473 (HL).
289 [2003] EWCA Civ 1651; [2004] 2 Lloyd's Rep 14.
290 *Services Europe Atlantique Sud (Seas) v Stockholms Rederiaktiebolag Svea (The Folias)* [1979] AC 685.

who were a French corporation, were obliged to use French francs, the currency in which their business dealings were conducted. In arbitration proceedings, by which time the value of the cruzeiro in French francs was half the value it had been at the time of the payment, the owners admitted their liability under the warranty of seaworthiness, but contended that the charterers should be reimbursed the cruzeiros and not the French francs as claimed. The arbitrators made their award in French francs as being the most appropriate and just result. On appeal to the court, Goff J held that the award should have been made in cruzeiros, as being the currency in which the loss was incurred. On further appeal, the CA held that the damages should be awarded in French francs, as being the currency that most truly expressed the charterers' actual loss.

The House of Lords ultimately decided this point in both cases, *The Despina R* and *The Folias*, thus:

1 It was reasonably foreseeable that a plaintiff who conducted his business in a certain currency would use that currency to purchase the currency required to put right the damage caused by the defendant's tort, and, applying the principle of *restitutio in integrum*, that was the currency in which damages should be awarded.
2 Where the terms of the contract did not expressly or by implication show that the parties had intended that payment arising from breach should be paid in a specific currency, the court should give judgment in the currency that best expressed the party's loss. That, in the case of *The Folias*, was French francs, the currency of the charterers' business.

Further difficulties as to currency arose on the facts of ***Transoceanica Francesca and Nicos V***;[291] the claimants in a collision action were given judgment by the Admiralty registrar in Italian lire, so they appealed, seeking to recover in US dollars.

On the date of the collision, *Francesca* was operating under a long-term charterparty under which the charter hire was paid in US dollars. Her owners (the claimants) owned four other ships, all of which were being operated by charterers under a charterparty providing that hire was also payable in US dollars. The company had obtained from the Ufficio Italiano dei Cambi two consents to maintain and operate accounts in US dollars. The maximum sum that the company was authorised to hold in US dollars was US$1,105,000. If, at any time, the balance of the US dollar account at the banks exceeded the maximum, the bank would automatically convert the excess into Italian lire and credit the company's Italian lire account with lire.

The income that the claimants received by way of charter hire of their ships was in US dollars, which were paid into their US dollar accounts. US dollars were used to make trading payments, and included in those payments were the costs of repairs. It was submitted on behalf of the claimants that it was clear from this that they really felt their loss in US dollars.

291 The *Transoceanica Francesca and Nicos V* [1987] 2 Lloyd's Rep 155; see also *The Mosconici* [2001] 2 Lloyd's Rep 313: in a case concerning disputes relating to the quantum of damages resulting from the loss of cargo, the appropriate currency for the limitation of liability under the special drawing rights was that which most justly expressed the loss; and, at p 316: thus, factors that are important in one case may or may not be important in another, and caution must be taken not to elevate factual observations made in one case into statements of principle to be applied generally in other cases.

Counsel for the defendants submitted that one must start from the fact that the claimants are an Italian company carrying on business in Italy. Although it is usual to agree charter hire rates in US dollars, the sole purpose of the dollar accounts was to avoid the need to make frequent applications to the exchange control authority to cover individual items of expenditure in currencies other than lire. The significant feature of the dollar accounts, counsel argued, was the maximum sum imposed in order to maintain and operate the US dollar accounts. In addition, it was submitted that the claimants did not bear the risk of fluctuations in dollar value, if their income exceeded the limit placed on the dollar accounts, and that they would have done business only in lire, if there had been no problem in relation to conversion to other currencies.

Sheen J, dismissing the claimants' appeal, held that, on the evidence, the Admiralty registrar was right to award damages in Italian lire.

More recently, in ***Milan Nigeria Ltd v Angeliki B Maritime Co***,[292] where cargo interests claimed against the ship-owner for shortage of cargo in US dollars, the judge approved this part of the arbitrators' award and held that: the claimant had always asserted its claim in US dollars, and it was a part of the claim that the quantum of loss fell to be determined by reference to local prices, which had to be converted into US dollars. It was reasonable to conclude that the parties' shared expectation throughout the arbitral proceedings was that the tribunal's award would be made in US dollars and not naira.

4 LIMITATION PERIODS FOR COMMENCEMENT OF CLAIMS[293]

The following time limits apply when two or more vessels are at fault. If a vessel collides with a non-ship, the time limit is 6 years, as provided by the LA 1980.

Legal proceedings by cargo interests, or for personal injury against the non-carrying vessel, must commence within 2 years from the time when the cause of action arose: s 190 of the MSA 1995. Claims for personal injury and loss of life against the carrying vessel must commence within 3 years: *Navaro v Larrinanga*.[294] See, also, the FAA 1976 and the LA 1980.

Other claims for damage to, or loss of, cargo carried on board the ship at fault must be brought within the limitation period provided in their contract.

The 2-year time limit of s 190 applies also to claims of the vessels at fault against each other for their respective damage suffered by the collision.

Claims for contribution against the other ship at fault must be brought within 1 year from the date of establishment of liability to third parties, or settlement of claims for loss of life or personal injury: s 190(4) of the MSA 1995. Claims for contribution based on the CLCA 1978 can be brought within 2 years. For time limits applicable under the Athens Convention regarding passengers' claims, see Chapter 15, and, with regard to claims for pollution damage, see Chapter 16, below.

292 [2011] EWHC 892 (Comm); the decision is also important in relation to reversing the arbitrators' award on the issue of who bears the burden proof in a cargo claim where the carrier denies liability on grounds of exceptions under the HVR.

293 See, also, the defence of time bar generally in Ch 6, Vol 1.

294 [1965] P 80.

5 INSURANCE ISSUES

Insurance of collisions risks and settlement of claims are a complex area, not only because they usually involves too many parties and interests, but also because there are different types of insurance scheme that cover a variety of risks; reference should be made to specialist insurance texts. A practical book on insurance law for such a purpose is O'May, *On Marine Insurance* (Sweet & Maxwell, 1993). Only a brief resumé is intended here by way of introduction to the issues involved.

Damage to, or loss of, a ship caused by collision is insured by the H&M insurance under perils of the sea, or war risk underwriters for war risks. This is separate from liabilities incurred to third parties owing to the fault of the colliding insured ship. Such liabilities are, commonly, damage to, or loss of, the other colliding ship, which is covered by H&M insurers to a certain amount (see below). It will be seen shortly how other liabilities incurred to third parties, such as cargo, or any other property on board any of the colliding ships, are dealt with. Personal injury or loss of life on board any of the colliding ships is also a third-party liability.

Physical damage or loss to an insured ship

When the insured vessel is lost or damaged by collision, her H&M insurers, having paid the claim on the physical loss or damage sustained by the insured ship, will be subrogated to the rights of the assured as against the other colliding vessel, or vessels, which will be liable to pay damages in the proportion to which that other vessel is, or is held by the court to be, liable.

Loss of or damage to the other colliding ship

As regards the liability of the insured vessel to the other colliding vessel, this is covered by a clause in the Institute Clauses for H&M known as the running down clause (RDC). The RDC covers three-fourths of the proportionate liability of the assured for the damage done to the other ship, including legal costs.

The RDC does not cover cargo claims, or loss of life or personal injury claims, or claims in respect of liability incurred to harbours, piers etc., or for removal of obstruction consequent on such collision.

Loss of or damage to the cargo claimed against the non-carrying ship

Cargo underwriters cover loss of, or damage to, the cargo insured and carried on board a colliding ship under the Institute Cargo Clauses. When a cargo claim has been paid by the cargo insurer, he, too, is subrogated to the rights of the assured cargo-owner as against the non-carrying colliding ship, to the extent of her proportionate fault.

Loss of or damage to cargo carried on board the insured ship and other third-party liabilities

A cargo claim against the carrying ship will be subject to exemption from liability under the contract of carriage for negligent navigation.

P&I mutual insurance, known as P&I clubs, covers the liabilities of the assured ship-owner incurred to third parties, which include cargo claims, pollution liabilities, damage to harbours, piers etc., and personal injury or loss of life claims, which are all excluded from the RDC clause. In addition, the P&I insurers insure the remaining one-fourth of the assured's liability to the other ship under the RDC clause. Legal costs in defending such claims are covered as well.

Insurance is a contract of indemnity

What this means is that, in theory, once the assured has paid for the damage or loss incurred to a third party, he will be indemnified by the insurer, subject to the terms of the insurance contract.

The collision liability clause makes the underwriters' liability to the assured contingent not only to liability and to the terms of the policy but also to payment of the claim by the assured. Also, under the rules of a P&I association, there is a rule known as 'pay to be paid', which means that the assured has to pay the third party first in order to be indemnified.

The requirement of payment by the assured had created difficulties to third parties, in the past, under the Third Parties (Rights against Insurers) Act 1930, in the event the assured became insolvent before payment to the third party. See, further, Chapter 15, below, in the context of personal injuries. However, the Third Parties (Rights against Insurers) Act 2010, which has repealed the previous Act, has rendered the application of the 'pay to be paid' rule obsolete in cases in which it applies. There are International Conventions regulating liability for various maritime claims that now provide for compulsory insurance and a right of direct action of the third party against the insurer, as seen in Chapters 13–16, below.

Once the insurer has paid his assured, he will be entitled to pursue the rights of the assured, which he might have against third parties pursuant to the doctrine of subrogation.

Adjustment of claims

The adjustment of claims for collision damage is complex. At law, there are two methods of assessment when two vessels are both to blame for the collision: the first is the 'single' liability method, by which the respective liabilities are assessed, a set-off is made, and then there is a single payment by the vessel with the balance to pay; the second method, which is included in the RDC, is the 'cross' liability, by which the claim on underwriters is assessed as if each side, actually, made payment for their respective liability to the other side. There is also limitation of liability to be considered, which is examined in Chapter 14, below.

This page intentionally left blank

CHAPTER 10

RISKS AND LIABILITIES UNDER SALVAGE

1 The concept of salvage under maritime law 482
2 Salvage under contract 483
3 The Salvage Conventions 484
4 Application of the 1989 Salvage Convention 487
5 Elements of salvage 492
6 Salvage agreements 510
7 The master's authority to enter into salvage agreements 516
8 Duties and conduct of salvors 524
9 The position of several salvors 540
10 Duties of the owner of property in danger 543
11 Assessment of the award and special compensation 546
12 Problems arising from the drafting of Art 14 of the Convention 553
13 The solution provided by the SCOPIC 556
14 LOF 2000 and 2011: overview 561
15 Apportionment and payment 564
16 Jurisdiction 564
17 Time limits 565
18 Government intervention 566
19 Responder immunity 571
20 Environmental salvage 571

Invariably, ships find themselves in danger and need of assistance at sea for their safe navigation and prevention of marine pollution. An engine breakdown, for example, may be serious enough to put a ship in danger so as to call for a salvage tug, and, if the other prerequisites of salvage exist, the special maritime law principles of salvage will apply, which are different from those applicable to rescuers on land. 'Salvage' is a generic term used interchangeably to indicate either the salvage services, or salvage remuneration, or the cause of action, or the law of salvage, in the relevant context.

Three very important landmarks in developments of salvage law and practice since 1980 should be noted: the Lloyd's Open Form (LOF) 1980, introducing the 'safety net' as an exception to the principle of 'no cure, no pay'; the Salvage Convention 1989, introducing special compensation for salvors with regard to their expenses incurred to protect the marine environment from pollution damage; and the Special Compensation of Protection and Indemnity Clause (SCOPIC) in 2000, improving the position of salvors.

This chapter deals with the basic principles of salvage, risks and liabilities and recent developments, which include significant cases dealing with issues that had not been

analysed by the English courts before, such as the meaning of 'best endeavours'; the construction of Art 6.2 of the Convention (authority of master); the 'disparity principle'; the extent to which the value of the salved fund affects the assessment of the award; what would or would not amount to frustration of contract for sub-contracted tugs; and the new provisions of LOF 2011. Places of refuge and proposals for an environmental salvage are discussed at the end. The effect of the Wreck Removal Convention 2007 upon salvors and other oil pollution legislation are discussed in Chapters 13 and 16, respectively.

1 THE CONCEPT OF SALVAGE UNDER MARITIME LAW

1.1 DEFINITION

Brice[1] defines salvage as a right in law, which arises under English law when a person, acting as a volunteer (that is, without any pre-existing contractual or other legal duty so to act), preserves or contributes to preserving at sea any vessel, cargo, freight or other recognised subject of salvage from danger. This is known to be the 'civil salvage' as opposed to military, which is the rescuing of property from the enemy at a time of war, for which a reward is made by the Court of Admiralty sitting as a Prize Court.

In Kennedy,[2] salvage is defined as a service that confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation, nor solely for the interests of the salvor.

1.2 ORIGIN

The origins of salvage are ancient and exist in ancient legal systems. Its fundamental principles were established in the early part of the nineteenth century. It was then recognised that there was a need to administer justice and to proceed according to equitable principles of fairness. These principles were continually refined and developed by judges of the Admiralty Court. However, not until 1910 were these principles unified by the first salvage Convention to apply internationally.

In old times, salvage used to be rendered by seamen (not professional salvors) using personal skill and efforts, risking their lives in undertaking to rescue property from danger without a specific contract. They did not assume any obligation to continue the services and they could withdraw at any time, yet claim a reward if their services had contributed to the successful saving of the ship. Before 1875, professional salvage contractors did not exist, and express contracts were unknown.

When, near the end part of the nineteenth century, there was an increase in steamships, salvage was rendered under agreements on a 'no cure, no pay' basis, which

1 Brice, on *Maritime Law of Salvage*, 5th edn, 2011, Sweet & Maxwell, p 1.
2 Kennedy and Rose, *Law of Salvage*, 8th edn, 2013, Sweet & Maxwell, p 8.

developed into LOF agreements. Since the latter half of the twentieth century, most salvage services, other than 'standing by' a vessel in distress, have been performed by professional salvors under a salvage agreement in the form of LOF.[3]

1.3 FOUNDATION OF A RIGHT FOR AN AWARD

The right of an award, rather than remuneration (although it is referred to as 'remuneration'), arises from the fact that salvage is a mixed question of a private right and public policy. Its purpose is not merely to compensate the salvor for the benefit he has conferred to the salved property. It is also to provide a positive incentive to seafarers to take risks for the purpose of assisting others in danger. Although the parties involved may regulate, if they wish, the rendering of salvage services by agreement, the right to be rewarded for salvage at sea under common law is based both on equitable principles and public policy and is not contractual in origin. The law seeks to do what is fair and just, both to the owners of property and to the salvor. Each interest that has received a benefit from the salvage services provided must contribute to the award made for the salvage services.

In ***The Five Steel Barges***,[4] the underlying concept was put succinctly:

> The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract; but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject.

Also, Sir John Nicholl, in ***The Industry***,[5] examined the policy underlying the amount of the salvage reward:

> . . . there are various facts for consideration – the state of the weather, the degree of damage and danger as to ship and cargo, the risk and peril of the salvors, the time employed, the value of the property; and when all these things are considered, there is still another principle – to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters . . .

Thus, the foundation of salvage is necessity, when the subject of salvage has been in danger and services are rendered, even without request, in circumstances that a reasonably prudent owner would have accepted them.

2 SALVAGE UNDER CONTRACT

With the availability of powered tugs, modern means of communication and more readily available facilities for salvage, salvage is rendered more commonly by professional salvors under contract, with each party having rights and duties governing the relationship. Under it, the salvage contractor undertakes a continuing obligation, until

3 *The Tojo Maru* [1971] 1 Lloyd's Rep 341 (HL), p 362, per Lord Diplock.
4 (1890) 15 PD 142, p 146.
5 (1835) 3 Hagg 203, p 204.

the ship is brought to a safe port, to use his best endeavours to salve her and to provide the equipment and labour that, in the circumstances, would be reasonable for him to use for this purpose. These professional salvors keep tugs and equipment, waiting for an opportunity to provide assistance and earn a large salvage reward.

Contracts are usually entered into on a 'no cure, no pay' basis on the LOF. Under these contracts, the salvors receive no salvage award in cases where no property is salved. However, the concept of special compensation to recover expenses for efforts made to prevent or minimise damage to the environment, with an increment of those expenses in the event of succeeding in preventing or minimising such damage, whether or not property is saved, has developed since the 1980s. This was a major reason for the implementation of the International Salvage Convention 1989.

3 THE SALVAGE CONVENTIONS[6]

3.1 HISTORICAL DEVELOPMENT OF THE REVISION OF SALVAGE LAW

The first attempt to unify the principles on the law of salvage was the Brussels Convention 1910, on the initiative of the IMO. It was enacted only in part into English law by the Maritime Conventions Act (MCA) 1911. The Convention was amended by the Brussels Convention on Salvage of Aircraft 1938, to extend the law of salvage to salvage by or to seaborne aircraft.

The provisions of the 1910 Convention, however, proved to be inadequate to cover the needs of modern times, particularly with regard to problems arising from big disasters that resulted in damage to the marine environment.[7] There was a need, therefore, to encourage salvors, with some incentive to prevent or minimise such losses.

3.1.1 The creation of 'enhanced award' and 'safety net' prior to the 1989 Convention

The first initiative was an inclusion in the LOF 1980 of (a) an 'enhanced award' for salvors who, in addition to saving property, also prevented pollution damage from oil tankers, and (b) a 'safety net' in a form of compensation for expenses incurred by the salvor in cases in which he prevented pollution to the coastline but failed to earn an award because the tanker sank. In effect, the safety net was a deviation from the general principle of 'no cure, no pay', but it provided an incentive to salvors to undertake salvage involving oil tankers.

The enhanced award was part of the 'property salvage' (payable by the underwriters of the ship and cargo), but the safety net became known as the 'liability salvage' (payable by the P&I insurers of the ship-owners). Clause 1(a) read as follows:

> The contractor agrees to use his best endeavours to salve the [vessel] . . . and/or her cargo bunkers and stores and take them to . . . or other place to be hereafter agreed or if no place is

6 See commentary on the 1989 Convention by Shaw, R [1996] LMCLQ 202.

7 Such as *The Torrey Canyon*, *The Amoco Cadiz* and *The Exxon Valdez*.

named or agreed to a place of safety. The contractor further agrees to use his best endeavours to prevent the escape of oil from the vessel while performing the services of salving the subject vessel and/or her cargo bunkers and stores. The services shall be rendered and accepted as salvage services upon the principle of 'no cure, no pay' except that where the property being salved is a tanker laden or partly laden with a cargo of oil and without negligence on the part of the contractor and/or his servants and/or agents (1) the services are not successful or (2) are only partially successful or (3) the contractor is prevented from completing the services the contractor shall nevertheless be awarded solely against the owners of such tanker his reasonably incurred expenses and an increment not exceeding 15 per cent of such expenses but only if and to the extent that such expenses together with the increment are greater than any amount otherwise recoverable under this agreement. Within the meaning of the said exception to the principle of 'no cure, no pay' expenses shall in addition to actual out-of-pocket expenses include a fair rate for all tugs, craft, personnel and other equipment used by the contractor in the services and oil shall mean crude oil fuel oil heavy diesel oil and lubricating oil.

3.1.2 Underlying reasons for the revision of salvage law by a new Convention

The underlying reasons for the revision of the common law salvage were summarised by Lord Mustill in ***The Nagasaki Spirit***,[8] thus:

The reward for successful salvage was always large; for failure it was nil. At first, the typical salvor was one who used personal efforts and property to effect a rescue. As time progressed, improvements in speed, propulsive power and communications bred a new community of professional salvors who found it worthwhile to keep tugs and equipment continually in readiness, and for much of the time idle, waiting for an opportunity to provide assistance and earn a large reward.

This arrangement served the maritime community and its insurers well, and the salvors made a satisfactory living. It was, however, an expensive business and in recent years the capital and running costs have been difficult for the traditional salvage concerns to sustain. A number of these were absorbed into larger enterprises, less committed perhaps to the former spirit, and unwilling to stake heavy outlays on the triple chance of finding a vessel in need of assistance, of accomplishing a salvage liable to be more arduous and prolonged than in the days of smaller merchant ships, and of finding that there was sufficient value left in the salved property at the end of the service to justify a substantial award.

At about the same time, a new factor entered the equation. Crude oil and its products have been moved around the world by sea in large quantities for many years, and the risk that cargo or fuel escaping from a distressed vessel would damage the flora and fauna of the sea and shore, and would impregnate the shoreline itself, was always present; but so long as the amount carried by a single vessel was comparatively small, such incidents as did happen were not large enough to attract widespread attention.

This changed with the prodigious increase in the capacity of crude oil carriers which began some three decades ago, carrying with it the possibility of a disaster whose consequences might extend far beyond the loss of the imperilled goods and cargo. Such a disaster duly happened, at a time when public opinion was already becoming sensitive to assaults on the integrity of the natural environment. Cargo escaping from the wreck of *Torrey Canyon* off the Scillies caused widespread contamination of sea, foreshore and wild life. The resulting concern and indignation were sharpened when *Amoco Cadiz* laden with 220,000 tons of crude oil stranded on the coast of France, causing pollution on an even larger scale, in circumstances which rightly or wrongly were believed to have involved a possibly fatal delay during negotiations with the intended salvors.

To this problem the traditional law of salvage provided no answer, for the only success which mattered was success in preserving the ship, cargo and associated interests; and this was logical,

8 [1997] 1 Lloyd's Rep 323 (HL), pp 326–328.

since the owners of those interests, who had to bear any salvage award that was made, had no financial stake in the protection of anything else. This meant that a salvor who might perform a valuable service to the community in the course of an attempted salvage, by, for example, moving the vessel to a place where the escape of oil would be less harmful, would recover nothing or only very little, if in the end the ship was lost or greatly damaged. Something more was required to induce professional salvors, upon whom the community must rely for protection, to keep in existence and on call the fleets necessary for the protection of natural resources in peril. Some new form of remuneration must be devised. It is with an important aspect of the scheme worked out during long and hard fought negotiations between the ship owning and cargo interests and their insurers on the one hand and representatives of salvors on the other, with participation by governmental and other agencies, that the present appeal is concerned.

It is important to make clear that the solution devised in the 1980s was not to create a new institution: a kind of free standing 'environmental salvage'. The services performed remain, as they have always been, services to ship and cargo, and the award is borne by those standing behind ship and cargo. The difference is that the sum payable to the salvor may now contain an additional element to reflect the risk of the environment posed by the vessel for which the services are performed. . . .

The move towards the evolution of what has been called a 'safety net', designed to provide an additional incentive for salvors to keep fleets on station, began during the late 1970s with two parallel initiatives. These first bore fruit in the 1980 revision of the Lloyd's Open Form . . .

Within a few months of the *Amoco Cadiz* disaster the International Maritime Organization (IMO) had taken the matter in hand and prepared an initial report. The problem was also addressed by the Comité Maritime International (CMI) which agreed to co-operate in a study of the private law principles of salvage. The outcome was the establishment of a sub-committee under the chairmanship of Professor E Selvig, which prepared a draft convention accompanied by a report. These documents were placed before a conference of CMI in Montreal during May 1981, by which time LOF 1980 with its safety net provision had come into force. The debates at Montreal led to a final draft, together with a report by Mr B Nielsen. For a time, there was little further progress, but eventually a diplomatic conference led to the agreement of the International Convention on Salvage 1989 in which the Art 14 compensation was a solution of compromise as opposed to a more radical solution proposed by Professor Selvig for 'liability salvage' in order to encourage salvors to protect the environment by proper remuneration for pollution prevention, i.e. liability avoidance.

See about environmental salvage at para 20, below.

3.1.3 Adoption of 'enhanced award' and 'safety net' into the new Convention

The 1989 Salvage Convention ('the Convention') replaced the Brussels Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910. The concepts of enhanced award and safety net, enshrined in the 1980 LOF, were adopted by the new Convention. The former is taken into account when the assessment of the award is made by the arbitrators under Art 13(1)(b), and the latter is known as the 'special compensation' provision under Art 14.

They apply, not only to environmental damage from oil pollution, but also to substantial physical damage to human health, or to marine life, or resources in coastal or inland waters or areas adjacent thereto by pollution generally, contamination, fire, explosion or similar major incidents (Art 1(d)).

The Convention came into force internationally on 14 July 1996, but, in the meantime, the UK enacted it into English law by the Merchant Shipping (Salvage and Pollution) Act (MS(SP)A) 1994, and it came into force in the UK on 1 January 1995. With the consolidation of the Merchant Shipping Acts (MSAs) by the MSA

1995, the 1994 Act was repealed, and the Convention is found in Sched 11 to the MSA 1995.

The substantive changes to salvage law brought by the Convention were first incorporated in the LOF 1990. However, before the Convention had the force of law, these changes – as incorporated in the LOF 1990 – had only a contractual effect. Once the Convention became part of English law by statute,[9] its provisions have had the force of law since 1 January 1995, whether or not the parties enter into a contract, unless the parties to the LOF choose to contract out of some provisions of the Convention.

3.1.4 Other Conventions affecting salvage

The International Convention on Oil Pollution, Preparedness, Response and Co-operation 1990 (OPRC Convention) was concluded at a diplomatic conference in London at the IMO in November 1990. The OPRC Convention is in force internationally and provides for salvage policy, contingency plans and reporting of casualties. Briefly, it requires harbour authorities and ships to have oil pollution emergency plans and provides for oil pollution reporting procedures, including national contingency plans, as well as exhorting international co-operation to take action on receiving information about oil pollution incidents. Pursuant to powers under s 128(1)(d) of the MSA 1995 to give effect to the OPPRC Convention, the Merchant Shipping (OPRC) Order 1997 enables the OPRC Convention to be given effect by the making of regulations, the Merchant Shipping (OPRC) Regulations 1998 (SI 1998/1056).

The 1992 CLC and Fund Conventions on liability and compensation for oil pollution, the Bunkers Convention 2001 (in force since 2008), the HNS Convention 2010, the Wreck Removal Convention in 2007 and EU Directives affect the duties and potential liabilities of salvors (see, further, Chapters 2, 13 and 16).

4 APPLICATION OF THE 1989 SALVAGE CONVENTION

Whereas, in the previous editions, the pre-Convention application of salvage under the old MSA 1894 (repealed) was explained, in this edition only the law as applicable under the 1989 Convention is set out.

4.1 GENERAL APPLICATION

By Art 2, the Convention shall apply whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State Party.

Article 6(1) provides that the Convention shall apply to any salvage operations, save to the extent that a contract otherwise provides expressly, or by implication. Therefore, parties are free to contract out of the Act, or parts of it, by an express term in their contract.

9 By MSA 1995, s 224(1), the provisions of the Convention (Pt I, Sched 11) shall have the force of law in the UK.

There is an exception with regard to salvage operations controlled by public authorities. Article 5 provides that this Convention shall not affect any provisions of national law or any International Convention relating to salvage operations by or under the control of public authorities, although salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention. The extent to which a public authority, being under a duty to perform salvage operations, may avail itself of the rights and remedies provided for by the Convention shall be determined by the law of the State where such authority is situated.

Subject to Art 5, the Convention shall not apply to warships or other non-commercial State-owned vessels, unless a State Party decides to apply the Convention to warships (Art 4).

4.2 'RELEVANT WATERS'

The area of relevant waters where salvage operations can be regarded as salvage operations under the Convention and be awarded a salvage award, if successful, has been extended by the Convention. Unlike under previous law (under which salvage should have occurred in tidal waters), Art 1(a) defines that, for the purpose of the Convention, salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters, or in any other waters whatsoever.

Although the Convention encompasses salvage that takes place in any waters, State parties are permitted, by Art 30 of the Convention, to reserve the right not to apply the provisions of the Convention when the salvage operation takes place in inland waters. The UK has made such a reservation. Paragraph 2(1), Pt II of Sched 11 to the MSA 1995 stipulates that the provisions of the Convention do not apply to:

(a) salvage operations that take place in 'inland waters' of the UK and in which all the vessels involved are of inland navigation, and
(b) to a salvage operation that takes place in 'inland waters' of the UK and in which no vessel is involved.

It is thereafter stated that 'inland waters' do not include any waters within the ebb and flow of the tide at ordinary spring tides or the waters of any dock that is directly, or indirectly, connected with such waters (that is, tidal waters).

It is unfortunate that the UK adopted the reservation, instead of following the provision of the Convention by which salvage is permitted in any waters. However, should there be a need for salvage in UK inland waters, the parties may agree to contract out of this provision, or to have the services rendered on the basis of a contract for engaged services.

4.3 RECOGNISED SUBJECT OF SALVAGE

Traditionally, maritime law salvage recognises as its subject the property in danger, that is a ship or craft, cargo on board, freight payable pursuant to the contract of carriage and bunkers carried on board the ship. The concept of property has been

expanded by the Convention (see below). The Convention also recognises saving life as an independent subject of salvage, regardless of whether or not the life salvors saved the property in danger. The Convention also recognises as subject of salvage the protection of the marine environment. Although skill and effort by salvors exerted successfully to protect the environment are taken into account in calculating the award for property salvage, protecting the environment is treated separately from property salvage by special compensation, as will be seen later.

The problem under maritime law salvage and under the MSAs[10] before the MSA 1995[11] was the definition of ship or craft as a subject of salvage.[12] In recent years, the definition of a ship for the purpose of maritime law has been clarified (as discussed in Chapters 1 and 9).

4.3.1 Ship, vessel or craft

Section 313(1) of the MSA 1995 defines 'ship' as including every description of vessel used in navigation. By s 311 of the MSA 1995, the Secretary of State has power to decide that a thing designed or adapted for use at sea is or is not to be treated as a ship for the purposes of the provisions of the Act.

The Convention, by Art 1(a), defines 'salvage operations' as including services rendered to vessels, or to any other property in danger.

Article 1(b) defines a vessel as meaning 'any ship or craft, or any structure capable of navigation'. It is suggested in Brice[13] that the comma after 'craft' is significant in that the ship or craft does not have to be capable of navigation for the purpose of salvage, as it may not be in some cases. So, on the construction of 1(b), the phrase 'capable of navigation' refers to 'structures' to distinguish them from those that are fixed to the seabed and, hence, excluded under Art 3. Accordingly, a disabled or sunken ship or a derelict could be included within Art 1(b).

4.3.2 Property

'Property' means any property not permanently and intentionally attached to the shoreline, and includes freight at risk (Art 1(c)).

All merchandise being carried on the vessel could be subject to salvage, except personal effects of the crew, master and passengers.[14] Salvors removing cargo during the course of salvage are in a position of bailees of the cargo-owners.[15] The bunkers are a valuable element of the salved value. The position of the ship-owner in relation to the bunkers, when the ship is time chartered, is that of a bailee, and the charterers remain the owners of the bunkers until redelivery.[16]

10 A vessel or craft had to qualify as a ship before it was recognised as a subject of salvage. Section 742 of the MSA 1894 defined 'vessel' as any ship or boat, or any other description of vessel used in navigation; and 'ship' as including every description of vessel used in navigation not propelled by oars.

11 For more details, see Ch 1; by the Merchant Shipping (Registration etc) Act 1993, an amendment to s 742 dropped the phrase 'not propelled by oars'.

12 *The Gas Float Whitton (No 2)* [1897] AC 337.

13 Op. cit. fn 1, at paras 3–07–3–08.

14 See op. cit., Brice, fn 1, Ch 3, for further details of salved property.

15 *The Winson* [1982] 1 Lloyd's Rep 117.

16 *The Span Terza* [1984] 1 Lloyd's Rep 119.

Article 1(c) of the Convention refers to freight at risk. Freight in this context is the remuneration due and payable for the carriage of cargo and not hire for the use of the ship. Obviously, it does not cover freight paid in advance. The freight may be at the risk of the ship-owner or charterer.[17]

4.3.3 Structures

A structure may not necessarily be a ship in the strict sense, but it could be any other property having the essential characteristic of being capable of navigation, provided it is not permanently and intentionally attached to the shoreline (as per Art 1(c)).

The Convention does not apply to fixed or floating platforms or mobile offshore drilling units when they are on location engaged in the exploration, exploitation or production of seabed mineral resources (Art 3). This suggests that oil rigs and offshore installations, which are not fixed or floating on location, or are not engaged in activities described above, would be recognised subjects of salvage. The mere fact that 'navigation' is incidental to some more specialised function, such as dredging, or the provision of accommodation, does not take oil rigs, if they are capable of and used in navigation, outside the definition.[18]

Gas floats and landing stages not attached to the shoreline[19] may well be included under Art 1(c) of the Convention.

'Shore line' is defined in the *Oxford English Dictionary* as the line where shore and water meet. So, if a vessel or a buoy were attached to the seabed or moored at sea, it would not be included in the definition of 'property'.

4.3.4 Wrecks

Could a sunken ship, or wreck, come within the meaning of Art 1 of the Convention? Section 255(1) of the MSA 1995 states that a wreck includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water. At common law, a wreck has been held to be a subject of salvage.[20]

Under the Wreck Removal Convention 2007 (see Chapter 13, below), enacted in the UK by the Wreck Removal Act 2011, a wreck (for the purposes of salvage) includes 'a ship that is about, or may reasonably be expected, to sink or to strand . . .'

A wreck could come within Art 1(a) of the Salvage Convention, 'vessel or any other property in danger', provided it is still in danger itself, apart from the fact that it causes danger to navigation. A wreck that contains treasures may be a subject of salvage, provided there is no reservation made as to archaeological finds, as is allowed by Art 30(1)(d) of the Convention.

By Art 4, the Convention does not apply to warships or non-commercial vessels owned or operated by the State and entitled, at the time of salvage operation, to sovereign immunity under international law, unless that State decides otherwise.

Section 230 of the MSA 1995 deals with salvage claims against and by the Crown.

17 *The Pantanassa* [1970] 1 Lloyd's Rep 153.

18 *Perks v Clark* [2001] 2 Lloyd's Rep 431 (CA); *The Key Singapore* [2005] 1 Lloyd's Rep 91 was a jack-up rig and was subject to salvage.

19 The gas float in *The Gas Float Whitton*, fn 13, was permanently and intentionally attached to the shore bed. It was not a proper subject of salvage.

20 *The Gas Float Whitton (No 2)*, op. cit. fn 13.

4.3.5 Hovercraft/aircraft

The Hovercraft Act 1968, ss 1(1)(h)(ii)[21] and 2(2), provides that rules of law relating to ships apply to hovercraft as if references to ship included reference to hovercraft. Also, by Art 8 of the Hovercraft Order 1972, salvage services to hovercraft are treated as if they were salvage services to a ship. Similar provisions are made in s 87 of the Civil Aviation Act 1982, extending salvage to aircraft.[22]

4.3.6 Life salvage

Prior to the 1989 Convention, there was no pure life salvage as such, but it depended on whether property was salved. If there was no property salved, remuneration for mere life salvage was not recoverable in the Admiralty Court. The MSA 1854 (ss 458–460) provided for liability to pay a reasonable amount of salvage to life salvors by the owners of cargo as well as the owners of the ship, but such liability was limited to the value of the property saved from destruction. There should have been something more than life saved by salvors for the property to contribute to life salvors' award. In ***Cargo ex Sarpedon***,[23] while the cargo-owners whose cargo was salved, together with 88 people on board the abandoned ship, paid for salvage remuneration, the owners of the ship, which was not capable of salvage, were not ordered to pay a portion of the sum awarded to salvors.

By contrast, in ***Cargo ex Schiller***,[24] the court abandoned a strict construction of the statutory provision in order to remedy the injustice created by existing law and practice, and held that it was immaterial whether or not the property saved from destruction had been saved by the salvors who saved the lives on board. The salvors who saved 15 people from a sinking ship were awarded; divers were later instructed to raise part of the sunken cargo.

Despite this decision, which established a judicial recognition of independent life salvage, uncertainty still existed owing to a lack of clear statutory provisions to encourage the saving of life at sea by rewarding life salvors. Thus, a Mercantile Fund was established by s 544 of the MSA 1894, and voluntary organisations, such as the Royal National Lifeboat Institution (RNLI), and HM Coastguard were formed to help those in danger at sea.

The MS(SP)A 1994 repealed the relevant sections of the MSA 1854, and, by Sched 2, s 6(3)(b), saving life was included in salvage services.

Life salvage became independent of saving property by the Convention and is dealt with by Art 16 (Sched 11, Pt I of the MSA 1995). Article 16(1) provides that no remuneration is due from persons whose life is saved, but leaves national laws unaffected on this subject. It further provides that a salvor of human life is entitled to a fair share of the payment awarded to the salvor for saving the vessel or other property, or preventing or minimising damage to the environment (Art 16(2)).

In Pt II of Sched 11, para 5 provides for resource for life salvage payment, where services are rendered wholly or in part in UK waters in saving life from a vessel, and

21 The MSA 1995 applies to enactments and instruments with respect to which provision may be made by Order in Council pursuant to the Hovercraft Act 1968, s 1(1)(h).

22 Thus, *Watson v Victor* (1934) 22 LlL Rep 77, where a claim for salvage of cinematography equipment from a wrecked seaplane failed, is now not good law after the Civil Aviation Act 1982.

23 (1877) 3 PD 28.

24 (1877) 2 PD 145.

the vessel is either destroyed or the sum under Art 16(2) is less than a reasonable amount for the services rendered in saving life; the Secretary of State, if he/she thinks fit, may pay the salvor an additional sum.

The Admiralty Court has jurisdiction to entertain claims for life salvage under s 20(2)(j) of the Supreme Court Act (SCA) 1981.

5 ELEMENTS OF SALVAGE

Salvage arises when the property (as seen above) is in danger, the salvors are volunteers, and there is success, or contribution to success, by their services.

5.1 DANGER – GENERAL PRINCIPLES

There must be some real danger that is likely to expose the property to destruction or damage. An apprehension[25] of danger will suffice, as long as it is not a fanciful danger. The existence of danger is a question of fact. The master's decision that the ship is in danger must be reasonable. If his decision was unreasonable, there would be no danger for salvage, no matter how honestly his decision was made.

5.1.1 What kind of danger?

No actual or immediate distress is required; it suffices that there is a misfortune that may expose the vessel to risks of destruction without assistance: In ***The Charlotte***,[26] Dr Lushington said:

> According to the principles which are recognised in this court in questions of this description, all services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered.[27]

The master of the vessel missed the harbour he was aiming for, and the vessel was caught up in a violent gale, with fog and rain, which drove the ship towards the rocks. After a day of effort to board her, the salvors took the ship in tow with great exertion and labour, having to force their way through a heavy sea before they could get the vessel towed in. They claimed salvage remuneration. The owners' defence was that no salvage services had been rendered, because, during the whole time of the towing of the ship, the weather was fine, and that there was an agreement for towage at the cost of 20 shillings each. It was held that, on the facts, it was undisputed that the vessel's masts and all her sails had been cut away and that, in the 'dismasted' state she was in, she was towed into Long Island Channel; prima facie, salvage services had been rendered.

25 *The Phantom* [1866] LR 1 A&E 58, p 60, per Dr Lushington.
26 (1848) 3 W Rob 68.
27 Ibid, p 71.

It does not matter if the danger is slight, but it is important that danger can be said to exist. The extent of the danger is only relevant in determining the extent of the award.

The Helenus,[28] fully laden, was to sail for Rotterdam, but the voyage was cancelled, as a gale began, with mighty and forceful winds that afternoon. It gradually became stronger, causing the stern ropes of *The Helenus* to part. Her master made a call for assistance. The vessel, surging under the influence of the wind and tide, came into collision with *The Motagua*, which was lying close to *The Helenus*. As a result, *The Motagua* rendered her own moorings. Both vessels drifted north and rubbed up against *The Imichil*, pushing that vessel's bows to port and pressing it up against a large dockyard crane. The crane was lifted off its feet on one side, so that it was leaning over dangerously. This was the dangerous position the vessels were in when the tugs arrived. The tugs made fast to *The Helenus* and pulled her away. They were unable to reach *The Motagua*, but, once *The Helenus* was removed, *The Motagua* was in a less dangerous situation and was assisted to her berth. A salvage award was claimed. Sheen J examined the dangers in the circumstances:

> . . . having regard to the fact that it was night, there was a very high wind; they were in a very confined space; the tide was ebb; there were dangers of damage to the side of the vessel from ranging against *The Motagua* and the danger to both vessels from that source. There was the possibility, if they tried to move, of fouling other vessels or doing more damage or even possibly damaging their propellers if they got too close to the wharves.[29]

It was held that salvage services had been rendered to *The Helenus*, but the services rendered to *The Motagua* were to be treated as a comparatively minor service.

5.1.2 Temporary difficulty?

In ***The owners of the tug Sea Tractor v the owners of Tramp (Tramp)***,[30] the claimants sought to recover salvage remuneration in respect of services rendered by their tug *Sea Tractor* to the defendants' vessel *Tramp*. The defendants contended that the services were merely towage services to be remunerated in accordance with the claimants' usual tariff in the sum of £625. *Sea Tractor*'s replacement cost was in the region of £150,000. *Tramp*'s value was in the region of £400,000.

The *Tramp* had berthed without a tug. The manoeuvre involved dropping the starboard anchor to bring the vessel around. Thereafter, the starboard anchor was weighed and, on approaching the wharf, the port anchor was let go to control the berthing alongside. The vessel duly berthed and, having completed discharge of her cargo, was prepared for departure. The pilot's suggestion that a tug be used to assist in *Tramp*'s departure from the berth was rejected by the master.

The usual mode of departure would have been to come off the berth by using the back spring so as to pivot the bow out. However, in the prevailing weather conditions, it was decided to come off by swinging the stern off using the fore spring. As the vessel came astern into the stream, the vessel was caught by the wind, bringing the bow right round to head upstream. *Tramp* then embarked on numerous engine and

28 [1982] 2 Lloyd's Rep 261.
29 Ibid, p 265.
30 [2007] 2 Lloyd's Rep 363.

anchor movements up and down Loden Hope, trying to turn the bow to seaward, and it was, then, decided to seek tug assistance. *The Sea Tractor* was contacted, which got underway promptly, arriving at the scene about 15 minutes later. After towing for about 3 or 4 minutes, *Tramp*'s bow was brought round to seaward, and *Sea Tractor* let go.

It was held by Steel J that the test of whether *The Tramp* was in sufficient danger to found a claim for salvage was essentially an objective one. The vessel must have encountered a situation that would expose it to damage if the service was not rendered, such that no reasonable person in charge of the venture would refuse a salvor's help, if it was offered to him upon the condition of paying a salvage award. *Tramp* was significantly impeded in her manoeuvring ability and, to all intents and purposes, immobilised. She was clearly in need of tug services on salvage terms.

The judge went on to state that this was a relatively straightforward service to a vessel in modest danger, from which she could not extract herself safely. The services were rendered by a small tug, which had responded promptly but which had no claim to professional status. In the circumstances, an appropriate award would be £12,500.

5.1.3 Future or contingent danger

The Troilus,[31] which has become known as 'The Troilus danger', illustrates what kind of future danger the courts will be prepared to take into account in assessing the existence of danger, but each case will be judged on its own facts. There is no rigid rule about it.

The vessel was carrying cargo from Australia to Liverpool. She fractured her tail shaft and dropped her propeller in the Indian Ocean, but, otherwise, she was unimpaired. She was towed to Aden, where she anchored. This admittedly constituted salvage services. There being no facilities for repairs, nor for storage of cargo at Aden, the damaged ship was towed by another vessel to the UK, as repair in the Mediterranean would have been difficult and would have involved considerable delay. The cargo-owners contended that this constituted ocean towage, not salvage services, as the ship was in perfect safety when she reached Aden.

It was held that, although the ship and cargo were in physical safety at Aden, the services in question were salvage services. The master of a damaged ship must do his best to preserve the ship and cargo and bring them to their destination as cheaply and as efficiently as possible, bearing in mind expense and the effect of delay on both and considering the possibility of transhipment or of repair at some convenient port.

The case reached the House of Lords, which approved the decision of the CA, and Lord Porter added:

> . . . The question whether a ship and cargo have reached a place of safety must, I think, depend upon the facts of each case, one of which is the possibility of safely discharging and storing the cargo and sending it on to its destination and the danger of its deterioration. It is not a sufficient answer to say that she can lie in a particular position of physical safety. It must be remembered that in every voyage of a merchant ship carrying cargo the interests of both ship and cargo have to be borne in mind.[32]
>
> In the present case the whole of the facts and law were carefully considered by the learned President, and, unless the appellants could establish that salvage services always end where

31 [1951] AC 820.
32 Ibid, p 830.

the ship can be in physical safety and where the cargo also can remain at least for some time without danger or damage, he appears to me to have reached the right conclusion upon ample and adequate grounds. He carefully considered the opportunities for repair at each port on the voyage, the risks and delay involved and the possibilities of safe towage. Amongst others, he had in mind those of drydocking *The Troilus* without discharging her cargo and the imprudence of tipping a Liberty ship sufficiently to fit a propeller. On the last two points the Court of Appeal took the advice of their assessors, who thought that either expedient would be unsafe, and your Lordships' assessors took the same view.[33]

Therefore, the services still constituted salvage services. There may be an issue of reconciling this case with Clause H of LOF 200 and 2011, which provides that there will be a deemed performance when the property is in a safe condition in the place of safety, notwithstanding that the property is damaged or in need of maintenance.

However, as it was explained by Lord Porter, above, in *The Troilus*:

It is not a sufficient answer to say that she can lie in a particular position of physical safety. It must be remembered that in every voyage of a merchant ship carrying cargo the interests of both ship and cargo have to be borne in mind.

It has been confirmed in recent years that there could be a reasonable future apprehension of danger even when the swing of the ship by the wind had stopped temporarily.[34]

5.1.4 Effect of danger on a towage contract[35]

This is examined in the next chapter on towage, but it suffices to mention, in this context, in what circumstances a danger during towage may or may not convert the towage into salvage.

In ***The North Goodwin (No 16)***,[36] the defendants' light vessel, *The North Goodwin*, was being towed by *The Mermaid*. It was anticipated that the light vessel would be handed over to the tugs *Northsider* and *Ironsider* so that she might be taken to dock. The tugs were employed under the UK Standard Conditions for towage. Gale-force winds caused such a heavy swell that *Northsider* moved up-river. When the tugs arrived, the pilots considered the weather conditions too bad to allow the pilot cutter to leave the harbour entrance, but *Northsider* continued through the piers and turned to the north, towards *The Mermaid. The Mermaid* decided to take the light ship into the river and hand over to *Northsider* when the vessels had protection from the piers. While *The Mermaid* was engaged in turning to starboard, the towing rope parted, and the light vessel was free to drift down wind. *Northsider*, seeing what had happened, immediately went to the assistance of the light vessel, managed to pass a towage connection to those aboard and then towed her to an anchorage about a mile and a half from the coasts.

Sheen J held that, although the light vessel was drifting downwind, she was equipped with three anchors, and, if *Northsider* had not reacted so promptly to the parting of the tow rope, *The Mermaid* would have been alerted to the danger presented

33 Ibid, p 836.
34 E.g. *The Hamtun and St John* [1999] 1 Lloyd's Rep 883, *The Tramp* fn 30.
35 See definition and details of towage contracts in Ch 11, below.
36 [1980] 1 Lloyd's Rep 71.

and given orders for an anchor or anchors to be let go, which would have held the light vessel, until *The Mermaid* could have manoeuvred to put a line aboard; and, if *Northsider* had offered her services on salvage terms, there was no doubt that the offer would have been declined.[37]

The point made by the judge was that *Northsider* was employed under a towage contract, and there was no salvage service.

Towage may be converted to salvage, if the circumstances that occurred had not reasonably been contemplated by the parties when they entered into the towage contract.

In ***The Aldora***,[38] Brandon J laid down the general principle governing claims for salvage by a pilot engaged to pilot a ship, or a tug engaged to render towage services:

> . . . they are only entitled to claim salvage if, first, the ship is in danger by reason of circumstances which could not reasonably have been contemplated by the parties when the engagement to pilot or tow was made, and, secondly, risks are run, or responsibilities undertaken, or duties performed, which could not reasonably be regarded as being within the scope of such engagements. This principle is, in my view, a continuing principle in the sense that, where a salvage situation arises by reason of the existence of the two factors referred to above, it only remains in being so long as those factors continue to exist to some extent at least.[39]

It was standard practice for ships of *The Aldora*'s size to be met at the harbour by a pilot and tugs to help her navigate into her berth. Owing to a misunderstanding about the time of her arrival, the tugs and pilot were not yet at the buoy when *The Aldora* arrived. The master of the vessel decided to proceed out to sea again when, owing to the master's error, the ship ran aground on a sandbank outside the dredged channel leading to the harbour. Four tugs were engaged to help to refloat her. With the help of these tugs and the ship's own engines, and under the direction of the pilot, the vessel was refloated. Thereafter, she was taken up the channel and into the harbour and to her berth, with the help of the pilot and the tugs. The tug-owners and crew and the pilot claimed salvage remuneration from the defendants – owners of *The Aldora*. The latter contended that the refloating of the vessel constituted salvage, but the subsequent service of assisting the ship back to the harbour was towage. The pilots and tug-owners contended that they were entitled to a salvage award, and that the salvage services were completed when the vessel was safely berthed in the harbour.

It was held that *The Aldora* was exposed to dangers that could not reasonably have been contemplated within the scope of the original engagements of the pilot and tugs. However, having been refloated and returned to the dredged channel, the ship was no longer in any unexpected danger, and the responsibilities of the pilot and tugs were exactly the same as those to be undertaken under their original engagements.

The Convention provides, by Art 17, that no payment is due under the provisions of the Convention, unless the towage services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.

37 [1980] 1 Lloyd's Rep 71, p 74.
38 [1975] 1 Lloyd's Rep 617.
39 Ibid, p 623.

5.1.5 Threat or danger to the environment

What if there is a threat of damage to a third party? Article 8 of the 1910 Convention considered only the danger run by the salved vessel, her passengers, crew and cargo as a criterion for fixing salvage remuneration. By contrast, Art 8(1)(b) of the 1989 Salvage Convention provides that salvors should exercise due diligence to prevent or minimise damage to the environment, and Art 13(1)(b) lists the relevant factors for the assessment of the award, among which is 'the skill and efforts of the salvors in preserving or minimising damage to the environment'. Also, Art 14 allows special compensation to salvors who prevent or minimise damage to the environment. The 'safety net'[40] concept of LOF 1980 was very different from the special compensation under Art 14 of the present Convention: 'Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents' (Art 1(d)).

This aspect of salvage and whether there can be a separate environmental or liability salvage will be considered under paras 11 and 12.

5.2 VOLUNTARY SERVICES

'Voluntary' means that the services are not rendered under a pre-existing agreement or under official duty, or purely for the interests of self-preservation. As long as the persons are recognised in law as volunteers and they render salvage services, they are entitled to salvage remuneration. Subject to this rule, there is no limit to the class of persons that can be considered as volunteers.[41] The 1989 Convention does not refer to voluntariness, but states in Art 17 that no payment is due under the Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose. Examples are given below.

5.2.1 Services under a pre-existing agreement

This relates to agreements entered into prior to the time of the existence of danger. It includes the ship's master and crew, who have pre-existing employment agreements with the ship-owner and, therefore, have a duty to preserve the ship and cargo. They cannot convert themselves into salvors,[42] although it is not impossible.

In ***The Neptune***,[43] it was held that a salvor is a person who, without any particular relation to a ship in distress, confers useful service and gives it as a volunteer adventurer, without any pre-existing covenant connected with the duty of employing himself for the preservation of the ship.

40 See Brice, G, 'Safety net' [1985] 1 LMCLQ 33.

41 Per Clarke J in *The Sava Star* [1995] 2 Lloyd's Rep 134, p 141.

42 Contrast the situation in *The Telemachus* [1956] 2 Lloyd's Rep 490, where the master and crew of a ship owned by the same owner as *The Telemachus* received a salvage reward for valuable personal services.

43 (1824) 1 Hagg 227.

Lord Stowell explained:[44]

> . . . the crew of a ship cannot be considered as salvors. What is a salvor? A person, who without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself in the preservation of that ship; not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service for the purpose is pledged to this extent. Accordingly, we see in the numerous salvage cases that come to this court, the crew never claim as joint salvors although they have contributed as much as (and perhaps more than) the volunteer salvors themselves.

In ***The North Goodwin (No 16)***, Sheen J said: '. . . the master and crew of *Northsider* were not volunteers in that they were employed to work aboard *Northsider* whenever the tug was rendering towing services as she was on this occasion.'[45]

Sometimes, the master of a ship that is facing imminent danger may order the crew to abandon ship to protect their lives. Could the crew be volunteers if they later boarded the ship and saved her from danger?

In ***The Albionic***,[46] Lord Greene MR held that the mere order of the master to abandon the ship was not enough to constitute abandonment. Whether or not there had been abandonment depended on the facts of each individual case. He agreed with the trial judge that, on the facts shown below, the master did not give an order in the ordinary sense of the word, but he gave 'a piece of advice' in a state of panic.

During bad weather and rough sea, the vessel caught fire and was completely out of control. The master shouted for all hands to jump overboard in the lifeboats, which had been made ready to pick them up. Some of the crew and the master did so, but the chief officer, who had now taken control, forbade the rest of the crew from abandoning the ship. Those who remained on board rendered valuable assistance in getting the ship to port and keeping the fire under control. The wireless operator of the ship claimed salvage for the services rendered after half the crew had left the ship. He contended that the circumstances in which they left the ship amounted to abandonment.

Here, there was no complete abandonment, but conflicting orders given to the crew by senior officers. It was, therefore, not an order that the men were bound to obey, or by which their contract of service was terminated. The conclusion was that those who remained on the ship did so in the ordinary discharge of their duty and were not entitled to any salvage.

5.2.1.1 Exceptions

Despite a pre-existing agreement, there are circumstances in which a salvage award may be allowed, either because there had been an effective abandonment of the ship by the crew, or because the circumstances that arose were not contemplated by the parties to a contract. There are also cases in which assistance is rendered in compliance with statutory duties and can qualify for a salvage reward.

44 Ibid, p 236.
45 [1980] 1 Lloyd's Rep 71, p 74.
46 [1942] P 81.

The San Demetrio[47]

The vessel, S, was proceeding with a convoy from Halifax to a UK port, heavily loaded with petrol, when an enemy warship attacked the convoy. The ships in the convoy were hit, and some sunk, or were left disabled. S was severely damaged, and her captain gave orders to abandon the ship. In contrast to the facts of *The Albionic*, the crew in this case left in three boats, one of which was manned by the plaintiffs. S was hit again and burst into flames. Two days later, the plaintiffs' boat, still at sea, spotted S, which was still in flames. Everything on her was destroyed except her engines. There were no navigational instruments whatsoever. The plaintiffs got on board, extinguished the fires and, after many days, with the help of tugs, took the vessel to Clyde safely, with 10,000 tons of cargo still on the ship. Langton J found that the four requisites laid down by Dr Lushington in *The Florence*[48] to justify a reasonable abandonment of the ship had been fulfilled. The ship was properly abandoned under the orders of her master. It was held that the plaintiffs had rendered a magnificent service, and a salvage award was given.

5.2.2 Services rendered by a tug under the towage contract

As seen under para 5.1.4, above and in Chapter 11, below, the obligations of a tug contemplated under a towage contract normally prevent the rise of salvage for the services rendered by the tug to the tow, unless there are exceptional circumstances not contemplated by the contract.

Article 17 of the Convention provides: 'No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.'

The circumstances in which tugs engaged in towage could claim salvage[49] were summarised by Hill J in ***The Homewood***:[50] To constitute a salvage service by a tug under contract to tow, two elements are necessary: (1) that the tow is in danger by reason of circumstances that could not reasonably have been contemplated by the parties; and (2) that risks are incurred or duties performed by the tug that could not reasonably be held to be within the scope of the contract.[51]

5.2.3 The services of pilots

Pilots are in a different situation, but these, too, cannot claim salvage, unless the services rendered were exceptional – that is, not within the normal services expected from the pilot.

5.2.3.1 When services may be exceptional

For example, in ***The Sandefjord***,[52] which was in charge of a pilot and stranded after a breakdown of the steering gear, lifeboats and tugs were standing by. Upon

47 (1941) 69 LlL Rep 5.
48 (1852) 16 Jur 572.
49 See *The Aldora* [1975] 1 Lloyd's Rep 617.
50 (1928) 31 LlL Rep 336; see Ch 11, below, on towage for full facts.
51 Ibid, p 339.
52 [1953] 2 Lloyd's Rep 557.

recommendation by the pilot that tugs should not be engaged, a kedge anchor was laid out by lifeboats, and the ship was refloated by hauling on the anchor.

Willmer J held that, although the courts would never encourage a pilot (in possible anticipation of big reward) to take undue risks in advising against the use of tugs, in the particular circumstances of this case, the pilot took no more than a fair risk as, with tugs standing by, there would still have been time for them to have been engaged before the position became critical. The pilot was entitled to a substantial award, although not approaching a sum that might have been awarded to tugs had they been employed – the salved value was £655,500, and the award was £500.

He brought his personal knowledge of the local conditions and his seafaring skill to bear on the problem created by the grounding of *The Sandefjord*; He gave the master advice (which events proved to be good advice); and he gave one more thing of a rather intangible nature, as to which I have had an opportunity of forming some judgment, having seen him in the witness box: he gave, I have no doubt, a great deal of encouragement to this foreign master, whose ship was stranded in waters with which he was not familiar.[53]

Another judge today might consider that the pilot's services in this case were within the ambit of his duties, and salvage might have not been awarded.

In an exceptional case, ***The Akerblom v Price***,[54] Brett LJ considered that the question turned on whether the acts of the pilots, by reason of the weather and the position of the ship, were so different in danger or responsibility from the ordinary acts of service of pilots, so that no fair and reasonable owner would have insisted on requiring such service for other than a salvage award. The rule of law was held to be as follows:

. . . in order to entitle a pilot to salvage reward he must not only shew that the ship is in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward.[55]

The vessel in this case was driven by the violence of the wind and sea on to dangerous sands. The locality was strange to both her captain and crew, and therefore she was in danger of being lost. Seeing the peril, the pilots put to sea to assist her. By preceding and signalling to her, they led her to a safe anchorage in the bay. The question put to the CA was whether the amount paid to the pilots was only for pilotage services, or was it to be treated as payment for salvage services.

It was held that the payment to the pilots ought to be considered as payment for salvage.

Another good example of a pilot rendering exemplary salvage services was ***The Hudson Light***.[56] While the ship was lying at anchor, there was a strong ebb tide, and, shortly before evening hours, she began to drag her anchor under the influence of the tide. Despite attempts to combat the drag, she continued to move down river and eventually went aground. Efforts to refloat her with her engines were unsuccessful. Tug assistance was called, and, in response, five tugs came to her rescue, but were

53 Ibid, p 561.
54 (1881) 7 QBD 129.
55 (1881) 7 QBD 129, p 135, per Brett LJ.
56 [1970] 1 Lloyd's Rep 166.

unable to move her, as she was aground on the bottom of sand and gravel, covered by a thick layer of mud. A pilot was requested, and he took charge of the operations for refloating the ship, giving instructions to each of the tugs. He displayed a very considerable degree of skill, both in planning and executing the refloating operation. The ship was eventually refloated and safely moored at a buoy, at about midnight. The pilot claimed a salvage, which was rejected by the owners, arguing that the method for refloating was obvious.

It was held that, not only did the pilot display considerable skill, but the responsibility that he undertook in rendering the services and running the risks involved was commendable. He was entitled to salvage reward. In assessing the reward, it was necessary to consider the merits of the contribution made by him to what were, in effect, joint services rendered by the tugs and him.

5.2.4 Cargo-owners services – can a salvage award be made?

Prior to ***The Sava Star***,[57] there had been no authority that the owners of cargo on board a ship in need of salvage, who render assistance and advice as to how a particular cargo on board should be handled and, therefore, contribute in the salvage of ship and cargo, could claim salvage. The issue before the court was whether or not cargo-owners should be entitled to a salvage award; the owners of the salved ship argued that they should not, as their services were rendered out of self-interest or for self-preservation.

This interesting point was dealt with by Clarke J, as a preliminary issue. A complex fertiliser, NPK, was being carried in bulk on board the defendants' vessel, *The Sava Star*. The master noticed smoke and gas escaping from the holds. On finding that the cargo was decomposing, the master called the charterers, a parent company of the cargo-owners (the claimants), who gave practical advice over the telephone regarding cooling of the cargo. The master had further contact with the charterers overnight. The decomposing cargo could not be discharged overboard. The claimants were informed of the incident and, thereafter, they initiated a crisis plan. They arranged for a helicopter overnight to make an inspection, constructed fire lances and provided chemists to take gas tests. The claimants' general manager gave advice to the dock master at Hull and to the Skuld P&I surveyor. United Towing Ltd (who became contractors under Lloyd's Form of Salvage Agreement) were informed of the casualty and decided to mobilise one fire-fighting tug. The contractor's tug departed carrying eight firemen, the claimants' technical manager and their chief fire-fighting officer, together with specialised fire-fighting equipment provided by the claimants. A meeting took place on board the contractors' tug, and the claimants' representatives advised on the use of fire lances and the need to avoid breathing the fumes released by the burning cargo. After preparations and briefings, the crew of *The Sava Star* and the claimants' representative, directed by the salvage master, fought the decomposition using water lances and thermocouples provided by the claimants.

The salvage of vessel and cargo was completed within 2 days, and the claimants claimed salvage remuneration, although, admittedly, cargo-owners had not historically claimed salvage, presumably because the occasion had not arisen.

57 [1995] 2 Lloyd's Rep 134.

Clarke J held that the owners' submission that cargo-owners were not volunteers would be rejected and stated that the reason why persons with contractual duties or persons such as the master and crew of the ship cannot recover a salvage award is because they are performing services ordinarily to be expected of them.

He reviewed the principles of cases with regard to salvage services rendered to sister ships, where the owner of the salving tug and the owner of the salved are the same, and salvage had still been rewarded against both the salved ship and the cargo on board her.

Although the facts of this case were unusual, there might be occasions when a chemical cargo on board necessitates special expertise for handling it by the provider, the shipper, but the terms of the bill of lading or charterparty ought to be checked, in case the shipper has an obligation under contract to assist.

5.2.5 Duties arising under statute or official duty

5.2.5.1 Duty to assist after a collision

It has been discussed in Chapter 9 that the MSA 1894, s 422, being replaced by s 92 of the MSA 1995, imposes a duty upon the master of a ship involved in a collision to stand by and render assistance after the collision. Failure to comply with such a duty without reasonable excuse is a criminal offence: s 92(4).[58] The issue whether compliance with such a duty bars the mariners from claiming salvage award was for the first time considered by the House of Lords in the following case.

The Melanie v The San Onofre[59]

In a collision between S and M in the Bristol Channel, on a foggy morning, S struck M on her starboard side and made a large hole in her, with the result that the engine room and one of the holds filled with water. The master of M – believing that he was in immediate danger of sinking – boarded S with most of his crew. The rest of the crew boarded U, an armed steam trawler that was escorting S. As M did not sink, the master of S proposed, with the assistance of U, to tow her to Barry, and the crew of M returned to her and lashed her to S on the starboard side and to U on the port side. After towing for three-quarters of an hour, all three vessels accidentally grounded on a ledge of rocks near the shore. S and U got off soon after and left M on the rocks. When the tide fell, the water in M drained out of her, and the master, by closing a watertight door between the hold and the engine room, was able to prevent the water coming into the hold. Both S and M were badly damaged by the grounding. M was successfully towed to Barry by two tugs on the following day.

A series of litigation resulted from the incident. First, it was found in the collision action that M was solely to blame for the collision. Later, this action was brought by the owners of S claiming salvage against M, which was disputed on the ground that M was left abandoned on the rocks after the grounding and, thus, in a greater danger than she was originally. In any event, she was ultimately saved by other tugs.

58 See Ch 9.
59 [1925] AC 246 (HL).

Bailhache J, acting on the advice of his assessors, decided that the towage had not materially contributed to the ultimate safety of M and dismissed the claim, but the CA, on the advice of its assessors, came to the contrary conclusion.

The House of Lords reversed the CA and restored the judge's decision, on the ground that the services rendered were not meritorious.[60]

Lord Phillimore stated, on the point of the duty of mariners to assist after a collision:

> This is, I believe, the first opportunity which this House has had of pronouncing upon a question which has, I imagine, long been treated as settled in the courts below. Ever since the judgment of Sir Robert Phillimore in *The Hannibal* and *The Queen* accepted, I think, in the Privy Council, though there was another ground on which the decision was confirmed – it has been taken as law that the duty cast by the MSAs upon one of the two colliding vessels to stand by and render assistance does not prevent that vessel, if she renders assistance, from claiming salvage.[61]

Even when the fault of the vessel, which stands by after the collision, was causative to the collision, this might not prevent her from earning salvage.[62]

5.2.5.2 Duty to assist others in distress

In addition to the statutory duty to stand by after a collision, there has also been a duty upon masters of ships to help others being in distress or danger at sea. This was first imposed by Art 11 of the Brussels Convention 1910. The provision was enacted into English law by s 6 of the MCA 1911, which was replaced by the MS(SP)A 1994 (Sched 2, para 2). It is now found in the consolidating statute, s 93 of the MSA 1995.

Article 10 of the Salvage Convention 1989 reinforces that duty by providing that every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger or being lost at sea. State parties shall adopt measures to enforce that duty; but the owner of the vessel shall incur no liability for a breach of the duty by the master of his ship.

By s 93,[63] a master of a ship is obliged to give assistance to persons in distress, upon receiving information that a ship or aircraft is in distress, and failure to do so is a criminal offence (s 93(6) and Sched 11, Pt II, para 3 of the MSA 1995).

However, it is expressly stated in s 93(7), as it was in its predecessor, that compliance with this provision shall not affect his right, or the right of any other person, to salvage, as is shown in ***The Tower Bridge (TB)***.[64]

The *TB* got into an ice field and she was totally surrounded by a pack of ice, being in a very dangerous situation, with the possibility of sinking. An SOS message was sent out, and *The Newfoundland* (N) hastened to her assistance. She had just contrived to get out of the ice herself, earlier on. It was, however, found that the TB was not in so desperate a position as it had seemed, and by the time the N came in sight of the TB, she had managed to get things under control to an extent. The TB, thus, requested that the N merely stood by to see the TB into port. The captain of the N thought this was unnecessary and intimated that he did not intend to stand by, indefinitely. Instead, he gave the chief officer of the TB definite information on what

60 See para 5.3, below.
61 [1925] AC 246, p 262.
62 See *The Kafiristan* [1938] AC 136, at para 8.3, below.
63 Previously, the Merchant Shipping (Safety Convention) Act 1949, s 22 (repealed).
64 [1936] P 30.

to do to get into clear water. In compliance with his advice, the TB got out of the ice field.

It was held that a very material service was rendered by the N. One of the arguments put forward by the TB was that the master had not, in fact, rendered any salvage service, as he was only complying with his duty under the statute. It was held that the provision of the then Merchant Shipping (Safety and Load Line Conventions) Act 1932 clearly stated that compliance by the master with the provisions of this section shall not affect his right, or the right of any other person, to salvage.

5.2.5.3 Salvage by officers under orders of a naval commander of the Royal Navy

Confusion may arise as to whether salvage is earned when the services are rendered under orders of a naval commander, which are rendered under an official duty. Exclusion from salvage would arise if the duty was owed to the vessel to be salved,[65] and not if the duty was to obey orders of a naval commander. The test of voluntariness in these situations had been laid down in ***The Sarpen***:[66]

> The test of voluntariness is only applicable between salvor and salved, and if the services are voluntary in relation to the salved, that is, not rendered by reason of an obligation towards him, it is quite immaterial that the salvor has been ordered by someone who has control of his movements to render them.

Prior to 1947, officers of the Royal Navy were regarded as being under a duty by standing orders to carry out salvage services. The courts did not favour claims by them for salvage, but only if the services were of substantial importance and rendered at personal risk, which were regarded to be outside their normal duties.

Since s 8(2) of the Crown Proceedings Act (CPA) 1947, there has been no bar on claims for salvage by or against the Crown in relation to services in the nature of salvage rendered by or to the Royal Navy. This position has been confirmed and clarified by s 230(1), (2) of the MSA 1995. Save for the exclusion of *in rem* proceedings against the Crown, salvage claims against or by Her Majesty's ships shall be subject to the same law as with respect to any other private person. However, s 230(3) provides that no claim for salvage by the commander or crew of any HMS vessel shall be finally adjudicated upon without the consent of the Secretary of State.

In ***The American Farmer***,[67] the crew of an RAF aircraft was awarded salvage, although the services were not considered meritorious, because the ship in danger would have been found by the other tugs sent to help; nevertheless, the action to send an aircraft across was not a usual risk to be taken by Royal Air Force planes.

5.2.5.4 Salvage operations controlled by public authorities

Article 5 of the Salvage Convention, Sched 11, Pt I of the MSA 1995, states that the Convention shall not affect any provisions of national laws or any International

65 In *The Carrie* [1917] PDA 224, the crew of two HM trawlers claimed salvage successfully for saving cargo of munitions belonging to the allies from a German submarine, which was about to sink the carrying ship. Although they had a duty to the allies, they did not owe an official duty to the ship itself.

66 [1916] P 306, p 315.

67 (1947) 80 LlL Rep 672.

Convention relating to salvage operations by or under the control of public authorities (Art 5(1)). The extent to which a public authority may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated (Art 5(3)). For example, English law, by statute, forbids a Fire Brigade Authority, which may assist in fire fighting in salvage, to charge for its services (s 3(4) of the Fire Services Act 1947).

The port authorities perform various duties under statute (see Chapter 13, below). For example, s 252 of the MSA 1995, as amended by the Wreck Removal Act 2011, gives the harbour authority the power to remove any vessel sunk, stranded or abandoned in water under the control of the harbour authority, where the vessel is likely to be or is an obstruction or danger to navigation. Harbour authorities have a common law duty to ensure that the harbour is safe for navigation. The authorities also have a statutory charge for recovering their expenses in respect of the removal of wrecks. They may not be entitled to salvage remuneration, unless they do more than what is expected of them under their statutory power.

In ***The Gregerso***,[68] the ship grounded in port, obstructing navigation to and from the port. She called for assistance, and a tug of the port authority was sent. The dock and harbour masters had to spend the whole night on board her, because the tug could not free the ship by towage that night as the tide had fallen. In the morning, when the tide was higher, the vessel was freed without much difficulty. The tug rendered further assistance by getting her a short distance down the river, to a position where she could proceed safely on her own. The port authority, the dock and harbour masters, and the master and crew of the tug claimed salvage from the owners of the ship.

It was held that it was in the interest of the port to clear the channel from the obstruction created by the casualty. The authority and its employees were not entitled to salvage, because their services were not voluntary but in discharge of duties. The corporation owed a duty to all users of the port and to the owners of this ship, which duties could only be performed through its employees. Considering the circumstances, there was nothing exceptional in terms of difficulty or danger in the work done by their tugs. The port authority, exercising its statutory powers, had no power to deal with the situation by entering into an LOF contract to salve the vessel. However, Brandon J said (*obiter*) that nothing in his judgment was intended to throw doubt on the right of a port authority or its servants to recover salvage for assisting a vessel in situations that did not call for the exercise, by the authority of its statutory power, of removal of obstructions or wrecks.

The South African court relied upon this decision in ***The Mbashi***,[69] in which salvage remuneration was granted to the port authority that sent two of its tugs to a ship in great distress, having lost all its power after a fire on board. Article 5 of the Convention was relied upon, and the court referred to English decisions.[70]

In the English court, a salvage claim was successful in the circumstances of ***The Mars***.[71]

68 [1971] 1 All ER 961.
69 [2002] 2 Lloyd's Rep 602.
70 See *The Cleopatra Dream* [2011] Lloyd's Maritime Newsletter, 25 Nov 2011.
71 (1948) 81 LlL Rep 452.

This was a salvage claim by three employees of the Port of London Authority (PLA), the crew of *The Boy Mark*, a motor patrol vessel, who claimed to have rendered salvage services to 11 drifting dumb barges in the river Thames. The barge-owners contended that the services were rendered in the ordinary course of the claimants' employment by the Authority, to whom the barge-owners had paid a sum for the services, and that, therefore, there could be no claim for salvage.

It was held that the mere existence of the statutory duty imposed by statute upon the PLA did not, of itself, automatically exclude the possibility of a claim for salvage, and that, where, as here, the claimants rendered services that went beyond their ordinary, every-day duties as servants of the PLA, they were entitled to an award; the claim being in respect of personal services, the award would be small.

In ***The Star Maria***,[72] one harbour authority tug, engaged under LOF, was unable to assist, in rough weather, *The Star Maria*, which had suffered damage to her steering gear after a collision; subsequently, a tug chartered by the coastguard, also engaged under LOF, sought the assistance of another tug belonging to the harbour to assist in the task of bringing the casualty into the harbour. This engagement was understood to be a towing service, which was expected to be remunerated on the terms of the board's commercial tariff rate. Owing to the great difficulties, in bad weather conditions, the towage connection with the coastguard tug parted, and the casualty was in danger of grounding. The captain of the harbour tug exerted great skill and effort to prevent grounding, which was not a risk reasonably foreseeable when the tug was instructed to assist. The risks incurred and duties performed during this period could not reasonably be held to be within the scope of her contractual duty to act as a steering tug, and, therefore, it was entitled to salvage under common law. The original LOF between the first harbour authority tug and the master of the casualty had been terminated.

5.2.5.5 Salvage operations and HM coastguards

Section 250 of the MSA 1995 provides for the remuneration of coastguards for services rendered in watching or protecting property at sea, payable by the owner of the property on a scale fixed by the Secretary of State. Being part of the marine division of the Department of Environment and Transport, they perform a public duty and are, therefore, unlikely to be able to claim salvage award, unless they render services far and above those duties expected of them. However, the owners of tugs chartered to the coastguard as emergency towing vessels can enter into a salvage agreement with the casualty's master.[73]

5.2.5.6 Salvage by lifeboat crews of the RNLI

The duty of a lifeboat crew is to go out and save lives, and the RNLI rewards crew members on a scale basis, provided they make no claim for salvage. The RNLI is supported by voluntary contributions. Lifeboat crew are not supposed to render services to save property, if other vessels are on the spot. If no other vessel is standing

72 [2003] 1 Lloyd's Rep 183.

73 *The Star Maria* [2003] 1 Lloyd's Rep 183, in which, apart from two harbour tugs engaged in salvage, a chartered tug to the coastguard was also engaged under LOF.

by, then the crew may accept a salvage engagement, whereupon the crew members become hirers of the lifeboat and, if they succeed, they must pay to the RNLI expenses incurred in respect of the boat, in accordance with the RNLI's regulations.

A good example of the courts' attitude towards lifeboat crews is provided in the decision of Hewson J, in ***The Viscount***.[74]

Services were rendered by a crew member of the RNLI lifeboat *Henry Blogg* to the defendants' motor vessel, *The Viscount*, which ran aground on the Norfolk coast. *Henry Blogg* arrived at 10.00 hours and stood by until the tide began to make, when she went along the starboard side of *The Viscount*. While she was manoeuvring on to *The Viscount*'s port quarter, a carton of 200 cigarettes was thrown on board from *The Viscount*. *Henry Blogg* was asked to come back and take a rope in an hour, but, as the tide was setting strongly to the south east, the lifeboat crew insisted on taking the rope then (15.15 hours). *The Viscount* was refloated in a few minutes. A claim was made for salvage award, but *The Viscount* denied that *Henry Blogg* rendered any material assistance and contended that the plaintiffs agreed to render any assistance necessary for 200 cigarettes. The salved values were not insignificant.

Hewson J held that, although there was little danger, *Henry Blogg* acted as an 'animated drogue' in helping to hold up *The Viscount*'s stern against the flood tide, and those services were rendered at the critical few minutes between the time she became lively and the time she went astern into deep water; that cigarettes were not accepted as prepayment for assistance that was requested; and that, therefore, the plaintiffs were entitled to a salvage award of £250. The judge added a general comment:

> In making this award I want to make it quite clear that the primary duty of life boatmen manning lifeboats owned by the RNLI is the saving of life. It must be clearly understood that in the course of standing by to save life this court is giving no encouragement to life boatmen to get a line on board a disabled vessel at all costs; but, nevertheless, they must be encouraged to stand by and to give such assistance, without unduly risking their craft, when necessary.[75]

The weight of judicial opinion with regard to crews of RNLI lifeboats has been to favour an award for personal risk, local knowledge and highly meritorious services by those men, for which they should be rewarded, for future encouragement.[76]

5.3 SUCCESS

The third element for an award of salvage to be made is that the services must either succeed in, or contribute to the success of, saving the property. There must be meritorious services.

5.3.1 Meritorious services

The cause of action of salvage, which is available in the Admiralty Court, is quite distinct from a *quantum meruit* available in the common law courts.

74 [1966] 1 Lloyd's Rep 328.
75 [1966] 1 Lloyd's Rep 328, p 333.
76 *The Boston Lincoln* [1980] 1 Lloyd's Rep 481; *The Africa Occidental* [1951] 2 Lloyd's Rep 107; *The Geertjie K* [1971] 1 Lloyd's Rep 285.

The principle was laid down by Dr Lushington in ***The India***,[77] where he said that: '. . . unless the salvors by their services conferred actual benefit on the salved property, they are not entitled to salvage remuneration'.

Article 12 of Sched 11 to the consolidating MSA 1995 provides that a salvor will be entitled to a reward if the salvage operations had a useful result. The exception to this is contained in Art 14, which gives salvors the right to recover special compensation for salvage services rendered to a vessel, or its cargo, when by itself or its cargo threatened damage to the environment (see later, at para 11, below).

Lord Diplock, in ***The Tojo Maru***,[78] examined certain characteristics of salvage contracts that differentiate them from ordinary contracts for work and labour: 'The first distinctive feature is that the person rendering the salvage services is not entitled to any remuneration unless he saves the property in whole or in part. This is what is meant by 'success' in cases about salvage.'[79]

If, after the service is actually rendered, the ship is in as grave a danger as it was originally, then no award will be given. Also, services that rescue a vessel from one danger but end by leaving her in a position of as great, or nearly as great, a danger, though of a different kind, are held not to contribute to the ultimate success and are not entitled to salvage reward.

In ***The Cheerful***,[80] which had lost her propeller in the English Channel, the tug H came to her rescue and proceeded to tow her to port, but both hawsers parted, and C got into a position of considerable danger in adverse weather conditions. In an attempt to get hawsers on board again, H got out of command, became unmanageable and eventually collided with C, causing damage to both vessels. Eventually, H left C, as she was in danger herself. Two tugs finally came to the assistance of C and towed her to safety. H claimed salvage, alleging that, at the time she came to C's rescue, the weather was bad, that there was a heavy sea with squalls and gale, and that C was in danger of going on to the coast and becoming a total wreck if no vessel had come to her rescue. The owners of C argued that she was in no immediate danger, and that H had by her actions left C in a worse position than she was originally and should not be awarded salvage. They also counterclaimed damages for the injury done to C as a result of the negligence of H at the time they were attempting to get the hawser on board again. As no actual benefit was conferred on C by the services of H, no salvage was awarded. In the opinion of the Elder Brethren, however, H was not negligent in its actions or omissions, and, therefore, the counterclaim for injury to C due to H's negligence failed.

In ***The Melanie v The San Onofre***,[81] the defendants claimed that the plaintiffs had left M in a position of greater comparative danger than she was in before S began to tow her, and, therefore, no salvage was due. It was held that services that rescue a vessel from one danger but end by leaving her in a position of as great, or nearly as great, danger, though of another kind, do not contribute to the ultimate success and do not amount to salvage. The mere fact that the claimant has brought the ship

77 (1842) 1 Wm Rob 406.
78 [1972] AC 242 (HL).
79 Ibid, p 293.
80 (1855) 11 PD 3.
81 [1925] AC 246.

to a position or spot where the ultimate salvor has found her does not of itself show that bringing her to that spot was a contribution to the ultimate success.

Where many vessels are involved in the salvage operation of a ship, only those vessels that could be considered as having 'materially assisted' the rescue of the ship or cargo would be entitled to any salvage reward.

In ***The Killeena***,[82] Sir Robert Phillimore quoted a passage from *The Undaunted* (1860) Lush 90, which summarises the principles of law applicable to the question of whether *The Nora*, in this case, was entitled to a salvage reward:

> Salvors who volunteer, go out at their own risk for the chance of earning reward, and if they labour unsuccessfully, are entitled to nothing. The effectual performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour and service may not prove beneficial to the vessel.

The Killeena had been abandoned by her master and crew during a heavy gale, which affected the vessel badly. She drifted about in the Atlantic until she was sighted by *The Nora*, a Norwegian vessel. The crew of *The Nora* boarded *The Killeena*, but they became frightened and decided to abandon the vessel; they hoisted an ensign union down to attract the attention of those on board *The Beatrice*, which, with the assistance of another tug, brought *The Killeena* into Falmouth. The court held that the master and crew of *The Nora* were not entitled to any salvage reward.

Sir Robert Phillimore added:[83]

> Now, there is no doubt that where a set of salvors have done some acts which tend to the ultimate salvage of a vessel they are usually entitled to some remuneration, but there is a circumstance in this case most material to consider. The four men and the boy who were put on board from *The Nora* . . . abandoned and deserted *The Killeena*. It appears to me, therefore, that *The Killeena* was again a derelict vessel. . . . It appears to me that it would be contrary to the principles upon which salvage remuneration is awarded to allow *The Nora*'s people to appear as salvors in this case, inasmuch as they were, according to the evidence, turning their backs and running away from the danger to which the vessel was exposed. The men on board *The Beatrice* had as much reason to be alarmed, but they persevered, and their courage deserves to be rewarded. I am clearly of opinion that the owners, master, and crew of *The Nora* are not entitled to claim salvage.

5.3.2 Salvage services by standing by a vessel in danger

Meritorious services can also be rendered merely by standing by, as long as the property is ultimately saved. In ***The Tower Bridge***,[84] it was held that N rendered most valuable assistance in showing the TB how to get out of the ice field. It was not necessary to define the precise moment at which the service began or to quantify the moral support afforded to the TB, when the only available ship in the North Atlantic came ploughing her way through the ice. Each separate item of the proceedings could not be regarded in isolation. The whole of the circumstances that existed at the time must be looked at.

82 (1881) 6 PD 193.
83 (1881) 6 PD 193, p 198.
84 [1936] P 30.

5.3.3 Salvage and engaged services

Before the emergence of sophisticated salvage agreements, there used to be salvage services rendered at request – as contrasted with volunteer salvors – and, even if there was no contribution to success, there would be salvage remuneration, as an exception to the general rule that the right to salvage accrues only upon success. That exception was affirmed by Dr Lushington, in ***The Undaunted***:[85]

> There is a broad distinction between salvors who volunteer to go out, and salvors who are employed by as ship in distress. Salvors who volunteer, go out at their own risk for the chance of earning reward, and if they labour unsuccessfully, they are entitled to nothing; the effectual performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labour and service may not prove beneficial to the vessel. Take the case of a vessel at anchor in a gale of wind, hailing a steamer to lie by and be ready to take her in tow if required; the steamer does so, the ship rides out of the gale safely without the assistance of the steamer: I should undoubtedly hold in such a case that the steamer was entitled to salvage reward . . .

A later example of engaged services was seen in ***The Alenquer and Rene***.[86] *The Alenquer*, having done the thing she was asked to do by *The Rene* (that is, to respond to a distress signal and stand by *The Rene*), would have been entitled to an award, had it not been for her negligence, which deprived her of her right to it.

There have been a few other cases in which salvage was awarded on those bases, but, in modern times of salvage requirements and facilities available, such services will either be covered by a specific agreement for towage or salvage, or will be considered as salvage operations falling within the definition of Art 1(a) of the Convention.

6 SALVAGE AGREEMENTS

6.1 HISTORICAL DEVELOPMENT

Ordinary salvage arises out of the fact that aid has been given voluntarily at the time of danger, and, if there has been benefit to the subject of salvage from the services rendered to the subject matter, an award will be made. There is no need for an actual contract between the parties. Unless the parties expressly agree to contract out of the Convention, or the MSA, all salvage operations will be governed by the statute (Art 6(1) of Sched 11 to the MSA 1995).

If the services were already rendered prior to any agreement, a subsequent agreement will cover only future action. The salvor has vested rights prior to the agreement.[87]

Similarly, the Convention and the 1995 Act protect salvors in respect of any salvage operations with a useful result (Art 12).

85 (1860) Lush 90, p 92.
86 [1955] 1 Lloyd's Rep 101.
87 See *The Inchmaree* [1899] P 111, pp 116–117.

Formal salvage agreements came to be used in the late nineteenth century, with the first standardised form dated 1892, on the basis of 'no cure, no pay'. Professional salvors render services under an agreement entered into at the time of danger. These agreements are made on the 'no cure, no pay' basis, on the LOF, and the remuneration is fixed by arbitration. The parties to the agreement retain their common law rights. There have been a series of LOFs over the years: after the LOF 1980 and since the Salvage Convention, the forms commonly in use have been the 1990 and 1995; in recent years, there has been the LOF 2000, which is now amended by the LOF 2011 (see para 14, below).

As will be seen later, problems with regard to salvors' compensation for protection of the environment from pollution arose from difficulties in the interpretation of Art 14 of the Convention (see under paras 11 and 12, below). These difficulties led to commercial pressure being exerted by the ISU for improvement of the wording of Art 14. After consultation and negotiations between the ISU, property underwriters and P&I clubs, there was the birth of a new clause, known as the Special Compensation of Protection and Indemnity Clause (SCOPIC) (see under para 13, below). This, in fact, is a form of guaranteed remuneration to salvors for protecting the environment, payable by the P&I club of the ship-owners whose vessel needs salvage, to encourage the salvor to proceed to a casualty, whether or not there is a threat of damage to the environment. It can be incorporated into any LOF, if the salvors so choose (of which see later). The previous LOFs may still be used if the parties so desire.

6.2 THE ROLE OF THE CONVENTION AND OTHER LEGISLATION

Unless the parties wish to contract out of some of the provisions of the Convention, or, as far as English law is concerned, the provisions of the MSA 1995, which incorporates the 1989 Salvage Convention, the Convention shall apply. If there is no contract, the rules of the Convention shall apply to all salvage operations, save where the law applicable to a salvage operation is of a State that has not ratified the Convention.

The contract is for supply of services. Therefore, the Supply of Goods and Services Act 1982, ss 13–16 would apply, particularly regarding implied terms concerning reasonable care and skill, to provide a tug fit for the purpose and complete the services within a reasonable time.

The Unfair Contract Terms Act 1977, apart from s 2(1) regarding no exclusion of liability for death or personal injury, has no application to marine salvage contracts, but there is an exception in case the owner of the salved property is dealing as a consumer, and this could arise if there is a salvage of a private yacht used for personal and not for business purposes.[88]

There may be salvage agreements with fixed amounts for specific services, as mentioned earlier, but, with the passing of the Salvage Convention, the scope of these contracts has been limited. If the amount is not agreed upon, the remuneration will be adjudged by the court, which has jurisdiction under s 20(2)(j) of the SCA 1981.

88 Section 1(2) and Sched 1 para 2 of the Unfair Contracts Terms Act 1977.

There is, however, a lump sum agreement, the 'Salvom' International Salvage Union Agreement, with detailed clauses about the parties' rights and obligations.

6.3 COURT'S INTERVENTION

Unlike ordinary contracts, the courts can re-open salvage contracts, even in the absence of economic duress, misrepresentation or operative mistake. This is more common where the contracts are fixed-sum salvage agreements, where the courts may intervene to determine the rate of remuneration.[89]

The 1989 Convention, Art 7, provides that a contract may be annulled or modified if it has been entered into under undue influence or the influence of danger and its terms are inequitable, or if the payment under the contract is, in an excessive degree, too large or too small for the services actually rendered.

The LOF 2000 and 2011, by cl L, expressly prohibits undue influence prior to entering into the agreement.

Common law principles will apply to such situations, and some examples of economic duress, misrepresentation and mistake are shown below.

6.3.1 Economic duress, or overbearing conduct by the salvor

Both at common law and in equity, a party cannot be held to its contract if its consent has been obtained by unjustified threats, or duress. The Privy Council, in ***Pao On v Lau Yiu Long***,[90] held that duress is a coercion of the will so as to vitiate consent, but commercial pressure is not enough to do so. Material questions for the inquiry of the existence of coercion will be whether or not: (a) the innocent party protested; (b) he had an alternative course open to him; (c) he was independently advised; and (d) he took steps to avoid the contract after having entered into it.

In ***Huyton SA v Peter Cremer***,[91] the court, reviewing the authorities on economic duress, stated that it was the deflection rather than the coercion of the will of the innocent party that the court will be looking for, in considering whether the contract is voidable. The illegitimate pressure must be a significant cause, which must have induced the innocent party to enter into the contract, but the court will take into account other possible choices available to the victim and assess them objectively.[92]

In salvage contracts, it is in the nature of salvage that agreements have to be entered into quickly and under pressure because of the danger to the property involved, and there will be very rare cases in which the master of the property in danger has other courses open to him, or even time to take independent advice.

89 See, e.g., *The Mark Lane* (1890) 15 PD 135; *The Crusader* [1907] P 15; *The Westbourne* (1889) 14 PD 132.

90 *Pao On v Lau Yiu Long* [1980] AC 614 (PC); see, also, *Occidental Worldwide Investment Corp v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705; and *Universe Tankships Inc of Monrovia v ITWF* [1983] 1 AC 366 (HL); see also Ch 7.

91 [1999] 1 Lloyd's Rep 620.

92 See, further, *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530; *Carillion Construction ltd v Felix (UK) Ltd* [2001] 1; *The Cenk Kaptanoglu* [2012] 1 Lloyd's Rep 501 and other cases in Ch 7, para 7.3.5.

On the other hand, the fact that there is not equal bargaining power, or the fact that the parties to an agreement for salvage services about to be performed on the high seas have not contracted on equal terms, will not in itself invalidate such an agreement; but if, in addition to the master of the vessel about to be salved being at a disadvantage, the sum insisted upon by the intending salvor is, in the opinion of the court, exorbitant, the necessary elements exist for setting aside the agreement as inequitable.[93]

When ***The Port of Caledonia*** (POC)[94] was in great difficulty during a south-westerly gale, her anchor was dragging towards another ship, the A. Both were heading to the wind, were fully exposed to the ground swell and were in danger of fouling one another. The master of POC called for a tug and pilot and S, being close by, responded to the signal, asking £1,000 for the service. When the master of POC offered to pay £100, the master of S rejected the smaller offer, whereupon the master of POC, being in great difficulty, accepted to pay the greater amount and hailed S to take the tow. S towed POC to a safe berth and claimed the sum of £1,000, as well as a reasonable sum for salvage from A. The learned judge considered the value of the services to be less than £1,000, and the question was whether the bargain was so inequitable and unreasonable that the court could not allow it to stand. It was held that, as one party was in a position to insist upon his terms, and the other party had to put up with it, being in a desperate situation, the agreement was inequitable, extortionate and unreasonable.

6.3.2 Misrepresentation and non-disclosure

The general principles of common law and statute will apply, if either party to the agreement has misrepresented the true facts so as to cause prejudice to the other party's position, who relied on the facts as represented.[95] Liability in damages may lie under the Misrepresentation Act 1967, s 2(1).[96]

In addition, the Admiralty Court has inherent jurisdiction to interfere with salvage agreements, and the following case is an example of the court's approach when the salved ship had misled the salvor about the danger.

The Kingalock (K)[97] was at the entrance of the river Thames, met with extremely bad weather and suffered considerable damage. Her master entered into an agreement with the master of a steamer to tow K to London for a fixed sum of £40, but he did not disclose the fact that K had encountered such difficulty before and had been damaged. A short time after the towage began, the hawser broke, and the master of the steamship discovered what had previously happened. He immediately declared the agreement at an end, but, nevertheless, towed the vessel to London, as though no agreement had been made. With much difficulty, the vessel was towed safely to London. The salvors claimed a salvage reward, but the owners of K contended that the original agreement was still valid and subsisting. Dr Lushington stated, thus:

93 *The Rialto* [1891] P 175.

94 [1903] P 184.

95 *The Unique Mariner* [1978] 1 Lloyd's Rep 438 (see also Chs 7 and 8).

96 See, also, *Howard Marine and Dredging Co Ltd v A Ogden & Sons Ltd* [1978] QB 574 (CA); *The Unique Mariner* [1978] 1 Lloyd's Rep 438, pp 454–455, per Brandon J; and see Ch 11.

97 (1854) 1 Spinks E&A 265.

> An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties; and if any fact which, if known, could have any operation on the agreement about to be entered into is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidentally or by carelessness; we all know that there may be what, in the eye of the law, is termed equitable fraud.[98]

It was held that the omission to state the undisclosed facts would vitiate the agreement, because those facts would have affected the service to be performed. The lack of ground tackle on the ship may have been important, particularly during weather as tempestuous as this was. This might have, to a certain extent, governed the manoeuvres of the steamer. Therefore, the agreement was null and void *ab initio*. The owner of K was ordered to pay an additional sum suitable in the circumstances, because the tug had been misled that this was an ordinary towage. Dr Lushington stressed that, if there had been an agreement for extraordinary towage, with full knowledge of the state of the vessel, no addition would have been made.

6.3.3 Operative mistake

This is a very debatable issue, and there have been many court decisions, which can be found in contract law texts. The general principle to be drawn is that, for an agreement to be annulled owing to mistake, there must have been a fundamental common mistake, where both parties hold the same mistaken belief of the facts that renders the performance of the contract impossible. The effect of such a mistake at common law is to render the contract void.[99] A mutual mistake occurs when the parties to a contract are both mistaken about the same *material* fact within their contract. Although there is meeting of minds, they are at cross-purposes. Hence, the contract is voidable.[100]

In salvage cases, in which third-party tugs are, invariably, engaged, there can be instances where there is a mistake between the parties as to the location of the casualty or the tug, or the time of expected arrival of the tug, or a mistake about the instructions as to which tug had been sent to the casualty, or a misunderstanding as to the appreciation of danger. In reality, salvage requires swift action, and the parties do not have time to seek the assistance of the court, but they try to find their own practical solutions. However, disputes may arise afterwards, particularly because the salvor has to subcontract other craft and equipment, and mistaken information may affect his decision, resulting in him being liable either to the party needing assistance or to the third party (tug-owner) under their respective contracts.

The salvor's main concern is to assist, as soon as possible, the property in danger. However, does the law help him, so that he is not left in a worse position than before

98 Ibid, p 265.

99 *Bell v Lever Brothers Ltd* [1932] AC 161: it established that common mistake can void a contract only if the mistake of the subject matter was sufficiently fundamental to render its identity different from what was contracted, making the performance of the contract impossible.

100 *Raffles v Wichelhaus* (1864) 2 Hurl & C 906 Court of Exchequer. In *Raffles*, there was an agreement to ship goods on a vessel named *Peerless*, but each party was referring to a different vessel. Therefore, each party had a different understanding, which they did not communicate to each other.

he got involved, considering that he is working under different conditions from those in which parties to ordinary contracts do? If the constraints of common law principles do not help, could or should equity help?

In ***The Great Peace***,[101] Tsavliris salvors contracted on an LOF basis to salve *Cape Providence*, which had suffered serious structural damage in the Indian Ocean. There was a danger that the ship might sink, with loss of life, if there was a delay waiting for a tug to arrive. Tsavliris, through brokers, subcontracted *The Great Peace* on the basis of misinformation about its locality, but both parties to this subcontract believed that the tug was close to the casualty. Following the fixture, the real distance of *The Great Peace* from the casualty was discovered, which was about 410 miles away, instead of 35 miles, as was originally believed. The salvor immediately sought a tug that was nearer to the casualty and then cancelled the agreement with *The Great Peace*. The owners of *The Great Peace* sought to recover damages for 5 days' hire due under the charterparty.

The salvors argued that the effect of the mistake was to deprive the contract from the underlying consideration on which it was based, in that it was essentially and radically, or fundamentally, different from the performance contemplated by the parties, and, therefore, the contract was rendered void; they relied on the House of Lords' decision in *Bell v Lever Brothers*, which set the principle of mutual mistake at common law.[102]

In the alternative, they relied on *Solle v Butcher*[103] and argued that the effect of the mistake was to make the contract voidable in equity, giving the salvors the right of rescission in equity, because the mistake concerned a fundamental matter to the agreement. Denning LJ, in the latter decision, had held that a contract that did not satisfy the strict test of *Bell* could be voidable and be set aside, if the parties were under a common misapprehension either as to facts or to their relative and respective rights, provided that the misapprehension was fundamental, and the party seeking to set it aside was not himself at fault.

The judge interpreted the salvors' conduct in making the decision to hold on to the contract with *The Great Peace*, until they found a replacement, as a factor indicating that they did not regard it as void as soon as they discovered its true position. He disregarded the extreme condition of danger in which the salvor had to save life and, for this reason, was holding on to this tug, which should be distinguished from the position of parties endeavouring to save life on land.

The CA agreed with the judge and commented on the decision in *Solle v Butcher* that it dramatically extended the jurisdiction of the court by introducing a category of equitable mistake where the contract was not void at common law, whereupon making it difficult to reconcile it with *Bell v Lever Brothers*. Thus, the CA decided that there was no judicial basis for allowing equity to grant rescission in cases where common law did not make the contract void.

Lord Phillips MR, for the CA, held that the mistake was not sufficiently fundamental to avoid the contract. It was going to take 22 hours to do 410 miles, but that was not a delay to make performance 'essentially different from those the parties envisaged when the contract was concluded'.

101 [2002] 2 Lloyd's Rep 653 (CA).
102 Op. cit. fn 100.
103 [1950] KB 671 (CA).

From a strict application of contractual principles at common law, and as the law stands at present, salvors could look to protect themselves by negotiating an appropriate cancellation clause to be included in the contract with subcontractors. Such a clause can stipulate events that would trigger cancellation of the contract without the salvors having to pay a cancellation fee.

7 THE MASTER'S AUTHORITY TO ENTER INTO SALVAGE AGREEMENTS

The master of a ship has authority to act on behalf of the owners in various circumstances arising from being in command of the ship. Such authority is derived mainly from his contract of employment, and it is actual authority, express or implied, depending on the circumstances.

Actual authority will exist in most cases when the owner issues standing orders, or gives such authority through wireless communications. Implied authority derives from the nature of the contract of employment in respect of acts that are necessary to be done in the performance of that contract and fall within the usual scope of his position, as for example the act of signing bills of lading, or engaging other agents to provide necessary materials and provisions for the running of the ship.

On occasions, the authority may be implied by the operation of law, as, for example, when the master acts as an agent of necessity. Although it is not difficult to trace the root of the master's authority vis-à-vis the owner of the ship through the principles of agency law, a problem had arisen in the past as to whether the master had authority to bind the owners of the cargo carried on board the ship, in the contract with the salvors, by signing the salvage agreement.

Prior to the Salvage Convention 1989, the issue was dealt with in accordance with the principle of agency of necessity, but this proved to be problematic in certain circumstances, where the criteria of that agency were not satisfied.

Although the Convention has resolved the issue of authority of the master of the ship in danger, when agreeing to accept the assistance of salvors on behalf of both his principal and third parties, and in that respect the parties to a salvage contract are not allowed to contract out of Art 6(2), it is important to explain the problem at common law, which led to the need for this matter to be settled by the Convention.

7.1 MASTER'S AUTHORITY AT COMMON LAW

The essential characteristic of agency is the power of the agent to affect the legal position of the principal as regards third parties. In a situation of salvage, the master of the ship will be acting as agent of the owners of the properties to be salved, with a view to binding them into an effective contract of salvage with the third party, the salvors.

There are two sets of triangular relationships to be examined: first, as between the master, his employers and the salvors; and, second, as between the master, the owners of cargo (or of other property on board) and the salvors.

7.1.1 The basis of the master's authority to bind his principal to a salvage contract[104]

It has been established that the master of a ship that needs salvage assistance has implied actual authority to bind his principal, the ship-owner, to the contract of salvage. This principle was confirmed by the court in ***The Unique Mariner (No 1)***.[105]

When the vessel ran aground, the master signed an LOF salvage agreement in the mistaken belief that a tug that approached him had been sent on behalf of his principal. He later discovered that his principal had retained another tug and, in the light of this, he dismissed the first tug in favour of the latter. The question before the judge was whether a signed LOF was a valid contract, binding on the owners. Counsel for the owners contended that, although the master had implied actual authority to accept the services of a tug, such authority did not extend to his entering into a special contract, such as the LOF. Brandon J stated:

> The implied actual authority of a master, unless restricted by such instructions lawfully given, extends to doing whatever is incidental to, or necessary for, the successful prosecution of the voyage and safety and preservation of the ship.[106] . . .
>
> I do not think that the implied actual authority of the master of a stranded ship to accept the services of a suitable tug is limited to his accepting them subject to the ordinary maritime law of salvage. I think, on the contrary, that it extends to accepting such services on the terms of any reasonable contract.[107]

It was held that the LOF had been used and accepted as being reasonable and fair.

7.1.2 The basis of the master's authority to bind cargo interests to a salvage contract

The master could bind the cargo-owners to the contract as an agent of necessity, if the means of communication in the time available to respond to an emergency would put his ship and cargo on board at a greater risk. The same would apply in case of freight being at charterer's risk.[108]

Agency of necessity arises by operation of law in certain circumstances where a person is faced with an emergency in which the property or interests of another person are in imminent jeopardy and it becomes necessary, in order to preserve the property or interests, to act for that person without his authority.[109]

There exist four elements for the agency to arise:

(a) an emergency;
(b) inability to obtain instructions, or failure by the cargo interests to give any instructions when appraised of the situation;[110]

104 See, also, Ch 11, below.

105 [1978] 1 Lloyd's Rep 438, as the ship was in ballast, there was no issue of the master's authority vis-à-vis cargo-owners.

106 Ibid, p 449.

107 Ibid, p 450.

108 *The Pantanassa* [1970] 1 Lloyd's Rep 153.

109 *Bowstead and Reynolds on Agency*, 18th edn, 2005, Sweet & Maxwell.

110 Lloyd J, at first instance, in *The Winson* [1982] AC 939 (HL), thought that the first element of the agency of necessity was inability by the master to obtain proper instructions.

(c) the master must act bona fide for the interest of all; and
(d) it is reasonable for the master or ship-owner to enter into the particular contract.[111]

The court in ***The Winson***[112] examined the agency of necessity in the context of salvage, together with principles of bailment.

The Winson, a bulk carrier, was chartered by the Food Corporation of India (the cargo-owner) to carry full cargo of wheat from US Gulf ports to Indian ports under a voyage charterparty. In the course of the voyage, she stranded in the South China Sea. Professional salvors (China Pacific) were quickly on the scene, and a salvage agreement in the LOF was entered into, signed by the master on behalf of the ship-owner and cargo-owner. During the salvage operations, it was necessary to lighten the vessel by off-loading part of her cargo into barges provided by the salvors and carrying it to a place of safety. This was done, and some 15,429 tonnes of wheat were off-loaded and carried to Manila, which was a proper place of safety.

The carriage was in six separate parcels that arrived in Manila at various dates between 10 February and 20 April 1975. The salvage operations at the site of the stranding were temporarily suspended on 15 April 1975, owing to fighting in the vicinity having broken out between the forces of North Vietnam and South Vietnam. On 24 April 1975, the ship-owner gave notice to cargo interests that he had abandoned the chartered voyage. By that date, it was obvious that the completion of the carriage of the cargo in *The Winson* to its destination under the charterparty, even if it were to become physically possible (which, in the event, it was not), would involve such long delay as would frustrate the contract.

It was not disputed that it never became practicable thereafter to resume the salvage operations, and, on 20 May 1975, the salvors gave formal notice of termination of their salvage services. *The Winson*, with the remainder of the cargo of wheat still on board her, eventually became a total loss.

Upon the arrival of each parcel of salvaged wheat at Manila, where the salvors had no storage premises of their own, it became necessary for it to be stored in suitable accommodation under cover, until a decision was reached what to do with it. The salvors arranged for the storage of part of the wheat in a vessel, *The Maori*, lying in Manila harbour, and the remainder in a bonded warehouse ashore. In doing so, they incurred expenses for stevedoring and charter hire of *The Maori* and warehouse charges ashore. The stored wheat was held to their order by those in whose vessel and warehouse it was stored ('the depositaries'). These expenses, which the salvors became personally liable to pay under the contracts that they made as principals with the depositaries, continued to be incurred by them until the cargo-owner had completed taking possession of the wheat – which did not happen until 5 August 1975.

The storage expenses incurred after the termination of the contracted voyage (24 April 1975) were paid by the cargo-owners, who did not dispute the payment from 24 April. The salvors brought this action against the cargo-owners to recover the storage expenses up to that date, who contended that, by virtue of the contract of carriage, the immediate right to possession of the goods before it was terminated rested

111 The fourth criterion was added by Slade LJ in *The Choko Star* [1990] 1 Lloyd's Rep 516 (see below).
112 [1982] AC 939 (HL).

with the ship-owner, and the salvors were, thus, under a duty to deliver the cargo to the ship-owner. They argued that it was the ship-owner who was liable to reimburse the salvors for those expenses. Such a proposition was rejected by Lloyd J at first instance, but accepted by the CA.

The Winson at the House of Lords

Apart from the importance of this decision on issues of bailment, the relevant issue in this context was the legal nature of the relationship between the master of the ship and the owner of the cargo, when the salvage contract was signed. The issue of payment of the salvors' expenses was solved on the basis of bailment.

It was held that, where in the course of salvage operations cargo is off-loaded from the vessel by which the contract of carriage was being performed and conveyed separately to a place of safety, the direct relationship of bailor and bailee is created between the cargo-owner and the salvor, as soon as the cargo is loaded on vessels provided by the salvor to convey it to a place of safety. All the mutual rights and duties attaching to such a relationship at common law become binding. The relationship continues to exist until the cargo-owners take possession of the cargo from the warehouse. The cargo-owner, therefore, had to pay for all expenses incurred.[113]

Lord Diplock said:

> My Lords, it is not suggested that there is any direct authority on the question of law that is posed in this appeal. In my opinion the answer is to be found by applying to the unusual circumstances of the instant case well known and basic principles of the common law of salvage, of bailment and of lien.[114]
>
> . . . with modern methods of communication and the presence of professional salvors within rapid reach of most parts of the principal maritime trade routes of the world, nearly all salvage of merchant ships and their cargoes nowadays is undertaken under a salvage contract in Lloyd's Open Form. The contract is one for the rendering of services; the services to be rendered are of the legal nature of salvage and this imports into the contractual relationship between the parties to the contract by necessary implication a number of mutual rights and obligations attaching to salvage of vessels and their cargo under common law, except insofar as such rights and obligations are inconsistent with express terms of the contract.
>
> Lloyd's Open Form is expressed by cl 16 to be signed by the master '. . . as agent for the vessel her cargo and freight and the respective owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof'. The legal nature of the relationship between the master and the owner of the cargo aboard the vessel in signing the agreement on the latter's behalf is often though not invariably an agency of necessity. It arises only when salvage services by a third party are necessary for the preservation of the cargo.
>
> . . . It would, I think, be an aid to clarity of legal thinking if the use of the expression 'agent of necessity' were confined to contexts in which this was the question to be determined and

113 Also relevant is the Supreme Court decision in *ENE 1 Kos Ltd v Petroleo Brasileiro SA Petrobras (The Kos)* [2012] UKSC 17; [2012] 2 AC 164 (which concerned termination of the charterparty by the withdrawal of the vessel, for non-payment of hire, which had cargo on board). It was held that: the cargo was originally bailed to the ship-owner under a contract that came to an end while the cargo was still in its possession; as a matter of law, the ship-owner's obligation to look after the cargo continued, notwithstanding the termination of the charterparty; and the only reasonable or practical option open to the ship-owner was to retain the cargo until it could be discharged. Although *The Winson* was a claim for expenses, the same principle should be applied to a claim for remuneration where the claimant stored and handled the goods with his own facilities.

114 [1982] AC 939 (HL), p 957.

not extended, as it often is, to cases where the only relevant question is whether a person who without obtaining instructions from the owner of goods incurs expense in taking steps that are reasonably necessary for their preservation is in law entitled to recover from the owner of the goods the reasonable expenses incurred by him in taking those steps.

. . . In the instant case, it is not disputed that when the Lloyd's Open Form was signed on 22 January 1975, the circumstances that existed at that time were such as entitled the master to enter into the agreement on the cargo-owner's behalf as its agent of necessity. The rendering of salvage services under the Lloyd's open agreement does not usually involve the salvor's taking possession of the vessel or its cargo from the ship-owner; the ship-owner remains in possession of both ship and cargo while salvage services are being carried out by the salvors on the ship.

But salvage services may involve the transfer of possession of cargo from the ship-owner to the salvors, and will do so in a case of stranding as respects part of the cargo, if it becomes necessary to lighten the vessel in order to re-float her. Where in the course of salvage operations cargo is off loaded from the vessel by which the contract of carriage was being performed and conveyed separately from that vessel to a place of safety by means (in the instant case, barges) provided by the salvor, the direct relationship of bailor and bailee is created between cargo-owner and salvor as soon as the cargo is loaded on vessels provided by the salvor to convey it to a place of safety; and all the mutual rights and duties attaching to that relationship at common law apply, save insofar as any of them are inconsistent with the express terms of the Lloyd's open agreement.

On parting with possession of cargo to the salvor the ship-owner loses any possessory lien over it to which he may have been entitled for unpaid freight, demurrage or general average. Whether the lien in respect of liabilities of the cargo-owner that had already accrued due at the time of parting with possession would revive upon the ship owner's recovering possession of the cargo for on-carriage to its contractual destination is a question on which there appears to be no direct authority; but it does not arise for decision by your Lordships in the instant case. The ship-owners neither obtained nor even sought repossession of any part of the salved wheat after it had been off loaded from *The Winson* into the barges provided by the salvors on and before 24 April 1975. . . .[115]

. . . The cargo-owner was kept informed of the salvors' intentions as to the storage of the salved wheat upon its arrival in Manila; it made no alternative proposals; it made no request to the salvors for delivery of any of the wheat after its arrival at Manila, and a request made by the salvors to the cargo-owner through their solicitors on 25 February 1975, after the arrival of the second of the six parcels, to take delivery of the parcels of salved wheat on arrival at Manila remained unanswered and uncomplied with until after notice of abandonment of the charter voyage had been received by the cargo-owner from the ship-owner.

. . . The failure of the cargo-owner as bailor to give any instructions to the salvors as its bailee although it was fully apprised of the need to store the salved wheat under cover on arrival at Manila if it was to be preserved from rapid deterioration was, in the view of Lloyd J, sufficient to attract the application of the principle to which I have referred above and to entitle the salvors to recover from the cargo-owner their expenses in taking measures necessary for its preservation.

. . . For my part, I think that in this he [the judge] was right and the Court of Appeal, who took the contrary view, were wrong. It is, of course, true that in English law a mere stranger cannot compel an owner of goods to pay for a benefit bestowed upon him against his will; but this latter principle does not apply where there is a pre-existing legal relationship between the owner of the goods and the bestower of the benefit, such as that of bailor and bailee, which imposes upon the bestower of the benefit a legal duty of care in respect of the preservation of the goods that is owed by him to their owner.[116]

Lord Simon added,[117] on the agency of necessity:

For an agency of necessity to arise, the action taken must be necessary for the protection of the interests of the alleged principal, not of the agent; the alleged agent must have acted bona

115 [1982] AC 939 (HL), pp 958–959.
116 Ibid, p 961.
117 Ibid at pp 965–966.

fide in the interests of the alleged principal . . . the law does not seem to have determined in this context what ensues where interests are manifold or mixed: it may well be that the court will look to the interest mainly served or to the dominant motive.

Although the general principle of what is required for agency of necessity to arise is clear, in practice, even if there might be a possibility for the master to communicate with the cargo interests before signing a salvage contract, there may be pressures to respond quickly to protect the interests of his ship and property on board (the dominant motive).

The problem of the master's authority to bind the cargo interests to a salvage contract came to a head, in what is regarded as wasted litigation, a few years later, in ***The Choko Star***.[118]

The ship was on charter from ports in the Argentine to Italy; she grounded in the river Parana and was stranded. At the time, she was loaded with cargo consisting of soya beans and sun seeds in bulk. As the master could not refloat the vessel without assistance, he entered into a salvage agreement in the LOF 1980, whereupon the vessel was successfully refloated, and the salvors claimed salvage remuneration. The ship-owner settled their part of the remuneration, but the cargo-owners contended that the master had no authority to engage salvors on their behalf. After arbitration, they paid the amount due, though under protest. They commenced proceedings against the salvors, claiming restitution of the monies, on the ground that the salvage contract was not done in their own best interests, and that it was also unreasonable because the salvors employed were European instead of local ones, who would have been better equipped, and would have had more experience of that river. The issue was the master's authority to bind them to the salvage contract.

The question was whether the master would have authority to bind the cargo-owners by contract in circumstances where it was reasonably practicable to communicate with cargo-owners and obtain their instructions before signing the contract on their behalf. (The master here had not so communicated with the cargo interests in this case.) Would the law imply a term in the contract of carriage binding the cargo-owners, even though the circumstances that existed did not give rise to an agency of necessity?

The learned trial judge held that, when cargo is loaded on a ship, the cargo-owners must recognise that circumstances may exist in which the ship or cargo would require salvage services. Therefore, if the master has implied authority to enter into salvage agreements on behalf of the ship-owner, he must also have implied authority to enter into the same reasonable contract on behalf of the cargo-owner. The master's implied authority arose out of the contract of carriage and was not given by necessity. It was being necessarily implied. On appeal by the cargo-owners, the CA was not convinced that it was necessary to imply such a term in order to give the contract of carriage business efficacy.[119] Slade LJ stated, thus:

Until an emergency arises, such as to give rise to an agency of necessity, there is no question of the ship-owner or master being an agent for the cargo-owners. Accordingly, it is not possible

118 [1990] 1 Lloyd's Rep 516.

119 In the sense laid down by the House of Lords in *Liverpool v Irwin* [1977] AC 239; for a modern approach to implied terms, see: *Attorney General of Belize v Belize Telecom Ltd* ; *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] 2 Lloyd's Rep 639.

to spell out authority for either of them to bind the cargo-owners to a salvage contract, as merely incidental to his pre-existing general authority as an agent . . .

Merely because the authority conferred by ship-owners on their agent, the master, is deemed to extend to engaging salvors on reasonable terms on behalf of the ship-owners, it does not follow that the master has the like implied authority to bind cargo-owners to salvage contracts, in the absence of circumstances giving rise to an agency of necessity.[120]

This decision caused confusion in practice, particularly because of the invidious situation masters of a ship found themselves in when there was an emergency, whereupon quick decisions had to be made to save their ship and cargo on board. Unnecessary haggling over reaching an agreement caused problems in the past.

Now, in the light of the Convention and the modernisation of the LOF over the years, such problems have been resolved. However, problems may still arise with regard to a master's authority in particular circumstances, when the law of a country that has not ratified, or enacted, the Convention applies to the contract.[121]

The Pa Mar,[122] in which the events occurred before the Convention had the force of law, provides a good example of the considerations that should be borne in mind by both a ship-owner and a salvor when the master signs a salvage agreement to bind the cargo interests.

The generators of *The Pa Mar* had failed in the Red Sea. Her master signed LOF 1990, engaging the tug *Leopard* to tow his ship to a place of safety. That contract was subsequently varied by the managers of *The Pa Mar* (Kappa) on behalf of her owners. The variation concerned the place of delivery of the properties after salvage. The contractors under the LOF, both in its original form and as varied, were Tsavliris Salvage International Ltd (Tsavliris). It was common ground that both the master and Kappa purported to contract on behalf of the owners of *The Pa Mar*, her cargo, freight, bunkers, stores and other property on board her. However, at a comparatively early stage, before the vessel left Singapore and while security was being negotiated, the owners of the cargo took the point that neither the master nor Kappa (nor, indeed, the ship-owners) had any authority to contract on their behalf. The principal question for decision in these actions was whether the owners of cargo were bound by the LOF apparently entered into on their behalf, either in its original form or as varied.

It was held by Clarke J:

The evidence showed that no towage assistance was available on commercial terms so that unless the vessel and her cargo were to be left indefinitely immobilised prudence dictated the engagement of the tug on LOF; it was true that the vessel was at anchor in the Red Sea and that her anchor was not dragging, but she could not fairly be said to be in a place of safety; she was exposed to both the winds and the swell and her exposed position together with the fact that she was indefinitely immobilised was sufficient to satisfy the requirement that it was necessary to take salvage assistance; Tsavliris had shown that it was necessary for the master to take salvage assistance.

In entering into the original contract, that is, without a Dubai/Colombo option, the master and indeed Kappa were acting reasonably; the master was acting both bona fide and reasonably in the interests of both ship and cargo when he entered into the unamended LOF on 9 June; and the cargo-owners were bound by the contract in that form.

120 [1990] 1 Lloyd's Rep 516, pp 525–526.
121 See op. cit., Brice, fn 1, paras 5–44–5–45.
122 [1999] 1 Lloyd's Rep 338.

As to the variation of the agreement with regard to final destination, the judge held that:

No reasonable ship-owner would have committed the owners of cargo to a LOF which involved a long tow on salvage terms without carrying out further investigations; Tsavliris had failed to discharge the burden of proving on the balance of probabilities that Kappa acted bona fide and reasonably in the interests of cargo in agreeing to a variation of the LOF by adding the Dubai/Colombo option.

What was needed was that the owners should have asked both the ship's classification society and the Salvage Association surveyor to investigate the position at the first stop, Aden.

It would be prudent if owners and salvors did bear this in mind in future similar cases, when the Convention does not apply, but the signing of an LOF, which incorporates the Convention, usually cures such problems.

7.2 MASTER'S AUTHORITY UNDER THE CONVENTION

The practical problems arising from these decisions led to recognition that the question of the master's authority to bind the cargo interests to a salvage contract ought to be solved by an International Convention. Article 6(2) of the 1989 Convention brought the most significant change (alongside Art 14) to salvage law and clearly provides that:

The master shall have the authority to conclude contracts for salvage operations on behalf of the owners of the vessel. The master or the owner of the vessel shall have authority to conclude such contracts on behalf of the owner of the property on board the vessel.

Before the Convention had the force of law, this provision had been inserted in the LOF 1990, cl 14, but it had only contractual force, and there were still questions as to whether the consent of the cargo-owners was necessary to be obtained expressly. Since 1 January 1995, however, when the provisions of the MS(SP)A 1994 came into force, giving effect to the Salvage Convention 1989, the authority of the master was clothed with statutory force insofar as English law was concerned. The subsequent LOF of 1995 incorporated Arts 1, 6, 8, 13 and 14 of the Convention on the back for information. To avoid any doubt, cl 16 of LOF 1995 restated the master's authority to bind the respective owners of the properties to be salved to the agreement that he signs on their behalf.

It can be inferred from the wording of Art 6(2) of the Convention, 'the master shall have the authority', that it is obligatory. It does not allow the parties to provide otherwise in the contract. The policy reason behind it is to prevent delays in signing the contract for the interests of the salved property.

LOF 2000 and 2011 not only do expressly provide that English law shall apply to the contract, but they also define the scope of the master's authority, namely, cl K provides:

The master or other person signing this agreement on behalf of the property identified in the contract enters into this agreement as agent for the respective owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof.

Neither Art 6(2) nor the express term in the LOF had been challenged in the courts until ***The Altair***.[123]

This vessel, belonging to the Ministry of Trade of Iraq (MOTI), with cargo on board belonging to the Grain Board of Iraq (GBI), grounded in Kuwaiti waters. MOTI entered into a salvage agreement with Tsavliris on the terms of LOF 2000, which was signed by a representative of Tsavliris and, purportedly on behalf of the 'property' to be salved, by an employee of the vessel's managers, and the vessel was successfully refloated. Tsavliris (considering that the cargo might be protected by State immunity) did not arrest it as security for its salvage claim but proceeded to arbitration pursuant to the arbitration clause in the LOF. GBI refused to participate in the arbitration and did not provide security. The arbitrator held that the cargo was the property of GBI, which was a separate entity from the Government of Iraq, that the cargo was a commercial cargo, and that GBI had agreed to arbitration because it was a party to the LOF by reason of Art 6.2 of the Salvage Convention. Consequently, the arbitrator held that he had jurisdiction to determine whether or not GBI was liable to Tsavliris, and he went on to find that GBI should pay its share of the award to Tsavliris. MOTI, together with GBI, challenged the award in the English court, submitting that the arbitrator did not have jurisdiction, as there was no valid arbitration agreement, as GBI was part of MOTI and was, therefore, entitled to rely on sovereign immunity.

Gross J held that GBI was bound by the LOF. The provisions of the Salvage Convention had the force of law in the UK. It was irrelevant that Iraq had neither ratified nor acceded to the 1989 Convention.

Article 6.2 of the Convention gave the master and owner of the vessel express authority to conclude salvage contracts on behalf of the owners of cargo. Accordingly, Article 6.2 was applicable, and GBI was bound by the LOF arbitration agreement. On the evidence, GBI was a separate entity from the MOTI within the meaning of s 14(1) of the State Immunity Act 1978. The entry by GBI into the LOF was not done in the exercise of sovereign authority within the meaning of s 14(2), and, therefore, GBI was not entitled to immunity.

8 DUTIES AND CONDUCT OF SALVORS

The 1989 Salvage Convention, unlike its predecessor, stipulates the duties of both the salvors and the owner of the property in danger; there is, in fact, no change in the law, but codification of the common law duty of care owed by salvors throughout the salvage operations. In addition, the contract also provides that the salvor shall use his best endeavours to complete the salvage and to prevent or minimise damage to the environment.

Under ordinary maritime law of salvage, there is no obligation on the salvor to complete salvage. He can discontinue the salvage services without incurring any liability. Under Lloyd's standard forms and the Convention, there are certain obligations upon the salvor, which need consideration.

123 *Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd (The Altair)* [2008] 2 Lloyd's Rep 90.

8.1 BEST ENDEAVOURS

All LOFs, 1980, 1990, 1995 by cl 1(a), LOF 2000 and LOF 2011 by cl A, provide that the contractor (salvor) shall use his best endeavours to salve the property and to take it either to a place agreed or to a place of safety, as may hereafter be agreed. In addition, LOFs 1990, 1995, cl 1(a)(ii), 2000 and 2011, cl B, provide that, while performing salvage operations, the contractor shall also use his best endeavours to prevent or minimise damage to the environment.

8.1.1 Judicial interpretation of 'best endeavours'

What is certain about this term is that there is no absolute obligation or a guarantee given to succeed. Such an obligation is found in commercial contracts to make it clear that the party who promises to use his best or all reasonable endeavours is not undertaking an absolute obligation. But what is meant by 'best endeavours'? Is it sufficiently certain so as to be an enforceable obligation? What are the parameters of the steps that have to be taken to discharge the obligation? (see, also Chapter 5, above, in the context of ship managers.)

In an old non-salvage case, best endeavours was interpreted to meant that 'the contractor <u>will do his best, not his second best</u>'.[124] But what does this mean, and what is the yardstick by which to determine that the best has been done? There has been no definition of 'best endeavours' in salvage cases.

There have been, however, decisions dealing with the interpretation of 'best endeavours'[125] and similar terms in sale of goods or of land contracts or construction contracts. In a couple of cases concerning the obtaining of a licence for the sale of goods, it was held that, whatever phrase is used, the seller must show that he has done his best; 'perhaps "best endeavours" in a contract mean something different from doing all that can reasonably be expected – although I cannot think what the difference might be', said Mustill J;[126] similarly, Kerr J[127] said, as to the standards to be applied, that the practice of other exporters will be taken into account in determining whether the seller exercised due diligence in obtaining an export licence. However, these decisions did not deal with the questions posed earlier, and uncertainty prevailed as to the precise meaning of the term.

More recently, the cases that have reached the courts contain variations of the obligation to use endeavours, such as 'reasonable' or even 'all reasonable' endeavours. What is the difference between these terms and best endeavours?

An opportunity was presented to the CA to define the term and explain the steps that need be taken in ***IBM UK Ltd v Rockware Glass Ltd***,[128] in which it was held

124 *Sheffield District railway Co v Great Central Railway Co* [1911] 27 TLR 451.

125 *Terrell v Mabie Todd & Co* [1952] 2 TLR 574: the contracts could not be construed more favourably for the defendants than that their obligation to use their best endeavours was to do what they could reasonably do in the circumstances.

126 *Oversea Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep 608.

127 *Malik Co v Central European Trading Agency Ltd* [1974] 2 Lloyd's Rep 279, applying the principle in *Anglo Russian Merchant Traders Ltd v Batt (John) & Co Ltd* [1917] 2 KB 679: that the contract did not impose upon the sellers an absolute obligation to ship or to pay damages in default of shipment, and that, therefore, the sellers, who had used reasonable diligence to obtain a licence to ship, were not liable in damages to the buyers.

128 [1980] FSR 335.

that, in the context of an obligation by the buyer to use 'best endeavours' to obtain a planning permission, the obligation means that he is bound to take all those steps in his power that are capable of producing the desired results, being steps that a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take.

This seems to equate 'best endeavours' with 'all reasonable endeavours'.

Flaux J, followed the same line of reasoning in ***Rhodia International Holdings Ltd v Huntsman International LLC***;[129] he said, in the context of a case for a planning permission, the following:

> There may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours and it seems to me that is essentially what Mustill J is saying in the *Overseas Buyers* case.

Thus, 'best endeavours' is understood to be the same as 'all reasonable endeavours', while 'reasonable endeavours' requires a lower test. Some cases deal usefully with the question as to whether taking 'all reasonable courses' includes the sacrifice of the obligant's own interests.

Lloyd LJ, in ***Yewbelle Ltd v London Green Developments Ltd***,[130] interpreting the phrase 'all reasonable endeavours' held that the judge was correct in his interpretation of the term that the seller <u>was not required to sacrifice his own interests</u>, but the judge was wrong in holding the seller had not used all reasonable endeavours to obtain planning permission (Buxton LJ dissenting). Lloyd LJ was of the view that the House of Lords in the *Talisman* case (see below) did not lay down a general rule about the applicable test, but that each case should be looked at on its own facts.

In the context of a construction contract, the Court of Session (Outer House) held, in ***EDI Central Ltd v National Car Parks Ltd***,[131] that an obligation on a developer to use 'all reasonable endeavours' in pursuing a development was more onerous than one merely to use 'reasonable endeavours'. However, notwithstanding that the developer would be expected to explore all avenues reasonably open to him, and to explore them all to the extent reasonable, <u>he was not required to act against his commercial interests</u>, and was entitled to rely upon his judgment, informed by experience, of what was and was not likely to bear fruit, and, if it was clear that the developer could not succeed, whatever further avenues he might take, he could not be expected to continue wasting time, effort and expense.

The Court of Session (Inner House)[132] clarified the obligation, holding that: A contractual obligation to use 'all reasonable endeavours' or 'reasonable endeavours' did not require the obligant to disregard its own commercial interests; the balance fell to be struck depending on the wording of the relevant obligation, and, in considering what steps would be reasonable, the court also had to consider whether any further steps would have been successful; if an obligant could show that it would

129 [2007] 1 CLC 59, at para 33.
130 [2007] EWCA Civ 475, at para 33.
131 2011 SLT 75.
132 2012 SLT 421.

have been useless for it to have taken a particular step, because it would not have been sufficient to achieve success, that would provide an answer to any claim that the obligant had acted in breach of contract; equally, if there was an insuperable obstacle, it was irrelevant that there might have been other obstacles that could have been overcome, or at any rate in respect of which the obligant had not yet done all that could reasonably be expected of it to try to overcome.

The test is objective, held the House of Lords in ***Stephen v Scottish Boatowners Mutual Insurance Association (The Talisman)***,[133] and it affirmed the judgment of the Second Division that the question of whether the taking of a particular course of action would have constituted a reasonable endeavour to save the vessel was essentially one for the judgment of the court, to be arrived at upon the evaluation of all the evidence, which, where appropriate, might include expert evidence, and the test was an objective one, directed to ascertaining what an ordinarily competent fishing-boat skipper might reasonably be expected to do. The skipper claimed loss against his insurers for the sinking of the boat. The policy of insurance provided that the insurer would not be liable if the skipper had not used 'reasonable endeavours' to save his vessel from loss or damage. The vessel was fishing when she started to take on water in her engine room. The skipper was unsure as to whether to leave the seacocks open and continue to pump the bilges or to close the seacocks. He chose to leave them open. The vessel sank!

What is clear from the authorities is that each case will be looked at on the basis of its own facts and circumstances with regard to the specific activities or services a party is agreeing to undertake, if such activities are not uncertain.[134]

However, the first occasion for the court to examine whether or not the term 'best endeavours' was sufficiently certain so as to be an enforceable obligation was in ***Jet2.com Ltd v Blackpool Airport Ltd***.[135] The claimant airline (J) claimed that the defendant airport operator (B) was in breach of contract in refusing to accept departures or arrivals of J's aircraft outside its normal hours. The agreement provided that J and B would co-operate and use their 'best endeavours' to promote J's low-cost services from the airport, and that B would use 'all reasonable endeavours' to provide a cost base that would facilitate J's low-cost pricing.

The judge held that there was no difference between 'best' and 'all reasonable endeavours' in this context. It could not have been intended that B should be able to pick and choose what to do in the light of what suited it or its parent company financially. The provision in the instant case was towards the objective end of the range, although not necessarily so clear cut as to enable the court to proceed by ascertaining what an ordinarily competent airport might reasonably be expected to do in the same circumstances. Accepting, however, that the provision of a cost base required the wide and flexible hours contended for by J, the words 'all reasonable endeavours' imposed a lesser obligation than an absolute commitment to provide those specific hours.

133 [1989] 1 Lloyd's Rep 535.

134 In Australia, a 'best endeavours' clause 'prescribes a standard of endeavour which is measured by what is reasonable in the circumstances, having regard to the nature, capacity, qualification, and responsibilities of the party in question in the light of the particular contract': *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83.

135 [2011] EWHC 1529 (Comm).

The CA,[136] holding (by majority) that the airport was in breach (Lewison LJ dissenting[137]), said: The content of a contractual obligation to use 'best endeavours to promote' another person's business was not so uncertain[138] as to be incapable of giving rise to a legally binding obligation, although it might be difficult to determine its precise limits in advance, but which can nonetheless be given practical content. It obliged the airport to do all it reasonably could do to enable the business to succeed and grow. In considering the question whether the airport was required to sacrifice its own commercial interests, the majority agreed with the judge that the question of whether, or to what extent, a party who has contracted to use best endeavours can have regard to his own commercial interests depends on the nature and terms of the contract in question.

By comparison, the contract in ***CPC Group Ltd v Qatari Diar Real Estate***[139] included an obligation to use 'all reasonable but commercially prudent endeavours'. It was held that the agreement, by including the additional phrase of 'commercially prudent endeavours', allowed Q to consider its own commercial interests alongside those of C, and required it to take all reasonable steps to procure the planning permission, provided those steps were commercially prudent. Considering the highly political intervention with the development by the Prince of Wales, Q was not in breach of its obligation.

It seems clear from these cases that the obligation 'all reasonable endeavours' did not require the obligant to disregard its own commercial interests, although it would be better if the clause (such as in the case above) spelt out the limits of the obligation. With regard to the obligation 'best endeavours', which seems to be equated to 'all reasonable endeavours', the CA in *Jet2* made it clear that the question depends on the nature and terms of the contract in question.

8.1.2 Application of principles to salvage

Applying these principles to salvage, a salvor will fulfil his obligation under the LOF to 'use his best endeavours' if he takes all those steps in his power that are capable of producing the desired results; the steps will be those that a prudent, determined and reasonable salvor, acting in his own interests and desiring to achieve that result, would take. As seen above, although the obligation is not an absolute undertaking, it is quite onerous (that is, do what is within your power to get results), but the steps taken will be judged against the standard of reasonableness, and it would be up to the salvor to show whether any further steps would have been successful. In order to succeed, a salvor does incur expenses, hoping that he will recover them with the award. Considering the nature and terms of a salvage contract on an LOF form, it is

136 [2012] EWCA Civ 417.

137 Lewison LJ concluded that the phrase was too vague to give rise to a binding obligation, and, therefore, the defendant was not in breach. He construed the obligation strictly and thought that it required both the object of the endeavours and the range of possible endeavours to be considered together in order to decide whether there was a justifiable obligation. The clause in this case, he thought, was too open-ended to allow the court to recognise the limits of the obligation.

138 By contrast, a poorly defined objective may lead to a very weak obligation, e.g. an obligation to use reasonable endeavours to agree when the delivery of gas should begin: see *Phillips Petroleum v Enron* [1997] CLC 329.

139 [2010] EWHC 1535 (Ch).

submitted that a salvor would not be expected to sacrifice his own interest by taking steps that could ruin his business.

On proof that best endeavours were not used, there would be a breach of contract.

8.2 DUE CARE

Under the Convention, Art 8(1)(a), (b), it is provided:

1 The salvor shall owe a duty to the owner of the vessel or other property in danger:
 (a) to carry out the salvage operations with due care;
 (b) in performing the duty specified in sub-paragraph (a) to exercise due care to prevent or minimise damage to the environment.

Not only does the salvor owe a duty to the owners of the property in danger to carry out the salvage operations with due care, but also to exercise due care to prevent or minimise damage to the environment. The salvor also has a duty under Art 8(c), (d) – when circumstances reasonably require – to seek assistance from other salvors, and to accept intervention of other salvors, when requested to do so by the owner or master of the vessel or the property in danger.

The standard to be applied to due care is that of reasonableness, taking into account the standards applied by the salvage industry.

Article 8 is incorporated into LOF contracts either by reference or fully. The duty of 'due care' is emphasising the common law duty of care not to cause damage by negligence to the property in danger and to the environment when carrying out salvage operations. It is different from the 'best endeavours' obligation, which is relevant to achieving success in salving the property, as seen under paras 8.1.1–8.1.2, above.

8.2.1 Remedy for negligent misconduct of salvors under the Convention

Article 8(1) of the 1989 Convention does not address the issue of damages for breach; the Salvage Convention 1910 did not do either, and, therefore, principles of damages at common law have been applied. This has, however, been contested, because salvors should be viewed leniently, even if they are negligent, considering the dangers they face, and, therefore, it has been suggested that principles of the maritime law salvage should be applicable.

Article 18 provides for the consequences of salvors' misconduct, in that the salvors may be deprived of the whole or part of the payment due under the Convention, to the extent that the salvage operation has become necessary or more difficult because of fault or neglect on his part, or if the salvor has been guilty of fraud or other dishonest conduct.

This Article deals only with negligence before salvage, which makes a salvage operation necessary (see *The Key Singapore*, under 8.3, below), and when the salvage becomes more difficult owing to the negligence of salvors, but the remedy provided is reduction of the award or no award; no damages. The Convention may not have intended that the salvor should be liable to pay damages in the event of damage caused by his negligence, and, therefore, a potential conflict would arise between the consequences provided under common law and Art 18 of the Convention.

However, the Convention does not deal with situations where the negligence of the salvor causes an independent damage, being distinct from the original danger.

8.2.2 Negligent misconduct under common law

The English courts have, for many years, recognised that negligence of salvors who respond to an emergency of a ship in distress, at risk to themselves, should be judged leniently. This approach was taken by the courts with non-professional salvors. It was considered that deduction from the award of an assessed sum of the damage done would be sufficient,[140] or, in more serious cases of negligence, the deduction would be in proportion to the misconduct,[141] or the misconduct could forfeit the award.[142]

Until *The Tojo Maru* case (see below), the courts had been reluctant to award damages against salvors, even in cases in which the misconduct had led to the loss of the ship.[143] The effect of misconduct, other than criminal, that diminishes the salved value, used to be taken into account in the amount of the award, but wilful or criminal misconduct would result in forfeiture of the entire award.[144] Some examples are given here.

The question whether or not a salvor should be liable in damages to the owner of the property arose in 1874 in ***The CS Butler***[145] case, where *The Butler* responded to a distress signal sent by *The Baltic* and agreed to tow her upon a fixed sum. During the services, *The Butler* came into collision with *The Baltic* three times, causing much damage to her, but eventually *The Butler* brought her to a place of safety. The concept of *crassa negligentia* was adopted by Sir Robert Phillimore, who stated: '. . . gross want of proper navigation, which certainly would, in my judgment, render her liable for damage that she, thus, caused, notwithstanding that she was acting as salvor'.

The Baltic recovered damages assessed in the usual way, and *The Butler* was awarded the amount agreed upon as salvage remuneration.

In the twentieth century, the courts were more robust in considering awarding damages to the owner of the salved property for a salvor's negligence. In ***The Delphinula***,[146] the CA (reversing the first instance decision) held that, if the salvor is guilty of misconduct, not only may a reduction in value of the salved property caused by his negligence be taken into account in assessing the award, but also a counterclaim or cross-claim, or an independent action for damages, will lie.

140 *The Dwina* [1892] P 58; *The Queenforth v Royal Fifth* (1923) 17 LlL Rep 204.

141 *The Cape Packet* (1848) 3 W Rob 470; *The Perla* (1857) Swab 230; *The Magdalen* (1861) 31 LJ (Adm) 22; the reduction of the award to one salvor of the two who was negligent was said to be not by way of punishment, but it was treated as a means of indemnifying the owner.

142 See *The Neptune* (1842) 1 W Rob 297; *The Kendal* (1948) 81 LlL Rep 217.

143 *The Yan-Yean* (1883) 8 PD 147, owing to salvor's negligence the ship sank, but was later raised by her owners. No award of salvage was made, nor were the salvors made to pay damages. As the loss arising from the misconduct of the salvors was probably equal to that from which the Y was first rescued, no salvage reward was due. If the Y had been ultimately saved, such misconduct would have worked as a partial reduction of the reward only. It was laid down by the Privy Council in *The Duke of Manchester* (1847) 6 Moo PC 91 that, if by the negligence of the salvors a ship is led into peril as great as that from which she has been rescued, all claim to salvage is forfeited.

144 *The Atlas* (1862) Lush 518.

145 (1874) LR 4 A&E 178, p 183.

146 *Anglo-Saxon Petroleum Co Ltd v The Admiralty (The Delphinula)* (1947) 80 LlL Rep 459.

In ***The Alenquer***,[147] no salvage award was made, but the damage claim had to be paid in full, although the judge adhered to the general principle of policy by saying:

> It seems to me that I have to pay regard to the general principles of policy in relation to salvage which have been laid down over the years by this court. Those general principles of policy require that this court, in judging the conduct of salvors, should err, if anything, on the side of leniency towards salvors insofar as their behaviour is criticised . . . if the result of the decisions of this court were such as to discourage salvors from taking risks and showing enterprise when rendering services at sea.

In 1971, the House of Lords, in ***The Tojo Maru***,[148] affirmed that a claim in damages will lie against the salvors for their negligence by way of a counterclaim, independently of merely taking salvors' negligence into account in the assessment of the salvage award.

Owing to a collision, a large crack was caused to the hull of ship; *The Tojo Maru* entered into a salvage agreement under the standard LOF, 'no cure, no pay' basis. In order to cover the large crack, a large plate had to be bolted to the hull by firing bolts, but the adjoining tank had to be made gas-free first by a diver, for safety reasons. The salvors' diver, contrary to the orders he had received, fired a bolt through the shell plating of the vessel. The result was an explosion and fire that caused extensive damage to the vessel. Eventually, after obtaining additional help to put out the fire and make the vessel seaworthy, she was towed to Singapore and then Kobe, where she was repaired.

The salvors claimed a salvage award in the salvage arbitration, and the owners counterclaimed damages suffered due to the salvors' negligence. They argued that the salvors had by the contract undertaken to 'use their best endeavours' to salve the vessel; in breach of that contract, they had negligently caused damage to the vessel and were therefore liable in damages for the loss caused to the owners by their negligence.

The salvors argued that the rules of maritime law were that a successful salvor could not be liable in damages to the owner for the result of any negligence on his part, but such negligence would only allow the court to reduce or forfeit the salvage award and, thus, did not give rise to a claim for damages. The reason, they said, was that the salvage services resulted in an overall benefit to the owner, and, as the salvor had done more good than harm, no counterclaim in respect of the harm was possible.

The arbitrator's decision

On the facts, the arbitrator found that the salvors were negligent, and the owners were entitled to recover damages. He took the net salved value after deduction of the damage suffered by the owners and, on the basis of that figure, he calculated the salvage award. Then, he deducted the amount of the award from the damage amount (which was higher), leaving a balance to be paid by the salvors to the owners. However, he then applied, on this balance, limitation of liability, based on the tonnage of the salvor's tug, diminishing the amount of damages due from £206,767 to £10,725.

147 [1955] 1 Lloyd's Rep 101, p 112.
148 [1972] AC 242, [1971] 1 Lloyd's Rep 341 (HL).

The judge at first instance

The issues of whether the owners were entitled to a counterclaim, and whether the salvors could limit their liability, were referred to appeal as a special case. Willmer LJ, sitting as a judge, agreed with the arbitrator with regard to the counterclaim for damages, but disagreed with him on the limitation of liability issue because, at that time, the limitation of liability statute, s 503 of the MSA 1894, did not apply to salvors.[149]

The CA decision

On appeal to the CA,[150] the then Master of the Rolls, Lord Denning, analysed the previous relevant authorities in depth and concluded that the issue of whether the owners were entitled to full damages could not strictly be determined by the common law of England but only by the maritime law of the world, which the English Admiralty Court had done so much to form. Where there was 'more good than harm' done by the salvors, he said, the principle established by the authorities[151] shows that:

> In assessing the amount of salvage remuneration, the conduct of the salvor is a material consideration. He is rewarded highly for great service, poorly for bad service. If he has behaved in a violent or overbearing manner, it may diminish the amount of his reward, even though he has done no damage (*The Marie* (1882) 7 PD 203). So also if he has been negligent and, by so doing, damaged the vessel he is seeking to save, it may diminish the amount of the reward, according to how much he is to blame; but not necessarily to the full extent of the damage done.[152]

Save for three authorities,[153] which were distinguished by Lord Denning because (on their facts) there was more harm than good done by the salvors, he further said:

> The long line of cases represents the maritime law of England and of the world on this subject. They apply whenever the salvor has done much good in saving a vessel in distress, but, in the course of the salvage operation, has damaged her somewhat by his negligence. The damage is taken into account in two ways: first, the salvage award is calculated on the salved value and is, therefore, less on account of the damage; second, it may be further reduced by deducting some part of the damage, or even the whole of it, from the salvage reward. But, save to this extent, the salvor is not liable for the damage done. In particular, he is not liable to a counterclaim for damages.[154]

He distinguished *The Delphinula* on the basis that the comments made there by the CA were *obiter dicta* and, in any event, he disagreed with that decision, in which

149 Analysis of this principle, together with the present law on limitation, is examined in Ch 14. Suffice to mention that, under the present law, the salvors would be able to limit in the circumstances that arose in this case.

150 *The Tojo Maru* [1969] 2 Lloyd's Rep 193 (CA).

151 *The Cape Packer* (1848) 3 W Rob 122; *The Perla* (1857) Swab 230; *The Atlas* (1862) Lush 518; *The Yan-Yean* (1883) 8 PD 147; *The Dwina* [1892] P 58; *The Queenforth v Royal Fifth* (1923) 17 LlL Rep 204 (these cases established that the most grave misconduct, gross negligence or wilful, would forfeit the award, while other negligence would only diminish it).

152 *The Tojo Maru* [1969] 2 Lloyd's Rep 193 (CA), per Lord Denning MR, at p 199.

153 *The Thetis* (1869) LR 2 A&E 365; *The Butler* (1874) LR 4 A&E 178; *The Alenquer* [1955] 1 Lloyd's Rep 101.

154 [1969] 2 Lloyd's Rep 193 (CA), p 200.

English common law was applied instead of English maritime law, which was quite different.

In effect, what Lord Denning proposed was in line with the spirit of both maritime law salvage and the present Salvage Convention, Art 18. It does not appear from his dicta that he supported an exoneration of salvors for their negligence causing damage to the property in danger, but, drawing support from relevant authorities, he was convinced that the proper approach for dealing with the issue was the maritime law approach and not that of the common law principles applicable to damages for negligence, which can dangerously produce different results and discourage salvors from undertaking difficult salvage operations.

To the lucid judgment of Lord Denning, Salmon LJ added most persuasively why *The Delphinula* was different from the present case. First, it was not a claim for salvage but for damages, as the vessel – having stranded in port at the time – blew up owing to the negligence of the superintendent of salvage operations at the port. The case was for damages because the salvors conferred no benefit. He further said that he did not read the judgment of Scott LJ in *The Delphinula* as meaning that, if at the end of the day the ship had been saved, the owners might successfully have claimed a sum owing to the salvor's negligence.

Salmon LJ drew a dichotomy between two categories derived from previous authorities, although none was binding on the CA.

The first category (the 'dire danger' cases) was concerned with cases in which the ship had been in 'dire danger' of becoming a total loss and was saved from that danger, but, owing to salvor's negligence, some damage was done. In all such cases, negligence by the salvors is taken into account in assessing the salvage reward, the effect of which is a reduction in the amount of the reward to the extent of the negligence.

The second category (the 'non-dire danger' cases), where there is total loss of the ship due to the salvors' negligence, no benefit is conferred by the salvor. In this category, he said, the owners, at the end of the day, were worse off than they would have been, but for the salvors' negligence. In such circumstances, Salmon LJ said an award in damages would not be inconsistent with the principle of public policy applicable to salvage cases; in particular, he said:

> On grounds of public policy it is of the greatest importance for the safety of shipping that salvors should come to the assistance of vessels in distress and especially that professional salvors should be encouraged to invest capital and incur expenses in maintaining salvage tugs and services to enable them to come to the assistance of ships in distress.[155]

As regards limitation of liability, although the salvors were not entitled to limit under s 503 of the MSA 1894, the CA, unlike the House of Lords (see below), dealt with the question (*obiter*) as to when limitation should be applied, that is, before or after a set-off. In its opinion, there would be no set-off before limitation was applied. If, on the other hand, the salvors were not entitled to limit, the salvage reward should first be calculated as if no damage had been done by their negligence; then the counterclaim should be calculated on the cost of repairs, delay and loss of profit; then a balance should be struck.[156]

This would be a fair approach to the issues involved and in line with the principles of maritime law salvage.

155 Ibid, p 205.
156 Ibid, pp 203, 207.

The House of Lords decision

The House of Lords reversed the decision of the CA on the main issue of the owners being entitled to counterclaim damages, but it did not deal with the limitation issue. With regard to the reasons in support of their Lordships' decision, it is worth considering some dicta of Lord Reid and Lord Diplock. Both relied heavily on established principles of negligence by professionals at common law, rejecting that any special rule on the basis of 'more harm than good' or 'more good than harm' had been firmly established in the maritime law of salvage.

'More good than harm'

Lord Reid explored the principles:

It is said that public policy requires and always has required that every proper encouragement should be given to salvors. With that I agree. In older times, it was highly desirable to encourage the master and crew of any vessel which encountered another in distress to do their utmost to save that other vessel. And, today, it is equally desirable to encourage professional salvors to maintain salvage vessels in a wide variety of situations. Just as courts are very slow to hold that errors of judgment in emergencies amount to negligence, so too courts are slow to impute negligence to salvors. But, here the arbitrator has found against them on that matter and the respondents do not seek to challenge his finding.

It is said that it will be most discouraging to salvors if they have to contemplate the possibility of heavy awards of damages against them by reason of their vicarious liability for their employees, and that it is not easy for them to cover their liability by insurance. But the rule for which the respondents contend would not prevent such awards. *The rule [of 'more good than harm'] is only said to apply where the salvage has been successful* [emphasis added]. It is not disputed that if, by reason of the negligence of the salvors' employees, a ship which they are trying to salve is lost, then the salvor can be sued for that negligence and he must pay damages. To serve the public interest, the encouragement of salvors must operate on their minds before they begin salvage operations. But, at that stage, the salvor cannot know whether, if negligence of his employees occurs in the course of salvage operations, it will merely cause damage, or will cause total loss of the vessel. I could understand a rule that a salvor can never be liable for the damage caused by negligence in trying to salve a vessel. . . . But the rule for which the respondents contend would not be a satisfactory solution of the problem viewed as a whole.

. . . There is a second argument which was accepted by the Court of Appeal. It was said that the salvors' operations should be considered as a whole. We should consider the position when the salvors began their operations. If the actual salved value, notwithstanding the damage done by the salvors' negligence, exceeds the value which the vessel had in its perilous and damaged condition when the salvors began their operations, then the salvors have done more good than harm to the owners and they ought not to have to pay damages. It may be proper to forfeit any award of salvage but it would be unjust to go farther.

There is little or no authority for such a principle. But this case presents some novel features, and I would not reject this approach merely because it is new. There would be much to be said for it in certain circumstances. This is not only a question of maritime law.

Volunteers on land and professional salvors

Lord Reid compared volunteers who save land property from danger with professional salvors, contrasting the effect of their respective negligence, and continued:

Suppose a house is on fire. It contains a valuable collection of, say, china. There is little or no hope of saving the collection but a passer-by, with or without the consent of the owner, goes in and brings most of the collection to safety. But owing to some gross negligence on his part some of the china is smashed. On land, a person who interferes to save property is not in law

entitled to any reward. But it would be most unjust in my view if, although he benefited the owner by saving the bulk of the property, he were held liable for his negligence in destroying the rest. Of course, in such a case the court would be very slow to find that the rescuer was guilty of negligence, but the circumstances might be such that such a finding could not be avoided. Similarly, if a passing ship lends assistance to a vessel in dire distress, when without such assistance the vessel would almost certainly be lost, and the salvor succeeds in saving the vessel but by gross negligence causes much unnecessary damage to it, it might be quite proper to forfeit any salvage award, but I would think it most unjust that the salvor should have to pay damages. Taking the salvor's operations as a whole he would have done much more good to the owner than harm. Could it be right that the owner need not even say thank you for the good, but should recover damages because the ship which, without the salvor's efforts he would never have seen again, is of less value when returned to him than it would have been if the salvor had not caused damage by negligence?

But any such exception from the general rule would have to be confined within reasonable limits. Take the volunteer who saves property from the burning house. The case would look very different if others on the spot would almost certainly have saved all the property if the volunteer had not officiously interfered. Or suppose that there is no immediate emergency. The owner of a house is advised that it is likely to collapse soon and he engages professional removal contractors to remove the contents. If they do damage to the furniture by their negligence they could not possibly be allowed to plead that if nothing had been done the furniture would have been destroyed when the house fell a week later.

Even if such a principle were accepted I do not think it could be applied in this case. This was not a case of a sudden emergency. There is nothing to suggest that *The Tojo Maru* would have become a total loss if the respondents' tug had not offered her services. The respondents offered their services as professional salvors, time was taken to arrange a contract, then they made elaborate preparations to do the necessary repair work before the vessel could be towed away and it was only several weeks later in the course of that repair work that the negligence of the diver caused this damage. It would require a very strong case to convince me that in such circumstances it is unjust to apply the ordinary law.[157]

Summary of principles from Lord Reid's judgment

Four essential points can be drawn from what Lord Reid said:

1. Of course, the courts look leniently on negligence of salvors that causes damage to the property in danger during salvage operations and will judge their efforts as a whole.
2. It was not disputed that there can be a claim for damages when the ship is lost due to salvors' negligence, depending on the circumstances of a case.
3. The same standards of care should apply in judging the conduct of professional salvors as those applicable to other professionals, save that public policy issues applicable to maritime salvage carried out in an emergency will be taken into account by the court. On the facts of this case, which presented unusual features, the damage was caused several weeks after the salvage, during the repairs of the salved property.
4. The proposed exception of 'more harm than good' to the common law negligence principle had not been established, but it could conceivably apply in very exceptional cases when there was no hope that the property could be saved without assistance.

157 [1972] AC 242 (HL), pp 267–269.

Ordinary principles of negligence at common law applied

Lord Diplock was more robust in his conviction that the general rule of negligence applicable at common law should apply to both professional salvors and to those passing vessels that volunteer assistance. Comparing salvage contracts with contracts for work and labour, Lord Diplock said:

The first distinctive feature is that the person rendering the salvage services is not entitled to any remuneration unless he saves the property in whole or in part. This is what is meant by 'success' in cases about salvage . . . In my view there is nothing in it which ought in principle to displace the general law as to the liability of a party to a contract for work and labour for negligence in the performance of it.[158]

He then phrased the ordinary rule of English law to be, thus:

The special characteristics of salvage remuneration payable for salvage services whether rendered under Lloyd's standard form of salvage agreement with professional salvage contractors, or volunteered by a passing vessel and accepted without any express contract, would not appear in themselves sufficient to oust the ordinary rule of English law that a person who undertakes for reward to do work and labour upon the property of another owes to the owner of the property a duty to exercise that care which the circumstances demand and, where he holds himself out as carrying on the business or profession of undertaking services of that kind, to use such skill in the performance of them as a person carrying on such a business may reasonably be expected to possess.[159]

Lord Diplock thought that there was no justification for treating salvage services as excluded from the general principles of English law of liability for negligence,[160] as it has developed in the twentieth century. He further said:

It is not in this but in an entirely different situation that the converse of the concept of 'more harm than good' has previously been applied in salvage law. That is: where one salvor has performed salvage services to a vessel in distress but has not completed her rescue and she has been ultimately brought to a place of safety by a different salvor. The right of the first salvor to share in the salvage reward depends upon his showing that he has contributed to the saving of the vessel. This has often turned upon whether, when his own services ended, he had left the vessel in less peril than that in which he found it, that is, whether his services had done 'more good than harm' . . . I have endeavoured to show that the conclusions sought to be drawn from judgments given in the mid-19th century cases, upon which this proposition is founded, are based upon a misunderstanding of the historical use of the expression 'negligence', upon a failure to take into account of the supposed limitations upon the jurisdiction of the Court of Admiralty and upon a misapprehension of the kind of situation in which it was relevant to inquire whether a salvor had done more good than harm.[161]

Thus, the House of Lords rejected the approach of the CA that damages would be recoverable from the salvors only if the measure of the harm done by the salvors exceeded the measure of the good. Such a principle was not to be found in any of the previous authorities.[162]

158 Ibid, p 293.

159 [1972] AC 242 (CA), p 293.

160 The general principle of negligence had been applied in *Anglo Saxon Petroleum Co v Lords Commissioners of the Admiralty* (*The Delphinula*) [1947] KB 794 (CA), (1947) 80 LlL Rep 459, which was criticised by the CA as being inappropriate to salvage cases.

161 *The Tojo Maru* [1971] 1 Lloyd's Rep 341 (HL), p 367.

162 This principle was deduced by the CA from old decisions that reflected justice and fairness in the cases of salvage in which well-established principles of maritime law had been applied for a long time. It

Damages by way of counterclaim

Reversing the CA decision, it was held permissible to entertain the owners' counterclaim for damages, which could be offset against the award. It was stressed, however, that damages would be allowed only by a counterclaim to a claim for an award with respect to successful salvage services. If there was no success, there would be no award. The decision is not an authority for the proposition that there could be a separate claim in damages for negligence against the salvors if there was no success, as their Lordships did not have to decide this issue on the facts of this case.

Method of assessment of the award

The arbitrator's decision was restored, except with regard to the method of assessment of the salvage award. Lord Diplock objected to the arbitrator's assessment of the salvage award on the basis of her damaged state, the effect of which would be to account for the salvor's negligence twice. It was held that the award was to be assessed on the assumption that there had been no negligence (no deduction of costs for repairing the damage). He remitted the award to the arbitrator to make the adjustment.

Method of assessing the damages

As regards the measure of damages, their Lordships held that the owners should be put in the same position they would have been in had there been no negligence. In particular, had the salvage operation been conducted without negligence, the owners would not have had to spend money for repairs and would not have suffered loss. On the other hand, they would have had to pay salvage. The proper measure of damages was the difference between what would have been the value of the ship upon completion of the salvage, if there had been no negligence (undamaged salved value), and her actual value at the place of termination in the state in which she was as a result of the negligence. Then, the figures arrived at for the award and for the damages would be set off against each other.[163] The result would seem to be that, either a salvage award would be due to the salvor, or an award for damages would be due to the ship-owner, depending on which figure was the highest.

Their Lordships did not deal with limitation, because there was no right of limitation at that time for salvors under the old legislation.

8.2.3 Unresolved issues

Brice was critical of the decision and of the formula of assessment of damages, which may not be appropriate in all cases. His personal view was:[164]

(a) In *The Tojo Maru*, there was an isolated incident of negligence by the diver of the salvors causing damage to the ship when the salvage services had been performed.

was accepted that these authorities were not binding upon the CA, as none had reached the House of Lords, but, nevertheless, they had not been wrongly decided.

163 [1971] 1 Lloyd's Rep 341, pp 355, 367, 368.

164 On his paper delivered during a debate on the subject held by the London Shipping Law Centre on 19 June 1997; see, generally, on breach of duty, Brice, op. cit. fn 1, Ch 7.

(b) He questioned the way salvage remuneration was proposed to be assessed, which might not be appropriate, particularly in cases where the whole planning and execution of a salvage operation was negligent. He suggested that, perhaps, in those cases the 'no cure, no pay' principle should be applied, and the damages should be assessed on the actual damage done; a fictional state of affairs, as proposed by the House of Lords, and an assumption that a successful service was rendered could not be contemplated.

(c) On the assumption that there were two salvors, and the ship, although saved, was of little value owing to the negligence of the one salvor, for the purpose of arriving at an award for damages against the negligent salvor in accordance with the formula of *The Tojo Maru*, his salvage remuneration would have to be assessed on a notional ship value. The non-negligent salvor, however, would receive no reward, as this would be the consequence of the negligence of the other. It would be absurd, he said, if the assessment of damages with regard to the negligent salvor were arrived at on the basis of the formula of *The Tojo Maru*. Presumably, he pondered, the non-negligent salvor would have a cause of action in tort against the negligent one.

Brice[165] proposes a tentative solution and compares American with English law on the question of salvors' negligence. American salvage law is, in general, the same as English law, and the Salvage Convention applies in both systems. There is, however, a significant difference in approach. The American courts will award damages for breach of contract when (a) there is an ill-prepared professional salvor who takes a gamble with the rescue of the vessel by taking on the job, which is beyond his capacity owing to inadequate equipment or expertise; (b) there is gross negligence or wilful misconduct; (c) there is 'distinguishable and independent damage' of the immediate peril caused, which would not have occurred in the absence of the salvors' assistance.

Brice concludes that, perhaps, the most just answer may be that proposed by the American courts, namely that the salvor is only liable for damage that is distinct and independent of the immediate peril, and, once the immediate peril is passed, then the ordinary rules as to recovery and limitation of liability should apply.

The court, he proposes, should exercise greater leniency in cases where the salvors are not professionals and also in cases where the circumstances are very perilous for the would-be rescuer.

This proposal is close to what Lord Reid was prepared to accept in *The Tojo Maru*, where he said that it could be argued that the damage was 'distinguishable', in that it was not the type that was inherent in the situation.

Whether limitation of liability by the salvor should apply before or after the set-off was left unanswered by the House of Lords in *The Tojo Maru*. Thus, one may assume that the answer given by Salmon LJ at the CA on this issue, albeit *obiter*, that limitation of liability must be applied first to the damages award before the set-off between the damages and the salvage award, seems to be an attractive and fair solution.

In fact, there have not been any other cases like *The Tojo Maru* in the courts, and, as this case was a pre-Convention case (which was decided on its own unique facts),

165 Op. cit., Brice, fn 1, Ch 7, at pp 517–528.

the issue of negligence of salvors where the Convention applies should be dealt with in accordance with Art 18. It seems that, as the Convention is silent on the issue of damages in Art 8, the proper approach under the Convention may be to take the damage done by the salvor into account by reducing the award, or, in distinct cases of an independent and distinct damage, to deal with it as Brice proposes, following the American approach.

8.3 NEGLIGENCE OCCURRING BEFORE SALVAGE SERVICES WERE RENDERED

This can occur when there is a collision between two ships, and salvage services are rendered afterwards, or when there is towage, and the negligence of the tug creates danger requiring salvage. It has already been seen that there is a statutory duty upon masters and crew of colliding ships to offer assistance to each other after the collision, and that that duty is no bar to earning a salvage award. The House of Lords decided, in ***The Melanie v The San Onofre***,[166] that the vessel at fault can earn a salvage award if the services are meritorious. The outcome will depend on the facts of each case.[167]

The Convention, in Art 18, provides that the salvor may be deprived of the whole or part of payment if the salvage operations have become necessary because of his negligence.

In ***The Key Singapore***,[168] in which tugs were engaged to tow a jack-up rig, in extreme weather conditions, the towline parted frequently, but the rig was eventually brought to safety. The question was whether the tugs deserved a salvage award, or whether the situation of danger was created by their negligence, so as to deprive them of any award. The appeal arbitrator found the tugs 50 per cent at fault and reduced the award of US$1 million awarded to the tugs by the arbitrator. On appeal to the court, Steel J upheld the award made by the appeal arbitrator. With regard to Art 18, he held that, to assess the extent to which the salvage operations had become necessary owing to the fault or neglect of the salvor, it was necessary to assess the causative potency and blameworthiness of the salvor's faults relative to the causative potency and blameworthiness of the rig's faults. Both tugs and tow had fallen short of their duties.

In ***Beaverford v Kafiristan***,[169] the issue was slightly different. It raised the question whether a sister ship of a colliding ship, whose fault necessitated salvage, could claim salvage award for the successful salvage services rendered to the other colliding ship. *Kafiristan* collided with *The Empress*, which stood by until her sister ship, *Beaverford*, came for assistance and towed *Kafiristan* for about 10 miles, when

166 *The Melanie v The San Onofre* [1925] AC 246, p 262 (HL): dictum of Lord Phillimore: 'the duty cast by the MSAs upon one of the two colliding vessels to stand by and render assistance does not prevent that vessel, if she renders assistance, from claiming salvage'.

167 In *The Duke of Manchester* (1846) 2 Wm Rob 470, a claim for salvage was dismissed on the ground that the salvors put the vessel in danger by towing her aground; see similarly *The Robert Dixon* (1979) LR 5 PD 54.

168 [2005] 1 Lloyd's Rep 91.

169 [1938] AC 136 (HL); *The Glengaber* (1872) LR 3 A&E 534 approved; *Cargo ex Capella* (1867) LR 1 A&E 356 distinguished.

she handed *Kafiristan* over to other tugs. The tugs brought her to safety. *Beaverford* claimed salvage remuneration.

The House of Lords held that there is no principle in law that prevents a ship from obtaining a salvage award, merely because she belongs to the same owners whose vessel caused, or was partly responsible for, the damage giving rise to the necessity for the salvage services.

Lord Wright said:

> Where ... both colliding vessels are to blame, the fixing of the salvage remuneration would seem to be a necessary step in setting off the items of damage on the one side or the other so as to ascertain the final balance of account. It is true that the owners of the other colliding vessel are in law responsible for the damage caused by negligence of their servants including the amount of any salvage awarded to the salving vessel which they also own, but the equities are best worked out by making the salvage award without regard to the fact of common ownership, leaving the incidence of what is awarded to depend on the relative proportions of blame.[170]
>
> It is, I think, in accordance with the ideas of maritime law to treat in a case like this for purposes of salvage the vessels concerned as separate entities and to disregard at that stage the aspect of common ownership and the consequences of the rule of vicarious liability. Thus, the owner of the salving ship is dissociated from himself as owner of the wrongdoing ship.[171]

The 1989 Convention expressly states, in Art 12(3), that the provisions of the Convention shall apply, notwithstanding that the salved vessel and the vessel undertaking the salvage operations belong to the same owner.

The rule of common law that 'no man will profit from its own wrong', which was applied in this case by the trial judge and the CA, is only relevant to salvage cases to the extent of reducing the award if there are meritorious services rendered by the salvor whose negligence necessitated salvage. This is also reflected in Art 18 of the Convention.

9 THE POSITION OF SEVERAL SALVORS

9.1 DISPOSSESSION OF ONE SALVOR BY ANOTHER UNDER MARITIME LAW SALVAGE

Under maritime law salvage, the master of the vessel is the sole judge of whether or not to accept salvage services. If, after he has accepted the services of a salvor, a subsequent salvor supersedes the first against the wishes of the master, he will earn no remuneration. The principle is that, unless there are special circumstances,[172] a subsequent salvor is not entitled to dispossess a prior salvor, provided that the prior salvor has a reasonable prospect of accomplishing the salvage service himself and is not endangering the safety of the salved property.[173]

170 [1938] AC 136, p 148.
171 Ibid, p 149.
172 *The American Farmer* (1947) 80 LlL Rep 672.
173 *The Fleece* [1850] 3 W Rob 278.

Under the 1989 Convention, Art 8(2) provides for a duty of the owner of the vessel to co-operate (para 10, below). Article 8 (1)(c)(d) provides also for the duties of a salvor in seeking assistance, or permitting the intervention of other salvors when the situation so requires (para 9.3, below).

9.2 DISMISSAL OF A SALVOR

Dispossession of a salvor by way of dismissal by the master of the ship being salved has different consequences under (a) maritime law salvage, where there is no contract and the Convention does not apply, and (b) where there is a salvage contract. This can happen owing to mistake (seen earlier, para 6.3.3, above).

In ***The Unique Mariner (No 2)***,[174] where, after her grounding, her owners arranged through agents for a suitable tug to be despatched from Singapore, informing the master that a tug was being despatched, and another tug, *The Salvaliant*, in the meantime, was engaged by the captain, mistakenly believing it was the tug from Singapore, the issue was whether *The Salvaliant*, which had stood by until the other tug arrived, deserved an award, or damages for breach of contract.

The question for the court was how to assess the award for salvage services that had been wrongfully interrupted by the master, and whether the contractors were entitled, in addition to an award, to *restitutio in integrum* as compensation, or as damages for breach of contract, or both. The contractors contended that, as superseded salvors, the compensation should be assessed at an amount that they would have earned by way of salvage remuneration, had they been allowed to complete their services successfully, less deductions for risks not run, expenses not incurred and operating time saved, including an allowance of a discount for the possibility that they might have been unable to complete the services successfully, even if they had been allowed to do so.

Brandon J stated the general principles applicable to: (1) salvage under the general maritime law (where there is no salvage contract); and (2) salvage under contract:

9.2.1 Salvage under maritime law

Under maritime law salvage, the owners of the property to be salved were under no obligation to allow the salvors to complete their services, but were entitled, if they wished, to dismiss them and supersede them by other salvors.

However, if the salvors were later dismissed by the master of the ship and superseded by other salvors, they were entitled to remuneration in the nature of salvage (a) as a reward for the services that they had actually rendered before they were superseded and (b) by way of some compensation for the loss of opportunity to complete their services.

The justification for the compensation, he said, was to be found on reasons of public policy referred to by Lord Merriman P in *The Hassel*, and was implicit in the

174 [1979] 1 Lloyd's Rep 37; see also *Dover Harbour Board v Owners of the Star Maria* [2003] 1 Lloyd's Rep 183.

passage from Kennedy, *Law of Salvage*, adopted as a correct statement of the law by Willmer J in *The Loch Tulla*. The reasons of public policy were the encouragement of salvors to be willing and ready to render salvage services, even though they may, after entering upon them, be deprived, as a result of being superseded, of the opportunity to complete them successfully.[175]

He concluded that salvors, in such cases, were not entitled to full compensation, assessed like damages, for breach of contract or duty, on the basis of *restitutio in integrum*; and the right to compensation for being superseded was not dependent on any prior benefit having been conferred.

9.2.2 Salvage under contract

By contrast, where the salvors were engaged under an express salvage agreement in the terms of Lloyd's form, as was in the present case, it was an implied term that the owners of the property to be salved would not act in such a way as to prevent the salvors from performing the services, so long as they (the salvors) were willing and able to do so. The obligation not to act in such a way so as to prevent performance included an obligation not to dismiss or supersede.

With particular reference to the facts of this case, the judge held that: As the appeal arbitrator had found that the salvors were willing and able to perform the services that they had undertaken, and the act of the master of *Unique Mariner* in superseding *The Salvaliant* with *Asiatic Gala* was a breach of contract, such a conduct was a breach of obligation of such a character as to constitute a repudiation of the contract that was accepted on behalf of the salvors.

On the basis that the ship-owners repudiated the salvage agreement, and the salvors accepted such repudiation, the salvors were entitled to the usual remedy in damages that a party to a contract had in such a case. However, they were not also entitled to recover payment for services they had actually rendered.

Mistake will not be a defence, unless it is a fundamental common mistake, as was held in ***The Great Peace*** (para 6.3.3, above), where Lord Phillips MR for the CA held that the mistake was not sufficiently fundamental to avoid the contract.

9.2.3 Summary of the principles

(a) Under ordinary maritime law salvage, there is no obligation not to dismiss. There will be payment for salvage rendered and some compensation for lost opportunity.
(b) Under contractual salvage, the master of the salved has a duty not to prevent salvors from doing their work, and a dismissal by him will be breach of contract answerable in damages for repudiation of the contract.

The common law position is affected by the 1989 Convention, when it applies. There is a duty of the owner of the property to co-operate under Art 8(2) (see para 10, below), and a duty upon the salvor under Art 8(1) to seek assistance (see para 9.3, below).

175 [1979] 1 Lloyd's Rep 37, pp 50–52; *The Hassel* (1959) 2 Lloyd's Rep 82. *The Loch Tulla* (1950) 84 LIL Rep 62.

In addition, both LOF 1990 and 1995 contain a new provision (not being in the Convention) in cll 18 and 4, respectively, about termination of the agreement by *the owner of the vessel*, when there is no longer any prospect of a useful result leading to salvage reward in accordance with Art 13, by giving reasonable notice to the contractors. Clause G of LOF 2000 and 2011 grants a right to termination *to both the owners of the vessel or the contractor* by giving reasonable prior written notice to the other, when there is no longer any reasonable prospect of a useful result in accordance with Arts 12 and 13 of the Convention.

The expression 'useful result', which is borrowed from Art 12 of the Convention, has not been defined, although in obvious cases it may be easily understood. There are potential problems, however, if there is no agreement between the parties to the contract concerning whether the ship is economically salvable, where repair costs have not been properly assessed. It is submitted that an independent assessor may be asked to assess the situation as to whether there is objectively no 'useful result' in continuing the operations.

9.3 THE POSITION OF SEVERAL SALVORS UNDER THE SALVAGE CONVENTION 1989

Article 8(1)(c) imposes a duty on a salvor, whenever circumstances reasonably require, to seek assistance from other salvors, and Art 8(1)(d) imposes a separate duty on a salvor to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger, provided, however, that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.

Thus, prior salvors cannot refuse assistance from subsequent ones, nor exclude them. Any misconduct by a salvor will be taken into account to reduce the award or, depending on the seriousness of the misconduct, deprive him of any payment under the Convention (Art 18) (see, further, para 8, above).

10 DUTIES OF THE OWNER OF PROPERTY IN DANGER

10.1 DUTY TO CO-OPERATE UNDER THE CONVENTION

Under Art 8(2)(a), there is an express duty upon the owner of the property in danger and the master of the vessel to co-operate fully during the course of the salvage operations. The article states:

> The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor:
>
> (a) to co-operate fully with him during the course of the salvage operations;
> (b) in so doing, to exercise due care to prevent or minimise damage to the environment; and
> (c) when the vessel or other property has been brought to a place of safety, to accept re-delivery when reasonably requested by the salvor to do so.

The previous Salvage Convention did not provide that a duty of care was owed by either the salvor or the salved to each other during salvage operations, but common law principles applied.

Nothing is said in the 1989 Convention, however, about recoverable damages in the event of breach, and, thus, relevant national law would apply.

10.2 DUTY TO CO-OPERATE UNDER COMMON LAW

Under common law, the master and owner of the ship in danger have a duty to co-operate with the salvor and not to mislead him.[176] In the event of breach of this duty, ordinary principles of common law will apply to provide a remedy, as was held by Hill J in ***The Valsesia***.[177]

When V ran aground, two tugs were engaged to render her assistance upon an agreed sum. After some hours of work, V grounded again, owing to negligence of her crew in having failed to slip the cable at the time agreed between the masters of the respective parties. The tugs were, therefore, unable to complete the salvage operation, and V grounded again. She was then in a worse position than she was before the tugs got hold of her. The tugs claimed damages from the owners of V, on the ground that they were deprived of the opportunity to complete the salvage owing to the negligence of V's servants. They contended that, as the tugs had performed the services, except for completing the salvage, they should be treated as if they had performed the contract and were, thus, entitled to recover the stipulated salvage sum.

Hill J held:

> In my view this case falls to be decided according to the ordinary principles of common law and no question peculiar to the law of salvage is involved. I think there was a mutual obligation implied in such an agreement as this, at least, to act with ordinary skill and care in carrying out the respective parts in the combined work. It was the duty of the tugs to obey the orders of those who were in command of the ship and to use skill and care in the handling of the tugs, and it was equally the duty of those in charge of the ship to use ordinary skill and care in carrying out their part of the contract, which was the slipping of the cable at the right time. This, indeed, was the essential part which the ship was to play in the combined operation . . .[178]
>
> I find a difficulty in saying that anybody can recover a lump sum to be paid in respect of a completed work, when in fact, that work has not been completed. But if the plaintiffs were prevented from completing it by the negligence of those on board the ship, and if they were thereby deprived of the opportunity of earning the stipulated sums, then they are entitled to damages for the breach . . . and in this case the damages would be exactly commensurate with the stipulated sums because the plaintiffs had in substance completed the whole of what they had undertaken to do.[179]

10.3 DUTY TO CO-OPERATE UNDER CONTRACT

Under LOF contracts, the owners, their servants and agents shall co-operate fully with the contractor in and about the salvage, including entry to a place named or the

176 *The Kingalock* (1854) 1 Spinks E&A 265.
177 [1927] P 115.
178 Ibid, p 118.
179 Ibid, p 119.

place of safety. Under LOF 2000 and 2011, the 'duties of property owners' is more extensive; in particular, cl F spells out in detail what the co-operation is about:

(i) the contractors may make reasonable use of the vessel's machinery gear and equipment free of expense provided that the contractors shall not unnecessarily damage abandon or sacrifice any property on board;
(ii) the contractors shall be entitled to all such information as they may reasonably require relating to the vessel or the remainder of the property provided such information is relevant to the performance of the services and is capable of being provided without undue difficulty or delay;
(iii) the owners of the property shall co-operate fully with the contractors in obtaining entry to the place of safety stated in the contract or agreed or determined in accordance with the contract.

10.4 OBLIGATION TO PROVIDE SECURITY TO SALVORS

The Convention, by Art 21, and the LOF contracts impose a dual obligation on the owner of the salved vessel: first to provide satisfactory security for the salvage claim, including interest and costs in respect of the vessel, and, second, to use their best endeavours to ensure that the cargo-owners provide satisfactory security, including interest and costs before the cargo is released.[180] The salved property shall not be removed from the port or place of arrival after completion of salvage without the consent of the salvor, until such security is provided.

A provision for salvage security is included in notice 1 in both LOF 2000 and 2011. It states:

As soon as possible the owners of the vessel should notify the owners of other property on board that this agreement has been made. If the contractors are successful the owners of such property should note that it will become necessary to provide the contractors with salvage security promptly in accordance with cl 4 of the Lloyd's Standard Salvage and Arbitration (LSSA) clauses. The provision of general average security does not relieve the salved interests of their separate obligation to provide salvage security to the contractors.

Common law principles will apply as to the amount of the security, which must be reasonable.

In ***The Tribels***,[181] it was held that it is an implied term of the salvage contract that the contractor would not ask for unreasonably high security. The salvors were entitled to demand security for a sum that would secure payment of a top-level award, which they could reasonably anticipate to obtain, including the arbitration costs. In the event of excessive security demanded by the salvor in this case, the owners applied for and were granted an injunction to restrain the salvor from demanding security above £1 million.

The Convention expressly provides, by Art 20, that nothing shall affect the salvor's maritime lien under any International Convention or national law, but that the salvor may not enforce his maritime lien when satisfactory security for his claim, including interest and costs, has been duly tendered or provided.

180 The meaning of 'best endeavours', explained under para 8, should be equally applicable in this context. When satisfactory security for the salvor's claims is duly provided or rendered, including interest and costs, the salvor may not enforce his maritime lien (Art 20(2)).

181 [1985] 1 Lloyd's Rep 129.

11 ASSESSMENT OF THE AWARD AND SPECIAL COMPENSATION

The Convention provides (Art 12(1), (2)) that, if the salvage operations have had useful result, the salvor will be rewarded, and, except as otherwise provided, no payment is due under the Convention if there is no useful result.

Article 13 refers to the assessment of award for property salvage, Art 16 is relevant to life salvage, and Art 14 deals with special compensation (liability salvage), which is not meant to be environmental salvage.[182]

Services rendered, notwithstanding the express and reasonable prohibition by the owner or master of the vessel or the owner of any other property in danger that is not and has not been on board the vessel, shall not give rise to payment under the Convention (Art 19).

Every interest salved contributes according to its salved value (Art 13(2)). The awards, exclusive of interest and recoverable legal costs, shall not exceed the salved value of the vessel and other property.

Both Arts 13 and 14 are incorporated in the LOFs 1990 and 1995 by reference. LOF 2000 and 2011 are made subject to English law by cl D.

11.1 THE CRITERIA FOR ASSESSING THE SALVAGE AWARD

Criteria for assessing the award are set out in Art 13(1) and reflect the common law position. Article 13(1)(b) gives allowance for increasing the award in the event of efforts made by the salvors to protect the environment to be included in the property award.

Article 13(1) provides: The award shall be fixed with the view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

(a) value salved: every interest salved contributes according to its salved value;
(b) the skill and efforts of the salvors in preventing or minimising damage to the environment;
(c) the measure of success obtained by the salvors;
(d) the nature and degree of danger;[183]
(e) salvors' skill, effort in salving the vessel, other property and life;
(f) the time used and expenses and losses incurred by the salvors;
(g) the risk of liability and other risks (including equipment) run by salvors or their equipment;
(h) the promptness of the services rendered;
(i) the availability and use of vessels and equipment intended for salvage operations;
(j) the state of readiness and efficiency of the salvors' equipment and the value thereof.

The concept of salvage is based on two main considerations: first, that the salvors should be paid for benefits conferred to the property, and, second, that public policy requires such payment to be generous with a view to encouragement of salvors.[184]

182 As Lord Mustill stressed in *The Nagasaki Spirit*; at the time of writing, the International Salvage Union, in collaboration with other industry bodies, is working on developing the concept of environmental salvage.

183 Such as the risk of becoming a TL or CTl, or suffering of further damage with the result of loss of use.

184 See, for example, *The William Beckford* (1801) 3 C Rob 355; *The Industry* (1855) 3 Hagg 203.

The salved value is assessed at the time of termination, which can be different for ships and cargo. The ship's market value is taken, less the amount for reasonable costs and related expenses to carry out repairs. The cargo value is usually based on the CIF value.

Salvage claims are now very seldom determined in courts, as they are dealt with effectively under the auspices of LOF arbitrations. Apart from ordinary cases in the assessment of an award, a couple of cases that came before the courts recently are worth mentioning.

11.1.1 The rule of *The Amerique*[185] tested

The rule is understood to be that, although the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered.

A good example of the application of this rule was ***The Queen Elizabeth***,[186] in which Wilmer J said that, where there is practical certainty of continuing damage and continuing expense, as in this case, coupled with the possibility, even if not more than a bare possibility, of a much more serious loss, one has to give some real effect to the very high value of the salved property. However, by that, the court meant that one must not go beyond giving some effect by saying that this is a case in which the value of the salved property, at least, provides a sufficient and abundant fund out of which to reward the salvors.

In ***The Ocean Crown***,[187] the issue was whether the effect of the world economic downturn upon salvage business should be taken into account when considering salvors' remuneration in complex cases, particularly when the salved values were high; the rule of *The Amerique* was tested.

This was an appeal by ship and cargo interests from an arbitration award, where the total value of the salved fund was US$166 million. The appeal arbitrator increased the award from US$34,500,000 to US$40,750,000, plus interest and costs. The appeal involved three questions of law, namely:

1 Whether the arbitrator could take into account, as an enhancing feature in the assessment of salvage remuneration, the possibility that the salvor and/or the salvage industry might experience difficult economic conditions in the future.
2 If, in principle, it was relevant to take such matters into account, whether it was permissible to take into account the actual economic conditions experienced between the date of termination of the services and the date of the award.

185 (1874) LR 6 PC 468 (PC): although the *quantum* of remuneration to salvors is to some extent to be affected by the value of the property salved, it must not be raised to an amount altogether out of proportion to the services actually rendered. Where the court below had awarded an exceptional and excessive amount of remuneration solely from regard to the value of the property salved, their Lordships, notwithstanding the general rule of non-interference upon a question of mere discretion, reduced the said amount by two-fifths.

186 (1949) 82 LlL Rep 803, 821; this was the famous ship that grounded and was faced with great reputational risks. The services were short but the salved fund was about £6.2 million – not common at those times – but it was faced with the certainty of continuing damage and a small risk of much more serious loss. The award was in the sum of £43,000.

187 [2010] 1 Lloyd's Rep 468

3 Whether the principle in *The Amerique* was applicable to all types of salvage case, including complex and comprehensive cases, or whether a different principle applied in such cases.

The appeal arbitrator had stated that the principle in *The Amerique* does not apply in complex cases.

Gross J allowed the appeal and held that the appeal arbitrator erred in law in having regard to the risk of a future economic downturn and the actual economic conditions experienced since the salvage services had been performed as specific factors enhancing an award of salvage remuneration. In his view, the principle in *The Amerique* applied in all types of salvage case, including complex and comprehensive cases. No account was to be taken of actual economic conditions experienced between the termination of services and the appeal award. The appropriate form of relief was not to reinstate the award of the first instance arbitrator but to remit the matter to the appeal arbitrator for reconsideration.

11.1.2 The 'Disparity' principle tested

This means that, in salvage where there is only need for immobilisation, no great urgency, but straightforward towage is required, the sum awarded should not be wholly out of line with commercial towage rates.

In ***The Voutakos***,[188] the court held that the so-called 'disparity principle', which was said to be applicable in straightforward rescue towage cases, was flawed and unworkable.

Tsavliris provided salvage services to the vessel *Voutakos* and her cargo on the terms of LOF 2000. The vessel had suffered a main engine breakdown in the south-western approaches to the English Channel. On conclusion of the salvage agreement, the salvors chartered an ocean-going tug. When the wind increased, they hired another tug to act as a steering vessel for the casualty. The arbitrator awarded US$1,750,000, but, on appeal, the appeal arbitrator increased the original award to US$2,700,000.

The appeal arbitrator held that the disparity principle was seriously flawed and should be disregarded, because commercial rates are irrelevant to the assessment of salvage remuneration, and Art 13 does not require commercial rates to be taken into account.

The ship-owners appealed, contending that the appeal arbitrator had erred in law in discarding the disparity principle and in determining that there should be a general increase in awards in towage cases.

Steel J agreed with the appeal arbitrator and said: insofar as there was a narrow principle that it was only applicable in straightforward towage cases that commercial rates were relevant, such a narrow principle was seriously flawed. It was unworkable, given the gradations of danger in cases of immobilisation. Accordingly, the disparity principle in the sense advanced was misconceived.

However, the judge further held that it was not correct that commercial rates were always irrelevant. They were relevant and useful as a cross-check by way of providing

188 [2008] 2 Lloyd's Rep 516.

a floor to a salvor's legitimate claim. The significance of commercial rates would depend on the facts of each case. As to what commercial rates should be taken, where the bulk of the services had been subcontracted on a daily rate, the actual cost to the salvor thereby incurred was a relevant factor.

A fair balance had to be struck between encouraging professional salvors by generous awards and discouraging owners from accepting services on salvage terms. He remitted the award to the appeal arbitrator for reconsideration.

11.2 CRITERIA FOR SPECIAL COMPENSATION

As seen under 3.1.1, the safety net under LOF 1980 was, for the first time, an exception to the 'no cure, no pay' principle and covered reasonably incurred expenses plus up to 15 per cent increment, including a fair rate for tugs and equipment. It applied only when the salvage concerned laden tankers.

The Convention, by Art 14, has improved salvors' position, but, as will be seen in *The Nagasaki Spirit* case, their position has not been as had originally been hoped, that is, to get an environmental salvage. In view of the interpretation of Art 14, this is not within the wording of the Article, although the drafters of the Convention could have included it.

In summary, the salvor gets compensation for his out-of-pocket expenses, plus a 'fair rate' for equipment and personnel actually and reasonably used; this may be increased up to 30 per cent of expenses, with the arbitrators' discretion to increase it to 100 per cent of expenses, depending on the services rendered to protect the marine environment from pollution damage.

Article 14(1)

If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under Art 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

Article 14(2)

If, in the circumstances set out in para 1, the salvor by his salvage operations has prevented or minimised damage to the environment, the special compensation payable by the owner to the salvor under para 1 may be increased up to maximum of 30 per cent of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in Art 13(1) may increase such special compensation further, but in no event shall the total increase be more than 100 per cent of the expenses incurred by the salvor.

Article 14(3)

'Salvor's expenses' for the purpose of paras 1 and 2 means the out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used in the salvage operation, taking into consideration the criteria set out in Art 13, para 1(h), (i), (j).

Article 14(4)

The total special compensation under this article shall be paid only if and to the extent that such compensation is greater than any reward recoverable by the salvor under Art 13.

Article 14(5)

If the salvor has been negligent and has thereby failed to prevent or minimise damage to the environment, he may be deprived of the whole or part of any special compensation due under this article.

Article 14(6)

Nothing in this article shall affect any right of recourse on the part of the owner of the vessel.

11.2.1 Interpretation

Skill and efforts to minimise damage to the environment will be taken into account in assessing property salvage by way of an 'enhanced award' (Art 13(1)(b)).

In addition to the enhanced award, the salvor will get his expenses paid by way of special compensation, under Art 14(1), if he made efforts to protect the environment. He will even get his expenses, regardless of whether property was saved or whether his efforts to minimise or prevent damage to the environment were ultimately successful.

However, he will not get Art 14 compensation if the award under Art 13 is higher than the total special compensation (Art 14(4)). In particular, Art 14(1) provides for special compensation being equivalent to the salvor's expenses, in the event he has not earned an award under Art 13 at least equivalent to special compensation, when the vessel, or its cargo, threatened damage to the environment.

In addition, if the salvor has, in fact, prevented or minimised such damage, the special compensation will be increased up to 30 per cent of the expenses incurred by the salvor. Such compensation may be further increased, taking into account the factors under Art 13, but no more than 100 per cent of the expenses incurred (Art 14(2)). Negligence on the part of the salvor will deprive him of the whole, or part, of any special compensation under this Article (Art 14(5)).

In Part II, para 4 of Sched 11 to MSA 1995 (common understanding), it is stated that, for fixing a reward under Art 13 and assessing the special compensation under Art 14, the court or arbitrator is under no duty to fix a reward under Art 13 up to the maximum salved value of the vessel and other property before assessing the special compensation to be paid under Art 14.

11.2.2 The decision in *The Nagasaki Spirit*

The principal issue in *The Nagasaki Spirit* was concerned with the definition of 'expenses' in Art 14(3) (above) and, in particular, that part of it that refers to 'fair rate for equipment'. In other words, the point was whether, in assessing a 'fair rate' for the salvor's own craft, equipment, personnel etc., it was permissible to include a market or profitable rate, or whether the salvor was entitled solely to reimbursement of expenditure.

The case involved a collision between *The Nagasaki Spirit*, laden with crude oil, and the container ship, *The Ocean Blessing*, in the northern part of the Malacca Straits. Following the collision, about 12,000 tonnes of crude oil escaped from *The Nagasaki Spirit* into the sea, and a fire resulted. Both vessels were engulfed in the fire, and all crew on *The Ocean Blessing* lost their lives. Two members of the crew on board *The Nagasaki Spirit* survived. The next day, professional salvors agreed to salve *The Nagasaki Spirit* and her cargo under the LOF 1990, which contained Arts 13 and 14 of the 1989 Convention. They provided craft, personnel, equipment and consumables. With the help of a number of tugs, the fire on *The Nagasaki Spirit* was extinguished. Her cargo was transhipped, and the vessel was safely redelivered to her owners.

The award

The award was made on the basis of Art 13, and the arbitrator, in fixing special compensation, stressed the need for encouragement. In order to arrive at a fair rate, he took into account some contribution to future investment, so that professional salvors were encouraged to stay in business.

The appeal award

The appeal arbitrator, Mr Willmer QC, disagreed; he increased the award under Art 13 and took a different line on Art 14, taking into account the type and scope of the job in assessing the fair rate, which would be reflected in the costs to the salvors. As his assessment of the award was higher than that of the special compensation, no compensation under Art 14 was payable.

The judge's decision

The Admiralty judge, on appeal from the award, concluded that, although fair rate imported the idea of remuneration, which would normally include an element of profit, the appeal arbitrator was right to reject this. The words, read in their context, meant recompense for expenditure, because the Convention drew a distinction between remuneration or reward and compensation.

The CA decision

The CA agreed with the judge and, reading Art 14 in context with Art 13(1), concluded that fair rate means a rate of expenses, which is to be comprehensive of indirect or overhead expenses and taking into account the additional costs of having resources instantly available. So, fair rate, in the view of the CA, was not to be a salvage reward, or anything like it. Article 14 does not refer to skill and effort of the salvors etc., as does Art 13(1).[189]

Evans LJ dissented only to the extent that these expenses did not necessarily exclude any profit element, and, in this respect, he preferred the approach of the appeal arbitrator and said:

189 [1996] 1 Lloyd's Rep 449, p 455, per Staughton LJ.

I agree with the judgment of Staughton LJ on the 'fair rate' issue in rejecting the concept of salvage remuneration or reward and in limiting the salvor's claim under Art 14(3) to the expenses which he has incurred. I would not go on to hold, however, that these expenses necessarily exclude any profit element or that they are confined to costs, including overheads, as the learned judge held. The appeal arbitrator, Mr JF Willmer QC adopted an approach which is distinct both from that of the arbitrator, Mr RF Stone QC, and that of the judge. In summary, I would hold that the judge was wrong to exclude altogether a possible 'profit' element and that Mr Stone erred in assessing the 'fair rate' as if it was a form of remuneration or reward. Broadly speaking, in my judgment, Mr Willmer was correct to have regard to commercial or, where relevant, market factors as well as to the salvor's costs.[190]

The House of Lords decision

Lord Mustill, delivering judgment, held that 'fair rate', under Art 14(3), meant fair rate of expenditure and did not include any element of profit. The first half of Art 14(3) covered out of pocket expenses, and the second half covered overhead expenses. The word 'rate' was the appropriate word to use when attributing or apportioning general overheads to equipment and personnel reasonably and actually used in the particular salvage operation. 'Expenses' denoted amounts either disbursed or borne, not earned as profits. The fact that Art 14(3) requires fair rate to be added to the out of pocket expenses made it clear that it contained no element of profit. Also, Art 14(2) twice makes use of the expression 'expenses incurred' by the salvor. The word 'incur' obviously showed that it is not something that yielded him profit. Lord Mustill concluded that Art 14(3) was not concerned with remuneration and described the intention of the legislation, thus:

Furthermore, and in my view decisively, the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purpose of preventing damage to the environment. Paragraphs 1, 2 and 3 of Art 14 all make it clear that the right to special compensation depends on the performance of 'salvage operations' which, as already seen, are defined by Art 1(a) as operations to assist a vessel in distress. Thus, although Art 14 is undoubtedly to encourage professional salvors to keep vessels readily available, this is still for the purpose of a salvage for which the primary incentive remains a traditional salvage award. The only structural change in the scheme is that the incentive is now made more attractive by the possibility of obtaining new financial recognition for conferring a new type of incidental benefit. Important as it is, the remedy under Art 14 is subordinate to the reward under Art 13, and its function should not be confused by giving it a character too closely akin to salvage.[191]

11.3 ARTICLE 14 DOES NOT PROVIDE FOR ENVIRONMENTAL SALVAGE

The long-standing principle in salvage law of 'no cure, no pay' changed, at first, with the introduction of the novel concept of 'safety net' by the LOF 1980, the purpose of which was to encourage salvors to do their best to protect the environment from oil pollution. However, this concept related only to steps taken to protect the environment from oil pollution.

190 Ibid, p 457.
191 [1997] 1 Lloyd's Rep 323, pp 332–333.

Following the concept of the 'safety net', the Salvage Convention 1989 introduced the concept of 'special compensation'. This new concept widened the scope of encouragement to salvors, in that it applies to prevention of any pollution, not just oil pollution. However, damage to the environment is limited to substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto (Art 1(d)), and not further than these waters.

As salvors will recoup, at least, their expenses if they take steps to protect the environment, even if there is no success in salving the property in danger, there is no longer 'no cure, no pay' salvage, because of the fall back on Art 14, as Lord Mustill stated in *The Nagasaki Spirit*; but, he added, no profit is allowed by it; the Convention has not introduced a 'pure environmental salvage'. Article 14(3) is not concerned with remuneration, which implies a profit element, but with reimbursement of reasonable incurred expenses and overheads. Giving the words used in this article their natural meaning, and considering its context as a whole, Art 14 is subordinate to Art 13. It provides for an uplift to Art 13, only if the compensation under Art 14 is higher than the award under Art 13.

Its novelty lies in the provision for compensation in respect of expenses incurred by reason of the efforts made during salvage operations to protect the environment, even though no property is saved, or even when damage to the environment is not prevented (Art 14(1)).

11.4 SOME ISSUES FOR CONSIDERATION

Not all problems were resolved by the Convention, and perhaps more were created, as will be seen below. For example, under LOF 1980, the safety net was applicable even if the salvor's efforts to minimise or prevent damage to the environment took place on the high seas, as opposed to near coastal or inland waters or areas adjacent thereto only (Art 1(d)).

A solution was found for these problems by the SCOPIC (see para 13 below), which can be incorporated into any LOF, but it will become operative only when the salvor opts to invoke the clause.

In practice, there are insuperable problems that salvors are faced with, particularly when there is a risk to the environment. A marine casualty becomes a political matter, as has been witnessed in some major casualties, such as *The Erika*, *The Prestige* and *The Castor*. Only recently has there been a move, particularly after these incidents, to oblige coastal States to follow the IMO Guidelines with regard to providing places of refuge (see Chapters 2 and 13).

Salvors face great risks and they have to invest in order to be ready to respond to casualties such as these.

12 PROBLEMS ARISING FROM THE DRAFTING OF ART 14 OF THE CONVENTION

Professional salvors reacted strongly to the decision of the House of Lords in *The Nagasaki Spirit*. From their point of view, the decision disregarded the loss suffered by salvors in maintaining sophisticated tugs and equipment (which invariably may

have to be made available by borrowing a large capital) in readiness during salvage operations until the danger to the environment is eliminated. Such advance capital provision cannot be compensated, in their opinion, without allowance of an element of profit in the 'fair rate' of Art 14.

In reply to this, Lord Mustill defended his judgment – at a debate held by the London Shipping Law Centre on 19 June 1997 – that 'he was only the pianist who had to perform the music composed by someone else', referring to the draftsmen of the Convention being the composers.

During the same debate, the appeal arbitrator of the decision, John Willmer QC, highlighted the problem arising from the drafting of the Convention and, in particular, with regard to special compensation, as follows.[192]

12.1 TERRITORIAL LIMITS

Unlike LOF 1980, which provided for the 'safety net' to apply in cases in which the casualty occurred on the high seas and the salvor exerted efforts to protect the marine environment, the Convention has restricted special compensation to coastal or inland waters or areas adjacent thereto.

Article 1 provides:

For the purpose of this Convention: . . .

(d) Damage to the environment means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

Considerable concerns had been expressed by professional salvors as to the territorial limits of Art 1(d). If salvage of a major disaster on the high seas was required, Art 14 would not apply. Undoubtedly, oil or other chemicals from a casualty would be transported to the coastal areas, but, unless a special agreement was reached between the owners' liability insurers to cover the expenses of salvors, as they would be covered had Art 14 applied, there would be no incentive for salvors to act.

It might be possible, however, in a given case, Mr Willmer said, to prove that, having regard to the prevailing wind and current, a ship spilling thousands of tons of oil or noxious chemicals, even though far out to sea, nevertheless threatened damage to marine life or resources in coastal waters or areas adjacent thereto. Questions would, however, arise as to the meaning of coastal waters. Could they be equated to the economic zone? Should the waters over the continental shelf be regarded either as coastal or adjacent waters? Unless these questions were authoritatively answered, uncertainty would prevail for salvors and P&I clubs as to the ambit of the special compensation provision.

192 The paper delivered at the seminar is available from the office of the London Shipping Law Centre: www.shippingLBC.com

12.2 SUBSTANTIAL PHYSICAL DAMAGE

The second difficulty arising from the wording of Art 1(d) has been that the damage must be substantial and physical. Minor damage to a tourist beach or mere economic loss would not be enough. The historical context in which the provisions of the Convention have to be construed, said Mr Willmer, indicated that the word 'substantial' had to be considered to be meaning 'seriously' and must mean something more than 'not trifling'. However, he continued, the imprecision of the word 'substantial' would be likely to lead to continued argument as to its application to the facts in particular cases.

12.3 THREATENED DAMAGE

The next drafting ambiguity for the application of special compensation has been the word 'threatened' in Art 14(1). Lloyd's arbitrators treat it as indicating that, for the salvor to succeed in a claim for special compensation, there ought to be reasonable apprehension, rather than actual danger, of damage to the environment. The main reason for that approach, he said, was that the incentive or encouragement to salvors intended by the Convention would not be promoted by too rigid an interpretation of this word. To wait until it could be seen that there was actual danger would increase the risk that help would arrive too late.

In this connection, Brice[193] had commented that the distinction between the two words used by the Convention, 'danger' in Art 13 and 'threatened' in Art 14, was significant. This was because there might be cases when a threat of damage to the environment might not materialise, as, for example, when there was change in wind force and direction, and, therefore, the danger never materialises. However, this approach was not universally acceptable by P&I clubs, and it was important that parties to a salvage agreement knew where they stood.

12.4 FAIR RATE

How the arbitrator was to ascertain the fair rate has posed a real practical problem. Staughton LJ, in the CA (*The Nagasaki Spirit*), concluded that this was a matter of judgment for the tribunals of fact and not necessarily the result of any mathematical calculation. Lord Mustill said, in the same case, that:

> Your Lordships were pressed with a submission that the meaning given to Art 14(3) by the judge and the Court of Appeal would be unworkable in practice. I cannot accept this, for it seems to me that the ascertainment of the fair rate must necessarily be performed with a fairly broad brush, albeit not so broad as the fixing of the reward under Art 13, and the uplift under Art 14(2). Quite sufficient information for such purposes could be derived from the salvor's books, as indeed became clear when reference to materials from that source was made in the course of argument.[194]

193 Op. cit. fn 1, p 425.
194 [1997] 1 Lloyd's Rep 323, p 333.

Mr Willmer explained during this debate that, from his experience as an appeal arbitrator, the real problem here was that professional salvors were very reluctant to disclose books that they would regard as highly confidential. Involvement of accountants would increase the costs of the arbitration and delay matters.

12.5 THE INCREMENT

Another problem mentioned in this debate, which has frequently arisen in arbitration with regard to the salvor's entitlement to increment under Art 14(2), was whether or not the salvor has to prove that, had it not been for the services performed, an escape of oil would have occurred and would have caused the substantial damage. Mr Willmer disagreed with such a construction, which would be illogical in the context of the Convention.

12.6 SECURITY FOR SPECIAL COMPENSATION

The last point of difficulty raised during this debate was the issue of security for special compensation. Under the Convention, Art 21, there is an obligation upon the owner of the ship to provide security. However, if there was no ship salved, it could be difficult to enforce this obligation under the Convention.

13 THE SOLUTION PROVIDED BY THE SCOPIC

13.1 THE INITIATIVE

The marine salvage industry, represented by the ISU, having discussed the problems outlined above with the IGP&I, the London property underwriters and the International Chamber of Shipping, appointed a committee of experts that worked for 2 years from 1997 and proposed a new solution, the SCOPIC, which was finalised in August 1999 and was amended in 2000. It is kept under annual review by the Salvage Liaison Committee. Fine adjustments were made in 2005, the rates were amended in 2007, and there was a further amendment to the rates in 2011.

The SCOPIC clause leaves the fundamental principles of special compensation unchanged, but gives the option to the parties to use SCOPIC in place of Art 14. It is a voluntary addition to the LOF contract.

It has an impact in the following respects:

(a) It puts in place a more workable framework for calculating remuneration, which is based on pre-agreed rates for vessels, personnel and equipment.
(b) It provides greater financial security to salvors.
(c) It dispenses with the problematical special 'triggers' required under Art 14.

(d) It may be invoked by the salvor at any stage during a salvage operation, but only in appropriate circumstances, including high-risk, low-value cases. Therefore, it reinforces the salvor's ability to deliver a swift response.[195]

The parties to a salvage contract may agree to incorporate SCOPIC into any LOF contract by reference, thereby contracting out of Art 14 of the Convention.

SCOPIC was the result of lengthy negotiations and required 'give and take' on the part of all interested parties; it represents a balance of everyone's interests. It is backed up by two codes of conduct: one between the ISU and the IGP&I, and the other between the London property underwriters and the IGP&I; these codes are not legally binding but are basically a gentlemen's agreement.

13.2 THE SUB-CLAUSES

SCOPIC 2011 has 16 sub-clauses, which set out the basic scheme, and three appendices setting out the contractual position between the salvor and the ship owner.

Substitution of Art 14

Clause 1 of SCOPIC provides that the clause is supplementary to a 'no cure, no pay' LOF, and that the method of assessment of special compensation under Art 14 shall be substituted by the method set out in SCOPIC. The clause clears up the problems arising from Art 14 discussed earlier.[196]

Invoking SCOPIC (cl 2)

Whatever the circumstances, even if there is no threat of damage to the environment, the contractor may, by giving written notice to the ship-owner, invoke the provisions of the clause at any time of his choosing. The assessment of the SCOPIC remuneration begins from the time of the written notice, and there will be no SCOPIC remuneration for services rendered before that time. If services to protect the environment have already been rendered prior to the written notice, the compensation will be assessed under Art 14. Therefore, it is important for the salvor to exercise his option as soon as possible in order to maximise his recovery.[197]

Security (cl 3)

Ship-owners shall provide security in the sum of $3 million within 2 days of the contractor invoking SCOPIC. If at any time the security is too great or too little, it shall be reduced or raised on application, and any disputes as to the amount of security shall be determined by the arbitrator.

195 Walenkamp, H (President to International Salvage Union), 'SCOPIC: a new solution now available for us' (2000) 14(7) P&I International, July, p 166.

196 See Brice, G, 'Salvage and the role of the insurer' [2000] LMCLQ, February, pp 26–41.

197 Browne, B, 'Salvage – LOF and SCOPIC' (1999) *International Journal of Shipping Law*, June, Pt 2, pp 113, 120.

The P&I clubs agree, through the code of conduct (mentioned earlier), to provide (on behalf of their member ship-owner) any security required for SCOPIC remuneration by a Standard Guarantee Form ISU 5.

Withdrawal (cl 4)

If security is not provided within 2 days, the contractor has the option to withdraw from SCOPIC entirely and revert to Art 14. Such right can be exercised at any time before security has been provided.

Tariff rates (cl 5)

SCOPIC remuneration shall be assessed by applying tariff rates to personnel, tugs and equipment used, adding a bonus assessed generally at 25 per cent of the sum of the tariff rates and out of pocket expenses. The rates are reviewed annually.

The out-of-pocket expenses mean money paid by the contractor, or on his behalf, to third parties for hire of men, tugs, other craft and equipment, as well as other expenses reasonably necessary for the operation. These expenses may be agreed at cost, or on tariff rates, if the hire is from another ISU member.

Relationship with Art 13 award (cl 6)

The assessed SCOPIC remuneration is payable by the ship-owner only to the extent that it exceeds the total Art 13 award payable by all salved interests, even if the Art 13 award or any part of it is not recovered.

Discount (cl 7)

If SCOPIC is invoked and the remuneration proves to be less than the Art 13 award, then the Art 13 award will be discounted by 25 per cent of the difference between the Art 13 award and the amount of the SCOPIC remuneration that would have been assessed. This would, in effect, be the consequence of opting for SCOPIC when it was perhaps not necessary, for example, if there were prospects of an adequate salvage award.

Payment of SCOPIC remuneration (cl 8)

If there is no potential of an Art 13 award, payment is due within 1 month of presentation of the claim. (The liability is that of the ship-owner and his P&I club.) If there is to be an Art 13 award, 75 per cent of the difference between the SCOPIC remuneration and the Art 13 security is payable within 1 month and the balance when the Art 13 award is assessed.

Termination (cl 9)

(i) The contractor can terminate SCOPIC and the LOF, if the cost of his services exceeds the value of all property salved and the likely SCOPIC remuneration.
(ii) The owners can also terminate SCOPIC (but not the LOF) at any time after

SCOPIC has been invoked, provided that the contractor shall be entitled to at least 5 clear days' notice of such termination.

(iii) The above provisions shall not apply if the contractor is restrained from demobilising by the government or local authority (this is likely to be so if there is a threat to the environment).

This provision may give rise to difficulties for salvors, whose security may prove not to be sufficient to maintain his services. It is said by a commentator that the salvor has the right under cl 9(i) to withdraw from the entire LOF contract if it is no longer financially viable, which is considered as an additional brake on an owner terminating SCOPIC unreasonably.[198] However, given cl 9(iii), neither party would be able to withdraw if the relevant government restrains demobilisation.

In ***The Sea Angel***,[199] sub-cl 9(iii) of the SCOPIC was relevant.

The ship, laden with light crude oil, grounded near the approaches to the port of Karachi and subsequently broke into two. There was a major pollution incident. Tsavliris contracted with the owners of the property to salve the ship under LOF 2000, incorporating the SCOPIC. The salvor subcontracted a ship – belonging to the claimant – under a time charterparty to lighten the casualty by off-loading part of the cargo. The subcontracted vessel, after completing the transfer of the cargo, could not be redelivered by the salvors (as charterers) to its owners, because the Karachi Port Authority refused to issue the relevant certificate, resulting in the salvor having to continue payment of hire. To determine whether or not there was a frustrating event that might have absolved the salvor from paying further hire to the subcontracted vessel, sub-cl 9(iii) of the SCOPIC was relevant. The court had to consider whether the detention by the authorities gave rise to a fundamental change of the obligation by Tsavliris under the time charter contract.

Gross J held that the detention was not a frustrating event. The CA, approving his decision held:

> The foreseeability of this general risk [detention by port authorities], recognised within the industry, and provided for in its well-known terms of trade (SCOPIC), provides a special and highly relevant factor against which the issue of frustration needs to be assessed. However, like most factors in most cases, it must not be exaggerated into something critical, excluding, preclusive: for if, on the special facts of a particular case, the charter is frustrated, then the obligation to reward the salvor under SCOPIC goes – despite his inability to demobilise his equipment.
>
> The requisition, seizure or trapping of a vessel in the course of a major conflict were quite unlike the instant case, since it was not possible to negotiate or litigate one's way out of such consequences of war. Delay was an important consideration but only the starting point. The right approach was to consider all the factors. In the instant case the purpose of the charter had been performed and the effect of detention was purely a question of the financial consequences. That was not like the situation where the supervening event either postponed or interrupted the adventure itself. In general terms the contractual risk of such delay caused by detention of government authorities was firmly on Tsavliris. The risk of detention by the littoral authorities arising out of a salvage situation where there was a concern about pollution was in general terms foreseeable. That general risk was foreseeable by the salvage industry and

198 Paper by Archie Bishop, 'The development of environmental salvage and review of the Salvage Convention 1989', delivered at Tulane University, 9 February 2012.

199 *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) (The Sea Angel)* [2007] 1 Lloyd's Rep 335 and CA [2007] 2 Lloyd's Rep 517.

was provided for by the terms of the special compensation protection and indemnity clause which was incorporated in the charter and had been invoked by Tsavliris. The particular risk which occurred was within the provisions of that clause. It was common ground that there was no frustration until the strategy of commercial negotiation had failed, so that the instant case was one of 'wait and see' and not one in which the charter was frustrated then and there by the supervening event. The judge had asked himself the right question and had been entitled to find that the delay was not frustrating.

In the light of this case, the salvor has to ensure that a suitable clause is inserted in the charter allocating the risk of detention costs between himself and the charterer at 50/50 per cent, and/or obtain insurance cover for such an eventuality of detention.

Duties of the contractor (cl 10)

The duties and liabilities of the contractor remain the same as under the LOF, namely to use his best endeavours throughout the salvage operations to salve the vessel and property thereon and, in so doing, prevent or minimise damage to the environment. For the meaning of 'best endeavours', see para 8.1, above.

Ship-owners' casualty representative (cl 11)

Once the SCOPIC has been invoked, the owners may at their sole option appoint a ship-owners' casualty representative (SCR) to attend the salvage operation, in accordance with the terms and condition set out in Appendix B.

Thus, the P&I clubs have the opportunity to get involved in the salvage operations through their member's representative.

Special representatives (cl 12)

At any time after the SCOPIC has been invoked, the H&M underwriters may appoint a special hull representative, and the cargo underwriters may appoint a special cargo representative.

The salvage master, the ship-owners and the SCR are obliged to co-operate with the special representative (Appendix C).

Pollution prevention (cl 13)

The assessment of SCOPIC remuneration shall include the prevention of pollution, as well as the removal of pollution in the immediate vicinity of the vessel, insofar as this is necessary for the proper execution of the salvage, but not otherwise.

General average (cl 14)

The SCOPIC remuneration shall not be general average expense to the extent that it exceeds the Art 13 award. Any liability to pay such SCOPIC remuneration shall be that of the ship owner alone.

Dispute resolution (sub-cl 15)

Any disputes arising out of the SCOPIC or the operations shall be referred to arbitration, as provided under the main agreement (LOF).

The SCOPIC provides a bridge between salvage and wreck removal, and the salvage property contributes towards the overall cost of wreck removal. For the Wreck Removal Convention and its effect upon salvage, see Chapter 13.

14 LOF 2000 AND 2011: OVERVIEW

14.1 LOF 2000

LOF 2000 is meant to be used with the SCOPIC. Clauses A and B provide that the contractor agrees to use best endeavours to salve the property and to prevent or minimise damage to the environment. By cl C, the SCOPIC provisions may or may not be included. Clause E expressly states that services rendered prior to the agreement are included, and cl F spells out the duties of the property owners.

The right of termination under cl G depends on whether there is no prospect of useful results, but the right is given to both parties, the contractor and the ship-owner.

The deeming provision of a place of safety, where the services could be terminated, as in LOF 1990, was clarified by the insertion of an agreed place of safety in LOF 2000. The duty of co-operation by the owners of the property has been clarified in cl F by stating what kind of information the salvors should expect from the owners.

In practice, salvors have been frequently faced with a situation when local authorities of a port, where the salved property was taken, demanded a large sum of money as a security for alleged, or possible, contamination of the territorial waters. Salvors have been put into a position of having either to negotiate terms or to seek to protect their interests by obtaining insurance cover, in the event their efforts to salve failed owing to delays ensuing by reason of such demands. Clause H is a novel clause that could protect salvors in such situations, by providing for a deemed performance of the services. The clause states:

> . . . the contractors' services shall be deemed to have been performed when the property is in a safe condition in the place stated or agreed . . . in accordance with cl A. For the purpose of this provision, the property shall be regarded as being in safe condition notwithstanding that the property (or part thereof) is damaged or in need of maintenance if (i) the contractors are not obliged to remain in attendance to satisfy the requirements of any port or harbour authority . . . and (ii) the continuation of skilled salvage services from the contractors or other salvors is no longer necessary to avoid the property becoming lost or significantly further damaged or delayed.

Unfortunately, the wording under proviso (i), above, may still cause problems for salvors in some ports, because it does not define what kinds of requirement and in what circumstances the requirements of the port authority would be satisfied; it is not uncommon that some port authorities abuse their powers (as, for example, the authorities involved in the detention of the *Sea Angel*, above, abused their power).

The LOF 2000 is supplemented by the LSSA clauses and procedural rules, which are incorporated by reference (cl I).

The governing law is English (cl J), but, even so, cl K reiterates the master's authority to sign the contract on behalf of all respective owners of the property. Inducement to sign the agreement is prohibited by cl L.

14.2 CHANGES MADE BY LOF 2011

Following lengthy debate at the Lloyd's Salvage Group (LSG) meetings in 2010 and 2011, there are two amendments to LOF 2000 and procedural changes to LSSA (see below). The changes to the LOF are two additional notices:

> I Publication of awards
>
> Awards, appeal awards and reasons will be made available on the Lloyd's website (accessible via subscription only), unless the parties submit, in writing, reasons to the arbitrator that these should be withheld or deferred.[200]
>
> This amendment is in line with the other changes, including the new system for appointments to the LOF Panel of Arbitrators, designed to make the LOF process more transparent. The procedure through which parties to an arbitration may object to publication of the award is governed by cl 12 of the LSSA (see below).
>
> II Notification of LOFs to Lloyds
>
> Contractors operating under the LOF must notify the Council of Lloyd's of said undertaking within 14 days of their engagement to render services, and forward the signed agreement or a copy of this to the Council.[201]

14.3 CHANGES TO THE LSSA CLAUSES

These clauses form an integral part of the LOF 2011 or its predecessor LOF 2000[202] ('the Agreement', which expression includes LSSA clauses and Lloyd's Procedural Rules referred to in cl 6) and are incorporated by virtue of cl I of the form.

They concern: security for the award to be provided to salvors; security that an arbitrator may obtain for his/her fees (both of which should be provided directly to Lloyds); security to be obtained in cases involving containerised cargo, which has been difficult for salvors to obtain; the arbitration procedure in relation to the contractor's remuneration and/or special compensation; and costs.

Their interpretation is subject to the overriding objectives of the agreement, as provided in cl 2, namely:

(a) to seek to promote safety of life at sea and the preservation of property at sea and during the salvage operations to prevent or minimise damage to the environment;
(b) to ensure that its provisions are operated in good faith and that it is read and understood to operate in a reasonably businesslike manner;
(c) to encourage co-operation between the parties and with relevant authorities;
(d) to ensure that the reasonable expectations of salvors and owners of salved property are met; and
(e) to ensure that it leads to a fair and efficient disposal of disputes between the parties, whether amicably, by mediation, or by arbitration within a reasonable time and at a reasonable cost.

200 LOF 2011, Important Notices – cl 3.
201 Ibid, cl 4.
202 LSSA cl 1.1.

In particular, the provisions for security for the salvors' award, maritime lien and the right to arrest, are set out in cl 4. The appointment of the arbitrator is provided under cl 5, and any dispute under the SCOPIC should be referred to the same arbitrator appointed by cl 5.

The arbitration procedure, arbitrator's powers and representation of the parties are provided in cll 6 and 7. Provisions as to interest and currency of the award are provided in cll 8 and 9, respectively. Provisions as to payment are provided in cl 11, and provisions as to awards are provided in cl 12.

Provisions for claiming salvage with regard to employees and subcontractors are made under the general provisions of cl 17.

14.3.1 Security for arbitrators' fees

Traditionally, the salvage security covers the fees and/or costs of the arbitrator, as well as Lloyd's. The newly introduced clause aims to cover instances where this has not been provided at all, or, if it has, it is in a form not acceptable to Lloyd's.[203] The new entitlement and power of the arbitrator is provided in cl 6.6, and an identical power of the appeal arbitrator is provided in cl 10.8, which provides:

> The Arbitrator shall be entitled to satisfactory security for his reasonable fees and expenses whether such fees and expenses have been incurred already or are reasonably anticipated. The Arbitrator shall have the power to order one or more of the parties to provide security in a sum or sums and in a form to be determined by the Arbitrator. The said power may be exercised from time to time as the Arbitrator considers appropriate.[204]

14.3.2 Security for containerised cargo

When the cargo carried in containers is owned by hundreds or more different owners, there was not means by which security could be obtained. Special provisions are made in cll 13–15 that shall apply to salved cargo insofar as it consists of laden containers.

Clause 13 allows notices to be sent to the party or parties who have provided salvage security (the insurers) in respect of that property, and this shall be deemed to constitute proper notification to the owners of such property.[205] Clause 14 allow the salvors to apply to the arbitrator to bind the unrepresented cargo to the terms of the settlement agreement where the agreement has been reached with owners of at least 75 per cent by value of the salved cargo.[206] Clause 15 allows the salvors to apply to the arbitrator to excuse any cargo below an agreed value from any liability for salvage, where the cost of including it is likely to be disproportionate to its proportion of any award or settlement.[207]

14.3.3 Changes to costs[208]

The following are the updated costs as of 4 July 2012.

203 Lloyd's guidelines, p 2.
204 Statement from Lloyd's Salvage Arbitration Branch, p 2.
205 LSSA cl 13.
206 Lloyd's guidelines, p 3.
207 Lloyd's guidelines, p 3.
208 Para 5 and Schedule of Fixed Costs (annex to the Lloyd's guidelines).

- Arbitrator's fee = fixed charge = £4,500; arbitrator's fee on appeal = £3,000, plus arbitrator's costs for work not within the scope of the fixed cost procedure.[209]
- Party and party costs (excluding arbitrator's fee) = £15,000 and on appeal = £1,500.
- Lloyd's fees = £1,000 and on appeal = £500.

What are not included are reasonable disbursements or costs of obtaining security or enforcing a lien.[210]

Most importantly, what is not included is a special reward for environmental salvage, to compensate them for their efforts to prevent oil spills, which salvors consider to be necessary, while the P&I clubs have objected to a new clause in relation to it.

15 APPORTIONMENT AND PAYMENT

Article 15(1) of the Convention provides that the apportionment of the reward under Art 13 between salvors shall be made on the basis of the criteria contained in that article, in accordance with the parties' contribution to salvage. Article 15(2) provides that the apportionment between the owner, master and other persons in the service of each salving vessel shall be determined by the law of the flag of that vessel. If the salvage has not been carried out from a vessel, the apportionment shall be determined by the law governing the contract between the salvor and his servants.

The LOF 1995 contains provision for the protection of rights of subcontractors (cl 18), by which the head salvors can claim salvage and enforce any award on their behalf (unless the subcontractor acts in performance of public duty, for example, fire brigades). A similar provision is incorporated in cl 13 of the procedural rules of the LOF 2000.

The Convention further provides for interim payments by Art 22. The tribunal having jurisdiction over the claim of the salvor may, by interim decision, order that the salvor shall be paid on account such amount as seems fair and just, and on such terms, including terms as to security where appropriate, as may be fair and just according to the circumstances of the case. In the event of an interim payment under this Article, the security provided under Art 21 shall be reduced accordingly.

The interest on any payment due under the Convention shall be determined according to the law of the State in which the tribunal seised of the case is situated (Art 24).

16 JURISDICTION

Under the LOF contracts, the parties submit to the jurisdiction of a Lloyd's arbitrator to determine the award.[211] However, salvage is also a remedy that arises independently of contract.

209 Para 5(c).
210 Para 5(f).
211 In *The Lake Avery* [1997] 1 Lloyd's Rep 540, the issue was whether there was an effective agreement to arbitrate, and this depended on whether the salvage services were rendered under LOF 1995, which the defendants disputed. The salvors had appointed an arbitrator, and applied to the court to confirm

The Admiralty Court has both an inherent jurisdiction to protect the interests of salvors during the course of salvage operations[212] and a statutory jurisdiction under s 20(2)(j) of the SCA 1981 for any claims under the Salvage Convention 1989, or any contract in relation to salvage services or in the nature of salvage (not falling within the above). Also, a claim by salvors against the shipowner for breach of the clause in the LOF contracts in relation to his obligation to use his best endeavours to ensure that the cargo interests provide security before the discharge of the cargo comes within sub-s (2)(j).[213] Section 20(6) defines the terms used in s 20(2)(j).

A salvage claim, outside the LOF arbitration agreement, can be brought in the Admiralty Court, and it is defined under Civil Procedure Rules (CPR) r 61.1(2)(f) to mean:

(i) for or in the nature of salvage;
(ii) for special compensation under Art 14;[214]
(iii) for the apportionment of salvage; and
(iv) arising out of or connected with any contract for salvage services.

The claim is enforceable *in personam* (s 21(1)) and *in rem* (s 21(3), (4)). The ship or a sister ship can be arrested to enforce the claim.

A property salvage attracts a maritime lien against all property salved, but the liability salvage (special compensation under Art 14) does not. The Convention, by Art 20(1), does not affect the salvor's maritime lien on the property under national or international law. As far as liability salvage under Art 14 is concerned, in practice, the salvors' right to compensation depends on the co-operation of the liability insurer, the P&I club, and his right can be protected by obtaining security for such claims from the liability insurer. The intention behind the SCOPIC is that such co-operation will be forthcoming, and it has been in most cases in which the SCOPIC has been invoked in practice.

A sister ship arrest under s 21(4) is available if the requirements are satisfied, but the maritime lien is not transferable to the sister ship. A maritime lien enjoys certain priorities.[215]

A claim against salvors for negligence is within paras (e), (j) and (h) of s 20(2) of the SCA 1981.[216]

17 TIME LIMITS

Article 23(1) of Sched 11 to the MSA 1995 provides for a 2-year time limit for claims in relation to payment under the Convention within which to commence arbitral or

that there was a valid appointment. If there was a valid agreement, there would be no issue as to the validity of the appointment of the arbitrator; the proceedings were ancillary to arbitration proceedings, so Art 1(4) of the Brussels Convention applied, and the case was outside the Brussels Convention, which does not apply to arbitration (*The Atlantic Emperor* [1992] 1 Lloyd's Rep 342, applied); see, further, Chs 7 and 8, Vol 1.

212 *The Tubantia* [1924] P 78.

213 Contrast *The Tesaba* [1982] 1 Lloyd's Rep 397; Ch 2, Vol 1.

214 The Arrest Convention 1999 provides for arrest of a ship with regard to the enforcement of special compensation.

215 See Ch 5, Vol 1.

216 See *The Eschersheim* [1976] 1 WLR 430; [1976] 2 Lloyd's Rep 1 (HL), discussed in Ch 2, Vol 1.

judicial proceedings. The limitation commences on the date on which the salvage operations are terminated. The person against whom a claim is made may, at any time during the running of the limitation period, extend that period by a declaration to the claimant. The period may in the like manner be further extended (Art 23(2)). An action for indemnity by a person liable may be instituted, even after the expiration of the limitation period of the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted (Art 23(3)).

It would seem, from the wording of Art 23(1), that the time limit applies only to claims for payment under Arts 13 and 14 and not to claims for damages. However, as claims for damages against the salvors for negligence can be brought by way of a counterclaim, a wide meaning of the word 'payment' ought to be given. If the ship is not saved but lost owing to the salvor's negligence, and an action is brought against the salvor, the time limit that applies in claims based on the tort of negligence will apply.

18 GOVERNMENT INTERVENTION

18.1 THE SOSREP

The Salvage Convention provides, by Art 9, that nothing in this Convention shall affect the right of coastal States concerned to take measures in accordance with generally recognised principles of international law to protect their coastal line or related interests from pollution or the threat of pollution following upon a maritime casualty, or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences, including the right of coastal States to give directions in relation to salvage operations.

Immediately after the SCOPIC was completed, the Government accepted Lord Donaldson's proposal in his report – 'Review of salvage, intervention, command and control' – for a Government official (SOSREP) to represent the Secretary of State in maritime emergency situations in UK territorial waters.

Although the SOSREP will not intervene when he accepts the salvage plan, he has power to resume operational control and determine the salvage plan with the salvage master.

The idea of limiting the control to two key persons developed after the disaster of *The Sea Empress* spill, at Milford Haven, in which miscommunication between the port master and the pilot contributed to the exacerbation of damage caused to the environment (see Chapter 13). This system has proved to work very well, and other countries are adopting the idea of the SOSREP.

In addition, the Merchant Shipping and Maritime Security Act 1997, which amends the MSA 1995, extends the powers of the Secretary of State and of fire services authorities to deal with emergencies and safety at sea. In particular, there are: powers of intervention where a shipping accident threatens pollution; powers of intervention in cases of pollution by substances other than oil; and powers of fire services authorities to use fire brigades and equipment at sea (amending s 3 of the Fire Services Act 1947).

Furthermore, the Marine Safety Act 2003 provides for powers of intervention and directions to the SOSREP, and this includes powers in relation to places of refuge (see later).

18.2 POTENTIAL OFFENCES BY THE SALVOR OR HARBOUR MASTER

The SOSREP, being the representative of the Secretary of State, acting in the public interest, can direct or order a salvor or harbour master to take action when there is a shipping casualty, as defined by s 137 of the MSA 1995.

Non-compliance with such directions is an offence[217] under s 139 of the MSA 95, as amended by the MS (Prevention of Pollution) (Intervention) (Foreign Ships) Order 1997 to apply to foreign ships as well.

In addition, under s 85 of the Water Resources Act (WRA) 1991, it was an offence if a person knowingly permitted any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters, providing for strict liability.[218] One of the defences under s 88 was if an authorisation was given for a prescribed process, or any local statutory provision or statutory order expressly conferred power to discharge effluent into water.

The potential exposure of salvors and port authorities to criminal prosecution was highlighted by the successful prosecution, under the WRA 1991, of the Milford Haven port authority in *The Sea Empress* case, following her grounding and subsequent extensive pollution. A fine of £4 million was imposed on the port authority (see Chapters 2 and 16).

Sections 85–91 of the MRA 91 were modified by subsequent legislation and have now been repealed by the Environmental Permitting (England and Wales) Regulations 2010, which amend many provisions of the WRA 91 and came into force on 6 April 2010.

The offence is now provided under Reg 38(1) regarding any contravention by a person, or Reg 41 (contravention by a corporate body) or Reg 12(1) relating to the requirement for an environmental permit (causing or knowingly permitting a water discharge activity, or operating without a permit). This is not the same offence as under s 85 (which provided: 'it is an offence if a person knowingly permitted any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters'), but it is a general environmental offence punishable under Reg 39 by summary conviction to a fine of £50,000 or imprisonment of a maximum 12 months or both, or on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years.

Defences to this offence are provided in Reg 40, namely that the person must prove that the acts alleged to constitute the offence were done in an emergency in order to

217 Failure to comply with directions of authorised persons following a marine accident (generally to avoid or minimise pollution) can attract a maximum fine of £50,000 under s 139 MSA 95.

218 In *Alphacell v Woodward* [1972] 2 All ER 475, it was found that the prosecution only have to show there was some underlying operation to cause pollution. There is no need for the prosecution to show the defendant was negligent or at fault. The test for whether the actions of third parties could break the chain of causation was whether the intervening event was a normal and familiar fact of life or an abnormal and extraordinary event.

avoid danger to human health in a case where (a) the person took all such steps as were reasonably practicable in the circumstances for minimising pollution; and (b) particulars of the acts were furnished to the regulator as soon as reasonably practicable after they were done.

Of course, the MSA 1995 covers offences relating to International Conventions regulating oil pollution;[219] in addition, there is the EU criminalisation Directive that affects salvors as well (see Chapter 16, below, and Chapter 2, above).

18.3 PLACES OF REFUGE

Work on this highly debated issue commenced in 2002 at the IMO level, particularly after the incidents of *The Castor* and *The Prestige*. In May 2002, the MSC, at its 75th session, approved, in principle, the proposed general framework concerning future work on places of refuge developed by the Sub-Committee on Safety of Navigation (NAV).

Future work placed high priority on the safety of all involved in any operation concerning the provision of places of refuge,[220] with due attention to all environmental aspects associated with these operations.

In November 2003, the IMO Assembly adopted two resolutions (see below) addressing the issue of places of refuge for ships in distress – an important step in assisting those involved in incidents that may lead to the need for a place of refuge to make the right decisions at the right time.

18.3.1 IMO Guidelines on places of refuge for ships in need of assistance

By Resolution A.949(23), the Guidelines are intended for use when a ship is in need of assistance but the safety of life is not involved. Where the safety of life is involved, the provisions of the SAR Convention 1979, as amended in 2004, should continue to be followed.[221]

The Guidelines recognise that, when a ship has suffered a casualty, the best way of preventing damage or pollution from its progressive deterioration is to transfer its cargo and bunkers and to repair the casualty. Such an operation is best carried out in a place of refuge. However, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation.

Therefore, granting access to a place of refuge could involve a political decision, which can only be taken on a case-by-case basis. In so doing, consideration would need to be given to balancing the interests of the affected ship with those of the coastal

219 Brice, G, writes on maritime salvage, op. cit. fn 1, at paras 6–178 and 6–179 that through the 'channelling provision' of s 156(2)(d) of the MSA 1995, which enacted the pollution liability convention, the salvors are protected, provided their involvement in salvage operations is with the consent of the owner of the ship or on the instructions of a competent public authority. This, however, would not protect them if they were involved prior to obtaining consent, or if their assistance is rejected but they nevertheless continue their efforts; for an American perspective, see also Shirley, J, 'Responder immunity for salvors', Holand & Knight; www.hklaw.com

220 See, also, Van Hooydonk, E, 'The obligation to offer a place of refuge to a ship in distress', in the *Work of CMI*, Part II, 2004.

221 The UK issued the SAR framework in 2008.

States. The Wreck Removal Convention is adopted (see Chapter 13) and, once it is in force, it will ease the way for coastal States to provide places of refuge if the financial guarantees, as provided by the Convention, are in place.

The EU, by the amended European Traffic Monitoring Directive, adopts the IMO Guidelines (see, further, Chapter 2).

18.3.2 Maritime assistance services

Resolution A.950(23) recommends that all coastal States should establish an MAS. The principal purposes would be: receiving the various reports, consultations and notifications required in a number of IMO instruments; monitoring a ship's situation if such a report indicates that an incident may give rise to a situation whereby the ship may be in need of assistance; serving as the point of contact if the ship's situation is not a distress situation but nevertheless requires exchanges of information between the ship and the coastal State; and serving as the point of contact between those involved in a marine salvage operation undertaken by private facilities, if the coastal State considers that it should monitor all phases of the operation.[222]

18.3.3 Places of refuge in the international scene

The developments on places of refuge in the international scene through the EU and IMO have been seen in Chapter 2, above. In a nutshell, the issue concerns the conflict between the right of coastal States under UNCLOS (Arts 194–9, 211, 221, 225) to protect their coastline from marine pollution and their duty (Art 98) to render assistance to vessels and persons in distress. The thorny issue for coastal States is liability and compensation arising from a decision to grant access to a ship in distress. Of course, it has to be recognised that more damage can be done to the coastline if access to a place is not granted to a ship in distress, as happened with *The Prestige* in Spain.

The CMI's advice to the IMO was, in 2005, that, as there are no clear guidelines in the International Conventions about the duties and obligations of ship-owners, States and salvors, a separate Convention would be needed on the subject of places of refuge. The legal committee of the IMO decided, at that time, that there was more urgent priority for States to ratify the existing liability Conventions than draft a new Convention, which would take longer to implement. After a further report, an attachment of a draft instrument was submitted to IMO by the CMI in 2006, following which the IMO attached the instrument to its Guidelines, as seen above. These aim to provide a framework or an international code (in the legal context of the relevant international liability Conventions) on the responsibilities and obligations of States concerning the granting of or refusing access of ships to a place of refuge.

This is supported by the EU Directive 2009/17/EC on maritime traffic monitoring and places of refuge.

However, until the liability Conventions providing for financial guarantees and compulsory insurance are ratified by maritime States, the issue will remain unresolved. In the EU, compulsory insurance is now imposed for maritime claims, and there are

222 Extracts from the IMO website, www.imo.org; see also Ch 2, above.

also financial guarantees provided by the Bunkers Convention, which came into force in 2008. However, there will be more assurance for coastal States once the Wreck Removal Convention is ratified.

18.3.4 The UK's approach to places of refuge

The summary[223] below explains the position in the UK, which should be an example for other States to follow:

1. Places of refuge are locations into which a ship that is in need of assistance can be brought, so that its condition can be stabilised – through repair or transhipment of cargo – and further damage to the ship (and consequential pollution damage to the seas and coasts) averted.
2. In the UK, the Marine Safety Act 2003 provides powers of intervention and direction to the SOSREP, working with the MCA's Counter-Pollution and Response Branch.
3. The SOSREP oversees all incidents in UK waters where there is significant risk of pollution, and he or the MCA directs vessels to places of refuge when he judges it appropriate.
4. Anywhere around the UK's coasts could be a place of refuge, and we would consider it unwise to pre-emptively rule anywhere in or out as a potential place of refuge.
5. The Government considered that there can be no preconceived list or ranking of places of refuge. This is because each incident has its own unique, transient and varied nature.
6. When a ship in need of assistance requires a place of refuge, the SOSREP inevitably takes account of all the factors that relate to the specific incident, such as the weather, the geographical whereabouts of the incident and the type of threat posed by the vessel and its cargo, with a view to determining the most appropriate place of refuge, minimising adverse consequences.
7. However, in making this judgement, the SOSREP necessarily builds on information that has been assembled pre-event. This information takes the form of a partial inventory of the UK's coast, providing a generic analysis of locations that could lend themselves to becoming a place of refuge for ships. This information is assembled and kept up to date by the MCA.

A good example of the implementation of places of refuge policy in the UK was the *MSC Napoli* containership, which was in great distress during severe weather conditions in January 2007, on the south coast of the UK, and was ordered by the SOSREP to take refuge in Lyme Bay. The way in which the SOSREP handled the incident was commended by the representatives of the European Commission, which welcomed the effectiveness of the action taken by the UK authorities to assist the *MSC Napoli*. This was based on independent decisions taken following an objective analysis of the situation, making it possible to avoid a major disaster. The incident illustrated the need to expedite the proposals made by the European Commission to improve safety at sea in European waters (see Chapter 2).

223 Extracts from Maritime Coastguard Agency's website, www.mcga.gov.uk

19 RESPONDER IMMUNITY

Under the liability Convention, CLC 1992, for oil pollution damage there is a channelling provision by which claims are directed to the registered owner. Salvors are in the category of the persons who are protected by the channelling, as the Convention prohibits claims being brought against them under the Convention or otherwise (see Chapter 16, para 6). The Bunkers Convention 2001 does not include channelling provisions, and, as this Convention covers bunker oil pollution (persistent oil or not) from any seagoing ship, the need of salvors' assistance to prevent or minimise danger or threat to the environment from bunker oil may, potentially, be greater than under the CLC.

However, the risks for salvors have become greater, not only because they are exposed to civil claims by various potential claimants for damages, but also because they are exposed to risks of criminalisation under the various laws in the USA and under the ship-source pollution EU Directive (discussed in Chapter 2, above).

Unfortunately, during the Diplomatic Conference of the adoption of the Bunkers Convention, calls for a responder immunity provision were rejected. Instead, there was a Conference Resolution calling upon States to consider, when implementing the Convention, the inclusion of protective provisions in their domestic legislation. Considering that oil spills can have devastating economic and environmental consequences, without responder immunity there will, certainly, be issues whether or not responders are prepared to take the risks of liabilities that might be incurred.

A review of responder immunity is considered in the USA, promoted by a coalition of the response industry after the *Deepwater Horizon* incident. It is hoped that IMO takes a more robust approach to resolve responder immunity for the protection of responders to casualties.

20 ENVIRONMENTAL SALVAGE

20.1 THE BACKGROUND

As was seen earlier in this chapter, the 'special compensation' under Art 14 is not an award or remuneration for the salvors' efforts and investment to prevent pollution damage. It is compensation that is assessed on the basis of a 'fair rate' for the use of equipment and personnel and the reasonable out-of-pocket expenses incurred in the services, plus a bonus of up to 30 per cent of the total expenses; or, if it is fair and just to do so, up to 100 per cent of such expenses. Article 14 is known as the 'Montreal Compromise' and was agreed at the Conference where the Convention was adopted.

Considering that (a) Art 14 is not providing remuneration to professional salvors for their efforts to prevent pollution damage, and (b) that this led to the introduction of the SCOPIC clause, professional salvors, through the ISU, have been trying to promote the concept of a separate environmental salvage award. It has been argued that there is a need for an express provision in the Salvage Convention for remuneration of salvors, rather than 'an expenses plus' basis for preventing pollution. In 2006, the ISU launched its proposals for amendments to the Salvage Convention

to provide for a stand-alone Environmental Salvage Award in order to rectify the defects of Art 14 of the Convention.

Extensive discussions between ship-owners, salvors, P&I clubs and property underwriters took place, and the issue was put to the CMI in 2008. The International Working Group (IWG) of CMI considered the proposed amendments to the Salvage Convention, and the issues were finally put to the vote at the CMI Beijing Conference in October 2012; a summary of its conclusion is given at the end of this part. The proposed reform, its viability and some views about it are, briefly, examined below.

20.2 THE REASONS FOR THE PROPOSAL[224]

The underlying reason for seeking an international acceptance for an environmental, stand-alone liability salvage award is that, in current times, there has been a growing concern for the protection of the environment, and salvors need to invest more in order to be ready to respond to casualties.

Considering the size and sophistication of modern ships, casualties present greater risks to the environment than in the old times, and the salvors' efforts are not sufficiently rewarded under the present Convention. In particular, the broad and major reasons for the reform sought[225] are:

(a) Awards under Art 13 of the Convention, which includes an assessment of the salvors' efforts to prevent or minimise pollution damage, are limited by the value of the salved property.
(b) Salvors are not fully rewarded for the benefit they confer.
(c) There are more risks for salvors from tough regimes, which can criminalise the actions of well-meaning salvors.
(d) The Bunkers Convention 2001 does not include 'responder immunity', which opens up the salvor to third-party claims, potentially, drawing him into expensive and time-consuming litigation in a variety of jurisdictions.
(e) Salvors and the marine property insurers believe it is not fair that the traditional salvage reward, which currently reflects the salvors' efforts in protecting the environment, is wholly paid by the property insurers, without contribution from the liability insurers, who cover the ship-owners' exposure to claims for pollution and environmental damage.
(f) The geographical area under the present Salvage Convention, unlike under the Liability Conventions for pollution damage regime, is limited to coastal areas.

20.3 THE PROPOSAL

The specific proposals of the ISU for a separate liability or environmental salvage award and, hence, the proposed amendments to the Convention are as underlined below:

224 See Bishop, A, op. cit. fn 198; see also 'Report of the IWG on the Salvage Convention for consideration by delegates to the Beijing CMI Conference, 2012', at the CMI website.

225 President of the ISU, April 2012.

1 Article 1(d) to read: 'damage to the environment means significant[226] physical damage to human health or to marine life or resources, caused by pollution, contamination, fire, explosions or similar major incidents', and the geographical limit to coastal waters to be deleted from Art 1(d).
2 To replace the present sub-para (b) of Art 13(1), criteria for the award (that is, 'skill and efforts of salvors') with 'the measure of success obtained by the salvor'. The remaining criteria remain the same.
3 To replace Art 14 (1) with the following (expressly providing for environmental salvage):

> If the salvor has carried out salvage operations in respect of a vessel which by itself or its bunkers or its cargo *threatened damage to the environment* he shall also be entitled to an environmental award, in addition to the reward to which he may be entitled under Art 13. The environmental award shall be fixed with a view to encouraging the prevention and minimisation of damage to the environment whilst carrying out salvage operations, taking into account the following criteria without regard to the order in which they are presented below.

[It is noted that the tribunal will make an environmental award whenever there is a 'threat of damage to the environment', regardless of actually preventing damage.]

4 The criteria proposed in order to encourage the prevention and minimisation of damage are:
(a) any reward under the revised Art 13;
(b) the criteria set out in the revised Art 13 (b)–(i); and
(c) the extent to which the salvor has prevented or minimised damage to the environment and the resultant benefit conferred.
The tribunal is left with wide discretion.
5 The ISU recognised that there should be a cap to the award by reference to the liability and limitation Conventions and proposes: Art 14(2) to be replaced with the following:

> Any award payable by the ship-owner in respect of services to the environment, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed an amount equivalent to: [limits per gross tonnage of ships with a multiplier of SDR].

6 To avoid competition between salvors and other claimants, it is made clear in the newly proposed Art 14(3) that 'an environmental award shall be paid in addition to any liability the ship-owner may have for damage caused to other parties'.
7 Article 14(4) should read: 'any environmental award shall be paid by the ship-owners'.
8 Article 14(5) refers to the negligence of salvors, and Art 14(6) states that nothing in this article shall affect any right of recourse on the part of the owners of the vessel. [These remain the same.]
9 Life salvage is proposed in Art 16(2).

226 The word 'substantive' before 'damage' is replaced with 'significant', because it is considered that to judge whether the damage is 'substantive' would depend on where it might occur.

20.4 SOME VIEWS BY COMMENTATORS

It is beyond the purpose of this chapter to summarise the views of various commentators. Most of them went over old ground and historical developments. There were arguments for and against. However, there have been three issues that need to be considered.

First, it was said that the proposed yardstick ('benefit conferred') for the assessment of the award is too vague. One commentator considered that an assessment of the value of the award would involve a hypothetical assessment of the damage that might have been prevented, which would entail a difficult and speculative enquiry into what damage might have occurred, had the pollution resulted from the casualty.[227]

Another commentator said that the question is whether the formulation of Art 14 would be practical, but, in general, he did not see why problems should arise in its implementation, other than it would require a whole new body of case law. There would be detailed evidence of risk evaluations, of costs actually incurred and of the potential costs of clean-up that were avoided. One possible objection, he stated, might be that there would be no guidance about how the arbitrators should allocate expenses as between the Art 13 and Art 14 awards, but that, in his opinion, did not present insuperable difficulties, because competent arbitrators should be able to evolve solutions on a case-by-case basis. There would, undoubtedly, be a new type of salvage assessment, but it seemed completely workable to him.[228]

Second, there has been a concern that, as the current legal system is the product of a very carefully balanced and delicately negotiated compromise between all interested parties, if one part were to be modified, the entire construct would fall apart.[229]

In this connection, it is important to mention the submission put forward by the Swedish delegation,[230] whose views were very persuasive at the Beijing CMI conference. It stated that the amendments to Arts 13 and 14 of the Convention, as proposed by the ISU, would, if adopted, result in fundamental changes to very important provisions. Reference was made to IMO Assembly Resolutions A.500(XII) and A.700(18), which stated that amendments to Conventions should only be considered if 'there was a clear and well-documented compelling need'. In addition, the delegation pointed out that the suggestion made by the ISU that the proposed environmental award would be considered as costs of preventative measures under the 1992 Civil Liability and the Fund Conventions and, therefore, qualify for compensation under these Conventions, was misconceived. The concept of preventative measures in the 1992 Conventions only covered measures to prevent or minimise pollution damage as defined in these Conventions. Since damage to the environment per se did not qualify for compensation under the Conventions, costs of measures to prevent such damage would not be admissible for compensation either. For these reasons, the Swedish delegation opposed any submission to IMO by CMI proposing a revision of the Salvage Convention. It suggested that the best way forward would be for the industries concerned to continue to work towards a practical

227 De La Rue, C and Anderson, C, 'Environmental salvage – plus ça change . . .?' JIML 18 (2012) 323.

228 Michael Howard QC, opinion to ISU dated 24.05.2012, at pp 2–3, www.isu.org

229 De La Rue, C and Anderson, C, op. cit. fn 227.

230 Represented by Måns Jacobsson.

solution to the issues raised by the ISU in the form of a voluntary agreement acceptable to all of them.

Third, the most difficult issue surrounding environmental salvage concerns the finances and who should pay for it.

There have been no tangible or workable proposals about it, other than the strong views voiced on behalf of ship-owners, the ICS and P&I clubs, who feel they should not pay for it. However, the present writer believes that there can be a solution, in due course, as is seen under 20.5.4 and 20.5.5, below.

20.5 THE WRITER'S VIEWS

As a general comment, although the above views carry weight, experience shows that people do adapt to changes in the law, particularly when commercial reality and technical advancements require changes to be made. The majority of opinions expressed do not dispute that something more has to be done to encourage salvors. Although it was argued by ICS that EMSA has contracted in specialist salvage tugs for emergency response and, therefore, professional salvors would not need to keep tugs in places, this may be useful to a limited extent (i.e. in EU waters) but it cannot possibly cater for the needs of protecting international waters and the waters of coastal States.

At this point, it is important to consider two legal issues as to the legal framework of environmental salvage.

20.5.1 Can environmental salvage be tacked on to the present Salvage Convention?

It should be borne in mind that environmental salvage concerns pollution liability avoidance. It is generally accepted that pollution liability avoidance salvage is a by-product of salvage operations, for the benefit, by and large, of property owners, and is inextricably linked to Art 13, being a feature of a successful salvage. The positive obligation imposed upon salvors by Art 8(1)(b) to exercise due care to prevent or minimise damage to the environment is related to saving the property and it is owed to the owners of the property.[231]

Furthermore, as Howard points out,[232] Arts 8(1)(b) and 13(1)(b) of the Convention mean that salvors must be properly rewarded for, among other things, preventing pollution. However, he also argues, it is not normally the case that a salvage award is separated out into its individual elements, though he does consider that this would be procedurally possible, at least in some cases, as a matter of general arbitral practice.[233] It would be necessary to ascertain what is encompassed within such an award; for example, the extent to which it gave effect to (a) the benefit to property owners of the avoidance of liability, or (b) the public policy elements and (c) the relationship between these two. With experts' advice, competent and experienced arbitrators would be able to ascertain the value of such an award.[234]

231 See Howard, op. cit. fn 228, at p 1.
232 Ibid.
233 Ibid, at p 3
234 Ibid, at p 4.

Nevertheless, he argues, a separate environmental award has not, so far, been made, and the issue would be the usual argument: who pays for it, as it is linked to Art 13. This is the main contention of the property insurers.

The anomaly that arises under the present law, it is submitted, is that pollution liability avoidance, in current times, may be hugely more valuable in monetary terms than the salved property, and it is not only for the benefit of the property owners, as will be seen later. Thus, logically, its value is more for the benefit of the liability insurers than the property ones, and this justifies the separation between the two.

As has been seen in *The Nagasaki Spirit* (where Lord Mustill said Art 14 does not give rise to an environmental salvage award), the result has been unsatisfactory, because of the restrictive language used in Art 14.[235]

Although salvors owe no express duty of pollution liability avoidance to the public (that might be affected) under the Convention, Arts 8(1)(b) and 13(1)(b) recognise that any efforts to prevent or minimise pollution damage will be properly rewarded.[236]

The issue remains that salvors are not 'properly rewarded' under the present Convention, and this issue concerns what should be the proper legal framework of environmental salvage. Hence, reconsideration of amending the Salvage Convention would be necessary, whether as proposed by the ISU or otherwise.

20.5.2 Can environmental salvage stand alone?

Under the current Convention, it would be difficult, in practice, to have a stand-alone environmental salvage. As a concept, it could legally be based on the wider scope and spirit of the Salvage Convention as derived from Arts 8(1)(b) and 13(1)(b), as well as on public policy and equitable considerations. The proposed amendments to the Convention, although they were rejected by the CMI Beijing Conference in October 2012 (see later), serve the purpose of separating environmental salvage from property salvage.

In reality, environmental salvage would be a reward to salvors for assisting a wide spectrum of interested parties to exercise proper risk management when an accident occurs, in order to safeguard against potentially catastrophic financial consequences.

Viewed in this sense, salvors confer value to: (a) P&I clubs, their member ship-owners, and the International Group, who would have to pay out to would-be claimants with regard to liability arising under the CLC regime; (b) coastal States, by minimising or preventing the incurrence of economic losses to clean up pollution damage, irreparable damage to their environment, damage to future tourism and trade; (c) IOPC Funds, which would incur higher losses and expenses, if the CLC limit was exceeded, or the ship-owner was exempted from liability; and (d) oil traders, who would have to make higher contributions to the IOPC Funds as a knock-on effect of (c).

Although consideration is given to the above elements of public benefit in both Arts 13 and 14, the Art 13 award is the liability of the property insurers, and the special compensation of the Art 14 award is not concerned with benefit conferred to the above interested parties.

235 Art 14 was a compromise to the proposal made by Professor Selvig for 'Liability salvage' at the Montreal Conference, which adopted the 1989 Convention.

236 If not successful, there will be no breach incurring liability of salvors, because there is no duty owed to the public.

Given that there is, undoubtedly, greater public benefit derived from salvors' efforts than what is currently considered to be a fair rate, a stand-alone environmental salvage award is justified both legally and equitably. Looking at the wider scope of environmental salvage and not just at the technicalities as to how it is going to be implemented, it is submitted that there is 'a clear and compelling need' (to use the words of the IMO mentioned under 20.4, above) that amendments to the Convention are urgently needed to delineate 'property' salvage from 'environmental' salvage.

20.5.3 Feasibility of the proposed environmental salvage

In the context of the above analysis, the ISU proposal, or a variation of it, if implemented, would involve, not only the P&I clubs, which presently pay for the liability salvage, but also the oil traders, traders of hazardous cargoes, as well as coastal States, who will benefit from the salvors' efforts in preventing or minimising threatened pollution or environmental damage. For this reason, the limitation under the proposed Art 14(4) above, that 'any environmental award should be paid by the ship-owners' should be omitted.

Assuming that amendments to the Salvage Convention, if the go-ahead by the IMO Legal Committee were to be given, would be likely to take a long time to be agreed by States, another solution may have to be found, in the meantime, to provide for the basis of the entitlement to environmental salvage.

The LOF 1980 was the first to provide for a 'safety net' (pollution liability salvage) when the need arose after the catastrophic pollution incidents of the *Torrey Canyon* and the *Amoco Cadiz*. It is more than 30 years since then, and it has been shown that modern ship accidents can today be more devastating to the environment than even the above incidents.

Therefore, the relevant industry sectors have to come together to agree a new LOF providing for environmental salvage.

However, the stumbling block to overcome is the financial burden involved. The new formula of environmental salvage, whether under an amended Salvage Convention, or by way of a new LOF, would need to be backed up by the establishment of a fund. It is proposed that such a fund could be named the '**Salvors Environmental Protection Fund**' (see 20.5.4).

Industry sectors and governments are well aware of the risks involved and the astronomical consequences that might arise, if no action is taken to protect their environments and their citizens by coming to a consensus to create the right law for environmental salvage. In the same vein of argument, as the IOPC Funds would be relieved from greater liabilities to pay claimants, were the salvors to prevent or minimise the damage, it would be in the interests of oil traders to contribute to this fund, which would have an effect upon reducing their liability to contribute to the IOPC Funds.

Issues of practicality as to how to assess such an award can be resolved in practice by competent arbitrators.[237] It should not be difficult to estimate, from previous experience and the documented evidence kept in the IOPC Funds' records, what

237 Howard, op.cit. fn 228.

would be the value of such efforts in individual cases, by using common sense to deliver 'rough justice'; this analysis may be considered as providing the answer to the first issue set out in para 20.4.

20.5.4 Financial considerations

What is proposed here may seem logistically complex, but it is not impossible to implement, provided there is good will. Well-informed professionals would not disagree that the twenty-first century is a risk management era. It is instructive to start from the premise that:

(a) The insurance industry would not be capable of affording more increases in the limits of liability under the various liability Conventions (all limits have been increased considerably, as seen in Chapters 14–16).
(b) Ordinary taxpayers would not accept to take on board extra tax burdens, if such burdens are imposed by governments to recover any shortfall of pollution clean-up expenses that could exceed the Convention limits.

What is needed is prevention. Governments of coastal States should consider putting their mind to risk management for their own purposes. The salvors are the key to this issue. Making more criminal laws to punish polluters is not a solution.

It may, at present, seem impossible to persuade all the interested parties to contribute to the proposed fund. But it was not impossible to persuade oil traders to contribute to the 1992 and 2003 IOPC Funds. Also, when the need arose, it was not impossible to fashion the voluntary agreements between P&I clubs and oil receivers for the purpose of the Small Tankers Oil Pollution Indemnity Agreement (STOPIA) and Tankers Oil Pollution Indemnity Agreement (TOPIA) (seen in Chapter 16).

However, in the context of the 1992 Fund Convention and the 2003 Protocol, it could be argued that there were media pressure and public outcry after the well-known catastrophic incidents (see Chapter 16), which speeded up matters. The counter-argument to this is that, as experience has shown, it is unwise to consider taking protective measures after events happen, or to wait for another disaster before new laws are implemented. Equally, this should be borne in mind with regard to environmental salvage, before salvors go out of business, if their investment is not encouraged and supported by all interested parties concerned. No sane commercial person would argue that such considerations are based on charitable reasons; as seen earlier, there are sound legal and public policy reasons for the proposals made.

If such a burden were to be shared between all those interested parties who will benefit from the efforts of the salvors in preventing environmental damage, it may be easier to reach an agreement. Drawing a parallel with the liability Conventions regime for oil pollution damage, the CLC liability of ship-owners is met by P&I clubs and any excess by the IOPC Funds, which are funded by the oil industry. The present special compensation to salvors under Art 14 is met by P&I clubs. If an environmental salvage fund were to be established, the ship-owners and their P&I clubs should not be expected to bear the burden alone. The other interested parties, who will benefit from prevention or minimisation of oil pollution damage, should also contribute to the proposed fund.

In practical terms 'marine environment protection levy' could be set up by governments, to be funded by bunker oil providers, oil traders and ship-owners (through their P&I clubs), who carry out business in the particular State, for the establishment of the '**Salvors' Environmental Protection Fund**'. Such a fund should be available to each member State for the purpose of environmental salvage awards, should the need arise (this would, arguably, provide the answer to the third issue raised above, and to the second issue raised by the Swedish delegation, under para 20.4).

For example, the Australian government has established a 'Protection of the Seas Levy', funded by the shipping industry through a marine environment tax. From this fund, the authorities were reimbursed for the shortfall of clean-up expenses incurred by reason of the bunker oil spill from the *Pacific Adventurer* incident in 2009, because the clean-up cost exceeded the 1996 Protocol limits (see Chapter 14). More incidents of bunker spills,[238] which will exceed the Convention limits, are not unlikely to arise.

States' willingness to facilitate a quick pollution response is also shown in the USA. ICS, in its report to the CMI Beijing Conference, in October 2012, reported that:

> It has been seen in the US for example, where under national legislation (33 CFR Part 155 Salvage and Marine Fire-fighting Requirements, applicable to all tank vessels as from February 2011), owners are now required to enter into a written funding agreement, the purpose of which is to ensure that salvage and marine fire-fighting responses are not delayed due to funding negotiations at the time of an incident. However while the US government has legislated to ensure a rapid salvage response, it has not set out the details of funding which can be agreed by the parties. . . . The US Coastguard approves the funding agreements under this legislation and has approved several agreements which follow funding arrangements set out in the LOF plus SCOPIC.

The requirement for the '**Salvors' Environmental Protection Fund**' should be appended to the Salvage Convention when it is amended.

20.5.5 Application of the Fund

The above developments may indicate that there is a mood for change. How might the proposed fund be applied in practice?

If more than one State would have been affected by pollution damage arising from an incident, had the salvors not have taken measures to prevent or minimise its effect, the funds of the 'affected' States (to be established as suggested above) should contribute to the salvors' environmental award.

The establishment of the legal framework for environmental salvage and of the fund to encourage prevention of pollution damage liabilities and clean-up expenses is a matter of priority for coastal States, industry sectors and the IMO.

20.6 THE PRESENT STATUS OF THE ISU PROPOSAL

The result of the deliberations of the CMI Conference in Beijing, held on 19 October 2012, was that only one of the proposed amendments achieved the support of the meeting.

238 E.g. *The Rena* in New Zealand, 2011, but SCOPIC tariff rates were agreed.

One of the resolutions adopted at the Plenary Session was:

> To report to the IMO Legal Committee that the meeting did not support the changes sought to the Salvage Convention 1989 by the ISU, with the exception of widening the geographical scope of definition of 'damage to the environment' in Art 1(d).

Thus, the only change that has been approved is the deletion of the words 'in coastal or inland waters or areas adjacent thereto' in Art 1(d) and their replacement by the provisions contained in Art II(a)(i)(ii) of the CLC 1992 (see Chapter 16, below), but not including the words 'to pollution damage caused'. The effect of this will be to extend the definition under Art 1(d) to the territorial sea and the EEZ, to be in tandem with the CLC, the Bunkers Convention and the HNS Convention.

The meeting also encouraged the industry, salvors, ship-owners and their insurers to seek solution to the issues discussed at the Conference in relation to environmental salvage and security for container casualties, as well as the other matters that were debated.[239]

Thus, hope is not lost, and efforts should be made to reconsider the issues and what is proposed in this part of this chapter, so that a clear and convincing case can be made to the IMO Legal Committee for the amendment of the Convention.

239 See CMI Newsletter No 3 October/December 2012.

CHAPTER 11

RISKS AND LIABILITIES UNDER TOWAGE CONTRACTS

1 Introduction 581
2 Definitions 582
3 Towage versus salvage 583
4 The making of a binding contract 587
5 Commencement, duration, interruption, termination 595
6 Duties of the tug-owner 601
7 Duties of the tow 613
8 Relationship between tug and tow and their liabilities to third parties 617
9 Exclusion from liability and indemnity clauses 624
10 The substitution and Himalaya clause of the UKSTC 634
11 Limitation of liability 638
12 Liabilities under Offshore towage contracts 640
13 Offshore supplytime charters 650

1 INTRODUCTION

Towage is the service provided, usually, by specialist tugs, generally to assist the propulsion, or to expedite the movement, of another vessel (the tow) that is not in danger and needing salvage. Tugs can range from ocean-going ships to coastal or harbour tugs that are designed with special equipment to push or pull the tow. Modern towage has developed to a sophisticated industry, with power tugs offering a range of services to the offshore industry, and it encompasses much more than just assisting another vessel to prosecute her voyage.[1]

The purpose of this chapter is to examine the basic principles relating to risks and liabilities undertaken in the operation of tug and tow under towage contracts governed by English law. Particular attention is given to areas where the law seems to be unsettled. There are two aspects concerning towage: first, the contractual relationship between the tug and tow, as provided for in the contract or statutory implied terms, and, second, their respective relationship with third parties, who are not bound by the contract, but liability of either the tug or the tow towards third parties may arise

1 For a detailed treatment of the subject, see Rainey, S, *The Law of Tug and Tow and Offshore Contracts*, 3nd edn, 2011, Informa, which has expanded rightly to cover the modern standard terms of BIMCO contracts used by the Offshore industry.

in tort or under statutory provisions. The contract regulates such liability as between the tow and the tug, but the third parties are not concerned with any arrangements made between tug and tow in the towage contract.

With the evolution of the standard form contracts, the relationship between the parties is primarily governed by the terms and conditions contained in those contracts. Standard form contracts are: the United Kingdom Standard Towage Conditions (UKSTC) of 1986 for port and harbour towage, but parties also use them for some offshore services; the BIMCO forms designed for international ocean towage (TOWCON and TOWHIRE 1985), new forms of 2008, which resemble voyage and time charters; alternative forms are the BIMCO Supplytime 1989 and 2005; the special needs of the industry necessitated the creation of appropriate forms of towage contracts for heavy lift objects, BIMCO HEAVYCONBILL (new 2007), and a new BIMCO form, a type of charterparty, PROJECTCON, for carrying project cargoes; in addition, in the salvage area, there are lump sum salvage agreements SALVCON and SALVHIRE 2005, the WRECKHIRE 2010 and the BIMCO/ISU Wreckfixed 2011. It is beyond the scope of this book to deal with all these contracts, which are now dealt with in the third edition of the specialist Tag and Tow book of Rainey.[2]

In this chapter, the UKSTC terms are compared with those of TOWCON/ TOWHIRE, and emphasis is placed on the innovative allocation of risks between the parties, known in the industry as the 'knock-for-knock' clauses. Although these clauses were conceived for the purpose of reducing litigation, the idea being that, if the parties allocated the risks between themselves in the contract, there would be fewer disputes, the drafting of such clauses is far from perfect, and cases have come to the English courts to construe the meaning of certain terms. A comparison is also made in this respect with the Supplytime Forms 1989 and 2005.

Whereas the UKSTC 1986 contract is heavily in favour of the tug-owner, TOWCON and TOWHIRE contain more balanced terms as to the responsibilities between the parties.

2 DEFINITIONS

Unlike salvage, which does not always depend upon a contract, towage services are always rendered under a contract concluded between a tug and tow for specific services or purpose, at a fixed price, based either on a daily basis or on an agreed lump sum. It is a contract for services. Like any other contracts, towage is governed by the basic principles of contract law, and its particular features have led, over the years, to its being regarded as a specialised maritime law subject.

2.1 OLD DEFINITIONS UNDER COMMON LAW

Towage was defined in ***The Princess Alice***[3] as: '. . . the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating of her progress'.

2 Ibid.
3 [1849] 3 W Rob 138.

Dr Lushington, in ***The Kingalock***,[4] gave the definition of ordinary and extraordinary towage:

. . . there are two species of agreement that may be entered into by a vessel whose usual occupation is to tow vessels from one place to another. One is, where she meets with a vessel disabled, and . . . undertakes for any sum agreed upon between the parties to perform the service of bringing the vessel from one port to another or place of safety. This may be called extraordinary towage . . . ordinary towage is that which takes place for the purpose of expediting a vessel on her voyage either homeward or outward.

The modern use of towage, nowadays, is much broader than what is described above.

2.2 DEFINITIONS UNDER THE UKSTC 1986

Clause 1(b) defines:

(i) 'towing' as: . . . any operation in connection with the holding, pushing, pulling, moving, escorting or guiding of or standing by the hirer's vessel and the expressions 'to tow', being towed' and 'towage' shall be defined likewise;
(ii) 'vessel' shall include any vessel, craft, or object of whatsoever nature (whether or not coming within the usual meaning of the word 'vessel') which the tugowner agrees to tow or to which the tugowner agrees at the request, express or implied, of the hirer, to render any service of whatsoever nature other than towing;
(iii) 'tender' shall include any vessel, craft or object of whatsoever nature which is not a tug but which is provided by the tugowner for the performance of any towage or any service;
(iv) the expression 'whilst towing' shall cover the period commencing when the tug or tender is in a position to receive orders direct from the hirer's vessel to commence holding, pushing, pulling, moving, escorting, guiding or standing by the vessel, or to pick up ropes, wires or lines, or when the towing line has been passed to or by the tug or tender, whichever is the sooner, and ending when the final orders from the hirer's vessel to cease holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to cast off ropes, wires or lines has been carried out, or the towing line has been finally slipped, whichever is the later, and the tug or tender is safely clear of the vessel.

2.3 UNDER TOWCON/TOWHIRE

In the ocean towage standard forms, the names of the tug and tow are inserted in the form and places of departure and destination. The price is fixed as a lump sum or daily hire. The contract contains details of the parties' respective obligations, exclusion of liability and cross-indemnities.

3 TOWAGE VERSUS SALVAGE

Although towage is distinguishable from salvage, because a salvor is generally a volunteer, sometimes there seems to be an overlap or, as has been seen in the previous chapter, the towage may be converted into salvage in exceptional circumstances.

4 (1854) 1 Ecc & AD 264.

3.1 UNDER THE SALVAGE CONVENTION 1989

Article 17 of the 1989 Salvage Convention makes it clear that: 'No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose.'

3.2 UNDER UKSTC 1986

Clause 6 provides:

> Nothing contained in these conditions shall limit, prejudice or preclude in any way any legal rights which the tugowner may have against the hirer including, but not limited to, any rights which the tugowner or his servants or agents have to claim salvage remuneration or special compensation for any extraordinary services rendered to vessels or anything aboard the vessels by any tug or tender . . .

3.3 UNDER TOWCON/TOWHIRE

By comparison, cl 15 of the original TOWCON/TOWHIRE and cl 19 of the 2008 forms provide:

> Should the tow break away from the tug during the course of the towage service, the tug shall render all reasonable services to reconnect the towline and fulfil this agreement without making any claim for salvage.
>
> If at any time the tugowner or the tugmaster consider it necessary or advisable to seek or accept salvage services from any vessel or person on behalf of the tug or tow, or both, the hirer hereby undertakes and warrants that the tugowner or his duly authorised servant or agent including the tugmaster have the full actual authority of the hirer to accept such services on behalf of the tow on any reasonable terms.

It should be implicit in the first paragraph above that any services that are not contemplated by the agreement and are beyond reasonable efforts of the tug to reconnect the towline (which is an obligation under the towage contract) may qualify for salvage. The second sentence concerns the authority of the tug to engage salvage assistance from other tugs.

3.4 UNDER COMMON LAW

At common law, the issue of when a towage contract is converted into salvage has been analysed in decided cases, some of which have been discussed in the previous chapter. The general principles, as have been established in those decisions, are summarised in the following examples.

The dicta of Lord Kingsdown in ***The Minnehaha***[5] illustrate when towage can become salvage:

5 (1861) 15 Moo PC 133 (HL), pp 153, 158.

. . . if in the discharge of this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage . . . In the cases on this subject, the towage contract is generally spoken of as superseded by the right to salvage . . .

. . . they [the tug-owners] must show that, the ship being in danger from no fault of theirs, they performed services which were not covered by their towage contract, and did all they could to prevent the danger.

Sir Samuel Evans considered the same issue in ***The Leon Blum***:[6]

Where salvage services (which must be voluntary) supervene upon towage services (which are under contract) the two kinds of services cannot co-exist during the same space of time. There must be a moment when the towage service ceases and the salvage service begins; and, if the tug remains at her post of duty, there may come a moment when the special and unexpected danger is over, and then the salvage service will end, and the towage service would be resumed. These moments of time may be difficult to fix, but have to be, and are, fixed in practice.

This, however, raises the question as to how the tugmaster is supposed to know when salvage has superseded towage, and what to do in circumstances where there is uncertainty as to whether the duties to be performed are within the contemplation of the parties to the contract.

In ***The Annapolis***,[7] the learned judge laid down the rules that may assist the parties involved to recognise the situation in which there may be a conversion from towage to salvage as follows:

. . . a contract for mere towing does not include the rendering of any salvage service whatever. If it happens by reason of unforeseen occurrences in the performance of the contract to tow that new and special services are necessary, the contract is not at once rendered void, nor is the tug at liberty to abandon the vessel, for that would be most detrimental; nor, on the other hand, is the tug bound to perform the new service for the stipulated reward agreed for the original service; but the law requires performance of the service and allows salvage reward.[8]

Hill J, in ***The Homewood***,[9] considered the elements that should exist for the tug to be able to claim salvage:

To constitute a salvage service by a tug under contract to tow two elements are necessary: (1) that the tow is in danger by reason of circumstances which could not reasonably have been contemplated by the parties; and (2) that risks are incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract.[10]

In this case, the steamship had previously been in tow of the tug under a towage contract. Owing to bad weather, she broke away and drifted. The crew were rescued and taken off by a lifeboat. The vessel was lying in an exposed position with no one on board. The tow was an empty shell, with no means of propulsion, and could not anchor. The tug resumed towage services without knowledge of the tow's crew. When

6 [1915] P 90.
7 (1861) Lush 355.
8 Ibid, p 361.
9 (1928) 31 LlL Rep 336.
10 Ibid, p 339.

the tug claimed remuneration for salvage, the question was whether the events that arose during the towage were within the contemplation of the contract.

It was held that the risk of interruption and prolongation by bad weather, the possibility of the hawser parting and the fact that there was a need to anchor the tow were reasonably within the scope of the contract. However, the contract did not contemplate that the lifeboat would take off the crew, nor that the vessel would be let at anchor with no one on board. The element of danger to the tow was present. The crew of the tug was, therefore, entitled to remuneration for salvage.

Similarly, the facts of ***The Aldora***[11] are worth noting, for the purpose of defining the boundary between towage and salvage.

The defendants' ship, *The Aldora*, was on a voyage with a full cargo to be delivered at a terminal in Blyth Harbour, which was approached from the sea by a dredged channel, the seaward limits of which were marked on the north side by a buoy. It was standard practice at the harbour for a ship of *The Aldora*'s size to be met outside the harbour and to be navigated into her berth in the harbour by a pilot, with the assistance of four tugs. Owing to a misunderstanding as to the time, *The Aldora* arrived earlier than had been anticipated by the pilot, or the tugs that had been engaged to render assistance to her at a position about 2 miles from the buoy, and *The Aldora* continued on her inward journey towards the buoy at reduced speed, expecting to be met by the pilot and the tugs at any moment. On reaching the buoy and finding that the pilot and the tugs had still not arrived, the master of *The Aldora* turned her around in order to proceed out to sea again. In the process of that operation, the ship ran aground on a sandbank. The pilot and the tugs arrived soon afterwards and succeeded in refloating the ship. Thereafter, the pilot, with the assistance of the tugs, navigated *The Aldora* to her berth in the harbour.

The plaintiffs, the pilot, and the tug-owners, masters and crew, brought an action *in rem* against the owners of *The Aldora*, claiming remuneration for salvage services and contending that such services lasted until *The Aldora* was safely berthed in the harbour. Brandon J held that the salvage services terminated near the buoy before the ship proceeded inward into the harbour, and that, thereafter, the plaintiffs were entitled to be paid for towage services only.

This part of their service was contemplated by the towage contract.

A contrast between *The Albion* and *The North Goodwin* (below) can further illustrate the boundary between towage and salvage: In ***The Albion***,[12] the contract simply provided for towage. While the towage services were being performed and after a temporary anchoring of the tow, a strong gale rose that forced the tug to seek shelter nearby. The gale blew the tow out to sea, resulting in the loss of equipment and anchors. Upon moderation of the weather, the tug went searching for the tow. After considerable effort, the tow was found and was towed back to safety. The tug was awarded salvage for her efforts to find the tow and tow her back.

By contrast, in ***The North Goodwin***,[13] this lightship was in tow of *The Mermaid*. Having reached close to the river Tyne, about a mile distance, it was anticipated that two other tugs, *The Northsider* and *The Ironsider*, would take over the towage under the UKSTC. However, gale-force winds caused heavy swell, and it was considered

11 [1975] QB 748.
12 (1861) Lush 282.
13 [1980] 1 Lloyd's Rep 71.

dangerous to allow the pilot boat to leave the harbour. Despite this blowing gale and swell, *The Northsider* went out to meet the tow, being still under tow of *The Mermaid*, which was trying to bring the lightship into the river for more protection and then hand her over to the other tugs. At this point, the towing hawser parted, and the lightship drifted away, whereupon *The Northsider* went immediately to her assistance and managed to pass a towage connection and tow her to an anchorage about a mile from the coast. The owners, master and crew of *The Northsider* claimed salvage in respect of these services. Sheen J held that there was no salvage in these circumstances:

> It is implied in all such contracts that the tug will do her duty in case of accident and do all she can to take care of and protect the ship. From time to time towing ropes do part. If *Northsider* had already taken the light vessel in tow and the tow rope had parted in precisely the same position as that in which it parted, and thereafter *Northsider* had made fast again, I do not think it would have been arguable that the tow was in danger by reason of circumstances which could not reasonably have been contemplated by the parties, or that risks were incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract. In these circumstances, it being conceded that *Northsider* had come out of the protection of the piers pursuant to the terms of her contract, I do not think it can properly be said that risks were incurred or duties performed which were not within the scope of the contract.[14]

Although each case must be looked upon on its own facts, the facts of this case indicate that it ought to be regarded as a borderline case, and perhaps another judge may have held a different view. A clearer case than this, on the issue that there was no immediate danger other than some unexpected difficulty in the performance of the towage, was ***The Glaisdale***.[15] This involved an engine defect that developed unexpectedly in the tow after the engagement of towage. The weather conditions were not such as to impose danger. It was held that there was nothing to indicate that the circumstances were so different and the risk to the ship such that the towage contract should be changed retrospectively into a salvage service.

In a more contemporary case, ***The Key Singapore***,[16] tugs were engaged to tow a jack-up rig, in extreme weather conditions; the towline parted frequently but the rig was eventually brought to safety. The towage was converted to salvage despite the negligence of the tug in the performance of the towage contract (see Chapter 10, above).

4 THE MAKING OF A BINDING CONTRACT

4.1 AUTHORITY OF THE MASTER

Towage contracts are invariably entered into directly between the owner of the tow and professional tug-owning companies. There are, however, circumstances where the master of the ship may have to sign the contract as an agent of the owners and, if there is cargo on board, as an agent for the cargo-owners, provided the requirements

14 Ibid, p 74.
15 (1945) 78 LlL Rep 403.
16 [2005] 1 Lloyd's Rep 91.

of agency of necessity are met. The issue of authority was seen in Chapter 10.[17] Further points are made here in the context of towage.

By virtue of his employment contract, the master of a ship has an implied actual authority to enter into towage contracts, only when it is reasonably necessary for the due performance of the voyage in which the ship is engaged and the safety of the ship, on reasonable terms. This is an additional authority to what is necessary for, or incidental to, effective execution of his express authority in performing his duties for the preservation of the ship and safe prosecution of voyages. The general principle was laid down in ***The Ocean Steamship v Anderson***[18] by Sir Baliol Brett MR, when he said:

> A captain cannot bind his owners by every towage contract which he may think fit to make: it is binding upon them only when the surrounding circumstances are such as to render it reasonable to be made, and also when its terms are reasonable.

Brandon J, in ***The Unique Mariner***,[19] referred to this old authority and held that the implied actual authority of the master, unless it is restricted by instructions lawfully given by his principal, extends to doing whatever is incidental to, or necessary for, the successful prosecution of the voyage and the safety and preservation of the ship. Although actual implied authority is distinct from ostensible or apparent authority, they can co-exist or overlap only when the restriction of the actual implied authority is not brought to the attention of a third party who deals with the agent, in this case the master. This was the situation in *The Unique Mariner*.[20]

With the modern means of communication, however, the master will normally be able to communicate with his principals (unless he genuinely misunderstands instructions), and an express authority may be given to him. Sometimes, when the third party (the tugmaster) enters into the contract of towage with the apparent agent of the owner of the tow, the latter may be estopped[21] as against the tugowner from denying that the master of the tow acted as his agent. If, in fact, the master had no actual authority, he may be liable for breach of warranty of authority,[22] unless his principal ratifies the contract.

In circumstances in which the hirer is not the owner of the tow, there is an express warranty of authority given by the hirer in all standard terms towage contracts that the hirer has such an authority to bind the owner of the tow to the contract.

In particular, cl 2 of the UKSTC, cl 22 of the original TOWCON/TOWHIRE and clauses 29/27, respectively, of the TOWCON/TOWHIRE 2008, similarly, provide:

> If at the time of making this agreement or of performing the towage or of rendering any service other than towing at the request, express or implied, of the hirer, the hirer is not the owner of the Tow referred to in Box . . . the hirer expressly represents that he is authorised to make and does make this agreement for and on behalf of the owner of the said Tow and agrees that both the hirer and the owner are bound jointly and severally by the provisions of this Agreement.

17 See further *Bowstead and Reynolds on Agency*, 19th edn, 2010, edited by Watts, P and supplements 2012, 2013, Sweet & Maxwell, Ch 2 (creation of agency).

18 (1883) 13 QBD 651, p 662.

19 [1978] 1 Lloyd's Rep 438, pp 443, 449; see, also, Ch 10.

20 Ibid, pp 450–451; see, also, *Freeman and Lockyer v Buckhurst Park Properties* [1964] 2 QB 480, p 503; 'ostensible or apparent authority is the authority of an agent as it appears to others'.

21 Op. cit., Bowstead and Reynolds, fn 17.

22 Ibid.

4.2 AUTHORITY OF THE MASTER TO BIND THE CARGO-OWNERS

The relevance of the authority of the master in this respect is with regard to binding the cargo-owners to pay to the owners of the carrying vessel their pro rata proportion of the towage costs, if the towage comes properly within the provisions of general average.[23] Unless there is agency of necessity,[24] the master would not have authority to bind the cargo-owners to the towage contract, except when the cargo-owners give express authority to him. Neither the owners of the ship nor their master have authority to bind the goods or the owners of the goods by any contract.[25] The master is always the agent of the ship and, in special cases of necessity, the agent of the cargo.[26]

It has been defined by Bowstead[27] in the following terms:

A person may have authority to act on behalf of another in certain cases where he is faced with an emergency in which the property or interests of the other are in imminent jeopardy and it becomes necessary, in order to preserve the property or interests, so to act. In some cases this authority may entitle him to affect his principal's legal position by making contracts or disposing of property. In others it may merely entitle him to reimbursement of expenses or indemnity against liabilities incurred in so acting, or to a defence against a claim that what he did was wrongful as against the person for whose benefit he acted.

Following the decision in *The Winson*[28] defining this type of agency, the principle was elaborated more extensively in ***The Choko Star***[29] in relation to salvage:

Until an emergency arises, such as to give rise to an agency of necessity, there is no question of the shipowner or master being agent for the cargo-owners. Accordingly, it is not possible to spell out authority for either of them to bind the cargo-owners to a salvage contract, as merely incidental to his pre-existing general authority as an agent.

4.3 AUTHORITY OF THE TUGMASTER

A tugmaster of a professional tug company will be acting within the scope of his employment contract when he enters into a towage contract, and his authority will be actual, express or implied to do what is necessary and reasonable to bind his employers to the contract, based on ordinary agency principles.[30] In cases where the master of a merchant ship, however, decides to tow a vessel without the express authority of his employer, it would not be said that he could bind the owners of his ship to a towage contract, because the scope of his usual employment would not

23 See Ch 12, below.
24 See Ch 10.
25 *Anderson v Ocean Steamship* (1884) 10 App Cas 107, p 117, per Lord Blackburn.
26 *The Onward* (1874) LR 4 A&E 38, p 51.
27 Op. cit., Bowstead and Reynolds, fn 17.
28 See Ch 10, above.
29 [1990] 1 Lloyd's Rep 516, pp 525–526, per Slade LJ.
30 But Phillimore J held, in *The Inchamaree* [1899] P 111, that the master of a tug has no power, after the services [of salvage] had been performed, to bargain away, without their consent, the rights acquired by the crew of the salving vessel and, in this case, no authority could be implied on behalf of the owners of the tugs, for they were close by on shore and could have been communicated with by the agents of the *Inchmaree*. The agreements for towage after salvage had been completed, were treated by the Court as not binding. The tugs were rewarded for one entire salvage service.

encompass entering into such contract. Only if the circumstances of a case are such as to justify him to assist a vessel in distress by towing, could it be held that the master would have implied authority to bind his principals, but this situation would be more likely to amount to salvage services.[31]

In some circumstances, a professional tug company may charter in tugs from another company to perform a towage contract. Whether this third party is entitled to the benefits of the contract of towage between the tug company and the tow is dependent on there being actual, express or implied authority on the tug company to bind the third party.

In ***The Borvigilant and Romina G***,[32] the tug company, National Iranian Oil Company (NIOC), entered into a contract of towage with the owners of a tanker, Monsoon Shipping (M). Clause 7 of the contract provided that:

> The Company shall have the right to perform their obligations under this contract by using a tug or tugs not owned by themselves but made available to the Company under charter parties or other arrangements. In such circumstances . . . the Hirer agrees the Owners or Charterers of such tug or tugs have the benefit of and being bound by these conditions to the same extent as the Company.

Subsequently, NIOC chartered a berthing tug from Borkan (B), which collided with M's tanker during the towage operation, causing the total loss of the tug. The question was whether B was entitled to the benefit of the contract, even though it was not expressly mentioned and its services were requested after the contract between NIOC and M had been created.

M appealed against a finding on a trial of preliminary issues[33] that B had the benefit of an indemnity for the loss of its tug, either under the terms of a tug requisition form issued by N, the terminal operator, or on the basis of ratification by B. B cross-appealed against part of the judgment that found that the exclusion from liability did not cover a failure to take reasonable care to ensure the tug's seaworthiness.

Lord Justice Clarke, in the CA, found that NIOC had implied actual authority from M to bind B to the contract. Further, it was found that both NIOC and M must have intended NIOC to make the contract on behalf of itself and the owners of any tug used in performing the contract. Clause 7 expressly provided that a tug so engaged should have the benefit of. and be bound by, the conditions of the contract to the same extent as NIOC.

The court relied on the House of Lords' decision in *Midland Silicones Ltd v Scruttons Ltd*,[34] in which the issue was whether the stevedores appointed by one party to the contract might be able to take advantage of provisions in a bill of lading contract to which they were not a party but which were intended to benefit them. Lord Reid said in that case that there was a possibility of success of the agency argument if: first, the bill of lading made it clear that the stevedore was intended to be protected by the provisions in it that limit liability; second, that the bill of lading made it clear that the carrier was also contracting as agent for the stevedore; third, the carrier had authority from the stevedore to do that, or there was perhaps a ratification later by

31 *The Thetis* (1869) LR 2 A&E 365.
32 [2003] EWCA Civ 935; [2003] 2 Lloyd's Rep 520 (CA).
33 [2002] EWHC 1759.
34 [1962] AC 446; see also now the Contracts (Rights of Third Parties) Act 1999.

the stevedore; and, fourth, that any difficulties about consideration moving from the stevedore were overcome.

Whereas it was common ground that the first and fourth requirements were satisfied in the present case, the issue for the CA was whether the second and third requirements were met. Lord Justice Clarke found that the contract between NIOC and M was largely based upon UKSTC 1986, which therefore justified applying the commercial, common-sense interpretation of cl 7. The approach of the court below, he said, was consistent with the approach approved by the Privy Council in other authorities regarding the interpretation of the Himalaya clause[35] since *Midland Silicones*.

Dismissing the appeal and the cross-appeal, it was held that the terms of the contract and surrounding circumstances were such that it was clear that N had B's implied authority to enter into the contract with M, and B was, therefore, entitled to the benefit of the indemnity. In the alternative, the judge below was correct to find that B had ratified the contract after the casualty, with the result that M was bound by the terms of the contract that provided B with a valid indemnity, subject to it taking reasonable care as to the tug's seaworthiness.

It should be noted that this case is also useful on the issue of the nature of the duty of the tug-owner under the UKSTC, that is, that it is a duty to take reasonable care (see later).

Another interesting decision concerning express or implied authority of the tugmaster arose in ***Targe Towing Ltd v Marine Blast Ltd***.[36] Marine Blast (M) agreed with Noas (N), the owners of a dredger, *Von Rocks*, to charter her for operations in Scotland.

By a towage contract, on terms of the TOWCON 1994, M as hirer and Targe (T) as tugowner agreed to tow *Von Rocks* from Sweden to Scotland. During the course of the towage, *Von Rocks* capsized and became a constructive total loss. N was indemnified pursuant to its insurance contract with its hull insurers, who were subrogated to the claim of N against T. T settled the claim with the insurers of N and issued proceedings in the English court claiming indemnity from M (under the TOWCON terms providing for such indemnity in respect of liability incurred by T to third parties). M asserted that, as N was a party to the towage contract, T would have had a complete defence against the claim by N and should not have settled it. The preliminary issues for the court were: (a) whether N was a party to the towage contract; and (b) if so, whether, on the true construction of the contract, T could maintain its claim against M.

T's case was that, if M had no authority from N to enter into the towage, then N constituted a third party for the purpose of the indemnity clause.

It was held by the court at first instance, and approved by the CA, that there was no evidence that M had express authority from N to enter into the towage contract on its behalf.

As far as implied authority was concerned, the CA differed from the judge and held that M bore the burden of proving that N was a party to the contract. The fact that T was seeking an indemnity on the ground that N was a third party did not alter

35 *The Eurymendon* [1975] AC 154 (PC); *The New York Star* [1980] 2 Lloyd's Rep 317 (PC); *The Mahkutai* [1996] AC 650 (PC).

36 [2004] 1 Lloyd's Rep 721 (CA).

that. On the face of it, N was a third party, and it was for M to establish some authority or ratification. The judge had erred in holding that implied authority could only be deduced from all the surrounding circumstances, if it was necessarily incidental to the commercial venture on which M and N were to engage.

The correct test was that authority could be implied, where it was reasonable to infer consent to an agency relationship from the parties' conduct. N had not consented to an agency relationship. The charter party in respect of the dredger neither authorised M to act on N's behalf, nor made it likely that such authorisation had been contemplated, or later given. N was ignorant of, or indifferent to, the precise terms of the towage contract, including a clause by which M warranted that it was authorised to, and did, make the agreement on behalf of the owner of the tow. Even if there was a sub-bailment of the dredger to T, or a simple non-contractual bailment from N to T, there was no authority suggesting that consent to a sub-bailment could confer authority to act as agent, if the sub-bailee so stipulated. It was not possible to construe the contract imposing on N no primary liability but binding it by other conditions regulating liability.

M had not discharged the onus of proof that N was a party to the contract. That meant that N was a third party, and so T, as the tugowner, who paid damages for loss to that third party, or its insurer, was entitled to rely on the indemnity clause to seek redress from M.

4.4 PRE-CONTRACTUAL DUTIES

4.4.1 Duty of good faith?

Under English contract law, the governing principle is that negotiating parties are under a duty not to mislead each other by positive misrepresentation of fact. There is no pre-contractual obligation or positive duty upon the parties to make full and frank disclosure of all material facts. As the House of Lords held, in ***Walford v Miles***,[37] a duty to negotiate in good faith is inherently repugnant to the adversarial position of the parties when involved in negations and unworkable in practice. The parties are free to make their own investigations.

Three main reasons have been given for what is called the 'traditional English hostility'[38] towards a doctrine of good faith: The first is that the preferred method of English law[39] is to proceed incrementally by fashioning particular solutions in response to particular problems, rather than by enforcing broad, overarching principles. A second reason is that English law is said to embody an ethos of individualism, whereby the parties are free to pursue their own self-interest, not only in negotiating

37 [1992] 2 AC 128, at p 158, per Lord Ackner; see also *Chitty on Contracts*, 31st edn, Vol 1, para 1–039; also Ch 8, above.

38 See McKendrick, *Contract Law*, 9th edn, pp 221–222.

39 Per Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programme Ltd* [1989] 1 QB 433, at 439: in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that, in making and carrying out contracts, parties should act in good faith. Its effect is, perhaps, most aptly conveyed by such metaphorical colloquialism as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair, open dealing. English law has committed itself to no such overriding principle but developed piecemeal solutions in response to demonstrated problems of unfairness.

but also in performing contracts, provided they do not act in breach of a term of the contract. The third main reason given is a fear that recognising a general requirement of good faith in the performance of contracts would create too much uncertainty. There is concern that the content of the obligation would be vague and subjective, and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight.

4.4.2 Modern development

Recently, there has been an interesting development. Leggatt J, in ***Yam Seng v ITC***,[40] considered and explained the importance of recognising the doctrine of good faith and fair dealing in all contractual relationships, but especially those involving a longer-term relationship, such as joint venture agreements, franchise agreements and long-term distributorship agreements. He said that, in refusing to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. He examined the status of this concept under the civil law systems, as well as under other common law jurisdictions, and said that, apart from the class of contracts of *uberrimae fidei*,[41] the concept has been, in recent years, gaining ground in other common law jurisdictions; in addition, under English law, it has been recognised by the leading authorities concerning the interpretation of contracts.

In due time, this case will be evaluated in the context of *Walford v Miles* and related decisions, but, as the judge said in *Yam Seng*, these cases were concerned with pre-contract negotiations.

4.4.3 Good faith in towage contracts?

Whether contracts for salvage or towage fall within the class of contracts of *uberrimae fidei* was discussed in *The Unique Mariner*, in which the contractor argued that they did. Reference was made to *The Kingalock*,[42] decided over 100 years earlier, in which Dr Lushington had held:

> An agreement to bind two parties must be made with full knowledge of all the facts necessary to be known by both parties; and if any facts which, if known, could have any operation on the agreement about to be entered into is kept back or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance, if there should be misapprehension, accidentally or by carelessness; we all know that there may be what, in the eye of the law, is termed equitable fraud.

However, as was accepted by Brandon J in ***The Unique Mariner***,[43] *The Kingalock* is not an authority that establishes a general principle that all contracts relating to salvage services are contracts of *uberrimae fidei*. This case was just one example of the exercise by the Admiralty Court of its equitable power to treat that kind of salvage agreement as invalid on the ground of serious unfairness. The Admiralty Court has always exercised an equitable jurisdiction to declare invalid, and refuse to enforce,

40 [2013] EWHC 111 (QB).
41 Ibid, at paras 124–143.
42 (1854) 1 Spinks E&A 265.
43 *The Unique Mariner* [1978] 1 Lloyd's Rep 438, pp 454–455.

an agreement of this kind, if it considers that the agreement, in all the circumstances of the case, is seriously inequitable to one side or the other.

Furthermore, the court held that there is no reason why these contracts, which are commercial contracts for work and labour, should be regarded as contracts *of uberrimae fidei*. Insofar as misrepresentation is concerned, Brandon J did not see any reason why the ordinary principles of law relating to rescission of contracts for fraudulent or innocent misrepresentation (including the relevant provisions of the Misrepresentation Act (MA) 1967) should not apply to contracts for the rendering of salvage services, including contracts on the terms of Lloyd's form, in exactly the same way as they apply to all other contracts. Thus, there should be no reason for the exercise by the Admiralty Court of any additional equitable jurisdiction to treat such contracts as invalid by reason of misstatement.

4.5 UNFAIR CONTRACT TERMS

Towage contracts are usually entered into between commercial companies with fairly equal bargaining power. Save for the exception under s 2(1) of the Unfair Contract Terms Act (UCTA) 1977, below, its provisions do not apply to contracts of marine salvage or towage,[44] unless the tow-owner (of small boats or a yacht) is dealing as a consumer, not in the course of business (s 12(1)). In such a case, the Act applies and prohibits clauses excluding liability for negligence if they are unreasonable, in which case they may be struck down.

An additional protection for consumer yacht owners may be found in the EC Directive 93/13/EEC on unfair contract terms, which was given statutory force in the UK by the Unfair Terms in Consumer Contracts Regulations 1994, in force from 1 July 1995, which have now been superseded by the 1999 Regulations. There is, however, very little that this Directive can add to the UCTA 1977, as far as English law is concerned.

An interesting variation introduced by this Directive (Art 3) is that a term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. A term shall always be considered as not individually negotiated where it has been drafted in advance and the consumer has, therefore, not been able to influence the substance of the terms, particularly in the context of a pre-formulated standard contract.

Such cases would be the standard term towage contracts and the Directive, adopting EU law principles, introduces the concept of good faith in such contracts.

Section 2(1) of the UCTA prohibits exclusion of liability for death or personal injury resulting from negligence, and it applies to salvage or towage contracts to which English law applies, even if they are not contracts with a consumer.[45] However, this

44 It does not apply, in addition, to charterparties, or contracts for the carriage of goods; see Sched 1 para 2 of the Act, except to the extent of section 2(1), i.e. no exclusion or restriction of liability for death or personal injury.

45 Sched 1 to the Act, para 2. Cases dated prior to the Act, in which exclusion clauses from liability for loss of life or personal injury were held to be valid, are no longer good law, e.g. towage contracts, even on the basis of standard forms, contained such clauses, see *Great Western Rly Co v Royal Norwegian Government* (1945) 78 LlL Rep 152. As a result, neither the exclusion from liability clause nor the indemnity clause of the UKSTC 1986 contains a reference to loss of life or personal injury.

does not prohibit mutual exclusion for such claims between a tow and a tug-owner, as in BIMCO TOWCON/TOWHIRE contracts, provided each contracting party takes the risk and responsibility for such claims with regard to their own respective personnel.

4.6 CONTRACT FOR SERVICES

As towage is a contract for services, the Supply of Goods and Services Act (SGSA) 1982 would apply, unless it is expressly excluded. The implied obligation under this Act (s 13), as will be seen later, is to perform the services with reasonable skill and care and within a reasonable time (s 14).

5 COMMENCEMENT, DURATION, INTERRUPTION, TERMINATION

5.1 COMMENCEMENT

- **At common law**: The towage contract commences when the ropes have been passed between the vessels.
- **Under UKSTC 1986**: Commencement can occur at an earlier stage, when the tug is ready to receive orders from the hiring vessel.
- **Under TOWCON/TOWHIRE**: These contracts specify the place of departure from which the contract commences, and it ends at the place of destination.

5.2 COMMENCEMENT AND DURATION UNDER THE UKSTC

The duration of the towage operation under the UKSTC is written in much wider terms than at common law. Clause 1(b)(iv) provides that:

> The expression 'whilst towing' shall cover the period commencing when the tug or tender is in a position to receive orders direct from the hirer's vessel to commence holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to pick up ropes, wires or lines, or when the towing line has been passed to or by the tug or tender, whichever is the sooner, and ending when the final orders from the hirer's vessel to cease holding, pushing, pulling, moving, escorting, guiding or standing by the vessel or to cast off ropes, wires or lines has been carried out, or the towing line has been finally slipped, whichever is the later, and the tug or tender is safely clear of the vessel.

The obligations and liabilities of the contracting parties, as well as the operation of exception clauses or indemnity, will depend on the construction of the contract as to when the towage commenced, how long it lasted, and whether or not there was interruption of services, which may amount to termination or have the effect of no application of the exception clauses.

5.3 EXAMPLES AT COMMON LAW

The following examples of cases illustrate the different wording of clauses used in various contracts with regard to commencement and their effect on the operation of exemption from liability of the tug in the event of negligence, or indemnity from the tow to the tug for liability incurred by the tug.

The Clan Colquhoun[46]

Clause 1 of the agreement provided: '. . . the towage or transport shall be deemed to have commenced when the tow-rope has been passed onto the tug and to have ended when the tow-rope has been finally slipped.'

The tugs *Beam* (B) and *Sirdir* (S) belonged to the PLA, the claimants. They contracted with the defendant to tow the vessel *Clan Colquhoun* (CC) from lock to berth. S was made fast ahead of the CC and was towing her, and B was proceeding to the CC, which had passed through the lock into the dock when B was struck by the revolving propeller of the CC. The collision was entirely due to the improper way in which B was handled, through those on board not realising that the CC had twin screws.

PLA contended that, by cl 4 of the towage contract, the defendants were obliged to pay for any damage to their property arising from the collision, even though it was due to the contributory negligence of their tug. The defendants contended that the clause was inapplicable, as the towage contract had not commenced, because, under cl 1 of the agreement, the contract was deemed to commence when the tow rope had been passed. As the ropes had not yet been passed to the tug B, the contract had not commenced. It was held by Bucknill J (at para 164) that:

> Clause 4, which is the protection clause, refers to the owner of the ship so being towed paying for damage to any of the PLA's property (including the tug or tugs engaged in such towage). Here again I think this clause contemplates that the towage by the two tugs shall have started, namely, that the tow rope has been passed to each of the two tugs. . . .
>
> If the owners of the ship consider that two tugs are needed for the task, it seems unreasonable to hold the ship liable for damage done through the negligence of the PLA's servants when only one tug is fast and towing. On the other hand, if cl 1 of the terms should be read in this case to mean: 'The towage or transport shall be deemed to have commenced when the tow rope has been passed to or by either of the two tugs,' then the plaintiffs are in this difficulty. At the time of this accident only the *Sirdar* was towing ahead, and the damage to the *Beam* did not occur in connection with the towage by the *Sirdar*. In a case of this kind I think the Court ought not to interpret the clause in question in such a way as to entitle the PLA to recover from the ship in respect of damage to their property through the negligence of the Authority's servants, if any other reasonable interpretation can fairly be given to the clause in question. If the PLA wishes to impose terms on the owners of the tow which entitles the Authority to recover damage done to their property through the negligence of their own servants, from the owner of the tow, I think that the terms must be perfectly clear as to their meaning.

46 [1936] P 153.

The Uranienborg[47]

The 'commencement' clause in this case stated that:

For the purpose of these conditions, the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow-rope has been passed to or by the tug, whichever is sooner . . .

The towage contract was to commence at 11 am. The tug arrived a few minutes earlier, but was proceeding so fast that she was unable to reverse her engines in time. As a result, she struck and damaged the tow. At the time of the collision, the crew of the tow were not ready to give orders, as they were still discharging the ship. Also, the crew of the tug were not expecting such orders. The question was whether the towage conditions had begun to apply to enable the tug to take advantage of the exemption provisions.

It was held that 'in a position to receive orders' does not refer to physical readiness. It means, not only that the vessel is within hailing distance, but that the tug is ready in herself to receive orders, and the tow is ready to be towed, which it was not. Per Sir Boyd Merriman:

I doubt whether the word 'position' is only used in the sense of local situation, I think it involves also the conception of the tug being herself in a condition to receive and act upon orders. But, however that may be, the orders which she is to be in a position to receive are orders to pick up ropes or lines, not orders generally, but those specific orders, and I think that that must have some reference to the intention of those on board the ship to give those orders, and to the readiness of those on board the tug to receive them.[48]

By contrast, in ***The Glenaffric***,[49] upon construction of the same clause, towage had commenced on the facts of this case. The agreement was subject to the UKSTC; as to commencement, cl 1 is seen above. Clause 3 provided:

the tugowner shall not whilst towing, bear . . . damage of any description done . . . to the tug and the tugowner shall not, whilst at the request expressed or implied of the hirer rendering any service other than towing, be held responsible for any damage done to the hirer's vessel and the hirer shall indemnify the tugowner against any claim by a third party . . .

The tugs, in performance of the agreement, approached early morning within 20 or 30 ft of the steamship, which was at anchor with her anchor lights burning. Those in charge of *The Glenaffric* hailed the tug, *Standard Rose*: 'We are not ready. Clear away or keep away.' The master of the tug dropped astern, but kept his engines working to stem the tide, until he saw the anchor lights of the steamship replaced by the navigation lights. He then steamed within about 20 ft of the steamer. He was then hailed: 'Don't want you yet. Wait till we get in a bit.' The tug stood off again, and, when the steamer had drawn nearer to the dock, it approached again, all ready to receive ropes or lines and take the ship in tow. The tugmaster was told that no rope would be passed then and was ordered to take a message to the dockmaster to

47 [1936] P 21.
48 Ibid, p 27.
49 [1948] P 159, [1948] 1 All ER 245 (CA).

say that the ship would not dock in that tide. In dropping astern to obey that order, his tug struck the ship and sustained damage to herself, for which the tug-owners claimed to be indemnified under the conditions of the towage agreement.

It was held that, on the true interpretation of the agreement and the application of it to the facts of the present case, the plain meaning of the words in cl 1 were not susceptible of modification by implying the additional words: 'and the ship is ready to give orders'. It was expressly provided that 'whilst towing' was deemed to cover a period of time before the towing proper actually began. The tug was in that position, and the plaintiffs were entitled to be indemnified in respect of damage to the tug by virtue of the provision of cl 3 of the conditions.

Scott LJ distinguished the judgment of Sir Boyd Merriman in the previous case, which was the only one on the same point. He said:[50]

> That was quite a different case. There the tug was employed to go to a wharf in the Thames where the vessel was discharging, in order to tow her from her wharf after discharge or to assist her in her passage from the wharf by towing. The tug arrived before the vessel was ready, at a time when the discharging was still going on. In my view, one answer to the question, which was raised in that case indirectly, is that the primary condition precedent to the whole business of towing, namely, that the ship was ready to be towed, had not come into operation, and the learned President so held.

A wide commencement clause was used in ***The Ramsden***:[51] 'whilst tug is in attendance upon or engaged in any manoeuvre for the purpose of making fast' was held to cover the negligence of the tugmaster when he was proceeding towards the tow in order to make fast.

The criteria of when a tug is ready to receive orders were laid down in ***The Apollon***.[52] The usual commencement clause provided that:

> . . . the period commencing when the tug is in a position to receive orders direct from the hirer's vessel to pick up ropes or lines or when the tow-rope has been passed to or by the tug, whichever is the sooner . . .

The owners of *The Apollon* had ordered two tugs. The first tug commenced towing. While the second tug was manoeuvring towards *The Apollon*, she struck a dock gate and sustained damage. The tug-owners claimed an indemnity under the conditions providing for the hirer to pay for damages sustained while towing.

Brandon J laid down the general principles extracted from the earlier cases:

> It seems to me that, for a tug to be in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, three conditions must be fulfilled. The first condition is that the situation is such that those on board the tug can reasonably expect the ship to give the tug an order to pick up ropes or lines. The second condition is that the tug is ready to respond to such orders if given. The third condition is that the tug should be close enough to the ship for the order to be passed direct: in other words that the tug should be within hailing distance.[53]

It was held that all three conditions had been fulfilled in this case, even though the tug had to make a further manoeuvre in order to carry out the pilot's instructions. She was, nevertheless, in a position to receive that order.

50 [1948] P 159, p 166.
51 [1943] P 46; see also *The Baltyk* [1948] P 1.
52 [1971] 1 Lloyd's Rep 471.
53 Ibid, p 480.

In ***The Blenheim v The Impetus***,[54] the collision occurred after orders had been given, but before they were carried out. There was no need for the tug to be able to perform, at the time the orders were given, provided she was ready to receive the orders. It was held that the collision occurred during the period defined as 'whilst towing' in cl 1 of the UKSTC, as the tug was then 'in a position to receive orders'; the tug-owners were therefore protected from liability by cl 3, which excludes liability for damage 'whilst towing'.

5.4 CONSEQUENCES OF INTERRUPTION OF TOWING

The obligation of the tug is to complete the towage but, as will be seen later, there is no absolute warranty to complete the towage under all circumstances and at all hazards, when there is an impossibility of performing it.[55] However, when the towage is interrupted, the principle is that it is the tug's duty to return to the tow and resume towage, or, if this cannot be done, it must not leave the tow until she is safe or other assistance is sought.[56] If neither of these duties is performed, the towage terms will cease to operate, as there will be an interruption of the towage amounting to a breach of contract, and it may have the effect of termination. The protection of the tug by the contractual exception from liability applies only while the tug is performing its duties, for example, 'while towing' (see also paras 9.1 and 9.2, below).

The Refrigerant[57]

The towage contract provided that:

> During the towage service the master and crew of the tugboat become the servants of the owners of the vessel in tow, and are under the control of the master or person in charge of the vessel in tow, the company only providing the motive power. The company will not be liable for any damage or loss to or occasioned by the vessel in tow . . . or any damage or loss to any person or property whatsoever, although such damage or loss may be caused or contributed to by the acts or defaults of the master or crew of the tugboat, or by any defect in or breakdown of or accident to the . . . equipment or towing gear of the tugboat.

It was also expressly stated that the tug-owners would provide a towing hawser sufficient for the purpose, and that the tow should have steam available.

During the towage, the hawser parted when the weather was bad. The tug left the tow and went to Falmouth in search of a new rope. The master of the tug sent another tug to assist the tow, but the tow refused assistance, unless the master of the new tug was ready to make an agreement. Eventually, the tow had to hire and pay for the services of another vessel up to Plymouth, before the plaintiffs returned and completed the towage. When the tug-owners claimed remuneration, the tow counterclaimed for the amount paid to the other vessel for salvage. The tug-owners sought to rely on

54 [1959] 2 All ER 354.

55 *The Minnehaha* (1861) 15 Moo PC 133.

56 *The Aboukir* (1905) 21 TLR 200, where performance became impossible because the tow could not get into the dock, but the tug's obligation was to leave her into a safe place, which meant in this case taking her back to the anchorage from where the towage had started.

57 [1925] P 130.

the terms of the contract excluding liability for losses or damage to the tow, or any person or property during the towage service.

It was held that the tugmaster had acted improperly by leaving the tow, as the master ought to have stood by the tow throughout. Bateson J stated that:

> In my opinion the words 'during the towage service' mean while the service is being conducted – not while it is being interrupted, in the sense that the master of the tug leaves the ship altogether and goes into port and sends out somebody else to do his work.[58]

The judge in this case relied on the dictum of Lord Sterndale in *The Cap Palos* (see below) and held that the exceptions from liability in the contract did not apply to an interruption of towage, but were confined to a time when the tug-owner was doing something in the actual performance of the contract, and not when he had abandoned his duties.

The Cap Palos[59]

A very wide exception clause was agreed to protect the tug-owner for damage done, otherwise than by collision to the vessel being towed by reason of the default of the tug-owner. The tug-owner got an additional tug to assist, but both tugs lost their hawsers during the tow. The tow could not make her way out of the bay, and the tugs left her there; a moderate breeze was rising. It appeared that the defendant had ordered another tug to go to the CP, but cancelled the order, as he thought (erroneously) that the Salvage Association had sent tugs to her assistance. Three days later, the tow, still unable to get out, drifted onto the rocks and became a constructive total loss. When the plaintiffs brought an action for loss of their vessel, the defendants pleaded the exception clause under the contract. The question was whether the exception could cover the period of time when the defendants had left the tow, in breach of their obligations under the contract. Lord Sterndale MR, in the CA, reversing the judge's decision, said:

> I think that the whole clause points to the exceptions being confined to a time when the tugowner is doing something or omitting to do something in the actual performance of the contract, and do not apply during a period when, as in this case, he has ceased, even for a time, to do anything at all and has left the performance of his duties to someone else. In other words, I think the exception extends to cover a default during the actual performance of the duties of the contract, and not to an unjustified handing over of those obligations to someone else for performance.[60]

5.5 TERMINATION OF TOWING

The towage operations will terminate upon the occurrence of one of the following events: either (a) when the final orders by the tow to cease holding, pushing, pulling, moving, escorting, guiding or standing by, or to cast off ropes wires or lines have been carried out; or (b) when the towing line has been finally slipped. The latest of either of these events will be taken into account, provided the tug is safely clear

58 Ibid, pp 140–41.
59 [1921] P 458.
60 Ibid, p 468.

of the tow. The incident of 'when the lines have been finally slipped' does not refer to accidental[61] parting of the towline, but to an act to terminate the contract according to the agreement.

The standard terms of TOWCON/TOWHIRE provide for an agreed place of destination (where the tow must safely be brought) as a place of termination.

6 DUTIES OF THE TUG-OWNER

The mutual relations of tug and tow are governed by the express terms of the contract, and, in the absence of express terms, certain terms will be implied, provided they are not inconsistent with the express terms or have not been expressly excluded.

6.1 FITNESS OF THE TUG

This obligation is usually an implied term of the contract, but contracts of standard terms provide expressly for the obligation. It includes an obligation that the crew, tackle and equipment are what might reasonably be expected of a vessel of the particular class. The nature of the obligation is to exercise due care to make the tug reasonably fit and efficient for the services required.

But what is the nature of the obligation of the tug-owner in the absence of an express term? Is it an obligation that amounts to an implied absolute undertaking or warranty – like the undertaking given by the common carrier to provide a seaworthy ship in a carriage of goods contract?[62] Or is it just a duty to exercise reasonable care to make the tug fit for the service? If it is the former, a breach of it that causes damage to the tow will deprive the tug-owner from relying on the exception from liability provisions in the contract, and the tow-owner will not have to prove negligence of the tug. The burden of proof will shift on to the tug-owner to show that there was no breach, the tug was fit, and the damage was caused, for example, by an 'act of God'. In other words, this analysis would make the obligation amount to strict liability, in that the tug shall be fit.

If the obligation is a duty to exercise reasonable care to make the tug reasonably fit for the service, the tow-owner will have to prove negligence on the part of the tug. If it is proved, the remedy would be subject to the contractual exceptions from liability, and it would be a matter of construction of the contract, if the parties intended to exempt liability of the tug despite the breach. Old decisions, decided prior to the CA decision in *The West Cock* (see below), seemed to favour the view that the obligation was an absolute warranty or undertaking. However, the law does not seem to be settled

61 *The Walumba (Owners) v Australian Coastal Shipping Commission* [1965] 1 Lloyd's Rep 121.

62 *Steel v State Line Steamship Co* (1877) 3 App Cas 72 (HL); Lord Blackburn said, p 86:

I take it, my Lords, to be quite clear, both in England and in Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a warranty, not merely that they should do their best to make the ship fit, but that the ship should really be fit.

as to which of the two theories applies, because the dicta of the CA decision in *The West Cock* were *obiter*.

Although this issue is now academic, as the parties provide in their contracts about their respective obligations, it is interesting to examine how the views of the courts changed over time.

6.1.1 Decisions in favour of an absolute warranty of fitness

Butt J, in ***The Undaunted***,[63] in which the tug had insufficient coal for the voyage, said:

> . . . there being an implied obligation on the tug owners to supply an efficient tug, that is to say, one properly equipped and properly supplied with coal, and as I have found that the tug was deficient in the latter respect, the plaintiffs would be liable. Notwithstanding the exception contained on the card . . . the plaintiffs had not properly fulfilled their contract.

In ***The West Cock***[64] (at first instance), the decision of the President, Sir Samuel Evans, is important, not only because it was confirmed by the CA only as to the result, but also because the comments made by the CA (disapproving the view of the President as to an implied warranty of fitness) were only *obiter*.

The defendant's tugs were engaged to tow the plaintiff's vessel to Liverpool. During the towage, the towing gear of one of the tugs was carried away and fell overboard, causing the tow to be driven against the knuckle of the pier head at the entrance to the dock, resulting in damage to it. The defendants relied on an exemption in the contract, under which they were not responsible for any damage to the tow arising from accidents of the seas, rivers 'or arising from towing gear (including consequences of defects therein or damage thereto)'.

The President, Sir Samuel Evans, at first instance, made the following findings of fact:

> Without going in further detail into the evidence, I will state the conclusions at which I have arrived as to the cause of the accident. I find that the accident was due to the weakness, fatigue, and defective condition of the eight rivets, and that at the time of the contract, and of the commencement of the towing operations, the tug *West Cock* was inefficient on this ground to perform the towage services which the defendants contracted to perform . . . I further find upon the evidence . . . that this inefficiency could have been ascertained by reasonable care, skill, and attention on the part of the tug-owners; that no proper inspection of the tug was made by them or their servants before the towage contract was entered into; and that the last inspection before the contract was only an ordinary and perfunctory one, and did not extend to an examination of the rivets or fastenings between the towing gear and the bulkhead casing.

He referred to authorities that he thought supported his view that there was a warranty of fitness:

> The primary obligation of a tug owner under a towage contract may be described as a duty to provide a tug which, at the time of the contract or at the commencement of the operations of towage under the contract, is efficient to perform the towage services which the tug undertakes to perform in circumstances reasonably to be expected; or as a representation, or an engagement,

63 (1886) 11 PD 46, p 48.
64 [1911] P 23, pp 30–34; [1911] P 208 (CA).

or a contract, or an implied engagement that the tug is reasonably efficient for that purpose. If my findings of fact in this case are justified, it matters not whether this primary obligation is an absolute one, so as to amount to a warranty of fitness or efficiency, or whether the obligation is satisfied by the tug owner proving that the unfitness or inefficiency was not discoverable or preventable by any care or skill, or by his proving that he was not aware of the unfitness or inefficiency, and that it could not be discovered by an ordinary inspection . . .

In my opinion it is not sufficient for a tug owner in an action like the present to prove that he was not aware of any unfitness or inefficiency or that it could not be discovered by an ordinary inspection. At the lowest, I think his obligation is to prove that the unfitness or inefficiency was not preventable or discoverable by care and skill. But is not the obligation at the outset greater than this? Is it not an obligation which is absolute and which, therefore, amounts to a warranty? I think it is. It is well established that the obligation under a charter party or a bill of lading to provide a vessel which is 'seaworthy', in the commercial and legal sense, is an absolute one and amounts to a warranty of seaworthiness; and this obligation has been described as 'a representation and an engagement – a contract – by the ship-owner that the ship . . . is at the time of its departure reasonably fit for accomplishing the service which the ship-owner engages to perform' (per Lord Cairns in *Steel v State Line Steamship Co*); and as 'a duty on the part of the person who furnishes or supplies the ship . . . unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy; and I think also in marine contracts, contracts for sea carriage, that is what is properly called a "warranty", not merely that they should do their best to make the ship fit, but that the ship should really be fit . . .'

It is as important that a tug which undertakes to tow a vessel in some cases for long distances and in varying circumstances, with lives and property at risk, should be efficient for the accomplishment of its work, as it is that a cargo laden ship should be seaworthy, and in this sense fit for the purposes of the services undertaken under a charter party. The foundation of the obligation is the same in either case, namely, the fitness of the tug or the ship for the purpose of the services to be performed . . .

In *The Minnehaha* (see later), Lord Kingsdown, in giving the decision of the Privy Council, said:

When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so, and will do so, under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipment, as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated, and which may render the fulfilment of her contract impossible, and in such a case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser.

This, I think, means, or at any rate is consistent with the construction, that there is, in a towage contract, first a warranty that at the outset the crew, tackle and equipment are efficient, and afterwards an implied obligation that competent skill and best endeavours should be exercised in the performance of the work.

I see no reason whatever why the same kind of obligation as to efficiency or fitness should not attach to a marine contract of towage as attaches to a marine contract of carriage. But whether the ordinary contract be (as I think it is) a warranty of fitness, or an implied obligation to provide a tug in a fit and efficient condition, so far as skill and care can discover its condition, a serious question remains, namely, whether, under the special terms of exemption in the contract in this case, the defendants are relieved from liability. Whatever the exact obligations of the tug owners may be, there are exceptions under which they seek to avoid, restrict, or minimise those obligations, and they must clearly make out that they are protected by these conditions. I think that the canon of construction to be applied is similar to that which has so frequently been applied in 'seaworthiness' cases.

Before looking at the reasoning of the CA in *The West Cock*, which belongs to the second school of thought, namely that there is no warranty of fitness, it is important to see how Sir Samuel Evans had dealt with the same issue in his next decision, decided in the same year, although he was there more concerned with whether the tug would be entitled to a salvage award.

The Maracha Suchet[65]

The contract was to tow the vessel from Falmouth to London by a tug to be supplied by the plaintiffs. The vessel, while in tow of the tug, took the ground. This was owing to a strong wind encountered, which caused the tug and the tow to drift. The vessel remained aground for several days until lifeboats, boatmen and other tugs belonging to the plaintiffs came to her assistance. Claims for salvage awards by all parties involved were separately considered. With regard to the owners, master and crew of the tug engaged under the towage contract, it was held that the owners had failed to prove that they had supplied a tug efficient for the purpose for which she was engaged. The President, Sir Samuel Evans, said:

> The contract . . . was for the towage of *The Marachal Suchet* by a tug to be supplied by the plaintiffs. This being so, the owners of the tug must be taken to have contracted that the tug should be efficient, and that her crew, tackle, and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected; and that reasonable skill, care, energy, and diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be done under all circumstances and at all hazards, and the failure to accomplish it would be excused if it were due to *vis major* or to accidents not contemplated, and which rendered the doing of the work impossible.[66]

Scrutinising the claim for salvage, he stated that:

> The burden of proof is upon the plaintiffs [tug-owners]. It is a twofold burden. They must shew that they were not wanting in the performance of the obligations resting upon them under the towage contract; and they must also account for the stranding of the vessel by shewing something like *vis major*, or an inevitable accident.[67]

The plaintiffs proved neither of these.

Having failed in the towage contract, the tug-owners could not in the circumstances claim as salvors. It was also held that, although the special conditions in the towage contract could not avail the plaintiffs in the salvage claim, they had a defence to the counterclaim for damages for breach of contract. The court was left in doubt as to whether the accident (as a matter of causation) was due solely to the inefficient condition of the tug and its equipment.

In 1992, the CA in Singapore decided the issue in ***The Sumi Maru 9001***,[68] and preferred the comments of the President in *The West Cock* that there was an implied absolute warranty as to fitness of the tug.

65 [1911] P 1.
66 Ibid, p 12.
67 Ibid, p 12.
68 *Wiltops (Asia) Ltd v Owners of the Tug Sumi Maru 9001* [1993] 1 SLR 198.

The respondents (tug-owners) undertook the towage of two vessels belonging to the appellants from Eleusis Bay, Greece, to Taiwan, and the payment was to be made by instalments. The contract contained a very wide exception clause. The tug-owners were obliged to provide bunkers and all necessary provisions. Owing to an increase in bunker prices, the tug-owners were unable to pay for them, and, after negotiations with the appellants, the latter agreed to pay the second instalment of the contract price, although it was not yet due. In return, the tug-owners agreed to commence towing immediately, but, in fact, they postponed it and, instead, they pressed for early payment of the third and fourth instalments, as well as a further bunkers surcharge. The third instalment and part of the fourth were paid, but the rest was refused.

At Cape Town, the tug-owners failed to provide bunkers for the next stage of the voyage, and bunkers were only provided after the appellants agreed to pay an increase of the towage fee in the amount of $170,000, on a 'no cure, no pay' basis, of which $60,000 was paid, together with the balance of the fourth instalment for the towage. The tug, however, deviated to Mauritius (instead of sailing direct to Singapore), because it did not have sufficient bunkers. En route, she encountered bad cyclonic weather, and the tug-owners demanded a further sum of $103,500 as demurrage for delays, which was refused by the appellants. The cyclonic conditions worsened, and the portside main wire snapped, resulting in the parting of the tug from the tow. The tug did not retrieve the tow, but sailed to Colombo to begin another assignment. Subsequently, the tug-owners went into liquidation.

The ratio of the decision of the Singaporean CA seems to be that there was an implied absolute obligation in the towage contract,[69] on the part of the tug-owner, to provide a tug efficient for the operation of the towage at the commencement of each stage of the voyage, in the same way as in contracts of affreightment.[70] The Lords Justice considered that the implied obligation was fully consistent with the obligations of a tug-owner, as laid down by Lord Kingsdown in *The Minnehaha*,[71] and disregarded the *obiter* comments made by the CA in *The West Cock* (see below).

The factual position, however, in this case speaks for itself; the conduct of the tug-owner, the level of pressure exerted upon the tow and the final abandonment of the tow constituted very bad conduct, albeit that it also amounted to economic duress. In the circumstances, on the issue in question, no general principle can be drawn from this decision with regard to the nature of the tug-owner's obligation to provide a tug fit for the purpose for the following reasons.

First, this was a case of deliberate conduct by the tug-owner. Not only did he not meet the standard of reasonable skill and care expected of him, but he received almost all the instalments of payment by exercising undue pressure and still abandoned the

69 Cf. Rainey, S, in his 3rd edn, op. cit. fn 1, p 42, reads the case differently and says that the CA of Singapore did not decide that there was an absolute warranty or, if it did, the better view remains that of the CA in the *West Cock*, albeit *obiter*.

70 *Thin & Another v Richards & Co* [1892] 2 QB 141; *The Vortigern* [1899] P 140 (CA); *Northumbrian Shipping Co v Timm* [1939] AC 397 (HL).

71 (1861) 15 Moo PC 133, pp 152–155: when a steamship engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazard, but she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle and equipment as are reasonably to be expected in a vessel of her class.

contract. Second, it is doubtful whether a principle on this issue was established in *The Minnehaha*, which was concerned with whether or not there was a warranty by the tug to complete the services. Third, the analogy drawn from the contracts of carriage of goods authorities is misplaced, because these are different contracts from the contracts of towage, and, in any event, the law with regard to seaworthiness has moved on since those old cases.[72] Fourth, the rights and duties between the parties are governed by the law of towage, and the common carrier rules of liability should not apply.

It is submitted that the correct approach should be that there is no absolute warranty as to the tug's fitness, but the tug should be reasonably fit for the service required, as far as reasonable care and skill can make it.[73] The obligation may be modified by express or appropriate terms in the contract. Such was the view, albeit, strictly speaking, *obiter*, held by the CA in *The West Cock*, referred to next.

6.1.2 The view that there is no absolute warranty of fitness of the tug

The West Cock (CA)[74]

Although the CA (Vaughan Williams, Farwell and Kennedy LJJ) affirmed the decision in the court below that the defendants were liable, on the basis of different reasons from the judge, it implicitly disapproved of the President's view that the obligation to provide a fit tug was an absolute one. The reason the tug-owner was liable in this case was that the defective condition of its rivets was not covered by the exemptions in the contract, the conditions of which only applied in circumstances occurring after the commencement of, and during, the towage, and not to the state of things existing before the towage began.

On the issue of fitness, both Farwell and Kennedy LJJ did not wish to extend the common law absolute warranties to towage contracts. Although the CA did not have to decide the point, it is important to state the views expressed, in the course of the judgment, on this issue.

Williams LJ said[75] that the President, Sir Samuel Evans, referred to his own decision in *The Marachal Suchet* and claimed that his observations there were based upon the House of Lords' decision in *The Ratata*.[76] However, both *The Ratata* and the Privy Council's decision in *The Minnehaha*, on which the President relied, pointed the other way, rather than supporting the statement that there was a common law warranty or condition of fitness at the commencement of the risk. As regards all other cases claimed by the President to support his proposition, they were cases dealing with different contracts entirely, namely contracts of carriage. Williams LJ did not agree that the same principle applying to contracts of affreightment should also apply to towage.

72 Cf. *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 WLR 474, the obligation to provide a seaworthy ship is an innominate term.

73 The same view is suggested by op. cit., Rainey, fn 1.

74 [1911] P 208 (CA).

75 [1911] P 208 (CA), p 225.

76 [1898] AC 513 (HL), p 517. Lord Halsbury said:

> The fact that it was an inefficient tug . . . is proved by the defendants themselves, when they shew how on other occasions it had properly and efficiently performed its functions. If it was suggested that it was some extraordinary and unusual event, and as this was not a contract of warranty, the defendants would have been entitled to insist on that as a defence; it was for the defendants to prove it.

The question as to what is the liability of the tug-owner was answered by Farwell LJ, quoting Lindley J in *Hyman v Nye*,[77] which dealt with a contract of carriage by coach and horses. He paraphrased the test of that case – which was a test of reasonable care and skill – and adapted it to the situation of tug hire, thus:

> His duty appears to me to be to supply [a tug] as fit for the purpose for which it is hired as care and skill can render it; and if whilst [the tug] is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to shew that the breakdown was in the proper sense of the word an accident not preventable by any care or skill . . . As between him and the hirer the risk of defects in [the tug], so far as care and skill can avoid them, ought to be thrown on the owner of [the tug]. The hirer trusts him to supply a fit and proper [tug], the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses.[78]

Although Kennedy LJ reserved his final opinion, he was inclined to support[79] the law as laid down in *Hyman v Nye* and the alternative view pointed out by the President, which was: '. . . an implied obligation to provide a tug in a fit and efficient condition so far as skill and care can discover its condition'.

As the CA did not have to decide the issue, and the comments made by the Lords Justice were only *obiter*, lawyers are none the wiser as to the answer to this problem. However, if one takes the President's alternative view (stated above) to be the correct law, it will be consistent with contractual terms that provide for an obligation on the part of the tug-owner to exercise reasonable care to provide a seaworthy tug, as is seen next.

6.1.3 Contractual terms of standard towage contracts on tug's fitness

6.1.3.1 Under the UKSTC

Clause 4(c)(i) provides that the exceptions from a tug's liability under cl 4(a), and the indemnity given by the tow to the tug under cl 4(b), shall not apply to the following:

> All claims which the hirer shall prove to have resulted directly and solely from the personal failure of the tug owner to exercise reasonable care to make the tug or tender seaworthy for navigation at the commencement of the towing or other service. For the purpose of this clause the tug owner's personal responsibility for exercising reasonable care shall be construed as relating only to the person or persons having the ultimate control and chief management of the tug owner's business and to any servant (excluding the officers and crew of any tug or tender) to whom the tug owner has specifically delegated the particular duty of exercising reasonable care and shall not include any other servant of the tug owner or any agent or independent contractor employed by the tug owner.

The duty of the tug-owner under this contract is to exercise reasonable care to make the tug seaworthy for navigation at the commencement of the towing. The duty is expressly stated to be personal, that is, it is a duty of the persons having the ultimate control and chief management of the business, for example, the directors (the 'ego'

77 [1881] 6 QBD 685, p 687.
78 *The West Cock* [1911] P 208 (CA), p 227.
79 Ibid, p 232.

or the 'alter ego' of the company).[80] As it is stated to be personal, the duty is non-delegable and is equivalent to the duty of the carrier under AA III r 1 of the HVR. Therefore, the rule of The Muncaster Castle,[81] which is applicable to contracts of carriage of goods by sea, applies. Personal failure to exercise reasonable care to make the tug seaworthy under the UKSTC will contractually deprive the tug-owner from relying on the clause exempting him from liability for negligence, or relying on the indemnity provision with respect to claims that have directly and solely resulted from such personal failure.[82] Otherwise, if loss or damage to the tow or the tug or the personnel of either is caused by the negligence of the tug, the tug-owner is protected by the terms of the contract. (See, further, para 9 below.)

6.1.3.2 Under TOWCON/TOWHIRE

Clause 13 of the original TOWCON/TOWHIRE contracts, cl 19 of TOWCON and cl 17 of TOWHIRE 2008, provide:

> The tug owner will exercise due diligence to tender the tug at the place of departure in a seaworthy condition and in all respects ready to perform the towage, but the tug owner gives no other warranties, express or implied.

This clause again reduces the obligation of the tug-owner to that of reasonable care, but it is silent as to whether or not the obligation is personal to the tug-owner, although this may be implied upon proper construction of the clause.

6.2 THE POSITION OF FITNESS WHEN A SPECIFIC TUG IS REQUESTED

When a particular tug is known in the market for its strength and specific equipment, a tow-owner may request it for an ocean towage. Whether or not, in such a case, there is an implied obligation on the tug-owner to provide a fit tug, the position, again, is not clear. There are again two strands of judicial view.

6.2.1 One school of thought: no warranty of fitness

It is said that there is no warranty of fitness and no implied contract that the tug shall be reasonably fit for the purpose, because, if the tow-owner chose the tug, he would not be able to argue that he had relied on the skill and judgment of the tug-owner to choose a suitable tug. In such a case, it would be expected that the tow-owner assumes the risk of a possible inefficiency of the specific tug chosen and the consequential damage or loss arising thereof. This is derived from the dicta of some old cases, such as ***Robertson v Amazon Tug and Lighterage***,[83] in which the CA

80 See the definition of 'ego' and 'alter ego', or how liability is attributed to a company, in Ch 4, above.

81 [1961] 1 Lloyd's Rep 57.

82 *The Borvigilant and Romina G* [2003] 2 Lloyd's Rep 520.

83 *Robertson v Amazon Tug and Lighterage Co* (1881) 7 QBD 598, at 605-09(CA); see, also, *The Mary Francis Whalen* (1922) 13 LlL Rep 40 (PC); the Privy Council preferred to support the view of the majority in the Robertson case; *Fraser & White Ltd v Vernon* [1951] 2 Lloyd's Rep 175: it was held that, as the contract was one for the supply of specific tugs, there was, accordingly, no implied warranty as to the fitness of the tugs.

(by a weak majority; Brett LJ favoured this rule, Cotton LJ seemed not committed, and Bramwell LJ dissented) held (reversing the judge's decision) that there is no implied warranty of fitness because, when the thing is specifically requested, the person requesting it takes the thing as it is.

In the previous editions, the relevant parts of the decisions of this strand were set out fully, but space does not allow the same here. The point made was that no general rule can be drawn from these decisions (see also Rainey[84]), and that the common-sense approach of the dissenting judge, Bramwell LJ, should be applied, who said:

> The case seems to me the same as a contract of hiring, and as all contracts when one man furnishes a specific thing to another which that other is to use. The man so letting and furnishing the thing does not, except in some cases, undertake for its goodness or fitness, but he does undertake for the condition being such that it can do what its means enable it to do. Thus, if a man hired a specific horse and said he intended to hunt with it next day, there would be no undertaking by the letter that it could leap or go fast; but there would be that it should have its shoes on, and that it should not have been excessively worked or unfed the day before. If I am asked where I find this rule in our law, I frankly . . . cannot discover it plainly laid down anywhere. But it seems to me to exist as a matter of good sense and reason, and it is I think in accordance with the analogous authorities. I am afraid that the nearest is the *dictum* of Lord Abinger in *Smith v Marrable*: 'No authorities were wanted'; 'the case is one which common sense alone enables us to decide'.[85]

6.2.2 Second school of thought: no general rule about absence of a warranty of fitness

The CA in ***Yeoman Credit Ltd v Apps***[86] (concerning a hire purchase agreement of a car that was unusable) was surprised at the decision in the *Robertson* case and – because of the weak majority – it felt not bound by it. It held, instead, that, in the ordinary hiring agreement of a specific chattel, there was an implied obligation that the chattel should be fit for the purpose for which it was hired, except in the case where the defect was apparent to the hirer, and he did not rely on the skill and judgment of the owner. The CA relied on its previous decision, *Karsales (Harrow) Ltd v Wallis*, and approved *Reed v Dean*, in which it was held that the implied warranty of fitness was subject to the exercise of reasonable skill and care.[87]

6.2.3 Tug fitness and risk management

The apparent conflict between the decisions is unsatisfactory. It appeals to common sense that the proper rule to be applied to such cases should be that the tug or chattel should be fit for the purpose for which it is hired, as far as skill and care can make it. The *Robertson* case may be limited to its own factual situation, which was unusual. The only exception to the rule that a tug should be reasonably fit for the purpose should be when the tow owner has actual knowledge of a specific tug and its condition

84 See analysis of these decisions in Rainey, S, op.cit. fn 1, pp 43–46.

85 Op. cit. fn 83, p 603.

86 [1962] 2 QB 508.

87 *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936; *Reed v Dean* [1949] 1 KB 188. It concerned the hire of a named motor launch. Owing to an unexplained cause, the launch caught fire. The defendant's failure to provide proper fire-fighting equipment was a breach of the implied warranty of fitness, which was subject to the exercise of reasonable skill and care.

and has requested it for hire, accepting it as it is, except in cases of common mistake about the tug's characteristics.[88] Save for latent, or not apparent, defects, the hirer would be making a conscious commercial decision to accept the risk of the tug's failure to perform, if that failure was due to the condition that the hirer accepted. Presumably, the contract would reflect that in the price agreed to be paid for the service.

Considering the uncertainty in the law, it is important that parties who engage the services of a tug bear these issues in mind and make it clear in their contract, for the purpose of risk management, what they expect from the tug-owner as to the fitness of the tug or tugs and services to be provided.

6.3 TO USE BEST ENDEAVOURS TO COMPLETE THE TOWAGE

The meaning of 'best endeavours' or 'all reasonable endeavours' has been discussed in Chapters 5 and 10, referring to new decisions that clarify the various uses of these phrases. In summary, the term is understood to mean that the obligant has to take all those steps in his power that are capable of producing the desired results,[89] or taking all reasonable courses he can, which, in that context, may well be that an obligation to use all reasonable endeavours equates with using 'best endeavours'.[90] Such contractual obligation did not, however, require the obligant to disregard its own commercial interests; the balance fell to be struck depending on the wording[91] of the relevant obligation and on what steps would be reasonable.[92] The test is objective, and what constitutes reasonable or best endeavours is for the court to arrive at upon evaluation of all the evidence.[93]

In the present context, it has to be shown that the tug did its best (all reasonable efforts)[94] in the circumstances to complete the towage. It may only be excused by the intervention of unforeseen incidents, which were not contemplated when the contract commenced and which rendered the fulfilment of the contract impossible. However, it will not be excused if an unforeseen event made the contract more difficult than expected.

For example, in ***The Minnehaha***,[95] Lord Kingsdown laid down the principle governing the duty of a tug to complete the towage services by his well-known statement in this case:

88 See Rainey, op. cit. fn 1, p 46, referring to *The Salvador* (1909) 25 TLR 384.

89 *IBM UK Ltd v Rockware Glass Ltd* [1980] FSR 335.

90 *Rhodia International Ltd v Huntsman International LLC* [2007] 1 CLC 59, at 33 per Flaux J; in *Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm), the judge held that there was no difference between 'best endeavours' and 'all reasonable endeavours' in the context of the case; the CA in the same case, [2012] EWCA Civ 417, held that the term, 'best endeavours to promote another person's business', in the context in which it was used, was not so uncertain as to be incapable of giving rise to a legally binding obligation, although it might be difficult to determine its precise limits in advance.

91 E.g. see the qualified wording 'all reasonable but commercially prudent endeavours' in *CPC Group Ltd v Qatari Diar Real Estate* [2010] EWHC 1535 (Ch).

92 *EDI Central Ltd v National Car Parks Ltd* [2012] SLT 421 (Inner House, Court of Session).

93 *The Talisman* [1989] 1 Lloyd's Rep 535.

94 See also *The Kismet* [1976] 2 Lloyd's Rep 585: the tug failed in their best endeavours to supply the water required by the water supply services contract, but this was not the cause of *The Kismet* having to be towed subsequently by the same tug to Durban.

95 (1861) 15 Moo PC 133, p 153.

> When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so and will do so under all circumstances and at all hazards; but she does engage that she will use her best endeavours for that purpose, and will bring to the task competence, skill, and such a crew, tackle and equipment as are reasonably to be expected in a vessel of her class.
>
> She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated and which may render the fulfilment of her contract impossible; and in such case, by the general rule of law, she is relieved from her obligations.
>
> . . . but she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship hawser.

The UKSTC 1986 form of contract does not mention that the tug owner will use best endeavours to complete the towage, but common law will fill this gap.

Other standard forms, such as the TOWCON, may expressly provide for the tug to use best endeavours. In ***Ease Faith Ltd v Leonis Marine Management Ltd***,[96] 'best endeavours' and to proceed with 'utmost dispatch' were among the obligations of the tug.

Ease Faith (E) carried on business as purchasers of ships for demolition and purchased *Kent Reliant*, a bulk carrier, with a view to reselling it in China. She had suffered bottom damage as a result of grounding. E agreed with Leonis (L), whose business was the chartering of tugs for towage, to tow the vessel to China under a sub-TOWCON. L chartered a tug under a head TOWCON from C, as tug-owner. Both the head and the sub-TOWCONs were in standard International Ocean Towage Agreement form. The TOWCONs described the vessel as 'Deadship in light ballast condition'. *Kent Reliant* towed the vessel to China, but, by the time it arrived, disputes had arisen between E, L and C. E claimed damages on the ground that L was in breach of the sub-TOWCON, because the tug had failed to proceed on the voyage with utmost dispatch, as, for much of the voyage, the tug used only one of her two engines. The loss claimed by E was additional pilot and escort charges (because the convoy arrived late at the Shanghai pilot station), and the amount by which the Chinese purchasers reduced the price for late delivery. L sought to pass on any liability to C on the basis that, if L was liable to E under the sub-TOWCON, that was because C was in breach of the head- TOWCON. C counterclaimed against L, and L counterclaimed against E, on the basis that it had been represented to them and provided in the towage agreement that the vessel was in 'light ballast condition' but she was not. C and L submitted that E's claims were excluded by cl 18.3 of the standard wording of the TOWCONs, which excluded liability for loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever (see under para 12, below).

Smith J held that the misrepresentation counterclaim failed; the undertakings of description of the vessel were complied with, and there was no breach of the TOWCON relating to the condition of the *Kent Reliant*. On the facts, the tug failed to proceed with utmost dispatch. It was implicit in the sub-TOWCON (as well as in the head TOWCON) that the tug would proceed with all reasonable dispatch.

96 [2006] 1 Lloyd's Rep 673.

Progress at all reasonable speed, or reasonable dispatch, was a speed that could reasonably be achieved if both engines were routinely used. In the circumstances, the tug was in breach of the utmost dispatch obligation.

6.4 THE DUTY TO EXERCISE PROPER SKILL AND DILIGENCE THROUGHOUT

Unless the contract specifies otherwise, ss 13 and 15 of the SGSA 1982 apply to the towage contracts, which are contracts for supply of goods and services. Section 13 provides: 'In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.'

Section 14 deals with the time for the service to be carried out, if it is not fixed by the contract. There is an implied term to carry out the service within a reasonable time; what is a reasonable time is a question of fact.

These statutory duties had been established at common law prior to the Act. The Privy Council, in an old case, had given a comprehensive analysis of these duties in ***The Julia***:[97]

A steam tug entered into an engagement to tow a vessel. By the misconduct of the master and crew of the vessel in tow, who acted contrary to the directions of the pilot on board the vessel, a collision occurred whereby the tug received damage. In an action by the owner of the tug for negligence, it was held that the collision and damage had, indeed, been caused by the negligent acts of the tow, and the tug-owners were entitled to recover damages. On the issue of fault and liability, Lord Kingsdown stated:

> If, in the course of the performance of this contract, any inevitable accident happened to the one without any default on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident.

On the duties of both parties to the contract, he summarised the principle:

> When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken.[98]

The House of Lords, in ***The Ratata***,[99] confirmed the principles, and Lord Halsbury stated:

> My Lords, no written contract between the parties has been put in evidence, but your Lordships are invited to infer what the contract was from the ordinary course pursued between shipowners and contractors for towage. Looking at the facts, I should infer that, while on the one hand

97 (1861) 14 Moo PC 210.
98 Ibid, p 230.
99 [1898] AC 513, p 516.

there is no warranty by the contractors that the vessel shall arrive in time to avoid grounding, on the other hand, I think it is clear that they undertook to exercise reasonable care and skill in the performance of the obligation which they have taken upon themselves for hire and reward in conducting the business of the towage to its consummation. Looking at the nature of the thing to be done, I should say they were bound to have reasonable knowledge of the state of the tide, inasmuch as they are to give the signal for the starting of the operations; reasonable care and skill in conducting the operation itself; . . . and reasonable care in providing adequate steam power to accomplish the object in question.

7 DUTIES OF THE TOW

7.1 DUTY TO SPECIFY WHAT IS REQUIRED AND TO DISCLOSE THE CONDITION OF THE TOW

As discussed earlier (at para 4.4), under pre-contractual duties, the tow-owner ought to give all necessary information about the tow before the contract commences, so that the tug can make the appropriate arrangements for the towage services required. The court has an equitable jurisdiction to open agreements that were entered into without full knowledge of the condition of the tow, if, for example, a non-disclosure of material facts would render the job of the tug more difficult than was contemplated and reflected in the remuneration. The court may award damages for breach of contract, or fix a price that would be fair in the circumstances.

In ***Elliot Steam Tug Co v New Medway Steam Packet***,[100] the defendants called the plaintiff's tug company to tow an 800-ton concrete lighter from the mudbank where she was lying. Nothing was disclosed to the plaintiffs showing that this was anything other than an ordinary towing job. In fact, however, the lighter had been lying in mud for some years, and the berth was not easy to get to unless the vessel was very small. It was not, therefore, in a position in which the plaintiff's tug could reach it. Consequently, the tugmaster abandoned the tow attempt. The parties entered into a second agreement, whereby the plaintiffs supplied a smaller tug. However, they were still unable to shift the lighter. The plaintiffs claimed damages for breach of contract. It was held that the defendants were in breach of their duty to put the lighter in a position where she could be reached, and in not disclosing that the contract was anything but a simple towage contract.

Any untrue representation of material facts about the tow would be subject to the provisions of the MA 1967. As was seen earlier in *Easy Faith v Leonis Marine Management*,[101] there was no misrepresentation of the condition of the tow when she was described as being in 'light ballast condition'.

7.2 THE CONDITION OF THE TOW

The purpose of an implied obligation under common law or of the express obligation in the contract that the 'tow should be reasonably fit for the towage' is to ensure that

100 (1937) 59 LlL Rep 35.
101 [2006] 1 Lloyd's Rep 673.

the allocation of risk of: (i) extra expenses incurred by the tug to perform the contract, or (ii) damage done to the tow or the tug, or (iii) damage done to the third parties by reason of the tow's unfitness, is upon the tow-owner. Modern standard terms of towage contracts (see 7.2.2, below) provide for the obligation expressly and also for knock-for-knock provisions (as in TOWCON/TOWHIRE) for the allocation of risks between the parties (as will be seen later).

7.2.1 At common law

Whether or not the tow is in a seaworthy condition for towage will depend on the circumstances that have necessitated the towage; for example, a ship (either in ballast or with cargo on board) may have been damaged, or she may be disabled, and would need the assistance of a tug to reach destination safely, or the nearest port. Provided the position and condition of the tow has been made clear to the tug (as seen above), there can be towage where the tow has run into difficulties and would not be able, without the assistance of a tug or tugs, to withstand the ordinary perils of the sea. In such circumstances, it may not be considered seaworthy, and, if a tug accepts to undertake the towage, extra precautions will be needed, and the price will be fixed accordingly.

For example, in ***Gamecock Steam Towing Co Ltd v Trader Navigation Co Ltd***,[102] the towage concerned towing of a ship in a damaged condition. The ship had gone into the rocks at the entrance to Dartmouth harbour owing to the breakdown of her steering gear. She was temporarily repaired and made watertight. A certificate of seaworthiness was issued by Lloyd's Register. Then, her owners asked for towage, explaining the position to the tug company who accepted to tow her in the damaged condition from Dartmouth to Southampton. The agreement was for a lump sum, and that no salvage would be claimed. Problems arose during towage owing to leaking of the tow and the tug had to put her to Portland, which caused delays; the tug-owner claimed more money for salvage and expenses incurred. Goddard J held that, although the tug-owner had to perform extraordinary services, it was aware of the position and accepted to tow her in the conditions in which she was. The contract turned out to be unfavourable, but it was not entitled to claim salvage. It was awarded the additional sum offered by the tow in settlement and the cost of the action.

There is an implied obligation at common law that the tow will be in a reasonably fit condition for the towage that she requires.

In ***Elliot Steam Tug Co Ltd v Chester***,[103] *Chester* was described as an obsolete ship, meaning, as the judge said, she was out of date. Her owner planned to have her and another of his vessels towed to a break-up yard.

They engaged Elliot Steam (ES) (the tug-owners). The contract provided for a lump sum payment and that one tug would tow *Chester* to the destination. It turned out that the bottom of *Chester* was foul, and it was not safe to proceed to sea with one tug. The tow-owners stated that they always contemplated that there would be two tugs, and that it was ES's duty to ascertain the position and how many tugs were required. The dispute was about an extra payment for the use of two tugs. It was

102 (1937) 59 LlL Rep 170.
103 (1922) 12 LlL Rep 331.

recognised that, for the safety of the ship and for the avoidance of a disaster, two tugs were required, and it was held that the tow had to make the extra payment.

Hill J commented that, under a contract for the towage of an obsolete ship, there must be an implied obligation on the part of the tow that she is in a reasonably fit condition to be towed.

As the main issue in this case was whether the agreement was for one or two tugs for the safety of *Chester*, and whether the extra payment for the use of two tugs was due under the contract, there was no analysis about the implied obligation. In the circumstances of this case, the author made a short but cryptic comment in the previous edition of this book (2007, para 7.2) that: '*this case did not decide that the tow should be "seaworthy" in the strict sense of the word, but to be "fit to be towed", which is different*'. Without further explanation of this statement, it was capable of being misunderstood[104] and, for this reason, it is explained here: The implied obligation is relative, as it is also relative under contracts of affreightment, where the ship should be reasonably fit to withstand the perils of the sea that may foreseeably be encountered on the voyage and to keep her cargo reasonably safe from those perils.[105]

'Fitness to be towed', or tow-worthiness applies to varied circumstances and is relevant to the conditions, which the tow has encountered and (as seen above) necessitate towage, whereas, in the carriage of goods by sea cases, the obligation is relevant to the type of the particular ship carrying the particular cargo for the purpose of keeping the cargo reasonably safe. In that sense (as it was meant in the previous editions), the obligation that the tow should be 'fit to be towed' can be distinguished from the obligation of seaworthiness under the HVR for the carriage of goods by sea, where the ship-owner has a personal duty to exercise due diligence before and at the beginning of the voyage to make the ship seaworthy, properly man, equip and supply her and make the holds etc., in which goods are carried, fit and safe for their reception, carriage and preservation. The circumstances of towage situations vary considerably from one case to another, and the implied obligation that the tow should be in a reasonably fit condition for the towage should be understood in the context of the particular towage, that is, in the situation in which the tow is at the particular time.

In this connection, it is also stated in the third edition of *Tug and Tow* that:[106]

> What fitness entails will vary depending not only on the vessel to which it applies but also the operation for which it is to be fit and the circumstances in which that operation is to be carried out which will bear upon that fitness.

7.2.2 Express terms in the contract

The standard terms of contract, for example, cl 12 of the original TOWCON/ TOWHIRE and cl 18 of TOWCON 2008 form, titled 'Tow-worthiness of the tow', expand on the obligation and expressly provide that:

104 See op. cit. Rainey, S, at fn 1, para 2.71, where the quotation (see above) is inaccurately transposed.
105 See *Voyage Charters*, 3rd edn, 2005, Informa, p 213.
106 Op.cit. fn 1, para 2.72; the author has expanded on this issue in the 3rd edn (2011).

(a) The hirer shall exercise due diligence to ensure that the tow shall at the commencement of the towage be in all respects fit to be towed from the place of departure to the place of destination.
(b) The hirer undertakes that the tow will be suitably trimmed and prepared and ready to be towed at the time when the tug arrives at the place of departure and fitted and equipped with such shapes, signals, navigational and other lights of a type required for the towage.
(c) The Hirer shall supply to the Tug owner or the Tugmaster, on arrival of the Tug at the place of departure a certificate of tow-worthiness for the Tow issued by a recognised firm of Marine Surveyors or Survey Organisation, provided always that the Tug owner shall not be under any obligation to perform the towage until in his discretion he is satisfied that the Tow is in all respects trimmed, prepared, fit and ready for towage but the Tug owner shall not unreasonably withhold his approval.
(d) No inspection of the Tow by the Tug owner shall constitute approval of the Tow's condition or be deemed a waiver of the foregoing undertaking given by the Hirer.

There is an express obligation of the tow-owner under this clause to exercise due diligence to make the tow 'tow-worthy'. The tow must be fit with reference to the requirements of the towage needed and is assessed at the commencement of the towage.

In some towage contracts, such as in ***The Salviva***,[107] the obligation to make the tow seaworthy may be put upon the tug-owner. The relevant clause provided:

The tow to be prepared for towage by the tug owner and to the satisfaction of the tug owner and/or their master and provided with the necessary documents required for towage issued by a competent classification society (or Nippon Kaiji Kentei Kyokai).

If the tow becomes unseaworthy during the voyage for any reason whatsoever the seaworthiness to be re-established by the company and a new seaworthy certificate to be issued on tug owner's request.

P agreed with D to tow a crane barge from Japan to Alexandria. The tow was approved by the classification society, but it became unseaworthy during the course of towage, and P was put to expense. P claimed this expense from D, and Bingham J held that P was entitled to succeed. On appeal by D, the CA held that, upon a true construction of the towage contract, P had complied with all of its obligations under the contract and was entitled to an indemnity (see, further, under para 9.3, below).

7.3 DUTY TO EXERCISE DUE CARE AND SKILL DURING THE TOWAGE

This is an implied term in the contract and has been explained in *The Julia* case (summarised at para 6.4, above), but situations in towage vary, and, in some instances, it may be that the tow is powerless to do anything during towage. However, due care and skill should be exercised in the planning of towage, in navigation, and in co-operating with the tug throughout towage, (unless the tow is an unmanned barge, in which case the control in navigation is, completely, on the tug).[108]

107 [1987] 2 Lloyd's Rep 457.

108 E.g. see *The Devonshire* [1912] P 21 (HL); *The Abaris* (1920) 2 LlL Rep 411; *Minnie Sommers* (1921) 6 LlL Rep 398; *The Valsesia* [1927] P 115.

7.4 TO PAY REMUNERATION TO THE TUG

Towage is a service contract. Therefore, payment is made on completion of the service. Failure to perform towage, which has been fixed for a lump sum on arrival, will result in no remuneration. If the contract provides for payment 'per running day', then the tug, which has used best endeavours to complete, but failed to do so, will be remunerated for the work actually completed.

If, on the other hand, the contract is frustrated by an unforeseen and supervening event that had not been anticipated by the parties, but payment was made before the time of discharge from duties, as a result of a contractual obligation to pay, such sum shall be recoverable. Sums payable after the time of discharge shall cease to be payable. If the tug-owner, however, had incurred expenses for the performance of the contract before the time of discharge, the court may, if it considers it just to do so, allow the tug-owner to retain or recover the whole or part of the sum so paid or payable (s 1(2) of the Law Reform (Frustrated Contracts) Act 1943).[109]

8 RELATIONSHIP BETWEEN TUG AND TOW AND THEIR LIABILITIES TO THIRD PARTIES

8.1 LIABILITY BETWEEN TUG AND TOW UNDER THE UKSTC

The obligations and liabilities between the tug and tow are governed by express or implied terms of the contract. In standard form contracts, it is usually provided that the crew of the tug are deemed to be the servants of the tow. For example, cl 3 of the UKSTC 1986 states:

> Whilst towing or whilst at the request, express or implied, of the hirer, rendering any service other than towing, the master and crew of the tug or tender shall be deemed to be the servants of the hirer and under the control of the hirer and/or his servants and/or his agents, and anyone on board the hirer's vessel who may be employed and/or paid by the tug owner shall likewise be deemed to be the servant of the hirer and the hirer shall accordingly be vicariously liable for any act or omission by any such person so deemed to be the servant of the hirer.

This clause effectively transfers the risks – arising from the negligence of a tug's officers and crew, or other employees of the tug owner – while towing (see cl 1(b)(iv)) or while rendering any other services at the request of the hirer, upon the tow. Under ordinary common law principles, an employer is, by law, vicariously liable for the negligence of his servants under the principle of 'responder superior'. In towage situations under UKSTC, the tow will be vicariously liable also for the negligence of

109 Generally, as to principles of frustration and *force majeure* clauses, see McKendrick, E (ed), *Force Majeure and Frustration of Contract*, 2nd edn, 1995, LLP. In a case of a slightly different context, *The Sea Angel* [2006] 2 CLC 600 and [2007] EWCA (comm) 12.6.07 (CA) (see Ch 10), the CA approved the judgment of Gross J that the detention of the tug by the port authorities in Karachi was not a frustrating event to render the charterparty frustrated, although the delay was inordinate. The judge thought the detention was an ordinary incident of salvage operations, particularly when pollution risk is involved.

the tug's master or crew during towage, because they are temporarily made the servants of the tow by agreement.

If damage occurs to the tow owing to the negligence of the tug's servants, the tow-owner cannot claim, against the tug-owner, damages sustained by the tow (cl 4(a)). Moreover, if damage occurs to the tug owing to the negligence of those on board it, the tow-owner will be liable to the tug-owner for such damage (cl 4(b)).

In ***The President Van Buren***,[110] decided before the use of the UKSTC, there was a similar clause to cl 3, above, in the contract. S was one of the tugs engaged to tow the PVB, and they collided owing to the negligence of the tug. It was held that the clause achieved what it set out to do, which was to make the master and crew of the tug the servants of the owners of the tow for the purposes of towage and for all other purposes connected thereto. It was also clear from the contract that the owners of the tow undertook to pay for any damage caused to property belonging to the tug-owner.

The provisions under UKSTC make these types of standard term imbalanced. For more balanced contractual provisions see TOWCON/TOWHIRE under para 12. With regard to the extent of exception from liability clauses, see para 9.1, below.

8.2 TUG, TOW AND THIRD PARTIES

The contractual provisions of allocation of risk between tug and tow are only relevant between the parties to the contract. If third parties suffer loss owing to the negligence of either the tug or tow, they are not concerned with the contractual arrangements as between them. Clause 3 (above) has no effect upon third parties' rights to claim damages for loss caused by the negligence of the servants of either tug or tow. The usual rules of liability arising from breach of duty of care at common law will apply.

However, confusion surrounded this area in the past with regard to who would be liable, the tug or the tow; this was due to a conflict that had arisen about how liability was to be allocated. By way of background, the two conflicting theories are, briefly, explained.

8.2.1 The 'unit' and the 'control' theories

Under the unit theory, both tow and tug were regarded as being one unit, so that the faulty navigation of the tug was attributable to the tow, in any event, in accordance with the rule of undivided command. The control theory is based on deciding which of the two is in control of the particular act of navigation that causes the damage (see, further, Chapter 9, above).

8.2.1.1 Examples of applying the unit theory

Cases decided on the basis of the 'unit' theory produced peculiar results. For example, in ***The Singuasi***,[111] in which the tug negligently caused a collision by turning to port without orders from the pilot on board the tow, the tow was held liable to the third

110 (1924) 19 LlL Rep 185.
111 (1880) 5 PD 241.

party, because the tug was regarded as a unit with the tow. This concept was elaborated in the leading authority of ***The Niobe***.[112]

The Flying Serpent was towing *The Niobe* and came into collision with *The Valetta*, resulting in severe damage to her and, ultimately, her sinking, with two members of her crew being drowned. *The Niobe* also collided with *The Flying Serpent*, but no damage resulted from that collision. It was found that the collision was partly caused by bad lookout, on the part of *The Niobe*, and her failure to warn the tug that she was on a collision course. It was held that the collision was due to the fault of both the tug and *The Niobe*.

At first instance, Sir James Hannen applied a test based on the control theory by which the tow was to be considered always in control of towage, except in cases when the tug takes over a particular manoeuvre:

> . . . [It] appears to me that the authorities clearly establish that the tow has, under the ordinary contract of towage, control over the tug. The tug and tow are engaged in a common undertaking, of which the general management and command belongs to the tow, and in order that she should efficiently execute this command it is necessary that she should have a good lookout and should not merely allow herself to be drawn, or the tug to go, in a course which will cause damage to another vessel.[113] . . . [But] if it had been shewn that *The Flying Serpent* had, by some sudden manoeuvre, which those on board *The Niobe* could not control, brought about the collision, I should have held *The Niobe* blameless.[114]

At the House of Lords,[115] the case was between the owners of *The Niobe* and their insurers; the owners sought to recover under their insurance policy what they had paid to the owners of *The Valetta*. One of the underwriters refused to pay, on the ground that the insurers would only be liable if the damage arose from a 'collision' between *The Niobe* and the other ship, not just a collision between the tug and the other ship.

The majority of the Lords held that *The Niobe* was, in the contemplation of the law, one and the same ship with her tug, for all purposes of their joint navigation. Therefore, within the meaning of the insurance policy, the collision between the tug and *The Valetta* must be taken to have been a collision of *The Niobe* with *The Valetta*. The underwriters were liable.

Although the judge in the collision action had found the tow liable, on the ground that it was in control of the towage operation, the House of Lords, in the insurance claim, arrived at the same result by applying the notion of the 'unity' between tug and tow.

8.2.1.2 Examples of the control theory

The House of Lords found the opportunity, 20 years later in ***The Devonshire***,[116] to analyse the position of tug and tow liability to third parties by taking into consideration which of the two, on the facts, was in control of navigation at the

112 (1888) 13 PD 55 (HL).
113 Ibid, p 59.
114 Ibid, p 60.
115 [1891] AC 401.
116 [1912] AC 634, Reference is made to old authorities, which are useful in explaining the judicial acceptance of this theory.

particular time. The artificial notion of a unity between tug and tow, regardless of who was in control, was rejected. It was held that: it must be taken as conclusively established that the question of the identity of the tow with the tug that tows her is one of fact, not law, to be determined upon the particular facts and circumstances of each case.

The control theory emerged from a pragmatic view of towage situations and allows the court to look upon the facts of each case, instead of ascribing control to the tow as a matter of a presumption, for reasons of expediency and avoidance of a divided command.

The principles that derive from *The Devonshire* are as follows:

(a) when a tug has undertaken towage of an unmanned boat or craft and there is a collision between either the barge or the tug and a third vessel, the tug, which must, in such circumstances, have been in control of the situation, will be responsible, if it can be established that the negligence of those on board the tug caused or contributed to the collision;
(b) when the tow has officers and crew on board, they should be able to be in control of navigation and warn the tug of dangers in compliance with the collision regulations and seamanship skill. Equally, those on board the tug will have a duty to exercise due care in navigation and will be in control of towage operations depending on the circumstances. To determine which of the two was in control of a particular manoeuvre, which caused a collision, will be a question of fact and the particular circumstances in each case;
(c) a third innocent party who has suffered damage owing to the negligence of the other two can sue either of them for the whole loss. This issue is explained further below.

The Collision Regulations of 1972 apply to tugs and tow, and both have a duty to observe them.[117] In addition to the regulations, which apply generally to all vessels, there are special provisions dealing with towage situations, for example Reg 21 deals with 'towing lights', or Reg 27 specifies additional lights to be displayed by certain towing vessels. Although there is no presumption of fault for breach of these regulations by any vessel, failure to observe the regulations constitutes evidence on which the plaintiff may rely in showing breach of the duty of care owed to other vessels at sea.[118]

8.2.2 Control and the 'two employers' conundrum

Despite the contractual arrangement that the tug's crew are to be regarded as employees of the tow, as far as third parties are concerned, the issue as to which of the employers will take responsibility was raised in ***Mersey Docks and Harbour Board v Coggins and Griffiths***:[119] the House of Lords held that, where an injury is caused by the negligence of a servant who is, with the consent of his general

117 There are numerous cases of breach of the Collision Regulations (lookout rule, speed, warning on danger etc.): see, e.g. *The Basis* (1950) 84 LlL Rep 306, when both tug and tow were in breach of the duty to obey those regulations. See, further, Ch 9, above.

118 See Ch 9, above.

119 [1947] AC 1 (HL).

employer, doing work for a temporary employer, the general employer is prima facie responsible to the injured party. To shift the responsibility on to the shoulders of the temporary employer,[120] the general employer must prove that the temporary employer has authority to direct or to delegate to the servant the manner in which work is to be done. A crane driver employed by a harbour board was hired by stevedores, with his crane, to load a ship. While working his crane, the driver negligently injured an employee of the stevedores. It was held that the negligence lay in the manner in which the work was performed, which was not under the control of the stevedores (the temporary employer), and, consequently, the harbour board was liable.

Thus, as against a third party who is injured by the act of a servant of the tug, liability will depend on who was in control of navigation at the particular time of the injury, which is a question of fact. Should it be found, on the facts, that the tug had been in control at the time of the incident, and liability to the third party is adjudged against it, then the tug-owner can invoke the indemnity clause of the contract (cl 4 of UKSTC) to recover from the tow in respect of its liability to the third party (*The Atlantic and The Wellington*).[121]

In ***The Panther and The Ericbank***,[122] the steam barge *Trishna* came into collision with the tug of *The Ericbank* as she was proceeding inward-bound up the Manchester Ship Canal. *The Ericbank* failed to signal to her tug that they were passing *Trishna*, and the tug, without orders from the tow, made a manoeuvre resulting in a collision with *Trishna*. The tug's propeller, which was improperly left revolving, struck *Trishna* repeatedly, after which *Trishna* sank. The contract between the owners of *The Ericbank* and the tug-owners deemed the crew of the tug to be the servants of the tow. It was found that the damage done to both vessels by the actual collision was minimal, but the cause of the damage to *Trishna* was the continuous revolving of the tug's propeller. The tug-owners sought to rely on the contractual term in order to escape liability to the third party.

Willmer J stated the effect of the House of Lords' decision in *Mersey Docks and Harbour Board v Coggins and Griffiths*[123] to be as follows:

> . . . as between themselves, these parties agreed that the crew of the tug should be deemed to be the servants of the owners of the tow. But, as against a third party who is injured by the act of a servant, the question which of two possible masters is liable (the regular employer or the temporary employer to whom the servant is loaned) does not depend on the terms of the contract made between the respective employers; it depends upon which employer has the right to control the servant, not only as to what he is to do, but as to the way he is to do it. Moreover, it has been held that where the servant of one employer is temporarily loaned to another, it requires cogent evidence to prove that the latter has acquired such a degree of control over the servant as to render him, rather than the regular employer, liable in the event of negligence on the part of the servant.[124]

He stated further:

> Here, however, the faulty manoeuvre of failing to stop the port propeller in time was a matter which concerned the tug alone and not the tow, and in such circumstances, I hold that the

120 See further liability for the negligence of a pilot on board the ship in Ch 13, below.
121 (1914) 30 TLR 699; see para 9.2, below.
122 [1957] P 143.
123 [1947] AC 1 (HL).
124 Op. cit. fn 122, p 143, 147.

liability for the negligence of the mate of *The Panther* [the tug] rests with his regular employers, the owners of *The Panther*.[125]

The faults of the tug and tow were distinct and separate, and, accordingly, the blame should be apportioned between all three vessels (see Chapter 9).

In a more recent case concerning negligence on the part of both salvors and the crew of the oil rig being salved, ***The Key Singapore***,[126] Steel J held, on appeal against the arbitrator's award, that where both those on board the rig and those on board the tugs had failed in their respective duties (the one by failing to order the tugs to heave to, and the other by failing to advise that the order given was flawed), the assessment of relative responsibility under Art 18 of the Salvage Convention was not made by reference to the fact that those on board the rig were in overall charge of the tow. It was necessary to assess the causative potency and blameworthiness of the salvor's faults, being relative to the causative potency and blameworthiness of the rig's faults. There was nothing in the case law to support the proposition that overall command of a towage convoy imported with it an enhanced degree of fault, in circumstances where both tug and tow had fallen short of their mutual duty to take care. The appeal arbitrator was, therefore, entitled to conclude, as he did, that those on board the rig and those on board the tugs were equally at fault.

A very useful guide with regard to finding out who of the two masters might be exercising control, or whether it is possible to have a dual vicarious liability of the two employers, the general and the temporary one, was provided by both May LJ and Rix LJ in ***Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd***.[127] They considered the various points made by their Lordships in the *Mersey Docks* case (above), thus:

Per May LJ:

The opinions make clear that decisions of this kind depend on the particular facts and that many factors may bear on the result (see Lord Porter at p 17). In assessing the facts, certain considerations will or may be relevant. These include: (a) the burden of showing that responsibility does not remain with the general employer, is on the general employer and is a heavy one (Viscount Simon at p 10, Lord Macmillan at p 13, Lord Uthwatt at p 21); (b) by whom is the negligent employee engaged? Who pays him? Who has power to dismiss him (Lord Simon at p 10)? In the present case, the answer to these questions is that it is the general employer, the third defendants; (c) who has the immediate direction and control of the relevant work (Lord Simon at p 10, Lord Porter at p 16)? Who is entitled to tell the employee the way in which he is to do the work upon which he is engaged (Lord Porter at p 16, Lord Uthwatt at p 23: 'The proper test is whether or not the hirer had authority to control the manner of execution of the act in question. Given the existence of that authority its exercise or non-exercise on the occasion of the doing the act is irrelevant'); (d) the inquiry should concentrate on the relevant negligent act, and then ask whose responsibility it was to prevent it (Lord Simon at pp 10, 11). In the Mersey Docks case, the stevedores had no responsibility for the way in which the crane driver drove his crane, and it was this which caused the accident (Lord Simon at p 12, Lord Macmillan at p 13, Lord Simonds at p 18). The ultimate question may be, not what specific orders or whether any specific orders were given, but who is entitled to give the orders as to how the work should be done (Lord Porter at p 17); (e) a transfer of services can only be effected with the employee's consent (Lord Porter at p 15, Lord Uthwatt at p 21);

125 Ibid, p 149.

126 *Owners of the Maridive v Owners and Demise Charterers of the Key Singapore (The Key Singapore)* [2005] 1 Lloyd's Rep 91.

127 [2005] 4 All ER 1181, at para 7.

(f) responsibility should lie with the master in whose act some degree of fault, though remote, may be found (Lord Simonds at p 18).

May LJ concluded that, on the facts of this case, both defendants were equally entitled (and in theory obliged) to control the negligent fitter, and, there being no rule of law rendering dual vicarious liability impermissible, both defendants were liable. Rix LJ accepted this approach and commented:

The remaining question is to attempt to define the circumstances in which the liability should be dual. It is possible that where the right to control the method of performance of the employee's duties lies solely on the one side or the other, then the responsibility similarly lies on the same side. That reflects the significance of Lord Esher MR's doctrine of entire and absolute control. If so, then it will only be where the right of control is shared that vicarious liability can be dual. I would agree that the balance of authority is in favour of this solution. On this basis, I agree with May LJ's analysis of the facts in this case as demonstrating a situation of shared control. I would go further and say that it is a situation of shared control where it is just for both employers to share a dual vicarious liability.[128]

Rix LJ went on to consider how, in subsequent cases, the imposition of dual vicarious liability might be refined:

However, I am a little sceptical that the doctrine of dual vicarious liability is to be wholly equated with the question of control. I can see that, where the assumption is that liability has to fall wholly and solely on the one side or the other, then a test of sole right of control has force to it. Even the Mersey Docks case, however, does not make the control test wholly determinative. Once, however, a doctrine of dual responsibility becomes possible, I am less clear that either the existence of sole right of control or the existence of something less than entire and absolute control necessarily either excludes or respectively invokes the doctrine. Even in the establishment of a formal employer/employee relationship, the right of control has not retained the critical significance it once did. I would prefer to say that I anticipate that subsequent cases may, in various factual circumstances, refine the circumstances in which dual vicarious liability may be imposed. I would hazard, however, the view that what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence . . .[129]

One is looking therefore for practical and structural considerations. Is the employee, in context, still recognisable as the employee of his general employer and, in addition, to be treated as though he was the employee of the temporary employer as well? Thus in the Mersey Docks situation, it is tempting to think that liability will not be shared: the employee is used, for a limited time, in his general employer's own sphere of operations, operating his general employer's crane, exercising his own discretion as a crane driver. Even if the right of control were to some extent shared, as in practice it is almost bound to be, one would hesitate to say that it is a case for dual vicarious liability. One could contrast the situation where the employee is contracted-out labour: he is selected and possibly trained by his general employer, hired out by that employer as an integral part of his business, but employed at the temporary employer's site or his customer's site, using the temporary employer's equipment, and subject to the temporary employer's directions. In such a situation, responsibility is likely to be shared. A third situation, where an employee is seconded for a substantial period of time to the temporary employer, to perform a role embedded in that employer's organisation, is likely to result in the sole responsibility of that employer.[130]

128 Ibid, at para 78.
129 Ibid, at para 79.
130 Ibid, at para 80.

9 EXCLUSION FROM LIABILITY AND INDEMNITY CLAUSES

At common law, the tug owner will be liable for damage to the tow caused by the tug's negligence. Under the UKSTC 1986, the tug owner is protected by an exemption from such liability, as well as by an indemnity for liability that might be incurred by negligence of the tug to third parties. It has been explained earlier that the UCTA 1977 does not apply to towage contracts, except insofar as the tow–owner deals as a consumer. By contrast, the TOWCON form (see para 12, below) places the parties on an equal footing, and each one will bear its own loss. There is also cross-indemnity provision for liability incurred to third parties.

9.1 THE AMBIT OF THE EXCEPTION CLAUSES

Exclusion from liability clauses must be drafted in clear terms. Vague and wide clauses will be construed against the person claiming benefit from them, under the rules of construction of contract terms. Careful drafting is essential to managing the risks the parties wish to prevent from happening.

However, an exception clause will not assist the tug-owner if it aims to exclude the very thing the tug-owner was contracted to do (*The Cap Palos*), or if it attempts to negate the object of the contract (*The Sumi Maru*).

In ***The Cap Palos***,[131] the exception clause in the towage contract provided that the tug-owner would not be responsible (inter alia) for,

> any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed . . . whether such damage arise from or be occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug owner, or any of his servants or employees . . .

The facts of this case are seen earlier; the defendant (tug) left the CP grounded without assistance, whereupon she drifted onto the rocks and became a constructive total loss. In an action by the plaintiffs for the loss of their vessel, the defendant pleaded the exception clause.

The CA, reversing Hill J, held that, as the defendant had, at any rate temporarily, given up any attempt to continue the towage and had left the performance of his duty to others, he could not avail himself of the words 'default of the steam tug owner', which only extended to cover defaults during the actual performance of the duties of the contract. It was not clear enough to exclude liability for 'not doing the thing contracted for in the way contracted for'.

In ***The Sumi Maru***,[132] the exclusion of liability clause was very wide, and it is important to quote it in full:

> Tug owners shall not be responsible for any loss, damage or delay whatsoever to the tow or any of the cargoes on board or for failure to undertake and/or complete the towage services however caused whether due to any unseaworthiness or defect in or breakdown of the tug or to the unfitness of any gear employed, shortage of fuel, bunkers from whatever cause, or other unforeseen circumstances or to the act of God, perils of the sea, fire, snow, ice barratry or negligence of the master or crew, arrest or restraint of princes, rulers or people, strikes, labour

131 [1921] P 458 (CA); see, also, para 5.2, above.

132 1993 1 SLR 198; see, also, para 6.1.1, above.

disturbances or civil commotion, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, gear or appurtenances, collision, stranding or other accidents of navigation even when occasioned by the negligence, default or error in judgment of the pilot, master or crew of the tug or any other servants of tug owners or for any personal injury or loss of life to persons on the employ of contractor or any third party; and contractor shall relieve tug owners from and indemnify them against all such loss, damage, injury or liability and against all claims whatsoever arising out of or in respect of such matters including any costs, charges or expenses which tug owners may incur or may be put to in defending any such claims.

The CA of Singapore held that the clause should not be construed in such a way as to render the whole contract nugatory, or defeat the object that both parties had in view, or to make the contract become nothing more than a statement of intent. 'Failure to undertake and/or complete the towage services, however caused, cannot possibly extent to and include an intentional and deliberate failure or refusal to perform an obligation under the contract.'

In ***The Carlton***,[133] the terms of the towage contract between the plaintiff and the port authority (the defendants) contained a clause stating:

. . . the owners of the ship . . . so being towed or transported hereby agree and undertake to indemnify and hold harmless the Port Authority against all claims for or in respect of . . . loss or damage of any kind whatsoever and howsoever or wheresoever arising in the course of and in connection with the towage or transport, and whether such loss, injury or damage be caused or contributed to by any negligence, default or error in judgment on the part of any officers or servants whatsoever of the Port Authority . . .

The plaintiff's steamship suffered damage, when in tow by the defendant port authority's tugs, owing to wrong signals negligently given by the defendants' lock foreman. The lock foreman had signalled to the plaintiff's ship in tow of the defendants' tugs to enter into the Cutting. About the same time, he also signalled to another tug to enter the Cutting from the opposite end. In an attempt to avoid a collision, the plaintiff's steamship made a wrong move astern. As a result, she got out of position and struck the walls of the Cutting and suffered damage. The port authority was sued by the plaintiff (owner of the tow), and the authority sought to rely on the above clause, alleging that, if its servants were guilty of negligence, the port was under no liability to the plaintiffs. It also counterclaimed for the damage done to the side of the Cutting.

The issue was whether the above clause was just an indemnity against third-party claims, or whether it was also a clause under which the hirer was prevented from recovering for damage to his own ship.

Bateson J came to the conclusion (at p 194) that the clause was no more than an indemnity against third-party claims and did not prevent a claim by the hirer. There was no part in this clause that protected the port from claims due to the negligence of its own servants that did not arise in the course of and in connection with the towage. The damage here did not arise in connection with the towage, but it arose in the course of signalling that the road was clear for *The Carlton* to proceed. Clearer terms would be required in the contract to protect the authority from such negligence.[134] Accordingly, the plaintiffs were entitled to recover the amount of the damage caused by the negligence of the defendants' servant.

133 [1931] P 186.

134 *The Carlton* was later approved by the CA in *The Lindenhall* [1945] P 8.

The UKSTC have a wide and fairly clear clause of exclusion of liability. Clause 4(a) provides:

Whilst towing, or whilst at the request, either expressed or implied, of the hirer rendering any service of whatsoever nature other than towing:

(a) the tugowner shall not (except as provided in cl 4(c) and (e) hereof) be responsible for or be liable for
  (i) damage of any description done by or to the tug or tender, or done by or to the hirer's vessel or done by or to any cargo or other thing on board or being loaded on board or indented to be loaded on board the hirer's vessel or the tug or tender or to or by any other object or property; or
  (ii) loss of the tug or tender or the hirer's vessel or of any cargo or other thing on board or being loaded on board or indented to be loaded on board the hirer's vessel or the tug or tender or any other object or property; or
  (iii) any claim by a person not a party to this agreement for loss or damage of any description whatsoever;

arising from any cause whatsoever, including (without prejudice to the generality of the foregoing) negligence at any time of the tug owner, his servants or agents, unseaworthiness, unfitness or breakdown of the tug or tender, its machinery, boilers, towing gear, equipment, lines, ropes or wires, lack of fuel, stores, speed or otherwise.

The question whether a serious breach of the contract by the tug-owner will render exception clauses inoperative depends on the construction of the contract as a whole.[135]

It was once thought that a fundamental breach gave the court power to declare that such a breach overrode express contractual terms, exempting the guilty party from liability under the contract. Such a rule was abandoned by the House of Lords in *Photo Production v Securicor* and, since 1980, it has been definitively settled that there is no such thing as a fundamental breach that is not excludable by an exception clause. The parties are free to put what they like into their contract, provided the exclusion clause does not defeat the object of the contract. If the parties agree that a breach should not be actionable, the agreement is binding. The rule is that the court should look at the intention of the parties, as it can be deduced from the wording of the clause, viewed in the context of the contract. The construction of exclusion clauses in some old decisions, for example *The Refrigerant*, *The Cap Palos*, *The Carlton* (discussed also under para 5.2), would be in line with the present principle.

The parameters of the exception in cl 4(a) of UKSTC are limited by the first two lines of the clause, and the tug-owner must show that the incident took place 'whilst towing' or 'whilst at the request'.

In ***The Impetus***,[136] when the tug had come along on a parallel course to the tow for the purpose of receiving the towlines, a collision occurred. The argument was that it was not ready to receive orders, and so the exception from liability did not cover the tug, as the collision was outside the scope of 'whilst towing'. It was held that the tug was in a position to receive orders. The fact that no orders had been given until after the collision occurred was irrelevant. Therefore, the tug was protected by the exception clause.

135 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

136 [1959] 1 Lloyd's Rep 269, it applied *The Glenaffric* (1948) 81 LlL Rep 174; see para 5.1, above.

The wording of the clause shows fairly clearly what the parties intended to exclude from liability. If there is an interruption of towage (and assuming there is no impossibility to perform), the question whether or not the exclusion from liability will avail the tug-owner will depend on whether he can show that he did not stop doing what he had been contracted to do.

Clause 4(b) deals with indemnity of the tug by the tow (see para 9.2, below).

Clause 4(c) qualifies cl 4(a) and renders the tug liable in certain limited situations (see para 9.3, below, and para 6.1.3, above).

Clause 4(d) stipulates that the tug-owner shall under no circumstances whatsoever be responsible or be liable for any loss or damage caused by, or contributed to, or arising out of delay, or detention of the hirer's vessel or of the cargo on board.

Clause 4(e) prohibits the tug's exception from liability for death or personal injury.

Clause 7 also contains a sub-clause exempting the tug-owner from liability for the consequences of war, riots or other unforeseen conditions or delays of any description, even if caused by the negligence of the tug-owner or his servants.

The TOWCON/TOWHIRE clauses are seen under para 12, below.

9.2 INDEMNITY CLAUSE

In all contracts, the importance of using clear language in the drafting has been stressed throughout this book. This is more so with respect to exception or indemnity clauses. Parties claiming the benefit of such clauses may find themselves victims of ambiguous drafting if they do not express their intentions clearly. Prior to the standard terms of towage contracts there had been very wide exception clauses; the following case illustrates why the tug-owner was unable to recover an indemnity from the tow-owner for the liability incurred to a third party owing to the negligence of the tug's servants.

The Devonshire and The St Winifred[137] **(or *Devonshire No 2*)**

A laden barge, while in tow of a tug, owned by the Manchester Ship Canal Company, was sunk in the Mersey after a collision with a steamship, and the owners of the lost cargo commenced an action for damages against the steamship and the tug. The tug-owners brought in the owners of the barge as third parties for a declaration that they were entitled to be indemnified by the barge-owners under the terms of a 'towage requisition' in respect of any sum to which they (the tug-owners) might be liable to a third party, the cargo-owners on board the barge.

The 'towage requisition' contained a long clause excepting the tug-owners from any liability, providing:

> The tug owners were not to be responsible or liable for damage or injury to any ship vessel or craft, or the persons or goods on board any ship vessel or craft, of which the company may undertake the towage or docking in the river Mersey . . . or which may be piloted by any of their servants to or from any place in the river Mersey . . . or for any loss sustained or liability incurred by any one by reason of such damage or injury, or for any loss or liability incurred in consequence of any such ship, vessel, or craft colliding with or otherwise damaging any other vessel or thing, or for any loss or liability of any kind whatsoever arising from the towing,

137 [1913] P 13.

docking or piloting whatever may be the cause or causes of such damage, injury, loss or liability, or under whatever circumstances such damage, injury, loss or liability may have happened or accrued, even though arising from or occasioned by the act, omission, incapacity, negligence or default, whether wilful or not, of the company's servants or agents or any other persons, or any defect, imperfection, or insufficiency of power in or any delay, stoppage or slackness of speed of any tug or vessel, her machinery or equipment engaged in towing or docking any ship, vessel or craft, whether such defect, imperfection or insufficiency of power be in existence at the beginning of or during the said towing or docking.

The argument for the tug-owners was that they were relieved by the contract from all liability and from all loss, however incurred or caused, while the towing was carried out; consequently, there was in their contract with the barge-owners an implied term that they should be indemnified for all such liability or loss so incurred. Authorities such as *Hamlyn v Wood*,[138] *The Moorcock*[139] and *Kruger & Co v Moel Tryvan Ship Co*[140] were relied upon.

Sir Samuel Evans held:[141]

In my view the contract in this case is an ordinary business contract which speaks for itself, and which does not require any implied term to give it efficacy, or to give it the effect which was intended by the parties. Dealing with contracts of indemnity and third party procedure, Bowen LJ in *Birmingham and District Land Co v London and North Western Rly Co.*[142] says as follows:

'I think it tolerably clear that the rule' – that is, the third party rule – 'when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of 10, a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract: by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do. I say in nine cases out of 10, for there may possibly be a 10th. Thus, there might be a statute enacting that under certain circumstances a person should be entitled to indemnity as such, in which case the right would not arise out of contract, and I do not say that there may not be other cases of a direct right in equity to an indemnity as such which does not come within the rule that all indemnity must arise out of contract express or implied.'

The contract in this case is between A (the tug owners) and B (the barge-owners). It means that A is not to be responsible or liable to B for damage, injury, or loss however occasioned: not that A is not to be responsible or liable to anyone. In the circumstances of this case A was responsible and liable to, and suffered judgment at the suit of, other persons, namely, the cargo-owners, for the negligence of A.

A seeks to say, not merely 'I shall not be responsible or liable to you, B, for any damage, injury, or loss, which may in any way arise out of the towage', but, further, 'You, B, are responsible and liable to me, A, for any such damage, etc., for which I may be responsible or liable to the rest of the world'. The contract does not say so.

I do not believe that the parties intended that it should impliedly mean that. To make such an implication is not in any sense necessary for the efficient performance of the contract. To introduce such an implied term would, I think, be to make a wholly different contract from that which was made, or which the parties intended to make.

138 [1891] 2 QB 488.
139 (1889) 14 PD 64.
140 [1906] 2 KB 792, [1907] AC 272.
141 Op. cit. fn 137, pp 19–20.
142 [1886] 34 Ch D 261, p 274.

An attempt was made therefore by cl 4(b) of UKSTC 1986 to define the circumstances in which the tug-owner can claim an indemnity from the hirer. Clause 4(b) of UKSTC provides:

> The hirer shall (except as provided in cl 4(c) and (e)) be responsible for, pay for, and indemnify the tug owner against and in respect of any loss or damage and any claims of whatsoever nature or howsoever arising or caused, whether covered by the provision of cl 4(a) hereof or not, suffered by or made against the tug owner and which shall include, without prejudice to the generality of the foregoing, any loss of or damage to the tug or tender or any property of the tug owner even if the same arises from or is caused by the negligence of the tug owner his servants or agents.

This express indemnity clause is very wide and covers liabilities incurred by the tug-owner to third parties, as well as damage to or loss of the tug, or any other property of the tug-owner, regardless of his servants' negligence. It is an unfair bargain for the tow, but the parties (engaged commercially) are free to agree their terms. The words 'claims of whatsoever nature or howsoever arising' include a salvage claim brought by third-party contractors for their efforts to save the tug or tow if, owing to the tug's negligence, such salvage assistance became necessary.[143]

By contrast, an equal bargaining is struck by the TOWCON contract, in which neither the tug owner nor the hirer will have recourse against each other for either damage or loss to themselves or damage or loss to third parties caused by the negligence of their respective servants or agents (see under para 12, below).

9.3 LIMITATIONS TO EXCLUSION AND INDEMNITY CLAUSES

As seen (under paras 9.1 and 9.2, above), the risk of towage under the UKSTC, for accidents, negligence, delay and any damage of whatever nature caused to either tow or tug or third parties howsoever arising, is put on the tow, provided such risks occur 'whilst towing', as defined in cl 1(b)(iv) (see para 5.1, above).

The benefit of exclusion from liability and indemnity provisions in favour of the tug-owner is, however, restricted by cl 4(c), which provides:

> The provisions of clause 4(a) and 4(b) hereof shall not be applicable in respect of any claims which arise in any of the following circumstances:
>
> (i) All claims which the hirer shall prove to have *resulted directly and solely from the personal failure* of the tug owner to exercise reasonable care to make the tug or tender seaworthy for navigation at the commencement of the towing or other service. For the purpose of this clause the tug owner's personal responsibility for exercising reasonable care shall be construed as relating only to the person or persons having the ultimate control and chief management of the tug owner's business and to any servant (excluding the officers and crew of any tug or tender) to whom the tug owner has specifically delegated the particular duty of exercising reasonable care and shall not include any other servant of the tug owner or any agent or independent contractor employed by the tug owner.

143 In *The Walumba* [1965] 1 Lloyd's Rep 121, a salvage claim was recoverable under the indemnity clause, which provided to indemnify the tug-owner against all consequences thereof; see also *The Riverman* [1927] 29 Ll Rep 80.

This seems to be straightforward in disallowing the tug owner from relying on the protective clauses of the contract for any damage caused to the tug or tow or third parties, upon proof by the tow owner that the tug owner failed personally to exercise reasonable care to make the tug seaworthy and that unseaworthiness was the direct and sole cause of the loss.

In ***Borvigilant and Romina G***,[144] one of the issues between the parties related to the effect of equivalent clauses to cl 4(a) and (b) in the contract providing, 'where relevant loss is caused by want of reasonable care on the part of the Company to make the tug seaworthy for the navigation of the tug during towage operations or other services'. The judge held that, in the event of causative unseaworthiness attributable to the want of due diligence, neither the defence to the liability for loss nor the indemnity are available. This was upheld by the CA.

The fault must be personal to those who represent the ego of the company, or the alter ego of the company, and the clause helpfully defines who they are: they are those who have ultimate control and chief management of the company, or those servants (except the ship-officers and crew) who are specifically delegated to carry out the particular duty.[145] The clause goes further to clarify that no other servants, agents or subcontractors are included in this category.

As the clause makes it clear that the duty is personal, it means that it is non-delegable (the rule of *The Muncaster Castle* – as discussed under para 6.1.3, above – should apply, in that the tug-owner would not be able to disclaim liability arising from the tug's unseaworthiness by the fact that he delegated the duty to independent contractors to check the condition of the tug).

A similar provision found in the Baltime charterparty in ***The Brabant***[146] was explained in this light by McNair J, who said that the submission, that 'want of due diligence' on the part of the owner to make the ship seaworthy referred only to personal default (emphasis added) of the owners, was erroneous; the fallacy in this was that it fails to realise that a breach of a personal obligation, which cannot be delegated, may arise either by personal default on the part of the person subject to that obligation, or the default on the part of the servants or agents whom the owner employs to perform the work involved in the obligation; the above submission confuses the *obligation* that is personal to the owners with the *performance* of that obligation, which may or may not be personal.

The clause deals also with causation and makes it clear that the hirer must prove that the loss *resulted directly and solely from the personal failure*. If the loss involved concurrent causes or contributing causes, the hirer will not be able to discharge the burden of proof as required by the clause.

The relevant time of exercising the duty is the time of commencement of the towage, and not if the tug became unseaworthy afterwards. Thus, if by the fault of servants of the tug-owner, the tug becomes unseaworthy during the performance of the towage, such incident will not be caught by cl 4(c)(i).

144 [2003] EWCA Civ 935, [2003] 2 Lloyd's Rep 520 (CA).

145 See Ch 4, above, for the analysis of the rule of attribution of liability to a company in the context of statutes and Conventions.

146 [1965] 2 Lloyd's Rep 546, at 554–555.

The second sub-paragraph of clause 4(c) provides:

The provisions of clause 4(a) and 4(b) hereof shall not be applicable in respect of any claims which arise in any of the following circumstances:

(ii) All claims which arise when the tug or tender, although towing or rendering some service other than towing, *is not in a position of proximity or risk* to or from the hirer's vessel or any other craft attending the hirer's vessel *and is detached from and safely clear of any ropes*, lines, wire cables or moorings associated with the hirer's vessel. Provided always that notwithstanding the foregoing, the provisions of cl 4(a) and (b) shall be fully applicable in respect of all claims which arise at any time when the tug or tender is at the request, whether express or implied, of the hirer, his servants or his agents, carrying persons or property of whatsoever description (in addition to the officers and crew and usual equipment of the tug or tender) and which are wholly or partly caused by, or arise out of the presence on board of such persons or property or which arise at any time when the tug or tender is proceeding to or from the hirer's vessel in hazardous conditions or circumstances.

The breakdown of the elements of this clumsily drafted clause can be as follows:

To render the exceptions from liability, cl 4(a), and indemnity, cl 4(b), inoperative for all claims, there must be the following conditions under the first sentence of the clause:

(a) The tug must not be in a 'position of proximity or risk to or from the hirer's vessel or any other craft attending' at the critical point in time in which a liability arose; *and*
(b) It must be detached from and safely clear of any ropes etc. associated with the hirer's vessel.

The phrase 'although towing or rendering some services other than towing' at the beginning of cl 4 (c)(ii) is ambiguous and, presumably, it is supposed to mean that the towage contract is not abandoned, or deliberately interrupted (as seen earlier) when there is no connection line between tug and tow or no proximity with it.[147]

Another ambiguity that is bound to arise from this wording is how one can judge 'proximity' or 'risk'; how far should the tug be? Or should it be in a distance where there is no risk of collision between tug and tow? However, even if that were to be right, the distance between the two may become suddenly very short, when forceful wind blows.

The clause becomes further perplexing with the second long sentence, the proviso, which seems to be an exception to the exception from the application of cl 4(a) and (b); it seems to provide that the first sentence will not apply to eliminate the protection of the tug under cl 4(a)(b) when, at the time when claims arise:

(a) the tug is, at the request, express or implied, from the tow or his agents, carrying persons or property or equipment for the hirer and such claims arise wholly or partly by, or out of, the presence of persons or property on board the tug (emphasis added); or
(b) at any time when the tug or tender is proceeding to or from the hirer' s vessel in hazardous conditions or circumstances (emphasis added).

147 Rainey, op. cit. fn 1, suggests, at p 87, that the clause refers to towage services during 'pure' towage.

It is fairly easy to imagine the difficulties involved in interpreting such a clause.

Clear and plain language would greatly assist in establishing what the contracting parties intend to exclude by this clause.

An example of criticism by the CA concerning bad drafting is provided by ***The Salviva***,[148] in which Parker LJ said: 'The dispute between the parties arises out of an unusual and very ill drafted towage.' It is useful to refer to it by way of explaining the construction of clauses intended to protect the tug from liability.

That contract, being under the Norwegian ocean towage form, provided, principally, for the towage of APA's crane barge *Montasser* from Kegoya, Japan, to Alexandria, Egypt, by Goliath's ocean-going tug, *The Salviva*.

Clause 10 provided who would be responsible for the seaworthiness of the tow:

> The tow to be prepared for towage by the tug owner and to the satisfaction of the tug owner and/or their master and provided with the necessary documents required for towage issued by a competent classification society [or Nippon Kaiji Kentei Kyokai]. If the tow becomes unseaworthy during the voyage for any reason whatsoever the seaworthiness to be re-established by the company and a new seaworthy certificate to be issued on tug owner's request.

Clause 17 dealt with obligations, liabilities and exception from liability of the tug as follows:

> Provided the tug owners shall exert due diligence to prepare the tug before departure from Kegoya in a fit, seaworthy and perfect condition in all respects to perform the voyage and provided the tug owner prepares the tow for this towage in accordance with [Nippon Kaiji Kentei Kyokai's] surveyor's requirements the tug owner shall not be responsible for any loss, damage or delay whatsoever to the tow or any of the cargoes on board or for failure to undertake and/or complete the towage services however caused whether due to any unseaworthiness or defect in or breakdown of the tug or to the unfitness of any gear employed, shortage of fuel bunkers from whatever cause or other unforeseen circumstances or to the act of God, perils of the sea, fire, snow, ice, barratry or negligence of the master or crew, arrest or restraint of princes, rulers or people, strikes, labour disturbances or civil commotion, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, gear or appurtenances, collision, stranding or other accidents of navigation even when occasioned by the negligence, default or error in judgment of the pilot, master or crew of the tug or any other servants of the tug, tug owner or for any personal injury or loss of life to persons in the employ of the company or any third party, and the company shall relieve tug owners from and indemnify them against all such loss, damage, injury, loss of life or liability against all claims whatsoever arising out of or in respect of such matters including any costs, charges or expenses which tug owners may incur or may be put to in defending any such claims.

The tug and tow departed from Kegoya and shortly thereafter deviated from their course to avoid the typhoon Gay. The deviation lasted for 3 days. In respect of this, Goliath claimed US$5000 per day for three days' extra steaming time, pursuant to cl 24 of the contract.

After the deviation, the crew of the tug inspected the tow and found that some of the sea fastenings consisting of steel wire had loosened during the voyage, and that they and other sea fastenings had suffered damage. As a result, it was necessary to put in to Singapore for repairs. The repairs were carried out at a cost of US$84,027.18 and were paid for by Goliath, who in turn claimed this sum plus demurrage amounting to US$110,310.41 in respect of the time spent in Singapore.

148 [1987] 2 Lloyd's Rep 457.

Between Singapore and Port Said, the sea fastenings and lashings suffered further damage, necessitating the carrying out of further repairs in Port Said. In respect of the cost of those repairs, no claim was made, for they were paid by APA's insurers. Goliath, however, claimed demurrage amounting to US$50,821.90 in respect of the time spent in Port Said while repairs were being effected. The judge upheld all claims. APA contended that the judge erred in upholding the last three claims.

APA's basic case was that, under the terms of the contract, express or implied, Goliath warranted the tow-worthiness of the tow. In other words, it warranted that the materials and workmanship of the sea fastenings were reasonably fit. They were not so fit, because steel wire was used for the primary lashings, such lashings would inevitably stretch in foreseeable weather conditions and, having stretched, would allow movement that would set up loads leading to damage and the necessity for repairs.

APA contended in the alternative that Goliath contracted to prepare the crane barge for towage and to procure her survey. Although it was entitled and expected to subcontract the work of preparation, it was vicariously liable for any negligence on the part of the subcontractor or surveyor. It was, they submitted, negligent to use wire lashings.

Goliath, on the other hand, contended that, under the contract, its obligation was merely to procure and pay for the preparation of the tow for towage to the reasonable satisfaction of itself and/or the tugmaster, to comply with the recommendations of the towage approval surveyor, and to obtain a certificate of fitness to tow from such surveyor. It complied with those obligations and, having done so, it was, under the terms of the contract, entitled to recover the amount claimed.

It further contended that there was nothing wrong with the steel-wire lashings as such. They were unstretched, but the plan did not provide for stretched wire. There was nothing wrong with the workmanship of Kegoya in applying the lashings.

APA's case was simply that wire should not have been used at all, but that, instead, chain or structural steel rods or tie bars should have been employed.

Parker LJ construed the contract and held:

> Clause 17 and other clauses throw light upon the meaning and intent of the opening words of cl 10 . . .
>
> The two provisos upon which the wide relief accorded to the tug owner depend are of considerable significance. So far as the tug itself is concerned, the exercise of due diligence to make it seaworthy must be shown, but with regard to the tow it is sufficient to show that it has been prepared in accordance with, in the event, NK3's requirements. If cl 10 imposes on the tug owner not merely an obligation to exercise due diligence in the preparation of the tow, but a positive unqualified warranty of seaworthiness and suitability of materials and workmanship, it appears to me unlikely in the extreme that APA would have agreed to relieve the tug owners from all loss, damage or delay to the tow, and indemnify the tug owner against all such loss and damage on the mere proof that the tow had been prepared in accordance with NK3's requirements, albeit that such requirements were insufficient to produce a seaworthy tow, provided for unsuitable materials and were grossly negligent.
>
> If the second proviso stood alone, it would in my view point strongly to the mutual intent of the parties that the tug owner's obligation under cl 10 being the limited one found by the learned judge. The indication is even stronger when the second proviso is contrasted with the first proviso. Mr Sumption submits that to derive a limited meaning to cl 10 from the wording of cl 17 is to cut down by an exemption clause the extent of the obligation in cl 10, but this submission in my view fails for two reasons: first, because the problem is to find out by reference

to the contract as a whole what is the meaning of cl 10; secondly, because it is of the essence of an exemption clause that it should cut down a liability that would otherwise exist.[149]

The lesson to be learned from this case is that ill drafting results in expensive litigation, and it is essential that the intention of the parties, particularly with regard to exception clauses, is made clearer than having long convoluted clauses such as this and cl 4(c) (ii) of UKSTC (just discussed).

The second part of cl 17 contained an all-embracing exception from liability, which was made subject to the tug-owner having satisfactorily discharged the duty imposed by the first part of the clause. Considering the facts of the case, the lashing broke more than once. Either the quality or type of the lashing, or skill and care to lash properly, had been wanting, which could, conceivably, have led to the conclusion that the tug-owner had failed to fulfil the obligation stated in the first part of this clause. However, the clause was qualified by the further provision that the preparations would be subject to the satisfaction of Class.

10 THE SUBSTITUTION AND HIMALAYA CLAUSE OF THE UKSTC

10.1 SUBSTITUTION OF TUGS, AUTHORITY TO SUBCONTRACT AND TRANSFER OF BENEFITS

Clause 5 of UKSTC provides that:

> The tug owner shall at any time be entitled to substitute one or more tugs . . . for any other tug . . . or tugs . . . The tug owner shall at any time . . . be entitled to contract with any other tug owner . . . to hire the other tug owners' tug or tender and . . . it is hereby agreed that the tug owner is acting . . . as the agent of the hirer, notwithstanding that the tug owner may in addition, if authorised . . . act as agent of the other tug owner at any time and for any purpose including the making of any agreement with the hirer . . . It is hereby agreed that such contract is and shall at all times be subject to the provisions of these conditions so that the other tug owner is bound by the same and may as principal sue the hirer thereon and shall have the full benefit of these conditions in every respect expressed or implied herein.

It purports to give authority to the tug to act as an agent of the tow and, at times, of another tug-owner for the purpose of substituting another tug, if necessary, binding the tow and the substituted tug to the terms of the contract.

This provision was drafted as a result of ***The Conoco Arrow***:[150]

T agreed to supply tugs for D's vessels on an older form of the UKSTC, which provided for an indemnity in favour of T and, further, 'T may substitute one tug for another and may sub-let the work, wholly or in part, to other tug owners who shall also have the benefit of and be bound by these conditions'.

P's tug was subcontracted to carry out towage, but it collided with D's vessel and sank. P sued D, and his claim was based on two separate causes of action: one in the tort of negligence, alleging negligent navigation by D's vessel, and the alternative claim

149 [1987] 2 Lloyd's Rep 457, p 461.
150 [1973] 1 Lloyd's Rep 86.

was founded upon the contract between T and D to which P was not a party. P argued that it was entitled to the benefit of the contract, that is to the same remedies as T would have against D.

D sought to have the claim based on contract struck out, on the basis that a party cannot claim under a contract to which he was not a party. The Admiralty registrar struck this claim out. P appealed to the High Court and argued that, first, this claim should not be dismissed summarily, and, second, it would be opened to the House of Lords to review the position of English law.

Brandon J held that his claim would be bound to fail even at the House of Lords, unless the House of Lords decided not to follow long-standing decisions of its own. The Admiralty registrar had rightly struck out the alternative claim, as the law is settled.

Without any evidence of agency or trusteeship, the plaintiffs could not obtain rights under a contract between the defendants and the head contractors.

The problems created by the principle of privity of contract were resolved, first, by the invention of the so-called 'Himalaya' clauses and, second, by statute (see below).

10.2 TRANSFER OF CONTRACT RIGHTS TO A THIRD PARTY

10.2.1 The Himalaya provision and no-suit clause

The doctrine of privity of contract under English law had meant that third parties can neither take the benefit of, nor be imposed with obligations arising under, a contract made between two other parties.[151] However, invariably, the performance of a contract can affect third parties. This had caused difficulties, over many years, particularly with regard to the extent to which third parties may benefit from exclusion or limitation of liability clauses in a contract for loss or damage arising through their negligence.

Civil law systems provide in their codified law that, in some circumstances, rights or obligations under a contract may be conferred on third parties. Although vicarious immunity was accepted by the House of Lords in *Elder, Dempster Co Ltd v Paterson, Zochonis Co Ltd*,[152] demonstrating a desire by the judiciary to find ways around the doctrine of privity, the majority of the House of Lords later, in *Midland Silicones Ltd v Scruttons Ltd*,[153] did not accept that a general principle could be drawn from the *ratio decidendi* in its previous decision. To overcome this problem, parties to a contract used techniques to enable third parties to take the benefit of exclusion clauses, when the circumstances required that third parties involved in the performance of the contract should be protected.

151 *The Basis* (1950) 84 LlL Rep 306, in which Lord Merriman had held that: (a) the blame for a collision between the tow and her tug, which resulted in the drowning of all but one of the crew of the tug, was to be apportioned as to two-thirds to the tow and one-third to the tug; and (b) as the towage contract was made with the time-charterers and not with the owners of the tow, no claim for indemnity under the conditions of that contract lay against the owners.

152 [1924] AC 522 (HL).

153 [1962] AC 446 (HL).

Such clauses have been known as 'Himalaya' clauses,[154] and encouragement for their use was given by the majority of the Privy Council in ***The Eurymedon***.[155]

This involved the performance of unloading of goods from a ship by stevedores, who sought to rely on the exclusion from liability clause in the contract of carriage agreed between the shipper and the carrier for the latter's benefit. Lord Wilberforce said:

> [The contract] . . . brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the [stevedores], made through the carrier as agent. This became a full contract when the [stevedores] performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the [stevedores] should have the benefit of the exceptions and limitations contained in the bill of lading.[156]

Although this decision was criticised for providing an artificial analysis, the policy reason behind it was to discourage actions against the servants, agents or independent contractors, which purported to get round the exceptions in the contract. The Privy Council, in ***The New York Star***,[157] re-affirmed the principle of *The Eurymedon* and stressed that it should not be confined to its own facts. Lord Goff, at the Privy Council, reviewed the function of Himalaya clauses in ***The Mahkutai***.[158] Following this decision, Himalaya clauses were regarded as developing towards becoming a fully-fledged exception to the doctrine of privity.[159]

The UKSTC, cl 5 (shown under para 10.1, above) combines the substitution of a tug with a Himalaya clause, and effectively shows the intention of the parties that a substituted tug will enjoy the benefits of, and be subject to, the obligations for the performance of the contract, the conditions of which should be binding between the substituted tug and the hirer.

In addition, for extra protection of the servants and agents of the tug-owner, or any tug-owner whose tug has been sub-let to the hirer, the hirer undertakes, by cl 8 of UKSTC (the non-suit clause), not to bring proceedings against them in respect of any negligence, breach of duty or other wrongful act.

As was seen earlier, in ***The Borvigilant and Romina G***,[160] the tug company, NIOC, entered into a contract of towage with Monsoon Shipping, the owners of the tanker, *Romina G*. There was a tug requisition form signed by the master of *Romina G*, which contained very similar clauses to those of the UKSTC. The contract provided, inter alia, the right to subcontract by cl 7, thus:

> The Company shall have the right to perform their obligations under this contract by using a tug or tugs not owned by themselves but made available to the Company under charterparties or other arrangements. In such circumstances . . . the Hirer agrees the Owners or Charterers of such tug or tugs have the benefit of and being bound by these conditions to the same extent as the Company.

154 The name of the clause was adopted from the name of the vessel in *Adler v Dickson* [1955] 1 QB 158 (CA), which involved a claim by passengers of a ship against the master of the ship, in tort, in order to avoid the limitation of liability clause in a passenger ticket.

155 [1975] AC 154 (PC).

156 Ibid, p 167.

157 [1981] 1 WLR 138.

158 [1996] 3 WLR 1; he did not accept that the principle extends to exclusive jurisdiction clauses.

159 For a full review and analysis of the privity doctrine, as well as the 1999 Act, see Merkin, R, *Privity of Contract*, 2000, LLP (Himalaya clauses, p 158).

160 [2003] EWCA Civ 935, [2003] 2 Lloyd's Rep 520 (CA).

Romina G arrived at Kharg Island to load crude oil at NIOC's terminal. NIOC owned its own tugs, but it engaged a tug, *Borvigilant*, from the claimants (Borkan) to assist in berthing *Romina G*. During the course of berthing, this tug collided with *Romina G*. There was loss of life and of the tug. Borkan claimed against Monsoon (the owners of *Romina G*) in contract and in tort, and Monsoon claimed in tort for its losses. Borkan relied on the conditions contained in the tug requisition form and argued that, by cl 7, they could take the benefit of the contract under traditional agency principles. Each party argued that the collision was caused by the fault of the other, and, in addition, Monsoon contended the collision was caused by the unseaworthiness of the tug. The preliminary issues were: (a) whether Borkan was entitled to rely on the benefit of the conditions in the tug requisition form; and, if so, (b) whether Borkan was exempt from liability.

It was held by the CA that it was not necessary that the tug requisition form should expressly state that NIOC was contracting as agent for Borkan; cl 7 expressly provided that Borkan should have the benefit of, and be bound by, the conditions of the tug requisition form to the same extent as NIOC. As to the second issue, the effect of the exclusion of the indemnity provision (for loss of and damage to the tug, and loss of life of the tug's crew caused by want of reasonable care to make the tug seaworthy,) was that Borkan (the tug-owner) could not rely on the protective clauses of the contract.

The TOWCON (see para 12, below) expressly regulates the rights of the tug's servants or agents to rely on the exceptions, defences, immunities, limitation of liability, indemnities, privileges and conditions granted or provided by the main agreement between the tug-owner and the hirer by a separate Himalaya clause (cl 19).

10.2.2 The Contracts (Rights of Third Parties) Act 1999

Eventually, the doctrine of privity was abolished by this Act. At the initiative of the Law Commission, which published its report on *Privity of Contracts* in 1996,[161] the Contracts (Rights of Third Parties) Act (C(RTP)A) 1999 received Royal Assent on 11 November 1999. Section 10(2) provided for it to come into force 6 months thereafter, so that contracts made before 11 May 2000 are not subject to the Act, wheras contracts made after that date are.

One of the reasons why the reform was required was said (by the Law Commissioner, Andrew Burrows)[162] to be injustice to third parties. In particular, he put it that:

> The privity rule causes injustice to a third party where a valid contract has engendered in the third party reasonable expectations of having the legal right to enforce (as it does, for example, where the contract contains an express term to that effect). The injustice is heightened where the third party has relied on the contract to regulate his or her affairs or has accepted it by communicating assent to the promisor. Indeed, where such heightened injustice is present, we believe that it outweighs the general right of the contracting parties to change their original intentions. That is, the parties' right to vary or cancel the contract should be overridden once the third party has relied on, or accepted, the promise.

161 See Law Commission Report No 242, *Reforming Privity of Contract* [1996] LMCLQ 467, p 468, for the background to the problems existing by reason of the doctrine of privity.

162 Ibid.

Where English law applies to a towage contract, the 1999 Act enhances the protection of third parties intended to be protected by the terms of the contract, providing an alternative to the Himalaya clauses. Section 1 of the Act grants to a third party the right to enforce a term of a contract if, either the contract expressly provides he may, or the term purports to confer a benefit upon him. Section 1(5) of the Act stipulates the enforcement of rights of third parties (as provided by s 1): 'There shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract.'

11 LIMITATION OF LIABILITY[163]

Limitation of liability under the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976, as amended by the 1996 Protocol, is examined in Chapter 14, below. The limitation fund is calculated on the basis of the vessel's tonnage (Arts 11–14).

In ***The Caspian Basin***,[164] Rix J (as he then was) considered whether a claim for loss of a tow came within the meaning of Art 2(1)(a) of the LLMC for the purpose of limitation of liability. He concluded that the words 'indirect connection with the operation of the ship' provided the necessary linkage between 'loss or damage' and the ship in respect of which the claim to limit is made.

A barge, owned by B, was being towed to South Africa under a charterparty between B and U when it was lost. B commenced proceedings against U (the charterer) and C, who owned the tug, in South Africa and in England, claiming damages of over £50 million for misrepresentation. C and U had commenced limitation actions in the UK seeking declarations limiting liability to a limitation fund of £573,717 (applicable at that time). Liability had not been admitted or established, and the issue arose as to whether it was possible for a declaration of limitation to be made prior to any actual liability being determined. The judge held that this was permissible under the MSA 1995, which enacted the Convention. He further held that, where the damages claimed were so much greater than any limitation fund, as in the instant case, a declaration of limitation would allow the parties to judge whether litigation would be worthwhile, and it was reasonable practice in such a situation for a declaration to precede determination of liability.

One issue dealing with limitation of liability in relation to tugs and tows has been whether or not their tonnage should be aggregated in order to provide a higher limitation fund. The question of aggregation is usually referred to as 'the flotilla issue'. If the theory that tug and tow are one unit were correct, the aggregated tonnage of the two might be considered for purpose of limitation. In most collision cases, which involve towage contracts, however, a collision is caused by the faulty navigational manoeuvre of the one that has been in control. That may be either the fault of the tug, or of the tow, or of both. In accordance with the control theory, the limitation fund will be calculated on the basis of the tonnage of the particular vessel or vessels

163 For an outline of the principles of limitation of liability, see Ch 14, below.

164 *Bouygues Offshore SA v Caspian Shipping Co (No.4) and Ultisol Transport Contractors Ltd v Bouygues Offshore SA (No.4)(The Caspian Basin)* [1997] 2 Lloyd's Rep 507; this case has been mentioned in Vol 1 of this book with regard to jurisdictional issues [1998] 2 Lloyd's Rep 461(CA).

at fault. This is of particular concern to claimants who may have suffered loss caused by the negligent navigation of a small tug towing a great liner. The small tug has comparatively small value, and it would have a correspondingly low measure of liability if limitation were to be calculated on the basis of its tonnage alone, as opposed to calculation based on an aggregate tonnage of both tug and tow.

It is an established principle that it is the tonnage of the ship at fault that is relevant to the calculation of the limitation fund, as far as claims by third parties against the tug or the tow are concerned. It is a separate question how the tug and tow allocate liability between themselves under their contract (see also under para 12, below).

In ***The Bramley Moore***,[165] the tug BM, in tow of two barges, the B and the M, was southbound in the river Mersey when the M came into collision with E, resulting in the sinking of M. In an action by her owners against the E and the BM, both the E and BM were found equally to blame. In a limitation action by the BM against the M and the E, the issue was which tonnage should be taken into account for the calculation of the limitation fund under s 503 of the Merchant Shipping Act, 1894. Was it the tonnage of the tug alone, or the combined tonnages of tug and one or both tows? Cairns J held that the limit of liability of the tug should be governed by her tonnage alone; the calculation of limitation was not done on the basis of the aggregate tonnage.

On appeal by the tug, the CA approved the judgment and made it clear that, where those on the tug were negligent and those on the tow were not, the owners of the tug could limit their liability according to the tonnage of the tug. Lord Denning MR added that limitation of liability is not a matter of justice. It is a rule of public policy that has its origin in history and its justification in convenience.

In ***The Smjeli***,[166] a tug towing a dumb barge, both belonging to the defendants, damaged the groynes of the District Council of Shepway, which claimed damages against the defendants, the tug-owners. The defendants contended that they were entitled to limit their liability pursuant to s 503 of the MSA 1894, as amended by the 1958 Act. The plaintiffs submitted that, if the defendants were entitled to limit their liability, the amount was to be calculated by reference to the aggregate tonnage of both vessels belonging to the defendants.

Sheen J held that, as the plaintiffs' claim depended solely on an allegation that there was negligence in the navigation of the tug, so the limit of the defendants' liability must be calculated by reference to the tonnage of the tug alone.

This approach is settled and is followed by the courts that whichever, the tug or the tow, was to blame for the negligence, the limit will be in accordance with the tonnage of the ship blamed; if both were negligent, then the tonnage of each would be taken into account for their respective liabilities. This was confirmed by Morison J (*obiter*) in ***Smit v Mobius***. In this case (see 12.2.6, below), the claim of the tug for indemnity against the tow under cl 18(2)(b) of the TOWHIRE was not subject to the limitation under Art 2.1(a) of the LLMA, because the limitable claim was the claim by the third party against the tug, for which the tug was seeking indemnity from the tow according to the TOWHIRE contract. However, if the tug unreasonably

165 [1963] 2 Lloyd's Rep 429 (CA); see also *Sir Joseph Rawlinson* [1973] QB 285: the only negligence to be considered was the causative negligence, which in such cases as this must be that in the navigation of the tug alone; the limitation fund should be ascertained by reference to the tug's tonnage.

166 [1982] 2 Lloyd's Rep 74.

refused to limit the claim of the third party by reference to the tug's tonnage, that could provide a defence to the tow in the indemnity claim as between the tug and tow under the contract.

12 LIABILITIES UNDER OFFSHORE TOWAGE CONTRACTS

12.1 INTRODUCTION

Towage contracts and charterparties used in the offshore industry, often have distinct clauses that are different from those usually found in other maritime contracts.

As mentioned in the introduction to this chapter and in various paragraphs above in which reference was made by way of comparison to TOWCON and TOWHIRE, in this paragraph, attention is drawn to allocation of risks between the parties to the TOWCON/TOWHIRE for offshore towage. There also exist SUPPLYTIME 89 and SUPPLYTIME 2005 time charterparties for offshore service vessels. All these standard form contracts are created by BIMCO.

TOWCON and TOWHIRE are very similar contracts but TOWHIRE provides for towage on a daily basis hire, while TOWCON provides towage for a specific event or voyage with a lump sum payment. However, the liability clauses are identical. Further references being made, in the preceding paras of this chapter, to other clauses of the TOWCON and TOWHIRE contracts,[167] the focus here is placed on the liability clauses.

12.2 ALLOCATION OF LIABILITY BETWEEN TUG AND TOW

By contrast to the 'blanket' exception from all liability of the tug-owner under the UKSTC, the TOWCON/TOWHIRE provide for a balanced distribution of risk.

Such clauses are known as knock-for-knock allocation of risk, which is achieved by the combination of liability and indemnity clauses, as well as mutual insurance obligations, as seen below.

By allocating risks in their contract, the parties avoid litigating about issues of liability, and, in this way, third parties are also assisted in achieving settlement for their claim quickly from either the tug or the tow. Certainty of contract is created, as the parties know that they will pay for the losses caused by their own employees. Extra costs in litigation and multi-party proceedings are avoided.

As Morison J said in *Smit v Mobius* (see later), the knock-for-knock scheme provides a '*crude but workable allocation of risk and responsibility*' between the parties.

12.2.1 Liabilities for loss of or damage to each other or to third parties

Clause 18(2) of the original TOWCON provides that the tug-owner and hirer each agree to bear their own property loss or damage, without any right of recourse against the other, their respective servants, or agents, even if these losses arose from a '*breach*

167 For detailed analysis of these contracts see Rainey, S, op. cit. fn 1.

of contract, negligence or any other fault'. In particular, the losses for which clause 18(2)(a) provides for allocation of risk are:[168]

(i) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug [or the Tow] or any property on board the Tug.
(ii) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tug [or the Tow] or obstruction created by the presence of the Tug [or the Tow].
(iii) Loss or damage of whatsoever nature suffered by the Tug-owner [or the Tow-owner] or by third parties in consequence of the loss or damage referred to in (i) and (ii) above.
(iv) Any liability in respect of wreck removal or in respect of the expenses of moving or lighting or buoying the Tug [or the Tow] or in respect of preventing or abating pollution originating from the Tug [or the Tow].

Under TOWCON 2008, cl 25(b) (and the equivalent clause of TOWHIRE 2008, cl 23(b)), each provides respectively, in sub-cll (b)(i) and (b)(ii), for mutual exclusions with regard to the same losses or damage, as above. But, there have been two significant changes made to the above wording.

Clause 25(b)(i)(1) of TOWCON (or TOWHIRE cl 23(b)(i)(1)), together with cl 16(c) (or TOWHIRE cl 14(c)), leave the hirer always liable for loss or damage to the 'towing gear and accessories' of the tug.

In addition, cl 25(b)(ii) (or cl 23(b)(ii)) clarifies that the hirer shall be liable for the above specified types of losses (under i–iv) even when they were due '*to the unseaworthiness of the Tug*'. These changes do, unfortunately, disturb the balance, as to the allocation of risks, between the tug and the tow (see: *Smit v Mobius*[169] at 12.2.6, below).

12.2.2 Cross-indemnity

The above clauses further provide that the tug-owner and the tow-owner will indemnify each other in respect of liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage.

However, there is no cross-indemnity or right of recourse with respect to the loss or damage of whatsoever nature, howsoever caused or sustained by the tug (or the tow), whether or not the same is due to any breach of contract (including a breach of the seaworthiness oblication of the tug).

12.2.3 Liability and cross-indemnity with regard to personnel

The original TOWCON cl 18(1) contains indemnities whereby each party indemnifies the other '*in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death occurring during the towage or other service hereunder*' to its own personnel.

The tug-owner's personnel are as follows:

(a) the master, tug crew and any other servant or agent of the tug-owner;[170]
(b) members of the riding crew provided by the tug-owner and any person whom the tug-owner provides on board the tow;[171] and

168 Clause 18(2)(a)(i)–(iv).
169 [2001] CLC 1545.
170 Cl 18(1)(a)(i).
171 Cl 18(1)(a)(ii).

(c) any other person on board the tug who is not a servant/agent of the hirer or otherwise on board at the hirer's request.[172]

The hirer's personnel are as follows:

(a) the master, the crew of the tow and any other servant or agent of the hirer;[173] and
(b) any other person on board the tow for whatever purpose, except the riding crew or any other person whom the tug-owner provides on board the tow.[174]

The TOWCON 2008 cl 25(a) and TOWHIRE 2008 cl 23(a) offer similar provisions to the original TOWCON,[175] but add new wording to clarify that the period of liability begins from the arrival of the tug at the pilot station, or customary waiting place, or anchorage at the place of departure (whichever is sooner), and ends upon disconnection at the place of destination.[176] However, such geographical or time limits shall not apply to the members of the riding crew provided by the tug-owner or any other person whom the tug-owner provides on board the tow.

12.2.4 Financial losses

The knock-for-knock scheme also incorporates exclusion of liability for financial losses. TOWCON cl 18(3) excludes liability '*for loss of profit, loss of use, loss production or any other indirect or consequential damage for any reason whatsoever*'. However, the exclusion does not apply to breach of contract on the following four occasions:

- Clause 11: the obligation on the tow and hirer to arrange for necessary permits and certification.
- Clause 12: the obligation upon the hirer to ensure the tow-worthiness of the tow.
- Clause 13: the obligation upon the tug-owner to ensure the seaworthiness of the tug.
- Clause 16: the regime of rights and responsibilities in the event of the wrongful cancellation of the contract or the withdrawal of either tug or tow.

TOWCON 2008, cl 25(c)(i)(ii), and TOWHIRE 2008, cl 23(c)(i)(ii), provide equivalent provision, but the wording of the clause for the excluded losses has been amended. These new contracts separate loss of profit from consequential losses; the clause in the original TOWCON/TOWHIRE (above) has given rise to an issue about which there are conflicting views by judges, as will be seen below. The amended clauses provide as follows:

(i) Any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non-performance of this agreement,

172 Cl 18(1)(a)(iii).
173 Cl 18(1)(b)(i).
174 Cl 18(1)(b)(ii).
175 For tug-owner's personnel, see cl 25(a)(i)1–3; for hirer's personnel, see cl 25 (a)(ii) 1–2.
176 The TOWHIRE provisions are identical in this respect.

and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents, or

(ii) Any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents.

12.2.5 The conflicting views about 'loss of profit'

As appears from the decisions below, 'loss of profit' in cl 18(3) is ambiguous, and there are different views held by judges; therefore, when the original TOWCON/TOWHIRE is intended to be used by parties, it should be clarified by an amendment to the standard clause what the parties mean to exclude, in particular, what type of loss of profit (direct or only indirect, or consequential).

In ***Ease Faith Ltd v Leonis Marine Management Ltd***,[177] the tug-owners were in breach of a towage contract, and the hirer was entitled to damages caused by the delay in delivering his bulk carrier (being under tow) to the scrapyard. The tug had not proceeded 'at utmost dispatch', as required by the contract. Thus, the claim of Ease Faith (E) for extra pilotage expenses and escort charges and reduced price (by reason of the delay) paid for the vessel succeeded.

Smith J held (arguably *obiter*) that such losses of E were not excluded by cl 18.3 of the TOWCON. The words 'loss of profit' referred to loss of profits generated by future use of the tug or the tow. The losses incurred by E were such as to reduce the profits of the company generally and, more specifically, the profits of the particular venture in which it was engaged. The term 'loss of profit' in cl 18.3 was intended to have a more restricted meaning and was directed to protecting the tug-owner (from a claim for loss of productive use of the tow) and the hirer (from a claim for loss of productive use of the tug). E's loss was more akin to a diminution of price than a loss of profit. Therefore, E's claim was not one for loss of profit within cl 18.3. It was, therefore, not necessary for E to rely on the argument that cl 18.3 excluded liability only for indirect, and not direct, loss of profit. The judge preferred the approach of Clarke J in the *Tsavlirs*[178] case than the approach of Rix J in BHP (see below), which deprived the word 'other' of any real force. He treated 'loss of profit' (which, in this clause, appears before 'consequential loss') as being *ejusdem generis* of the other words that followed.

By contrast, Rix J (as he then was), in ***BHP Petroleum Ltd v British Steel plc***,[179] (concerning, not a TOWCON contract, but a contract containing a similar clause –

177 [2006] 1 Lloyd's Rep 673 (at paras 143–145).

178 See also *Tsavliris v OSA Marine Ltd* (*The Herdentor*)(unreported) 19.01.1996, to which Smith J referred in his judgment in support of his decision: Clarke J held in this case that cl 18(3) is intended to exclude liability for indirect loss of profit, not for direct. He also said that 'any other indirect or consequential damage' gives content to the meaning of 'loss of profit, loss of use' and 'loss of production' and strongly suggests that only indirect losses of profit, use and production are to be excluded, together with any other indirect or consequential damage that may occur (at p 26 of the transcript).

179 [1999] 2 Lloyd's Rep 583: the case was about supply of coated steel pipes for use in an offshore oil and gas production complex. It concerned the construction of exclusion of liability clauses and it also included a clause similar to 18(3) of the TOWCON. The relevant clause referring to loss of profit was 14.5:

Neither the Supplier nor the Purchaser shall bear any liability to the other (and each party hereby agrees to indemnify the party relying on this provision) for loss of production, loss of profits, loss of business or any other indirect losses or consequential damages arising during and/or as a result of the performance or

see fn 179) said that the parties must have made an error in drafting by including the word 'other' in the phrase 'any other indirect or consequential losses', which causes a conundrum in the construction of the clause. His view was that there is authority (*Deepak v ICI*)[180] supporting that 'loss of profit' is prima facie an example of direct loss, and loss of production and loss of business are merely variations of that theme. If it were otherwise, the judge said, the first part of the clause (preceding 'any other indirect losses') would be made redundant.

Although judges avoid rewriting parties' contracts, the judgment of Rix J sent a strong message to the market that the parties should make their intentions clear in the drafting of such clauses next time. It should be noted that BIMCO amended the equivalent clause of TOWCON/TOWHIRE 2008, as seen above.

Further difficulties with the construction of vague exclusion clauses were exemplified by Teare J in ***The Humber Way***;[181] the exclusion, cl 9, provided:

> . . . no liability to the customer in contract, tort, negligence, breach of statutory duty or otherwise for any loss, damage, cost or expenses of any nature whatsoever incurred or suffered by the customer which is of any indirect or consequential nature including without limitation the following [emphasis added]: loss or deferment of profit, or revenue; loss of goodwill; loss of business; loss or deferment of production or increased costs of production the liabilities if the customer to any other party.

Teare J said (at para 83):

> where a party seeks to protect himself from liability for losses otherwise recoverable by law for breach of contract he must do so by clear and unambiguous language . . . it would require very clear words indeed to indicate that the parties' intentions when using such words was to exclude losses which fall outside that well-recognised meaning [of indirect or consequential losses].

non-performance of this Contract regardless of the cause thereof but not limited to the negligence of the party seeking to rely on this provision.

The judge said that 'indirect or consequential' do not refer to what might be called 'knock-on' effects, but are concerned with losses which would only be contemplated with the input of knowledge of special circumstances outside the ordinary course of things (i.e. the second limb of *Hadley v Baxendale*, although, since then, the courts prefer not to refer to the first or second limb of this case; see *The Achilleas* [2008] UKHL 48). Rix J went on to say that the specific wording that the parties have agreed appears to require that either direct losses have to be treated as though they were indirect, or that the phrase 'indirect or consequential' has to be given a special meaning different from that which authority has given to it, or else that the solution that is favoured by Mr Sumption has to be adopted, that only indirect and consequential losses of profits, production or business are excluded. In my judgment, the best solution is to construe the clause as though it read 'for loss of production, loss of profits, loss of business or indirect losses or consequential damages of any other kind' and accept that the parties may have been in error to permit the inference that the former phrases are examples of indirect or consequential loss. Appealed on the issue whether liability was excluded by the contract and was affirmed by the CA [2000] 2 Lloyd's Rep 277, but the main issue, which Rix J decided, was not appealed.

180 *Deepak Fertilisers & Petrochemicals Corp Ltd v Davy McKee (London) Ltd* [1999] 1 Lloyd's Rep 387 CA, following *Croudace v Cawoods* [1978] 2 Ll Rep 55: the phrase 'consequential loss or damage' in an exclusion clause does not cover any loss that directly and naturally results in the ordinary course of events from the breach; this principle was affirmed by the CA in *British Sugar v NEI Power Projects* [1997–1998] Info TLR 353: the word 'consequential' does not cover any loss which directly and naturally results in the ordinary course of events from late delivery; *Millar's Machinery v David Way* (1934) 40 Com Cas 204; *Saint Line v Richardsons* [1940] 2 KB 99. Teare J, in *Feeryways NV v Associated British Ports (The Humber Way)* [2008] EWHC 225 (Comm), said that the exclusion clause in this case was different from the classic ones on consequential loss (as found and defined in the above cases); so he felt not bound by the authorities.

181 Ibid, *Feeryways NV v Associated British Ports (The Humber Way)* [2008] EWHC 225 (Comm).

His conclusion on the construction of cl 9 (at para 84) was this:

> The important question therefore is whether the words in clause 9 'including without limitation the following' indicate clearly that the parties were giving their own definition of indirect or consequential losses so as to include the specified losses even if they are the direct and natural result of the breach in question. In my judgment those words do not provide the sort of clear indication which is necessary for the defendant's argument. The parties are merely identifying the type of losses (without limitation) which can fall within the exemption clause so long as the losses meet the prior requirement that they are 'of an indirect or consequential nature'. Had the parties intended that liability for losses which were the direct and natural result of the breach could be excluded they would have hardly have described such losses as 'indirect or consequential'.

The judge considered that the exclusion clause in this case was different from the classic ones on consequential loss (as found and defined by other authorities); and so he felt not bound by them.

This seems to be a fair construction.

It should be noted, however, that the issue is not settled by higher courts, therefore, there are two first instance decisions (by Smith J in *Ease Faith* (but arguably *obiter*), and Clarke J (as he then was) in *The Herdentor*) going one way, and one (by Rix J (as he then was) in *BHP*) going the other way.[182]

However, as far as TOWCON contracts are concerned, if TOWCON/TOWHIRE 2008 are used, in which the wording has been amended, the problem may go away. As far as other contracts are concerned, which have similar clauses to that of the original TOWCON, there is a need for the Supreme Court to solve the conundrum. Until then, parties may be advised to make clear in their contracts what types of profit loss they mean to exclude from liability.[183]

The equivalent clause under the SUPPLYTIME (see below) is similar to the clause as shown in *Ferryways (The Humber Way)*, above.

12.2.6 Does the knock-for-knock scheme apply in case of unseaworthiness of the tug?

In ***Smit v Mobius***,[184] the tug-owner (claimant) entered into a tow-hire contract, on the BIMCO TOWHIRE conditions, for a 6-month charter with the defendant (hirer). While the tug was towing the barge of the defendant, the tow came into contact with a dredger owned by a third party. As a result of the contact, both the tow and the dredger suffered damage. The owner of the dredger claimed damages from the tug-owner, which was partly compromised. In the meantime, the tow-owner claimed from the tug-owner direct and consequential losses suffered as a result of the damage to their tow and their loss of its use while the tow was repaired. The tug-owner commenced proceedings against the defendant tow-owner for outstanding hire and for two declarations on the bases of cl 18(2)(b) of the TOWHIRE: first, that the defendant will indemnify the claimant in respect of all liability arising from the accident

182 See further commentary in op.cit. Rainey, S at fn 1, pp 183–186.

183 For a thoughtful analysis of the problem and suggested solutions, see the paper by Gay, R of Hill Dickinson LLP, delivered at the LSLC event on 'Offshore Contracts' held on 13 January 2010.

184 *Smit International (Deutschland) GmbH v Josef Mobius GmbH* [2001] CLC 1545.

to the third party; and, second, that the defendant was not entitled to recover his losses from the claimant caused as a result of the contact between the barge and the dredger. A default judgment was obtained by reason of the defendant's failure to acknowledge service.

On the defendant's application to set aside the default judgment, it was argued that the claimant was not entitled to rely on cl 18(2)(b), because the tug was unseaworthy; its tugmaster was, allegedly, constantly drunk and unfit to be in charge of the tug; hence, the indemnity provision did not apply; alternatively, the defendant sought to limit liability as against the claim of indemnity.

Morison J proceeded in his decision by saying that he was basing his judgment upon what he perceived to be the more businesslike, or commercial, approach. He held that the seaworthiness of a tug hired out under tow-hire conditions containing a knock-for-knock agreement was irrelevant to a determination of liability, as to permit the introduction of such an argument would lessen the effectiveness of the knock-for-knock agreement.

The judge also explained (see above) that the limitation of liability provision did not apply to such a claim under the contract (as seen at para 11, above).

This decision was considered by the P&I clubs to be a triumph for the knock-for-knock provisions. However, as will be seen below, the provisions give reason for concern in terms of the obligation of tugmasters (and their employers) to observe safety regulations. The broader implications of such provisions may be that they encourage a cavalier attitude to safety. In addition, reliance on the fact that the insurer of the other party will pick up the bill for any damage caused should concern insurers, who may consider including appropriate provisions in the insurance policy to safeguard against reckless conduct.

In a later case, ***The A Turtle***,[185] Teare J had to consider TOWCON's cl 18(2).

Using the standard form of towage contract, TOWCON, the parties agreed that S's tug would tow T's rig from Brazil to Singapore via Cape Town. The tug ran out of fuel in the South Atlantic, whereupon the towage connection was released, and the rig drifted away from the tug. She was later found on the shores of Tristan da Cunha. Salvage attempts failed, and the wreck of the rig was later removed and dumped at sea. T claimed damages from S for the loss of the rig and associated wreck removal expenses. S counterclaimed for 95 per cent of the agreed freight.

The issues were (a) whether S was in breach of the TOWCON; (b) if so, whether S was protected from liability under Part II cl 18 of the TOWCON; (c) whether S was entitled to the sum sought in its counterclaim.

Teare J dismissed both the claim and the counterclaim on the following grounds:

1 S was in breach of the TOWCON by failing to exercise due diligence to tender the tug in a seaworthy condition when the towage commenced and ensure that it was ready in all respects to perform the towage. S had made no attempt to assess the likely speed of the voyage to Cape Town and to ensure that the tug had sufficient bunkers to reach Cape Town. S was also in breach in failing to exercise best endeavours to replenish the bunkers during the performance of the voyage, once it became obvious that the tug would run out of fuel before reaching

185 *A Turtle Offshore SA v Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep 177.

Cape Town. Best endeavours required that the tug return to South America, where her bunkers could be replenished.

2 However, S was protected by cl 18 of the contract; it provided for a mutual allocation of risk. The commercial purpose of cl 18 was to make clear to the parties which one of them was to bear the risk of the loss, damage and liabilities that might arise during the towage and enable each to insure against such losses. It followed, notwithstanding that the TOWCON placed obligations on S to exercise due diligence to tender the tug in seaworthy condition and ready for the towage and to exercise its best endeavours to perform the towage, that cl 18 exempted it from liability for breach of those obligations where the loss, damage or liabilities thereby caused were within the loss, damage and liabilities that T had agreed to accept for their sole account. There was no dispute that the losses claimed by T fell within the types of loss that they had agreed to accept for their own account.

3 Although cl 18 was widely worded, it was necessary to consider whether there was a limit to it, and, if so, whether the facts of this case fell within that limit. The judge held that the clause covers any breach, no matter how extreme.

4 However, he considered that the clause should be construed so that it applied so long as S was actually performing its obligations under the TOWCON, albeit not to the required standard. This assumed that S's obligations were more than a mere declaration of intent.[186] S had been negligent, but it had not ceased to do anything at all in the performance of its obligations. It followed that the loss and damage claimed by T was for their sole account and that S was exempt from liability in respect thereof.

5 As to S's counterclaim, the contract having provided that 95 per cent of the towage price was due and payable on arrival of tug and tow at the place of destination, the balance never became due, and S's counterclaim failed. S, however, had the benefit of being a loss payee under the insurance policy of the rig in respect of a sum equal to 95 per cent of the lump sum freight.

12.2.7 Risk management issues

The above case and the TOWCON contract raise a number of issues in terms of risk management. The wide exception clause (albeit mutual), coupled with the loss payee clause, encourages, not only carelessness in performing towage contracts by tug-owners, but also breach of international safety regulations, without taking responsibility for the consequences. The clause has been interpreted too widely, and it has the potential effect of prohibiting recovery of damages by tow-owners for loss caused, not only by mere negligence, but by culpable conduct, even by wilful misconduct, by the tug.

The clause should be amended to make it clear that the tug will not be protected by exclusion if the conduct of the tugmaster and/or the tug-owners amounts to recklessness in the preparation and performance of the towage, which results in defeating the object of the contract.

186 *Owners of the Cap Palos v Alder* [1921] P 458 and *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 applied.

Although the judge held that the tug was performing the contract at the time of the accident (in a sense that it had not abandoned the tow), and, therefore, the exclusion should apply, such performance by the tug on the facts, in effect, amounted to non-performance. Similarly, in *Smit v Mobius*, if the alleged drunkenness of the master was investigated and proved, that would be an offence under statutory provisions (as seen in Chapter 9, above) and would not be permissible by international regulations, particularly the STCW Convention (see Chapters 2–4, above).

Of course, if commercial parties are prepared to agree mutual allocation of risks between themselves, the courts can only apply the law as it should be applicable to the terms agreed, and moral issues of right or wrong, or unfairness, do not enter into it, but wider considerations of safety issues should be taken into account in the interpretation of the contract.

In the circumstances, consideration should be given by tow-owners and BIMCO to amend the standard contract and, in order to avoid any doubt, specify the circumstances in which the exceptions from liability for any losses will not apply. The contract should also spell out the types of conduct, for example, wilful default or recklessness, that should not be excusable to protect the tug-owner.

Although the parties' respective insurers take the brunt of liability, at the end of the day, insurers, in recent years, have realised that such conduct mentioned here should not be included in the exclusions from the liability scheme in the contracts – for example, see ***Tradigrain SA v Intertek***.[187] The contract in this case was governed by German law but was written in English, which caused some difficulties in the interpretation of the term 'gross negligence'.

The CA held that the expression 'gross negligence' in the waiver of recourse clause imported that concept as recognised by German law, which involved both an objective and a subjective element. However, the court further said that 'gross negligence' is not a term recognisable under English law.[188] However, other English authorities[189] – in which the term was explored (see Chapter 2) – were not put before the CA.

For example, Mance J, in ***The Hellespont Ardent***,[190] analysed the concept from the point of view of both common law and civil law jurisdictions, and, as far as English

187 *Tradigrain SA v Intertek* [2007] EWCA Civ 154, or [2007] 1 CLC 188: also interesting in this case is the interpretation by the CA of the provision in the contract as to whose acts or omissions would be attributed to the company (see, further, about the rules of attribution of liability to a company in Ch 4, above); Intertek had undertaken responsibility for ensuring the safe keeping of the oil and its delivery to third parties in accordance with instructions received from Tradigrain, under a management agreement. Intertek had delegated the performance of that contract to its subsidiary in India, CBI, whose employees allowed two purchasers to remove various parcels of oil before paying for it and without instructions from Tradigrain. The insurers, having indemnified Tradigrain in respect of the loss, tried to recover the loss from CBI on the ground that the loss had been caused by the wrongful acts or omissions of the persons employed by CBI. The policy contained a waiver of recourse clause protecting CBI employees from action except in cases of wilful misconduct and gross negligence of its representatives, who were defined in the contract as being members of the board of executives, directors or equivalent category of persons.

188 Under Federal Maritime Law, there is no indemnification under offshore contracts for gross negligence: *Becker v Tidewater, Inc* (5th Cir, Aug 2009) 581 F 3rd 256 No 0830183; *Houston Exploration Co v Halliburton Energy Services, Inc* (5th Cir, 2001) 269 F 3rd 528,531 (for further details see paper by McLaughlan, P of Gardere Wynne Sewell LLP, delivered at the London Shipping Law Centre event on 13 January 2010).

189 *Armitage v Nurse* [1998] Ch 241; *The Hellespont Ardent* [1997] 2 Lloyd's Rep 547.

190 Ibid.

law is concerned, he was prepared to say that: as a matter of ordinary language and general impression, the concept of gross negligence is capable of embracing, not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk. Factors that went to 'crassness' or 'blatancy' of the defendant's conduct were relevant.

While weighing all the circumstances in the context of the facts of both ***Smit v Mobius*** and ***The A Turtle***, it could be argued that the conduct of the tug-owners and of the tugmaster in both cases would fit the test of 'gross negligence' or recklessness.

It is encouraging to see that, in some offshore contracts, in the field of oil and gas,[191] risk management practices, where accepted standards of safety management must be applied, have influenced the drafting of contracts. For example, clauses are used referring to impermissible conduct, such as 'an intentional and conscious or reckless disregard of good and prudent oil and gas field practice and/or of any terms of the contract'; or 'utter disregard of avoidance of harmful consequences'. Excusable conduct is 'an act or omission or error of judgment or mistake made in good faith'. Such terms could be included in the TOWCON/TOWHIRE and SUPPLYTIME BICMCO contracts.

12.2.8 Limitation of liability and Himalaya clause

Clause 18(4) of the original TOWCON, cl 25(d) of TOWCON 2008 and cl 23(d) of TOWHIRE 2008 provide that:

> Notwithstanding any provisions of this agreement to the contrary, the Tug-owner shall have the benefit of all limitations of, and exemptions from, liability accorded to owners or chartered owners of vessels by any applicable statute or rule of law for the time being in force.

Clauses 19, 26 and 24, respectively, extend the protection of exceptions, defences, immunities and limitations of liability, indemnities etc. applicable to the tug-owner and to the hirer under the contract for the benefit of (a) demise charterers, sub-contractors, operators, master, officers and crew of the tug or tow, and (b) all bodies corporate, parent, subsidiary to, affiliated with or under the same management as either the tug-owner or the hirer, as well as all directors, officers, servants and agents of the same, and (c) all parties performing services within the scope of this agreement for or on behalf of the tugs or tug-owner or hirer as servants, agents and subcontractors of such parties.

Furthermore, to ensure there is no doubt as to the authority of either the hirer or the tug-owner to transfer such benefits to third parties, the clause further provides that the tug-owner or hirer shall be deemed to be acting as agents or trustees of and for the benefit of all such persons mentioned above.

191 See 'Allocation of risks and exclusions in offshore marine construction contracts', by Blackburn, E QC, a paper delivered at event of the London Shipping Law on 'Offshore Contracts' held on 13 January 2010.

13 OFFSHORE SUPPLYTIME CHARTERS

13.1 ALLOCATION OF RISKS UNDER SUPPLYTIME 89

13.1.1 Mutual exclusions

The knock-for-knock clause in SUPPLYTIME 89 can be found in cl 12. Sub-section (a) excludes charterer's liability '*arising out of, or in any way connected with, the performance*' of the charterparty for loss of, or damage to, property of the owner or their contractors or subcontractors, including the vessel, and for the personal injury or death of the owner's employees, contractors or subcontractors, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect or default of the charterers, their employees, contractors or subcontractors, and even if such loss, damage, injury or death is caused wholly or partially by the unseaworthiness of any vessel.

Clause 12(b) is identical, as above, in favour of the tow-owners, excluding their liability for the same losses as above as regards charterers' property, employees, contractors and subcontractors, caused in the same way.

13.1.2 Mutual indemnities

Additionally, at the end part of the same clauses, it is provided that each party undertakes to 'indemnify, protect, defend and hold harmless the [other] from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising' in connection with such losses.

13.1.3 Consequential damages

In the matter of consequential damages, SUPPLYTIME 89, cl 12(c), states,

> Neither party shall be liable to the other for, and each party agrees to protect, defend and indemnify the other against, any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, including, but not limited to, loss of use, loss of profits, shut-in or loss of production and cost of insurance. [192]

13.1.4 Limitation of liability

By cl 12(d), the right of each party to limitation of liability applicable by law, or statute or convention, is preserved. A Himalaya clause is included (12(e)), and a mutual waiver of recourse is optional by cl 12(f).

192 This clause is similar to that found in the *Ferryways* case, seen earlier. See, also, op. cit. Gay, R at fn 183.

13.1.5 Charterer remains liable for damage caused by hazardous and noxious substances

However, cl 12(g) provides that, notwithstanding any other provisions of the charter, the charterers shall always be responsible for any losses, damages or liabilities suffered by the owners, their employees, contractors or subcontractors, by the charterers or third parties, with respect to the vessel or other property, personal injury or death, pollution or otherwise, which losses, damage or liabilities are caused, directly or indirectly, as a result of the vessel's carriage of any hazardous and noxious substances in whatever form, as ordered by the charterers, and the charterers shall defend, indemnify the owners and hold the owners harmless for any expense, loss or liability whatsoever or howsoever arising with respect to the carriage of hazardous and noxious substances (HNS).

13.1.6 Clauses on pollution and insurance

It should be noted that the knock-for-knock provisions do not apply to the following clauses on pollution and insurance. Apart from cl 12(g) above, cl 13(a) provides that the owners shall be liable for, and agree to indemnify, defend and hold harmless the charterers, against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of actual or potential pollution damage and the cost of clean-up or control thereof arising from acts or omissions of the owners or their personnel which causes or allows a discharge or leak from the vessel, unless the discharge or leak emanates from cargo on or in the vessel.

Clause 13(b) makes the charterers liable and requires them to indemnify the owners in respect of any other actual or potential pollution damage, even 'where caused wholly or partially by the act, neglect or default of the owners, their employees, contractors or subcontractors, or by the unseaworthiness of the vessel'.

Clause 14(a) requires the owners to procure and maintain in effect for the duration of the charterparty with reputable insurers the insurances set out in Annex B, namely marine hull insurance, marine liability insurance, general third-party liability insurance, workmen's compensation and employer's liability insurance for employees, comprehensive general automobile liability insurance and such other insurance as may be agreed. The charterers must be named as co-insured upon request. Owners must upon request cause insurers to waive subrogation rights against charterers.

Clause 14(b) requires owners upon request to furnish charterers with certificates of insurance sufficient for charterers to verify that owners have complied with the insurance requirements.

Clause 14(c) enables charterers to purchase similar insurance themselves and to deduct the cost from any payment due to the owners, if owners fail to comply with their insurance requirements.

13.2 ALLOCATION OF RISKS UNDER SUPPLYTIME 2005

In the new version of SUPPLYTIME, the liability clause is found in cl 14. Broadly, it provides the same as the 1989 form, but it brings a couple of subtle and potentially significant differences.

One of the changes concerns the grouping of the categories of persons protected by the knock-for-knock clause. The respective groups of the owners and of the charterers are defined by cl 14(a). Whereas the owners' group includes the same people, namely employees, contractors and subcontractors, the charterers' group expands the categories and, not only includes employees, contractors and subcontractors, as does the 1989 form, but also includes: 'co-ventures and customers (having a contractual relationship with the Charterers always with respect to the job or project on which the vessel is employed) and employees of any of the foregoing'.

BIMCO explains the amendment for the purpose of facilitating easier reading and understanding without changing the meaning or interpretation. However the charterers are protected for claims that can potentially be made from a larger group that is in tandem with the current commercial usage of offshore activities.

The clause does not make any substantive change to the content of the parties' respective liabilities, and each party pays the claims of its own group following an accident. The mutual waiver of recourse is dropped, as it was felt that it was no longer needed, because it is proved that the courts have accepted the knock-for-knock provision.

The second significant amendment is with regard to consequential damages; cl 14(c) is redrafted in recognition, as BIMCO says, of the need to improve clarity, and it provides as follows:

> Neither party shall be liable to the other for any consequential damages whatsoever arising out of or in connection with the performance or non-performance of this Charter Party, and each party shall protect, defend and indemnify the other from and against all such claims from any member of its Group as defined in cl 14(a).
>
> 'Consequential damages' shall include, but are not limited to, loss of use, loss of profit, shut-in or loss of production and cost of insurance, whether or not foreseeable at the date of this Charter Party.

Perhaps, considering the difficulties in the interpretation of 'loss of profit' and 'consequential loss', seen earlier, the redraft aims to ensure that the mutual exclusion from liability under cl 14(c) is meant to include consequential, not direct losses (see the approach of Smith J in *Ease Faith*, and Clarke J (as he then was) in *The Herdentor*, above). The use, or purpose, of the phrase 'whether or not foreseeable' is not clear. BIMCO explains that the amendment was made because the previous cl 12(c) of the 1989 form was vague. However, it is respectfully submitted that this drafting is not free from vagueness. One possible construction of it may be that 'consequential' refers to any consequence of the particular breach, whether direct or not, and this may be inferred from the phrase 'whether or not foreseeable at the date of this charter party' (see 12.2.5, above, particularly *BHP v British Steel*, per Rix J).

CHAPTER 12

LIABILITY AND RISKS IN GENERAL AVERAGE

1 Introduction 653
2 The York–Antwerp Rules 656
3 Conditions giving rise to GA 660
4 Causation 665
5 Effect of fault on GA entitlement 666
6 Accrual of the cause of action 674
7 Security 675

1 INTRODUCTION

This chapter provides a concise overview[1] of the principles applicable to general average (GA). It considers construction of the York–Antwerp Rules (YAR) and the elements of GA, situations in which it arises, including whether ransom payments to pirates for the release of the ship are legal, causation issues, effect of fault and situations where there will be no liability for GA, including recent court decisions when a ship encounters the risk of piracy attack, deviation from route and the master's entitlement to disobey charterers' orders, accidents caused due to unseaworthiness or shipment of dangerous goods, issues of GA security and time bar for GA claims.

The concept of GA is very ancient, having its roots in Rhodian law and having been adopted into the 'Digest of Justinian', and it is said that its origins date back to at least 1000 BC.[2]

1.1 DEFINITIONS

GA involves an intentional and extraordinary sacrifice of an interest in a ship or cargo carried on board to avert a danger threatening the common adventure and it is done for the benefit of all interests. The loss incurred by the sacrifice is not left on the interest upon which it has fallen, but all interests – for whose benefit the sacrifice has been made – contribute, rateably, in proportion to the saved values, as they are assessed at the place and time the adventure ends.

1 For detailed analysis of the subject, see textbooks: Hudson, G and Harvey, M, *The York–Antwerp Rules*, 3rd edn, 2010; Lowndes & Rudolf: *The Law of General Average and the York–Antwerp Rules*, 13th edn, 2008; Rose, F D, *General Average Law and Practice*, 2nd edn, 2005.

2 Ibid, Hudson, at p 1; Rose, at p 1; see, also, Macdonald, J, 'General average, ancient and modern' [1995] LMCLQ 480.

Thus, GA is the financial sharing by all interests of the common adventure of the expenditure incurred as a result of the extraordinary sacrifice made for preserving ship and cargo from peril.[3]

The expenditure or sacrifice is the GA act and must be voluntary (or otherwise referred to as intentional) and reasonable (see, further, para 3, below). The result is an entitlement to a GA contribution by the person whose property has been sacrificed, or the expenditure incurred, against the other interests that are saved. The word 'average' means 'loss'.

The YAR (see under para 2) define a GA act in Rule A uniformly:

> There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

The elements of GA are, therefore:

(a) a peril to the common adventure;
(b) the peril must be real[4] and imminent, substantial and threatening;[5]
(c) extraordinary, voluntary[6] and reasonable sacrifice or expenditure;
(d) preservation of property.

GA is distinguished from particular average, which is a partial loss sustained by individual interests being exposed to particular risks. As particular average is not a loss sustained for the preservation of the whole adventure, it lies where it falls.

1.2 BASIS OF THE OBLIGATION

GA is an independent part of maritime law; it is relevant to contracts of carriage of goods by sea, but the obligation does not depend on a provision in the contract, although ship-owners and cargo interests may agree their respective GA rights and liabilities in the contract by incorporating the YAR into the contract of carriage. Nor does the obligation depend upon an implied term of a particular contract, as there are many interests involved, other than those of the contracting parties.

It depends upon a general rule of maritime law, as a matter of natural justice and equity.[7] Its justification is based mainly on equity, as well as mercantile custom, common law, public policy and natural justice.[8]

3 Per Lawrence J in *Birkley v Presgrave* (1801) 102 ER 86: all loss that arises in consequence of extraordinary sacrifice made or expenses incurred for the preservation of the ship and cargo comes within GA and must be borne proportionately by all who are interested.

4 Mistaken belief that a danger existed, such as smoke from the cargo hold and the remedial steps taken to put the imagined fire out by which the cargo was damaged, did not qualify for GA sacrifice: *Joseph Watson & Sons Ltd v Fireman's Fund Insurance Co of San Francisco* [1922] 2 KB 355 – see, further, para 3, below.

5 *Société Nouvelle d'Armement v Spillers & Baker Ltd* [1917] 1 KB 865, at 871: more than ordinary perils of the sea; *Vlassopoulos v British & Foreign Marine Insurance Co Ltd* (*The Makis*) [1929] 1 KB 187, at 199: it is not necessary that the ship is in the grip of a disaster that may arise from danger – see para 3, below.

6 Meaning it should not be ordered by authorities: *The Atheltemplar* [1944] KB 87 – see para 3, below.

7 *Simonds v White* (1824) 2 B & C 805, 811, per Abbott CJ; *Burton v English* (1883) 12 QBD 218, p 200, per Brett LJ; cf Lord Bramwell, in *Wright v Marwood* (1881) 7 QBD 62, said that, to judge from

These grounds are the same as in salvage. There are also some common elements between salvage and GA, as they both arise in situations of necessity, and there is a benefit conferred to the property in danger. Unlike in incidents of salvage, however, where a volunteer, being a third party to the adventure, saves property in danger (see Chapter 10, above), the rights and obligations in GA arise only between those who are involved in the 'common maritime adventure'.

1.3 WHO PAYS FOR THE LOSS?

The losses that result from a GA act are insurable, as provided by the Marine Insurance Act 1906 and by contract: the Institute Time Clauses Hull 1983, 1995, International Hull Clauses 2003 and Institute Cargo Clauses A, B and C 1982. The contribution for the ship is paid by the hull insurers, and for the cargo by the cargo insurers. However, the obligation does not depend on whether or not there is insurance.

The principle was codified in the Marine Insurance Act 1906:

General Average Loss, s 66:

(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.
(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.
(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

1.4 PROPERTY SUBJECT TO GA

The subject matter of GA includes all the interests of the common adventure that are at risk. Such interests are physical, namely the ship, the cargo, the bunkers, stores, personal effects; but there are also those interests that are dependent on the safety of the physical property, such as the freight (whether at the risk of the time-charterer or the ship-owner and earned upon the safe carriage of the cargo), wages and any other property involved that is at risk during a maritime common adventure.

1.5 EXAMPLES OF GA

The sacrifice must go beyond what is necessary for the performance of the contract of affreightment. Only a few examples can be offered here. A typical example has

the way in which contribution is claimed in England, 'it would seem to arise from an implied contract inter se to contribute by those interested.' And in *Strang Steel v Scott* (1889) 14 App Cas 601, p 608, PC:

whether the rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity.

8 Op. cit., Rose, fn 1, pp 6–8.

been the jettison of part of the cargo to lighten the ship. Grounding or engine or boiler breakdown are common occurrences. Efforts made by engaging tugs and expense incurred to refloat the vessel will be GA. However, the cost incurred to repair the damage done to the hull by the grounding itself would be a particular average loss, unless the grounding was an intentional act for the preservation of property. Fire on board and measures taken to put it out may cause damage to both cargo and ship; loss resulting from it would be within GA. Loss for foreseeable damage done to a third party for the safety of a very badly damaged ship, for example, to a dock, when there was a strong ebb tide that caused the vessel to strike the pier, was accepted as a GA, considering that the master had acted reasonably.[9] Attack on or seizure of the ship and cargo by pirates and the sacrifice made for the release are within GA (see 3.2, below).

2 THE YORK–ANTWERP RULES

2.1 ORIGIN AND APPLICATION

The ancient law of GA was incorporated into a number of national legal systems. In the course of this process, it received a number of differing interpretations. Owing to an enthusiasm for internationalisation in the nineteenth century, efforts were made to impose on its interpretation some measure of uniformity. This resulted in what have become known as the YAR. These rules do not form an International Convention, but are incorporated by reference into contracts of carriage. This process has, in fact, imposed a quite remarkable measure of uniformity on the basis of average adjustments around the world.

There have been various sets of YAR over the years; the most commonly known were the 1890, the 1924 and the 1950 Rules; the modernised editions are YAR 1974 (as amended in 1990), the 1994 and 2004 YAR.

Most GA adjustments are today drawn up on the basis of the YAR 1994, although some are still prepared according to the YAR 1974 (as amended in 1990). The most recent set of rules, dated 2004, were the result of pressures imposed by cargo insurers. There are four unwelcome changes brought by the 2004 Rules:

(a) Rule VI, ‘Salvage remuneration’, excludes from GA the allowance of salvage, except in cases where one party to the salvage has paid all or any of the proportion of salvage due from another party.
(b) Rule XI, ‘Expenses at port of refuge’, excludes the allowance in GA of wages and maintenance of master, officers and crew while the vessel is detained at a port of refuge.
(c) Rule XIV, ‘Temporary repairs’: the effect of the second sentence added to this rule has the effect that recovery in GA of costs of temporary repairs of accidental damage at a port of refuge is limited.
(d) Rule XX, ‘Provision of funds’, abolishes commission of GA disbursements.

9 *Austin Friars Steamship Co Ltd v Spillers & Bakers Ltd* [1915] 1 KB 833 (CA).

The 2004 Rules have, therefore, found little favour with the remainder of the maritime community and are not included in the standard terms of contracts issued by BIMCO.

The YAR are voluntary. Therefore, where they are not incorporated into a charterparty or bill of lading, they do not apply. The question, therefore, arises as to which jurisdiction a GA act falls within in order to decide how the law of that jurisdiction deals with general average.[10] The authorities in this area are supportive of the view that, in the absence of any contrary agreement, general average is governed by the law of the place where the maritime adventure ends,[11] although the parties can agree a different place.

The rules, if the parties to a contract have adopted them, provide a complete code and, by virtue of the general rule of interpretation, 'shall apply to the exclusion of any law and practice inconsistent with them'.

2.2 CONSTRUCTION

These rules consist of a set of lettered rules, followed by a set of numbered rules. The lettered rules, from A to G, state the general principles, and the numbered rules (from I to XXIII) are specific and deal with commercial practicability; they qualify the general principles.

2.2.1 Conflict between lettered and numbered rules

Where the lettered rules do not mention a specific item, but the numbered rules deal with it, the question arose, in ***Vlassopoulos v British and Foreign Marine Insurance Co (Makis)***,[12] whether or not the circumstance that gave rise to the expenditure was GA. The underwriters argued that, as the event that resulted in the expenses at the port of refuge was not covered by the lettered rules, the specific numbered rules had no application. The ship-owners, on the other hand, argued that the particular rules should prevail over the general. The judge rejected both arguments.

In construing the 1974 YAR, Roche J held that the lettered rules enunciate the general principles, and the numbered rules settle how the general principles are to be applied in what might, otherwise, be doubtful cases. He further stated:[13]

> This is a matter of construction, and in my view the true construction of these Rules, general and particular, is not precisely what either of the contending parties has contended for. In my view those who drew up the Rules intended to provide a complete code which is to govern the law of general average for anybody who adopts it . . . It may be that there are omitted cases not covered by the general or by the specific Rules. That I do not decide. Nor do I decide any question as to the law apart from the Rules, because there is a finding that the parties by their contract intended that the code which should govern their rights and obligations should be the York–Antwerp Rules of 1924, and I treat that as conclusive for the present purpose and the common law of this or any other country as being outside the scope of my consideration and my decision . . .

10 Although, in practice, most parties insert rider clauses into their charterparties, which provide for the application of the YAR, there can be instances where this does not happen.

11 E.g., see *Simonds v White* (1824) 2 B & C 805.

12 [1929] 1 KB 187.

13 Ibid at pp 196, 198.

> But when . . . a general set of Rules provided laying down the general principles which are to operate, then the Rules go on to deal with certain specific cases, and I am satisfied on the true construction of the Rules that those cases are dealt with not by way of mere illustration, but in order to make definite and certain what the Rules decide about certain cases which are on the border line, and which might be held to be on one side or the other of the line which is to be drawn under the general Rules . . .
>
> The York–Antwerp Rules, 1924, are framed in order that the parties, if they choose to adopt the Rules by way of contract, may not be troubled with any question as to what, if any, general law is to apply . . . The Rules must be read together and as a whole, and not as two codes one of which may contradict the other.

In any question of a lacuna in the lettered rules, therefore, or an issue of conflict between the lettered and the numbered rules, the rules should be read as a whole, and the result in a particular case will be a matter of construction of the rules in the context of the circumstances. Whether a purposive approach of interpretation or a strict literal interpretation of the rules should be adopted, would depend on the circumstances of a case.[14]

2.2.2 Commercial practicability over principle

As the lettered rules enshrine the principles and the numbered rules enshrine commercial practicability, if 'principle and commercial practicability are found to conflict, practicability should be preferred'.[15] It should be noted that the scheme of the rules is governed by the rule of interpretation, which, in the 1974 Rules, provides that, 'except as provided by the numbered rules', the lettered rules shall be applied.[16]

A Rule Paramount was added to the 1994 and the 2004 Rules (following *The Alpha* case – see paras 5.2 and 5.3, below), requiring the principle of reasonableness to apply in any sacrifice or expenditure that might be incurred, which is not required in the 1974 Rules. Thus, the rule of interpretation, in both the 1994 and 2004 Rules, has been amended and reads: 'except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules'.

A difficult point of construction arose in ***The Bijela***.[17] The issue was the interpretation of Rules XIV and X(b); the issue was whether the owners of *The Bijela* could claim GA contribution in respect of the cost of temporary repairs carried out in the course of a voyage before the ship reached her destination, in India.

The YAR 1974 Rule XIV is to be applied on the assumption that temporary repairs have not been effected. The ship-owners' vessel was chartered for the carriage of cargo from Rhode Island to India under a charterparty, which provided that the GA was to be settled in London according to the YAR 1974. The ship grounded and sustained damage. The nearest port of permanent dry-dock repair was New York, where the cargo would have been unloaded and stored pending repair. The ship-owners elected to carry out temporary repairs, at a cost of US$282,606, and the vessel completed the voyage. The cost of discharging, storing and reloading the cargo to allow

14 *The Bijela* [1993] 1 Lloyd's Rep 411 (CA), reversed [1994] 1 WLR 615 (HL), indicating a combination of a literal and purposive approach; for the strict approach, see *The Trade Green* [2000] 2 Lloyd's Rep 451.

15 Macdonald, op. cit. fn 2, at 493.

16 *Corfu Navigation Co v Mobil Shipping Co Ltd (The Alpha)* [1991] 2 Lloyd's Rep 515, p 518.

17 [1994] 2 Lloyd's Rep 1 (HL).

permanent repairs in New York would have exceeded US$535,000. The adjuster included the cost of temporary repairs in GA as being less than the expense that would have been incurred if the repairs had not been carried out. The cargo-owners refused to pay their contributions, and the ship-owners issued court proceedings. The judge dismissed the claim on the ground, inter alia, that Rule X(b) only allowed for the cost of discharging and storing cargo in respect of repairs 'necessary for the safe prosecution of the voyage'; the CA, by a majority, dismissed the ship-owners' appeal.

On appeal to the House of Lords, it was held that Rule XIV of the YAR 1974 was to be applied on the assumption that the temporary repairs had not been effected, and that assumption was to be carried through when applying Rule X of the YAR; if the temporary repairs had not been carried out, the ship-owners' vessel would have been required to discharge its cargo and go into dry dock in New York for the repairs necessary to enable the vessel to proceed to India; accordingly, as on that assumption such repairs would have been necessary, within the meaning of Rule X(b) of the YAR, for the safe prosecution of the voyage, the ship-owners had shown that the cost of handling and storing the cargo would have been allowable in GA. Rules X(b) and XIV have to be read together.

As a result of this case, the rule on temporary repairs, Rule XIV was amended in the 2004 Rules at the Vancouver Conference[18] by the addition of the following provision to the second paragraph of Rule XIV(b):

> Provided that for the purpose of this paragraph only, the cost of temporary repairs falling for consideration shall be limited to the extent that the cost of temporary repairs effected at the port of loading, call or refuge, together with either the cost of permanent repairs eventually effected or, if unrepaired at the time of the adjustment, the reasonable depreciation in the value of the vessel at the completion of the voyage, exceeds the cost of permanent repairs had they been effected at the port of loading, call or refuge.

For the understanding of the meaning of this provision, the whole clause must be read together (there is no space here to set out the GA long clauses).

2.3 AUTHORITY TO ACT IN GA

In an old authority, ***Athel Line Ltd v Liverpool & London War Risks Insurance Association***,[19] Tucker J said:

> The rule (A) I think, clearly envisages the exercise by someone of his reasoning powers and discretion applied to a particular problem with freedom of choice to decide to act in one out of two or more possible ways, and the language is quite inappropriate to describe the blind and unreasoning obedience of a subordinate to the lawful orders of a superior authority.

On the facts of this case, there was no GA act when the commodore of a convoy ordered the convoy to a port of refuge under the orders of the Admiralty, in order to protect British ships from enemy acts. It was not a voluntary act of the master.

On the point as to who should have ultimate authority to decide the act of sacrifice, the judge did not decide the issue, but expressed his opinion that there was no clear authority as to whether the act giving rise to a GA claim must be the act of the master.

18 See Hudson, op. cit. fn 1, at pp 259–261.
19 [1944] KB 87, p 94.

It is now clear, since the ***Australian Coastal Shipping Commission v Green***,[20] that the act need not be that of the master; orders are given from the office of the ship-owner, and the master will act upon such authority.

In ordinary circumstances, the master's authority in cases of necessity, in which he has to act for the interests of all parties, has not been doubted for an act of GA to arise, and it was confirmed by the House of Lords in ***Morrison v Greystoke Castle (The Cheldale)***:[21]

> The ship-owner through the master has imposed upon him other and super-added duties causing him to act as agent for all the persons whose interests are endangered.

He is the person, according to the test stated earlier, to apply his reasoning and discretionary powers to a particular problem of danger, and he has the authority to take reasonable steps in the circumstances, provided his steps are for the interests of all parties involved in the adventure.[22]

As to whether strangers can act, the view according to the principle of agency of necessity is that the master, who is generally authorised to act on behalf of the ship-owner and cargo interests, should be consulted.[23]

In this connection, in a situation when a SOSREP orders the ship to a port of refuge for the safety of the common adventure and the protection of the environment, would the act be GA? As seen in Chapter 10, above, the SOSREP has statutory powers and he takes control of a casualty for a limited purpose; the master co-operates but he does not lose his authority as the master of the ship. The SOSREP's authority should be the authority of a proper person to act, for the purpose of the GA, as this situation is different from that pertaining to the orders of the Admiralty, seen in *Athel Line*, above. Expenditure incurred by the parties to the adventure on account of salvage, whether under contract or not, for the purpose of preserving the common adventure from peril is allowed in GA (Rule VI), including expenses incurred at the port of refuge (Rule X). In *MSC Napoli*,[24] which was ordered to a port of refuge by the SOSREP, there was unfortunately no GA declared, presumably because of the very many items of cargo carried on board for various individuals.

3 CONDITIONS GIVING RISE TO GA

The definition of GA given above identified four elements to be satisfied in order for a GA act to occur. These elements are examined in more detail below, including how the YAR treat the incidents of GA.

3.1 DANGER OR PERIL TO THE COMMON ADVENTURE

3.1.1 Danger or peril

Under s 66(2) of the Marine Insurance Act 1906, no recovery can be made in GA unless there exists a peril. The danger or peril must affect the whole adventure and

20 [1971] 1 Lloyd's Rep 16.

21 [1947] AC 265, p 281, per Lord Roche.

22 See, further, *Papayianni v Grampian Ltd* (1896) 1 Com Cas 448; *Price v Noble* (1811) 4 Taunt 123; Rose, op. cit. fn 1, discusses other possibilities of intervention at 31–35.

23 *The Winson* [1982] AC 939.

24 *Metvale Ltd v Monsanto International Sarl (The MSC Napoli)* [2009] 1 Lloyd's Rep 246 (see facts in Ch 14 in relation to limitation of liability).

not only one interest.[25] English law has given a strict interpretation to this phrase in requiring such peril to be real and not imaginary.[26] Even a belief reasonably held will be insufficient for recovery. The wording of Rule A of the YAR refers to 'preserving from peril'.

Although it is a requirement that the peril must be real,[27] it need not be immediate, in the sense of actually pressing at the moment, but it may be imminent. Indeed, English law allows for the recovery in GA of taking precautionary measures that avert an imminent peril.[28] However, it is also clear that such peril must be substantial and not negligible.[29]

There can be differences in degree when it comes to deciding whether property is in peril. What should be the extent of the peril?

For example, in the ***Vlassopoulos*** case, while the ship was loading at Bordeaux, the foremast broke and a derrick, which was attached to the foremast, fell into a hold and was damaged. The casualty was an accidental and fortuitous occurrence. The ship was then moved into a wet dock for the purpose of repairs. After being repaired, she proceeded on her voyage to her destination. While at sea, she fouled some submerged wreckage and damaged the blades of her propeller, and was thereby rendered unfit to encounter the ordinary perils of the sea, and accordingly she put into Cherbourg for inspection and repairs. The YAR 1924 were applicable to the charterparty and to the insurance contract.

A dispute arose between the ship-owner and the underwriters with regard to liability for certain expenses incurred and payments made by the owner in the ports of Bordeaux and Cherbourg in connection with the two casualties, namely: wages and provisions of master, officers and crew during the time the ship was being repaired; coal consumed in shifting the ship in and out of dock; handling of cargo on board; discharging of cargo; towage in and out of port, mooring expenses and port charges. The dispute was referred to arbitration, and the arbitrator held that none of these expenses was the subject of GA contribution, but stated a case for the opinion of the High Court. It was held that:

1 None of the above mentioned items of expenses incurred at the port of Bordeaux in connection with the first casualty came within Rules X, XI or XX of the YAR 1924, and, therefore, they were not recoverable in GA because they were not incurred for the purpose of preserving the property involved in a common maritime adventure from peril. Rule X did not apply to a case of the repair of accidental damage, and the shifting of cargo thereby caused, where the ship was in no danger.
2 However, the above mentioned items of expenses incurred at the port of Cherbourg, in connection with the second casualty were recoverable in GA under Rules X and XI, because they were expenses incurred for the purpose of preserving the property involved in the common adventure from peril.

25 *Nesbitt v Lushington* (1792) 4 TR 783, where a mob took the corn loaded on board by threats to the master of the ship.

26 *Joseph Watson v Fireman's Fund* [1922] 2 KB 355; see fn 4.

27 *Vlassopoulos v British and Foreign Marine Insurance Co (The Makis)* [1929] 1 KB 187, p 199.

28 *Lawrence v Minturn* (1854) 17 How 100; *Société Nouvelle d'Armement v Spillers & Bakers Ltd* [1917] 1 KB 865: more than ordinary perils of the sea.

29 *The Makis*, op. cit. fn 27; see, further, under deviation and piracy issues at para 5.3.3, below.

3.1.2 Threat

Another question that troubles the interpreters of the YAR is whether or not a GA act should be a response to a physical threat to the property, or could a commercial threat to the completion of the voyage qualify for it to be a GA act? It is suggested that the YAR embody both threats, physical and commercial, and the costs of releasing the common property from commercial threat should form the proper subject of a GA contribution.[30]

The distinguishing feature of GA is that the danger must be threatening to the common adventure; there must be at least two interests[31] exposed to danger, regardless of whether or not such interests belong to the same owner. The danger to the common adventure will end when the property is brought to a safe place. Ideally, that place should be the place where the delivery of the cargo was stipulated by the contract of carriage. Sometimes, the cargo may have to be taken off prior to reaching that place, and the ship may have to be taken to a safe place. Once the cargo is taken off, it should not, in principle, be obliged to contribute to GA, nor be entitled to GA contribution, unless its removal formed part of complex salvage operations.[32]

3.1.3 Common maritime adventure

The 1994 and 2004 YAR define, in Rule B, 'common maritime adventure' as including circumstances when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in salvage operation. It further provides that a vessel is not in common peril with another vessel or vessels if, by simply disconnecting from the other vessel or vessels, she is in safety; but, if the disconnection is itself a GA act, the common adventure continues.

Throughout the successive editions of the YAR, 'adventure' has been used in a way that naturally describes the common enterprise represented by the carriage of goods by sea in which ship and cargo are both involved, and 'voyage' has been used to refer to the passage of the vessel from her first loading port to her final discharging port. For example, in ***The Trade Green***,[33] a fire had occurred in the engine room while the vessel was in port and in the process of discharging the cargo. The vessel had subsequently been removed from her berth upon the instructions of the port authority and taken under tow to an anchorage. Her owners maintained that, for the purposes of allowing wages, maintenance and port charges in GA, there had been a relevant 'detention within the port' pursuant to the YAR 1974 r XI(b), as the vessel had not been ready to proceed upon her voyage until the interruption to discharging operations was over.

30 Macdonald J, op. cit. fn 2, at 483–487; this is indicated by the scope of Rules X, XI and XIV, relating to ports of refuge expenses and temporary repairs to the ship for the purpose of enabling it to continue the adventure.

31 If there is only one interest in danger, this is known as 'particular average loss', which is not a GA loss (s 64(1), MIA 1906); expenses incurred by the assured to preserve the subject matter insured, other than general average and salvage charges, are called particular charges (s 64(2), MIA 1906).

32 See some old authorities in Rose, op. cit. fn 1, at 25.

33 *Trade Green Shipping Inc v Securitas Bremer Allgemeine Versicherungs AG* (*The Trade Green*) [2000] 2 Lloyd's Rep 451.

The court held that 'detained in any port or place' for the purposes of Rule XI(b) of the YAR was intended as a reference to an unplanned occurrence that had the effect of either interrupting the voyage or otherwise preventing the vessel from proceeding to her ultimate destination. Once the vessel reached her final berth, the voyage was complete. As removal from her berth had not been to facilitate completion of the voyage, the ship had not been 'detained', and the towage charges were not allowable in GA.

By contrast, it is submitted that Rule XI(b), 'detained in . . . a place', will cover seizure (detention) by pirates.

3.2 EXTRAORDINARY EXPENDITURE OR SACRIFICE

The classic examples of an extraordinary sacrifice that will be allowed in GA is the jettisoning of part of the cargo (Rule I); or causing damage to the ship or cargo for the purpose of making a jettison (Rule II); or pouring water into the holds to extinguish a fire on board a ship and thereby damaging the cargo carried in such holds, including damage by beaching or scuttling a burning ship (Rule III); or voluntary stranding (Rule V); or damage done to machinery or boilers when the ship is aground (Rule VII); or ship's materials and stores burnt for fuel for the common safety (Rule IX).

The above are subject always to the operation of the YAR. For example, Rule I of YAR states that: 'No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognised custom of the trade'. Similarly, damage to the ship's machinery or boilers shall only be allowed as GA where such damage is occasioned in attempting to refloat her (Rule VII).

Generally, expenditure that will be allowed as GA will come under one of the following examples:

- additional expenses that would not normally be allowed as GA, but that replace expenses that would normally be classed as GA (Rule F);
- expenses incurred in saving the ship and cargo from loss or damage. Classic examples include: the engagement of salvage services following a stranding; the cost of employing lighters to transfer cargo in order to lighten the vessel; and the employment of towage services (Rule X);
- expenses incurred in lightening the ship when ashore (Rule VIII);
- expenses for wages etc. in port of refuge (Rule XI);
- expenses for temporary repairs, either at the port of loading or a port of refuge (Rule XIV);
- port of refuge expenses.[34]

Since 2008, piracy risks have dramatically increased, and the ransom that is paid for the safety of the common adventure is accepted to be a GA expenditure, although cases, in practice, settle without having formally declared GA. H&M and war risk

34 Many expenses that are incidental to port of refuge expenses are expressly provided for in Rules X and XI of the YAR.

underwriters have accepted that ransom is a GA expenditure.[35] The court in ***Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)***[36] resolved certain questions that surrounded payment of ransoms, which are relevant to GA; it held that the payment of ransom to pirates: (a) was reasonable, given the contrast between the sum required and the value of the property; (b) is not illegal in England, as there is no legislation against such payments; (c) is not contrary to public policy. Somali pirates are not known to be terrorists – and these payments are not illegal. It follows that, in appropriate cases, payments may be recovered from insurers as sue and labour expenditure, or be recovered in GA because, by the payment, the common adventure is preserved. The payment of the ransom in this case was made, and negotiated, by the owner of the vessel.

3.3 VOLUNTARY, OR INTENTIONAL, AND REASONABLE

The word 'voluntary' found in s 66 of the Marine Insurance Act 1906 has been replaced with the term 'intentionally' in Rule A of the YAR.[37] This emphasises the fact that, just because a decision was made under extreme pressure, when there was no effective alternative, this will not of itself be enough for the act to lose its voluntary nature.

The requirement of intention means that the GA act must be made or incurred with the sole objective of preserving the interests involved from peril.[38]

The requirement of reasonableness appears in Rule A of YAR. However, if a GA act fell within one of the numbered rules that does not impose a requirement for reasonableness, it would follow that such losses incurred could be recoverable in GA, even if the action taken was unreasonable.[39] Such possible conflict between the lettered and the numbered rules has been remedied by the introduction of the Rule Paramount in the YAR 1994 and 2004, which prevents recovery for sacrifice or expenditure unless reasonably made or incurred. Rule Paramount provides: 'In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.'

The requirement of reasonableness is a fetter on the master's discretion as to what action to take in times of peril. However, this fetter is not wide-ranging and would only bite when the master makes a decision that fails to benefit the common adventure as a whole. He has complete freedom to choose which action to take in order to benefit the common adventure. For example, the master will be able to enter into a contract for towage or salvage services on standard terms that are widely used in practice.[40] Such action will be reasonable. Even if the master enters into a contract for the provision of services on particularly onerous terms, losses flowing from this

35 See also *Hicks v Palington* (1590) Moore's QB R 297 (cargo given to pirates by way of ransom to save the adventure was subject to GA contribution); there is also a specific insurance policy for risks relating to kidnap and ransom (KR policy).

36 [2010] EWHC 280 (Comm), approved by the CA [2011] EWCA Civ 24.

37 This appears in the three YAR revisions: 1974, 1994 and 2004.

38 *Athel Line Ltd v Liverpool & London War Risks Insurance Association Ltd* [1944] KB 87, p 94.

39 The rule of interpretation in the YAR 1974 provides that, where the numbered and lettered rules conflict, it is the numbered rules that prevail.

40 See further commentary on standard form towage contracts (at Ch 11, above) and salvage contracts (at Ch 10, above).

action will be recoverable in GA, provided there was no reasonable alternative open to the master.[41]

The fetter on the master's discretion is examined in the context of having to make his choices in time of danger for the ship and property on board for the purpose of preserving the common adventure.

3.4 PRESERVATION OF PROPERTY IMPERILLED

This requirement relates to the subject matter relating to GA recovery. Traditionally, general average concerns the preservation of property involved in the 'common adventure', that is, the ship,[42] bunkers, her cargo and freight.

In order to be liable to contribute in GA, the freight has to be at the carrier's risk. Therefore, once freight has been earned, it does not contribute as an interest, as it is no longer at risk to the carrier. However, the cargo for which the freight has been earned will still be liable to contribute.

4 CAUSATION

4.1 DIRECT CONSEQUENCE

Rule C of the YAR states that only such losses, damages or expenses that are the direct consequence of the GA act shall be allowed as general average; under Rule E, the onus of proof is upon the party claiming in GA to show that the loss or expense claimed is properly allowable as GA. Section 66(1) of the Marine Insurance Act 1906 allows recovery in GA for losses 'caused by or directly consequential to' a GA act.

Thus, the claimant has to prove that his loss was a direct consequence of a GA act to recover contribution (Rule E). The defendant has the burden of showing a break in the chain of causation.[43]

In addition to the obvious sacrifices and expenditures incurred in GA, other losses resulting from GA acts may qualify for recovery in GA. Whether they can or not is dependent upon whether such losses are a direct result of the GA act. An intervening negligence during the GA act may or may not break the chain of causation between the act and the loss.

4.2 FORESEEABILITY AND BREAK IN THE CHAIN OF CAUSATION

In ***Australian Coastal Shipping v Green***,[44] there were two vessels in peril. The ship-owner contracted for two tugs to tow both vessels to safety, contracting on

41 *Australian Coastal Shipping Commission v Green* [1971] 1 QB 456, p 483, per Lord Denning MR.
42 The equipment on board the ship also qualifies as 'property' in GA.
43 E.g. *The Alpha*, para 5.2, below.
44 [1971] 1 QB 456.

UKSTC terms. In both cases, the towing line broke, rendering one tug a total loss, with the other tug claiming salvage expenses. Under the UKSTC, the ship-owner was liable to indemnify the towage company for all losses and expenses suffered. He contended that these losses were recoverable by him in GA. Lord Denning MR, in the CA, held they were, stating:

> If the master, when he does 'the general average act', ought reasonably to have foreseen that a subsequent accident of the kind might occur – or even that there was a distinct possibility of it – then the subsequent accident does not break the chain of causation . . . If, however, there is a subsequent incident which was only a remote possibility, it would be different.[45]

5 EFFECT OF FAULT ON GA ENTITLEMENT

The ship-owner's obligation to perform the voyage under the contract of affreightment is to deliver the cargo safely to the port of destination upon payment of the agreed freight. He must have complied with his obligation to provide a seaworthy ship at the commencement of the voyage.[46] Contribution for GA, when incurred for the common safety, does not absolve the parties from their contractual rights and obligations. Only when the sacrifice or expenditure is beyond the contractual duties will it be allowed in GA.[47]

5.1 REMEDIES OR DEFENCES – THE PRINCIPLE

Rule D provides that rights of contribution in GA shall not be affected if the event giving rise to the sacrifice or expenditure is due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences that may be open against or to that party in respect of such fault.

In ***Goulandris v Goldman***,[48] it was held: The equitable defence that a person may not recover from any other person in respect of the consequences of his own wrong was one of the 'remedies' preserved by the second part of Rule D of the YAR 1950, and that defence was unaffected by para 3 of r 6 of Art III of the Hague Rules and defeated the claimants' claim; as far as the cargo-owners' cross-claim was concerned, in r 6 of Art III of the Hague Rules 'loss or damage' referred to loss or damage relating to the cargo-owners' goods, but it was not confined to actual loss or physical damage; the ship-owners had not been discharged under r 6 of Art III from liability on the cargo-owners' cross-claim for damages equal to the amount of the GA contribution payable by them to the ship-owners, even though no suit had been brought within 1 year after delivery of the goods.

This rule against recovery is known as the 'equitable defence'.

45 Ibid, 482.

46 See *Sunlight Mercantile Ltd v Ever Lucky Shipping Co Ltd* [2004] 2 Lloyd's Rep 174: no GA contribution to the ship-owner was allowed because of his breach of his duty to exercise due diligence before and at the commencement of the voyage to provide a seaworthy ship, as required by the contract.

47 *The Bijela* [1993] 1 Lloyd's Rep 411.

48 *Goulandris Brothers v B Goldman & Sons* [1957] 2 Lloyd's Rep 207: the objects of Rule D were to keep all questions of alleged fault outside the adjustment and to preserve, unimpaired, the legal remedy at the stage of enforcement.

5.2 NEGLIGENCE

The question of actionable fault will depend on the terms of the contract and, if the Hague Rules or HVR are incorporated, negligence in navigation or management of the ship is an excepted peril (Art IV, r (2)(a)).

In ***The Torepo***,[49] this tanker grounded transiting the Patagonian Channels. The cargo interests alleged the casualty was caused by unseaworthiness. Criticisms were made about lookout, the competence of the chief officer and the master, passage planning and night orders. The court found the unseaworthiness was not causative, and, therefore, the owners were protected by the defence of negligence in navigation under the HVR, Art III r 2, Art IV r 2(a). Consequently, the claim by cargo interests against the owners to recover the amount they were obliged to pay to salvors and to recoup their GA security failed.

If in the course of taking action for the purposes of GA, there is negligence in carrying out the operation, which causes damage to the property on board, it may be actionable in a claim for breach of contract.[50] In addition, such negligence may break the chain of causation between the GA act and the loss, and the expenditure may not be recoverable in GA.

For example, in ***The Alpha*** case[51] the master's negligence in putting the ship aground, in the first place, and in dealing with the resultant situation, whereupon he caused damage to the engine of the ship, was irrelevant. He was criticised, however, for acting unreasonably in many respects when he was trying to refloat the vessel after grounding.

The defendants, cargo-owners, who were sued by the owners of the ship for GA contribution, argued that what the master did could not be GA, or that the element of unreasonableness broke the chain of causation between the GA act and the damage. The court held that, on the evidence, the risk of damaging the engine had been appreciated by the master, but the damage arose from an actual intention of the master to try to refloat the vessel at risk of such damage. Therefore, the owners recovered GA contribution for the damage to the engine.

5.3 NO LIABILITY TO CONTRIBUTE

In Rule I, it is stated that no jettison of cargo shall be allowed as GA, unless such cargo is carried with the recognised custom of the trade. Thus, if deck cargo is carried with the consent of the parties in accordance with the custom of the trade, GA contribution will be allowed.

49 *Owners of Cargo Lately Laden on Board the Torepo v Owners of the Torepo* [2002] 2 Lloyd's Rep 535; see also *The Isla Fernandina* [2000] 2 Lloyd's Rep 15; *The Lendoudis Evangelos II* [2001] 2 Lloyd's Rep 304.

50 See, also, *The Oak Hill* [1975] 1 Lloyd's Rep 105: breach of contract was proved in handling the cargo carelessly during discharge and storage after the vessel's accident; *The Hector* [1955] 2 Lloyd's Rep 218: the fact that the master acts as agent of necessity does not relieve him of his duty to exercise reasonable care in the preservation of the cargo; see, also, *Goulandris Brothers*, op. cit. fn 46.

51 *Corfu Navigation Co v Mobil Shipping Co Ltd (The Alpha)* [1991] 2 Lloyd's Rep 515.

In ***Strang Steel v Scott***,[52] the Privy Council expounded the exceptions to GA contribution:

> There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice: actionable fault and unauthorised deck cargo:

5.3.1 Fault

Schloss v Heriot[53] is the leading English authority upon the point. There was an action by the ship-owner against the owners of cargo for contribution in an average loss, a plea stated in defence to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness; it was held to be a good answer to the claim by Chief Justice Erle and Willes and Keating JJ, stating:

> When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril that [mediately] (sic) gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property that was imperilled by his own tortious act and that it was his duty to save.

5.3.2 Unauthorised deck cargo

The second exception is in the case of deck cargo. The reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of maritime law, the placing of goods upon the deck of a seagoing ship is improper stowage, because they are hindrances to the safe navigation of the vessel, and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of encumbrances that ought never to have been there, and not as a sacrifice for the common safety. However, the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck, and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

In ***Onego Shipping & Chartering BV v JSC Arcadia Shipping***,[54] it was held that, where a charterparty incorporated the Hague Rules/HVR and envisaged that deck cargo would be carried but did not state what deck cargo was being carried, the Rules applied to the carriage of that deck cargo, unless the bill of lading issued for

52 (1889) 14 App Cas 601, pp 608, 609.
53 *Schloss v Heriot* (1863) 14 CB (NS) 59 (improper stowage).
54 [2010] EWHC 777 (Comm).

the cargo contained an on-deck statement as required by Art I(c) of the Rules. If not, it would be unauthorised cargo.

5.3.3 Deviation through an unauthorised route and piracy issues[55]

Equally, if the ship deviated from the voyage route without the consent of the contracting party, or without waiver of the breach, it would be a serious breach of the contract entitling the other party to elect to terminate the contract. If a GA act was necessary during the deviated route, unless the contracting parties waived the breach, there will be no GA contribution to the owner.[56]

However, piracy risks may necessitate the ship deviating from its route and even disobeying the charterers' orders. Whether or not the deviation will be permitted will depend on both the factual situation and the interpretation of the contractual terms of the contract of affreightment, which usually includes war risks provisions, particularly if the ship is contracted to trade in piracy risk areas.

If it is found on the facts of a case that the deviation was not justified, the owner will be committing a serious breach. Unless the breach is waived, not only will he be incurring extra expenditure, which will not be recoverable as a GA contribution, he will also be exposed to be held liable in damages for repudiation of the contract, in addition to losing hire payments.[57] Moreover, if a casualty occurs in the deviated route, any action taken to save ship and cargo from danger will not be recoverable as a GA expenditure, and the insurance cover may be prejudiced.

Therefore, the owner needs the assistance of the law in situations in which his ship and crew are exposed to risks of piracy attacks, so that he and the master know what will be permitted to do without risking ship, cargo and crew and also throwing up his contract unintentionally.

55 With regard to piracy risks and practical issues, see papers on 'Piracy II – ship-owners' and charterers' concerns regarding their contractual obligations' and on 'Insurance law developments', delivered at the events held by the London Shipping Law Centre on 15 March 2010 and on 14 April 2011, respectively.

56 *Hain SS Co Ltd v Tate & Lyle Ltd* (1936) 41 Com Cas 350.

57 Whether or not seizure by pirates is an off-hire event (so that, if the hire does not have to be paid, it would not be a deduction from the values to be contributed to GA), it will depend on the wording of the off-hire clause and the construction of the charter as a whole to ascertain how this risk was allocated between the parties. Unless the parties expressly and clearly include such an event in the off-hire clause, the court held, in *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2011] 1 Lloyd's Rep 187, that the terms of a charterparty (the standard cl 15 of the NYPE form) did not entitle charterers to put the vessel off-hire from when it was seized by pirates. Contrast *Osmium Shipping Corp v Cargill International SA (The Captain Stefanos)* [2012] 2 Lloyd's Rep 46, where the point in dispute turned on the construction of the words 'capture/seizure' in cl 56, in the context of the clause and the charter as a whole. The judge held that 'the words "capture/seizure" are free standing and constitute a separate head of off-hire, quite apart from "detention or threatened detention by any authority" including arrest' (at para 17).

At para 33:

There was no issue between the parties that the word 'seizure' covered any 'forcible possession' of the ship and was apt to include hijacking by pirates unless the words were qualified by the further words 'by any authority', which appear later in the clause

The judge, agreeing with the arbitrators, held that, on proper construction of cl 56 of the charter, the relevant off-hire event was the 'capture/seizure' of the vessel, and she was off-hire between 21 September 2008 and 6 December 2008 while subject to the hijacking by pirates. The clause had allocated that risk to the owners. Therefore, this example should be borne in mind by owners when they agree the off-hire clause, if the market forces are in their favour.

Whether or not the master is entitled to disobey the charterers' orders will depend on the terms of the particular charter, and there has been a trilogy of recent decisions that provide guidance.

For example, in ***The Triton Lark***,[58] it was held by Teave J that, in sub-cl 2 of the CONWARTIME 1993 clause, the phrase 'may be, or are likely to be, exposed to war risks' expressed a single degree of possibility or probability. The clause did not require it to be more likely than not that the vessel would be exposed to acts of piracy;[59] rather, it required a real, as opposed to fanciful, likelihood that the vessel would be exposed to acts of piracy. Thus, the clause operated where the master or owner formed a reasonable judgment that the vessel was 'likely to be' exposed to war risks, including acts of piracy.[60]

Furthermore, in his subsequent decision, ***The Triton Lark***,[61] in order to clarify points arising from his earlier judgment, the judge construed the phrase 'exposed to War Risks' in cl (2) of CONWARTIME 1993 insofar as it related to acts of piracy and held: the question to be addressed by an owner or master, when ordered to go to a place, was whether there was a real likelihood that the vessel would be exposed to acts of piracy in the sense that the place would be dangerous on account of such acts. The judge explained that 'dangerous' must be considered when asking whether there was a 'real likelihood' of being 'exposed to war risks', and it will depend on the facts, upon both the degree of likelihood that a particular peril may occur and the gravity or, otherwise, the consequences, should it occur.

In the third case of the trilogy, ***The Paiwan Wisdom***,[62] on the true construction of a time charter incorporating the CONWARTIME 2004 clause, it was held that the ship-owner was not precluded from relying on that clause to justify its refusal to proceed on a voyage to a place (even within the trading limits) ordered by the charterer, even where there was no material change in the risk of proceeding with that voyage between the date of the charterparty and the date of the order. Although Kenya was

58 *Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark)* [2012] 1 Lloyd's Rep 151: The phrase 'may be' was to be understood as 'likely to be', the word 'or' being used in the sense of 'that is'. The two phrases did not express different degrees of possibility or probability; nor did 'may be' refer to the present and 'likely to be' to the future (see paras 38, 47 of judgment).

59 A simpler account of what a master could recall was given by Andrew Baker QC in his paper 'Piracy during a time charter – hire, war risks and other animals', 22 March 2012, delivered at the ICMA XVIII 2012 conference, where he clearly stated, at para 54:

> I would therefore propose that the Conwartime Clause, as applied to piracy risks, disentitles the charterers from ordering the vessel to proceed to or via a port, place, area of zone if, in the reasonable judgment of the master or owners, there would be *a non-negligible chance*, if the vessel did so, that she would encounter an act of piracy, or acts of piracy, that could be dangerous (i.e. that could cause her damage despite the due exercise of the skill and care expected from master and crew).

Surely a master would be able to understand and remember the chosen phrase of Mr Baker, namely: 'a non-negligible chance', rather than contemplating what degree of likelihood would there be of encountering an act of piracy!

60 This was an appeal from the arbitrators' award and the decision did cause controversy because, although the arbitrators had found that, on the facts of the case, 'there was a serious risk of [the vessel] being hijacked by pirates when transiting the Gulf [of Aden]', the judge was persuaded by counsel for the charterers that the arbitrators meant there was a serious event occurring that would have serious consequences, instead of having made a clear finding of the size of the risk. Thus, the arbitrators were directed by the judge to re-examine the case 'whether, in the reasonable judgment of the owners, there was a real likelihood that the Gulf of Aden would, on account of acts of piracy, be dangerous to *Triton Lark*'.

61 *Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark)* [2012] 1 Lloyd's Rep 457.

62 *Taokas Navigation v Komrowski Bulk Shipping KG (The Paiwan Wisdom)* [2012] 2 Lloyd's Rep 416.

within the vessel's trading limits under the charterparty, CONWARTIME 2004 provided that an owner could refuse to proceed to a place that was dangerous on account of a war risk. The presence in the Gulf of Aden of naval forces and a convoy system explained why the owner had agreed to pass through the Gulf of Aden, but that agreement was no warrant for construing cl 50 as an agreement that the vessel could be ordered by the charterer to proceed to any port or place on the east coast of Africa, other than the excluded countries of Eritrea, Ethiopia and Somalia, where there was a risk of piracy but no naval forces or convoy system. The judge further held that there was no lack of commercial sense in a construction of the charterparty, which permitted trading to Kenya on day 1, but which entitled the owner to refuse an order to trade to Kenya on day 2.[63]

This is a welcome decision, because the issue 'whether the master can refuse charterers' orders even if the degree of risk has not materially changed since the date of the charter' had not arisen before under this clause, and ***The Product Star (No 2)***[64] was distinguished both on the facts and the contractual terms. It should be noted that the CA there held (at p 404 col 2):

> Although at the time when the charterparty was made the whole of the Gulf, including UAE waters, constituted a war risk zone, the owners were, by the combination of cll 10 [the trading limits clause], 40(2) [the war risk clause] and 50 [the war risk premium clause] accepting that in the circumstances prevailing at the date of the charterparty the risks of proceeding to UAE ports and loading there were not such as they would consider 'dangerous' so as to render the discretion under cl 40(2) exercisable.

Owners should be particularly alert to such terms in the charter before accepting them, which would be likely to be construed by the court that the owners had accepted the risk.

These three decisions are of extreme importance to owners regarding piracy risks and whether they can refuse to obey charterers' orders to proceed to a place that (even though agreed at the time of the charter) was considered by the master, at the time the order was made, to be a place where there was a real likelihood that his ship would be exposed to piracy attacks.

5.3.4 Unseaworthiness

A few examples illustrate how the ship-owner can be deprived of GA contribution which arose from owing to causative unseaworthiness. In ***Sunlight Mercantile Ltd v Ever Lucky Shipping Co Ltd***[65] (which concerned the common law obligation of the ship-owner to provide a seaworthy ship and not the obligation under the Hague Rules), no GA contribution from the cargo interests to the ship-owner was allowed by the Singaporean CA, because of breach of the obligation. On the facts, it was found that the ship was unseaworthy by reason of defects in the main engine, which caused an explosion and necessitated towage of the vessel to a port for repairs. The owners claimed GA contribution from the cargo-owners, who refused to pay, relying on the above breach. The owners argued that, even if the ship was unseaworthy, there was a wide exception clause in the bill of lading for deck cargo (namely, that the

63 Ibid, at paras 16–25.
64 [1993] 1 Lloyd's Rep 397.
65 [2004] 2 Lloyd's Rep 174, CA Singapore.

owner should not be responsible for loss of or damage to deck cargo 'howsoever arising' or 'howsoever caused'). This exception, they argued, absolved them from liability, and, therefore, there was no actionable fault. The judge agreed, but he was overruled on appeal.[66]

In ***The Evje No 2***,[67] the ship was found unseaworthy at the beginning of the voyage, because there were insufficient bunkers or because the bunkers were of the wrong quality, and the unseaworthiness was the cause of the casualty when the fuel ran out and the ship needed towage. No GA contribution was due to the owners from the charterers.

In ***The Kasmar Voyager***,[68] the ship was carrying a cargo of soya beans under a contract of carriage evidenced by a bill of lading, which was subject to the Hague Rules. Engine problems arose during the voyage, and the vessel was immobilised, needing towage services to reach a repair port. Investigations revealed that there was a defect in manufacture of the piston skirt, which developed into a crack in the life of the piston. The major damage to the engine had been caused after a spare piston had been fitted whose dimensions were not compatible with the main engine. Upon a claim by the owners against the cargo insurers for GA contribution, the claim was resisted on the ground of the owners' failure to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage. On evidence, it was found that the service of the cylinder had been postponed, and the routine maintenance prescribed had not been followed. The vessel was unseaworthy, and the owners could not discharge the burden of proof that they, or their agents, exercised due diligence before and at the beginning of the voyage.[69] Thus, the GA expenditure was caused by their actionable fault, and they were unable to recover GA contribution from the cargo interests.

With regard to exercising due diligence to make the ship seaworthy in terms of equipment, training the crew and following the internationally established procedures to deal with risks of piracy, if the ship trades in the high-risk piracy areas, there may be issues of whether or not the burden of having exercised due diligence can be discharged.

As discussed under causation (para 4, above), for the defendant to GA to succeed in his defence, he must show a causal link between the fault and the event giving rise to the GA act and to the loss, as is shown in *The Evje* and *The Kasmar Voyager*, unless the claimant for GA contribution proves that either he exercised due diligence or his liability for the fault is excluded.[70]

Assuming that the cargo-owner succeeds in its defence, this would not invalidate the right of the ship-owner to recover GA vis-à-vis his insurer, subject to the terms of the policy:

66 The Singaporean CA found an opportunity to comment on *The Imvros* case [1999] 1 Lloyd's Rep 848, in which Langley J had interpreted the same exception clause as absolving the owner from liability even when it arose from unseaworthiness, that it was bad law.

67 [1976] 2 Lloyd's Rep 714; see also *The Aga* [1968] 1 Lloyd's Rep 431: the ship had a stability problem before she left port, resulting in heavy listing, which necessitated beaching her.

68 [2002] 2 Lloyd's Rep 57.

69 *The Muncaster Castle* [1961] 1 Lloyd's Rep 57 was applied.

70 *Milburn & Co v Jamaica Fruit Co* [1900] 2 QB 540 (CA), approved by the House of Lords in *Louis Dreyfus & Co v Tempus SS Co* [1931] AC 726; see, also, *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft mbH & Co KG* [2006] 2 Lloyd's Rep 66, a case where the liability for proper stowage was upon the charterer, and the owner was not at fault.

(a) the hull insurer will pay the ship's proportion of GA expenditure, provided the owner is not in breach of the relevant provisions of the Marine Insurance Act 1906, for example, s 39(1) (voyage policy – implied warranty that the ship shall be seaworthy at the commencement of the voyage for the purpose of the particular adventure) and s 39(5) (time policy – sending the ship to sea in an unseaworthy condition with knowledge and privity of that unseaworthiness that caused the loss);
(b) the P&I club, subject to there being no breach by the assured of the club's rules, will reimbursed the ship-owner whose ship is entered with the club with regard to the cargo's proportion to GA expenditure that is not recoverable from the cargo insurers by reason of the owner's breach.

5.3.5 Dangerous goods causing combustion or fire

Similarly, when the shipper ships goods that he knows to be dangerous, which results in the jettison of the cargo for the safety of the common adventure, he will not recover GA contribution.[71] Rule XIX of YAR also provides that 'undeclared or wrongfully declared cargo' loaded without the knowledge of the ship-owner or his agents, or goods wilfully mis-described at the time of shipment, shall not be allowed as GA, if damage or loss is caused to them, but such goods shall remain liable to contribute, if saved.

In this connection, three important decisions are mentioned here and, although they are not directly relevant to GA, they illustrate how the risk of something unexpected arising from the cargo is allocated between the parties, which will, inevitably, affect liability for GA contribution.

In the well-known decision of Mustill J, ***The Athanasia Cominos***,[72] his words on the issue have never been improved upon, as the CA said in *The Aconcagua*,[73] to which it referred at para 22:

> There . . . remains the problem of identifying the boundary between those risks which the ship-owner contracts to bear and those which he does not. One possibility is to draw the line by reference to the proper method of carriage. A ship-owner who consents to carry goods of a particular description contracts to perform the carriage in a manner appropriate to goods of that description, and thereby assumes all risks of accidents attributable to a failure to carry in that manner.
>
> This is an attractive proposition, for it neatly solves the question of degree to which I have referred, and enables attention to be concentrated on the means adopted to carry the goods. If the carrier proves that he has used the appropriate means, the claim succeeds, without his having to engage in the often difficult tasks of establishing the precise character of the goods, and the precise respects and degree in which they deviated from the norm. Conversely, if his performance has fallen short of what is appropriate, in a manner which is causative of the loss, his claim must fail. This approach also has the theoretical merit of keeping attention focused on the carriage of the goods, which is the subject-matter of the contract from which the liability of both parties mainly, if not exclusively, arises.

71 c.f. *Greenshields, Cowie & Co v Stephens & Sons* [1908] AC 431: in this case, the owners of the coal were entitled to claim against the ship contribution in GA in respect of the sacrifices voluntarily made for the common advantage of all, the fire having been caused by the inherent qualities of the coal, or, in other words, by spontaneous combustion, without default on the part of the shippers.

72 [1990] 1 Lloyd's Rep 277

73 *Compania Sud Americana De Vapores SA v Sinochem Tianjin Limited Aconcagua* [2010] EWCA Civ 1403.

This approach will be sufficient to deal with most problems relating to dangerous cargoes, for in respect of the great majority of goods, the normal precautions will suffice to eliminate the risk of carrying normal goods of the description stated in the contract. Leaving on one side casualties from wholly extraneous causes, one can say that proper carriage and dangerous nature are opposite sides of the same coin.

There are, however, cases to which this simple analysis cannot be applied: i.e. those where the nature of the goods is such that even a strict compliance with the accepted methods of carriage will not suffice to eliminate the possibility of an accident. Whether consciously or not, seafarers and those who advise them have chosen to adopt methods of carriage which involve an element of risk. No doubt the risk could be eliminated, if those concerned were to provide complex equipment, and enforce rigorous standards of performance. But for practical reasons, they do not. The existence of this gap between acceptable carriage and safe carriage means that there may be cases where an accident is due, neither to the unusual cargo, nor to any short-comings in the carrier, but to simple bad luck.

Who is to bear the risk of accidents falling into this category? In my judgment, the risk must fall on the carrier. By contracting to carry goods of a specified description, he assents to the presence on his ship of goods possessing the attributes of the goods so described; and in the case under discussion, those attributes include the capacity to create dangers which the accepted methods are not always sufficient to overcome.

On the fact of ***The Aconcagua***, the CA held, at para 23:

Calcium hypochlorite is not a cargo whose nature is 'such that even a strict compliance with the accepted methods of carriage will not suffice to eliminate the possibility of an accident'. It has been carried safely for decades and if the carriage by the ship-owner (or, as in this case, the time charterer) cannot be faulted the likelihood must be, both in common sense and in law, that the claim by the owner/charterer for breach of contract in shipping dangerous cargo is likely to succeed.

It should be noted that, under Art IV r 6 of the HVR, liability of the shipper is strict, and it has been interpreted by the House of Lords, in ***Giannis SK***,[74] thus: The ship-owner was entitled to damages under the Hague Rules Art IV r 6, which stated that the shipper must bear all damages and expenses directly arising out of the shipment of dangerous goods to which the carrier had not knowingly consented. 'Dangerous' cargo in that context included cargo that was physically dangerous to other cargo, and not just cargo that caused direct physical damage. Article IV r 6 imposed strict liability on a shipper in respect of the shipment of dangerous goods, and they were not entitled to limit their liability by reference to Art IV r 3, which required fault or neglect for liability to be imposed.

6 ACCRUAL OF THE CAUSE OF ACTION

The cause of action for contributions in GA under contractual provisions, which did no more than require GA to be adjusted according to YAR, accrues at the time when each GA sacrifice is made or GA expense is incurred.

It was stated by the Privy Council, in ***The Potoi Chau***,[75] that the effect of the GA clause in the bill of lading was to transfer to the consignee as indorsee of the bill of lading the common law liability to contribute to GA of whomever had been the

74 [1998] AC 605.

75 *Castle Insurance Co v Hong Kong Islands Shipping Co (The Potoi Chau)* [1983] 2 Lloyd's Rep 376 (PC), *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65 approved.

owner of the cargo when the sacrifice was made. As it did not by its terms postpone the date when the cause of action accrued, and as, at common law, a cargo-owner's liability accrued at the time of the sacrifice or the incurring of the expense, the ship-owners' cause of action against the consignees under the GA clause had been time-barred at the time when the ship managers had applied to join the ship-owners as additional plaintiffs.

As this liability arises under a simple contract, the period of limitation is 6 years from the accrual of the cause of action, but the clause is intended to regulate, and to transfer to whomever acquires title to the consignment of cargo under the bill of lading, what would otherwise be a common law liability of the owner of the cargo at the time of the GA act.[76]

However, the Privy Council further decided that: where a consignee executed a Lloyd's standard form average bond in return for the release of cargo to him, he undertook a fresh contractual obligation to contribute to GA. As, by their terms, the bonds provided that the obligation to contribute was not to arise until the GA statement had been completed, this was the earliest date at which the ship-owners' cause of action against the consignees for payment of contribution arose under the GA bonds, and so the claim was not time-barred (see below, 7.2).

7 **SECURITY**

At the time of the 'Digest of Justinian', the obligation was upon the master of the vessel to have a GA arising on the voyage adjusted. In modern times, this responsibility has devolved upon the ship-owner.

7.1 RIGHT TO A POSSESSORY LIEN

In order to protect the rights of GA creditors, the ship-owner is obliged[77] to obtain reasonable security from contributing interests. The law assists him in this by allowing him to exercise his right of the common law possessory lien on the property until such security is given. The GA act gives rise to a possessory, not maritime, lien on the property. The owner, therefore, through the master, may withhold delivery of property at the destination until reasonable security has been provided.

7.2 FORMS OF SECURITY

It is an invariable practice that security is provided in the form of a GA bond, signed by the consignee and secured by a GA guarantee, signed by the insurer for the cargo. If the cargo is uninsured, or the particular cargo insurer is not acceptable to the ship-owner, a GA cash deposit[78] – of an amount that is usually recommended by the average adjuster – is held by the average adjuster, pending the completion of his adjustment.

76 *The Potoi Chau*, p 379.
77 *Crooks v Allan* (1879) 5 QBD 38.
78 Such cash deposits are provided for by YAR, Rule XXII.

In ***The Lehmann Timber***,[79] where the cargo-owner refused to provide the GA bond, although the insurer had provided the GA guarantee, the ship-owner was allowed to continue to exercise his lien on the cargo, because it had not been lost by his acceptance of the GA guarantee. The guarantee was not a sufficient security, the judge held, without the GA bond, and, therefore, its retention was not inconsistent with the continued exercise of the lien. The CA[80] upheld the decision on this point, but, on the questions whether the shipowner could recover the storage expenses, unlike the judge, it restored the arbitrators' award. It held that the ship-owner was entitled to recover from the cargo-owner the storage of cargo costs, because the contractual arrangement provided for damages in the event of the consignee's failure to discharge the cargo. The exercise of a lien by the ship-owner provided no excuse to the consignees for performance of their contractual obligations; *Somes v British Empire Shipping Co* (1858) – which established the common law principle that the exercise of a self-help remedy does not give rise to a claim by the lienee for expenses (applied by the judge) – did not apply in the context of commercial shipping.

The average bond, as backed up by an insurer's guarantee, or a cash deposit, is a new contract, being independent from the contract of affreightment, between the ship-owner and the owner of the other interest. The consideration provided is the release of the possessory lien on the cargo by the ship-owner, and, as far as cargo interests are concerned, the consideration is the assumption of personal liability to pay when the adjustment is presented.

Usually, the parties agree the law and the jurisdiction to which the security will be subject for adjudication of any disputes that might arise between the parties under the terms of the security. To prevent problems arising from the *lis pendens* rule of the EU Brussels I Regulation (as amended), it would be advisable that the parties agreed in the GA guarantee that the English court shall have exclusive jurisdiction.[81]

The contractual obligation assumed by the cargo interests under the security, the GA bond and the guarantee, is to make payment of a liquidated sum at a future date, which will not arrive until the GA statement has been completed by an average adjuster appointed by the ship-owners. That is the earliest date at which the ship-owners' cause of action against the consignees under the average bond for payment of GA contribution arises.[82] Therefore, in ***The Potoi Chau***, seen under 6, above, the insurers' appeal was dismissed, as by their letters of guarantee they had assumed a primary liability to pay a sum of money either explicitly or implicitly expressed to be the GA contribution that might be found to be due on completion of the average statement; and so, at the time of the application to join the ship-owners as plaintiffs, the ship-owners' right of action against the insurers had not been time-barred.

7.3 NON-SEPARATION AGREEMENT

Where, during the course of the contracted voyage, cargo is forwarded by some other vessel or conveyance, the ship-owner will usually require that a non-separation

79 *Metall market v Vitorio Shipping Co Ltd (The Lehmann Timber)* [2012] EWHC 844 (Comm).

80 [2013] EWCA Civ 650.

81 E.g. to avoid the issues that arose in *Mora Shipping Inc v Axa Corporate Solutions Assurance SA* [2005] EWCA Civ 1069; see, further, Ch 7, Vol1 of this book.

82 *The Potoi Chau*, op. cit. fn 75, pp 382–383.

agreement forms part of the average bond and the average guarantee. If the contract of carriage provides that GA is to be adjusted according to the YAR 1994 or 2004, a non-separation agreement wording will automatically apply.

A non-separation agreement provides that, although cargo has been separated, by forwarding, from the rest of the maritime adventure, its contribution to the GA will be calculated as though it had remained with the carrying vessel until its delivery. The agreement is between the ship-owner and the cargo-owner, and it enables the ship-owner to recover his GA expenses as if the cargo had remained on board.

7.4 TIME LIMIT

Further to what was discussed under paras 6 and 7.2, above, Rule XXIII of YAR 2004 expressly provides that a claim for GA contribution, including any rights to claim under GA bonds and guarantees, shall be extinguished, unless an action is brought by the party claiming such contribution within a period of 1 year after the date upon which the GA adjustment was issued.

In no case shall such an action be brought after 6 years from the date of termination of the common maritime adventure. The period may be extended upon the agreement of the parties after the termination of the common maritime adventure.

At the end of the day, it is the insurers (for hull or cargo) of the respective parties involved in the common adventure that pay for GA contributions, which the parties can recover by way of indemnity pursuant to their respective insurance contracts.

This page intentionally left blank

CHAPTER 13

RISK MANAGEMENT BY HARBOUR AUTHORITIES

LIABILITIES RELATING TO PORTS, PILOTS AND WRECK REMOVAL

Introduction 679

Section A: Law and regulations affecting harbours 680

1 Sources of port powers and definitions 680

2 Types of harbour authority 683

3 Legislation for the protection of the environment 684

4 Powers and duties of harbour authorities 687

5 Liability of ship-owners for damage caused to harbours 703

6 Harbour dues 711

7 Port security 712

Section B: Pilotage and risks 712

1 Introduction 712

2 Duties of a competent harbour authority in relation to pilotage 714

3 Duties of masters and pilots in a compulsory pilotage area 718

4 Pilot's authority and relationship between master and pilot 719

5 Liability of a pilot 721

6 Liability of harbour authorities with respect to pilotage 722

7 Liability of the ship-owner for negligence of the pilot 723

8 Charges by the competent harbour authority 730

9 Conclusion 730

Section C: The WRC 2007 731

1 Introduction 731

2 Fundamental provisions 732

INTRODUCTION

This chapter focuses on duties, powers and liabilities of harbour authorities, the legal relations between pilots and ship's master, the question of who employs the pilot when on board the ship, and potential liabilities of ship-owners to port authorities and third parties. The law relating to harbours' general duties, powers and liabilities is examined under Section A; their particular duties arising in relation to pilotage

services are discussed separately under Section B; finally, the effect of the Wreck Removal Convention 2007 (WRC) is discussed under Section C of this chapter.

Consistent with the ISM Code requirements for risk assessment imposed upon ship-owners and operators in relation to ship safety, the implementation of risk assessment and compliance with the Port Maritime Safety Code (PMSC) 2012[1] is paramount for harbour authorities to ensure safety throughout in port operations and in their services for pilotage. The Code includes accountability of the board of statutory harbour authorities for the implementation of risk assessment and management, contingency plans and emergency response, management of navigation and pilotage.

Parallel legislation towards a coherent policy on ports and maritime infrastructures has now been implemented at the EU level (see Chapter 2, above).

Harbour authorities have a duty to make proper use of powers, to make by-laws and to give directions (including pilotage directions) to regulate all movements in their waters. The powers should be exercised in support of policies and procedures developed in the authority's SMS. They should have clear policies on the enforcement of directions and should monitor compliance.[2]

SECTION A: LAW AND REGULATIONS AFFECTING HARBOURS

1 SOURCES OF PORT POWERS AND DEFINITIONS

1.1 STATUTES AND REGULATIONS REGARDING HARBOURS' POWERS

Unfortunately, there are many statutes, some of them very old, and regulations. In addition, there is local legislation that applies to particular harbours. The following statutes are the basic applicable statutes at present:

1 The Harbours, Docks and Piers Clauses Act (HDPCA) 1847 (10 Vict c 27), which is 'the mother statute', containing a comprehensive code of operational powers of the authorities governed by statute, and sections of it are usually incorporated in special legislation of harbour authorities.
2 The Harbours Act (HA) 1964 was passed after recommendations of the Rochdale Report and was the first Act concerned with the central organisation of harbours.[3] It included provisions for subordinate legislation.

1 The first initiative was taken after the accident of the *Sea Empress* (1997) by the issue of 'A guide to good practice on port marine operations', 30 January 2001, and 'Review of trust ports', following *The Future of Transport* White Paper; further see: The Government's Port Policy Review, May 2006; the original Code has been amended and superseded by the Port Marine Safety Code 2012 (PMSC): www.dft.gov.uk

2 *Guide to Good Practice on Port Marine Operations*, 2012, to be used in conjunction with the PMSC 2012.

3 The Harbours Act 1964 Sched 2 para 1 did not allow for partial replacement of an existing harbour authority by a newly constituted authority. The natural meaning of the words 'the harbour in lieu of the

3. The Docks and Harbours Act 1966, which conferred some new powers on the harbour authorities, including power to carry out harbour operations.
4. The Harbour Conservancy Act 1971.
5. The Local Government Act 1972, s 237, replaces s 83 of the HDPCA 1847, relating to by-laws.
6. The Health and Safety at Work Act 1974.
7. The Transport Act (TA) 1981.
8. The Dangerous Vessels Act (DVA) 1985.
9. The Pilotage Act (PA) 1987, as amended in 2003.
10. The Environmental Protection Act 1990.
11. The Aviation and Maritime Security Act 1990.
12. The Water Resources Act (WRA) 1991.
13. The Ports Act 1991 provides for the privatisation of port trusts.
14. The Transport Works Act 1992 basically amends some parts of the HA 1964.
15. The Environment Act 1995.
16. The Merchant Shipping Act (MSA) 1995 consolidated all the previous MSAs and some provisions of the HA 1964; it is relevant in this context with respect to wrecks, lighthouses, pollution and relevant powers of port authorities; s 252, relating to powers of port authorities in relation to wrecks, has been amended by ss 19 and 21 of the Poole Harbour Revision Order 2012.[4]
17. The Merchant Shipping Maritime Security Act (MSMSA) 1997 contains important provisions in relation to environmental protection and emergency situations in UK territorial waters. It includes powers of the Secretary of State to make regulations. A SOSREP is appointed to perform the functions of the Secretary of State under the MSA 1995 (s 293) in relation to marine pollution.
18. The Maritime Safety Act 2003 provides for powers of intervention and directions to the SOSREP.
19. The Planning and Compulsory Purchase Act 2004.
20. The Terrorism Act 2006.
21. The Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010 provides additional guidance following the Deepwater Horizon accident.
22. The Wreck Removal Act 2011 implements the Wreck Removal Convention 2007.

The following Regulations and Codes are also relevant:

1. The Dangerous Substances in Harbour Areas Regulations (DSHA Regs) 1987.
2. The MS (Dangerous Goods and Marine Pollutants) Regulations 1990.
3. The MS (Reporting Requirements for Ships Carrying Dangerous or Polluting Goods) Regulations 1995.
4. The MS (Port State Control) Regulations 1995.
5. The MS (Prevention of Pollution) Regulations 1996.
6. MS (Dangerous Goods and Marine Pollutants) Regulations 1997.

existing one' was the wholesale replacement of the existing harbour authority by another in respect of the whole of the harbour managed by that existing authority: Judicial review: *R (on the application of Humber Oil Terminals Trustee Ltd) v Marine Management Organisation* [2012] EWHC 3058 (QB).

4 SI 2012 No 1777 on Harbours, Docks, Piers and Ferries, The Poole Harbour Revision Order 2012.

7 The MS (Port Waste Reception Facilities) Regulations 2003 (revoked the 1997 Regs).[5]
8 The Fire Precautions (Workplace) Regulations 1997.
9 The MS (Oil Pollution Preparedness, Response and Co-operation) Regulations 1997.
10 The MS (Prevention of Pollution by Garbage) Regulations 1998.
11 The Control of Major Accident Hazards (COMAH) Regulations 1999.
12 The MS (Carriage of Cargoes) Regulations 1999.
13 The Health and Safety at Work Regulations 1999.
14 The MS (Safety of Navigation) Regulations 2002, implementing SOLAS Chapter V, 2002.
15 The MS (Safe Loading and Unloading of Bulk Carriers) Regulations 2003, implementing Directive 2001/96/EC; and the International Maritime Solid Bulk Cargoes Code 2008.
16 The Pilotage (Recognition of Qualifications and Experience) Regulations 2003, amending the Pilotage Act 1987.
17 The ISPS Code 2003, in force since 2004.
18 The Control of Major Accident Hazards (Amendment) Regulations 2005, amending COMAH 1999; they implement Council Directive 96/82/EC, known as the Seveso II Directive, as amended by Directive 2003/105/EC.
19 The IMO Guide to Good Practice for Port Reception Facilities 2009.
20 The MS (Light Dues) (Amendment) Regulations 2009.
21 The MS (Port Security) Regulations 2009.
22 Offshore Petroleum Activities (OPPC) (Amendment) Regulations 2011.
23 The MS (PSC) Regulations 2009 and 2011 (implementing the EU Directive 2009/16/EC).
24 The Maritime Security Guide 2012.
25 The MS (Accident Reporting and Investigation) Regulations 2012.
26 The Port Marine Safety Code 2012 (PMSC) and Guidelines to Good Practice 2012, amending the PMSC 2009 on the implementation of risk assessment by ports, which had amended the PMSC 2000.

1.2 DEFINITIONS

A 'harbour' is defined by s 313 of the MSA 1995, for the purposes of this Act, as including 'estuaries, navigable rivers, piers, jetties, and other works in, or at which, ships can obtain shelter, or ship and unship goods or passengers'.

In relation to pollution matters, the Act, in Chapter II, Pt VI, defines harbour in the UK as meaning,

> a port, estuary, haven, dock or other place the waters of which are within the UK national waters and, in respect of entry into or the use of which by ships, a person or body is empowered by an enactment (including a local enactment) to make any charges other than charges in respect of navigational aids or pilotage.

The definition of harbour by s 57(1) of the HA 1964, for the purpose of this Act, is wider, including,

5 At its 56th session in July 2007, the MEPC of IMO approved a Revised consolidated format for reporting alleged inadequacy of port reception facilities (see MEPC 1/Circ 469/Rev 1).

any harbour, whether natural or artificial, and any port, haven, estuary, tidal or other river or inland waterway navigated by sea-going ships, and includes a dock, wharf, and in Scotland a ferry or boat slip being a marine work . . . Dock is a dock used by sea-going ships and wharf is any wharf, quay, pier, jetty or other place at which seagoing ships can ship or unship goods or embark or disembark passengers.

The PA 1987 and the Ports Act 1991 adopt this definition, and so it is very relevant to the discussion in this chapter.

'Harbour operations' are defined by s 57(1) of the HA 1964 as:

(a) the marking or lighting of a harbour or any part thereof;
(b) the berthing or drydocking of a ship;
(c) the warehousing, sorting, weighing or handling of goods on harbour land or at a wharf;
(d) the movement of goods or passengers;
(f) the towing, or moving of a ship which is in or is about to enter or has recently left the harbour;
(g) the loading or unloading of goods, or embarking or disembarking of passengers, in or from a ship which is in the harbour or the approaches thereto;
(h) the lighterage or handling of goods in the harbour; and
(i) in relation to a wharf, the towing or moving of a ship to or from the wharf, the loading or unloading of goods, or the embarking or disembarking of passengers at the wharf in or from a ship.

2 TYPES OF HARBOUR AUTHORITY

Harbours may be classified by the types of function they perform and by the nature of their organisation. Most major ports perform the following broad categories of functions:

(a) provision and maintenance of harbour facilities and pilotage services;
(b) carrying out harbour operations and taking precautions about navigational safety;
(c) regulating the movement and berthing of ships and preventing pollution.

The major ports in the UK are either port trusts,[6] created by statute for the management of a harbour without share capital, or companies created by statute, local Acts of Parliament. A number are managed by local authorities (municipal port authorities), and others are reconstituted under the name 'Associated British Ports' by virtue of the TA 1981, and they are controlled by a company.

The TA 1981 allowed the investment of private capital in the development of harbour facilities. Nationalised ports (that is, ports serving the British railway system, on the south and east coasts) are controlled by the Association of British Ports.

Associated British Ports Holdings plc (ABPH) is the largest operator of seaports in the United Kingdom. The company also owns docks in the United States and provides port-related services, such as stevedoring and distribution. Created from the privatisation of the former British Transport Docks Board in 1983, the company's core Associated British Ports subsidiary owns 23 ports, covering much of the English and Welsh coastlines, including some of the country's most important ports, such as

6 The Government has proposed the 'Review of Trust Ports', *A New Deal for Transport, Better for Everyone*, 1999, White Paper, www.dft.gov.uk

Southampton, Swansea, Grimsby, Cardiff and Hull. Other docks held by the company include Barry, Ayr, Barrow, Immingham, Newport, Plymouth, Colchester, Talbot and Whitby.[7]

There are also ports registered as privately owned limited companies, which are subject to the Companies Acts.

3 LEGISLATION FOR THE PROTECTION OF THE ENVIRONMENT

With the ever-increasing demands for safer ships, cleaner seas and the prevention of environmental damage in coastal waters by marine casualties, the role of harbour authorities in ensuring safety in port operations and protecting coastal waters is vital and instrumental.

3.1 OIL POLLUTION LEGISLATION AND POWERS OF THE SECRETARY OF STATE

The MSA 1995 implements the Oil Pollution Preparedness, Response and Co-operation (OPRC) Convention 1990. The Merchant Shipping Regulations 1998 introduce into UK law the oil spill planning requirements and oil spill reporting requirements of the OPRC Convention. They require the harbour authorities to have approved oil pollution emergency plans.[8]

The MS (Prevention of Pollution) Regulations 1996, together with the provisions of the MSA 1995, give powers to harbour authorities to regulate the discharge of oil into the sea. Section 131 of the MSA 1995, as amended by s 7 of the MSMSA 1997, created a criminal offence if any oil or a mixture containing oil is discharged from a ship into UK national waters that are navigable by seagoing ships. Both the owner and the master of the ship shall be guilty of the offence. Section 144 of the MSA 1995 gives power to the harbour master to detain the ship. The general responsibility is in the hands of the Secretary of State. General powers of the Secretary of State

7 Altogether, ABP's ports process more than 127 million tons of cargo per year. The company's purchase of American Port Services (Amports), a British-owned but US-based business, gave it seaport operations in California, Delaware, Georgia and Florida. ABPH also runs a property investment and development arm, Grosvenor Waterside Group, which focuses on redevelopment efforts of the company's unused port-side properties. Other companies under the ABPH umbrella include Northern Cargo Services, a stevedoring company operating in the Port of Hull, which was acquired in 2000; Exxtor Shipping Services, acquired in 1998, based in Immingham; and Amports UK, formed from the 2000 acquisition of the Berkeley Group. ABPH also owns shares in joint ventures, including Southampton Container Terminals (49 per cent) with P&O Ports; and Tilbury Container Services, jointly owned by ABP, P&O Ports and Forth Ports. The company trades on the London Stock Exchange. ABPH has been restructuring in order to focus on its core ports and port services operations. This has led to the sell-off of a number of operations in 2000 and 2001, including its Red Funnel ferry service and the aviation management division of Amports, as well as plans to sell off a large part of its £650 million property portfolio; www.fundinguniverse.com/company-histories/associated-british-ports-holdings-plc-history/

8 The Secretary of State has powers conferred by Art 2 of MS (OPRC) Order 1997 (SI 1997/2567) and issued the 1998 Regulations (SI 1998/1056). This implemented the Oil Pollution Preparedness, Response and Co-operation Convention (OPPRC) 1990 (as amended by OPRC Protocol 2000) and came into force on 14 June 2007. It is about salvage policy, contingency plans and reporting of casualties; see, further, Chs 2 and 9, above.

derive from s 137 of the MSA 1995, as amended by the MSMSA 1997 (see, further, Chapter 16, below).

In addition, the Offshore Installations (Emergency Pollution Control) Regulations 2002 give the government power to intervene in the event of an incident involving an offshore installation where there is, or there may be, a risk of significant pollution, or where an operator has failed to implement proper control and preventative measures.

The Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005 (OPPC) provide for offences with regard to any unlawful discharge of oil, other than in accordance with the permit granted under these Regulations for oily discharges. A defence to this offence would be if the contravention arose because of something that could not have been reasonably prevented, or it was due to something done as a matter of urgency for the purpose of securing the safety of any person.

All oil pollution emergency plans – now known as OPEPs (previously OSCPs) – are subject to new guidance note 2012, on the OPEP for UK offshore oil and gas operators, which replaced the 2009 guidance note. OPEP is a fit-for-purpose operational document that sets out clear procedures for responding to offshore oil pollution incidents from oil and gas installations. This was in response to the Gulf of Mexico Deepwater Horizon incident. It builds on experience gained since the OPRC Regulations 1998.

Personnel with responsibility for oil pollution incident response must be competent, both in oil pollution incident response and in the use of their OPEP. The Department of Energy and Climate Change (DECC) is the regulatory approving authority for oil and gas installations and the review of OPEPs. The Oil Pollution Incident Response Training Guidelines for the UK Offshore Oil Industry must be followed as a minimum standard.

Inevitably, when there is an offshore pollution incident, the harbour authority will be involved.

Further legislation in this respect is the Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010, which extends the provisions of the OPPC 2005 Regulations to offshore gas unloading and storage operations and offshore carbon dioxide storage operations. This extension is, however, subject to geographical limitations to reflect the different devolution settlements relating to these offshore activities. The Offshore Petroleum Activities (Oil Pollution Prevention and Control) (Amendment) Regulations 2011 introduced a number of changes to the 2005 Regulations.

These include a new definition of 'offshore installation' to encompass all pipelines, some of which were not previously covered by the OPPC Regulations. The amending Regulations introduce the concept of 'release' to cover all unintentional oil emissions that occur through accidental spills/leaks or non-operational discharges. Intentional emissions are now clarified as discharges. However, given the OPPC Regulations already cover oil spills and leaks, the concept of 'release' is incorporated by amendment of the Regulations solely for the purpose of conforming with the Offshore Chemicals (Amendment) Regulations 2011.

Further related legislation is the OSPAR Recommendations 2010/18 on the prevention of acute oil pollution from offshore drilling activities, and the MS

(Implementation of Ship-Source Pollution Directive) Regulations 2009, as amended to implement the revised Directive 2009/123/EC (see Chapter 2, above).

The MS (Accident Reporting and Investigation) Regulations 2012 implement the EU Directive 2009/18/EC (Chapter 2, above) on the investigation of accidents and came into force on 31 July 2012. They set out the procedures for dealing with specified casualties and incidents, which are collectively defined as an 'accident', and how an investigation is to be conducted. 'Accident' means a marine casualty that is an event or sequence of events that has resulted in pollution or the potential of such pollution to the environment caused by damage to a ship or ships and has occurred directly or in connection with the operation of a ship.

The Secretary of State is given powers of intervention by s 137 of the MSA 1995, as amended by s 2 of the MSMSA 1997, when an accident has occurred to, or in, a ship and, in the opinion of the Secretary of State, oil from the ship will, or may, cause significant pollution on a large scale in the UK, the UK waters or a part of the sea specified by virtue of s 129(2)(b) of the MSA 1995.

For the purpose of preventing, or reducing, oil pollution, he, or his representative, may give directions as respects the ship, or its cargo, or the risk of oil pollution, to the owner of the ship, master, salvor and to the harbour master or to the harbour authority. The Secretary of State, through his representative, the SOSREP,[9] is able to override the powers of harbour masters and harbour authorities where this is necessary in order to prevent, or minimise, pollution.

3.2 THE ROLE OF THE PORT IN INSPECTIONS AND ENFORCEMENT OF LEGISLATION

A port State, whose port a ship enters voluntarily, must ensure that International Conventions, with regard to protecting the marine environment from ship-source pollution, are complied with. The PSC has undergone many reviews and is now part of an international regulatory regime.[10] The MS (Port State Control) Regulations 2011 implemented the EU Directive 2009/16/EC (see Chapter 2, above).

Its purpose is to ensure that substandard ships of whatever flag do not enter or leave ports with consequent risk to safety of life, and to ensure the preservation of property and the protection of the environment. Its role is like a police force that provides an effective deterrent to those owners who might, otherwise, have considered too lightly the risks involved in allowing a 'rust bucket' to leave a port and endanger lives at sea and the marine environment.[11] It became necessary in the light of evidence that some flag States were failing to enforce compliance with International Conventions rigorously enough.[12]

9 The SOSREP is now always involved in maritime emergency situations in UK territorial waters, as proposed by Lord Donaldson in his report 'Intervention powers, command and control', March 1999, www.dft.gov.uk; see, also, Ch 9, above.

10 For its origin and the background to it, see Kasoulides, M, *Port State Control and Jurisdiction*, 1993, Kluwer. See, also, Ch 2, above, for recent developments.

11 Sir Anthony Clarke, 'Port state control or substandard ships: who is to blame? What is the cure?' [1994] LMCLQ 202.

12 See further developments in this respect and initiatives taken by the EU to control the performance of flag States and their delegated recognised organisations in Ch 2, above.

4 POWERS AND DUTIES OF HARBOUR AUTHORITIES

4.1 GENERAL POWERS

Powers are derived either from special Acts of Parliament, the Harbour Acts, mentioned earlier, or from general Acts of Parliament relating to harbours and enabling them to make by-laws. Reference must be made to the local Acts and orders.

The MSA 1995, as amended, contains several powers of harbour authorities. If these powers are exceeded, the acts of the harbour authority will be *ultra vires*.[13] Similarly, if a company is registered by an Act of Parliament to operate public services (as, for example, for railway and market services), the company cannot abandon its objects without statutory sanction, even if the services are no longer required.[14]

A harbour authority, by s 51 of the HDPCA 1847, has the power to appoint a harbour master to regulate the time and manner of ships' entry to, or departure from, and movement within, the harbour waters (s 52 of the HDPCA 1847). The harbour master obtains his powers from by-laws. The authority's by-laws may include provisions for regulating the powers and duties of the harbour master, who is accountable to the authority for the safety of operations in the harbour.

The DVA 1985, by s 2, empowers harbour masters to give instructions to refuse entry to, or to require the removal of, dangerous vessels. However, it also enables the Secretary of State to countermand the directions of harbour masters, if he considers that this is necessary to secure the safety of any person or vessel. A harbour master may detain a vessel if he has reason to believe that it has committed an offence by discharging oil, or a mixture containing oil, into the waters of a harbour (s 144 of the MSA 1995).

In addition to the DVA 1985, harbour authorities have powers to regulate the activities of other persons in harbours and give directions to a casualty and to ships involved in salvage operations in order to ensure safety and prevention of pollution. This is enhanced by the Maritime Safety Act 2003.

Apart from statutes, additional powers of harbour authorities derive from EU Directives, which are implemented in the UK by Regulations. Further information about the EU Directives and Regulations are seen in Chapter 2, above.

4.2 DUTIES OF HARBOUR AUTHORITIES IN A RISK MANAGEMENT ERA

4.2.1 Duties under general and local legislation

A harbour authority has statutory duties contained in local Acts and Orders that transpose the provisions of the HDPC Act 1847, the HA 1964, the DVA 1985, the pilotage Act 1987, as amended, and the MSA 1995, as amended. The provisions of local Acts and Orders have much in common, but vary from port to port in the details.

13 *Dundee Harbour Trustees v Nicol* [1915] AC 550.

14 *Re Salisbury Rly & Market House* [1969] 1 Ch 349.

Several Merchant Shipping Regulations, seen above, concerning ports' duties are issued to transpose International Conventions or EU Directives and Regulations into UK law.

These duties include to:

- direct vessels to support safe navigation;
- manage dangerous vessels and dangerous substances effectively;
- provide pilotage services, if required in the interests of safety;
- provide aid to navigation through local lighthouse authority; lay down buoys and beacons in its area;[15]
- keep port open as a public facility, upon payment of rates, for shipping and unshipping of goods and embarkation/disembarkation of passengers;
- effectively manage any dangers to navigation from wrecks or obstructions;
- follow the directions of the Secretary of State through the SOSREP in the event of incidents threatening pollution and safety;
- prepare and implement waste management plans.

4.2.2 Duties under common law

The harbour authority has the duty to conserve the harbour in a reasonably fit state for use as a port and a duty of reasonable care to see that the harbour is in a fit condition for a vessel to resort to it.

4.2.3 Specific obligation to implement risk assessment

The obligations enshrined in the revised Code, PMSC 2012, mentioned earlier, are of paramount importance for risk assessment of all risks related to the port operations and for the implementation of an SMS. The Code identifies the following relevant general duties of harbour authorities in relation to marine operations:

- take reasonable care to ensure that all who may choose to navigate in the harbour may do so without danger to their lives or property;
- conserve and promote the safe use of the harbour and prevent loss or injury caused by the authority's negligence;
- have regard to efficiency, economy and safety of operation as respects the services and facilities provided;
- take such action that is necessary or desirable for the maintenance, operation, improvement or conservancy of the harbour.

In addition, the Health and Safety at Work Regulations 1999 impose a duty on the harbour to carry out a risk assessment of the risks to the health and safety of employees and non-employees, arising out of the conduct of the harbour undertakings, and to implement an SMS. The authority should have regard to these systems in the exercise of its statutory powers.

15 Under Part VIII of the MSA 95, each statutory authority is the local lighthouse authority (s 193 as amended by the MS and Maritime Security Act 1997; local lighthouse authority may be directed by the general lighthouse authority, s 198).

4.2.4 The revised guidance for risk assessment

Since 2001, there has been a requirement by the implementation of the PMSC 2000 to set in place systems for formal risk assessment and ensure that the SMS is comprehensive and fully effective. This was the recommendation of the report made after the accident of *The Sea Empress* (1997) at Milford Haven, and it is in line with the ISMC, which applies to ship operators and their ships, as seen in Chapter 3, above.

This PMSC was revised in 2009 and, more recently, in 2012 by the Department of the Environment, Transport and the Regions' port division.[16]

4.2.4.1 Scope and aim of the Code

The Code is concerned with the responsibilities of the harbour authority for port safety but does not purport to cover all the duties and responsibilities and does not relate to duties derived from health and safety legislation or safety of vessels under the MSAs. It has, however, been designed so that compliance with the good practice contemplated by the Code should be fully compatible with compliance with the harbour's other duties and responsibilities. The aim of the Code is to reduce the risk of incidents occurring in harbour waters and provide some protection for the 'duty holder' if an incident occurs.

4.2.4.2 Responsibility

The Code applies to all harbour authorities and it is primarily intended for the 'duty holder', who, in most authorities, is the harbour board and is directly accountable for the safety of marine operations in its waters and approaches. The board members should regard themselves as individually and collectively responsible for meeting the Code's standards.

The Code provides the national standards against which the policies, procedures and the performance of harbour authorities can be measured, and it describes the role of the board members, officers and key personnel. As well as complying with their statutory duties and powers, the harbour authorities must develop an effective marine SMS.[17]

4.2.4.3 Aspects of compliance with the Code

In order to comply with the Code, each harbour authority must:

- review their existing powers based on local and national legislation;
- comply with the duties and powers under such legislation;
- ensure all risks are formally assessed and as low as reasonably practicable (ALARP) in accordance with good practice;
- operate an effective SMS, which must have been developed after consultation and uses of formal risk assessment;

16 See www.gov.uk/dft

17 Ibid, see summary of the PMSC.

- use competent people (that is, trained, qualified and experienced) in positions of responsibility for safety of navigation;
- monitor performance, review and audit the marine SMS on a regular basis; an independent designated person (DPA) has a key role in providing assurance for the duty holder;
- publish a safety plan showing how the standard in the Code will be met and a report assessing the performance against the plan;
- comply with directions from the general lighthouse authorities and supply information as required;
- investigate incidents and provide instructions and guidance on any investigation and enforcement action that may be required as a result.

The Code mirrors the general requirements provided under the ISM Code, adapted to port authorities' duties and responsibilities.

The Guide to Good Practice 2012 on port marine safety operations complements the Code and gives details of how to apply risk assessment in ports and includes a port marine employee training policy. The MCA has issued a very useful 'aide-memoire' summary for port authorities with regard to the steps they have to take to ensure implementation. The DPA has to be independent and not part of the management of the board and will have direct access to the duty holder.

4.2.4.4 Accountability for marine safety

The 'duty holder' is accountable for managing operations within the port safely and efficiently. The harbour authorities shall make a clear, published commitment to comply with the standards laid down in the Code.

Executive and operations responsibilities must be clearly assigned, and those responsible and those entrusted with these responsibilities must be answerable for their performance.

A DPA must be appointed to provide 'independent' assurance about the operations of its marine SMS. The DPA must have direct access to the Board.

The powers, policies, plans and procedures should be based on a formal assessment of hazards and risks, and harbour authorities should have a formal SMS. The SMS should be in place to ensure that all risks are controlled – the severer ones must either be eliminated or kept 'as low as reasonably practicable' (ALARP standard).

In the same way as the ISM Code (see Chapters 3 and 4, above), the implications of this Code will be that the manuals of the SMS will be adduced as evidence to support, or to disprove, the proper performance of the obligations of the harbour authorities in litigation.

4.3 STATUTORY DUTIES AND LIABILITIES

4.3.1 The duty to operate the port

Section 33 of the HDPCA 1847 provides for what is called the 'open port duty'. It is incorporated into, or substantively contained in, local legislation of harbour authorities and imposes the duty on harbour authorities to operate harbours, keep

them open for anyone wishing to use them and offer facilities. In particular, it provides that:

> Upon payment of the rates made payable by this and the special Act (that is, the Act which incorporates s 33) and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers.

A wide construction was given to this section by the House of Lords in *LNER v British Trawlers Federation Ltd*.[18]

For the purpose of s 33, the harbour authority must make facilities for the operation of tugs, which may be necessary for the loading, or unloading, of cargo.[19]

Under s 33, a harbour authority is obliged to keep its harbour open to any person. Subject to rights of others to use the port, it is possible to grant regular use to some persons by contract, such as the right to use a specific berth to an operator who needs access regularly.[20] A provision can be included in the local legislation by which a harbour may set aside or appropriate part of the port or equipment for the exclusive or preferential use for a certain trade or by certain people. No other person may use the facilities of the appropriated part without the consent of the harbour master.[21] Any appropriation must be narrowly construed to derogate as little as possible from the freedom enshrined in s 33. If there is a berth available, then s 33 dictates that the authority must allow a lawful user to use it.[22]

Whether a port authority has power to restrain lawful trade in order to prevent unlawful protest came for judicial review in ***R v Coventry CC ex p Phoenix Aviation and Others***.[23]

It concerned the issue whether public authorities – operating air and sea ports – were entitled to ban the flights or shipment of livestock by animal exporters; if so, whether they could properly refuse to handle that trade in response to the demands of unlawful protesters for animal rights. Two applications were made by livestock exporters, who relied on statutory provisions relating to availability of facilities for lawful trade on equal terms to all without discrimination: Article 78(3) of the Air Navigation Order 1989 and s 33 of the HDPCA 1847, respectively. The third application was by the local authority for judicial review of the decision of a statutory body not to ban the export of livestock. It relied on the ground that the local authority had discretion, under s 40 of the HA 1964, to refuse the use of dock services to those engaged in a particular trade, for the reason that a substantial police force was needed to control animal protesters. The first two applications were granted, and the third was refused, on the following grounds:

(a) the public authority had no general discretion under its respective statutory powers to distinguish between different lawful trades;
(b) the rule of law did not allow public authorities to respond to unlawful protest and threats from pressure groups by surrendering to their dictates, but required

18 [1934] AC 279.
19 *JH Pigott & Son v Docks and Inland Waterways Executive* [1953] 1 QB 338.
20 *Thoresen Car Ferries Ltd v Weymouth and Portland BC* [1977] 2 Lloyd's Rep 614.
21 Dover Harbour Revision Order 1969.
22 *R v Coventry CC ex p Phoenix Aviation and Others* [1995] 3 All ER 37, p 54.
23 Ibid.

them, in co-operation with the police, to safeguard the right of others to go about their lawful business without disruption.

4.3.2 The duty to provide navigational safety and safety procedures

As seen earlier, the PMSC and the guide of good practice on port marine operations reinforces the statutory duties of a harbour authority to manage operations within the port safely and efficiently and makes its board members accountable to ensure that they do so.

Using lighthouses, beacons and buoys[24] to mark channels and provide warning of dangers to users of the port, as well as removing any obstructions, are functions of utmost importance. The MSA 1995, Pt VIII, has consolidated all provisions included in the previous MSAs and the HA 1964, as well as the Port Act 1991, concerning powers, functions, division of duties between general and local lighthouse authorities, rights and liabilities. Section 195 of the MSA 1995 imposes responsibility on the harbour authority for the management and superintendence of lighthouses and general maintenance of all property vested in them. Sections 197 and 198 deal more specifically with the duties of lighthouse authorities in this respect.

Under the MS (Port State Control) Regulations 2009 and 2011, if a port authority, in exercising its normal duties, learns that a ship within its port has deficiencies that may prejudice the safety of the ship or pose an unreasonable threat of harm to the marine environment, the authority must inform the Maritime Safety Agency. Failure to do so will result in the port authority being guilty of an offence.

The MS (Accident Reporting and Investigation) Regulations 2012 impose additional obligations on port authorities.

As seen in Chapter 2, above, at the EU level, there are new safety procedures for monitoring, controlling and providing information with regard to traffic in European waters and with regard to inspection of ships at European ports and the prevention of oil pollution; increased controls are imposed upon ship inspection organisations and flag administrations.

4.3.3 Duties, powers and liability in relation to wrecks

Chapter I of Part IX of the MSA 1995 allocates rights and duties with respect to salvage and wrecks; Chapter II deals with vessels in distress and the duties of harbour authorities in dealing with wrecks. Chapter III, s 252, grants power to harbour authorities, and s 254 to lighthouse authorities, to remove wrecks causing obstruction, as well as to destroy or sell the wreck and recoup its expenses from the proceeds of sale.[25] Section 252 has been amended by ss 19 and 21 of the Poole Harbour Revision Order 2012 to enable the authority to claim its expenses for the removal of a wreck personally against its owner, if the power was exercised in emergency and, having

24 See definitions in s 223 of the MSA 1995; s 77 of the HDPCA 1847 is incorporated in special legislation of harbour authorities and requires the harbour authority to lay down buoys for guidance of vessels.

25 There can be forfeiture of the right to claim expenses if the obstruction was caused by the fault of the harbour authority: *The Oxbird* (1937) 58 LlL Rep 346. Here, the authority had no defence under statute, because it had contracted with the owner of the wreck to raise it but, owing to its negligence in failing to light the wreck, a collision occurred.

given not less than 48 hours' notice to the owner of the wreck, it did not receive a response as to the owner's intention to dispose of the wreck.

In addition, s 56 of the HDPCA 1847, which is incorporated in almost all special legislation of harbour authorities, empowers the authority and the harbour master to remove wrecks or other obstructions impeding navigation. Intervention is justified when the wreck causes an obstruction to navigation and, hence, a hazard to other ships, or a threat to the environment.

The Wreck Removal Convention 2007 (see Section C of this chapter) provides the legal basis for States Parties to remove, or have removed, from their EEZs wrecks that may pose a hazard to navigation or, because of the nature of their cargo, to the marine and coastal environments, or to both.

The Convention requires ship-owners to take out insurance to cover the costs of removal and provides States with a right of direct action against insurers.[26] The Convention applies to all types of danger to navigation, especially the danger posed by drifting ships and ships that may reasonably be expected to result in wrecks. It provides uniform international rules aiming to ensure the prompt and effective removal of wrecks located beyond the territorial sea of States into their EEZ. It enables States Parties to apply certain provisions of the Convention in their territorial sea.

The Convention is not yet in force – see further Part C, of this chapter.

4.3.3.1 Issues in relation to abandoned wrecks

Sometimes, the owner of a sunken ship may abandon his ownership rights of the wreck by showing a positive intention to relinquish his rights in the property. However, by doing so, the owner cannot relinquish accrued liabilities,[27] and, fortunately, liabilities arising from wrecks are covered by P&I insurance.

Prior to the Wreck Removal Convention 2007, the problem of abandoned wrecks and the recovery of expenses by the port authority was not easy to solve, despite the amendments brought by the MSAs 1988 and 1995.[28]

Although the MSA 1995 gave very wide powers (by ss 252–255) to the harbour and lighthouse authorities for the removal or destruction of a wreck, a power of sale[29]

26 IMO; www.imo.org

27 For interests in wrecks, see Palmer, N and McKendrick, E (eds), *Interests in Goods*, 2nd edn, 1998, LLP, by Gaskell, N, Ch 7. Clear intention to abandon a wreck must be shown: see also Brice, on *Maritime Law of Salvage*, 5th edn, 2011, Sweet & Maxwell, at paras 4–56–4–58 and 4–74.

28 Unless there was a statutory provision expressly granting the authority a cause of action to sue the relevant owner, who was the owner of the ship at the time of the sinking and before abandonment, the expenses could not be recoverable, because the right to claim the expenses against the owner would not have accrued at the time of sinking, but only after the owner had abandoned the wreck, or ceased to be its owner. Problems of interpretation of s 56 of the HDPCA 1847 arose in old cases, such as *The Crystal* [1894] AC 508, where it was held that expenses could not be recovered from the owner because the expenses were incurred after the abandonment of the wreck, and the owner was not then owner within the meaning of s 56, and in addition because the wreck had been removed by destruction, and the Act only gave the harbour authority power to 'remove' and not to 'destroy'. Much later, in 1988, attempts were made to rectify the problem by an amendment of the MSA 1894, s 531, which dealt with wrecks, by the MSA 1988, Sched 5, para 2, which created a personal debt of the wreck-owner and changed the test of ownership. This Act was further amended by the MSA 1995, ss 252–255. However, the debt could not be enforced against a bankrupt one-ship company.

29 With regard to a statutory right to detain the *res* and power of sale of the port authority to recover its expenses and priority of claims, see *The Sea Spray* [1907] P 133; *The Queen of the South* [1968] P 449, Ch 5, vol 1 of this book.

and reimbursement for their expenses out of the proceeds of sale, the section did not give the relevant authorities a personal cause of action against the owners of the sunken ship to recover their expenses in case the value of the wreck was below the level of their costs incurred for its removal. Although local legislation provided that the owner would compensate the port authority for its wreck removal expenses, and now this is also provided by ss 19 and 21 of the Pool Harbours Revision Order 2012 – see above – in practice, recovery from a bankrupt one-ship company, once the wreck has gone, is not possible.

However, when the ship becomes a wreck within UK waters, the Wreck Removal Convention Act 2011, implementing the Wreck Removal Convention 2007, will apply when it comes into force by a statutory instrument. It amends the MSA 1995 by the insertion of ss 255A–255U and deals also with what is to happen when the registered owner of the wreck does not respond to the notices served by the Secretary of State for the removal of the wreck and payment of the expenses of the port authority involved. The authority will be able to recover its expenses by a direct action against the insurer of the wreck.

Under the Act, the owner of the wreck will be committing an offence by not responding to the notices, punishable with a fine; it will also be an offence if the owner had not put insurance in place, as provided by the Convention, punishable with a £50,000 fine. The port authority is granted powers to deal with the abandoned wreck in default of the owner doing so.

4.3.3.2 Duty to mark wrecks

When a ship sinks and becomes a wreck, risk management issues arise with regard to preventing liability to third parties from arising. Wrecks present a risk to navigation and, unless they are properly dealt with, will cause damage to others navigating territorial waters within which the harbour authorities can exercise their statutory powers.[30] There are certain statutory provisions that provide that the authority should place the appropriate light and use the appropriate shape of a buoy in such a distance so as to give a sufficient warning to others that there is a sunken wreck at that position.

With the PMSC 2012, the harbour authority is obliged to have risk assessment procedures in place and follow the guide to good practice, as mentioned earlier. Although, in the Foreword to the PMSC, it is stated that the framework of the Code is non-mandated, in reality it would be unwise if a harbour authority failed to implement the Code, particularly as it makes the board of the authority accountable for its implementation and, should the authority be sued for damage caused by the negligence of its servants, the lack of, or insufficient, implementation of the Code will be provided as evidence to prove negligence, or breach of the statutory duties, on the part of the authority.

4.3.3.3 Liability to third parties for unmarked wrecks

In old cases, a very important question had arisen as to who would be liable in damages to a passing vessel that collided, without its own fault, with an unmarked or unlit

30 The Wreck Removal Convention 2007 gives coastal States sovereign powers to remove wrecks from the EEZ.

wreck, the owner or the harbour authority. The owner of the wreck would be liable if, having control over his sunken ship, he did not place a warning light or a buoy and did not warn the harbour authority.[31] However, if the harbour authority, after notice given to it by the owner, had undertaken to buoy the wreck, the authority, and not the owner, would be liable, as was held by the CA in *The Douglas*.[32]

The principle that the port authority once it has undertaken control and management of the wreck under its statutory powers, it will be accountable and liable to third parties in the event of damage caused to their ships using the port, if the wreck is the cause of the damage, was confirmed by the Privy Council in ***The Utopia***;[33] the principles derived from previous authorities were confirmed:

> The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandons the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that, so long as, and so far as, possession, management and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But, in order to fix the owners of a wreck with liability, two things must be shewn, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect.

At common law the owner who abandons his wreck cannot be absolved from liability for negligence.[34] If the owner of the wreck employs an independent contractor to raise the wreck, he cannot be absolved from liability to third parties caused by the negligence of the contractor. In ***The Snark***,[35] the CA held that the owners of the wreck, who had not abandoned it, nor transferred management or control, were bound to see that the necessary precautions were taken to prevent danger to the public, and could not escape from liability by throwing the blame on the contractor employed by them to do the work.

When a harbour authority, in the exercise of its statutory powers, assumes responsibility for marking the wreck, it owes a duty of care to all persons lawfully using the port to carry out that marking with reasonable skill and care.[36] Provided that such duty is discharged, and subject to causation issues, the authority will not be liable for an accident caused owing to the negligence of a third party by not keeping a good lookout or by not appreciating the message conveyed by the warning.[37]

4.3.4 Duty to maintain the port in good condition – liability to third parties

Non-compliance with its statutory duty to maintain the port in good condition, which has implications upon the safety of the port, and non-compliance with the PMSC

31 See *Harmond v Pearson* [1808] 1 Camp 515.

32 [1882] 7 PD 151.

33 [1893] AC 492, pp 498–499 (PC).

34 *Dee Conservancy Board v McConnell* [1928] 2 KB 159: a ketch sank, through the negligence of her owners, who became liable at common law for the damage caused by the obstruction to the navigation of the river and the blocking of the approach to the wharf. They could not escape liability for that damage by abandoning the wreck.

35 [1900] P 105.

36 *The Tramontana II* [1969] 2 Lloyd's Rep 94.

37 Ibid.

and the guide of good practice, which require harbour authorities to commit to risk assessment and management in marine operations, will expose the port or harbour authority to potential liabilities towards those using the port.

Marine operations mean the moving, berthing and unberthing of ships and other marine craft within the limits and approaches of a harbour authority. The guide provides advice and information on these operations and all the various activities that affect the safety of life, property and the environment.

A port or harbour authority will be liable to third parties for breach of the statutory provisions to the extent to which the statute provides. The statute will also provide for the standard of care. Non-compliance with the PMSC will provide evidence for possible breach of the statutory duties of the harbour authority.

4.3.5 Liability under common law

Apart from the statutory duty of harbour authorities to keep the port safe for navigation and maintain it in good condition, public authorities are subject also to the common law duty of care in making the port safe. Failure to take reasonable care will result in liability to pay damages.

In ***Mersey Docks Trustees v Gibbs***,[38] the port was unfit to be navigated, by reason of accumulated mud in the port. The principle with regard to the common law duty of the port authority was restated, referring to previous authorities:

> When such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair . . . And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property.

It did not make any difference that, in this case, the trustees did not collect tolls for their own profit, but merely as trustees for the benefit of the public.

A warranty of accessibility of the port will be implied, if the port authority, in the exercise of its statutory powers, represents to the public that the port has a certain depth or other characteristics. In ***Bede SS v River Wear***,[39] the harbour commissioners were authorised and required by statute to execute works of improvement and maintenance in a harbour, and were empowered to make and maintain docks and to take harbour and dock tolls in respect of the use of the harbour and docks. They advertised that there was a certain depth of water on the sill of a dock belonging to them. Ship-owners sent their ships to the dock on the faith of that advertisement. Where, in such a case, the commissioners had not used reasonable care, but had allowed silt to accumulate at the entrance to their harbour, and a ship had consequently been detained for 4 days in the dock, the commissioners were liable to the ship-owners in damages for the detention of their ship on the ground of breach of the warranty.

In an old decision, ***The Neptun***,[40] the court did not find the port liable, nor did it hold – contrary to the *Bede v River Wear* case (above) – that publishing information and charts gives rise to a warranty about the minimum depth of the water.

38 (1866) LR 1 HL 93.
39 [1907] 1 KB 310.
40 [1938] P 21.

The Neptun became a total loss by stranding at a port in which the defendant, Humber Conservancy Board, was the buoyage and beaconage authority charging dues for its services. It was its duty to exercise reasonable care in the performance of its functions to keep the channels safe for vessels to navigate in, and to place lightships in such positions as would indicate to vessels where the deep water channels were. The information supplied by the defendants indicated a minimum depth of 3 ft at low-water ordinary spring tides throughout the Whitton channel. The owners of *The Neptun* argued that this amounted to a warranty. It was shown in evidence that the channels in the Upper Humber changed their course frequently and rapidly, that the lightships had constantly to be moved, and that the Upper Whitton lightship had been shifted before the accident happened. No notice had been issued this time about the shallowness of the water.

It was held that the liability of the defendants depended upon the special relationship that arose through their taking dues; that this relationship, though not exactly that of invitor and invitee, imposed duties analogous to the common law duties existing between invitor and invitee to take reasonable care; that the issue of the information and charts did not give rise to a representation or warranty that a minimum depth of 3 ft would be found on any given date in a bed of a river that was constantly changing; that the defendants had not been negligent as regards the frequency or extent of their soundings, or in the placing of the lightships; and that the action failed.

The correctness of this decision may be doubtful today, particularly because of the extra responsibilities imposed on ports to implement risk assessment practices to prevent risks arising from misinformation and old charts. It is submitted that *Bede v River Wear* is a reliable authority on the important issue that publishing information and charts with regard to certain characteristics of the port amounts to a warranty of accessibility, breach of which will render the port liable to persons suffering loss or damage by relying on the representation.

The place and method of mooring vessels within a port are within the authority of the harbour master or port captain. Where, by a harbour master's orders, two vessels were removed from moorings and negligently remoored and retained in new positions, so that, on the occurrence of an extraordinary flood, both were carried away and lost, it was held by the Privy Council, in ***East London v Caledonian Shipping***,[41] that the harbour board was liable for the acts of its officer.

Failure by the trustees, in whom a harbour had been vested by statute, to examine whether a berth was safe was breach of the duty to take reasonable care. They could not shift this duty to the local pilots, who were not their servants.

In ***The Bearn***,[42] the owners of the steamship sued the harbour trustees for damage to their vessel due to the defective condition of the berth. They also sued the owners of the wharf, a railway company. The trustees argued that, as they had not received any report from the local pilots, upon whom the duty was imposed by by-laws to make periodical inspections and take soundings, they had not been negligent in being unaware of the defective condition of the berth. The owners of the wharf argued that, as the responsibility of keeping the berth in proper condition rested with the trustees, they were not negligent in being unaware of a defect that was due to a breach of the harbour by-laws by persons unknown.

41 *East London v Caledonian Shipping* [1908] AC 271.
42 [1906] P 48.

The CA held, affirming the decision of the court below, that both defendants were liable: the trustees, because they had negligently omitted to perform the duty laid down in *Mersey Docks Trustees v Gibbs*, of taking reasonable care to see whether the harbour, including the berth in question, was in a fit condition, and they could not shift this duty on to the local pilots who were not their servants, and whose duty to take soundings was for the purpose of enabling them to navigate the vessels employing them.

The railway company was liable under the rule in *The Moorcock*[43] because, as wharf-owner, it had invited the plaintiffs' vessel alongside for profit to itself, and could not rely upon the pilots performing the duty cast upon them by the trustees, for, in its capacity as wharf-owner, it had the opportunity of ascertaining the condition of the berth, and should, therefore, have either satisfied itself that it was reasonably fit, or warned those in charge of the vessel that it had not done so.

Even when no dues are charged, there is a general benefit derived from the use of the port, and the duty to use reasonable care exists.

In ***The Grit***,[44] the plaintiffs' motor barge received damage by taking the ground on some large stones in a berth alongside the defendants' wharf, where she was loading a cargo of slag. The defendants, a railway company, owned the wharf, but not the bed of the river alongside the wharf, and they charged no dues in respect of the use of the wharf. The arrangements for the cargo to be loaded into the barge at the wharf were delegated to an agent. A year previously, the agent had warned the defendants that the berth might be dangerous to vessels using it, because stones had been placed to protect the river bank from falling into the bed of the river. The defendants took some soundings, but did nothing else.

Although the defendants did not charge dues for the use of the wharf, they were held liable because they derived benefit by reason of the freight earned for the land carriage of the cargo, and they were in the position of persons who had invited vessels to use the wharf. They owed a duty, therefore, if they had not taken steps to see that the berth alongside the wharf was safe for vessels and for failing to warn that they had not done so.

These are good examples concerning risk management and, had the port authorities been aware of formal risk assessment at that time, such risks would have been prevented.

4.3.6 Liability under the Occupiers' Liability Acts

Furthermore, vessels using ports are invitees, and the Occupiers' Liability Acts 1957 and 1984 will also apply.

By charging dues, a special relationship is created between the harbour authority and the users of the port, which imposes duties analogous to the common law duties existing between invitor and invitee to take reasonable care.[45]

In ***Carisbrooke Shipping CV5 v Bird Port Ltd***,[46] the port was held liable to the ship-owners under the Occupiers' Liability Act 1957 and in negligence, in respect

43 (1889) 14 PD 64.

44 [1924] P 246.

45 *Maclenan v Segar* [1917] 2 KB 325; *St Just Steam Ship Co Ltd v Hartlepool Port and Harbour Commissioners* (1929) 34 LlL Rep 344.

46 [2005] 2 Lloyd's Rep 626.

of damage caused to their ship while she was using the berth.[47] The court pointed out that the underpinning cause of the damage was lack of safe operations by the port, which required a system of regular inspections.

The berth at B's port was within a dock that could be closed by gates (described as 'not always afloat but safely aground'). It was expected that vessels would or might take the ground at low water. The bottom of the berth was typically covered with a layer of silt or mud that came in with the tide. When operational considerations permitted, dredging operations were carried out in the dock. Steel coils were commonly loaded and discharged at the port. Before the vessel had arrived at B's port, no ingress of water into the ballast tanks (or into the fuel tanks) had been reported, and no unusual trim had been observed at sea. After leaving the port, soundings had revealed an increasing amount of water in the vessel's ballast tanks. An inspection showed that the vessel's bottom shell plating had suffered a circular indentation about 80 mm in depth, causing damage over a diameter of about 1.5–1.6 m, including fractures of the plating and buckling of the internals. At the centre of the circular indent, there was a dimple. The owners claimed the cost of repair, consequential expenses and lost hire, on the basis that the damage had been caused when the vessel sat on a steel coil at the bottom of the berth.

Giving judgment for the ship-owner, the judge held that the nature of the damage was cogent evidence that the damage was caused while the vessel was alongside the berth in B's port. B had not shown that the coil had been removed from the berth. The ship-owner established on the balance of probabilities that the damage suffered by the vessel was caused by the vessel sitting down on a steel coil in the berth.

The court further held that safe operation of the dock required a system of inspection and regular dredging. B's system was inadequate and in breach of its duty of care to port users, and that failure was causative of the damage. The ship owner was entitled to recover: (a) lost hire; (b) the costs of an employed superintendent (not his salary, which would be paid in any event) on the basis that the cost of the employee time could be taken as an approximation for the loss of revenue, as if an external expert were engaged;[48] and (c) an 'agency' claim in the sum of 1 per cent of the proved claim, to reflect expenditure or revenue loss by reason of disruption and expenditure of management time.[49]

4.3.7 Contractual duty to make the port reasonably safe

In cases where a private dock-owner invites ship-owners to use his dock, a warranty is contained in the contract between the parties, namely, that the dock-owner has taken reasonable steps to see that the berth offered to the boat is safe. If it is not safe, the dock-owner will give notice of the fact to the ship-owner.[50]

The dock-owner may exempt himself from liability for negligence by placing a notice to this effect at a visible place in clear and unambiguous language. For example,

47 See also a relevant case, *George v Coastal Marine 2004 Ltd (The Bon Ami)* [2009] EWHC 816; [2009] 2 Lloyd's Rep 356, where it was held that a berth at a shipyard was a reasonably safe berth, provided that an adequate warning was given about the risk of grounding hollow, because of a change in gradient of the seabed at the landward end, and a warning to move a vessel astern to avoid grounding.

48 *Admiral Management Services Ltd v Para Protect Europe Ltd* [2002] EWHC 233.

49 *Owners of the Kumanovo v Owners of the Massira* [1998] 2 Lloyd's Rep 301.

50 *The Moorcock* (1889) 14 PD 64.

in ***The Ballyalton***[51] case, the vessel lying at berth sustained serious damage by reason of the unevenness of the berth.

Her owners brought an action alleging negligence, breach of contract and breach of warranty by the owners of the dock. However, the defendant had put a notice up of which the claimant had knowledge.

> Notice is hereby given that vessels . . . have to take the ground after high water, and it must be understood that, while the corporation take steps to keep [berths] in order, they do not ensure the berths always being level . . . vessels . . . must be and are at the risk of the owners . . . AND NOT OF THE CORPORATION, who will not be responsible for and will repudiate any liability in respect of any damage . . . to vessel . . . resulting from using [a berth], or taking ground thereat . . . owners must satisfy themselves that the vessels both in their construction and the disposition in them of the cargo, may safely take the ground and lie in the berths, and of the condition of the berths, as the corporation will not be responsible for and will repudiate any liability in respect of any damage . . . to vessel . . . resulting from using the quays or river diversion, or either of them, or taking the ground thereat or therein, or from the berths thereat or therein . . .

It was held that the defendants were protected by the notice, excepting them from liability for damage to vessels. Not only were the words of the exemption clause wide and unambiguous enough to cover negligence, but they would have been meaningless on any other interpretation.

Exception clauses will be subject to the test of reasonableness of the Unfair Contract Terms Act 1977, and, of course, liability cannot be excluded for death or personal injury, under s 2(1) of that Act.

4.3.8 The duty to provide efficient pilotage services

4.3.8.1 Review of duties after The Sea Empress

Although pilotage is examined under Section B below, a brief summary is made in this context. Following the accident of *The Sea Empress* at Milford Haven in 1997, and the comments made by the MAIB about the role of the port authority in the handling of the accident through its pilots, it was thought necessary to review the functions conferred on harbour authorities by the PA 1987.[52]

The main points emphasised in the report of the review were that:

(a) pilotage ought to remain a harbour authority function and become fully integrated with other port safety services under the control of the authority;
(b) harbour authorities should use their powers to ensure that there is a clear practical assignment of responsibility for the safety of piloted vessels;
(c) harbour authorities should keep under formal regular review the specific powers and duties imposed by the 1987 Act, relating to use of powers and direction, as well as the recruitment, authorisation, examination, employment status and training of pilots;
(d) harbour authorities should be made more accountable for all their port safety functions, with a new reserve power for the Secretary of State to direct improvements where neglect of safety duties may cause a danger to public navigation.

51 [1961] 1 WLR 929.
52 Review of the Pilotage Act 1987, Consultation Paper, 27 July 1998, updated 7 March 2001.

The principal proposal of the report was that a Marine Operations Code for Ports should be developed, covering all port safety functions, and not just pilotage. This should serve as a national standard, among other things, for training and examination of pilots, a guide to best practice, and a framework for the preparation of published policies and plans by harbour authorities. The Code was swiftly drafted and was supplemented with a guide to good practice, incorporating the points of the report. It was published at the end of January 2001.

The Code is directed at harbour authorities empowered by statute (hence, competent harbour authorities within the meaning of the PA 1987), to regulate shipping movements and the safety of navigation within their harbours.

As seen earlier, the Code was amended in 2009 and in 2012; the latter amendment contains the current requirements. It requires the harbour authority to have available competent pilots and properly certified boats for their use. The authority should ensure that the pilot assigned to every ship is fit and appropriately qualified for the task, and that, under the PA 1987, pilotage services provided by a harbour authority should be based upon a continuing process of risk assessment. Authorised pilots should be accountable to their authorising authority for the use they make of their authorisation, and harbours should have contracts with authorised pilots, regulating the conditions under which they work, including procedures for resolving disputes.

The PA 1987 provides for a competent harbour authority to use an agent for pilotage services and to have formal joint arrangements with other competent harbour authorities for the discharge of pilotage functions (s 11).

4.3.8.2 The effect of the EU Directive

A further relevant amendment to pilotage law and the PA 1987 is based on EU Directive 1999/42/EC,[53] relating to the mutual recognition of qualifications and experience of pilots that should be recognised as between Member States. It enshrines a general principle that qualifications awarded in one Member State should be recognised in another. In view of the lacuna that existed in the PA 1987 in this respect, in that it placed no constraints on the way that a competent harbour authority might determine the qualifications of pilots, it was necessary to make it explicit in the Act that the principle of the Directive should be followed; thus, the Act was amended by regulations, The Pilotage (Recognition of Qualifications and Experience) Regulations 2003.[54]

The amendment specifies the qualifications of pilots and requirements of experience, as set out in Sched A1. Paragraphs 10 and 11 of Sched A1 provide that a competent harbour authority requires persons applying for authorisation to provide proof of financial standing and proof that they are insured against financial risks arising from their professional liability.

Obviously, the harbour authority will be looking to the pilot to recover, by way of indemnity, any loss or damage it may have sustained in the event it was found liable to third parties by reason of the pilot's negligence.

By Reg 2(2) of the 2003 Regulations, s 3(1) of the Act was amended by the insertion of sub-s (1A), stating:

53 OJ L201 31.7.1999 p 77.

54 SI 2003/1230, Reg 2, in force 30 May 2003, amending the PA 1987.

In considering whether a person is suitably qualified (a) to be authorised under sub-s (1) above to act as a pilot (i) in inland waters only, or (ii) in inland waters and other waters, or (b) to continue to be authorised, a competent harbour authority shall act in accordance with Sch. A1 to this Act (which makes provision about persons with qualifications obtained in EEA states other than the UK).

By Reg 2(4), after s 3(2), sub-s (2A) is inserted, which prohibits the authority from acting in such a way as to contravene Sched A1 when it makes its determination about the qualifications of a pilot.

Section 2 of the PA 1987 states the duty of a competent harbour authority, which is to provide pilotage services where they are needed, and to designate areas that, in the interests of safety, would be compulsory pilotage areas. On the issue of liability of harbour authorities under the Act for acts of pilots, see Section B of this chapter.

4.3.9 Limitation of liability

Harbours, conservancy, dock and canal authorities can limit their liability on the basis of s 191(2) of the MSA 1995 for any loss or damage caused to a ship, or any goods, merchandise or other things whatsoever on board any ship. It shall be limited in accordance with sub-s 191(5) by reference to the tonnage of the largest UK ship that, at the time of the loss or damage is, or within the preceding 5 years has been, within the area over which the authority or person discharges any functions. The LLMC limits of Art 6(1)(b), as amended, shall apply (see Chapter 14, below).

The liability under this section relates to the whole of any losses and damages that may arise on any one distinct occasion, although such losses or damage may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or local or private Act, and notwithstanding anything contained in such an Act (s 191(3)).

Pursuant to s 191(4), the bar to the right to limit under LLMC Art 4 applies (set out in Pt I of Sched 7 of the 1995 Act).

4.3.10 Criminal liability

It is important at this point to mention that the harbour authority may be criminally liable for permitting the pollution of waters, under s 85(1) of the WRA 1991, which provides for strict liability, namely: 'A person contravenes this section if he causes . . . any . . . polluting matter to enter any controlled waters'. This may arise in connection with an inexperienced pilot, as it did in *The Sea Empress*.[55]

Briefly, the ship was laden with light crude oil when she struck the mid-channel rocks in the entrance to Milford Haven, North Wales, owing to negligent navigation by her pilot, who had been trained and authorised by the Milford Haven Port Authority. She grounded in Mill Bay, causing a large-scale oil spill in the area. The port authority was prosecuted under this section and pleaded guilty without admission of fault, and the case came before the Admiralty judge, David Steel, to determine the application of the section to the facts and the fine. Assisted by a House of Lords authority[56] in the interpretation of this section, the judge said that the section would

55 [1999] 1 Lloyd's Rep 673.

56 *Empress Car Co v National Rivers Authority* [1998] 1 All ER 481.

apply if there was a positive act, not an omission, by the defendant, which need not be the immediate cause of the oil escape.

With regard to causation, the section would apply if the defendant caused a situation in which the polluting matter could escape, but a necessary condition of the actual escape was also the act of a third party. If that act were a matter of ordinary occurrence, as opposed to extraordinary, it would not negative the causal effect of the defendants' act, even if it were not foreseeable.

The judge had no difficulty in concluding that the port authority, being the port's operator of compulsory inward pilotage, which trained and authorised the pilot, whose experience for this type of vessel was sketchy, did something that caused pollution, bearing also in mind that the pilot's negligence was a normal occurrence. He made no finding of fault, but, on the basis of strict liability, he fined the authority £4 million, reflecting the genuine and justified public concern.

The Sea Empress prompted the British Government to take other measures, in addition to the review of the functions and accountability of harbour authorities by the PMSC 2012. It accepted a proposal made by Lord Donaldson for an official representative of the Secretary of State (the SOSREP) to have powers of intervention and agree a salvage plan with the salvage master to prevent situations arising, such as in *The Sea Empress* case, where there was a delay to agree the plan because the local pilot did not have such powers (see Chapter 10, above).

As regards civil liability for pollution damage, see Chapter 16; although the IOPC Fund brought a recourse action against the Milford Haven Port Authority, seeking to recover some of the sums paid to the victims of pollution damage on the basis of the negligence of the port authority, the case was settled.

5 LIABILITY OF SHIP-OWNERS FOR DAMAGE CAUSED TO HARBOURS

In England and Wales, ports or harbours, whether privatised by an Act of Parliament, or publicly owned, are regulated by statutes and by-laws. Their rights for damage caused to their property are to be found in statutory provisions.

5.1 STATUTORY CAUSE OF ACTION AGAINST THE REGISTERED OWNER OF A SHIP

Under s 74 of the HDPCA 1847, there is strict liability imposed upon ship-owners whose ship causes damage to any of the property of the harbour or port authority. The ship-owner will be liable, whether or not the damage was caused by his or his servants' fault. Therefore, the port authority does not have to prove that the damage was caused by negligence. There may be a defence if the damage was caused when the ship had been abandoned by her crew because of tempestuous weather.

In ***River Wear Commissioners v Adamson***,[57] the courts had difficulty in construing this old section.

57 (1876) 1 QBD 546 (HL).

The defendants' ship was driven on shore by a storm when endeavouring to make the port of Sunderland. The crew were taken off with difficulty, and the ship, being a complete wreck, was afterwards driven by the winds and waves against the pier belonging to the harbour and caused damage to it, for which the commissioners brought an action against the owners under s 74 of the HDPCA 1847.

The question was whether the defendants were liable to pay the commissioners for the damage suffered. This depended on the interpretation of s 74, which reads:

The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ, and put his vessel in charge of.[58]

Decision of the CA

The issue was whether it was the intention of the legislature that the owner was not to be excused, even for liability caused by such tempestuous weather amounting to an act of God. Mellish LJ held:

I think, looking at the language of the section, it clearly was the intention of the legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law: because, if that is not the intention, it is not easy to see the object of the section at all. Looking at the pointed language in which negligence or wilful act is brought in, looking to the fact that the section goes on to speak of the master, or the person having the charge of the vessel, it seems to shew clearly that the owner is intended to be liable even in the case where neither the master nor the crew had anything to do with it. But the question arises, because we may decide, on the language used, that the owner may be made liable where it is not proved that he or the master was guilty of negligence, are we bound to hold that in every case whatever, where the vessel physically damages the pier, etc., the owner is so liable? I am of opinion that the statute only contemplates the case where either directly or indirectly, through the act of man [emphasis added], the vessel is caused in some way or other to run against the pier. It is quite consistent with our law that in certain cases a person may be made liable as insurer against the acts of all the men whom he may have under his control.[59]

Denman J, also sitting in the CA, said:

I am of the same opinion. No doubt, taking the words of s 74, it is possible to hold that they impose an absolute liability to the dockowner on the part of the owner of the vessel. The words are strong, intelligible, and grammatical (referring to the first part of the section). But I am of opinion, taking the rest of the section, some qualification must be put on those words, not by introducing fresh words into the Act of Parliament, or supposing a clause to exist in it which does not exist, but by qualifying those words by the principle of law which is so well known, and which must be taken to override the language of an Act of Parliament.

58 The proviso of s 74 (last sentence) has, in effect, been repealed by the provisions of the various Pilotage Acts since 1913, which made the owner answerable to any damage caused by pilot's negligence while he is in control of navigation of the ship, whether or not pilotage is compulsory.

59 (1876) 1 QBD 546, p 553.

I apprehend that there is no principle of law better established than this, that in an Act of Parliament words are not to be construed to impose upon individuals liability for an act or acts done, if those acts are not done by the individual, or not caused by his property or his servants, but are acts which are substantially caused by a superior power, such as the law calls the act of God [emphasis added].

In this case, there can be no doubt, from the facts, that the injury occasioned by the vessel was not the result of any neglect on the part of the owner, or on the part of any person having charge of the vessel, or, indeed, of any human being, but it was really the effect of the violence of the winds and waves overcoming all control on the part of the master or owner of the vessel, and forcing the vessel against the pier. Under those circumstances I apprehend, on the general principle that every statute is to be so construed as to leave untouched a principle of common law which applies to all similar cases, we are not bound to hold – and ought not to hold – that the damage was done by the vessel within the meaning of the Act of Parliament; but that, on the contrary, it was damage occasioned by the act of God, and therefore no action lies.[60]

The defendants (ship-owners) were not held liable, because (as the CA thought) the statute intended to excuse the owner, in the same way as common law excused the common law carrier, when an act of God was the cause of the damage.

The House of Lords' decision

On appeal to the House of Lords,[61] although the House disagreed with the broad and liberal construction given to the words of the statute by the CA, their Lordships affirmed its judgment for different reasons.

From careful reading of what the majority of the House held, it would seem implicit that they were prepared to excuse the owner when the master and crew had been compelled, as on the facts of this case, to escape from the vessel and had, consequently, no control whatever over it (no human agency factor).[62]

In particular, the Lord Chancellor (Lord Cairns) explained that:

. . . If a duty is cast upon an individual by Common Law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care; but, if in carrying them with proper care, they are destroyed by lightning, or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do, namely, to be liable for the damages. If, therefore, by the section to which I have referred, it is meant that the owner of every vessel shall, independently of whether anything has happened which would, at Common Law, give a right of action against anyone, pay to the undertakers the damage done by a ship to the pier, I should be unable to see any reason why the payment should not be made in the manner required by the statute.

60 Ibid, p 555.

61 (1877) 2 App Cas 743.

62 Lord Gordon, dissenting, said:

On the ground that the intention of the legislature in passing the Act must be decided by the ordinary meaning of the words used, and here the words used in the first portion of the section were words creating a liability without any restriction whatever.

I cannot, however, look upon this section of the statute as intended to create a right to recover damages in cases where, before the Act, there was not a right to recover damages from someone.[63]

Confusion arose in the interpretation of this judgment, because Lord Cairns elaborated further that there was no new substantive right created by the statute, but a new procedure. In other words, as a matter of procedure, a claim could be brought against the owner under s 74, and there was no need to prove negligence; but, by reason of the defence of compulsory pilotage, as provided at the end of the section (which was applicable at those times and not at present), the owner could recover over what he would have to pay to the port authority, if the damage was caused by the negligence of the pilot.[64]

Lord Blackburn gave the substantive reasons that existed behind this legislation and held:

My Lords, reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the legislature was to give the owners of harbours, docks, and piers more protection than they had. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship – and in most cases those are the servants of the owners – but that these were matters which in every case must be proved, and consequently that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed: and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour . . .

My Lords, on reading the words of the enactments, I am brought to the conclusion that such was the scheme of legislation adopted by Parliament; the mischief being the expense of litigation; the remedy that the owners should be liable without proof of how the accident occurred.[65]

The words used in the statute imposed strict liability and did not generally give any indication of an exception to strict liability for damage caused by an act of God. The variation made to this general principle, taking into account the facts of this case, as derived from the interpretation of the decision (see *The Mostyn*, below), was that the only exception to liability would arise when there was no human agency on board the ship at the time of the tempest, as happened in this case.

Lord Gordon,[66] who dissented from the majority as to the outcome of the decision with great hesitation, was of the view that the owners, even on the facts of this case in which the crew were forced by the tempest to abandon ship, should not be excused from liability.

63 (1877) 2 App Cas 743, p 750.

64 He meant that the owner would have to prove negligence of the pilot, which, if proved, would have the effect of surpassing the strict liability element of his liability to the port authority. The defence of compulsory pilotage, which was applicable under s 74 of this Act, became obsolete by the PA 1913 (see under Section B, 'Pilotage'), so there is no longer an issue in this respect.

65 (1877) 2 App Cas 743, pp 768–769.

66 Ibid, p 780.

Problems created by the decision in Adamson

Shipping lawyers and judges thought that this decision created an ambiguity arising from the dicta of Lord Cairns that no new substantive right of action was created, meaning that the statute enacted the common law as it then was. This confusion resulted in further litigation, as seen in *The Mostyn*.

The House of Lords felt the need to interpret *Adamson* in ***Great Western Rly Co v Owners of SS Mostyn (The Mostyn)***.[67] The question here was whether s 74 extended the liability of a ship-owner to the port beyond what common law provided, so as to create a new substantive right.

The owners of the docks at Swansea brought this action against the owners of the steamship, *The Mostyn*, to recover damages for negligence, or alternatively, on the ground of s 74 of the HDPCA 1847, for the damage done by *The Mostyn* to the Swansea docks. In a masonry chase-way, electric cables were laid for lighting purposes and the supply of power. During the night, while *The Mostyn* was proceeding along the channel to the Prince of Wales' Dock, her port anchor fouled and damaged some of these cables, with the result that the docks were plunged into darkness. The cables were part of the dock works.

The President came to the conclusion, on the evidence, that no negligence was proved against the ship-owners and held, following its previous authority in *Adamson*, that, where negligence was disproved, liability under s 74 of the HDPCA 1847 did not lie. He, therefore, gave judgment for the ship-owners. The CA affirmed the judgment of the President.

The House of Lords dealt with the question in more detail and in broader terms, drawing a general principle for guidance in subsequent cases; the majority (Viscount Haldane, Lord Shaw and Lord Blanesburgh)[68] held:

> Under s 74 of the HDPCA 1847, the owner of a vessel doing damage to a harbour, dock or pier, or works connected therewith, is responsible to the undertakers for the damage, whether occasioned by negligence or not, where the vessel is at the time of the damage under the control of the owner or his agents.

When commenting on *River Wear v Adamson*, Viscount Haldane said, in particular:

> My Lords, the massive legal intelligence even of Lord Cairns does not seem to me to have wholly disposed of the question before us. He was dealing with a case in which human agency had been superseded. Here, we are dealing with one in which there was human agency . . . I think that he meant to go further, and to suggest that, even if there was human agency, there would be no liability created provided that there was no breach of duty at common law. But that question was not before him, and what he suggests was not necessary for the decision of the *Adamson* case. It is, therefore, important to see whether his suggestion was concurred in by the other noble and learned Lords who took part in the decision.
>
> . . . Even if we accept his view that the section is one creating a new procedure, that of suing the owner . . . I am quite unable to see how this leaves the existing substantive law intact and relates to procedure alone. The owner could not be sued under that law unless he had violated some duty. If he can be sued at all, even with a right to recover over, it must be because some new substantive liability has been imposed on him by the statute. I think, therefore, that it follows that the common law has been altered and that a new right of action has been created

67 [1928] AC 57 (HL).

68 Viscount Dunedin and Lord Phillimore dissenting.

depending on the alteration. This is much more than mere procedure. Did his colleagues who heard the appeal with him accept his view as I interpret it? I think they did not . . .

Lord Hatherley was a very careful judge . . . He was content to express his general agreement with the view of Mellish LJ that the statute only applied where human agency had intervened, and that it was because it was absent in the *Adamson* case, that he concurred in the judgment of the Court of Appeal.

. . . Lord Gordon in *Adamson* expressly dissented. At the conclusion of an elaborate judgment, he expressed the opinion that the statute ought not to be construed as if it contained any exemption from liability where it occurred even from the act of God. The words appeared to him to be express and unambiguous, and being so, he thought that they ought to be read according to their ordinary construction . . .

My Lords, upon scrutiny of the words used by Lord O'Hagan, I have come to the clear conclusion that he did not concur in the *dictum* of the Lord Chancellor, so far as it went beyond the facts of the case before him, that the statute created no new right of action, but was confined in its scope to procedure only. The language, Lord O'Hagan thought, was prima facie sufficient to cover all cases, including those in which no human agency came in. But he was of opinion that, reading the whole of the section, and particularly the reference to 'such' vessel in the words declaring the liability of the master or person having charge of it, an intention was expressed to confine the liability of the owner to vessels 'in charge of a master or somebody else'. On this point he expressed his concurrence with Mellish LJ. The owner is therefore placed in a worse position than he would have been at common law, but not so bad as that in which he would have been had he been made liable when no one had charge on his behalf . . .[69]

My Lords, when the expressions used by Lord Blackburn are considered, I cannot find in them concurrence with the *dictum* of Lord Cairns that no new right of action was created, even where human agency came in . . .

On this point, the opinions delivered appear to me to leave us under the duty of deciding, unfettered by authority, whether when the vessel which caused the damage was under the control of the owner's agents, he is liable notwithstanding that there was no breach of the duty not to be negligent on their and his part.

I do not think that *River Wear Commissioners v Adamson* settles the point of non-liability where the vessel was in charge, at the time of the accident, of the owners' agents. It seems to me that the words of the statute are too clear to admit of this conclusion, and that the decision of this House in the earlier case is not in truth any authority for it . . .

I comment on the decision in the *Adamson* case on the assumption that, notwithstanding what was said by Lord Blackburn, there was no such human agency. For, if there was, that in my view brings the case within the uncontrolled words, and would render it analogous to the present case. But, on the facts set out in the report, I think that the vessel must be taken to have become out of human control.

It appears to me to be bound by the authority of the *Adamson* case [insofar as] to hold that the section in question is not to be read literally, but as applying when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not. The decision further exempts the owner when the vessel is not under such control but is, for instance, derelict. When there are facts to which it applies, it effects an alteration in the common law which imposes a new liability to be sued on the owner, and to that extent changes not merely procedure but also substantive law.

My Lords, if these things are true I think that, on the facts established in the present case, we must find the owners liable, reverse the judgment of the court below in their favour, and give judgment for the appellant railway company for damages, the agreed amount of which is 226l.[70]

The difference in the facts between the *Adamson* and *The Mostyn* cases was that, in the former, the ship had been abandoned because of the extreme weather, whereas, in the latter, the ship was under the control of its master and crew when the accident happened.

69 [1928] AC 57, pp 67–69.
70 [1928] AC 57, pp 71–72.

The issue of strict liability was questioned again later, in the context of damage suffered by the harbour authority, which was due partly to its fault. The House of Lords had another opportunity to interpret s 74 in ***The Towerfield***[71] (seen also below and under ship-owners' liability for pilot's negligence).

Lord Porter, considering the contention put forward by the harbour board that, although their negligence may be one of the causes of the disaster, yet they can recover by reason of the terms of s 74 of the HDPCA 1847, held:

> The section has, my Lords, been considered at least four times and has twice been fully discussed . . . In *River Wear Commissioners v Adamson* . . . Lord Gordon took the first view and Lord Cairns the second. . . . The next case to reach your Lordships' House was *Great Western Rly Co v Mostyn (Owners)*, but before that case was considered, Roche J (in *Det Forenede Dampskibs Selskab v Barry Rly Co)* followed the decision in the *River Wear* case in holding a ship-owner not absolutely liable, but excused in a case where the damage to the harbour works was, in part at least, caused by the fault of the harbour authority. As I read the decision in *The Mostyn*, however, the majority of their Lordships took the view that the ship-owner was responsible for damage done to harbour works whether he was in fault or not, save in a case similar to that decided in the *River Wear* judgment. Accordingly, where the ship had been abandoned and was therefore out of the control of its owners, they agreed that no liability attached under the section. But, save for that concession, they decided in terms, as I think, that the only exception from liability was that afforded to an abandoned ship . . .
>
> I would only add that, like those of your Lordships who are of the same opinion, I would limit the damages to those directly caused to the harbour, in which, as the ship-owners concede, are to be included the restoration of the channel to the condition in which it was before the stranding of *The Towerfield*, but I would not embrace amongst them any loss of revenue to which the harbour board have been put thereby. Save to this extent I think the claim and counterclaim fail.[72]

A question as to who is the owner under s 74 was considered in ***The Chevron North America***.[73] An argument was advanced by the defendants that the word 'owner' in s 74 meant the person who had possession of the vessel and had the right to control the master and crew, for example demise charterers or bareboat charterers. The House of Lords, in rejecting this interpretation, stated that there was a public policy reasoning behind s 74 to enable claims to be made quickly and efficiently. Such an interpretation would run counter to these objectives, and so the word 'owner' is to be taken to mean the registered owner of the vessel.

5.2 IS A DEFENCE OF CONTRIBUTORY NEGLIGENCE SUSTAINABLE?

Lord Porter, in ***The Towerfield***, held that contributory negligence by the harbour authority was no defence to a claim by them under s 74 of the HDPCA 1847 for damage caused by the ship to the harbour.

In 1941, the ship, in charge of a compulsory pilot, approached an English harbour through a channel and went aground on an undredged accumulation of river silt, sustaining damage. It was conceded on behalf of the ship-owners that she had also

71 *Workington Harbour Dock Board v Towerfield (Owners)* [1951] AC 112.

72 [1951] AC 112, pp 135–136.

73 [2001] UKHL 50, [2002] 1 Lloyd's Rep 77.

caused damage to the harbour. The harbour authority was found, on the facts, partly negligent for not having maintained the approaches to the harbour clean, which contributed to the casualty. The pilot on board the ship, which stranded, was also found partly negligent for the stranding of the ship and the damage caused to the property of the harbour.

On the issue of whether the application of strict liability of the owner was excluded because of the fault of the harbour authority, Lord Potter, applying *The Mostyn*, said:

> . . . the majority of their Lordships took the view that the ship-owner was responsible for damage done to harbour works whether he was in fault or not, save in a case similar to that decided in the *River Wear* judgment. Accordingly, where the ship had been abandoned and was therefore out of the control of its owners, they agreed that no liability attached under the section. But save for that concession they decided in terms, as I think, that the only exception from liability was that afforded to an abandoned ship.

In short, the effect of the interpretation of the *Adamson* decision given by the House of Lords in *The Mostyn* is that ship-owners will be liable for any damage caused by their ship to the property of public harbour, or dock authorities, whether caused by negligence of their servants or not, or even if it is caused by an act of God, unless the ship is abandoned because of tempestuous weather, by reason of which the ship is not under human direction.

As s 74 imposes strict liability upon ship-owners, the *Towerfield* case added to this principle that the fault of the port authority contributing to the loss would not be a defence for the ship-owner. Their Lordships relied on the previous authorities, the *Mostyn* or the *Adamson* cases; however, the issue of contributory negligence was not within the issues before the court in either of these cases. In addition, since the *Towerfield* was decided, there have been changes, as is seen below, and it could be argued that the decision can no longer be relied upon as an authority that no defence of contributory negligence can be raised.

The contributory negligence defence under English law was enacted in 1945 by the Law Reform (Contributory Negligence) Act (LR(CN)A) 1945, whereas the events in this case happened in 1941. Were the case to be decided today, considering the changes, generally, in the responsibilities and duties of harbours, as seen in this chapter, there should be a different conclusion reached by the courts.

Section 74 of the old statute is not in tandem with modern developments (see at 2.2.2 and 2.2.3, above) and needs to be amended.

5.3 OTHER OPTIONS FOR THE OWNER

In the event that a ship-owner cannot raise the contributory negligence defence under s 74 because it does not expressly provide for any defence (other than the defence of compulsory pilotage, which is now obsolete), it is submitted that the owner should be able to claim damages for his loss, either by way of a counterclaim, when sued by the authority, or by a separate action against the harbour authority on the basis of breach of statutory, or even contractual, duties by the authority, as seen in cases mentioned under paras 4.3.5–4.3.7, above. This view is supported, particularly today,

by the current underlying objective requiring the harbour authorities to carry out risk assessment to guard against anything that would render the port unsafe. Failure to comply with its obligation under the PMSC should provide evidence of such breaches.

5.4 RECOVERABLE DAMAGES BY THE HARBOUR

As far as recoverable damages are concerned, in an action based on s 74, the damages that can be claimed by a jetty or pier owner will include physical damage to the property as well as consequential financial loss arising from consequential delay (that is, to repair the port or jetty), which will inevitably delay the business in the port, causing the port to become liable to third parties with whom the port had entered into contracts.[74]

However, on the facts of *The Towerfield* (see above), Lord Potter did not wish to go as far as to embrace among damages any loss of revenue that the harbour board had suffered.

6 HARBOUR DUES

The harbour authority has a statutory power of detention and a right to arrest a ship and have it sold, if port dues are not paid.[75] The authority's claim for its expenses of removal or conservation of a wreck has priority over other claims, even those giving rise to maritime liens, such as collision damage and salvage. The reason for this is that, had the authority not preserved the *res*, there would be no property left for the satisfaction of these claims, provided the proceeds are sufficient.[76]

In ***The Veritas***,[77] where the ship was in distress outside Mersey Docks, salvage services were rendered to her, bringing her into the docks. Thereafter, a collision occurred between *The Veritas* and another steamship. Salvage services were again rendered to her by two tugs, and she was brought alongside the dock wall. However, she drifted against a landing stage, doing damage to the stage, and, finally, she sank. The Mersey Docks and Harbour Board, under the statutory powers conferred upon them, removed her. An action was instituted by the salvors against *The Veritas* in respect of the salvage services rendered. The board intervened in the action, and the vessel was released to the board, which sold it. After deducting its expenses, it paid the proceeds of the sale into court. The present action was to determine priorities between the judgment creditors. It was held that the claim of the board took priority over that of the salvors. This was because the lien of the board was one that arose *ex delicto* as opposed to one arising *ex contracto* or *quasi ex contracto*. Gorell Barnes J stated that:

> It is also clear that liens arising *ex delicto* take precedence over prior liens arising *ex contracto*. The principal . . . [reason is] that the person having a right of lien *ex contracto* becomes, so to

74 *Texada Mines Ltd v The Ship Afovos* [1974] 2 Lloyd's Rep 168.
75 *Corps & Corps v The Queen of the South* [1968] 1 Lloyd's Rep 182.
76 *The Sea Spray* [1907] P 133.
77 [1901] P 304.

speak, a part-owner in interest with the owners of the vessel. He has chosen to enter into relationship with the vessel for his own interests whereas a person suffering damage by the negligent navigation of a ship has no option. Reparation for wrongs done should come first.[78]

7 PORT SECURITY

Port security for the protection of people, ships and port infrastructure in EU ports was enhanced by the EU Directive 2005/65/EC supplementing Regulation 725/2004. The Directive established an EU framework to guarantee a high and comparable level of security measures, an implementation mechanism and appropriate compliance monitoring mechanisms.

EU countries must designate a port security authority for each port, which shall be responsible for identifying and taking the necessary port security measures in line with port security assessments and plans. The port security plans must be developed, maintained and updated to enhance port security. EU countries must also monitor security plans and their implementation and specify penalties for non-conformity.

In addition Commission Regulation No 324/2008 lays down procedures for conducting Commission inspections to monitor the application of the above. See, further, Chapter 3, above, para 10.

SECTION B: PILOTAGE AND RISKS

1 INTRODUCTION

1.1 PILOTS' FUNCTION

The term 'pilot' refers to a person with specialised knowledge of local conditions and navigational hazards, who is generally taken on board a vessel at a specific place for the purpose of navigating or guiding a ship through a particular channel, river or other enclosed waters to or from a port. It is defined in s 31(1) of the PA 1987, as amended by the MSA 1995, as 'any person not belonging to a ship who has the conduct thereof'.[79] His functions are: to guide vessels from open sea into port, or vice versa; to guide a ship from anchorage to a berth, or from berth to a terminal within a port; or to help a ship to dock or undock within a port. New regulations apply to the authorisation of a pilot and functions.

78 Ibid, p 313. However, this reasoning would be contrary to the practice, or discretion exercised by the court, in cases of priorities when salvors have been successful (see Ch 5, Vol 1). The accepted reason for the priority of the port authority's lien is seen in Ch 5, Vol 1.

79 Detailed provisions relating to pilot transfer arrangements, ladders, equipment and procedures for safety are now found in the amending MS (Safety of Navigation) Regulations 2002 (SI 2002 No 1473) implementing the SOLAS Ch V amendments and revoking the previous MS (Pilot Transport Arrangements) Regulations 1999. Criminal offences are provided if the owner and the master do not comply with these Regulations.

1.2 THE STATUTES AND FURTHER DEVELOPMENTS

1.2.1 Overview

There had been various successive Acts of Parliament relating to London Trinity House, of a general nature, since the eighteenth century. It became apparent in the early twentieth century that a confusion had been created by the variance between the general statute law and the special provisions of local Acts regulating the business of pilots. As a result, the PA 1913 was passed to consolidate and amend the law relating to pilotage.

This was amended by the MSA 1979, upon recommendations of an Advisory Committee on Pilotage, which established the Pilotage Commission to act as an advisory body. However, in 1983, both the 1913 Act and the pilotage provisions of the MSA 1979 were repealed and replaced by the PA 1983.

The responsibility of administering a pilotage district was upon a pilotage authority, which licensed pilots for its district and, where there was a compulsory pilotage, it granted pilotage certificates to masters. Its other functions were the making and enforcement of by-laws, pilotage charges and approval of pilots' boats. It could also employ pilots, but the majority of pilots, however, were self-employed.

1.2.2 The PA 1987

In 1987, there was a need for a new Act, the PA 1987, which came into force on 1 October 1988, to simplify the law of pilotage. It made radical changes to the provision of pilotage services by transferring the functions of pilotage <u>from a pilotage authority to the harbour authorities</u>.

By s 1 of the PA 1987, the responsibility for provision of pilotage services was placed upon a class of harbour authorities, which manage their harbours under statutory powers, designated as 'competent harbour authorities', the functions of which will be seen later.

Nevertheless, there were some provisions in this Act that lacked clarity and, perhaps, contributed to the problems encountered by the Milford Haven Port Authority in *The Sea Empress*.

1.2.3 The IMO recommendations

1.2.3.1 Risk assessment

IMO recognised that effective pilotage is a fundamental measure that can be used to protect the marine environment. There was a review of pilotage and the duties of the harbour authorities. The PMSC and a Guide to Good Practice on Port Marine Operations in 2001, as amended in 2009, were adopted (mentioned under Section A of this chapter and para 4.3.8). This was further amended and expanded, in 2012, by the new Guide to Good Practice on Port Marine Operations pursuant to the PMSC 2012 on general port duties, imposing the obligation of risk assessment, including risk assessment in relation to pilotage and authorisation of pilots.

1.2.3.2 Training, certification and operational procedures

IMO, together with the International Maritime Pilots Association, issued Resolution A.960(23) (adopted on 5 December 2003), by which recommendations were made on training, certification and operational procedures for maritime pilots, which mirrored the principles of the amended STCW with regard to crew. The Resolution concerns International Best Practice for Maritime Pilots. IMO urged governments to give effect to these recommendations. Although only recommendatory, it was looked at by the industry as a good step forward, containing, as it did, guidance on pilot training, certification, licensing, a syllabus for studies, continuous training, language and cultural issues, as well as operational procedures, particularly with regard to exchange of information between master and pilot and the agreement of a common plan. This is a most instrumental document that should be imposed compulsorily for the purpose of ensuring wide implementation and, hence, the protection of the environment.

1.2.4 The EU Directive 1999/42/EC and consequential Regulations 2003

This Directive concerns the recognition of qualifications of professionals, including pilots, trained and practising within the EU.

The MS Pilotage (Recognition of Qualifications and Experience) Regulations 2003 implement this Directive. They establish a mechanism for testing the knowledge and experience of pilots before their authorisation.

As a result, the PA 1987 was amended.[80]

2 DUTIES OF A COMPETENT HARBOUR AUTHORITY IN RELATION TO PILOTAGE

2.1 OBLIGATION TO PROVIDE PILOTAGE SERVICES

The harbour authority's duty relates to the safety of navigation and the regulation of marine operations, including pilotage (see para 4.3.8, above). Safety of navigation is a public right; provision of pilotage is a specific duty to facilitate the public right. Furthermore, each competent harbour authority shall, in performance of its duties, have regard, in particular, to the hazards involved in the carriage of dangerous goods or harmful substances by ships.

2.1.1 Under the PA 1987 as amended

2.1.1.1 Pilotage services

Competent harbour authorities (that is, those empowered by statute) have specific powers under the Act to enable them to discharge the pilotage duties imposed by the Act. They have a duty by s 2(1) to keep under consideration the following:

80 SI 2003 No 1230.

(a) whether any and, if so, what pilotage services need to be provided to secure the safety of ships navigating in or in the approaches to its harbour; and
(b) whether, in the interests of safety, pilotage should be compulsory for ships navigating in any part of that harbour or its approaches and, if so, for which ships and in which circumstances and what pilotage services need to be provided for those ships.

By s 2(3) of the Act, each competent harbour authority should provide such pilotage services as it considers necessary. Section 11 allows that the duty of providing pilotage services may, by arrangement, be provided on its behalf by another competent harbour authority or an agent.

2.1.1.2 Recognition of qualifications of pilots

The amendment by the 2003 Regulations to s 2 (by the inserted provision 1A after s 2(1)) concerns how the harbour authority will go about considering whether an applicant pilot is suitably qualified for recognition of his qualifications, as per Sched A1 to the Act. Most importantly, para 11 of the Schedule provides that a harbour authority should require persons applying for authorisation to provide proof that they are insured against the financial risks arising from their professional liability.

2.1.1.3 Compulsory pilotage

The designation of an area as a compulsory pilotage area is left at the discretion of the competent harbour authority, by s 7 of the Act, if it considers that it would be necessary in the interests of safety. Unlike the 1983 Act, the present statute does not contain any classes of ship that would be exempt from compulsory pilotage, such as Her Majesty's ships and ferryboats. The only exempt ships are small boats less than 20 m long, or fishing boats registered as being less than 47.5 m in length (s 7(3)).

The harbour authorities must ensure that any vessel that they own or operate and use in the exercise of their functions, otherwise than for pilotage, is subject to the same pilotage obligations as any other vessel (s 9).

2.1.2 Accountability for safety and risk management

The above duties should now be read in conjunction with the PMSC 2012, the IMO Resolution 2003 on training, certification and operational procedures, and the Pilotage Regulations 2003 relating to recognition of qualifications of pilots, seen earlier.

These are linked to the principle of accountability, which has been the main objective of the review of pilotage service and applies to the discharge of the authority's statutory duties, but harbour authorities are not publicly accountable at large.

However, a harbour authority that fails to provide adequate services of pilots may incur liability to the owner of a ship that sustains damage in consequence of the absence of pilots in the port.[81] If a pilot is provided but he is incompetent, it was, in the past, uncertain whether the authority would be liable to the owner for damage

81 *Anchor Line (Henderson Bros) Ltd v Dundee Harbour Trustees* (1922) 38 TLR 299; the case is still good law under the present statute.

sustained by his ship. Such uncertainty derived from the interpretation given to s 22(8) of the PA 1987, which excludes liability of the harbour authority for damage caused by an act or omission of a pilot authorised by it. However, in the light of the changes brought by the new Regulations, it would be inconsistent with the duties imposed upon the harbour authority to apply the section and exclude the liability of the authority even if there was a fundamental breach of its duties. It is submitted that this section should be interpreted in the light of the review of the duties of the harbour authorities after *The Sea Empress*.

Risk assessment and good practice are imposed by the PMSC 2012. In view also of the IMO Resolution A.960, harbour authorities should guard against risks of pilots' incompetence by assessing what further training in navigational skills or communication is required.

In *The Sea Empress*,[82] the Milford Haven Port Authority was prosecuted by the Environment Agency under s 85(1) of the WRA 1991, it pleaded guilty to the offence, which imposes strict liability, and paid a fine. The inexperience of the pilot involved and the lack of a coherent policy of the port for pilotage services were highly criticised by the court and raised great concerns in the industry, which led to the introduction of rules of best practice for training and familiarisation of pilots.

Civil liability for oil pollution damage is dealt with under the oil pollution legislation (see Chapter 16, para 10.4, below).

2.2 AUTHORISATION OF PILOTS

2.2.1 Under the PA 1987

A major change in the engagement of pilots was introduced by the 1987 Act. Section 3 of the Act (by contrast to the PA 1983, which gave power to a pilotage authority to license pilots) provides that the harbour authority has power to *authorise* persons to act as pilots in their harbour.

Although, under each Act, the purpose has been to ensure that pilots have the necessary qualifications, the difference is that, in the past, a licence enabled the pilot to act in the district in which he was licensed, whereas, under s 3 of the present Act, the authorisation must be coupled with a contract of employment or, otherwise, enable the pilot to act as an authorised pilot in a particular harbour.

2.2.2 The effect of the EU Directive and the 2003 Regulations

Section 3 (as amended by the Pilotage (Recognition of Qualifications and Experience) Regulations 2003) provides that each competent harbour authority may authorise suitably qualified pilots in its area. Authorisations may relate to ships of a particular description and to particular parts of the harbour. The authority must follow the guidelines of Sched A1 (inserted into the Act by the above Regulations) in determining the qualifications and experience for authorisation, and, once the person is authorised, he should have an adaptation period. The authority may employ the person under

82 [1999] 1 Lloyd's Rep 673.

a contract of employment, which must be offered to him, or a contract for services (s 4).

The employment status of pilots has been a contentious issue. Whatever arrangements are made for the use of pilots, they must safeguard the authority's position of control. Employment is a default option and the easier way of integrating pilotage services. If they are employed, they should become direct employees of the port authority and not of a subsidiary of the authority, as was the Milford Haven Pilotage Ltd.[83]

An authorisation must specify the area within which it has effect and it may limit the pilot's authority to certain parts of the harbour or types of ship. The authorisation may be suspended if the pilot is found guilty of misconduct or has ceased to have the relevant qualifications, or when the number of pilots required exceeds the needs of the area.

Section 8 allows a competent harbour authority to issue exemption certificates, upon the application of a master or mate of a ship, where a pilotage is compulsory, to enable him to navigate that ship in the area concerned without a pilot, if it is satisfied that his experience, skill and knowledge of the local area and of the English language are sufficient.

2.2.3 Revision of the duties by PMSC 2012 and the IMO Resolution A.960

As seen under 4.3.8 of Section A, above, the obligations of harbour authorities have been significantly affected today, and it is submitted that the court decisions about their liability to ship-owners for damage to their ship due to pilot's negligence, see later, should be viewed in the light of these changes. All the duties of harbour authorities have been reviewed by the PMSC 2012, and an emphasis has been placed on the duty of the harbour authority properly to train pilots and keep pilotage and safety procedures under constant review by systematic application of risk assessment and management.

The PMSC is a code of best practice and contains the current requirements. It requires the harbour authority to have available competent pilots and properly certified boats for their use. The authority should ensure that the pilot assigned to every ship is fit and appropriately qualified for the task and that, under the PA 1987, pilotage services provided by a harbour authority should be based upon a continuing process of risk assessment. Authorised pilots should be accountable to their authorising authority for the use they make of their authorisation, and harbours should have contracts with authorised pilots, regulating the conditions under which they work, including procedures for resolving disputes.

Part of this risk assessment, as was emphasised by the IMO Resolution in 2003, is the duty to ensure initial and continuing training in bridge resource management, emergency conditions, maintaining a good working relationship with the bridge team, communication skills to undertake exchanges with the master of the ship and bridge team, language skills and best practice in specific pilotage areas. A competent harbour authority should provide updating and refresher training and should satisfy itself, at

83 Op. cit., Consultation Paper, fn 1.

regular intervals, not exceeding 5 years, that all pilots under its jurisdiction continue to possess navigational knowledge of the local area, continue to meet the medical fitness and possess knowledge of current international, national and local laws, regulations and other requirements relevant to the pilotage area and the pilots' duties.

3 DUTIES OF MASTERS AND PILOTS IN A COMPULSORY PILOTAGE AREA

3.1 RULES OF ENGAGEMENT

Once a compulsory pilotage area is designated (most areas, nowadays, are compulsory pilotage areas), a ship navigated in that area must be under the pilotage of an authorised pilot, accompanied by an assistant, if that is required, or the master must hold an exemption certificate that he is qualified and, thus, he does not need a pilot (s 15 PA 1987). The master of the ship is under an obligation, by s 50, to display a pilot signal in a compulsory area.

It should be noted that para 4 of Annex 2 of the IMO Resolution A.960 specifies that the competent harbour authority should establish, promulgate and maintain procedures for requesting a pilot for an inbound or outbound ship, or for shifting a ship.

Paragraph 8 of Annex 2, specifies that the pilot should have the right to refuse pilotage when the ship to be piloted poses a danger to the safety of navigation or to the environment. Any such refusal, together with the reasons, should be immediately reported to the appropriate authority for action.

What constitutes an offer by a pilot? The offer must be clearly communicated in relation to the particular movement of the ship and it is a question of fact.[84] Court decisions on the issue of offer that were decided prior to the review of pilotage by the PMSC 2012 and the IMO Resolution A.960 must be viewed with scepticism.

When the offer is accepted, the master has an obligation to provide information about the ship (s 18) and facilitate the pilot boarding and leaving his ship (s 20).

3.2 OFFENCE NOT TO HAVE A PILOT

A master who navigates in a compulsory pilotage area, without notifying the competent harbour authority that he proposes to do so, will be guilty of an offence and liable of summary conviction (s 15(3)).[85] If any ship is not under such pilotage after an authorised pilot has offered to take charge of the ship, the master will be guilty of an offence, liable on summary conviction (s 15(2)).

84 *Babbs v Press* [1971] 2 Lloyd's Rep 383.

85 See, also, *Muller v Trinity House* (1924) 20 LlL Rep 56; *Clayton v Albertsen* [1972] 2 Lloyd's Rep 457, where the master was prosecuted because he failed to be under pilotage and failed to display a pilot signal in circumstances in which pilotage was compulsory in the Tyne Pilotage District, for the purpose of entering and making use of the Port of Tyne, if the ship was carrying passengers, contrary to the PA 1913, ss 11 and 43.

It will be an offence if the master has an unauthorised pilot on board, without first notifying the harbour authority, or if he continues to engage him after an authorised pilot has made an offer (s 17). However, in practice, this section will be of no practical application because, under the new Regulations, unauthorised pilots should not be allowed by a competent harbour authority in its area.

4 PILOT'S AUTHORITY AND RELATIONSHIP BETWEEN MASTER AND PILOT

4.1 WHO IS IN COMMAND?

The master remains in command of the vessel.[86] The pilot's duties are confined to navigation, and he does not supersede the master. However, the pilot is the person best qualified to appraise the situation in the particular area in which he has been authorised. Co-operation and assistance, in looking out for danger, in guiding the pilot how to handle the ship and in ensuring that the crew carry out the pilot's instructions are expected from the master.[87]

This should be applicable today, but with the qualification that masters and pilots should bear in mind the recommendations made by IMO Resolution A.960, mentioned earlier, about their respective duty to exchange information and work together as a team for the duration of the pilotage. Annex 2 of that Resolution makes recommendations about the duties of the master, the bridge officers and the pilot.

4.2 RESPECTIVE ROLES

Paragraph 2 of Annex 2 repeats the general duty of the master that the presence of pilot on board does not relieve him or the officer in charge of the navigational watch from their duties and obligations for the safety of the ship. However, the pilot, the master and the bridge team should be aware of their respective roles in the safe passage of the ship. They all share a responsibility for good communication and understanding of each other's role, and the master and the bridge officers have a duty to support the pilot and ensure that his/her actions are monitored at all times.

4.3 EXCHANGE OF INFORMATION

Paragraph 5 of Annex 2 provides a new guidance that the master and pilot should exchange information regarding navigational procedures, local conditions and rules and the ship' characteristics. These principles derive from old common law cases, but there had been a tendency, in practice, either by some pilots or some masters,

86 MSA 1995, s 313(1).

87 *Owners of SS Alexander Shukoff v SS Gothland* [1921] 1 AC 216 (HL); *The Nord* [1916] P 53; *The Hans Hoth* [1952] 2 Lloyd's Rep 341.

to ignore the importance of this exchange, which should be a continuous process for the duration of the pilotage.

In addition, it is recommended to the harbour authorities to develop a standard exchange of information practice, taking into account the regulatory requirements and best practices in the pilotage area.

Paragraph 5.4 specifies that the exchange of information should include, at least:

(a) presentation of a completed standard pilot card;
(b) general agreement on plans and procedures, including contingency plans, for anticipated passage;
(c) discussion of any special conditions such as the weather, depth of water, tidal current and marine traffic that may be expected during the passage;
(d) discussion of any unusual ship-handling characteristics, machinery difficulties, navigational equipment problems or crew limitations that could affect the operation, handling or safe manoeuvring of the ship;
(e) confirmation of the language to be used on the bridge and with external parties;
(f) berthing and mooring arrangements;
(g) pilots and competent harbour authorities should be aware of the voyage planning responsibilities under the IMO instruments, such as SOLAS on voyage planning and STCW Code.

4.4 REPORTING DUTIES

Furthermore, under para 7 of Annex 2, the pilot should report to the appropriate authorities anything observed that may affect safety of navigation or pollution prevention.

Under the Merchant Shipping (Reporting Requirements for Ships Carrying Dangerous or Polluting Goods) Regulations 1995, Reg 12, the master of a ship, before entering port in the UK, or a port of another Member State of the European Union, must complete a checklist giving details of the ship, her equipment, crew and survey certificates, and also make that list available to any pilot boarding the ship.

Under Reg 13, if the pilot engaged in berthing or unberthing a ship in UK waters learns of deficiencies in the ship, which may prejudice its safe navigation, he must immediately inform the port authority. If he boards a ship, knowing or believing that she has defects that may prejudice her safe navigation, he shall notify the master. Upon the master failing to notify the port authority of the defects in question, the pilot must himself notify the port authority (Reg 14). Failure to comply with these regulations, or the deliberate making of false statements, is a criminal offence (Reg 15).

An authorised pilot engaged in the berthing and unberthing of a vessel in the United Kingdom, or engaged on a vessel bound for a port within an EU Member State, must immediately inform the harbour authority whenever he learns, in the course of his normal duties, that there are deficiencies in the ship that may prejudice her safe navigation, or that may pose a threat of harm to the environment.[88] The harbour authority shall immediately inform the MCA.

88 The Merchant Shipping (Port State Control) Regulations 1995 (as amended in 2009 and 2011), Reg 15, see Ch 2, above.

4.5 RESPECTIVE DUTIES UNDER COMMON LAW

The respective duties of a pilot and master were defined as long ago as 1850, in ***The Christiana***,[89] by Baron Parke:

> The duties of the master and the pilot in many respects are clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiency of the ship and her equipment, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only.

However, considering the guidelines mentioned earlier, modern pilotage entails a shared duty to communicate and agree procedures, as professionals each in their own area of expertise. In view of these guidelines, incidents such as *The Peerless*,[90] *The Prinses Juliana*[91] and *The Julia*[92] would not happen, or would be prevented from happening by proper risk assessment, today.

The duties of the master and crew to give assistance to the pilot, as pointed out by the House of Lords in *Owners of SS Allexander Shukoff v SS Gothland*,[93] a case decided in 1921, should still remain good law today.

However, the importance of efficient teamwork, between the pilot, the master, the engineers and the officers on watch (for example, the cadet and chief officer) was highlighted by the court in ***The Torepo***,[94] which grounded in the Patagonian Channels of South America, perhaps owing to miscommunication between those in charge of navigation, and also owing to an erroneous transposition of figures on the charts.

5 LIABILITY OF A PILOT

5.1 CRIMINAL LIABILITY

Under s 21 of the PA 1987, a pilot may be guilty of an offence and be summarily convicted to imprisonment for a term not exceeding 6 months, or a fine, or convicted on indictment to imprisonment for a term not exceeding 2 years, or a fine, or both, if:

89 (1850) 13 ER 841.

90 (1860) 167 ER 16, p 17, per Dr Lushington: 'If the pilot is intoxicated, or steering a course to the certain destruction of the vessel, the master, no doubt, may interfere and ought to interfere, but it is only in urgent cases.'

91 [1936] P 139 at pp 149–150: on the facts of the case, the master of the ship wrongly and without any justification took the matter out of the pilot's hands and without the pilot's consent. He also gave a wrong order, without which the collision would not have occurred.

92 (1861) 14 Moo PC 210: by the misconduct of the master and crew of the vessel in tow, who acted contrary to the directions of the pilot on board the vessel, a collision occurred.

93 [1921] AC 216, at 223.

94 [2002] 2 Lloyd's Rep 535.

(a) he does any act that causes, or is likely to cause the loss or destruction of, or serious damage to, the ship or its machinery, navigational equipment or safety equipment, or the death of, or serious injury to, a person on board the ship; or
(b) he omits to do anything required to preserve the ship or its machinery, navigational equipment or safety equipment from loss, destruction or serious damage, or to preserve any person on board the ship from death or serious injury; and
(c) the act or omission is deliberate or amounts to a breach or neglect of duty, or he is under the influence of drink, or a drug, at the time of the act or omission.

5.2 CIVIL LIABILITY

The pilot must exercise reasonable skill and care in the performance of his duties and acquaint himself with the local conditions. Whether performing compulsory pilotage or not, he will be liable for his own negligence. His liability may be limited to £1,000 and the amount of the pilotage charges in respect of the voyage during which the liability was incurred (s 22(2)). However, pilots of today should have insurance for financial risks, which is required by the harbour authority when it authorises pilots, and this section needs reconsideration. The purpose of insurance is to ensure that the harbour authority could get an indemnity against the pilot for liability incurred by the authority to third parties caused by the pilot's negligence, who may have been employed by the authority.

The target for a claimant, third party, who sustained damage or loss by a ship owing to negligence of the pilot on board would be the ship-owner, even if the ship was navigated by the pilot in a compulsory pilotage area. By the passing of the PA 1913, the defence of compulsory pilotage was abolished, because s 15 made the owner, or the master of the ship, answerable[95] for any loss or damage caused by the vessel or by any fault of the navigation of the vessel, in the same manner as he would if pilotage were not compulsory.

There is a policy reason that the subsequent statutes on pilotage law have adopted the same provision. The courts have consistently held the ship-owner liable to third parties for damage caused by the negligence of the pilot, whether or not the pilot is an independent contractor or a person whose general employer might be the harbour authority. The courts have held that a pilot is the employee of the ship-owner *pro tempora* during the time of the navigation of the ship[96] (see under 7, below).

6 LIABILITY OF HARBOUR AUTHORITIES WITH RESPECT TO PILOTAGE

When the PA 1983 was repealed, the PA 1987 provided that, in the interests of efficiency and safety of navigation, a competent harbour authority (rather than a pilotage authority) should exercise pilotage functions both in its area and in another

95 'Answerable' means responsible in terms of damage sustained by a ship due to pilot's negligence, or of damage done to third parties: *Towerfield v Workington Harbour & Dock Board* (1950) 84 LlL Rep 233 (HL).
96 *The Cavendish* [1993] 2 Lloyd's Rep 292.

area, if it considered it necessary. Such competent harbour authority was given extensive powers, discretion and duties for the provision of pilotage services.

The duty of the authority under the PA 1987 is to provide efficient pilotage services and qualified pilots. The Pilotage (Recognition of Qualifications and Experience) Regulations 2003 deal more specifically with the expanded duties of the harbour authority in authorising qualified pilots with experience.

The review of the duties of harbour authorities under the PA 1987 by the PMSC 2012 has the effect of making the authority *assume responsibility* for safe pilotage.[97] The Code requires each harbour authority to hold itself accountable for the discharge of its duties and powers (which include pilotage) to the standard laid down. It requires the board members of each authority to accept responsibility for ensuring that the authority discharges its duties and powers to that standard. Board members are collectively and individually responsible for the proper exercise of the legal duties of the harbour authority, and risk assessment is required across the board of its activities.[98]

The occasion in which the PA 1987 expressly excludes liability of harbour authorities is by s 22(8), which provides that the harbour authority shall not be liable for any loss or damage caused by an act or omission of a pilot authorised by them by virtue only of that authorisation.[99]

Subject to that limitation, it follows that the authority may be held liable for damage caused to ships (using the facilities of the port) owing to breach of its duty to provide efficient pilotage services, which includes providing properly authorised and trained pilots; it may also be liable to pay fines, under the appropriate legislation (as in *The Sea Empress*; see 4.3.10, above) for pollution damage caused by the negligence of an incompetent pilot.

Section 22(8) seems to cover situations in which a pilot (authorised by the harbour authority) is competent but negligent; in such a case, the authority will not be liable for his negligence by the mere fact that it had authorised the pilot to pilot ships in its area.

Section 22(3) entitles the authority to limit liability for the negligence of a pilot whom it employs.

7 LIABILITY OF THE SHIP-OWNER FOR NEGLIGENCE OF THE PILOT

7.1 STATUTORY PROVISIONS

Under common law, owners of vessels were held liable whenever they took on a pilot in a non-compulsory pilotage area. However, where pilotage was compulsory, the owners were not liable, because the pilot could not be regarded as the owners' servant

97 See, also, Section A of this chapter; Lord Jauncey, in *The Esso Bernicia* [1989] AC 643, said that, theoretically, it is possible that the general employer, the port authority, may be liable if it assumes responsibility for safe pilotage.

98 Department for Transport on Port Marine Safety Code: www.dft.gov.uk

99 The PA 1983 had a similar provision (s 17).

or someone for whose acts and omissions the owners should be liable. This rule had been enshrined in s 633 of the MSA 1894, which provided:

An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

However, the defence of compulsory pilotage was first abolished by s 15 of the PA 1913, which provided:

Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.

There came next the repeal of the 1913 Act by the consolidating PA 1983, and s 35 of this Act was identical to s 15 of the PA 1913.

Problems of construction of the wording of this section gave rise to interesting decisions, which perhaps provided the ground for the amendment of the same provision by the equivalent section of the 1987 Act, s 16. It was thought that the new Act intended to change the law, but this was not so (see later).

7.2 HOW THE COURTS HAVE DEALT WITH PILOTS' NEGLIGENCE

In ***The Towerfield***,[100] the ship was in the charge of a pilot, in a compulsory pilotage area. She went aground on undredged, accumulated river silt while approaching an English harbour. She sustained damage and also caused damage to the harbour. It was found, on the facts, that both the harbour authority and the pilot were negligent, and their negligence contributed to the casualty. The harbour authority was negligent in that it failed to discharge its duty to ascertain the condition of the channel and to communicate the relevant information either to the master or to the pilot. The duty to give warning to the master arose from the relation of invitor and invitee. The argument by the harbour board that the pilot was intimately acquainted with the port and that he knew, or, at any rate, the board was entitled to assume that he knew, the port's exact condition, was rejected.

Regarding the pilot's negligence, however, the House of Lords held the ship-owner responsible, not only for the damage to the harbour on the basis of s 15 of the PA 1913, but also for the damage that his ship sustained.

In particular, the issue was whether 'answerable' meant more than just the damage done by the ship to the harbour so as to include damage suffered by the ship, in which case her owner would have to bear the loss for her damage.

The owners' submissions were that, on the language of the section, the effect of the change in the law was that they would be liable for any loss or damage to other persons, in case the negligence of the pilot was imputed to them, but, on the other hand, the section did not prevent them from claiming damage done to their ship.

100 [1951] AC 112, see also at 5.1, Section A, above.

Although Lord Norman criticised the clumsy drafting of this section, he said:

> The wording of s 15 is not happy. The word 'answerable' is not the cause of the difficulty, and it is merely the equivalent of 'responsible'. But the words 'answerable for any loss or damage caused by the vessel', though apt when the claim is against the owner of a ship, are incapable of applying when the claim is by the owner for damage done to his ship. The words 'answerable for any loss or damage caused . . . by any fault of the navigation of the vessel' are ill chosen and clumsy, but they are capable of applying to the ship owner's claim.[101]

Despite the statement by Lord Norman that, in his view, the words used in the section were incapable of applying to the ship-owners' claim, his final conclusion cannot be supported by his interpretation of the section.

The majority of the CA in this case had accepted that, although the liability of a ship-owner for the negligence of the pilot was applicable to a claim in tort, it held that it had no application in a contractual situation. In their view of this case, the harbour had offered to receive any ship on the terms that the channel was safely dredged, and, by entering the port, *The Towerfield* had accepted such an offer. The House of Lords reversed the decision. Lord Potter said robustly in this respect:

> My Lords, for the purpose of this decision and without staying to consider its accuracy, I am prepared to accept the suggestion that such a contract was so formed. But I do not find myself able to agree with the contention that the withdrawal of the protection given to ships employing a compulsory pilot affects only cases where a claim in tort is made.
>
> Taking the view which I do, that upon the true construction of the Act a ship-owner is, after the beginning of 1918, to be responsible for the acts of a compulsory pilot, I do not find myself influenced by a consideration of the history of the negotiations leading to a change in the law. The provisions of the Act, as I think, themselves plainly attribute to ship-owners liability for the fault of a compulsory pilot in all cases and I can, therefore, see no reason for differentiating between contract and tort, more particularly as this appears to have been accepted as the correct view from the time when the Act came into force until the present day.[102]

Lord Potter gave the following answer to the owners' submissions:

> My Lords . . . the section says that the owner or master shall be answerable for any loss or damage caused by the vessel, or by any fault of the navigation of the vessel. In the present case, the damage to *The Towerfield* was undoubtedly caused by faulty navigation, but when the Act says that the owner shall be answerable for that faulty navigation, it has to be determined whether 'answerable' means more than that the damage, whether done to or done by his ship, is his responsibility or is confined to damage done by the ship. Either view no doubt is theoretically possible but I do not think that read in its context the use of the word 'answerable' would naturally convey the suggestion that, though the ship-owner is liable for any damage done by the pilot's fault, yet he can recover his own damage in full. 'Answerable', as I think, simply means responsible, and a ship-owner who through a compulsory pilot is responsible for faulty navigation is responsible for damage to his own ship as well as for injury to the property of another . . .[103]

The construction of s 15 of the PA 1913 was again examined, almost 40 years later, by the House of Lords in ***The Esso Bernicia***.[104]

101 Ibid, p 145.
102 [1951] AC 112, p 134.
103 Ibid, p, 133–134.
104 [1989] AC 643, [1988] 2 Lloyd's Rep 8.

In 1978, *The Esso Bernicia*, with a pilot on board, was being berthed at a jetty in an oil terminal (a compulsory pilot area) in the Shetland Islands, with three tugs in attendance. A towline had been secured by one of the tugs, S. At about midnight, a coupling blew out of a hydraulic pipe above the engine exhaust of the tug. The escaped hydraulic oil caught fire, and the towline was cut off. *The Esso Bernicia* was no longer under the control of the other two tugs and came into contact with mooring dolphins, whereby she and the dolphins sustained damage. Large quantities of bunker oil escaped. The tug S had been designed and built by Hall Russell Co Ltd for the purpose of berthing tankers at the oil terminal. The owners of *The Esso Bernicia* brought an action against the shipbuilders, Hall Russell, on the ground of negligence in the building of the tug, for an indemnity with respect to oil pollution liabilities incurred to third parties and for damage to the jetty. The pilotage authority was joined as third parties in the action. The shipbuilders averred that the pilot on board the vessel had caused the accident, and that the pilotage authority was vicariously liable for his acts and omissions, being an employee of the authority. At the time, the PA 1913 was still in force.

Despite the previous authorities on the issue, counsel for the shipbuilders was not deterred from arguing that the pilotage authority, being the general employer of the pilot, was vicariously liable. It was in the shipbuilders' interest that the owners won. He maintained that, although the owner was responsible to third parties for the acts and omissions of the pilot, he was not the master of the pilot for the purposes of any damage that the pilot caused to his ship. Therefore, he could sue both the pilot (*Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555) and, if he was employed by an authority, his employer. Thus, he argued, so far as the pilot was concerned, it mattered not whether he fell to be treated as the servant of the owner or as an independent contractor, for the purposes of a negligent act. In either event, the owner could recover from him, subject always to any statutory limitation of liability.

Lord Jauncey took the opportunity to analyse both principle and policy:

> The critical question is whether the owner can recover from a general employer of the pilot . . . The fact that he was an independent contractor did not alter the common law rule that when he had been engaged voluntarily by a ship-owner he was, so far as any acts or omissions on his part were concerned, the servant of the ship-owner. The rule operated whether he was in the general employment of a pilotage authority, or whether he was an independent contractor . . . My Lords, nothing that has been said on behalf of Hall Russell persuades me that the rationale of the line of authority to which I have referred was wrong or that there is any exception to the general application of s 15 of the Act of 1913 to damage suffered by a ship under pilotage. Subject only to what I have to say in the context of Hall Russell's second submission, the pilot is to be considered for all purposes as the servant of the owner . . . If Hall Russell's argument were correct, there would follow the curious result that the doctrine of *respondeat superior* would apply to two different masters in respect of two different claims of damage arising out of a single act of negligence. It is a well-recognised principle, exemplified in cases involving crane drivers, that a servant in the general employment of A may, for a particular purpose, be treated as in the *pro hac vice* employment of B. However, there is no principle which permits a servant to be in the *de jure* employment of two separate masters at one and the same time.[105]

It should be noted, however, that the 'dual vicarious' liability of two employers has, in recent years, been clarified, as seen in Chapter 11 at para 8.2.2.

105 [1989] AC 643, pp 685–686. It should be noted that, in other jurisdictions, such as the USA, the doctrine of *respondeat superior* applies.

The shipbuilders' second argument was that the pilotage authority had assumed the responsibility of piloting ships and had held themselves out as undertaking pilotage services as principals of the pilot.

Lord Jauncey rejected this argument also, and concluded by stating a general rule:

> My Lords, it may be stated as a general rule that the employer of a qualified licensed pilot is not vicariously responsible to the owner of a ship damaged by his negligence while under pilotage. All the authorities support such a rule and none appear to controvert it. The basis of the rule is twofold, namely: (1) the pilot is an independent professional man who navigates the ship as a principal and not as a servant of his general employer, and (2) s 15(1) makes him the servant of the ship-owner for all purposes connected with navigation.
>
> In stating this rule, I am not going so far as to say that an employer of a licensed pilot could never be responsible for his negligent navigation. It is theoretically possible that such an employer could himself assume the obligation of safe pilotage although, at the moment, I have very great difficulty in envisaging a situation in which such an event could occur. However, it is unnecessary to speculate further since there is nothing in the present case to take it out of the general rule.[106]

Strictly speaking, on the facts of this case, there seemed to be fault in the tug used by the authority rather than clear evidence of pilot's negligence. The legal framework, at that time, was not as it is today, where the harbour authority assumes more responsibilities, and one of its duties is to maintain SMSs, review the efficiency of pilots, perform risk assessment and provide continuous training to pilots. It assumes, nowadays, the obligation of safe pilotage, as seen early in this chapter. ***The Cavendish***[107]was the third case in the line of these authorities, which is particularly important because it was decided after the 1987 Act was in force and there was negligence by the pilot. However, this case did not reach the highest court, presumably because the owners, considering the previous House of Lords decisions, must have thought that they would not have better luck.

The relevant sections for interpretation were ss 2 and 16 of this 1987 Act. Section 2 is seen under para 2.1, above.

Section 16 provides:

> The fact that a ship is being navigated in an area and in circumstances in which pilotage is compulsory for it, shall not affect any liability of the owner or master of the ship for any loss or damage caused by the ship or by the manner in which it is navigated.

The PLA provided pilotage services under the PA 1987. It had directed that pilotage be compulsory for ships navigating in the approaches to the river Thames. The master of *The Cavendish* requested the services of a pilot, and a pilot was duly provided who took charge of the vessel. About 40 minutes later, the vessel struck a buoy, in the approaches to the Thames, resulting in damage to her. Her owners sought to recover their loss and expense from PLA. For the purpose of determining a preliminary issue about the effect of ss 2 and 16 of the 1987 Act, the parties agreed that it was to be assumed, without being admitted, that the loss suffered by the owners was caused by the negligence of the pilot.

The first issue was whether s 2 of the 1987 Act imposed a positive duty upon the authority to pilot ships, the authority, therefore, becoming vicariously liable for the negligence of the pilot. The second issue was whether PLA was liable to the owners

106 Ibid, pp 690–691.

107 [1993] 2 Lloyd's Rep 292.

in contract, having contracted to supply pilotage services, subject to a statutory or common law implied term that such services would be performed with reasonable skill and care and that the claim was not precluded by s 16 of the Act.

Clarke J (as he then was) held on the first issue that the effect of s 2 of the 1987 Act was not to impose duties upon competent authorities to pilot ships, but to require them to supply properly authorised pilots for ships.[108] If the law had intended to provide for this new duty upon an authority, it could have been done in clear and unequivocal terms. In essence, s 2 gave statutory definition to duties that were, in practice, assumed by pilotage authorities under the earlier legislation. Therefore, PLA was not vicariously liable in tort for the negligence of the pilot.

On the second issue, the judge held that there was no basis for holding that a contract existed between the parties.[109] It was no more than an arrangement between PLA and the plaintiffs for the discharge of the ship-owner's statutory obligation by taking a compulsory pilot and paying a fee provided by the regulations made under the Act.

Finally, on s 16, the owners argued that this section had changed the law, in that it prevented the ship-owner from relying on the negligence of a compulsory pilot in resisting claims by third parties, but it restored the common law position so far as claims by the ship-owner against the general employer of the pilot were concerned.

The judge held that s 16 replaced the similar provision of the 1913 Act, and it was not intended to alter the meaning of the earlier provision, but to put it into more modern language. It imposed liability for negligence of a compulsory pilot on the ship-owner in respect of claims by third parties. If this was so, there was no reason for holding that the pilot was the servant of the ship-owner for that purpose, but not for the purpose of making them liable to bear their own loss. A pilot could not have two masters, and, once it was held that the pilot was, for some purposes, the servant of the ship-owner, he could not be at the same time the servant of his general employer, the competent authority.

7.3 COMMENTS

Although the intention of the change in the statute was not to change the meaning of it, as the judge said, the wording of s 16 of the 1987 Act did not make the position any clearer than its predecessor did. For example, the words '*any loss or damage caused by the ship*' have been copied without any additional words referring to damage done or caused to the ship. It should be recalled that Lord Norman, in *The Towerfield*, criticised the above phrase as being a clumsy drafting and also (which is very important here) that it was not capable of applying when the claim is by the owner for damage done to his ship.

Undoubtedly, these decisions are based more on policy than principle. The language of the statute is not clear to support the position adopted by the courts in these decisions, and, in any event, the statute is out of step with modern developments. In the above authorities, the reasoning was based on the practice prevailing at those

108 The judge applied the principle of *Fowles v Eastern and Australian Steamship Co Ltd* [1916] 2 AC 556.

109 The judge applied the principle in *Oceanic Crest Shipping Co v Pilbara Harbour Service Ltd* (1985) 160 CLR 626.

times that the pilot was an independent contractor and became the employee of the owner, *pro tempore*, during the pilotage of his ship. Lord Jauncey, in *Esso Bernicia*, stated that he was not, in that case, going so far as to say that the harbour authority, as employer of a pilot, could never be responsible for his negligence, if the authority assumed the obligation for safe pilotage, but, at that time, Lord Jauncey could not envisage such a situation (see passage quoted above). However, there is such a situation now.

Assumption of responsibility relates to risk assessment under the PMSC in 2012. It is emphasised in the Code that harbour authorities assume responsibility for the safety of port operations, which includes efficient pilotage services. In particular, it provides that the authority should ensure that the pilot assigned to every ship is fit and appropriately qualified for the task, and that pilotage services provided by a harbour authority under the PA 1987 should be based upon a continuing process of risk assessment. Pilots should be accountable to their authorising authority. It should also be noted that harbour authorities now ensure that the pilots have proper insurance cover in place for this purpose. In addition, the Directive 1999/42/EC, which regulates the employment of competent and properly authorised and experienced pilots by the harbour authorities, reinforces this argument of the authority's accountability (see 2.2.2 and 2.2.3, above). These developments do, undoubtedly, affect the over-protective approach to harbours adopted in the Pilotage Acts and by the courts.

Were these cases to be decided today, it is submitted that, as the harbour board assumes responsibility to provide efficient and safe pilotage services, it could be held liable in the event of failure to meet the standards required by the PMSC in 2012, by which the PA 1987 was reviewed.

On the issue raised by Lord Jauncey in *Esso Bernicia* and by Clarke J in *The Cavendish*, that there cannot be two masters for the purpose of vicarious liability, otherwise there would be a curious result of the doctrine of *respondeat superior* (see above), it is interesting to note the modern view of judges today and, in this context, the comment of Rix LJ in ***Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd***[110] is illuminating.

Rix LJ went on to consider how, in subsequent cases, the imposition of dual vicarious liability might be refined:

> One is looking therefore for practical and structural considerations. Is the employee, in context, still recognisable as the employee of his general employer and, in addition, to be treated as though he was the employee of the temporary employer as well? Thus in the Mersey Docks situation, it is tempting to think that liability will not be shared: the employee is used, for a limited time, in his general employer's own sphere of operations, operating his general employer's crane, exercising his own discretion as a crane driver. Even if the right of control were to some extent shared, as in practice it is almost bound to be, one would hesitate to say that it is a case for dual vicarious liability. One could contrast the situation where the employee is contracted-out labour: he is selected and possibly trained by his general employer, hired out by that employer as an integral part of his business, but employed at the temporary employer's site or his customer's site, using the temporary employer's equipment, and subject to the temporary employer's directions. In such a situation, responsibility is likely to be shared. A third situation, where an employee is seconded for a substantial period of time to the temporary employer, to perform a role embedded in that employer's organisation, is likely to result in the sole responsibility of that employer.[111]

110 [2005] 4 All ER 1181, at para 7.
111 Ibid, at para 80.

The second situation postulated by Rix LJ could be the situation of the pilot on the ship-owner's ship, using, temporarily, the owners' equipment, so that responsibility could be shared between the port authority and the owner in the event of the pilot's negligence. Speculating further as to how this could work in practice, and in the light of what is discussed above, it is proposed that, (a) the owner could sue the port authority for damage caused to his ship (as s 16 of the PA 1987 does not exclude claims from the owner for damage to his ship); (b) the harbour authority could then have an action of recourse against the pilot, whose insurance policy should pay for the damages.

The owner remains answerable for any damage done by his ship to third parties, as the language used in s 16 of PA 1987 is intended to cover.

8 CHARGES BY THE COMPETENT HARBOUR AUTHORITY

The authority is authorised, by s 10 of the PA 1987, to make reasonable charges for the services of pilots authorised by it, and for expenses reasonably incurred in connection with the pilot's services. Such charges may include:

(a) charges for the services of an authorised pilot;
(b) charges for expenses incurred by the pilot in providing his services;
(c) penalties for failure to keep an estimated arrival or departure time;
(d) charges for providing, maintaining and operating a pilot boat;
(e) any other costs in providing and maintaining the authority's pilot organisation.

Pilotage charges must be published in such manner as to bring them to the notice of those persons likely to be interested.

There is no maritime lien for pilotage charges. The charges are recoverable as a debt, which is enforceable under s 20(2)(i) of the Supreme Court Act 1981 by an *in rem* claim form.

9 CONCLUSION

The law of harbours and pilotage is bedevilled by numerous, some very old statutes, in which both principle and language are outdated. They cause confusion, and it is about time for the government to consider their consolidation and modernisation. Harbour authorities, in modern times, are in business to provide services for which they get fees, and they have statutory and contractual duties. They are commercial, and overprotectionism, as is reflected in the old statutes, is not befitting the new trends of requiring harbour boards to be accountable for the services they provide in the event of failure to meet the national standard of good practice in port operations.

SECTION C: THE WRC 2007

1 INTRODUCTION

The Convention was agreed at the Diplomatic Conference in Nairobi on 18 May 2007.

It provides the first set of uniform international rules to ensure the prompt and effective removal of wrecks located beyond the territorial sea for the protection of navigation from hazardous wrecks and includes an option for States to apply certain provisions of the Convention to their territorial sea. UNCLOS, by Art 45, makes provision only for the protection of the environment from pollution by wrecks, but there was no Convention protecting navigation from hazardous wrecks on the high seas and the EEZ. Thus, the WRC fills that gap.[112]

Three very important reasons prompted the adoption of the Convention:

(a) a wreck frequently constitutes a hazard to navigation, and an international regime was required to protect vessels and crews from danger;
(b) there was a serious issue about who would pay the costs of an increasingly expensive exercise of removing a wreck, particularly when its owner (usually a one-ship company) was insolvent;
(c) wrecks, depending on the nature of their cargo, present a risk of causing substantial damage to the marine and coastal environments, and the Convention fills a gap in the existing international oil pollution damage framework.[113]

1.1 APPLICATION

Coastal States have jurisdiction to remove wrecks located in internal waters and their territorial sea. Under UNCLOS, s 56, they have limited rights to take action on environmental grounds in the EEZ in order to remove a wreck. The Convention enables States to take measures to remove wrecks that are located in their EEZ, if those wrecks constitute a danger to navigation or to the marine environment.

However, as most wrecks, in reality, pose greater danger if they are found in internal waters, governments supported the extension of the provisions of the Convention to the internal waters and territorial sea for the purpose of uniformity in the rules.[114] This led to the 'opt-in' provision that will enable a coastal State to make a declaration that it will apply certain articles of the Convention to wrecks in its internal and territorial waters. In relation to the UK, which has opted in, see Chapter 14 para 4.7.2.2, regarding the reservation made as to limitation of liability with regard to wreck removal expenses of a harbour authority.

'Convention area' is defined in Art 1(1) as the EEZ established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State, determined by that State in accordance

112 See Brice, on *Maritime Law of Salvage*, 5th edn, 2011, at para 4–106.
113 IMO briefing, 22 May 2007.
114 Report to CMI by Shaw, R, CMI News Letter No 2 May–August 2006.

with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

The Convention applies (by Art 1(2)) to seagoing vessels of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources.

A 'wreck', following upon a maritime casualty, means (Art 1(4)): a sunken or stranded ship, or any part of a sunken or stranded ship, including any object that is or has been on board such a ship, or any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea, or a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

'Maritime casualty' means (Art 1(3)): a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo.

1.2 OBJECTIVES OF THE CONVENTION

The main objective of the Convention is to provide a sound legal basis for State parties to remove, or have removed, shipwrecks that pose a hazard to the safety of navigation, or to the marine and coastal environments, or both. It ensures that the costs of wreck removal are covered by making ship-owners financially liable. It requires them to take out insurance, or financial security, to cover the costs of wreck removal and provides for a right of coastal States of direct action against the insurer.[115]

2 FUNDAMENTAL PROVISIONS

2.1 GENERAL PRINCIPLES: PROPORTIONALITY AND REASONABLENESS

The objectives and general principles of the Convention are stated in Art 2, namely, that:

1 A State Party may take measures in accordance with this Convention in relation to the removal of a wreck that poses a hazard in the Convention area.
2 Measures taken by the affected State in accordance with para 1 shall be proportionate to the hazard.
3 Such measures shall not go beyond what is reasonably necessary to remove the wreck posing the hazard, and shall cease as soon as the wreck has been removed; they shall not unnecessarily interfere with the rights and interests of other States including the State of the ship's registry, and of any person, physical or corporate, concerned.

115 Following the model of the other liability and compensation Conventions – see Ch 16, below.

4 The application of this Convention within the Convention area shall not entitle a State Party to claim or exercise sovereignty or sovereign rights over any part of the high seas.
5 States Parties shall endeavour to co-operate when the effects of a maritime casualty resulting in a wreck involve a State other than the affected State.

The purpose of emphasising the principles of reasonableness and proportionality is to balance the rights of the States involved, for example, the 'affected' State and the flag State, because the Convention, unlike UNCLOS, confers extraterritorial sovereign rights to a State Party affected by the danger posed by the wreck. On the other hand, under para 4 above, the Convention does not entitle a State Party to exercise sovereign rights over any part of the high seas.

2.2 OBLIGATIONS UNDER THE CONVENTION

Articles 7–9 set out the obligations under the Convention for locating, marking and removing wrecks that pose a hazard, and that the registered owner shall remove a wreck determined to constitute a hazard.

These obligations of a coastal State include:

- reporting and locating wrecks, or casualties to the nearest coastal State;
- marking and warning mariners and coastal States about the wreck;
- determining the criteria of the hazard posed;
- taking measures to facilitate the removal of, and removing, wrecks.

2.3 WHAT IS A HAZARD?

A hazard is defined in Art 1(5) as any condition or threat that:

(a) poses a danger or impediment to navigation; or
(b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

Article 6 gives extensive details of the criteria as to what may constitute a hazard.

The criteria to be taken into account include: the depth of water above the wreck, proximity of shipping routes, traffic density and frequency, type of traffic and vulnerability of port facilities, as well as environmental criteria, such as damage likely to be done to the marine environment from the release of cargo or oil.

2.4 LIABILITY OF THE REGISTERED OWNER

As provided by Art 10, the liability of the registered owner for the costs of locating, marking and removing the wreck, under Arts 7–9, is strict, unless the registered owner proves that the maritime casualty that caused the wreck:[116]

(a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;
(b) was wholly caused by an act or omission done with intent to cause damage by a third party; or
(c) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Further exceptions to liability are provided by Art 11, in that the registered owner shall not be liable for the costs under Art 10, if, and to the extent that, liability for such costs would be in conflict with the CLC 1992, HNS 1996, the Nuclear Damage Conventions and the Bunkers Convention 2001 (see Chapter 16).

Limitation of liability of the registered owner for such costs is permitted under Art 10(2), which states that nothing in this Convention shall affect the right to limit as provided for under any applicable national or international regime, such as the 1976 Limitation Convention, as amended (see Chapter 14, below).

Liability for the recovery of the costs is extinguished unless an action is brought within 3 years from the date on which the hazard was determined in accordance with the Convention, in no case shall an action be brought after 6 years from the date of the maritime casualty that resulted in the wreck, and, if the casualty consisted of a series of occurrences, the 6-year period shall run from the date of the first occurrence (Art 13).

2.5 COMPULSORY INSURANCE

Compulsory insurance or financial security is extensively dealt with in Art 12, following the same pattern as is found in the other Conventions mentioned above.

The registered owner of a ship of 300 gross tonnage and above and flying the flag of a State Party shall be required to maintain insurance or other financial guarantee of a bank or similar institution, to cover liability under the Convention in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases not exceeding an amount calculated in accordance with Art 6(1)(b) of the LLMC 1976, as amended.

In the same way as with the other Conventions, a certificate attesting that insurance is in force in accordance with the provisions of the Convention shall be issued to each ship of the above description. The P&I clubs usually provide such insurance. Article 12(10) provides for direct action against the insurer, who will be entitled to limit liability, even if the registered owner might not have been able. Although the insurer

116 The exceptions are identical to the exceptions provided for in the other liability and compensation Conventions for pollution damage; see Ch 16, below.

will have the benefit of the defences (other than bankruptcy or winding-up of the registered owner) that the registered owner would have been entitled to invoke, he will not have other defences that he would be entitled to raise in proceedings brought against him by the registered owner (apart from the wilful misconduct defence).

2.6 THE WRC AND SALVORS

It is hoped that the Convention will improve the position of salvors in recovering their expenses, if they are engaged to remove hazardous wrecks in EEZs of State parties, which may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

To prevent conflict between the WRC and the Salvage Convention, or national law, Art 11(2) of the WRC provides that, to the extent that measures under this Convention are considered to be salvage under applicable national law or an International Convention, such law or Convention shall apply to questions of the remuneration or compensation payable to salvors to the exclusion of the rules of the WRC.

In addition, salvage operations engaged already with regard to a ship that is reasonably expected to sink or to strand will take the casualty outside the scope of 'wreck' for the purpose of the WRC (Art 1(4)), but this provision has a limited effect, in that it applies to circumstances when the ship is not yet a wreck. This provision should be read together with Art 9(4), which entitles the registered owner to contact any salvor to remove a wreck determined to be a hazard. However, co-operation with the 'affected' State is required, which will lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and the protection of the environment.[117]

2.7 THE WRC AND PLACES OF REFUGE

There is not yet an international solution, apart from the IMO Resolution A.949(23) 2003, which addresses the issue by a set of guidelines for places of refuge and the EU Directive (see Chapters 2 and 10, above).

However, it is hoped that, when the WRC comes into force, it will make an immense contribution to the protection of the environment from imminent threat of ships in distress which sink. But the mere existence of a certificate of insurance will probably not serve to allay the concerns of harbour authorities and coastal States when there is a request for a place of refuge. Among the resolutions adopted by the Conference was a resolution on compulsory insurance certificates under existing maritime liability Conventions, including this Convention, urging IMO Member States to ensure the entry into force of the other liability and compensation Conventions (seen in Chapter 16) and the Athens Convention 2002 (Chapter 15).

117 See further opinions: Forrest, G, 'At last: a convention on the removal of wrecks' (2008) 4 JIML, p 394; Gauci, G, 'The International Convention on the Removal of Wrecks 2007 – a flawed instrument?' (2009) JBL, p 1.

The Conference invited IMO (and its Legal Committee) to develop a model for a single insurance certificate that may be issued by States Parties in respect of each and every ship under the relevant IMO liability and compensation Conventions.

2.8 COMING INTO FORCE

The Convention opened for signature from 19 November 2007 to 18 November 2008 and thereby was open for ratification or accession or acceptance. By Art 18, it will enter into force 12 months following the date on which 10 States have either signed it without reservation as to ratification, acceptance or approval, or have deposited instruments of ratification, acceptance, approval or accession, with the Secretary General of IMO. As at 31 March 2013, six States (Bulgaria, India, Iran, Nigeria, Palau and the UK) had ratified, or accepted, the Convention.

The UK has passed the WRC Act 2011 to implement the Convention. It enacts it by amending s 255 of the MSA 1995. By s 255C (3)(4)(5), the UK has opted in the provisions of the Convention to apply, subject to the direction of the Secretary of State, to the areas of a lighthouse, or harbour, or conservancy, authority. These areas include any area that is adjacent to the areas specified, above, and is within the UK's Convention area.

As mentioned in Chapter 14, the UK preserves the reservation under para 3 of Pt II of Sched 7 of the MSA 1995 about no application of Art 2(1)(d) of the LLMC regarding limitation of liability for claims by harbour authorities to remove wrecks until, by an order of the Secretary of State, a fund is set up to compensate harbour authorities for any shortfall caused by reason of Art 2(1)(d).

Section 2 of the Act 'Short title and commencement' provides:

1 This Act may be cited as the Wreck Removal Convention Act 2011.
2 This Act comes into force in accordance with provision made by the Secretary of State by order made by statutory instrument.[118]
3 An order may include transitional provision (including savings).

118 This will be, presumably, when the Convention comes into force.

PART IV
COMPENSATION FOR LIABILITIES AND LIMITATION UNDER INTERNATIONAL CONVENTIONS

This page intentionally left blank

CHAPTER 14

LIMITATION OF LIABILITY FOR MARITIME CLAIMS

1 Introduction 739

2 Scope of the LLMC 741

3 Persons entitled to limit 744

4 Claims subject to limitation 750

5 Claims excepted from limitation (Art 3(a)–(e)) 761

6 Exclusion of total liability 763

7 Conduct barring limitation or exclusion of liability 764

8 Establishment of the limitation fund 781

9 The 1996 Protocol and recent developments 787

1 INTRODUCTION

1.1 JUSTIFICATION OF LIMITATION

The concept of limitation of liability is ancient, and its origin goes back to the 1600s. The owner of a ship was absolutely liable for the loss of goods, because he was a common carrier and liable by the custom of the realm, even though the goods were stolen without his fault or privity. As Lord Denning said in ***The Euresthenes***,[1] that was settled in 1674 in the great case of *Morse v Slue*,[2] and because the law operated so harshly on ship-owners, Parliament passed the first of the Merchant Shipping Acts (MSAs) (7 Geo 11 c 65) in 1734, saying that: a ship-owner was not to be held liable for any loss or damage occasioned by the master or mariners 'without the privity and knowledge' of the owner to an amount greater than the value of the ship. This was followed by a succession of MSAs, all of them directed to limiting the responsibilities of the ship-owner for the acts or defaults of his servants. The rest is history.

Why then does the law seem to be benevolent to ship-owners? The concept has developed more on the basis of public policy than on a critical legal analysis of concepts of fault and recompense. It is justified for practical reasons and convenience[3] in order to permit recovery by many claimants in proportion to their loss. The system has also been designed to encourage and protect trade. Some have argued that limitation of

1 [1976] 2 Lloyd's Rep 171, see under para 7.2.3, below.

2 (1674) 1 Vent 190, p 238.

3 *Alexander Towing Co v Millet (The Bramley Moore)* [1964] P 200, per Lord Denning; read, also, the address to the British Maritime Law Association in 1993, Mustill (Lord), 'Ships are different – or are they?' [1993] LMCLQ 490, and the reply by Steel, D, QC, 'Ships are different – the case for limitation of liability' [1995] LMCLQ 77.

liability is anachronistic and overprotective of ship-owners and their insurers.[4] However, if there was unlimited liability, there would be no insurance capacity to insure risks for liability to third parties. Limitation ensures that insurance, which is now compulsorily imposed by almost all the International Conventions (as will be seen in the chapters of this Part), is obtained, and, thus, victims are protected, even if their claims are not fully met.

The rationale for ship-owners' limitation of liability was put in a nutshell by Mr Justice Staughton (as he then was), in ***The Garden City***:[5]

> The reasoning behind the Convention may now be that ship-owners should be encouraged to insure against liability, and limitation makes it easier for them to do so; but that limitation should not be tolerated in the case of outrageous conduct, such as deliberately or recklessly causing loss. However, the historical reason for the introduction of limitation appears to have been to enable British ships to trade on equal terms with those of other nations.

Over 20 years later, the CA, in ***CMA v Classica Shipping***,[6] affirmed that the object and purpose of the Limitation Convention is to encourage the provision of international trade by way of sea carriage. It does so by limiting the liabilities that arise on a distinct occasion.

The sustainability of a viable insurance system facilitates trade, boosts the employment of a large part of the workforce and, consequently, allows other infrastructures of the service industries to operate. Had it not been for limitation, freight and fuel prices would not be competitive, and the movement of goods would be slower or more difficult. The dependent and related services would suffer, which would have a knock-on effect on the prosperity of a country and, generally, on employment. These reasons provide significant justification for nations to reach consensus and sign up to International Conventions in favour of limitation.

1.2 MODERN TRENDS: OVERVIEW

In recent years, there have been substantial increases in the limits provided under the various Conventions (as is examined in this part of the book). This trend, coupled with strict liability and compulsory insurance, including the right of direct action against the insurers, secures claimants by providing for capped higher limits.

As it will be seen later, the limits provided by the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 were raised by the 1996 Protocol, which came into force in 2004. Burdening the LLMC limit, however, with claims for bunker pollution under the Bunkers Convention 2001, which came into force in 2008, has produced some startling consequences.

A couple of incidents arose in 2009: one was the incident of the *Pacific Adventurer*, which was caught by a powerful cyclone in Australia, resulting in hull damage and bunker pollution, the cost of which exceeded the limit of the LLMC Protocol. Practical and political issues arose, as the Australian government suggested the owner waived the limit, so that all the clean-up expenses could be met by him and not by

4 See Guici, G (Dr), 'Limitation of liability in maritime law: an anachronism' (1995) 19(1) *Marine Policy* 65, pp 65–74.

5 [1982] 2 Lloyd's Rep 382.

6 [2004] 1 Lloyd's Rep 249.

the taxpayer.[7] However, the significant consequence of this is the increase of the limits under the LLMC by 51 per cent, which was adopted by the IMO Resolution LEG 5(99) on 19 April 2012 through the tacit acceptance rule. If there is no objection to this amendment of limits by States within 18 months from the above date, the new limits will be expected to come into force 18 months thereafter, that is, by 19 April 2015.

The other incident was the grounding during a storm of the bulk carrier *Full City*, on 31 July 2009, in Norway, spilling her bunker fuel. Norway applied its national law to clean-up costs, which were treated as wreck removal costs, the limit for which, in Norway, is much higher than the LLMC Protocol limit. This brings into question the relationship between the Wreck Removal Convention (WRC) 2007, for which the limit to be applied when it comes into force will be the limit of the LLMC regime, unless a State has made a reservation of no limitation for such costs under national law, as is permitted by the Convention.

In addition, at the EU level, Directive 2009/20/EC was implemented to impose compulsory insurance for maritime claims under the LLMC, as amended by the Protocol, to be in place by ship-owners trading within the EU. The MS (Compulsory Insurance of Ship-owners for Maritime Claims) Regulations 2012 implement this Directive in the UK.

Against this background, this chapter considers: (a) the provisions of the London LLMC Convention 1976, (b) the persons who are entitled to limit, (c) claims that are subject to limitation and that are not, including the difficulties posed by some heads of claims under the UK reservations, (d) the conduct barring the right to limit, (e) the procedure to bring limitation, (f) the limit under the 1996 Protocol and subsequent developments, as referred to above.

2 SCOPE OF THE LLMC

The LLMC regime is known as the 'global limitation' regime, because it is designed to deal with disasters in which the ship-owner faces claims from a variety of claimants; it seeks to create one overall maximum limit in relation to all claimants, subject to certain exceptions. It is also known as the tonnage limitation, because the limit is based on the tonnage of ships. Unlike the Conventions dealt with in Chapters 15 and 16, below, this Convention does not deal with liability but only with limitation.[8]

2.1 BACKGROUND TO LLMC 1976 AND RECENT DEVELOPMENTS

The predecessor to the 1976 Convention was the International Convention Relating to the Limitation of Liability of Owners of Sea-going Ships 1957, which had not

7 See commentary by Ince & Co at www.incelaw.com: 'Pushing the limits: IMO announces increase in the limits of liability for ship-owners'.

8 The Hague Rules 1924, the HVR 1968, the Hamburg Rules 1978 and the Rotterdam Rules 2009 regulate the carrier's obligations and liabilities with respect to the carriage of goods by sea and provide for limitation of the carrier's liability for loss of or damage to cargo 'carried on board'. Reference to these Conventions is made in this chapter for the purpose of comparison with the tonnage limitation Convention.

wholly been adopted by the UK, but some of its provisions were used to amend the previous regime on limitation enshrined in s 503 of the MSA 1894. This was done by the Merchant Shipping (Liability of Ship-owners and Others) Act (MS(LSO)A) 1958.

Limitation under these provisions could not avail the ship-owner, if he could not show that the incident giving rise to the claims took place without his 'actual fault or privity'. It was a difficult burden for the ship-owner to discharge, as will be shown later. This issue, coupled with a demand for a higher limitation figure, led to the International Conference for Limitation of Liability held in London in 1976, under the auspices of IMO, which resulted in the adoption of the 1976 Convention.

The Convention was a compromise in order to strike a balance between claimants and ship-owners. It achieved the increase of the limitation fund to a sufficiently high level, so that the claimants could reasonably be compensated, but not so high as to make the ship-owners' liability uninsurable. As a *quid pro quo* for the increase of the fund, the article providing for the loss of limitation became tighter, so that it is almost impossible for the claimants to break the right to limit (discussed later).

The Convention came into force on 1 December 1986. Countries that have not ratified it have their own national system of limitation, or some still apply the 1957 Convention.

The UK adopted the whole Convention, and it was given effect, domestically, first by s 17 of the MSA 1979. The consolidating MSA 1995 contains the Convention in Sched 7, Pt I; see, also Pt VII ss 185–190 of the same Act. The Convention is part of English law subject to certain reservations contained in Pt II, Sched 7.

Schedule 7 was amended by the MS (Convention on Limitation of Libility for Maritime Claims) (Amendment) Order 1998 (SI 1998/No 1258) to implement the 1996 Protocol.

2.2 APPLICATION OF THE LLMC AND LIMITATIONS

Article 15 of the Convention (Sched 7, Chapter IV of the MSA 1995) provides:

1 This Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State.

2 A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are:
   (a) according to the law of that State, ships intended for navigation on inland waterways;
   (b) ships of less than 300 tons.

A State Party which makes use of the option provided for in this paragraph shall inform the depositary of the limits of liability adopted in its national legislation or of the fact that there are none.

2.2.1 Limitation to seagoing ships

The Convention applies to seagoing ships. However, in the UK, the right to limit has been reserved to apply to any ship,[9] whether seagoing or not (Pt II, para 2 of Sched 7 and s 185 of the MSA 1995).

The provisions of limitation that have the force of law under s 185 shall also apply to Her Majesty's ships, which are defined, by s 192(2), as ships of which the beneficial interest is vested in Her Majesty in right of Her Government in the UK, or are registered as Government ships, or which are for the time being demised, or sub-demised to, or in the exclusive possession of the Crown.

2.2.2 Hovercraft not included in the Convention

Although the LLMC does not apply to hovercraft, English law does apply the Convention to hovercraft by Sched 13, para 42 of the MSA 1995, to the extent that it shall not apply to the baggage of hovercraft passengers to which the Carriage by Air Act 1961 applies.[10]

2.2.3 Floating and drilling platforms excluded

By Art 15(5), the Convention does not apply to air-cushion vehicles, or to floating platforms constructed for the purpose of exploring or exploiting the natural resources of the seabed, or the subsoil thereof.

The UK has not incorporated into the MSA 1995 this limitation of application. Whether or not such platforms are to be regarded as ships for the purpose of limitation will depend on whether the Secretary of State, who has powers by virtue of s 311 of the MSA 1995 to order that a thing designed or adapted for use at sea may be treated as a ship, so orders.[11]

With regard to ships constructed for drilling, the Convention seems to apply (Art 15(4)), and it only excludes them if a State has established a higher limit than that provided for by Art 6 of the Convention, or when that State has become a party to an intentional Convention regulating the system of liability in respect of such ships.

Under English law, a drilling unit satisfies the definition of a ship[12] and it will qualify for limitation under the MSA 1995.

2.2.4 Minimum tonnage

Subject to variations from State to State with respect to minimum tonnage, as is allowed by the Convention, there is a single minimum limit for all ships of no more than 500 tonnes, but the UK has varied this position.[13]

9 'Ship' is defined in the MSA 1995, s 313, as including any description of vessel used in navigation; in Sched 7 Pt II para 12, the meaning of a 'ship' under the Convention includes any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship.

10 Civil Liability Order 1986 (SI 1986/1305).

11 See Ch 1 of Vol 1 of this book about whether a platform can be regarded as a ship.

12 See Ch 1, Vol 1, and Ch 9, Vol 2; *Perks v Clark* [2001] 2 Lloyd's Rep 431 (CA).

13 Ch II, Art 6, of Sched 7 MSA 1995, and MS (Amendment) Order 1998 No 1258, s 4, limits of liability: the first layer of tonnage is up to 2,000 tons.

With respect to passengers' claims, the tonnage is not relevant to the calculation of the limit, but it is the number of passengers that the ship is certified to carry (Art 7, LLMC 1976).

3 PERSONS ENTITLED TO LIMIT

Article 1 provides:

1 Ship-owners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Art 2.
2 The term 'ship-owner' shall mean the owner, charterer, manager or operator of a sea-going ship.
3 Salvor shall mean any person rendering services in direct connection with salvage operations. Salvage operations shall also include operations referred to in Art 2, para 1(d), (e) and (f).
4 If any claims set out in Art 2 are made against any person for whose act, neglect or default the ship-owner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.
5 In this Convention the liability of a ship-owner shall include liability in an action brought against the vessel herself.
6 An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.
7 The act of invoking limitation shall not constitute an admission of liability.

3.1 SHIP OWNERS AND OTHERS

3.1.1 Meaning of 'owner' under the old law

Under the old regime of limitation, the right to limit liability was only given to actual registered or beneficial owners of a ship, by s 503 of the MSA 1894.

Pursuant to the 1957 Limitation Convention, Art 6, the right was extended to persons other than ship-owners, to include, 'charterers, any person interested in or in possession of the ship,[14] a manager or operator of the ship, and the master, crew or other servants of the owner . . . acting in the course of their employment'.

A person merely in possession, but not in operation of the vessel, for example, a mortgagee, or ship-repairer, was allowed to limit his liability by s 3(1) of the 1958 Act.[15]

3.1.2 Owner under the present Convention

Under the 1976 Convention, Art 1(2) states: 'The term "ship-owner" shall mean the owner, charterer, manager or operator of a sea-going ship'.

Owners or operators are easy to identify.

14 'Any person interested in . . . the ship' meant a person having a legal or equitable interest in the ship: *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 (HL).

15 *Mason v Uxbridge Boat Centre* [1980] 2 Lloyd's Rep 592; the judge followed the precedent of the House of Lords' decision in *The Ruapehlu* [1927] AC 523 (HL), which decided in favour of a dockowner acting as a ship-repairer under the previous statute of limitation, the MS(LSO)A 1900, s 2.

3.1.2.1 Person with interest in or in possession not included

By eliminating the words 'any person interested in or in possession of the ship' in Art 1(2) of the 1976 Convention, it is clear that the right is not given to a mortgagee, unless the mortgagee, upon default by the owner, takes over the management and operation of the ship (see Chapter 6, above).

Other persons who merely hold possession of the ship, such as a ship-repairer, are not included within the meaning of Art 1(1). A ship-repairer may be able to rely on s 191 of the MSA 1995 to limit liability, as far as English law is concerned, provided he is a person who can be considered coming within the wording or meaning of this section (see para 3.4, below). A salvor, who may be in possession of the ship, can limit as is mentioned specifically in Art 1(1).

3.1.2.2 Charterer

A charterer can limit liability for claims for which he is liable.

The CA held, in ***CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)***,[16] that the word 'charterer' in Art 1(2) of the 1976 Convention connoted a charterer acting in his capacity as such, not a charterer acting in some other capacity. To say that a charterer had to be acting as owner was to impose a gloss on the wording of Art 1(2) of the Convention and accord it a meaning other than its ordinary meaning. Thus, the charterers were entitled to limit their liability pursuant to the MSA 1995 in respect of their liability to indemnify the ship-owner in respect of cargo claims, but not in respect of damage to the ship chartered by them.

3.1.2.3 All types of charterer?

As to whether or not the word 'charterer' included all types of charterer, and not only the demise charterer, as was the case under the MSA 1894,[17] the CA held, in the same case, above, that it would be too bold to construe the word 'charterer' in a modern International Convention to mean only 'demise charterer'.

As to whether the word included a part charterer, or a slot charterer, who does not hire the ship as a whole, it was argued on behalf of the owners that the framework of the Convention could not have intended that a slot charterer could limit his liability to the owner, particularly as it would be absurd that his limit would have to be calculated by reference to the whole tonnage of the vessel, when he never contracted to have that tonnage available.[18]

However, as this issue was not necessary to be decided in this case, the court was content to leave the answer to this question for a future case, while it observed that the court had already previously held, in the context of arrest of a ship, that a charterer under the 1952 Arrest Convention was interpreted to include a slot charterer.[19]

16 [2004] EWCA Civ 114; [2004] 1 Lloyd's Rep 460.

17 *The Hopper No 66* [1908] AC 126.

18 Griggs, P, Williams, R, & Farr, J, *Limitation of Liability for Maritime Claims*, 4th edn, 2005, LLP, p 11: the authors suggest that, as the slot charterer uses only part of the ship, and there is no provision that allows a slot charterer to limit liability proportionately, the choice would seem to be between allowing him to limit according to the full tonnage of the ship, or not at all. However, the authors prefer the former view, which would be in line with the aim of the Convention.

19 *The Tychy* [1999] 2 Lloyd's Rep 11 (CA); see Ch 4, Vol 1, of this book; see, further, *The Tasman Pioneer* [2003] 2 Lloyd's Rep 713: a sub-time charterer was able to limit under the equivalent legislation on limitation in New Zealand.

The issue of whether a slot charterer could limit liability came before the court in ***The MSC Napoli***,[20] where Teare J held that, in accordance with the ordinary meaning of the word 'charterer' and in the light of the evident object and purpose of the Convention, a slot charterer was within the definition of ship-owner and entitled to limit liability. A slot was defined in the charter agreement as a space on any vessel for the stowage of containers. The slot charterer pays slot charter hire in respect of all slots hired; the agreement is for a fixed period of time. They, therefore, have some features in common with time charterers, but for the fact that a slot charterer does not direct the vessel where to go. BIMCO has described slot charters as a hybrid type of charterparty. The judge referred in his reasoning to the *obiter dicta* of the CA in *CMA v Classica*, that there was no reason not to include the slot charterer within the word 'charterer' used in the Convention. Were slot charterers not to be included, slot chartering, which is an efficient way of organising the carriage of goods, might fall into disuse, because slot charterers would not be able to rely on limitation provisions, and this would not encourage international trade, which was the object and purpose of the Convention. The judge continued that there was nothing absurd in a slot charterer being able to limit by reference to a limit calculated by reference to the whole tonnage of the ship. The judge, rightly, concluded that a literal meaning must give way to a purposive construction. A study of the *travaux préparatoires* of the Convention did not support the suggestion made by some authors that the drafters of the Convention intended to restrict the right to limit to those who controlled the whole of the ship for a tonnage limitation to apply.

3.1.2.4 Manager

The word 'manager' does not include the crewing agent but a manager who is involved in the technical management of the ship, or in the ship's operation.[21]

3.1.3 Other persons entitled to limit

The wording of Art 1(4) provides: '. . . any person for whose act, neglect or default the ship-owner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention'.

3.1.3.1 Servants or agents

The provision is mainly concerned with granting an independent right of limitation to those people for whose act, neglect or default the ship-owner, or manager, or operator, or salvor will be vicariously liable. These people[22] were, before the 1957

20 [2009] 1 Lloyd's Rep 246.

21 For types of management of ships, see Ch 5, Part II, above.

22 Under contracts of carriage in which the Hague Rules apply, there is no equivalent independent right given to the carrier's servants to limit liability, unlike under the HVR; so Art 1(4) of the 1976 Convention will be useful to them for the purpose of limitation, although it is common in such contracts to include a Himalaya clause. When English law applies to such contracts, the Contracts (Rights of Third Parties) Act 1999, which applies to contracts made after 11 May 2000, enhances the protection of third parties to the contract intended by the terms of the contract to be protected in the same way as the parties to the contract.

Convention, potentially exposed to be sued separately from the ship-owner, if the claimants wished to bypass the owner's right to limit.

However, this Convention, unlike the 1957 Convention, refers to 'persons' and not just to 'servants or agents acting in the course of their employment'. In addition, the meaning of the word 'responsible' in Art 1(4) will be ascertained by reference to broad and generally accepted principles of construction, without any English law preconceptions, and some of such principles are enshrined in Arts 31 and 32 of the Vienna Convention 1969 on the Law of Treaties (which came into force in 1980). The duty of the court, pursuant to the guidelines of these articles, is to ascertain the ordinary meaning of the words used, not just in their context but also in the light of the evident object and purpose of the Convention. The court may have recourse to the *travaux préparatoires* and the circumstances in which the Convention was concluded.[23]

3.1.3.2 Independent contractors

Some issues are considered here with regard to the negligence of independent contractors and whether they are included in Art 1(4). For example, when ship-repairers are appointed by the owner to repair his ship, and their negligence causes the ship to be unseaworthy, which causes loss to third parties, the ship-owner will be constructively liable to the third parties for such loss, not because he is vicariously liable for the negligence of the independent contractor,[24] but because of his direct liability to the claimant, his non-delegable duty under Art III, r 1 of the HVR (*The Muncaster Castle*).[25] The owner can limit his liability.

The ship-repairer may be sued separately and, as he is not included in the category of people under Art 1(4), claimants would be able to bypass the limitation provisions of the Convention. Under English law, a ship-repairer will be able to limit under s 191 of the MSA 1995 in respect of damage caused to ships, goods or merchandise on board the ship.[26]

What about other independent contractors, such as stevedores? The answer would depend on how a court will interpret the meaning of the word 'responsible' in Art 1(4). The owner is not, normally, vicariously liable for the stevedores' negligence under the common law systems. For the purpose of this Convention, the wording of Art 1(4), stevedores may be included within the category of persons who can limit their liability, if the ship-owner or charterer were responsible for their acts or omissions.

If English law applies, stevedores would be protected under the Contracts (Rights of Third Parties) Act 1999, if the main contract between the ship-owner and the third

23 *CMA v Classica Shipping Co Ltd* [2004] 1 Lloyd's Rep 460, pp 463, 464, per Longmore LJ, referring to previous authorities.

24 See *Salsbury v Woodland* [1970] 1 QB 324, pp 336–337, per Widgery LJ:

It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think that it is entirely accepted that those cases – and there are some – in which an employer has been held liable for injury done by the negligence of an independent contractor are, in truth, cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf.

25 [1961] 1 Lloyd's Rep 57 (HL).

26 See under para 3.4, below.

party intended to protect stevedores in the same way as the parties to the contract, or through a Himalaya clause.[27]

3.2 SALVORS

The 1976 Convention introduced the right of limitation for salvors, as well as any person rendering services in direct connection with salvage operations (Art 1(3)). Article 1(1) of the Convention provides that salvors '. . . may limit their liability in accordance with the rules of the Convention for the claims set out in Art 2 of the Convention'. This new development was a direct consequence of *The Tojo Maru*. It should be noted briefly what happened in this case with regard to limitation.

The Tojo Maru[28]

A salvage agreement was signed on the Lloyd's open form on the 'no cure, no pay' basis. After the ship had been brought to a place of safety, the salvors' diver, who was trying to repair a crack at the bottom of the ship being salved, negligently fired a bolt through the shell plating of the ship, which went through a gas-filled cargo tank. This resulted in an explosion, causing substantial damage to the vessel. When the salvors claimed salvage remuneration, the ship-owners counterclaimed damages for the damage to be set off against any remuneration the salvors might have been entitled to. The salvors sought to limit their liability under s 503 of the MSA 1894, if they were held liable to pay damages. This section restricted limitation to acts, or omissions (which caused the damage or loss), in the navigation or management of the ship, or through the act, or omission, of any person on board the liable ship, the owners of which were seeking to limit liability. The central issue with regard to limitation was whether the negligent act of their diver, which caused the explosion, took place in the management of their tug or, alternatively, whether it took place on board the tug. Although the owners' counterclaim for damages was upheld, it was held that the salvors were not entitled to limit their liability under s 503(1) of the MSA 1894. The salvors' contention that the negligent act of their diver was done either in the management of, or on board, the tug was rejected. Lord Reid stated, quite sympathetically:[29]

> But a court must go by the provisions which have been agreed and enacted. If the special position of salvors was unforeseen, then we must await alteration of those provisions if those concerned see fit to make some alteration.

As a result of this case, the law changed. Now, the wording of Art 2(1) of the Convention specifically covers the circumstances of this case, namely that limitation applies to claims in respect of loss of life, or personal injury, or loss or damage to property occurring on board, or in direct connection with the operation of the ship, or with salvage operations, and consequential loss resulting therefrom.[30]

27 See, further, Ch 11, above.
28 [1972] AC 242 (HL) (see Ch 10, above).
29 Ibid, p 270.
30 In Ch 10, above, issues of offsetting damages for salvor's negligence against the salvage award, and when a salvor can limit, are discussed.

In addition, Art 1(4) includes the servants of the salvor in the list of people with the right to limit, if any claims under Art 2 are made against any person for whose acts, neglect or default the salvor is responsible.

3.3 THE LIABILITY INSURER

The Convention has innovated by including, in Art 1(6), for the liability insurer to be entitled to the benefits of this Convention to the same extent as the assured himself. This will apply in the event the insurers are sued directly by those who sustained damage to, or suffered loss of, property; or those who suffered personal injury, or the dependants of those whose life was lost on board, or in connection with the operation of the ship, or with salvage operations.

3.3.1 When is there a right of action against the insurer?

The right of action against insurers was first introduced by the Third Parties (Rights Against Insurers) Act 1930, which, in essence, provided for a statutory subrogation entitling the victim of the wrongdoer (the assured, insofar as the liability insurer is concerned) to bypass the privity of contract barrier and take the benefits of the contract of insurance between the liability insurer and the assured. The rights of the assured against the insurer under the insurance contract were transferred to, and vested in, the third party to whom the liability was so incurred (s 1(1) of the 1930 Act).

In view of several problems that arose in the application of this Act, the Third Parties (Rights against Insurers) Act 2010 received Royal Assent on 25 March 2010,[31] with the intention to repeal and replace the 1930 Act once it comes into force. This instrument makes a number of changes to the Third Parties (Rights Against Insurers) Act 1930 and aims to make recovery by third parties against subrogated insurers easier, quicker and less expensive. It enables the third party to pursue its claim in a single set of proceedings and makes it easier to find out about the policy through disclosure procedures. The changes brought in by the new Act are of relevance both to liability insurers and to insurers pursuing subrogated recovery actions.

The Act was likely to commence in 2013, once some administrative procedures were complete, such as some changes to court rules.

3.3.2 The trigger of liability under the Act

The statutory subrogation and the rights of the third parties arise in the event of insolvency or bankruptcy of the assured, in other words when he is unable to satisfy the claim. The third party can pursue its claim directly against the insurer, and the policy proceeds are preserved from the assets that may be available for other creditors of the insured.

In relation to claims by passengers of ships, this Act, together with the Athens Convention and the 2002 Protocol, are examined in Chapter 15, below.

31 On 31 July 2001, the Law Commission and the Scottish Law Commission published a report recommending reform to the Third Parties (Rights against Insurers) Act 1930. The Commissions also published a draft Bill giving effect to the recommendations. This followed a consultation paper in 1998.

3.3.3 Direct action against insurers

As all Liability Conventions relating to pollution damage provide for compulsory insurance and direct action against the insurer, the lacuna under the LLMC, which does not have such a provision, was filled by the Directive 2009/20/EC and its implementation into UK law by the 2012 Regulations, as mentioned under 1.2, above.

3.4 HARBOUR AUTHORITIES

Although the Convention does not include harbour authorities, or conservancy authorities, or the owners of docks or canals, in the class of persons who are entitled to limit their liability, s 191 of the MSA 1995 grants them the right of limitation in the UK in respect of claims for damage caused to ships,[32] goods, merchandise or other things whatsoever on board the ship.

The basis of limitation is by reference to the tonnage of the largest UK ship that has been within the area over which the authority discharges any functions at the time of the loss, or within the last 5 years before the relevant incident.

According to s 191(5), the limit of liability shall be ascertained by applying the method of calculation specified in para 1(b) of Art 6, Pt II, Sched 7, read together with para 5(1)(2), Pt II. Dock includes wet docks and basins, tidal dock and basins, locks, cuts, wharves, piers, stages, landing places and jetties (s 191(9)).

4 CLAIMS SUBJECT TO LIMITATION

Article 2 provides:

(1) Subject to Arts 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:
   (a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basin and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;
   (b) claims in respect of loss from delay in the carriage by sea of cargo, passengers or their luggage;
   (c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;
   (d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;
   (e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
   (f) claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

32 Limitation will, presumably, still apply even if the dock incurs liability by discharging its function of repairing a ship within its area. The majority of the House of Lords held that the right was not confined to acts done in their capacity as dockowners but extended to acts done in their capacity as ship-repairers: *The Ruapehlu* [1927] AC 523 (HL).

(2) Claims set out in para 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under para 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

4.1 THE UK TREATMENT OF CLAIMS BY PASSENGERS (FOR LOSS OF LIFE AND PERSONAL INJURY)

The 1996 Protocol has amended the Convention and was brought into force in the UK on 13 May 2004.[33]

States are permitted by Art 15(3bis)[34] of the Convention to regulate – by specific provisions of national law – the system of liability to be applied to claims for loss of life or personal injury to passengers of ships, provided that the limit is not lower than as prescribed in para 1 of Art 7 of the Convention.

Following this permission, the UK has excluded claims for loss of life or personal injury suffered by passengers of seagoing ships from Art 2(1)(a) of the LLMC, and such claims are, therefore, channelled to the Athens Convention.

As the old limits of the Athens Convention have been substantially increased by the 2002 Protocol, being now in force within the EU and, probably, soon internationally (see Chapter 15, below), passengers on any seagoing ship who suffer loss will be better off than under the LLMC, because, under the LLMC, there will be many other claimants among whom the fund will be shared. Claims involving passengers of non-seagoing ships are subject to the LLMC regime under English law, as seen in Chapter 15, para 3.

4.2 ARE LITIGATION COSTS CLAIMS INCLUDED?

In ***Thompson v Masterton***[35] (Royal Court of Guernsey), and ***The Robert Whitmore***[36] (New South Wales Supreme Court), the issue was whether the limitation fund established for claims under Art 2 of the Convention includes the sums of cost orders that may be made in proceedings establishing the claims. In both cases, it was held that a limitation fund under Art 11 of the 1976 Convention was exclusive of any legal costs that might be incurred in establishing a claim against the fund. Costs in establishing the claim are separate and distinct from the claim itself. The relief given to the ship-owner by the limitation statutes historically has been in relation to damages and nothing else.[37] For example, if the damages to be awarded exceed the limitation fund, the practice in the UK has been that the damages will be limited to

33 The Protocol was ratified by the UK on 11.06.1999.

34 As amended by Art 6 of the Protocol.

35 [2004] 1 Lloyd's Rep 304.

36 [2004] 2 Lloyd's Rep 47.

37 Per Viscount Simonds in *The Stonedale (No 1)* [1955] 2 Lloyd's Rep 9, p 13; furthermore, under the Warsaw–Hague Convention, the court held, in *Swiss Bank Corp v Brink-MAT Ltd* [1986] 2 All ER 188, that the limits of liability of a carrier encompass every expense except costs to which an air carrier might be put as a result of a successful claim that equalled or exceeded the limits on liability imposed by Art 22(2) of the Convention.

the full amount of the fund established, and there will be a separate order for costs.[38] Claims under Art 2 carry their literal meaning, which goes no further than their express words. A claim for reimbursement of the legal expenses incurred in prosecuting a disputed claim under Art 2(1)(a) is outside the scope of both this article and Art 6(1)(b) referring to 'any other claims'.[39] The Convention does not say anything about the way in which legal costs of disputed claims are to be dealt with.

4.3 ALL CLAIMS, WHETHER FOR DAMAGES OR FOR A DEBT OR INDEMNITY (ART 2(1)(2))

Article 2(1) provides that, subject to excluded claims, specified in Art 3, and to instances where the right to limit can be lost, as stated in Art 4, limitation shall apply to all claims outlined in sub-paras (a)–(f), whatever the basis of liability may be, such as for breach of contract (debt or damages) or in tort.

Furthermore, it is emphasised in Art 2(2)[40] that claims set out in para (1) shall be subject to limitation of liability, even if brought by way of recourse, or for indemnity under a contract, or otherwise.

This results in considerable extension of claims being subject to limitation, which is reinforced by express provisions for clarification purposes, as seen below.

In addition, under Art 2(1)(a) and 6(1), there can be distinct occasions in which the party seeking limitation can establish a limitation fund under Art 11 for each occasion to satisfy claims arising from each distinct occasion (see ***The APL Sydney***).[41]

4.4 CLAIMS OCCURRING ON BOARD OR IN DIRECT CONNECTION WITH THE OPERATION OF THE SHIP OR WITH SALVAGE OPERATIONS (ART 2(1)(a))

4.4.1 The ambit of this provision

Claims under Art 2 may arise either in contract, or in tort, or through any other cause. Article 2(1)(a) covers claims for loss of life or personal injury when, for example, the crew or passengers of a ship claim damages caused owing to negligence of another ship involved in a collision.

Under English law, however (as seen under 4.1), claims of passengers of seagoing ships are channelled to the Athens Convention regime (Sched 7 Pt II of the MSA

38 *Wheeler v London & Rochester Trading Co Ltd* [1957] 1 Lloyd's Rep 69; *Beauchamp v Turrell* [1952] 1 Lloyd's Rep 266.

39 *The Robert Whitmore* [2004] 2 Lloyd's Rep 47, pp 53, 54.

40 This article has altered the position under the old UK regime of limitation, when, by s 503 of the 1894 Act, as amended by the 1958 Act, limitation was applicable only to claims for which the ship-owner was liable in damages and not claims for a debt or for an indemnity under contract: *The Kirkness* [1956] 2 Lloyd's Rep 651, in which the owners of the tug, which suffered damages while it was towing under a contract of towage containing the usual covenant of indemnity, claimed against the owners of the tow to be indemnified. The latter could not limit their liability.

41 *Strong Wise Ltd v Esso Australia Resources Pty Ltd (The APL Sydney)* [2010] FCA 240 reported [2010] 2 Lloyd's Rep 555.

1995, para 2A states: 'Para 1(a) of Article 2 shall have effect as if the reference to "loss of life or personal injury" did not include a reference to loss of life or personal injury to passengers of seagoing ships').

Previously, only those claims that arose owing to negligent acts or omissions done by persons on board, or in the navigation or management of the ship, or in the loading, carriage or discharge of its cargo, or the embarkation, carriage or disembarkation of its passengers, were subject to limitation. Article 2(1)(a) of the present Convention has widened the scope of limitation quite considerably.

The added wording 'in direct connection with the operation of the ship' is considered wide enough and covers damage to harbours, although this phrase was added to Art 2(1)(a) to overcome the difficulties the salvors had with regard to their inability to limit liability in *The Tojo Maru* (as explained earlier (under 3.2).

It is suggested in the text of Griggs, Williams and Farr[42] that this wording is capable of encompassing claims in respect of loss of life or personal injury or loss of or damage to property etc., as enumerated in Art 2(1)(a), arising from neglect or default of a person ashore (for whose acts or omissions the ship-owner is responsible, as discussed earlier, 3.1.3). That person may be the superintendent who may be negligent while he is performing duties in connection with the operation of the ship. The authors go further and suggest that such claims may also arise when the vessel is in dry dock, and the damage is caused by such a person in performance of an act ashore, being directly connected with the operation of the ship.

Although the suggestion above is plausible, and claims arising in such situations might be included in the group of claims covered by the Convention, the question for the court will be how far the meaning of 'in direct connection with the operation of the ship' can be extended for the purpose of the Convention by looking at the *travaux préparatoires*. An *obiter dicta* indication that the extension can be broad, following a broad policy of construction that should be applied, can be found in the judgment of Thomas J in *The Aegean Sea* (see below). He expressed the view[43] that, 'operation of the ship' encompasses all that goes with operation and whatever is used for its safety. To confine its meaning to a narrow scope would significantly limit the protection that should be available in respect of claims that can reasonably be brought within the scope of the Convention.

4.4.2 Claims as between the owners and charterers of the ship

Thomas J (as he then was) analysed each heading in ***The Aegean Sea***[44] and broadly grouped the property claims, which were relevant in this case, into two categories:

(a) claims for loss of the vessel, freight and bunkers; and
(b) claims for recourse or indemnity.

42 Op. cit., Griggs, William and Farr, fn 18, p 20.
43 [1998] 2 Lloyd's Rep 39, at p 51.
44 [1998] 2 Lloyd's Rep 39.

The Aegean Sea was chartered under the Asbatankvoy form to ROIL for the carriage of crude oil to one or two safe port(s) in the European Mediterranean. ROIL was a trading company and was wholly owned by Repsol, a company owned by the State of Spain and which operated refineries in Spain. While *The Aegean Sea* was proceeding to berth at La Coruña, Spain, to discharge her cargo, she grounded on rocks, broke in two and exploded. The vessel and most of her cargo were lost, and there was large-scale pollution of the environment and damage to private property. The owners, being sued by third parties, paid the claims and sought to recover the same from the charterers, together with the value of the vessel, the bunkers on board and the freight from ROIL and Repsol, on the ground of unsafe port and/or for complying with the charterers' orders.

The charterers denied the port was unsafe and further contended that, in the event they were found liable, they were entitled, as charterers of *The Aegean Sea*, to limit their liability under the provisions of the Convention on LLMC 1976 (the 1976 Convention).

In considering claims under Art 2(1), which states 'whatever the basis of the claim might be', Thomas J (as he then was) stated that one should look at the nature and not the basis of the claim, and he referred to *Caspian Basis*,[45] in which Rix J (as he then was) expressed the principle in those terms. He decided that the 1976 Convention did not provide (and was not intended to provide) an entitlement to charterers to limit for any of the claims brought against them by the owners.

He approached the issue from an analysis of Arts 11, 9 and 1(2) of the Convention and said that, under the Convention Art 11, there is only one fund established on behalf of the owner, charterer and operator, and a separate fund on behalf of the salvor. A fund constituted by one of the persons mentioned in Art 9 (1)(a), (b) or (c) shall be deemed constituted by all persons mentioned. The Convention provides, by Art 9, for the aggregation of claims arising from one distinct occasion. Although a distinction can be drawn between ship-owners and salvors, no such distinction is drawn between ship-owners and charterers under Art 1(2). For example, when a vessel is lost carrying cargo under the owner's or charterers' bills of lading, there is one limit of liability and one fund, which is for the benefit of all claimants and protects equally the owner, charterer, manager and operator in respect of those claims. There is no provision for a separate limit or separately constituted fund through which the charterer can limit his liability to the owner.

He, thus, held that it could not have been intended by the Convention that the limitation fund be reduced when the owners bring direct claims against the charterers for the loss of the ship, or the freight or the bunkers; the fund was intended for claims by cargo interests and other third parties external to the operation of the ship against those responsible for the operation of the ship; to permit limitation for claims of the type advanced by the owners against the charterers to come within the scope of the limitation fund would diminish what was available to others. Even if, on the assumption that the limitation fund formed under the 1976 Convention was intended to include claims brought by the ship-owner against the charterer, the loss of the ship was not the loss of '*property occurring in direct connection with the operation of the ship*'

45 [1997] 2 Lloyd's Rep 507, p 522; later approved by the CA [1998] 2 Lloyd's Rep 461, p 473.

in Art 2(1)(a), because it was the operation of the very ship that must have caused the loss of property and the ship could not be the object of the wrong.[46]

In the subsequent decision of ***CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)***,[47] Steel J , at first instance, held in the same way as Thomas J, that the charterer could not limit, because the all-embracing category of 'ship-owners' suggested that individual members of that class, such as charterers, operators, managers, may be exposed to claims by reason of activities usually associated with ownership. Shipment of a dangerous cargo that was the cause of the ship's loss was not an activity associated with ownership, but it was done in the capacity as charterer. The property damaged could not be the very same thing as the ship, the operation of which caused the damage; that ship could not be at the same time the other property.

4.4.2.1 What is included?

The CA, in ***The CMA Djakarta***,[48] overruled the decision partly.

On the facts of this case, the owners' container ship was damaged by an explosion, which (as the arbitrators found) was caused by bleaching powder shipped in containers, in breach of the charterers' obligations under the time charterparty on the New York Produce Exchange form, which excluded carriage of dangerous or flammable goods. The main part of the owners' claim was the cost of repairs of the ship and salvage services rendered. There were other claims made by them against the charterers, to be indemnified in respect of their liability to contribute to GA and their liability to cargo-owners for loss or damage to cargo. The charterers claimed to be entitled to limit their liability under Art 1(2) of the 1976 Convention, which included 'charterer' in the definition of ship-owner, and had established a limitation fund in France for all claimants.

Claims for cargo damage by way of indemnity

The CA held, with regard to each particular category of claim, that only the indemnity for the cargo claims was included. Therefore, overruling the judge on this point, it held that the charterer in *CMA v Classica* could limit liability for claims brought by the owner to be indemnified for claims brought in tort against him by cargo interests, as the charterer was the contractual carrier under the bill of lading. It would be an anomaly if the charterer could not limit as against the owner, who passed the claim on to him, as he could limit as against the cargo interests, if they brought the claim directly against him. Such a claim is a result of 'loss of or damage to property . . . occurring . . . on board the ship' and, thus, falls within Art 2(1)(a); in any event, it falls within Art 2(2).[49]

Recourse claims

The recourse claims for pollution damage paid to third parties, namely for direct damage to property by pollution, clean-up claims and consequential loss of profit

46 He further expressed the view, although he did not have to decide the points, that the loss of bunkers being on the ship would be within the wording of Art 2(1)(a), as such loss happens in direct connection with the operation of the ship. As regards freight, if the freight was earned, it would be due and owing in full, without limitation of liability.

47 [2003] EWHC 641 (Comm); [2003] 2 Lloyd's Rep 50.

48 [2004] 1 Lloyd's Rep 460 (CA).

49 Ibid, p 469.

claims resulting from loss of cargo, were claims that occurred in direct connection with the operation of the ship and were within Art 2(1)(a) as damage to property. Although the judge's view in *The Aegean Sea* was *obiter*, because he took the view that the charterers could not limit with regard to any claims brought by the owner against him, it would seem, considering the view taken by the CA in the *CMA v Classica*, that had such claims been in issue in the latter case, the CA would have approved this view. Equally, claims for loss of profit by fishermen and perhaps others will fall within this head. The philosophy of the Convention is to extend, and not to restrict, limitable claims.

4.4.2.2 What is not included?

Claims for loss of or damage to the ship

The CA in the above case further held that the correct interpretation of Arts 2 and 9 of the Convention led to the conclusion that the claims in respect of which an owner or charterer could limit did not include claims for loss of, or damage to, the ship. The judge had been right to hold that the ordinary meaning of Art 2(1)(a) did not extend the right to limit for a claim in respect of damage to the vessel by reference to the tonnage of which limitation was to be calculated. *The Aegean Sea* was approved on this point.

The salvage and GA claims

In addition, the court held, the charterers could not limit in respect of the owners' claims to be indemnified in respect of liability to salvors or liability to contribute to GA, because these claims were not within Art 2(1).

Longmore LJ, in *CMA v Classica*,[50] interpreted Art 2(1)(a) to include three types of claim being subject to limitation:

First, loss of life or personal injury; second, loss of or damage to property occurring on board; and, third, loss of or damage to property 'occurring . . . in direct connection with the operation of the ship'; he suggested that the most obvious reason for including this third category of claim was to cater for cases of collision with another ship. Loss of or damage to that other ship (or its cargo) would be loss of or damage to property 'occurring in direct connection with the operation of the ship'.[51]

Consequential loss to the loss of the ship being liable

Article 2(1)(a) would not include (within the claims for which liability can be limited) consequential losses to the owner arising from the loss of the ship being liable for the damage caused (*The Aegean Sea* was approved on this point by the CA in *CMA v Classica Shipping Co Ltd*). The language of Art 2(1)(a), 'loss of property occurring in direct connection with the operation of the ship', does not intend to include the loss of the very thing in connection with the operation of which the damage was caused.

50 Ibid.
51 Ibid, p 467.

Following the same logic, a claim for freight that had not been earned, but was due, the judge in *The Aegean Sea* thought (*obiter*) it would not be within the meaning of Art 2(1)(a), because the loss of freight would be consequential to the loss of the ship (the subject of the damage).

Where a bareboat charterer claimed against the owners of the chartered ship, which suffered damage itself, needing repairs, and incurred liabilities to third parties owing to a collision with another vessel, the owner in ***The Darfur***[52] was not able to limit liability as against the bareboat charterer for any claims that were consequential to the damage of the chartered ship. Steel J, having considered *The Classica* case, held that:

Insofar as the heads of claim were consequential upon damage to *The Darfur*, the owners were not entitled to limit their liability in respect of them. For this purpose, it mattered not, as suggested by the owners, that it was the owners that were seeking to limit against claims brought by the bareboat charterer rather than, as in *Classica* S, the other way round. The issued turned on the scope of the claims that were subject to limitation and not the class of persons entitled to limit.

Similarly, the charterer in ***CMA v Classica*** was not able to limit with respect to the claim made by the ship-owner to recover the cost incurred with regard to salvage operations, because such a claim did not come within Art 2(1)(a). Even if such a claim to recover the salvage cost were to be regarded as consequential loss, it was still a claim in respect of the damage to the ship, and it could not be brought within Art 2(1)(a) or (f) (see below). The same principle applied to the claim by the owner against the charterer to be indemnified against his liability to contribute to GA.[53] The charterer could not limit his liability.

4.4.3 The recourse and indemnity claims

As seen earlier, the recourse claims for pollution damage paid to third parties, namely for direct damage to property by pollution, clean-up claims and consequential loss of profit, as well as claims for indemnity for damage to or loss of cargo, were claims that occurred in direct connection with the operation of the ship and were within Art 2(1)(a) as damage to property. Equally, claims for loss of profit by fishermen and perhaps others will fall within this head.

Recourse claims in the nature of damages for breach of the contract of carriage are included. For example, when the cargo-owners claimed compensation against the ship owner with respect to the amount their insurers had to pay to the salvors for saving the ship and cargo, in ***The Breydon Merchant***,[54] the ship-owners were entitled to limit liability. This was so because the claim was a claim for breach of the contract of carriage, and not for salvage under Art 3; there was a claim for damage to property within Art 2(a), and there was a claim in respect of measures taken in order to minimise loss within Art 2(f).

Consequential loss with regard to wreck removal expenses resulting after a collision incident would be 'consequential loss' under Art 2(1)(a), save for the exception that the owner of the wreck will not be able to limit his liability to his own contractor

52 [2004] 2 Lloyd's Rep 469.

53 Ibid.

54 *The Breydon Merchant* [1992] 1 Lloyd's Rep 373.

engaged to remove the wreck, according to Art 2(2), or to the harbour authority raising the wreck (as of which see under 4.7, below).

4.5 CLAIMS FOR LOSS RESULTING FROM DELAY (ART 2(1)(b))

This new provision, under Art 2(1)(b), may be of particular help to the ship-owner seeking to limit liability for loss suffered by the cargo-owner owing to delay in delivery of the goods under the contract of carriage, as it is not certain whether Art IV, r 5(a), of the HVR includes such claims.[55] It is equally useful with regard to loss caused to passengers by delay that is not covered by the Athens Convention regime.

4.6 CLAIMS FOR RIGHTS THAT HAVE BEEN INFRINGED (ART 2(1)(c))

Claims in respect of loss resulting from infringement of rights that occurs in direct connection with the operation of the ship, or salvage operations, are subject to limitation, provided they do not arise from infringement of contractual rights. This may include rights of access into a port by other ships, or the rights of the port itself, if the port is obstructed by a stranded ship that prevents a right of passage or use of the port facilities. It will also include claims for loss of profit made by fishing-boat owners and others, which can properly be described as resulting from the infringement of rights other than contractual rights.

4.7 COST INCURRED FOR WRECK REMOVAL (ART 2(1)(d),(e))

This includes costs for wreck removal imposed by law (not being incurred contractually).

4.7.1 The reservation under the old Convention

The predecessor to the 1976 Convention, the 1957 Limitation Convention, in Art 1(1)(c), had extended the right of limitation of liability imposed by law for expenses relating to removal of wreck.

Despite the incorporation of this provision into UK law by the 1958 Act, a reservation was made by the same Act, as was permitted by the 1957 Convention, restricting the provision of limitation for wreck removal expenses incurred by harbour authorities (pursuant to their statutory powers) from coming into force until such a date as the Secretary of State appointed by statutory instrument.

The reservation was not removed by the Secretary of State; therefore, the limitation statute remained consistent with the common law position that a ship-owner could

55 The Hamburg Rules specifically refer to limitation for loss by delay.

not limit his liability for the expenses of wreck removal incurred by the port authority in raising the wreck in the UK.[56]

4.7.2 Wreck removal expenses under the 1976 Convention

The 1976 Convention preserves the owners' right to limit with respect to claims for expenses incurred for the raising, removal, destruction or rendering harmless of a ship that has sunk or is wrecked, stranded or abandoned, including anything that is or has been on board such a ship (Art 2(1)(d)), provided the liability does not relate to remuneration under a contract (Art 2(2)).

4.7.2.1 The UK reservation for wreck removal expenses

The Convention, by Art 18, allows States to make reservations. The UK has continued to reserve the position against limitation of liability for claims of harbour authorities pursuant to their statutory powers (as provided by s 201 of the MSA 1995 and s 56 of the HDPCA 1847).

Schedule 7 to the MSA 1995, Pt II, para (3) states that Art 2(1)(d) shall not apply unless provision has been made by an order of the Secretary of State for the setting up of a fund to be used for making payments to the harbour or conservancy authority needed to compensate them for the reduction of their expenses in consequence of Art 2(1)(d). The reason for this reservation is to protect the public authority's right to recover its expenses in relation to the raising of wrecks in full, including 'anything that is or has been on board such ship', which should include the cargo on board and bunkers.

Paradoxically, the reservation does not include sub-para 1(e), which refers to claims in respect of the removal, destruction or the rendering harmless of the cargo on board the ship. However, this seems to relate only to the salvage of the cargo and not the raising of the wreck by the harbour authority, and it may be the reason for not applying the exclusion from limitation to claims relating merely to the removal of the cargo from the ship under sub-para 1(e), whereas removal or raising of the cargo together with the wreck is included in 1(d).

4.7.2.2 The effect of the WRC

It should be noted that the WRC, which was adopted at the Diplomatic Conference in Nairobi on 18 May 2007, and is not yet in force,[57] provides for limitation of liability (Art 10(2)) of owners of wrecks by reference to the LLMC 1976, or national law; in addition, by Art 12, there is an obligation upon the owner of the wreck to have in place compulsory insurance up to the amount of the limit.

The WRC Act 2011, which incorporates the Convention into UK law, provides in s 255G (5) (when a ship becomes a wreck in the UK Convention area): 'this section does not prevent the exercise of the right (if any) to limit liability by virtue of section 185' (of the MSA 1995). However, there is an inadvertent contradiction between

56 See *The Stonedale (No 1)* [1956] AC 1.

57 The WRC needs signatures by eight States; as at 31 March 2013, it had been signed by six States. The UK WRC Act 2011 will come into force soon by a statutory instrument.

s 255G (5) and s 185 of MSA 1995, because s 185 refers to Pt II of Sched 7 of the Act, which maintains the reservation in para 3 of no limitation of liability for claims put forward under Art 2(1)(d) of the LLMC, unless provision has been made by an order of the Secretary of State for a fund to be used to cover the shortfall that may occur by the reduction of the amount of compensation to the harbour authority by virtue of 1(d). The same applies, by s 255P (5), in cases in which the insurer, if sued directly, seeks to limit his liability.

States parties are permitted by the WRC to legislate with regard to wrecks in their territorial sea, as Art 3(2), second sentence, provides:

> When a State Party has made a notification to apply the Convention to wrecks located within its territory, including the territorial sea, this is without prejudice to the rights and obligations of that State to take measures in relation to wrecks located in its territory, including the territorial sea, other than locating, marking and removing them in accordance with this Convention. The provisions of Articles 10, 11, and 12 of this Convention shall not apply to any measures so taken other than those referred to in Articles 7, 8 and 9 of this Convention.

Articles 10–12 refer to liability, insurance and limitation, which will not apply to measures taken by States Parties in their territorial sea, other than measures for locating, marking and removing wrecks.

Therefore, it should follow that the limitation of liability for wreck removal claims when the wreck was located in the Convention area should apply; the reference to s 185 should be amended accordingly.

4.7.3 Clean-up expenses

Issues of interpretation arise in relation to clean-up costs incurred for bunker spills and whether such expenses come under Art 2(1)(a) or 1(d) of the LLMC. If they fell under 1(a), they would be claims within limitation, but, if they fell under 1(d), they would not be limitable pursuant to the UK reservation. This is a political issue, because the Government should argue, as the Australian Government did in the *Pacific Adventurer* (see para 1.2, above), that such claims should not be the burden of the taxpayer. The ship-owner, on the other hand, may argue that he has a right to limit under the Convention.

The Bunkers Convention 2001, which came into force in 2008, provides for compulsory insurance, with provisions for direct action against the insurers (see Chapter 16, below). Unfortunately, as far as limitation of liability is concerned, the Bunkers Convention refers to limitation provisions under national law or the LLMC. Such complications could have been avoided by establishing an autonomous limitation regime under both the Bunkers Convention and the WRC.

However, as seen earlier, such claims, insofar as they relate to clean-up for pollution caused by bunkers, are regarded to be within property damage[58] under Art 2(1)(a) and, therefore, would be subject to the limit. However, they could equally come under 1(d), if the clean-up is done by the harbour authority, and, thus, not be subject to

58 See also s 168 of MSA 1995.

the limit in the UK. In the *Full City*, the Norwegian Government applied a higher limit than the LLMC limit for such a claim under national law.[59]

4.8 CLAIMS IN RESPECT OF MEASURES TAKEN IN ORDER TO AVERT OR MINIMISE LOSS (ART 2(1)(f))

Sub-paragraph 1(f) should (as much as sub-para 1(d) and (e)) be read together with the second sentence of Art 2(2), which makes it clear that limitation will not apply to claims relating to remuneration under contract with the person liable, for example a claim for remuneration by a salvage contractor. It is also made clear, by the insertion of the words 'claims of the person other than the person liable' for the claim, that claims under para (f), which incur by reason of the steps taken to prevent or minimise loss, are claims made only against the ship-owner (the person liable).

An example of loss 'for which the person liable may limit liability' is a claim made by a cargo-owner whose cargo was in peril of loss, and measures were taken by a third party to minimise such loss of the cargo on board for which the ship-owner would be liable. The costs of those measures, when paid in full by the cargo-owner to the salvor, can be claimed against the ship-owner, who can limit his liability under this sub-paragraph.[60] If further damage was caused to the cargo in the course of taking such measures to avert or minimise loss, a claim for such further loss will be subject to limitation under this head.

5 CLAIMS EXCEPTED FROM LIMITATION (ART 3(a)–(e))

Article 3 provides:

The rules of this Convention shall not apply to:

(a) claims for salvage including, if applicable, any claim for special compensation under Art 14 of the International Convention on Salvage 1989, as amended, or contribution in general average;
(b) claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution damage . . .;
(c) claims subject to any international Convention or national legislation covering or prohibiting limitation of liability for nuclear damage;
(d) claims against the ship-owner of a nuclear ship for nuclear damage;
(e) claims by servants of the ship-owner or salvors whose duties are connected with the ship or salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the ship-owner or salvor and such servants the ship-owner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Art 6.

59 See Ince & Co newsletter on these issues at www.incelaw.com
60 *The Breydon Merchant* [1992] 1 Lloyd's Rep 373.

5.1 SALVAGE AND CONTRIBUTION IN GA CLAIMS

Claims excluded from limitation under Art 3(a) are direct claims against the ship-owner (as defined in Art 1(2)) by salvors, or by a party who has incurred a GA loss or sacrifice. However, as has been discussed earlier, if a cargo-owner has paid his proportion of salvage, or of GA, to the party entitled to it, he can claim that amount by way of damages or indemnity against the ship-owner, in which case limitation of liability will apply to that claim under Art 2(2). Claims for special compensation under Art 14 of the Salvage Convention 1989 are also excluded, since the 1996 Protocol came into force on 13 May 2004, by which Art 3(a) was revised.[61]

5.2 CLAIMS FOR OIL POLLUTION (DEALT WITH BY SPECIAL LEGISLATION)

Claims for oil pollution damage, within the meaning of the Civil Liability Convention (CLC), as amended by the 1992 Protocol are excluded from limitation under this Convention (Art 3(b)), because they are dealt with separately by the specialised Convention and, insofar as the UK is concerned, by s 153 of the MSA 1995. See, further, Chapter 16, below.

5.3 NUCLEAR DAMAGE CLAIMS

Claims subject to any International Convention for nuclear damage (under Art 3(c)) are excluded from limitation, to the extent that there is an International Convention dealing with these claims. However, under UK law, para 4, Pt II of Sched 7 stipulates that such claims are claims made by virtue of ss 7–11 of the Nuclear Installations Act 1965. The 1965 Act allows limitation in certain circumstances. With regard to Art 3(d), nuclear damage done by a nuclear ship is outside the scope of the 1976 Convention but in the UK such damage is dealt with by a separate statute, the Liability of Operators of Nuclear Ships Act 1962 (see further, about the particular Vienna and Paris Conventions and the Brussels Supplementary Conventions on nuclear damage in Chapter 16, below).

5.4 CLAIMS BY THE MASTER AND CREW AGAINST EMPLOYERS

The Convention limitation does not apply to claims by servants of the ship-owner or salvor, as provided by Art 3(e). Article 3(e) refers to the law governing the contract of employment of the master and crew. If that law does not allow limitation, or if the limitation amount is greater than that of Art 6 of the Convention, then the Convention rules do not apply. If the law of the contract is the law of the UK, s 185(4) of the MSA 1995 has re-enacted s 35 of the MSA 1979 and exercises the option of unlimited liability for claims by the master and crew against their employer. Section 185(4)

61 Statutory effect had been given earlier to that amendment in the UK by amending para 4(1) of Part II, Sched 7 to the MSA 1995.

provides that the provisions of the Convention shall not apply to any liability for loss of life, or personal injury caused to, or loss of or damage to any property of, a person who is on board the ship in question, or employed in connection with that ship, or with the salvage operations in question, if (a) he is on board or employed under a contract of service governed by the law of any part of the UK, and (b) the liability arose from an occurrence that took place after the commencement of this Act (that is, 1 January 1996).

If the law of the contract is foreign, one has to find out whether the law governing the contract provides for unlimited liability, or for limitation that is lower than that provided by Art 6 of the 1996 Convention. If the former is provided, then the limitation of the Convention shall not apply; if the latter is provided, then the limitation of the Convention shall apply. If the limitation is greater than that of Art 6, then the greater limitation shall apply to crew claims.

6 EXCLUSION OF TOTAL LIABILITY

6.1 LOSS CAUSED BY FIRE ON BOARD: OLD LAW

With regard to British ships, the old statute, s 502 of the MSA 1894, provided for exclusion of ship-owners' liability for any loss or damage to property (such as cargo) caused by *fire on board, or to valuables by reason of theft, provided the nature and value of valuables had not been declared to the owner at the time of shipment.*

An overriding qualification to exclusion from liability was that the loss or damage did not result from the owner's actual fault or privity. Damage by fire includes damage caused by smoke or water to put the fire out.[62] Although the section required a causal connection between the loss or damage and the fire on board, it was not necessary to show actual contact, if the fire was operative in fact to the loss.[63]

This section was repealed and replaced by s 18(1)(a) of the MSA 1979, which maintained the exclusion for the same claims, but adopted the test for breaking the right of exclusion from Art 4 of the 1976 Convention.

6.2 LOSS BY FIRE ON BOARD, OR LOSS OF VALUABLES BY THEFT: PRESENT LAW

The same provision is now found in s 186(1) of the MSA 1995. This section of exclusion of liability applies to: property damaged by fire on board, or loss of valuables

62 *The Diamond* [1906] P 28: the crew on board the vessel caused an outbreak of fire by negligently overheating a stove. The plaintiffs' bags of flour and bran on board the vessel were damaged by the fire, smoke and the water used to extinguish the fire. The plaintiffs alleged that the vessel was unseaworthy, because the stove was placed too near a bulkhead, without any means of insulation, and the defendant was privy to the position of the stove. Therefore, they alleged, the defendant was not entitled to exclude his liability on the basis of the MSA 1894, s 502(2). Also, that damage by smoke and water used to extinguish the fire was not within the scope of the Statute. It was held that: the stove was not placed in an improper position, rendering the vessel unseaworthy; and there was no actual fault or privity on the part of the owners; that the water and smoke were matters that occurred by reason of the fire; thus, they were covered under provisions of the statute.

63 *Louis Dreyfus v Tempus Shipping* [1930] 1 KB 699.

caused by theft on British ships. It excludes the exclusion of liability for the same losses occurring on board passenger vessels[64] and for loss of, or damage to, property of persons employed on board, or in connection with the ship, or with salvage operations.[65] Paragraph 3, s 186, adopts the same test for breaking the right to exclude liability as provided in Art 4 of the Convention (examined below).

As far as theft of valuables on board is concerned, the exclusion of liability under s 186 of the MSA 1995 will be operative, if neither the nature nor the value of valuables carried on board was declared at the time of the shipment.[66] The only case where the description would be sufficient without an express statement of the value would be where the shipment consists of coins, in which case it may be enough to state the number and description of the coins.[67]

The justification for this exclusion is that it would be unfair to make the ship-owner liable for highly expensive items for which he did not have an opportunity, if its value was not declared, to charge higher freight. Again, the exclusion shall not apply, if the conduct required under Art 4 of the Convention is proved (s 186(3)).

As far as liability and limitation with regard to passengers' claims are concerned, see Chapter 15, below.

7 CONDUCT BARRING LIMITATION OR EXCLUSION OF LIABILITY

7.1 COMPARISON BETWEEN CONVENTION PROVISIONS

Limitation provisions have rules defining when the right to limit is lost.

Under the Conventions below, it is difficult, if not impossible, to break the right to limit. The State Parties to the 1976 Convention agreed this stringent test in exchange for higher limits. Article 4 provides:

> A person liable shall not be entitled to limit his liability if it is proved that the *loss* resulted from his personal act or omission, committed with the intent to cause *such loss*, or recklessly and with knowledge that *such loss* would probably result.

The Athens Convention 1974 and the 2002 Protocol Art 13 provides:

> The carrier shall not be entitled to the benefit of the limits of liability prescribed in Arts 7 and 8 and para 1 of Art 10, if it is proved that the *damage* resulted from an act or omission of the carrier done with intent to cause *such damage*, or recklessly and with knowledge that *such damage* would probably result.

64 The MSA 1995, para 13, Pt II, Sched 6, which incorporates the Athens Convention 1974, expressly states that s 186 shall not relieve a person of any liability imposed on him by the Athens Convention.

65 For such claims, limitation is not allowed by s 185(4) (and previously by s 35 of the MSA 1979).

66 Art IV, r 5, of the HVR provides that:

> Neither the carrier nor the ship shall in any event become liable for any loss or damage to or in connection with the goods in an amount exceeding . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

67 *Williams v The African Steam Ship Co* [1856] H&N 300, p 305.

Article IV of the HVR 1968 provides:

5(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any *loss or damage* to or in connection with the goods in any amount exceeding . . .

5(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the *damage* resulted from an act or omission of the carrier done with intent to cause *damage*, or recklessly and with knowledge that *damage* would probably result.

The Warsaw Convention 1929, as amended by The Hague Protocol 1955 and the Montreal Protocol 1975, provides, by Art 25:

In the carriage of passengers and their luggage, the limits of the liability specified in Art 22 shall not apply if it is proved that the *damage* resulted from an act or omission of the carrier, his servants or agents, done with intent to cause *damage*, or recklessly and with knowledge that *damage* would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Article 8 of the Hamburg Rules 1978 provides:

The carrier is not entitled to the benefit of the limitation of liability provided for in Art 6 if it is proved that the loss, damage, or delay in delivery resulted from an act or omission of the carrier done with intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Articles 60 and 61 of the Rotterdam Rules 2009 provide:

Neither the carrier nor any of the persons mentioned in Art 18 is entitled to the benefit of the limitation of liability as provided in Art 59 . . . if the claimant proves that the loss resulting from the breach of the carrier's obligations under the Convention was attributable to a personal act of omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

CLC 1969, Art V.2 provides that the owner shall not be entitled to avail himself of the right of limitation if the incident occurred as a result of his actual fault or privity (the old test).

CLC 1992, however, follows the modern test in Art V.2:

The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The differences between the Conventions are briefly mentioned below, and their possible consequence are referred to later in the relevant context. The components of the mental status of the person seeking to limit regarding the test barring limitation are examined under 7.2, below. The limitation provisions under the pollution legislation are examined in Chapter 16.

7.1.1 What type of loss?

Although the mental element required under these Conventions to bar limitation is the same, the Conventions differ slightly in the words used with respect to the types of loss that would be subject to limitation. Under the 1976 Convention, only 'loss' is mentioned (see, further, under para 7.3.4, below). In the Athens Convention, the CLC 1992 and the Warsaw Conventions, reference is made to 'damage', whereas r 5(a) of Art IV of the HVR refers to both, 'loss or damage', and r 5(e) refers to 'damage' only; in the Hamburg Rules, reference is made to 'loss or damage or delay', and, hence, any uncertainty as to what types of claim would be included within the limitation provision is removed. In Art 61 of the Rotterdam Rules, reference is made to 'loss', but it is deemed to include damage; this can be derived from the special provision of Art 60 on limitation for loss or damage caused by delay.

The test for breaking limitation under all Conventions is strict under the above provisions.

7.1.2 Whose act or omission?

It is the carrier's act or omission under the Athens Convention, the HVR and the Hamburg Rules, whereas, under the 1976 Convention and the CLC 1992, it is emphasised that it is the *personal* act or omission of the person liable as referred to therein (see, further, below). Under the Warsaw Convention, it is the act or omission of the carrier, his servants or agents. Under the Rotterdam Rules, a personal act or omission includes some forms of management failure by the corporate body.

7.1.3 Whose conduct?

Article 1 of the 1976 Convention defines the persons who are entitled to limit and who have a separate right from each other, that is, the 'person liable'. It is the conduct of that person that is taken into account (as regards a corporate body, see Chapter 4, above).

The other Conventions define who is the carrier – whose conduct is important. Under the HVR, Art 1, the 'carrier' includes the owner or the charterer who enters into a contract of carriage covered by a bill of lading, or similar document of title.

Under the Athens Convention and the 2002 Protocol Art 1, 'carrier' means the person in whose name the contract is concluded. He remains responsible, by Art 4, even if the performing carrier performs the contract. The performing carrier means a person other than the carrier, who may be the owner, or the charterer, or the operator of the passengers' ship, who actually performs the whole or a part of the carriage (Art 1(b)).

Under the Hamburg Rules, the 'carrier' is the person named in the contract of carriage, and 'actual carrier' is the person entrusted by the carrier to perform the contract. The carrier remains responsible for the acts or omission of the actual carrier and of his servants and agents.

Under the Rotterdam Rules, similarly, it is the conduct of the carrier or the performing party that is taken into account.

7.1.4 Is it specific loss or damage?

The conduct mentioned in the 1976 Convention and the Rotterdam Rules is related to 'such loss' and, in the Athens Convention, is related to 'such damage' that occurred. The Hamburg Rules, more explicitly, refer to 'such loss, damage or delay'. The HVR and the Warsaw Convention refer to 'damage' (for the interpretation of these words, see later).

7.1.5 Causation

Apart from the Rotterdam Rules, under which a case of causation will be made out if it is shown that the loss was attributable to the act or omission of the person seeking to limit (which is easier to prove), under the remaining Conventions, the test of causation is stricter, namely it requires proof that the act or omission was the cause from which the loss or damage resulted.

7.2 THE TEST BARRING LIMITATION: COMPARISON BETWEEN CONVENTIONS

7.2.1 Burden of proof

Under ss 503 and 502 of the MSA 1894, as amended by the MSA 1958, following the 1957 Limitation Convention, the claimant was entitled to full compensation unless the ship-owner, who claimed that he was entitled to limit, or be excluded from liability, discharged the burden of proof that the loss was caused without his 'actual fault or privity'. Many cases were litigated, and it was usually difficult for the ship-owner to discharge this burden.

Under the 1976 Convention, the right to limit shall apply automatically, as Art 2(1) provides, 'the following claims . . . *shall* be subject to limitation of liability', unless it is proved by the claimant that the party seeking to limit is guilty of the misconduct barring limitation under Art 4.

The court is not obliged to investigate whether or not the person liable is guilty of conduct barring limitation when that person commences a limitation action.[68] The effect of Art 4 is that, once the person liable has established that the claim falls within the claims mentioned in Art 2, he is entitled to a decree of limitation, unless the claimant proves the facts required by Art 4[69] (for example, not only did the loss result from the personal act or omission of the ship-owner, or other person liable, but it was also committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result).

It is obvious that not only is the burden of proof difficult to discharge, but it is now upon the claimant and not upon the ship-owner, as it used to be under the old law.[70] The same applies under the other Conventions mentioned earlier, but with the following differences.

68 *The Bowbelle* [1990] 3 All ER 476, per Sheen J.
69 *The Capitan San Luis* [1994] 1 All ER 1016, per Clarke J.
70 *The Norman* [1960] 1 Lloyd's Rep 1 (HL).

7.2.2 Personal act or omission versus acts or omissions of others

7.2.2.1 Old law

Section 503 of the 1894 Act, as amended, provided that:

> (1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity . . . be liable beyond the following amounts.

It is important to set out para (c) of this section in order to compare it with the present Convention in relation to 'act or omission':

> (c) Where any loss of life or personal injury is caused to any person not carried in the ship through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship.

Similar wording had been adopted in relation to loss of or damage to property under para (d). It is to be noted that, under the old law, it was the 'act or omission of any person', and not just the 'personal act or omission' of the person claiming limitation, that was taken into account for limitation purposes.

On the construction given to this wording by the courts, the owners were not able to limit their liability incurred by the fault of a person to whom a task had been delegated by them, such as the managers of the ship (see *The Marion*, below), unless they could show that the particular occurrence took place without their actual fault or privity.

7.2.2.2 Present law

By contrast, Art 4 of the 1976 Convention has restricted the 'act or omission' to the 'personal act or omission' of the person liable (see *The Leerort*, as contrasted with *The Saint Jacques*, below). For example, even if the act or omission that causes the loss is that of the master of the ship, or any of the crew members acting in the course of their employment, the owner, or salvor, or the charterer or the manager or operator of the ship, whoever was vicariously responsible for the acts or omissions of those servants, would still be able to limit his liability, even if the employee was guilty of the misconduct described in Art 4.

If the act or omission is that of the owner's agent, for example, the manager of the ship, the owner will be able to limit, whereas under the old law he was not able to limit for the fault of his agents or servants, if he could not prove that the damage occurred without his actual fault or privity.[71]

The manager or operator, or the master and crew will be able to limit independently, provided their act or omission that caused the loss was not committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

71 *The Marion* [1984] 2 Lloyd's Rep 1.

If, however, the manager or operator is not a third-party ship-management company, but is integrated within the owner's corporate structure, questions may arise with regard to who was the 'directing mind'[72] of the owning and managing companies as, invariably, the mind and control of both companies may be the same.

A material difference exists in the wording of Art 25 of the Warsaw Convention, which states that it is also the misconduct of the carriers' servants or agents that will disqualify the carrier from limitation.

The other Conventions (except the Rotterdam Rules) do not require 'a personal' act or omission of the carrier, but just 'act or omission of the carrier'. It may be no material difference between the Conventions and Art 4 of the 1976 Convention, other than using the word 'personal' for emphasis in the 1976 Convention. This can be derived from the *travaux préparatoires* to these Conventions that it is only the misconduct of the carrier himself that will defeat the right to limit. Such interpretation has been accepted by the English courts in relation to the HVR and the Athens Convention.[73]

7.2.3 The test 'actual fault or privity' under the 1957 Convention

It is important to look at the following decisions on this issue, as this Convention is still applicable by some maritime nations. The facts of these cases are very interesting to bear in mind from a risk management perspective generally.

In ***Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd***,[74] the ship, loaded with cargo of benzene, stranded and then caught fire. The ship-owners were a limited company, and the managing owners, JM Lennard & Sons Ltd, were another limited company. The managing director of the latter, John Lennard, was the registered managing owner and took an active part in the management of the ship on behalf of the owners. Upon a claim by the cargo interests for loss of their cargo, on the ground of unseaworthiness of the ship by reason of the defective condition of her boilers, the owners admitted liability and sought to exclude liability on the basis of s 502 of the MSA 1894. The judge found that the ship was unseaworthy, that the fire and the loss of the cargo were due to that unseaworthiness, and that the loss did not happen without the owners' actual fault or privity. The case reached the House of Lords, and the question for decision was whether the fault of the managing owner was the fault of the company itself for the purpose of s 502.

Lennard was director of both companies entrusted with the management of the vessel. He appeared to be the spirit in the joint stock company. So, Lennard knew, or had the means of knowing, of the defective condition of the boilers, but he gave no special instructions to the captain or the chief engineer regarding their supervision, and took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition.

Viscount Haldane said:[75]

> For, if Mr Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company

72 The concept of the alter ego is discussed in Ch 4, above.

73 Diamond, A (QC), 'The Hague–Visby Rules' [1978] LMCLQ 225; *The European Enterprise* [1989] 2 Lloyd's Rep 195; *The Lion* [1990] 2 Lloyd's Rep 144.

74 [1915] AC 705.

75 Ibid, p 714.

itself, within the meaning of s 502 . . . It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim *respondeat superior* the burden lies upon him to do so.

Lennard could not discharge the burden, and the owner was liable.

In ***The Lady Gwendolen***,[76] the ship collided with a vessel at anchor during fog.

It was held by the CA, confirming the judgment below, that the causes of the collision were, briefly: inadequate use of radar and excessive speed in fog, and that the master, who took command of *The Lady Gwendolen*, had had no experience in radar and was given no instructions as to its use or misuse.

The assistant managing director (Williams) ('W') was responsible for the vessels and was the alter ego of the owning company. The radar problem merited his personal attention. Although the owners' main business was that of brewers, in their capacity as ship-owners, they were to be judged by the standard of conduct of the ordinary reasonable ship-owner in the management and control of vessels in all matters of safety at sea. The installation of radar required particular vigilance of ship-owners through the person (in this case, W) who was responsible, in the capacity of the owners, for the running of the ships. The owners had failed in that vigilance and had failed to consider or appreciate the problems that had arisen through the use of radar and to impress their master with the gravity of risks he was taking. Therefore, they failed to prove that the accident happened without their actual fault or privity.

The marine superintendent in *The Lady Gwendolen*, Mr Robbie, had perused the logs in the performance of his duty, but failed to detect the master's habit of navigation in such dangerous circumstances, or, if he did, or suspected it, he failed to warn the master, or deter him from this practice, or take any step to see that the regulations were complied with. He also failed to inform his employers, who, throughout, seemed to have been unaware of the risks the master of this ship was taking. The superintendent did not supervise properly, though the judge was satisfied that he knew enough to enable him to do so.

On these facts, Willmer LJ explained:[77]

I think the true view is that where shipowners delegate the performance of a duty of the kind conveniently described as 'non-delegable' they are held constructively guilty of fault of its non-performance. This means that, so far as liability is concerned, they cannot escape. But such fault falls short, in my view, of what is meant by 'actual fault' within the meaning of s 503 of the Act. Constructive fault goes only to liability, and leaves untouched the question whether there is such actual fault on the part of the shipowners themselves as will defeat their right to limitation. This seems to me to accord with the view expressed by Lord Justice Buckley in *Asiatic Petroleum Company Ltd v Lennard's Carrying Company Ltd*, p 432, as follows:

'The words "actual fault or privity" in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents . . .'

I think it is necessary to examine in detail the facts of each particular case in order to see what, in fact, the shipowners did, or omitted to do, which could fairly be said to constitute actual fault on their part . . .

76 [1965] 1 Lloyd's Rep 335.
77 Ibid, pp 344, 345.

The word 'privity' was interpreted by Lord Denning MR in ***The Eurysthenes***,[78] in the context of s 39(5) of the MIA 1906 and, in doing so, he examined the origin and history of the development of the concept of 'fault or privity' in old cases and statutes. His interpretation was adopted in cases in which the courts had to consider the meaning of 'actual fault or privity' under the old system of limitation of liability. Useful extracts of Lord Denning's judgment below sufficiently explain the evolution and meaning of the concept:

According to the old common law, the master of a servant was only responsible for the acts of his servant if they were done 'by his command or with his privity'. But, if the acts were done by the servant in the course of the master's service, and for his master's benefit, they were presumed to be done by the authority of the master 'although no express command or privity of his master was proved'[79] . . . On the other hand, the owner of a ship was absolutely liable for the loss of goods, because he was a common carrier and liable by the custom of the realm, even though they were stolen without his fault or privity. That was settled in 1674 in the great case of *Morse v Slue*.[80] (It) operated so harshly on ship-owners that in 1734 Parliament passed the first of the MSAs (7 Geo 11 c 65) saying that a ship-owner was not to be held liable for any loss or damage occasioned by the master or mariners 'without the privity and knowledge' of the owner to an amount greater than the value of the ship. This was followed by a succession of MSAs, all of them directed to limiting the responsibilities of the ship-owner for the acts or defaults of his servants. He was not to be liable for acts done 'without his fault or privity' beyond the value of the vessel. The object of these Acts was to limit his liability for his servants on the basis of *respondeat superior*, but to leave him fully liable for faults done by himself personally or with his privity[81] . . . This distinction underlies the provision of the MSA 1894, which limits the liability of a shipowner for damage or loss of goods which takes place 'without his actual fault or privity' but leaves him fully liable for acts done by his actual fault or with his privity.

Lord Denning continued:

This historical survey shows to my mind that, when the old common lawyers spoke of a man being 'privy' to something being done, or of an act being done 'with his privity', they meant that he knew of it beforehand and concurred in it being done. If it was a wrongful act done by his servant, then he was liable for it if it was done 'by his command or privity', that is, with his express authority or with his knowledge and concurrence. 'Privity' did not mean that there was any wilful misconduct by him, but only that he knew of the act beforehand and concurred in it being done. Moreover, 'privity' did not mean that he himself personally did the act, but only that someone else did it and that he knowingly concurred in it. Hence, in the later MSAs, the owner was entitled to limit his liability if the act was done without his 'actual fault or privity'. Without his 'actual fault' meant without any actual fault by the owner personally. Without his 'privity' meant without his knowledge or concurrence.

Such is, I think, the meaning we should attach to the word 'privity' in s 39(5). If the ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness, that is, to unseaworthiness of which he knew and in which he concurred.

To disentitle the ship-owner, he must, I think, have knowledge, not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea. And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge

78 [1976] 2 Lloyd's Rep 171 (CA).

79 See *Turberville v Stamp* (1697) Raym 264; *Huzzey v Field* (1835) 2 CM&R 440.

80 (1674) 1 Vent 190, p 238.

81 See *Wilson v Dickson* (1818) 2 B&A 2; *The Spirit of the Ocean* (1865) B&L 336, p 339, per Dr Lushington; *Asiatic Petroleum Co v Lennard's Carrying Co* [1914] 1 KB 419, p 432, per Buckley LJ.

expressed in the phrase 'turning a blind eye'. If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry – so that he should not know it for certain – then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.[82]

Thus, under the old limitation system, without his 'actual fault' meant without any actual fault by the owner, personally; the fault of an inefficient manager appointed by the owner would be imputed to the owner, as a matter of law, in a sense of being his actual fault or a fault committed with his privity (*The Marion*, see below). Without his 'privity' meant without his knowledge of, and concurrence in, the faults of others, but not necessarily amounting to wilful misconduct.

7.2.4 Faults of ship managers under both Conventions (compared)

The extent of managerial duties of owners and managers, especially in relation to the supply of navigational information and publications to their vessels, was in issue in some cases from 1960. The House of Lords, in ***The Norman***,[83] shed new light on the duty of managers and, since then, it has no longer been permissible for managers to wash their hands of all questions of navigation or to leave everything to the unassisted discretion of the masters. Any company that embarks on the business of ship-owning must accept the obligation to ensure efficient management of its ships, if it is to enjoy the very considerable benefits conferred by the statutory right to limitation.[84]

In 1984, there was the famous limitation of liability case, *The Marion*.[85] The vessel was owned by a Liberian company and was managed by professional managers, an English company, who were insured for third-party liabilities with the same P&I club as co-assured of the owners of the ship.

It is important to note in what way the managers were at fault, which prevented limitation by the owners under the old system. What was said in this judgment (as well as in *The Lady Gwendolen*, above) sounds like the prelude to the kind of supervision needed today under the ISM Code (see Chapter 4, above). Such conduct will be relevant when the ship-owners' and managers' SMSs, which they are obliged to maintain under the provisions of the ISM Code, are scrutinised. Defects of the system, however, may or may not amount to the conduct required under Art 4 of the 1976 Convention for the purpose of limitation.[86]

The Marion

The vessel's anchor fouled an oil pipeline on the seabed, causing damage to it owing to the negligence of the master, who was relying on out-of-date charts. The owners had delegated the management of the ship to third-party managers, an English company. It was the managers' duty to oversee that there were up-to-date charts on board and that the master used them. There was evidence that the master was in the

82 [1976] 2 Lloyd's Rep 171, pp 178–179.
83 [1960] 1 Lloyd's Rep 1.
84 *The Lady Gwendolen* [1965] 1 Lloyd's Rep 335, pp 345, 346, per Sir Gordon Willmer; and *The England* [1973] 1 Lloyd's Rep 373, p 383.
85 [1984] 2 Lloyd's Rep 1.
86 See Ch 4, above.

habit of being superficial in this respect; had he used the new charts, he would have seen the position of the pipeline, so the accident would not have happened. Upon a claim made by the pipeline owners for $25 million, the ship-owners admitted liability but sought to limit their liability under s 503 of the MSA 1894, as amended. The issue for the court was whether the damage occurred without the owners' actual fault or privity.

The questions to be decided by the court were: (1) What action should have been taken by the managers as reasonably prudent ship managers to ensure that *The Marion* was supplied with up-to-date charts? (2) If the answer to this question showed that there was fault on the part of the managers, was that fault a fault for which the owners were liable upon the footing of *respondeat superior*, or was it the fault of somebody for whom the owners were liable because his action was the very action of the company itself? The judge held that, on the evidence, there was no fault on the part of the managers, and so he allowed limitation. He was overruled by the CA, which held that the owners had not established that the casualty was caused without their actual fault or privity. The ship-owners appealed to the House of Lords. The thrust of the issue was whether the managers had, in their management and operation of *The Marion*, a system by which the managing director ensured that an adequate degree of supervision of the master to keep and observe the up-to-date charts was exercised, either by himself or by his subordinates. Although, in the absence of the director from the office, his subordinate had written to the master to follow the new charts, as had been pointed out by the report on the ship by the flag State, Liberia, he omitted to follow this up and ensure that the master, in fact, did so. The director was in communication with the office, but he was not informed about this report. The inference by the House of Lords was that his instructions in this respect to his subordinates were insufficiently clear, and so his system of supervision was defective.

Confirming the decision of the CA, Lord Brandon said:

> My Lords, in the result, I conclude that there were two actual faults of the appellants: first, in Mr Downard's (director of the managers) failure to have a proper system of supervision in relation to charts; and, secondly, in failing, when he departed to Greece, to give to Mr Lowry and Mr Graham (his subordinates) instructions with regard to the matters about which he required to be kept informed which were sufficiently clear, precise and comprehensive.[87]

Lord Brandon approved the approach of the CA in *The England*,[88] in which it had been settled that it was not sufficient to appoint a competent master and delegate all matters to him for the owners or managers to discharge their responsibilities. On the facts of this case, the manager ought to have realised that the master had a propensity to navigate with obsolete charts and requested him to abandon such habit, and, if he was incapable of reform, he should have been relieved of his command as captain. Lord Brandon referred to his previous decision in *The Lady Gwendolen* and repeated what he had said in that case, that ship-owners must accept the obligation to ensure efficient management of their ships if they are to enjoy the very considerable benefits conferred on them by the statutory right to limitation.

Thus, the owners were not able to limit liability, because the fault of the manager constituted, as a matter of law, actual fault of the owners, and such fault caused or contributed to the damaging of the pipeline.

87 [1984] 2 Lloyd's Rep 1, p 8.
88 [1973] 1 Lloyd's Rep 373.

If the case were to be decided under the present system of limitation, it would be the managers, separately from the owners, who would seek limitation. Regardless of the fault of Mr Downard, the owners would be able to limit, because his fault, which should qualify as a personal omission under Art 4 of the Convention, would not be the personal omission of the owners.[89] However, whether or not the managers would be able to limit under the 1976 Convention would depend on proof by the claimants that such personal omission amounted to a reckless conduct, and, also, that the person liable was aware that such loss would probably result from his omission (for the interpretation of the words used in Art 4, see below).

While the information in the system of management, which will now be transparent because of the ISM Code, will assist the claimants in the burden of proof under Art 4, it will be a matter of degree as to whether the conduct of the person liable in a particular case amounts to recklessness coupled with the required knowledge. On the facts of *The Marion*, it might be considered reckless under the present system not to have dismissed a master of a ship who was known to be in the habit of navigating with outdated charts and to disregard instructions, but such conduct might not in itself amount to knowledge that the loss suffered would probably result (see Chapter 4, above).

7.3 THE MENTAL ELEMENT OF TEST UNDER THE 1976 CONVENTION

Article 4 provides:

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause *such loss*, or recklessly and with knowledge that such loss would probably result.

The acts or omissions of the person seeking to limit were examined in the previous paragraphs. For the purpose of considering how the mental element of the test and its four essential parts have been interpreted by the courts, each of them is examined in the following paragraphs:

7.3.1 'Intent to cause such loss'

Under criminal law, 'intent' means the subjective intent (*mens rea*) of the person liable.

This phrase is equivalent to *wilful misconduct*, which has been defined in the context of other statutes. In ***Horabin v British Overseas Airways Corp***,[90] it was stated that:

> Wilful misconduct is misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness might be. The will must be a party to the misconduct, and not merely a party to the conduct of which complaint is made . . . To establish wilful misconduct on the part of . . . [the] pilot, it must be shown, not only that he knowingly (and in that sense wilfully) did the wrongful act, but also that, when he did it, he was aware that it was a wrongful act, i.e. that he was aware that he was committing misconduct . . .

89 See the identification theory in Ch 4, above.

90 [1952] 2 Lloyd's Rep 450, p 459.

In the context of safety practices as envisaged by the regulations in air carriage, it was held, in ***Rolls Royce plc v Heavylift-Volga Dnepr Ltd***:[91]

For the finding of wilful misconduct the court must find on a balance of probabilities that the acts (or omissions) alleged to constitute the misconduct must not only fall below the standards to be expected of persons acting reasonably, but be sufficiently below such standards as to be capable of being regarded as 'misconduct', and not just as careless, or very, or grossly careless. Second, the person must know that he is misconducting himself when he does (or fails to do) the acts complained of and does them intentionally or recklessly as to the consequences.

7.3.2 'Recklessness'

First, it is important to look at how 'recklessness' is treated in criminal law, as there has been a fairly recent re-examination of this term. It was defined 24 years ago by Lord Diplock, in ***R v Caldwell***,[92] in the context of s 1 of the Criminal Damage Act 1971 (CDA):

A person charged with an offence under section 1(1) . . . is reckless . . . if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has none the less gone on to do it . . .

. . . to decide whether someone has been 'reckless' as to whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as 'reckless' in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual upon due consideration of the risk would not be deterred from treating it as negligible, could the accused be described as 'reckless' in its ordinary sense if, having considered the risk, he decided to ignore it.[93]

Thus, the test, as set by Lord Diplock, was that there must be an obvious risk assessed by the standards of a reasonable prudent man.

Lord Hailsham in ***R v Lawrence***,[94] agreed with Lord Diplock's definition of recklessness by saying:

I share the distaste for the obsessive use of the expressions 'objective' and 'subjective' [test] in crime. In all indictable crime, it is a general rule that there are objective factors of conduct which constitute the so called *actus reus*, and a further guilty state of mind which constitutes the so called *mens rea* . . . It is, of course, true that in a legal context, the state of mind described as 'reckless' is discussed in connection with conduct objectively blameworthy, as well as dangerous.[95]

The court in *Caldwell* (by a majority of 2:1) adopted the wider interpretation of recklessness, namely that the term covers advertent and inadvertent wrongdoing. By

91 [2000] 1 Lloyd's Rep 653.
92 [1982] AC 341 (HL).
93 Ibid, p 354.
94 [1982] AC 510 (HL).
95 Ibid, pp 520–521.

bringing within the reach of s 1(1) of the CDA 1971 cases of inadvertent recklessness, the decision in *Caldwell* became a source of potential injustice, as Lord Steyn said in the following decision. Lord Diplock's test was criticised by academics and judges that it amounted, in effect, to not examining the state of mind of the accused.

Thus, the House of Lords, in ***R v G***[96] (in which two boys set fire in a shop by setting fire to some newspapers), was asked to re-examine the meaning of the word 'recklessness' in the context of s 1 of the CDA 1971, and it departed from the test in *Caldwell* by placing emphasis on a *subjective awareness of the risk*.

It was held that, in order to convict of an offence under s 1, it had to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk that did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. The accepted meaning of recklessness involved foresight of consequences. The shift is towards adopting a subjective approach by looking at the matter in the light of how it would have appeared to the defendant.

7.3.3 'Recklessness and with knowledge'

The present system clearly requires either wilful misconduct ('intent'), or 'recklessness' and, in addition to recklessness, the person liable must have had particular 'knowledge that such loss would probably result'.

These words have been interpreted in the context of Art 25 of the Warsaw Convention, in connection with claims by air passengers. There have also been a few cases on the meaning of these words under Art 4 of the 1976 Convention, which will be seen later.

The CA, in ***Goldman v Thai Airways International***[97] (which, at the time, had to look at the test of *Caldwell* to interpret recklessness in the context of Art 25 of the Warsaw Convention), cautioned against construing an International Convention on the basis of English criminal law statutes, and Eveleigh LJ said:

> When conduct is stigmatised as reckless, it is because it engenders the risk of undesirable consequences. When a person acts recklessly he acts in a manner which indicates a decision to run the risk or a mental attitude of indifference to its existence. . . . One cannot, therefore, decide whether or not an act or omission is done recklessly without considering the nature of the risk involved. In the present case, the omission relied upon was the failure to order seat belts to be fastened. The risk with which we are concerned, therefore, is the risk of injury to the passenger whose belt should have been fastened. If the article had stopped at the word 'recklessly', I would have been prepared to say that, on the judge's findings, the plaintiff had proved his case. This is because, on those findings, the pilot had deliberately ignored his instructions which he knew were for the safety of the passengers, and, thus, demonstrated a willingness to accept a risk. Also, it might be said that he thought that he knew better than those responsible for the manual and, while this might mean that he in his own mind saw no risk, he was, in fact, taking the risk that his judgment was better than that of other experts. If this is so, I would be prepared to say, as did the judge, that a deliberate disregard of the rule must be considered recklessness in the circumstances of the case. I shall consider later whether or not a deliberate disregard of instructions has been proved. However, the doing of the act or omission is not only qualified by the adverb 'recklessly', but also by the adverbial phrase 'with knowledge that damage would probably result'. If the pilot did not know that damage

96 [2003] UKHL 50, [2003] 3 WLR 1060.
97 [1983] 1 WLR 1186.

would probably result from his omission, I cannot see that we are entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed. I appreciate that, when introducing an English version to coincide with a French text, there is naturally an inclination to follow the pattern of that text and where possible to avoid a free translation. Even so, I cannot believe that lawyers who intended to convey the meaning of the well known phrase 'when he knew or ought to have known' would have adopted 'with knowledge'.[98]

. . . An act may be reckless when it involves a risk, even though it cannot be said that the danger envisaged is a probable consequence. It is enough that it is a possible consequence, although of course there comes a point where the risk is so remote that it would not be considered reckless to take it. We look for an element of rashness which is perhaps more clearly indicated in the French text 'temerairement', Art 25, however, refers not to possibility, but to the probability of resulting damage. Thus, something more than a possibility is required. The word 'probable' is a common enough word. I understand it to mean that something is likely to happen. I think that is what is meant in Art 25. In other words, one anticipates damage from the act or omission.[99]

Lord Eveleigh continued:

I say at once that, reading Art 25 as a whole for the moment and not pausing to give an isolated meaning to the word 'recklessly', the article requires the plaintiff to prove the following: (1) that the damage resulted from an act or omission; (2) that it was done with intent to cause damage; or (3) that it was done when the doer was aware that damage would probably result, but he did so regardless of that probability; (4) that the damage complained of is the kind of damage known to be the probable result.[100]

Thus, a person acts recklessly and with knowledge that damage would probably result when he anticipates that damage would be likely to follow from his act or omission.

An interesting examination of 'knowledge' can be found in the judgment of the CA in ***Nugent v Michael Goss Aviation***,[101] concerning Art 25 of the Warsaw Convention, where the knowledge of the pilot was under scrutiny. Three types of knowledge were examined: actual knowledge, background knowledge and imputed knowledge. It was stressed that the approach of the court is to identify actual knowledge and to reject imputed knowledge. As to the background knowledge, it was more difficult to determine its effect on actual knowledge, and it was argued that it should be regarded as the 'store' of knowledge being part of actual knowledge, albeit that it may be forgotten at the time. The majority decided that the intention of the legislation is to attribute a narrow scope to the provision of limitation, and that was voted by a majority at the 1955/56 Hague Conference, which amended Art 25 of the Warsaw Convention. It was not sufficient to show that, by reason of his training and experience, the pilot ought to have known that damage would probably result from his act or omission. There was no basis for concluding that those who agreed the text of Art 25 intended to include background knowledge. However, this is not to say that background knowledge is totally ignored; the greater the obviousness of the risk, the more likely the tribunal is to infer recklessness and that the defendant, in so doing,

98 Ibid, p 1194.
99 Ibid, p 1196.
100 Ibid, p 1194.
101 [2000] 2 Lloyd's Rep 222 (CA).

knew that he would probably cause damage. Inference is different from imputing.[102] There could not be a deeming provision of knowledge if the person did not have that knowledge present in his mind at the time. The article requires that there should be knowledge of the probable consequences.

The courts have confirmed that there is a clear distinction in the legislation between what a person ought to (or should) have known and what a person must have known (or did know).[103]

The same approach is followed with regard to the interpretation of Art 4 of the 1976 Convention. Unlike in the past, there have recently been a few decisions on Art 4. In ***The MSC Rosa M***,[104] the cargo interests, in their defence to a limitation decree (applied for by the demise charterers of the ship), alleged that there were various defects in the fuel and ballast systems that caused the ship to take in water and list, with the result that it had to be abandoned by the crew and eventually salved. The cargo interests became liable to a substantial amount of salvage. They contended that, as the captain and technical director had been advised of these defects, he ought to have known of them. His failure to give instructions to check the cross-connections of the valves amounted to reckless disregard for the safety of the ship, and that, as a master mariner and technical director of the company, he would know that failure to take those steps would lead to the risk of a serious incident.

Steel J held that, as regards knowledge under Art 4, this meant actual and not constructive knowledge. It was insufficient to make an allegation that the relevant person ought to have known something. The judge was not persuaded, following *Nugent*, that it was open to the cargo interests to say that the kind of 'shut-eye' knowledge, as explained by Lord Denning in *The Eurysthenes* (that is, refraining from asking relevant questions in the hope that, by his lack of enquiry, he will not know for certain), constitutes actual knowledge for the purpose of Art 4. Although he did not have to decide the point, he said that, in this case, it was not suggested that the demise charterer consciously suspected other defects and he deliberately chose not to check, so as to avoid turning suspicion into awareness (which is a different inquiry).[105] It must be shown by cargo interests that, at the time of those alleged acts or omissions, the alter ego of the demise charterers actually knew that a capsize would probably result.

By contrast, in ***Saint Jacques II and Gudermes***,[106] a case that was described by the judge to be exceptional, there was a real prospect of defeating the right to limit. The *Saint Jacques* was navigating across the traffic separation scheme, as a rogue vessel contravening Reg 10 of the Collision Regulations. Both the skipper, who happened to be the owner of the vessel, and the deckhand were aware of the contravention, and they were doing this in order to reach the fishing grounds before other vessels. She collided with *Gudermes*. The skipper commenced the limitation

102 Ibid, pp 227, 232: 'But as a matter of proof, the two will often stand or fall together.'

103 See *Rolls Royce v HVD* [2000] 1 Lloyd's Rep 653, p 659; also, in the context of s 39(5) of MIA 1906, such distinction was made in *The Star Sea* [1997] 1 Lloyd's Rep 360, p 378 (CA) and [2001] 1 Lloyd's Rep 389, and in the following cases concerning limitation of liability: *Nugent v Michael Goss Aviation* [2000] 2 Lloyd's Rep 222; *The MSC Rosa M* [2000] 2 Lloyd's Rep 399.

104 [2000] 2 Lloyd's Rep 399.

105 The test applied to s 39(5) of MIA 1906; see *The Star Sea* [2001] 1 Lloyd's Rep 389.

106 [2003] 1 Lloyd's Rep 203.

action. The judge decided that the matter should go to trial but, on the issue of reckless navigation, he decided that the conduct of the claimant was a repeated practice in flagrant breach of the Collision Regulations, directed personally by the claimant for commercial reasons, and there was a real prospect for the defendant to defeat the claimant's right to limit at trial.

In ***The Leerort***,[107] an anchored ship at berth was struck by another, entering the harbour, resulting in breaching one hold, which caused flooding and damage to its cargo. It was held that the limitation provisions of the 1976 Convention provide even greater protection to the person seeking to limit than those applicable in relation to carriage by air. It must be the causative personal act or omission of the person liable that could defeat the right to limit, and the test required a foresight of the very loss that actually occurred. Limitation was permitted.

Under the Warsaw Convention, it is also the act or omission of servants or agents that is taken into account; see ***Nugent v Michael Goss Aviation***,[108] in which, as regards 'knowledge', it was restated by the CA that those who drafted Art 25 of this Convention did not intend that anything less than actual conscious knowledge would suffice. An interesting question was raised at first instance as to whether 'turning a blind eye' would be consistent with the knowledge required by Art 25. The judge ruled that it would not be consistent, but Pill LJ, who dissented on appeal only on the issue of whether background knowledge was relevant (see earlier), disagreed with the judge. The matter does not appear to have been dealt with by the majority, as it was not relevant to the decision, but the outcome of the reasoning of the majority points towards agreement with the judge. It is important, however, to note what Pill LJ said in this respect:

> The article does not permit in my view the actor to say that his knowledge is no longer his knowledge because he has made a conscious decision to put it out of his mind.[109]

Such a statement is in accord with what the House of Lords said in ***The Star Sea***,[110] in the context of s 39(5) of the MIA 1906, where it was stated, by way of drawing a parallel, that:

> Privity in its ordinary meaning connotes knowledge. 'Blind-eye' knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground – and if it is not, it should be – that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence.

In other words, this statement should mean that actual knowledge is deliberately suppressed.

Although it has been stressed, in the decisions cited above, that actual knowledge is necessary for the purpose of Arts 25 and 4 of the respective Conventions, it is submitted that actual knowledge should be inferred if the facts show that a deliberate action was taken to obscure the realisation of actual knowledge, once it was consciously

107 [2001] 2 Lloyd's Rep 291.
108 [2000] 2 Lloyd's Rep 222.
109 Ibid, p 231.
110 [2001] 1 Lloyd's Rep 389, p 413.

realised that such knowledge should be put out of mind. In that sense, 'blind-eye' knowledge should be taken into account in the test.

7.3.4 Such loss would probably result

There is reference only to 'loss' and 'such loss' in Art 4; it has been debated whether the omission of the word 'damage' from Art 4 was inadvertent or deliberate, and whether it should be implied from the context of the Convention. The word 'damage' is used in Art 25 of the Warsaw Convention, the CLC 1992 and Art 13 of the Athens Convention; 'loss or damage' is used in Art IV, r 5(a) of the HVR, but only 'damage' in r 5(e), whereas, in the Hamburg Rules and the Rotterdam Rules, the words 'loss, damage or delay' are used.

The words 'loss' and 'damage' were interpreted in the context of the HVR Art IV r 5(a) by Burton J, in ***The Limnos***,[111] which he juxtaposed with the words 'goods lost or damaged' used in the same rule. He held that the latter phrase was not to be construed in the same way as the former. Loss normally suggests that the loss is economic, whereas damage suggests the loss is physical. On the contrary, 'lost goods' means that they are vanished, destroyed, whereas 'damaged' means that the goods are surviving in a damaged form.

In the context of the 1976 Convention and, in particular, considering that the word 'damage' is included in the various claims outlined in Art 2, its omission from Art 4, it is submitted, might have been inadvertent. In the context of the Convention, it must be implied that the legislator meant to cover both, loss or damage. Etymologically, 'damage' is harm from which one suffers loss; 'loss', whether economic or physical, should embrace damage, and – adopting a broad construction that is in line with the purpose of the Convention – it should also embrace loss resulting from delay, as can be derived from Art 2(1)(b), which specifies that 'claims in respect of loss from delay . . .' are within the ambit of the Convention.

Another difference that exists between the Conventions concerns the words 'loss' and 'damage', which are used in connection with the mental element required to break limitation. For example, the 1976 Convention and the Rotterdam Rules refer to 'with intent to cause *such* loss, or recklessly and with knowledge that <u>such</u> loss would probably result'; the Athens Convention and CLC 1992 refer to '<u>such</u> damage'; and the Hamburg Rules refer to '<u>such</u> loss, damage or delay'. By contrast, the HVR and the Warsaw Convention, as amended, link the misconduct generally to 'damage' without using the word '*such*'. This may, or may not, be of a material significance when reading the interpretation given to these words by Eveleigh LJ, when he said, in ***Goldman***:

> It is with rather less confidence that I have said that the damage anticipated must be of the same kind of damage as that suffered. I have reached my conclusion because Art 25 is designed to cover cases of damage both to the person – in other words, injury – and to property . . . There may be occasions when an act can be said to be done recklessly in regard to one possible kind of damage, although morally wholly justified as the price of averting some other more serious hurt. Perhaps, one could resolve this matter by saying that recklessness involves an element of moral turpitude. If all that can be anticipated is the spilling of a cup of tea over someone's dress, it does seem wrong that the pilot should be blamed for unexpected personal

111 [2008] 2 Lloyd's Rep 166.

injuries. Whether or not I am right in this, I am satisfied that the pilot must have knowledge that damage will result from his omission. With respect to the judge, I cannot see that the fact that a wine glass may slip from a tray and cut a passenger's leg should make the carriers liable for unlimited damages in respect of an injury suffered because there was no seat belt to protect him. The damage, whether it is referred to as 'the damage' or merely 'damage', refers to something which results from the omission. The French text, by the use of the word 'en', clearly establishes this.[112]

Purchas LJ said that 'damage' involves probable damage contemplated by the article.[113] This is also reflected in the fourth limb of the test of Eveleigh LJ: 'that the damage complained of is the kind of damage known to be the probable result'.

In the context of Art 4 of the 1976 Convention, the question whether 'such loss' means a loss within a kind or type of loss, for example, either personal injury or property damage, and not the very loss suffered, was answered, for the first time, by Steel J, in ***The MSC Rosa M***,[114] where he said that: '. . . The person challenging the right to limit must establish both reckless conduct and knowledge that the relevant loss would probably result'.

Also, in ***The Leerort***,[115] Lord Phillips MR said:

It seems to me that this requires foresight of the very loss that actually occurs, not merely of the type of loss that occurs . . . the words 'such loss' clearly refers back to the loss that has actually resulted and which is the subject matter of the claim in which the right to limit is asserted.

There was emphasis that the wording of the limitation provisions in relation to merchant shipping provides even greater protection than air carriage and requires restrictive interpretation.

What if the anticipated loss was collision damage? Should the liable person have anticipated that a collision may occur with the particular ship, or with any ship? This was dealt with in *The Leerort*, but it was not necessary to decide which of the two was correct. In either event, the reality was, the court said, that:

When damage results from collision the ship owner will only lose his right to limit if it can be proved that he deliberately or recklessly acted in a way which he knew was likely to result in the loss of or damage to the property of another in circumstances where, inevitably, the same consequences would be likely to flow to his own vessel.[116]

8 ESTABLISHMENT OF THE LIMITATION FUND

8.1 PROCEDURAL MATTERS UNDER THE CONVENTION

As far as forum shopping and *lis pendens* are concerned, as well as the application of *forum non conveniens* principles, see Chapters 6 and 7, Vol 1.

112 [1983] 1 WLR 1186, p 1196.
113 Ibid, p 1202.
114 [2002] 2 Lloyd's Rep 399, p 401.
115 [2001] 2 Lloyd's Rep 291, p 295.
116 Ibid, p 295.

8.1.1 Constitution of the fund

Article 11 of the 1976 Convention provides for the establishment of a limitation fund, which will be distributed by the court to satisfy the claims being subject to limitation; in particular:

1 Any person alleged to be liable may constitute a fund with the court or other competent authority in the State Party in which legal proceedings are instituted in respect of claims subject to limitation . . .
2 A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the court or other competent authority.
3 A fund constituted by one of the persons mentioned . . . shall be deemed constituted by all persons mentioned . . .

The article implies that the person seeking to limit has an option to establish a limitation fund in the court of a State Party in which the liability proceedings have been brought, but, beyond that, it states nothing with regard to other jurisdictional options.

In practice, it has been quite common for the person seeking to limit to start limitation proceedings in a jurisdiction of his choice, before the liability action is brought (as has been seen in Chapters 6 and 7, Vol 1), and the English courts do not have any difficulty in permitting limitation actions to be brought in a different forum from that of the liability action.[117]

The issue of whether or not there can be a free-standing limitation action under Art 11 was examined in *The Denise*[118] (Steel J) and *The Western Regent*,[119] in which the CA approved the approach of the judges in both *The Denise* and in this case.

The Western Regent

The vessel was operating in the North Sea, towing six steamers. Two of the steamers came into contact with a buoy, resulting in damage to the head installation of the oilfield. It was accepted that the collision and the damage were due to the negligence of the demise charterer. Both the registered owners and the demise charterer brought limitation proceedings in England. The owner of the oil installation, a British company, which suffered damage to its property and loss from interruption of business, brought proceedings in Texas, a year later, where the limitation is based on the value of the ship after the collision and not on the 1976 Convention. The claimants in the limitation action applied for summary judgment and for an anti-suit injunction, restraining the defendants from pursuing the proceedings in Texas.[120] The defendants applied for a declaration that the court had no jurisdiction, alleging that neither the Convention nor the MSA 1995 contemplates the possibility of a pre-emptive strike by the ship-owner before any proceedings on liability had been brought.

117 See, for example, *Caspian Basin v Bouygues No 4* [1997] 2 Lloyd's Rep 507, p 525; *The Happy Fellow* [1998] 1 Lloyd's Rep 13, and other examples in Chs 6 and 7, Vol 1.
118 (2004) 3 December, unreported.
119 [2005] 2 Lloyd's Rep 359 CA.
120 Issues arising with regard to the anti-suit injunction are discussed in Ch 8, Vol 1.

It was held by the CA that there was nothing in the language of the Convention, or the Supreme Court Act (SCA) 1981, or the CPR 1998, that required the person seeking to limit to wait until a claimant brought proceedings in England.

Clarke LJ commented that, if a case involves many claimants, they may commence proceedings in different jurisdictions, and the owner may choose to start limitation proceedings and constitute a fund under the Convention in any such jurisdiction.

Paragraph 8(3), Pt II of Sched 7 to the MSA 1995 gives the court in which the fund has been constituted discretion to stay any proceedings, relating to any claim arising out of that occurrence, which are pending against the person by whom the fund has been constituted.

8.1.2 Bar to other actions

Article 13 provides:

1 Where a limitation fund has been constituted, any person having made a claim against the fund shall be barred from exercising any right in respect of that claim against other assets of a person by or on behalf of whom the fund has been constituted.

2 After a limitation fund has been constituted in accordance with Art 11, any ship or other property belonging to a person on behalf of whom the fund has been constituted, which has been arrested within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the court of such State. However, such a release shall always be ordered if the limitation fund has been constituted:
(a) at the port where the occurrence took place . . .; or
(b) at the port of disembarkation (for loss of life, or personal injury claims); or
(c) at the port of discharge in respect of damage to cargo; or
(d) in the State where the arrest is made.

3 The rules of the above paragraphs shall apply only if the claimant may bring a claim against the limitation fund before the court administering that fund and the fund is actually available and freely transferable in respect of that claim.

Any person who has a claim arising out of the same incident may, nevertheless, pursue to break limitation. Regardless of whether a claimant contends that he can prove that the ship-owner was guilty of conduct barring limitation, the combined effect of Arts 2 and 13 of the 1976 Convention is that a person liable can only be compelled to constitute one fund, in accordance with Art 11, and not be also compelled to put up bail for the release of his ship.[121]

An interesting issue on Art 13(2) and (3) arose in ***The ICL Vikraman***,[122] which should be borne in mind as a warning for not providing a Letter of Undertaking (LOU) without referring to the Convention limit.

After a collision incident and the sinking of the vessel *The ICL Vikraman*, the cargo interests arrested a sister ship and obtained a LOU from the P&I club of the owners in lieu of the release of the ship. The cargo interests proceeded to arbitration, as

121 *The Bowbelle* [1990] 3 All ER 476.
122 [2004] 1 Lloyd's Rep 21.

provided by their contract of carriage, and obtained an award. Since the LOU did not contain any restriction with regard to tonnage limitation, the owners of the ship applied for limitation and established a limitation fund. They also sought an injunction to prevent the claimants from presenting the LOU to the club. They obtained leave to serve the limitation claim form out of the jurisdiction and were also granted the injunction. The claimants applied to set aside both, alleging that, as they had obtained security (unlimited by reference to limitation) by having arrested the sister ship, they were not bound by the establishment of the fund.

Colman J held that the purpose of Art 13 was to protect the person who had properly constituted a limitation fund in any State Party from enforcement of a claim in respect of the same occurrence against his ships, or property, or such security, as might have been given, which were subject to the jurisdiction of the same or any other State Party.

Once the fund was established, there was jurisdiction to give leave to serve the limitation claim out of the jurisdiction. However, the LOU stood as the only security in the pending *in rem* action in Singapore, which remained alive despite the arbitration award in London, and it stood in place of the released ship, and so it could be released only by order of the Singaporean court. As Singapore was not a State Party to the 1976 Convention, there was no basis for the operation of Art 13(2). The security regime provided by the Convention was confined to States that are parties to it. The Convention could not be construed so as to create a power in the country of one State Party to interfere by order with the disposition of security within the jurisdiction of a non- State Party.

If that was wrong, then, under Art 13(3), the limitation fund established in this country was available to a given claimant, notwithstanding that there was no limitation decree at the material time. Thus, the absence of a limitation decree would not be a ground for refusing the release of the LOU.

Pursuant to Art 11(3), a fund constituted by one of the persons mentioned in Art 9, or his insurer, shall be deemed constituted by all persons mentioned in Art 9. So it was held in ***MSC Napoli***,[123] where the fund had been constituted by the owner of the ship, who was also a claimant. The fund was deemed to have been constituted by the slot charterers too. Whether or not the person who put up the fund was entitled to any form of contribution from those who took the benefit of the fund as 'shipowners', it is not clear under the Convention, which does not deal with this matter expressly, the judge held.

Once the release of the ship has been ordered after the constitution of the limitation fund, there is a bar to other actions, but the person whose ship has been released shall be deemed to have submitted to the jurisdiction of the court (see para 10, Pt II, Sched 7 of MSA 1995).

The law applicable to the constitution and distribution of the fund shall be the law of the State in which the fund is constituted (Art 14).

No lien or other right in respect of any ship or property shall affect the proportion in which, under Art 12, the fund is distributed among several claimants (para 9, Pt II).

123 [2009] 1 Lloyd's Rep 246, see under para 3.1.2, above; see also *The Aegean Sea* at para 4.2.1.1, above.

8.1.3 Distribution of the fund

Article 12 provides, in paras 1 and 2:

1 Subject to the provisions of paras 1, 2 and 3 of Art 6 and of Art 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.
2 If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund, such person shall, up to the amount he has paid, acquire by subrogation the rights that the person so compensated would have enjoyed under this Convention.

8.2 COUNTERCLAIMS

Article 5 of the Convention provides:

Where a person entitled to limitation of liability under the rules of this Convention has a claim against the claimant out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Convention shall only apply to the balance, if any.

Thus, limitation of liability applies after the respective claims of the parties have been set off. The limits provided by the Convention apply to the balance. An interesting question, which has not been authoritatively answered, is this: if a ship, after an accident, receives salvage services, and, during the salvage operations, damage is caused to the ship by the negligence of the tug, for which the salved will have a counterclaim in damages against the salvor (as in *The Tojo Maru*), would a claim for salvage award and the claim for negligence be regarded as having arisen out of the same occurrence, so that the respective claims are set off against each other, and the limitation provisions then apply to the balance? It is doubtful that Art 5 is meant to apply in such a situation, because a claim for salvage is excluded from limitation under the rules of the Convention. It is submitted that this article should apply to claims and counterclaims for which the Convention permits limitation, as, for example, those arising out of a collision between two ships.

In ***The Khedive***,[124] the House of Lords had decided on this issue as is provided in Art 5.

Two ships, V and K, came into collision. Both ships were held to blame. The owners of K brought an action to limit their liability under the then Merchant Shipping Amendment Act 1862 and paid the amount of their liability into court. The damage to V was greater than that to K, and the fund in court was not sufficient to satisfy all the claims for which the owners of K were answerable in damages.

It was held that limitation of liability applied to the balance remaining after deducting the smaller from the larger claim. The owners of V were entitled to prove against the fund their damage, less the damage sustained by K, and to be paid in respect of the balance due to them (after such deduction) *pari passu* with the other claimants out of such fund.

124 (1882) 7 App Cas 795 (HL).

8.3 PROCEDURE IN THE ADMIRALTY COURT IN RELATION TO LIMITATION (BRIEF ACCOUNT)

There are three ways of enforcing the right to limit: the Admiralty Practice Directions provide that limitation may be relied upon by way of defence to any claim;[125] a limitation claim may be brought by counterclaim with the permission of the Admiralty Court;[126] and a limitation claim is begun by the issue of a claim form in Admiralty.[127]

If the defendant invokes the right to limit by way of defence and counterclaim and is found liable, the limit of that liability will apply only to that claim. Therefore, to avoid separate proceedings, if it is envisaged that many claims will be brought, the best method of proceeding would be to institute a limitation action, in which the limitation fund will be valid against all claimants who claim against the fund.

There is no provision in the Convention with regard to the jurisdiction of limitation claims, nor a requirement that the limitation action must be brought in the court in which liability is determined. As seen in Chapters 6 and 7, Vol 1, a limitation claimant may choose the forum of his choice (forum shopping), and it has recently been confirmed that there can be a free-standing limitation action (*The Western Regent*).

Art 7 of the Brussels I Regulation (previously, Art 6A of the Brussels Convention), provides that the court that has jurisdiction in actions relating to liability shall also have jurisdiction over claims for the limitation of such liability. This provision, however, applies when the liable party is sued in a Member State. As regards *lis pendens*, see Chapter 7, Vol 1.

When a limitation fund has been constituted, a caveat against arrest will be issued.

Once the limitation decree is granted, the Admiralty Court may order the stay of any proceedings relating to any claim arising out of the same occurrence; or order the claimant to establish the fund, if he has not already done so. However, the court has no power to order a party seeking to limit to constitute a limitation fund by way of security.[128]

The court may give directions for the advertisement of the decree, if it is a general and not a restricted one.[129] Claimants against the fund are invited in the advertisement to submit their claims.

Any person other than a named defendant may apply to the Admiralty registrar, within a time fixed in the decree, to set aside the decree.[130]

The limitation fund is distributed to claimants in proportion to their established claims against the fund (Art 12(1) of the 1976 Convention), and no lien or other right in respect of any ship or property shall affect the proportions in which, under Art 12, the fund is distributed among the several claimants (para 9, Pt II, Sched 7 to the MSA 1995).

125 PD 61, para 10.18.
126 CPR, r 61.11(22).
127 PD 61, para 10.1; Form No ADM15.
128 *The Tasman Pioneer* [2003] 2 Lloyd's Rep 713 (NZHC).
129 CPR, r 61.10(13).
130 CPR, r 61.10(16).

9 THE 1996 PROTOCOL AND RECENT DEVELOPMENTS

9.1 GENERAL PROVISIONS

The 1996 Protocol has substantially increased the limits provided for by the Convention and it came into force on 13 May 2004 internationally.

In the UK, two statutory instruments (SI 1998/1258 and SI 2004/1273) bring the Protocol into UK law and the details as to the determination of the unit of account into sterling.

By s 6 of the SI 1258, Pt I of Sched 7 of the MSA 1995 is amended by adding Art 18, which permits the following reservations:

(a) to exclude the application of Art 2 para 1(d) and (e);
(b) to exclude claims for damages within the meaning of the HNS Convention.

In para 3 of Pt II Sched 7, there is no limit for claims under Art 2(1)(d) of the Convention, such as the costs incurred by harbour authorities in the raising of wrecks (discussed earlier under 4.7.2).

By s 7 of the SI, Pt II of Sched 7 of the MSA 1995 is amended by the addition of para 2A, which excludes the application of Art 2(1)(a) of the Convention (claims for loss of life or personal injury) from seagoing passenger ships; in effect the SI channels these claims to the Athens Convention regime (see, further, Chapter 15, below).

States Parties are permitted to regulate different limits in case of loss of life or personal injury, provided the limits are not lower than as provided by Art 7(1) of the Convention (see Art 15(3bis), included in Pt I Sched 7 of MSA 1995).

9.2 THE LIMITS UNDER THE PROTOCOL

The global general limits for claims arising on any distinct occasion are calculated on the basis of a sliding scale, depending on the size of the vessel's tonnage (Art 6(1)). It is the gross tonnage of the ship that is relevant. For hovercrafts, however, limitation is calculated by reference to the maximum operational weight.

Claims for *personal injury or loss of life* are treated preferentially to other claims. Article 6(1)(a) of the Protocol provides the general limits, and it also applies to claims for loss of life or personal injury on board a non-passenger ship. There is a sliding scale upwards, and the additional units will be added to the previous scale. In respect of loss of life or personal injury claims:

(a) For a ship up to 2000 GT, the limit is 2 million units of account (SDR).
(b) For each ton from 2,001 to 30,000 GT, 800 units of account.
(c) For each ton from 30,001 to 70,000 GT, 600 units of account.
(d) For each ton in excess of 70,000 GT, 400 units of account.

In respect of any other claims:

(a) For a ship up to 2,000 GT, the limit is 1 million units of account (SDR).
(b) For each ton from 2,001 to 30,000 GT, 400 units of account.
(c) For each ton from 30,001 to 70,000 GT, 300 units of account.
(d) For each ton in excess of 70,000 GT, 200 units of account.

The unit of account is defined in Art 8 and is stated in SDR, as defined by the International Monetary Fund.

Article 7 of the Convention, relating to claims for loss of life or personal injury to passengers of a passenger ship, as amended by the Protocol, provides that the new limit of liability shall be 175,000 units of account, multiplied by the number of passengers that the ship is certified to carry. It is presumed that the overall limitation fund will then be distributed by dividing it by the number of passengers claiming to arrive at the sum each claimant will get.

In the UK, this limit is confined to non-seagoing passenger ships, and, unlike the Protocol, the limitation amount applies per passenger. The limit for death or personal injury claims against sea-going passenger ships was increased in the UK[131] to 300,000 units of account per passenger. It came into force on 1 January 1999 and applies only to carriers whose principal place of business is in the UK. However, since the 2002 Protocol to the Athens Convention is in force in the EU Member States by the EU Directive 392/2002, the limits of the 2002 Protocol brought into effect by the Directive will apply (see Chapter 15, below).

9.3 THE IMO RESOLUTION LEG 5(99)

As mentioned in the introduction to this chapter, the recent incidents on bunker pollution necessitated the further increase in the limits under the LLMC. The IMO explained the reason for the increase: Taking into account the experience of incidents, as well as inflation rates, the limits set in the 1996 Protocol have, in recent years, been seen to be inadequate to cover the costs of claims, especially those arising from incidents involving bunker fuel spills. The new limits are expected to enter into force 36 months from the date of adoption, on 19 April 2015, under the tacit acceptance procedure.

Art 3 of the 1996 Protocol is amended as follows:

In respect of claims for loss of life or personal injury, the reference to:

- '2 million units of account shall read 3.02 million units of account';
- '800 units of account shall read 1,208 units of account';
- '600 units of account shall read 906 units of account';
- '400 units of account shall read 604 units of account'.

131 The Carriage of Passengers and their Luggage by Sea (UK Carriers) Order 1998 SI 1998/2917.

In respect of any other claims, the reference to

- '1 million units of account shall read 1.51 million units of account';
- '400 units of account shall read 604 units of account';
- '300 units of account shall read 453 units of account';
- '200 units of account shall read 302 units of account'.

The scheme of the LLMC is to provide for two separate funds, one for loss of life or personal injury and the other for any other claims.

9.4 THE EU DIRECTIVE FOR COMPULSORY INSURANCE

The Directive 2009/20/EC on civil liability and financial guarantees for damage done by ships provides that: (a) all ships flying the flag of an EU country and all ships intending to stop in an EU port must have insurance cover to correspond to the relevant maximum amount of limitation laid down in the LLMC 1996; (b) proof of insurance will be a commercial insurance certificate; (c) inspection under the PSC Directive can verify whether the ship is carrying an insurance certificate; (d) ships not carrying a certificate may be detained or expelled over and above any fines imposed by the EU country concerned.

The MS (Compulsory Insurance of Ship-owners for Maritime Claims) Regulations 2012 adopt the Directive.

This completes the picture of provision of compulsory insurance for compensation of claimants with regard to all maritime claims, at least, at the EU level.

This page intentionally left blank

CHAPTER 15

LIABILITY, LIMITATION AND COMPENSATION FOR PASSENGERS' CLAIMS

1 Introduction 791

2 The PAL 1974 Convention 794

3 Relationship between PAL 1974, the LLMC 1976 and the LLMC Protocol 1996 804

4 The 2002 Protocol to the PAL 1974 Convention (PAL 2002) 806

5 The IMO Reservation/ Guidelines 2006 815

6 The Passengers Liability Regulation (PLR 2009) 817

7 The MS (Carriage of Passengers by Sea) Regulations 2012 819

8 Conclusion on the amounts of potential liability 820

1 INTRODUCTION

Carriers who perform passenger carriage services are faced with different risks and liabilities than carriers who transport cargoes. Managing risks involved with passenger vessels has become more complex, particularly with regard to modern and large cruise ships carrying a large number of people, as shown by the accident of the *Costa Concordia* (see Chapters 1 and 2, above).

The purpose of this chapter is to compare the provisions of the Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea (PAL 1974 Convention) with the provisions of the 2002 Protocol (PAL 2002 Protocol). Both instruments have been consolidated into the Athens Convention 2002.

The recent developments at IMO and EU levels have succeeded in speeding up the implementation of the 2002 Protocol, at least, within the EU Member States, from the beginning of 2013.

1.1 A SHIFT FROM FAULT-BASED TO STRICT LIABILITY

The PAL 1974 Convention and the PAL 2002 Protocol deal with civil liability of carriers, limitation of liability and compensation to passengers for losses incurred during the voyage, such as losses resulting from loss of life or personal injury or loss of, or damage to, their property/luggage.

There are important differences between the two in terms of the basis of liability, insurance provisions and the amount of compensation. Whereas the PAL 1974

Convention is a fault-based liability regime, the PAL 2002 Protocol provides for two bases of liability (strict and fault-based) and two tiers of limitation amounts (see para 4.3, below). It imposes strict liability for loss of life or personal injury caused by a shipping incident, which is limited to 250,000 SDR per passenger on each distinct occasion, and compulsory insurance with a right of claimants for direct action against insurers. If the loss exceeds the above amount, there is a maximum limit of 400,000 SDR per passenger on each distinct occasion, unless the carrier proves the incident was caused without his fault.

In the event that loss of life or personal injury is caused by a non-shipping incident, fault of the carrier has to be proved by the claimant. The liability shall, in no case, be more than 400,000 SDR per passenger on each distinct occasion. With regard to loss or damage caused by war or terrorism risks, which are taken out of the Athens 2002 Convention, separate limits are provided for by the IMO Reservation and Guidelines (see para 5, below); these became necessary in order to facilitate the ratification of the PAL 2002 Protocol by States with the reservation of the right to limit up to certain sums in the event the incident was caused by war risks; war risks should be covered by separate compulsory insurance provided by war-risk underwriters, not the P&I clubs, which insure all other risks for loss of life or personal injury.

1.2 THE BACKGROUND

Under the PAL 1974 Convention, which came into force in 1987, the procedure required in order to make any amendments to the Convention involved the ratification of the amended instrument by a certain number of States before it could enter into force. The result of such a procedure of ratification would often be that – by the time the requisite number of signatories could be reached – the changes made could be outdated.

As at 31 March 2013, the PAL 1974 Convention was ratified only by 37[1] States (including Hong Kong and Macao of China); its subsequent PAL Protocol 1976[2] came into force in 1989 and was ratified by 26[3] States; the PAL Protocol 1990[4] (ratified by six[5] States only) never came into force. A number of States have adopted the principles of the Athens Convention 1974, or of the 1976 Protocol, and some have adopted the higher limit provided by the 1990 Protocol, into their national laws.

1 The following countries having ratified the Athens Convention 1974, as at 31 March 2013, are shown in brackets: Africa: (Egypt, Equatorial Guinea, Liberia, Libya, Malawi, Nigeria); North America: (Belize, Bahamas, Barbados, Dominica, St Kitts and Nevis), and Canada has incorporated the limits of the 1990 Protocol into its law; South America: (Argentina, Guyana); Asia: (China, Jordan, Hong Kong, Macao China, Russian Federation, Yemen); Australia and Pacific: (Marshall Islands, Tonga, Vanuatu); Europe: (Albania, Belgium, Croatia, Estonia, Georgia, Greece, Ireland, Latvia, Luxembourg, Poland, Serbia, Spain, Switzerland, UK, Ukraine).

2 The 1976 Protocol made the unit of account the Special Drawing Right (SDR), replacing the 'Poincaré franc', based on the 'official' value of gold, as the applicable unit of account.

3 Albania, Argentina, Bahamas, Barbados, Belgium, China, Croatia, Estonia, Georgia, Greece, Ireland, Latvia, Libya, Luxembourg, Marshall Islands, Poland, Russian Federation, Spain, Switzerland, Tonga, Ukraine, UK, Vanuatu, Yemen, HK, Macao China.

4 The 1990 Protocol was intended to raise the limits set out in the convention, but it did not enter into force and was superseded by the 2002 Protocol.

5 Croatia, Egypt, Germany, Spain, Switzerland and Tonga.

It was realised that the procedure of adopting a Convention, or its amendments, needed a change, and thus the tacit acceptance procedure was agreed by IMO Member States (see Appendix: 'IMO procedure' at the end of Chapter 16).

1.2.1 Tacit acceptance procedure

The PAL 2002 Protocol has included a measure designed to simplify the procedure for raising the limits of liability (see the Final Clauses of the Consolidated Convention, Arts 17–25). Amendments (which shall be submitted to the IMO's Legal Committee for prior consideration) shall be adopted by a two-thirds majority of the States Parties to the Convention, as revised by the Protocol, on the condition that at least one half of the States Parties to the Convention shall be present at the time of voting.

Certain restrictions are stipulated on proposals to amend the limit, such as: no amendment may be considered within 5 years from the date the Protocol was offered for signature, or from the date of the entry into force of a previous amendment; and no limit may be increased by more than 6 per cent per year, calculated on a compound basis from the date on which the Protocol was offered for signature.

Any amendment adopted shall be notified to all States Parties by IMO. The amendment shall be deemed to have been accepted at the end of a period of 18 months after the date of notification. An amendment deemed to have been accepted as above shall enter into force 18 months after its acceptance, and shall bind the States Parties unless they denounce this Protocol at least 6 months before the amendment enters into force (see further about the procedure of adoption or ratification of a Convention and of the tacit acceptance procedure in the Appendix).

Revision or amendment of the PAL Protocol 2002 shall be requested by not fewer than one-third of the States Parties.

1.2.2 Competence of regional organisations

A provision in the PAL Protocol (Art 19 of Final Clauses) provides that a Regional Economic Integration Organisation, which is constituted by sovereign States that have transferred competence over certain matters governed by the Protocol to that organisation, may sign, ratify, accept, approve or accede to the Protocol. The regional organisation that is a party to the Protocol shall have the rights and obligations of a State Party, to the extent that the regional organisation has competence over matters governed by the Protocol.

The European Union is such a regional organisation and has exercised its right to accede to the Protocol on behalf of its members by a regulation (see para 6, below) requiring them to take the necessary steps to incorporate the Protocol into their national laws by the end of 2012.

1.3 THE DEVELOPMENTS LEADING TO THE ADOPTION OF THE 2002 PROTOCOL

Since its entry into force, the PAL 1974 Convention has been subject to criticism for imposing too low a limit of liability for carriers. The subsequent Protocols did not solve the problem internationally.

In 2002, the new PAL Protocol was agreed, which went further than merely raising the limits, as seen under 1.1, above. However, in view of concerns from the insurance industry, particularly P&I clubs, with regard to insurance capacity and terrorist risks, after extensive consultations, a compromised was reached at the IMO level that was acceptable to the EU. A Reservation and Guidelines for the implementation of the Convention issued by IMO were finally adopted in Paris on 19 October 2006, so that the ratification of the PAL 2002 Protocol could be progressed. The Guidelines separate insurance obligations for war risks from non-war risks and specify that a separate set of Blue Cards attesting that insurance is in place, one covering liability for war risks and the other covering non-war risks, will have to be issued. This initiative restrained the EU from taking a regional action.

Shortly afterwards, the EU – seizing the opportunity to speed up the implementation of the PAL 2002 Protocol within the EU – adopted Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents, in which it reproduces in its annexes the relevant provisions of the consolidated version of the Athens Convention, as amended by the Athens Protocol and the IMO Guidelines, making their application mandatory upon the EU Members. The Regulation came into force on 31 December 2012, and its basic provisions are explained under para 6, below.

The UK passed the MS (Carriage of Passengers by Sea) Regulations 2012[6] to apply the compulsory insurance provisions of the EU Regulation to ships entering or leaving ports in the UK and to UK ships entering or leaving ports in other EU countries. These Regulations came into force on 12 January 2013 and provide penalties for non-compliance (see, further, at para 7, below).

For international uniformity, however, the PAL 2002 Protocol has to come into force, and it may not be too long now before it does, once the 10th remaining State ratifies it. The Athens Convention 1974 will remain in force until the PAL 2002 Protocol comes into force internationally, whereby the former will have to be denounced by those States that have ratified it.

For the purpose of comparison between the liability and limitation provisions under the PAL 1974 Convention and the PAL 2002 Protocol, and in order to put into context the recent developments, the PAL 1974 Convention is looked at first.

2 THE PAL 1974 CONVENTION

The general provisions, other than the liability ones, mentioned below, are incorporated into the consolidated version of the Athens Convention 2002, and so these are not repeated when the PAL 2002 Protocol is examined at para 4, below.

2.1 APPLICATION AND SCOPE

The Convention applies to any ‘international carriage’, which means any carriage in which, according to the contract of carriage, the place of departure and the place of

6 By SI 2012 No 3152.

destination are situated in two different States Parties to the Convention.[7] In the UK, the scope was extended to apply also to all domestic carriage, and the Convention was incorporated into UK law by virtue of s 183 of the MSA 1995.

Article 2(1) provides that: This Convention shall apply to any international carriage if:

(a) the ship is flying the flag of or is registered in a State Party to this Convention, or
(b) the contract of carriage has been made in a State Party to this Convention, or
(c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

2.2 EXCLUSION OF APPLICATION

By Art 2(2): Notwithstanding para 1 of this Article, this Convention shall not apply when the carriage is subject, under any other International Convention concerning the carriage of passengers or luggage by another mode of transport, to a civil liability regime under the provisions of such Convention, insofar as those provisions have mandatory application to carriage by sea.

2.3 DEFINITIONS

2.3.1 Ship

By Art 1 (3): 'ship' is defined as being only a seagoing vessel, excluding an air-cushion vehicle.

The meaning of 'seagoing' came before the court recently in ***The Sea Eagle***,[8] where it was held that:

> The term 'ship or vessel' within the meaning of the Athens Convention 1974, as enacted by the Merchant Shipping Act 1995 s 183 and Sched 6, included any vessel capable of being used in navigation, whether or not it was in fact being used in navigation at the relevant time. The word 'seagoing' was adjectival and was intended to describe the actual use of a vessel; thus, although a ship might be a ship for the purposes of the 1995 Act, it would not be a seagoing ship unless it was its actual business to go to sea.

2.3.2 Carrier

By Art 1(1):

(a) 'Carrier' means a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or by a performing carrier.

7 Art 2(1). The definition of international carriage also allows the place of departure and destination to be in a single State, so long as there is an intermediate port of call in another State. This covers a range of modern-day cruises, where the place of departure and destination of the cruise itself is the same port, but the ship calls at several other ports over the course of the voyage.

8 *Musgrave (Trading as Ynys Ribs) (The Sea Eagle)* [2012] 2 Lloyd's Rep 37 paras 31–33.

(b) 'Performing carrier' means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage.

2.3.3 Contract of carriage

Article 1(2) defines 'contract of carriage' as meaning a contract made by or on behalf of a carrier for the carriage by sea of a passenger or of a passenger and his luggage, as the case may be.

2.3.4 Passenger

Article 1(4) states: 'passenger' means any person carried in a ship,

(a) under a contract of carriage, or
(b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not governed by this Convention.

2.3.5 Luggage

By Art 1(5): 'luggage' means any article or vehicle carried by the carrier under a contract of carriage, excluding:

(a) articles and vehicles carried under a charterparty, bill of lading or other contract primarily concerned with the carriage of goods, and
(b) live animals.

By Art 1(6): 'cabin luggage' means luggage that the passenger has in his cabin or is otherwise in his possession, custody or control. Except for the application of para 8 of this Article and Article 8, cabin luggage includes luggage that the passenger has in or on his vehicle.

2.3.6 Loss of or damage

By Art 1(7): 'loss of or damage to luggage' includes pecuniary loss resulting from the luggage not having been redelivered to the passenger within a reasonable time after the arrival of the ship on which the luggage has been or should have been carried, but does not include delays resulting from labour disputes.

2.3.7 Period of carriage

By Art 1(8): carriage covers the following periods:

(a) with regard to passengers and cabin luggage in their custody, the period during which they are on board or in the course of embarkation or disembarkation, and the period during which they are transported by water from land to the ship and vice versa, if the cost of such transport is included in the fare, or if the vessel

used for this purpose of auxiliary transport has been put at the disposal of the passengers by the carrier. However, with regard to the passenger, carriage does not include the period within which he is in a marine terminal or station or on a quay or in or on any other port installation;

(b) with regard to cabin luggage, also the period during which the passenger is in a marine terminal or station or on a quay, or port installation, if that luggage has been taken over by the carrier or his servants or agents and has not been redelivered to the passenger;

(c) with regard to other luggage (not cabin luggage), the period from the time of its taking over by the carrier or his servant or agent on shore or on board until the time of its redelivery by the carrier or his servant or agent.

2.4 PERSONS LIABLE

Both the carrier and the performing carrier are made liable under the Convention, pursuant to Arts 3 and 4, and, where both carriers are liable, their liability shall be joint and several (Art 4(4)). The carrier shall remain liable for the entire carriage, even if the carriage, or part of it, has been entrusted to a performing carrier, who shall be subject and entitled to the provisions of the Convention for the part of the carriage performed by him (Art 4(1)).

The Convention further makes it clear, by Art 4(2), that the carrier shall, in relation to the carriage performed by the performing carrier, be liable for the acts and omissions of the performing carrier and of his servants and agents acting within the scope of their employment. It should, of course, be presumed that the performing carrier should be liable for the acts or omissions of his own servants or agents, although it is not expressly stated.

2.5 FAULT-BASED LIABILITY UNDER PAL 1974

Article 3(1) covers: (a) damage suffered as a result of the death of, or personal injury to, a passenger, and (b) loss of, or damage to, luggage, if the incident that caused the damage occurred in the course of the carriage and was due to the fault or neglect[9] of the carrier or of his servants or agents acting within the scope of their employment.

The burden of proving that the incident that caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, lies with the claimant (Art 3(2)).

For example, it seems from the CA decision in ***Dawkins v Carnival***[10] (in which a passenger slipped on a wet floor and was injured) that, once a prima facie case of fault was made out, the court looked at all the circumstances and, if the evidence was missing on the part of the defendant, it would draw inferences against the defendant. This case will still be relevant under the Athens Convention 2002 in cases in which fault is still the basis of liability.

9 *Davis v Stena Line Ltd* [2005] 2 Lloyd's Rep 13.
10 [2011] EWCA Civ 1237.

There was in the instant case prima facie evidence of negligence against the respondents. The strength of the case depended on all the circumstances. There was evidence of the existence of a safety system, including inspection and observation, but there was no evidence from those with the duty to implement the system, at or around the time of the accident, that they took the necessary steps to prevent the accident. There was no evidence as to how long the liquid had been on the floor. The absence of evidence from one or more of the many members of staff claimed to have been present in the restaurant at the material time was remarkable. The judge was not entitled to infer from the existence of a safety system that the spillage that led to J's fall occurred only a very short time before the accident, particularly as there was lack of evidence from members of staff who were responsible for the implementation of the safety system. Therefore, no finding could be made that there was no time to prevent the accident, and J's claim succeeded.

This case shows, for risk management purposes, that it is not enough to have a safety system in place, if it is not properly implemented to prevent accidents.

2.6 PRESUMED FAULT UNDER PAL 1974

The burden of proof reverses to the carrier, if *death of or personal injury to a passenger or the loss of or damage to cabin luggage* arose from or in connection with a *shipping incident (*wreckage, collision, stranding, explosion or fire, or defect in the ship). Thus, the fault in such circumstances is presumed unless the contrary is proved (3(3)).

In respect of loss of, or damage to, other luggage, such fault or neglect shall be presumed, unless the contrary is proved, irrespective of the nature of the incident that caused the loss or damage (Art 3(3)).

In all other cases, the burden of proving fault or neglect shall lie with the claimant (Art 3(3)).

2.7 THE RELEVANCE OF RISK ASSESSMENT

Where a death has occurred, for example, through drowning when falling overboard, it may be difficult for the next of kin to establish the fault or neglect of the carrier. This is more so if the next of kin claiming was not aboard the ship when the incident took place; but the court, nowadays, will look beyond the immediate cause and examine the operational diligence of the carriers as to whether or not they applied proper risk assessment and training practices, as the court did in the following case.

Davis v Stena[11]

During a very rough ferry crossing from Ireland to Wales, the claimant's husband fell overboard into the sea from the ro–ro ferry, *Koningen Beatrix*, owned and operated by Stena. The use of *Koningen Beatrix*'s lifeboats was ruled out owing to the severe weather conditions. He was spotted by a crew member of a container ship, *Celtic*

11 *Davis v Stena Line Ltd* [2005] 2 Lloyd's Rep 13.

King, which was in the vicinity and had a lifeboat, with a full crew, on standby to launch. During the course of attempted rescue by the *Koningen Beatrix*'s crew, Mr Davis died.

His widow sued Stena. The issue before the court was whether or not Mr Davis had died as a result of the negligence of the defendants and their crew, in particular the captain in charge of the rescue operation. Possible reasons for the claimant's husband having gone overboard included the finding that, close to the time of the sighting of Mr Davis in the water, the ship had made a sudden change of course in order to avoid a collision. It was mooted that, maybe at this time, he had stumbled into the safety railing and gone over it into the water, or that he fell over a gap in the railing that had been left open. When the police examined the ship in Wales, there was no finding of anything untoward aboard the ship. There was no evidence that Mr Davis deliberately jumped overboard, or that he had taken a foolish and reckless action.

As the claimant's claim did not fall within any of the incidents listed in Art 3(3) of the Convention, the burden was upon the widow to prove negligence, which, from the facts, appeared inconclusive. However, the court held that both Stena as a company and the captain of *Koningen Beatrix* were negligent, and that this led to the death of the claimant's husband. The following reasons relied upon by the court were given:

(a) It was a known fact in the maritime industry, since the publication of the report of the *Estonia* disaster, that a ship such as *Koningen Beatrix*, which was described as a high-sided vessel, made a rescue of a man overboard virtually impossible.
(b) The crew were negligent for failing to give any consideration as to how Mr Davis was to be rescued. The defendants (Stena) were negligent in that neither the master nor the officers and crew had received advice or guidance or underwent training with regard to rescue of a man overboard in such circumstances.
(c) Stena had not carried out any appropriate risk assessment of such an emergency. Even if Stena's shortcomings were representative of the standards of the industry, being applicable at the time, this did not excuse them.
(d) It should have been obvious to the master that *Celtic King*'s fast rescue boat was in a position to rescue Mr Davis considerably faster and with far less danger to him than the planned retrieval of him to *Koningin Beatrix*.

The lessons learnt from this case should be obvious for passenger carriers from a risk management perspective.

2.8 LIMITS OF LIABILITY

The carrier, performing carrier and servants or agents of both shall be entitled to limit their liability as provided by this Convention (Arts 7–11). The carrier and the passenger may agree, expressly and in writing, to higher limits of liability than those prescribed below (Art 10(1)).

2.8.1 Prohibition of contracting out

Any contractual provisions concluded before the occurrence of the incident that has caused the death of or personal injury to a passenger, or the loss or damage to his luggage, purporting to relieve the carrier of his liability towards the passenger or to prescribe a lower limit of liability than that fixed by the Convention, except as provided in Art 8(4) (deductible), or any such provision purporting to shift the burden of proof which rests with the carrier, shall be null and void. However, the nullity shall not render the contract of carriage void, which shall remain subject to the provisions of this Convention (Art 18).

2.8.2 PAL 1974 limits for death or personal injury

Article 7(1) states that, 'the liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 46,666[12] units of account per carriage'. States Parties may fix a higher 'per capita' limit of liability (Art 7(2).

It would seem from the words: 'the liability . . . to a passenger shall in no case exceed', that this low limit for personal injury or death claims is applicable 'per passenger'. However, given that PAL 1974 is silent about how the overall limit for all claims could be calculated,[13] it could be argued that two interpretations may be advanced: (a) the 46,666 SDR is the maximum limit per passenger per carriage,[14] multiplied by the number of the actual claimants or (b) the words 'shall in no way exceed 46,666 units of account per carriage' in Art 7 could be interpreted to mean that this unit may be the *yardstick* 'per capita',[15] which is to be multiplied by the number of passengers carried on board during the particular carriage (in which there was personal injury or death) regardless of the number of claimants. The present author supports the latter interpretation, which may result in higher compensation per passenger, if not all passengers make claims, in the light of the very low limit under the PAL 1974 Convention. Should there be two conflicting interpretations, the one that would be more favourable to the injured party should be adopted by the courts of States in which the PAL 1974 may still apply.

It will be seen under para 4, below, how Art 7 of the PAL 2002 Protocol has been amended, stating expressly that the limit, which has been considerably increased to a maximum of 400,000 units of account, applies per passenger on each distinct occasion (not per carriage), adopting the approach of the LLMC.

The value of the SDR in the national currency, which fluctuates from day to day, shall be calculated at the date of the judgment or the date agreed by the parties (Art 9).

12 Art 7(1). The wording of the original text of the Convention referred to 700,000 gold francs per carriage, which was to be converted to monetary units, each unit consisting of 65.5 milligrams of gold, by virtue of Art 9. The 1976 Protocol stated the limits in SDR, which enables a standard currency to be used in all Conventions, so that it is converted accurately into a country's national currency.

13 Contrast the LLMC Convention, which provides that the 46,666 units of account apply to claims arising on any distinct occasion and are to be multiplied by the number of passengers the ship is certified to carry.

14 See Griggs, Williams, Farr, *Limitation of Liability for Maritime Claims*, 4th edn, p 53.

15 The phrase 'per capita' is used in Art 7(2).

For example, under PAL 1974, the conversion rate of SDR to US dollars, as at 21 June 2013, was (1 SDR = US$1.514630), and the sum of 46,666 SDR would be equivalent to US$70,682.00, approximately, per passenger per carriage.

Although, 30 years ago, at the time of the conclusion of the Convention, this limitation figure might have been satisfactory, it is certainly not today.

Article 7(2) allows States Parties to the Convention to impose higher limits than the 46,666 SDR provided for by the Convention. The UK did so for carriers of international carriage who had their principal place of business in the UK. The limit for death or personal injury under PAL 1974 was set to 300,000 SDR per passenger.[16] However, it should be noted that, since the UK declared that Sched 6 of the MSA 1995 (incorporating the PAL 1974 Convention) will no longer apply from the date on which the Regulations 2012 came into force (SI No 3152), the above limit will no longer apply, as it would be inconsistent with the new limit provided for by the PAL 2002 Protocol. (Regulations 2012 brought into UK law the EU Regulation 392/2009 through which the PAL 2002 Protocol is made part of UK law; see later.)

2.8.3 PAL 1974 limits for loss of, or damage to, luggage

By Art 8 of the PAL 1974 Convention, as amended by the 1976 Protocol, loss of, or damage to, cabin luggage is limited to 833 SDR per passenger per carriage. Damage to vehicles, including whatever luggage is carried within the vehicle, is limited to 3,333 SDR. All other luggage not covered by the above is limited to 1,200 SDR.

2.8.4 Losing the right to limit

Article 13(1) provides that:

> The carrier shall not be entitled to the benefit of the limits of liability prescribed in Arts 7, 8 and 10(1) if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The same test applies to servants or agents of the carrier or of the performing carrier by Art 13(2), if they seek to limit liability for damage resulting from their act or omission.

This test is identical to the test that is incorporated into the LLMC Convention 1976, save for the word 'loss' instead of 'damage' used in the 1976 Convention. The analysis of the test is provided in Chapter 14, above.

2.9 CARRIAGE OF VALUABLES

By Art 5, the carrier shall not be liable for the loss of, or damage to, valuable items such as jewellery, gold, silver, ornaments, artwork and monies, except where such valuables have been deposited with the carrier for the agreed purpose of safe-keeping,

16 The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998, SI 1998/2917, s 3.

in which case the carrier shall be liable up to the limit provided for in Art 8(3), unless a higher limit is agreed upon in accordance with Art 10(1).

2.10 CONTRIBUTORY NEGLIGENCE

Article 6 of the PAL 1974 Convention provides that, if the carrier proves that the death of, or personal injury to, a passenger or the loss of, or damage to, his luggage was caused or contributed to by the fault or neglect of the passenger, then the court may exonerate the carrier wholly or partly from his liability in accordance with the provisions of the law of the State of that court. As far as the UK is concerned, the law of contributory negligence is dealt with by the Law Reform (Contributory Negligence) Act 1945.

2.11 LIABILITY ARISING THROUGH THE NEGLIGENCE OF THE SERVANTS OR AGENTS OF THE CARRIER

It was thought that, even though the carrier is liable for the acts of his servants or agents while engaged in employment with the carrier, passengers may try to circumvent the limits of the Convention by seeking to claim directly against the servant or agent. In order to prevent this from occurring, Art 11 of the Convention allows a servant or agent to bring themselves within the Convention and its limits, as long as they are able to show that their acts or omissions that led to the damage being claimed occurred when they were acting within the scope of their employment.

2.12 TIME LIMIT

There is an overall time limit for any action under the Convention of 2 years, provided for by Art 16. For personal injury claims, time starts to run from the date of the passenger's disembarkation. For claims relating to the death of a passenger, time starts to run from the date when the passenger should have disembarked. If the passenger suffers a personal injury, which leads to his or her death, then the time starts from the date of death, as long as this does not exceed 3 years from the disembarkation date.

For the loss of, or damage to, luggage, time starts from the date of disembarkation or from the date when disembarkation should have taken place, whichever is later.

In addition, Art 15 provides that the passenger shall give written notice to the carrier or his agent in case of apparent damage to luggage, before or at the time of disembarkation, as far as cabin luggage is concerned, and before or at the time of redelivery as far as all other luggage is concerned. If the damage is not apparent, such notice should be given within 15 days from the date of disembarkation or the redelivery date, or from the time when such redelivery should have taken place. In the event of failure to comply with this provision, it shall be presumed, unless the contrary is proved, that the luggage was received undamaged.

2.13 JURISDICTION

When a claimant pursues a claim against a carrier under the Convention, there are provisions dealing with the jurisdiction in which to bring the action.

Article 17(1) of the PAL 1974 Convention affords the claimant a choice of jurisdiction in which to sue the carrier. As long as the court concerned is located in a State Party to the Convention, the claimant may bring a claim against the carrier in: (a) the court of the place of permanent residence, or principal place of business of the defendant; or (b) the court of the place of departure or that of the destination according to the contract of carriage; or (c) a court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to the jurisdiction in that State; or (d) the court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to the jurisdiction in that State.

The parties may agree, after the occurrence of the incident, that the claim shall be submitted to any jurisdiction or to arbitration (Art 17(2)).

Apparently, although there are four options of jurisdiction, there are in essence two, that is, the jurisdiction of a court of a State Party where the defendant has its place of business, or of a court of the place of departure or destination, because the other two options are subject to the condition that the defendant has its place of business there.

2.14 CONTRACTS OF CARRIAGE THROUGH TRAVEL AGENTS

Contracts made in the UK will include standard terms of the cruise operator's contract, the UK Package Travel Regulations (PTR) 1992[17] and the Athens Convention.

Regulation 15 of the PTR 1992 provides that a cruise operator is liable to the consumer for the proper performance[18] of the obligations under the contract, whether performed by him or by other suppliers, and is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract, unless the improper performance is due neither to any fault of the cruise operator nor to that of another supplier of services.

The exception is linked to either the fault of the consumer, or to unforeseen or unavoidable circumstances, which could not have been avoided by the exercise of due care, or an event that, even with all due care, could not have been foreseen or forestalled.

These Regulations will have to be amended to be in line with the Athens Convention 2002 and the EU Regulation 392/2009 implementing the Convention at the EU level. Therefore, the court decisions with regard to issues concerning the

17 The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, implementing Council Directive 90/314/EEC on package travel for the protection of consumers.

18 The test is that reasonable skill and care will be used in the rendering of services: *Hone v Going Places* [2001] EWCA Civ 947.

interpretation of the PTR 1992, which were referred to in the previous edition of this book, are omitted from this edition.

It should be noted that passengers can claim compensation from tour operators for diminution in value, consequential pecuniary loss covering out-of-pocket expenses, physical inconvenience and discomfort[19] and mental distress.[20]

The time limit provided by Art 16 of the Convention, which is 2 years and not 3, as it is for other personal injury claims,[21] will prevail, as it was held in ***Norfolk v My Travel Group plc***:[22] The claimant's attempt to circumvent the application of the PAL 1974 Convention failed. She had booked her cruise holiday through a travel agent. She suffered personal injury during the carriage. After the 2-year time limit had lapsed, she presented her claim for personal injury as a statutory claim for damages for improper performance of the contract by the travel agent and brought her claim under the PTR 1992. The Plymouth County Court rejected this approach and held that the Convention applied, and, therefore, the claim was time barred. The court further held that the fact that the 1992 Regulations flowed from a Council Directive did not affect the standing of the International Convention, and the provision of the Human Rights Convention had no bearing on the interpretation of International Conventions.[23]

However, as it will be seen later under 4.8, a further maximum time limit is provided by Art 16(3) of the Athens Convention 2002.

3 RELATIONSHIP BETWEEN PAL 1974, THE LLMC 1976 AND THE LLMC PROTOCOL 1996

3.1 PAL 1974 AND LLMC 1976

As has been seen in Chapter 14, above, under the LLMC 1976, ship-owners (and others) are able to limit their liability on the basis of the gross tonnage of a ship for maritime claims other than passenger claims, subject to exceptions in Art 3, provided they are able to bring the various claims within Art 2. The Convention provides for a 'global' limitation of liability: in other words, it caps the amount that the ship-owner is liable for various different claims, with the exception of claims brought for pollution damage and damage from HNS, which are governed by the Liability and Compensation Conventions (see Chapter 16, below).

The tonnage limitation does not apply to passengers' claims; by contrast to general limits based on the tonnage of a ship under Art 6 of the LLMC, Art 7(1) of the LLMC 1976 adopted the sum of 46,666 SDR limit of the PAL 1974 Convention

19 *Stedman v Swan's Tours* (1951) 95 SJ 727; *Farley v Skinner (No 2)* [2001] UKHL 49, [2002] 2 AC 732; *Adcock v Blue Sky Holidays* [1982] CLY 74.u (CivDiv, CA): in assessing the diminution in value, the court had to assess the difference between what the supplier contracted to provide and what was actually provided; *Milner v Carnival* [2010] EWCA Civ 389.

20 *Jarvis v Swans Tours Ltd* [1973] QB 233.

21 Under the Limitation Act 1980, the time limit in which to bring a claim for personal injury is 3 years from the date of the incident.

22 *Norfolk v My Travel Group plc* [2004] 1 Lloyd's Rep 106.

23 The judge gained support for his view from the judgment of Lord Hope in a previous case, relating to the Warsaw Convention, in *Sidhu v British Airways plc* [1997] 2 Lloyd's Rep 76, [1997] AC 430.

for passengers' claims, which was increased by the 1996 Protocol to 17,500 SDR (see 3.2, below). Article 7(1) of the LLMC differs from Art 7(1) of the PAL 1974 Convention in three respects: (a) it sets the overall limit of liability for passengers' claims by multiplying the units of account by *the number of passengers that the vessel is certified to carry*; (b) it provides for the limit of claims arising on any distinct occasion and not per carriage; and (c) it caps the liability to 25 million SDR. Therefore, the overall limitation fund on each occasion has been higher under the LLMC (even in the unamended form) than what is provided by the PAL 1974 limit.

However, if all passengers of large cruise ships made a claim under the LLMC, their individual claims would be reduced proportionately, and, thus, with regard to very large cruise ships, the proportion for each passenger could be reduced considerably; the cruise owner was protected by the upper limit of 25 million.

3.2 THE 1996 PROTOCOL TO THE 1976 LLMC AND PAL 1974

The 1996 Protocol raised both the general limits (Art 6) and the limit for passenger claims (Art 7) and introduced a procedure simplifying the process of raising the limits in the future.[24] For personal injury or loss of life claims arising on any distinct occasion, the limit was raised (by Art 4 of the Protocol amending Art 7) to 175,000 SDR multiplied *by the number of passengers that the ship is authorised or certified to carry*, and the 25 million SDR ceiling was removed.

The 1996 Protocol entered into force on 13 May 2004. It has 47 States Parties, as compared with the 54 LLMC States Parties. The UK is a State Party to the 1996 Protocol,[25] and, accordingly, the 1976 Convention has to be read in accordance with the 1996 Protocol.

The enabling Order by which the Protocol was enacted in the UK confined the limit of 175,000 SDR to non-seagoing ships.[26] In addition, the UK enabling Order applies this limit per passenger, whereas the Protocol multiplies this sum by the number of passengers the ship is certified to carry (see para 6 of Pt II of Sched 7 of the MSA 1995, which refers to the limit *per passenger* and deletes the remaining sentence of Art 7(1), which provides for the multiplication of the unit of account with the number of passengers).

With regard to seagoing ships, the UK did not apply the above limit. However, as seen earlier (para 2.8.2), the limit for such claims was increased to 300,000 SDR per

24 There are more dramatic changes with regard to the increase of the limits for the tonnage limitation by the IMO Resolution LEG 5(99) 2012. The amendments to limits have become easy since the procedure of tacit acceptance was included in the Protocols.

25 The enabling power that brought the 1996 Protocol into force nationally was the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998, SI 1998/1258 (see, further, Ch 14, above).

26 S 7(b) of the Order, which amends the 1976 Convention, provides:

before paragraph 3 there shall be inserted, 2A. Paragraph 1(a) of article 2 shall have effect as if the reference to 'loss of life or personal injury' did not include a reference to loss of life or personal injury to passengers of seagoing ships.

Article 7(e) of the Order further expressly provides: 'Article 7 [of the 1976 Convention] shall not apply in respect of any seagoing ship; and shall have effect in respect of any ship which is not seagoing . . .'

passenger (not being calculated by multiplying the unit of account by the number of passengers the ship is certified to carry), and this limit has been applied since 1999 to carriers whose principal place of business has been in the UK.[27]

However, with the PAL 2002 Protocol being in force in EU countries with regard to ships not being of Class A and B (see later), the above limit, which was linked to PAL 1974, will not be applicable in the future. The PAL 1974 Convention was denounced by the UK by enacting the disapplication of Sched 6 to the MSA 1995, as will be seen in the explanatory notes to the SI No 3152, implementing the 2012 Regulations. (See, also, the EU Regulation 392/2009, 4.2, below.)

The system has become very complex owing to a maze of intermediate amendments brought to Scheds 6 and 7 of the MSA 1995 by the various statutory instruments, as is shown also in Chapter 14, and, unavoidably, they can cause confusion in their application.

4 THE 2002 PROTOCOL TO THE PAL 1974 CONVENTION (PAL 2002)

Having made a brief introduction to the Protocol at the beginning of this Chapter, the basic elements of it are summarised below. The provisions of the PAL 1974 Convention regarding definitions (seen under 2.3, above), which remain unchanged under PAL 2002, are not repeated here. As mentioned earlier, there is consolidation of the two instruments into the Athens Convention 2002.

4.1 THE STATUS OF THE PAL 2002 PROTOCOL INTERNATIONALLY

Following several years of work at the IMO's Legal Committee meetings, the 2002 Protocol to the Athens Convention was concluded on 1 November 2002, after its acceptance by the Diplomatic Conference on 20 October 2002.

It was decided that it will be known as the Athens Convention 2002 and, when it enters into force, it will entirely replace the PAL 1974 Convention. Therefore, when States ratify it, they will have to denounce the 1974 Convention and the subsequent Protocols of 1976 and 1990.[28]

It will enter into force 12 months after at least 10 States have either signed it *without reservation* as to ratification, acceptance or approval, or have deposited instruments of ratification, acceptance, approval or accession with the Secretary General of the IMO.[29] As at 31 May 2013, there have been 9 States[30] out of the required 10 that have ratified the Protocol; therefore, it is not yet in force internationally. That means that, other than EU Members, the rest of the world applies either the PAL 1974 Convention, or national law.

27 SI 1998/2917, Art 3.
28 Athens Convention 2002, Art 17(5).
29 Ibid, Art 20.
30 Albania, Belize, Denmark, Latvia, Netherlands, Palau, St Kitts and Nevis, Serbia, Syria.

4.2 STATUS OF THE PAL 2002 PROTOCOL AT THE EU LEVEL

The EU, by Regulation 392/2009, incorporated the 2002 Protocol into EU law as part of the Erika III measures (see Chapter 2, above). It provides that the Regulation shall apply from the date of the entry into force of the 2002 Protocol for the Community, and in any case from no later than 31 December 2012. Thus, it has been in force since 1 January 2013, notwithstanding that the Protocol is not yet in force internationally.

In effect, the EU has pre-empted the application of the Protocol within the EU Members through the Regulation. However, EU Members will have to ratify the Protocol independently, because the EU does not have competence over all issues that are the subject of the Protocol, such as the right of individual Members to fix higher limits.

In addition, the EU adopted two Council Decisions, 2012/22/EU[31] (concerning the accession of the EU to the Protocol – except for Arts 10 and 11 relating to jurisdiction, recognition and enforcement of judgments)) and 2012/23/EU[32] (concerning the accession of the EU to the Protocol, including a variation as to jurisdiction, recognition and enforcement provisions). The Decisions stipulate that Member States should take the necessary measures to ratify or accede to the Protocol.

4.3 TWO BASES OF LIABILITY AND TWO-TIER LIMITS UNDER THE PAL 2002

By contrast to the fault or presumed fault basis of liability under the PAL 1974 Convention, the consolidated instrument of the Athens Convention 2002 provides:

(a) strict liability for loss suffered as a result of death or personal injury to a passenger caused by certain defined shipping incidents;
(b) fault-based liability for loss suffered as a result of death or personal injury to a passenger not caused by a shipping incident and for loss of, or damage to, cabin luggage;
(c) presumed fault for loss of, or damage to, cabin luggage caused by a shipping incident and for loss of, or damage to, other luggage, whether or not it was caused by a shipping incident. These are explained below.

No action for damages for the death of, or personal injury to, a passenger, or for the loss of, or damage to, luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention (Art 14).

'Loss' shall not include punitive or exemplary damages (Art 3(4)(d)).

31 OJ 12.01.2012, L 8/1.
32 OJ 12.01.2012, L 8/13.

4.3.1 Strict liability for death or personal injury caused by a shipping incident

4.3.1.1 First-tier limit

Article 3(1) provides that, for loss suffered as a result of the death of, or personal injury to, a passenger caused by a shipping incident (which is defined in Art 3(5)(a) as a shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship), the carrier shall be liable (strict liability) to the extent that the loss in respect of that passenger on *each distinct occasion* does not exceed 250,000 units of account[33] per passenger, unless the carrier proves that the incident:

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exception, inevitable and irresistible character;[34] or
(b) was wholly caused by an act or omission done with the intent to cause the incident by a third party.

A defect in the ship is defined in Art 3(5)(c) as meaning any:

> malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation, and disembarkation of passengers, or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding; or when used for the launching of life-saving appliances.

If the incident was due to a 'defect in the ship', it will raise issues of whether or not there has been a proper implementation of the SMSs of the company under the ISM Code, and the other provisions on safety of passenger ships under the SOLAS Convention (see Chapters 2 and 3, above); subject to evidence, a finding of breach of the safety regulations may result in loss of the right to limit liability, if the test provided by Art 13 is met (see Chapters 4 and 14, above).

4.3.1.2 Second-tier limit

If, and to the extent that, the loss resulting from a 'shipping incident' exceeds the above strict liability limit, the carrier shall be further liable up to SDR 400,000[35] per passenger (second tier provided by Art 7), unless he proves that the incident that caused the loss occurred without his fault or neglect. 'Fault or neglect' includes the fault or neglect of the servants of the carrier, acting within the scope of their employment (Art 3(5)(b)).

Article 6 provides for the contributory fault defence, which may exonerate the carrier wholly or partly from his liability in accordance with the law of the court seised of the matter.

33 SDR as provided by Art 9; as at 21 June 2013, the conversion into US dollars was 378,657.00, at the rate of US$1.514630 per SDR, and UK pounds Sterling 244,612.00, at the rate of 0.978445 pence per SDR.

34 It follows the same pattern of the exemptions from liability as under the CLC 1992, of which (including the meaning of the natural phenomenon) see Ch 16, below.

35 As at 21 June 2013, 400,000 SDR corresponded to, approximately, US$605,852.00; see comparison of amounts in different currencies at the end of the chapter.

4.3.2 Fault-based liability for death or personal injury caused by a non-shipping incident

If any death or personal injury loss is not caused by a 'shipping incident', liability is determined on the fault-based system, and the claimant bears the burden of proving such fault or neglect (Art 3(2)).

The liability of the carrier shall, in no case, exceed 400,000 units of account (SDR) per passenger on each distinct occasion (Art 7), unless the right to limit is lost, as provided for in Art 13.

4.3.3 Loss of, or damage to, cabin luggage

4.3.3.1 Fault based

For loss suffered as a result of the loss of or damage to cabin luggage, the carrier shall be liable if the incident that caused the loss was due to the fault or neglect of the carrier (Art 3(3)).

4.3.3.2 Presumed fault

If the loss was caused by a 'shipping incident', the fault or neglect of the carrier shall be presumed (Art 3(3)). The presumption may be rebutted by evidence.

4.3.4 Loss of, or damage to, other luggage or vehicles – presumed fault

For loss of, or damage to, any luggage, other than cabin luggage, the carrier shall be liable, unless he proves that the incident that caused the loss occurred without his fault or neglect (Art 3(4)).

4.3.5 Liability in relation to incidents occurring during the carriage

Article 3(6) specifically states that the liability of the carrier under Art 3 relates only to loss arising from incidents that occurred in the course of the carriage. The burden of proof that the incident occurred in the course of the carriage, and the extent of the loss, shall lie with the claimant. The period of carriage is defined in Art 1(8), as seen under 2.3, above.

4.4 PERIOD AND EXTENT OF LIABILITY

By Art 4, the carrier shall remain liable for the entire carriage, according to the provisions of the Convention, even if the performance of the carriage has been entrusted to a performing carrier (see 2.3, above). Furthermore, the carrier shall be liable for the acts and omissions of the performing carrier's servants and agents acting within the scope of their employment. The performing carrier shall also be subject and entitled to the provisions of the Convention for the part of the carriage performed by him. Where, and to the extent that, both the carrier and the performing carrier are liable, their liability shall be joint and several.

4.5 RIGHT OF RECOURSE OR OF THE DEFENCE OF CONTRIBUTORY NEGLIGENCE

By Art 3(7), nothing in this Convention shall prejudice any right of recourse of the carrier against any third party, or the defence of contributory negligence under Art 6 of the Convention.

4.6 FINANCIAL SECURITY (COMPULSORY INSURANCE AND DIRECT ACTION)

4.6.1 Compulsory insurance

The idea of compulsory insurance for carriers is not new. The International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992 included the use of compulsory insurance as a means of forcing carriers to meet any potential liability. Furthermore, the HNS Convention 2010,[36] the Bunkers Convention 2001[37] (see Chapter 16, below) and the Wreck Removal Convention 2007[38] (Chapter 13, above) have included compulsory insurance as part of their scheme.

Under the Athens Convention 2002, Art 4*bis*, all ships that are registered in a State Party – and are licensed to carry 12 or more passengers – have to carry insurance or some other form of financial security, at least up to the sum of 250,000 SDR per passenger on each distinct occasion, for claims arising out of death or personal injury. A model form of the certificate required is produced as an Annex to the Convention.

It is recognised that many ships that are in operation may not be registered in any country that is likely to be a State Party to the Athens Convention 2002. In order to encourage ships that are registered in countries that have not ratified the Convention, it obliges States Parties to refuse access to their ports as regards all ships that are licensed to carry 12 or more passengers and do not carry the requisite financial security, wherever they are registered (Art 4*bis* (13)).

4.6.2 Direct action

Keeping in line with the other liability Conventions, the Athens Convention 2002 contains a provision allowing claimants to seek direct action against the carrier's insurers for any claim that may arise (Art 4*bis* (10)).

This makes it easier and faster for claimants to obtain judgment for any claim arising under the Convention. The reason behind this provision is that it may be costly and time-consuming for a claimant to find out where to sue a large company that may have several offices and subsidiary companies in several jurisdictions. By suing the insurer directly, claims can be more efficiently settled, leaving the insurers to take action against their assured, if necessary.

36 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances 1996, but it is now known by the date of its adoption, 2010.

37 International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

38 The Nairobi International Convention on the Removal of Wrecks was adopted on 18 May 2007.

By Art 4*bis* (10), the limit of compulsory insurance of 250,000 SDR per passenger applies also as a limit of liability of the insurer, or provider of financial security, even if the carrier, or performing carrier, is not entitled to limit.

4.6.3 Defences

The insurer may invoke the defences (other than bankruptcy or winding up) that the carrier would have been entitled to invoke in accordance with the Convention. Furthermore, the insurer may invoke the defence of wilful misconduct[39] by the assured (carrier), but he shall not invoke any other defences that he might have been entitled to invoke in proceedings brought by the assured against the insurer.[40]

This provision, coupled with the provisions of the new Third Parties (Rights Against Insurers) Act 2010, is very significant, because the insurer will not be allowed to raise defences that he might have had against the assured arising under the terms of the insurance policy, as was the case under the repealed Third Parties (Rights Against Insurers) Act 1930. Consequently, if the assured made a material non-disclosure, or he was in breach of a warranty or a condition under the policy, the insurer cannot rely on such defences. 'Pay first' clauses found in policies of insurance provided by P&I clubs, which require the assured to pay sums due to the third party before claiming under the policy, will not apply when rights have been transferred under the 2010 Act.

4.7 THE RIGHT TO LIMIT LIABILITY AND LOSS OF IT

The limits prescribed below apply to the aggregate of the amounts recoverable in all claims arising out of the death of, or personal injury to, any one passenger or the loss of, or damage to, his/her luggage. If the carriage is performed by a performing carrier, the aggregate of the amounts recoverable from the carrier and performing carrier, or their servants and agents, shall not exceed the highest amount that could be awarded against either the carrier or performing carrier under the Convention; but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to him (Art 12).

The test for the loss of the right to limit under Art 13 is the same as it is under both the PAL 1974 and the LLMC 1976.In particular, Art 13(1) provides:

> The carrier shall not be entitled to the benefit of the limits of liability prescribed in Art 7 and 8 or under Art 10(1) (in the event that higher amounts than what is provided by the Convention

39 Despite lengthy discussions and recommendations to the IMO's Legal Committee about dropping the 'wilful misconduct' defence, as the purpose of compulsory insurance is to protect the victims of disasters, it is unfortunate that it has been maintained. It is also unfortunate that the alternative proposal for protection of victims by the provision of accident insurance, which is not subject to the defence of wilful misconduct, was not accepted. One argument in support of retaining the defence of wilful misconduct was that it would discourage owners who may be minded to scuttle their ship for gain, or deliberately do not maintain the ship in a seaworthy condition. The other argument in favour of maintaining this defence was that it would be unfair to the other owners, who are insured mutually in the P&I clubs, to have to finance the insurance for such conduct by substandard owners. However, balancing the interests of the owners with the interests of passengers, it would be fairer if the passengers were protected, because they are not in a position to vet a substandard ferry owner, whereas the P&I managers and directors are in such a position.

40 The insurer has the right to require the carrier and performing carrier to be joined in the proceedings (Art 4*bi*s (10)).

have been agreed between the carrier and the passenger), if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

The same test applies to the servants or agents of the carrier under Art 13(2).The analysis of the occasions in which the loss of the right to limit may arise is seen in Chapter 14, above.

4.7.1 Limits applied for death or personal injury

The second-tier limit (400,000 SDR) under Art 7 applies to claims that exceed the first-tier limit, for which there is strict liability up to 250,000 SDR under Art 3.

Under Art 7(2), there is a provision within the Convention allowing national States to increase the limits within their own national laws.

4.7.2 Limits applied for loss of, or damage to, luggage and vehicles

The limit for loss of, or damage to, cabin luggage is 2,250 SDR per passenger per carriage. For damage to vehicles, including any luggage within the vehicle, the limit is 12,700 SDR per vehicle per carriage. For all other luggage, the limit is 3,375 SDR per passenger per carriage (Art 8(1)(2)(3)).

The carrier may agree with the passenger a deductible, not exceeding 330 units of account in the case of damage to a vehicle, and not exceeding 149 SDR per passenger in the case of loss of, or damage to, other luggage, such sum to be deducted from the loss or damage (Art 8(4)).

4.7.3 Valuables

By Art 5, it is provided that the carrier shall not be liable for the loss of, or damage to, movies, negotiable securities, gold, silverware, jewellery, ornaments, works of art, or other valuables, except where such valuables have been deposited with the carrier for the agreed purpose of safe-keeping, in which case the carrier shall be liable up to the limit provided for Art 8(3), namely 3,375 SDR, unless a higher limit is agreed upon in accordance with Art 10(1).

4.7.4 Interest and legal costs

Interest on damages and legal costs are not included in the limits of liability prescribed in Arts 7 and 8, above (Art 10(2)).

4.8 TIME LIMIT FOR CLAIMS

The requirement that the time bar expires after 2 years with regard to all types of claim is maintained (Art 16(1)). Some changes have been brought by the 2002 Protocol in the method of calculating the commencement of the time bar, and, in addition, an all-embracing maximum time limit is provided.

In particular, for personal injury claims, the time commences to run from the date of disembarkation of the passenger (Art 16(2)(a)).

In case of death occurring during carriage, the time commences from the date when the passenger should have disembarked, and, in the case of personal injury occurring during carriage, which results in death after disembarkation, from the date of death, provided that this period shall not exceed 3 years from the date of disembarkation (Art 16(2)(b)).

With regard to loss of, or damage to, luggage, the time starts from the date of disembarkation or when disembarkation should have taken place, whichever is the later (Art 16(2)(c)).

In no case shall an action under the Convention be brought after expiration of any one of the following periods of time (Art 16(3):

(a) a period of 5 years, which begins with the date of disembarkation or when disembarkation should have occurred, whichever is the later; or
(b) if earlier, a period of 3 years beginning with the date when the claimant knew or ought reasonably to have known of the injury, loss or damage caused by the incident.

Notwithstanding the provisions in paras 1–3 of Art 16,the period may be extended by a declaration of the carrier, or by agreement of the parties, in writing, after the cause of action has arisen (Art 16(4)).

Article 15 requires written notices of claims to be given by the claimant to the carrier in case of apparent damage to cabin luggage, before or at the time of disembarkation and, as regards other luggage, before or at the time of its delivery.

In case of non-apparent damage, the required notice shall be given 15 days from the date of disembarkation or redelivery, or from the time when such redelivery should have taken place.

Unless the claimant complies with the above provisions of notice, he/she will be presumed, unless the contrary is proved, to have received the luggage undamaged.

4.9 COMPETENT JURISDICTION AND RECOGNITION OF JUDGMENTS

The same four heads of jurisdiction as under the PAL 1974 Convention are provided by Art 17 of the Athens Convention 2002, as amended by Art 10 of the Protocol, which provides for 'Competent Jurisdiction' of the court of the State of: (a) the permanent residence or principal place of business of the defendant; (b) departure or that of the destination according to the contract of carriage; (c) the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State; (d) where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State (Art 17(1)).

In addition, the actions under Art 4*bis* against the insurers could be brought in any of the jurisdictions provided for claims against the carrier (Art 17(2)).

After the occurrence of the incident, the parties are free to agree that the claim for damages shall be submitted to any jurisdiction or to arbitration (Art 17(3)).

The additional Art 17*bis*, as amended by Art 11 of the Protocol, provides in para 1 that any judgment given in a court having jurisdiction, which is enforceable in the

State of origin and there is no longer subject to ordinary forms of review, shall be recognised in any State Party, except where the judgment was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his or her case.

A judgment recognised under para 1 of this Article shall be enforceable in each State Party as soon as the formalities required in that State have been complied with, and such formalities shall not permit the merits of the case to be re-opened (Art 17*bis*(2)).

Paragraph 3 of Art 17*bis* allows a State Party to this Protocol to apply other rules for recognition and enforcement, provided that their effect is to ensure that judgments are recognised and enforced at least to the same extent as under paras 1 and 2 of this Article.

In this connection, the Brussels I Regulation (44/2001), as amended by the recast Regulation 2012 (see Chapter 7 of Vol 1 of this book), relaxes the rules of recognition and enforcement of judgments of EU courts as between EU member States. Council Decision 2012/23/EU concerning the accession of the EU to the Protocol provides, in para 3 of the recitals, that, because Arts 10 and 11 of the Athens Protocol affect the Brussels I Regulation on jurisdiction and enforcement of judgments in civil and commercial matters, the Union has exclusive competence as regards these Articles. Therefore, the Decision makes it clear, in para 4 of the recitals, that Art 10 of the Athens Protocol, and, hence, Art 17 of the consolidated Athens Convention 2002, should take precedence over the relevant Union rules on jurisdiction upon accession of the Union to the Protocol.

Paragraph 5 of the recitals provides that the rules on recognition and enforcement of judgments laid down in Art 11 of the Athens Protocol, and, hence, Art 17*bis* of the Athens Convention 2002, should not take precedence over the rules of the Union as regards Denmark and Members of the Lugano Convention.

By Art 3 of the Decision, the following declaration is made about Art 17*bis*(3) of the Athens Convention (see above), as amended by Art 11 of the Protocol: judgments on matters covered by the Athens Protocol 2002, when given by a court of a Member State of the Union, shall be recognised and enforced in a Member State of the EU in accordance with the relevant rules of the EU on the subject.

4.10 INVALIDITY OF CONTRACTUAL PROVISIONS

It is clearly stated, in Art 18, that contractual terms concluded before the occurrence of the incident causing the death of, or personal injury to, a passenger, or the loss of, or damage to, the passenger's luggage, purporting to oust the provisions of the Convention with regard to liability, burden of proof and the limits, as specified by the Convention, shall be null and void, but the nullity of those provisions shall not render the contract of carriage void, which shall remain subject to the provisions of the Convention.

5 THE IMO RESERVATION/GUIDELINES 2006

5.1 THE BACKGROUND

It took 6 years to produce the Protocol, which was met with an undercurrent of opposition from ship-owners and the insurance market. As no progress was being made to implement the Protocol, the EU took steps to oblige its members to implement the Protocol into their national legislation. As a first step, the Commission presented a proposal for a Council Decision in June 2003, by which the Community would become a contracting party to the Protocol. Later, as the industry and the governments were not moving towards implementation by 2005, the Commission proposed that the Protocol should be implemented at the EU level by a passenger liability Regulation.[41]

The areas of concern about the implementation of the Protocol had been the introduction of compulsory insurance for passenger ships, coupled with direct action against the P&I insurers, who had also been concerned about the steep increase of the limits. It had been argued that there would not be sufficient insurance capacity in the market. In addition, as P&I clubs, which insure third-party liabilities, operate on the principle of mutual insurance, they were, understandably, concerned that non-passenger carriers, who are members of the clubs, would refuse to cover the high risks posed by the owners of large passenger ships.

However, it was eventually accepted that, like the other modern Conventions that provide for compulsory insurance and direct action against the insurer, the 2002 Protocol should be in line with those Conventions. The issue of market capacity was resolved by restructuring the overall excess insurance cover of the P&I group through the reinsurance market.

A further serious issue of concern for P&I clubs, which had been a stumbling block to the progress of ratification of the Protocol, was the enormous potential exposure of P&I clubs to terrorist risks, when an incident of loss was partially caused by terrorists' activities and partially by the failure of the owners to protect passengers adequately from terrorism. Such loss would not be covered by the exception of Art 3(1)(b) of the 2002 Protocol. P&I clubs, apart from certain exceptions, do not insure liabilities arising from terrorist acts, and, considering that there is aggregation of claims with regard to passengers carried on a ship, the prospect of liability for damage arising from terrorist acts was unattractive. It was necessary, therefore, to find a solution.

It was recommended by the IMO Legal Committee, at its 90th session, that, if terrorist risks were excluded from the Convention by a Reservation when a State ratifies the Convention, this would speed up the ratification process, because it would be possible to obtain insurance for those risks from a separate entity. Then, the P&I clubs would be prepared to issue Athens insurance certificates if war and terrorist risks were kept out.

41 COM(2005) 592 final.

The European Commission took note of these concerns, which were addressed at a global level within the IMO, and halted its action to impose a solution at a regional level.

The problems were solved in Paris, 16–19 October 2006, where the IMO Legal Committee, at its 92nd session, adopted the proposed Guidelines and Reservation for the implementation of the Protocol, and the IMO issued a circular No 2758 (dated 20 November 2006) containing the Guidelines and Reservation, mentioned in the introduction to this chapter. The Guidelines, which represent a good compromise, confirm a broad consensus that the 2002 Protocol should be ratified and enter into force. The adoption of the Reservation/Guidelines is final, not requiring another Diplomatic Conference.[42]

5.2 THE BROAD PROVISIONS OF THE RESERVATION/GUIDELINES

5.2.1 War- or terrorism-risks insurance

Liability incurred owing to war or terrorism is capped up to the lower of two amounts: either 250,000 SDR per passenger on each distinct occasion, or 340 million SDR overall per ship on each distinct occasion (1.2). It is considered that this will match the level of market insurance. Such insurance shall cover, under Guideline 2.2, liability for loss suffered as a result of death of, or personal injury to, a passenger caused by:

(a) war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power;
(b) capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat;
(c) derelict mines, torpedoes, bombs or other derelict weapons of war;
(d) act of any terrorist or any person acting maliciously or from a political motive and any action taken to prevent or counter any such risk;
(e) confiscation or expropriation.

This liability may be subject to the following exceptions, limitations and requirements under paras 2.2.1 and 2.2.2:

(a) war automatic termination and exclusion clause;[43] and
(b) an upper limit: in the event the claims of individual passengers exceed, in their aggregate, the sum of 340 million SDR overall per ship on any distinct occasion, the carrier shall be entitled to invoke limitation of his liability in the amount of 340 million SDR, always provided that:

42 Rosaeg Erik, 'Light at the end of the tunnel for passengers', editorial in the *Journal of International Maritime Law*, vol 12, issue 5, October 2006; Professor Rosaeg, Director of the Scandinavian Institute of Maritime Law, University of Oslo, Norway, played an instrumental role in the process of finding solutions to the various issues involved in the Protocol.

43 The insurance cover shall terminate automatically upon the outbreak of war between the UK, USA, France, the Russian Federation and the People's Republic of China.

(i) this amount should be distributed among claimants in proportion to their established claims;
(ii) the distribution of this amount may be made in one or more portions to claimants known at the time of the distribution; and
(iii) the distribution of this amount may be made by the insurer, or by the court or other competent authority seised of jurisdiction by the insurer in any State Party in which legal proceedings are instituted in respect of claims allegedly covered by the insurance.

Furthermore, the reservation or undertaking in para 1.2 of the Reservation (specifying the limit of either 250,000 SDR per passenger, or 340 million SDR per ship) will apply regardless of the basis of liability in Art 3(1)(2) of the Convention (that is, shipping incident or not), and notwithstanding anything to the contrary in Art 4 (performing carrier) or Art 7 (limit of 400,000 SDR of liability for death or personal injury per passenger); in any event, the reservation or undertaking does not affect the operation of Art 10 (referring to agreement of higher limits between the carrier and the passenger than those specified in Arts 7 and 8) and the operation of Art 13 (loss of the right to limit).

5.2.2 Non-war risks insurance

Guideline 2.3 provides that non-war risks insurance should cover all perils subject to compulsory insurance, other than those risks listed in Guideline 2.2, whether or not they are subject to exceptions, limitations or requirements in 2.1 and 2.2, meaning that the absolute minimum of compulsory insurance is 250,000 SDR per passenger.

5.2.3 Blue Cards

There will be a 'Blue Card' issued by a war-risks insurer attesting that insurance cover is in force, and another Blue Card issued by a P&I mutual cover insurer. The wordings of both cards and of a model certificate of insurance are provided in Appendix B to the Guidelines.

Both war-risks and non-war risks insurance[44] are subject to exceptions with regard to loss or damage caused by radioactivity and cyber-attack.

6 THE PASSENGERS LIABILITY REGULATION (PLR 2009)

The 392/2009 Regulation, as explained in the introduction, brings together the 2002 Protocol and the IMO Reservation/Guidelines regarding the provision of insurance for war and non-war risks.

44 Raets Marine P&I marine insurance specialists offer both P&I and war risk insurances.

6.1 SCOPE

Article 1 provides that the Regulation lays down the EU regime relating to liability and insurance for the carriage of passengers by sea as set out in:

(a) the relevant provisions of the Athens Convention 1974, as amended by the 2002 Protocol; and
(b) the IMO Reservation and Guidelines for the implementation of the Athens Convention adopted by the IMO Legal Committee in 2006.

The effect of the Regulation, being in force since the beginning of 2013, is that passenger vessel operators, whether EU based on not, will not be able to trade within the EU without having complied with the compulsory insurance requirements, as will be seen below.

6.2 APPLICATION

By Art 2, it applies to:

(a) any international carriage within the meaning of the Athens Convention 2002; and
(b) carriage by sea within a single EU Member State on board ships of Class A and B (from 2016 and 2018, respectively), as defined by Art 4 of Directive 98/18/EC;

where:

(i) the ship is flying the flag of, or is registered[45] in, a Member State;
(ii) the contract of carriage has been made in a Member State; or
(iii) the place of departure or destination, according to the contract of carriage, is in a Member State.

Member States may apply this Regulation to all domestic seagoing voyages.

As provided by Art 5, it does not modify the rights or duties of the carrier under national legislation implementing the LLMC 1976.

6.3 ADDITIONAL PROVISIONS

It further provides for compensation with respect to:

(a) mobility equipment or other specific equipment, if the incident that caused the loss was due to the fault of the carrier, which shall be presumed if the loss was caused by a shipping incident. The compensation shall correspond to the replacement value of the costs of repairs (Art 4);

45 Recital 12 defines the expression 'is registered' to mean that the flag State for the purposes of bareboat charter-out registration is either a Member State or a State Party to the Athens Convention.

(b) advance payment to claimants for death or personal injury caused by a shipping incident, sufficient to cover immediate economic needs within 15 days of the identification of the person entitled to damages (in the event of death, the payment shall not be less than €21,000). An advance payment shall not constitute admission of liability and may be offset against any subsequent sums paid on the basis of this regulation (Art 6).

In addition, it requires information to be given to passengers at all points of sale (Art 7).

Recital 11 states that the matters covered by Arts 17 (jurisdiction) and 17*bis* (recognition and enforcement of judgments) of the Athens Convention fall within the exclusive competence of the Community, insofar as they affect the rules established by the Brussels I Regulation. To that extent, these two provisions will form part of the legal order when the Community accedes to the Athens Convention.

7 THE MS (CARRIAGE OF PASSENGERS BY SEA) REGULATIONS 2012

These implement the EU Regulation and, in effect, the 2002 Protocol, referred to as the Athens Convention 2002, and the IMO Reservation and Guidelines; they also provide penalties (Reg 8) and power of detention (Reg 9)for non-compliance with the compulsory insurance provisions.

They apply to international carriage where the ship is registered in the UK, or the contract of carriage has been made in the UK, or the place of departure or destination is in the UK (Reg 3). They also apply to domestic voyages within the UK on board Class A ships, on or after 30 December 2016, and Class B ships on or after 30 December 2018 (Reg 4).

Class A and Class B ships are defined in Art 4(1) of Directive 2009/45/EC[46] concerning safety rules and standards for passenger ships, by reference to the sea areas in which they operate. Class B ships are passenger ships engaged in domestic voyages, where they are at no point more than 20 miles from the line of coast. Ships falling within the description of Class A are those engaged in domestic voyages at greater distances from the coast.[47]

In the meantime, until ships of Class A and B come within the Regulations, the limit for those ships, presumably, should be the limit of 175,000 SDR per passenger, as seen in para 3.2, above.

By Reg 14, s 183 of the MSA 1995 is dis-applied, which means that the PAL 1974 Convention, which had been incorporated into UK law through Sched 6 of the Act, will no longer apply to the carriage of passengers to which the 2012 Regulations apply since 12 January 2013.

46 OJ–L 163, 25.6.2009, p 1.

47 See the explanatory notes to the SI 2012 No 3152, which implements the Regulations.

8 CONCLUSION ON THE AMOUNTS OF POTENTIAL LIABILITY

Under the Athens Convention 2002 and the IMO Reservation/Guidelines, the limits are reflected in the following figures:

(a) 250,000.00 SDR per passenger for compulsory strict liability amounts to €287,295.00[48] per passenger; assuming there are 3,500 passengers on board claiming, the aggregate payments will amount to €1,005,532,500.00, or, by comparison, US$378,657.00[49] per passenger, and a total for 3,500 passengers of US$1,325,229,500.00, or £244,612.00[50] per passenger, and a total for 3,500 passengers of £856,142,000.00.
(b) If the maximum liability of 400,000.00 SDR per passenger is required in a particular case, this will amount to €459,672.00 per passenger, or US$605,852.00 per passenger, or £391,378.00 per passenger.
(c) The overall upper limit per ship for war risks of 340,000,000.00 SDR will be €390,721,200.00, or US$514,974,200.00, or £332,671,300.00, unless a State opts for the 250,000.00 SDR per passenger.

48 At a rate of 1 SDR = €1.14918, as at 21 June 2013.
49 At a rate of 1 SDR = US$1.514630, as at 21 June 2013.
50 At a rate of 1 SDR = £0.978445, as at 21 June 2013.

CHAPTER 16

LIABILITY, LIMITATION AND COMPENSATION FOR MARINE POLLUTION, HNS, AND NUCLEAR, DAMAGE[1]

Introduction 821
1 Related International Conventions 822
2 The international oil pollution compensation regime 829
3 The three-tier system of compensation 832
4 Application of the 1992 CLC and Fund Conventions 834
5 Liability, defences and compulsory insurance under the CLC 1992 842
6 Channelling provisions and the ship-owner's rights of recourse 846
7 Constitution of the limitation fund under CLC 849
8 Jurisdiction and procedural matters 850
9 Differences between the 1969 CLC and 1992 CLC 852
10 The 1992 Fund Convention ... 852
11 The 2003 Supplementary Fund Protocol 856
12 STOPIA and TOPIA 860
13 Common law 861
14 The Bunkers and the HNS Conventions 862
15 Criminal liabilities under the MSA 1995 relevant to oil spills 872
16 Nuclear Damage Conventions 872

INTRODUCTION

This chapter provides an overview[2] of liability, compensation and limitation under: (a) the International Conventions relating to marine damage by oil pollution, including the voluntary arrangements by STOPIA and TOPIA; (b) the Bunkers and HNS Conventions; and (c) the Nuclear Damage Conventions. 'Damage' for the purpose of the HNS and Nuclear Conventions includes loss of life and personal injury.

1 In the second edition, liability for marine pollution had been contributed by Elizabeth Blackburn QC of Stone Chambers, to whom the present author is grateful for her comprehensive treatment of the subject, which formed the backbone of the present chapter. Like all the chapters of the third edition of this book, this chapter has also been substantially restructured and updated. The author expresses her gratitude to Måns Jacobsson, former Director of the IOPC Funds, for his meticulous and valuable comments on the drafts of the chapter, but the responsibility for the final content of it remains with the author.

2 For a detailed analysis of marine pollution law, see De La Rue, C and Anderson, C, *Shipping and the Environment*, 2nd edn, 2009, Informa Law.

The subject matter is of immense importance and not free from difficulties in the interpretation of the Conventions. However, a wealth of information can be found in the specialist texts and in the annual Manuals of Incident Reporting of the IOPC Funds.

For the regulations and directives made at the regional level by the European Union concerning environmental protection and maritime safety, including the Criminalisation Directive (as amended) for ship-source pollution, see Chapter 2 of this volume.

Before an analysis of the specific Conventions in this area can be made, a brief reference to other related International Conventions[3] is necessary, because they provide the context and the general framework of international law in relation to the protection of the environment.[4] A considerable reduction in pollution generated by ships has been achieved by addressing technical, operational and human element issues.

The chapter provides an overview of the oil pollution compensation regime, the interrelationship between the CLC and the Fund Conventions and the role of the IOPC Funds. Since issues arising under the CLC may affect liability arising under the Funds, it will be seen later that the Funds' governing bodies are involved in the interpretation of matters arising under both Conventions. The chapter further explains the tier system of compensation, the application of the regime, liability and exceptions, how compulsory insurance works, the constitution of the limitation fund, the involvement of the IOPC Funds and of the voluntary agreements, as well as procedural and jurisdictional matters. The chapter also gives a brief account of the specialised conventions in relation to pollution from bunkers, and hazardous/noxious substances, ending with the nuclear damage Conventions.

1 RELATED INTERNATIONAL CONVENTIONS

1.1 UNCLOS

Part XII of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 deals with the protection and preservation of the marine environment.

As set out in Art 235, States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment, and are liable in accordance with international law. States must ensure that recourse is available, in accordance with their legal systems, for prompt and adequate compensation or other relief in respect of damage caused by pollution by persons under their jurisdiction. With the objective of ensuring prompt and adequate compensation in respect of all damage caused by pollution, States are to co-operate, not only in the implementation of existing international law, but also in the further development of international law relating to responsibility and liability for the assessment of, and compensation for, damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance and compensation funds.

3 See www.imo.org
4 See further www.comitemaritime.org

1.1.1 Sovereign obligations

Article 192 of UNCLOS provides that States have the obligation to protect and preserve the maritime environment. Article 211(1) and(2) provides that States, acting through the IMO, or general diplomatic conference, shall establish and keep under review international rules and standards to prevent, reduce and control pollution of the marine environment from vessels, and promote the adoption, in the same manner, of routing systems designed to minimise the threat of accidents that might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States.

States are to legislate for the prevention, reduction and control of pollution of the marine environment from vessels *flying their flag, or of their registry*,[5] and Art 211(4) also provides that States can adopt laws and regulations for the prevention, reduction and control of pollution in their *territorial sea*, including vessels exercising the right of innocent passage, but such laws and regulations are not to hamper innocent passage of foreign vessels.[6]

1.1.2 Jurisdiction, rights and duties of States

Part V of UNCLOS deals with EEZs, which are areas beyond and adjacent to the territorial sea, and such zones are subject to the specific legal regime established in this Part of the Convention, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed. Such a zone cannot extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 56 provides that the coastal State has jurisdiction as provided for in the relevant provisions of UNCLOS, inter alia, with regard to the protection and preservation of the marine environment in the economic zone. Article 221 recognises the right of States to take and enforce measures beyond their territorial sea, proportionate to the actual or threatened damage, in order to protect their coastline or related interests, including fishing, from pollution or threat of pollution, following upon a maritime casualty or acts relating to such a casualty that may reasonably be expected to result in major harmful consequences.

Article 58 establishes the rights and duties of other States in the EEZ, such as the freedom of navigation of the high seas, over-flight, and the laying of submarine cables and pipelines. However, in exercising these rights, such States should have due regard to the rights, duties and laws of the coastal State, and, in exercising its rights and performing its duties under the Convention in the EEZ, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

5 UNCLOS, Art 211(2).

6 Pursuant to Art 19(2)(h) of UNCLOS, a passage through the territorial sea is not innocent if there is an 'act of wilful and serious pollution contrary to the Convention'. Hence, in the absence of a wilful and serious act of pollution, passage by a foreign ship in the territorial sea of a coastal State must be considered to be 'innocent passage': Mensah, T, presentation on 'Sovereign rights in legislation of Member States', 8th Cadwallader Memorial Lecture, 4 October 2005, The London Shipping Law Centre, www.shippinglbc.com

In addition, coastal States have jurisdiction physically to inspect, and to commence proceedings against, ships in their territorial waters and EEZ, where there are clear grounds for believing that the ship concerned has violated domestic or international pollution regulations.[7] It should be further noted that a State, in whose port a vessel is, may take legal proceedings against that vessel, not only for breaches of the pollution laws of that State, but also in respect of any discharge outside its internal and territorial waters or its EEZ, in violation of applicable international rules and standards.[8]

1.2 MARPOL

The International Convention for the Prevention of Pollution from Ships (MARPOL) 1973 and the 1978 Protocol are concerned with all forms of pollution from ships, apart from dumping. Detailed standards are laid down covering oil, noxious liquid substances in bulk, harmful substances carried by sea in packaged form, sewage and garbage and air pollution (Annex VI). It covers ships flying the flag of, or operated under the authority of, a State Party, but does not apply to warships or State-owned ships used only on governmental, non-commercial service.

MARPOL empowers and obliges every State Party to 'prohibit' any violation of its requirements. Each State Party is required to establish sanctions under its laws for such violations, subject to the limitations and constraints as provided mainly by MARPOL, which is also subject to the overarching principles of UNCLOS.

Each State Party undertakes to conduct an investigation of a casualty occurring to any of its ships, if it has produced a major deleterious effect upon the marine environment. It imposes a duty on the master to report such incidents, and, if the vessel is abandoned or in the event of a report from the ship being incomplete or unobtainable, the owner, charterer, manager or operator of the ship or their agents shall, to the fullest extent possible, assume the obligations imposed on the master.

1.3 SOLAS

The International Convention for the Safety of Life at Sea (SOLAS) 1974 and its 1978 Protocol (and subsequent amendments) contain detailed provisions covering oil tankers, and include mandatory provisions for ships carrying dangerous cargoes in bulk (the IBC Code, which is also mandatory under MARPOL) and for those carrying liquefied gases in bulk (IGC Code). Chapter IX makes mandatory the application of the International Safety Management (ISM) Code, which requires SMSs to be run on those ships to which the ISM Code applies. This involves establishing environmental protection policies and having instructions and procedures to ensure protection of the environment in compliance with international and flag State legislation (see, further, Chapters 2, 3 and 4, above).

7 UNCLOS, Art 220.
8 Art 218.

1.4 THE INTERVENTION CONVENTION

The 1969 Intervention Convention (as amended by its 1973, 1991 and 1996[9] Protocols) confirms the coastal State's right to take measures beyond the territorial sea in cases of maritime casualties that cause or threaten to cause pollution. By Art I, the parties to the Convention may take such measures on the high seas,

> as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil (defined by article II as crude oil, fuel oil, diesel oil and lubricating oil), following upon a maritime casualty or acts related to such a casualty which may reasonably be expected to result in major harmful consequences.

Article V of the Intervention Convention provides that measures taken by the coastal State shall be proportionate to the damage (actual or threatened) to it; such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Art I, and the measures shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.

In considering whether the measures are proportionate to the damage, account shall be taken of (a) the extent and probability of imminent damage if those measures are not taken, (b) the likelihood of those measures being effective, and (c) the extent of damage that may be caused by such measures. Article III of the Intervention Convention provides for a system of consultation and notification when a coastal State is exercising its right under Art I, including consultation with a list of experts maintained by IMO.

Under English law, maritime intervention is particularly dealt with in ss 137–41 of the Merchant Shipping Act 1995 (MSA 1995), as amended by ss 2 and 3 of the Merchant Shipping and Maritime Security Act 1997. Intervention is now allowed, not only in respect of polluting oil, but also pollution by other substances liable to create hazards to human health, to harm living resources and marine life, and to damage amenities or to interfere with other legitimate uses of the sea.

The powers of the Secretary of State under s 137(4) may be delegated,[10] and such delegation has been made to the SOSREP. The SOSREP has been appointed to provide overall direction for all marine pollution incidents, involving the salvage of ships or offshore installations, that require a national response. As set out in the National Contingency Plan for Marine Pollution from Shipping and Offshore Installations, the normal arrangement is for him/her to exercise operational control.

1.5 OPRC

The International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC Convention) is concerned with ensuring prompt and effective action in the event of a pollution incident and requires ships to carry detailed plans

9 The 1996 Protocol did not amend the Convention, but extended its application to substances other than oil.

10 See s 137(5) of the MSA 1995, and Ch 10, above.

for dealing with pollution emergencies. The Convention requires incidents to be reported without delay, national and regional systems to be set up for dealing with such incidents, and the States Parties to agree to co-operate and provide advisory services, technical support and equipment. This is covered in English law in s 128(1)(d) of the MSA 1995 and the order and regulations made under that section. A Protocol to the OPRC Convention adopted in 2000 extended the application of the provisions of the Convention to pollution by hazardous and noxious substances other than oil (OPRC–HNS Protocol). The 2000 Protocol entered into force in 2007. States that are party to the OPRC Convention and OPRC–HNS Protocol are required to establish a national system for responding to oil and HNS pollution incidents, including a designated national authority, a national operational contact point and a national contingency plan. This needs to be backed up by a minimum level of response equipment, communications plans, regular training and exercises.

In the Nuuk Declaration, dated 12 May 2011, the ministers of the Arctic Council Member States decided to establish a Task Force, reporting to the Senior Arctic Officials, to develop an international instrument on Arctic marine oil pollution preparedness and response, and called for the Emergency Prevention, Preparedness and Response and other relevant working groups to develop recommendations and/or best practices in the prevention of marine oil pollution, the preliminary or final results of both to be presented jointly at the next ministerial meeting in 2013.

1.6 CONVENTION ON PREVENTION OF MARINE POLLUTION BY DUMPING

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972, the 'London Convention', is one of the first global Conventions to protect the marine environment from human activities and has been in force since 1975. Its objective is to promote the effective control of all sources of marine pollution and to take all practicable steps to prevent pollution of the sea by dumping of wastes and other matter.

The 1996 Protocol to the 1972 London Convention (the London Protocol) represents a modern and comprehensive global agreement with the objective of protecting the marine environment from pollution caused by disposal at sea. Under the Protocol, all dumping is prohibited, except for possibly acceptable wastes. The Protocol entered into force on 24 March 2006.

From the outset, the London Protocol was developed as a self-contained treaty, rather than as a set of amendments to the London Convention 1972, and, when it was negotiated, parties agreed that: (a) the Protocol would supersede the Convention as between parties to the Protocol that are also parties to the Convention (Article 23); and (b) a party to the Convention deciding to become a party to the Protocol would not be required to denounce the Convention.

The IMO is responsible for secretariat duties in relation to both the Convention and Protocol. States Parties to the Convention and Protocol meet jointly on an annual basis to report on activities, discuss issues and decide on implementation matters relevant to both agreements. In 2008, the governing bodies agreed that a Joint Long-term Programme (JLTP) for the London Convention and Protocol (LC/LP) should

be prepared that outlined the tasks and activities undertaken by States Parties and their meetings in relation to the two instruments.

This JLTP outlines the tasks and activities undertaken by States Parties and the Secretariat in relation to the Convention and Protocol and includes the activities given to the Scientific Groups under the LC/LP and to the Compliance Group. It also includes targeted completion dates and a priority level for each activity. The activities given to the LC/LP Scientific Groups and the LP Compliance Group cover the period 2012–14.

1.7 ANTI-FOULING

The International Convention on the Control of Harmful Anti-fouling Systems on Ships, which was adopted on 5 October 2001, prohibits the use of harmful 'organotins' in anti-fouling paints used on ships and establishes a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems. The Convention entered into force on 17 September 2008.

Under the terms of the Convention, States Parties are required to prohibit and/or restrict the use of harmful anti-fouling systems on ships flying their flag, as well as those which do not, but they operate under their authority, and all ships that enter a port, shipyard or offshore terminal of a State Party.

1.8 BALLAST WATER MANAGEMENT

The International Convention for Ballast Water Management (BWM Convention) was adopted by consensus at a Diplomatic Conference held at IMO Headquarters in London on 13 February 2004, after 14 years of negotiations. It aims, through the control and management of ship ballast water and sediments, to prevent, minimise and ultimately eliminate risks to the environment and human health, property and resources arising from the transfer of harmful aquatic organisms and pathogens.

The Convention requires all ships to implement a Ballast Water and Sediments Management Plan (BWSMP). All ships will have to carry a Ballast Water Record Book (BWRB) and will be required to carry out ballast water management procedures to a given standard. Parties to the Convention are given the option to take additional measures, which are subject to criteria set out in the Convention and to IMO guidelines. The MEPC, at its 54th session in March 2006, adopted the Guidelines for approval and oversight of prototype ballast water treatment technology programmes (G10); sets of these guidelines were adopted by Resolution MEPC.173(58) in October 2008.[11] From 2009, but not later than 2016, the Convention requires the establishment of a ballast water management system on board ships, which will replace the uncontrolled ballast water uptake and discharge operations common until then. Thus, ballast water will have to be treated on board

11 The Convention will enter into force 12 months after ratification by 30 States, representing 35 per cent of world merchant shipping tonnage (Art 18). As at August 2012, 27.95 per cent of IMO Member States had signed; it is anticipated that the Convention will come into force by the end of 2013.

before being discharged into the marine environment, in compliance with the ballast water performance standard.[12]

1.9 RECYCLING

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (the Hong Kong Convention) was adopted at a diplomatic conference held in Hong Kong from 11 to 15 May 2009, which was attended by delegates from 63 countries. The Convention aims at ensuring that ships, when being recycled after reaching the end of their operational lives, do not pose any unnecessary risks to human health, safety or the environment. This Convention is not yet in force. (For developments at the EU level, see Chapter 2, at 3.6.)

1.10 THE WRECK REMOVAL CONVENTION

See Chapter 13, above.

1.11 THE SALVAGE CONVENTION

Under the London Salvage Convention 1989 (set out in Sched 11 to the MSA 1995), the salvor owes a duty to the owner of the salved vessel or other property on board to carry out the salvage operations with due care and, in performing that duty, to exercise due care to prevent or minimise damage to the environment. The Convention defines 'damage to the environment' as meaning substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents (see Chapter 10, in which the need for environmental salvage is explained).

1.12 THE SYSTEM IN THE UNITED STATES: OPA 1990

In the USA, there are both Federal and State statutes relating to damage caused by pollution. The main Federal statutes are the Clean Water Act, the Federal Water Pollution Control Act, the Comprehensive Environmental Response Compensation and Liability Act and the United States Oil Pollution Act (OPA) 1990. An attempt was made after the Deepwater Horizon disaster to reform the OPA-90 legislation by the proposed Bill (2010) for Consolidated Land, Energy, and Aquatic Resources (CLEAR), but it was not passed. However, there is a high probability that a reform will come in the near future.[13]

12 www.imo.org

13 See Anderson, C, 'Proposals for legislative Reform following the Deepwater Horizon Oil Spill', Ch 5 in *Pollution at Sea – Law and Liability*, eds Soyer, B and Tettenborn, A, 2012, Informa.

2 THE INTERNATIONAL OIL POLLUTION COMPENSATION REGIME

2.1 OVERVIEW

The dramatic grounding, in 1967, of the Liberian tanker *Torrey Canyon* off the Cornish coast of the UK, together with the consequent spilling of 119,000 tonnes of crude oil, was the first major tanker disaster and prompted the international community, through IMO, to take measures to introduce compensation regimes for victims of pollution damage. An ad hoc Legal Committee was established to deal with the various issues raised by the casualty, and the committee soon became a permanent organ of the IMO, currently meeting once per year to deal with any legal issues raised at IMO.

2.1.1 The old regime

In 1969, a conference convened by IMO adopted the International Convention on Civil Liability for Oil Pollution (1969 CLC), which dealt with the civil liability of the registered ship-owner for pollution damage caused by spills of persistent oil from tankers.

It emerged during the course of the diplomatic conference that the liability limits established under 1969 CLC were too low, and that adequate compensation might not be available to victims. Another diplomatic conference was convened in 1971, which resulted in the adoption of a sister convention, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the 1971 Fund Convention). The two Conventions entered into force in 1975 and 1978, respectively.

Over time, it became clear that the amount of compensation available for major incidents needed to be increased, and the scope of the regime widened. The 1984 Protocols, which provided for increased limits and enhanced scope of application, did not receive sufficient ratifications to enter into force.

2.1.2 The current regime

A second attempt for reform resulted in the 1992 Protocols to the CLC and Fund Conventions, and the amended Conventions are known as the 1992 Civil Liability Convention (the 1992 CLC) and the 1992 Fund Convention (see 2.1.5, below). The substantive provisions in the 1992 Protocols are identical to those in the 1984 Protocols, whereas the entry into force conditions in the 1992 Protocols were less strict than in the 1984 Protocols. The 1992 Protocols entered into force on 30 May 1996.

Following *The Erika* and *The Prestige* incidents, a third instrument, the Protocol to the 1992 Fund Convention (Supplementary Fund Protocol), was adopted in 2003, providing an extra layer of compensation over and above that available under the 1992 Fund for pollution damage in the States that become parties to the Protocol (see 2.1.6, below).

To complete the picture, STOPIA 2005 and TOPIA 2006 are two voluntary agreements that were set up to indemnify the 1992 Fund and the 2003 Supplementary Fund, respectively, up to certain amounts (see under para 12, below). The 1992 Fund and the Supplementary Fund are not parties to these agreements, which nevertheless confer legally enforceable rights on the Funds to indemnification from the ship-owner in States in which the 1992 Fund Convention, or the Supplementary Fund Protocol, is in force.

Overall, as will be seen below, it seems that the pollution compensation regime has achieved a balance between ship-owners (compensating victims of pollution damage under the CLC) and receivers of oil (see 2.1.7, below – compensating victims pursuant to the 1992 Fund Convention and the Supplementary Fund Protocol). In practice, claims are dealt with and settled by the P&I club of the ship-owner and the relevant Fund together.

2.1.3 Application of the regime

The 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol apply to spills of persistent oil from tankers that cause pollution damage in the territory (including the territorial sea) or the EEZ or equivalent area of a State Party to the respective treaty instrument (see, further, para 4, below).

2.1.4 Liability under the 1992 CLC

Under the 1992 CLC, the ship-owner is liable to pay compensation for pollution damage caused by the escape or discharge of persistent oil from his ship, even if the pollution was not due to his fault (strict liability). He can normally limit his liability to an amount determined by the tonnage of the particular ship involved. He is obliged to maintain insurance under the Convention (see para 3, below, about the tier system of compensation). Only in special circumstances (see para 5) is the ship-owner exempt from liability. Liability is channelled to the ship-owner (see para 6, below).

2.1.5 The role of the 1992 Fund

The 1992 Fund Convention, which is supplementary to the 1992 CLC, establishes a regime for compensating victims when compensation under the CLC is not available or is inadequate. The 1992 Fund was set up under the 1992 Fund Convention and pays compensation when:

- the damage exceeds the limit of the ship-owner's liability under the 1992 CLC; or
- the ship-owner is exempt from liability under the 1992 CLC; or
- the ship-owner is financially incapable of meeting his obligations in full under the 1992 CLC, and the insurance is insufficient to pay valid compensation claims.

2.1.6 The role of the Supplementary Fund 2003

The 2003 Protocol to the 1992 Fund Convention, which established the Supplementary Fund, aims to provide additional compensation for pollution damage – over

and above that provided by the 1992 Fund – in those States that are members of the Supplementary Fund. The criteria under which compensation claims qualify for compensation from it are identical to those of the 1992 Fund. Thus, the claims policy settlement of the 1992 Fund applies also to settlements under the Supplementary Fund (the IOPC Funds).

2.1.7 The IOPC Funds

The Funds are intergovernmental organisations that provide compensation for oil pollution damage that occurs in their respective Member States[14] resulting from spills of persistent oil from tankers. They have their headquarters in London and have a joint Secretariat. They are financed by contributions paid by entities that receive certain types of oil by sea transport. These contributions are based on the amount of oil received in the relevant calendar year and cover payments of compensation for oil pollution damage claims, together with the costs of administering the Funds.

The 1971 Fund still exists, but it is in the process of being wound up and does not cover incidents occurring after 24 May 2002.

The 1992 Fund is governed by two bodies: the Assembly, which is composed of representatives of the governments of all Member States, and the Executive Committee, which is elected by the Assembly and is composed of 15 Member States. The 2003 Fund has its own Assembly, and the 1971 Fund has an Administrative Council. The Executive Committee of the 1992 Fund represents all funds.

The 1992 Fund Assembly appoints the Director of the IOPC Funds, who is responsible for the operation of the three Funds and has extensive authority to take decisions regarding the settlement of claims. The main function of the Executive Committee is to approve claims, but it normally gives the Fund's Director very extensive authority to approve and pay claims.

Considering their role explained above, the governing bodies of the IOPC Funds take a position on matters relating to cases that require interpretation of not only the 1992 Fund Convention but also the 1992 CLC.

Since their establishment, the 1992 Fund and the preceding 1971 Fund have been involved in 145 incidents of varying sizes, all over the world. In the great majority of cases, all claims have been settled out of court.

The maximum amount payable for each incident by the 1992 Fund is 203 million SDR (that is, about US$308 million as at 12 March 2013), including the amount actually paid by the ship-owner and his insurer under the 1992 CLC; the maximum amount payable by the Supplementary Fund is 750 million SDR[15] (that is, about US$1,126 million as at 12 March 2013) for incidents that are covered by the 2003 Protocol, including the amounts payable under the 1992 Conventions.

14 As at 31 December 2012, the 1992 Fund had 109 Member States, with two further States joining by July 2013; 28 of these States were parties to the Supplementary Fund, as reported in the IOPC Funds incidents report, 2012.

15 The dollar figures are obtained on the basis of the value of the dollar vis-à-vis the SDR at a given time.

3 THE THREE-TIER SYSTEM OF COMPENSATION

The 1992 CLC/Fund regime provides for two 'tiers' of available compensation, unless the 1992 Fund States have also joined the 2003 Supplemental Fund, which provides for the third tier (see below). If the total amount of the established claims exceeds the two tiers, and the Supplementary Fund is not applicable in that particular State, the compensation paid to each claimant will be reduced pro rata; when there is a risk that this situation will arise, the 1992 Fund may make interim prorated payments and final prorated payments, to ensure equal treatment of all claimants. In practice, claims are dealt with and settled by the P&I club insurer of the ship-owner for the CLC liability and the relevant Fund (for the Fund's contribution) together, and this explains the interest of the Funds' governing bodies in the interpretation of issues arising under the Conventions.

3.1 THE 1992 CLC: FIRST TIER

The victim first looks to the registered ship-owner and his CLC insurer (normally his P&I club) for the initial tier of compensation, which is governed by the 1992 CLC and is subject to a tonnage type 'limitation' ceiling.

The registered ship-owner maintains insurance to cover his CLC limited liability,[16] and claims can be brought directly against the CLC insurer.[17] From 1 November 2003, the ship-owner's limitation ceiling was increased.[18]

3.2 THE 1992 FUND: SECOND TIER

The second tier, which is governed by the 1992 Fund Convention, is provided by the 1992 Fund, which exists to pay compensation in certain circumstances, when those suffering oil pollution damage do not obtain full compensation under the 1992 CLC (see 2.1.5, above).

The 1992 Fund is financed by contributions levied on any person who has received, after sea transport, in one calendar year, more than 150,000 tonnes of crude oil and/or heavy fuel oil in a State Party to the 1992 Fund Convention. Annual contributions are levied to meet the anticipated payments of compensation and administrative expenses during the coming year, and are paid directly to the 1992 Fund.

The maximum compensation payable by the 1992 Fund for any one incident was also increased, with effect from 1 November 2003, to 203 million SDR.

16 1992 CLC, Art VII(1).

17 1992 CLC, Art VII(8).

18 It ranges from 4.51 million SDR (approximately US$7 million) for a ship not exceeding 5,000 units of gross tonnage, up to 89.77 million SDR (approximately US$136 million) for a ship of 140,000 gross tons or over. This followed amendments made to the 1992 Protocol to the CLC, which were adopted at the 82nd meeting of the IMO's Legal Committee in October 2000.

3.3 THE 2003 SUPPLEMENTARY FUND: OPTIONAL THIRD TIER

In the light of the devastating consequences of the sinking of both *The Erika* and *The Prestige*, a diplomatic conference adopted the 2003 Protocol on the Establishment of a Supplementary Fund for Oil Pollution Damage in May 2003; it entered into force on 3 March 2005,[19] that is, 3 months after the date on which the requirements for entry into force were met. The 2003 Protocol provides an optional *third tier* of compensation by means of a Supplementary Compensation Fund, which will afford additional compensation over and above the compensation available under the 1992 Conventions, but only in those States to the 1992 Fund Convention who choose to become parties to the 2003 Protocol.

The Supplementary Fund will only cover incidents that occur after its entry into force. The 1992 Fund States that consider that they do not wish to join the Supplementary Fund (for whatever reason) need not do so.

The aggregate amount of compensation that will be available to victims per incident, if the relevant State is a party to the 1992 CLC, 1992 Fund and the 2003 Protocol, will be 750 million SDR.

3.4 LIMITATION OF LIABILITY

CLC pollution damage is excluded from the 1976 Limitation Convention and has its own limitation regime. The 1992 CLC allows the ship-owner to limit his CLC liability to an amount determined by the tonnage of the ship. As seen in Chapter 14, above, the modern limitation regimes have adopted the same or very similar test for breaking limitation. When pollution damage occurs, the ship-owner is only deprived of the right to limit if it is proved by the claimant that damage resulted from anything done or omitted to be done by the ship-owner personally, either with intent to cause any such damage or cost, or recklessly and in the knowledge that such damage or cost would probably result. As can be seen from the recent decisions of the English courts on the similarly worded Art 4 of the 1976 Limitation Convention,[20] it is very difficult to break the right to limit: see, for example, *The MSC Rosa M*,[21] *The Leerort*,[22] and *The Gudermes*.[23]

The CLC guarantor/insurer is entitled to limit his liability under CLC, even if the ship-owner loses his right to limitation, as is also the case under the LLMC Convention 1976.

19 The 2003 Protocol came into force in the UK on 8 September 2006.
20 See, further Ch 14, above.
21 [2000] 2 Lloyd's Rep 399.
22 [2001] 2 Lloyd's Rep 291.
23 [2002] EWHC 2452; [2003] 1 Lloyd's Rep 203.

3.5 INFORMATION ON THE COMPENSATION REGIME

Information on the regime, including the States Parties to each of the treaties is available on the IOPC Funds website.[24]

In addition, the IOPC Funds publish a Claims Manual. The Funds' Annual Reports[25] and an annual publication 'Incidents involving the IOPC Funds' are very useful sources of information relating to the worldwide casualties dealt with by the IOPC Funds and include outlines of decisions made by the Funds' governing bodies on the admissibility of compensation claims and on interpretation and application of the regime.

3.6 THE RELEVANT UK LEGISLATION

In the United Kingdom, the 1992 CLC/Fund Conventions are the relevant law, as enacted in ss 152–182 of the MSA 1995, as amended. It should be particularly noted that the terms of the Conventions have not themselves been specifically enacted into, or scheduled to, the UK legislation. Nevertheless, in construing the relevant sections of the 1995 Act, the legislation should be given a liberal and broad rather than a restricted construction and in a way that it conforms to the language of the Conventions.[26] The UK has become a State Party to the 2003 Protocol and has enacted it in the MSA (Pollution) Act 2006.

4 APPLICATION OF THE 1992 CLC AND FUND CONVENTIONS

4.1 SEA-GOING VESSELS CARRYING PERSISTENT OIL IN BULK

The 1992 regime applies to any seagoing vessel or any seaborne craft of any type whatsoever, constructed or adapted for carrying persistent hydrocarbon mineral oil in bulk as cargo. A ship capable of carrying oil and other cargoes *will be regarded as a ship for these purposes only when it is actually carrying oil in bulk as cargo, and during any voyage following such carriage*, unless it is proved that it has no residues of such carriage of oil in bulk aboard.[27] The regime does not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.[28]

24 www.iopcfund.org

25 From 2009, the Annual Report is split into two publications: the 'Annual Report', which deals with administrative matters, and the 'Incidents Report', dealing with incidents and claims in which the IOPC Funds were involved.

26 *Algrete Shipping Co Inc (RJ Tilbury and Sons (Devon) Ltd) v IOPC Fund 1971: The Sea Empress* [2003] EWCA Civ 65; [2003] 1 Lloyd's Rep 327, p 332.

27 1992 CLC, Art I, and ss 153(3), (4), 170(1) of the MSA 1995.

28 1992 CLC, Art XI, and s 167(1) of the MSA 1995.

The term 'persistent' is used to describe those oils that, because of their chemical composition, are usually slow to dissipate naturally when spilled into the marine environment and are likely to spread and require cleaning up, such as crude oil, fuel oil, heavy diesel oil and lubricating oil. Non-persistent oils tend to evaporate quickly when spilled and do not require cleaning up. Neither persistence nor non-persistence is defined in the Conventions. Bitumen and asphalt come within the regime, but damage caused by spills of non-persistent oil, such as gasoline, light diesel oil and kerosene, is not compensated under the Conventions.

4.2 WHAT IS A 'VESSEL'?

There have been a number of cases on whether the relevant vessel is a 'ship' for the purposes of the 1992 regime, in which the 1992 Fund Assembly (which interprets issues arising under the Fund Convention) indicated that offshore craft, such as floating storage units and floating production, storage and offloading units, should be regarded as 'CLC ships' only when they carry oil as cargo on a voyage to or from a port or terminal outside the oilfield in which they normally operate.

In ***The Al Jaziah 1*** (UAE, January 2000), the casualty was about 40 years old, she had a rudder and propeller, but did not carry basic navigation equipment, and her design at build had been approved by the Dutch small ship inspectorate as an inland-waters motor tank ship. She had a very low forecastle but, at the time she sank, she was operating in open seas. The 1992 Fund Executive Committee took the view that, if a vessel was actually operating at sea at the time of the incident, she came within the regime.

In ***The Dolly*** (Caribbean, 5 November 1999), the vessel had been built in 1951 as a general cargo ship, but at some date three tanks for carrying bitumen had been installed in the hold, and the opening of the original hatch had been closed with steel plates. The Executive Committee concluded that she was a 'CLC ship', because she had been adapted for the carriage of oil in bulk. (See, also, *The Slops*, Greece, June 2000.)

It should be noted, however, that the Committee's decisions are not binding in law, and a party can always refer the issue to the relevant national court. The CA indicated in ***The Sea Empress***[29] that decisions made by the 1992 Fund Assembly are not even particularly persuasive;[30] in practice, however, the courts tend to adopt the interpretation of the Fund's governing bodies given to particular issues arising under the CLC or Fund Conventions, and claimants find it, often, difficult to pursuade them otherwise.[31]

29 *Algrete Shipping Co Inc (RJ Tilbury and Sons (Devon) Ltd) v IOPC Fund 1971* [2003] EWCA Civ 65; [2003] 1 Lloyd's Rep 327, p 332.

30 In May 2003, the Administrative Council of the IOPC Fund adopted a Resolution in which the Council expressed the view that the courts of States Parties should take into account the decisions of the governing bodies of the Fund relating to the interpretation and application of the Conventions.

31 See, further, the Vienna Convention on the Law of the Treaties, Arts 31.2, 31.3 and Resolution No 8 of the 1992 Fund.

4.3 GEOGRAPHICAL APPLICATION

4.3.1 Territory and Waters

The 1992 Conventions apply to 'pollution damage' caused in the territory or territorial sea of a State, which is a party to the Convention in question, and to pollution damage caused in the EEZ of such a State. If a State Party has not established such a zone, then the 'quasi EEZ'[32] is taken into account. In the UK, the relevant area beyond the territorial sea is defined in s 129(2)(b) of the MSA 1995[33] and the orders made there under.[34] (Under the Fund 1992,[35]such terms have the same meaning as in Art I of the 1992 CLC.[36])

Provided that the relevant vessel is a seagoing vessel, the regime would appear to apply to pollution damage caused on inland waterways. For example, in October 2003, the 1992 Fund Executive Committee considered the question of whether the CLC regime applied to pollution damage in the inland, non-tidal reaches of rivers in the context of ***The Victoriya*** (Russia, 2003), where the incident occurred in the upper reaches of the Volga River, some 1,300 km inland from the Caspian Sea and the Sea of Azov.

The Victoriya was registered for river and sea navigation and traded regularly in the Mediterranean, Black Sea and Baltic. Since 2002, she had traded in Turkey, Greece and Ukraine, and, at the material time, was en route to a non-Russian port in the Black Sea. The Fund Executive Committee concluded that *The Victoriya* was a 'ship' for CLC purposes, and, under general principles of public international law, the concept of territory of a State covers inland waters, including rivers. However, during the discussion, some delegations expressed reservations about the applicability of the 1992 Conventions, drawing attention to the preamble of the 1992 CLC, which referred specifically to pollution posed by the worldwide maritime carriage of oil and the exclusion of inland waters from the scope of application of UNCLOS.

Section 153 of the MSA 1995 defines the geographical extent by using the words 'in the territory of the United Kingdom', which would appear to encompass inland waters.

4.3.2 Incident and territory

'Incident' is defined as meaning 'any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage'.[37] It follows that, if a response on the high seas or within the territorial waters of a non-State Party succeeds in preventing or reducing pollution damage within the territorial sea or EEZ of a State Party, that response qualifies for

32 A quasi-EEZ is an area beyond and adjacent to the territorial sea of that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

33 1992 CLC, Art 2; s 170(4) of the MSA 1995.

34 Merchant Shipping (Prevention of Pollution) Limits Regulations 1996, SI 1996/2128, made pursuant to Art 2 of the Merchant Shipping (Prevention of Pollution) (Law of the Sea Convention) Order 1996, SI 1996/282.

35 1992 Fund Convention, Art 3.

36 1992 Fund Convention, Art 1(2).

37 1992 CLC, Art I(8).

compensation. The expense of reasonable preventive measures is recoverable, even if no spill of oil occurs, provided that there was a grave and imminent threat of such pollution damage being caused.[38]

4.4 POLLUTION DAMAGE

'Pollution damage' is defined as,

> loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur. This is subject to the proviso that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken.[39]

If the material vessel comes within the definition of a 'CLC vessel', loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunkers will be compensated.[40] The definition of pollution damage also extends to the costs of preventive measures (that is, any reasonable measures taken by any person after an incident has occurred, to prevent or minimise pollution damage in the above-mentioned areas of a State Party to the Convention in question, wherever these measures are taken)[41] and further loss or damage caused by such preventive measures.[42]

4.5 TYPES OF POLLUTION DAMAGE CLAIM

Anyone who has suffered pollution damage in a 1992 CLC State Party may bring a claim. Such claims may be (a) for direct damage to property, or consequential loss or expense incurred to clean up pollution or contamination of property; (b) for economic loss suffered by prevention of normal business operations due to the pollution; (c) reasonable costs incurred to reinstate recovery of the environment; and (d) reasonable costs for using legal or expert advisors to assist claimants in presenting their claims.

4.5.1 Claims for direct property damage and consequential loss or expenses

(a) Property damage: compensation for reasonable costs of cleaning up, repairing or replacing property that has been contaminated by oil.
(b) Clean-up:
  (i) compensation for reasonable costs of reasonable clean-up and preventive measures;

38 See also s 153(2) of the MSA 1995.
39 1992 CLC, Art I(6).
40 See the definition of oil in 1992 CLC, Art 1(5) and s 153(7) of the MSA 1995.
41 1992 CLC, Art I(7), and s 153(1)(b) of the MSA 1995.
42 1992 CLC, Art I(6).

(ii) loss or damage caused by preventive measures (for example, if clean-up measures result in damage to roads or piers, the cost of the resulting necessary repairs is an admissible claim);

(iii) compensation for reasonable costs associated with the capture, cleaning and rehabilitation of wildlife, in particular birds, mammals and reptiles;

(iv) compensation for reasonable cost to combat the oil and defend sensitive resources.

(c) Consequential loss: compensation for loss of earnings suffered by the owners of such contaminated property (for example, loss of income by fishermen as a result of their nets becoming oiled, which prevents them from fishing until their nets are cleaned up).

4.5.2 Claims for prevention of normal business operations: pure economic loss

Compensation can also be payable, in certain circumstances, where property has not been damaged by pollution, but, owing to the pollution of the area or the fishing grounds, some trade is prevented from normal operations; for example, where a hotelier located close to a polluted beach has lost business, or when a fisherman has been prevented from fishing because the fishing grounds have been polluted. What is recoverable as a pure economic loss is a complex area. For example, in cases of loss in the business of tourism, hotels located close to contaminated public amenity beaches may suffer loss of profit because the number of guests falls during the period of the pollution, and if such loss is caused by the contamination. The business must be directly affected by the reduction of visitors, and so wholesalers or manufacturers of souvenirs for tourists would not be directly affected. In the case of fishermen, a fisherman may decide not to go to a contaminated area to which he would normally go in order to avoid the contamination of his nets and gear. Fishermen may also suffer loss as a result of the interruption of feeding, growth or normal stocking cycles. Fishermen and fish cultivators may impose their own temporary bans to protect markets. Owners of fish processing facilities may suffer loss owing to the contamination of fishing and mariculture activities[43] (see 4.6, on causation, below).

4.5.3 Claims for environmental damage

The scope of this type of claim is limited to loss of profit from actual impairment of the environment and costs of reasonable measures of reinstatement aimed at accelerating natural recovery of the environment from the pollution damage[44] and that are actually undertaken or to be undertaken.[45] Examples of acceptable claims for economic loss due to environmental damage include a reduction in revenue for a marine park or nature reserve that charges the public admission fees. As it is not possible to bring a damaged site back to the pre-damage ecological state, the aim of

43 The IOPC Funds Manuals 2008–2012.

44 1992 CLC, Art I(6)(a), and s 156(3) of the MSA 1995.

45 Examples of other types of allowable claim can be found in the IOPC Funds' Claims Manuals, adopted by the 1992 Fund Assembly, which provide a very helpful analysis of how claims are evaluated and dealt with by the Funds.

any reasonable measures of reinstatement should be to re-establish a biological community in which the organisms characteristic of that community at the time of the incident are present and functioning normally.[46]

4.5.4 Use of advisors

If advisors are used to assist claimants to present their claims, compensation may be paid for reasonable costs of work carried out. Account is taken of the necessity for the claimant to use an advisor, the usefulness and quality of the work, as well as the time spent and rate charged.

4.6 ADMISSIBILITY OF CLAIMS AND CAUSATION[47]

The Claims Manual emphasises that, for claims to be admissible: (a) any loss or expense must actually have been incurred; (b) the expense must relate to measures that are deemed reasonable; and (c) the expense/loss or damage must have been caused by contamination resulting from the spill.

In particular, with regard to claims for economic loss not resulting from property damage (pure economic loss), for example, from loss of business that depends *directly* on the fisheries and mariculture activities (including supplies for fuel and ice, fish porters, fish wholesalers and retailers), they would qualify for compensation only if the loss was caused by contamination, and not just because a pollution incident occurred. In order for a claim for pure economic loss to be accepted, there should be a sufficiently close link of causation, or a reasonable degree of proximity, between the contamination and the loss or damage sustained.

When considering whether a sufficiently close link of causation exists with regard to pure economic loss claims, account is taken of the following factors:

(a) geographic proximity between the claimant's activity and the contamination;
(b) the degree of economic dependence on the affected resource;
(c) the extent to which a claimant had alternative sources of supply or business opportunities; and
(d) the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

A claimant is entitled to compensation only if he has suffered a quantifiable economic loss, and he has to prove the amount of his loss or damage by producing appropriate documents or other evidence. The extent to which claimants are able to reduce their losses is taken into account.

Claims are assessed by the Funds on the basis of objective criteria, and one of the prime benefits of the regime is that, provided causation is established, and the costs for clean-up and other preventative measures can be shown to be reasonable, the Funds endeavour to settle claims out of court, applying Fund practice, and the Funds

46 Ibid.
47 See useful guidance in the IOPC Funds' Claims Manuals.

then pursue their subrogated rights. Costs, however, are not accepted when it could have been foreseen that the clean-up measures taken would be ineffective.

If a compromise cannot be reached, the claimant has the right to bring his or her claim before the competent court in the State in which the damage occurred.

4.7 CLAIMS NOT COVERED BY THE REGIME

The regime does not provide a right to compensation to a claimant whose loss is of an indirect, relational, pure economic nature. A claim is not accepted solely because a pollution incident occurs. The 'but for' test (that is, but for the incident, the loss would not have occurred) is not applicable, and neither the ship-owner nor the Funds will be liable to compensate claimants who cannot show that their claims are admissible.

In ***The Sea Empress***,[48] the CA held that a whelk-processing company located in Devon was not entitled to recover its loss of profit after a fishing ban was imposed off Milford Haven to prevent any health hazards through pollution. The local fishermen claimed that the result of the ban was that they were stopped from supplying whelks under a contract with the processing company. They lost at first instance and appealed to the CA. Dismissing the appeal, the court held that the loss was secondary or relational economic loss, not directly caused by contamination. The undoubted factual differences between the instant case and *Landcatch*[49] were not sufficient to justify a different conclusion with regard to the secondary nature of any loss caused. The claimant's loss was outside the intended scope of the MSA 1995 Sched 4, which was closely focused on physical contamination and its consequences. The claimant was not engaged in a local activity in the physical area of the contamination. Its interest was in landed whelks, not in whelks in their natural habitat. The resulting loss arose from its inability to carry out processing and packing and delivering of processed and packed whelks at points far away from the contaminated areas. In construing the legislation, it had to be borne in mind that it was concerned to implement International Conventions. It was the clear purpose of the legislation to introduce liability independent of fault, to the exclusion of any common law claims in negligence. The claimant's loss was caused by the inability of fishermen to perform contracts for the supply of whelks and was not within the meaning of 'pollution damage' for the purposes of Sched 4 s.175(1). For a similar decision in Scotland, see *Landcatch v IOPC*.[50]

4.8 POSSIBLE CLAIMS BY SALVORS

There is one other type of claim that might arise under the CLC/Fund regime if there have been salvage services. As discussed in Chapter 10, above, under the London Salvage Convention 1989, the salvor owes a duty to the owner of the vessel or other property on board being in danger to carry out the salvage operations with due care

48 Op cit, fn 29; the 1971 Fund had rejected the claim.
49 [1999] 2 Lloyd's Rep 316.
50 Ibid.

and, in performing that duty, to exercise due care to prevent or minimise damage to the environment. Damage to the environment in the context of the 1989 Salvage Convention means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

Salvage operations on a casualty do, in many cases, include an element of pollution prevention being incidental to the salving of property. However, according to the IOPC Funds' Claims Manual, for the purposes of CLC/Fund compensation, salvage operations can be considered as 'preventive measures' only if the primary purpose is to prevent pollution damage.

If the operations have another purpose, such as salving hull and cargo, the costs incurred are not admissible under the Conventions. The IOPC Funds'Manual suggests that, if the activities are undertaken for the purpose of both prevention and salving the ship and cargo, but it is not possible to establish with any certainty the primary purpose of the operations, the costs are apportioned between pollution prevention and other activities. The manual goes on to point out that the assessment for compensation for activities that are considered to be preventive measures would not be made on the basis of the criteria applied for assessing salvage award, but would be limited to costs, including a reasonable element of profit.

There is some controversy about whether the salvor could bring such a claim under the CLC/IOPC Fund regime. For example, Brice[51] submits that, in the event that a salvor is not able to recover a salvage reward under Art 13 of the 1989 Salvage Convention, it is unlikely that the salvor could, as an alternative, recover his costs under the CLC/IOPC Fund regime. The reasoning is developed on the basis that any measures taken by a salvor to prevent or minimise pollution damage are generally measures taken to further the salvage operation; what a salvor is doing is performing salvage services, and any apparent preventive measures are purely incidental; a salvor, unlike any other class of person, has his own remedies under Arts 13 and 14 of the 1989 Salvage Convention, and it is unlikely that it was the intention under any of the Conventions to give him concurrent remedies to recover his costs.

However, it could equally be argued that, as the salvor owes a duty to the owner of the salved vessel or other property in danger, not only to carry out the salvage operations with due care, but also, in performing that duty, to exercise due care to prevent or minimise damage to the environment, in an appropriate case, the activities are being undertaken for the purpose of both prevention and salving the ship and cargo, and, as suggested in the IOPC Funds Manual, the costs should be apportioned. The IOPC Funds have also, in several cases, paid compensation in relation to operations that have an element of salvage, as set out in the Claims Manual.

This point could, perhaps, become relevant if, for example, the SCOPIC[52] has been incorporated into the material Lloyd's form relating to a CLC vessel; if SCOPIC has been invoked at a later stage of the salvage services, the special compensation provisions of Art 14 of the Salvage Convention are replaced in effect by SCOPIC; assuming that the casualty is suddenly lost, the salvor would be out of pocket in respect

51 *Brice on the Maritime Law of Salvage*, 5th edn, 2011, Sweet & Maxwell, para 6–184.

52 The SCOPIC, in effect, provides for agreed tariff rates to be paid as remuneration from the time when written notice is given to the vessel's owners (see Ch 10, above).

of the earlier part of his work, prior to the invocation of SCOPIC, and his only potential remedy would be under the CLC/IOPC regime. (See further thoughts about how a pure environmental salvage could work, in Chapter 10.)

5 LIABILITY, DEFENCES AND COMPULSORY INSURANCE UNDER THE CLC 1992

5.1 STRICT LIABILITY

The 1992 CLC provides that the registered ship-owner[53] is liable for pollution damage caused by his ship. The liability is strict; there is no need for the claimant to prove fault on the part of the ship-owner, but only that the pollution damage resulted from an incident involving the ship-owner's vessel. This means that the burden of proof shifts to the ship-owner to show that he is not liable.

5.2 DEFENCES

The registered ship-owner will be exonerated from liability if he proves that the damage or the threat of contamination:

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
(b) was wholly caused by an act or omission done with intent to cause damage by a third party (for example, sabotage/terrorism); or
(c) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.[54]

In addition, the owner may also be exonerated *wholly or partially* from his liability, if the pollution damage resulted, wholly or partially, either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person.[55]

As regards the first exception from liability under (a) above, the words used, '*resulted from*', are meant to be consistent with the principle of causation in insurance cases established by the leading case, *Leyland Shipping Co. Ltd v Norwich Union Fire Insurance Society*,[56] where the proximate cause of the loss was war risks and not marine perils. The ship-owner has to show that a war incident was the proximate or dominant

53 In the absence of registration, 'owner' means the person or persons owning the ship; and, where a ship is owned by a State and is operated by a person registered as the ship's operator, 'owner' means the person registered as its operator: s 170 of the MSA 1995.
54 1992 CLC, Art III(1), (2), and s 155 of the MSA 1995.
55 1992 CLC, Art III(3), and s 153(8) of the MSA 1995.
56 [1918] AC 350 (HL).

cause to the pollution damage.[57] Even if there was contributory negligence on his part, or on the part of his servants, the ship-owner will not be deprived of his defence if, on the balance of probability, he can show that the predominant cause of the damage was any of the events described under (a) above. With regard to the natural phenomenon defence, see further under 5.2.1, below, about the meaning of the words qualifying 'natural phenomenon'.

With regard to the second and third exceptions from liability, under (b) and (c) above, the ship-owner has a more difficult burden. He must show that the pollution damage was 'wholly' caused either by an act or omission of a third party intending to cause damage, or a wrongful act or negligence on the part of the government involved. If there was contributory negligence by him or his servants, he will not be able to discharge the burden of proof required for these exceptions.

By contrast, under the last exception, the ship-owner may be wholly or partially, exempted from liability if he can show that the damage was wholly or partially caused by the person claiming to have suffered the damage.

5.2.1 The natural phenomenon defence

While the ship-owner, as seen under 5.2, above, will have to show that the natural phenomenon was the proximate cause of the pollution damage, acceptance or rejection of the defence will depend on satisfying the additional criteria of 'exceptional, inevitable and irresistible character'. It would appear that, in order to establish the defence, the ship-owner would have to demonstrate, not only that he and his employees could not have avoided the phenomenon relied upon, but also that the phenomenon relied upon was too strong to be resisted.

This raises another issue, namely whether the ship-owner has to prove that the exceptional natural phenomenon was unavoidable and difficult to be withstood by the vessel itself (or by ships of the same category), or would he have to go further and prove these matters in respect of any ship?

One author[58] suggests that the words qualifying 'natural phenomenon' should be understood as meaning 'beyond all human power to prevent'.

Another author[59] argues that:

> . . . the wording of the paragraph in question – being in the nature of an exception – would justify a strict interpretation to the effect that reference should be made to that category of ships when gauging irresistibility; going beyond that to gauge irresistibility on the basis of any ship in existence might be taking the spirit of the Convention too far and might mean imposing a quasi-impossible burden of proof on the ship-owner.

In the view of the present author, it is submitted that, in any issue of interpretation of a statutory exception, the intention of the draftsman should be taken into account. If the intention of the draftsman of the Convention was to protect the victims of

57 See also de la Rue, C and Anderson, C, op. cit. fn 2.

58 Forster, M: 'Civil liability of ship-owners for oil pollution'[1973] *Journal of Business Law* 23.

59 Gauci, G: *Oil Pollution at Sea: Civil Liability and Compensation for Damage*, 1997, Wiley & Sons, p 73; but see an analytical approach to the interpretation of these words in *Civil liability for Bunker Oil Pollution Damage* by Gunasekera, D M, 2010, Peter Lang.

damage (which would be within the spirit of the pollution legislation), then the exception should be construed against the person for whose benefit it exists; such interpretation would result in requiring proof by the owner that the 'natural phenomenon' would affect 'any' or most ships in the area, i.e. it would be 'beyond all human power to prevent'. It should be a question of fact depending on the circumstances prevailing at the time in the particular region.

In ***The Nakhodka*** (Sea of Japan, January 1997), the ship-owners denied liability on the grounds that the combined state of the natural conditions facing the ship at the time of its loss amounted to an exceptional natural phenomenon in the particular part of the Sea of Japan, which could not have been avoided or withstood by *The Nakhodka* or ships of the same category. The case raised interesting issues on the ambit of this defence, including: whether the Art III(2)(a) defence required a court to limit the defence only to exceptional phenomena that could be categorised within a single description, such as earthquake or tsunami, or whether a court could properly decide that combinations of phenomena fell within the defence, provided they met the individual criteria in Art III(2)(a). In the end, the issue was not pursued, and all claims were settled out of court, and so these arguments were not tested in the Japanese courts.

As these issues that arise under the CLC may exonerate the ship-owner from liability, the governing bodies of the IOPC Funds take great interest in the interpretation of the Conventions.

There was another opportunity to test the 'natural phenomenon' defence in the ***Volgoneft 139*** (2007),[60] which shows that the 1992 Fund interpreted the defence in terms of the effect of the phenomenon upon the region, rather than focusing on the particular ship. The issue was whether the storm was exceptional so as to exonerate the ship-owner from liability, which meant that the 1992 Fund would have to pay the entire compensation to all the victims of the oil spill. The conclusion of the Fund's experts was that the storm was not exceptional, as there were records of similar storms being experienced in the region. It was not inevitable that the vessel would be caught in the storm, as there were timely forecasts of the storm and conditions. The case was heard by the Arbitration Court of Saint Petersburg, which decided that the ship-owner and its insurer had not provided evidence that the oil spill resulted from an act of God, exceptional and unavoidable. The master, having had all the necessary storm warnings, had not taken all necessary measures to avoid the incident, and, therefore, the incident was not unavoidable for the vessel.

5.2.2 The defence of government wrongful act

In ***The Nissos Amorgos*** (Venezuela, February 1997), the Bolivian Republic of Venezuela brought criminal proceedings for environmental damage against the ship-owner, his P&I club and the master of the ship. They were held liable and ordered to pay US$60 million to the government. On appeal, the judgment was upheld. The defence by the ship-owner and his P&I club (supported by the 1971 Fund) was that the government did not have an admissible claim, because the pollution was caused

60 IOPC Fund Annual Report, 2008, pp 119–122.

wholly by the wrongful act of the Venezuelan Government. The Maracaibo Channel was in a dangerous condition, owing to poor maintenance, and this was known to the Venezuelan authorities, but its full extent was concealed, and the arrangements for alerting mariners to the dangers that existed were unreliable. However, the court disregarded this defence!

5.3 COMPULSORY INSURANCE OR OTHER FINANCIAL SECURITY

5.3.1 Third-party liability insurance

The ship-owner is obliged to maintain insurance (or other financial security) to cover his liability under the 1992 CLC, in the sum fixed by applying the limits of liability prescribed under the CLC regime,[61] unless the ship is carrying less than 2,000 tonnes of oil in bulk as cargo.

The P&I club, or other provider, issues a Blue Card to the ship-owner as evidence of insurance that meets the requirements of the Convention. The ship-owner submits this to the State whose flag the ship flies, which issues the certificate of insurance in the form prescribed by the Convention, confirming the name of the insurer.

Issues may arise when there are inconsistencies between the insurance policy and the certificate issued by the flag State, for example, if the insurance policy limits the liability by a warranty. This occurred in the ***Alfa I*** incident (Greece 2012), in which the insurance policy stated 'warranted non-persistent cargo only', and the certificate issued by the flag State (Greece) confirmed the insurance cover pursuant to the Convention. The 1992 Fund is arguing that the ship was allowed to trade on the basis of the representation made on the certificate, and, therefore, the P&I club should be liable up to the CLC limit of compensation applicable to this vessel, being less than 5,000 GT. At the time of writing, however, it was not certain whether the ship was carrying more than 2,000 tonnes of persistent oil, for the insurance obligation under the CLC to apply, and the Fund Secretariat was examining the claim.

Claims for compensation under the 1992 CLC can be brought directly against the CLC insurer/guarantor,[62] which will normally be one of the P&I clubs that insure the third-party liabilities of ship-owners.

The ***Redffren*** barge, which sank in Nigeria in 2009, is an example of problems posed for victims of pollution and for the Funds. The barge was not even registered, and so her owner is unknown, and there is no P&I club insurance. Allegedly, there are 102 communities affected by pollution damage, and there are claims for US$26 million. In October 2012, the Funds' Executive Committee agreed that the Director should first establish whether the barge was a CLC ship and the precise location of the claimants, to assess the likely losses caused by the incident. Similar problems have been posed to victims of pollution damage in Nigeria by the oil spill, in 2009, from the damage to the hull of the ***JS Amazing***, which did not have P&I insurance, although she carried more than 2,000 tonnes of oil.[63]

61 1992 CLC, Art VII(1), and s 163 of the MSA 1995.
62 1992 CLC, Art VII(8), and s 165 of the MSA 1995.
63 See incidents involving the IOPC Funds in the Annual Report 2012.

The Third Parties (Rights against Insurers) Act 1930, as amended by the 2010 Act, is not applicable to this specific contract of insurance covering the CLC liability.[64]

The insurer has a defence to his CLC liability if:

(a) the ship-owner's defences set out above are applicable; or
(b) he can prove that the pollution damage was due to the wilful misconduct of the owner himself.

The insurer will always be entitled to the benefit of limitation under the CLC regime, as seen later.

It will be difficult to break the limit under the 1992 CLC, but some countries still apply the CLC 1969, under which the test for breaking the limit is 'actual fault or privity'.

Normally, the 1992 Fund co-operates closely with the relevant P&I club in the settlement of claims, and a local claims office will usually be set up when there has been an incident that has given rise to a large number of claims. Claimants can be private individuals, partnerships, companies, States or local authorities.

5.3.2 The ship-owner's rights of subrogation

Article V(5) of the 1992 CLC provides that, if, before the ship-owner's limitation fund is distributed, the ship-owner and his insurer have paid compensation for pollution damage, they acquire by subrogation the rights that the person so compensated would have enjoyed under the CLC.

6 CHANNELLING PROVISIONS AND THE SHIP-OWNER'S RIGHTS OF RECOURSE

6.1 WHO ARE PROTECTED BY CHANNELLING?

Claims for compensation for pollution damage in CLC States are channelled to the registered owner of the relevant ship, pursuant to CLC.[65] The so-called 'channelling provisions' of the 1992 CLC Art III(4)[66] expressly prohibit claims being brought under the Convention or otherwise against:

(a) the servants or agents of the ship-owner or the members of the crew;
(b) the pilot or any other person who, without being a member of the crew, performs services for the ship;[67]
(c) any charterer, however described and including a bareboat charterer, manager or operator of the ship;

64 See s 165(5) of the MSA 1995.
65 1992 CLC Art III(4) and ss 156(1) and 166(2) of the MSA 1995.
66 1992 CLC Art III(4) and s 156 of the MSA 1995.
67 In *The Erika* case, the French Court of Cassation, in September 2012, held that the classification society in principle fell within the category of persons carrying out services for the ship.

(d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
(e) any person taking preventive measures; and
(f) all servants or agents of the persons mentioned at (c), (d) and (e) above.

6.2 INTERPRETATION OF, AND EXCEPTION TO, CHANNELLING

The exception to the channelling provisions is that victims may bring claims against the persons set out in (a)–(f) above, if damage resulted from their personal act or omission committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

In this connection, it is worth noting *The Prestige* and *The Erika* court decisions.[68]

In ***The Prestige*** (which sank in 2002), proceedings were brought before the Southern District Court in New York by the Spanish State against the ship's classification society, ABS, to recover damages in respect of the pollution damage, alleging faulty conduct on the part of ABS in connection with the classification and certification when it performed services for the ship. ABS challenged the jurisdiction of the court relying on the CLC, arguing that the claims should be litigated before the courts of a State Party to the Convention, which the USA is not, and pleaded that, in any event, it was protected by Art III(4)(b). The court held (on 2 January 2008) that it had no jurisdiction on the basis of Art IX of the CLC. In any event, it held that Art III(4)(b) is unambiguous and therefore, ABS was a person who performed services for the ship. However, it is doubtful how valuable such a judgment is, considering that it was issued by a court of a non-State Party to the CLC. The judgment was quashed on procedural grounds on appeal.

In ***The Erika*** (which sank in 1999), Rina (the classification society of the ship) was prosecuted before the criminal court of Paris, together with the French company, Total, the charterers of the ship, the president of the ship management company, the technical managers of the ship and the shareholders of two Panamanian companies that owned *The Erika*. Rina pleaded the defence of immunity[69] and the exception under Art III(4)(b).

As regards the channelling provision, the first instance court held, on 16 January 2008, a couple of weeks after the US court decision in *The Prestige*, that this Article identifies the persons against whom no claim could be made, for example, the servants and agents of the owner, the charterer and the salvor, or a person who, although not a pilot or member of the crew, actually participates in the maritime

68 For more detailed analysis of the issues, see the papers submitted to the London Shipping Law Centre by Francesco Siccardi of Siccardi Bregante (Genoa) and Luc Greller of Reed Smith (Paris) at the event: 'Classification Societies – Regulatory regime and current issues on liability' held on 21 February 2013. Request can be made to the LSLC-Maritime Business Forum, www.shippinglbc.com

69 Rina argued that it could not be sued because it was acting as the agent of the flag State of Malta when it issued statutory and class certificates. The French first instance court in 2008 rejected the immunity defence; the CA (in 2010) upheld the defence with regard to both functions of class (statutory and class certificates), because Class, as delegated by the flag State, performs an activity of public service for the purpose of safety at sea. However, it held that Rina had waived the right by having taken part in the substantive proceedings. The Court of Cassation (in 2012) affirmed the conclusion of the CA but for different reasons.

operations; Rina was not within those persons intended to be protected by this Article, because the class society does not perform services for the ship. The French CA approved the decision and held that Rina, as it had pleaded that it performs statutory services and sought the protection of immunity, was independent from the owner and could not pretend to perform services for the ship. However, the Court of Cassation reversed the decision and, adopting the advice of the Advocat General, held that, although Rina was protected by Art III(4)(b), it was caught by the exception to this Article, because it had acted recklessly.

It should be noted that nothing in the CLC regime prejudices any right of recourse by the ship-owner against third parties, including those persons who are covered by the 'channelling' provisions,[70] but any recourse action by the ship-owner would fall outside the CLC regime and would have to be based on the applicable national law. It follows, for example, that a salvor could be sued by the registered owner, who could be held liable if there was causative negligence; and likewise a bareboat charterer.

With regard to *The Prestige* incident, the 1992 Fund Executive Committee authorised, at the October 2012 sessions of the governing bodies of the Funds, the Director to bring a recourse action against the classification society (ABS) in France, as an interim measure to protect the interests of the 1992 Fund and avoid the action becoming time-barred under French law.

6.3 JOINT AND SEVERAL LIABILITY WHEN TWO OR MORE SHIPS ARE INVOLVED IN AN INCIDENT

Provision is also made in the 1992 CLC regime for situations where damage has resulted from an incident involving two or more 'ships', each of which is a ship within the regime. Article IV of the CLC provides that,

> when an incident involving two or more ships occurs and pollution damage results, the owners of all the ships concerned, unless exonerated under Article III of the Convention, shall be jointly and severally liable for all such damage which is not reasonably separable.[71]

There could, of course, be a recourse action by the owner and the insurer of the one ship against the owner of the other; equally the Fund can take such recourse action. An example for this is ***The Hebei Spirit***,[72] which was struck at anchor by the crane barge *Samsung I* on the west coast of Korea, puncturing three of its cargo tanks, being fully laden with crude oil. The recourse action was brought against the owner and bareboat charterer of *Samsung I* by the owner of the *Hebei Spirit* and the P&I club at the Ningbo Maritime Court of China; the 1992 Fund brought a separate recourse action to protect its interests. The court accepted the recourse action of the owner and P&I club, but, on appeal, it was decided that the Korean Court was a more appropriate forum. In March 2011, the owner and club and the Fund lodged separate applications to the Supreme Court of Beijing for a retrial, but, in December 2011, the application was dismissed on grounds of *forum non-conveniens*. The parties settled.

70 1992 CLC Art III(5) and s 169 of the MSA 1995.
71 See also s 153(6) of the MSA 1995.
72 See the incident reports issued by the Funds, www.iopcfunds.org

7 CONSTITUTION OF THE LIMITATION FUND UNDER CLC

7.1 THE LIMITATION FUND

In order to be entitled to limit his liability, the ship-owner must constitute a limitation fund in the relevant court of the State Party in which an action for compensation has been brought, or, if no actions have been brought, in the court in any State Party in which an action could be brought, under Art IX.[73]

Claims in respect of expenses reasonably incurred, or sacrifices reasonably made, by the owner of the property, voluntarily to prevent or minimise pollution damage ranks equally with other claims against the limitation fund.[74]

The court where the fund has been constituted may also order that a sufficient sum shall provisionally be set aside, where the ship-owner/insurer establishes that he may be compelled to pay compensation at a later date.[75]

7.2 BAR TO ANY OTHER ACTIONS AGAINST THE ASSETS OF THE OWNER

Under Art VI, where the ship-owner has constituted a CLC limitation fund and is entitled to limit his liability, no claimant is entitled to exercise any right against any other assets of the ship-owner in respect of a claim for pollution damage arising out of the incident, and the court has to order the release of any ship or other property belonging to the owner that has been arrested in respect of such a claim, and shall similarly release any bail or other security furnished to avoid such arrest. However, these provisions only apply if the claimant has access to the court administering the fund, and the fund is actually available in respect of his claim.

It would appear, from the wording of Art VI and s 159 of the MSA 1995, that the ship-owner needs a finding from the court that he is entitled to limit, before this relief is triggered, and, in this respect, Art VI and s 159 differ from the position under the provisions of Art 13 of the 1976 Limitation Convention, where a limitation decree does not appear to be required before similar relief as above is granted[76] (see Chapter 14, above).

73 1992 CLC, Art V(3).

74 1992 CLC, Art V(8), and s 158(6) of the MSA 1995.

75 1992 CLC, Art V(7), and s 158(7) of the MSA 1995.

76 *The ICL Vikraman* [2003] EWHC 2320; [2004] 1 Lloyd's Rep 21. Colman J was dealing with Art 13(2) of the 1976 Limitation Convention, and he indicated that a 1976 limitation fund established in the English courts is actually available to a given claimant, notwithstanding there being no limitation decree at the material time. The availability continues unless and until a claimant discharges the burden of proving that the ship-owner is not entitled to the decree.

7.3 BAR UNDER MSA TO OTHER PROCEEDINGS AGAINST OTHER LIABLE PERSON

As set out in s 160 of the MSA 1995, where, as a result of any discharge or escape of oil from a ship or as a result of any relevant threat of contamination, the owner of the ship incurs a liability under s 153, and any other person incurs a liability, otherwise than under that section, for any such damage or cost as is mentioned, then, if the ship-owner has been found to be entitled to limit his liability and has paid that sum into court, and the other person is entitled to limit his liability in connection with 'the ship' by virtue of s 185 or 186 of the MSA 1995, no proceedings shall be taken against the other person in respect of his liability; and, if any such proceedings were commenced before the ship-owner paid the sum into court, no further steps shall be taken in the proceedings except in relation to costs.

7.4 RESTRICTION UNDER MSA ON ENFORCEMENT AFTER ESTABLISHMENT OF LIMITATION FUND

Section 161 of the MSA 1995 (entitled 'establishment of limitation fund outside UK') also provides that, where the events resulting in the liability of any person under s 153 also resulted in a corresponding liability under the law of another CLC country, s 160 and s 159 (restriction on enforcement after establishment of limitation fund) shall apply, as if the references to ss 153 and 158 included references to the corresponding provisions of that foreign law, and the references to sums paid into court include references to any sums secured under those provisions in respect of the foreign law liability.

8 JURISDICTION AND PROCEDURAL MATTERS

8.1 WHICH COURT HAS JURISDICTION

Under Art IX, actions for compensation under the 1992 CLC against the ship-owner or his insurer may be brought only before the courts of the State Party in whose territory, territorial sea or EEZ the pollution damage occurred, or in respect of which the preventive measures were taken to prevent or minimise such pollution damage. However, as set out in Art IX(3), after a limitation fund has been constituted, the courts of the State in which the fund is constituted are exclusively competent to determine all matters relating to the apportionment and distribution of the fund.

Section 153 of the MSA 1995 provides for jurisdiction where damage has been caused in the territory of the UK, which, by virtue of the provisions of s 170, includes the specified areas beyond the territorial sea; or where preventive measures have been taken to prevent or minimise damage in such territory. However, where a ship-owner incurs a CLC liability in two Convention countries, such as the UK and France, and a claim is brought in the UK under s 153(5) of the MSA 1995, the ship-owner is liable in the UK for any damage or cost for which he would be liable in France.[77]

77 1992 CLC, Art IX(2), and s 153(5) of the MSA 1995.

8.2 BRINGING CLAIMS FOR POLLUTION DAMAGE UNDER MSA

Section 20(5) of the Supreme Court Act (SCA) 1981 provides that s 20(2)(e) (concerned with jurisdiction of the Admiralty Court in respect of any claim for damage done by a ship) extends to any claim in respect of a liability incurred under s 153 of the MSA 1995 and any claim in respect of a liability falling on the 1992 IOPC Fund[78] (see Chapter 2, Vol 1).

It follows that, where pollution damage has been suffered, or preventive measures have been taken in the specified areas, an action can be brought against both the registered ship-owner and the CLC insurer. As set out in the Practice Direction to Part 61 of the Civil Procedure Rules, such an action will proceed in accordance with Part 59 of the Rules (that is, the Commercial Court Practice), and, where necessary, permission will be given to serve any claim form on the defendants, if they are out of the jurisdiction. An *in rem* action could also be brought against the polluting ship or a sister ship, in England, provided that the requirements of s 21(4) of the SCA 1981 are met (see Chapters 2 and 4, Vol 1).

Under English law, no maritime lien is available to a claimant for pollution damage, because the right of compensation is created by statute. The Admiralty Practice Direction (PD61) also deals with the IOPC Funds' right to intervene in claims being brought under the 1992 CLC.

8.3 TIME BARS

Under Art VIII, claimants will, ultimately, lose their right to compensation under the 1992 CLC, unless they bring a court action against the ship-owner and his insurer within 3 years from the date when the *damage occurred*. In no case, however, shall an action be brought after 6 years from the date of the incident that caused the damage.[79] Where the incident consists of a series of occurrences, the 6-year period runs from the date of the first such occurrence.

In the Scottish decision of ***Gray v Braer Corporation***,[80] Gray brought an action in damages against Braer Corporation under the Merchant Shipping (Oil Pollution) Act 1971 s 1 and sought to amend his pleadings. A dispute arose as to the effect of s 9, which then provided that no action would be entertained unless it was 'commenced not later than three years after the claim arose, nor later than six years after the occurrence . . . by reason of which the liability was incurred'.

It was common ground that, if the 3-year period applied, the claim that the amendment sought to introduce had prescribed. Gray argued that, whereas the 3-year period was applicable in the case of a once and for all loss, in a case of continuing loss, where future losses could be uncertain, the 6-year period must apply.

It was held by the Court of Session (Outer House), refusing the amendment, that Gray's interpretation was contrary to a natural reading of the section. All claims were

78 The appropriate extension of the Admiralty jurisdiction in Scotland is dealt with in s 166(1) of the MSA 1995.

79 See s 162 of the MSA 1995.

80 [1999] 2 Lloyd's Rep 541.

subject to a prescriptive period of 3 years, running from the date at which the claim emerged (i.e. damage done). The 6-year period provided a long stop. No claim could be pursued more than 6 years after the relevant occurrence, whether the losses complained of had already been sustained or were anticipated.

8.4 RECOGNITION AND ENFORCEMENT OF A CLC JUDGMENT

Any judgment given by a court with jurisdiction in accordance with Art IX, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except where the judgment was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present his case.[81] A judgment so recognised shall be enforceable in each contracting State, as soon as the formalities have been complied with, but those formalities shall not permit the merits of the case to be re-opened.[82]

9 DIFFERENCES BETWEEN THE 1969 CLC AND 1992 CLC

Briefly, the 1969 CLC applies only to escapes and discharges from laden tankers and to pollution damage occurring only in the territory/territorial waters of a contracting State.

It does not cover purely preventive measures, where there is only a threat of escape or discharge; it does not have the extensive channelling provisions of the 1992 CLC, but it only protects the ship-owner's servants or agents; it has different limitation provisions, namely a lower limitation amount and a test for breaking the limitation right is based on 'actual fault or privity' of the party seeking to limit.

10 THE 1992 FUND CONVENTION

It has been seen, under paras 2–4, above, what the purpose is of the 1992 Fund Convention and the IOPC Funds. In this part, a reference is made only to certain aspects of the Convention that have not been discussed already. The Fund Convention does not apply to damage that occurs in a State that is not a party to it. The relevant English law is to be found in ss 172–182 of the MSA 1995.

81 1992 CLC, Art X(1); see for example *The Plate Princess* incident, which took place in Venezuela in 1997; the action was brought by fishermen and their union, 9 years after the incident; despite the fact that it was time barred and the Fund (1971 applicable) was not notified, the court upheld the claims for very high sums of compensation without evaluating the evidence; all appeals to higher courts of Venezuela by the Fund on the basis of lack of due process and that it had not been given a fair opportunity to present its case were rejected.

82 1992 CLC, Art X(2).

10.1 LIMITED REDRESS AGAINST THE 1992 FUND IN RESPECT OF POLLUTION DAMAGE CAUSED IN 1969 CLC STATES

As the 1971 Fund Convention ceased to be in force on 24 May 2002 where pollution damage occurs in a 1969 CLC State, a claimant will have no rights of redress under the 1992 Fund Convention, unless the claim is in respect of measures to prevent or minimise pollution damage in the territory, territorial sea and EEZ/quasi-EEZ of a 1992 Fund State.

10.2 WHEN THE 1992 FUND WILL MEET CLAIMS

It has already been explained that the 1992 Fund will be liable to pay compensation to any person suffering pollution damage, only if such person has not been able to obtain full compensation for the damage under the terms of the 1992 CLC. By way of recapitulation, the following events will trigger the liability of the Fund:

(a) when no liability for the damage arises under the 1992 CLC;
(b) when the owner liable for the damage under the 1992 CLC is financially incapable of meeting his obligation in full, and any financial security that may be provided under Art VII of the CLC does not cover, or is insufficient to satisfy, the claims for compensation for the damage; (an owner is treated as financially incapable, if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under the 1992 CLC after having taken all reasonable steps to pursue the legal remedies available to him);[83]
(c) when the damage exceeds the owner's liability under the 1992 Liability Convention, as limited pursuant to Art V(1) of that Convention.[84]

Article 4(1) of the Fund Convention expressly provides that expenses reasonably incurred, and sacrifices reasonably made, by the ship-owner voluntarily to prevent or minimise pollution damage are to be treated as pollution damage, and the ship-owner can claim these expenses from the 1992 Fund.[85]

Any proceedings by or against the 1992 Fund may, under UK legislation, either be instituted by or against the Fund in its own name, or be instituted by or against the Director of the Fund as the Fund's representative.[86]

83 In *Landcatch v IOPC Fund* [1999] 2 Lloyd's Rep 316, the Outer House of the Court of Session made it clear that the Fund's liability was secondary, and no decree against the Fund could be granted until this condition had been satisfied.

84 1992 Fund Convention, Art 4(1), and see s 175 of the MSA 1995.

85 See also s 175(6) of the MSA 1995.

86 Section 180 of the MSA 1995, and 1992 Fund Convention, Art 2(2).

10.3 FUND DEFENCES

The defences available to the 1992 Fund are more limited than those available to the ship-owner under the CLC.

The 1992 Fund is not liable to pay compensation if: (a) the pollution damage resulted from an act of war, hostilities, civil war or insurrection; (b) if the claimant cannot prove that the damage resulted from an incident involving one or more ships, as defined by CLC;[87] (c) there has been contributory negligence on the part of an individual claimant, whereupon the Fund may be exonerated wholly or partially from its liability as regards that claimant.

However, in the context of contributory negligence, the Fund is not exonerated with regard to preventive measures.[88]

As set out above, the two Conventions do not apply where pollution damage has been caused by a spill from a warship or other ship owned or operated by a State and used, at the time of occurrence, only on Government, non-commercial service.

Likewise, if the 1992 Fund proves that the pollution damage resulted, wholly or partially, either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the Fund may be exonerated, wholly or partially, from its obligation to pay compensation to such person.[89]

The 1992 Fund will pay compensation if the ship-owner has established the 'natural phenomenon' defence or the defences set out in CLC Art III(2)(b) or (c). Obviously, the IOPC Funds have an interest in the interpretation of the CLC defences.

10.4 RIGHTS OF SUBROGATION

Although claimants have the right to take their claims to the competent national court, in practice, the 1992 Fund seeks to settle claims out of court, so that claimants receive compensation as promptly as possible, and the 1992 Fund then acquires, by subrogation,[90] the rights that the person so compensated may enjoy under CLC 1992 against the ship-owner and his P&I club.

The Fund also has rights of recourse or subrogation against persons other than the ship-owner and the insurer.[91] For example, after the grounding of ***The Sea Empress***, the Fund sued the Milford Haven Port Authority on the basis that the port authority was, allegedly, in negligent breach of duty in relation to safe navigation within the Haven and its approaches, and that the necessary causative link between the alleged breaches and the incident existed. In the event, the claim was compromised.[92]

87 1992 Fund Convention, Art 4(2) and s 175(7) of the MSA 1995.
88 1992 Fund Convention, Art 4(3), and s 175(9) and (10) of the MSA 1995.
89 1992 Fund Convention, Art 4(3), and s 175(8) and (10) of the MSA 1995.
90 1992 Fund Convention, Arts 9(1) and 4(1), and s 179(1) of the MSA 1995.
91 1992 Fund Convention, Art 9(2).
92 See IOPC Funds' Annual Report 2003, pp 58–62.

It should also be noted that, under Art 9(3) of the Fund Convention, a State Party, or agency thereof, that has paid compensation for pollution damage in accordance with provisions of national law also acquires, by subrogation, rights that the person so compensated would have enjoyed under the Fund Convention.

In this regard, s 179(2) of the MSA 1995 provides that, in respect of any sum paid by a public authority in the UK as compensation, that authority acquires by subrogation the rights that the recipient had against the Fund.

10.5 TIME BAR

Claimants will ultimately lose their right to compensation under the 1992 Fund Convention unless they bring court action against the 1992 Fund within 3 years of the date when the damage occurred,[93] or make formal notification to the 1992 Fund of a court action against the ship-owner or his insurer within that 3-year period.

In no case shall an action be brought against the Fund after 6 years from the date of the incident that caused the damage.[94]

10.6 JURISDICTION

Pursuant to Art 7(1), actions for compensation under the 1992 Fund Convention against the 1992 Fund may only be brought before the court that would be competent under Art IX of the 1992 CLC. However, if an action for compensation under the 1992 CLC has been brought before a court in a State Party to the 1992 CLC, but not to the Fund Convention, any action against the Fund shall, at the option of the claimant, be brought either before the court of the State where the Fund has its headquarters or before any court of a State Party to the 1992 Fund Convention competent under Art IX of the 1992 CLC.[95]

10.7 JUDGMENTS

As set out in Art 7(6) of the 1992 Fund Convention and s 177 of the MSA 1995, where, in accordance with rules of court, the Fund has been given notice of liability proceedings brought against the ship-owner or CLC insurer/guarantor under the 1992 CLC, any judgment shall, after it has become final and enforceable, be binding on the Fund in the sense that the facts and evidence in the judgment may not be disputed by the Fund, even if the Fund had not intervened in the proceedings.[96]

93 Section 3 of the Merchant Shipping (Pollution) Act 2006 amended s 178(1) of the Merchant Shipping Act 1995 to restrict claims to being enforced within 3 years of the damage occurring, whereas previously it had been restricted to within 3 years after 'the claim against the Fund arose', and within 6 years of the damage occurring.

94 1992 Fund Convention, Art 6, and s 178 of the MSA 1995.

95 1992 Fund Convention, Art 7(3), and see s 175(2) of the MSA 1995.

96 See also PD61, para 11.

Subject to any decision concerning the prorating of claims, any final type judgment given against the Fund by a court having jurisdiction under Art 7(1) and (3) shall be recognised and enforceable in each State Party, pursuant to Art 8 of the Fund Convention, except where the judgment was obtained by fraud or the Fund was not given reasonable notice and a fair opportunity to present its case.[97]

11 THE 2003 SUPPLEMENTARY FUND PROTOCOL[98]

11.1 WHY IS IT NEEDED?

It was recognised after major incidents (such as *The Nakhodka*, 1997, in Japan, *The Erika*, 1999, in France, *The Prestige*,[99] 2002, in Spain) that the maximum amount available for compensation from the 1992 Fund was not sufficient to provide full compensation to victims in major cases.

The Protocol was adopted under the auspices of the IMO on 16 May 2003, and its purpose is to increase the amount of compensation available to victims of pollution damage arising from a serious incident involving the carriage of persistent oil as cargo by sea. It was negotiated against the background of *The Erika* casualty, following the European Union's move to promote the establishment of a European Compensation Fund for Oil Pollution in European Waters, with a proposed fund of €1 billion (see, further, Chapter 2, above). The subsequent *Prestige* disaster in Spain caused the acceleration of the adoption of the Protocol.

Thus, the 2003 Protocol to the 1992 Fund Convention entered into force on 3 March 2005. The text of the Protocol does not allow the EU to become a party to it, but, by Council Decision 2004/246/EC, EU Member States are authorised to sign, ratify or accede to the Protocol (see Chapter 2, above).

The UK has passed the Merchant Shipping (Pollution) Act 2006 to give effect to the Supplementary Fund Protocol 2003, and the Protocol came into force in the UK on 8 September 2006.

11.2 APPLICABILITY

Only States Parties to the 1992 Fund Convention are able to become States Parties to the Protocol.[100] If such a State chooses to become a party to the Protocol, the Supplementary Fund, in certain circumstances, will provide a third tier of additional compensation:

97 See s 177 of the MSA 1995; see also at fn 81 about the incident of *The Plate Princess* case (Venezuela).

98 For a detailed analysis of the 2003 Protocol, see *The 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992: one bridge over some particularly troubled water*, JIML [2003] 9(6), 530, by Elizabeth Blackburn QC.

99 The Audiencia Provincial (Criminal Court) in La Coruña commenced hearings on 16 October 2012, dealing with both the criminal and civil liabilities arising from the incident. The oral hearings have focused, to date, on witnesses associated with the criminal liabilities. Proceedings were expected to continue until June 2013, and witnesses for the civil liabilities were expected to be called from May 2013 onwards.

100 2003 Protocol, Art 19(3).

(a) over and above the compensation available under the 1992 CLC and 1992 Fund regime, for pollution damage;
(b) caused in the territory, including the territorial sea, and the EEZ/quasi-EEZ of such a State; and
(c) for preventive measures, wherever taken, to prevent or minimise such damage.[101]

The Supplementary Fund will only cover incidents that occur after the entry into force of the 2003 Protocol.

11.3 CONDITIONS FOR THE SUPPLEMENTARY FUND LIABILITY

It will pay compensation to any person suffering pollution damage, if that person has been unable to obtain full compensation for an 'established claim' for such damage under the terms of the 1992 Fund Convention, because the total damage exceeds, or there is a risk that it will exceed, the applicable limit of compensation laid down the 1992 Fund Convention in respect of any one incident.[102]

11.4 WHEN SHOULD THE SUPPLEMENTARY FUND PAY?

It will pay compensation[103] when the Assembly of the 1992 Fund has considered that the total amount of the established claims exceeds, or there is a risk that the total amount of established claims will exceed, the aggregate amount of compensation available under the 1992 Fund Convention, and that, as a consequence, the Assembly of the 1992 Fund has decided, provisionally, or finally, that payments will only be made for a proportion of any established claim.

The Assembly of the Supplementary Fund will then decide whether, and to what extent, the Supplementary Fund shall pay the proportion of any 'established claim' not paid under the 1992 CLC and the 1992 Fund Convention.[104]

'Established claim' is defined in Art 1(8) of the 2003 Protocol as meaning a:

> claim which has been recognised by the 1992 Fund or been accepted as admissible by decision of a competent court binding upon the 1992 Fund not subject to ordinary forms of review and which would have been fully compensated if the limit set out in Article 4 paragraph 4 of the 1992 Fund Convention had not applied to that incident.

The aggregate amount of compensation, which is available if a State is a party to the 1992 CLC, 1992 Fund and the 2003 Protocol, is 750 million SDR.[105]

101 2003 Protocol, Art 3. Such terms have the same meaning as in Art 1 of the 1992 CLC.

102 2003 Protocol, Art 4(1).

103 The incident of *The Alfa I* (March 2012) in Greece is the first incident involving a Member State of the Supplementary Fund. However, it is unlikely that claims arising from the incident will exceed the limit under the 1992 Fund Convention, as envisaged at the meeting of the Governing Bodies of the Funds in October 2012.

104 2003 Protocol, Art 5.

105 2003 Protocol, Art 4(2). The maximum figures for compensation under the 2003 Protocol, proposed at the outset of the Diplomatic Conference by various States, ranged from 400 million SDR to 800 million SDR.

11.5 THE 'MEMBERSHIP' FEE

As set out in Art 10 of the 2003 Protocol, this third, optional tier will be financed by oil receivers in the States that become parties to the Protocol, based on the same principles as apply to the financing of the 1992 Fund.[106]

However, the Protocol includes a novel provision in Art 14, which ensures that there is 'a membership fee' for countries with smaller oil receipts to obtain the benefits of the Supplementary Fund. If the actual receipts of contributing oil in the State are less than 1 million tons, it is deemed to be a minimum receipt of 1 million tons of contributing oil in the State; the State that chooses to become a party in such circumstances to the Protocol assumes the liability to pay the contribution based on the deemed 1 million ton receipt, or the difference between the 1 million ton deemed receipt and the actual receipts within the State that fall within the Protocol.[107]

Where the aggregate quantity of contributing oil received in a State Party is less than 1 million tons, that State assumes the obligations that would be incumbent under the Protocol on any person who would be liable to contribute to the Supplementary Fund in respect of oil received within the territory of that State, insofar as no liable person exists for the aggregated quantity of oil received.[108]

11.6 COMMUNICATION OBLIGATIONS AND THE DENIAL OF COMPENSATION

As with the 1992 Fund Convention, States Parties will be obliged, pursuant to Art 13 of the 2003 Protocol, to communicate to the Director of the Fund relevant information on oil receipts,[109] and, where a State does not fulfil its obligations to submit this communication and this results in a financial loss to the Supplementary Fund, that State will be obliged to compensate the Supplementary Fund for such loss.

If, as set out above, there is no such receiver or person in a State Party who meets the conditions of Art 10 of the 2003 Protocol, that State will also be obliged, under Art 15(1) of the Protocol, to inform the Director of the Fund accordingly.

11.6.1 The temporary denial of compensation

If a State Party fails to honour the communication obligations provided for in Arts 13(1) and 15(1) of the Protocol, serious repercussions may follow. Under Art 15(2) of the 2003 Protocol, if a State Party has failed to communicate to the Director of the Fund information on oil receipts in accordance with Art 13(1) and a casualty occurs, then no compensation will be paid by the Supplementary Fund for pollution damage in the territory, territorial sea or the EEZ/quasi-EEZ of that State, until the obligation to communicate has been complied with for all years prior to the occurrence of the incident.

106 2003 Protocol, Art 10.
107 2003 Protocol, Arts 12(2) and 14.
108 2003 Protocol, Art 14(2).
109 In accordance with Art 15 of the 1992 Fund Convention.

The same applies if a State Party has failed to comply with the communication obligation imposed by Art 15(1) of the Protocol (that is, notification that there is no person/receiver in that State who meets the conditions of Art 10 of the 2003 Protocol).[110]

11.6.2 The permanent denial of compensation

Where compensation has been denied temporarily in accordance with Art 15(2), compensation will be denied permanently, in respect of that incident, if the obligations to communicate to the Director under Arts 13(1) and 15(1) have not been complied with within 1 year after the Director has notified the State of its failure to report.[111]

11.7 TIME BAR

Otherwise, as set out in Art 6 of the 2003 Protocol, rights to compensation against the Supplementary Fund are extinguished, only if they are extinguished against the 1992 Fund under Art 6 of the 1992 Fund Convention, that is, if the claim is time barred against that Fund. A claim made against the 1992 Fund is to be regarded as a claim made by the same claimant against the Supplementary Fund.[112]

11.8 RIGHTS OF SUBROGATION

The Supplementary Fund acquires, (a) the victim's rights of subrogation under the 1992 CLC against the ship-owner or his insurer; and (b) the rights that the person compensated may enjoy under the 1992 Fund Convention against the 1992 Fund.[113] Again, nothing in the 2003 Protocol prejudices any right of recourse or subrogation of the Supplementary Fund against persons other the ship-owner and his insurer/guarantor, such as port authorities.[114]

A State Party, or agency thereof, that has paid compensation for pollution damage in accordance with provisions of national law also acquires, by subrogation, the rights that the person so compensated would have enjoyed under the 2003 Protocol.[115]

11.9 JURISDICTION

Jurisdiction is dealt with in Art 7 of the 2003 Protocol, and, for the most part, it mirrors the provisions of the 1992 Fund Convention. However, where an action for compensation for pollution damage has been brought before a court competent under Art IX of the 1992 CLC against the ship-owner, or his insurer/guarantor, such court shall have exclusive jurisdictional competence over any action against the

110 2003 Protocol, Art 15(2).
111 2003 Protocol, Arts 15(3) and 6(1).
112 2003 Protocol, Art 6(2).
113 2003 Protocol, Art 9(1), (2).
114 2003 Protocol, Art 9(3).
115 2003 Protocol, Art 9(4).

Supplementary Fund for compensation, unless that court is in a State that is not a party to the 2003 Protocol.

In such a case, the action against the Supplementary Fund shall, at the option of the claimant, be brought either before a court of the State where the Supplementary Fund has its headquarters, or before any court of a State Party to the 2003 Protocol, competent under Art IX of the 1992 CLC.[116]

If an action for compensation against the 1992 Fund has been brought before a court in a State Party to the 1992 Fund Convention, but not to the 2003 Protocol, any related action against the Supplementary Fund shall, at the option of the claimant, be brought either before a court of the State where the Supplementary Fund has its headquarters, or before any court of a State Party to the 2003 Protocol that is competent under Art 7(1) of the 2003 Protocol.[117]

11.10 RECOGNITION AND ENFORCEMENT

Recognition and enforcement are dealt with in Art 8 of the 2003 Protocol, which mirrors the provisions of the 1992 Fund Convention. Article 8(2) was inserted into the 2003 Protocol for the purposes of the European Judgments Regulation, and it provides that a State Party may apply other rules for the recognition and enforcement of judgments, provided that their effect is to ensure that judgments are recognised and enforced at least to the same extent as under Art 8(1) of the 2003 Protocol.

12 STOPIA AND TOPIA

12.1 BACKGROUND TO FURTHER CONTRIBUTIONS TO COMPENSATION BY SHIP-OWNERS

A Working Group was set up by the 1992 Fund Assembly in 2000 to carry out a review of the CLC/Fund Conventions. The review considered the ship-owner's liability and related issues, such as further increases in the limitation amount, the possibility of including charterers' (usually cargo-owners') liability in the compensation regime, and an additional layer of liability to be used where the spill involves a deficient oil tanker. However, a clear majority for the revision of the CLC regime would be required, if substantial amendments were to be made, and a large number of governments voiced their objections to revising the international regime.

Therefore, the 1992 Fund Assembly decided, in October 2005, to remove the revision from the Assembly's agenda and to disband the Working Group.

For many States, the decision to stop revision of the CLC regime was made in reliance on the offer made by ship-owners, through their P&I clubs, to share the overall cost of claims equally with oil receivers by voluntary agreements of the STOPIA, regarding indemnity to the 1992 Fund, and the TOPIA, regarding indemnity to the Supplementary Fund, regardless of the size of the polluting tanker.

116 2003 Protocol, Art 7(2).
117 2003 Protocol, Art 7(3).

12.2 STOPIA

The boards of all IGP&I clubs agreed to put in place a mechanism for voluntarily increasing the minimum limit of ship-owner liability under 1992 CLC in respect of small ships (up to 29,548 GT). This agreement came into effect at the same time as the entry into force of the 2003 Protocol, namely 3 March 2005.

Under STOPIA, the owner of the relevant tanker agrees to indemnify the 1992 Fund in respect of claims paid in excess of the ship-owner's relevant CLC limit of liability, up to a ceiling of 20 million SDR per incident, as opposed to the minimum limit of 4.5 million SDR applicable under CLC 1992. STOPIA was reviewed, in 2006, and applies to all States that are parties to the 1992 Fund Convention.

The first incident that came within STOPIA is ***The Solar I*** (which sank in the Philippines in 2006).

12.3 TOPIA

In addition, the discussions and consultations that took place between the Fund Secretariat, OCIMF, the P&I clubs' boards, Intertanko and ICS resulted in an additional agreement by which ship-owners are contractually bound to indemnify the Supplementary Fund in respect of 50 per cent of the amount of any claim falling on the Supplementary Fund, so that the burden imposed under the 2003 Protocol will be equally shared between shipping and oil industry interests. In contrast to STOPIA, this agreement applies to all relevant tankers, regardless of their tonnage measurements. It came into effect in 2006.

12.4 GENERAL SCOPE OF STOPIA AND TOPIA

Following approval by members of P&I clubs on 1 February 2006, an amendment to the clubs' rules, with effect from 20 February 2006, makes the members of the P&I club automatically members of the Agreements, unless they opt out.

The implementation of STOPIA and TOPIA is reflected in a MOU between the 1992 Fund and the Supplementary Fund and the IGP&I Clubs, in order to give effect to the clubs' undertakings to provide automatic entry into STOPIA and TOPIA and provide cover for the liabilities arising. The MOU gives the right to the 1992 Fund and to the Supplementary Fund of direct action against the relevant P&I club regarding those liabilities.

13 COMMON LAW

Marine pollution incidents that fall outside the ambit of the CLC/IOPC Fund regime would fall to be decided in England under normal tortious principles at common law, and the following causes of action may be relevant, namely public nuisance, private nuisance, trespass, negligence and, possibly, the rule in *Rylands v Fletcher*. If the ship-owner is dealing with common law claims, he will also be able to limit his liability under the 1976 Limitation Convention, as amended by its 1996 Protocol.

14 THE BUNKERS AND THE HNS CONVENTIONS

There are two further international pollution damage conventions, which are of relevance: the Bunker Oil Pollution Damage Convention 2001 (Bunkers Convention), based on the CLC model, which deals with pollution damage caused by hydrocarbon mineral oil, including lubricating oil used for the operation or propulsion of the ship and any residues of such oil. It came into force on 21 November 2008. The other Convention is the HNS Convention 1996, based on the CLC and Fund Conventions model. A Protocol amending the HNS Convention was adopted in 2010.

By Council Decision 2002/762/EC, Member States of the EU were authorised, in the interests of the Community, to sign, ratify or accede to the Bunkers Convention[118] and the HNS Convention.[119]

By a statutory instrument No 1244, the MS (Oil Pollution) (Bunkers Convention) Regulations 2006 were passed to amend Ch 3 of Part 6 of the MSA 1995 (liability for oil pollution) in order to implement the above Council Decision. This SI amends sections from 152 to 168 and 170 of the MSA 1995; section 153A is inserted (liability for pollution by bunker oil). (For the details of the amendments, readers are referred to the SI and to the above mentioned sections of the MSA.)

An elementary summary of the Conventions follows.

14.1 THE BUNKERS CONVENTION

It was adopted on 23 March 2001 and entered into force on 21 November 2008. It follows the CLC precedent of strict liability and compulsory insurance, but there is only one tier of liability. There is no intergovernmental international Fund established by contributions from oil receivers and no channelling provisions; therefore, as there is no prohibition or protection of other classes of people who may be liable for the bunker pollution damage, proceedings could be brought against such third parties.[120]

The time limit, ship-owner's defences, jurisdictional and enforcement provisions mirror the 1992 CLC.[121]

14.1.1 Scope of application

The Convention covers 'bunker oil' pollution (whether it is persistent bunker oil or not) from 'any seagoing vessel and seaborne craft, of any type whatsoever'.[122] The scope of geographical application is the same as in CLC.

However, the Bunker Convention has a wider definition of the 'ship-owner' than that contained in CLC; it covers, not only the registered owner, but also the bareboat charterer, manager and operator of the ship.[123]

118 Council Decision of 19 September 2002 (OJ L 256, 25/09/2002, p 7).

119 Council Decision of 18 November 2002 (OJ L 337, 13/12/2002, p 55).

120 See also 'Bunker Convention in force' by Jacobsson, M, *Journal of International Maritime Law*, 2009, p 21. 'Liability for pollution from ships' bunkers', by Colin de la Rue, Ch 2 in *Pollution at Sea – Law and Liability*, eds Soyer, B and Tettenborn, A, 2012, Informa.

121 See Bunker Convention, Arts 8–10.

122 Bunker Convention Art 1(1): 'any type whatsoever' is very broad; includes oil tankers or not, offshore installation but not warships, and other ships owned or operated by a State and used, for the time being, only on government, non-commercial service, are excluded by Art 4(2).

123 Bunker Convention, Art 1(3).

14.1.2 Pollution damage

'Pollution damage' is defined under this Convention as meaning loss or damage caused outside the ship by contamination resulting from the escape or discharge from the ship of 'bunker oil', which means any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil.[124]

The Convention covers such pollution damage and the costs of preventive measures, including further loss or damage caused by preventive measures.[125] As regards impairment of the environment, the Bunkers Convention contains the same proviso as the 1992 CLC.

The Bunkers Convention does not apply to pollution damage 'as defined in the 1992 CLC whether or not compensation is payable in respect of it under that Convention'.[126] It is argued that this exclusion can, potentially, cause problems of interpretation.[127] See, further, at 14.1.4.

14.1.3 More than one person liable

Whereas, under the 1992 CLC, the registered owner of the ship is liable, under the Bunker Convention, the ship-owner is defined in Art 1.3 to include 'the owner, the registered owner, bareboat charterer, manager and operator of the ship'. Where there is more than one person who is liable under the Convention, the liability is joint and several.[128] However, this is likely to cause problems, because only the registered owner is obliged to have insurance in place. Art 3.6 gives the registered owner right of recourse, which exists independently from this Convention.

Where an incident involving two or more ships occurs, and pollution damage results (Art 5), the ship-owners of all the ships involved, unless exonerated under the provisions of Art 3, shall be jointly and severally liable for all such damage that is not reasonably separable (s 154 of MSA).

The same limited exemptions from liability afforded to the ship-owner under 1992 CLC[129] are available also under Art 3 of the Bunkers Convention.

14.1.4 Liability

The MS (Oil Pollution) (Bunkers Convention) Regulations 2006 amend Ch 3 of Pt 6 of the MSA 1995 in order to implement Council Regulation 2002/762/EC authorising Member States to sign, ratify or accede to the Bunkers Convention. Regulation 5 inserts s 153A, which provides that where, as a result of any occurrence, any bunker oil is discharged or escapes from a ship, the owner of the ship shall be liable for any damage caused outside the ship in the territory of the UK by contamination resulting from the discharge or escape. The owner is also liable for the cost of any damage caused by the measure taken. Furthermore, where there is

124 Bunker Convention, Art 1(5).
125 Bunker Convention, Art 1(9).
126 Bunker Convention, Art 4(1).
127 See Jacobsson, M, 'Bunkers Convention in force', JIML, 2009, pp 21–36, at p 24.
128 Bunker Convention, Art 3(2).
129 Bunker Convention, Art 3(3).

grave and imminent threat of contamination by bunker oil, the owner is liable for the cost of measures taken to prevent or minimise damage and for damage caused by those measures.

14.1.5 No provisions for limitation of liability

The Bunkers Convention does not have its own limitation provisions,[130] as are found in the 1992 CLC and the HNS Conventions. Such claims, however, may be limitable by the ship-owner under the Convention on LLMC 1976, or any national law provisions. Article 6 does not grant a positive right of limitation, but provides that 'nothing in the Convention shall affect the right of the ship-owner to limit liability under any applicable national or international regime, such as the LLMC 1976 as amended'.

This is, indeed, unfortunate, because different provisions of limitation still apply at the various jurisdictions, despite the wide spread of implementation of the LLMC, and there will be no uniformity in limitation for bunker pollution liability.

Furthermore, the LLMC 1976 gives the ship-owner no general right of limitation for bunker pollution claims, nor does it contain in its list pollution damage, particularly of the clean-up kind, or any consequential damage that does not involve physical damage to property.

As far as the UK is concerned, s 168 of the MSA 1995, which has been amended by the MS (Oil Pollution) (Bunkers Convention) Regulations 2006 to include s 153A (bunker pollution), provides for limitation of liability under the Act for oil pollution (other than from a tanker in accordance with CLC) to be deemed to be damage to property for the purposes of LLMC Art 2.1(a). Although a proposal was put by the CMI and the IGP&I Clubs to the Diplomatic Conference to modify the proposed Art 6 of the Bunkers Convention to ensure, beyond doubt, that liabilities under the new Convention were limitable under the LLMC, the delegates did not see a need for it.[131] There is support for the view that clean-up expenses for bunker pollution damage come under s 2(1)(a) of the LLMC (see Chapter 14, above).

The Resolution 1 adopted at the Diplomatic Conference 2001, urging States to ratify the 1996 Protocol increasing the limits to the 1976 LLMC, if they have not done so, is a 'patching-up' solution and not a satisfactory way to resolve the problem. However, see further developments with regard to a further increase of the limits by an IMO Resolution in Chapter 14.

14.1.6 Compulsory insurance

The same system of compulsory insurance as is under the CLC and the HNS Conventions is provided also by the Bunkers Convention (s 163A has been added to the MSA); it is an obligation that rests with the registered owner, to the exclusion of the other persons who come within the definition of 'ship-owner'.[132] This obligation applies to ships having a gross tonnage greater than 1,000.[133]

130 See further Jacobsson, M, op. cit. fn 120, who points out the weaknesses of the Convention.
131 For details of this see: Colin de la Rue, op. cit. At fn 120, at p 20.
132 Bunker Convention, Art 7(1).
133 Bunker Convention, Art 7(1), (12).

There can be an exemption to this obligation for compulsory insurance in relation to ships operating exclusively on 'domestic voyages' within the territorial sea.[134]

Again, there is a direct action provision against the insurer, who can always limit his liability to the amount equal to the 1976 Limitation Convention, and the insurer has the same defences as contained in the 1992 CLC.[135]

An interesting case came before the court, ***The Zoorik (IRISL Steamship Mutual Indemnity Association***,[136] concerning the recovery of clean-up expenses for pollution damage (covered by the Bunkers Convention) incurred and paid to the third party by the owner of the ship, which had grounded in China. The owner sought to recover such expenses from the P&I club.

However, pursuant to powers conferred by the Counter-Terrorism Act 2008, HM Treasury had issued the Financial Restrictions (Iran) Order 2009, SI 2009/2725. HM Treasury was empowered to exempt specified acts from the Order by issuing licences. It issued two licences authorising the club to continue to provide insurance cover under an existing contract with IRISL for specified periods. The second of these periods expired on 30 October. The third licence provided that the club 'may continue to provide insurance cover in accordance with the Blue Cards issued to IRISL for a period of three months starting on 30 October 2009 . . .'

On the same day, the club terminated cover with effect from midnight on 30 October, because it took the view that the terms of the licence issued on 30 October meant that it was no longer permitted to provide insurance cover to IRISL. On 31 October, IRISL's vessel *Zoorick* grounded in China, causing bunker oil pollution and rendering it a constructive total loss. The club denied liability. The club asserted that the correct interpretation of the licence meant that it was not permitted to provide insurance cover and thereby to indemnify IRISL in respect of claims made by third parties against IRISL for pollution damage, and that the contract of insurance in respect of *Zoorick* was discharged by frustration and/or supervening illegality. The effect of the licence was simply that the club had to meet third-party claims arising before the termination of the cover. IRISL argued that it was clear from the terms of the 30 October licence that the provision of insurance cover in respect of its losses arising from the casualty from pollution damage, in accordance with its obligations under the Bunkers Convention, was not rendered illegal.

The judge held in favour of IRISL, saying that the overall effect of the 30 October licence, properly construed, permitted the club: (a) to continue to provide IRISL with insurance cover in respect of the risks required to be insured by reason of the provisions of the Bunkers Convention; and (b) to meet all claims made in respect of those risks and not only claims made by third parties pursuant to the direct right of action.

14.1.7 Responder immunity

As there is no channelling provision, efforts were made by maritime organisations representing shipping and insurers to include in the Convention a provision for immunity from liability of those who respond to a casualty, such as salvors and other

134 Bunker Convention, Art 7(13).
135 Bunker Convention, Art 7(10).
136 [2011] 1 Lloyd's Rep 195.

responders, but the Diplomatic Conference rejected responder immunity when adopting the Bunkers Convention. A Conference Resolution was adopted calling upon States to consider, when implementing the Convention, the inclusion in their domestic legislation of protective provisions for responders (see, further, Chapter 10, above).

14.2 THE HNS CONVENTION

The 1996 HNS Convention, as amended by the 2010 HNS Protocol, is known as the 2010 HNS Convention.

14.2.1 Modelled on the CLC/Fund regime

It is largely modelled on the CLC/Fund Convention structure, but the concept of damage is much wider than just pollution damage. The system of contributions under the HNS Convention is more complex than the 1992 Fund Convention. The exclusion from the contribution system by the 2010 Protocol of hazardous or noxious substances *carried in packed form* simplified matters and eased the way to its entry into force.[137]

Compensation payments to be made by the HNS Fund will be financed by contributions levied on persons who have received, in a calendar year, contributing cargoes after sea transport in a State party in quantities above the thresholds laid down in the HNS Convention.

In contrast to the IOPC Funds, the HNS Fund has a general account, which is divided into sectors, and also separate accounts in respect of: (a) oil, (b) liquefied natural gases of light hydrocarbons, with methane as the main constituent (LNG); and (c) liquefied petroleum gases of light hydrocarbons, with propane and butane as the main constituents (LPG).[138]

The contributions to finance the compensation payments will be made post event, and levies may be spread over several years in the case of a major incident.

14.2.2 What ships are covered?

In Art 1.1, 'ship' is defined as 'any seagoing vessel or any seaborne craft or any type whatsoever' (as in the Bunkers Convention), which is wider than the CLC ship.

The Convention does not apply to warships or ships on government, non-commercial service.[139] It allows a State to exclude its application to ships that do not exceed 200 gross tonnage and carry HNS only in packaged form, and while the ships are engaged on voyages between ports or facilities of that State.[140]

137 For an in-depth analysis of the Convention, see: Jacobsson M, 'The HNS Conventions and its 2010 Protocol' in *Pollution at Sea law and Liability*, Ch 3, eds Soyer, B and Tettenborn, A, 2012, Informa.
138 HNS Convention, Art 16.
139 HNS Convention, Art 4(5).
140 HNS Convention, Art 5(1).

14.2.3 What substances are covered?

The final position taken at the adoption of the Convention[141] was to define HNS by reference to lists of individual substances that have been previously identified in the relevant IMO technical instruments.

The Convention defines HNS in Art 1.5 as any substances, materials or articles *carried on board a ship* as cargo referred to in a number of IMO instruments (which are set out in detail). Liability arises if damage is caused by HNS in connection with their carriage by sea on board the ship (Art 7.1).

Although the Convention does not specifically exclude the carriage of small quantities of hazardous substances in packaged form, packaged goods are included only to the extent that they are covered by the IMDG Code, because, as Måns Jacobsson explains,[142] without this limitation, every shipment of packaged hazardous cargoes, however small, included in any one of the lists, would have to be insured for the entire potential liability under the Convention.

Bulk solids, such as coal, grain, iron ore and certain types of fishmeal are excluded, because of the low hazards they present, but bulk solids that possess chemical hazards are included.[143]

A large number of substances are covered, including LNG and liquefied petroleum. It will apply to the residues from the previous carriage in bulk of such cargoes, except where the previous carriage had been of packaged items.[144]

14.2.4 What damage is covered?

The HNS Convention covers:

(a) loss of, or damage to, property outside the carrying ship caused by pollution damage, fire and explosion;
(b) non-pollution damage caused by persistent oil, for example, damage caused by fire or explosion;
(c) loss of life or personal injury on board or outside the ship carrying the HNS;[145]
(d) economic loss or damage caused by contamination of the environment, such as loss of income in fishing and tourism, and the costs of reasonable measures of reinstatement of the environment;
(e) the costs of reasonable preventive measures (such as clean-up or removal of HNS from a wreck, if the HNS presents a hazard or pollution risk) and further loss or damage caused by such measures.

The HNS Convention applies only if the damage is caused by the hazardous and noxious character of the substances involved, carried on board the ship.

It does not cover pollution damage caused by persistent oil, as defined by the CLC, whether or not compensation is payable under that Convention,[146] nor does

141 See Jacobsson, M, op.cit. fn 137.
142 Ibid, p 27.
143 Ibid.
144 HNS Convention, Art 1(5)(b).
145 HNS Convention, Art 1(6).
146 HNS Convention, Art 4(3).

it apply to damage caused by bunker fuel oil, nor damage caused by class 7 radioactive material.

14.2.5 Geographical application

The Convention applies to claims other than claims arising out of any contract for the carriage of goods and passengers, and applies to:

(a) any damage caused in the territory, including the territorial sea, of a State Party;
(b) damage by contamination of the environment caused in the EEZ or quasi-EEZ of a State Party;
(c) damage, other than damage by contamination of the environment caused outside the territory, including the territorial sea, of any State, if this damage has been caused by a substance carried on board a ship registered in a State party or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party; and
(d) preventive measures, wherever taken (see Art 3).

14.2.6 The registered ship-owner's HNS liability

Under the Convention, assuming that he can limit his liability, the registered ship-owner is liable for the loss or damage up to a certain amount, which is covered by insurance.[147] The ship-owner is required to take out insurance in respect of this limited sum or maintain other acceptable security, and, as under the CLC regime, claims for compensation may be brought directly against the HNS insurer/guarantor.[148]

No claim for compensation may be made against the same category of parties as set out in the 'channelling' provisions of 1992 CLC, unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.[149]

However, as in the CLC regime, the registered ship-owner does have rights of recourse, where appropriate, including rights against the people referred to in the channelling provisions.[150]

The Convention only begins to apply from when the hazardous or noxious substance enters the ship's equipment, or passes its rail on loading, and ends when the HNS ceases to be present in any part of its equipment or passes the rail on discharge.[151]

14.2.7 Strict liability and defences

The Convention does not impose liability on the owner of the HNS involved in the incident. The registered owner of the ship is liable to pay compensation, unless he can prove (as in the case of the CLC) that:

147 HNS Convention, Arts 1(3), 7, 9(1), (2), and 12.
148 HNS Convention, Art 12.
149 HNS Convention, Art 7(5).
150 HNS Convention, Art 7(6).
151 HNS Convention, Art 1(9).

(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
(b) the damage was wholly caused by an act or omission done with the intent to cause damage by a third party, for example, sabotage/terrorism; or
(c) the damage was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function; or
(d) (in addition to the above CLC defences) the failure of the shipper or any other person to furnish information concerning the hazardous and noxious nature of the substances shipped either:
    (i) has caused the damage, wholly or partly; or
    (ii) has led the owner not to obtain insurance in accordance with Art 12;
    provided that neither the ship-owner, nor his servants or agents, knew or ought reasonably to have known of the hazardous and noxious nature of the substances shipped.[152]

In the same way as under the CLC, if the ship-owner proves that the damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage, or from the negligence of that person, the ship-owner may be exonerated wholly or partially from his obligation to pay compensation to such person.[153]

14.2.8 Two or more ships

Where damage has resulted from an incident involving two or more 'ships', each of which is a ship within the respective regime, Art 8 of the HNS Convention provides that each owner, unless exonerated under the relevant provisions of the Convention, shall be liable for the damage. The owners shall be jointly and severally liable for all such damage that is not reasonably separable. However, the owners are entitled to the limits of liability applicable to each of them under the Convention. Nothing in this article prejudices any right of recourse of an owner against any other owner.

14.2.9 Limitation

The test for limitation is the same as under the 1992 CLC.[154] The ship-owner's limitation of liability is calculated on the basis of the units of gross tonnage of the ship, as follows: where the damage has been caused only by bulk HNS:

(a) 10 million SDR for a ship not exceeding 2,000 gross tons;
(b) for a ship in excess of 2,000 gross tons, 10 million SDR, plus:
    (i) for each unit of tonnage from 2,001 to 50,000 GT, 1,500 SDR; and
    (ii) for each unit of tonnage in excess of 50,000 GT, 360 SDR.

152 HNS Convention, Art 7(2).
153 HNS Convention, Art 7(3).
154 HNS Convention, Art 9(2).

The aggregate amount of the ship-owners' liability shall not exceed 100 million SDR.[155]

Where the damage has been caused by packaged HNS, or by both bulk and packaged, or where it is not possible to determine whether the damage originating from that ship has been caused by bulk HNS or by packaged HNS, the limits are:

(a) 11.5 million SDR for a ship not exceeding 2,000 GT; and
(b) for ships in excess, 1,725 SDR for each tonnage or unit from 2,001 to 50,000 GT, in addition to the amount under (a) above;
(c) for each unit or tonnage in excess of 50,000 GT, 414 SDR;

provided that the aggregate amount shall not exceed 115 million SDR.

The amount available for compensation is distributed among claimants in proportion to their established claims, but loss of life/personal injury claims have priority over other claims, and up to two-thirds of the available ship-owner's limitation amount is reserved for such claims.[156]

14.2.10 Jurisdiction

Claimants can only take legal action against the registered owner/his guarantor in a court in the State Party in whose territory, territorial waters or EEZ/quasi-EEZ the damage occurred, or in respect of which the preventive measures have been taken; see, in this respect, Art 38(1).

However, Art 38(2) provides that, where an incident has caused damage exclusively outside the territory, including the territorial sea, of any State Party, and either damage (other than damage by contamination of the environment) has been caused by a substance carried on board a ship registered in a State Party (or, in the case of an unregistered ship, on board a ship entitled to fly the flag of a State Party), or preventive measures have been taken, actions for compensation may be brought against the owner or HNS insurer/guarantor only:

(a) in the courts of the State Party where the ship is registered; or
(b) in the case of an unregistered ship, the State Party whose flag the ship is entitled to fly; or
(c) the State Party where the owner has habitual residence or where his principal place of business is established; or
(d) where the ship-owner's limitation fund has been established.

14.2.11 The HNS Fund's liability

The HNS Fund (which will mirror the organisation of the 1992 Fund) will pay compensation when the total admissible claims exceed the ship-owner's liability; or where the ship-owner is exonerated from liability; or the ship-owner is financially incapable of meeting his obligations.[157]

155 HNS Convention, Art 9(1).
156 HNS Convention, Art 11.
157 HNS Convention, Art 14(1).

A claimant must be able to prove that there is a reasonable probability that the damage resulted from an incident involving one or more ships, and the HNS Fund will be liable to pay compensation, even if the particular ship cannot be identified.[158]

The maximum amount payable by the HNS Fund in respect of any single incident is 250 million SDR (about £244,611,250.00, as at 21 June 2013), including the sum paid by the ship-owner or his insurer.[159]

14.2.12 Exclusions

The Fund is exonerated from its obligation to pay compensation to a claimant in the event: the damage was caused by an act of war, hostilities, civil war or insurrection, or by HNS discharged from a warship or from a vessel on government, non-commercial service.

If the HNS Fund proves that the damage resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage, or from the negligence of that person, the Fund may be exonerated wholly or partly from its liability against that person. There is no such exoneration with regard to preventive measures.[160]

14.2.13 Time bars

Under Art 37(1), rights to compensation from the ship-owner are extinguished unless an action is brought within 3 years from the date when the person suffering the damage knew, or ought reasonably to have known, of the damage and of the identity of the owner. Rights to compensation from the HNS Fund are extinguished unless, within 3 years from the date when the person suffering the damage knew, or ought reasonably to have known, of the damage, an action is brought or a notification has been made to the Fund that HNS proceedings have been brought against the ship-owner or HNS insurer/guarantor.[161]

In no case shall an action be brought against the ship-owner or the HNS Fund later than 10 years from the date of the incident that caused the damage. Where the incident consists of a series of occurrences, the 10-year period runs from the date of the last of such occurrences.[162]

14.2.14 Jurisdiction

Actions against the HNS Fund should be brought before the same court as actions taken against the ship-owner. Where an incident has occurred, and the ship involved has not been identified, legal action may be brought against the Fund only in a State Party where damage occurred.[163]

158 HNS Convention, Art 14(3).
159 HNS Convention, Art 14(5).
160 HNS Convention, Art 14(3), (4).
161 HNS Convention, Arts 37(2) and 39(7).
162 HNS Convention, Art 37(3), (4).
163 HNS Convention, Art 39.

15 CRIMINAL LIABILITIES UNDER THE MSA 1995 RELEVANT TO OIL SPILLS

The EU Criminalisation Directives 2005/35/EC and 2009/123/EC are examined in Chapter 2, above. This part is concerned with the criminal liability provisions of the MSA 1995 relating to oil spills.

Sections 131[164]–134, 136 and 143 of the MSA 1995 deal with the criminal liability for oil spills, defences thereto and the obligation on the owner or master to report spills. It should be noted that s 134 gives some protection for acts done in exercise of certain powers of harbour authorities. There is a power to detain ships for s 131 offences.[165]

Section 135 of the MSA 1995 deals with the restrictions on transfer of oil at night, and ss 142 and 147 relate to the keeping of oil records. The relevant criminal sanctions are dealt with in s 142.

Section 139 provides for criminal penalties in respect of any failure to comply with orders given during maritime intervention by the Secretary of State under s 137.

If fines are not paid, s 146 provides for enforcement by arrest and sale of the vessel, and the court also has power to direct that the fine be paid to those who have suffered damage or incurred expenses in relation to a discharge of oil covered by s 131.

The MSA 1995 also provides powers to board and inspect vessels to investigate discharges or escapes of oil, and sanctions for the failure to produce the relevant records.[166]

Where proceedings are being brought under s 131, and the ship-owning company is out of the jurisdiction, service on the master is good service under s 143(6).

Section 293 of the Act covers the functions of the Secretary of State in relation to marine pollution and, as amended by s 6 of the Merchant Shipping Maritime Security Act (MSMSA) 1997, enables him to indemnify those who assist counter-pollution operations.

16 NUCLEAR DAMAGE CONVENTIONS

16.1 INTRODUCTION

There are two international liability regimes dealing with civil liability for nuclear damage: the International Atomic Energy Agency's (IAEA) Vienna Convention on Civil Liability for Nuclear Damage 1963,[167]and the OECD's Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960,[168] which was supplemented by the Brussels Supplementary Convention 1963; the Paris and Brussels Conventions were amended by the Protocols dated 1964 and 1982.

164 As amended by s 7 of the MSMSA 1997.
165 See ss 144–146 of the MSA 1995, as amended by the MSMSA 1997.
166 See ss 259 and 260 of the MSA 1995.
167 In force from 1977.
168 In force from 1968.

These two systems were linked by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention 1988, which was intended to preclude any possible conflict of laws in the case of international transport of nuclear material, and which also expanded the cover provided by the two Conventions. The Joint Protocol entered into force in 1992.

Thereafter, the 1997 Protocol to the Vienna Convention, which broadened the definition of nuclear damage to cover environmental damage and preventive measures, extended the geographical scope and increased the liability limits to a figure not less than 300 million SDRs, entered into force in 2003.

In 1997, the IAEA parties also adopted a Convention on Supplementary Compensation (CSC) for Nuclear Damage, but it is not yet in force. This Convention provides for additional amounts to be provided through contributions by States Parties on the basis of installed nuclear capacity and UN rate of assessment. Taken together, the 1997 Protocol and Convention should substantially enhance the framework for compensation beyond what is provided by the existing Conventions (see: www.iaea.org/publications).

In 2004, the States Parties to the Paris and Brussels Conventions signed Amending Protocols, which broadened the definition of nuclear damage, widened the scope of application and set new limits of liability. These Protocols are not yet in force, but will enter into force in due course.[169]

However, many States with nuclear power reactors are not yet parties to any international nuclear liability Convention,[170] but most countries with commercial nuclear programmes have their own legislative regimes for nuclear liability.

16.2 COMMON ELEMENTS OF THE VIENNA AND PARIS CONVENTIONS

The Vienna and Paris Conventions share the following common aims and principles:

If nuclear damage occurs in a State Party (or, in certain circumstances, in the course of transport to or from a non-State Party), liability is channelled exclusively against the operator of the relevant nuclear installation in that State; this includes a nuclear incident involving nuclear substances coming from such an installation.

Whatever the nationality, domicile or residence of a victim of nuclear damage, liability is strict, save where the damage caused by a nuclear incident was directly due to an act of armed conflict, hostilities, civil war, insurrection or (except insofar as the legislation of the State Party in whose territory the nuclear installation is situated may provide to the contrary) a grave natural disaster of an exceptional character.

The operator, in relation to a nuclear installation, means the person designated or recognised by the competent public authority as the operator of that installation.

Liability is limited under both regimes. Under the Paris and Brussels Conventions, the maximum liability is a total of 300 million SDR. Under the Vienna Convention, the ceiling is not fixed, but it may be limited by legislation in each State Party.

169 Section 76 of the Energy Act 2004 will be used in due course for this purpose in the UK.

170 See Civil Liability for Nuclear Damage UIC Nuclear Issues Briefing Paper No 70, June 2004. India signed the CSC in 2010 and Mauritius in 2013.

The operator must maintain insurance or other financial security for an amount equal to his limit of liability, and, beyond this level, the installation State can provide public funds, but can also have recourse against the operator. Generally, rights to compensation are extinguished under both regimes, if an action is not brought within 10 years, although, in the case of theft, loss, jettison or abandonment of the nuclear fuel or radioactive products, the period shall in no case exceed 20 years.

Many EU countries, including the UK, are parties to the Paris Convention and the Brussels Supplementary Convention.

16.3 THE UK LEGISLATION

In the UK, the relevant legislation covering both Conventions is to be found in ss 7–21 and 26 of the Nuclear Installations Act 1965, as amended by the Energy Act 1983. In the UK, the operator's only defence is if the occurrence or the causing of the injury or damage is attributable to hostile action in the course of any armed conflict.[171] It should be noted that a claim under the 1965 Act does not give rise to any lien or other right in respect of any ship or aircraft, pursuant to s 14.

16.4 THE 1971 CONVENTION ON CIVIL LIABILITY FOR MARITIME CARRIAGE OF NUCLEAR MATERIAL

The 1971 Convention relates to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR 71), to which, for example, France, Spain, Denmark, Italy, Norway, Belgium, the Netherlands and Germany (among EU States) are State Parties, but not the UK. It provides that any person who, by virtue of an International Convention or national law applicable in the field of maritime transport might be held liable for damage caused by a nuclear incident, shall be exonerated from such liability:

(a) if the operator of a nuclear installation is liable for such damage under either the Paris or the Vienna Convention; or
(b) if the operator is liable for such damage by virtue of a national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as under either the Paris or Vienna Convention.

The provisions of NUCLEAR 71 do not, however, affect the liability of any individual who has caused the damage by an act or omission done with intent to cause damage.

171 See s 13(4) of the 1965 Act.

APPENDIX

IMO PROCEDURE OF ADOPTION OF A CONVENTION AND TACIT ACCEPTANCE (EXTRACTS FROM WWW.IMO.ORG)

Adopting a convention 875

Entry into force 876

Accession 878

Amendment 878

Enforcement 879

Tacit acceptance procedure 881

ADOPTING A CONVENTION

This is the part of the process with which IMO, as an organisation, is most closely involved. IMO has six main bodies concerned with the adoption or implementation of conventions. The Assembly and Council are the main organs, and the committees involved are the Maritime Safety Committee, Marine Environment Protection Committee, Legal Committee and the Facilitation Committee. Developments in shipping and other related industries are discussed by Member States in these bodies, and the need for a new convention or amendments to existing conventions can be raised in any of them.

Normally the suggestion is first made in one of the committees, as these meet more frequently than the main organs. If agreement is reached in the committee, the proposal goes to the Council and, as necessary, to the Assembly.

If the Assembly or the Council, as the case may be, gives the authorisation to proceed with the work, the committee concerned considers the matter in greater detail and, ultimately, draws up a draft instrument. In some cases, the subject may be referred to a specialised sub-committee for detailed consideration.

Work in the committees and sub-committees is undertaken by the representatives of Member States of the organisation. The views and advice of intergovernmental and international non-governmental organisations that have a working relationship with IMO are also welcomed in these bodies. Many of these organisations have direct experience in the various matters under consideration, and are therefore able to assist the work of IMO in practical ways.

The draft convention that is agreed upon is reported to the Council and Assembly, with a recommendation that a conference be convened to consider the draft for formal adoption.

Invitations to attend such a conference are sent to all Member States of IMO and also to all States that are members of the United Nations or any of its specialised

agencies. These conferences are therefore truly global conferences, open to all governments that would normally participate in a United Nations conference. All governments participate on an equal footing. In addition, organisations of the United Nations system and organisations in an official relationship with IMO are invited to send observers to the conference, to give the benefit of their expert advice to the representatives of governments.

Before the conference opens, the draft convention is circulated to the invited governments and organisations for their comments. The draft Convention, together with the comments thereon from governments and interested organisations, is then closely examined by the conference, and necessary changes are made in order to produce a draft acceptable to all or the majority of the governments present. The Convention thus agreed upon is then adopted by the conference and deposited with the Secretary-General, who sends copies to governments. The Convention is opened for signature by States, usually for a period of 12 months. Signatories may ratify or accept the Convention, and non-signatories may accede.

The drafting and adoption of a Convention in IMO can take several years to complete, although, in some cases, where a quick response is required to deal with an emergency situation, governments have been willing to accelerate this process considerably.

ENTRY INTO FORCE

The adoption of a Convention marks the conclusion of only the first stage of a long process. Before the Convention comes into force – that is, before it becomes binding upon governments that have ratified it – it has to be accepted formally by individual governments.

Each Convention includes appropriate provisions stipulating conditions that have to be met before it enters into force. These conditions vary, but, generally speaking, the more important and more complex the document, the more stringent are the conditions for its entry into force. For example, the International Convention for the Safety of Life at Sea 1974 provided that entry into force requires acceptance by 25 States whose merchant fleets comprise not less than 50 per cent of the world's gross tonnage; for the International Convention on Tonnage Measurement of Ships 1969, the requirement was acceptance by 25 States whose combined merchant fleets represent not less than 65 per cent of world tonnage.

When the appropriate conditions have been fulfilled, the Convention enters into force for the States that have accepted – generally after a period of grace intended to enable all the States to take the necessary measures for implementation.

In the case of some Conventions that affect a few States or deal with less complex matters, the entry into force requirements may not be so stringent. For example, the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971 came into force 90 days after being accepted by five States; the Special Trade Passenger Ships Agreement 1971 came into force 6 months after three States (including two with ships or nationals involved in special trades) had accepted it.

For the important technical conventions, it is necessary that they be accepted and applied by a large section of the shipping community. It is, therefore, essential that these should, upon entry into force, be applicable to as many of the maritime States

as possible. Otherwise, they would tend to confuse, rather than clarify, shipping practice.

Accepting a Convention does not merely involve the deposit of a formal instrument. A government's acceptance of a Convention necessarily places on it the obligation to take the measures required by the Convention. Often, national law has to be enacted or changed to enforce the provisions of the Convention; in some cases, special facilities may have to be provided; an inspectorate may have to be appointed or trained to carry out functions under the Convention; and adequate notice must be given to ship-owners, shipbuilders and other interested parties so they may take account of the provisions of the Convention in their future acts and plans.

At present, IMO Conventions enter into force within an average of 5 years after adoption. The majority of these instruments are now in force, or are on the verge of fulfilling requirements for entry into force.

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

The terms signature, ratification, acceptance, approval and accession refer to some of the methods by which a State can express its consent to be bound by a treaty.

Signature

Consent may be expressed by signature where:

- the treaty provides that signature shall have that effect;
- it is otherwise established that the negotiating States were agreed that signature should have that effect;
- the intention of the State to give that effect to signature appears from the full powers of its representatives or was expressed during the negotiations (Vienna Convention on the Law of Treaties 1969, Art 12.1).

A State may also sign a treaty 'subject to ratification, acceptance or approval'. In such a situation, signature does not signify the consent of a State to be bound by the treaty, although it does oblige the State to refrain from acts that would defeat the object and purpose of the treaty until such time as it has made its intention clear not to become a party to the treaty (Vienna Convention on the Law of Treaties, Art 18(a)).

Signature subject to ratification, acceptance or approval

Most multilateral treaties contain a clause providing that a State may express its consent to be bound by the instrument by signature subject to ratification.

In such a situation, signature alone will not suffice to bind the State, but must be followed up by the deposit of an instrument of ratification with the depositary of the treaty.

This option of expressing consent to be bound by signature subject to ratification, acceptance or approval originated in an era when international communications were not instantaneous, as they are today.

It was a means of ensuring that State representatives did not exceed their powers or instructions with regard to the making of a particular treaty. The words 'acceptance' and 'approval' basically mean the same as ratification, but they are less formal and non-technical and might be preferred by some States, which might have constitutional difficulties with the term ratification.

Many States nowadays choose this option, especially in relation to multinational treaties, as it provides them with an opportunity to ensure that any necessary legislation is enacted and other constitutional requirements fulfilled before entering into treaty commitments.

The terms for consent to be expressed by signature subject to acceptance or approval are very similar to ratification in their effect. This is borne out by Art 14.2 of the Vienna Convention on the Law of Treaties, which provides that 'the consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification'.

ACCESSION

Most multinational treaties are open for signature for a specified period of time. Accession is the method used by a State to become a party to a treaty that it did not sign while the treaty was open for signature.

Technically, accession requires the State in question to deposit an instrument of accession with the depositary. Article 15 of the Vienna Convention on the Law of Treaties provides that consent by accession is possible where the treaty so provides, or where it is otherwise established that the negotiating States were agreed or subsequently agreed that consent by accession could occur.

AMENDMENT

Technology and techniques in the shipping industry change very rapidly these days. As a result, not only are new Conventions required, but existing ones need to be kept up to date. For example, the International Convention for the Safety of Life at Sea (SOLAS) 1960 was amended six times after it entered into force in 1965 – in 1966, 1967, 1968, 1969, 1971 and 1973. In 1974, a completely new Convention was adopted, incorporating all these amendments (and other minor changes) and has itself been modified on numerous occasions.

In early Conventions, amendments came into force only after a percentage of contracting States, usually two-thirds, had accepted them. This normally meant that more acceptances were required to amend a Convention than were originally required to bring it into force in the first place, especially where the number of States that are parties to a Convention is very large.

This percentage requirement in practice led to long delays in bringing amendments into force. To remedy the situation, a new amendment procedure was devised in IMO. This procedure has been used in the case of Conventions such as the Convention on the International Regulations for Preventing Collisions at Sea 1972, the International Convention for the Prevention of Pollution from Ships 1973 and

SOLAS 1974, all of which incorporate a procedure involving the 'tacit acceptance' of amendments by States.

Instead of requiring that an amendment shall enter into force after being accepted by, for example, two-thirds of the parties, the 'tacit acceptance' procedure provides that an amendment shall enter into force at a particular time, unless, before that date, objections to the amendment are received from a specified number of parties.

In the case of the 1974 SOLAS Convention, an amendment to most of the Annexes (which constitute the technical parts of the Convention) is 'deemed to have been accepted at the end of two years from the date on which it is communicated to Contracting Governments . . .', unless the amendment is objected to by more than one-third of contracting governments, or contracting governments owning not less than 50 per cent of the world's gross merchant tonnage. This period may be varied by the Maritime Safety Committee, with a minimum limit of 1 year.

As was expected, the 'tacit acceptance' procedure has greatly speeded up the amendment process. Amendments enter into force within 18–24 months, generally. Compared with this, none of the amendments adopted to the 1960 SOLAS Convention between 1966 and 1973 received sufficient acceptances to satisfy the requirements for entry into force.

ENFORCEMENT

The enforcement of IMO Conventions depends upon the governments of Member parties.

Contracting governments enforce the provisions of IMO Conventions as far as their own ships are concerned and also set the penalties for infringements, where these are applicable.

They may also have certain limited powers in respect of the ships of other governments.

In some Conventions, certificates are required to be carried on board ship to show that they have been inspected and have met the required standards. These certificates are normally accepted as proof by authorities from other States that the vessel concerned has reached the required standard, but in some cases further action can be taken.

The 1974 SOLAS Convention, for example, states that 'the officer carrying out the control shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew'.

This can be done if 'there are clear grounds for believing that the condition of the ship and its equipment does not correspond substantially with the particulars of that certificate'.

An inspection of this nature would, of course, take place within the jurisdiction of the port State. However, when an offence occurs in international waters, the responsibility for imposing a penalty rests with the flag State.

Should an offence occur within the jurisdiction of another State, however, that State can either cause proceedings to be taken in accordance with its own law, or give details of the offence to the flag State, so that the latter can take appropriate action.

Under the terms of the 1969 Convention Relating to Intervention on the High Seas, contracting States are empowered to act against ships of other countries that have been involved in an accident or have been damaged on the high seas, if there is a grave risk of oil pollution occurring as a result.

The way in which these powers may be used are very carefully defined, and, in most Conventions, the flag State is primarily responsible for enforcing Conventions as far as its own ships and their personnel are concerned.

The IMO itself has no powers to enforce Conventions.

However, IMO has been given the authority to vet the training, examination and certification procedures of contracting parties to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978. This was one of the most important changes made in the 1995 amendments to the Convention, which entered into force on 1 February 1997. Governments have to provide relevant information to IMO's Maritime Safety Committee, which will judge whether or not the country concerned meets the requirements of the Convention.

RELATIONSHIP BETWEEN CONVENTIONS AND INTERPRETATION

Some subjects are covered by more than one treaty. The question then arises which one prevails. The Vienna Convention on the Law of Treaties provides, in Art 30, for rules regarding the relationship between successive treaties relating to the same subject matter. Answers to questions regarding the interpretation of treaties can be found in Arts 31–33 of the Vienna Convention on the Law of Treaties. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

UNIFORM LAW AND CONFLICT OF LAW RULES

A substantive part of maritime law has been made uniform in international treaties. However, not every State is party to all Conventions, and the existing Conventions do not always cover all questions regarding a specific subject. In those cases, conflict of law rules are necessary to decide which national law applies. These conflict of law rules can either be found in a treaty or, in most cases, in national law.

IMO CONVENTIONS

The majority of Conventions adopted under the auspices of IMO or for which the organisation is otherwise responsible, fall into three main categories.

The first group is concerned with maritime safety; the second with the prevention of marine pollution; and the third with liability and compensation, especially in relation to damage caused by pollution. Outside these major groupings are a number of other

Conventions dealing with facilitation, tonnage measurement, unlawful acts against shipping and salvage etc.

TACIT ACCEPTANCE PROCEDURE

The amendment procedures contained in the first Conventions to be developed under the auspices of IMO were so slow that some amendments adopted have never entered into force. This changed with the introduction of the 'tacit acceptance' procedure.

Tacit acceptance is now incorporated into most of IMO's technical Conventions. It facilitates the quick and simple modification of Conventions to keep pace with the rapidly evolving technology in the shipping world. Without tacit acceptance, it would have proved impossible to keep Conventions up to date, and IMO's role as the international forum for technical issues involving shipping would have been placed in jeopardy.

In the spring of 1968, IMO – then still called IMCO, the Inter-Governmental Consultative Organization – celebrated the 20th anniversary of the adoption of the IMO Convention. It should have been an occasion for some congratulations, but all was not well. Many of the organisation's Member States were not happy with the progress that had been made so far.

Many were concerned about the Organisation's structure and its ability to respond to the changes taking place in shipping. In March 1967, the oil tanker *Torrey Canyon* had gone aground off the coast of England, resulting in what was then the world's biggest oil spill. IMO was called upon to take action to combat oil pollution and to deal with the legal issues that arose. But would it be able to do so?

The general disquiet was summed up by Canada in a paper submitted to the 20th session of the IMO Council in May 1968. It stated that 'the anticipations of twenty years ago have not been fulfilled' and went on to complain of the effort required by Member States in attending meetings and dealing with the technical problems raised by IMO. The paper was discussed by the Council, which agreed to establish a working group to prepare a draft statement of the objectives of IMO and an inventory of further objectives that the organisation could usefully fulfil in the field of international maritime transport.

In November 1968, the working group reported back to the Council. It outlined a list of activities, far broader than the programmes undertaken by IMO so far. This was approved by the Council, which also agreed that IMO needed to improve its working methods.

The working group was asked to report to the Council again at its 22nd session in May 1969.This time, it put forward a number of proposals for improving IMO's working methods, the most important of which concerned the procedures for amending the various Conventions that had been adopted under IMO's auspices.

The problem facing IMO was that most of its Conventions could only be updated by means of the 'classical' amendment procedure. Amendments to the 1960 SOLAS Convention, for example, would enter into force 'twelve months after the date on which the amendment is accepted by two-thirds of the Contracting Governments including two-thirds of the Governments represented on the Maritime Safety Committee'. This did not seem to be a difficult target when the Convention was adopted, because, to enter into force, the Convention had to be accepted by only 15

countries, 7 of which had fleets consisting of at least 1 million gross tons of merchant shipping.

However, by the late 1960s, the number of parties to SOLAS had reached 80, and the total was rising all the time, as new countries emerged and began to develop their shipping activities. As the number of parties rose, so did the total required to amend the Convention. It was like trying to climb a mountain that was always growing higher, and the problem was made worse by the fact that governments took far longer to accept amendments than they did to ratify the parent Convention.

The Council approved the working group's proposal that, 'it would be a useful first step to undertake a comparative study of the Conventions for which IMO is depositary and similar instruments for which other Members of the United Nations family are responsible'. This proposal was endorsed by the sixth regular session of the IMO Assembly in October 1969, and the study itself was completed in time to be considered by the Assembly at its seventh session in 1971.

It examined the procedures of four other UN agencies: the International Civil Aviation Organization, the International Telecommunications Union, the World Meteorological Organization and the World Health Organization.

It showed that all of these organisations were able to amend technical and other regulations. These amendments became binding on Member States without a further act of ratification or acceptance being required.

On the other hand, IMO had no authority to adopt, let alone amend, Conventions. Its mandate allowed it only to 'provide for the drafting of Conventions, agreements or other instruments and to recommend these to Governments and to intergovernmental organisations and to convene such conferences as may be necessary'. Article 2 of the IMO Convention specifically stated that IMO's functions were to be 'consultative and advisory'.

The organisation could arrange a conference – but it was up to the conference to decide whether the Convention under discussion should or should not be adopted, and to decide how it should be amended. The study concluded that,

> any attempt to bring IMO procedure and practice into line with the other organisations would, therefore, entail a change either in the constitutional and institutional structure of the Organisation itself or in the procedure and practice of the diplomatic conferences which adopt the Conventions of IMO.

The first might involve an amendment to the IMO Convention itself. The second might require that diplomatic conferences convened by IMO should grant greater power to the organs of IMO in regard to the review and revision of the instruments.

The study was discussed at length by the Assembly. Canada pointed out that the amendments adopted to the 1960 SOLAS Convention in 1966, 1967, 1968 and 1969 had failed to enter into force, and this 'sufficed to show that IMO would henceforth have to tackle serious institutional problems'. A note submitted to the conference by Canada stated that, 'unless the international maritime community is sufficiently responsive to these changed circumstances, States will once again revert to the practice of unilaterally deciding what standards to apply to their own shipping and to foreign flag shipping visiting their ports'.

The result was the adoption of Resolution A.249(VII), which referred to the need for an amendment procedure, 'which is more in keeping with the development of technological advances and social needs and which will expedite the adoption of

amendments'. It called for the Legal Committee and Maritime Safety Committee to prepare draft proposals for consideration by the eighth Assembly.

A growing urgency was added by the fact that IMO was preparing a number of new Conventions for adoption during the next few years. Conferences to consider a new Convention on the International Regulations for Preventing Collisions at Sea and an International Convention for Safe Containers were both scheduled for 1972, a major Convention dealing with the Prevention of Marine Pollution from Ships for 1973, and a conference to revise SOLAS was scheduled for 1976. All of these treaties required a new, easier amendment procedure than the traditional method.

The MSC discussed the amendment question at its 25th session in March 1972. A working group was formed to discuss the matter in detail and it concluded that, at current rates of acceptance, the requisite 'two-thirds' target needed to amend SOLAS 1960 'will not be achieved . . . for many years, possibly never'. Moreover, any future amendments would almost certainly suffer the same fate. This would include any amendments intended to improve the amendment procedure itself.

The working group reported: 'It follows that the only realistic way of bringing an improved amending procedure into effect within a reasonable period of time is to incorporate it into new or revised technical Conventions.'

A few weeks later, the Legal Committee held its 12th session. Among the documents prepared for the meeting was a report on discussions that had taken place at the MSC and a detailed paper prepared by the Secretariat. The paper analysed the entry into force and amendment processes of various IMO Conventions and referred to two possible methods that had been considered by the Assembly, for speeding up the amendment procedure. Alternative I was to revise each Convention so that greater authority for adopting amendments might be delegated to the appropriate IMO organs. Alternative II was to amend the IMO Convention itself and give IMO the power to amend Conventions.

The study then considered Alternative I in greater detail. The main reason why amendments took so long to enter into force was the time taken to gain acceptance by two-thirds of contracting governments. One way of reducing this period would be by 'specifying a date . . . of entry into force after adoption by the Assembly, unless that date of amendment is explicitly rejected by a certain number or percentage of Contracting Governments'. The paper said that this procedure 'has the advantage that all Contracting Governments would be able to advance the preparatory work for implementing the amended regulations and the industry would be in a position to plan accordingly'.

The Committee established a working group to consider the subject and prepared a preliminary study based on its report, which again referred to the disadvantages of the classical amendment system. The study continued:

> The remedy for this, which has proved to be workable in practice, in relation to a number of Conventions, is what is known as the 'tacit' or 'passive' acceptance procedure. This means that the body which adopts the amendment at the same time fixes a time period within which contracting parties will have the opportunity to notify either their acceptance or their rejection of the amendment, or to remain silent on the subject. In case of silence, the amendment is considered to have been accepted by the party . . .

The tacit acceptance idea immediately proved popular. The Council, at its meeting in May, decided that the next meeting of the Legal Committee should consist of

technical as well as legal experts, so that priority could be given to the amendment issue. The Committee was asked to give particular attention to tacit acceptance.

The idea was given non-governmental support by the International Chamber of Shipping, which had consultative status with IMO and submitted a paper stating that the lack of an effective amendment procedure created uncertainties and was detrimental to effective planning by the industry. The classical procedure had also encouraged some governments to introduce unilateral legislation that, however well intentioned, was 'seriously disruptive to international shipping services'. The paper said that, if other governments did the same, 'the disruption to international shipping and the world trade which it serves would become increasingly severe. Such unilateral action strikes at the purpose of IMO'.

By the time the Legal Committee met for its 14th session in September 1972, there was general agreement that tacit acceptance offered the best way forward. Other ideas, such as amending the IMO Convention itself, had too many disadvantages and would take too long to introduce. There was some concern about what would happen if a large number of countries did reject an amendment, and the Committee members agreed that tacit acceptance should apply only to the technical content of Conventions, which was often contained in annexes. The non-technical articles should continue to be subject to the classical (or 'positive') acceptance procedure.

The Committee also generally agreed that alternative procedures for amending the technical provisions should be retained, but it did not reach consensus on another issue: should amendments be prepared and adopted by an appropriate IMO body, such as the Maritime Safety Committee – or by contracting parties to the Convention concerned? This was an important point at the time, as many contracting parties to IMO Conventions were not yet members of IMO itself and might object to treaties they had ratified being amended without them even being consulted.

This issue was still unsettled when the Conference on Revision of the International Regulations for Preventing Collisions at Sea opened in October 1972. The purpose of the conference was to update the Collision Regulations and to separate them from the SOLAS Convention (the existing regulations were annexed to SOLAS 1960).

The amendment procedure is contained in Article VI. Amendments to the Collision Regulations adopted by the MSC (by a two-thirds majority) have to be communicated to contracting parties and IMO Member States at least 6 months before being considered by the Assembly. If adopted by the Assembly (again by a two-thirds majority), the amendments enter into force on a date determined by the Assembly, unless more than one-third of contracting parties notify IMO of their objection. On entry into force, any amendment shall 'for all Contracting Parties which have not objected to the amendment, replace and supersede any previous provision to which the amendment refers'.

Less than 2 months later, on 2 December 1972, a conference held in Geneva adopted the International Convention for Safe Containers, Art X of which contains procedures for amending any part or parts of the Convention. The procedure is the traditional 'positive' acceptance system, under which amendments enter into force 12 months after being adopted by two-thirds of contracting parties. However, Art XI contains a special procedure for amending the technical annexes, which also incorporates tacit acceptance. The procedure is slightly different from that used in the Collision Regulations, one difference being that the amendments can be adopted by the MSC, 'to which all Contracting Parties shall have been invited to participate

and vote'. This answered the question of how to take into account the interests of parties to Conventions that were not Member States of IMO.

The next Convention to be considered was the International Convention for the Prevention of Pollution from Ships (MARPOL), which was successfully adopted in May 1973. It, too, incorporated tacit acceptance procedures for amending the technical annexes. In the meantime, IMO was preparing for a new SOLAS Convention. This was considered necessary because none of the amendments adopted to the 1960 version had entered into force and did not appear likely to do so in the near future. The 1966 Load Lines Convention also contained a classical amendment procedure, and the intention was to combine the two instruments in a new Convention, which was scheduled to be considered in 1976.

The MSC discussed this proposal at its 26th session in October–November, but it was clear that this would be a daunting and time-consuming task. The combined instrument might be a good idea for the future, but the real priority was to get the amendments to SOLAS 1960 into force as quickly as possible, and to make sure that future amendments would not be delayed. A working group was set up to consider the various alternatives, but opinion began to move in favour of a proposal by the UK that IMO should concentrate on an interim Convention, designed to bring into force the amendments adopted since 1960. The new Convention, it was suggested, would consist of the 1960 text, with the addition of a tacit acceptance amendment procedure and the addition of amendments that had already been adopted.

Another advantage, the UK pointed out, was that the conference called to adopt the revised Convention 'might be held considerably earlier than 1976 since comparatively little preparation would be needed'. The subject was discussed again at the MSC's 27th session in the spring of 1973, and, although some delegations wanted a more comprehensive revision, others felt that the workload would be so great that the conference would be seriously delayed. By a vote of 12 in favour and 4 abstentions, the Committee decided to call a conference with limited scope, as proposed by the UK.

On 21 October 1974, the International Conference on Safety of Life at Sea opened in London, and, on 1 November, a new SOLAS Convention was adopted that incorporated the tacit acceptance procedure.

The tacit acceptance amendment procedure has now been incorporated into the majority of IMO's technical Conventions and has been extended to some other instruments as well. Its effectiveness can be seen most clearly in the case of SOLAS 1974, which has been amended on many occasions since then. In the process, the Convention's technical content has been almost completely rewritten.

This page intentionally left blank

INDEX

accidents
aftermath, emergency procedures 23
analysis by European Maritime Safety Agency 38
Directive 2009/18/EC on investigation 42–3
human error, avoiding 19
inevitable, defence of 425–6
involuntary or gross negligence manslaughter 123
ISM Code 83
weather conditions 21
see also specific incidents
accountability of harbour authorities 690, 715–16
Admiralty, contribution between joint tortfeasors by statute in 449–51
Advisory Committee on Pilotage (Pilotage Commission) 713
agents
limitation of liability 746–7
negligence 802
aggregation doctrine, attribution of liability 125
'agony of the moment' defence, collisions at sea 432–3
aircraft, salvage 491
AISs (automatic identification systems) 34, 35
ALARP (as low as reasonably practicable mnemonic) 9, 689, 690
***Alert* (journal) 10**
***Alfa I* incident (2012) 845**
***Al Jaziah 1* incident (2000) 835**
***alter ego* of company or corporation**
concept 98–9
concept of *alter ego* distinguished from ego of company 99
insurance issues 111
or identification doctrine 97
privity, meaning 99
towage contracts 608
alternative danger defence, collisions at sea 432–3
anti-fouling provisions 827
appurtenances 173
assignment
shipbuilding contracts 284–5
tenants in common 136
Associated British Ports/Associated British Port Holdings (ABPH) 683
Association of Norwegian Marine Yards 222
Association of West Europe Shipbuilders 222
Athens Convention 2002 (previously 2002 Protocol to PAL 1974 Convention) 791
competent jurisdiction and recognition of judgments 813–14
compulsory insurance 810
contributory negligence 810
death or personal injury, limits applied for 812
defences 811
developments leading to adoption of 793–4
direct action 810–11
EU status 807
financial security 810–11
interest and legal costs 812
international status 806
liability
cabin luggage, loss or damage 809
defect in ship 808
fault-based liability for death or personal injury caused by a non-shipping incident 809
incidents occurring during carriage 809
loss of right to limit 811–12
other luggage or vehicles, loss of or damage to 809
period and extent of 809
right to limit 811–12
strict liability for death or personal injury caused by a shipping incident 808
two bases of liability and two-tier limits under 807–9
luggage 809, 812
'pay first' clauses 811
presumed fault under 809
recourse, right of 810

Athens Convention 2002—*cont.*
tacit acceptance procedure 793
time limits 812–13
valuables, carriage of 812
attribution of liability
alter ego of company or corporation *see alter ego* of company or corporation
collisions at sea 405
corporate personality and rules of attribution 97–8
identification doctrine 97, 100–3
International Safety Management (ISM), legal implications upon liabilities 104–31
carriage of goods contract, effect of ISM upon liability arising from 106–8
criminal liability and role of ISM Code 119–30
implications of ISM Code for criminal liabilities 131
insurance issues, effect of ISM upon 109–13
limitation of liability and role of ISM Code 113–19
Meridian rule 98, 103–4, 112
privity 99, 109, 110–11
'special rule of attribution' 98
substantive rule of law 103, 104
vicarious liability doctrine 98
authority of ship managers
crew, engagement of 151
exceptional repairs 152
extent of authority to bind owners 150
issuing proceedings in name of principal 150
technical matters 151–2
automatic identification systems (AISs) 34, 35

ballast/laden method, repairs 470
ballast water
BWM Convention (International Convention for the Control and Management of Ships, Ballast Water and Sediments) 827–8
general safety and environmental measures 50–2
Ballast Water and Sediments Management Plan 827
Ballast Water Record Book 827
Baltic and International Maritime Council (BIMCO) 73, 147, 323, 746
'Guardcon' 2012 (standard terms contract) 20
management agreements 135, 146, 147
NEWBUILDCON *see* NEWBUILDCON (standard new building contract)
towage contracts 582, 652
York-Antwerp Rules (YAR) 657
bareboat charterers 12–13
Basel II and III Implementation on Banking Supervision (Basel framework) 13
BC Code (Code of Safe Practice for Solid Bulk Cargoes) 48
best endeavours
and 'all reasonable endeavours'/'reasonable endeavours' 526, 527, 610
good faith, negotiation in 294–6
judicial interpretation 525–8
management of ships
obligations of ship manager 152, 153–4, 155
and reasonable care 155–6
risk management in drafting of best endeavour clauses 154–5
meaning 482
and reasonable care 155–6
salvage
application of principles to 528–9
duties and conduct of salvors 524–40
towage, completion of 610–12
Best Management Practice (BPM4, 2011) 5, 7, 27
piracy risk assessment and planning guidelines 20, 21
Bierritz European Council, Erika II measures 34
BIMCO *see* Baltic and International Maritime Council (BIMCO)
'blind eye' privity or knowledge 110–11, 779, 780
Blue Cards, IMO Reservation/Guidelines 2006 817
BMLA (British Maritime Law Association) 75
bottomry bonds, charges 178
BPM *see* Best Management Practice (BPM)
BP Shipping, safety culture philosophy 10
***The Braer* disaster (1993) 3, 69–70, 71**
breach of contract
contractual protection of manager/employees
exclusion of liability 164
indemnity and Himalaya clauses 165–6
liability and limitation 165
damages 453
sale and purchase risks (second-hand ships) 294, 297
third-party contracts, interference by mortgagee 216
British Maritime Law Association (BMLA) 75
brokers, risk management by 307–8
bulk carriers 48–9, 222
'bunker oil' 863
Bunkers Convention (Bunker Oil Pollution Damage Convention) 2001 821, 862–6
compulsory insurance 864–5
liability 863–4
more than one person liable 863

Bunkers Convention—*cont.*
no provisions for limitation of liability 864
pollution damage 863
responder immunity 865–6
scope of application 862
burden of proof
collisions at sea
civil liability 411
damages and rule of remoteness of damage 451
duty of care, breach 419–20
limitation of liability issues 767

cargo
cargo-owners, authority of master to bind 589
Code of Safe Practice for Solid Bulk Cargoes (BC Code) 48
containerised, security for 563
damage to 775, 446–9
International Maritime Solid Bulk Cargoes Code (IMSBC Code) 48
loading risks 21
loss of or damage to 478–9
not part of security 174
unauthorized deck 668–9
voluntary services by owners 501–2
carriage of goods contract, effect of ISM upon liability arising from
due diligence under HVR 106–7
ISM Code and DPA, relevance 107–8
causation
accidental, following marine accident 58
break in chain of, unreasonable conduct 369–70
CLC 1992 and Fund Conventions, application 839–40
collisions at sea
causation in fact 422–4
causation in law 424–5
damages 452
in fact 422–4
foreseeability and break in chain 665–6
general average 665–6
in law 424–5
limitation or exclusion of liability, conduct barring 767
sale and purchase risks (second-hand ships)
'but for' test (inducement and causation) 298, 301
'decisive part/real and substantial part' (inducement and causation) 300
inducement to enter a contract 300–1
***caveat emptor*, effect 296**
Central Register of British Ships, division of 142
certification 53, 72, 145, 341, 714
interim, under ISM Code 86–7
International Sewage Pollution Prevention (ISPP) 334, 335
ISM Code
interim certification 86–7
required certificates 84–5
and verification 85–6
and verification under ISM Code 85
channelling provisions, pollution
court having jurisdiction 850
government intervention 568
interpretation and exception to channelling 847–8
jurisdiction and procedural matters 850–2
MSAs, bringing claims for pollution damage under 851
persons protected by channelling 846–7
time bars 851–2
charge, ship mortgage compared 177–8
charterers
bareboat 12–13
demise 745
liability for damages caused by hazardous and noxious substances 651
limitation of liability 745–6, 753–7
part 745
slot 745, 746
charterparties 173, 188, 208
chattel security 178
civil law, hypothecation under 177–8
civil liability
classification societies 374–83
American approach 382–3
comparison with air industry 380–2
whether duty of care owed to third parties 375–80
collisions at sea
employer of wrongdoer 412–16
'equipment,' ship as 417
fiduciary duty 413
liability attaching to ship 417
master, crew and pilot 417–18
negligence principles 411, 413
persons liable 412–19
persons responsible for management and operation of ship 416–17
port authority 418–19
salvors 418
shipbuilders and ship-repairers 419
three-stage negligence test 411–12
tug or tow 418
vicarious liability doctrine 412–16
pilots 722
Civil Liability Convention (CLC) 1992 *see* CLC (Civil Liability Convention) 1992

civil salvage 482
claims, obligation to discharge 188
classification societies
civil liability to buyers and other third parties 374–83
American approach 382–3
comparison with air industry 380–2
whether duty of care owed to third parties 375–80
and flags of convenience 69–70
functions 72, 293
immunity from liability 72–3
inspections/surveys of ships by 29–31
conformity requirements of flag States 31
Directive 94/57/EC (1994) 29–30
Directive 2001/105/EC (2001) 30
Directive (Recast) 2009/15/EC (2009) 30–1, 41–2
financial responsibility provision 30
monitoring of conformity with international standards 30–1
Recognised Organisations 30, 40
Regulation (EC) 391/2009 41–2
sales and purchases 328–9
safety and security of ships, role in 72–3
shipbuilding, new 221, 222
CLC (Civil Liability Convention) 1992
admissibility of claims and causation 839–40
application 834–42
geographical 836–7
incident and territory 836–7
territory and waters 836
'but for' test 840
claims not covered 840
compulsory insurance 845–6
Convention of 1969 compared 852
defences 842–5
definition of 'incident' 836
definition of 'vessel' 835
direct property damage and consequential loss or expenses 837–8
environmental damage claims 838–9
financial security 845–6
geographical application 836–7
government wrongful act defence 844–5
and HNS Convention 866
Limitation Fund, constitution under 849–50
natural phenomenon defence 843–4
normal business operations claims 838
oil pollution 829, 830
pollution damage 837
pure economic loss 838
recognition and enforcement of judgment 852
salvors, possible claims by 840–2
sea-going vessels carrying persistent oil in bulk 834–5
CLC—*cont.*
ship-owners' rights of subrogation 846
strict liability 842
third-party liability insurance 845–6
three-tier compensation system 832
types of pollution damage claim 837–9
CleanSeaNet (European satellite oil spill and vessel detection service) 36
clean-up expenses 760–1, 837
CMCH Act *see* Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH Act), criminal liability under
CMI (Comité Maritime International) 45, 46, 486, 579
coastguards, and salvage operations 506
Code of Safe Practice for Solid Bulk Cargoes (BC Code) 48
Code of Safe Working Practices for Merchant Seamen (CSWPMS) 11, 87
risk management 4, 5, 7, 9, 11, 17, 20, 24
collective knowledge doctrine, attribution of liability 125
collective responsibility 16–25
commitment to 25
funding for risk control and training 25
risk management stages 17–24
contract drafting 17–18
dispute resolution 23–4
incorporation of company 17
performance of voyage, risks at 19–23
ship operations 18–19
safety culture enhancement 24–5
systematic process, adopting 24–5
collisions at sea
actions *in rem* and *in personam* 390
action to avoid, steering and sailing rules 394
adjustment of claims 479
'both to blame' clause 449
bridge, collision with 443–4
burden of proof
civil liability 411
damages and rule of remoteness of damage 451
duty of care, breach 419–20
cargo, loss of or damage to 478–9
civil liability
employer of wrongdoer 412–16
'equipment,' ship as 417
fiduciary duty 413
liability attaching to ship 417
master, crew and pilot 417–18
negligence principles 411, 413
persons liable 412–19
persons responsible for management and operation of ship 416–17
port authority 418–19

collisions at sea—*cont.*
salvors 418
shipbuilders and ship-repairers 419
three-stage negligence test 411–12
tug or tow 418
vicarious liability doctrine 412–16
Conference on Revision 1972 884
contrast claims, cargo damage 446–9
contribution between joint tortfeasors 449–51
common law rule 449
by statute in Admiralty 449–51
criminal liability
general 401
involuntary manslaughter for breach of duty 408–10
new statutory offence 410
statutory offences under MSA 1995 *see* below
damages
assessment 463–77
background of developments 451–2
detention 470–4
extent of damage 458–9
foreseeability 456, 457
idiosyncrasy of claimant, remoteness and mitigation of damages 460–3
kind of damage 457–8
mitigation of loss or damage 459–60
present law, general principle 453–7
reasonable foreseeability 459
rule of remoteness 451–63
'thin skull' rule 459, 460
defences available
actus novus interveniens 427–31, 459, 461
'agony of the moment' 432–3
alternative danger 432–3
contributory negligence 426–7
inevitable accident 425–6
necessity 433
time bar 433–4
detention damages
loss and expenses, apportioning 472–3
mitigation issues 470–1
out-of-pocket expenses/other consequential losses 473
pure economic loss 473–4
routine repairs during collision damage repairs 472
distress, duty to assist those in 503–4
duty of care, breach 419–22
causation in fact 422–4
causation in law 424–5
res ipsa loquitur 420–2
standard of care and burden of proof 419–20
duty to assist following 502–3

collisions at sea—*cont.*
fault, statutory presumption of and subsequent abolition 388–9
foreign currency damages 475–7
foreseeability 411, 412, 454, 456
insurance issues 478–9
involuntary manslaughter for breach of duty 408–10
law and regulations currently 389–90
limitation periods for commencement of claims 477
loss of life claims 445–6
negligence 389, 426–7
three-stage negligence test 411–12
two negligent acts, clear line between 440–1
objects, avoidance action causing damage to 444–5
partial loss of ship and incidental losses 468–74
cost of repairs 468
detention damages 470–4
fixture, loss of use 468–70
loss of use of fixture during repairs 468–70
proportionate fault rule 434–45
application 435
causative potency and blameworthiness 436–40
'clear preponderance of blame' 436–7
composite faults approach 438
exceptions to 440–5
unit approach 438, 442, 443
proximity 411, 412
pure economic loss 412, 473–4
Regulations *see* Colregs (International Regulations for Preventing Collisions at Sea), 1972
risk management 19, 387–479
risk of 394
between ship and a non-ship 442–5
avoidance action causing damage to objects 444–5
bridge, collision with 443–4
statutory offences under MSA 1995
breach of documentation and reporting duties 403–4
conduct endangering ships, structures or individuals 405–7
dangerously unsafe ship/unsafe operation of ships 404–5
directions following shipping casualties, breach of duty to give 408
disobeying Collision Regulations 402–3
failure to give assistance to vessels after collision or to vessels/persons in distress 403

collisions at sea—*cont.*
life-saving regulations, breach of statutory duty with regard to 407
lighthouses, buoys or beacons 407–8
Traffic Separation Schemes 389, 396
Colregs (International Regulations for Preventing Collisions at Sea), 1972 388–401
breach under Merchant Shipping Act 122
conduct of vessels in restricted visibility (Part B, Section III) 398–400
conduct of vessels in sight of each other (Part B, Section II)
action by give-way vessel (Regulation 16) 398
action by stand-on vessel (Regulation 17) 398
crossing situation (Regulation 15) 397
specification of responsibilities between vessels (Regulation 18) 398
definition of vessel and ship 391
disobeying, as statutory offence under MSA 1995 402–3
general 391–2
lights and shapes (Part C) 400–1
and Orders in Council 390
origins 388
ships subject to 390
sound and signals (Part D) 401
statutory presumption of fault and subsequent abolition 388–9
steering and sailing rules (Part B, Section 1) 392–6
action to avoid collision (Regulation 8) 394
collision risk (Regulation 7) 394
narrow channels (Regulation 9) 395–6
proper lookout (Regulation 5) 392
safe speed (Regulation 6) 392–4
Traffic Separation Schemes (Regulation 10) 396
types of regulations 391–401
see also collisions at sea
combustion, dangerous goods causing 673–4
Comité Maritime International *see* CMI (Comité Maritime International)
Committee on Safe Seas and the Prevention of Pollution from Ships (COSS), establishment under Erika II 29, 38–9
common law
classification of terms of contract 319–20
common law possessory lien, ship mortgage compared 178
contribution between joint tortfeasors 449
exclusion of rules concerning duty of care 129
harbour authorities
respective duties of master and pilot 721
common law—*cont.*
risk management 688
statutory duties and liabilities 696–8
master's authority to enter into salvage agreement at 516–23
negligent misconduct under 530–7
salvage
duty of owner of property to co-operate 544
negligent misconduct 530–7
Tojo Maru case 536
shipbuilding contracts 234–5
tort, actions in 861
towage contracts
commencement of towage 595
condition of tow 614–15
definitions 582–3
examples at 596–9
towage versus salvage 584–7
Common Structural Rules (IACS) 73, 76, 222
companies
alter ego of *see alter ego* of company or corporation
controlling or directing mind of 12, 97, 104, 123, 769
corporate interrelations 12–13
corporate personality and rules of attribution 97–8
definition of 'company' under ISM Code 79, 152, 159, 161
gross negligence manslaughter, attribution of liability to 124–6
identification of relevant persons in 100
incorporation, risk management 17
infrastructures of shipping companies 11–16
one-ship 12, 209
persons in actual control 101, 102
as ports 683
risks exposed to 8
ship ownership 402–3
company security officer (CSO) 96
compensation
CLC (Civil Liability Convention) 1992 832
Compensation for Oil Pollution in European Waters Fund (COPE) 39
denial
permanent 859
temporary 858–9
Fund Convention 1992 832
information provision 834
international regime, oil pollution 829–31
IOPC Funds 831, 841
limitation of liability 833
relevant UK legislation 834
SCOPIC *see* Special Compensation of Protection and Indemnity Clause (SCOPIC)
ship-owners' contributions, further 860

compensation—*cont.*
special, salvage
concept 553
criteria 549–52
fair rate 549, 552, 555–6
Nagasaki Spirit case 550–2
out-of-pocket expenses 549
security 556
Supplementary Fund 2003 833
three-tier compensation system 832–4
see also International Oil Pollution Compensation Funds (IOPC Funds)
Compensation for Oil Pollution in European Waters Fund (COPE) 39
compulsory insurance
Bunkers Convention (Bunker Oil Pollution Damage Convention) 2001 864–5
CLC (Civil Liability Convention) 1992 845–6
limitation of liability 789
PAL 2002 (2002 Protocol to PAL 1974 Convention) 810
wilful misconduct defence 735
WRC (Wreck Removal Convention) 2007 734–5
see also insurance issues
conflict of laws
Convention on Maritime Liens and Mortgages (1993), ratification issues 183, 185
law governing mortgage and law of agreement to grant a mortgage 180–1
lex fori 182, 185
priorities between foreign liens and mortgages 181–5
whether proposals for a uniform approach 185
consideration, lack of in shipbuilding contracts 247–8
constructive total loss (CTL) 110
contract law
breach of contract *see* breach of contract
contract for services 595
contracts *uberrimae fidei* 296, 593, 594
dismissal of salvor under contract 541–3
duty to co-operate under contract, salvage 544–5
general average losses 655
insurance issues *see* insurance issues
salvage under contract 483–4
shipbuilding contracts *see* shipbuilding contracts
third-party contracts *see* third-party contracts, interference by mortgagee
towage contracts *see* towage contracts
travel agents, contracts of carriage through 803–4
unfair contract terms 594–5
contract price adjustment clauses, shipbuilding contracts 246
contracts, shipbuilding *see* shipbuilding contracts
contrast claims, cargo damage 446–9
contributory negligence defence
collisions at sea 426–7
harbour damage, liability of ship-owners for 709–10
passenger claims 802, 810
see also negligence
control theory, tug and tow 619–20
control and ‘two employers’ conundrum 620–3
Conwartime charter 21
co-ownership
joint tenants 136
minority shareholders, objections of 137, 138
in modern times 138
relationship between co-owners 137–8
tenants in common 136
in ‘whole ship’ 136
COPE (Compensation for Oil Pollution in European Waters Fund) 39
corporate interrelations 12–13
Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH Act), criminal liability under
applicable organisations 128
corporate killing offence 126–7
deaths in custody 127
duty of care 127
exclusion of common law rules concerning 129
‘relevant duty of care,’ meaning 128–9
elements of offence 127–8
fines 130
gross negligence killing 127
Law Commission proposal 126–7
penalties 129–30
prosecutions 130
question of law and of fact 129
reasons for offences under 127
reckless killing 127
corporate personality, and rules of attribution 97–8
corporations, *alter ego* of *see alter ego* of company or corporation
***Costa Concordia* disaster (2012) 3, 18, 21, 49**
craft
non-displacement 391
recognised subject of salvage 489
crew
civil liability 417–18
defence applicable Criminalisation Directives 55–6
engagement of 151

crew—*cont.*
lifeboat crews of RNLI, salvage by 506–7
limitation of liability issues 762–3
training 21, 53
CREWMAN A and B 2009 (ship management agreement) 135, 146, 147, 165
Criminalisation Directives on ship-source pollution 27, 822
Council Framework Decision (2005/667/JHA) 56
Directive 2005/35/EC
additional defence applicable to owner, master and crew 55–6
amendments made by Directive 2009/123/EC 64–5
background 54–5
challenge against 59–64
conduct 55
conflict with International Conventions 58–9
defences applicable to all persons involved 55
infringement 55
Directive 2009/123/EC
amendments made to Directive 2005/35/EC by 64–5
background 54–5
'reckless misconduct' 62, 63
'serious' negligence, elusive concept 60–4
'wilful misconduct' 62
International Conventions, treatment of ship-source pollution by
conflict with Directive 2005/35/EC 58–9
MARPOL relevant provisions 58
UNCLOs relevant provisions 57–8
recklessness 62, 63
criminal liability
collisions at sea
general 401
involuntary manslaughter for breach of duty 408–10
new statutory offence 410
statutory offences under MSA 1995 402–8
harbour authorities 702–3
implications of ISM Code for criminal liabilities 131
management of ships 161–4
mens rea offences 125, 162–4
non-strict liability offences 162
Merchant Shipping (ISMC) Regulations, criminal liability under 122–3
Merchant Shipping Acts, statutory offences under 119–22
breach of Collisions Regulations 122
breach of documentation and reporting duties 403–4

criminal liability—*cont.*
collisions at sea 402–8
conduct endangering ships, structures or individuals 405–7
dangerously unsafe ship 120, 404–5
directions following shipping casualties, breach of duty to give 408
disobeying Collision Regulations 402–3
failure to give assistance to vessels after collision or to vessels/persons in distress 403
life-saving safety measures 120, 407
lighthouses, buoys or beacons 407–8
logbook of ship 119
notices 119–20
rules of special ships 120
safe manning regulations 120
unsafe operation of ships 121–2, 404–5
non-strict liability offences 162
oil spills 872
pilots 721–2
prior to CMCH Act 2007
attribution of liability for gross negligence manslaughter to a company 124–6
gross negligence manslaughter test against individuals 124
offence of involuntary or gross negligence manslaughter 123
under CMCH Act 2007
applicable organisations 128
corporate killing offence 126–7
deaths in custody 127
elements of offence 127–8
exclusion of common law rules concerning duty of care 129
fines 130
gross negligence killing 127
Law Commission proposal 126–7
penalties 129–30
prosecutions 130
question of law and of fact 129
reasons for offences under 127
reckless killing 127
'relevant duty of care' 127, 128–9
CSWPMS *see* Code of Safe Working Practices for Merchant Seamen (CSWPMS)

damages
assessment 463–77
foreign currency damages 475–7
general principle (*restitutio in integrum*) 463–4, 467
limitation periods for commencement of claims 477
partial loss of ship and incidental losses 468–74

damages—*cont.*
Tojo Maru case 537
total loss of ship 464–8
background of developments 451–2
breach of contract 453
causation 452
consequential 650
detention
loss and expenses, apportioning 472–3
mitigation issues 470–1
out-of-pocket expenses/other consequential losses 473
pure economic loss 473–4
routine repairs during collision damage repairs 472
extent of damage 458–9
in foreign currency 475–7
foreseeability 456, 457
idiosyncrasy of claimant, remoteness and mitigation of damages 460–3
indemnity clauses 453
kind of damage 457–8
limitation of liability issues 748, 752
liquidated
delays 264
or acceleration in payment 280–2
or termination of shipbuilding contract 260
and penalty clauses 280, 281
price escalation issues 246
measure of 360–73
breach by seller 367–73
causation and remoteness 361–7
mitigation 368–73
ratio decidendi, case law 366
'Reid test' 361–2
mitigation 368–73
benefit derived by mitigating party 370–3
collisions at sea 459–60
detention damages 470–1
expectation loss 373
reasonable conduct 369
reliance loss 373
unreasonable conduct and break in chain of causation 369–70
novus actus interveniens 427–31, 459, 461
partial loss of ship and incidental losses 468–74
detention damages 470–4
fixture, loss of use during repairs 468–70
repairs 468–70, 472
present law, general principle 453–7
recoverable, by harbour 711
restitutio in integrum principle 463–4, 467
rule of remoteness 451–63
'thin skull' rule 459, 460

damages—*cont.*
total loss of ship
actual not speculative charter 467–8
value of ship where no market 466–7
yardstick applicable to ascertain loss sustained 464–6
danger
dangerous goods causing combustion or fire 673–4
dangerously unsafe ship/unsafe operation of ships 120, 404–5
effect on a towage contract 495–6
environmental 497
future or contingent 494–5
International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code) 50
International Maritime Dangerous Goods (IMDG) Code 49
kinds of 492–3
salvage 492–7
temporary difficulty 493–4
vessel in, salvage services by standing by 509
DAOs (Delegated Ashore Officers) 95
dead weight capacity (DWC) 231
death *see* life, loss of
Deepwater Horizon incident (2010) 10, 681, 685
defects guarantee, provision
exclusions from guarantee 255–6, 257
guarantee period and conditions of cover 254–5
remedy for guarantee defects 255
risk minimisation 256–7
defences
CLC (Civil Liability Convention) 1992 842–5
collisions at sea
actus novus interveniens 427–31, 459, 461
'agony of the moment' 432–3
alternative danger 432–3
contributory negligence 426–7
inevitable accident 425–6
necessity 433
time bar 433–4
Criminalisation Directives on ship-source pollution 55
general average entitlement 666
HNS (Hazardous and Noxious Substances) Convention 2010 868–9
PAL 2002 (2002 Protocol to PAL 1974 Convention) 811
delays
limitation of liability issues 758
shipbuilding contracts
construction stage 252
delivery of vessel 246, 351–3
excusable under NEWBUILDCON 263–4
excusable under SAJ form 263

delays—*cont.*
force majeure events 261–3
price escalation issues 246
remedies 264–5
Delegated Ashore Officers (DAOs) 95
delivery of vessel
condition of vessel on 339–48
delays 246, 351–3
encumbrances or debts at time of 337
essential documentation for exchange at 293, 334–5
liabilities incurred prior to 337–8
non-delivery as per contract 351–3
passing of property and risk by contract 254
passing of property and risk by statute 253
post-delivery matters 293, 360
see also under Norwegian Sale Form (NSF)
demise charterers 745
Department of Energy and Climate Change (DECC) 685
***The Derbyshire* disaster (1980) 3, 48**
Designated Person Ashore (DPA) 81
carriage of goods, effect of ISM upon liability arising from 107–8
and ECDIS 88
harbour authorities, duties 690
insurance issues and ISM Code 112–13
limitation of liability and role of ISM Code 115–17
detention damages
loss and expenses, apportioning 472–3
mitigation issues 470–1
out-of-pocket expenses/other consequential losses 473
pure economic loss 473–4
routine repairs during collision damage repairs 472
discharge port, risks at 22
disparity principle, salvage 482, 548–9
dispute resolution
risk management stages 23–4
shipbuilding contracts 285
Special Compensation of Protection and Indemnity Clause (SCOPIC) 560
dock-owners, negligence 699
documentation
breach, under Collision Regulations 403–4
delivery of vessel 293, 334–5
Document of Compliance (DOC) 79, 85, 86
ISM Code 84
non-signing of formal document, effect upon validity of contract 314–16
***Dolly* incident (1999) 835**
double-hull tankers, building 222
DPA *see* Designated Person Ashore (DPA)
drilling units 490, 743
dry-docking (inspection by classification society) *see under* classification societies
due diligence
external infrastructures 15
under HVR 106–7
mortgagee obligations when in possession 197
and role of DPA 113
stages of risk management 19
duty of care
breach, collisions at sea
causation in fact 422–4
causation in law 424–5
defences applicable to defendant 425–34
res ipsa loquitur 420–2
standard of care and burden of proof 419–20
Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH Act), criminal liability under 127, 128–9
exclusion of common law rules concerning 129
whether owed to third parties 375–80
'relevant' 127, 128–9
salvage 529–39
negligent misconduct under common law 530–7
reasonableness requirement 529
remedy for negligent misconduct under Convention 529–30
Tojo Maru case 531–7
unresolved issues 537–9
towage contracts, skill and diligence requirements 612–13
duty to exercise during towage 616

Early Warning System for the Baltic Sea 74
ECDIS *see* Electronic Chart Display and Information System (ECDIS)
economic duress
price escalation issues 248–51
salvage 512–13
EEZ (exclusive economic zone) 55, 693, 824
Wreck Removal Convention (WRC) 2007 731, 735
Electronic Chart Display and Information System (ECDIS) 4
collisions at sea 387, 404
general safety and environmental measures 50
importance of 11
ISM Code, effect on 87–8
navigational risks, dealing with 22
risk management standards 17
stages of risk management 20
EMCIP (European Marine Casualty Information Platform) 43
emergency preparedness 23, 83

employers
claims by master and crew against 762–3
collisions at sea, employment of wrongdoer 412–16
limitation of liability issues 762–3
towage contracts, control and 'two employers' conundrum 620–3
vicarious liability of 412–16
EMSA *see* European Maritime Safety Agency (EMSA)
enforcement, regulatory
context 68–77
classification societies, role in safety and security of ships 72–3
closer co-operation between flag and port State, need for 71
flag of ship, importance and role 68
flag State and PSC, role 70–1
flags of convenience 69–70
industry standards on safety and quality assessment 73–4
international safety measures, compliance with 70–1
other initiatives 74–7
ISM Code *see* ISM (International Safety Management) Code
ISPS Code, role for security measures 28, 94–6
oil companies, deterrent effect of vetting by
Rowan decision 92–4
vetting practice 91–2
Enron scandal, misrepresentation 297
environmental salvage 486, 571–80
background 571–2
whether can be tacked on to present Salvage Convention 575–6
whether can stand alone 576–7
feasibility for proposed reform 577–8
financial considerations 578–9
International Salvage Convention 1989 552–3
International Working Group (IWG) 572
'marine environmental protection levy' 579
out-of-pocket expenses 571
proposal for reform 572–3
reasons for reform 572
Salvors' Environmental Protection Fund 579
views of commentators 574–9
Equasis information system 76
equity of redemption, 'clog' or 'fetter' on 189–92
Erika I measures (2000) 29–34
elements 28
inspections and surveys of ships by classification societies
conformity requirements of flag States 31
Directive 94/57/EC (1994) 29–30
Directive 2001/105/EC (2001) 30
Directive (Recast) 2009/15/EC (2009) 30–1
Erika I measures (2000)—*cont.*
phasing out of single-hull tankers 31–3
Port State Control, Directives amending 33–4
Voyage Data Recorders, introduction of 33–4
Erika II measures (2002)
Community monitoring, control and information system 34–6
Directive 2002/59/EC 35
Directive 2009/17/EC 35–6
COSS, establishment 38–9
European Maritime Safety Agency 36–8
oil pollution damage compensation fund 39
proposals 28–9
Erika III measures (2009) 39–48
accident investigation (Directive 2009/18/EC) 42–3
civil liability and financial guarantees for damage done by ships (Directive 2009/20/EC) 44
conformity requirements of flag States (Directive 2009/21/EC) 40–1
inspections by classification societies (Directive 2009/15/EC and Regulation (EC) 391/2009) 41–2
liability and compensation to passengers (Regulation (EC) 392/2009) 43–4
PAL 2002 (2002 Protocol to PAL 1974 Convention) 807
Port State Control Directive (Directive 2009/16/EC) 42
proposals 29
traffic monitoring and places of refuge (Directive 2009/17/EC)
background 44–5
CMI Conference, draft instrument approved by 46
further EU measures 47–8
IMO Guidelines 46–7
status of places of refuge in the UK 47
Erika measures *see* Erika I measures (2000); Erika II measures (2002); Erika III measures (2009)
***The Erika* disaster (1999) 3, 4, 27, 45, 54, 829**
details 28, 847
measures following sinking *see* Erika measures
estoppel, and exceptions clauses 301–3
European Economic Interest Groupings 142
European Economic Interest States, incorporation in 142
European Marine Casualty Information Platform (EMCIP) 43
European Maritime Safety Agency (EMSA)
accident analysis 38
Administrative Board 37–8
Erika II measures (2002) 28–9
extension of remit 38

European Maritime Safety Agency (EMSA)
—cont.
future developments in maritime safety, role in 37
general tasks 36
governance 37–8
monitoring role 37
pollution prevention role 37
specific tasks 37
European Quality Shipping Information System (Paris MOU) 74
European Union (EU)
Commission inspections 96
EU Treaty, British citizens and nationals under 141–2
flagging rules, and tonnage tax 145
IMO, working in harmony with 27
LRIT (Cooperative Data Centre) 36, 47
passenger ships and roll-on/roll-off (ro-ro) vessels, safety and environmental measures 49
regulatory developments *see under* regulatory regime
Three Pillars of competences 56
evidential estoppel, and exceptions clauses 301–3
exceptions clauses
curtailment by Misrepresentation Act 1967 (Section 3) 303–5
and estoppel 301–3
exclusion of liability, breach of contract and contractual protection of manager/employees 164
exclusive economic zone (EEZ) *see* EEZ (exclusive economic zone)
'extended producer responsibility' principle 51

fatigue, prevention of 19, 22
MARTHA (fatigue prediction software model) 50
fault
collisions at sea
proportionate fault rule 434–45
statutory presumption of fault and subsequent abolition 388–9
deviation through unauthorised route 669–71
general average entitlement, effect on
CONWARTIME 1993 clause 670
dangerous goods causing combustion or fire 673–4
deviation through unauthorised route 669–71
negligence 667
no liability to contribute 667–74
piracy issues 669–71
remedies or defences 666
fault*—cont.*
rule against recovery (equitable defence) 666
unauthorized deck cargo 668–9
unseaworthiness 671–3
PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea)
fault-based liability under 797–8
presumed fault under 798
shift from fault-based to strict liability 791–2
PAL 2002 (2002 Protocol to PAL 1974 Convention), fault-based liability under 809
proportionate fault rule, collisions at sea 434–45
application 435
causative potency and blameworthiness 436–40
'clear preponderance of blame' 436–7
composite faults approach 438
exceptions to 440–5
unit approach 438, 442, 443
shift from fault-based to strict liability, in passenger claims 791–2
unauthorized deck cargo 668–9
financial issues
environmental salvage 578–9
Erika III measures (2009) 44
inspections/surveys of ships 30
towage contracts
financial losses 542–3
'loss of profit,' conflicting views 643–5
fines
MSA 1995, statutory offences under 403, 404, 406
under CMCH Act 2007 130
fire
dangerous goods causing 673–4
drills 19, 21
limitation of liability issues 763–4
fishing vessels 140–1, 143
fixtures, loss of use during repairs 468–70
flag of ship
flags of convenience 69–70, 145, 180
importance and role 68
flag States
'blacklisting' system imposed upon by amended PSC Directive 31
certificates of compliance granted by 84
conformity requirements under Erika measures 31, 40–1
implementation of International Conventions 75
need for closer co-operation with port States 71
role in enforcement 70–1
self-audit system (IMO) 41

floating platforms 490, 743
fluctuation clauses, shipbuilding contracts 246
***force majeure* events**
binding contracts 229
causing frequent disputes 262–3
delays 261–3
exclusion of liability 164
general strikes, knock on effect 262
labour strikes 262
SAJ (Shipbuilders' Association of Japan) contract form 252, 261, 262
shortage of materials or equipment 262–3
foreclosure, mortgagee rights 207
foreign currency, damages in 475–7
foreseeability
and break in chain of causation 665–6
collisions at sea 411, 412, 454, 456
damages and rule of remoteness of damage 456, 457
general average 665–6
formal safety assessment (FSA) 6–7, 11
***forum non conveniens* principle 781**
freezing injunctions, evaluation 354–60
case law 355–7
matters to be inferred from authorities 358
notification of application 358–60
Veracruz I/Siskina barrier 356–7
conditional injunctions 355–6
dissipation risk, test of 354
ex parte applications 356
limits to granting 355–60
freight
not part of security 174
right to 196–7
at risk 490
FSA (formal safety assessment) 6–7, 11
FSS Code (International Code for Fire Safety System) 50
***Full City* incident (2009) 741**
Fund Assembly 1992 831, 835, 838
Working Group 2000 860
Fund Convention 1992 852–6
admissibility of claims and causation 839–40
advisors, use of 839
application 834–42
territory and waters 836
'but for' test 840
claims not covered 840
defences of Fund 854
definition of 'incident' 836
definition of 'vessel' 835
direct property damage and consequential loss or expenses 837–8
environmental damage claims 838–9
geographical application 836–7
and HNS Convention 2010 866
Fund Convention 1992—*cont.*
incident and territory 836–7
judgments 855–6
jurisdiction 855
limited redress for pollution damage caused in 1969 CLC States 853
meeting of claims 853
normal business operations claims 838
oil pollution 830, 831
pollution damage 837
pure economic loss 838
salvors, possible claims by 840–2
sea-going vessels carrying persistent oil in bulk 834–5
subrogation rights 854–5
three-tier compensation system 832
time bar 855
types of pollution damage claim 837–9

GA *see* general average (GA)
gas floats, and salvage 490
GBS (Goal-Based Standards) *see* Goal-Based Standards (GBS)
general average (GA) 653–77
accrual of cause of action 674–5
authority to act in 659–60
basis of obligation 654–5
causation 665–6
common maritime adventure 655, 662–3
conditions giving rise to 660–5
common maritime adventure 662–3
danger or peril 660–1
intentionality 664
preservation of property imperilled 665
reasonableness requirement 664
threat 662
voluntary 664
danger or peril 660–1
definitions 653–4
'Digest of Justinian,' adopted in 653, 675
direct consequence 665
elements 654
examples 655–6
expenditure or sacrifice 654, 655
extraordinary 663–4
fault, effect on GA entitlement
CONWARTIME 1993 clause 670
dangerous goods causing combustion or fire 673–4
deviation through unauthorised route 669–71
negligence 667
no liability to contribute 667–74
piracy issues 669–71
remedies or defences 666
rule against recovery (equitable defence) 666

general average (GA)—*cont.*
unauthorized deck cargo 668–9
unseaworthiness 671–3
foreseeability
and break in chain of causation 665–6
foreseeable damage, loss for 656
limitation of liability issues 756, 762
lis pendens rule, Brussels I Regulation 676
losses, payment for 655
particular average, distinguished from 654
particular average loss 662
property subject to 655
security 675–7
forms 675–6
non-separation agreement 676–7
possessory lien, right to 675
time limits 677
Special Compensation of Protection and Indemnity Clause (SCOPIC) 560
threat 662
UKST towage contracts 666
York-Antwerp Rules (YAR) 653
of 1890 656
of 1924 656, 657, 661
of 1950 656
of 1974 656, 657, 658, 659
of 1994 656
of 2004 656–7, 659
construction 657–9
expenses at port of refuge (Rule XI) 656, 661, 663
origin and application 656–7
provision of funds (Rule XX) 656, 661
Rule A 661, 664
Rule C 665
Rule D 666
Rule E 665
salvage remuneration (Rule VI) 656
temporary repairs (Rule XIV) 656, 659
voluntary nature of 657
Global Integrated Shipping Information System (IMO) 43
Goal-Based Standards (GBS) 73, 76
shipbuilding contracts 221, 222
good faith concept
purchase of ships 293–4
'using best endeavours' to negotiate in good faith 294–6
withdrawal, effect of 294
towage contracts
whether duty of good faith 592–3
whether existing in 593–4
government wrongful act defence, pollution 844–5
Greek Shipping Cooperation Committee 59
Green Flag Award 74
gross negligence/gross negligence manslaughter
attribution of liability to a company 124–6
offence of 123
test against individuals 124
towage contracts 649
Gulf of Mexico Deepwater Horizon incident (2010) 10, 685

Hague-Visby Rules (HVR), due diligence under 106–7
harbour authorities
accountability 690, 715–16
claims 180
duties
accountability for marine safety 690
under common law 688
under general and local legislation 687–8
revised guidance for risk assessment 689–90
in risk management area 687–90
specific obligations to implement risk assessment 688
statutory 690–703
environmental protection 684–6
ISM Code 680
limitation of liability 750
open port duty 690
pilotage
compulsory 715
compulsory pilotage area, duties of masters and pilots 718–19
IMO recommendations 713–14
liability of harbour authorities with respect to 722–3
services 700–2, 714–16
see also pilots
pilots
accountability for safety and risk management 715–16
authorisation 716–18
authority of 719–21
charges by competent harbour authority 730
civil liability 417–18
communication with 23
Directive 1999/42/EC 701–2, 714
duties in a compulsory pilotage area 718–19
duties of competent authority in relation to 714–18
function 712
IMO recommendations 713–14
International Best Practice for Maritime Pilots 714
International Maritime Pilots Association 714
liability 721–2
negligence, liability of ship-owners for 723–30

harbour authorities—*cont.*
offence not to have 718–19
PA 1987 713, 714–15
recognition of qualifications 715
relationship with master 719–21
risk assessment 713
and risks 712–30
rules of engagement 718
services, obligation to provide 714–16
statutes 713–14
training, certification and operational procedures 714
voluntary services, when exceptional 499–501
powers 680, 687
risk management by 679–736
duties in risk management area 687–90
statutory duties and liabilities
under common law 696–8
criminal liability 702–3
duty to operate port 690–2
limitation of liability 702
maintenance of port in good condition 695–6
under Occupiers' Liability Acts 698–9
pilotage services 700–2
port safety, contractual duty in relation to 699–700
to provide navigational safety/safety procedures 692
wrecks 692–5
types 683–4
Wreck Removal Convention (WRC) 2007
application 731–2
coming into force 736
compulsory insurance 734–5
definitions 731–2, 733
liability of registered owner 734
objectives 732
obligations under 733
and places of refuge 735–6
proportionality and reasonableness 732–3
and salvors 735
see also harbours
harbour master, potential offences by 567–8
harbours
definitions
'harbour' 682
'harbour operations' 683
'offshore installation' 685
'release' concept 685
dues 711–12
laws and regulations affecting 680–712
liability of ship-owners for damage caused to 703–11
contributory negligence defence, whether sustainable 709–10
harbours—*cont.*
options for owner 710–11
recoverable damages by harbour 711
River Wear Commission v Adamson 703–9
statutory cause of action against registered owner 703–9
powers 680–2
recoverable damages by 711
River Wear Commission v Adamson case 703–9
CA decision 704–5
House of Lords decision 705–6
problems created by decision 707–9
see also harbour authorities
harm, possibility of 5
foreseeability 411
hazards
definition of 'hazard' 5, 733
hazardous and noxious substances (HNS), liability for 651
hazardous occurrences, ISM Code 83
HNS Fund 866
liability 870–1
see also HNS (Hazardous and Noxious Substances) Convention 2010
***The Herald of Free Enterprise* disaster (1987) 3, 18, 77**
attribution of liability 123, 124, 125
facts of case 125
high-risk area (HRA) 7
Himalaya clauses
limitation of liability issues 748
ship management 165–6
towage contracts 635–7, 649, 650
HM Coastguard 491, 506
HNS (Hazardous and Noxious Substances) Convention 2010 821, 866–71
concept of 'damage' 866
damage covered 867–88
exclusions 871
and Fund Convention 1992 866
geographical application 868
IMDG Code (International Maritime Dangerous Goods) Code 867
jurisdiction 870, 871
limitation 869–70
modelled on CLC Fund regime 866
registered ship-owner's liability 868
ships covered 866
strict liability and defences 868–9
substances covered 867
time bar 871
two or more ships 869
Horizon Project, on crew fatigue 50
hovercraft
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 743
salvage 491

hull and machinery (H&M) insurance cover 109, 187
hypothecation, and ship mortgage 177–8

IACS (International Association of Classification Societies) ***see*** **International Association of Classification Societies (IACS)**
IBC Code (International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk) 50
identification doctrine 100–3
corporate criminal liability 126
limitation of liability 115
or *alter ego* of company/corporation 97
and role of DPA 112
IMDG Code (International Maritime Dangerous Goods) Code 49, 867
imprisonment, statutory offences under MSA 1995 403, 404, 406
IMSBC Code (International Maritime Solid Bulk Cargoes Code) 48
incorporation of company, risk management 17
indemnity clauses
damages 453
and 'Himalaya' clauses 165–6
limitation of liability issues 752, 755, 757–8
limitations 629–34
management of ships 165–6
ship management 165–6
towage contracts 627–34
independent contractors, limitation of liability 747–8
industry support organisations 27
inevitable accident defence, collisions at sea 425–6
infrastructures of shipping companies 11–16
compliance with International Conventions 14
external 14–16
internal 12
market forces 15–16
regulatory and fiscal 14
relational 12–14
third parties' factors 14–15
injury prevention 22
inspections/surveys of ships
by classification societies 29–31
conformity requirements of flag States 31
Directive 94/57/EC (1994) 29–30
Directive 2001/105/EC (2001) 30
Directive (Recast) 2009/15/EC (2009) 30–1, 41–2
financial responsibility provision 30
monitoring of conformity with international standards 30–1
inspections/surveys of ships—*cont.*
Recognised Organisations 30, 40
Regulation (EC) 391/2009 41–2
sales and purchases 328–9
European Commission 96
expanded inspection 33
by Port State Control 33
purchase and sale of ships
inspection stage 327
pre-inspection stage 322–6
Institute Cargo Clauses A, B and C (1982) 655
Institute Clauses for Builder's Risk terms 257
Institute Clauses for H&M 478
Institute Time Clauses Hull 113
Institute Time Clauses Hull (1983, 1995) 655
instructions, clarity requirement 21
insurance issues
adjustment of claims 479
collisions at sea 478–9
compulsory insurance *see* compulsory insurance
constructive total loss 110
'cross' liability 479
effect of ISM Code upon
duty to disclose material facts 109
privity of assured 109–11
provisions of insurance contract 113
role of DPA 112–13
role of ISM Code 111
role of third-party ship manager 112
general average losses 655
as indemnity contracts 479
and limitation of liability 740, 789
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 740
management of ships
manager as a co-assured with owner 167
protection of manager and employees 166–7
mortgage of ships
additional perils policies 219
mortgagor obligations 186–7
risk management and insurance issues of mortgagee 218–19
operating without 10
'pay to be paid' rule 479
provisions 113
running-down clause 478, 479
shipbuilding contracts 257–8
sustainability of viable insurance system 740
third-party liability insurance 845–6
towage 651
uberrima fides contracts 296

insurance issues—*cont.*
'umbrella of a member's entry,' co-assurance 167
war-or terrorism-risks insurance 816–17
see also hull and machinery (H&M) insurance cover; liability insurer; protection and indemnity (P&I) cover
Intercargo 59, 73
Inter-Governmental Consultative Organization (IMCO) 881
Interim DOC (IDOC) 85, 86
Interim SMC 86
International Association of Classification Societies (IACS) 72, 75
Common Structural Rules 73, 76, 222
International Atomic Energy Agency (IAEA), Vienna Convention on Civil Liability for Nuclear Damage 1963 872, 873–4
International Best Practice for Maritime Pilots 714
International Civil Aviation Organisation 31
International Code for Fire Safety System (FSS Code) 50
International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code) 50
International Conference for Limitation of Liability, London (1976) 742
International Convention for the Prevention of Pollution from Ships (MARPOL) ***see*** **MARPOL (International Convention for the Prevention of Pollution from Ships) 1973**
International Convention for the Safety of Life at Sea (SOLAS) ***see*** **SOLAS (International Convention for the Safety of Life at Sea) 1974**
International Conventions
accession 878
adopting 875–6
amendment 878–9
enforcement 879–81
entry into force 876–7
IMO Conventions 880–1
and interpretation 880
ratification, acceptance and approval 877–8
signature 877
tacit acceptance procedure 881–5
treatment of ship-source pollution by
conflict with Directive 2005/35/EC 58–9
MARPOL relevant provisions 58
UNCLOs relevant provisions 57–8
uniform law and conflict of law rules 880
see also specific Conventions
International Goal-Based Construction Standards for Bulk Carriers and Oil Tankers 222
International Group of P&I (IGP&I) Clubs 73, 556, 557, 861
International Hull Clauses (2003) 655
International Maritime Dangerous Goods (IMDG) Code 49
International Maritime Organization (IMO) 5
Assembly 77, 78, 221
Council, 89th session 221
EU, working in harmony with 27
Facilitation Committee 875
formal safety assessment (FSA) developed by 6, 11
49th Plenary Session (2003) 32
Global Integrated Shipping Information System 43
Guidelines (on traffic monitoring and places of refuge) 46–7, 568–9
IMO Resolution LEG 5(99) 741, 788–9
information provision to 96
Legal Committee 46, 793, 811, 815, 816, 818, 883, 884
and London Convention 1972 826
Marine Environment Protection Committee (MEPC) 32, 875
Maritime Environment Committee (MEP) 52
passenger ships and roll-on/roll-off (ro-ro) vessels, safety and environmental measures 49–50
pilotage recommendations 713–14
regulatory developments *see under* regulatory regime
Reservation and Guidelines 2006 792, 820
background 815–16
Blue Cards 817
non-war risks insurance 817
war-or terrorism-risks insurance 816–17
self-audit system for flag States 41
tacit acceptance procedure 65–6
International Maritime Pilots Association 714
International Maritime Solid Bulk Cargoes Code (IMSBC Code) 48
International Oil Pollution Compensation Funds (IOPC Funds) 831
compared to HNS Fund 866
Fund Assembly 1992 831, 835, 838, 860
Manuals of Incident Reporting 822, 838, 839, 841
pollution damage claims under MSA 851
International Organisation for Standardisation (ISO), piracy risk assessment and planning guidelines 20–1

International Safety Management (ISM) Code
amendments 78
carriage of goods contract, effect on liability arising from 107–8
collisions at sea 387, 405, 407
consequences of breach of provisions 88–90
criminal sanctions and UK statutory instrument 88–90
no criminal sanctions for non-compliance 88
co-ownership 138
criminal liability and role of ISM Code
Merchant Shipping (ISMC) Regulations, criminal liability under 122–3
Merchant Shipping Acts, statutory offences under 119–22
prior to CMCH Act 2007 123–6
under CMCH Act 2007 126–30
CSWPMS, effect on 87
deterrent effect 90–1
duties of company under and effect of 2010 amendments 160–1
ECDIS, effect on 87–8
and flags of convenience 69–70
harbour authorities 680
insurance issues, effect upon
contract provisions 113
duty to disclose material facts 109
mortgage of ships 219
privity of assured 109–11
role of DPA 112–13
role of ISM Code 111
role of third-party ship manager 112
legal implications upon liabilities 104–31
criminal liability and role of ISM Code 119–30
effect of liability arising from contract of carriage of goods 106–8
insurance issues, effect of ISM upon 109–13
limitation of liability and role of ISM Code 113–19
limitation of liability and role of ISM Code
faults 117–18
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1957 104, 113–14
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 114–15
risk management issues 117–19
role of DPA 115–17
management agreements 147
mortgage of ships 187
non-compliance 19
objectives 80
origin 77–8

International Safety Management (ISM) Code—*cont.*
Part A
company responsibilities and authority 81
company verification, review and evaluation 84
core provisions 79–82
Designated Person Ashore (DPA) 81
documentation 84
emergency preparedness 83
functional requirements for a safety management system 80
general definitions 79
master's responsibility and authority 81–2
non-conformities, accidents and hazardous occurrences 83
objectives 80
resources and personnel 82
safety and environmental protection policy 80–1
shipboard operations 82–3
Part B 84–7
certificates required 84–5
certification and verification 85–6
interim certification 86–7
philosophy 78–9, 131
risk assessment and management under 4, 6
safety, role in 78
safety management system (SMS) 8, 9
ship manager, general obligations under 159
and SOLAS 824
stages of risk management 19, 20
teamwork requirement 8–9
and third-party ship manager, role 112
UK statutory instrument implementing (Merchant Shipping (ISMC) Regulations 1998) 88–90
application 89
defence 90
detentions 89
duties 89
offences and penalties 89–90
see also International Safety Management (ISM); safety and environmental measures

International Salvage Convention 1989
application 487–92
Article 13 award 558
Article 14
environmental salvage 552–3
problems arising out of drafting of 553–6
substitution of 557
whether environmental damage can be tacked on to 575–6
fair rate 555–6

International Salvage Convention 1989—*cont.*
general application 487–8
increment 556
master's authority under 523–4
pollution 828
recognised subject of salvage 488–92
'relevant waters' 488
remedy for negligent misconduct under 529–30
role 511–12
security for special compensation 556
substantial physical damage 555
territorial limits 554
threatened damage 555
towage versus salvage 584
see also salvage
International Salvage Union (ISU) ***see*** **ISU (International Salvage Union)**
International Sewage Pollution Prevention (ISPP) Certificate 334, 335, 336
International Ship and Port Facilities Security (ISPFS) Code 28
application 94–5
EU Commission inspections 96
extent of control on entry into ports 95
IMO, information provided to 96
master, role of 95
piracy risk assessment and planning guidelines 20
port facility requirements 96
regulatory enforcement 94–6
requirements 95
role for security measures 94–6
ship management 147
ship security alert system 96
International Standards Organisation (ISO) 73–4
International Tonnage Certificate 145
International Transport Intermediaries Club (ITIC) 167
International Transport Workers' Federation, industrial action by 68
Intertanko 59, 73
IOPC Funds ***see*** **International Oil Pollution Compensation Funds (IOPC Funds)**
ISM Code ***see*** **International Safety Management (ISM) Code**
ISO ***see*** **International Organisation for Standardisation (ISO)**
ISO (International Standards Organisation) 73–4
ISPFS Code ***see*** **International Ship and Port Facilities Security (ISPFS) Code**
ISPP (International Sewage Pollution Prevention Certificate) 334, 335, 336
ISPS Code ***see*** **International Ship and Port Facilities Security (ISPFS) Code**
ISU (International Salvage Union) 59, 556, 557
environmental salvage proposal 579–80
ITIC (International Transport Intermediaries Club) 167

Joint Long-term Programme (JLTP), London Convention and Protocol (LC/LP) 826–7
joint tenants 136
JS Amazing **incident (Nigeria 2009) 845**
jurisdiction
channelling provisions, pollution 850–2
Fund Convention 1992 855
HNS (Hazardous and Noxious Substances) Convention 2010 870, 871
passenger claims
Athens Convention 2002 (2002 Protocol to PAL 1974 Convention) 813–14
PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) 803
salvage 564–5
Supplementary Fund Protocol 2003 859–60
UNCLOS provisions 823–4

key performance indicators (KPIs) 25
'knock-for-knock' clauses, towage contracts 582, 652
unseaworthiness of tug 645–7
knowledge
'blind eye' 110–11, 779, 780
of circumstances 209
collective knowledge doctrine 125
limitation of liability 776–80

lawful act duress, shipbuilding contracts 249
LC/LP (London Convention and Protocol) 826, 827
legal risk management 8
lex fori**, conflict of laws 182–3, 185**
liability
attribution of *see* attribution of liability
civil *see* civil liability
criminal *see* criminal liability
limitation of *see* limitation of liability issues
liability insurer
direct action against 750
trigger of liability, statutory 749
when right of action against 749
liability salvage 484–5, 546
liens
common law possessory 178
discharge of 188
foreign, priority issues 181–5

liens—*cont.*
general average 675
obligation to discharge 188
possessory, right to 675
life, loss of
claims 445–6
fault-based liability caused by non-shipping incident 809
PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) 800–1
PAL 2002 (2002 Protocol to PAL 1974 Convention) 812
passenger claims 751
prevention 22
see also life-saving safety measures
proportionate fault rule, exception to 441
strict liability 808
lifeboat crews of RNLI, salvage by 506–7
life salvage 491–2, 546
Life-Saving Appliances (LSA) Code 407
life-saving safety measures
breach of statutory duty with regard to 407
Merchant Shipping Act offences 120
see also Colregs (International Regulations for Preventing Collisions at Sea), 1972; life, loss of
lighthouses, buoys or beacons, statutory offences in relation to 407–8
lights and shapes, Collision Regulations 400–1
likelihood of incident happening 5
Limitation Fund
Admiralty Court procedure relating to limitation 786–7
bar to other actions 783–4, 849–50
constitution 782–3
under CLC 849–50
counterclaims 785–6
distribution 785
establishment 781–7
lis pendens 781
MSAs, bar under to other proceedings against other liable person 850
procedural matters 781–5
limitation of liability 739–89
act or omission 766, 768–9
Admiralty Court procedure relating to 786–7
breach of contract and contractual protection of manager/employees 165
Bunkers Convention (Bunker Oil Pollution Damage Convention) 2001 864
charterers 745–6, 753–7
claims excepted from limitation 761–3
general average claims, contribution in 762
by master and crew against employers 762–3
limitation of liability—*cont.*
nuclear damage 762
oil pollution 762
salvage 762
claims subject to limitation 750–61
all claims, whether for damages, debt or indemnity 752
clean-up expenses 760–1
delay, loss resulting from 758
infringed rights 758
litigation costs claims 751–2
loss of life and personal injury of passengers 751
measures taken to avert/minimise loss 761
occurring on board/in direct connection with operation of ship or with salvage operations 752–8
owners and charterers 753–7
wreck removal 758–61
comparison between Convention provisions 764–7
act or omission 766
causation 767
persons liable 766
whether specific loss or damage 767
type of loss 766
compulsory insurance, EU Directive (2009/20/EC) 789
conduct barring limitation/exclusion of liability
act or omission 766, 768–9
'actual fault or privity' test under 1957 Convention 769–72
burden of proof 767
carriers 766
causation 767
comparison between Convention provisions 764–74
fault of ship managers under both Conventions 772–4
mental element 774–81
personal act or omission/omission of others 768–9
persons liable 766
whether specific loss or damage 767
test barring limitation 767–74
type of loss 766
damages 748, 752
exclusion of total liability 763–4
fire on board
old law 763
present law 763–4
general average claims 756, 762
harbour authorities 702, 750
HNS (Hazardous and Noxious Substances) Convention 2010 869–70
identification doctrine 115
IMO Resolution LEG 5(99) 741, 788–9

limitation of liability—*cont.*
indemnity claims 752, 757–8
and insurance 740, 789
International Conference for Limitation of Liability, London (1976) 742
ISM Code, role
faults 117–18
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1957 104, 113–14
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 114–15
risk management issues 117–19
role of DPA 115–17
justification of 739–40
liability insurer 749–50
Limitation Fund
Admiralty Court procedure relating to limitation 786–7
bar to other actions 783–4
constitution 782–3
counterclaims 785–6
distribution 785
Limitation Fund, establishment 781–7
procedural matters 781–5
litigation costs claims, exclusion 751–2
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1957 104, 113–14
'actual fault or privity' test 769–72
and background to 1976 Convention 741–2
fault of ship managers 772–4
wreck removal 758–9
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 114–15, 740
application/limitations 742–4
background 741–2
fault of ship managers 772–4
as 'global limitation' regime 741
scope 741–4
wreck removal 759–60
management of ships 165, 746, 772–4
measures taken to avert/minimise loss 761
mental element
'intent to cause such loss' 774–5
loss probably resulting 780–1
'recklessness' 775–6
'recklessness and with knowledge' 776–80
modern trends 740–1
offshore supplytime charters 650
owners and charterers, claims as between
cargo damage, by way of indemnity 755
categories 753
consequential loss to loss of ship being liable 756–7
excluded claims 756–7
general average claims 756
ISM Code, role—*cont.*
included claims 753–6
indemnity claims 757–8
loss of or damage to ship 756
recourse claims 755–6, 757–8
salvage claims 756
PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) 799–801
death or personal injury 800–1
losing right to limit 801
luggage, limitation for loss or damage 801
prohibition of contracting out 800
persons entitled to limit
charterers 745–6
exclusion of persons with interest in or in possession 745
independent contractors 747–8
managers 746
servants or agents 746–7
ship-owners 744–6
rationale for 740
recourse claims 755–6, 757–8
risk management issues 117–19
role of DPA 115–17
role of ISM Code 113–19
salvage 752–8, 756, 762
salvors 748–9
ship-ownership
claims as between owners and charterers 753–7
meaning of 'owner' under LLMC 1976 744–6
meaning of 'owner' under old regime 744
theft of valuables, present law 763–4
three-tier compensation system 833
towage contracts 638–40, 650
travaux préparatoires 746, 747, 769
liquidated damages
delays 264
or acceleration in payment 280–2
or termination of shipbuilding contract 260
and penalty clauses 280, 281
price escalation issues 246
***lis pendens* rule, Brussels I Regulation 676, 781**
litigation costs claims, limitation of liability 751–2
litigation risks 23
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1957 104, 113–14
'actual fault or privity' test 769–72
and background to 1976 Convention 741–2
fault of ship managers 772–4
wreck removal 758–9

LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 740
application 742–4
background 741–2
fault of ship managers 772–4
as 'global limitation' regime 741
ISM Code 114–15
limitations 742–4
floating and drilling platforms excluded 743
hovercraft excluded 743
minimum tonnage 743–4
passenger claims 744
seagoing ships only 743
and PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) 804–5
Protocol of 1996
general provisions 787
limits under 787–8
and PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) 805–6
scope 741–4
wreck removal 759–60
Lloyd's Open Form (LOF) 1980 481, 484, 511, 553
'safety net' concept 497
Lloyd's Open Form (LOF) 1990 522, 523, 546, 551
Lloyd's Open Form (LOF) 1995 523, 546
Lloyd's Open Form (LOF) 2000 511, 523, 546, 561
Lloyd's Open Form (LOF) 2011 482, 523, 546, 562
Lloyd's Register 59
Lloyd's Standard Salvage and Arbitration Clauses (LSSA), changes to 562–4
costs 563–4
security for arbitrators' fees 563
security for containerised cargo 563
logbook of ship, Merchant Shipping Act offences 119
London Shipping Law Centre 75, 77
Seventh and Eighth Cadwallader Lectures (2004 and 2005) 59
London Trinity House 388
long-range identification and tracking of ships (LRIT), system, EU 36, 47
lookout, steering and sailing rules (Collision Regulations) 392
losses
actual not speculative charter 467–8
apportioning 472–3
cargo claimed against non-carrying ship 478
causing by unlawful means 216–17
losses—*cont.*
colliding ships 478
consequential 473, 837–8
constructive total loss (CTL) 110
currency of 373–4
delays 758
expectation 373
fixture, loss of use during repairs 468–70
of life 22, 441, 445–6
limitation or exclusion of liability, conduct barring 766, 767
mental element
'intent to cause such loss' 774–5
loss probably resulting 780–1
partial loss of ship and incidental losses 468–74
detention damages 470–4
fixture, loss of use during repairs 468–70
repairs 468–70, 472
particular average 662
payment for, general average 655
physical damage to insured ship 478
pure economic loss 412, 473–4, 838
reliance 373
yardstick applicable to ascertain loss sustained 464–6
see also damages
LRIT (Cooperative Data Centre), EU 36, 47
LSSA *see* Lloyd's Standard Salvage and Arbitration Clauses (LSSA), changes to
luggage
defined 796
PAL 1974 limits for loss of or damage to 801
PAL 2002 Protocol on loss or damage 809, 812
Lyme Bay canoeing tragedy (1993) 123

MAIB (Marine Accident Investigation Branch) 91, 117
maintenance of ship, mortgagor obligations 187
management of ships
agreements 146–8
authority of ship managers
actual or implied 148–9
crew, engagement of 151
exceptional repairs 152
extent of authority to bind owners 150
issuing proceedings in name of principal 150
owner as an undisclosed principal 149–50
technical matters 151–2
best endeavours
obligations of ship manager 152, 153–4, 155
and reasonable care 155–6
risk management in drafting of best endeavour clauses 154–5

management of ships—*cont.*
breach of contract and contractual protection of manager/employees
exclusion of liability 164
indemnity and Himalaya clauses 165–6
liability and limitation 165
broad terms 147
confidentiality clauses in agreements 152
CREWMAN A and B 2009 (ship management agreement) 135, 146, 147, 165
criminal liability 161–4
mens rea offences 162–4
non-strict liability offences 162
discretion of managers 150
duties of ship manager
'account of profits' 158
fiduciary duty 156–8
'no conflict' rule 158
reasonable care and best endeavours 155–6
statutory 159–64
and statutory duties 161
exclusion of liability 164
fiduciary duty of ship manager
breach of 156–8
general principles 156
indemnity and Himalaya clauses 165–6
insurance and risk management 166–7
limitation of liability 165, 746, 772–4
obligations of ship manager 152–5
best endeavours 152, 153–4
risk management in drafting of best endeavour clauses 154–5
overview 145
reasonable endeavours 153, 154
shipbrokers and agents 145
SHIPMAN 2009 (form) *see* SHIPMAN 2009 (management agreement form)
statutory duties
criminal liability 161–4
duties of company under ISM Code and effect of 2010 amendments 160–1
effect upon manager's duties 161
ISM Code, general obligations under 159
major non-conformity 159
third-party managers 146
see also ship-ownership
manslaughter
collisions at sea, involuntary manslaughter for breach of duty 408–10
Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH Act), criminal liability under
applicable organisations 128
corporate killing offence 126–7
deaths in custody 127
duty of care 127, 128–9
elements of offence 127–8
manslaughter—*cont.*
fines 130
gross negligence killing 127
Law Commission proposal 126–7
penalties 129–30
prosecutions 130
question of law and of fact 129
reasons for offences under 127
reckless killing 127
gross negligence *see* gross negligence manslaughter
Mareva relief, freezing injunctions 356
see also freezing injunctions, evaluation
Marine Accident Investigation Branch (MAIB) 91, 117
Marine Environment Protection Committee (MEPC) 32, 875
Maritime and Coastguard Agency (MCA) 47
maritime assistance services 569
Maritime Environment Committee (MEP) 52
Maritime Guidance Note, UK 22
Maritime Labour Convention (MLC) 2006, general safety and environmental measures 53–4
Maritime Safety Committee (MSC) 21, 221, 875, 880
Maritime Subsidy Board, US Department of Maritime Administration 222
MARPOL (International Convention for the Prevention of Pollution from Ships) 1973 824
amendment 885
and Criminalisation Directives 58
MARTHA (fatigue prediction software model) 50
Maritime Assistance Services (MAS) 46–7
MAS (Maritime Assistance Services) 46–7
master of ship
agreement of salvage, authority to enter into
actual authority 516
basis to bind cargo interests to a salvage contract 517–23
basis to bind principal to a salvage contract 517
at common law 516–23
implied by operation of law 516
authority
to bind cargo-owners 589
to enter into salvage agreement 516–23
towage contracts 587–9
civil liability 417–18
compulsory pilotage area, duties in 718–19
defence under Criminalisation Directives 55–6
dismissal of salvor under contract 541–3

master of ship—*cont.*
limitation of liability issues 762–3
and pilots
common law, respective duties under 721
exchange of information 719–20
person in command 719
relationship of pilot with master 719–21
reporting duties 720
respective roles of master and pilot 719
responsibility and authority 81–2
role under ISPFS Code 95
salvage issues
authority to enter into salvage agreement *see* above
authority under Salvage Convention 523–4
dismissal of salvor under contract 541–3
Memoranda of Understanding (MOUs)
compliance with international safety measures 69–70
Latin America (1992) 69–70
Paris MOU *see* Paris Memorandum of Understanding (MOU)
Tokyo (1993) 42, 69–70
Memorandum of Agreement (MOA)
binding contracts, shipbuilding 229, 230
sale and purchase risks (second-hand ships) 292, 315–16, 325
***mens rea* offences**
criminal liability 125, 162–4
limitation of liability 774
MEP (Maritime Environment Committee) 52
MEPC (Marine Environment Protection Committee) 32, 875
Mercantile Fund 491
Merchant Shipping Act (MSA) 1988
effect of reform upon British ship-ownership 143–4
fishing vessels, irregularity on 140–1
fundamental changes brought by 139
owning British ship under 140
Merchant Shipping Act (MSA) 1995
collisions at sea
civil liability 412
criminal liability 401
definition of vessel and ship 391
limitation periods for commencement of claims 477
loss of life and personal injury claims 445
proportionate fault rule 435, 440
ships subject to 390
statutory offences under 402–8
statutory presumption of fault and subsequent abolition 388
time bar defence 433, 434
'used in navigation' 391
Merchant Shipping Act (MSA) 1995—*cont.*
court jurisdiction 850
eligibility to own a British ship under
British connection and majority interest 142
EU Treaty, British citizens and nationals under 141–2
harbour authorities 692, 693, 702, 750
Limitation Fund, bar to other actions 850
limitation of liability 742, 743, 750
exclusion of total liability 763–4
oil spills, criminal liability 872
pollution control 825, 826
salvage
application of 1989 Convention 487, 489, 490
recognised subject 489
wrecks 490
Merchant Shipping Acts
statutory offences under 119–22
breach of documentation and reporting duties 403–4
collisions at sea 122, 402–8
conduct endangering ships, structures or individuals 405–7
dangerously unsafe ship 120, 404–5
directions following shipping casualties, breach of duty to give 408
disobeying Collision Regulations 402–3
failure to give assistance to vessels after collision or to vessels/persons in distress 403
life-saving safety measures 120, 407
lighthouses, buoys or beacons 407–8
logbook of ship 119
notices 119–20
rules of special ships 120
safe manning regulations 120
unsafe operation of ships 121–2, 404–5
see also Merchant Shipping Act (MSA) 1988; Merchant Shipping Act (MSA) 1995
***Meridian* rule of attribution 98, 103–4, 112**
misrepresentation
Enron scandal 297
Misrepresentation Act 1967
exceptions clauses, curtailment (Section 3) 303–5
remedies under 305–7
representations inducing a contract amounting to 297–300
salvage 513–14
and silence 297–8
statements made during negotiations 296, 297
see also sale and purchase risks (second-hand ships)

mitigation (damages) 368–73
benefit derived by mitigating party 370–3
expectation loss 373
reasonable conduct 369
reliance loss 373
unreasonable conduct and break in chain of causation 369–70
mortgagee's interest insurance (MII) 219
mortgage of ships
appurtenances 173
cargo on board not part of security 174
charge compared 177–8
charterparties, covenant as to 188
chattel security 178
common law possessory lien compared 178
comparison of ship mortgage with other types of security 177–8
conflict of laws
Convention on Maritime Liens and Mortgages (1993), ratification issues 183, 185
law governing mortgage and law of agreement to grant a mortgage 180–1
priorities between foreign liens and mortgages 181–5
whether proposals for a uniform approach 185
freight not part of security 174
further advances 179
harbour authority's claims, effect upon mortgagee's priority 180
inherent risks 169
interference with third-party contracts by mortgagee 207–18
Collins v Lamport decision 210–11
De Mattos v Gibson decision 208–9
equitable remedy 209
impairment factor 210–11
issues 207–8
knowledge of circumstances 209
OBG v Allan decision 211–18
statutory basis 210
loan agreement 169
mortgagee rights 192–207
foreclosure 207
information provision 187
and minor default 192
receiver appointments 206–7
sale, power of 198–206
to take possession 193–7
mortgagor obligations
bound by contractual covenants 186–8
charterparties, covenant as to 188
collateral security, assignment of earnings as 188
discharge of claims or liens 188
insurance 186–7
mortgage of ships—*cont.*
legal trading 188
maintenance of ship in good condition and repair 187
notification of mortgagee 187
not to sell or grant a charge on the ship 188
statutory 188
mortgagor rights
Foresight Driller II example 191
ownership right of mortgaged ship 189
redemption right (no clog on equity of redemption) 189–92
nature of 170–4
OBG v Allan decision
details of case 216
impact upon mortgagees and previous authorities 217–18
modern strand of authorities prior to 211–15
reformulation of economic torts 215–18
pledge compared 178
possession, right of mortgagee to take
default, matters amounting to 193
mode of exercise of powers 195–6
rights and obligations in possession 196–7
security, impairment of 194–5
preferred ship mortgage (Greek legislation) 177
priorities
between foreign liens and mortgages 181–5
further advances 179
harbour authority's claims, effect 180
Hopkinson v Rolt rule 179
between mortgages 178
'project finance' transaction, newly constructed ships 169–70
property subject to mortgage 173–4
property transfer theory, origin and deconstruction 170–2
purpose of registered mortgage 173
redemption right (no clog on equity of redemption) 189–92
registration scheme, statutory 174–6
rights *in rem*/rights *in personam* 181, 185, 195
risk management and insurance issues of mortgagee 218–19
sale, power of
effect of sale by mortgagee 205–6
nature of duty of mortgagee in exercise of 199–205
role of mortgagee/extent of power 198–9
source of power 198
security, impairment of 194–5
statutory, prevailing theory 172–3
unregistered ships and status of unregistered mortgage 176
validity from 178
MSC (Maritime Safety Committee) 21, 221, 875, 880

narrow channels, steering and sailing rules (Collision Regulations) 395–6
National Contingency Plan for Marine Pollution from Shipping and Offshore Installations 825
natural phenomenon defence, pollution 843–4
navigational risks 22
necessity defence, collisions at sea 433
negligence
collisions at sea 389, 411–12, 426–7
three-stage negligence test 411–12
two negligent acts, clear line between 440–1
contributory negligence *see* contributory negligence
dock-owners 699
general average entitlement 667
gross negligence/gross negligence manslaughter 63, 123, 124–6, 649
independent contractors 747
passenger claims/PAL 1974 Convention 802
pilots 723–30
principles 411, 413
salvage
negligent misconduct under common law 530–7
remedy for negligence conduct under Convention 529–30
Tojo Maru case *see* below
'serious' negligence, elusive concept under Criminalisation Directive (Directive 2009/123/EC) 60–4
servants or agents of carrier 802
stevedores 747
Tojo Maru case (salvage)
arbitrator's decision 531
CA decision 532–3
damages by way of counterclaim 537
House of Lords decision 534
judge at first instance 532
method of assessment of award 537
method of assessment of damages 537
'more good than harm' principle 534, 535
ordinary principles of negligence at common law applied 536
summary of principles 535
volunteers on land and professional salvors 534–5
***nemo dat quod non habet* doctrine, joint tenants 136**
NEWBUILDCON (standard new building contract) 17–18
establishment by BIMCO (2008) 222
excusable delays under 263–4
form 2012 18
objectives 222
NEWBUILDCON (standard new building contract)—*cont.*
sections and clauses
Clause 14 (builder's refund guarantee) 245, 273, 276, 278
Clause 19 (completion stage) 252
Clause 20 (approvals) 252
Clause 21 (supplies) 252, 257
Clause 24 (modifications of specification) 252, 264
Clause 26 (modifications of specification) 252
Clause 27 (sea trials) 253, 260
Clause 31 (passing of property) 254
Clause 34 (delays) 252, 260, 263, 264
Clause 35 (builder's obligations) 254, 255, 257
Clause 37 (guarantee obligations) 256, 257
Clause 38 (insurance obligations) 257
Clause 39 (termination events) 245, 258, 259, 261, 264, 275, 276, 277
Clause 42 (dispute resolution) 285
Clause 45 (assignment) 284
outline 222, 241
Section 1 (description of vessel) 244
Section 2 (price and method of payment) 244, 245
Section 3 (specification) 252
***Nissos Amorgas* incident (Venezuela 1997) 844–5**
'no cure, no pay' principle, salvage 481, 482, 484, 485, 511, 552, 553, 557, 605
non-conformity, meaning under ISM Code 79
non-disclosure, salvage 513–14
non-separation agreements, general average 676–7
Norwegian Sale Form (NSF) 292
'appropriate amendments,' subject to 314
Clause 2 (deposit) 316, 323, 324, 325, 326
Clause 3 (payment of purchase price) 330, 332, 333, 353
Clause 4 (inspection) 327, 328, 344
Clause 5 (time and place of delivery and notices) 333, 334, 353
Clause 6 (diver's inspection and dry docking) 328–9, 343
Clause 7 (seller's obligation regarding listing spares, etc) 334
Clause 8 (documents) 334, 335
Clause 9 (encumbrances)
actual or contingent liabilities 337
construction by courts 336–8
documentation 334
encumbrances or debts at time of delivery 337
guarantee provision 337

Norwegian Sale Form (NSF)—*cont.*
indemnity provision (liabilities incurred prior to delivery) 337–8
other breaches by seller 353
risk management 18
safeguarding against breach of 338–9
seller's undertaking 335–6
spurious claims 337
Clause 11 (condition of vessel on delivery) 335, 339–48
1993 and 2012 forms 344–5
additional exceptions under 2012 form 345
'free of cargo'/'free of stowaways' 345
omissions in 2012 form 345
Clause 13 (buyer's default) 324, 325, 326, 351
Clause 14 (seller's default) 333, 334, 335, 351–2, 353
Clause 15 (buyer's representatives) 323
Clause 18 (entire agreement clause)
exceptions clauses and estoppel 302
express wording (2012 form) 348
notification to class 342
see also sale and purchase risks (second-hand ships)
notice of readiness (NOR) 292, 329–35
'advance deposit' 331
deliverable state 331–4
essential documentation for exchange at delivery 334–5
when payment of price arranged 330–1
notices
Merchant Shipping Act offences 119–20
notice of readiness *see* above
port safety 699–700
novus actus interveniens
collisions at sea 427–31
damages 459, 461
successive causes 430–1
NSF *see* Norwegian Sale Form (NSF)
nuclear damage 821, 872–4
Brussels Supplementary Convention 1963 and Protocols of 1964 and 1982 872
Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention 1988 873
limitation of liability issues 762
NUCLEAR 71 (Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material 1971) 874
Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960 872, 873–4
UK legislation 874
Vienna Convention on Civil Liability for Nuclear Damage 1963 872, 873–4
Nuuk Declaration 2011, pollution 826
objective evidence, meaning under ISM Code 79
OCIMF *see* Oil Companies International Marine Forum (OCIMF)
OECD (Organisation for Economic Co-operation and Development), Paris Convention on Third Party Liability in the Field of Nuclear Energy 1960 872, 873–4
OHSAS (Occupational Health and Safety Standard) 18001 73–4
oil companies, deterrent effect of vetting by
Rowan case
decisions 92–4
facts 92
vetting practice 91–2
and Vitol charter 92, 93
Oil Companies International Marine Forum (OCIMF) 4, 24, 76
oil pollution
current regime 829–30
Fund Convention 1992 830, 831
international compensation regime 829–31
IOPC Funds 831
limitation of liability 762
oil pollution damage compensation fund 39
oil pollution emergency plans (OPEPs) 685
Oil Pollution Incident Response Training Guidelines for UK Offshore Oil Industry 685
old regime 829
OPRC (International Convention on Oil Pollution Preparedness, Response and Co-operation) 1990 825–6
persistent oil 867
sea-going vessels carrying persistent oil in bulk 834–5
Secretary of State powers in relation to legislation 684–6
Small Tankers Oil Pollution Indemnity Agreement (STOPIA) 578, 830, 860, 861
spills, criminal liability under MSAs 872
Supplementary Fund 2003 830–1
Tankers Oil Pollution Indemnity Agreement (TOPIA) 578, 830, 860
see also compensation; International Oil Pollution Compensation Funds (IOPC Funds); pollution
oil rigs, and salvage 490
oil spills 845, 872
open port duty, harbour authorities 690
operative mistake, salvage 514–16
Organisation for Economic Co-operation and Development (OECD) 76

out-of-pocket expenses
environmental salvage 571
partial loss of ship and incidental losses 473
salvage compensation 549
ownership *see* ship-ownership

P&I clubs 22, 76, 479, 860
compulsory insurance 734
passenger claims 815
salvage 555, 558, 578
unseaworthiness 673
see also protection and indemnity (P&I) cover
P&I insurance *see* protection and indemnity (P&I) cover
***Pacific Adventurer* incident (2009) 740**
PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea)
application and scope 794–5
contributory negligence 802
definitions
'cabin luggage' 796
'carrier' 795–6
'contract of carriage' 796
'loss of or damage' 796
'luggage' 796
'passenger' 796
'performing carrier' 796
'period of carriage' 796–7
'ship' 795
exclusion of application 795
fault-based liability under 791–2, 797–8
'international carriage,' applicable to 794, 795
invalidity of contractual provisions 814
jurisdiction 803
limitation of liability 799–801
death or personal injury 800–1
losing right to limit 801
luggage, limitation for loss or damage 801
prohibition of contracting out 800
and LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 804–5
negligence of servants or agents of carrier 802
non-seagoing and sea-going ships 805–6
persons liable 797
presumed fault under 798
and Protocol of 1996 805–6
ratification 792
risk assessment, relevance 798–9
strict liability, shift from fault-based 791–2
time limits 802
travel agents, contracts of carriage through 803–4
valuables, carriage of 801–2
see also passenger claims
PAL 2002 (2002 Protocol to PAL 1974 Convention) *see* Athens Convention 2002 (2002 Protocol to PAL 1974 Convention)
Panamanian flag, and flags of convenience 69, 181
Paris Memorandum of Understanding (MOU), 1982
blacklist of flags 33, 42
compliance with international safety measures 69
conformity requirements of flag States 40
European Quality Shipping Information System established by 74
part charterers 745
partial loss of ship and incidental losses 468–74
detention damages
loss and expenses, apportioning 472–3
mitigation issues 470–1
out-of-pocket expenses/other consequential losses 473
pure economic loss 473–4
routine repairs during collision damage repairs 472
fixture, loss of use 468–70
repairs
cost of 468
loss of use of fixture during 468–70
routine repairs during collision damage repairs 472
passenger claims
amounts of potential liability 820
Athens Convention 2002 791, 797, 807, 820
background 792–3
contributory negligence 802
death or personal injury claims 808, 809, 812
definitions
'cabin luggage' 796
'carrier' 795–6
'contract of carriage' 796
'loss of or damage' 796
'luggage' 796
'passenger' 796
'period of carriage' 796–7
'ship' 795
Erika III measures (2009) 43–4
IMO Reservation/Guidelines 2006 792, 820
background 815–16
Blue Cards 817
non-war risks insurance 817
war-or terrorism-risks insurance 816–17
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 744
loss of life and personal injury 751
see also life, loss of

passenger claims—*cont.*
luggage
defined 796
PAL 1974 limits for loss of or damage to 801
PAL 2002 Protocol on loss or damage 809
minimum tonnage 744
MS (Carriage of Passengers by Sea) Regulations 2012 819
negligence 802
PAL 1974 Convention *see* PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea)
PLR (Passengers Liability Regulation) 2009 817–19
Protocol 2002 *see* Athens Convention 2002 (2002 Protocol to PAL 1974 Convention)
regional organisations, competence 793
strict liability, shift from fault-based 791–2
tacit acceptance procedure 793
travel agents, contracts of carriage through 803–4
valuables, carriage of 801–2, 812
passenger ships and roll-on/roll-off (ro-ro) vessels
safety and environmental measures
EU level developments 49
human element developments 50
IMO level developments 49–50
passing of property
contract, risk by 254
deliverable state 321
Sale of Goods Act (SOGA) 1979 321–2
statute, risk by 253
PCS *see* Port State Control (PCS)
penalties
ISM Code 89–90
MSA 1995, statutory offences under 403, 404, 406
under CMCH Act 2007 129–30
performance of voyage, risks at 19–23
accident aftermath 23
bulkhead failures and stresses, management 21
cargo loading 21
clear instructions requirement 21
crew training 21
discharge port 22
emergency procedures, accident aftermath 23
injury prevention 22
loss of life prevention 22
navigational 22
pilot, communication with 23
piracy risk assessment and planning 20–1
stowaways 22
voyage planning 20
Permanent Cooperation Framework, accident investigation 43
personal injury claims
Athens Convention 2002 (2002 Protocol to PAL 1974 Convention) 812
collisions at sea 445–6
fault-based liabilty caused by non-shipping incident 809
PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) 800–1
passenger claims 751
strict liability 808
personal injury claims, collisions at sea, 'thin skull' rule 459, 460
personnel of ship
ISMO Code 82
towage contracts, liability and cross-indemnity issues 641–2
pilotage
compulsory 715
compulsory pilotage area, duties of masters and pilots 718–19
IMO recommendations 713–14
liability of harbour authorities with respect to 722–3
services, obligation to provide 700–2, 714–16
see also pilots
Pilotage Commission, Advisory Committee on Pilotage 713
pilots
accountability for safety and risk management 715–16
authorisation
EU Directive and Regulations 716–17
under PA 1987 716
revision of duties by PMSC 2012 and IMO Resolution A.960 717–18
authority 719–21
charges by competent harbour authority 730
civil liability 417–18
communication with 23
compulsory pilotage defence, abolition (1913) 722
Directive 1999/42/EC 701–2, 714
duties in a compulsory pilotage area 718–19
duties of competent harbour authority in relation to 714–18
under PA 1987 714–15
recognition of qualifications 715
services, obligation to provide 714–16
function 712
IMO recommendations 713–14
International Best Practice for Maritime Pilots 714
International Maritime Pilots Association 714

pilots—*cont.*
liability
civil 722
criminal 721–2
and master of ship
exchange of information 719–20
person in command 719
relationship of pilot with master 719–21
reporting duties 720
respective roles of master and pilot 719
negligence, liability of ship-owners for
court decisions 724–8
statutory provisions 723–4
offence not to have 718–19
PA 1987 713, 714–15
recognition of qualifications 715
relationship with master 719–21
revision of duties by PMSC 2012 and IMO Resolution A.960 717–18
risk assessment 713
and risks 712–30
rules of engagement 718
statutes 713–14
training, certification and operational procedures 714
voluntary services, when exceptional 499–501
see also pilotage
***Piper Alpha* oilrig explosion (1988) 123**
piracy issues
general average entitlement, effect of fault on 669–71
risk assessment and planning 20–1, 94
terrorism, and piracy activities 94
places of refuge
status of places of refuge in the UK 47
and traffic monitoring
background 44–5
CMI Conference, draft instrument approved by 45
further EU measures 47–8
IMO Guidelines 46–7
status of places of refuge in the UK 47
and Wreck Removal Convention 735–6
platforms 490, 743
pledge, ship mortgage compared 178
PLR (Passengers Liability Regulation) 2009 817–19
additional provisions 818–19
application 818
scope 818
pollution
accidental causation following marine accident 58
Bunkers Convention (Bunker Oil Pollution Damage Convention) 2001 862–6
compulsory insurance 864–5

pollution—*cont.*
liability 863–4
more than one person liable 863
no provisions for limitation of liability 864
pollution damage 863
responder immunity 865–6
BWM Convention (International Convention for the Control and Management of Ships, Ballast Water and Sediments) 827–8
channelling provisions 846–8
Civil Liability Convention (CLC) 1992 *see* CLC (Civil Liability Convention) 1992
Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) 29, 38–9
Criminalisation Directives on ship-source pollution *see* Criminalisation Directives on ship-source pollution
damage *see* pollution damage
European Maritime Safety Agency, pollution prevention role 37
Fund Assembly 1992 831, 835, 838, 860
Fund Convention 1992 *see* Fund Convention 1992
Hong Kong Convention (Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships) 828
International Convention on the Control of Harmful Anti-Fouling Systems on Ships 827
International Sewage Pollution Prevention (ISPP) Certificate 334, 335, 336
Intervention Convention 825
London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters 826–7
MARPOL (International Convention for the Prevention of Pollution from Ships) 58, 824
National Contingency Plan for Marine Pollution from Shipping and Offshore Installations 825
Nuuk Declaration 2011 826
oil *see* oil pollution
'polluter pays principle' 51
Salvage Convention *see* International Salvage Convention 1989
SOLAS (International Convention for the Safety of Life at Sea) 72, 824
Special Compensation of Protection and Indemnity Clause (SCOPIC) *see* SCOPIC (Special Compensation of Protection and Indemnity Clause) 2000 560
Supplementary Fund Protocol *see* Supplementary Fund Protocol 2003
Tanker Management Self-Assessment (TMSA) 578

pollution—*cont.*
towage contracts 651
UNCLOS (United Nations Convention on the Law of the Sea) 822–4
and Criminalisation Directives 57–8
'innocent passage' 823
jurisdiction and rights and duties of States 823–4
sovereign obligations 823
Wreck Convention *see* WRC (Wreck Removal Convention) 2007
see also compensation
pollution damage
advisors, use of 839
Bunkers Convention (Bunker Oil Pollution Damage Convention) 2001 863
caused in 1969 CLC States 853
CLC (Civil Liability Convention) 1992 836, 837
defined 837
direct property damage and consequential loss or expenses 837–8
environmental 838–9
Fund Convention 1992 837
loss or expenses 837–8
MSAs, bringing claims under 851
prevention of normal business operations 838
property 837
pure economic loss 838
types of claim 837–9
in United States 828
see also oil pollution; pollution
port authority, civil liability 418–19
Port Maritime Safety Code (PMSC) 2012 680, 682
compliance with 689–90
duty to maintain port in good condition 695–6
pilots
IMO recommendations 713
revision of duties 717–18
responsibility 689
scope and aim 689
ports
contractual duty to make reasonably safe 699–700
duty to maintain in good condition 695–6
duty to operate 690–2
entry into, extent of control 95
facility requirements 96
Guide to Good Practice on Port Marine Operations 2012 682, 690, 696, 713
harbour authorities, duties in relation to 695–6, 699–700
major, in UK 683
open port duty 690
ports—*cont.*
role in inspections and enforcement of legislation 686
security 712
see also Port State Control (PCS)
Port State Control (PSC) regime 5
blacklisting of substandard ships by 71
Directives amending 33–4
insurance issues 109
mandatory inspections 33
role in enforcement 70–1
THETIS information system supporting 36
port trusts 683
possession, mortgagee in
due diligence, obligation to act in 197
right of mortgagee to take possession
default, matters amounting to 193
mode of exercise of powers 195–6
security, impairment of 194–5
rights and obligations in possession
freight, right to 196–7
operation and management, obligations during 197
The Prestige **disaster (2002) 27, 28, 31, 45, 54, 383, 829**
pollution 847, 848
privity 99, 109
'blind eye' 110–11
privity of contract doctrine, towage contracts 635
property
concept 488–9
general average, subject to 655, 665
pollution damage 837
preservation where imperilled 665
property transfer theory, origin and deconstruction 170–2
salvage 489–90
property salvage 546
proportionality
proportionate fault rule *see* proportionate fault rule, collisions at sea
Wreck Removal Convention (WRC) 2007 732–3
proportionate fault rule, collisions at sea 434–45
application 435
causative potency and blameworthiness 436–40
'clear preponderance of blame' 436–7
collision between ship and a non-ship 442–5
apportionment of blame when ship collides with bridge 443–4
avoidance action causing damage to objects 444–5
composite faults approach 438

proportionate fault rule, collisions at sea —*cont.*
exceptions to 440–5
'agony of the moment' defence, success 440
collision between ship and a non-ship 442–5
innocent third ship claims against one of the tortfeasors 441–2
loss of life or personal injury 441
two negligent acts, clear line between 440–1
unit approach 438, 442, 443
protection and indemnity (P&I) cover 10, 23, 109, 186
P&I clubs *see* P&I clubs
see also insurance issues
proximity, collisions at sea 411, 412
public authorities, salvage operations controlled by 504–6
purchase and sale of ships *see* sale and purchase risks (second-hand ships)

'qualifying ships,' tonnage tax 144, 145
quality shipping 25
Quality Shipping Campaign 75, 76

RDC (running-down clause), insurance issues 478, 479
reasonableness requirement
'all reasonable endeavours' 526, 527
best endeavours and reasonable care 155–6
conduct 369
exceptions clauses, curtailment (Misrepresentation Act 1967, Section 3) 305
exclusion clauses, ship-building contracts 238
general average 664
identification doctrine 102
port safety 699–700
reasonable endeavours 153, 154
salvage, due care 529
traffic monitoring and places of refuge (Directive 2009/17/EC) 46
unreasonable conduct and break in chain of causation 369–70
Wreck Removal Convention (WRC) 2007 732–3
York-Antwerp Rules (YAR) 658
receiver appointments, mortgagee rights 206–7
recklessness
Criminalisation Directives on ship-source pollution 62, 63
reckless killing, under CMCH Act 2007 127
towage contracts 649
Recognised Organisations (ROs) 30, 40, 75
Recognised Security Organisations (RSOs) 95
recourse claims, limitation of liability 755–6, 757–8
recycling provisions 828
***Redffren* incident (Nigeria 2009) 845**
refuge, places of
IMO Guidelines 568–9
in international scene 569–70
maritime assistance services 569
UK approach to 570
registration of ships, in UK
Central Register 142
conflict of laws 180
evidence, provision of 135
'flagging out' of ships to foreign registries 139
and flags of convenience 145
'quota hopping' by non-British ships, preventing 140
Registration of British Vessels 1823–5 170
see also ship-ownership
regulatory regime 27–66
Criminalisation Directives on ship-source pollution *see* Criminalisation Directives on ship-source pollution
Erika measures *see* Erika I measures (2000); Erika II measures (2002); Erika III measures (2009)
general safety and environmental measures
ballast water and waste residue 50–2
bulk carriers 48–9
crew training and certification 53
ECDIS 50
mandatory measures 50
Maritime Labour Convention 2006 53–4
passenger ships and roll-on/roll-off (ro-ro) vessels 49–50
ship recycling 52–3
rejection of vessel
sale and purchase risks (second-hand ships) 354
termination of shipbuilding contract 260
remedies
damages *see* damages
general average entitlement 666
sale and purchase risks (second-hand ships)
breaches by seller 353
breach of statutory terms by seller 353–4
buyer's remedies 351–4
delay in delivery or non-delivery as per contract 351–3
whether freezing injunctions a protective measure for buyer 354–60
measure of damages 360–73

remedies—*cont.*
Misrepresentation Act 1967, under 305–7
non-performance by one party, available options 349–51
seller's remedies 351
shipbuilding contracts
delays 264–5
guarantee defects 255
liquidated damages 260, 264, 280–2
specific performance 264–5
termination of contract 265
repairs
authority of ship managers 152
ballast/laden method 470
civil liability of ship-repairers 419
cost of 468
exceptional 152
loss of use of fixture during 468–70
mortgagor obligations 187
negligence of ship-repairers 747
routine repairs during collision damage repairs 472
time equalisation method 470
reporting duties, breach under Collision Regulations 403–4
***res ipsa loquitur*, breach of duty of care 420–2**
resources, ISMO Code 82
***respondeat superior* principle 617, 726, 729**
limitation of liability 770, 771, 773
responder immunity 571, 865–6
***restitutio in integrum* principle, damages 463–4, 467**
rights *in rem*/rights *in personam* 390, 504
mortgage of ships 181, 185, 195
risk exposure 8–9
risk management 3–25
accountability for 715–16
and assessment 6–7
best endeavour clauses, drafting 154–5
by brokers 307–8
collective responsibility and commitment 16–25
definition of 'risk' 5
funding for risk control and training 25
by harbour authorities 679–736
high-risk and low-risk ships 42
and insurance 166–7
legal 8
limitation of liability and role of ISM Code 117–19
mortgage of ships, risks in *see* mortgage of ships
option agreements, drafting of shipbuilding contracts 242–4
risk management—*cont.*
PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea), relevance of risk assessment under 798–9
refund guarantee 273–5
rescission by builder 284
safety culture 10
sale and purchase risks (second-hand ships)
binding contract 308–19
brokers, risk management by 307–8
science of 4
shipbuilding contracts, making 229–32
ship-ownership *see* ship-ownership
stages
contract drafting 17–18
dispute resolution 23–4
incorporation 17
performance 19–23
ship operations 18–19
standards for risk control 16–17
towage contracts 647–9
and tug fitness 609–10
risk profile 9
risk tolerance 9–10
RNLI *see* Royal National Lifeboat Institution (RNLI)
route (unauthorised), deviation through 669–71
Royal National Lifeboat Institution (RNLI) 491
salvage by lifeboat crews 506–7
Royal Navy, orders of naval commander 504
RSOs (Recognised Security Organisations) 95
running-down clause (RDC), insurance issues 478, 479

safe manning regulations, Merchant Shipping Act offences 120
SafeSeaNet (maritime information facility) 36, 47
safety and environmental measures
ballast water and waste residue 50–2
bulk carriers 48–9
compliance with international measures, role of flag State and PSC in enforcement 70–1
crew training and certification 53
definition of 'safety management system' under ISM Code 79
ECDIS 50
functional requirements for a safety management system 80
industry standards on safety and quality assessment 73–4

safety and environmental measures—*cont.*
mandatory measures 50
Maritime Labour Convention 2006 53–4
passenger ships and roll-on/roll-off (ro-ro) vessels 49–50
ship recycling 52–3
see also ISM (International Safety Management) Code
safety culture 10
enhancement through collective responsibility 24–5
Safety Management Certificate (SMC) 79, 86
Safety Management Manual (SMM) 84, 107, 111
Safety Management System (SMS), ISM Code 79, 80, 81, 84, 91
attribution of liability 111, 117, 131
co-ownership 138
inefficient 117
risk management 8, 9
SAJ (Shipbuilders' Association of Japan) contract form
articles and provisions
Article I (description of vessel) 244
Article II (price and method of payment) 244, 245, 276
Article III (delivery, speed, fuel consumption and dead weight)) 252
Article IV (approvals) 252
Article V (modifications of specification) 252, 263
Article VI (sea trials) 253
Article VII (delivery, passing of property) 254
Article VIII (delays) 252, 261, 262
Article IX (builder's obligations) 254, 255, 256, 257
Article X (right to rescind) 252, 258, 270, 274, 285
Article XI (builder's default) 274, 276, 277, 282, 283
Article XII (insurance obligations) 257, 270
Article XIII (dispute resolution) 285
Article XIV (assignment) 285
Article XVII (supplies) 252
Article XXI (sundry provisions) 278
outline 240
excusable delays under 263
wide use of 228
sale and purchase risks (second-hand ships) 291–383
binding contract and risk management 308–19
'buyer to be nominated,' effect 316–19
intention, clear expression of 308–9
meaning of 'subjects' 310–14
non-signing of formal document, effect upon validity of contract 314–16
sale and purchase risks (second-hand ships)—*cont.*
'subject to contract' wording 309, 311
'subject to details' wording 309, 311, 313
breach of contract 294, 297
brokers, risk management by 307–8
'buyer to be nominated,' effect 316–19
classification of terms 319–22
breach of a condition or warranty 319
at common law 319–20
under SOGA 1979 320–2
classification societies, civil liability to buyers and other third parties 374–83
American approach 382–3
comparison with air industry 380–2
whether duty of care owed to third parties 375–80
completion stage, contractual terms at 293, 328–83
classification society inspection (dry-docking) 34, 328–9
closing meeting 292, 349
condition of vessel on delivery 339–48
non-performance by one party, available options 349–51
notice of readiness 329–35
post-delivery matters 360
see also Norwegian Sale Form (NSF)
condition of vessel on delivery 339–48
certificates 341
'as is' provision *see* above
matters needing to be notified and when 343–4
notification to class 341–3
currency of loss 373–4
deposit, payment of
'banking day' 323
commitment to contract 292
consequences of non-payment 324–6
successive sales 326
when payable/method of payment 323–4
exceptions clauses
curtailment by Misrepresentation Act 1967 (Section 3) 303–5
and estoppel 301–3
good faith concept 293–4
inducement to enter a contract
and causation 300–1
and misrepresentation 297–300
inspection stage, contractual terms at 327
intention, clear expression of 308–9
'as is'/'as she was' provisions
class free of recommendation 340
class maintained as additional exemption to 'as is' 341
effect upon SOGA, Section 14(2) 345–8
fair wear and tear excepted 340

sale and purchase risks (second-hand ships)—*cont.*
free of average damage as additional exception to 340–1
making of contract 293–6
Misrepresentation Act 1967
exceptions clauses, curtailment (Section 3) 303–5
remedies under 305–7
negotiations and contract stage 291–2, 293–326
'but for' test (inducement and causation) 298, 301
caveat emptor, effect 296
Confidentiality Agreement 299
'decisive part/real and substantial part' (inducement and causation) 300
estoppel 301–3
exceptions clauses 301–5
express statements 297
implied statements 297
inducement and causation 300–1
Information Memorandum (IM) 299
making of contract 293–6
mere 'puffs' 296
misrepresentation, representations inducing a contract amounting to 228, 297–300
whether obligation for disclosure by seller 296–308
statements made during negotiations 296–7
statements of fact 297
non-signing of formal document, effect upon validity of contract 314–16
Norwegian Sale Form *see* Norwegian Sale Form (NSF)
notice of readiness 292, 293, 329–35
'advance deposit' 331
deliverable state 331–4
essential documentation for exchange at delivery 334–5
when payment of price arranged 330–1
whether obligation for disclosure by seller 296–308
pre-inspection stage 322–6
rejection of vessel 354
remedies
breaches by seller 353
breach of statutory terms by seller 353–4
buyer's remedies 351–4
delay in delivery or non-delivery as per contract 351–3
whether freezing injunctions a protective measure for buyer 354–60
measure of damages 360–73
Misrepresentation Act 1967, under 305–7
non-performance by one party, available options 349–51
seller's remedies 351

sale and purchase risks (second-hand ships)—*cont.*
risk management issues for buyers 354–60
standard forms, contractual terms under 322–6
'subjects,' meaning of 310–14
Sale of Goods Act (SOGA) 1979
classification of terms under
class notation 321
de minimis rule 321
passing of property 321–2
sale by description 320–1
'satisfactory quality' 236, 320
warranties 320
effect of 'as is' or 'as she was' upon (Section 14(2)) 345–8
narrow issue 347–8
wider issue 348
shipbuilding contracts
contractual terms implied 233–9
nature of contract under SOGA 227
sales versus agreements to sell 227
sale power of mortgagee in event of mortgagor default
effect of sale by mortgagee 205–6
nature of duty of mortgagee in exercise of 199–205
one-ship companies 209
role of mortgagee/extent of power 198–9
source of power 198
'true market value' versus 'proper price' 200, 203
salvage
agreements 510–16
court intervention 512–16
historical development 510–11
International Salvage Convention 1989 511–12
master's authority to enter into 516–24
'Salvom' International Salvage Union Agreement 512
apportionment and payment 564
assessment of award and special compensation 546–53
awards
Article 13 558
assessment 537, 546–53
cause of action versus *quantum meruit* 507
'enhanced award' and 'safety net' 484–7, 553
foundation of a right for an award 483
meritorious services 507–9
Nagasaki Spirit case 551
best endeavours of salvor 525–9
civil 482
civil liability 418
concept under maritime law 482–3
contract, under 483–4

salvage—*cont.*
Conventions 484–7
court intervention
economic duress/overbearing conduct by salvor 512–13
misrepresentation and non-disclosure 513–14
operative mistake 514–16
damage issues 555
danger
effect on a towage contract 495–6
environmental 497
future or contingent 494–5
kinds of 492–3
temporary difficulty 493–4
definition 482
disparity principle 482, 548–9
due care obligation 529–39
negligent misconduct under common law 530–7
reasonableness requirement 529
remedy for negligent misconduct under Convention 529–30
Tojo Maru case 531–7
unresolved issues 537–9
duties and conduct of salvors 524–40
best endeavours 525–9
due care 529–39
duties arising under statute or official duty
coastguards and salvage operations 506
duty to assist a collision 502–3
duty to assist others in distress 503–4
lifeboat crews of RNLI, salvage by 506–7
officers under orders of a naval commander of Royal Navy 504
public authorities, salvage operations controlled by 504–6
economic duress 512–13
elements 492–510
danger 492–7
voluntary services 497–507
engaged services 510
'enhanced award' and 'safety net'
prior to 1989 Convention 484–5
adoption into new Convention 486–7
and special compensation 553
environmental 486, 571–80
background 571–2
whether can be tacked on to present Salvage Convention 575–6
whether can stand alone 576–7
feasibility for proposed reform 577–8
financial considerations 578–9
International Salvage Convention 1989 552–3
International Working Group (IWG) 572

salvage—*cont.*
'marine environmental protection levy' 579
out-of-pocket expenses 571
proposal for reform 574–9
reasons for reform 572–3
Salvors' Environmental Protection Fund 579
views of commentators 574–5
fair rate 549, 552, 555–6
foundation of a right for an award 483
government intervention 566–70
potential offences by salvor or harbour master 567–8
SOSREP (Secretary of State Representative for Maritime Salvage and Intervention) 566–7
hovercraft/aircraft 491
International Salvage Convention 1989 487–92
Article 13 award 558
Article 14 552–6, 557
creation of 'enhanced award' and 'safety net' prior to 484–5
duty of owner of property to co-operate under 543–4
fair rate 555–6
general application 487–8
increment 556
master's authority under 523–4
pollution 828
position of several salvors under 543
recognised subject of salvage 488–92
'relevant waters' 488
remedy for negligent misconduct under 529–30
role 511–12
security for special compensation 556
substantial physical damage 555
territorial limits 554
threatened damage 555
towage versus salvage 584
jurisdiction 564–5
liability 484–5, 546
life 491–2, 546
by lifeboat crews of RNLI 506–7
limitation of liability issues 752–8, 756, 762
Lloyd's Open Form (LOF) 1980 481, 484, 497, 511, 552, 553
Lloyd's Open Form (LOF) 1990 522, 523, 546, 551
Lloyd's Open Form (LOF) 1995 523, 546
Lloyd's Open Form (LOF) 2000 511, 523, 546, 561
Lloyd's Open Form (LOF) 2011 482, 523, 546, 562

salvage—*cont.*
Lloyd's Standard Salvage and Arbitration Clauses (LSSA), changes to 562–4
costs 563–4
security for arbitrators' fees 563
security for containerised cargo 563
master's authority to enter into agreement
actual authority 516
basis to bind cargo interests to a salvage contract 517–23
basis to bind principal to a salvage contract 517
at common law 516–23
implied by operation of law 516
master's authority under Salvage Convention 523–4
master's dismissal of salvor under contract 541–3
meritorious services 507–9
misrepresentation 513–14
Nagasaki Spirit case 550–2
appeal award 551
award 551
CA decision 551–2
environmental salvage 553
fair rate 555
House of Lords decision 552
judicial decision 551
revision of law, underlying reasons for 485–6
negligence
negligent conduct under common law 530–7
occurring before salvage services rendered 539–40
Tojo Maru case *see* below
'no cure, no pay' principle 481, 482, 484, 485, 511, 552, 553, 557, 605
non-disclosure 513–14
operative mistake 514–16
origin 482–3
out-of-pocket expenses 549
overbearing conduct by salvor 512–13
owner of property in danger, duties
to co-operate under common law 544
to co-operate under contract 544–5
to co-operate under Convention 543–4
obligation to provide security to salvors 545
potential offences by salvor or harbour master 567–8
property 546
public authorities, salvage operations controlled by 504–6
recognised subject 488–92
bunkers 489
definition of 'capable of navigation' 489
definition of 'property' 489–90
definition of 'salvage operations' 489
definition of 'vessel' 489

salvage—*cont.*
freight at risk 490
hovercraft/aircraft 491
life salvage 491–2
ship, vessel or craft 489
structures 490
wrecks 490
refuge, places of 568–70
responder immunity 571
revision of law, historical development 484–7
underlying reasons for revision by a new Convention 485–6
risks and liabilities under 481–579
Salvage Liaison Committee 556
'Salvom' International Salvage Union Agreement 512
several salvors, position of 540–3
dismissal of salvor under contract by master of vessel being salved 541–3
dispossession of one by another under maritime law salvage 540–1
salvage under contract 542
salvage under maritime law 541–2
summary of principles 542–3
special compensation
concept 553
criteria 549–52
fair rate 549, 552, 555–6
Nagasaki Spirit case 550–2
out-of-pocket expenses 549
security for 556
Special Compensation of Protection and Indemnity Clause (SCOPIC) *see* SCOPIC (Special Compensation of Protection and Indemnity Clause) 2000
special maritime law principles 481
standing by a vessel in danger, services by 509
success 507–12
time limits 565–6
Tojo Maru case
arbitrator's decision 531
CA decision 532–3
damages by way of counterclaim 537
House of Lords decision 534
judge at first instance 532
method of assessment of award 537
'more good than harm' principle 534, 535
ordinary principles of negligence at common law applied 536
summary of principles 535
volunteers on land and professional salvors 534–5
versus towage 583–7
under common law 584–7
under Salvage Convention 1989 584
under TOWCON/TOWHIRE 1985 584
under UKSTC 1986 584

salvage—*cont.*
voluntary services
cargo-owners 501–2
pilots, when exceptional 499–501
under pre-existing agreement 497–9
rendered by a tug under towage contract 499
see also ISU (International Salvage Union); SOSREP (Secretary of State Representative for Maritime Salvage and Intervention)
'Salvom' International Salvage Union Agreement 512
salvors
best endeavours 525–9
civil liability, collisions at sea 418
dismissal under contract 541–3
duties and conduct 524–40
duty of care 529–39
limitation of liability issues 748–9
obligation to provide security to 545
overbearing conduct by 512–13
possible claims by 840–2
potential offences by 567–8
remedy for negligent misconduct under Convention 529–30
Salvors' Environmental Protection Fund 579
several, position of 540–3
dismissal of salvor under contract by master of vessel being salved 541–3
dispossession of one by another under maritime law salvage 540–1
salvage under contract 542
salvage under maritime law 541–2
summary of principles 542–3
Tojo Maru case 534–5
as volunteers 583
and Wreck Removal Convention 735
SCOPIC (Special Compensation of Protection and Indemnity Clause) 2000 481, 511, 553
CLC 1992 and Fund Conventions, application 841, 842
and International Group of P&I (IGP&I) Clubs 556, 557
and International Salvage Union (ISU) 556, 557
invoking 557
oil pollution 841
and Salvage Liaison Committee 556
sub-clauses 557–61
discount (cl 7) 558
dispute resolution (cl 15) 560
duties of contractor (cl 10) 558–60
general average (cl 14) 560
invoking SCOPIC (cl 2) 557
payment of remuneration (cl 8) 558
SCOPIC (Special Compensation of Protection and Indemnity Clause) 2000—*cont.*
pollution prevention (cl 13) 560
relationship with Article 13 award (cl 6) 558
security (cl 3) 557–8
ship-owners' casualty representative (cl 11) 560
special representatives (cl 12) 560
substitution of Article 14 (cl 1) 557
tariff rates (cl 5) 558
termination (cl 9) 558–60
withdrawal (cl 4) 558
see also salvage
SDRs (special drawing rights) 44
***The Sea Empress* disaster (1996) 3, 23**
seaplanes, defined 391
sea trials, acceptance or rejection 252–3
seaworthiness
towage contracts 603
see also unseaworthiness
Secretary of State, oil pollution legislation, powers relating to 684–6
Secretary of State Representative for Maritime Salvage and Intervention (SOSREP) *see* SOSREP (Secretary of State Representative for Maritime Salvage and Intervention)
security
arbitrator's fees 563
cargo not part of 174
chattel 178
classification societies, role in relation to 72–3
comparison of ship mortgage with other types of security 177–8
general average 675–7
impairment of 194–5
mortgagor obligations 188
obligation to provide to salvors 545
ports 712
salvage
arbitrator's fees 563
obligation to provide security to salvors 545
special compensation 556
Special Compensation of Protection and Indemnity Clause (SCOPIC) 557–8
see also International Ship and Port Facilities Security (ISPFS) Code
servants
limitation of liability 746–7
negligence 802
shipbuilding contracts 221–89
accrued rights of parties upon cancellation of contract 226–7
approvals 252
assignment 284–5
binding contract requirement 229–30

shipbuilding contracts—*cont.*
bridging contract 227–8
builder's obligations
defects guarantee, provision 254–7
insurance of vessel 257–8
refund guarantee, provision 258
buyer's property rights to partly constructed hull 224–5
civil liability of shipbuilders or ship-repairers 419
class rules and regulations 244
condition precedent or subsequent 230–1
construction stage 251–3
contract drafting stage, risk management 17–18
contract for sale or a contract of construction and sale 223
contract price adjustment clauses 246
contractual terms 232–9
common law developments 234–5
compliance with description (law prior to 3 January 1995) 233–4
conditions 232
exclusion clauses and UCTA 1977 238–9
fitness for purpose 236, 237–8
general 232
implied at common law 233, 234–5
implied under SOGA 1979 233–9
innominate 232
'merchantable quality,' demise of 235–6
'shipped in good condition' 232
statutory developments 235
warranties 232
defects guarantee, provision
exclusions from guarantee 255–6, 257
guarantee period and conditions of cover 254–5
remedy for guarantee defects 255
risk minimisation 256–7
delays
construction stage 252
delivery of vessel 246, 351–3
excusable under NEWBUILDCON 263–4
excusable under SAJ form 263
prevention principle 263
price escalation issues 246
remedies 264–5
delivery
passing of property and risk by contract 254
passing of property and risk by statute 253
description of vessel 244
dispute resolution 285
disputes, events causing 262–3
essential terms 231–2
exclusion clauses, and UCTA 1977 238–9

shipbuilding contracts—*cont.*
fitness for purpose
and 'merchantable' quality 236
reliance on skill and judgment of seller 237
Slater v Finning decision 237
subject matter, idiosyncrasy of 237–8
fluctuation clauses 246
force majeure events *see force majeure* events
general framework 240–2
General Technical Specification 241–2
invitation to tender, legal effect 227
letter of intent 227
making of, risk management 229–32
manufacturer's or builder's liability to third parties 286–9
materials, property in prior to completion 225
'merchantable quality,' demise of
law until 3 January 1995 235–6
law following 3 January 1995 236
sale and purchase risks (second-hand ships) 320
modifications of specification 252
nature 223–7
negotiations, legal significance of representations made during 228
option agreements and risk management in drafting 242–4
overcapacity prior to 2008 221
payment method 244–51
buyer's performance guarantee 245
buyer's refund guarantee 245–6
contract price adjustment clauses 246
fluctuation clauses 246
price escalation issues 246–51
pre-contract stage 227–8
price escalation issues
builder's delay in delivery 246
Clarkson's Clean Indexes 246
consideration, lack of 247–8
cost fluctuations and increase in price 246
economic duress 248–51
lawful act duress 249
Stilk v Myrick principle 247
quality of new shipbuilding 221
remedies
delays 264–5
guarantee defects 255
liquidated damages 260, 264, 280–2
specific performance 264–5
termination 265
repudiation 149, 260–1
rescission by builder, effect 282–4
SAJ contract form *see* SAJ (Shipbuilders' Association of Japan) contract form
Sale of Goods Act (SOGA) 1979
contractual terms implied under 233–9
nature of contract under 227

shipbuilding contracts—*cont.*
sales versus agreements to sell 227
'satisfactory quality' 236, 320
sea trials, acceptance or rejection 252–3
specification 241–2
standard terms 222
supplies by buyer 252
termination *see* termination of contract
warranties 232, 320
Ship Inspection Report Exchange (SHIRE) system 24–5
SHIPMAN 2009 (management agreement form) 135, 146, 147–8
authority of ship managers (Clause 3) 148–9, 150, 151
best endeavours, manager's obligations (Clause 8) 152, 155
commercial management (Clause 6) 148
crew management (Clause 5) 148
duties of ship manager 155–6
insurance and risk management (Clause 10) 167
liability to owners (Clause 17) 155–6, 164
obligations of ship manager 151, 155
technical management (Clause 4) 148, 151
see also management of ships
ship management *see* management of ships
ship operations
risks in 18–19
unsafe 121–2, 404–5
Ship-owners Association of Japan (SAJ) *see* SAJ (Shipbuilders' Association of Japan) contract form
ship-ownership
acquiring 135–6
authority of manager to bind owner, extent of 150
bankruptcy, acquired by 136
bill of sale, as title 135
bunkers, position of owner in relation to 489
casualty representative of owner 560
'commercial' management test, and UK tonnage tax 145
compensation contributions, further 860
co-ownership 136–8
corporate bodies, owners as 402–3
decline of British shipping 143
defence applicable to owners under Criminalisation Directives 55–6
evidence of 130
fishing vessels
British, eligibility to own 143
irregularity of MSA 1988 on 140–1
harbour damage, liability of ship-owners for 703–11
contributory negligence defence, whether sustainable 709–10

ship-ownership—*cont.*
options for owner 710–11
recoverable damages by harbour 711
River Wear Commission v Adamson case 703–9
statutory cause of action against registered owner 703–9
HNS Convention, liability under 868
inheritance, acquired by 136
insurance issues 167
limitation of liability *see* limitation of liability
Merchant Shipping Act 1988
effect of reform upon British ship-ownership 143–4
fishing vessels, irregularity on 140–1
fundamental changes brought by 139
owning British ship under 140
Merchant Shipping Act 1995, eligibility to own a British ship under
British connection and majority interest 142
EU Treaty, British citizens and nationals under 141–2
mortgaged ship, ownership right 189
owner as an undisclosed principal 149–50
pilot negligence, liability for
court decisions 724–8
statutory provisions 723–4
principles 135–8
relationships of owners with others 13–14
shipping register, UK 139
statutory overview of, and registration of British ships 139–45
old law (MSA 1894) 139
effect of reform upon British ship-ownership 143–4
eligibility to own a British fishing vessel 143
Factorame case (1991) 140–1
Merchant Shipping Act 1988 139–41, 143–4
Merchant Shipping Act 1995 141–2
subrogation rights 846
transmission, acquired by 136
undisclosed principal, owner as 149–50
wreck removal, liability of registered owner 734
see also management of ships
ships
building contracts *see* shipbuilding contracts
collisions *see* collisions at sea; Colregs (International Regulations for Preventing Collisions at Sea), 1972
conduct endangering 405–7
definition of 'ship' 391, 489, 743, 795, 866
management *see* management of ships

ships—*cont.*
non-seagoing 805–6
operations *see* ship operations
ownership *see* ship-ownership
partial loss and incidental losses 468–74
detention damages 470–4
fixture, loss of use during repairs 468–70
repairs 468–70, 472
recycling 52–3
sale and purchase of *see* sale and purchase risks (second-hand ships)
salvage, recognised subject 489
seagoing 743, 805–6
security alert system 96
shipboard operations, ISMO Code 82–3
special rules, Merchant Shipping Act offences 120
substandard 71, 74
total loss
actual not speculative charter 467–8
value of ship where no market 466–7
yardstick applicable to ascertain loss sustained 464–6
value where no market 466–7
see also cargo; freight; vessels
ship security officer (SSO) 96
shore line, defined 490
signals, Collision Regulations 401
single-hull tankers, phasing out 31–3
slot charterers 745, 746
Small Tankers Oil Pollution Indemnity Agreement (STOPIA) *see* STOPIA (Small Tankers Oil Pollution Indemnity Agreement)
SMC (Safety Management Certificate) 79
SMS *see* safety management system (SMS), ISM Code
***Solar I* incident (2006) 861**
SOLAS (International Convention for the Safety of Life at Sea) 1974 824
amendment 879, 885
certification required by 72
SOSREP (Secretary of State Representative for Maritime Salvage and Intervention) 47
government intervention 566–7
Intervention Convention 825
sound, Collision Regulations 401
Special Compensation of Protection and Indemnity Clause (SCOPIC) *see* SCOPIC (Special Compensation of Protection and Indemnity Clause) 2000
special drawing rights (SDRs) 44
speed safety, steering and sailing rules (Collision Regulations) 392–4
steering and sailing rules (Collision Regulations – Part B, Section 1) 392–6
action to avoid collision (Regulation 8) 394
collision risk (Regulation 7) 394
narrow channels (Regulation 9) 395–6
proper lookout (Regulation 5) 392
safe speed (Regulation 6) 392–4
Traffic Separation Schemes (Regulation 10) 396
stevedores, limitation of liability issues 747–8
STOPIA (Small Tankers Oil Pollution Indemnity Agreement) 578, 821, 830, 860
general scope 861
stowaways 22
stress management 21
strict liability
CLC (Civil Liability Convention) 1992 842
death or personal injury caused by a shipping incident 808
HNS (Hazardous and Noxious Substances) Convention 2010 868–9
non-strict liability offences 162
shift from fault-based to, in passenger claims 791–2
strikes, *force majeure* events 262
structures, salvage 490
subrogation rights
Fund Convention 1992 854–5
ship-ownership 846
Supplementary Fund Protocol 2003 859
substandard ships, tackling 71, 74
Supplementary Fund 2003 830–1
Assembly 857
'established claims' 857
three-tier compensation system 833
Supplementary Fund Protocol 2003
applicability 856–7
communication obligations and denial of compensation 858–9
denial of compensation
permanent 859
temporary 858–9
Fund Assembly 1992 860
jurisdiction 859–60
liability conditions 857
'membership' fee 858
reasons for 856
recognition and enforcement 860
subrogation rights 859
time bar 859
time of payment 857

tacit acceptance procedure 65–6, 793, 881–5
Tanker Management Self-Assessment (TMSA) 4, 9, 24
regulatory enforcement 73, 76, 91
tankers, single-hull: phasing out under Erika I measures 31–3
Tankers Oil Pollution Indemnity Agreement (TOPIA) *see* **TOPIA (Tankers Oil Pollution Indemnity Agreement)**
technical matters, authority of ship managers 151–2
tenants in common 136
termination of contract
builder's accrual rights, effect on 283–4
buyer's default and builder's rights 275–84
determining existing of default 276
effect of default 276–7
performance guarantee for unpaid instalments, builder's rights under 277–8
contract null and void 282
contractual limits of right to claim damages 274–5
effect 282–4
Rainy Sky decision
bonds, relevant clauses 269
court at first instance 271
dissenting judge 271
facts of case 268–9
issue 270
parties' arguments 270
ratio of majority of the CA 271
relevant provisions of shipbuilding contracts 269–70
risk of 273
Supreme Court 271–2
refund of prepaid instalments
guarantee per se versus performance bond 266–8
issues of construction 268–72
sale proceeds, application 282–3
termination by buyer
discharge from primary obligations 266
effect for builder's default 266–75
liquidated damages instead of termination 260
occurrence of terminating event not leading to termination 259–60
Paget's Law of Banking 268
refund guarantee and risk management 273–5
refund of prepaid instalments 266–72
rejection of vessel by buyer 260
repudiation of contract 149, 260–1
specific contractual events 258–9
see also shipbuilding contracts
terrorism, and piracy activities 94
THETIS information system 36
third parties
classification societies, civil liability to 374–83
American approach 382–3
comparison with air industry 380–2
whether duty of care owed to third parties 375–80
harbour authorities' liability to
maintenance of port in good condition 695–6
unmarked wrecks 694–5
infrastructures of shipping companies 14–15
manufacturer's or builder's liability to 286–9
third-party liability insurance 845–6
towage contracts
allocation of liability between tug and tow 640–1
Contracts (Rights of Third Party) Act 1999 637–8
control and 'two employers' conundrum 620–3
control theory 619–20
transfer of contract rights to third parties 635–8
tug and tow 618–23
unit theory 442, 618–19
see also third-party contracts, interference by mortgagee
third-party contracts, interference by mortgagee
Collins v Lamport decision 210–11
De Mattos v Gibson decision 208–9
equitable remedy 209
impairment factor 210–11
issues 207–8
knowledge of circumstances 209
OBG v Allan decision
details of case 216
impact upon mortgagees and prevous authorities 217–18
modern strand of authorities prior to 211–15
reformulation of economic torts 215–18
reformulation of economic torts 215–18
alleged wrongs 215–16
breach of contract, inducing 216
elements of tort 216–17
loss, causing by unlawful means 216–17
statutory basis 210
wrongful interference with contractual rights, tort of 211, 212, 214
see also third parties
third-party ship managers 112, 146
Three Pillars of EU competences 56
time equalisation method, repairs 470
time limits
channelling provisions, pollution 851–2
Fund Convention 1992 855
general average 677

time limits—*cont.*
HNS (Hazardous and Noxious Substances) Convention 2010 871
passenger claims
Athens Convention 2002 (2002 Protocol to PAL 1974 Convention) 812–13
PAL 1974 Convention (Athens Convention 1974 relating to Carriage of Passengers and their Luggage by Sea) 802
salvage 565–6
Supplementary Fund Protocol 2003 859
time bar defence, collisions at sea 433–4
TMSA *see* Tanker Management Self-Assessment (TMSA)
tonnage, minimum 743–4
tonnage tax, UK 144–5
TOPIA (Tankers Oil Pollution Indemnity Agreement) 578, 821, 830, 860
general scope 861
***Torrey Canyon* incident (1967) 829, 881**
towage contracts
agency of necessity 589
authority of master 587–8
to bind cargo-owners 589
authority of tugmaster 589–92
best endeavours, completion of towage 610–12
binding contract, making 587–95
civil liability 418
commencement 595
common law
commencement of towage 595
condition of tow 614–15
examples at 596–9
old definitions under 582–3
towage versus salvage 584–7
condition of tow 613–16
common law 614–15
duty to disclose 613
express terms in contract 615–16
'fitness to be towed' 615
contract for services 595
cross-indemnity 641–2
danger, effect on 495–6
definitions
old, under common law 582–3
'tender' 583
'towage' 581, 582
under TOWCON/TOWHIRE 1985 583
'towing' 583
under UKSTC 1986 583
'vessel' 583
'whilst towing' 583
duties of tow
condition of tow 613–16
specification of what is required and to disclose condition of tow 613

towage contracts—*cont.*
examples at common law
The Apollon 598
The Blenheim v The Impetus 599
The Clan Colquhoun 596
The Glenaffric 597–8
The Ramsden 598
The Uranienborg 597
exception clauses, ambit 624–7
exclusion clauses, limitations 629–34
fitness of tug, duties of tug-owners in relation to 601–8
contractual terms of standard towage contracts on tug's fitness 607–8
decisions in favour of an absolute warranty of fitness 602–6
no general rule about absence of a warranty of fitness 609
position of fitness when specific tug requested 608–10
tug fitness and risk management 609–10
view that there is no absolute warranty of fitness 606–7, 608–9
general average 666
good faith
whether duty of 592–3
whether existing in towage contracts 593–4
Himalaya clauses 635–7, 649, 650
indemnity clauses 627–9
limitations 629–34
interruption of towing, consequences 599–600
'knock-for-knock' clauses 582, 645–7, 652
limitation of liability 638–40, 650
no-suit clause and 'Himalaya' provision 635–7
offshore, liabilities under 640–9
offshore supplytime charters
charterer remaining liable for damage caused by hazardous and noxious substances 651
consequential damages 650
limitation of liability 650
mutual exclusions 650
mutual indemnities 650
pollution and insurance clauses 651
risk allocation under SUPPLYTIME 1989 650–1
SUPPLYTIME (1989) 650–1
SUPPLYTIME (2005) 651–2
offshore towage contracts, liabilities under 640–9
pre-contractual duties 592–4
recklessness 649
relationship between tug and tow under UKSTC 617–18
remuneration paid to tug 617

towage contracts—*cont.*
risk management 647–9
skill and diligence, duty to exercise throughout 612–13
during towage 616
standard forms
BIMCO/ISU Wreckfixed (2011) *see* below
HEAVYCONBILL (2007) 582
SALVCON (2005) 582
SUPPLYTIME (1989) 582, 645, 650–1
SUPPLYTIME (2005) 582, 645, 651–2
TOWCON/TOWHIRE *see* below
UKSTC (United Kingdom Standard Towage Conditions) (1986) *see* below
WRECKSHIRE (2010) 582
subcontracting authority 634–5
substitution of tugs 634–5
SUPPLYTIME (1989) 582
'loss of profit,' conflicting views 645
risk allocation under 650–1
SUPPLYTIME (2005) 582
'loss of profit,' conflicting views 645
risk allocation under 651–2
termination of towing 600–1
third parties
allocation of liability between tug and tow 640–1
Contracts (Rights of Third Party) Act 1999 637–8
control and 'two employers' conundrum 620–3
control theory 619–20
transfer of contract rights to 635–8
and tug and tow 618–23
unit theory 442, 618–19
towage versus salvage 583–7
under common law 584–7
under Salvage Convention 1989 584
under TOWCON/TOWHIRE 1985 584
under UKSTC 1986 584
TOWCON/TOWHIRE international ocean towage forms (1985) 582
allocation of liability between tug and tow 641, 642
best endeavours, completion of towage 611
commencement of towage 595
condition of tow 614, 615
contractual terms of standard towage contracts on tug's fitness 608
definitions 583
indemnity clauses 629
termination of towing 601
towage versus salvage 584
transfer of contract rights to third parties 637
transfer of benefits 634–5

towage contracts—*cont.*
tug and tow, allocation of liability between 640–9
cross-indemnity 641
financial losses 642–3
liabilities for loss of/damage to each other or to third parties 640–1
liability and cross-indemnity with regard to personnel 641–2
'loss of profit,' conflicting views 643–5
tug-owners, duties of 601–8
UKSTC (United Kingdom Standard Towage Conditions) (1986)
best endeavours, completion of towage 611
collisions at sea 418
commencement of towage 595
contractual terms of standard towage contracts on tug's fitness 607–8
control and 'two employers' conundrum 621
definitions 583
duration of towage 595
exception clauses 626
general average 666
Himalaya and no-suit clause 635–7
indemnity clauses 629
liability between tug and tow under 617–18
substitution and Himalaya clause 634–8
towage versus salvage 584
unfair contract terms 594–5
unseaworthiness of tug 645–7
voluntary services rendered by tug under 499
TOWCON/TOWHIRE international ocean towage forms (1985) 582
allocation of liability between tug and tow 641, 642
best endeavours, completion of towage 611
commencement of towage 595
condition of tow 614, 615
contractual terms of standard towage contracts on tug's fitness 608
definitions 583
indemnity clauses 629
termination of towing 601
towage versus salvage 584
transfer of contract rights to third parties 637
traffic monitoring and places of refuge (Directive 2009/17/EC)
background 44–5
CMI Conference, draft instrument approved by 46
further EU measures 47–8
IMO Guidelines 46–7
status of places of refuge in the UK 47

Traffic Separation Schemes 389, 391, 396
training
of crew 21, 53
of pilots 714
***travaux préparatoires* 104, 746, 747, 769**
travel agents, contracts of carriage through 803–4
Trinity House rules 388
tugmaster, authority of 589–92

***uberrima fides* contracts 296, 593, 594**
UKSTC (United Kingdom Standard Towage Conditions) (1986)
best endeavours, completion of towage 611
collisions at sea 418
commencement of towage 595
contractual terms of standard towage contracts on tug's fitness 607–8
control and 'two employers' conundrum 621
definitions 583
duration of towage 595
exception clauses 626
general average 666
Himalaya and no-suit clauses 635–7
indemnity clauses 629
liability between tug and tow under 617–18
substitution and Himalaya clause 634–8
towage versus salvage 584
UNCLOS (United Nations Convention on the Law of the Sea) 1982 822–4
and Criminalisation Directives 57–8
'innocent passage' 823
jurisdiction and rights and duties of States 823–4
sovereign obligations 823
undisclosed principal, owner as 149–50
unfair contract terms, towage contracts 594–5
United Kingdom Standard Towage Conditions (1986) *see* UKSTC (United Kingdom Standard Towage Conditions) (1986)
United Nations Convention on the Law of the Sea (UNCLOS) 1982 *see* UNCLOS (United Nations Convention on the Law of the Sea) 1982
United States (US), pollution damage 828
unit theory, tug and tow 442, 618–19
unregistered ships, and status of mortgage 176
unsafe ships (Merchant Shipping Act offences)
dangerously unsafe ship 120, 404–5
unsafe operation of ships 121–2, 404–5
unseaworthiness
general average entitlement 671–3
negligence of ship-repairers 747
towage contracts 641, 645–7
US Coast Guard, 'Qualship 21' 74
US Department of Maritime Administration, Maritime Subsidy Board 222

valuables
passenger claims 801–2, 812
theft of, limitation of liability 763–4
vessels
conduct where in sight of each other (Collision Regulations – Part B, Section II)
action by give-way vessel (Regulation 16) 398
action by stand-on vessel (Regulation 17) 398
crossing situation (Regulation 15) 397
specification of responsibilities between vessels (Regulation 18) 398
crossing situation (Collision Regulations) 397
in danger, standing by 509
definition of 'vessel' 391, 489, 583, 835
delivery
condition of vessel on 339–48
delays 246, 351–3
deliverable state 321
encumbrances or debts at time of 337
essential documentation for exchange at 334–5
liabilities incurred prior to 337–8
non-delivery as per contract 351–3
passing of property and risk by contract 254
passing of property and risk by statute 253
post-delivery matters 360
see also under Norwegian Sale Form (NSF)
failure to give assistance to following collision 403
fishing
British, eligibility to own 143
irregularity of MSA 1988 on 140–1
give-way, action by (Collision Regulations) 398
insurance *see* insurance issues
rejection by buyer 260
salvage, recognised subject 489
sea-going vessels carrying persistent oil in bulk 834–5
specification of responsibilities between (Collision Regulations) 398
stand-on, action by 398
see also ships
vicarious liability doctrine 98
collisions at sea 412–16
dual 623
limitation of liability 746–7
see also employers

***The Viking Islay* accident (2007) 90**
Voluntary Member State Audit Scheme (VIMSAS) 31
voluntary services
cargo-owners 501–2
exceptions 498–9
pilots, when exceptional 499–501
under pre-existing agreement 497–9
rendered by a tug under towage contract 499
Voyage Data Recorders (VDRs), introduction of 33–4
voyage planning 20

warranties
absolute warranty of fitness
decisions against 606–7, 608–9
decisions in favour of 602–6
shipbuilding contracts 232, 320
waste residue, general safety and environmental measures 50–2
wilful misconduct
Collision Regulations, disobeying 402
compulsory insurance 735
Criminalisation Directives on ship-source pollution 62
defined 774
passenger claims 811
and recklessness 776
WRC (Wreck Removal Convention) 2007
application 731–2
coming into force 736
compulsory insurance 734–5
'convention area,' defined 731–2
definitions 731–2, 733
effect 759–60
liability of registered owner 734
'maritime casualty,' defined 732
objectives 732
obligations under 733
and places of refuge 735–6
proportionality and reasonableness 732–3
and salvors 735
'wreck,' defined 732
wrecks
abandoned 693–4
duty to mark 694
harbour authorities, statutory duties in relation to 692–5
removal
limitation of liability claims 758–61
LLMC (Convention on Limitation of Liability for Maritime Clauses) 1976 759–60
UK reservation for expenses 759
Wreck Removal Convention (WRC) 2007 *see* WRC (Wreck Removal Convention) 2007
salvage 490
unmarked, liability to third parties for 694–5

York-Antwerp Rules (YAR) 653
of 1890 656
of 1924 656, 657, 661
of 1950 656
of 1974 656, 657, 658, 659
of 1994 656
of 2004 656–7, 659
and BIMCO 657
construction
commercial practicability over principle 658–9
conflict between lettered and numbered rules 657–8
expenses at port of refuge (Rule XI) 656, 661, 663
origin and application 656–7
provision of funds (Rule XX) 656, 661
Rule A 661, 664
Rule C 665
Rule D 666
Rule E 665
Rule Paramount added to 658, 664
salvage remuneration (Rule VI) 656
temporary repairs (Rule XIV) 656, 659
voluntary nature of 657